

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

CLAIM NO: BVIHC (COM) 62 OF 2011

BETWEEN:

KAUPTHING BANK HF

Applicant

and

EVEREST EQUITIES LIMITED

Respondent

REASONS

- [1] On 11 July 2011 I dismissed an origination application brought by Kaupthing Bank HF ('the Applicant') to appoint liquidators to the respondent Everest Equities Limited ('Everest'). I gave my reasons for doing that in open Court but the Applicant's lawyers wrote to me on 22 July 2011 and asked me to put them in writing. I do so gladly.
- [2] The application was based on service of a statutory demand made pursuant to section 155 of the Insolvency Act, 2003 ('section 155'). A copy of the 'Particulars of Debt' section of that document is annexed to these reasons marked 'A'.
- [3] The particulars refer to borrowings of monies totaling 68 million euros due by Everest 'under letters of guarantee.' I pointed out to Counsel then appearing that money is not borrowed under letters of guarantee and asked her to explain what that was supposed to mean. Counsel's response was that it might be that further evidence would assist, which appeared to me to be an acknowledgement that the document as it stood was defective. Counsel did not respond with a clear exposition of the nature of the consideration for the debt.

- [4] Although it is possible to piece together a story from the convoluted wording of the Particulars of Debt, it seemed to me that where the statutory demand route is to be followed the explanation required by section 155(2)(b) should be clear and not perplexing and I took the view that the explanation given in the present case, was not sufficiently clear.
- [5] Counsel pointed out to me that the statutory demand refers to a judgment having been obtained in the same amount. It seemed to me that, while it would have been open to the creditor to describe the 'nature and amount of the debt' merely as being a judgment debt in the sum 68 million euros and US\$2,957.80 costs, once it had embarked on a description of the consideration for the judgment it came under an obligation to describe the nature of the consideration both accurately and clearly. The description of the consideration as 'borrowings of money due under letters of guarantee' is neither of those things.
- [6] This may have been a harsh decision and it would have been open to me to take the view that in the circumstances the debtor could not have been prejudiced, but I consider that, given the very serious consequences that may attend the failure to respond to a statutory demand, the nature of the debt must be set out in the clearest terms. The demand in the present case did not, in my judgment, do that. This was not a case where there was an arithmetical mistake or typographical error. The demand was confused and confusing. Practitioners need to understand the necessity of settling statutory demands with the utmost punctiliousness. It does not matter that the debtor itself may have been aware of the debt. If the Court is to be asked to put a company into insolvent liquidation on the basis of a statutory demand it is entitled to be able to see from the face of the document that those having current conduct of the affairs of the debtor could have been in no doubt, upon receiving and reading the demand, as to the nature of the liability in question.



Edward Bannister
Commercial Court Judge
28 July 2011

ANNEXE "A"

'Particulars of Debt

These particulars must include (a) when the Debt was incurred, (b) the consideration for the Debt (or if there is no consideration the way in which it arose) and (c) the amount due as at the date of this statutory demand)

1. The Creditor commenced proceedings (the "Proceedings") against the Debtor and Komi Investments S.A (together, the "Defendants") in the High Court of Justice in the British Virgin Islands on 1 September, 2010 for relief in respect of the Defendants' borrowings of monies totaling the sum of €68 million due jointly and/or severally by each of the Defendants under Letters of Guarantee Nos. 0665-9815 and 0665-9663 respectively whereby the Creditor guaranteed loans made to each of the Defendants by Kaupthing Bank Luxembourg S.A. The Defendants having defaulted on their obligations to Kaupthing Bank Luxembourg S.A. and despite demand in writing made on each of them on the 29th September 2008, the said sum of €68 million remained due and owing to the Creditor which sought, inter alia, (1) payment of the sum of €68,000,000 being the amount paid by Claimant to Kaupthing Bank Luxembourg S.A. in satisfaction of the liabilities of the Defendants and each of them in respect of their borrowings from the said Kaupthing Bank Luxembourg S.A., (2) interest on the sums of money due and owing to Claimant and (3) costs.
2. The Debtor was served with the Proceedings at its registered office in the British Virgin Islands on 1 September, 2010 but the Debtor did not enter an Acknowledgment of Service or file a Defence in the Proceedings.
3. The Creditor obtained Judgment in Default of Defence (the "Judgment") on 11 November, 2010 for the sum of €68,000,000 and costs of US\$2,957.80. A copy of the order dated 11 November, 2010 is attached to this demand.
4. The Judgment was served on the Defendants but still no payments have been made to date.
5. Consequently the Debt being €68,000,000 and costs of US\$2,957.80 due to the Creditor from the Debtor remains outstanding as at the date of this Statutory Demand.'