IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

BRITISH VIRGIN ISLANDS

CLAIM NO. BVIHCV 2008/0259

In the Matter of the Insolvency Act 2003

and

In the Matter of Island Point Properties SA

Between

RICHARD FOGERTY

(JOINT OFFICIAL LIQUIDATOR OF TRADE AND COMMERCE BANK)

Applicant

and

ISLAND POINT PROPERTIES SA

Respondent

Appearances:

Karen Troy and Robert Nader of Forbes Hare for the Applicant
Claire Robey and Martin Kenney of Martin Kenney & Co for the opposing member/creditor

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2009: 22 and 30 April, 4 May
2009: 8 May

[Application for appointment of liquidator – statutory demand – whether statutory demand founded upon a debt due and payable at the time of the demand – IA 2003 s 155(2)(a) –

whether still open to Respondent company to dispute the debt – *Metalloyd Ltd. v Burwill Resources Ltd* BVI HCV2006/0083 considered – whether sole shareholder has *locus* to oppose where Respondent company does not appear]

JUDGMENT IN OPEN COURT

[1] Bannister J [ag]: This is an originating application issued on 28 August 2008 seeking the appointment of William Tacon and Richard Fogerty ('Mr Fogerty') as joint liquidators of the respondent Island Point Properties SA ('the company"). The application is made under section 162(1)(a) of the Insolvency Act 2003 ('the Act') on the grounds of the company's insolvency and is founded on what is said to be an unsatisfied statutory demand in respect of which no, or at any rate no timely, application was made to have it set aside.

[2] The original applicants were Mr Fogerty and Goronwy James Cleaver ('Mr Cleaver'), as Liquidators of Trade and Commerce Bank ('TCB'), but Mr Cleaver dropped out at some stage and the application is maintained by Mr Fogerty alone. Although it is clear that Mr Fogerty in his capacity as Liquidator of TCB has no personal standing to seek the winding up of the company, no point was taken on this and the hearing before me proceeded on the sensible footing that the real applicant is TCB.

[3] TCB appears on the hearing by Ms Karen Troy with Mr Robert Nader. The company does not appear. Instead, one Jacob Ungar ('Mr Ungar'), who appears before me by Ms Robey and Mr Kenny, claims that he has standing to oppose the application on the grounds (a) that he is the sole shareholder of the company and (b) that he is a creditor in the sum of US$47,000. I can dispose of the latter contention at once by saying that when I asked Ms Robey what was the nature of Mr Ungar's debt and when it had been incurred by the company, she said that she had no instructions. I am not prepared to consider the opinions of someone claiming to be a creditor who neglects to put his counsel in possession of particulars of his debt. I ignore Mr Ungar's alleged standing as an opposing creditor.

[4] So far as Mr Ungar's standing as a member is concerned, a mass of evidence was placed before me seeking to prove (1) on the part of Mr Ungar, that he is, by purchase, the sole

beneficial owner of the company and (2) on the part of TCB that he is not. Although I read this evidence and received submissions upon it, I do not consider that an application for the appointment of a liquidator is the proper forum for the resolution of an issue such as this. It would be quite wrong for me to decide - or even to make any observations on - an issue which, if it is to be pursued, must be pursued in proceedings properly constituted for that purpose. For present purposes it is sufficient, in my judgment, that Mr Ungar has produced evidence that he is presently the sole registered shareholder of the company. He is thus entitled to the benefit of the presumption in section 42(1) of the Business Companies Act 2004 which, for the reasons I have just given, I am not prepared to go behind on this application.

[5] Mr Ungar therefore satisfies me, for present purposes, that he is a member of the company. But Ms Troy says, and I agree with her, that in the absence of any other explanation, the failure of the company to contest these proceedings, while leaving its sole owner to oppose it in his character as a member, is nothing more than a forensic conjuring trick designed to avoid a perceived effect of the decision of Hariprashad-Charles J in Metalloyd Ltd. v Burwill Resources Ltd[1] ('Metalloyd') and that Mr Ungar has no standing as a mere member to challenge the validity of the demand or dispute the alleged debt.

[6] In those circumstances, I expressed reservations, at the outset of the hearing, as to whether I should listen to submissions from Mr Ungar at all. Given the stage the proceedings had reached and given that she had already appeared in the case at an earlier stage, I decided that I would hear Ms Robey *de bene esse* and I have been assisted by her submissions. It remains the case, however, that the application has never been opposed by the company and that is a fact that I have to keep in mind in deciding it. Mr Ungar has never had *locus* in his character as a member to apply to set aside the demand, because he is not the person who was served with it.[2] Similarly, I very much doubt whether the court should entertain submissions from a member about the truth of a

[1] BVIHCV 2006/0083
[2] See section 156(1) of the Act.

person's claim to be a creditor of a company or about any dispute that the company might have had about a creditor's debt. That seems to me to be something for the company and its directors (and, perhaps, for other creditors), but not a matter on which members should ordinarily be entitled to be heard separately in their character as such. The approach of Lord Justice Giffard in re Times Life Assurance and Guarantee Company[3] seems to me to cover the point and to be correct in principle.

[7] At the outset of the hearing Ms Troy applied for permission to amend the originating application to include reliance upon section 162(1)(b) of the Act – the just and equitable ground. I disallowed this amendment because it seemed to me that if Ms Troy established her debt and non-compliance with the statutory demand, then she was entitled (subject to the Court's residual discretion) to the order she seeks without additional specific reliance upon the just and equitable ground. Whatever the principal ground relied upon, the court never winds up a company otherwise than on the underlying ground that it is just and equitable to do so. If, on the other hand, Ms Troy failed to establish her debt and the insolvency of the company as a result of non-compliance with the statutory demand, then it did not seem to me that any stand alone just and equitable ground was available to her. The just and equitable ground in its stand alone role is a carry over from the law of partnership and is available to members of companies who are dissatisfied with the manner in which company's affairs are being conducted. Ms Troy sought to justify reliance on the just and equitable ground by asserting that there were matters about the company that cried out for investigation. That fact that there are matters to be investigated may persuade the court, in reliance upon the just and equitable ground in its ancillary sense, to make an order on a creditor's petition where opposing creditors, for example, urge that no order should be made, but the person invoking the ground in such circumstances must first establish *locus*. If Ms Troy cannot establish *locus* as a creditor, she has no standing to invoke the just and equitable ground at all.

[8] The statutory demand upon which TCB relies was dated 5 February 2008 and it is common ground that it was served at the company's registered office on the same day. It

[3] (1870) LR 5 Ch App 381

appears that that address was also the address of the company's registered agent. It is not known whether the registered agent informed the directors of the company of the service of the statutory demand, but if it did, they took no steps on the company's behalf to have it set aside within the prescribed 14 day period. Mr Ungar says that he was unaware of the service of the statutory demand until about 18 March 2008, when the registered agents (mistakenly) informed him that the demand had been served on about 17 March 2008. He says that an application to set aside the statutory demand was afterwards made but subsequently withdrawn when it became clear that 5 February 2008 was the actual date of service.

[9] The material parts of the statutory demand are as follows:

> *'The Creditor claims that the Company owes the sum of at least US$5,379,167.00, exclusive of interest . . . and that it is payable immediately and that such debt is unsecured.'*

The 'Particulars of Debt' supplied on page two of the demand are:

> *'1. The Company is indebted to the Creditor in the total sum of at least US$5,379,176.00 ('the Debt') as at the date of this demand, exclusive of interest.*
>
> *2. The Creditor is a company placed into liquidation in the Cayman Islands on 29 August 2002. During the course of the liquidation, the liquidators of the Creditor have determined that, as at 28 February 2001, the sum of the Debt was owed to the Creditor by a third company: 'Tarbet SA'. This liability is reflected on Tarbet SA's Balance sheet to 28 February 2001 (the 'Balance Sheet'), a copy of which is attached to this Statutory Demand.*
>
> *3. The Balance Sheet further indicates that Tarbet SA's total assets to February 2001 amounted to US$5,768,052.00 of which US$4,300,000.00 was comprised of property held by the Company.*
>
> *4. The Balance Sheet also identifies the sum of US$1,326,674 as an asset – that sum being entered under the heading 'External Debtors' and*

corresponding to an entry under the notes in the Balance Sheet by which 'External Debtors' appears to be a description of the Company.

5. *From investigations carried out by the liquidators of the Creditor, it appears that the sum of the Debt was gratuitously transferred by the Creditor to Tarbet SA and that this money was then used to purchase property which was held by the Company. The Company appears primarily to be a vehicle by which Tarbet SA purchased and held property. The Liquidators of the Creditor believe that the Company was the ultimate recipient of the sum of the Debt.*
6. *In the light of the matters described above, the Company is indebted to the Creditor in the total sum of at least US$5,379,167.00 at the date of this demand, exclusive of interest.'*

[10] Ms Troy's case is simplicity itself. She says that a statutory demand was admittedly served on the company; that it has not been set aside; that since the 14-day period for applying to have the demand set aside has expired, the company is precluded from making any submissions about the validity of the demand and that Mr Ungar can be in no better position; that the demand for payment has not been complied with; that section 8(1)(a) of the Act accordingly applies, so that the company is insolvent for all purposes; and that, apart from the discretion given to me under section 167(1)(a) of the Act, which she says I should not use to subvert the plain effect of section 8(1)(a), I have no option but to make the appointment. For all of this, she relies on Metalloyd.

[11] In Metalloyd a company owed the applicant a debt which the learned Judge found not to be the subject of any substantial dispute. The applicant had served a statutory demand, but the company made no application within the time limited by the Act to set it aside. At the hearing of the application the company sought to dispute the debt. The learned Judge held that it was not entitled to do so. In the light of the learned Judge's finding that there was no substantial dispute, the appointment of a liquidator in that case was obviously rightly made, but the primary reason given by the Judge for her decision was that a company which had not applied to have a statutory demand set aside and had not paid the

debt was precluded by the scheme of the Act from disputing the debt at the hearing of the application. It is on this part of the learned Judge's reasoning that Ms Troy relies.

[12] Hariprashad-Charles J reached her conclusion by the following steps. She held that the Act precludes a debtor company from applying to have a statutory demand set aside more than 14 days after service; that a company which had failed to apply timeously to set aside a statutory demand is also precluded by the terms of section 156 of the Act from disputing the debt on the hearing; that section 8(1)(a) of the Act provides that where a statutory demand has not been set aside and the demand has not been satisfied, the debtor company **is** insolvent (rather than merely being presumed to be insolvent); that (although she did not use these words) this statutory insolvency is binding on the debtor company and the world; and that the court cannot use the discretion given to it under section 167(1)(a) to subvert the plain effect of section 8(1)(a) of the Act; so that in such circumstances the court has no alternative but to appoint a liquidator.

[13] It is, I think, well established that the court sitting in insolvency has an inherent jurisdiction and indeed an obligation to see that its processes are not abused. In particular, the court will be vigilant to see that the procedures set out in the Act and the Rules made under it are not used for collateral purposes, such as putting pressure on a solvent company to submit to an unjustified claim or to pay a claim which is disputed, or, I would say, a claim which is unsound on its face, whether anyone disputes it or not.

[14] Hariprashad-Charles J was not asked to consider and expressed no opinion on the question whether the effect of a company's failure to set aside a statutory demand is to deprive the court of this inherent jurisdiction. I have no doubt that it is not. I thus regard myself as free to review the statutory demand and the evidence in support of it in deciding whether to exercise my discretion to appoint liquidators.

[15] The question remains, however, whether, even if that discretion survives the company's failure to set aside the demand, it is taken away by the effect of section 8(1)(a) of the Act, as Hariprashad-Charles J's conclusions would appear to demand.

[16] In my judgment the words 'statutory demand' in subsection 8(1)(a) of the Act must mean a statutory demand that is valid. In other words, section 8(1)(a) is engaged only if predicated upon a valid statutory demand. A demand which is bad as abuse of the process, such as one founded upon a disputed debt[4] or, still worse, no debt at all (such as a demand for a debt which the company has never conceivably incurred) cannot, in my judgment, engage section 8(1)(a). A statutory demand which starts its life as bad cannot achieve validity simply by lapse of time and the absence of a challenge within the prescribed period. So that even if the company fails to make an application to have the demand set side inside the statutory time limit, the position when the originating application comes on for hearing remains that it is based upon a bad demand and that section 8(1)(a) has not been engaged. In such a case there is, in my judgment, no statutorily binding insolvency precluding the court from reaching its own conclusion whether the applicant (a) has standing and (b) has proved the respondent company's insolvency.

[17] Given that the company does not appear and given that I have already ruled that Mr Ungar has no standing to oppose the originating application, it is unnecessary for me to decide whether failure to comply with the strict time limit imposed by section 156 means that a respondent company is precluded from opposing the originating application at the hearing. For what it is worth, my view, *obiter*, is that it is not. There is nothing in the strict wording of section 156 to compel that conclusion and in the absence of an express prohibition I would not be inclined so to restrict the access of a litigant to the court. Further, if, as I have held, the court is able to review the application in these circumstances, there seems to be no reason why it should be deprived of the assistance of the respondent company when doing so.

[18] For these reasons, I consider that it is open to me to review TCB's alleged debt and the validity of its statutory demand notwithstanding that no application was made to have the statutory demand set aside and that the demand has not been complied with. I should

[4] See **Sparkasse Bregenz Bank AG v Associated Capital Corporation** (unreported) ECCA, BVIHAP2002/0010, 18 June 2003)

make plain that on the facts of this case I would have conducted such a review before making an appointment even had no-one but TCB turned up on the hearing.

[19] TCB relies in its statutory demand and in its evidence in support upon an equitable restitutionary claim against the company. Such a claim cannot, in my judgment, support a statutory demand. Section 155 of the Act makes it clear that a statutory demand must be in respect of a debt immediately due and payable by the company. I am not going to attempt an exhaustive definition of debt, but in its commercial sense the expression denotes an obligation arising under a contract to pay a specific sum of money to another. It is true that debts can arise in other ways, but in essence they are the result of contractually assumed obligations. TCB's claim does not satisfy that test.

[20] Section 10(1) of the Act, defining the word 'liability' in my view supports this analysis by drawing a clear distinction between debts and other forms of claimable liability – including, in express terms, a liability arising out of an obligation to make restitution. The fact that in order to support a statutory demand the debt must be immediately due and payable (otherwise the debtor will be under no liability to comply with it) further demonstrates that a liability such as the one claimed here by TCB will not support a statutory demand.

[21] The statutory demand provisions are commercial in origin, background and purpose. A simple commercial test to establish whether a claim is or is not a claim in debt is, in my judgment, to ask whether a properly managed company would include it in its balance sheet under debtors or creditors. No company in the position of TCB could possibly enter its claim (assuming it was sustainable) in debtors. To do so would be wholly misleading. At most, it would form the subject of a Note in its accounts. Similarly, the company would not include the claim in creditors, at most noting it in its financial statements.

[22] In my judgment, therefore, TCB neither has nor asserts a claim in debt against the company. The statutory demand is bad accordingly and the company cannot be said to have failed to comply with its requirements, since those requirements were unwarranted.

Section 8(1)(a) of the Act therefore does not apply. There is no evidence of insolvency. In my judgment those are sufficient grounds for dismissing the originating application.

[23] However, the hearing before me also considered the underlying validity of TCB's claim and whether (assuming it could be classified as a claim in debt) it was sufficient to support the originating application. I understood Ms Troy to want my decision on that aspect of the case also in case my decision is appealed. The following are my conclusions.

[24] I have already set out the terms of the statutory demand. I must now set out the evidence in support. Before doing so, I should mention that on the second day of the hearing Ms Troy applied for permission to put in further evidence. When I asked her the nature of the new material, she told me that it went to Mr Ungar's credit. Since I did not consider that I was going to be assisted by Mr Ungar's evidence, evidence as to his credit seemed to me to be irrelevant, so I refused Ms Troy's application.

[25] Mr Cleaver's affidavit states that TCB was a bank registered in and operating out of the Cayman Islands. It was wound up on 29 August 2002. TCB was part of a group of companies described as 'the Velox Group', which Mr Cleaver says comprised substantial banking and consumer retail operations in the southern cone of Latin America. Mr Cleaver says that the company was set up to handle the offshore banking activities of five Velox Group companies. He exhibits to his affidavit what then was the most recent report to creditors of TCB. The report is dated 29 February 2008 and shows that as at that date the liquidators of TCB had recovered some US$6.5 million. Some US$6.3 million odd of this has had to be spent on professional fees and expenses and associated costs, so that as at 29 February 2008 only US$172k remained available, subject to the costs of distribution, for unsecured creditors. Apart from these depressing figures, the report refers, at paragraphs 7.3.1 and 7.3.2 to payments by TCB to other accounts for which the liquidators can find no commercial justification. The company is not identified as one of the transferees. The report refers to a BVI registered company called Whiterock which is not said to have any connection with the respondent company. Finally, the report refers to a mention made in a previous report to creditors of 'two sets of accounts'. There is no indication as to which

company or companies maintained these two sets of accounts or whether they have any bearing on the relationship between TCB and the company.

[26] Mr Cleaver goes on to say that in the course of TCB's liquidation he came into possession of TCB's computer banking records. He does not say when. He says that these records *'indicated that a Uruguayan company identified as 'Tarbet Trading SA' was a debtor of TCB in the sum of US$5,650,030.10'.* Mr Cleaver refers in the rest of his affidavit to the Uruguayan company Tarbet Trading SA as 'Tarbet', but I shall refer to it by its full name of Tarbet Trading SA. Mr Cleaver says that Uruguayan attorneys ('H&H') were engaged to pursue the debt. H&H discovered that the director of Tarbet Trading SA was one Alvaro Lecueder ('Mr Lecueder'). They contacted Mr Lecueder with a view, as Mr Cleaver says, *'to procuring payment of the debt owed by [Tarbet Trading SA] to TCB.'* At this stage, therefore, the liquidators appear to have been treating the relationship between TCB and Tarbet Trading SA as one of debtor and creditor.

[27] Mr Cleaver says that he obtained a copy of the balance sheets of Tarbet Trading SA for February 2001 and December 2000. He exhibits documents in Spanish, one of which, the purported balance sheet of Tarbet Trading SA to 28 February 2001 is also exhibited in translation. The Spanish version of this document bears a stamp: 'Alvaro Lecueder Contador Publico CIP No 41954'. I set out in full the English translation of the portion of the document containing the 28 February 2001 figures, omitting the comparative figures for 2000, which also appear on its face:

TARBET SA

Balance Sheet to 28 February 2001

	2001	
	US$	US$
ASSETS		
Investments		4,300,000
External Debtors	1,326,674	
Interest receivable	159,378	1,486,052

Total Assets		5,786,052
LIABILITIES		
Trade and Commerce Bank	5,379,167	
Interest payable	304,429	
External Creditors	78,854	5,762,450
Issued Share Capital		100,000
RESULTS		
Financial results previous year	13,476	
Financial results	-89,874	-76,398
Total Liabilities and shareholding		5,786,052

Trading account

	2001	
	US$	US$
Fees		-615
Interest lost	-248,637	
Interest gained	159,378	-89,259
Net from Trading		-89,874

Tarbet SA

Notes

Securities		4,300,000
Island Point	4,300,000	
External debtors		1,326,674
Island Point	1,326,674	

[28] Mr Cleaver relies in his affidavit on this document as evidencing that TCB is a creditor of Tarbet Trading SA in the sum of US$5,683,596, being the sum of US$5,379,167 shown as due to TCB together with 'interest thereon' of US$304,429. Mr Cleaver goes on to say

that the company is identified in the document as a debtor of Tarbet Trading SA in the sum of US$5,626,674. He reaches this conclusion by adding together the figures for investments (US$4.3 million) and external debtors (US$1,326,674) in the assets section of the document and by reference to the 'Notes' at the foot of the page, which mention an entity described as 'Island Point'. Mr Cleaver ignores the fact that while Mr Lecueder proffers this document as a balance sheet of Tarbet Trading SA, that is not the name of the entity under which it is headed. He also ignores that the company named in the statutory demand is called Tarbet SA, whereas his evidence refers throughout to a differently named company, Tarbet Trading SA.

[29] Mr Lecueder provided TCB's Liquidators with an affidavit in Spanish, a translation of which is exhibited. Mr Cleaver relies upon this affidavit as part of his evidence. In that affidavit, Mr Lecueder says that he acquired Tarbet Trading SA as a shelf company in the 1990's; that its shares were bearer shares; that at some unspecified date he was asked by 'Grupo Peirano', to which he says TCB belonged, for a company; that he sold Tarbet Trading SA to it, for which he says he continued to provide accounting and administrative services. He says he was asked by the Liquidators and H&H, following their examination of the records referred to above, to 'confirm the existence' of a debt of Tarbet Trading SA with TCB.

[30] Mr Lecueder goes on to say that after examining 'the accounting' of Tarbet Trading SA (presumably a reference to the balance sheets referred to above, but perhaps also to other documents unspecified), he confirmed that 'the debt owed TCB was effectively in excess of US$5,000,000'. Mr Lecueder is asserting a debtor/creditor relationship.

[31] I should set out the next passage in the translation of Mr Leuceder's affidavit verbatim:

> *'In like manner, I explained to H&H and the Liquidators that identified in the balances of Tarbet Trading SA as 'Island Point', apparently the only asset of Tarbet Trading SA, was in fact another company called Island Point Properties SA, incorporated in the British Virgin Islands, with shares to bearer, 100% owned by Tarbet Trading SA and just like it, belonging to Grupo Peirano. Further, I confirmed that it came out that Island Point Properties SA was also a debtor of*

Tarbet Trading SA for over USD 1,300,000. Immediately, H&H and the Liquidators asked me for an explanation for the reason for which the shares of Island Point Properties SA were valued according to the accounting of Tarbet Trading SA at USD 4,300,000. In consequence, I explained that according to my knowledge, Island Point Properties SA, was owner of land in the city of Taubate, State of San Pablo, Brazil. Consequently, and within which has always been an attitude of total cooperation with the authorities, including the Liquidators of TCB, I provided H&H and the Liquidators with a copy of the documentation referred to above . . .'

[32] It appears from this that Mr Lecueder was the source of the balance sheets on which Mr Cleaver relies.

[33] Mr Cleaver goes on in paragraph 10 of his affidavit to say that on the strength of the information which I have in part summarized and in part set out verbatim, it appears that the company was nothing more than a conveniently anonymous corporate vehicle to hold property purchased with monies gratuitously transferred in the form of a purported 'loan' from TCB to Tarbet Trading SA. Mr Cleaver says that it is almost certain that the company is controlled by the former controllers of TCB or their affiliates, Mr Cleaver says, further, that he has received advice that Tarbet Trading SA is obliged to make restitution to TCB of funds gratuitously, and wrongfully (as he asserts), transferred to it by TCB. He adds that (I quote) *'if and insofar as those funds have in turn been transferred to [the company], [Tarbet Trading SA's] wholly owned subsidiary which seems to be the case, I am advised and believe that the [company] has the same restitutionary obligation to TCB.'*

[34] TCB's case starts out, therefore, with a clear allegation of a debt due by Tarbet SA, or Tarbet Trading SA to TCB. That is reinforced by the evidence that H&H were instructed by the Liquidators of TCB to collect this debt and further reinforced by the evidence of Mr Lecueder and by the documents exhibited to his affidavit. That affidavit and that balance sheet also evidence that an entity called Island Point (which may or may not be identical with the Respondent Island Point Properties SA) owes Tarbet SA or Tarbet Trading SA

over US$1.3 million and that the same entity may hold property worth some US$4.3 million on behalf of Tarbet SA or Tarbet Trading SA. This is inconsistent with Mr Cleaver's contention, summarized in paragraph 28 above, that the company is a debtor of Tarbet Trading SA in the sum of US$5,626,674.

[35] Thus far, Mr Cleaver's evidence that TCB is a creditor of either Tarbet SA or Tarbet Trading SA, supported by the evidence of Mr Lecueder, directly contradicts any suggestion that TCB is a creditor of the company. In paragraph 10 of his affidavit, however, Mr Cleaver, goes on to say, without any supporting evidence, that the 'purported loan' by TCB to Tarbet Trading SA was not a loan (which is where Mr Cleaver started from) but a gratuitous and wrongful transfer for which Tarbet Trading SA is liable to make restitution to TCB and that 'if and insofar' as those funds have been transferred to the company, the company is subject to a similar liability.

[36] Mr Cleaver's case is thus inherently self-contradictory and suffers from the vice of being inconsistent with the evidence of his witness, Mr Lecueder. When I asked Ms Troy how the debt asserted by Mr Cleaver in the earlier part of his evidence had changed into a liability to repay money gratuitously and wrongfully transferred, she referred me to passages in the report to creditor which I have mentioned above which state that the Liquidators believe that many supposed loans within the Velox Group turned out to have no commercial substance. That seems to me to be pure speculation – as the use of the words 'if and insofar' make plain. In my judgment this is a hopelessly inadequate basis for fixing Tarbet Trading SA with liability under a restitutionary claim and an even more hopeless one for fixing the company with a parallel liability. When I add that TCB later adduced evidence to show that the land which it appears that the company holds in Brazil was not purchased with money filched from TCB, but transferred to it by a third party in satisfaction of a debt due to a Velox Group company, the attempt to fix the company with any sort of liability effectively implodes.

[37] In my judgment, neither the statutory demand nor the evidence in support discloses any viable cause of action, whether in debt or otherwise, available to TCB against the

company. In saying that I am not to be taken to mean that a properly formulated claim based on different evidence might not be made. I am saying no more than that I do not consider that the material before me makes out a case.

[38] For the above reasons, this application is dismissed.

Edward Bannister
Commercial Court Judge
8 May 2009