Article

Rangecroft v. Lenox: Statutory Demands, Arbitration Clauses and s.18 of the Arbitration Act 2013

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The recent first instance decision in *Rangecroft Limited v. Lenox International Holdings Ltd* BVIHC (Com) 37 of 2020 (unreported, 6 July 2020) is an interesting and potentially far reaching one. If followed by other Commercial Court judges (and upheld by the Court of Appeal), it would substantially alter the way in which liquidation applications are approached in the jurisdiction, particularly where there is an arbitration clause in the agreement from which the petition debt is said to arise. It is a decision of which all commercial practitioners with practices including the BVI should be aware.

In summary, the case concerned an application to appoint liquidators over Lenox (a BVI company) by Rangecroft (a Cypriot company). The underlying petition debt was said to have arisen under the terms of a loan agreement ("the Loan Agreement") between Rangecroft and Lenox (the debtor). That agreement contained a standard form arbitration clause providing that any dispute arising out of or connected with the loan agreement shall be resolved by arbitration (in this case an LCIA arbitration).

Following unsatisfied demands for repayment, Rangecroft issued an originating application to appoint liquidators over Lenox in March 2020. In accordance with well-established and judicially endorsed practice, Rangecroft chose not to serve a statutory demand prior to issuing the liquidation application.

In its response to the liquidation application, Lenox claimed *inter alia* that the debt was not in fact due and owing under the terms of the Loan Agreement. It also raised two cross-claims which it claimed exceeded the debt (if due). As a final fall-back argument, Lenox asserted that even if the court accepted that there was no genuine and substantial dispute about the petition debt, the court should nevertheless exercise its discretion and dismiss the application, given the existence of the arbitration clause. In essence, Lenox ran *Sparkasse* and *Bayoil* defences to the application.

In respect of the impact of the arbitration clause on the liquidation application, both Lenox and Rangecroft adopted the principles set out in Court of Appeal decisions in *C-Mobile Services Ltd v. Huawei Technologies Co Ltd* BVIHCMAP 2014/0017 (unreported, 15 September 2015) and *Jinpeng Group Ltd v. Peak Hotels Resorts Ltd* BVIHCMAP 2014/0025 and 2015/0003 (unreported, 8 December 2015). Those decisions established (or were thought to have established) *inter alia* that: (1) an application to appoint a liquidator is not a form of proceeding covered by s.18(1) of the Arbitration Act 2013, and therefore the court should not grant an automatic stay of the application simply because the respondent has raised a dispute over the applicant's ability to apply for a winding up order; and (2) there is no requirement under BVI law that a creditor must prove exceptional circumstances before a winding up order will be made; it merely has to show that the dispute is not on genuine and substantial grounds.

Notwithstanding the above, when the liquidation application eventually came before Jack J, the learned judge refused to consider whether there was a genuine and substantial dispute in relation to the petition debt and instead stayed the application and directed that an arbitrator be appointed to determine that question.

In reaching that conclusion, Jack J held (distinguishing *C-Mobile* and *Jinpeng*) that where there is a disputed debt that falls under an arbitration clause, the court should not in fact go on and determine whether or not that dispute is genuine and substantial (as per the Court of Appeal decisions), but should instead stay the application and refer the matter to arbitration. In fact, in staying the application before him, Jack J did not even refer the whole dispute to arbitration, but merely directed that an arbitrator be appointed to determine the question of whether or not the petition debt was disputed on genuine and substantial grounds. In other words, he ordered that an arbitrator be appointed to determine the question that the Court would have determined under *Sparkasse* and *Bayoil* principles.

In addition to his determination in respect of the arbitration clause, Jack J also went on to suggest, more broadly, that winding up on the basis of insolvency should be a two-step process in the BVI, and a statutory demand should be served before a liquidation application is issued. Although he noted that there is formally no requirement to serve a statutory demand, Jack J nevertheless criticised

Rangecroft for its "failure" to serve that document, and suggested, in effect, that a party choosing not to serve a statutory demand must provide a "good reason" for that decision.

With respect to the learned judge, it is difficult to see how that reasoning is consistent with the clear terms of the Insolvency Act (which do not require a statutory demand to be served) or the significant number of cases in this jurisdiction and elsewhere which either establish that no such requirement exists, or concern cases where liquidators were appointed in circumstances where no statutory demand had previously been served. This very point was noted by Webster J in *Jinpeng*, and we feel is founded in solid reasoning. Opening the door to a challenge via the statutory demand route on every occasion is to undermine the summary and creditor collective nature of the winding up process. Why would a debtor not apply to set aside and buy time of a delayed listing of a full hearing? Every minute out of liquidation could be considered by some to be a minute's reprieve, where proceeding to winding up is, in appropriate cases, faster and by definition in the best interests of all creditors.

Conclusion

Although interesting, Jack J's decision leaves the law in this area in a confusing and uncertain state. Whilst it is not binding on other Commercial Court judges, the decision in Rangecroft means that it is no longer entirely clear what approach the Court will take when determining a liquidation application that involves an arbitration clause and/or has been issued without the prior service of a statutory demand. Unfortunately, it may now be necessary for the Court of Appeal to intervene to clear up the uncertainty that Jack J's decision has caused.

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