THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP 2014/0006

BETWEEN:

C-MOBILE SERVICES LIMITED

Appellant

and

HUAWEI TECHNOLOGIES CO. LIMITED

Respondent

Before:

The Hon. Dame Janice M. Pereira	Chief Justice
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mde. Joyce Kentish Egan, QC	Justice of Appeal [Ag.]

Appearances:

Mr. Jason Nickless of Pump Court Chambers for the Appellant
Mr. Mungo Lowe of Harney Westwood & Riegels for the Respondent

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2015: May 22;
September 15.

Civil appeal - Setting aside statutory demand - Section 157(1) and section 157(2) of the Insolvency Act, 2003 – Stay pursuant to section 6(2) of the Arbitration Ordinance, 1976 - Whether statutory demand contrary to arbitration clause in contract - Whether the respondent was barred by the Convention on the Limitation Period in the International Sale of Goods (New York, 1974).

The respondent, on the 17th December 2013, served a statutory demand on the appellant in respect of a debt said to be due and owing to the respondent by the appellant. The appellant, relying on section 156(1) of the Insolvency Act, 2003, ("the IA") sought to set aside the statutory demand on various grounds. Essentially, the appellants argued that there is a substantial dispute as to the debt because: (1) the alleged debt, which is termed the 'Liberian Debt', arose under a contract bearing an arbitration clause; (2) the alleged Liberian Debt and contract is subject to the Convention on Limitation Period in the International Sale of Goods (New York, 1974), ("the Convention"), which has a four year limitation period, within which the respondents did not bring any proceedings relating to the contract; and (3) the appellant and respondent had reached a global settlement relating to

all monies owing to the respondent from the appellant which includes the Liberian Debt. The learned trial judge found that there was no substantial dispute as to the debt and that the appellant had acknowledged the debt within the four year Convention limitation period. As per the arbitration clause, the learned judge found that the case, **Applied Enterprises Ltd v Interisle Holdings Ltd et al**, relied on by the appellant, did not apply to setting aside statutory demands and that the correct approach was that laid down in the case of **Sparkasse Bregenz Bang AG v Associated Capital Corporation.** Applying the **Sparkasse** test, the appellant's request to set aside the statutory demand was denied.

On appeal, the grounds raised were in essence a re-run of the arguments raised before the learned trial judge save and except for ground three in which the appellant sought to rely on section 157(2) of the IA, notwithstanding the clear basis set out in its application which was that there is a substantial dispute as to the Liberian Debt. This encapsulates the basis for setting aside a statutory demand under section 157(1) of the IA.

Held: dismissing the appeal; confirming the order of the learned trial judge in refusing to set aside the statutory demand and awarding costs to the respondent to be assessed unless agreed within twenty-eight days, that:

1. Section 157(2) of the **Insolvency Act** ("IA") gives the court a discretionary power, whereas subsection (1) does not. Nowhere in C-Mobile's application to set aside do they pray in aid the exercise of the court's discretion pursuant to subsection (2). Furthermore, in order for the court to exercise the discretion given under subsection (2), material on which the learned judge could conclude that a 'substantial injustice would be caused' unless the demand was set aside, would be required to be placed before him. There was no such material. The learned judge was perfectly entitled to treat the point on **Applied Enterprises** as summarily as he did as the issue in that case and the present one differs. The court was here dealing with the setting aside of a statutory demand which is a precursor to the commencement of proceedings for the appointment of a liquidator on insolvency grounds. This has nothing to do with proceedings brought to recover a disputed debt which has arisen under an agreement containing an arbitration clause covering such dispute under the agreement as was the case in **Applied Enterprises**. **Applied Enterprises** was decided in a completely different context and is not applicable in the context of an application to set aside a statutory demand on the basis of a substantial dispute, as required to be shown under section 157(1) of the IA. The test for determining whether there is a substantial dispute as to a debt is well settled in **Sparkasse.** Furthermore, the application to set aside was not grounded under section 157(2) of the IA. The learned judge was not being asked to exercise a discretion. If, having examined the evidence, he was of the view that a substantial dispute (as distinct from a fanciful or make-believe or mere trifling or frivolous one) exists, he must (as distinct from may) set aside the statutory demand.

Applied Enterprises Ltd v Interisle Holdings Ltd et al BVIHCV (COM) 2012/0135 distinguished; **Sparkasse Bregenz Bang AG v Associated Capital Corporation** BVI Civ. App. 10/2002 applied.

2. The appellant has adduced no evidence to show that the Liberian debt had been included in the Global Settlement or how their belief that it was included could be reasonably held when all the evidence adduced pointed the other way. Based on the evidence before him it was open to the learned judge to find that the Liberian Debt remained due and owing and had not been compromised. Furthermore, the learned judge was not required under section 157(1) of the IA to evaluate the evidence for the purpose of exercising a discretion. He was required to decide whether on the basis alleged he was satisfied that there was a substantial dispute as to the debt. Whether a debt is disputed on substantial grounds is a question of fact. On the evidence before him it was open to him to find, for the reasons he gave, that he was not so satisfied. It is not open to an appellate court to simply substitute its evaluation of facts for that of the trial judge.

3. The learned judge had ample unchallenged material before him on which he could properly conclude that the Liberian Debt was not time barred under the Convention. He was entitled to have regard to the unequivocal statement by the appellant through its director confirming its liability to pay the amount due and to treat it as an acknowledgement of the debt, at least for the purposes of BVI law, there being no evidence of foreign law before him or this court, if such was relevant. No sound basis whatsoever has been put forward for disturbing the trial judge's view on this point.

4. As to the discretionary power under section 157(2) of the IA, the evidence adduced before this court shows that even though arbitration proceedings had been commenced before the International Court of Arbitration in Paris on 30th January 2014, those proceedings were withdrawn as at 24th March, 2015. Thus, as at the time of the hearing of this appeal there were no arbitral proceedings afoot. Accordingly, even were resort to be had to the discretionary power of the court on this appeal, the fact that there are no arbitral proceedings underway would be a weighty factor in deciding how the discretion should be exercised in the circumstances as matters currently stand before the court.

   Shalston v DF Keane [2003] EWHC 599 (Ch) explained.

JUDGMENT

[1] **PEREIRA, CJ:** This is an appeal brought by the appellant, C-Mobile Services Limited ("C-Mobile"), seeking to reverse the refusal, on 11th February 2014, by the

judge below, to set aside a statutory demand served upon it by the respondent Huawei Technologies Co. Limited ("HTC") on 17th December 2013 in respect of a debt said to be due and owing to HTC. The debt for descriptive and distinguishing purposes is referred to by the parties (and herein adopted) as the 'Liberian Debt' in the sum of US$2, 676, 175.10.

The Application to set aside made in the court below

[2] C-Mobile applied to set aside the statutory demand under section 156(1) of the **Insolvency Act, 2003**. The basis of the application made by C-Mobile was that there is a substantial dispute as to the Liberian Debt essentially because:

(1) The alleged Liberian Debt giving rise to the statutory demand arose under a contract dated 11th June, 2004 (the "Supply Contract") which contains an arbitration clause whereby any disputes "arising out or in connection with the formation, construction and performance of this contract which cannot be settled amicably between the parties shall be finally settled under the rules of arbitration and consultation of the International Chamber of Commerce". This will be referred to as the "Arbitration Agreement argument'.

(2) The alleged Liberian Debt and the Supply Contract is subject to the Convention on the Limitation Period in the International Sale of Goods[1] ("the Convention") which prescribes a four (4) year limitation period in which to bring proceedings in relation to the Supply Contract and no such proceedings having been brought within the four year limitation period, the proceedings were accordingly prescribed. This will be referred to as the "Convention Limitation argument".

(3) C-Mobile and HTC had reached a global settlement relating to all monies owing to HTC from C-Mobile which resulted in HTC confirming a settlement had been reached which had led to the withdrawal of its prior

[1] New York, 1974.

application to appoint liquidators on 18th March 2013 and which was itself based on two prior statutory demands one of which included the Liberian Debt. This will be referred to as the "Global Settlement argument"

The judgment in the court below

[3] The learned judge, in his judgment delivered ex-tempore following the hearing, after setting out what he described as the *'checkered history'* of the matter, found:

(a) In relation to the Global Settlement argument, that:

> "There is evidence from the Respondent [HTC] … which breaks down the composition of the amounts which may or may not have been included in a concluded Second Protocol Agreement in February 2013. There is no challenge on behalf of the Applicant company [C-Mobile] to the composition of the figures comprised within the Second Protocol Agreement which, if they are correct, show that they do not include the Liberian Debt, although it seems to me that the Applicant has been able, by very skillful advocacy, to induce the impression that there is a substantial dispute as to the company's liability in regard to the Liberian Debt. I have come to the conclusion that there is, indeed, no substantial dispute in that respect."

He went on further to say:

> "…the Applicant Company has simply not adduced any evidence to show that there really is a doubt that this amount is due. …. I have got simply no explanation at all from the Applicant Company why this debt is not due. It should have been a relatively straight forward matter to show that either payments have been made which satisfied it or alternatively that it … was incorporated within the Second Protocol Agreement, but that has not been done. … It seems to me that the burden is on the person seeking to set aside the statutory demand to produce some evidence which shows that there is a real dispute about the debt, … there is simply no dispute at all, because no attempt has been made to show why the Second Protocol Agreement … covered it in the face of evidence from Huawei [HTC] to the effect that it did not. … There is simply no material before the court to show that this debt has been satisfied or compromised … there is in fact nothing in this dispute at all."

(b) In relation to the Arbitration Agreement argument, C-Mobile sought to rely on the decision in **Applied Enterprises Ltd v Interisle Holdings Ltd et al**[2], a previous decision of the learned judge in which a stay of the claim brought to enforce various provisions of an agreement was sought pursuant to section 6(2) of the Arbitration Ordinance, 1976[3] on the basis of the arbitration clause contained in the agreement. The learned judge made short shrift of this argument. He stated:

> If A[pp]lied Enterprises applied to applications to set aside statutory demands, not only is Sparkasse[4] wrong, but a hundred years of English authority is also wrong, because it would mean that all a party had to do was to say I dispute this, and I'm afraid that's just not right. The authorities do not support that… .

(c) In relation to the Convention Limitation argument, while the learned judge did not specifically address this further in his decision the following excerpt from the transcript of the hearing[5] makes plain that he considered that there was nothing to the limitation point as there was undisputed evidence that the Liberian Debt had been unequivocally acknowledged in writing before the four year Convention Limitation period had expired:

> "The Court: [referring to Article 8 of the Convention] What this says is:
> "Where the debtor before the expiration of the limitation period acknowledges in writing his obligation to the creditor" …
> It seems very straight forward.
> Mr. Carroll: Yes my Lord, my instructions on the point is that the reconciliation statement merely confirmed the amounts within the invoices and does not constitute an acknowledgement which can extend limitation by 34 years.
> The Court: But where are the acknowledgements on which you rely Mr. Lowe?
> Mr. Lowe: My Lord they are at pages – the reconciliation statements are at page 35 to 36.
> …

[2] BVIHCV (COM) 2012/0135.
[3] Arbitration Ordinance 1976 – Laws of the Virgin Islands.
[4] Referring to the case of Sparkasse Bregenz Bang AG v Associated Capital Corporation -BVI Civ. App. 10/2002.
[5] See Record of Appeal, Bundle 1 pgs. 628 to 631.

> Mr. Lowe: This particular document is signed by Mr. Bassom Attar.
>
> The Court: Who is he?
> Mr. Lowe: A director … of Comium Services Limited which is the former name of C-Mobile Services. … the material sentences are underneath the schedule where it says:
> "Please confirm by signing this statement and returning to us as soon as possible if the balance mentioned above is correct. If we do not receive your reply within 30 days it represents the balance is correct and you have no disagreement with it. 2. If the balance is not correct we would be grateful if you could provide your records and the reasons for disagreement on the back of the statement and returning it to us as soon as possible."
> …
> So we say that the act of signing and returning this statement was constituted and written verification that the balance as stated was correct and is due.
> The Court: And then the other thing, are you relying on page 38 as well?
> Mr. Lowe: And that is compounded by page 38 which is a letter from Mr. Dalloul himself.
> The Court: So why do you say this does not amount to an acknowledgement?
> Mr. Carroll: My instructions are that under the Convention and under French law that does not amount to an acknowledgment.
> …
> Court: What it has to do under French law?
> Mr. Carroll: I'm not in a position to answer that question, My Lord.
> The Court: It is difficult to see how you go further in acknowledging a debt. "We hereby confirm that Comium Services is liable to pay the amount due"
> Mr. Carroll: That's a point I cannot take further."

[4] In the result, the learned judge concluded[6] that there was no good basis for setting aside the statutory demand as he was not satisfied, applying the test in **Sparkasse**[7], that there was any real dispute about the debt.

[6] See Transcript of hearing pgs. 77 – 79; Record of Appeal, Bundle 1 pgs.688-691.
[7] Ibid 2.

The Appeal

[5] C-Mobile raises four grounds of appeal in respect of the learned judge's dismissal. It says essentially, that he was wrong:

(i) in fact or otherwise wrongfully exercised his discretion in not having sufficient regard or give sufficient weight to the fact that the appellant believed there had been a compromise agreement in respect of the Liberian Debt and that this was supported by the actions of the Respondent;

(ii) in fact, or in law by finding that the Liberian Debt was not time barred pursuant to the Convention;

(iii) in failing to set aside the statutory demand pursuant to section 157(2) of the **Insolvency Act 2003**[8], (the "IA")given that there was a provision contained within the Supply Agreement, - clause 25;

(iv) not to stay the order authorizing an application for the appointment of liquidators in that he failed to give proper consideration to the application of section 6(2) of the **Arbitration Ordinance**.[9]

[6] The grounds raised are in essence a re-run of the arguments raised before the learned trial judge save and except for ground three in which C-Mobile now seeks to rely on section 157(2) of the IA, notwithstanding the clear basis set out in its application which was that there is a substantial dispute as to the Liberian Debt. This encapsulates the basis for setting aside a statutory demand under section 157(1) of the IA. I propose to deal with this ground first as it can be dealt with shortly.

[8] Insolvency Act, 2003 No. 5 of 2003 – Laws of the Virgin Islands.
[9] Arbitration Ordinance 1976 – Laws of the Virgin Islands.

Setting aside under section 157(2) of the IA

[7] A useful starting point is the recital of the relevant portions of section 157 of the IA. Section 157(1) states:

(1) The Court **shall**[10] set aside a statutory demand if it is satisfied that:

(a) there is a substantial dispute as to whether

(i) the debt, or
(ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum,is owing or due;
(b) …
(c) …

Section 157(2) states:

> "(2) The Court **may**[11] set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused
>
> (a) because of a defect in the demand, including a failure to comply with section 155(3); or
>
> (b) for some other reason."

[8] It is readily apparent that subsection (2) of section 157 gives the court a discretionary power, whereas subsection (1) does not. Nowhere in C-Mobile's application to set aside do they pray in aid the exercise of the court's discretion pursuant to subsection (2). Furthermore, as counsel for HTC contends, in order for the court to exercise the discretion given under subsection (2), material on which the learned judge could conclude that a '*substantial injustice would be caused'* unless the demand was set aside, would be required to be placed before him. There was no such material. All that was advanced before the learned judge was that he ought to follow his earlier decision in **Applied Enterprises Ltd. v Interisle Holdings Ltd.**[12] as it related to section 6(2) of the Arbitration Ordinance. In **Applied Enterprises**, Bannister J at paragraph [26] of his judgment had this to say:

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[10] Emphasis added.
[11] Emphasis added.
[12] BVIHCV(COM) 2012/0135.

"[26] In my view, the words in section 6(2) '*there is not in fact any dispute between the parties with regard to the matter to be referred*' mean no more than what they say - that there is no dispute. Once, however, a defendant who is *prima facie* entitled to the benefit of an agreement to arbitrate indicates that he is not liable to the claimant as claimed, it is impossible, in my view, to say that there is no dispute. The fact that it may be possible to see that the dispute can have only one outcome does not, I think, entitle the Court to say that the dispute is not a dispute. …

He concluded at paragraph [28]:

[28] It seems to me that the correct approach, in cases where a defendant applies for a stay under section 6(2) and the claimant responds with an application for summary judgment, is not to begin, as was done in the present case, by deciding whether, in the context of the summary judgment application, the defendant would have a real prospect of success were the matter to go to trial. The correct approach is to ask, first, whether the claim is within the scope of the arbitration agreement and, if it is, whether the defendant disputes it. If it is and if he does, then it seems to me that the Court has no alternative but to decline jurisdiction, grant the stay and decline to entertain the application for summary judgment.

[9] Counsel for C-Mobile complains that they were prevented from developing their point on **Applied Enterprises**[13] before the court below. To my mind however, the learned judge was perfectly entitled to treat with the point as summarily as he did as no further development of the point would result in a more favorable result. The court was here dealing with the setting aside of a statutory demand which is a precursor to the commencement of proceedings for the appointment of a liquidator on insolvency grounds. This has nothing to do with proceedings brought to recover a disputed debt which has arisen under an agreement containing an arbitration clause covering such dispute under the agreement as was the case in **Applied Enterprises.** In my view, he was right to hold that **Applied Enterprises** was decided in a completely different context and was not applicable in the context of an application to set aside a statutory demand on the basis of a substantial dispute as required to be shown under section 157(1) of the IA. The test for

[13] Ibid 10.

determining whether there is a substantial dispute as to a debt is so well settled in **Sparkasse**[14] that it need not be restated. It is difficult to see how the decision in **Applied Enterprises** can be prayed in aid as a basis for the exercise of a discretion under section 157(2) of the IA which in any event was not before the learned trial judge as the application to set aside was not grounded under section 157(2) of the IA. The learned judge was not being asked to exercise discretion. He was being asked to determine whether as a matter of fact and ultimately of law, there was a bona fide dispute as to the Liberian Debt on substantial grounds under section 157(1). As noted above, this subsection does not rest on the exercise of discretion. The court must make a determination as to whether or not a substantial dispute exists. If, having examined the evidence, he is of the view that a substantial dispute (as distinct from a fanciful or make-believe or mere trifling or frivolous) exists he must (as distinct from may) set aside the statutory demand.

C-Mobile's belief that the Liberian Debt was compromised

[10] The transcript of the proceedings below does not disclose any arguments advanced before the learned judge on the basis of mistake or estoppel. The learned judge was entitled to scrutinize the evidence which he had before him. He was entitled to take a view as to whether the asserted belief that the Liberian Debt had been compromised in the Global Settlement Agreements could be honestly and reasonably held. As counsel for HTC contends, one would have expected to see some evidence as to the discussions concerning the inclusion of this debt in the Global Settlement. However, no evidence was adduced seeking to show or explain how the Liberian Debt was included in the Global Settlement or to show how the belief by C-Mobile that it was so included could be reasonably held by it when all the evidence adduced pointed the other way. As the learned judge stated:

> "…the Applicant Company has simply not adduced any evidence to show that there really is a doubt that this amount is due. …. I have got simply no explanation at all from the Applicant Company why this debt is not due. It should have been a relatively straight forward matter to show that either

[14] Ibid 2.

> payments have been made which satisfied it or alternatively that it … was incorporated within the Second Protocol Agreement, but that has not been done."

Based on the evidence before him it was open to the learned judge to find that the Liberian Debt remained due and owing and had not been compromised. No reason has been advanced as to why this court would be justified in disturbing this finding. Indeed C-Mobile did not seek to vigorously assail the learned trial judge's finding on this issue, in my view wisely, given the lack of any evidence supporting its asserted belief. Furthermore, the learned judge was not required under section 157(1) of the IA to evaluate the evidence for the purpose of exercising a discretion. He was required to decide whether on the basis alleged he was satisfied that there was a substantial dispute as to the debt. Whether a debt is disputed on substantial grounds is a question of fact. On the evidence before him it was open to him to find, for the reasons he gave, that he was not so satisfied. It is not open to an appellate court to simply substitute its evaluation of facts for that of the trial judge. This principle is now trite.[15] In any event it has not been shown that he misapprehended the evidence or came to a conclusion which cannot be supported on the evidence. This ground of appeal in my view is wholly without merit.

The Convention Limitation

[11] This is a short point. As with the preceding point, the learned judge had ample unchallenged material before him on which he could properly conclude that the Liberian Debt was not time barred under the Convention. He was entitled to have regard to the unequivocal statement by C-Mobile through its director confirming its liability to pay the amount due and to treat it as an acknowledgement of the debt, at least for the purposes of BVI law, there being no evidence of foreign law before him or this court, if such was relevant (which point I need not address). I need not repeat the role of the appellate court having addressed this in the preceding paragraph. Suffice it to say that no sound basis whatsoever has been put forward for disturbing the trial judge's view on this point which in any event was not further

[15] See Biogen Inc v Medeva Plc [1997] RPC 1, Per Lord Hoffman at pg. 45.

pressed neither in the court below nor before this court. This challenge is also wholly unmeritorious.

Stay pursuant to section 6(2) of the Arbitration Ordinance

[12] C-Mobile urges under this ground that, failing a setting aside of the statutory demand, the learned judge ought to have granted a stay of the order authorizing an application to appoint liquidators, having regard to section 6(2) of the **Arbitration Ordinance**. Counsel places reliance on the case of **Shalston v DF Keane**[16], a decision of the English High Court, and seems to suggest that the court ought to, of its own motion, have stayed the order authorizing HTC to apply for the appointment of liquidators. **Shalston** concerned an application to set aside a statutory demand and the application of section 9 of the **English Arbitration Act** 1996. The Debtor had submitted to the court that it should have regard to the fact that he would be able to apply for a stay should the creditor apply for a petition and that such a stay would almost inevitably be granted. Justice Blackburne expressed the view that '[w]hen able to foresee the inevitable the court will always intervene summarily to anticipate it. The court does not countenance parties proceeding to a blank wall.' On this basis, counsel for C-Mobile urges that the court should have regard to this and not allow the parties to proceed to a blank wall, and that this accords with the overriding objective under the Civil Procedure Rules[17].

[13] Here again C-Mobile is urging resort to the discretionary powers of the court which were not invoked in their application made to the court. Further, for reasons which will become clear in the later judgment to be delivered in relation to a stay of the proceedings for the appointment of liquidators, I am not satisfied that a stay of those proceedings will be the inevitable result on the hearing of the application. I am accordingly not persuaded that the parties will be 'proceeding to a blank wall' which the court should step in and prevent.

[16] [2003] EWHC 599 (Ch).
[17] Eastern Caribbean Supreme Court Civil Procedure Rules 2000.

[14] In **Shalston**, Blackburne J. did not accede to the debtor's submissions having concluded that the debtor wished to 'have it both ways.' There the debtor was relying on section 9 of the **English Arbitration Act** to argue that the bankruptcy proceedings should be stayed in favour of arbitration when there was in fact no referral to arbitration. In this regard, reference must be made to the evidence adduced before this court which shows that even though arbitration proceedings had been commenced before the International Court of Arbitration in Paris on 30th January 2014, those proceedings were withdrawn as at 24th March 2015. Thus, as at the time of the hearing of this appeal there are no arbitral proceedings afoot. Accordingly, even were resort to be had to the discretionary power of the court on this appeal, the fact that there are no arbitral proceedings underway, would in my view, be a weighty factor in deciding (on the assumption that the court was minded to exercise such a discretion) how the discretion should be exercised in the circumstances as matters currently stand before the court.

Conclusion

[15] For the reasons set out above I would dismiss C-Mobile's appeal and confirm the order of the learned trial judge refusing to set aside the statutory demand. I would further order that the costs of this appeal shall be borne by C-Mobile to be assessed unless agreed within twenty eight days.

Dame Janice M. Pereira, DBE
Chief Justice

I concur.

Gertel Thom
Justice of Appeal

I concur.

Joyce Kentish Egan, QC
Justice of Appeal [Ag.]