BRITISH VIRGIN ISLANDS
EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE

CLAIM NO: BVIHCV 245/2009
IN THE MATTER OF THE INSOLVENCY ACT 2003

AND

IN THE MATTER OF THE TAMARIND CLUB II LIMITED
BETWEEN:

WESLEY BORK JR.

Applicant

And

THE TAMARIND CLUB II LIMITED

Respondent

Appearances: Mr Robert Foote and Ms Clare-Louise Whiley for Wesley Bork Jr, Ms Michelle Worrel for Ms Cynthia Clayton and Mrs Tana'ania Small-Davis for Mr Ashbell Lettsome and Kathy Wright

JUDGMENT

[2009: 23 November; 1 December]

(Statutory demand – demand not challenged within 14 day limit - company unrepresented – members appearing to dispute debt – whether sums advanced by applicant investments or loans – whether substantial dispute)

[1] Bannister J [ag]: This is an application by Wesley Bork, Jr ('Mr Bork') for the appointment of a liquidator over a company called The Tamarind Club II Limited ('the company'). Mr Bork claims to be a creditor of the company in the sum of US$643,175. On 14 May 2009 Mr Bork served a statutory demand on the company at its registered office. The company, which has had no directors since 8 May 2009, did not challenge that demand. The originating application was issued on 7 July 2009. It first came on on 22 September 2009 and has been adjourned on at least two occasions with a view to the parties compromising their differences. Regrettably, that has proved impossible, so that it has become necessary for the Court to determine the application.

[2] Apart from Mr Bork, who appeared by Mr Robert Foote, I heard submissions from Ms Michelle Worrell, who appeared for Cynthia Clayton ('Ms Clayton') and from Ms Tana'ania Small-Davis, who

appeared for Mr Ashbel Lettsome ('Mr Lettsome') and his wife, Kathy Wright ('Ms Wright'). Ms Wright is Ms Clayton's sister. On 18 September 2009 Ms Clayton issued an application asking for leave to be heard as a member of the company; for a stay of Mr Bork's application on the basis of an arbitration clause contained in a partnership agreement which I shall mention in a moment; and, in the alternative, for Mr Bork's application to be dismissed. This application is before me today.

[3] The company was incorporated on 12 May 2004 with an issued share capital of 5,000 shares. Of these, Mr Lettsome is registered as the holder of 3,400, Mr Bork and Ms Clayton as the holders of 500 each and Ms Wright as the holder of 200. Two other individuals, who have played no part in these proceedings, hold the remaining 400. The only director of the company has been Mr Lettsome. He was appointed on incorporation and resigned, as I have indicated, on 8 May 2009.

[4] On 3 December 2004 the company took a transfer from one Dawn Rosenberg ('Ms Rosenberg') of the land and buildings comprised in parcel 3239B in the Long Look Registration Section. This is the land upon which the hotel and restaurant business known as The Tamarind Club is situated. The transfer document states the consideration for the transfer as US$900,000. Of that sum, US$500,000 was provided by way of a commercial mortgage loan from First Caribbean International Bank (Cayman) Limited ('the bank') granted pursuant to a facility letter dated 18 November 2004, under which the bank agreed to advance $550,000 to the company. US$500,000 was to be applied towards the purchase of the land and the balance was for working capital. The land was charged to the bank as security for the loan, which was also secured by guarantees given by each of the members of the company. That given by Mr Bork was limited to US$550,000. The others were unlimited.

[5] The facts set out in paragraphs [3] and [4] above are the only facts known with any sort of certainty about the company and its dealings.

[6] In order to examine Mr Bork's claim to be a creditor of the company it is necessary to go back to events that took place from about 2002 onwards.

[7] Prior to 2002 Ms Clayton had worked in the United States for a company controlled or owned by Mr Bork. It seems to have been agreed between them that they should undertake a business venture in the British Virgin Islands. Ms Clayton says that she found that the Tamarind Club was for sale and in January 2003 she began negotiations with Ms Rosenberg for its purchase on behalf of

herself and Mr Bork. Mr Bork (in an affidavit in reply to that of Ms Clayton) says that it was agreed that he should provide 'loan finance' for the acquisition; in the following sentence he says that he agreed to Ms Clayton's proposition that they would be partners and fund the acquisition jointly. Although these two ways of putting the matter are not mutually exclusive, they would ordinarily be taken to be describing two entirely different methods of proceeding, one involving Mr Bork as creditor, the other as involving him as a furnisher, together with Ms Clayton, of partnership capital.

[8] Ms Clayton says that some time after the negotiations with Ms Rosenberg, she learned that as Non-Belongers she and Mr Bork would need a licence to acquire the land on which the Tamarind Club stood. The upshot was that Mr Lettsome, who is a Belonger, offered in return for a payment of US$1,000 per month to set up a company with himself as majority shareholder and sole director and to acquire the Trade Licence in his name. Ms Clayton says that she discussed this scheme with Mr Bork and that it was agreed that the company would be incorporated on this basis.

[9] It is not now in dispute (although surprisingly Mr Bork makes no mention of the fact in his affidavit in support of the originating application) that on 2 June 2003 Ms Clayton and Mr Bork entered into a form of written partnership agreement. That document gives as the object of the partnership the purchase and conduct of the Tamarind Club. The partnership is expressed to be terminable at will. The agreement provides that the capital should be provided by the partners. The initial capital was to be US$20,000, with additional deposits to be made into a capital savings or checking account as determined by the partners. Ms Clayton was authorised to seek *on behalf of the partnership* any necessary funding from local financial institutions (emphasis added). The final sentence of clause 7 of the partnership agreement provided as follows:

> 'Additionally, Ms Clayton shall be responsible for the successful incorporation to [sic] the business, The Tamarind II LTD, as provided by BVI guidelines.'

[10] Finally, I must mention that the partnership agreement provided that any controversy or claim arising out of or relating to the agreement, or breach of the agreement,

> 'should be settled by arbitration in accordance with the rules, then obtaining of the Royal Magistrates Supreme Court, in the British Virgin

> Island [sic], and judgment upon award rendered may be entered in any court having jurisdictions [sic] thereof.'

[11] Ms Clayton insists in her evidence that it was agreed between herself and Mr Bork that (put very shortly) the partnership agreement would govern 'the conduct of the business of the company'.

[12] From about mid July 2003 onwards Ms Clayton says that Mr Bork paid some US$200,000 into her private savings account with the bank and says that it was agreed that this would represent Mr Bork's half share of the expenses to be incurred in preparation for the takeover of the Tamarind Club. She produces evidence of some of these payments. Ms Clayton also says that she herself wired some US$130,000 into the same account, but produces no bank documents in evidence of this. She says that it was agreed that this money should represent her 'half' of the expenses.

[13] On 5 January 2004 Ms Clayton, purporting to be a director of a company called Marisol System Limited ('Marisol') signed an agreement with Ms Rosenberg for the purchase of the land and business of the Tamarind Club for US$1 million. Marisol was, she says, a company belonging to Mr Lettsome. The contract refers to a deposit of US$100,000. Ms Clayton says that it was agreed between her and Mr Bork that this would be provided equally between them. There are no transactional documents to evidence how the deposit was in fact met.

[14] On 12 May 2004 the company was incorporated. The membership and shareholdings, which I have already set out above, were, according to Ms Clayton, as recommended to her by Maples & Calder.

[15] Some time before 30 August 2004 Mr Bork paid a further US$400,000 into Ms Clayton's savings account. This money she paid to Maples & Calder on 30 August 2004 towards the purchase price of the Tamarind Club. As I have said, the land on which the Tamarind Club stands was transferred to the company on 3 December 2004.

[16] It seems likely that the sum of US$400,000 referred to above was used, together with US$500,000 of the Bank mortgage loan, to fund the payment of the US$900,000 balance of the purchase price.

[17] I should mention some other documents. In an e-mail sent on 13 July 2005 to Ms Clayton by a Mr Mark Lownds, who appears to have been an accountant acting for Mr Bork and to have been preparing tax returns for him, Mr Lownds asked Ms Clayton to clarify some material which she

appears to have sent him a few days earlier. He tells her that he has forwarded the information to some other person, whose role in these matters is unexplained 'for an explanation or clarification of the business arrangement as it relates to the balance sheet and income statement'. He says that he needs further clarification as to the amount [Mr Bork] paid for his shares. In reply, Ms Clayton told Mr Lownds that '[Mr Bork] has invested 650K for the purchase of the property and business'. This does not appear consistent with an understanding that Mr Bork's contribution had been by way of loan.

[18] Mr Bork exhibits to his second affidavit copies of certain financial statements purporting to describe the position of the company as at 31 December 2004 and prepared by Deloitte & Touche ('Deloitte') in October 2005. In a letter dated 7 October 2005, Deloitte accepted no responsibility for these statements, saying that they had been put together on the basis of information supplied 'by management'. The balance sheet as so compiled shows 'Directors' loans' amounting to US$787,964. The loans are described as interest free. The copy balance sheet in evidence is signed by Ms Clayton purportedly by way of board approval. Ms Clayton was not a member of the board. Nor was Mr Bork. So that if the US$787,964 was intended to represent indebtedness of the company to Ms Clayton and Mr Bork, it was wrong to describe it as due to 'Directors'.

[19] On 10 February 2006, Ms Clayton sent a fax to Mr Lownds, which included two pages of figures apparently setting out some of the payments made by Ms Clayton and Mr Bork during 2004 in respect of 'The Tamarind Club' (sic). Someone, who may or may not have been Mr Lownds, has made a number of manuscript annotations and calculations on Ms Clayton's fax. Although I cannot and do not make any findings based upon these manuscript notes, they appear to be attempts to adjust the contributions of Ms Clayton and Mr Bork, taking into account sums to be attributed (on various bases) to capital and suggesting that 'Director loans' carry interest at 9%. The content of some of the annotations suggests that they may have been made with a view to Mr Bork being bought out by Ms Clayton. Ms Clayton says in her affidavit that such discussions did take place, although she says that that happened in or around July 2008.

[20] Finally, each of Ms Clayton and Mr Bork signed a schedule dated 20 October 2006, headed 'The Tamarind Club II Limited'. It shows a 'Balance due to 'Wes Bork' as at 31 December 2004 of US$643,474, and to Ms Clayton at the same date of US$144,490. The aggregate figure is US$787,964 – the same figure which appears in the balance sheet signed by Ms Clayton as

representing directors' loans. Ms Clayton says that that represents their respective investments into the partnership. Mr Bork says that the figure of US$643,474 represents a loan made by him to the company.

Representation

[21] As I have said, the company has had no *de jure* directors since 8 May 2009, although it may be that Ms Clayton, who appears to have managed the Tamarind Club, has been and perhaps remains a *de facto* director. Ms Clayton certainly has *locus* as a member to appear on the application and the same applies to Mr Lettsome and Ms Wright. I have listened to submissions from both their counsel in opposition to Mr Bork's application. Were I to accept that Mr Bork was an undoubted creditor of the company and that the company was insolvent, it would, of course, be most unlikely that I would allow the views of members to override his wish that liquidators be appointed, but in any event I decided that I should hear them on the question whether the debt was to be considered as disputed.

Analysis and conclusion

[22] It is obvious from the bare recital of the main parts of the evidence which I have attempted to provide that the situation has been confused from the outset. It seems to me, however, that the simple question which I have to resolve on this application is whether I am satisfied that there can be no substantial dispute that the company owes Mr Bork US$643,175, or, if not that amount, an amount in excess of the statutory minimum of US$2,000.

[23] In his first affidavit, Mr Bork swore simply that the debt arose pursuant to a loan agreement between himself and the company. Mr Lettsome, who has been the only *de jure* director of the company since its incorporation, says that no such loan agreement was ever entered into. There is certainly no evidence as to how any such loan agreement was entered into. What seems to have happened was that Mr Bork put Ms Clayton in funds to acquire the land, in the contemplation that the acquisition would be made by a company to be incorporated some time after the partnership agreement of 2 June 2003 had been entered into. In his second affidavit Mr Bork says that it was Ms Clayton who liaised with Deloitte in the production of unaudited financial statements which I have mentioned above and that the references they contain to directors loans accord with his firm belief at the time that he was making payments by way of loan to the company. Mr Bork cannot, of

course, be expected to know that payments made before the company was incorporated on 12 July 2004 cannot, as a matter of law, conceivably have been made to the company, whether by way of loan or otherwise. Subsequent payments were not, as a matter of payment, made to the company, either. They were made to Ms Clayton.

[24] In his second affidavit, Mr Bork relies upon a draft of a letter which was dated 30 November 2004 and was intended to be sent to Mr Bork by Ms Clayton on her letterhead. Mr Bork relies upon this draft as supporting his contention that he is a creditor of the company. Having stated, correctly, that the draft says that the funds for the acquisition of the land had been provided 'by both of us' and that his 'contribution' had been roughly US$600,000, he goes on to say that the letter acknowledges that 'a further' loan of US$550,000 was required from the Bank. He thus suggests that the draft confirms that his contributions to date had been by way of loan. What the draft letter actually says is not that 'a further loan' was required, but that 'an additional $550,000 is required' and that it was to be provided by way of a loan from the Bank, which is something quite different.

[25] It is not known who prepared this draft, but it contains a paragraph in the following terms:

> 'The agreement between us is that you will bear the risk in relation to 50% of the cash of the Acquisition. This sum is comprised of cash sums you will have advanced (to the extent not reduced by myself) and any liability under the Limited Guarantee (the "Exposure').'

[26] It seems to me that the draft letter (for what it is worth), so far from corroborating Mr Bork's contention that his contribution was by way of loan to the company, is more consistent with the view that it was by way of introduction of joint venture capital.

[27] I do not overlook the balance sheet and schedule to which I have referred earlier. But these documents, prepared for what purpose is not explained, were prepared long after the money was paid over by Mr Bork and Ms Clayton says that the schedule of 20 October 2006 was intended to state the amounts of the investments of herself and Mr Bork in the partnership. Were this issue to go to trial, Ms Clayton would clearly have questions to answer about her signature of these documents. The critical question, however, is how and under what circumstances the company bound itself to repay to Mr Bork the money he had sent to Ms Clayton during 2004 – some of it before the company was even incorporated. There is no evidence that the company ever did that.

[28] I have not overlooked, either, the fact that the facility letter of 18 November 2004 provides for 'postponement of claim from Wesley Bork, Jr, in an amount that is unlimited'. Mr Foote relied heavily on this wording as showing that Mr Bork must have been a creditor of the company, otherwise the Bank would not have required the inclusion of the provision. I do not think that follows. It is to be inferred that the Bank would have inquired how the balance of the purchase price was to be funded and would have been told, no doubt, that it was being provided by Mr Bork. The Bank would have wished to protect itself against any claim by Mr Bork to priority and will have insisted on this term accordingly. That is insufficient to establish that as between Mr Bork and the company there existed the legal relationship of creditor and debtor.

[29] It may be that Mr Bork could establish that he is entitled to some restitutionary claim against the company in respect of the contributions made by him; or that the company holds the equity in the Tamarind Club on a resulting trust for himself and Ms Clayton in the proportions of their cash contributions to its acquisition. But neither of these entitlements would sound in debt – let alone a debt that was payable at the time that the statutory demand was served.

[30] Mr Foote, sensibly, did not rely upon the fact that no application had been made to set aside the statutory demand as establishing that the company is insolvent. Had he done so, I would not have accepted such submission, for the reasons which I set out in Fogerty v Island Point Properties SA[1].

[31] It seems to me that there is a substantial dispute whether Mr Bork is a creditor of the company, whether in the sum claimed or at all. If he wishes to proceed against the company, Mr Bork must establish his claim in proceedings brought for the purpose. Meanwhile, this application must be dismissed.

[32] In these circumstances I do not need to consider paragraph (ii) of Ms Clayton's application of 18 September 2009, seeking a stay of Mr Bork's application and I say no more about it.

Commercial Court Judge

1 December 2009

[1] BVIHCV 2008/0259