The Eastern Caribbean Supreme Court
In the High Court of Justice
Virgin Islands
Commercial Division

BVI HC (Com) Claim No. 2013/0003

In the matter of

The Insolvency Act 2003

And in the matter of

Deanhill Overseas Limited

Applicants:

Ogier Corporate Services (UK) Limited
(as Trustee of the Montenegro Development Unit Trust)

Respondents:

Deanhill Overseas Limited

Appearances: Ms Claire Goldstein for the Applicant
The Respondent company did not appear

JUDGMENT

2013 – 16, February; 18, 27 March

(Application by creditor for appointment of liquidators – sole allegation of insolvency non-compliance with statutory demand – applicant one only of two joint creditors – demand made by or on behalf of applicant alone – whether to be treated as a statutory demand – section 155 of the Insolvency Act, 2003 considered – **Mahmood v Penrose**[1] considered)

[1] This is an application for the appointment of Liquidators to a company called Deanhill Overseas Limited ('the company'). The Applicant is a company called Ogier Corporate Services (UK) Limited (as Trustee of the Montenegro Development Unit Trust) ('Ogier Trustee', 'the Trust'). The grounds upon which Ogier Trustee seeks the appointment as stated in the evidence in support of the application are, in short, that Ogier Trustee lent

[1] [2001] EWHC 1500

the company GBP199,562 on 5 February 2010 under a facility letter dated 19 January 2009 ('the facility letter'); that on 31 March 2011 Ogier Trustee requested certain information of the company; that that information was not supplied; that that omission amounted to a breach of the facility letter, entitling Ogier Trustee to call the loan; that the loan was duly called by Ogier Trustee by letter dated 29 February 2012; that on 27 March 2012 Ogier Trustee served a statutory demand which has neither been complied with nor set aside; and that by reason of that failure the company is to be presumed insolvent and unable to pay its debts as they fall due.

[2] The application is supported by an affidavit of Neil Townson ('Mr Townson'). He says that he is authorised by Ogier Trustee to make the affidavit. He says that the debt arises from the facility letter, which he describes as having been entered into between Ogier Trustee and the company. From the copy of the facility letter exhibited to Mr Townson's affidavit it appears that that assertion is not entirely accurate. In fact, the facility letter was made between Ogier Trustee and Ogier Corporate Administration Limited (in its capacity as manager of the Trust) ('Ogier Manager'), together defined as 'the Lender', on the one hand, and the company as Borrower on the other. The facility letter is executed severally by each of Ogier Trustee and Ogier Manager. It is apparent that the signatures are those of two different individuals, signing respectively for Ogier Trustee and Ogier Manager.

[3] Mr Townson exhibits the drawdown request for GBP199,582. It is dated 29 February 2010 and was addressed by the company to Ogier Trustee and Ogier Manager. The request was answered by Ogier Manager (alone), seeking certain confirmations which are not material to this judgment. Mr Townson goes on to explain that the drawdown request was satisfied by payment by Ogier Trustee to the company of GBP142,927.17 and the write off by the Applicant of a debt of GBP56,634.83. What appears to be a pass sheet relating to an account held by an unnamed customer at an unidentified bank is exhibited showing a debit in the sum of GBP144,927.77 on 5 February 2010. The narrative describes the transaction as 'Deanhill drawdown.' Mr Townson exhibits the letter of 31 March 2011 requesting information from the company. (to which I have referred above). Although Mr Townson describes it as having been written by Ogier Trustee, it was in fact written by the BVI law firm of Ogier ('Ogier BVI'), who described themselves as writing on behalf of both Ogier Trustee and Ogier Manager. The same applies to Ogier BVI's letter of 29 February 2012 calling in the loan.

[4] Mr Townson exhibits a copy of the demand relied upon. The demand is made by Ogier Trustee alone. Ogier Trustee is described as 'the Creditor'. No mention is made in the demand of Ogier Manager. The demand is signed by Ogier BVI as legal practitioners authorized by Ogier Trustee to do so.

[5] No evidence of insolvency is relied upon by Ogier Trustee other than non compliance with the demand.

[6] The application came on originally on 16 February 2013. It was (and remains) unopposed. At the hearing I queried whether non-compliance with a demand made by one only of two co-lenders was sufficient to establish that the borrower was insolvent. Since Ms Goldstein, who has appeared for Ogier Trustee on the application, had had no notice of the point, I adjourned the matter to enable her to consider it. At the adjourned hearing I had the benefit of careful submissions from Ms Goldstein.

[7] Ms Goldstein referred me to **Mahmood v Penrose**,[2] a decision of Mann J in the English High Court. The statutory demand in that case was based upon an order for costs made against the debtors in favour of the three defendants to proceedings which had been brought by the debtors against them in the County Court. The creditor serving the statutory demand was one only of the three defendants. The costs judge had issued a single certificate dealing with the costs of all three defendants compendiously, without setting out any amount to which each defendant was supposed to be severally entitled. The debtors' primary contention was that each of the three defendants should have been issued with a separate costs certificate setting out the precise sum owed to that defendant. They submitted that the single creditor could not rely upon a global certificate ordering the debtors to pay costs to all three defendants.

[8] The Court's answer to this was that all three defendants had been in the same interest and had been jointly represented. It had therefore been appropriate to issue a single costs certificate and would have been inappropriate to split the costs three ways without there being some reason for adopting that course, let alone to issue a separate certificate to each of the judgment creditors in the full sum. The creditor was thus one of three joint creditors and, as such, entitled to sue separately for the whole amount. Mann J observed, in passing, that payment to one of the three costs creditors would *pro tanto* discharge the debtors' liability to the others. He referred to the rules of court enabling debtors to apply for the joinder of joint creditors in cases where not all had sued, but held that those rules had nothing to do with statutory demands, which are not concerned, as he observed, with the enforcement of liabilities, but with establishing a presumption of insolvency.

[9] The debtors sought permission to appeal. The application was heard *ex parte* by Neuberger LJ, as he then was. In refusing permission, Neuberger LJ agreed that on the facts of the case it had been appropriate to issue a single costs certificate and said that the debtors were being realistic in not arguing that

[2] [2004] EWHC 1500

'if the cost certificate is valid, [the creditor] cannot rely on the certificate for the purpose of the statutory demand.'

In other words, if the single creditor was entitled to rely upon the certificate as showing that he was a creditor, then a statutory demand issued by himself alone was unimpeachable.

[10] As matter of English and BVI law, payment to one of a number of joint obligees operates as payment to them all. The rule is based upon a presumption that the recipient of the payment has the authority of his co-obligees to receive it: **Wallace v Kelsall**.[3] The argument in the case shows that the rule had its origin in the law of partnership, where a partner has the apparent authority to bind his co-partners, but there is no doubt that it extends beyond cases of strict partnership and is applied even where (as in that case) the single obligee received the settlement money in fraud of his co-lenders. The reasoning is unsatisfactory, but the principle is entrenched in English and BVI law.

[11] The question on this application, however, is not whether payment to Ogier Trustee alone would operate to discharge the loan, but whether Ogier Trustee alone could serve a good statutory demand for the outstanding debt. That question is not touched upon in **Mahmood v Penrose**. That case was concerned with the question whether the debtors were liable to the single creditor for the whole of the debt. The remark of Neuberger LJ which I have quoted above was an aside and is certainly not authority upon the point with which I am concerned.

[12] Section 155 of the Insolvency Act, 2003, which deals with statutory demands ('section 155', 'the Act'), is in the following terms:

> 'Statutory demand.
> (1)A creditor may make demand on a person for payment of a debt owed by that person to him.
> (2) A demand under subsection (1) shall
> (a) be in respect of a debt that is due and payable at the time of demand and that is not less than the prescribed minimum;
> (b) be in writing and shall specify the nature of the debt and its amount;
> (c) be dated and shall be signed by the creditor or by a person authorized to make demand on the creditor's behalf;
> (d) require the person to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the demand on him;
> (e) state that if the demand is not complied with, application may be made to the Court for the appointment of a liquidator or a bankruptcy trustee, as the case may be;

[3] (1840) 7 M&W 264 at 272

(f) set out the rights of the person to make application to set the demand aside under section 156; and

(g) comply with and be served in accordance with the Rules.

(3) If the creditor making demand under subsection (1) is a secured creditor in respect of the debt, the full amount of the debt shall be specified in the demand, but

(a) the demand shall specify the nature of the security interest, and the value which the creditor places on it at the date of demand ; and

(b) the amount claimed

(i) shall be the full amount of the debt less the amount specified as the value of the security interest; and

(ii) shall equal or exceed the prescribed minimum.

Please set out section 155

[13] The demand in the present case was not, in my judgment, made by 'the creditor' within the meaning of section 155. The creditor comprises Ogier Trustee and Ogier Manager, acting in different capacities, although it would, in my judgment, make no difference if they were acting in precisely the same capacity. Although section 155 permits the demand to be signed either by the creditor or by a person authorized to make the demand on the creditor's behalf, it still requires the demand to be made by the creditor. Even if the true construction of section 155(c) is that Ogier BVI could have made a demand as agent for the creditor (rather than merely signing the demand upon the creditor's behalf), Ogier BVI did not purport to be acting for the creditor. It held itself out as authorized by Ogier Trustee alone and it has to be assumed (for want of any evidence to the contrary), that it had no authority from Ogier Manager in the matter.

[14] On the latter point it is, I think, significant that at the adjourned hearing I was handed a letter dated 13 March 2012 signed by Mr Townson on behalf of Ogier Manager. The letter is expressed to confirm that Ogier Manager supports Ogier Trustee's application to appoint liquidators. What the letter conspicuously omits is any statement that the statutory demand was made with Ogier Manager's knowledge and approval, nor does it purport to ratify the making of the demand by Ogier Trustee. Since the parties involved are sophisticated trust managers, advised by experienced lawyers, I can only infer from those omissions that it has not been possible to make the appropriate assertion and that the view has been taken that ratification now would not affect the position. Given the reasons for my decision, I do not think that Ogier Trustee's case would have been improved had the letter done either of those things, but it does mean that I can proceed without having to take account of questions of authorization or ratification.

[15] In my judgment a demand made by, or on behalf of, one only of two or more joint creditors does not come within section 155, for the simple reason that it is not made by

'the creditor,' as the section requires that it should be. Section 155(c) makes that clear. 'The creditor' in the present case is Ogier Trustee together with Ogier Manager. Ogier Trustee is *a* creditor, but it is not, as a matter of ordinary language, *the* creditor. The significance of this can be seen in the fact that by confining the creditor to Ogier Trustee parts of the narrative contained in the demand are simply wrong.[4]

[16] In my view the question in the present case is not whether there is a defect in the demand and, if so, whether that defect is such as to cause substantial injustice, so as to engage the Court's discretion whether or not to set it aside.[5] In my judgment Ogier BVI's letter of 27 March 2012 is not a statutory demand at all, because it was not made by or on behalf of the creditor, as required by section 155. That means that the demand does not come within the section. It makes no difference that Ogier Trustee might have had separate standing to sue for the debt, or that payment of the debt to Ogier Trustee alone would have amounted to payment to Ogier Manager as well.

[17] The fact that in the present case the debtor company appears to be indifferent to the whole process is irrelevant. Before I can appoint liquidators to the company I must be satisfied that it is insolvent. The only evidence offered, in the present case, is a document which does not entitle me to presume that that is so and I am not prepared to infer insolvency from the fact that the company has chosen to ignore Ogier BVI's letter of 27 March 2012. It follows that I have no jurisdiction to make the appointment sought.

[17] For these reasons, this application is dismissed.

Commercial Court Judge
27 March 2013

[4] for example, the assertion that Ogier Trustee wrote to the company on 4 February 2010. It did not. The letter was written by Ogier Manager

[5] see subsection 157(2) of the Act