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

CLAIM NO: BVIHCV 279/2009

BETWEEN:

TELLTOP HOLDINGS LIMITED

Applicant

and

TARQUIN LIMITED

Respondent

Appearances: Mr Jeremy Scott for the Applicant
Mr Dirk van Heck for the Respondent

JUDGMENT

[2009: 7, 16 December]

[1] Bannister J [ag]: This is an application by Telltop Holdings Limited ('the company') to set aside a statutory demand served upon it on 31 July 2009 by the respondent Tarquin Limited ('Tarquin'). Tarquin is described in an affidavit made on 13 November 2009 by Mr Christopher Barlow as an 'affiliate' of Nomura International Plc ('Nomura'). The demand was in the sum of US$440,000,000, but it is common ground that it was overstated by US$65 million (and by the contractual interest on that figure). For reasons which will appear, the issues raised by the statutory demand and this application appear to me to be academic. Since, however, I have been asked to decide them, I must proceed to do so.

[2] The demand arises out of a series of arrangements between Tarquin and the company pursuant to a facility agreement entered into on 15 March 2006 between the company as borrower (1), Tarquin as original lender (2) and Nomura in dual capacities as (a) agent and (b) arranger (3) ('the facility agreement'). The form (but not necessarily the substance) of the arrangements was that Tarquin was to lend the company US$440,000,000, repayable on the earlier of 26 March 2026 or

the expiration of not less than ten business days notice given to the company by Tarquin (clauses 6.1 and 7.5 of the facility agreement). Of this sum, the company was obliged immediately to use US$220,000,000 ('Loan A') to purchase US$440,000,000 Series 2006-2 non-recourse second secured zero coupon notes due 2026 issued by Tarquin under the Non-Recourse Euro Medium Term Notes Programme ('the Notes'). In an affidavit sworn on 14 August 2009, Mr Rafat Rizvi ('Mr Rizvi'), who describes himself as an 'Advisor' to the company, but who is described in the facility agreement as its controller, explains that this was to be achieved by way of interest sums paid by the company to Tarquin between March 2006 and March 2026 on the other US$220,000,000 lent by Tarquin to the company ('Loan B'). No document has been put in evidence to show the precise terms upon which the Notes were issued.

[3] Loan A was expressed to be interest free for the first five years and thereafter at an annual rate of 6% plus any additional sum needed to compensate Tarquin for complying with the requirements of any central bank in respect of the lending under the facility agreement (described as 'Mandatory Costs').

[4] The Notes are said to have been charged by the company pursuant to a document referred to as 'the English charge'. I do not think that I have seen a copy of that document, although a form of it appears to have been 'circulated' prior to execution of the facility agreement. No copy of the English charge is annexed to the facility agreement. I assume that the English charge was intended to support one or both of the loans.

[5] Loan B was to be used (a) to pay an arrangement fee of US$2.5 million to Nomura in its capacity as arranger and (b) to fund as to part a deposit of US$220,875,000 to be made by the company with Dresdner Bank (Schweiz) AG ('the deposit'). The obligation to apply the money lent in this manner was contained in clause 3.1 of the facility agreement:

> '3. PURPOSE
> 3.1 Purpose
> ....
>
> (b) The Borrower shall apply all amounts borrowed by it under Loan B in paying the arrangement fee to the Arranger (as required by clause 11.1 (*Arrangement Fee*) and towards funding part of the deposit of

> US$220,875,000 to be made by the Borrower with the Account Bank and to be subject to the Swiss Charge.'

[6] By clause 19.8 of the facility agreement the company was obliged to ensure that the deposit was maintained at a minimum level of US$220,875,000; so that if interest on either loan was paid out of the monies on deposit and that payment caused the balance to be reduced below US$220,875,000, the company was obliged forthwith to make up the difference. The precise wording of clause 19.8 is important for present purposes and I had better set it out:

> '19.8 Deposit
>
> The Borrower will ensure that, on any Interest Payment Date, after accounting for the payment of any interest payable on such date in relation to Loan A and Loan B out of monies subject to the Swiss Charge, the amount of the deposit which is subject to the Swiss Charge shall not be less than US$220,875,000 and the Borrower undertakes immediately to make any additional deposit necessary to procure that this requirement is satisfied.'

[7] Interest was payable on Loan B on 17 March and 17 September each year. The annual rate of interest on Loan B was made up of a margin of 0.65% and 6-month US$ LIBOR, plus Mandatory Costs (see paragraph [3] above). In addition, the company was to pay Nomura, in its capacity as agent, an agency fee of US$125,000 on each interest payment date.

[8] The deposit was subject to a so-called 'Swiss charge'. This document which, although referred to in the facility agreement, is not annexed to it, purports to operate by way of security assignment by the company to Tarquin of all assets held by and all money standing to the credit of the company at Dresdner. That included the Notes. They were terms of the assignment (to put the matter very shortly) that the company surrendered all rights to operate the account to two nominees of Nomura, to whom a general power of attorney was given. By way of poison pill, Dresdner undertook to Tarquin that in case of any attempt by the company to operate the account itself it would block the account and release the deposit and any other assets held by it to Tarquin.

[9] It will readily be seen that these arrangements are, to put it mildly, curious. In his affidavit Mr Rizvi says that the facility agreement is only part of a series of very complex financial transactions involving Nomura, which, as he puts it, would help to explain the rather unusual provisions of the

facility agreement. He says that the underlying purpose of the facility agreement was to provide a viable long term solution to liquidity problems experienced by an Indonesian bank. In the absence of any information about the other complex financial transactions which would help to explain the rather unusual provisions of the facility agreement, however, the Court is left having to form its conclusions on the language of the documents which have been put before it.

[10] On 17 March 2008 the facility agreement was amended and restated pursuant to a so-called omnibus agreement. The main effect of the omnibus agreement was to release Tarquin's security over the Notes and to permit the company to draw money from the Dresdner deposit against the provision of irrevocable standby letters of credit for the difference between the amount withdrawn and US$220,000,000 (recital D to the omnibus agreement).

[11] In the amended and restated facility agreement (which formed schedule 3 to the omnibus agreement) the purpose of Loan A and Loan B was restated in exactly the same wording as that which is to be found in clause 3.1 of the original facility agreement (see paragraph [5] above). Clause 19.8 of the original facility agreement, however, was replaced by a new clause 19.8. For present purposes, the following are its material terms:

> '19.8 Letters of Credit
>
> (a) For so long as the Borrower has any liabilities under or in respect of the Finance Documents, it may procure that one or more Letters of Credit are delivered to or to the order of the Original Lender.
>
> (b) For so long as (i) the Borrower has any liabilities under or in respect of the Finance Documents and (ii) the monies held in the Bank Account amount to less than US$220,000,000 (the shortfall being the "Deposit Shortfall"), the Borrower shall procure that one or more Letters of Credit in an Aggregate LC Amount of not less than the Deposit Shortfall have been delivered and are held to or to the order of the Original Lender. For the purposes of calculating the Deposit Shortfall, any interest accrued on the moneys deposited in the Bank Account shall not be counted.
>
> (c) Where any Letters of Credit have been delivered to or to the order of the Original Lender, the Borrower will procure that, not less than 20 Business Days before the date (the Expiry Date") on which any existing Letter of Credit is due to expire, either:

i. such Letter of Credit (including any confirmation) will be extended by the same issuer and confirming bank; or

ii. a different Letter of Credit (including, if relevant, a corresponding confirmation) will be issued to the beneficiary of such existing Letter of Credit, which is effective on or prior to the Expiry Date,

in each case having an expiry date falling not earlier than the earliest of:

(A) 20 Business Days after the Termination Date; and

(B) 12 months after the Expiry Date of such existing Letter of Credit.'

[12] I am not sure whether Mr van Heck accepted that this new wording reduced the minimum maintainable balance in the deposit from US$ 220,875,000 to US$220,000,000 (subject to further reductions when substitute letters of credit were provided by the company) but in my judgment it undoubtedly had that effect. Clause 3.1 in the amended and restated facility agreement merely sets out (correctly) the original purpose of the Loans as stated in the original facility agreement. Clause 19.8 in the amended and restated facility agreement, on the other hand, incorporates a new provision as to the minimum balance to be maintained. That minimum balance originally stood at US$220,000,000 and has been subsequently reduced by the provision of substitute letters of credit to US$155,000,000.

[13] Under this new arrangement US$65 million was released from the deposit and replaced with standby letters of credit issued by ING Bank NV.

[14] The omnibus agreement made changes to the rate of interest applying to Loan B. Read in conjunction with the amended and restated facility agreement, it also made changes to the regime governing payment of interest under Loan B. While the interest payment dates remained unchanged, the effect of the amendments was to make interest for each six month interest period payable in advance by monthly instalments five business days before the 17th of each month. On 10 September 2008 the parties agreed a schedule of monthly interest prepayments covering the monthly prepayments from September 2008 to February 2009. Each monthly payment was to be

in the sum of US$695,468.40. The payments were to be made to a Nomura account at Citibank London. The six-monthly agency fee of US$125,000 remained unchanged.

[15] Finally, I should mention that the notice period for the call option under clause 7.5 of the facility agreement was increased from 10 to 30 days. No alteration was made by the omnibus agreement or under the amended and restated facility agreement to the Swiss charge or to the arrangements which it contained governing control by Nomura of the deposit.

[16] On 29 January 2009 Tarquin called in the loans under clause 7.5 of the facility agreement and required 'prepayment' of them by 17 March 2009. It will be recalled that 17 March 2009 was an interest payment date in respect of Loan B under the facility agreement.

[17] In its letter of 29 January 2009 Tarquin claimed that notwithstanding the fact that the loan had been called in, the company remained liable under the amended clause 19.8 to extend or replace any outstanding letters of credit as they expired. Tarquin said that the first of the three letters of credit then held by Tarquin was due to expire on 19 March 2009 and was required to be extended by 19 February 2009. Tarquin further demanded payment of the monthly prepayment instalment falling due on (per the call letter) 10 February 2009.

[18] On 6 February 2009 Nomura sent Mr Rizvi an e-mail reminding him that US$695,468.40 needed to be paid into Nomura's Citibank account on 9 February 2009 (the date specified in the interest schedule of 10 September 2008). Nomura followed that up on 10 February 2009 with a request for confirmation that the payment would be made. Mr Rizvi replied on the same day, referring to the fact that the loans had been called and asking whether, in those circumstances, there was any point in paying the money. Nomura responded by insisting that the interest instalment was due and that non-payment would amount to an event of default under the facility agreement. The writer reminded Mr Rizvi that Tarquin depended on full repayment of the Loans in order to make full repayment on its senior and junior notes, which, it was said were limited in recourse to the Loans and security therefor. It is not clear whether the notes being referred to are the Notes purchased with the proceeds of Loan A, but it seems likely that they were.

[19] On 11 February 2009 Tracy She sent a message to Nomura on behalf of the company. It was in the following terms:

> 'Sent for and on behalf of Telltop Holdings Ltd.
>
> Dear Gary
>
> Please note that the Loan Facility of US$440,000,000 has already been called by Tarquin Limited on 29 January 2009. Thus Telltop would default on prepayment of interest totaling USD 695,468.40. This would accelerate the process and allow Tarquin Limited to claim from the bank account of Telltop with immediate repayment of all loans outstanding under the Facility Agreement.
>
> If you have any further queries on the above, please feel free to contact either Khim at +65 6324 9539 or Tracy at +65 6324 9540.
>
> Best regards
>
> Tracy She'

[20] I understand that English is not Ms She's first language, but the gist of the communication seems to me to be clear: she is telling Nomura that it can help itself out of the deposit.

[21] On 12 February 2009 Nomura, as agent for Tarquin, called a default under clause 20.1 of the facility agreement by reason of the company's non-payment of the February interest instalment. Clause 20.1 is in the following terms:

> '20.1 Non-Payment
>
> The Borrower does not pay on the due date any amount pursuant to a Finance Document at the place and in the currency in which it is expressed to be payable unless:
>
> (a) its failure to pay is caused by:
>
> i. administrative or technical error; or
>
> ii. a Disruption Event; and
>
> (b) payment is made within 2 Business Days of its due date.'

I note in passing that the amended and restated facility agreement had substituted for the figure 3 where it occurs in clause 20.1(b) in the original facility letter the figure 2. As a result of this alleged default, Nomura claimed that the Loans and all other outstanding liabilities of the company were immediately due and payable pursuant to clause 20.12(b) of the facility agreement:

> '20.12 Acceleration
>
> On and at any time after the occurrence of an Event of Default which is continuing the Agent may, and shall if so directed by the Lenders, by notice to the Borrower:
>
> (a) cancel the Total Commitments whereupon they shall immediately be cancelled;
>
> (b) declare that all or part of the Loans, together with accrued interest, and all other amounts accrued or outstanding under the Finance Documents be immediately due and payable, whereupon they shall become immediately due and payable; and/or
>
> (c) declare that all or part of the Loans be payable on demand, whereupon they shall immediately become payable on demand by the Agent on the instructions of the Lenders.'

[22] On 31 July 2009 Tarquin served its statutory demand. Lengthy as they are, I must set out the particulars of debt which it provided:

> '(1) Pursuant to the terms of a Facility Agreement made between (i) the Debtor, as borrower; (ii) the Creditor, as lender, and (iii) Nomura International Plc ("Nomura") as agent and arranger, dated 15 March 2006 (and as subsequently amended and restated pursuant to the terms of a supplemental Ominibus Agreement, made between (i) the Debtor; (ii) the Creditor, (iii) Nomura; and (iv) Citicorp Trustee Company Limited, dated 17 March 2008) (the "Facility Agreement"), the Creditor agreed to make available to the Debtor a US$440,000,000 (four hundred and forty million United States dollars) term loan facility in two equal tranches of US$220,000,000 (two hundred and twenty million United States dollars) each, corresponding to each Loan A and Loan B.
>
> 2 Loan A is defined in the Facility Agreement as a fixed rate loan made available under the Facility Agreement in a maximum amount of US$220,000,00 (two hundred and twenty million United

States dollars), or such amount as may be reduced by the Facility Agreement.

3. Loan B is defined in the Facility Agreement as a floating rate term loan made available under the Facility Agreement in a maximum amount of US$220,000,000 (two hundred and twenty million United States dollars), or such amount as may be reduced by the Facility Agreement.

4. Pursuant to clause 6.1 of the Facility Agreement, the Debtor agreed to repay each Loan in full on the Termination Date (defined in the Facility Agreement as 17 March 2026), together with all accrued interest.

5. Pursuant to clause 8.1(c) of the Facility Agreement, the Debtor agreed that the rate of Interest on Loan B for the Loan B Interest Period (defined in paragraph 7 below) commencing on or about 17 March 2008 and each subsequent Loan B Interest Period is the percentage rate per annum which is the aggregate of the applicable (i) Margin (defined as 0.65% per annum), (ii) 6-month US dollar LIBOR, and (iii) Mandatory Costs, if any, such rate of interest: (iv) to be determined on the Loan B Interest Prepayment Calculation Date (defined as 7 Business Days before the start of such Loan B Interest Period); and (v) will remain the same throughout that Loan B Interest Period. The Facility Agreement defines Mandatory Costs as the amount determined by the Creditor as necessary to compensate it for the cost of compliance with any requirement of a central bank or other regulator in relation to the lending under the Facility Agreement.

6. Pursuant to clause 8.2(c) of the Facility Agreement, the Debtor agreed to pay Interest on Loan B in advance of paying the Loan B Interest Prepayment Date in a Loan B Interest Period. The Loan B Interest Prepayment Amount and the Loan B Interest Prepayment Dates for the Loan B Interest Period 17 September 2008 to 17 March 2009 are set out in the notice referred to in paragraph 10 below.

7. Pursuant to clause 9.1(c) of the Facility Agreement the Loan B Interest Period for Loan B for any period from and including the Interest Payment Date falling on or about 17 March 2008 shall be the period from and including 17 March 2008 to but excluding 17 September 2008, and thereafter each successive 6 month period from and including 17 September 2008 to but excluding the 17th day of the month occurring six months thereafter.

8. The Debtor agreed that if it fails to pay any amount payable by it under the Facility Agreement on its due date, default interest shall accrue on the overall amount from the due date to the date of actual payment (both before and after judgment) at a rate and in the manner stipulated in clause 8.3 of the Facility Agreement.

9. Pursuant to clause 27.1 of the Facility Agreement the Debtor agreed that on each date it is required to make a payment under the Facility Agreement, it shall make the same available to Nomura (unless a contrary indication appears in a Finance Document) for value on the due date at the time and in such funds specified by Nomura as being customary at the time for settlement of transactions in the relevant currency in the place of payment.

10. On 10 September 2008 Nomura issued a payment notice to the Debtor detailing the interest amounts due for the Loan B Interest Period 17 September 2008 to 16 March 2009. The total accrued interest due under Loan B for the period was US$4,172,810.40 (four million, one hundred and seventy two thousand, eight hundred and ten United States dollars and forty cents). This sum was to be paid in six equal monthly Loan B Interest Prepayment Amounts of US$695,468.40 (six hundred and ninety five thousand, four hundred sixty eight United States Dollars and forty cents) on 10 September 2008, 9 October 2008, 7 November 2008, 10 December 2008, 12 January 2009, and 9 February 2009 (the Loan B Interest Prepayment Dates).

11. The Debtor failed to repay the Interest amount due on 9 February 2009, namely, US$695,468.40 (six hundred and ninety five thousand, four hundred and sixty eight United States Dollars and forty cents) and, despite the demand for payment made by Nomura by letter dated 12 February 2009 (see further paragraph 14 below), has not paid that amount since that date.

12. Pursuant to clause 20.1 of the Facility Agreement an Event of Default includes, *inter alia,* the Debtor's failure to pay on the due date any amount payable pursuant to the Facility Agreement at the place and in the currency in which it is expressed to be payable. Accordingly, the Debtor's failure to make the payment referred to in paragraph 11 above constituted an Event of Default.

13. Pursuant to clause 20.12 of the Facility Agreement, the Debtor agreed that on and at any time after the occurrence of an Event of Default which is continuing, Nomura may, and shall if so directed by the Creditor, by notice to the Debtor, *inter alia,* (i) cancel the aggregate of the commitments under Loan A and Loan B, being

US$440,000,000 (four hundred and forty million United States Dollars); (ii) declare that all or part of the Loans, together with accrued interest, and all other amounts accrued or outstanding under, *inter alia,* the Facility Agreement be immediately due and payable, whereupon they shall become immediately due and payable, and/or (iii) declare that all or part of the Loans be payable on demand whereupon they shall immediately become payable on demand by Nomura on the instructions of the Creditor.

14. By a written notice dated 12 February 2009 Nomura made a demand on the Debtor for the sum of US$440,000,000 (four hundred and forty million United States Dollars) for repayment of Loan A and Loan B, together with the accrued interest of US$695,468.40 (six hundred and ninety five thousand, four hundred and sixty eight United States Dollars and forty cents) on Loan B, due on 9 February 2009, and all other amounts accrued or outstanding under the Finance Documents.

15. The Debtor is accordingly now liable for: (i) the sum of US$440,000,000 (four hundred and forty million United States Dollars) for the repayment of Loan A and Loan B, in accordance with Nomura's notice of acceleration of the Loans pursuant to clause 20.12 of the Facility Agreement (referred to in paragraph 14 above), (ii) the accrued Interest of US$695,468.40 (six hundred and ninety five thousand, four hundred and sixty eight United States Dollars and forty cents) for Loan B, due on 9 February 2009, pursuant to clauses 8.1(c) and 8.2(c) of the Facility Agreement, (iii) for default interest on the overdue amount from the due date up to the date of actual payment, pursuant to clause 8.3 of the Facility Agreement, and (iv) all other amounts accrued or outstanding under the Finance Documents.'

[23] It will be observed that the demand ignores Tarquin's call letter of 29 January 2009 which, if valid, made the entirety of the borrowing repayable on 17 March 2009 irrespective of whether an event of default occurred on 12 February 2009. I confess to being puzzled as to why Tarquin is insisting on arguing and the company is spending costs in meeting a complicated point on default in preference to a simple one on call.

The parties' contentions

[24] Mr Scott, for the company, takes a number of points about the statutory demand itself. First, he says that the full amount of the principal indebtedness is overstated by US$65 million (and the interest referable to that figure). That is conceded by Mr van Heck for Tarquin, but since that still

leaves a principal sum of US$375 million (on Tarquin's case) outstanding and since the facts enabling the company to calculate the true balance of principal were known to both parties and readily capable of agreement there does not seem to be anything in that point.

[25] Next, Mr Scott says, correctly, that the demand fails to comply with section 155(3) of the Insolvency Act, 2003 ('the Act'), because it fails even to mention, let alone to quantify, Tarquin's security interest over the deposit under the Swiss charge taken together with the standby letters of credit. It is thus impossible to calculate the sum required to satisfy the demand after deduction of the security interest. Even though there must on any footing (if the borrowing was validly called) be an amount of US$220,000,000 outstanding under Loan A, Mr Scott says that if there is a surplus in the deposit over and above the sum required to repay US$155,000,000 plus the outstanding interest on Loan B, the amount of that surplus is not known to the company, thus making it impossible for the company to know how much of Loan A it has to repay to satisfy the demand. Although intellectually impeccable, this seems to me, on the figures and in practice, to be highly artificial in fact and I am not persuaded that I should set aside the demand for this reason.

[26] Mr Scott's final argument is more formidable. He says that the mechanics of any payments to be made under the facility agreement are set out in clause 27.1(a) of the facility agreement, which is in the following terms:

> 'SECTION 10
> ADMINISTRATION
>
> 27 PAYMENT MECHANICS
> 27.1 Payments to the Agent
>
> (a) On each date on which the Borrower or a Lender is required to make a payment under a Finance Document, the Borrower or Lender shall make the same available to the Agent (unless a contrary indication appears in a Finance Document) for value on the due date at the time and in such funds specified by the Agent as being customary at the time for settlement of transactions in the relevant currency in the place of payment.'

Mr Scott, relying on the words 'make the same available', says that the only obligation of the company in respect of payments to be made to Tarquin was to make the necessary funds

'available' and that since at the hearing it was common ground that there was sufficient interest in the deposit to comply both with the obligations of the company under clause 19.8(b) of the amended and restated facility agreement (in the sense in which I have construed it) and to meet the interest instalment due on 9 February 2009 and since, pursuant to the Swiss charge, Tarquin had not only unfettered but sole access to the funds in the account, the company has complied with its obligation to make the sum of US$695,468.40 'available' to Tarquin on the due date.

[27] Mr van Heck, for Tarquin, while accepting that in the past interest has been dealt with (wholly or in part) by appropriation by Tarquin/Nomura from the deposit out of available surplus interest, relies upon clause 7.3 of the Swiss charge, which provides as follows:

> '7.3 Notwithstanding the provisions in this clause 7, the Lender is at liberty to enforce any Secured Obligations prior to the collection or enforcement of any Assigned Claims and to commence or pursue the regular debt enforcement proceedings against the Borrower without having first to collect or enforce any Assigned Claims, without foregoing any of its rights in relation to the Assigned claims.'

[28] With respect to Mr van Heck, clause 7.3 has nothing to do with the question whether the company had paid the interest due on 9 February 2009 by close of business two days later. Clause 7.3 merely makes clear that other enforcement procedures taken by Tarquin cannot be met by the argument that it should first enforce its security. In an English mortgage or charge this would go without saying but perhaps because the charge is governed by Swiss law it was thought prudent to spell the point out expressly.

[29] Nevertheless, I cannot accept Mr Scott's argument. When the entirety of clause 27.1(b) of the amended and restated facility agreement is set out it reads as follows:

> 'SECTION 10
> ADMINISTRATION
>
> 27 PAYMENT MECHANICS
> 27.1 Payments to the Agent
>
> (a) On each date on which the Borrower or a Lender is required to make a payment under a Finance Document, the Borrower or Lender shall

make the same available to the Agent (unless a contrary indication appears in a Finance Document) for value on the due date at the time and in such funds specified by the Agent as being customary at the time for settlement of transactions in the relevant currency in the place of payment.

(b) Payment shall be made to such account in the principal financial centre of the country of that currency with such bank as the Agent specifies.

(c) If payment is made to the Lender directly by the Borrower at the request or with the consent of the Agent, the Borrower will have no obligation to make the same payment to the Agent.'

This language makes it clear that payments have to be made into a specified account. The account specified by Nomura for the purposes of the 9 February 2009 interest payment was an account of Nomura at Citibank. No such payment was made. The word 'available' in clause 27.1(a) must be read together with the words 'for value on the due date . . .' In other words, the clause is stipulating that payments must be in cleared funds. The clause has nothing to do with Tarquin's ability to access funds in accounts which it controls.

Conclusion

[30] It seems to me, therefore, that the issue before me turns on the construction of the amended and restated facility agreement. Since no issues of disputed fact are involved, I should resolve the issue on this application. The result is that there is, in my view, no dispute that the company's failure to make a payment to Nomura's account at Citibank by close of business on 11 February 2009 was an event of default within the meaning of clause 20.1 and that the claim made in the statutory demand is a valid one. This decision means that there is no need for me to consider, let alone decide upon, a subsidiary issue raised by Mr van Heck to the effect that the company's challenge to the demand was not *bona fide*.

[31] This application is accordingly dismissed and I authorize Tarquin to proceed to make an application for the appointment of a liquidator over the company.

Commercial Court Judge

16 December 2009