EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
(COMMERCIAL DIVISION)

CLAIM NO. BVIHC (COM) 2020/0025, 2020/0043, 2020/0095 and 2020/0157

IN THE MATTER OF CAPITAL WW INVESTMENT LIMITED
AND IN THE MATTER OF THE INSOLVENCY ACT, 2003

BETWEEN:

TALL TRADE LTD

Applicant

and

CAPITAL WW INVESTMENT LIMITED

Respondent

Appearances:

Mr. Charles Samek QC, with him Mr. Peter Ferrer, Marcia McFarlane and Romane Duncan of Harneys for the Applicant
Mr. Robert Levy QC, with him Mr. Iain Tucker and Mr. Andrew Chissick of Walkers for the Respondent

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2020 October 13, 16
November 2

JUDGMENT

[1] **JACK, J [Ag.]**: On 5th February of this year in action number 2019/0189, I dismissed an application by the current respondent ("Capital") to set aside a statutory demand served on it by the current respondent ("Tall Trade"). A transcript of my oral judgment is annexed to this judgment. It outlines the background facts and some aspects of the law. I shall not repeat what is said in the February judgment, which should be read in conjunction with this judgment.

[2] Following that dismissal, on 17th February 2020 Tall Trade issued an application for the appointment of a liquidator over Capital under action number 2020/0025. That application

came before me on 30th March 2020. Capital served further evidence from Mr. Megrelishvili, who presented a new case disputing the application. Normally when the Court has dismissed an application to set aside a statutory demand, it deals with further attempts by the putative debtor to dispute the debt in a very summary manner. In the current case, however, I considered that Mr. Megrelishvili had just presented a sufficient case for the matter to be dealt with fully. Accordingly, I adjourned Tall Trade's application with directions for a full hearing. Due to the late service of Mr. Megrelishvili's evidence I made a stringent costs order against Capital.

[3] As a result of issues relating to the availability of counsel, the full hearing could only be listed on 13th October 2020 with an agreed one day time estimate. In the event counsel overran the time estimate, but I was able to hear the continuance of the hearing on the Friday of the same week. What Tall Trade overlooked, when the matter was listed for October, was that section 168 of the **Insolvency Act 2003**[1] provides that applications for the appointment of a liquidator must be determined within six months or stand to be dismissed automatically. There is provision for the Court to extend the life of such an application for a further three months at a time, but the Court cannot exercise that power retrospectively. As a result, action 2020/0025 was automatically dismissed.

[4] I note that this oversight is not unique. It occurred in **KMG International NV v DP Holding SA**,[2] during the pendency of an appeal to the Court of Appeal. The Commercial Court Users Group may wish to consider whether to propose to the Government a modest amendment to the Act, so as to give the Court a power to extend time retrospectively. As it is, Tall Trade were forced to issue a fresh application for the appointment of a liquidator on 1st October 2020 under action number 2020/0157. Due to the late issuance of the application, it has not been advertised. Tall Trade ask that I dispense with advertisement and abridge time as far as necessary. I shall consider this issue at the end of this judgment.

[5] For completeness I should add that since I adjourned the application to appoint a liquidator, Tall Trade has on 13th March and 16th June served a further two statutory demands on Capital, in respect of further instalments of the loan repayments. Capital in turn has issued further

[1] No 5 of 2003, Revised Laws of the Virgin Islands.
[2] BVIHCMAP2017/0013 (delivered 16th April 2018).

applications (under action numbers 2020/0043 and 2020/0095) to set those statutory demands aside. These two matters are before me. Capital says that issuing further statutory demands in this way just wracks up costs and is an abuse of process. Again I shall consider this issue at the end of this judgment.

[6] Further on 1st September 2020 Tall Trade issued a fourth statutory demand for the latest instalment, requiring Capital again to issue an application to set the demand aside. This matter was listed for 28th October 2020, but the parties have by consent agreed to stay this application pending determination of the current proceedings.

Capital's case on the merits

[7] Capital's case on the merits is this. They do not seek to revisit the points argued in February, which were the subject of my oral judgment. Instead, Mr. Levy QC, who appeared for Capital, says this in his skeleton:

> "56. As a result of new evidence that has come to light since 5 February 2020, the true picture, previously obscured, has now become far clearer. It is now clear, at least to the test of 'strong *prima facie* case', that Capital has been the victim of extraordinary manoeuvres by Mr. Isaev, and the people behind/in control of Befree, Messrs. Montik, Yaikau and Kashuba, (the 'Befree Conspirators') which have been designed to, and in fact have, caused serious damage to Capital, Mr. Megrelishvili, and his business partners. It is clear that from a very early stage, Mr. Isaev wanted to take a direct interest in Befree, and that the controllers of Befree, who have been in contact with Mr. Isaev, have illegitimately connived to advance his interests (and theirs), to prevent Befree paying dividends, with the intention that Capital would be forced into liquidation so that TT and the Befree Conspirators could take larger stakes in Befree/the Softswiss Group.
>
> 57. As part of these machinations, Capital has been (repeatedly) lied to and been deprived of its contractual rights viz-à-viz Befree (such as its rights to appoint three members to its board of five, to obtain financial information etc.). Befree has set up a number of aunt Sallies to ensure that its own controlling shareholder does not enjoy the rights that a controlling shareholder should enjoy.
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> 58. Furthermore, whilst Befree has lied to Capital about when and how it knew that the set-aside application had failed, it is clear that Mr. Isaev, together with the Befree Conspirators, are anxious that Capital should be wound up as soon as possible, not for the benefit of any class of supposed creditors, but rather so that the four of them (through their corporate vehicles or otherwise), can get their hands on Capital's very valuable interest in Befree and divvy it up between themselves. They have even had contracts drafted for this very purpose...

> 59. Perhaps counter-intuitively — because it involves the appointment of an independent Court-supervised officeholder — forcing Capital into liquidation benefits [Tall Trade] and the Befree Conspirators in achieving this aim. At present, [Tall Trade] and the Befree Conspirators are structurally sub-ordinated to Mr. Megrelishvili at the Befree level. Capital has a majority interest in Befree, and Mr. Megrelishvili has a majority interest in Capital. That affords him — at least if his rights were actually being respected — a controlling interest in Befree. If Capital is collapsed upon liquidation, and its Befree shares distributed by liquidators to shareholders after payment of creditors, [Tall Trade] and the Befree Conspirators together suddenly have a majority interest between them in Befree. Capital no longer exists and so its rights (and through it, Mr. Megrelishvili's rights) as against Befree and the Befree Conspirators under the Befree Shareholders' agreement evaporate. [Tall Trade] and the Befree Conspirators can therefore freeze Mr. Megrelishvili out of the decision-making process and control Befree as they wish.
>
> 60. Not only does [Tall Trade] not want Capital wound up for the benefit of creditors generally, but it is absolutely clear that the last thing [Tall Trade] wants is actually to be repaid. Thus, in October 2019, before Capital was aware of the conspiracy to prevent repayment, its corporate director wrote to [Tall Trade's] representative saying that the first tranche allegedly due under the loan would be repaid by RM from his private funds. [Tall Trade's] response was to reject that!"

[8] Capital says, therefore, (a) that there was a conspiracy against it; and (b) that the application to appoint a liquidator was made for an improper purpose. In addition, Capital take a point (c) founded on **Alghussein Establishment v Eton College**,[3] which I shall discuss separately.

[9] Counsel were agreed that the standard which Capital had to meet in order to defeat the application on all three points was the well-known **Sparkasse Bregenz** test,[4] which I set out at length in my oral judgment and shall not repeat here. That is certainly the correct test for considering whether a debt is disputed on substantial grounds or whether a debtor has a potential cross-claim. However, I am doubtful whether it is the correct test when assessing whether an application for the appointment of a liquidator is brought for an improper purpose. When a debt is disputed on substantial grounds, it is always open to the putative creditor to bring ordinary court proceedings to establish the debt. No such alternative proceedings are available if a defence of improper purpose is made. The standard of proof would normally be whether the allegation was true on the balance of probabilities. Otherwise the Court could hold on balance of probabilities that the application was not brought for an improper purpose, but

[3] [1988] 1 WLR 587.

[4] Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp, Civil Appeal No 10 of 2002 (determined 18th June 2003, unreported) at para [3].

nonetheless would have to dismiss the application, because the respondent company had shown substantial grounds for thinking that there might be an improper purpose, even though these grounds were less than 50 per cent probable. (See also the cases to which I refer below, which suggest "the very strongest proof" of an improper purpose is required.) In the event, I do not have to resolve this issue and will apply the **Sparkasse Bregenz** test, which is more favourable to Capital.

The Telegram text messages: admissibility

[10] Points (a) and (b) are linked. Both rely on evidence of Telegram text messages between Mr. Ivan Montik, who owns 20 per cent of the shares in Befree through his company Bitcapital Ltd, and Mr. Paul Kashuba (also known as "Pasha"), Softswiss's chief financial officer.

[11] Tall Trade sought to have the evidence excluded under section 125 of the **Evidence Act 2006**.[5] This applies to both civil and criminal cases and provides:

> "(1) Evidence that was obtained
> (a) improperly or in contravention of a law, or
> (b) in consequence of an impropriety,
> shall not be admitted unless the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained."

Subsection (2) deals with confessions and is irrelevant.

> "(3) For the purposes of subsection (1), the court shall take into account, among other things, the following matters:
> (a) the probative value of the evidence;
> (b) the importance of the evidence in the proceeding;
> (c) the nature of the relevant offence, cause of action or defence and the nature of the subject-matter of the proceeding;
> (d) the gravity of the impropriety or contravention;
> (e) whether the impropriety or contravention was deliberate or reckless;
> (f) whether any other proceeding, whether or not in a court, has been or is likely to be taken in relation to the impropriety or contravention;
> (g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law."

[5] No 15 of 2006, Laws of the Virgin Islands.

[12] The evidence of Mr. Megrelishvili in his second affidavit is that he negotiated with a "specialist telecommunications company" incorporated in the People's Republic of Donetsk, which uses the brand "Phoenix", to enter a joint venture. Capital was to inject $500,000 into the joint venture, but due to the non-receipt of dividends from Befree, the venture could not proceed. At a meeting in November 2019, Phoenix offered:

> "to use their expertise and specialist resources to assist Capital WW in gathering information about the alleged conspirators and the Conspiracy… [Phoenix] specialists have specialist knowledge in the development and operation of information systems designed for mass distribution of messages such as SMS and messages in messengers and that information in such messengers is poorly protected… [A]ccess to information from messengers is very often easily obtained by using access passwords to messengers, which are often disclosed because of leakage of user date from well-know IT services… [Phoenix] assured Capital WW that it was able to lawfully carry out the task… On 28th February 2020 [a] representative of Capital WW was provided with the newly acquired evidence by way of access to a remote desktop on a virtual machine which contained a running Telegram messenger with access to Mr. Kashuba's account."

[13] I infer from that, and find as a fact, that Phoenix hacked into Mr. Kashuba's computer or server and gave Capital access to all his Telegram messages. Mr. Megrelishvili admits that they had been given access to these personal messages. I find as a fact that he must have been aware of how access had been gained.

[14] There is no evidence where Mr. Kashuba's computer or server was when the hacking took place. It is therefore not possible to say whether it was a criminal offence to hack his computer or server where they were situated. Nor is there any evidence of the relevant law of the People's Republic of Donetsk from which the hacking operation was presumably carried out. This republic is a breakaway part of the Ukraine. It is only recognised as a state for the purposes of international public law by two states, both Russian associated states. In many cases it is possible to apply the fiction that foreign law is the same as BVI law. It is, however, not an invariable rule.[6] Here it would be wholly unrealistic to apply this presumption and assess the criminality of Phoenix's and Capital's behaviour by reference to our **Computer Misuse and Cybercrime Act 2014**.[7] In my judgment it has not been established that the obtaining of this evidence was obtained "in contravention of a law" under section 125(1)(a).

[6] Dicey, Morris and Collins on the Conflict of Laws (15th Ed, 2018) at paras 9-26 to 9-30.
[7] No 9 of 2014, Laws of the Virgin Islands.

[15] That, however, is not the end of the matter. In my judgment hacking a computer or a server is "improper" within the other limb of section 125(1)(a) and "an impropriety" under section 125(1)(b). Anyone using their own computer and storing confidential matter on a hard drive or a server has a reasonable expectation of privacy. I therefore have to carry out the balancing exercise required by section 125(1) and (3). In order to do this, I have, however, first to assess the "probative value" and "importance of the evidence" under section 125(3)(a) and (b). Having done so, I then need to weigh my conclusion against the other factors listed in section 125(3) and then reach a final value judgment under section 125(1).

[16] Accordingly, I will need to consider the messages themselves. There is no dispute that the messages are genuine. The question is whether they show the conspiracy alleged or at least sufficient a case to meet the **Sparkasse Bregenz** test.

Evidence adduced against Mr. Megrelishvili

[17] Before examining the messages, however, I should say a little more about Mr. Megrelishvili. It will be recalled that in my oral judgment at page 31, I rejected Mr. Megrelishvili's affidavit evidence that there had been an agreement to waive the first €2 million quarterly payment. I held that the documentary evidence put in evidence by Tall Trade was "wholly inconsistent with Mr. Megrelishvili's case." No appeal has been brought against that finding. It necessarily follows that I did not find Mr. Megrelishvili a witness of truth.

[18] Of course, the fact that a witness lies on one occasion does not mean that all his evidence is bound to be untruthful: **R v Lucas**.[8] However, on 29th October 2019, Mr. Megrelishvili made a declaration purportedly as sole director of Capital authorising a Quebec law firm, Levy Salis LLP, to send a letter to Befree also dated 29th October 2019. This letter stated:

> "The current shareholder structure of Befree and of Capital is as follows:
> - Capital holds 60% of the issued and outstanding shares of Befree; and
> - The sole registered shareholder of Capital is Revaz Megrelishvili (hereinafter 'Revaz'). Revaz is also the sole director of Capital.
>
> As the majority shareholder of Befree, Capital claims the following:
> - When Befree declares a dividend which is payable to Capital, Capital has the power to authorize and direct Befree to distribute such dividend to persons other than Capital, whether they be individuals, companies or other persons or entities."

[8] [1981] QB 720.

[19] It was not true that Mr. Megrelishvili was the sole shareholder of Capital. Tall Trade held a third of the shares. Nor was it true that he was the sole director. There was also a corporate director, WTS Directors Ltd. Mr. Megrelishvili was in my judgment making deliberate misrepresentations when he caused Levy Salis LLP to write the letter from which I have quoted. The purpose of having a letter sent in those terms was, I infer, to allow payments to be made directly or indirectly to Mr. Megrelishvili.

[20] The company administrator, Elena of Rivera, sent a long email reply on 4th November 2019. This pointed out (correctly) that under clause 46.2 of the Befree shareholders' agreement, the first payment of dividends was only due by 30th April 2020 (although the shareholders could bring the payments forward). As to payment of dividends to a third party, Rivera noted presciently:

> "Any payment of the dividends payable to any party according to its share title in favour of the other party is a violation of the rights not only of a formal shareholder, but also shareholders and creditors of such formal shareholder. Such non-typical schemes are not accepted by the corporate directors (providers), because they do not want to bear risk of passible claim[s] from the shareholder/option holder/private creditor/financial creditor of Befree against Befree, connected with the fact that the money from the investments (investment return of Capital), which should have been spent on paying off the obligations of the Capital, was instead transferred to some third party whose relationship with the Capital was not disclosed to us."

Elena then referred to problems of obtaining KYC documentation for the third party recipient and the need to consider the tax implications of payment to the third party.

[21] In my judgment, Mr. Megrelishvili was attempting to abstract monies from Befree without having to account to Tall Trade for monies owing under the loan agreement. It is also worth noting that on 30th July 2019 Mr. Megrelishvili stated to Befree's company administrator that he was the beneficial owner of Befree. That of course was completely untrue.

[22] Also significant in my judgment is that Mr. Megrelishvili has, since my February judgment, taken no steps to have Befree pay dividends to Capital. In his second affidavit in the first claim, he said that Befree held €19 million in cash. Under the Befree shareholders' agreement, Capital were entitled to nominate the majority of the board of Befree, which in turn could have authorised dividend payments. Mr. Megrelishvili complains that his nominees have not been

appointed, but he has taken no legal proceedings to enforce the shareholders' agreement and ensure the payment of dividends from the monies said to be standing to Befree's credit. The shareholders' agreement in clause 67 provides for arbitration under the auspices of the Vienna International Arbitral Centre. No arbitration has been commenced.

[23] Mr. Levy QC says that the Court should not look at Mr. Megrelishvili's reasons for not taking proceedings in respect of Befree. He relied on Kawaley J's judgment in **Re Sky Solar Holdings Ltd**,[9] a decision of the Grand Court in Cayman:

> "More general judicial support for the proposition that this Court should be slow to second guess litigants' tactical machinations may be found in the recent local case of **Marsh Management Services (Cayman) LLC-v-Nathaniel Clayton Price**.[10] In that case, McMillan J (albeit in the context of rejecting an application for indemnity costs) opined as follows:
>
> > '32…Tactical and strategic decisions have to be made by parties in the course of legal proceedings. These are decisions for the parties themselves and in normal circumstances the Court's approval or disapproval of those decisions is quite frankly neither here nor there.'"

[24] No doubt, as a general rule, that is correct. However, in the current case Mr. Megrelishvili appears to have a straightforward remedy against Mr. Yaikau and Mr. Montik to ensure the payment of dividends. I am entitled to take that into account in considering whether there is any genuine dispute.

[25] Mr. Megrelishvili says that Capital had difficulty opening a bank account. However, it did have an account. We know this, because on 7th June 2019 Tall Trade transferred €17 million from its account at Julius Bär to Capital's account at Bordier et Cie. The IBAN ending in 7940 appears on the transfer documentation.[11] This was followed on 2nd July 2019 by two transfers of €10.5 million each from Capital to Bitcapital Ltd (Mr. Montiq's company) and to Primefuture Ltd (Mr. Yaikau's company). Mr. Levy QC sought to give evidence himself that it was difficult for gaming companies to have bank accounts. However, there is no evidence that Capital was having difficulties with Bordier et Cie in keeping its bank account open. Given that such evidence, if it existed, would have been easily available to Mr. Megrelishvili, I am entitled to and do conclude that Capital did have a bank account.

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[9] FSD Cause No 190 of 2020 (IKJ) (determined 14th October 2020, unreported) at para [14].
[10] General No. 64 of 2020 (RMJ) (determined 22nd September 2020, unreported).
[11] Bundle 3/31/979 (internal 288).

[26] There is evidence that in February 2020 Befree's company administrator wanted more KYC information from Tall Trade, but by that time relations between Tall Trade and Capital had completely broken down, so the failure to cooperate on Tall Trade's part is hardly surprising. It was not argued that there was a contractual entitlement on Capital's part to receive KYC information from Tall Trade, so any failure by Tall Trade in my judgment would be immaterial.

Assessing the Telegram messages

[27] The fact that Mr. Megrelishvili is an unsatisfactory witness on whose testimony it would be unsafe to rely, does not mean that there was no conspiracy against him. I need to consider the Telegram messages on their own, without any presumptions against Mr. Megrelishvili. I can say at once that when I first read the extracts from the messages selected for Mr. Megrelishvili's first affidavit I was unconvinced that they showed any conspiracy between Mr. Isaev on the one hand and Mr. Montik, Mr. Yaikau and Mr. Kashuba on the other. A conspiracy which did not include Mr. Isaev would not give rise to any possible defence by Capital against Tall Trade's claims. (There is an issue, which I do not need to resolve, as to whether Mr. Isaev or another businessman introduced by Mr. Isaev was the beneficial owner of Tall Trade, but, to be relevant, a conspiracy needs Mr. Isaev to be tied to it.) Mr. Levy QC made beguiling submissions that, reading between the lines, there was definitely something untoward. He pointed out that, if matters were tried in separate civil proceedings, there would be disclosure and cross-examination of witnesses, which might paint a much more detailed picture. He is correct that there would be fuller evidence in such proceedings. However, he first needs to reach the modest hurdle of the **Sparkasse Bregenz** test. This is what I must decide.

[28] The messages are spread out over time. They are, until February 2020, when some are with Mr. Isaev, solely between Mr. Montik and Mr. Kashuba. The originals are in Russian or a dialect of Russian. The translations are often conspicuously poor. The first message relied on (at para 123 of Mr. Megrelishvili's first affidavit) is from 18th August 2019. It says:

> "Roland [Isaev] has prepared such complex plan, that went into action in the last few hours. I am almost sure the guys want to get control over the financial flow, and I assume Roland them that their Kolya is worthless. That is why Rezo [Megrelishvili] made a toast about him being a nice guy, though not yet professional enough and he comes to him for a piece of advice when he needs it. Basically Roland is a stick in their crow, though they don't give up and continue running their own game. The way

> they act shows that in real they do not have resource, and most probably Roland may easily get rid of them."

[29] This is said to be the start of the conspiracy against Mr. Megrelishvili. Yet there are an enormous number of uncertainties about it. What was the "complex plan"? The only events which had happened recently was a discussion in Moscow on 7th and 8th August 2019 concerned with the Direx loan: see page 16 of my oral judgment. Further, Mr. Megrelishvili seems to have had some involvement in it, because it was he who "made a toast". In my judgment it is wholly speculative to say that this message exchange refers to a plan by Mr. Isaev (supported by Mr. Montik and Mr. Kashuba, and presumably Mr. Yaikau) to rid Befree of Mr. Megrelishvili.

[30] The next message is from 11th September 2019. This records Mr. Isaev saying he would not speak to Mr. Barseev (one of Mr. Megrelishvili's associates) until the shares in Capital were issued. There was indeed a problem with the issuance of shares to Tall Trade: see Mr. Isaev's first affidavit paras [45]ff. Nothing in the message refers to any plan to move Mr. Megrelishvili out of Befree. The second half of it refers to a proposed investment in a casino project. Mr. Montik said he was thinking of calling Mr. Megrelishvili to discuss it, but Mr. Kashuba suggested he himself should discuss things with Mr. Isaev before he and Mr. Montik decided how to proceed. Mr. Montik's idea of telephoning Mr. Megrelishvili is in my judgment inconsistent with any conspiracy against him.

[31] Then there is a message from 2nd October 2019. The first part of it seems to be completely unrelated to Befree. It concerns a purchase of shares by a company called Merkeleon. This Austrian company and its associates were controlled by Mr. Yaikau and Mr. Montik, but were outside the Befree Group and outwith the non-compete provisions of the shareholders' agreement: see the Befree shareholders' agreement at clause 39(a)(i). The reference to "the money is already gone" appears to relate to this deal, not to Befree. The relevant part is Mr. Montik saying: "Yesterday, Rezo asked to start dividend distribution. Though, Roland says it should not be done in any case." This was followed on 12th October with Mr. Montik saying: "I told Albert we will not distribute anything till we get back the loan of 2 mln from Roland." This only seems to be an extension of the August discussions about the Direx loan. It does not in my judgment show any agreement nor therefore any conspiracy.

[32] Mr. Megrelishvili then cites a message from 22nd October 2019. This shows in my judgment the dangers of cherry-picking these messages. It starts by Mr. Montik saying: "So we have 12 mln for distribution. What about crypto, or we have it all set [*sic*] with euro?" However, this is a reference to deal with a company called Kindermatika; it has nothing to do with Capital.

[33] Particular reliance is placed by Mr. Megrelishvili on messages sent on 29th October 2019. Mr. Montik said: "For your information, yesterday Rezo was asking about the status of dividend processing. I told him it is now taken care of in Curacao, the lawyers are supposed to prepare the proper documentation." After Mr. Kashuba acknowledged this, Mr. Montik continued: "But we need to prepare something for real, as so far we have no idea how to distribute. In any case, they do not have bank account, so we do not have any concerns here. So we can do everything by stealth, even distribute, I think." There is nothing here which shows Messrs Montik and Kashuba in a conspiracy with Mr. Isaev. The inference from distributing by stealth is that the enrich themselves, not third parties like Mr. Isaev or Tall Trade.

[34] The following day, there is a discussion between the two men about taking payment by way of royalties, but this refers to a payment *to* Befree, not from Befree. The amount of royalty concerned is 200,000, presumably Euros, so it is a comparatively small sum.

[35] On 31st October 2019 there is a long exchange of messages between Mr. Kashuba and Mr. Montik, marked by particular vulgarity of language. Mr. Isaev says that the first two messages show those gentlemen wanting to cancel the sale of Befree shares to Capital because of "Jewish beefs", which is a reference to the dispute between Mr. Isaev on the one hand and Mr. Megrelishvili and his associates on the other (all of whom are Jewish), and because Capital were treating the Befree business as a "cash cow". That in my judgment is a convincing explanation of the messages. In particular, it does not show any conspiracy between Messrs. Kashuba and Montik on the one hand and Mr. Isaev (and his associates) on the other. The only conspiracy they might show is between the first two.

[36] The next messages on this date appear to have no relation to Befree or Capital. They refer to an "Australian issue" and a "German one".

[37] They go on to say: "The real plan B is IP. — It is our Joker." This may tie in with the following message where Mr. Kashuba says that Mr. Isaev was planning to fly in at the end of the month. He continued: "He also asked me to clarify how to move IP till he comes to you. I disregarded it and continue to do so." That does not show any agreement between the two men and Mr. Isaev. Mr. Isaev's explanation is that he had been put in a difficult position, because Mr. Megrelishvili had not paid the first instalment due on the loan, at a time when the latter had not provided any security. The reference, he suggests, is to providing the IP as a form of security.

[38] On 5th November 2019, Mr. Montik said: "Roland told about other businesses he had before." Mr. Kashuba replied: "He has no other options, but unless we find the way to get rid of the douches by ourselves he has options." Again, this suggests that Messrs. Montik and Kashuba wanted to get Mr. Megrelishvili out of the business, if Mr. Isaev was not successful in doing that, but it does not show any agreement between them and Mr. Isaev to that effect.

[39] On 9th November 2019 there is an exchange of messages involving, what the translator describes as, "thieves' cant". I am afraid I cannot make sense of the messages on this date.

[40] The following day the men discuss a proposal that all the money paid by him be returned to Mr. Megrelishvili. Mr. Kashuba says: "Look, in case they offer money to Roland it is important to saddle them with full KYC for money. Once we understand where the money comes from, we go to right people and tell them they buy a corporate conflict." This suggests that Mr. Montik and Mr. Kashuba were acting against Mr. Isaev's interests, which is not consistent with the three men being co-conspirators.

[41] On 14th November 2019 there were numerous messages exchanged about various business issues, including a transfer of money to Kindermatica Ltd. It starts with Mr. Kashuba saying: "So, for today Roland: 1. Receipt 2. Push for dividends, otherwise we have nothing to finance the factory with 3. Moldovans." There is then a baffling exchange with Mr. Montik saying: "Suknevich is hesitating. Let you discuss everything with him. And then we will make a transfer… Because I have already told Rezo that the money was returned." There is then a reference to "drowning" the Green Corporation, one of the Softswiss Group, and Bitcap Ltd purchasing it. Nothing shows a conspiracy in my judgment.

[42] The following day there is a further exchange which appears to have nothing to do with Befree.

[43] On 18th November 2019, there is this exchange:

> Mr. Kashuba: 19th of July!!! I made a screenshot of all my WhatsApp message history with Max. May you write all that to Roland? Especially the fact that the loan was issued before the deal, and that it has nothing to do with the partnership. That was not a payment to Roland, right… As per procedure. Statutory demand requires the claimant to provide 100% evidence that the obligations were not fulfilled + evidence it is not possible to fulfil them. Those Befree financial states would not let to fulfil the obligations. So we need to know 'all ins and outs' regarding this matter. So there would be no chance at all.
> Mr. Montik: What are you talking about?
> Mr. Kashuba: The request, that is being written by Roland's attorney. About WW Capital bankruptcy."

[44] Mr. Montik's asking what Mr. Kashuba was talking about is not consistent with some existing agreement to force Capital into insolvency. Moreover there is nothing wrong, or even suspicious, in minority shareholders in Befree being interested in possible steps being taken against the majority shareholder by Mr. Isaev.

[45] On 20th November 2019 the two men discuss Mr. Josh Baazov, one of Mr. Megrelishvili's associates, in unflattering terms. Mr. Montik says: "Rezo is the only one who wants to fight." He suggests that he sends "the record" to Mr. Isaev confidentially, "so that it does not pop up afterwards." It is unclear what "the record" is to which they refer. By this time, the serving of a statutory demand by Tall Trade, which finally occurred on 13th December 2019, was in contemplation.

[46] Mr. Megrelishvili at para 206 cites an exchange of messages on 6th December 2019. Mr. Isaev says: "That's why I'm going to refuse." Mr. Montik: "))". Mr. Isaev: "And ask you to shut down the money urgently..." Mr. Montik: "Yes, we can act as we have decided." Mr. Megrelishvili's comment is: "Mr. Isaev and Mr. Montik discuss preventing the payment of the Befree dividends to Capital WW." Mr. Megrelishvili's comment is not correct. Examination of the full message shows that it concerns payment of monies in respect of gaming machines to a company called Belatra. Again, this shows the danger of picking incomplete gobbets from the mass of messages exchanged by the two men.

[47] On 7th December 2019, there was a discussion about what seems to have been a separate deal involving Mr. Isaev concerning the merging of two companies, ZMS and YuzhStal. (ZMS is associated with Mr. Isaev, but this deal is unrelated to Befree.) However, Mr. Kashuba notes that Mr. Isaev did not "want to interfere with Rezo in any business." ("Be *involved* in any business" might make more sense.) Given that relations between Mr. Isaev and Mr. Megrelishvili had completely broken down with a statutory demand to be served in less than a week, this comment does not in my judgment show anything in connection with a conspiracy. It is a statement of fact. There is a reference to intellectual property, which Mr. Isaev says may relate to Tall Trade's wanting security for the lending to Capital. As I said at pages 11 to 13 of my oral judgment, Tall Trade were entitled to security, but this was never provided. Mr. Isaev's interpretation may well be right.

[48] On 10th December 2019, Mr. Montik discusses offering the 40 per cent shareholding in Befree to Mr. Isaev and using the drag-along provisions in the shareholders agreement to force Mr. Megrelishvili to match the price to be agreed with Mr. Isaev. 50 million, presumably Euros, is mentioned. This does not show a conspiracy involving Mr. Isaev. On the contrary it shows Mr. Montik pursuing his and Mr. Yaikau's own interests.

[49] On 20th December 2019, Mr. Kashuba notes that "Roland is ready to sacrifice Georgia just not to let them stay in business. That is the whole story. This why he's against my meeting with Rezo. He does not want anyone of them to stay." Mr. Megrelishvili suggests that the reference to Georgia is to Softswiss's activities in trying to expand in that country. He may be right, but Mr. Isaev explains that, if Tall Trade was to be involved in business in Georgia, he wanted Mr. Megrelishvili completely out of the business. This does not show a conspiracy.

[50] On 30th December 2019, Mr. Kashuba asks: "Then why is not Rezo solving the issue? They are sitting and doing nothing. Just pretending to do something [idiom: literally 'sat in a trench and just wave the flag']." Mr. Isaev suggests that this refers to the possibility of settlement negotiations. In my judgment he is probably right. In any event it does not show any conspiracy with Mr. Isaev.

[51] Mr. Megrelishvili cites an exchange of messages of 6th January 2020, but I confess I do not understand the messages. Mr. Kashuba says: "Roland told about that situation when Rezo

found someone from the fighting community. And this situation led to Giya." Even Mr. Megrelishvili is unable to provide a commentary on what he thinks it means.

[52] On 20th January 2020, Mr. Montik writes: "Don't forget about IP 😊 Patya offers to call Rezo and tell that Dima [Yaikau] is shocked now and wants to break the contract on IP. So they understand that in fact they have nothing to fight for." Mr. Kashuba replies: "No no, let the guys finish their plan: invite Rezo and let him sight. I see Giya inviting Rezo, and Roland and you are already waiting for him so the conversation begins." This appears to be a discussion of the approach to take with settlement negotiations rather than anything conspiratorial.

[53] In a later exchange of the same day, Mr. Montik says: "Basically, my goal is to arrange it the way that Dima and us have 56, they have 40, you [Mr. Kashuba] have 4. We will also need to talk to Dima. I think it would be logical in under certain circumstances if he cedes a little bit as well." Again, this is a discussion of a possible settlement involving buying out Mr. Megrelishvili in return for the shares. It does not support an argument that there was a plot to liquidate Capital.

[54] In the last exchange of the day, when Mr. Kashuba was already in bed, Mr. Montik said: "I talked to Rezo. Nicely. He lied to me for a few times during the call. I never showed I was not alone. Giya wanted to screw him…"

[55] On 4th February 2020 Mr. Isaev sent Mr. Montik an account received from Tall Trade's lawyers in this Territory of what occurred during argument before me that day on Capital's application to set aside the statutory demand of 13th December 2019. Mr. Megrelishvili suggests that there is something untoward in this, but both men had an interest in each other knowing what was happening here.

[56] Following my oral judgment on 5th February 2020, Mr. Isaev and Mr. Kashuba on different days discuss Capital's requests for KYC documentation from Tall Trade, but indicate they do not intend to cooperate with Capital. There is later in March 2020 correspondence in which Mr. Yaikau and Mr. Montik refuse to appoint Mr. Megrelishvili's nominees as directors.

Actionable conspiracy

[57] Actionable conspiracies are of two types: lawful means conspiracies and unlawful means conspiracies. The former type is vanishing rare, because the predominant purpose of the conspirators must be to harm the victim of the conspiracy. Since most conspiracies are formed in order to enrich the conspirators, the elements of a lawful means conspiracy are rarely made out. Here in my judgment a defence based on lawful means conspiracy cannot be made out for want of a predominant purpose to harm Capital.

[58] The latter type requires the conspirators to agree to use unlawful means to fulfil the purposes of the conspiracy. In **Taylor v Van Dutch Marine Holding Ltd**[12] it was held:

> "The constituent elements of unlawful means conspiracy… are:
> i) an agreement, combination or understanding involving two or more persons;
> ii) to take action which is unlawful;
> iii) with the intention (but not necessarily the predominant purpose) of injuring the claimant;
> iv) damage caused to the claimant by the unlawful means.
> The burden of proof is on the Claimant to establish all elements of his case: **Kuwait Oil Tanker Co SAK v Al Bader**.[13]"

[59] The United Kingdom Supreme Court in **JSC BTA Bank v Ablyazov (No 14)**[14] in discussing the element of unlawfulness left:

> "open the question how far the… considerations [which apply to criminal acts] apply to non-criminal acts, such as breaches of civil statutory duties, or torts actionable at the suit of third parties, or breaches of contract or fiduciary duty. These are liable to raise more complex problems. Compliance with the criminal law is a universal obligation. By comparison, legal duties in tort or equity will commonly and contractual duties will always be specific to particular relationships. The character of these relationships may vary widely from case to case. They do not lend themselves so readily to the formulation of a general rule… For present purposes it is unnecessary to say anything more about unlawful means of these kinds."

[60] In the current case, Capital face difficulties under each of the four elements. As to (i), as I have pointed out, there are difficulties relying on the Telegram messages to establish a conspiracy which includes Mr. Isaev. (ii) The unlawfulness relied upon is the failure to pay

[12] [2019] EWHC 1951 (Ch), [2019] Bus LR 2610 (Julia Dias QC) at para [289].
[13] [2000] EWCA Civ 160, [2000] 2 All ER (Comm) 271 at para [132].
[14] [2018] UKSC 19, [2020] AC 727 at para [15].

dividends from Befree to Capital. This can only be a breach of contractual duty. However, under the shareholders' agreement dividends were only payable by 30th April 2020. A "conspiracy" not to pay dividends about 29th October 2019 would not be unlawful. (iii) There must be an intention to harm Capital. If the sole purpose is self-enrichment by the conspirators, this will not be made out, although on the facts an intention may be capable of being made out, at least to the **Sparkasse Bregenz** standard.

[61] (iv) No damages have been pleaded. Only the legal costs of seeking to set aside the statutory demands and of defending the applications for the appointment of a liquidator have been incurred to date. However, firstly, these costs will not be more than the debt due to Tall Trade, so cannot be relied as a complete cross-claim. Secondly, even if the loss caused by a liquidator being appointed could be relied on as a cross-claim, causation cannot be shown. It has always been open to Capital to arbitrate to ensure that the majority of Befree board consists of Capital nominees, who could declare the dividends needed by Capital to pay Tall Trade. This — without in my judgment any adequate explanation — Mr. Megrelishvili has failed to do.

[62] Accordingly, in my judgment, no adequate case of actionable conspiracy has been made out to form a cross-claim, even to the low **Sparkasse Bregenz** threshold.

Improper purpose

[63] I turn to the question whether the applications for the appointment of a liquidator have been brought for an improper purpose. It is well established that:[15]

> "the petitioners [for winding up] as [creditors]… are *prima facie* entitled *ex debito justitiae* to a winding up order, and it seems to me to be impossible to displace that *prima facie* position without the very strongest proof that the petition is being improperly made use of for some ulterior motive."

[64] Likewise the English Court of Appeal in **Re Southard & Co Ltd** [16] held:

> "where the debt is established and not satisfied and there are no exceptional circumstances, the creditor is entitled to expect the Court to exercise its jurisdiction in the way of making a winding up order."

[15] Re Amalgamated Properties of Rhodesia (1913) Ltd [2917] 2 Ch 115.
[16] [1979] 1 WLR 1198 at p 1203.

[65] **French's Applications to Wind Up Companies**[17] gives a helpful list of cases where an improper motive has been found to nullify a winding up petition, but the learned author warns:

> "Although a creditor's petition to wind up a company has an improper collateral purpose it may nevertheless be permitted to proceed if the winding up would, to a material extent, serve the petitioner's interest as creditor, even if that is not the petitioner's principal purpose."

[66] In the current case, I have rejected the case based on an actionable conspiracy. Even if I am wrong on that, the highest the evidence goes is that Mr. Isaev, Mr. Montik, Mr. Yaikau and Mr. Kashuba have discussed possible division of shareholdings in Befree, if Capital is forced to sell its shares in Befree following a winding up order. That is in my judgment hardly evidence of an improper purpose. The natural purchasers of any shares in Befree which a liquidator may seek to sell will be existing investors (including indirect investors like Tall Trade).

[67] I have not overlooked Mr. Levy QC's point that around 29th October 2019 Mr. Megrelishvili made an offer to pay the loan instalment then due himself. That was rejected on the basis that the money should come from Capital. As a matter of law, that is right: a creditor is only obliged to accept payment from its debtor. Further, as a matter of practice, there may have been potential money-laundering issues with accepting payment from Mr. Megrelishvili personally. (I note that Mr. Megrelishvili did not "show the colour of his money" and has adduced no evidence that he held the money available for payment, but I shall ignore this point.)

[68] Mr. Levy QC waxed lyrical on how the refusal to accept the offer of payment shows the complete bad faith of Mr. Isaev and his alleged conspirators. The short answer is that even now, Mr. Megrelishvili has made no attempt whatsoever to make the outstanding loan repayments. Indeed, as can be seen from the discussions after I delivered my oral judgment on 5th February 2020, Capital was seeking time to pay. The fact that they have not paid, despite the considerable delay in this matter coming before me again, is in my judgment damning.

[17] 13th Ed, 2015 at para 2.119.

[69] Moreover, Tall Trade were in February 2020 offering to settle matters if Capital provided security, as was required by the loan facility. Capital did not provide security. If Tall Trade were acting in bad faith for collateral purposes, they would not have made such an offer.

[70] Even applying the low **Sparkasse Bregenz** test, this is not a case where the appointment of a liquidator should be refused on the grounds of the applicant having an improper purpose. Tall Trade have an undoubted claim to repayment of instalments of at least €2 million a quarter on their loan of €17 million. There is another creditor, Mr. Megrelishvili himself, who lent at least €1 million to Capital (he may have lent more, there is a dispute about this). I have found that Tall Trade has no improper purpose in seeking the appointment of a liquidator. Even if it did, however, this would be an appropriate case for appointing a liquidator. If the application were refused, then Tall Trade would be forced to issue proceedings for the outstanding instalments of the debt and then enforce it, probably by seeking a charging order over Capital's Befree shares. There is no sensible purpose in forcing Tall Trade down that route.

[71] Accordingly, I do not reject the application on the grounds of any improper purpose on Tall Trade's part.

Alghussein

[72] The third point taken by Mr. Levy QC was based on **Alghussein Establishment v Eton College**.[18] There the House of Lords held (reading from the headnote):

> "that there was a presumption that a party to a contract could not be permitted to take advantage of his own wrong as against the other party, applied, in the absence of an express provision to contradict the presumption, as much to a party who sought to obtain a benefit under a continuing contract on account of his breach, as it did to a party who relied on his breach to avoid a contract and thereby escape his obligations…"

[73] Here there was no breach of the Befree shareholders' agreement in not making dividend payments before 30th April 2020. In respect of the period after 30th April 2020, there is no causation. Accordingly, this point has no application. It is just an attempt to reargue the points which I rejected in my oral judgment.

[18] [1988] 1 WLR 587.

Admissibility of the Telegram messages

[74] I turn then to the admissibility of the Telegram messages. Because I have rejected Capital's case on its merits, including the Telegram messages, this point is hypothetical. Nonetheless, since the matter may go further, it is right that I should deal with it. Obviously, on the facts as I have found them, the "probative value of the evidence" is slight. That alone would be sufficient for me to exercise my discretion against allowing the messages into evidence.

[75] I shall therefore proceed on the basis that I am wrong in my conclusions as to the existence of a conspiracy and that, contrary to my findings, the messages are important evidence of a conspiracy to which Mr. Isaev was a party. I have dealt with the criteria in section 125(3)(a) and (b). Looking at the further criteria in section 125(3) of the **Evidence Act 2006,** (c) (the nature of Capital's defence) I shall consider after looking at the other criteria. As to (d), hacking someone's computer or server, as happened here, is a serious impropriety in my judgment. Everyone, including businessmen, has a reasonable expectation of privacy when using an encrypted service such as Telegram. As to (e), I have already found that Mr. Megrelishvili knew full well that Phoenix's behaviour was deliberate. As to (f), in practice neither Mr. Megrelishvili nor Phoenix will be punished for this behaviour. Rendering the evidence inadmissible is the only punishment available.

[76] As to (g), it can no doubt be argued that Mr. Megrelishvili would never have known of the messages without the hacking. However, that is not the test under (g). The evidence could have been obtained if Capital had brought proceedings against the alleged conspirators. Mr. Montik and Mr. Kashuba would have been obliged to disclose the Telegram messages as part of their disclosure obligations. If they had not done so, *then* (g) would have been highly relevant to the admission of the hacked versions of the messages. Capital could rely on (g) to allow the admission of the hacked messages as the only way to show that Mr. Montik and Mr. Kashuba were in breach of their disclosure obligations. As it is, in my judgment (g) is another factor against admissibility at this stage of the case.

[77] As to (c), I need to take an overall view of the case. There is no doubt that Tall Trade has lent a large sum of money to Capital. Capital has taken no effective steps to obtain the payment of dividends from Befree. There were steps which it could have taken, like arbitrating a dispute under the shareholders' agreement or suing the alleged conspirators. (This Territory would

probably have jurisdiction over the conspiracy claim based on Capital suffering the damage here: CPR 7.3(4).) It has done nothing. Mr. Megrelishvili put forward various defences to the statutory demand, all of which I rejected. He has offered to pay personally, but has not made any such payment, despite the long period since the hearing in February.

[78] What the legislator was envisaging under (c) was the possibility of a serious miscarriage of justice occurring, if illicitly obtained evidence was not adduced. In the current case, appointing a liquidator may make pursuit of the alleged conspirators more difficult. However, it would not make it impossible. The liquidator might have sufficient funds to do it him or herself. Alternatively, Mr. Megrelishvili might finance the litigation. Lastly the liquidator might sell the claim to Mr. Megrelishvili or a litigation funder. In my judgment, "the nature… of the defence and the nature of the subject-matter of the proceeding" are not such that great weight should be attached to this consideration, even on the hypothetical assumption which I am making that a case in conspiracy is made out.

[79] Standing back and looking at the seven factors in section 125(3), the considerations are overall firmly against the admission of the Telegram messages. In the exercise of my discretion under section 125(1) I refuse to allow the messages to be adduced in evidence.

[80] For completeness, I should add that Mr. Samek QC in his skeleton objected to the admission of the Telegram messages as inadmissible hearsay, although he did not pursue this point in oral argument. In my judgment his failure to pursue the point was well-advised. The law of evidence in relation to conspiracies is somewhat complicated, because "overt acts" by one conspirator are admissible against other conspirators, even when the other conspirators were not present (indeed in a "hub and spoke" conspiracy, conspirators on one spike of the conspiracy may not know the existence of a conspirator on another spike): see the discussion in my judgment in **R v Mahtani**.[19] The messages were relied on by Capital as overt acts. There was in my judgment no breach of rule against hearsay.

Advertisement of the second application

[81] I turn to the question whether I should appoint a liquidator in action number 2020/0157. Mr. Levy QC submits that the failure to advertise this second application means that I should at

[19] 2015 Gib LR 137.

least adjourn the matter, so that the application can be advertised. He pointed out that the purpose of advertisement was so that both supporting *and* opposing creditors could appear.

[82] In theory Mr. Levy is right. Advertising does allow opposing creditors to appear. However, on the facts of this case, this possibility is theoretical only. Capital is not a trading company (where different considerations might arise). There are, so far as appears from the evidence no creditors apart from Tall Trade and Mr. Megrelishvili himself. In these circumstances, advertisement serves no purpose in my judgment.

[83] Under section 165(1) of the **Insolvency Act 2003** I have the power to dispense with advertisement. Given that the application in action number 2020/0025 has been advertised, this is in my judgment a quintessential case for dispensing with the requirement. Adjourning the current application for advertisement will simply increase costs and cause delay. Accordingly, in the exercise of my discretion I dispense with advertisement of the second application.

The second and third statutory demands

[84] So far as the second and third statutory demands are concerned, Mr. Levy QC submits that serving these was an abuse of process. Mr. Samek QC argued that serving a statutory demand was not a form of court process and thus could not constitute an abuse of process. In my judgment, that is a matter of semantics. In general, there will need to be some special reason for issuing a second, and for that matter a third, statutory demand in respect of substantially the same dispute. The classes of case which might constitute a special reason are not closed. An obvious case (loosely modelled on the current case) might be where quarterly instalments of $2 million were owed. If the company had an arguable cross-claim of $3 million, which was set up to dispute the first statutory demand, it would be perfectly reasonable for the putative creditor to serve a second statutory demand in respect of a second unpaid instalment, because only an arguable cross-claim for the $1 million balance would survive the first statutory demand.

[85] In the current case, the litigation has been particularly hard fought. I am doubtful that it was justified to issue the second or the third statutory demand, but there were various uncertainties which may well have led Tall Trade to adopt a belt and braces approach. In my judgment, the

fairest course is to adopt that which the parties agreed in relation to the fourth statutory demand and simply adjourn the applications to set aside the statutory demands generally with liberty to restore. On case management grounds it is not appropriate to allocate Court resources to a now virtually academic exercise.

Conclusion

[86] I shall therefore order

(a) that advertisement of the application in action number 2020/0157 be dispensed with;

(b) that a liquidator be appointed over Capital; and

(c) that the applications to set aside the second and third statutory demands be adjourned generally with liberty to restore.

[87] I shall hear counsel on costs.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar

ANNEX

ORAL JUDGMENT OF 5TH FEBRUARY 2020

IN THE EASTERN CARIBBEAN SUPREME COURT

IN THE HIGH COURT OF JUSTICE

VIRGIN ISLANDS

COMMERCIAL DIVISION

CLAIM NO. BVIHC (COM) 189 OF 2019

IN THE MATTER OF CAPITAL WW INVESTMENT LIMITED

AND IN THE MATTER OF THE INSOLVENCY ACT

BETWEEN:

CAPITAL WW INVESTMENT LIMITED

Applicant

TALL TRADE LTD

Respondent

TRANSCRIPT OF CHAMBERS PROCEEDINGS

Wednesday, 5th February, 2020

9:40 a.m. to 10:31 a.m.)

BEFORE: HON. JUSTICE ADRIAN JACK, Judge (Ag.)

Court Reporting Unit

Government of the Virgin Islands

Road Town, Tortola

British Virgin Islands

COMPUTER-AIDED **TRANSCRIPT BY THE COURT REPORTING UNIT**

HARNEYS 2

APPEARANCES: **Craigmuir Chambers**
Road Town, Tortola
British Virgin Islands
BY: *MR.* CHARLES SAMEK, Q.C. and
MS. MARCIA, MCFARLANE
For the Applicant and
WALKERS
BY: MR. IAIN TUCKER AND MS
RHONA BROWN
For the Respondent

COMPUTER-AIDED **TRANSCRIPT BY THE COURT REPORTING UNIT**

P-R-O-C-E-E-D-I-N-G-S

* * *

(Matter resumes at 9:40 a.m.)

THE CLERK: BVIHCM 189 of 2019 - Capital WW Investment Limited and Tall Trade Ltd.

THE COURT: This is the hearing on application dated the 27th of December, 2019 in which the Claimant, which I'll call Capital seeks to set aside the statutory demand dated the 13th of December, 2019 served on it by the Defendant which I'll call Tall Trade.

The legal test for setting aside a statutory demand is well established in the case of Sparkasse Bregenz Batik AG and Associated Capital Corporation MI Civil Appeal Number 10 of 2002. At Paragraph 3 Chief Justice Byron said as regards the test of setting aside the statutory demand:

"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 must ignore... If the

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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. 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."

That was a case of a winding up petition, but it's well established that the same principle applies to an application to set aside a statutory demand.

In Jing Peng Group Limited and Peak Hotels and. Resorts BVIHCMAP 2014/2005, decision of the 8th of December 2015, at Paragraph 29 the Court of Appeal said:

"The judge was correct to observe that the winding up court should not be used to resolve disputes about debts or to decide issues of fact on a summary basis. But the court has a duty to carry out a preliminary investigation of the facts to determine whether the dispute that the company has raised about the debt is on genuine and substantial grounds. The

analysis that the judge carried out was limited to referring to the appellant's 'considerable swerve' regarding **its status which he said did not 'contribute to a feeling that the [respondent] has nothing to argue about'. He expressed doubts about the respondent's chances of proving that the appellant had accepted an allotment of shares in the respondent, but decided that 'serious doubts are not enough'. And finally, he suggested that any challenge, other than a 'hopeless Challenge' by the respondent would be sufficient to establish a sufficient dispute for the purpose of removing the appellant's status as a creditor. The question that the judge did not ask himself was whether the dispute raised by the respondent is one that is on genuine and substantial grounds. In my opinion, this is *a* higher standard than one that I would associate with expressions used by the judge such as 'serious doubts are not enough' and 'hopeless challenge'. The judge did not assess the dispute by the tried and**

tested expression that the debt and appellant's status as a creditor are 'disputed on genuine and substantial grounds'. He did not apply the standard set by the former Chief Justice Sir Dennis Byron's judgment in the *Sparkasse Bregenz Bank* case."

The Court of Appeal accordingly allowed

the appeal in that matter.

I reviewed all the relevant authorities in my recent judgment in Pacific Fertility Institutes Holdings Company Limited and Pacific Fertility Institutes (HK) Holding Company Limited, BVIHC(COMO 142 of 2019, the decision of the 22nd of January 2002 (sic).

In addition to the ground in section 157(1), Mrs. Turner sought to rely on the head of serious injustice in section 157(2)(1)) of the Insolvency Act 2003. He cited no authority to me on the provision. In my judgment it adds nothing to the case on the facts of this particular matter. If there's a dispute as to indebtedness which passes the Sparkasse Bregenz test, then Capital are entitled to have the statutory demand set aside as of right. If there is no substantial dispute, then they are not.

Section 157(2)(b) is very much a fall-back position which cannot be elevated into a general catch all for debtors who fail to establish a ground under section 157(1).

The current case concerns a dispute between shareholders. The underlying business is an internet gambling operation called Softswiss. The Trading company for Softswiss is a Cypriot company

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called Direx Limited. The hundred percent shareholder in Direx Limited is a Curacao company called Direx NV. In turn Direx NV is held a hundred percent by Befree Ltd., a Cypriot company.

Until the events to which I shall came, Befree was owned beneficially :by· Mr. Yaikau and Mr. Montik who were the founders of Softswiss. They held the shares in Befree through two Cypriot single purpose vehicles, Primefuture Ltd. and Capital Limited respectively.

In 2017 Mr. Revaz Mbgrelishvili became aware that Mr. Yaikau and Mr. Montik were interested in cashing out their interests in Softswiss. Mr. Megrelishvili is the majority shareholder in Capital.

Negotiations ensued in January 2019. It was agreed that Mr. Yaikau and Mr. Montik would sell Capital, a 60 percent stake in Befree, for C21,130,610. It was understood that Capital would need to find an outside investor in order to pay the 21 million odd euros.

Mr. Megrelishvili knew of the existence of Mr. Roland Iakovlevich Isaev and they in turn entered negotiations with each other. At the outcome of these negotiations in broad outline was that Mr.

Isaev would, through Tall Trade, lend Capital €17 million in return for 33.4 percent stake in Capital shares. It was intended that there would be interest on the loan of 2 percent per annum. The €17 million would be repaid out of dividends received by Capital from Befree over two years.

Pursuant to that agreement they entered what is described as the Russian Agreement. This was an agreement between four natural persons, Mr. Isaev on the one hand described as the investor in the agreement and then Mr. Megrelishvili and two other men, Mr. Ofer and Mr. Avraham, who were business associates of Mr. Megrelishvili, who are described as the guarantors. That agreement is dated the 23rd of April 2019.

The agreement is governed. by Russian law with a Russian jurisdiction clause, although it's not entirely clear whether the clause is an exclusive or non-exclusive jurisdiction clause, but nothing turns on that.

Clauses 2.1 and 2.2 define the obligation to make the €17 million loan in return for the 33.4 percent shareholding.

Clause 2.5 and 2.6 are important. 2.5 says:

"After closing the Transaction,

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Guarantors shall ensure that all profits earned by Befree Ltd. according to its confirmed financial statements, are directed in full to the payment of dividends in favour of WW Capital, which in turn is obliged to redirect all received funds for the repayment of the loan to the Investor. Thus, until the Financing is fully repaid to the Investor, the Guarantors voluntarily waive any of their rights and/or claims for dividends from TAM Capital. In this case, the Guarantors are obliged to ensure the adoption and execution of all resolutions and/or corporate documents of Befree Ltd. and NW Capital on the corporate level, which are required by law in the relevant jurisdiction in order to implement the repayment of the Financing to the Investor.

2.6. Repayment of the Financing to the Investor in accordance with clause 2.5 shall be on a quarterly basis, starting from the first Quarter after closing the Transaction and as follows:

In the full amount received by Befree Ltd. as a quarterly profit, but in any case not less than €2 million (two million) at the end of each Quarter, with the exception of the last Quarter, if the amount of the Financing balance due to be repaid to the Investor is less than €2 million. The full amount of

Financing must be repaid to the Investor in any case no later than 24 months from the date of the Transaction."

Annexed to the Russian Agreement is the Loan Facility Agreement which is written in English. It is said to take effect frown the 24th of May 2019, the Parties of Tall Trade on the one hand and Capital on the other. And recites that:

"Whereas the Lender does hereby agree that from the 24th of May 2019 a loan facility ("the Loan") shall be made available to the Borrower, on the following terms and conditions:

1. Principal amount of the loan.

Seventeen Million Euros (€17,000,000) with an option to draw additional ONE MILLION AND FIVE HUNDRED THOUSAND EUROS (E1,500,000) if required by the Investor.

2. Availability.

The Lender will make available the entire principal amount of the Loan or any portion thereof lip to the specified limit of the principal amount of the Loan as may be requested by the Borrower from time to time hereafter, or until this offer of a loan facility is withdrawn.

3. Term.

The term of the Loan is 24 months

commencing on the date of first drawdown.

4. Interest and Security.

The Loan is to bear simple interest at a rate of 2 percent per annum, payable quarterly in arrears. The loan interest commencing on the date of first drawdown being the 28th of May 2019. .. "

Pausing there, in fact the drawdown was on the 7th of June, 2019.

The agreement then continues.

"The borrower hereby agrees to provide security in an agreed form for whatever period remains of the term of the Loan as may at the sole discretion of the Lender be requested from time to time. It is agreed between the parties that said security shall be partly fixed and partly commensurate with the Principal outstanding at the time of the demand and may be reduced as the amount of the Principal is repaid.

5. Repayment provision.

Notwithstanding the terms and provision of Clause 2ss of this Agreement, the Loan (together with all or any accrued interest) will automatically and immediately fall due for first repayment starting from the first quarter following the date of the

transaction. Notwithstanding the amount of the total quarterly profit received by Befree Ltd. the minimum

amount of quarterly repayment shall be no less than €2 million with the exception of the last quarter if amount of the outstanding loan will be less than €2 million. Therefore, total repayment of the loan facility is due not later than 24 months."

There's then a provision for execution and counterparts.

The governing law is the British Virgin Islands, and the parties submit to the non-exclusive jurisdiction of the courts of the BVI.

And that's signed by all the relevant parties.

It's the facility loan which creates the obligation under which the statutory demand was served. The drawdown, as I've said, of €17 million took place on the 7th of June 2019. On that date there was a meeting between all six men involved, that's to say Mr. Isaev, Mr. Mbgrelishvili, Mr. Avraham, Mr. Yaikau and Mr. Montik.

It's worth noting that despite completion occurring, there were a number of outstanding matters such as the provision of security for the loan from Tall Trade to Capital, and the issue of Capital's shares to Tall Trade.

As regards the former, negotiations took

place between lawyers but nothing was finalized. *As* regards the latter, Capital originally allocated 16,655 shares in Tall Trade instead of the 16,700 to which Tall Trade were entitled, but the share register only shows 16,500 shares allocated.

While the further matters were occurring, *Mr.* Isaev said that he wanted a direct share in Befree. However, because that would reduce Capital to a minority shareholder in Befree, Mr. Mbgrelishvili refused that offer.

What I've said so far is common ground. The picture, in my judgment, is one of still quite fluid situation.

Where, as often, completion of a transaction will mark the conclusion of negotiations, indeed that's the purpose of completion, that is not the case here.

Now it's true that the Russian Agreement has in Clause 9.2 a prohibition on oral variations of that contract, but the Facility Agreement does not. *As a* matter of law, therefore, there is no difficulty with Capital and Tall Trade there in the terms of the Facility Agreement orally.

It's common ground that at the 7th of June 2019 meeting Mr. Isaev's role was discussed. What

Mr. Megrelishvili says is this:

"56. On the 7th of June 2019 (that being the same day that Capital NW drew down the €17 million pursuant to the Facility Agreement) the Befree Founders, Mr. Isaev (as representative of Tall Trade), My Business Partners and I (together the "Attendees") attended a meeting at the Softswiss Group's offices in Minsk, Belarus (the "June Meeting").

57. Although at the time of the June meeting, the purchase of the Befree Shares by Capital Wand the issue of Capital WW shares to Tall Trade, had not been effected, the Attendees discussed various matters pertaining to the Company and the Softswiss Group.

58. At the June Meeting, Mr. Isaev asked the Attendees whether they objected to him being appointed as Capital Ws financial representative with respect to Capital Ws affairs and its investment into the Softswiss Group.

59. At that time, I did not foresee any issues with this proposal. In assuming such a position, Mr. Isaev would be responsible for supervising the financial position of Softswiss and would have a strong level of control over the timing upon which the Befree Dividends would be paid by Befree

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to Capital M. In his position, Mr. Isaev would have an unparalleled insight into the financial status of both Capital WW and the wider Softswiss Group.

60. The Attendees therefore consented to Mr. Isaev's appointment as Capital WW's financial representative. Mr. Isaev continues to hold that position with the Company (in parallel with his position as Tall Trade's agent and representative), however, that is under review and I am considering what steps may be necessary to remove him from that role."

He then continues to discuss, further discussions, and in Paragraph 65 he says:

"Towards the end of July 2019, I spoke to Mr. Isaev on the telephone and (with My Business Partner, Mr. Avraham) met with Mr. Isaev personally in Moscow.

66. During the course of those discussions, Mr. Isaev informed us that he (in his personal capacity) required a loan of €2 million and he requested that the Softswiss Group provide that funding. Mr. Isaev repeated that request in a subsequent call attended by My Business Partner, Mr. Montik (one of the Befree Founders) and me.

67. Mr. Avraham and I supported the granting of the loan to Mr. Isaev, whereas Mr. Baazov

and Mr. Montik objected to it.

68. Nevertheless, shortly thereafter, Direx N.V. transferred a loan amount equivalent to circa Euro €2 million by United States dollar transfer to Mr. Isaev.

69. On the 7th and 8th of August 2019, the Befree Founders traveled to Moscow with the Softswiss Group's Chief Financial Officer and met with Mr. Isaev and Mr. Avraham (the "August Meeting").

70. At the August meeting, the Befree Founders stated that the Befree Dividends would only be distributed to Capital M after the Direx Loan had been repaid.

71. Mr. Isaev asked the attendees of the August meeting for guidance on when they required the repayment of the Direx Loan. It was agreed that the repayment of the Direx Loan was not urgent. As a consequence it was clear between and agreed by all parties that the Befree Dividends would not be paid until a date further in the future - that being a significant variation in timetable of payments that had been originally anticipated by me and My Business Partners.

72. I understand the Direx Loan was ultimately repaid shortly before the issue of the Loan

Acceleration Notice (as defined below) . However, the Befree Dividends remain unpaid.

73. I consider that the repayment of the Direx Loan by Mr. Isaev illustrates how he is seeking to manipulate the situation to his and Tall Trade's benefit. Mr. Isaev was content to use funds within the Softswiss Group for his personal benefit, in circumstances where it was accepted and agreed that this would mean that the repayment provisions as anticipated under the Facility Agreement would no longer apply, by virtue of the delayed payment of the Befree Dividends. However, now that Mr. Isaev is embarking upon an aggressive course of action against Capital WW, he has adopted a different approach and repaid the Direx Loan. I view this as nothing more than a presumptive attempt to try and nullify the arguments Capital WW has against him."

Mr. Isaev's evidence is in two parts, the first at Paragraph 18. He says:

"Referring to paragraphs 43 to 53 of Mr. Megrelishvili's affidavit, I confirm the description of how I met the beneficiaries of Capital.

19. I confirm that Tall Trade's

statutory demand accurately summarises the terms of the Facility Agreement, the Russian Agreement and the basis

for demanding the sums claimed.

20. Paragraph 47 of Mr. Megrelishvili's affidavit refers to an understanding and agreement between the parties to the Russian Agreement that any debt repayments by Capital would be financed by the Befree dividends. Although I accept that the parties may have envisaged that repayment of the Tall Trade loan should be from the Befree dividends, nevertheless the Russian Agreement and Facility Agreement are, I believe, clear that Capital had to make the minimum quarterly repayment of C2 million whether or not it had received any Befree dividends and if it did, if the Befree dividends be lower than that amount. That obligation was not in any way tied to Capital first having received any dividends from Befree. Indeed that was the whole point of paragraph 2.6 of the Russian Agreement and paragraph 5 of the Facility Agreement as the wording makes clear."

And then he explains how Tall Trade financed 80 percent of the purchase price for the Befree shares, but was receiving only 33.4 percent of the shares, and says that the main motivation was the additional security from Mr. Megrelishvili's shares in Capital and the guarantees being given.

He then deals with the meeting of the 7th

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of June and the subsequent conduct and says, Paragraph 25:

"I deny that I was appointed at any stage as a financial representative of Capital

26. In the meeting held on 7th of June 2019 and referred to in Mr. Mbgrelishvili's affidavit, I was promised by the beneficiaries of Capital that I would have a right to veto, on behalf of Tall Trade, any investments proposed to be made by Befree into new ventures which would have been outside its ordinary course of business. This was a concession given to Tall Trade in order to provide comfort that there would be no dissipation of the loan monies of €17 million and that Befree and Capital would prioritise the repayment of the loan.

27. Mr. Megtelishvili's affidavit, paragraphs 61 to 64, makes very vague and untrue allegations that I engaged in a process and took a series of steps to procure the delay of the payment of Befree dividends to Capital but has failed to say what that process was. This is denied. I had no authority to influence the payment of dividends by Befree to Capital and it is nowhere explained how I did as alleged.

28. Mr. Megrelishvili's affidavit

contends in paragraph 64 that the unidentified alleged steps that I took represented a variation to any legal arrangement that required Capital to repay pursuant to the Facility Agreement. Again, this is completely untrue."

Skipping the next paragraph, he says the Direx loan is irrelevant, and then in Paragraph 31:

"As previously stated, I did not have and could not exercise any power over Befree to delay the payment of dividends to Capital. At no time did I agree on behalf of Tall Trade that the terms of the Facility Agreement should be varied in any way. Tall Trade and I in any event would not agree anything of this nature without a long form agreement or a mortgage of Capital's shares as was envisaged by the Russian Agreement, neither of which was entered into.

32. Allegations in paragraph 62 of Mr. Mbgrelishvtli's affidavit are untrue. I did not request for the loan repayment to be delayed. On the contrary, since early September 2019 I have been repeatedly requesting from Mr. Megrelishvili to effect the loan repayment.

33. I deny that there was any oral agreement set out in paragraph 76 of Mr. Megrelishvili's affidavit to dispense with the payment

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of interest. While there was some discussion, and a draft unsigned side letter was received, the terms were rejected. There was no agreement between Capital and Tall Trade to avoid interest being payable under the Facility Agreement."

Mr. Samek Q.C. for Tall Trade criticizes Mr. Megrelishvili's evidence. He says that the evidence is vague and the allegation of an actual agreement regarding the delay in repayment of the loan only comes in Mr. Megrelishvili' s second affidavit. He points out that no one from Befree has given evidence.

In my judgment, this is putting an unfair burden on Capital. The timeframe for challenging a statutory demand is extremely tight and is not extendable. In this case the 14 days spanned Christmas. Getting the evidence such as it is over Christmas and the new year is a daunting endeavor. It is unrealistic to expect an applicant to be able to prepare its evidence with the rigour to be expected at trial. Likewise, I don' t accept Mr. Samek s submission that even if there had been an agreement between Mr. Megrelishvili on behalf of Capital and Mr. Isaev on behalf of Tall Trade to postpone repayment of the loan, there was no consideration for the agreement. He submitted there was no consideration passing from

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2 Capital. That is true, but there would in my judgment be considering passing from Befree. Befree would be able to use the money otherwise needed to pay dividends to expand its business. That is sufficient consideration in my judgment.

In English law, unlike the position in American law, consideration need not be provided by the contractual counter party. It can come from a third party, as here, if the agreement was made.

Accordingly, it's exceptionally rare in English law that a genuine commercial agreement will fail for want of consideration.

I then turn to Mr. Samek's main submission, namely that the oral agreement alleged by Mr. Megrelishvili is belied by the contemporaneous documentation. Here he relies on a series of documents starting on the 29th of October 2019.

On that date, Tall Trade wrote a letter to Mr. Megrelishvili and Capital saying:

"Dear sir.

We refer to the loan of Euro 17,000,000 which was granted and paid by Tall Trade Ltd ... on 7th June 2019...

Loan agreement:

We have drafted the first iteration more

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than a month ago. Following the exchanges between the parties we believe the attached to be the final draft, the content and form. which is in line with the agreement of the parties and obligations of the Borrower and is acceptable to both parties. You are kindly requested to sigh the attached loan agreement without undue delay."

Then, produces a mortgage document which they invite Capital to sign.

The issue of shares is then discussed, and it concludes:

"Repayment of the loan:

We remind you of your contractual obligation under the Framework Agreement to procure that all of the profits of Befree Ltd. for the past quarter be declared and paid to its shareholders as interim dividend, and that consequently all such dividend received by the Borrower is immediately used to repay the loan.

The loan was provided to you on 7th of June 2019. The first tranche of loan repayment became due and payable on the 8th of September 2019, but has not been paid to date and remains outstanding.

Accordingly, you are kindly requested to, without further delay:

1. Make the first repayment tranche in the amount of the higher of €2 million and Ql payment."

At the same time there was an email from a Miri Levy Turner who was working for the corporate director of Capital and on the 29th she says:

"Please note that we are sending a registered letter out today with the original apostilled in the Bia certificate of incumbency as well as the original loan between Capital and Tall Trade.

The above two documents are the last of the documents requested by you.

Pending on our side is the stock transfer form countersigned as well as a confirmation of the bank account Tall Trade will be receiving the funds.

Please note the funds will be sent from the majority shareholder's, Mr. Megrelishvili Revaz private account with Gazprom Bank in Russia.

Rezo", that's to say Mr. Megrelishvili, "will be financially supporting the next few loan repayments and the company will thereon after reimburse him these funds. We verified for your benefit that both on JB side and contractual terms it should, be acceptable.

We look forward to receiving your

confirmation so we can proceed and comply with the loan

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contract settlements.

Many thanks for your assistance in the matter."

Of significance is that email as cc'ed to Mr. Megrelishvili.

There was then a later exchange of e-mails between Ms. Turner and someone on behalf of Tall Trade, and Ms. Turner's email says:

"Dear Anna.

Capital WW has the right to assign temporarily the payment of the loan to any third party. Capital has opted this to be paid by Mr. Megrelishvili in order to comply with the loan agreement. I am sure JB will accept this payment as Revaz is a director and majority shareholder of Capital. Both parties wish to respect the payments, already delayed. JB already knows Befree is held by Capital WW. Let us simplify this back and forth.

There are two choices: payment from Befree directly or from Revaz Megrelishvili. We have already discussed with JB compliance and know this is not a problem. Let us move forward.

Many thanks for your understanding.

Miriam."

And on the same date there's input from

White Cliff who are the registered agents for Tall Trade, and it raises issues about the shares, but of significance is what comes under little Roman (iv) which says:

"Clause 7: Borrower proposes that: (a) the quarterly repayments amount to €2 million exactly; (b) if in any quarter Borrower repays more, this excess should be kept on account to be offset against the next quarter's tranche. This does not seem to be in line with the original agreement, which stipulates that the repayment will consist of all dividends received quarterly from Befree ... but in no event less than €2 million; so that all amounts in a quarter above €2 million would be considered a repayment received on the date funds were received by the Lender."

About a fortnight later on the 11th of Nova-doer, there's a further email from White Cliff. Sorry, the letter from Capital to White Cliff in which it says:

"With reference to the subject..."

Sorry. The subject line says "Concern: Request of delay in repayment of shareholders loan ("facility/"loan").

Dear Sirs.

With reference to the subject, we are

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addressing you this letter to direct your attention to the exceptional facts that, unfortunately, prevent the Company from complying with clause 5 of the valid 'facility' agreements signed with you, namely:

- Tall Trade Limited on 17th April 2019 with effect from 7th June 2019 and
- Revaz Megrelishvili on 26th June 2019 with same day effect.

As all parties are aware, the repayment of the facility agreements is through the receipt in regular intervals of dividends from Befree Limited ("Befree"), in which the Company holds 60 percent of the issued and outstanding share capital Softswiss is a highly successful business and was successful even before the Company made its initial investment into Befree. The latter is preparing for its next dividend distribution, which resulted in the distribution of a quarterly repayment installment of C2 million to Tall Trade Limited as per its facility agreement.

We believe that due to the gaming regulatory landscape and tax issues of different jurisdictions, we all wish to ensure that Befree distributes its dividends to the Company in compliance with all applicable regulatory requirements and in the most tax efficient way available. A team of

8 administrators, the group financial controllers and the legal and tax advisors, are currently working diligently to ensure that Befree distributes dividends to its shareholders within the timeline set out in their shareholders' agreement."

And:

"Notwithstanding the processes of Befree, the Company has suffered a delay independent to its will and out of its control which prevents any payment of dividends by Befree to the Company. The compliance department of the Company's bank has informed the Company that no dividend (or any other income which originates from Befree) may be deposited into the Company's bank account. Any attempt to deposit such funds into the Company's bank account will result in the funds being blocked and/or the bank account being closed."

And it then says, identifying different matters, and they make a proposal for amending the repayment provisions in which it recites that the:

"Lender recognises that it has received a quarterly installment of €2 million and as a result the remainder of the loan (together with any accrued interest) is €15 million. Notwithstanding the amount of the total quarterly profit received by Befree Ltd.

the next quarterly installment shall be no less than €4 million and the minimum amount of subsequent quarterly installment, shall be no less than €2 million..."

It's simply untrue that there was a payment of €2 million as recited in that letter

There was a reply on the 14th of November from Tall Trade to Capital. It says:

"Your letter seems to suggest that you had repaid a sum of €2 million which is hereby denied in no unclear terms. Your letter further suggests that the Borrower intends not to make any repayment until 28th February 2020, which is unacceptable."

And it then recites the obligations under the Loan Facility and the Russian Agreement.

And it purports to accelerate repayment of all the loan principal.

That's not a matter which arises before today.

There's then a chasing letter on the 18th of November from White Cliff which doesn't receive any reply until on the 22nd of November 2019.

There's a letter from Walkers, who represent Capital, to Harneys, who represent Tall Trade, in which Walkers in Paragraph 5 say:

"Our client accepts that Clause 5 of the

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Loan Agreement provides for the quarterly repayment of a sum of no less than €2 million (the "Quarterly Payment"). However, to the extent that any Quarterly Payment remains outstanding, then it is the Company's position that such outstanding amount owing is attributable to the improper actions and omissions of Tall Trade and its controlling minds.

6. *As* your client is well aware, it was always anticipated and agreed by the parties that the Company's obligations under the Loan Agreement were to be met by the Company out of the dividends it receives from Befree Ltd. ("Befree"). With this in mind, the Company (through its director, WTS Directors Ltd.) repeatedly notified Tall Trade that there was a significant risk that the Company's existing bank account providers would block or otherwise withdraw banking services for any funds related or connected with Befree would impact its ability to effect repayment from such distributions. Furthermore, our Client made your client aware from the early stage of their relationship that should the company's bank accounts be impacted by such circumstances, our Client would need to find an alternative banking provider or identify other solutions to allow it to make and receive payments. Our Client also made your client

aware that such a process would likely affect the timing of payments under the Loan Agreement, and relied upon your client's agreement in relation to the same."

In my judgment, these documents are wholly inconsistent with what is now Mr. Megrelishvili's case that there was an agreement to waive the €2 million quarterly repayment. In my judgment, I can confidently reject his evidence on this. It follows that Capital has not established a substantial defence within the *Sparkasse Bregenz* test. Accordingly, I refuse to set aside the statutory demand.

I should add, for completeness, that even if I was wrong in law on the serious injustice point under section 157(2)(b), I would still reject the point on the facts. There is simply no adequate evidence that Mr. Isaev had orchestrated the failure of Befree to pay dividends to Capital

So on the facts I refuse to set aside the statutory demand and refuse the application.

14R. SAMEK: *My* Lord, a couple of matters arise. The first one is --

Your Lordship will know, under the Act

Section 157(4) -- not that. I'm sorry.

(Counsel taking instructions.)

Yes, under 157(5):

"If the court dismisses an application to set aside a statutory demand it shall..."

So it's expressed in mandatory terms.

"...make an order authorizing the creditor to make application for the appointment of a liquidator over bankruptcy orders as the case may be."

So I respectfully ask for an order in those terms.

THE COURT: Do you oppose that?

MR. TUCKER: My Lord, Your Lordship mentioned during the submissions yesterday that it will be open to Your Lordship to, should Your Lordship make the decision that you've just made, in locus poenitentiae to afford Capital some time to make the payment under section 9 of the statutory demand.

THE COURT: Well, I think it -- although I authorized the bringing of an application to appoint a liquidator, it doesn't happen immediately. You've got to issue your application.

MR. SAMEK: Correct.

THE COURT: So that's the locus poenetentiae.

MR. TUCKER: My Lord, I

respectfully suggest that Capital be afforded same time to effect the payment before any such application for its liquidation can be brought.

THE COURT: How long are you asking for?

MR. TUCKER: My Lord, from the statutory demand, which we normally have 21 days, so I respectfully ask that the 21 days commence from Your Lordship's judgment, not setting aside the statutory demand.

THE COURT: What do you say about not presenting a --

MR. SAMEK: Can I just take same brief instructions.

(Counsel taking instructions.)

Well, we oppose that for one simple reason. There is evidence from Mr. Megrelishvili himself that there's already sitting in Befree some €19 million which is available for distribution. There is nothing to suggest that Capital as majority shareholder can't cause that money to be paid to it so that it can discharge the sum which is the subject of the statutory demand, and there's no evidence which had been adduced and indeed no evidence which might have been adduced this morning along the lines of Befree saying they need

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the money for some other purpose.

THE COURT: Just so that I can get the timetable in mind, if you issued your application to wind up the Company today or for the appointment of liquidator today, when would be the next liquidation date when the matter would come before the Court?

(Counsel taking instructions).

NFL SAMEK: I'm told by Harneys that it is likely to be March, I understand.

THE COURT: Well, if that's right, you're going to have the 21 days in any event, so I think I'm just going to make the order in the usual way.

MR. TUCKER: Very well, My Lord.

THE COURT: I mean, obviously if it comes to the liquidation date and you haven't yet paid the money, but there's likely to be money available, then it's always open to you to ask the judge for an adjournment, and generally speaking, the first application for an adjournment isn't too important, i.e., if you can show reasonable cause.

NFL TUCKER: Grateful, My Lord.

THE COURT: I'm not giving you any guarantees. I can't speak for Justice Wallbank, but you've got, it sounds as though, at least, until March.

MR. SAMEK: Finally, as to the costs of the application.

THE COURT: You can't oppose that, can you?

MR. TUCKER: My Lord, I can't oppose that costs be against us. We were sent a schedule of costs at half past 5:00 yesterday evening. I don't know whether Your Lordship is minded to entertain a summary assessment.

THE COURT: Let's see what

14R. WEEK: We obviously ask Your Lordship to summarily assess the costs today, please. We haven't got, I should say, a schedule from the other side as to what their costs were.

THE COURT: Is preparation of the statutory demand properly part of the costs of this application?

MR. TUCKER: **My Lord, it would be our submission that there are a number of items on this list that are not properly part of this**

application. For example, further down the page, reviewing letters in relation to loan acceleration and dealing with queries on priority, and also later on in the schedule we see some entries about preparation of the liquidation plan, I'd also submit are not properly

THE COURT: Well, it seems to me that you're entitled to your costs, but I'm not going to summarily assess them. You can go through the usual process and Mr. Tucker can raise the issues he wants to with those.

MR. SAMEK: Could I just take instructions on an alternative solution?

THE COURT: Yes.

MR. SAMEK: My Lord, I accept by way of general principle the points my learned friend makes in the sense that we are entitled to our costs of opposing the application; we're not entitled to extraneous costs. I accept that principle.

THE COURT: Yes.

MR. SAMEK: And. What I would invite Your Lordship to do is to adopt a broadbrush approach, that's to say, once Your

Lordship's had a glance at it, and subject to any identified points my learned friend makes, just to make

a percentage reduction or some appropriate healthy deductions.

THE COURT: Can I just understand the total you're asking for. You've got a grand total of fees and disbursements of $59,000, page 10, and then you've got the solicitors' time on page 2 of 38,000; is that right?

MR. SAMEK: I'm told that, on instructions, that the total, total, if I can put it like that is 59 -- I better just check.

THE COURT: I don't think that's right, because there's your brief fee plus the solicitors' time.

MR. TUCKER: My Lord, I think I'd respectfully suggest that we're not in a position to summarily assess this and we'll seek to agree it, and if we can't do we'll came back.

THE COURT: I'm inclined to agree with you.

Mr. Samek, I'm simply going to give you your costs and they can be assessed in the usual way. I mean, generally speaking, the legal practitioners here seem to manage to agree bills without too much difficulty. Fairly rarely they actually come to a taxation before me, but there we are.

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Very well. Thank you all very much.

Have you got a draft order or not yet?

MR. SAMUEL: There was. No, I don't think we've got a draft order We'll submit that in the usual way.

THE COURT: Very well.

(Matter concludes at 10:31 p.m.)

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REPORTER'S CERTIFICATE

PETULA V. STOUTT, a Certified Court Reporter, do hereby certify:

That on the 5th day of February, 2020 the foregoing proceedings were taken down by me in machine shorthand, consisting of 39 pages herein; that the foregoing is a true and correct transcript of the proceedings had.

That I am not an attorney, relative, or employee of any party hereto, or otherwise interested in the events of this cause;

IN WITNESS WHEREOF, I have hereunto affixed my signature at Road Town, Tortola, British Virgin Islands, this 13th day of February, 2020.

PETULA V. STOUTT
Certified Court Reporter