EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

CLAIM NO. BVIHCM 2018/0031

BETWEEN:

Anchorman Kavac Limited

Applicant

And

Jonathan Capener

Respondent

Appearances:

Ms. Marcia McFarlane of Harneys for the Applicant
Mr. Nicholas Burkill of Ogier for the Respondent

2018: 25 June
3 July
6 December

JUDGMENT

[1] ADDERLEY J. (Ag.): On 3 July 2018 I gave judgment setting aside the statutory demand of the respondent and promised to give my reasons later. These are my reasons for the decision.

[2] This was an application under sections 155,156,157 (1)(a) and 157(2) of the Insolvency Act 2003 to set aside the statutory demand ("the demand") made by the respondent, Mr

Capener, on 9 February 2018. The proceedings were commenced by way of originating application on 9 March 2018. The first hearing took place in chambers on 25 June 2018.

Background

[3] A statutory demand was served on the applicant on 9 February 2018. The applicant, Anchorman Kavac Limited ("Anchorman Kavac") is a BVI registered company. The demand alleged that the applicant was indebted to Anchorman Kavac in the sum of EUR 465,528.77 at 8% interest per annum ("the debt"). The debt is alleged to have arisen under the terms of a loan letter dated 24 December 2013 ("the loan letter") between the respondent and the applicant. The demand identifies the parties as Jonathan Capener and Anchorman Kavac Limited and asserts that the loan was due pursuant to the terms of the loan letter. The debt is disputed by the applicant.

The Insolvency Act 2003

[4] Under s 155 (1) of the Insolvency Act 2003 (the "IA") a creditor may make demand on a company for payment of a debt owed by that company to him. In the event that the company fails to comply with a statutory demand that has not been set aside in respect of a valid debt, the company is deemed insolvent under s.8(1)(c)(ii) of the IA as being unable to pay its debts as they fall due and this is a ground for seeking the appointment of a liquidator of the company under s.162(1)(a).

[5] Under s.156 (1) a person who has been served with a statutory demand may apply to set it aside within 14 days of the date of service of the demand on him (s.156 (2) IA).

[6] Section 157 of the IA provides the mechanism to set aside the statutory demand. For the purposes of the present case, the applicant submits that the Court should set aside the demand based on two grounds. Firstly, under s.157 (1)(a), that there is a substantial dispute as to whether the debt is owing or due. The section reads as follows:

> "The court shall 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."

[7] Secondly the applicant submits under s.157 (2) that substantial injustice would otherwise be caused if the demand were not set aside. Section 157 (2) gives the court a discretion to set aside under this head in two cases:

(a) because of a defect in the demand or, including failure to comply with section 155(3)

(b) For some other reason

[8] These statutory provisions have been interpreted in the authorities. Sparkasse Bregenz Bank AG v Associated Capital Corporation (BVI Civ Appeal 10/2002), is a leading authority in the BVI for determining what is a bona fide dispute over a debt. In Sparkasse the Court was asked to decide the issue of a disputed debt and it decided that the dispute must be one on genuine and substantial grounds. As put by Byron CJ, as he then was, (at [3)]:"*If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly".* Byron CJ applied the further test that the dispute must be genuine in both a subjective and an objective sense. Substantial means:

> "*not frivolous…There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried…"* (Byron CJ at [3]).

[9] The respondent helpfully provided the BVI authority of Professional Offshore Opportunity Fund Limited v Daiwa Securities (BVIHC(COM) 2009/006, in which Bannister J offered his interpretation of section 157(1) at [16]:

> "The wording of Section 157(1) does not require the court to resolve the dispute. It merely requires it to act if "satisfied" that there is a substantial dispute. In my judgment that means that the court must have been left in no doubt that a substantial dispute exists. On the authorities, that also means that the court must be in no doubt that the dispute is one in which the company has an honest belief."

[10] This reasoning concurs with Byron CJ's view for the need to establish a prima facie case and in Bannister J's view, an "honest belief" was an essential element to establishing such a case. Therefore, an applicant must have an honest belief based on reasonable grounds to succeed on the substantial dispute ground.

[11] The substantial injustice ground is invoked under Section 157 (2) IA. Whilst the Act does not define what constitutes "substantial injustice", the Court in exercising its discretion, will determine whether there exists any prejudice caused to the applicant that would amount to substantial injustice[1]. In doing so, the court will consider reasons which may be independent to those raised on the substantial dispute ground. In Integrated Whale Media Investments Inc and Highlander Management LLC (BVIHCM 2015/0017) ("Integrated **Whale")** Leon J opined that the applicant must assist the court in the identification of any reasons to set aside in the alternative.

[12] The issue underlying the present application and underlying the question of whether there is a "substantial dispute" is whether Anchorman Kavac is liable for the debt. In raising the "substantial injustice" ground, the applicant argues that the claim is defective and says that further substantial injustice would be caused by the breach of the principle of separate legal personality.

[13] The application was supported by three affidavits of Ms Dian Dentith (Ms Dentith), a director of Sovereign Management Limited ("SML"), which acts as one of two directors of Anchorman Kavac. The respondent filed two affidavits.

The Facts

[14] The applicant said that the loan letter exhibited to the demand was issued on the company letter head of Anchorman Montenegro Holdings Inc (Anchorman Montenegro) and signed by Predrag Uhrin, its director at the time. The letterhead features an 'Anchorman'

[1] China Alarm Holdings Limited v China Alarm Holdings Acquisitions LLC et al (BVIHCV2008/00385), Foster J (Ag) at para 47.

logo and below an address is given for Anchorman Montenegro: PC Marinovic, Radanovic, 85318, Kotor, Montenegro. The "receiving bank details" are identified as Anchorman Kavac's RBS account in the Isle of Man. Anchorman Kavac submits that this account was used merely as a "flow-through account" and that the money was not retained.

[15] The implication from the business information provided is that the letter is issued under the authority and business of Anchorman Montenegro which is part of a group of Anchorman companies as indicated by the Anchorman logo at the top. The Court was provided with details of the corporate structure relating to the Anchorman companies. The corporate structure chart depicts Anchorman Kavac and Anchorman Montenegro as being part of the Boka Group Companies ("Boka Group"), all of which are subsidiaries of Anchorman Holdings Inc. ("AHI"). AHI is the founder shareholder for the various Boka projects and Mr John Kennedy is the beneficial owner of AHI. The companies shown are also apparently separate legal entities. The exception is Anchorman Kavac Ltd MNE, which is depicted as the applicant's representative office in Montenegro. What is clear is that Anchorman Montenegro is an "associated company" of Anchorman Kavac by virtue of the Boka Group structure and it is described as such in the notes to the financial statement of Anchorman Kavac for the period ending 30th September 2016.

[16] The redacted Certificate of Incumbency for Anchorman Kavac dated 16th February 2018 identifies Sovereign Directors Ltd together with SML as the company's directors and the principal shareholders are named as AHI and Remkis Investment Limited ("Remkis"). Mr Capener is the director and owner of Remkis as shown by the Annual Return documents issued by Companies House dated 6th November 2014.

[17] The applicant denies the existence of any relationship between itself and Anchorman Montenegro apart from having AHI as a common shareholder. Otherwise, according to the applicant, they do not share officers or directors and do not have joint or several liabilities with each other. Whilst it cannot be denied that the two are at least associated companies, the Court finds based on the evidence that the loan is between Anchorman Montenegro and Mr Capener for reasons A to C set out below.

A. Anchorman Montenegro is a separate legal personality to Anchorman Kavac

[18] The constitutional documents of Anchorman Montenegro were presented to the Court showing its incorporation on 16th July 2012 on the Central Register of Business Companies in Montenegro. AHI is designated as the company's founder and the Executive Director is clearly named as Predrag Uhrin (Mr Uhrin). This evidence taken together with the independent incorporation documents provided for Anchorman Kavac, tells the Court that Anchorman Montenegro is a separate legal personality to Kavac.

[19] Mr Capener previously conducted business with Mr Kennedy when he made a loan for a construction project called the 'Sea Breeze' project in March 2013 located in the Municipality of Kotor, Montenegro (the "first loan"). Mr Capener's case is that he was led to believe that Kavac was responsible for the loan due to the similarities between this loan and the first loan which he says was also made to Kavac. The first loan comprised a sum of EUR58,913 advanced to Anchorman Kavac's Isle of Man account from Remkis by wire transfer on 25 March 2013. This was formalised by a loan letter (the "first loan letter") of the same date, defining the purpose of the loan as being in relation to the "Sea Breeze" project. Anchorman Kavac's Isle of Man account is listed under the "receiving bank details." There are similarities in respect of the terms of the first loan letter with the loan letter and each are countersigned by the same individual, Mr Uhrin, denoted as "Director".

[20] There is a letter dated 28th August 2012 to Mr Capener on behalf of AHI in relation to the "Sea Breeze – Kavac development" and signed by a Sasa Popovic, Office Manager (Montenegro). The legal structure for the Sea Breeze project shows Anchorman Kavac and Anchorman Montenegro as two separate subsidiaries of AHI with a construction agreement between Anchorman Kavac and Anchorman Montenegro. It appears that Kavac is the owner of the development land and villas, whilst Montenegro has the role of "construction management". The planning agreement, dated 13th March 2013 declares Mr Uhrin as a "representative" of Anchorman Kavac and an "Investor" in the project. The agreement confirms that any obligation for liability of the fee relating to the facility, lies with the Investor. In my view, the Respondent is therefore incorrect in their assertion that Mr Uhrin signed the agreement "as director of Kavac".

[21] The first loan letter has a company seal over Mr Uhrin's signature, clearly denoting 'Anchorman Holdings Inc Montenegro'. In an email from Mr Kennedy to Mr Capener on 20 March 2013, confirming arrangements for the first loan, Mr Kennedy tells Mr Capener: "*Thanks, I will prepare a letter and have it signed by the local co, just confirming the arrangement for your record*s." Mr Kennedy at this point seems to be advising Mr Capener that the relevant company handling the project is the local Montenegro company. This is supported by the March 2013 planning agreement and the "construction management" role assigned to Montenegro in the legal structure. The letter opens by confirming, "*We hereby agree the terms of the short-term loan facility kindly extended by yourself to this Company, for the purpose of settling the account of the Municipality of Kotor, Planning Tax for the construction of three properties at Sea Breeze*". The letterhead features, the company seal, the correspondence referred to and the established role of Anchorman Montenegro in the project, all indicate that "*this Company*" is Anchorman Montenegro.

B. Anchorman Kavac was not the recipient of the loan

[22] Mr Capener explains in JC1 at paragraph 19, that "*Mr Kennedy confirmed that he would arrange, as per the first loan, for a letter confirming the arrangement to be sent to me from his local Montenegro office. As expected, the letter confirmed that the monies were to be advanced to Kavac*". In the correspondence referred to, notably Mr Kennedy's email of 20 March 2013, there would appear to be a lack of clarity in Mr Kennedy's instructions in narrating the specific role of the local office and in highlighting that the loan would be made to Anchorman Montenegro as a distinct and separate company. In a further email of 9 August 2013, a Mr Milos Radimovic on behalf of the Boka Group, asks Mr Capener to send the bank instructions for Remkis "*so we can pay back the loan from Anchorman Kavac Limited".* Without any background context, one could reasonably infer from this statement that the loan was immediately repayable from Anchorman Kavac as the borrowing entity. However, later correspondence indicates that the loan would be paid into a separate account for the purpose of conversion from EUR into GBP and this is consistent with the Applicant's position that Anchorman Kavac's account was used merely as a "flow-through" account. In an email of 27 December 2013, Mr Kennedy asks for the

loan to be sent in the equivalent GBP value, as "*that way it will be kept in a separate account and it makes it much easier for the audit and accounting later, it can be converted to € when it is paid out of the Anchorman account*." He emailed again on 24 Dec 2013 stating, "*If your people have not yet transferred the capital for Ski, it will be easier if the €350k equivalent in GBP£ can be sent as this will go into an isolated account and be kept separate*…"

[23] An account statement dated 31st December 2013 provides sufficient documentary evidence that Anchorman Kavac's account was used as a flow-through account. It records the amount of GBP293,00000 paid in as the 'Boka Ski loan', followed by a further statement dated 31st January 2014 showing GBP293,00000 withdrawn from the same account to 'Anchorman Holdings'. This seems logical, due to AHI's role as founder of the Boka Group companies and also ties in with Ms Denith's explanation that the "*new entity was yet to establish its own banking facility*". No reason is provided for Anchorman Montenegro not having established its own bank facility since its incorporation in July 2012, but AHI was evidently managing the capital on Anchorman Montenegro's behalf.

[24] Having established that Anchorman Kavac's account operated only as a flow-through account, it is clear that Anchorman Kavac was not the ultimate recipient of the loan.

[25] The court was not pointed towards any evidence to show that the Applicant had any interest or benefit in the purpose of the transfer of 30 December 2013, namely the "Boka Ski Loan".

C. **Anchorman's power to undertake and guarantee loan**s was subject to shareholder consent

[26] Ms Dentith alleges that Mr Capener knew of the applicant's lack of power to provide a loan guarantee according to the terms of the Investment and Shareholder Agreement between AHI and Remkis dated 2 December 2011 ("the Agreement").

[27] Under clause 3.3.8 of the Agreement, Anchorman Kavac is not permitted or able to offer any guarantee to any loan. Mr Capener, through his company, Remkis, holds more than 50% of the non-voting B shares in the applicant, (demonstrated by the Share Certificate of 12 December 2011 exhibited to Mr Capener's first affidavit). Under the terms of the Agreement, Mr Capener's participation, through Remkis, would be required in the passing of any Resolution for a loan undertaken by Anchorman Kavac, as the holder of more than 50% of class B non-voting shares.

[28] According to Mr Capener, Ms Dentith fails to clarify that it is AHI which is required to obtain the necessary shareholder approvals for the undertaking by Kavac of a loan, referring to actions whereby AHI is required to obtain approval by written resolution within the terms of the Agreement. Mr Capener also refers to transactions which he says undermine Kavac's consistency in obtaining the necessary B shareholder consents as envisaged by the Agreement, including in relation to the circumstances surrounding the first loan.

[29] It is entirely conceivable that AHI in fact act on Kavac's behalf to acquire the approvals, given that Kavac is incorporated and managed under AHI. AHI's role in this respect therefore has no bearing on this issue.

[30] In any event, despite the alleged practice of giving loans without shareholders' consent, for the purposes of the application, the respondent has not established that the applicant is liable for the loan.

Conclusion

[31] For the above reasons, the Court is satisfied that there is a substantial dispute in relation to the debt claimed. The applicant put forward reasonable grounds that established that it had a prima facie case for the demand to be set aside, primarily arising from the fact that it is not a party to the loan letter and is therefore not liable to pay the debt.

[32] The terms of the first loan letter do not mirror a similar agreement as the current loan letter, and in the absence of any other contractual agreement or document linking Anchorman Kavac and Mr Capener, or Anchorman Kavac and Anchorman Montenegro, the demand

should be set aside. On this basis, and contrary to the Respondent's submission, the Applicant has established to the requisite standard on a balance of probability that it had an honest belief that there is a substantial dispute as to the validity of the debt and that that belief was based on reasonable grounds.

[33] The court also exercised its discretion to determine that substantial injustice would be caused to the applicant if the demand were not set aside because the demand is defective in terms of s.157(2). The respondent has failed to provide supporting evidence to rebut the prima facie case of Anchorman Kavac that the sum of EUR 350,000 was not paid by the respondent to it as the intended party to a loan.

[34] The Applicant further advanced the principle of separate legal personality to support the substantial injustice ground, but in my view this does not provide the court with any reason that is independent of the issues raised under the substantial dispute ground in the manner envisaged by Leon J in Integrated Whale.

[35] I wish to thank counsel for their submissions and my Judicial Assistant Ms Rachel Trotman for a substantial contribution to this judgment.

[36] Costs to the Applicant are to be assessed if not agreed.

Hon. K. Neville Adderley
Commercial Court Judge

By the Court

Registrar