Trinity Term

[2016] UKPC 15

Privy Council Appeal No 0108 of 2014

JUDGMENT

Vendort Traders Inc (Appellant) vEvrostroy Grupp LLC (Respondent) (British Virgin Islands)

From the Court of Appeal of the Eastern Caribbean Supreme Court (British Virgin Islands)

before

Lord Mance

Lord Kerr

Lord Sumption

Lord Carnwath

Lord Hodge

JUDGMENT GIVEN ON

13 June 2016

Heard on 20 April 2016

Appellant	Respondent
Marcus Staff	(Not participating)
Jeremy Child	
(Instructed by Blake Morgan LLP)	

LORD SUMPTION:

1.
The combined effect of sections 8 and 155 of the Insolvency Act 2003 of the British Virgin Islands is that a company is deemed to be insolvent and liable to be wound up if a statutory demand for a debt is made upon it and the demand is neither set aside by the court nor complied with within 21 days of its service upon the debtor. The grounds on which a statutory demand may be set aside by the court are identified in section 157 of the Act. One of them is that there is a "substantial dispute as to whether … the debt … is owing or due". The test for whether there is a "substantial dispute" is not in doubt. It is the same as the test for summary judgment, namely whether the debtor can raise a triable issue on the point.

2.
The appellant Vendort Traders Inc is a company incorporated in the British Virgin Islands. On 24 May 2012 the respondent, Evrostroy Grupp LLC served a statutory demand on it in respect of a debt said to be due under a final award made on 1 November 2011 in an arbitration under the rules of the London Court of International Arbitration. This appeal arises out of Vendort's application to set it aside. The application was dismissed by Bannister J (Ag), and his judgment was upheld by the Court of Appeal. On this appeal, the Board has not heard submissions on behalf of the respondent. It elected not to lodge a printed case or appear at the hearing, and must be taken to rely on the reasoning of the courts below. In the Board's opinion, that reasoning was correct. In view of the concurrence of opinion, the relevant points can be made quite shortly.

3.
The arbitration concerned a Share Purchase Agreement dated 25 May 2006 under which Vendort agreed to buy from Evrostroy 834,693 shares in a Russian company called ISKOG JSC for 44,672,769.36 Russian Roubles. The shares were duly transferred to Evrostroy in July 2006, but only 15,183,713 Roubles of the purchase price was ever paid. In the arbitration, Evrostroy claimed the balance of the price. It is important to note that the validity of the Share Purchase Agreement was not impugned in the arbitration proceedings and is not impugned now. Nor has there been any attempt to rescind it. Indeed, Vendort relies on the agreement to support its right to the shares, some of which it has disposed of.

4.
Before the arbitrator, Vendort ran two defences.

5.
One defence, as recorded in the award, was that the Share Purchase Agreement was tainted by illegality and unenforceable on account of the fraud of a Mr Kozlov. It was said that after the Share Purchase Agreement had been signed and the ISKOG shares transferred to Vendort, he was involved in a number of dishonest dealings in the shares. In summary, Evrostroy purported to assign its claim to the balance of the price to an English company called Crompton Solutions Ltd, and Vendort then purported to transfer its shares to Crompton in satisfaction of that claim. Mr Kozlov had been prosecuted in Russia for his involvement in these dealings and convicted. After the arbitrator had issued his award, the conviction was set aside on appeal, but he was then convicted at a retrial and on this occasion the conviction was upheld. The arbitrator was of course unaware of these later developments, but he rejected the argument based on the original conviction on the ground (i) that there was no evidence that Vendort knew of any fraud of Mr Kozlov, and (ii) that in any event the alleged fraud served only to demonstrate the disreputable character of Mr Kozlov's business practices, and there was no sufficient connection between these practices and the Share Purchase Agreement.

6.
Vendort's other defence was that the Share Purchase Agreement was informally varied so as to release its obligation to pay the balance of the price, or that a representation was made by Evrostroy that it would accept the part payment in full satisfaction of the price. There was no direct evidence of such a variation or representation. But it was said to be an inference from the fact that the shares were transferred without the full price being paid, and from statements made in evidence in the criminal proceedings by the manager of Evrostroy, a Mr Mamporia, that Evrostroy was "satisfied with the transaction". The arbitrator rejected this defence also. He held that there was no evidence that the Share Purchase Agreement had been varied or that any relevant representation had been made.

7.
Accordingly, Evrostroy was awarded the balance of the price, with interest and costs.

8.
In these proceedings, Vendort's main argument is that the arbitration award is not enforceable because it was procured by fraud. It also contends that even if the award was enforceable in principle, the resulting debt could not be made the subject of a statutory demand unless an order had been made under section 28 of the Arbitration Ordinance for its enforcement in the same manner as a judgment.

9.
The basis of Vendort's contention that the award was procured by fraud is that evidence was given at the second trial of Mr Kozlov in Russia which showed that at the relevant time Mr Kozlov controlled both Evrostroy and Vendort, with the result that the Share Purchase Agreement could not be regarded as an arm's length transaction. It follows, so it is said, that evidence given to the arbitrator that Evrostroy had no connection with Mr Kozlov, was untrue. This evidence derived from the retrial was not of course available in the arbitration proceedings because the retrial of Mr Kozlov did not occur until later.

10.
The Board is prepared to assume, without deciding, that evidence which was not available in the course of an arbitration and which discredits evidence given to the arbitrator is capable of making the award unenforceable. However, the least that must be demonstrated in such a case is that the issue to which the new evidence goes was potentially decisive of the outcome. That means, in the present case, that the new evidence must be potentially decisive of the question whether Vendort was liable to pay the balance of the price. In the Board's opinion, it was not. Even if Vendort were able to prove that the Share Purchase Agreement was not an arm's length transaction, it would still be a binding agreement, unless there was something improper about it. Vendort does not allege any impropriety in the making of the Share Purchase Agreement. On the contrary, as the Board has pointed out, it accepts that that agreement was binding. The transactions which are said to have been improper occurred after the Share Purchase Agreement was made and the shares transferred, and indeed after the alleged variation and representation are said to have been made. The new evidence tells one nothing about whether that variation or representation ever happened. The most that might be inferred from the common control of the two companies is that Evrostroy was aware, through Mr Kozlov, of the latter's frauds. But unless Mr Kozlov's frauds had some bearing on Vendort's liability to pay the price, it cannot matter whether Evrostroy was aware of them.

11.
That leaves Vendort's alternative argument that the award was not enforceable in the absence of an order under section 28 of the Arbitration Ordinance. In the Board's opinion this argument is misconceived. An unenforceable liability could not properly be made the subject of a statutory demand. But the award gave rise to an enforceable debt as soon as it was issued. Moreover, it was conclusive evidence as between the parties that an enforceable debt was due in respect of the price of the shares. The only relevance of an order under section 28 is that it makes available the court's procedural facilities for satisfying that debt. The order recognises the enforceability of the debt, but the source of its enforceability is not the order but the contract.

12.

It is, finally, necessary to notice two further matters. The first is a somewhat indistinct suggestion on the part of the appellants that the insolvency proceedings in the British Virgin Islands are themselves part of a plot to divest Vendort of its shares in ISKOG. That may well be the effect of the distribution of its assets in the winding up, but if so it is simply the legal consequence of a lawful winding up order occasioned by Vendort's failure to meet its legal liabilities. The second arises out of written submissions delivered on the Appellant's behalf after the hearing, which include a suggestion that Evrostroy dishonestly assisted Mr Kozlov to carry out his frauds. This is not an inference that could be drawn from the mere fact (if proved) that Evrostroy knew about the frauds through its common controller, which is the only point to which the new evidence could be said to go. Indeed, on the facts alleged, Evrostroy appears to have been as much a victim of the fraud as Vendort, since it purportedly assigned away its claim to the balance of the price. But there is a more fundamental objection to the point, which is that it is not properly before the Board. It does not appear to have been taken in either court below, at any rate with sufficient clarity to be reflected in the judgments, and it does not feature in the appellants' Printed Case. The respondent, having elected not to participate in the appeal, is in no position to answer it. The Board considers that the appellant must be confined to the points which it argued below and in its Printed Case for the appeal.

13.
For these reasons, the Board will humbly advise Her Majesty that this appeal should be dismissed.