[2017 Gib LR 220]

IN THE MATTER OF PETROCHEMICAL LOGISTICS LIMITED

PETROCHEMICAL LOGISTICS LIMITED v. GENTIUM LAW GROUP SARL

SUPREME COURT (Jack, J.): August 10th, 2017

Bankruptcy and Insolvency—statutory demand for payment—setting aside—statutory demand set aside under Insolvency Act 2011, s.143(1) if substantial dispute as to debt—low hurdle

The applicant applied to set aside a statutory demand.

The respondent had served a statutory demand on the applicant under s.141 of the Insolvency Act 2011, claiming CHF 890,000. In the particulars of the debt it was said that the respondent made the application "upon the basis of a legal theory of fraudulent conspiracy and is the victim of a fraud by [the applicant] . . ." It was said that the applicant's behaviour was "deceptive and deceitful, because it portrayed a pattern of conduct which revealed evidence of intent not to pay for work which they asked [the respondent] to undertake." The unpaid invoices were said to be for work carried out in the course of an arbitration by a series of companies, of which the applicant was alleged to form a part.

The applicant claimed that the only matter in which the respondent had represented it was a maritime arbitration. It claimed to have paid the

respondent's fees in that matter, save for an invoice raised in June 2017 which was not the subject of the claim in the statutory demand. With regard to the statutory demand, the applicant claimed *inter alia* that the respondent's bare allegation that the applicant had committed fraud was not supported by any evidence or particulars; the respondent had not represented the applicant in an arbitration in which the bills stood at CHF 890,000 or a similar sum; the applicant was not part of the group of companies alleged; and the respondent had not requested CHF 890,000 from the applicant.

The respondent resigned as the applicant's lawyer and the alleged fraudulent conspiracy was cited as the ground of resignation.

Section 143(1) of the 2011 Act provided that the court would set aside a statutory demand if satisfied that—

"(a) there is a substantial dispute as to whether—

(i) the debt, or

(ii) a part of the debt . . .

is owing or due."

The respondent sought an adjournment of the hearing of the matter.

Held, setting aside the statutory demand:

(1) The statutory demand would be set aside under s.143(1)(a) of the 2011 Act. The evidential hurdle for an applicant seeking the setting aside of a statutory demand was exceptionally low. It had to be shown merely that a debt was substantially disputed. In the present case there were clearly substantial disputes of fact. Furthermore, the statutory demand was bad on its face. A claim for fraudulent conspiracy was a claim for damages, not for debt. As such, it could not, as a matter of law, be the subject of a statutory demand (paras. 11–14).

(2) The respondent's application for an adjournment would be refused. Applications to set aside a statutory demand were intended to be dealt with quickly. An application seeking to set aside a statutory demand had to be made within 21 days and that time could not be extended by the court. The return date could be as little as 7 days from the issue of the application (para. 10).

(3) Costs would be assessed on the indemnity basis. The Insolvency Act was modelled on Australian insolvency legislation, where the practice was to examine closely whether the party serving a statutory demand was justified in doing so and, if not, whether the demand was an abuse of process. If a statutory demand was an abuse, indemnity costs were frequently awarded. It was appropriate to apply the same approach in Gibraltar. In the present case, the respondent must have been well aware that a claim for fraudulent conspiracy was a claim for damages so that no statutory demand could issue. It must also have been aware that the claim in fraudulent conspiracy was so vaguely formulated that any court would set aside a statutory demand based on the allegations. The respondent had

abused the process of the court and costs would therefore be assessed on the indemnity basis (paras. 15–16).

Cases cited:
(1) *Mount Grace Ins. Co. Ltd.*, *In re*, 2015 Gib LR 74, referred to.
(2) *Nuevo Castille Ltd.*, *In re*, 1991–92 Gib LR 74, considered.

Legislation construed:
Insolvency Act 2011, s.141: The relevant terms of this section are set out at para. 8.
s.142: The relevant terms of this section are set out at para. 8.
s.143: The relevant terms of this section are set out at para. 8.

D. Dumas, *Q.C.* and *C. Bonfante* for the applicant;
The respondent did not appear and was not represented.

1 **JACK, J.:** This is an application made on July 31st, 2017 under s.142 of the Insolvency Act 2011. By it, Petrochemical Logistics Ltd. ("Petrochemical") applies to set aside a statutory demand dated July 13th, 2017, served by Gentium Law Group SARL ("Gentium") claiming the sum of CHF 890,000.

2 The statutory demand gives the following particulars of the debt:

> "Gentium . . . is making this application upon the basis of a legal theory of fraudulent conspiracy and is the victim of a fraud by Petrochemical . . . The firm was engaged in an arbitration by a series of companies controlled by Integral Petroleum SA, of which Petrochemical . . . formed a part of [*sic*]. The firm has refused to pay for the substantial work incurred in this trial.
>
> The companies [*sic*] behaviour is alleged to have been deceptive and deceitful, because it portrayed a pattern of conduct which revealed evidence of intent not to pay for work which they asked the Creditor to undertake. Thereafter the Creditor resigned from all matters which it has been instructed to undertake from Integral Petroleum SA and other companies forming part of the same group.
>
> Requests for payment and mediation through intermediaries were unfruitful. The amount requested remains outstanding to date."

3 The covering letter from Gentium, also dated July 13th, 2017, expanded on this. It said:

> "1. On 27 June 2017 Gentium . . . resigned as Integral Petroleum SA's legal counsels [*sic*], following fraudulent non-payment of the Firm's invoices.

> 2. These invoices were for work carried in the course of an arbitration by a series of companies controlled by Murat Seitnepesov and Konstantin Ryndin.
>
> 3. Murat Seitnepesov owns a number of companies, of which Petrochemical . . . is one of them.
>
> 4. Mr. Seitnepesov and Mr. Ryndin, together with all companies owned by Mr. Seitnepesov are privy to a conspiracy to defraud Gentium . . . and therefore are all liable to pay the outstanding debts amounting to 890.000 CHF.
>
> 5. Please find enclose a statutory demand . . ."

4 Petrochemical relies on the evidence of Mykola Reshetov, who says he is the beneficial owner of Petrochemical. Mr. Reshetov's affidavit has not yet been sworn because ill-health prevented him getting to a notary in Switzerland to take the oath. The order I shall make provides for the position to be regularized. He says that Gentium, whilst it describes itself as a law firm, is in fact not regulated by the relevant Swiss authorities, nor by the English Solicitors' Regulation Authority, although the principal of the firm, a Mr. Parish, is an English solicitor.

5 The only matter in which Gentium represented Petrochemical, Mr. Reshetov says, is a maritime arbitration in which Petrochemical had a partial award given against it. Petrochemical had paid Gentium's fees in that matter, save for an invoice which Gentium raised on June 26th, 2017 for CHF 5,062.60. The invoice gave 30 days to pay, so, when the statutory demand was issued, it was not owing. It is not the subject of the claim in the statutory demand.

6 It appears to be common ground that Gentium resigned as Petrochemical's lawyer on about June 27th, 2017. The ground of resignation was the alleged fraudulent conspiracy. If there was no fraudulent conspiracy or other ground on which Gentium might properly have resigned, then there may be an issue as to whether the contract, whereby Gentium was engaged to act for Petrochemical in the arbitration, was a "whole" contract, so that all moneys paid in fees to Gentium would stand to be repaid due to Gentium's failure to complete the contract. At the time, Gentium also acted for Integral Petroleum S.A. ("Integral") in other arbitrations.

7 So far as the facts are concerned, Mr. Reshetov will depose as follows:

> "9. The Applicant works closely with Integral . . . a trading company in Geneva. The Applicant often organises shipments of cargoes of petroleum products on behalf of Integral. I know several people in Integral including its head of legal, Mr. Ryndin, and its Managing Director, Mr. Seitnepesov.

10. The Applicant does not have a legal department and does not have much experience in litigation and arbitration matters. I therefore requested Integral's assistance when instructing English lawyers and Mr. Ryndin instructed Mr. Parish on the Applicant's behalf."

He then sets out parts of the statutory demand and the covering letter and says what he asserts are falsehoods or misleading statements:

"16. Firstly, it is said that the Applicant committed some fraud. However, that is a bare allegation entirely unsupported by any evidence or particulars . . .

17. Secondly, it is alleged that [the] Applicant is controlled by Integral and is owned and/or controlled by Mr. Seitnepesov and/or is part of a group of companies owned and/or controlled by Mr. Ryndin and Mr. Seitnepesov. This is not true. I am the beneficial owner of the Applicant . . .

18. Thirdly, Mr. Parish . . . signed pleadings [which are then exhibited] on the Applicant's behalf asserting that the Applicant was not owned and controlled by Integral . . . and Mr. Seitnepesov . . . He also arranged for filing of those documents in the Mercantile Court in London . . .

19. Fourthly, the Respondent has never represented the Applicant in an arbitration where the bills stand at CHF 890,000 or anywhere close to this figure . . .

20. Fifthly, it is alleged that the Applicant's behaviour has been 'deceptive and deceitful.' The Applicant does not understand what aspects of its behaviour are said to have been 'deceptive and deceitful.' The Respondent cannot simply throw around allegations of fraud and demand CHF 890,000 without any proper explanation.

21. Sixthly, the Respondent has never requested the Applicant pay it CHF 890,000. Nor has it attempted to engage in any 'mediation through intermediaries' with the Applicant . . .

22. Seventhly, it is alleged that the Applicant has been privy to Mr. Seitnepesov's and Mr. Ryndin's alleged conspiracy to defraud the Respondent. But it is not clear on what basis the Respondent makes the assertions, and what it is said the Applicant has done as part of the alleged conspiracy and/or to facilitate the alleged conspiracy.

23. Finally, insofar as the Applicant is concerned, the only outstanding bill issued to it was for CHF 5,062.60 . . . [which] was not due for payment on 13th July 2017."

8 The Insolvency Act 2011, so far as material, provides:

"**Statutory demand.**

141.(1) A creditor may serve a demand on a person for payment of a debt owed by that person to him.

(2) A statutory demand shall—

(a) be in respect of a debt that is due at the time of the demand, the amount of which is not less than the prescribed minimum;

(b) be in writing and shall specify the nature of the debt and its amount;

(c) be dated and shall be signed by the creditor or by a person authorised to make demand on the creditor's behalf;

(d) require the person to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the demand on him;

(e) state that if the demand is not complied with, application may be made to the Court for the appointment of a liquidator or for a bankruptcy order, as the case may be;

(f) set out the rights of the person to make application to set the demand aside under section 142; and

(g) comply with, and be served in accordance with, the Rules.

(3) [Deals with secured creditors.]

Application to set aside statutory demand.

142.(1) Where a person has been served with a statutory demand he may apply to the Court for an order setting it aside.

(2) An application under subsection (1) shall be made within 21 days of the date of service of the demand on him.

(3) The Court is not to extend the time for making an application to set aside a statutory demand.

(4) A person applying to set aside a statutory demand under this section shall give 7 days' notice of the hearing to the creditor or, where a person is named in the demand as the person with whom communications in respect of the demand should be made, to that person.

(5) Where a person makes an application under this section, the time for compliance with the requirements of the statutory demand is extended until—

(a) the date on which the application is determined; or

(b) such later date as the Court may fix under section 143(5).

Hearing to set aside statutory demand.

143.(1) The Court shall set aside a statutory demand if it is satisfied that—

(a) there is a substantial dispute as to whether—

(i) the debt, or

(ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum,

is owing or due;

(b) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum; or

(c) the creditor holds a security interest in respect of the debt claimed and the value of the security interest is equal to or greater than the amount specified in the demand less the prescribed minimum.

(2) If the Court is satisfied that the amount of the creditor's debt is less than the amount specified in the statutory demand, but it equals or exceeds the prescribed minimum, it may make an order—

(a) varying the demand to show the amended debt; and

(b) declaring the demand to have had effect, as varied, as from the date of service of the demand.

(3) If the Court is satisfied that the security interest of a secured creditor has been under-valued in the statutory demand, the Court may require the creditor to amend the demand accordingly, but without prejudice to his right to make application for the appointment of a liquidator or for a bankruptcy order, as the case may be.

(4) The Court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused—

(a) because of a defect in the demand, including a failure to comply with section 141(3); or

(b) for some other reason.

(5) If, on hearing an application to set aside a statutory demand, the Court is satisfied that there are no grounds for setting aside the

> statutory demand, the Court shall dismiss the application but may extend the time for compliance with the statutory demand.
>
> (6) Having considered the evidence before it on a hearing under this section, the Court may either summarily determine the application or adjourn it giving such directions as it considers appropriate."

9 By email of August 7th, 2017 sent to Mr. Dumas, Q.C., Mr. Parish asked for an adjournment of the hearing of this matter on August 9th, 2017. Mr. Parish asked the court to give directions, so that the matter might be tried in Michaelmas.

10 I refuse the application for an adjournment. Applications to set aside a statutory demand are intended to be dealt with quickly. An application seeking to set aside a statutory demand must be made within 21 days and that time may not be extended by the court: s.142(2) and (3). The return date may be as little as 7 days from issue of the application: s.142(4).

11 Now there may, of course, be cases where directions for the service of evidence need to be given. However, it must be remembered that the evidential hurdle which an applicant must get over is exceptionally low. All an applicant needs show is that a debt is "substantially disputed." As Kneller, C.J. held in *In re Nuevo Castille Ltd*. (2) (1991–92 Gib LR 74, at para. 7):

> "Winding-up proceedings are not suitable proceedings in which to determine a genuine dispute as to whether the company owes the sum in question, or to determine whether that liability is an immediate liability or only a prospective or contingent one, unless the point is simple and straight-forward. It is not a legitimate means of seeking to enforce payment of a debt which is disputed in good faith and on substantial grounds . . ."

(Under the legislation then in force, there was no provision for the setting aside of statutory demands served on companies, so these issues had to be decided on the hearing of the winding-up petition or on an application for an injunction restraining advertisement of the petition.)

12 It is perfectly obvious that there are substantial disputes of fact. Paragraphs 16–23 of Mr. Reshetov's proposed affidavit, which I have cited in para. 7 above, all make perfectly valid points in my judgment. In addition, since the allegations of deceit appear to relate to representations or assurances as to Integral's creditworthiness, there may be an issue under the Statute of Frauds (Amendment) Act 1828 ("Lord Tenterden's Act") as to whether such representations or assurances are actionable. The 1828 Act requires such representations and assurances to be in writing signed by the person charged with making the representations or assurances.

13 Quite apart from these issues of fact, the statutory demand is bad on its face. A claim for fraudulent conspiracy is a claim for damages, not for debt. As such, it cannot, as a matter of law, be the subject of a statutory demand.

14 Accordingly, I have no hesitation in setting aside the statutory demand under s.143(1)(a) of the 2011 Act.

15 I then turn to consider costs. The Gibraltarian legislation, as I noted in *In re Mount Grace Ins. Co. Ltd.* (1) (2015 Gib LR 74, at para. 12), is modelled on Australian insolvency legislation. The Australian practice is to examine closely whether the party serving a statutory demand was justified in so doing, and, if not, whether the demand was an abuse of process. If a statutory demand is an abuse, then indemnity costs are frequently awarded. In my judgment, it is appropriate to apply the same approach in Gibraltar.

16 In carrying out this exercise, I note that Mr. Parish is an English solicitor and that Gentium was his vehicle for providing legal services. He must have been well aware that a claim for fraudulent conspiracy is a claim for damages, so that no statutory demand could issue. Likewise, he must have been aware that the claim in fraudulent conspiracy was so vaguely formulated that any court would set aside a statutory demand based on the allegations. Gentium, in my judgment, has abused the process of the court. Accordingly, in the exercise of my discretion, I order that costs be assessed on the indemnity basis.

Order accordingly.

This judgment was corrected under the slip rule, August 14th, 2017.