

BRITISH VIRGIN ISLANDS

IN THE COURT OF APPEAL

CIVIL APPEAL NO.7 OF 2006

BETWEEN:

VANDEBELT MANAGEMENT GROUP LTD.

Applicant/Appellant

and

BIBIANA PEREZ RIVAS

JAVIER PIZARRO

JUAN REUCCI

**(And the persons whose names appear
in the Schedule to the Notice of Appeal)**

Respondents

Before:

The Hon. Mr. Brian Alleyne, SC
The Hon. Mr. Michael Gordon, QC
The Hon. Mr. Hugh Rawlins

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

Appearances:

Mr. John Carrington for the Applicant/Appellant
Mr. Paul Webster, QC, Mr. Kerry Anderson with him, for the Respondents

2006: May 9;
July 3.

JUDGMENT

[1] **RAWLINS, J.A.:** This is an appeal by Vanderbelt against an order which a judge of the High Court made on 17th February 2006 dismissing Vanderbelt's application to set aside a statutory demand. The respondents served the statutory demand on 16th January 2006 on Vanderbelt, a company incorporated under the International Business Companies Act of the British Virgin Islands and which carries on business as a financial broker investing in currency futures in Panama. In the statutory demand,

the respondents allege that Vanderbilt owes them an aggregate sum of \$13,311,071.14, which is due and payable.

- [2] The judge dismissed Vanderbilt's application. In doing so, she found that the statutory demand met the requirements of section 155 of the Insolvency Act 2003 ("the Act").¹ The learned judge also found that the statutory demand contained sufficient particulars to make Vanderbilt aware of the nature of the debt and how it arose, and that amounted to *prima facie* evidence that the debt was due and payable. According to the judge, since Vanderbilt wished to move the Court to set aside the statutory demand pursuant to section 157 of the Act, the burden was on Vanderbilt to produce sufficient evidence to displace the *prima facie* case which the respondents presented and to convince her that there is a substantial dispute as to whether the debt was due and payable. She found that Vanderbilt had failed to rebut that case. In its appeal, Vanderbilt has insisted that, in the first place, the statutory demand did not contain sufficient particulars to satisfy section 155(2)(a) and (b) of the Act, and even if it did, the learned judge should have set aside the demand on the ground that there was a substantial dispute as to whether the debt was due and payable.

¹ So far as it may be necessary for the purpose of this case, section 155 provides:

(1) A creditor may make demand on a person for payment of a debt owed by that person to him.

(2) A demand under subsection (1) shall

(a) be in respect of a debt that is due and payable at the time of the demand and that is not less than the prescribed minimum;

(b) be in writing and shall specify the nature of the debt and its amount;

(c) be dated and shall be signed by the creditor or by a person authorized to make demand on the creditor's behalf;

(d) require the person to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the demand on him;

(e) state that if the demand is not complied with, application may be made to the Court for the appointment of a liquidator or a trustee, as the case may be;

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

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

- [3] In dismissing the application, the judge awarded costs to the respondents. She also extended the time for compliance with the statutory demand to 27th February 2006, and authorized the respondents to present an application for the appointment of a liquidator over Vanderbelt after the said 27th February 2006.

The issues

- [4] Importantly, then, this appeal raises for the first time under the recent insolvency statutes of this Territory, two issues that relate to statutory demands and applications to set them aside. Sections 155 and 157 of the Act are the pivotal provisions. The first issue is concerned with the sufficiency of particulars that a potential creditor must provide to the alleged debtor when making a statutory demand under section 155 of the Act in order to satisfy the requirement of the Act that an alleged debtor has an outstanding debt that is due and payable to the creditor.
- [5] The second question is what evidence is required on an application to set aside a statutory demand pursuant to section 157 of the Act,² and who bears the burden

² So far as it may be necessary for the purpose of this case, section 157 provides:

- (1) The Court shall set aside a statutory demand if it is satisfied that
 - (a) there is a substantial dispute as to whether
 - (i) the debt, or
 - (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum,is owing or due;
 - (b) ... ; or
 - (c)
- (2) The Court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused
 - (a) because of a defect in the demand, including a failure to comply with section 155(3); or
 - (b) for some other reason.
- (3) Where the Court is satisfied that the security interest of a secured creditor has been under-valued in the statutory demand, the Court may require the creditor to amend the demand accordingly, but without prejudice to his right to make application for the appointment of a liquidator or a bankruptcy order, as the case may be.
- (4)
- (5) If the Court dismisses an application to set aside a statutory demand, it shall make an order authorizing the creditor to make application for the appointment of a liquidator or a bankruptcy order, as the case may be.

to satisfy the court that there is a substantial dispute as to whether an alleged debtor has an outstanding debt that is due and payable to the creditor. Section 157(1) of the Act requires the High Court to set aside a statutory demand if the Court is satisfied that there is a substantial dispute whether the whole debt, or a part of the debt that is sufficient to reduce the undisputed debt to less than the prescribed minimum, is due or owing. The second issue will become purely academic and redundant for the purposes of this appeal and will only be considered in this judgment if Vanderbelt fails on the issue of sufficiency of particulars.

Sufficiency of particulars

[6] Section 155(2) of the Act sets out in sub-paragraphs (a) through to (g) the mandatory requirements for a statutory demand. If any of them is not met the High Court may, in its discretion, set aside the statutory demand pursuant to section 157(2) of the Act, if it is satisfied that substantial injustice would be occasioned because they were not complied with. Such non-compliance would constitute a defect in the demand for the purposes of section 157(2)(a) of the Act.

[7] In the present case, the question whether the respondents' demand met the requirements of paragraphs (c) to (g) of section 155(2) of the Act is not in dispute.³ The dispute on the first issue revolves around paragraphs (a) and (b) of section 155(2). Vanderbelt challenges the demand on the ground of insufficiency of particulars of the nature of the debt to satisfy section 155(2)(b) and insufficient particulars to show that, *prima facie*, the debt was due and payable by to the respondents at the time of the demand, in order to satisfy section 155(2)(a) of the Act. In short, the assertion is that the learned judge erred by not finding that there

³ These include the requirements that the demand must be in writing and shall specify the nature and the amount of the debt; the demand must be signed by the creditor or by a person who is authorized to do so on behalf of the creditor; the demand must require the debtor to pay the debt or to secure or compound for it within 21 days of the service of the demand; the demand must state the right of the debtor to apply to set aside the statutory demand, and must be served in accordance with the Insolvency Rules.

was an insufficiency of particulars in the demand and thereby setting it aside pursuant to section 157(2)(a) and (b) of the Act.

- [8] The particulars of the debt that were set out in the statutory demand in this case are:

“The Creditors claim that the Company owes to it (sic) the sum of \$13,311,071.14 in respect of sums held by the Company to the account of the creditors and requested by the Creditors in accordance with the currency trading agreement between the Company and the creditors as follows:”

This is followed by a table which lists the names of a number of persons, the amount allegedly owed by Vanderbelt to each person and the total debt due for payment by Vanderbelt to the respondents.⁴ The learned judge found, in effect, that this was *prima facie* evidence of the debt and sufficient particulars for the purpose of making Vanderbelt aware of it and to require Vanderbelt to provide evidence to rebut that *prima facie* evidence. She found, further, that the demand contained *prima facie* evidence, which put the onus upon Vanderbelt to show that there was a substantial dispute as to whether the debt was due.

- [9] Mr. Carrington, learned Counsel for Vanderbelt, submitted that the judge erred because the respondents’ demand was no more than a bare demand, which on its face did not indicate that the debt was due and payable at the time of the demand. He submitted that the demand merely stated that the creditors (the respondents) had requested the sum in question in accordance with a currency trading agreement, which sum was held to the account of the creditors. He submitted, further, that there were no particulars in the demand as to the terms of the alleged agreement or the conditions under which the sums were held to the account of the respondents. He insisted that there was therefore nothing in the demand from which the Court could have concluded that Vanderbelt owed the sums claimed

⁴ The total sum claimed is substantially higher than the minimum amount that may be claimed on a statutory demand. Rule 149(1) of the Insolvency Rules, 2005, which were made by the Executive Council of the British Virgin Islands, provides that the minimum sum for which a statutory demand may be issued is \$2,000.00.

under the currency trading agreement or that the sums were due and payable in accordance with the said agreement at the time when the respondents made the demand. Mr. Carrington therefore urged this Court to dismiss the appeal citing **Sparkasse Bregenz Bank AG v. Associated Capital Corporation**,⁵ **Sinocan Lianxing Limited v Richardson Developments Limited**,⁶ and **In re A Company (No. 003729 of 1982)**⁷ as affording indirect support for his submissions.

[10] The submissions by Mr. Webster, QC, learned Counsel for the respondents may be summarized as follows: While it is true that the statutory demand must be in respect of a debt that is due and payable, there is no requirement in the Act that the respondent creditor must prove that the debt is due and payable. Instead, section 156 of the Act sets out the right of a person, such as Vanderbelt, on whom a statutory demand is served, to challenge the statutory demand. Section 155 even requires that this right be specified in the statutory demand. If there was a defect in the demand, it was for Vanderbelt to avail itself of the right to challenge the demand and apply for it to be set aside. If Vanderbelt thought that the demand did not fully comply with section 155 and was therefore defective, Vanderbelt should have produced evidence to support its contention that the debt was not due and payable. Vanderbelt chose not to produce any such evidence and chose only to make a bare denial of the respondents' claim. The court therefore had only evidence of the statutory demand in which the respondents set out the basis for the claim, which basis was *prima facie* evidence that the sums claimed are due and payable. As such, he contended, the learned Judge was entitled to find that *prima facie*, the debt was due and payable and that the demand complied with section 155 of the Act.

[11] According to Mr. Webster, if Vanderbelt's submissions in support of the first issue in this appeal are correct, a creditor would first have to prove all of the matters listed at paragraphs 2(a) through (g) of section 155 of the Act in order for a court to

⁵ British Virgin Islands Civil Appeal No. 10 of 2002 (18th June 2003).

⁶ British Virgin Islands Civil Appeal No. 9 of 2003 (23rd May 2003).

⁷ [1984] 1 WLR 1090.

even find that the statutory demand is valid. This would be unworkable and unduly burdensome and would also run counter to the obvious scheme of the Act. If this was the legislative intent, the Act would have contained, *inter alia*, a requirement for the respondent to file and serve evidence of its compliance with section 155 of the Act including evidence of service in accordance with the rules and evidence of authority to sign on behalf of the creditors. Additionally, section 157(2) gives the court discretion to set aside a statutory demand if there are any defects in the demand itself. This is in contrast to section 157(1) that provides that the court *must* set aside the demand if there is a substantial dispute as to whether the debt is due or owing. Under section 157(2) the court may set aside the demand if there is a defect, but only if it finds that substantial injustice would be otherwise caused. The learned judge took the view that the demand contained sufficient particulars to enable Vanderbelt to dispute the debt if it wanted to. The judge did not believe that any substantial injustice would be caused by allowing the demand in its current form to stand; and no evidence was produced by Vanderbelt to suggest otherwise.

Findings

- [12] **Sparkasse, Sinocan and In re A Company (No. 003729 of 1982)** do not afford direct authority for the issue of sufficiency of evidence needed to support a statutory demand because they all relate to winding up petitions. **Sparkasse**, for example, was mainly concerned with the question of whether there was a substantial dispute as to whether a debt was due and payable under the old winding up statutes. In the case, the High Court had dismissed the petition by Sparkasse, an Austrian Bank. Sparkasse had, pursuant to a customer's agreement, undertaken orders from Capital, the respondent, to purchase and sell DAX options on the German EUREX exchange. Sparkasse alleged that by September 2001, there were significant arrears in Capital's account, and, therefore, it (Sparkasse) made a demand on Capital for some US\$420,000.00. Sparkasse issued the petition to wind up Capital when Capital did not pay the

demand. Capital challenged the petition on the ground that there was a substantial dispute as to whether it owed the debt and Matthew J (Ag.) dismissed the petition on this ground, among others.

- [13] This Court agreed with the finding by Matthew J (Ag.) that there was a substantial dispute and dismissed Sparkasse's appeal with costs. In this regard, having stated the applicable principles which are the bases on which to determine whether there is a substantial dispute,⁸ Sir Dennis Byron, CJ, considered the evidence that was presented by way of affidavits and concluded:⁹

"Both parties knew that Capital was denying liability to pay this sum for reasons it openly advanced. The affidavits reveal a question of fact to be resolved. It is clear that not every factual dispute could constitute a substantial dispute as to whether the debt existed. In this case, however, as I understand the evidence, Sparkasse has never produced any information showing what, if any, funds it disbursed. Consequently Capital does not know if there is a negative balance, when it was created, or whether it was created in accordance with its instructions. In my view, if a creditor refuses to disclose information about the circumstances under which the alleged debt was incurred that creates a substantial issue to be resolved."

- [14] Mr. Carrington submitted that this statement supports his submissions that the statutory demand should be set aside because of insufficiency of particulars of the debt. I do not agree. **Sparkasse** was concerned with the assessment of affidavit evidence that might be produced for the purposes of winding up or for the appointment of a liquidator in order to determine whether there is a substantial dispute as to whether the debt is due and payable. It was not concerned, as in the present case, with the sufficiency of particulars which must be given in a statutory demand. Mr. Carrington was asking the judge to exercise her discretion to set aside the demand under section 157(2)(a) of the Act for non-compliance with section 155(2)(a) and (b) as a first step, even before considering the question whether there was a substantial dispute that the debt was owing or due.

⁸ At paragraph 3 of the judgment.

⁹ At paragraph 12 of the judgment.

[15] It is trite principle, which flows, for example, from the judgment of Viscount Simon LC in **Charles Osenton & Co. v Johnson**¹⁰ and reiterated in this Court by Sir Vincent Floissac CJ in **DuFour v Helenair Corporation Ltd.**,¹¹ that an appellate court will only reverse a decision that is based on the exercise of discretion by a court of first instance where it is clear that the judge erred in principle by failing to take into account some legal principle or requirement; by misapprehending the facts and circumstances or by taking into account irrelevant factors, so that the decision exceeded the generous ambit within which reasonable disagreement is possible.

[16] Since sections 157(2)(a) and (b) of the Act provide that a demand shall be made by a creditor for a debt that is owed by a debtor, which is due and payable at the time of the demand, and that the demand must be in writing and must specify the nature of the debt, a statutory demand must on its face contain sufficient particulars to show these prerequisites. It is particularly necessary that these requirements are stringently met because insolvency¹² is the consequence of an alleged debtor company's failure to comply with the requirements of a statutory demand. The statutory demand in the present case does not give any particulars of the circumstances in which the debt arose or of the specific nature of the debt. It does not state that the debt is due and payable, or whether it is payable on demand or on a specific date that predates the demand. I think that the judge exercised her discretion wrongly because these are requirements under sections 155(2)(a) and (b) of the Act which were not met. It might have been helpful to exhibit the currency trading agreement upon which the relationship between the parties is predicated, and upon which the debt allegedly arose.

[17] Had the respondents provided the required particulars, the burden would then have shifted to Vanderbelt to show that there is a substantial dispute whether the

¹⁰ [1941] 2 All E.R. 245, at page 250. See also *Francis v Boriel*, St. Lucia Civil Appeal No. 13 of 1995 (20 January 1997) and *Grenada Electricity Services Ltd. v. Isaac Peters*, Grenada Civil Appeal No. 10 of 2002 (28th January 2002).

¹¹ 52 WIR 188.

¹² By virtue of section 8 of the Act.

debt is due and payable, and, thereby, move the court to set it aside pursuant to section 157(1)(a) of the Act. In order to determine whether there is a substantial dispute, a judge may draw upon the legal principles, which were adumbrated in **Sparkasse**, and the guidance that this Court offered therein.

- [18] Having found that the judge exercised her discretion wrongly because she failed to ensure that the demand complied with the statutory requirement, the question then is whether this Court should set aside the demand pursuant to section 157(2) of the Act because the noncompliance would cause substantial injustice. I can think of no greater prejudice or injustice than a company facing automatic insolvency on the basis of a statutory demand which has not complied with a statutory requirement. In the premises, I would allow the appeal and set aside the Order which the learned judge made herein on 17th February 2006.

Costs and Order

- [19] In the Notice of Appeal, Vanderbelt sought an order that the appeal should be allowed and the order of the judge be set aside. They also sought an order setting aside the statutory demand with costs to Vanderbelt in the appeal and in the High Court. There are no circumstances in this case, which preclude the application of the general principle that the unsuccessful party should meet the costs of the successful party. Vanderbelt shall have their costs in both Courts in accordance with their prayer. The transcript of the proceedings before the High Court on 17th February 2006 shows¹³ the circumstances in which the parties agreed on \$1000.00 costs in that Court because the hearing was in Chambers and the preparation was not stringent. I confirm that sum as the costs that the respondents will pay to Vanderbelt in those proceedings. However, it is my view that the preparation and presentations in these appeal proceedings call for an order that costs shall be assessed if not agreed.

¹³ At pages 34 and 35.

[20] The order then is that the appeal is allowed; the order which the learned judge made herein on 17th February 2006 is set aside and the statutory demand which the respondents served on the appellant, Vanderbelt, on 16th January 2006 is also set aside. The respondents shall pay \$1000.00 agreed costs to Vanderbelt in the High Court proceedings and costs in these appeal proceedings to be assessed if not agreed.

Hugh A. Rawlins
Justice of Appeal

I concur.

Brian Alleyne, SC
Chief Justice [Ag.]

I concur.

Michael Gordon, QC
Justice of Appeal