THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 57 OF 2012

BETWEEN:

TIBERIUS INVESTMENTS & CAPITAL LIMITED

Applicant

AND

VIKEN SECURITIES INC.

Respondent

Appearances: Mr Andrew Willins and Miss Sarah Masson for the Applicant
Mr Thomas Elias and Miss Rhonda Brown for the Respondent

2013: 15, 25 January

JUDGMENT

(Statutory demand – whether bona fide disputed on substantial grounds – whether debt due and payable at date of service of statutory demand – whether debtor company estopped by convention from denying that debt due and payable at date of service)

[1] This is an application to set aside a statutory demand served on 5 June 2012 by Viken Securities Inc ('Viken') upon Tiberius Investments & Capital Limited ('the Company'). The application to set aside was served in time on 19 June 2012, although Mr Elias, who appeared with Miss Brown for Viken objected to a subsequent amendment of the set aside application on 10 December 2012 as being contrary to the intendment of the timelines imposed by section 156 of the Insolvency Act, 2003 ('the Act'). I say at once that I do not think that there is anything in this point. Provided that the application is made within the prescribed 14 day period, I do not think that the Court is obliged, at the hearing, to confine its considerations only to arguments precisely specified as the

grounds of the application as originally served. There is nothing in the Act to that effect and I see no reason to add to its plain wording.

[2] By the statutory demand Viken claims to be a creditor of the Company in the sum of US$1,693,860.77. It says that the amount is due from the Company to Viken as the result of the Company's failure to 'liquidate' a debt under a loan; that the debt was immediately payable on 5 June 2012; and that it is unsecured.

[3] The particulars of debt state that Viken has, since 2004, lent money to the Company for the purposes, as it is put, of investment. It is alleged that these loans were repayable on seven days notice and that interest on the loans was to be paid in accordance with the returns on the underlying investments. The particulars refer to an Investment Management Agreement entered into between Viken and the Company in April 2006 ('the IMA') under which it is alleged that the Company was entitled to charge management fees in relation to the sums invested by way of loan and refers to the balance as having fluctuated over time as further loans were made, interest payments were made and management fees were charged.

[4] Viken in fact executed not one but two agreements, each described as an Investment Management Agreement, with the Company. The first is dated 27 March 2006 and was executed by Viken on 3 April 2006. It records that Viken is entrusting to the Company's management the sum of US$4.5 million, together with further sums, which are being transferred to the Company for it to manage. That is described as 'the Portfolio.' By clause 3 of the document, the Company engages to manage the portfolio and enter into transactions and arrangements on behalf of Viken, but promises not to enter into any transactions (a) with or (b) for Viken unless the Company considers that it is suitable for Viken, having regard to information supplied by Viken to the Company. The document provides that the Company will charge fees and commissions for its services and will pay interest quarterly. Clause 6 of the IMA provides for termination on not less than three months written notice either side, to expire on the last day of a calendar month. There are certain warranties given by Viken to the Company, and arrangements to enable money laundering regulations to be complied with, but I need not refer to those in detail.

[5] Schedule 1 to this IMA records the initial composition of the portfolio as 'Cash: US$4.5 million.' The section of Schedule 1 providing for the 'Valuation of Current Portfolio' is left blank.

[6] Schedule 3 of the IMA provides for the Company's management fees and also stipulates that each of the Company and an entity called Vision Opportunity Capital Management LLC ('Vision')[1] shall be entitled to a commission of 15% of the gross investment profits of the Portfolio after deduction of management fees. Vision, as I understood it, was the investment vehicle in which the loans made by Viken to the Company were intended to be invested.

[1] this may have been intended to refer to more than one Vision entity, but that is not material for present purposes

[7] Viken executed a further IMA, dated 30 March 2006, on the same day, 3 April 2006. The document is identical with the earlier dated IMA, except that the section of Schedule 1 providing for the cash comprising the initial portfolio is left blank and the figure for 'Valuation of Current Portfolio' is given as US$5,461,997. A footnote breaks this figure down into the sum of US$4.45 million[2] as having been transferred between 20 November 2005 and 28 February 2006, together with 'profits on invested portfolio' of US$1,011,997.

[8] Each of these documents was expressed to be subject to 'the attached Terms and Conditions.' Although the copy IMA's contained in the bundles have no Terms and Conditions adjacent to them in the bundles, there was no dispute about the identity of the document referred to, which is to be found elsewhere. There is no need for me to refer to these Terms and Conditions in detail. They are, put shortly, in the form of a standard brokerage agreement. Neither party dissented from that as a fair description of the document. I do need, however, to refer to condition 6, upon which Mr Willins, who appeared for the Company, placed reliance. The first paragraph of condition 6 provides that a transaction effected upon a client's behalf will generate contract notes showing amounts due or from the client on the given settlement dates. The second paragraph provides that all transactions are undertaken with the object of settlement and stipulates that the Company is not obliged to settle transactions on account of a client unless it has received all necessary documents or money. The Company undertakes that it will use all reasonable endeavours to obtain the necessary documents or money within a reasonable timeframe. In case of failure to put the Company in funds to settle a transaction, the Company stipulates for a lien on client's property, with a right to sell on default for more than seven days after settlement date.

[9] I should dispose immediately of a point mentioned by Mr Willins, who appeared for the Company on the application, based upon this Condition 6. He says, and it is not in dispute, that the Vision fund, which comprises the underlying investment in which Viken is supposed, under these arrangements, to be interested, is illiquid. So, he says, the Company is not obliged to repay Viken's loan because the Company has not received, within the meaning of condition 6 of the Terms and Conditions, all the money (from Vision) necessary for it to do so. In my judgment, this is a misreading of Condition 6. Condition 6 is designed to cover the position when the Company carries out a particular trade on behalf of the counterparty to whatever agreement it may be into which the Terms and Conditions have been incorporated. No trades were ever carried out in that sense by the Company for Viken. Condition 6 is irrelevant and is certainly no answer to any claim by Viken for repayment of its 'loan.'

[10] Condition 9 of the Terms and Conditions provides that ordinarily the Company will act as the Client's agent.

[11] Condition 10 provides that the Client may request withdrawals from the Portfolio on not less than three months prior written notice to the Company. The condition also provides that where a requested withdrawal necessitates the sale or redemption of securities, the value of the securities sold will be based on their value at the end of the month within

[2] not US$4.5

which written notice of withdrawal was provided to the Company. Any increase in the value of securities thereafter will accrue to the benefit of the Company.

[12] Condition 17 provides that any instruction or communication to be given to the Company by the Client must be in writing and sent by hand, post, facsimile or email to the Client's portfolio manager or otherwise as notified to the Client.

[13] It appears that over the whole relationship Viken invested some US$16 million through the Company into Vision. Drawings have totaled some US$16.8 million and additionally some US$11.9 million was converted into shares in April 2008 in satisfaction of 'outstanding loan amounts.'

[14] In March 2009 Vision suspended redemptions, although it appears that some relatively small payments have been made to Clients of the Company, including Viken, since that date.

[15] In June 2009 the members of the family which owns and controls Viken indicated, at an informal meeting in Lagos, that they wished to recover their investment. It was subsequently accepted in about June of 2009 by a Mr Navin Dadlani, who appears to have been a contact point for the family but who was never an employee of the Company (although he was an employee of the Company's subsidiary, Tiberius UK), that the family had demanded repayment. It is the fact, however, that Viken has never served a written request upon the Company demanding repayment of its loan as required by Condition 10, apart from the statutory demand itself, which demanded payment within 21 days of the date of service of the demand – i.e. by 27 June 2012.

[16] The figure demanded in that document is, as I have said, US$1,693,860.77. That is derived from an unaudited balance sheet of the Company as at 30 September 2010, which shows that sum as due to Viken among 'creditor balances falling due within one year.' If Condition 10 applied, that amount, on the assumption that payment would have required the sale or redemption of securities, would have been the amount repayable if a request in writing for repayment had been made during the month of September 2010. No such request has been made.

[17] The statutory demand itself cannot have been a good demand for payment under Condition 10, because it demanded payment within 21 days, rather than the minimum of three months. Even if it had been a good demand under Condition 10, it would have been bad as a statutory demand, because (unless Mr Elias succeeds on his estoppel argument – as to which see below) the money demanded would not have been due and payable on 5 June 2012, when the demand was served.[3]

[18] Mr Elias relies upon the unaudited balance sheet as showing (I quote from his impressive skeleton submissions) that 'the amount payable falls due within one year.' With respect, however, the unaudited balance sheet does not state that the amount is payable at any particular point in time. It says merely that the amount 'falls due' within one year. I had

[3] see section 155(2)(a) of the Act

no evidence showing under what, if any, accounting standards the balance sheet was complied or why these figures were so described in this particular document, but I can readily understand why funds capable of being called on three months notice should be treated as payable within the year of account. What the balance sheet does not do, however, is show that those amounts would have become payable by 31 December 2010 and thus would have formed part of aged debt unless paid by that date at the latest.

[19] Mr Elias does not contend that the Company was ever under an obligation to repay loans on seven days notice, as stated in the statutory demand. Instead, he argues that the Company is estopped by convention from 'asserting that an effective demand has not been made.' He does not define the expression 'effective demand.' Mr Elias referred me to ING Bank NV v Ros Roca SA[4] in which Carnwath LJ referred to the principle of estoppel by convention as stated by Lord Steyn in Republic of India v India Steamship Co Ltd (No 2).[5] The principle may apply where parties to a transaction act on an assumed (i.e. shared, or made by one and acquiesced in by the other) state of facts and law and which it would be unconscionable for a party to repudiate.

[20] I have to say that I do not consider that a creditor faced with a dispute whether or not a debt was payable at the date of service of a statutory demand is likely – outside of some exceptional factual circumstances – to be able to show that that dispute is at best fanciful by relying upon nothing more than an estoppel by convention. The insolvency ground for appointing liquidators under the Act is intended to operate in a commercial context – that is to say, in reliance upon the sort of evidence which would persuade a properly qualified auditor that a debt was due and payable and unpaid, or that a particular company was unable to pay its debts as they fell due. No competent auditor would sign off a company's financial statements on the basis of an alleged estoppel by convention and in my judgment (I repeat, in the absence of quite exceptional circumstances) the Court should not appoint liquidators under the insolvency ground upon the basis of estoppels of this sort.

[21] Even if I am wrong about that, however, the only 'shared assumption' which can be identified by Mr Elias is, at best, a shared assumption that the family wanted repayment of its investment. Mr Elias relies upon a letter dated 6 January 2011 from the Company to investors which refers to the Company's wish to pay out on their accounts as and when the Company is in a position to do so. I do not think that it is possible for me to deduce from this material that there was a shared assumption that the Company had incurred a liability to make a repayment by any particular date at all, such that when the statutory demand was served on 5 June 2012 the Company was already in default – which is what the requirement that the debt should be both due and payable imports into the statutory scheme.

[22] I find accordingly that there is a substantial dispute whether any particular sum of money had become payable by the Company to Viken by 5 June 2012. It follows that the statutory demand must be set aside.

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[4] [2011] EWCA Civ 353

[5] [1998] AC 878, 913, 914

[23] It may be, for all I know (although I am certainly not deciding) that the Company is insolvent within the meaning of section 8 of the Act. The present application, however, is not concerned with that question. It is concerned only with the question whether the statutory demand should be set aside. For the reasons which I have given, it must be.

Commercial Court Judge
25 January 2013