BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

BVIHCV2007/0315

IN THE MATTER OF EQUATOR EXPLORATION LIMITED

BETWEEN:

EQUATOR EXPLORATION LIMITED

Applicant

AND

BW PEACE LIMITED (formerly known as BW ENDEAVOUR LIMITED)

Respondent

Appearances:

Mr. Stephen Moverley-Smith QC and Mr. Christopher Young of Harney Westwood & Riegels for the Applicant

Mr. Paul Webster QC and Mr. Malcolm Arthurs of O'Neal Webster for the Respondent

---

2008: April 30, May 7

JUDGMENT IN CHAMBERS

(Insolvency – Application to set aside statutory demand – debt disputed on ground that not contractually due and payable or amounts to an unenforceable penalty and not liquidated damages – contract governed by English law and dispute resolution vested exclusively in Commercial Court of English High Court – whether debt disputed on substantial grounds within the meaning of section 157 of the Insolvency Act 2003)

[1] **Joseph-Olivetti J:** This is an application[1] by the Applicant, Equator Exploration Ltd ("Equator") under sections 156 and 157 of the Insolvency Act 2003 to set aside a statutory demand served on it by the Respondent, BW Peace Limited ("BW") on 7 December 2007 on the grounds that there is a substantial dispute as to whether the debt claimed the demand is owing or due.

[1] filed on 21 December 2007

[2] At the end of oral arguments I gave a preliminary decision dismissing the application and undertook to provide written reasons as soon as possible thereafter. I was able to do so by the timely provision of comprehensive written submissions which the court had ample time to peruse and consider thus rendering the oral arguments easy to understand and follow. Both counsel must be commended on their industry and the clarity of their submissions, both oral and written.

[3] The evidence by Equator in support of its application is contained in the first and second affidavits of Mr. Philip Dimmock and that on behalf of BW in the affidavits of Messrs Svein Harfjeld, Morten Brass and Lars Vogt. In addition, the court was invited to consider expert evidence on behalf of Equator (Mr. Michael Collett in his two reports) and that of Mr. David Owen Q.C. on behalf of BW. Incidentally, both experts hail from the same Chambers in London, a not unusual feature I am told in the highly specialized world of commercial law in London.

The Background

[4] Mr. Webster QC appearing on behalf of BW did not take issue with the background as presented by Mr. Moverley-Smith Q.C. who represented Equator and therefore I happily draw from that background as set out in Mr. Moverley-Smith's written submissions.

[5] Equator is a BVI company. It operates in the business of oil and gas exploration and production. It has a wholly owned subsidiary, Equator Exploration (OML122) Limited ("the Subsidiary") a company incorporated in Nigeria for the purpose of exploring block OML122 of the offshore Bilabri oil field, Port Harcourt, Nigeria.

[6] On 16 October 2006 the Subsidiary and another Nigerian company, Peak Petroleum Industries Nigeria Limited ("Peak") entered into a time charter contract with BW ("the Contract") under which BW was to supply a floating production storage and off loading vessel ("the FPSO"), this turned out to be the vessel aptly named BW Endeavour. The Contract by Article 33 thereof is governed by English law and the Commercial Court of the English High Court has exclusive jurisdiction to resolve any dispute, controversy or claim arising out of or in connection with the Contract.

[7] By letter dated 25 October 2006 Equator guaranteed to BW the performance of the Contract by the Subsidiary. Under the terms of the Contract, the Subsidiary was required

to provide a bank guarantee. The guarantee was in due course provided by Equator in the aggregate sum of US $20M.

[8] Before the FPSO could become operative BW was required to carry out certain work on it at its expense to meet the Company's specifications. The Target Delivery Date (i.e. date for delivering the FPSO to the Company at the agreed site at the Bilabri Field) for completion of the work was adjusted by the subsidiary and Peak from 21 July 2007 in accordance with their rights under Article 28.2 to 21 October 2007.

[9] The Subsidiary by letter dated 30 November 2006 sought to terminate the Contract in accordance with Article 19.1. BW rejected the notice on the ground that it was signed only by the Subsidiary and that Article 19 required the signature of 'the Company' a defined term which constituted both the Subsidiary and Peak.

[10] The Company, that is, the Subsidiary and Peak (adopting this contractual definition of "the Company") failed to make two stage payments in June and July 2007 for a variation order – VO 01. These amounted in the aggregate to US$3,150,000.00.

[11] Subsequently, by letter dated 30th July 2007 BW gave 14 days notice pursuant to Article 19.5 of the Contract requiring the Company to remedy the breach. The Company failed to make the payments and by a further letter of 7th August, BW terminated the Contract in accordance with Article 19.5.

[12] By letter dated 24th August BW made demand on the Company and Equator for the Early Termination Payment of US$52M ("the ETP") pursuant to clause 19.6 of the Contract and sent an invoice for same. In addition it sent invoices for the amounts due under the variation orders. Apparently, none of the three other parties took issue with this letter.

[13] On 24th September BW drew down the US $20M guarantee referring specifically to the ETP as falling due under the contract. The Company, and Equator were all notified of this at the time yet they made no protest. The monies were subsequently applied in part payment of the ETP and other debts due in the sum of US$6,175,212.00.

[14] By letter dated 5 December 2007, BW's solicitors, O'Neal Webster, served on Equator a Statutory Demand pursuant to s. 155 of the Insolvency Act for the sum of US$38,175,212.00 in accordance with its obligations under the guarantee, to make good the Company's defaults. That sum reflects the balance due for the ETP after crediting the

proceeds of the US$20M left over after payment therefrom of the sum of US$6,175,212.00 due on the variation orders.

The Law

[15] Section 157(1) of the Insolvency Act provides that the court **shall** set aside a statutory demand if it is satisfied, inter alia, that:

(a) there is a **"substantial dispute"** as to whether the debt the subject matter of the demand is owing or due;

(b) the person upon 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 that is 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 that security interest in equal to or greater than the amount specified in the demand less than prescribed minimum ($2,000.00). It is noted that s. 151(2) gives the court **a discretion** to set aside the demand because of a defect in the demand or for some other reason.) Here Equator is relying on the ground that there is a substantial dispute as to whether the debt is owing or due.

[16] There is no dispute on the governing principles. The Court of Appeal in **Sparkasse Bregenz Bank AG v. Associated Capital Corporation** (BVI Civil Appeal No. 10 of 2000) (Byron CJ) laid down the guiding principles. And, as has been pointed out by Counsel **Sparkasse** has been followed by the courts, including my decision in **Haldanes v. China North Industries Investment Management Limited[2].**

[17] Byron CJ explained :-

> "… if the debt is disputed the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the Company could be wound up. **To fall within the principle, the dispute must be genuine in both a subjective and an objective sense.** That means that the

[2] BVIHCV2006/0022

reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the court should ignore. **There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided.** The onus is on the Company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action or by some other proceeding … the process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions …. Invoking the process of the court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the court". (Emphasis added.)

[18] I am reminded by Mr. Moverley-Smith Q.C. and properly so as borne out by **Sparkasse** (See paragraph 4 per Byron CJ) that it is no part of the court's function to resolve factual and legal disputes. And that where, as here, the parties have agreed that another tribunal should have exclusive jurisdiction over disputes any attempt by the court to resolve the dispute will amount to an encroachment and usurpation of the jurisdiction which the parties had conferred on another tribunal. I therefore proceed on the premise that the court is not required to go beyond determining whether the grounds relied on disclose that the dispute is substantial and not frivolous and that it is not called upon to resolve the dispute.

[19] The grounds relied on by Equator for saying that the debt is substantially disputed are two-fold, namely, (i) the Contract makes no provision for payment of an ETP to BW in the circumstances that have happened; and (2) even if the Contract did provide for an ETP to BW such a provision is as a matter of English law an unenforceable penalty.

[20] Interestingly, both parties saw fit to rely on English law experts although it is readily apparent that our law on this subject is the same as English law and that our judges readily embark on considerations of matters of English law without the aid of experts. Be that as it may, the more curious factor is that neither expert and in particular Mr. Collett speak to ground one relied on by Equator. Both proceeded on the basis that the ETP of US$52M is contractually due to BW in the circumstances which have arisen, subject only to the issue

of whether the payment constitutes a penalty which is Mr. Collet's opinion or liquidated damages, the view of Mr. Owen.

[21] The only evidence relied on by Equator to support its claim that in the circumstances which have arisen the ETP is not contractually due is that of Mr. Dimmock in his second affidavit filed 22 February 2008 approximately two months since his first which grounded the application (See Tab 22 TB) and ostensibly made by way of reply to the affidavits filed on behalf of BW. Mr. Dimmock is the Chief Operating Officer of Equator and advances no claim to hold any legal qualifications and therefore he can by no stretch of the imagination be regarded as an expert witness on English law. Strictly, matters of foreign law, and the parties have taken the course of treating English law on this issue as foreign law, are matters of fact which fall to be determined on expert evidence. It follows ineluctably that there is no expert evidence on this issue before the court.

[22] Mr. Moverley-Smith Q.C., when faced with this difficulty, engagingly submitted that the court ought to look at the relevant provisions and itself determine whether there is an arguable case that the ETP is not contractually due. Mr. Moverley-Smith Q.C. says that this is readily apparent on the face of the Contract and that the court will not be required to construe it as such.

[23] I find it strange to say the least, that experts who were asked to consider whether a payment under a contract amounted to a penalty or not would not have seen fit to draw to the court's attention that upon construing the contract the primary question arose as to whether the payment fell due at all. It would have been clear to the experts for the documents they were asked to peruse that this as not an academic exercise but on regarding a claim for in excess of US$52M and the threat of liquidation of one of the parties. See Mr. Collett at para. 16 of the first report. This shows he readily understood the context in which his advice was sought. This is even more singular if as Mr. Moverley-Smith Q.C. contends this issue is readily apparent on the face of the Contract. If this were so then in my view it would have been highly remiss of both experts not to have adverted to it and this omission would have serious consequences not the least the experts being faced with their respective clients clamouring at their doors for their money back. Further, it would also beg the question why the legal advisor with conduct of the matter overlooked such a plain and obvious construction. I hesitate to picture that scenario.

[24] In rebuttal, to the approach recommended by Mr. Moverley-Smith Q.C., Mr. Webster Q.C. pointed out that Mr. Collett in his first report at para. 26 stated specifically that in his opinion the ETP was payable in the circumstances of this case with the only reservation being the question of penalty. Further, that Mr. Collett provided a supplemental report and on its face, this was after he had read Mr. Dimmock's second affidavit. This was his chance to rectify any omissions especially having regard to his duty to the court as an expert - a duty he was fully cognizant of as is seen by para. 10 of his supplemental report. Yet, Mr. Collett made no attempt to raise this issue. I cannot accept Mr. Moverley-Smith's explanation that the fact that he did not comment on it meant that he accepted it. Mr. Webster hazarded that it is more likely that Mr. Collett did not comment on Mr. Dimmock's interpretation as if he adopted it he would have been forced to commit a **volte face** with the ensuing difficulties faced by his omission to raise the point in his first report. I prefer to say, not having heard from Mr. Collett on this, and having seen the care he took to raise the peripheral issue in para. 27 of his first report as to whether the failure to make payment was such a breach as would entitle BW to terminate, that it is more than likely that he thought nothing of the point hence he did not comment on it.

[25] Accordingly, I am of the view that this issue, being one treated by the parties as one of foreign law and it not having been raised by the experts, the court cannot embark on a consideration of its merits by itself without evidence. Further, I have had regard to the specific instructions on which Mr. Collett acted indeed also on the instructions given to Mr. Owen and I have no doubt that this issue fell within the ambit of the specific issue on which they were asked to advise and both perused the entire contract before giving their opinions. If there were a difficulty one would have expected one or the other of the experts to have alluded to it. On the contrary what we have are unambiguous statements that the ETP was contractually due subject to the penalty issue. See Mr. Collett para. 26. Therefore, in the circumstances the court will decline Mr. Moverley-Smith's alluring invitation. It follows then that, on the evidence adduced, Equator has not satisfied the court that it has substantial grounds for disputing the debt on this basis. Ground one therefore falls away.

[26] However, out of abundance of caution if I am wrong in not looking at the contract I have considered the submissions on the construction of the relevant provisions, Article 19.5 and Article 19.6, made by Mr. Moverley-Smith Q.C.

[27] Mr. Moverley-Smith Q.C. contends that Article 19.6 provides that "where termination takes place under Article 19.5 the Company remains liable for all sums due under Articles 10 and 11 (day rates, expenses and other related charges) …." and in addition, to the applicable early termination payment as though the Company had elected to terminate the Contract **effective as of the Demobilization Date**. That the Demobilization Date is defined in Article 1 as the day on which the FPSO is disconnected from the Risk Facilities at the end of the Contract Term. Contract Term is defined as the aggregate of the Primary Term and of any Secondary Term.

[28] Article 19.2 provides that a termination of the contract by the Company, ... that results in the termination date of the Contract **being prior to the date of the expiration of the primary term or the then current secondary term** (as applicable) during which such notice was given, shall automatically generate an obligation upon the Company to pay to the Contractor the early termination payment as provided for in Appendix C.

[29] Thus the Company has no obligation to make an ETP if it elected to terminate on the Demobilization Date i.e. at the end of the Contract Term it only has an obligation to make an early termination payment only if it terminates prior to the contractual expiration date. Accordingly there is no liability for an ETP under Article 19.6. In short, the court cannot imply a term to the effect that "Demobilization Date" should have a different meaning in Article 19.6 from the meaning given to it in Article 1 as an implied term cannot contradict an express term. See **Chitty on Contracts** 29th Edition para. 13-009. BW's remedy if any is for rectification. (See **Snell's Equity 31st edition** paragraph 14-01)

[30] The court cannot second-guess the result of an application for rectification, particularly as in such proceedings the court would need to be satisfied as to what the true agreement was by reference to subjective intentions of the parties as to which there is no evidence at all.

[31] Therefore, there is a substantial dispute as to how Article 19.5 operates and in accordance with **Sparkasse** the court is precluded from adjudicating on it.

[32] I have looked specifically at Article 19.6 which provides:-

> "19.6 Following receipt of the Contractor's notice of termination as aforesaid, the Company shall redeliver the FPSO to the Contractor at the earliest practical opportunity thereafter in accordance with Article 27 and the Contractor shall demobilize the FPSO promptly thereon. If the Contract should be terminated as aforesaid the Company shall remain liable to the Contractor for all amounts owing or earned and unpaid as per Article 10 and/or Article 11 (whether or not invoiced) until the Demobilization Date and, in addition, for the applicable early Termination Payment as though the Company has elected to terminate the contract effective as of the Demobilization Date."

[33] This Article provides inter alia that upon receipt of the termination notice the company shall redeliver the FPSO to the Contractor and the Contractor shall demobilize the FPSO promptly on taking delivery. Further that the Company shall remain liable for all amounts owing or earned and unpaid per Articles 10 and/or 11 until the Demobilization Date and in addition for the applicable ETP as though the Company had elected to terminate the contract on the Demobilization date.

[34] The Article clearly envisages that an ETP is payable if the contract terminates for breach prior to the expiry of the contract, that all sums due and owing should be paid and that the date of effective termination is the date on which the FPSO is disconnected from the Riser Facilities.

[35] On Mr. Moverley-Smith's literal instructions not only will there be no liability for the ETP but the Company will be responsible for all monies earned under Articles 10 and 11 until the expiration of the contractual term. That makes little sense also. Clearly the parties intended that if the contract was terminated early for breach by the Company then the contractor would be entitled to all monies earned up to the date the FPSO was demobilized/dismissed from the FPSO and in addition to an ETP as if the company had elected to terminate from the date the FPSO had been disconnected. Any other meaning would be absurd. This construction ties in with the general scheme of the contract and the Court in resolving ambiguities has a duty to put a construction on contractual terms which would promote business efficacy. See **Chitty on Contracts**.

[36] It is established law (both English and BVI) that when the court is called upon to construe contracts the courts must ascertain the intention of the parties from the words used in the

contract. If there is any ambiguity then the court must look further and consider what has been termed the factual matrix to assist in ascertaining the true intentions of the parties.

[37] I refer again to the fact that the experts did not see fit to raise this issue and the real likelihood that this issue does not arise at all. Further when one views the provisions in the Contract as a whole it is extremely unlikely that BW would be given the right to terminate for breach on the part of the Company before the expiry of the contract without the Contract making provision for an ETP. Having regard to all the circumstances I am of the view that this is a dispute which is without substance or in other words is frivolous as it carries no likelihood of success.

[38] Now to ground two. Has Equator adduced substantial grounds for saying that the early termination payment is a penalty and not liquidated damages? I have had specific regard to the experts' evidence and considered the submissions. Both experts agree that the governing law is as laid down in **Dunlop Pneumatic Tyre Company Ltd. v. New Garage and Motor Company Ltd. [1915] AC 79** but they differ as to their application in these circumstances. See the principles as expressed by Lord Dunedin (pp. 86-88) as referred to by Mr. Collett at p. 10 of his first report:-

> 'The leading decision establishing the principles applicable in deciding whether a sum stipulated in a contract is a penalty is **Dunlop Pneumatic Tyre Company Ltd. v. New Garage and Motor Company Ltd. [1915] AC 79**, in which Lord Dunedin stated the following propositions (at 86-88):
>
> > "1. Though the parties to a contract who use the words "penalty" or "liquidated damages" may prima facie be supposed to mean what they say, yet the expression used is not conclusive. The Court must find out whether the payment stipulated is in truth a penalty or liquidated damages. This doctrine may be said to be found passim in nearly every case.
> >
> > 2. The essence of a penalty is a payment of money stipulated as in terrorem of the offending party; the essence of liquidated damages is a

genuine covenanted pre-estimate of damage **(Clydebank Engineering and Shipbuilding Co. v. Don Jose Ramos Yzquierdo y Castaneda)**.

3. The Question whether a sum stipulated is penalty or liquidated damages is a question of construction to be decided upon the terms and inherent circumstances of each particular contract, judged of as at the time of the making of the contract, not as at the time of the breach **Public Works Commissioner v. Hills** and **Webster v. Bosanquet**.

4. To assist this task of construction various tests have been suggested, which if applicable to the case under consideration may prove helpful, or even conclusive. Such are:

(a) It will be held to be penalty if the sum stipulated for its extravagant and unconscionable in amount in comparison with the greatest loss that could conceivably be proved to have followed from the breach. (Illustration given by Lord Halsbury in **Clydebank Case.**)

(b) It will be held to be a penalty if the breach consists only in not paying a sum of money, and the sum stipulated is a sum greater than the sum which ought to have been paid (**Kemble v. Farren**). This, though one of the most ancient instances, is truly a corollary to the last test. Whether it had its historical origin in the doctrine of the common law that when A. promised to pay B. a sum of money on a certain day and did not do so, B. could only recover the sum with, in certain cases, interest, but could never recover further damages for non-timeous payment, or whether it was a survival of the time when equity reformed unconscionable bargains merely because they were unconscionable - a subject which much exercised Jessel M.R. in **Wallis v. Smith** – is probably more interesting than material.

(c) There is a presumption (but no more) that it is penalty when "a single lump sum is made payable by way of compensation, on the occurrence of one or more or all of several events, some of which may occasion serious and others but trifling damage" (Lord Watson in **Lord Elphinstone v Monkland Iron and Coal Co.**)

(d) On the other hand: It is no obstacle to the sum stipulated being a genuine pre-estimate of damage, that the consequences of the breach are such as to make precise pre-estimation almost an impossibility. On the contrary, that is just the situation when it is probable that pre-estimated damage was the true bargain between the parties (**Clydebank Case**, Lord Halsbury; **Webster v Bosanquet**, Lord Mersey)."

[39] I accept Mr. Owen's view that the contract is of such a nature that it would be difficult to ascertain the damages resulting on breach. The rationale for parties making provisions for liquidated damages is explained by Lord Woolfe in **Phillips Hong Kong Ltd. v Attorney General of Hong Kong**[3] the chief reason being certainty.

> "There are two main reasons for the particular importance attached by the Court to upholding liquidated damages clauses in commercial contracts.
>
> (1) Assuming that the parties are of broadly equal bargaining power, there can be little justification for interference. The parties are presumed to be able to look after themselves. As Lord Woolf put it in Phillips:
>
> "… the fact that two parties who should be well capable of protecting their respective commercial interests agreed the allegedly penal provision suggests that the formula for calculating liquidated damages is unlikely to be oppressive."
>
> (2) A liquidated damages clause contributes significantly to commercial certainty. It enables parties to know the extent of their liability and the risks which they run in entering into the contract."[4]

[40] Again, I accept Mr. Owen's analysis that it is apparent that the parties adverted to the consequences of breach and that the payment stipulated for in the event of breach leading to termination was not a lump sum payable in every circumstance but a graduated sum. Payments were larger if the Contract was determined earlier and the payments decreased

[3] (1993) 61 BLR 49
[4] English Law Expert Report – David Owen Q.C. – Exhibit MA1

to cater for later termination. I have also had regard to the evidence of Mr. Dimmock and the evidence on behalf of BW as to the amounts expended on by BW on the FPSO, the likely earnings for the Primary Term (3 years) and the fact that as of 24 January 2008 BW despite efforts had not been able to obtain another contract for the FPSO since August 2007. (See Mr. Hartjeld para. 14.17 Tab 11.) Also, I take into account both experts view that the English court (like this court) is predisposed to uphold such clauses especially where as here the parties enjoyed equal bargaining power. See para 13 of Mr. Owen:-

> "In the case of commercial contracts, the English Court is all the more predisposed to uphold liquidated damages clauses. As was pointed out in **Alfred McAlpine Capital Projects Ltd v. Tilebox Ltd. [2005] EWHC 281 (TCC)**:
>
> > "Because the rule about penalties is an anomaly within the law of contract, the courts are predisposed, where possible, to uphold contractual terms which fix the level of damages for breach. This predisposition is even stronger in the case of commercial contracts freely entered into between parties of comparable bargaining power."

[41] Clearly there is a dispute but having regard to all evidence I am not satisfied that Equator has established that the dispute is substantial in the sense used in **Sparkasse**. To my mind Equator has no real prospects establishing that its ETP is a penalty.

[42] Further, in **Sparkasse,** the court held that to establish a substantial dispute the dispute must be genuinely disputed in both the subjective and the objective sense. So far we have been looking at it objectively. Now I turn to the subjective perspective. The evidence, undisputed, is that Equator since August 2007 was aware that BW was demanding the ETP in accordance with Article19.6. However, Equator did nothing to refute the Company's obligation to pay the ETP which would have impacted on Equator's liability under the guarantee. Instead, it was only after BW had served the Statutory Demand that it re-acted.

[43] A delay to assert one's rights is not by itself ground for questioning a person's bona fides; however, the delay is not the only factor here. What is of moment is that BW drew down on the bond/guarantee for US$20M and applied the funds inter alia on account of the ETP

and that although aware of this Equator made no protest neither did it demand the balance of US $13,824,788.00 which it now asserts is due to it from the US$20M.

[44] I have considered the explanation for this given by Mr. Dimmock in his first affidavit at para. 10. He says in short that Equator took an alternative course of action which was beneficial to BW. Equator on 13 September 2007 entered into the Bilabri Settlement Agreement with Peak. Under this agreement Peak would become responsible for their joint obligations under the Contract. Further that Peak has negotiated a new contract similar to the contract with BW. (This contract was not signed as allegedly Peak could not confirm financing. This was as of September 2007[5]. See Mr. Harfjeld para. 11.) Therefore, he says it was anticipated that the losses to BW caused by early termination would be small and that the ETP would not be relevant. I offer no comment about the level at which these companies operate if a loss of US$20M, could be deemed by them to be so inconsequential as not to merit even a caveat to the other that it was not payable. This explanation in all the circumstances makes little sense as Mr. Dimmock has not shown that BW acceded to this or in any way agreed to waive its rights under the contract.

[45] In the words of Lord Denning in **Re Claybridge Shipping SA [1997] 1BCLC 572 at 574** which I like Mr. Webster Q.C. find both apt and irresistible I consider that this challenge to the Statutory Demand in all the circumstances is "a put-up job" and that BW holds no honest belief that it has any good and substantial grounds for disputing the payment of the ETP.

[46] Accordingly, for the reasons advanced in the words of Byron CJ in **Spakasse,** "I am not satisfied that 'there is so much doubt and question about the liability to pay the debt that the court sees there is a question to be decided' and I would dismiss the application with the usual consequences. I was advised by counsel that costs had been agreed at $150,000.00.

[47] Under s. 157(5) of the Insolvency Act on dismissing an application such as this the court is required to make an order that BW proceed with the petition for winding up and I now do so.

[5] It is to be remarked that problems of finances appear to have plagued the company from the out set. See para 3 of Mr. Dimmock's first affidavits tab 3.

[48] At the close of the hearing Mr. Moverley-Smith Q.C. had properly drawn this subsection together with subsection (4) (this provides for an extension of time to comply with the statutory demand) to the court's attention and had indicated his intention to seek the appropriate relief thereunder and possible stay pending appeal after receipt of my reasons. No doubt when these applications are made they will be treated with some degree of urgency.

Rita Joseph-Olivetti
High Court Judge
British Virgin Islands