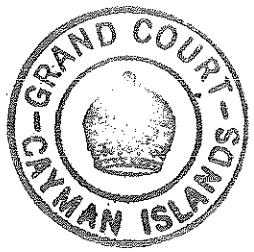
IN THE GRAND COURT OF THE CAYMAN ISLANDS

FINANCIAL SERVICES DIVISION



The Honourable Mr. Justice Andrew J. Jones QC
In Open Court as Chambers, 21st and 24th May 2013

FSD No.56 of 2013 (AJEF)

IN THE MATTER OF THE COMPANIES LAW (2012 REVISION)

AND IN THE MATTER OF EBULLIO COMMODITY MASTER FUND L.P.

Appearances: Mr. Mark Goodman of Campbells for Noble Resources International Pte Ltd
Mr. Peter McMaster QC of Appleby for Ebullio Commodity Master Fund L.P.

REASONS

Introduction

1. On 30 April 2013 Noble Resources International Pte Ltd ("Noble") presented a winding up petition against Ebullio Commodity Master Fund L.P. ("Ebullio") on grounds of insolvency. Ebullio is registered as an exempted limited partnership. Pursuant to section 15(4) of the Exempt Limited Partnership Law (2012 Revision), the Court has jurisdiction to make an order that a limited partnership be wound up and dissolved on the ground of insolvency, for which purpose the provisions of Part V of the Companies Law and the Companies Winding Up Rules apply as if Ebullio was a limited company. The matter was assigned to a judge of the Financial Services Division and the petition was listed for hearing on Monday 27 May 2013. On 6 May 2013 Ebullio issued two summonses by which it sought orders that (1) the petition be struck out as an abuse of the process or, alternatively, stayed pending the outcome of an arbitration commenced by Ebullio against Noble on 30 April 2013, the same day that Noble had presented its winding up petition and (2) Noble be restrained from advertising the petition pending a substantive hearing of the strike out application.

2. On 6 May 2013, the same day that the summonses were issued, Cresswell J. made an order restraining advertisement of the petition pending the hearing of the strike out application which was originally due to take place on 16 May 2013. For reasons outside

the control of the parties, that hearing had to be adjourned. I heard the substantive application on 21 May 2013 and reserved my decision until today.

The Law

3. It is well established a dispute about the existence of a petitioner's debt (as opposed to its quantum) is a dispute about the petitioner's standing and must normally be resolved before the Court can consider whether the company or limited partnership should be wound up. However, proceedings on a winding up petition are not to be used for determining a dispute about the existence of a debt. The Court will therefore strike out or dismiss a petition based upon a debt which is the subject of a *bona fide* dispute on substantial grounds. The correct approach was recently set out by the Court of Appeal in *Camulous Partners Offshore Limited v. Kathrein and Company* 2010 (1) CILR 303, in which Chadwick P. said –

> "58 It is clear that inevitability of failure is not the only – or, indeed, the usual – basis for striking out a creditor's petition on the abuse of process ground. In *Mann v. Goldstein* (8), Ungoed-Thomas, J. observed ([1968] 1 W.L.R. at 1093-1094) that –
>
> "it is well established that this court has jurisdiction to restrain the presentation or advertising of a winding-up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court's inherent jurisdiction to prevent an abuse of the process of the court. It will be exercised where a winding-up application is presented or prosecuted otherwise than in accordance with the legitimate purpose of such process."
>
> 59 And he went on to explain (*ibid.*, at 1099) that it was not the legitimate purpose of the winding-up process to decide whether a petitioner claiming to be a creditor is a creditor. When a petitioning creditor's debt is disputed on substantial grounds, the court should restrain the prosecution of the petition as an abuse of the process of the court "even though it should appear to the court that the company is insolvent." For a more recent analysis of the position in England reference may be made to a decision of mine, sitting as a Judge of the High Court of England and Wales, in *In re a Company (No. 006685 of 1996) (6)* ([1997] BCC at 832):
>
> > "The true rule, which has existed for many years, is the rule of practice that this court will not allow a winding-up petition to be used for the purpose of deciding a substantial dispute raised on *bona fide* grounds."

60 It is the fact that the petitioner is seeking to make improper use of the court's winding-up jurisdiction to resolve an *inter partes* dispute which attracts the sanction of a strike-out. To invoke the court's winding-up jurisdiction to resolve a dispute in circumstances where the claim is bound to fail is an example – but as the disputed debt cases show not the only example – of improper use."

The relevant facts

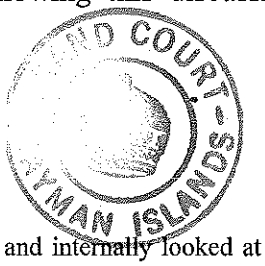
4. By a written contract dated 3 September 2012 (numbered CU118681SJZ) ("the First Contract"), Ebullio agreed to buy from Noble 2000 metric tonnes (± 2%) of London Metal Exchange ("LME") registered Grade A copper cathodes for delivery CIF Rotterdam and/or Warehouse Rotterdam at Ebullio's option in four lots of 500 tonnes during October 2012. The purchase price was the LME Official Cash Settlement Price for copper established during the period not more than 10 nor less than 4 London working days prior to arrival in Rotterdam, plus a premium of US$132 per tonne. The contract was expressed to be subject to the Noble Group's General Terms and Conditions ("GTCs") in respect of physical non-ferrous metals trading.

5. By a second written contract dated 15 January 2013 (numbered CU200243SRK) ("the Second Contract") Ebullio agreed to buy from Noble a further 1500 metric tones (± 2%) of LME registered Grade A copper cathodes for delivery CIF Rotterdam and/or in Warehouse Rotterdam in three lots of 500 tonnes during March 2013. Apart from the amount of copper and the delivery dates, the terms of the First and Second Contracts (including the purchase price mechanism) were the same.

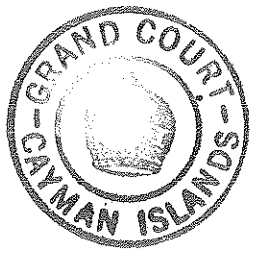
6. On 11 September 2012 the First Contract was varied by a written addendum signed by the parties and identified as 'Addendum I'. The purpose of this variation was to increase the quantity of copper cathodes purchased by adding seven additional deliveries of 500 metric tonnes each, thus increasing the total to 5,500 metric tonnes. The first two deliveries of 500 tonnes each were duly made and paid for in October 2012. Thereafter, the parties repeatedly agreed to vary the delivery schedule for the balance of 4,500 tonnes. Noble agreed to delay certain of the delivery/payment dates in consideration for Ebullio agreeing to pay the consequential carrying cost (comprising warehousing, insurance and finance). These variations of the First Contract (referred to by the parties as "rolling over the contracts") are evidenced by a series of written addenda (identified as Addendum II through IX), each produced on Noble's letterhead and signed by both parties. The carrying costs were separately invoiced and paid by Ebullio.

7. Commencing on 5 February 2013, Ebullio sent a series of e-mails to Noble requesting that prices be fixed for the various deliveries under the First Contract. (The time for fixing the price under the Second Contract had not yet arisen). The contract prices are the LME Official Cash Settlement Price on the days specified by the purchaser plus the agreed premium of US$132 per tonne. Noble duly fixed the prices and issued a series of written Pricing Confirmations. In my judgment it cannot be seriously disputed that Ebullio was then under a contractual obligation to pay the purchase price and accept delivery of 4,500 tonnes (± 2%) of copper cathodes pursuant to the First Contract on 28 February 2013. However, towards the end of February Ebullio asked Noble to agree to "roll over" both Contracts. By this time the market price for copper was falling.

8. Ebullio's request was discussed between Mr Josph Crawley, Ebullio's portfolio manager based in London, and Mr René van der Kam, the manager responsible for Noble Group's base metals trading business in its Singapore office. Following this discussion, Mr Crawley sent an e-mail in the following terms –



> "Sent: Tue Feb 26
> Subject: Copper
> Hi Rene,
> Following our telecon today and having spoken to our clients and internally looked at the book overall, paying margin is not going to work as we don't have margin clauses in any of our contracts.
>
> As you know, the market for cathodes in Europe is very slow at the moment and the bulk of our clients for these tonnages can't take it until quarter end (where most of them have to take it), so we need to roll forward again.
>
> We have always worked on a mutual agreement basis and been allowed to roll forward (against paying roll cost plus a nice fee to Noble) as and when it suited the book and/or our clients.
>
> In addition, having looked at the original contracts, margin is only mentioned for unpriced tonnages. As you also know, we have never been called for margin before – even when the mark to market has been at similar amounts to now.
>
> Nevertheless, we obviously want to work with you and continue our good relationship with Noble, so we suggest the following:
>
> The current priced tonnages (4000 mt currently sitting on 28/02/13 for scheduled delivery then) and 2000 mt sitting on the March date (20/03/13) are rolled on 28/03/13.
>
> As usual, we will pay the roll charge (estimated at approx USD 100,000, but please advise exact amount) immediately.
>
> As agreed no further pricing to be made on 3000 mt for q2 until q1 material delivered.



We think the above is very fair and look forward to your confirmation.

Kind regards,
Joe"

9. Mr Van der Kam took the position that Noble was entitled to ask for a margin payment pursuant to clause 7.6 of it GTCs. Ebullio was either unable or unwilling to make any margin payment in cash but, by an e-mail transmitted on 27 February, Mr Crawley offered to provide security up to US$5 million in the form of shares of another Ebullio group company. In the event Noble agreed to roll over both Contracts to 28 March 2013 in consideration for payment of the carrying cost. On 25 March Noble issued invoices for US$37,581,680.14 in respect of the First Contract and US$12,615,377.58 in respect of the Second Contract, together with a separate invoice for US$109,860.63 in respect of the total carrying cost for the period to 28 March. Simultaneously, the Rotterdam warehouse company issued confirmations to Ebullio stating that it was holding the requisite quantities of copper to the order of Noble. Ebullio failed to accept delivery and pay the purchase price, with the result that Noble terminated the Contracts and claimed damages, being the difference between the market price and the contract prices as at the date of the breach.

Ebullio's case – "the over-arching oral agreement"

10. Ebullio's case is that the Contracts are subject to what has been described as an "overarching oral agreement" concluded on or about 30 October 2012 between Mr Crawley acting for Ebullio and Mr van der Kam acting for Noble. Mr Crawley's witness statement signed on 3 May 2013 describes this agreement in the following way.

> "11.....Rene told me that they had lots of available cash and offered to enter into an arrangement with us under which we paid a cash premium to defer delivery dates at our option, a mutual agreement that suited the books of both parties. The benefit to Noble was that they obtained a substantial return on their investment in the copper in the form of roll over payments. The benefit to us was that it gave us the flexibility to take or defer taking the copper having regard to the state of our overall copper book at any given time.
>
> 12 ..... Provided that we agreed to pay the "roll-costs" we would be able to defer the delivery dates."

11. According to Mr Crawley, notwithstanding the express terms of the Contracts (including the GTCs), the purpose and effect of this oral agreement is that Ebullio has the right, exercisable at its sole option, to defer the delivery dates and the corresponding payment

obligations for up to ninety days in consideration for paying Noble's consequential carrying costs. It is said that the Ebullio's entitlement to defer delivery/payment continues to be exercisable unilaterally, even after the contract prices have been fixed. Mr Crawley's witness statement does not say that he actually agreed with Mr van der Kam that Ebullio's right to defer its obligations could be exercised *repeatedly* but this is the way in which its case was put by counsel, although he hesitated to conclude that Ebullio has the right to do so *indefinitely*. It will be immediately apparent that the commercial effect of the overarching oral agreement, as described by Mr Crawley, would be highly beneficial to Ebullio as purchaser. Once the price has been fixed (between 10 and 4 days prior to each delivery date), Mr Crawley says that Ebullio is entitled either to take delivery and pay the purchase price or "defer delivery [and payment] to a time when it was appropriate for the overall copper book of [Ebullio] ". In other words, Ebullio's case is that it had the right, notwithstanding the express terms of the written Contracts, to decide when to take delivery and pay the price having regard to its own commercial interest. If the market price rises above the contract price, Ebullio can take delivery and re-sell at a profit. If the market price falls below the contract price, as in fact happened, Ebullio can avoid realizing a loss by deferring its obligations until such time as the market recovers. According to Ebullio, its only obligation in these circumstances is to keep paying the seller's carrying costs – warehousing, insurance and finance costs. This arrangement is characterized by Mr Crawley as some form of trade financing facility similar to that which Ebullio is said to have had with Standard Bank. However, according to Mr Crawley the overarching oral agreement does not impose upon Ebullio any obligation to make a margin payment or otherwise post security in the event that the market price falls below the contract price.

12. It follows, according to Ebullio, that its failure to pay the total purchase price of US$50,197,057.72 and accept delivery of approximately 6,000 metric tonnes of copper cathodes on 28 March 2013 in accordance with the express terms of the First and Second Contracts (as varied by the written Addenda) did not constitute a default, because Ebullio has an overarching contractual right under the oral agreement to defer its payment/delivery obligations for up to 90 days in consideration for paying Noble's carrying costs. In fact, Ebullio initially sought to roll over both Contracts only until 15 May 2013. However, it did not tender the purchase price on that date. Instead it gave notice to roll the Contracts over again until 31 July 2013, although I have seen no evidence that it tendered payment of any carrying costs for this period. Nor has it paid the sum of US$109,860.63 invoiced for carrying costs up to 28 March 2013. Nor was Counsel prepared to concede that Ebullio will have any obligation to pay the purchase price on 31 July 2013. As I understand it, Ebullio's case is that, if it suits it to do so, it will be entitled to roll the Contracts over again and again, provided only that it pays Noble's carrying costs.

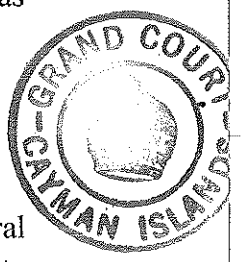
Noble's case – there was no such oral agreement

13. Noble's case is that no such overarching oral agreement was ever discussed, let alone concluded, and that it is simply a "put-up-job" concocted by Ebullio' management after the presentation of the winding up petition. In his second affidavit, Mr van der Kam says that the exchange of e-mails between himself and Mr. Crawley on 30 October 2012 related to a discussion about an entirely different matter which has been grossly mischaracterized by Ebullio. He says –

> "11 In fact, in about October 2012, Mr. Crawley and I discussed a request by [Ebullio] that [Noble], in effect, provide a collateralized line of credit for [Ebullio] , as [Ebullio] was not happy with its bank, Standard Bank. The proposal was that [Noble] would purchase material held either by [Ebullio] or by the bank on [Ebullio's] behalf and sell the material back to [Ebullio] after 90 days. In this way, we would provide finance to [Ebullio]. We had an exchange of e-mails concerning this matter at the end of October 2012 ("the October e-mails"), to which Mr. Crawley refers, albeit selectively. .....
>
> 12 Mr. Crawley alleges that the October e-mails confirmed our discussions relating to the alleged Oral Agreement. In fact, they did nothing of the sort. What they related to were the possible financing arrangements I have just outlined in respect of material already held by or on behalf of [Ebullio], not the postponements of the deliveries still to be made under the First Contract, or any other contract (by that stage, some 5,500t had been agreed for delivery before the end of December ....).
>
> 13 As the October e-mails make clear, I agreed that we could match the bank's terms for financing, and that no further documentation was required to establish that fact. It is also clear from the October e-mails that nothing further had in fact been agreed concerning any financing arrangements, since I said that we would have to discuss the pricing/EFP (exchange for physical) of any such deals."

14. Noble's case is that Ebullio's failure to pay the purchase price of US$37,581,680.14, due under the First Contract and US$12,615,377.58 under the Second Contract on 28 March 2013 constituted a breach of the Contracts entitling it to claim damages of US$3,722,732.00 and US$1,226,385, being the difference between the contract prices and the market price as the date of the breach. Invoices for these amounts were rendered on Ebullio on 11 April 2013. It failed to pay. Instead, Ebullio commenced arbitrations against Noble under clause 29.1 of the GTCs in which it seeks declarations that Noble was not entitled to terminate the Contracts. It is stated in paragraph 11 of each of its Statements of Claim that "[Ebullio] has refused to accept such repudiatory breaches of

contract and has elected to affirm the Contract[s]", but this does not mean that Ebullio intends to tender payment of the purchase price on 31 July 2013, because it claims to be entitled, at its option, to keep rolling over the Contracts, presumably until such time as the market price for copper recovers.



Conclusions

15. I have reached the conclusion that Ebullio's attempt to set up the "overarching oral agreement" is not *bona fide* and that there is no substantial basis upon which its liability to pay the purchase price and accept delivery on 28 March 2013 can be disputed. The evidence leads me to this conclusion for the following reasons.

16. I think that it is important to remember that this case concerns two commercial contracts made between apparently experienced businessmen. Mr Crawley describes himself as the managing partner of a commodity trading fund, of which Ebullio forms part. Mr van der Kam describes himself the "director-base metals" having responsibility for conducting the base metal trading business of Noble, which is itself a subsidiary of a well established company whose shares are listed on the Singapore stock exchange. I infer from this evidence and the documentary evidence reflecting the way in which this business was actually transacted, that Messrs Crawley and van der Kam are industry professionals, having experience of base metal trading and familiarity with the practices of the LME. It does seem to me inherently improbable that any industry professional in Mr van der Kam's position would enter into an oral agreement of the kind asserted by Mr Crawley.

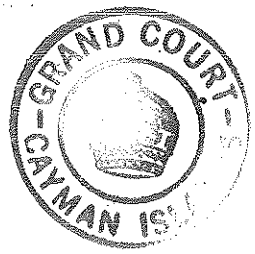
17. There is no contemporaneous evidence tending to support the existence of any overarching oral agreement. It is not documented in any way. If such an agreement had ever been concluded, one might have expected that it would be referred to in one or more of the subsequent written addenda by which the First Contract was varied. It is not. If Mr Crawley genuinely thought that he had negotiated such an agreement, the terms of which would be highly beneficial to Ebullio, one might have expected him to have memorialized it in some way or at least to have referred to it or relied upon it in subsequent negotiations. He did none of these things. The way in which the parties "rolled over" the First Contract on numerous occasions is inconsistent with the existence of the overarching oral agreement. Addenda II to IX are bilateral agreements written on Noble's letterhead and signed by both parties. If Ebullio had a contractual right, exercisable unilaterally at its option, there would have been no need to enter into these agreements. Instead, it would have been open to Ebullio to defer any given delivery/payment date simply by serving notice on Noble. This was never done. Nor does the contemporaneous e-mail correspondence contain any hint that Mr Crawley thought that Ebullio might be entitled to act in this way. The high point of Ebullio's case appears

to be the exchange of e-mails on 30 October 2012. On a plain reading of Mr Crawley's e-mail, he is talking about Noble's offer to establish a line of credit similar to that which Ebullio had with Standard Bank or might establish with any other bank. It is plainly obvious that the overarching oral agreement is wholly different from a credit facility agreement of a kind which might be concluded with a bank for the purpose of financing commodity trading. The fact that the expression "Libor + 2.5%" is used in some documents relating to tin contracts, which are not the subject of this winding up petition, does not, in my view, support the proposition that the 30 October e-mail exchange is evidence of the existence of an overarching oral agreement in the terms asserted by Ebullio. Having regard to the contemporaneous written evidence and the way in which the parties in fact conducted their business, I think that Mr. Crawley's witness statement is so obviously lacking in credibility that I am driven to the conclusion that there is no genuine dispute about Ebullio's contractual liability which can or should be taken seriously by this Court.

18. For the sake of completeness, I will deal briefly with two further points raised by Counsel for Ebullio. First, Noble seeks to rely upon certain statements made by Ebullio in e-mail correspondence which is marked "without prejudice". Having read the e-mails in question, I concluded that they were not relevant to the issue presently before the Court. I therefore disregarded this evidence without enquiring whether it was inadmissible by reason of being marked "without prejudice". Second, counsel relied upon the fact that Ebullio commenced an arbitration on the very same day that Noble presented its winding up petition. In this regard I agree with the analysis of the Singapore High Court in *Sanpete Builders (S) Pte Ltd* [1989] SGHC 4, per Chao Hick Tin JC at paragraphs 36 and 37. The existence of the arbitration clause in the GTCs and/or the existence of the pending arbitration would only come into play if I had concluded that the debt relied upon by Noble is the subject of a bona fide dispute on substantial grounds.

19. For these reasons Ebullio's summons to strike out the winding up petition as an abuse of the process is dismissed. I will hear Counsels' further submissions in relation to costs and consequential directions for the hearing of the winding up petition.

Dated 24th day of May 2013



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