BRITISH VIRGIN ISLANDS

THE EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
(CIVIL)

Claim No. BVIHCV2006/0083

IN THE MATTER OF THE INSOLVENCY ACT 2003

AND IN THE MATTER OF BURWILL RESOURCES LIMITED

Between

METALLOYD LTD

Applicant

-and-

BURWILL RESOURCES LIMITED

Respondent

Appearances:

Mr. Richard Evans with him Ms. Dawn Smith for the Applicant
Mr. Christopher Young with him Ms. Keisha Durham for the Respondent

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2006: June 14
2006: July 14,17

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JUDGMENT

[1] HARIPRASHAD-CHARLES J: The primary issue in this application is whether a liquidator should be appointed over Burwill Resources Limited on the ground that the Company is insolvent pursuant to section 162 of the Insolvency Act 2003 ("the Act").

The parties

[2] The Applicant, Metalloyd Limited ("Metalloyd') is a company incorporated in accordance with the laws of England and Wales and carries on business as a trader of steel products and raw materials in the Asia Region.

[3] The Respondent, Burwill Resources Limited ("Burwill") was incorporated under the provisions of the International Business Companies Act, Cap. 291 on 2 February 1999 and has its registered office at P.O. Box 957, Office Incorporation Centre, Road Town, Tortola, British Virgin Islands. The authorized share capital of Burwill is $50,000 made up of one class and one series of shares divided into 50,000 shares of US$1.00 par value each. Burwill is also a trader of steel products and raw materials in the Asia region.

[4] During 2003 and 2004, Metalloyd and Burwill entered into various contracts for the supply of minerals and steel. Disputes arose between the parties over certain of the contracts in 2003 and they agreed to settle these disputes by entering into a settlement agreement dated 30 May 2003 ("the Settlement Agreement").[1]

[5] The relevant terms of the Settlement Agreement are as follows:

> "Whereas the buyer [the Company] agrees to settle the following amount through the contract no. BW/RJG 029CM (MS0402) covering 1,153,359 MT MV 'OB' by means of:
>
> - Letter of Credit: USD 370/MT to be opened on/before 15 June 2003
> - Commission: USD50/MT to be offered on/before 15 June 2003
> - Balance: USD82/MT to be settled by new business on/ before 31 May 2004.

[6] The parties are at loggerheads with respect to the third limb of this Agreement.

[7] It is Metalloyd's case that Burwill performed only two of its three obligations under the Settlement Agreement. The third, an obligation to pay a balance of $94,578.39 remains outstanding. As a consequence, it served a statutory demand in the prescribed form dated 10 June 2005 on Burwill. Burwill has not applied to set aside the statutory demand. Metalloyd's case is that the law is strict: Burwill had fourteen days within which to apply to set aside the statutory demand and failed to do so. It is therefore too late in the day for Burwill to seek to dispute the alleged debt.

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[1] A copy of the Settlement Agreement is exhibited to Mr. Chiu's affidavit and marked :"Exhibit BRL –1" in Bundle Volume 1.

[8] Metalloyd next submitted that in the event that the Court does not dispose of the case on that issue, there is no genuine disputed debt and Burwill's case stands or falls upon a question of construction in respect of the one obligation of the Settlement Agreement. Metalloyd also asserted that the alleged cross-claim is the subject of (confidential) arbitration proceedings and reference to it in Mr. Chiu's affidavit is improper.

[9] Conversely, Burwill is of the view that it is not in breach of the Settlement Agreement as it did in fact fulfil the third limb of the Settlement Agreement. Burwill alleges that its perception of the parties' understanding at the time they entered into the Settlement Agreement was that the third limb of the agreement was no more than a gesture of goodwill pursuant to which the balance of USD82/MT would be written off by way of it providing new business of an unspecified value to Metalloyd. Therefore, there is no judgment debt and even if there is (which is denied), the debt is disputed on substantial grounds and there is a genuine and serious cross claim which exceeds the amount of the alleged debt.

[10] It is a fact that Burwill has not applied to set aside the statutory demand. As a result, on 20 March 2006, Metalloyd filed an originating application seeking the appointment of a liquidator over Burwill.

## The evidence

[11] Metalloyd relies upon the two affidavits of Mr. Neil Darren Fitzpatrick and the affidavit of Mr. Muralidharan Gopalakrishan. They were both present with Mr. Dicky Yu, former Managing Director of Burwill when the terms of the Settlement Agreement were agreed upon during a meeting at Burwill's office in Hong Kong on 30 May 2003. Mr. Chan Hung Chiu, upon whose affidavit Burwill relies, was not present at the meeting. In addition, it is not apparent when he became the Deputy General Manager of Burwill. He offered no evidence in this regard.

[12] The evidence of these witnesses will be examined fully later on in the judgment. It is however suitable at this point in time to explore the legislative regime.

## The Legislative regime: the reform of the Insolvency Act

[13] On 12 May 2003, the Legislature of the Virgin Islands enacted the new Insolvency Act 2003 (the "Act"). This Act and the Insolvency (Amendment and Consequential Provisions) Act were proclaimed in force as of 16 August 2004. The Insolvency Act was intended to reform (emphasis added) the law relating to the insolvency of companies and foreign companies, limited partnerships, partnerships and individuals and to provide, in particular, for a mechanism for insolvent persons to enter into arrangements with their creditors, an administration procedure for companies, the receivership of companies and foreign companies, the liquidation of companies, foreign companies, limited partnership and partnerships, the making of bankruptcy orders against individuals, the licensing and regulation of insolvency practitioners, the penalization and redress of wrongdoing associated with insolvent persons, the disqualification of directors, the avoidance of certain transactions, cross border insolvency issues and other matters connected therewith.[2]

[14] The Act is revolutionary and innovatory in nature. It transformed the whole notion of how companies and foreign companies, limited partnerships, partnerships and individuals behave in this highly commercial-litigious jurisdiction. In its advancement, the Act took a quantum leap and even surpassed that of its mother country legislation [3] which it closely followed for many decades. Succinctly put, the Act was avant-garde. It empowers the Court to deal with insolvency matters in a timely and expeditious manner. It places strict time period within which certain things have to be done, for example, section 168 requires that an application to appoint liquidators be determined within 6 months. If it is not, and the period is not prospectively extended, the application is deemed dismissed.[4]

## Salient statutory provisions and their effects

[15] A consideration of the applicable principles should begin with section 159 of the Insolvency Act which deals with the powers to appoint liquidator. Section 159 (1) (a) makes provision

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[2] See Preamble of the Insolvency Act, 2003, page 1.
[3] See UK Insolvency Act of 1986, particularly sections 122, 123, 267, 268, 271.
[4] See (1) Safe Solutions Accounting Ltd [In Administration] (2) Asciom Solutions Limited [In Administration] v French Connections Limited (BVHCV2005/0242) [unreported] –per Hariprashad-Charles J.

that the Court may appoint an eligible insolvency practitioner as liquidator of a company, on an application under section 162. Section 162 states as follows:

> "(1) The Court may, on application by a person specified in subsection (2), appoint a liquidator of a company under section 159 (1) if
>
> (a) the company is insolvent;
>
> (b) the Court is of the opinion that it is just and equitable that a liquidator should be appointed; or
>
> (c) the Court is of the opinion that it is in the public interest for a liquidator to be appointed."

[16] In this case, Metalloyd relies on ground (a) that Burwill is insolvent.

[17] The Interpretation section, that is, section 2 of the Act provides that insolvent, (a) in relation to a company or a foreign company, has the meaning specified in section 8 (1) and (b) in relation to an individual, has the meaning specified in section 8 (2).

[18] Section 8 (1) defines the word "insolvent" as meaning:

> "A company or a foreign company is insolvent if
>
> (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
>
> (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partly unsatisfied; or
>
> (c) it is proved to the satisfaction of the Court that
>
> i. the value of the company's liabilities exceeds its assets; or
>
> ii. the company is unable to pay its debts as they fall due."

[19] Mr. Richard Evans, Learned Counsel for Metalloyd submitted that the language of section 8 (1) is determinative and prescriptive: a company **is** insolvent if any of the conditions in

subsection (a) to (c) is fulfilled. He submitted that, remarkably, the section is not a deeming provision, less still one that creates any form of presumption.

[20] The statutory scheme in this jurisdiction can be contrasted with the UK Insolvency Act, 1986 ("the UK Act"). The parallel provisions under the UK Act differ materially as to their detail. Section 122 (1) (f) of the UK Act provides that "A company may be wound up by the court if …(f) the company is unable to pay its debts."

[21] The definition of "inability to pay debts" is contained in section 123 which states:

> "A company is deemed unable to pay its debts –
>
> (a) if a creditor (by assignment or otherwise) to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company's registered office, a written demand (in the prescribed form) requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor.
>
> (b) ……."

[22] Mr. Evans submitted that the clear difference between the UK Act and our Act is material. Our Act has adopted a course of certainty in determining whether a company is insolvent. There is no scope for implication or discretion in determining the issue. He argued that non-compliance with the statutory demand determines the issue conclusively. In the present case, there has neither been compliance with the statutory demand nor has any application been made to set it aside.

[23] Mr. Young discreetly reminded the court that it is not bound to make a winding up order merely because this definition is prima facie technically satisfied at the time that the application for the appointment of liquidators is issued. He argued firstly that an applicant for the appointment of a liquidator must have locus. Section 9 defines a creditor as a person who has a claim which would be an admissible claim in the liquidation. A person whose debt is disputed does not have locus as a creditor: Sparkasse Bregenz Bank AG

v In the Matter of Associated Capital Corporation. [5] Secondly, the mere fact that a company has served a statutory demand which has not been set aside does not confer locus. If an application to set aside a statutory demand is made and dismissed, section 157 (5) authorizes a creditor to make an application for the appointment of a liquidator or for a bankruptcy order, as the case may be. There is no provision which states that in the event that no application to set aside is made, the person making the demand shall be entitled to make an application for the appointment of a liquidator. He argued that had this been the intention of the legislature, such a provision would have appeared in the statute. He submitted thirdly, that section 162 (1) (a) states that the court may appoint a liquidator if the company is insolvent. He argued that the section does not state that the court shall do so let alone that it shall do so because a definitional requirement based on section 8 (1) (a) was prima facie, met at the time of the issue of the application. According to him, the court clearly has a discretion even if the company is insolvent. In any event, the inference of insolvency raised by section 8 (1) (a) is rebuttable on the basis of evidence which is placed before the court in relation to the claim - the subject of the statutory demand.

[24] Mr. Young further contended that the court has the widest discretion in these matters and such is demonstrated by section 167 (1) (b) which provides that "on the hearing of an application for the appointment of a liquidator, the court may dismiss the application, even if a ground on which the Court could appoint a liquidator has been proved."

[25] Both sections 162 and 167 use the word "may" which connotes that the Court has a discretion in the appointment of a liquidator. But, the discretion cannot be exercised in such a way as to undermine the statutory provisions relating to the determination of insolvency. It seems to me that section 8 (1) (a) is strict: a company is insolvent if it fails to comply with the requirements of the statutory demand that has not been set aside under section 157. Failure to comply with the statutory demand does not, in my opinion, raise the presumption of insolvency. If that were the case, the Act would have clearly said that " a company is presumed to be insolvent if it fails to comply with the requirements of the

[5] Civil Appeal No. 10 of 2002 [unreported], Court of Appeal of the Eastern Caribbean Supreme Court, British Virgin Islands. Judgment delivered on 18 June 2003.

statutory demand that has not been set aside under section 157. In Australia, for example, section 459 C of the Corporations Act 2001 (Cth) deals with presumptions to be made in certain proceedings in winding up in insolvency. Section 459 C (2) states "The Court must presume that the company is insolvent, if during or after the 3 months ending on the day when the application was made: (a) the company failed (as defined by section 459 F) to comply with the statutory demand. " In such a case, the failure to comply with a statutory demand raises the presumption of insolvency and the onus is on the company to rebut this presumption by providing persuasive evidence that the company is indeed solvent.

[26] In my judgment, section 8 (1) is explicit: a company is insolvent if it fails to comply with the requirements of a statutory demand that has not been set aside under section 157. It therefore follows that Burwill is insolvent.

Non-compliance with statutory demand

[27] The next question which arises is whether the Court is precluded at the hearing of the application to appoint liquidator from considering matters which could have been raised in an application to set aside a statutory demand. Mr. Young submitted that an application to appoint a liquidator is a court proceeding and the relief sought is draconian in that it signals the death knell of the company. He next submitted that the proposition that a party cannot defend itself against a court proceeding when there has been no previous adjudication on the merits and cannot do so now even when the proceeding is aimed at bringing its existence to an end is unattractive and fortunately, does not represent the law. Counsel submitted if that were the case, then there would have to be a statutory provision expressly stating that a company shall not be entitled to adduce any evidence in opposition to an application for the appointment of a liquidator if no application to set aside a previous statutory demand had been made. He stated that there is no such clear provision in the Act.

[28] Mr. Young next submitted that if the Court did not have any discretion and was bound to make a winding up order if a statutory demand had not been set aside, it would mean that the court was bound to wind up a company just because it did not apply in time to set

aside the statutory demand. He next submitted that it is relevant to note that an application must be made within 14 days and there is expressly no jurisdiction to extend time (sections 156 (2) and (3)). So, for example, if a statutory demand having been duly served at a company's registered office in the BVI did not find its way to and actually come to the attention of a director (who in the case of most BVI companies be based abroad) in time for him to cause the company to instruct solicitors in the BVI to make an application within 14 days the company would be unable to resist an application to wind it up. Further, if the court had no discretion, it would mean that even if evidence was adduced at the petition stage demonstrating that the company was solvent and trading profitably; that the debt was disputed or even that there was no case at all for even contending that there was any debt, and that winding up was not in the interests of the general body of creditors, the Court would be bound nevertheless to make a winding up order.

[29] Having exemplified a hypothetical situation, Mr. Young contended that the statutory demand was not disregarded. Richard Butler on behalf of Burwill wrote to Conyers, Dill & Pearman on 21 and 28 June 2005 respectively disputing the debt. As is stated in paragraph 1 of the letter dated 28 June 2005, Richard Butler had by then had the opportunity to take fuller instructions. The statutory time limit for applying to set aside the statutory demand had by then expired.

[30] Mr. Young submitted that in England, there is no statutory procedure whereby a company may apply to set aside a demand (in contrast to the position in bankruptcy where there is such a statutory procedure) but as a matter of common law practice, a company served with a statutory demand which is disputed may apply to the court for an injunction restraining presentation of the winding up petition. However, if it failed to do so, it does not follow that the court was bound to make a winding up order.

[31] In England, there is in the case of individual insolvency, a very similar statutory procedure to that which obtains in the BVI for applying to set aside a demand. Mr. Young submitted that the court should in the case of both individual and corporate insolvency (because it is expressly obvious that the BVI provisions relating to a statutory demand and an application

to set it aside apply both to companies and individuals equally) follow English law on the position which obtains when an individual seeks to dispute the debt at the bankruptcy petition stage when he has made no application to set aside the demand or when he has made such an application but it had been dismissed on procedural rather than substantive grounds.

[32] The English position is set out in the cases of Commissioners of Inland Revenue v Lee-Phipps [6] and Adams v Mason Bullock. [7] The principle emanating from these judgments is that in bankruptcy cases, where there has been a hearing on the merits at a statutory demand stage, the debtor is prevented from raising the same issues again at the petition stage. This principle makes good sense. In the case of Brillouet v Hachette Magazines Ltd; Re a Debtor (No. 27 of 1990) [8], Vinelott J pointed out:

> "…the debtor cannot go back and reargue the very same grounds on which he unsuccessfully sought to have the statutory demand set aside. It will require some change of circumstance between the unsuccessful attempt to set aside the statutory demand and the hearing of the petition before the court (on the hearing of the petition) can be asked to go into the question which has already been determine at the hearing of the statutory demand. To hold otherwise, would be to encourage a waste of court time, and a waste of the parties' money and would defeat the obvious purpose of the statutory scheme."

[33] However, where no application has been made to set aside the statutory demand or an application has been made but dismissed on procedural rather than substantive grounds then there is no estoppel and the court has a duty to decide whether or not to make a bankruptcy order on all the material then before it.

[34] Mr. Young referred the recent cases of Haldanes v China North Industries Investment Management Limited and Haldanes v TL Management Ltd [9]. In those cases, the learned judge dismissed applications for the appointment of liquidators on the basis that the debts were disputed notwithstanding in those cases, no application has been made to set aside the statutory demands which had been served. It was not contended by Counsel

[6] [2003] BPIR 803, paras. 16 to 21of judgment.
[7] [2005] BPIR 241, paras. 20 to 32 of judgment.
[8] [1996] BPIR 518 , ChD.
[9] BIHCV2006/0022 and 0023 (unreported) –per Joseph-Olivetti J – judgment delivered on 10 April 2006.

for the Applicants in those cases that the companies were not entitled to adduce evidence as to an alleged dispute at the subsequent hearing of the application to appoint liquidators. Mr. Young advocated that this Court should follow Haldanes.

[35] Mr. Evans asserted that a company which has been served with a statutory demand and has not applied within 14 days to set it aside cannot do so at the hearing of the application to appoint a liquidator. He submitted that the opportunity was afforded to Burwill (by reason of the statutory scheme). However, it did not avail itself of it and as such, it cannot do so now.

[36] Mr. Evans augmented his submission by stating that even though the Court has a discretion in these matters, a debtor cannot pray in aid as part of the Court's discretion, matters that ought to have been raised at the stage of (and in support of an application to set aside) the statutory demand. Were this not the case, the effect of the statutory provisions relating to determining insolvency and statutory demand would be rendered nugatory. There will be no incentive for a debtor company to challenge a statutory demand if, instead, it could simply raise the same argument when the application to appoint a liquidator came on for hearing.

[37] It follows, said Mr. Evans, that the matters that a Court can take into account when exercising any discretion must exclude (a) allegations or matters that would permit the statutory demand to be set aside; and (b) any allegation or matter tending to suggest that the company is not insolvent.

[38] Learned Counsel argued that if this approach appears unduly strict, in its defence, it has the merit of certainty. Moreover, it is consistent with the policy of the Act of creating certain time limits; some of which carry draconian penalties in the event of non-compliance, for example, section 168 which requires that an application to appoint liquidators be determined within 6 months. If it is not, and the period is not extended, the application is deemed dismissed.

[39] Counsel also urged the Court not to apply English law especially the cases relating to bankruptcy proceedings as the law and procedure are totally dissimilar. Counsel also persuaded the Court, albeit tacitly, not to follow the recent cases of Haldanes v China North Industries Investment Management Limited and Haldanes v TL Management Ltd which did not consider section 8 of the Act.

[40] The relevant statutory provisions dealing with statutory demands are contained in sections 155 to 157 of the Act. Section 156 provides as follows:

> "(1) Where a person has been served with a statutory demand he may apply to the Court to set it aside.
>
> (2) An application under subsection (1) shall be made within fourteen days of the date of service of the demand on him. (emphasis added).
>
> (3) The Court may not extend the time for making or serving an application to set aside a statutory demand."

[41] Indeed, in England, there appears to be no equivalent statutory procedure whereby a company may apply to set aside a statutory demand as there is in the BVI. Mr. Young suggested that in such a case, this Court should follow English law on the position which obtains when an individual seeks to dispute the debt at the bankruptcy petition stage when he has made no application to set aside the statutory demand. To do so, in my view, would from the start, lead to wrong conclusions because of the dissimilarities between our Act and the Insolvency laws of England relating to bankruptcy proceedings.

[42] The statutory provisions dealing with statutory demands in the BVI are clear and unequivocal. A company served with a statutory demand may apply to set it aside within 14 days of the date of service. If unanswered, a statutory demand, based on an assertion that a debt is due and payable otherwise than by virtue of a Court judgment has draconian consequences.

[43] Australia seems to have somewhat similar insolvency provisions to the BVI particularly, with regard to statutory demands. Section 459G of their Corporations Act states as follows:

" 459 G- Company may apply

(1) A company may apply to the Court for an order setting aside a statutory demand served on the company.

(2) An application may only be made within 21 days after the demand is so served.

(3) An application is made in accordance with this section only if, within those 21 days:

a) An affidavit supporting the application is filed with the Court; and

b) A copy of the application, a copy of the supporting affidavit, are served on the person who served the demand on the company."

[44] A company served with a statutory demand may apply to set it aside within 21 days after the demand has been served upon it (s. 459G (2)). In David Grant & Co. Pty Ltd v Westpac Banking Corp[10], the High Court of Australia unanimously held that "provision to be mandatory; it is incapable of qualification…Nor does a failure to comply with that time limit constitute a mere "procedural irregularity"….In other words, the provisions for statutory demands and for setting aside of a demand notice are to be complied with strictly and it does not matter whether strict compliance causes injustice to the company in question."

[45] In another Australian case of Braams Group Pty Limited v Miric [11], Mr. Miric, an alleged creditor, served a statutory demand on Braams. Braams failed to satisfy the demand or apply for the demand to be set aside within the time limit of 21 days specified in s. 459G CL. Miric had previously obtained judgment against Braams in proceedings before Foster J. After winding-up proceedings were instituted, Braams unsuccessfully sought a stay or adjournment of those proceedings, pending the determination of its appeal against Foster J.'s judgment. A winding up order was made by the Chief Judge in Equity, Young J. On appeal, Braams sought to establish that:

a) The statutory demand and winding-up proceedings were an abuse of process; or

[10] (1995) 184 CLR 265 referred to in the case of Chadmar Enterprises Pty Ltd v IGA Distribution Pty Ltd [2005] ACTSC 39 (10 May 2005) at page 17.
[11] [2002] NSWCA 417, New South Wales Court of Appeal per Mason P and Stein and Ipp, JJA. Date of judgment –20 December 2002.

b) Alternatively, that Young J. had erred in his finding that the company was insolvent and his discretion had miscarried in failing to dismiss, adjourn or stay the proceedings.

[46] The Court considered whether Young J. should have granted an adjournment or stayed the winding-up proceedings under s 459S. Failure to comply with a statutory demand raised a presumption of deemed insolvency (section 459C(2))[12]. The onus was upon Braams to rebut this presumption by providing persuasive evidence that the company was indeed solvent. It was unable to establish that its assets exceeded the value of its liabilities on the evidence before the Court.

[47] The Court held that the learned Judge did not err in refusing the adjournment. Braams was raising a ground for opposing the winding-up and in support of its application for an adjournment, on which it could have relied in making an application to set aside the statutory demand within the prescribed period.

[48] Because of its failure to contest the statutory demand within the prescribed time period, Braams was required to show its solvency. This decision demonstrates the court's view on statutory demands: that a company must seek to set aside the demand within the time limit, as it cannot later bring evidence in support of its application that could have been adduced to set aside the demand (emphasis added).

[49] In my opinion, the scheme of these provisions under the present Act, plainly is to ensure that if a debtor wishes to dispute the debt, or wishes to raise a counterclaim or cross claim against a creditor, he should do so by an application to set aside the statutory demand; and until that application has been heard and determined or the prescribed time limit has expired, no application to appoint a liquidator can be presented. If he fails to avail himself to that opportunity, then he cannot later bring evidence in support of its application that could have been adduced to set aside the demand.

[12] The Court must presume that the company is insolvent if, during or after the 3 months ending on the day when the application was made (a) the company failed to comply with a statutory demand.

[50] As Mr. Evans rightly suggested, the discretion under sections 162 and 167 must be exercised in such a way so as not to undermine section 156. The discretion is not at large. If the Court could deal with the issue of disputed debt at the hearing of the appointment of a liquidator, then what is the purpose of section 156? Surely, the legislature could not have intended that debtors would choose at what stage they dispute a debt: whether 14 days after the statutory demand has been served or at the hearing of the application for the appointment of liquidator. If that is the case, then there would be no inducement for a debtor company to challenge a statutory demand if, instead, it could simply raise the same argument when the application to appoint a liquidator came on for hearing.

[51] It follows that the matters which Burwill raise, simply cannot be raised at this juncture as a defence to the application. If it wishes to rely upon such matters, it ought to have applied to set aside the statutory demand. It failed to do so and it is very late in the day to do so now.

Per incuriam – decision in Haldanes v China Industries

[52] In my considered opinion, Mr. Evans is correct that the decision in the recent cases of Haldanes v China North Industries Investment Management Limited and Haldanes v TL Management Ltd is *per incuriam* and this Court should not follow it. The judgment failed to consider section 8 of the Act.

Disputed debt

[53] In the event that I am wrong to find that Burwill is estopped from raising matters which it could have raised in an application to set aside the statutory demand, I will consider Burwill's allegation that the debt which found this application is disputed on substantial grounds.

[54] It is settled law that if a debt is disputed on substantial grounds, the Applicant does not have the requisite locus as a creditor to invoke the winding-up jurisdiction of the court and it is an abuse of the process of the court to seek to do so. In Sparkasse, Byron CJ (at page 2) stated:

> "The law governing the making of winding up orders is well-settled and could easily be set out at this stage. The Court will order a winding up for failure to pay a

> due and undisputed debt over the statutory limit, without other evidence of insolvency. 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: *Re Taylor's Industrial Flooring Ltd (1990) BCC 44.* But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up: *Tweeds Garages Ltd (1961) 1 Ch. 406.* To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. 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 either before the Court itself or in an action or by some other proceeding: *Palmers Company Law, Vol. 3 Para. 15.214.* A creditor who has served a statutory notice on the company is not entitled to a winding up order if the company bona fide disputes the debt and there is no evidence of the insolvency of the company: *In re London* and *Paris Banking Corporation (1874) LR 19 Eq. 444*. If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court: *Mann v Goldstein (1968) 2 All ER 769.* The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions. A debt disputed on genuine and substantial grounds could not support a winding up petition. Invoking the process of the Court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court: *Re Ringinfo Ltd (2002) IBCLC 210."*

[55] The principles of law are clear that if the Company has genuine and substantial grounds for disputing the debt, this court sitting as a Company Court should not allow the application to continue but should instead dismiss it so that the parties can determine any dispute in a civil court. The onus of proof that there are genuine and substantial grounds for disputing the debt lies on the Company. In Re a Company (No 001946 of 1991), ex parte Fin Soft Holding SA[13], Harman J. at page 740 said:

> "In my view, the true test is: Is there a bona fide dispute? Meaning thereby: Is there a real dispute? That is, a real and not fanciful or insubstantial dispute about the debt. Alternatively, the test can be defined as: Is the debt disputed upon substantial grounds?…'Bona fides', in the sense of good faith, has nothing to do

[13] 1991 Butterworths Company Law Cases 737

> with the matter. I therefore, believe that the true question is, and always is: Is there a substantial dispute as to the debt upon which the petition is allegedly founded?"

[56] Mr. Young submitted that there is no judgment debt. Burwill's case therefore stands or falls upon a fine question of construction in respect of the third limb of the Settlement Agreement. It is not in dispute that Burwill performed the first two limbs of the agreement.

[57] The third is: [Burwill] agrees to settle [the sum due under previous dealings] ….by means of …balance: USD82/MT to be settled by new business on/before 31 May 2004.

[58] Burwill alleged that this provision "was no more than a gesture of goodwill pursuant to which the balance of USD82/MT would be written off by way of it providing new business of an unspecified value to the Applicant [Metalloyd]. Burwill further alleged that "new business was not given the peculiar meaning of a specific cash payment amounting to USD94,578.39. Such would have had to have been the case in order for Metalloyd to insist upon or expect the same.[14]

[59] In his comprehensive second affidavit, Mr. Fitzpatrick detailed how the Settlement Agreement was arrived at. At para. 13, he stated that "the suggestion by Mr. Chiu that the third limb would be satisfied by the Respondent "providing new business of an unspecified value" is completely incorrect. The contract price was US$502pmt. The total of the figures of US$370/MT, USD50/MT and USD82/MT which appear in the settlement agreement is USD502/MT, which is the contract price. The third limb was, therefore, always intended to compensate the Applicant for a specific amount."

[60] Mr. Fitzpatrick stated that the difference between the total of the first two limbs (US$420pmt) and the contract price of US$502pmt is US$82pmt, which is precisely the figure stated in the third limb of the Settlement Agreement.

[61] Burwill's assertion that the third limb of the Settlement Agreement was "no more than a gesture of goodwill…" is unattractive. The covenant was contained in the Settlement

[14] See paragraph 11 of Mr. Chiu's affidavit filed on 8 May 2006.

Agreement: it is extremely unlikely that provisions merely carrying the force of a gesture of goodwill would be contained in what was plainly a negotiated, contractual settlement.

[62] Mr. Evans in his admirably succinct submission submitted that Metalloyd's account is cogent, accords with commercial reality and significantly, it has the marked advantage of being provided by two deponents who actually negotiated and executed the Settlement Agreement on its behalf. On the contrary, Mr. Chiu, for Burwill was not a party at those negotiations. Certainly, the source of his information concerning the effect of the third limb of the Settlement Agreement is not entirely clear.

[63] Metalloyd's account is that the Settlement Agreement was negotiated in such a manner so as to enable it to recover a definite sum. This, according to Mr. Evans, makes good commercial sense. The reference to new business merely recorded how it was intended Burwill would fund the making of the payment. For all intents and purposes, it was a concession to Burwill to allow delayed payment to be made.

[64] In short, there is no substance in Burwill's assertions which amount to no more than inferences and are contrary to the direct evidence of the true position.

[65] I find that there is no disputed debt on any ground; be it substantial or frivolous. The reality is that Burwill owes the sum of US$94,578.39 to Metalloyd.

The cross-claim

[66] Given my finding on the law relating to statutory demands, I do not think that this issue needs any consideration. In the event that I am wrong to come to this finding, I shall explore the issue of cross-claims. To begin with, I am deeply indebted to Mr. Young for his helpful analysis of the authorities relating to cross-claims.

[67] If the debt is undisputed but there is a genuine and serious cross-claim which exceeds the amount of the debt an application for the appointment of a liquidator will be dismissed: Re

Bayoil SA[15], Montgomery v Wanda Modes Ltd[16] and Popely v Popely [17]. See also Insolvency Act, section 157 (1)(b). The cross-claim must be genuine and serious or one of substance; it must be an amount exceeding the amount of the petitioner's debt, and one that the company had been unable to litigate. Nevertheless, there existed a residual discretion which allowed the judge to ask himself in each case whether there are special circumstances which might make it appropriate for the application to be dismissed or stayed. At page 71, Nourse LJ in Bayoil had this to say:

> "Moreover, an order that a company be wound up, unlike a bankruptcy order, is often the death knell. Nor can it be certain that a liquidator, even with security behind him, will prosecute the company's claims with the diligence and efficiency of its directors. These, I believe, are considerations which go to justify the practice in cross-claim cases. I emphasise that the cross-claim must be genuine and serious or, if you prefer, one of substance, that it must be one which the company has been unable to litigate; and that it must be in an amount exceeding the amount of the petitioner's debt. "

[68] In the instant case, as Mr. Young rightly submitted, Burwill's evidence shows that it not only has a claim against Metalloyd which is genuine and serious and exceeds the amount of the debt but that it is pursuing this claim through an arbitration which it is anticipated will be concluded at about the end of the current year or early next year. This evidence is not disputed by Metalloyd. At paragraph 19 of his affidavit, Mr. Fitzpatrick said that "The Applicant [Metalloyd] denies liability and the outcome of the arbitration is not a foregone conclusion as suggested by Mr. Chiu."

[69] Metalloyd is worried that Burwill makes mention of the arbitration proceedings which is meant to be a means of resolving a dispute privately and confidentially. Mr. Evans submitted that the alleged cross-claim is the subject of (confidential) arbitration proceedings, reference to it in Mr. Chiu's affidavit is improper. In any event, the claim is still pending. Mr. Young argued that it is necessary to do so because Metalloyd has sought to wind up Burwill despite the existence of a cross-claim which was filed well in advance of even the statutory demand. This submission has merit. In Bayoil, a Swiss company, chartered a tanker from Seawind Tankers Corporation ("Seawind") a Liberian company, to

[15] [1999] 1 BCLC 62.
[16] [2002] 1 BCLC 289.
[17] [2004] EWCA Civ 463.

carry crude oil from Iraq to the United States. Due to the failure of one of its engines, the tanker had to be diverted via South Africa. Seawind claimed freight charges and diversion expenses; Bayoil counterclaimed for damages for breach of the charterparty, alleging misrepresentation and breach of warranty. The dispute was submitted to arbitration in London. In due course, an interim final award was made in favour of Seawind in respect of freight charges. No stay of the interim award was sought or granted. Bayoil having failed to make any payment under the statutory demand, Seawind presented a winding up petition against Bayoil based on the statutory demand. At the hearing of the petition, Bayoil did not dispute the debt; rather it contended that the petition ought to be stayed or dismissed on the grounds that it had a counterclaim which exceeded the amount of the petition debt. The judge at first instance held that he had a discretion which was at large, and that in the circumstances of the case, the discretion ought to be exercised by making a winding up order. Bayoil appealed. Nourse LJ concluded that the winding up petition ought to be dismissed in what he described as "cross-claim cases", save in special circumstances.

[70] I agree fully with the Court of Appeal in Bayoil and conclude that had it not been for the strictness of the law relating to statutory demands, I would have had to stay or dismiss this application since the cross-claim which is not disputed is genuine and serious (albeit that Metalloyd is defending it) and it exceeds the debt in this application. Bayoil was also a case where the dispute was submitted to arbitration.

Solvency of Burwill

[71] The present application for a liquidator to be appointed over Burwill proceeded upon the allegation that the company is insolvent. It is remarkable that Burwill has failed to demonstrate that it is in fact, solvent. The closest that it has come to allege solvency is found at paragraph 3 of Mr. Chiu's affidavit where he stated "To date, the Respondent continues to trade and has no overdue trading debts or liabilities. The Respondent is a member of a group of companies comprising 720 employees."

[72] Mr. Evans correctly asserted that this is a bald assertion which lacks specifics and there is no documentary evidence to substantiate the assertion. However, in his closing

submissions, Mr. Young assured the Court that if it were persuaded to appoint a liquidator, Burwill would need 14 days to pay the debt.

## Conclusion

[73] Having applied the statutory scheme under the Act, I conclude that Burwill is insolvent and consequently, it is apposite to appoint a liquidator over the company. Having been assured by Mr. Young that Burwill will be able to satisfy this debt in 14 days, I will not order an immediate winding-up but will suspend this order for 14 days in order to effect payment.

[74] In the final analysis, my order will be:

1. Unless Burwill shall by 4.00 p.m. on 31 July 2006 have paid the amount of US$94,578.39, William Tacon, a licensed insolvency practitioner of Ernst & Young (BVI) of P.O. Box 3340, Road Town, Tortola, British Virgin Islands be appointed as liquidator of Burwill ("the Liquidator") pursuant to sections 159 (1) and 162 of the Insolvency Act 2003.

2. That the Liquidator shall without prejudice to section 186 (1) of the Insolvency Act 2003 have all the powers contained in Schedule 2 of the Insolvency Act 2003.

3. That the Liquidator shall be at liberty to employ such agents including solicitors in the British Virgin Islands and elsewhere to assist him with his duties as Liquidator at such hourly rates as may be agreed from time to time by him and such agents.

4. That the Liquidator be at liberty to charge for his services and also the services of his employees in accordance with the provisions of the Insolvency Act 2003.

5. That the Liquidator shall provide to the Court every six months after 31 July 2006 reports on the progress of the liquidation of Burwill.

6. That a costs budget already having been set in these proceedings by reason of the Order dated 6 June 2006 in the amount of $60,000, the said costs shall be:

    a. In the event of Burwill complying with paragraph (1) of this Order, paid by Burwill by 31 July 2006;

    b. In the event of Burwill failing to comply with paragraph (1) of this Order, be costs within the liquidation of Burwill and paid pursuant to Section 207 (1) (a) of the Insolvency Act 2003.

7. In the event that Burwill shall by 4.00 p.m. on 31 July 2006 have paid the amount of US$94,578.39 and the further sum of US$60,000 in respect of costs, the application for the appointment of a liquidator do stand dismissed.

Indra Hariprashad-Charles
High Court Judge