

THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE
COMMERCIAL DIVISION

Claim No BVIHC (COM) 2025/0296
BETWEEN:

JJW HOTELS & RESORTS HOLDING INC

Applicant

and

BENJAMIN ALEXANDER RHODES AND ANOTHER

Respondents

Appearances:

Mr Stuart Rau, of Maples and Calder, BVI, for the Applicant

Ms Jennifer Jenkins and Mr Vadims Bovtramovics, both of Maurant Ozannes BVI, for the Respondents

2026: March 11th, 31st

Introduction

- [1] **MITHANI J KC (Ag):** This is an application ("the Application") by JJW Hotels & Resorts Holding Inc ("the Applicant" or "JJW") pursuant to **section 156 of the Insolvency Act 2003** ("the Insolvency Act") to set aside a statutory demand dated 19 June 2025 ("the Statutory Demand") served upon it by the Respondents. The Application raises an important question concerning the interrelationship between insolvency law and private international law: namely, whether a foreign judgment that remains unrecognised within this jurisdiction may properly found a statutory demand.

- [2] The Statutory Demand seeks payment of £229,735.13, said to be due in respect of costs orders made against the Applicant in proceedings before the Royal Court of Guernsey, the Guernsey Court of Appeal, and the Judicial Committee of the Privy Council (“the Guernsey Costs Orders”).
- [3] The Respondents are the joint liquidators of JJW Limited and were defendants to the Guernsey proceedings brought by the Applicant. Those proceedings concerned claims seeking declarations that the Applicant was the beneficial owner of shares held by JJW Limited in certain subsidiaries.
- [4] The Applicant's claims were dismissed. Costs orders were made against it at first instance and on appeal. Permission to appeal to the Privy Council was refused, generating further costs orders in the Respondents' favour.
- [5] Bills of costs were subsequently served by the Respondents. The Applicant did not challenge those bills within the time permitted by the applicable Guernsey procedural rules. The Respondents contend that the costs thereby crystallised as judgment debts.
- [6] On 19 June 2025, the Respondents served the Statutory Demand in the British Virgin Islands seeking payment of those sums. The Applicant now applies to have that demand set aside.

The Parties' Submissions

The Applicant

- [7] The Applicant submits that the Statutory Demand should be set aside because it is founded upon foreign court orders which have not been recognised or enforced in the BVI.
- [8] On the Applicant's case, such unrecognised foreign judgments cannot constitute a debt that is "due and payable" within the meaning of **section 155 of the Insolvency Act**.
- [9] In support of that proposition, the Applicant relies principally upon the decision of the English Court of Appeal in **Servis-Terminal LLC v Drelle**¹ ("**Drelle**"). In that case, the Court of Appeal held that a

¹ [2025] EWCA Civ 62, [2026] Ch 1

foreign judgment which had not been recognised in England could not found bankruptcy proceedings.

- [10] The Applicant submits that the reasoning in **Drelle** reflects a fundamental principle of private international law: foreign judgments may not ground insolvency proceedings unless they have first been recognised by the courts of that jurisdiction. Recognition may be obtained by registration of the foreign judgment or through such statute or treaty as permits enforcement in the BVI.
- [11] The Applicant further submits that the decision of the Privy Council in **Vendort Traders Inc v Evrostroy Grupp LLC**² (“Vendort”), relied upon by the Respondents for the proposition that a statutory demand may be issued on the basis of a foreign judgment without prior recognition, is distinguishable. It argues that Vendort concerned an arbitral award confirming a pre-existing contractual obligation, whereas the present case concerns court-ordered costs arising solely from the exercise of judicial authority.
- [12] In any event, the Applicant submits that there is at least a substantial dispute as to whether the Guernsey Costs Orders are capable of recognition in the BVI at common law, and that on that basis the Court is required under **section 157(1)(a) of the Insolvency Act** to set aside the Statutory Demand.

The Respondents

- [13] The Respondents oppose the Application and submit that it should be dismissed.
- [14] They contend that the Applicant's reliance on **Drelle** is misplaced, that decision being neither binding nor persuasive in the BVI.
- [15] The Respondents submit instead that the governing authority is **Vendort**, a decision of the Privy Council on appeal from the BVI, which upheld the decisions of the BVI High Court and the Eastern Caribbean Court of Appeal.

² [2016] UKPC 15

- [16] On the Respondents' case, Vendort is authority for the proposition that recognition or enforcement of a foreign award or judgment is not a prerequisite to its deployment as the foundation of a statutory demand. The service of a statutory demand and the making of an application for a liquidation order do not, they submit, amount to enforcement of a foreign judgment in any relevant sense; they do no more than invoke the debtor's pre-existing underlying obligation to pay, which arises independently of, and is not created by, the foreign judgment itself.
- [17] In further support of their position, the Respondents produce orders of the Guernsey Courts by which it has been declared that the costs liabilities in question (except costs incurred in the Privy Council) have become final and that they constitute judgment debts for definite and ascertained sums.
- [18] In the circumstances, the Respondents contend that the alleged debt is not genuinely disputable.
- [19] They, therefore, invite the Court to dismiss the Application and permit them to bring an application for a liquidation order against the Applicant on the basis that the Statutory Demand is valid.

Analysis

- [20] The central issue is whether the Statutory Demand is founded upon a debt that is due and payable within the meaning of **section 155 of the Insolvency Act**.
- [21] The material provisions of **section 155** are in the following terms:
- "(1) A creditor may make demand on a person for payment of a debt owed by that person to him or her.
 - (2) A demand under subsection (1) shall [*inter alia*] ... (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; ... (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 or her or such longer period as may be prescribed ..."
- (Emphasis supplied.)

- [22] The Applicant relies on the decision in **Drelle**, which held that a foreign judgment which has not been recognised cannot found bankruptcy proceedings. The Court of Appeal held that foreign judgments have no direct operation in the forum and cannot be used as a 'sword' in insolvency proceedings unless and until recognised.
- [23] In that case, Servis-Terminal LLC ("Servis"), a bankrupt Russian entity, sued its former Chief Executive, Mr Valeriy Drelle, pursuant to **Article 53(3) of the Russian Civil Code**. The claim alleged that Mr Drelle had acted in bad faith by procuring a RUB 2 billion loan for Fort Steiton LLC (personally guaranteed by its owner, Mr Motylev) without verifying that company's financial position. The Arbitrazh Court of Yaroslavl Oblast awarded Servis RUB 2 billion in damages on 24 May 2019, a decision upheld through successive appeals, the last of which concluded on 17 February 2020. Servis then served Mr Drelle (by that time resident in London) with a statutory demand under **section 268(1)(a) of the Insolvency Act 1986 of England and Wales ("the Insolvency Act 1986")** for the judgment debt on 9 October 2020, followed by a bankruptcy petition on 14 October 2020 claiming £19.8 million. ICC Judge Burton made a bankruptcy order against Mr Drelle. Richards J dismissed his appeal against the making of that order.
- [24] The Court of Appeal reversed Richards J's decision. It held that foreign judgments have no direct operation in England and require either a common law action or statutory recognition before they may be enforced. Although insolvency proceedings constitute collective — rather than direct — enforcement, they nonetheless deploy the foreign judgment offensively as a "sword". Unrecognised foreign judgments — by analogy with foreign taxes under the so-called "revenue rule" — do not qualify as "debts" for the purposes of bankruptcy petitions under **sections 267(1) and (2)(b) of the Insolvency Act 1986**, citing **Re a Judgment Debtor**³. It followed that petitions founded on unregistered, and *a fortiori* unrecognised, foreign judgments were precluded; such judgments were neither "payable immediately nor at a certain future time" within **section 267(1)(b)**.

³ (No 2176 of 1938) [1939] 1 ALL ER 1

[25] Newey LJ stated in **Drelle**:

- "[41] The principle that a foreign judgment 'has no direct operation in England' reflects the common law's aversion to enforcing a foreign exercise of sovereign power. As Professor Briggs has explained, 'if a foreign adjudication and judgment is understood as being an act of state sovereignty, ... it is regarded as completely effective within the territory of the sovereign, and as completely unenforceable outside it' ... That logic suggests that any use of an unrecognised and unregistered judgment as a 'sword', including presentation of a bankruptcy petition founded on it, is objectionable.
- [42] The 'revenue rule' has a similar root. Professor Briggs referred to it as 'a particular manifestation of a more fundamental rule, that an assertion or exercise of the sovereign right of a foreign state will not be enforced by an English court' ... the fact that imposition of a tax involves an exercise of sovereign power must result in a foreign tax not being regarded as a 'debt' on which a bankruptcy petition can be presented. That tends to support the contention that an unrecognised foreign judgment, which has no 'direct operation' because it arises from an exercise of sovereign power, is likewise not to be seen as giving rise to a 'debt' capable of founding bankruptcy proceedings.
- [55] Drawing some threads together, it seems to me that, where there is no statutory provision to contrary effect, a bankruptcy petition cannot be presented in respect of a foreign judgment which has not been the subject of recognition proceedings. While an unrecognised judgment may be determinative for certain purposes, it will have 'no direct operation' in this jurisdiction and so cannot be used as a 'sword', whether as regards 'direct execution' or as the basis of a bankruptcy petition. An obligation to make a payment imposed by an unrecognised foreign judgment is not enforceable as such in this jurisdiction and, in the eyes of the law of England and Wales, does not constitute a 'debt' for the purposes of section 267(1) or section 267(2)(b) of the 1986 Act ... It is also reinforced by section 267(1)(b)'s requirement that the 'debt' in respect of which a bankruptcy petition is presented should be 'payable ... either immediately or at some certain, future time'. A sum for the payment of which a foreign judgment provides is not, as it appears to me, to be regarded as so 'payable' if the judgment is unenforceable unless and until recognised by a Court in this jurisdiction."

[26] Snowden LJ's observations in **Drelle** were to similar effect:

- "[61] ... a claim for unliquidated damages for breach of duty will not found a bankruptcy petition: see section 267(2)(b) of the 1986 Act. Accordingly, it is clear that Mr Drelle's only obligation to pay a liquidated sum upon which the Company can rely arises from the fact that he has been ordered to do so by the Arbitrazh Court.

[64] ... I consider that in the same way as a person who relies upon a foreign judgment cannot invoke the individual enforcement mechanisms of the English court for his own benefit unless and until he obtains an English judgment, or registers the foreign judgment or has some other basis under a statute or treaty that permits its enforcement, so also such a person should not be able to invoke the collective enforcement mechanisms of bankruptcy or winding up proceedings in the English court unless and until he obtains an English judgment, or registers the judgment or has some other basis under a statute or treaty permitting such enforcement of the foreign judgment."

[27] The above observations reflect a long-established principle of private international law. As the Privy Council explained in **Owens Bank Ltd v Bracco**⁴, foreign judgments have no direct operation outside the territory of the state from which they emanate and are only enforceable through the machinery of the domestic court upon recognition. Until such recognition is obtained, they do not give rise to rights enforceable within the forum.

[28] The Respondents, however, submit that the governing authority for the purposes of this Court is the Privy Council's decision in **Vendort**, which arose on appeal from the BVI.

[29] In my judgment, in so far as the Respondents assert that there is an inconsistency between Drelle and Vendort, they are correct that Vendort constitutes the binding authority for the purposes of this Court. I do not, however, consider there to be any true inconsistency between the two decisions.

[30] In Vendort, the Privy Council held that a statutory demand could properly be founded upon a foreign arbitral award, notwithstanding that enforcement proceedings had not yet been brought in the BVI. Lord Sumption explained that the award gave rise to an enforceable obligation as soon as it was issued, and that the purpose of recognition or enforcement proceedings was merely to provide the procedural machinery for satisfying that obligation.

[31] The facts of **Vendort** may be stated briefly.

[32] The statutory demand in **Vendort** was based upon a debt arising from a final arbitration award dated 1 November 2011 concerning the failure to pay the purchase price for shares. Vendort had applied

⁴ [1992] 2 A.C. 443

to set aside the statutory demand, arguing that the award was procured by fraud and that enforcement required a prior court order under **section 28 of the then BVI Arbitration Ordinance** (now replaced by the **BVI Arbitration Act 2013**), which provided that an arbitration award was binding and, upon application to the court, could be enforced as a judgment.

[33] The Board found that, even if Vendort could prove that the share purchase agreement was not an arm's-length transaction, it would remain binding in the absence of any impropriety in its making; Vendort neither alleged such impropriety nor disputed that the agreement was binding.

[34] The Board held that the award gave rise to an enforceable debt as soon as it was issued and was conclusive evidence between the parties that an enforceable debt was due. The only relevance of an order under **section 28** was that it made available the court's procedural facilities for satisfying that debt; the enforceability stemmed from the contract, not from any court order.

[35] Dismissing the application to set aside the statutory demand, Lord Sumption stated:⁵

"Vendort's alternative argument [is] that the award was not enforceable in the absence of an order under section 28 of the Arbitration Ordinance. In the Board's opinion this argument is misconceived. An unenforceable liability could not properly be made the subject of a statutory demand. But the award gave rise to an enforceable debt as soon as it was issued. Moreover, it was conclusive evidence as between the parties that an enforceable debt was due in respect of the price of the shares. The only relevance of an order under section 28 is that it makes available the court's procedural facilities for satisfying that debt. The order recognises the enforceability of the debt, but the source of its enforceability is not the order but the contract."

[36] The Applicant seeks to distinguish **Vendort** on the basis that it concerned an arbitral award rather than a foreign court judgment.

[37] The principle articulated by the Board in **Vendort** is that a statutory demand does not constitute enforcement of a foreign determination but proceeds upon the underlying obligation to pay. Two situations must be distinguished. In the first, the underlying obligation constitutes a pre-existing debt between the parties — as in **Vendort**, where the obligation arose contractually. In such a case, the

⁵ [2016] UKPC 15.

existence of a judgment (whether or not recognised) does not determine whether the debt is due: the debt exists independently of the judgment, provided that it is not disputed on substantial grounds. If supported by an enforceable judgment, the court will ordinarily decline to go behind the judgment.

[38] In the second situation — which arises here — there is no underlying obligation giving rise to a debt independently of the judgment. The only source of the alleged indebtedness is the foreign judgment itself. In such a case, unless and until that judgment is recognised in this jurisdiction, there is no enforceable obligation and, therefore, no debt capable of founding a statutory demand.

[39] In deciding whether a statutory demand ought to be set aside, the following points warrant specific mention.

[40] First, **section 157(1) of the Insolvency Act** provides, *inter alia*, that 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) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross-claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum; or
- (c) the creditor holds a security interest in respect of the debt claimed and the value of the security interest is equal to or greater than the amount specified in the demand less the prescribed minimum."

[41] Second, **section 157(2) of the Insolvency Act** (which will seldom apply in practice)⁶ and **section 157(3) of the Insolvency Act** provide:

- "(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.

⁶ See, for example, **Re a Debtor (No 1 of 1987, Lancaster)**, *ex p Debtor v Royal Bank of Scotland Plc* [1989] 2 ALL ER 46.

- (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."

[42] Third, it is relevant to note that, unlike the bankruptcy provisions of **sections 267(2)(b) and 268(2)(b) of the Insolvency Act 1986**, an applicant for a bankruptcy order in the BVI cannot rely upon a future debt. An applicant for a bankruptcy order in the BVI must, therefore, have served a statutory demand for a debt payable immediately: see **section 296(1)(a) of the Insolvency Act**, below.

[43] Fourth, the provisions of **section 296 of the Insolvency Act** must be noted. They provide that:

- "(1) A creditor's application for a bankruptcy order shall be made in respect of a liability or liabilities where, at the time of the application — (a) the amount of the liability, or the aggregate amount of the liabilities, exceeds the prescribed minimum; and (b) the liability, or each of the liabilities, is for a liquidated sum payable to the applicant creditor immediately. (2) An application under subsection (1) may not be made in respect of a liability incurred outside the Virgin Islands unless the liability is payable by the debtor to the creditor by virtue of a judgment or award enforceable by execution in the Virgin Islands."

(Emphasis supplied.)

[44] Had the Applicant been an individual rather than a company, this provision would expressly have precluded the Respondents from proceeding with the Statutory Demand; indeed, the Court would be obliged to set it aside *ex debito justitiae*. I should add that there is no equivalent of **section 296** in the context of liquidation applications: see below.

[45] Unlike the bankruptcy provisions of the **Insolvency Act**, the liquidation provisions of that Act impose no requirement that insolvency be established by the service of a statutory demand. This is clear from **section 162**, which simply provides that the Court may appoint a liquidator, *inter alia*, at the behest of a creditor if "the company is insolvent." **Section 8(1) of the Insolvency Act** states that a company is insolvent, *inter alia*, "(a) if it fails to comply with the requirements of a statutory demand that has not been set aside under section 157; ... or (c) either — (i) the value of the company's liabilities exceeds its assets; or (ii) the company is unable to pay its debts as they fall due."

[46] **Section 8(1)** reflects, in substance, **section 123 of the Insolvency Act 1986**. In the context of winding-up petitions in England and Wales, petitioners often rely simply upon a final enforceable judgment or sometimes upon the underlying debt alone if it cannot be disputed on substantial grounds to establish indebtedness and insolvency: see, for example, **Taylor's Industrial Flooring Ltd v M & H Plant Hire (Manchester) Ltd**.⁷ and **Re a Company**⁸. Insolvency may thus be proved without service of a statutory demand, provided some demand has been made — preferably in writing, specifying a date for payment of the debt alleged to be due. Furthermore, **section 157(4) of the Insolvency Act** provides that if, on hearing an application to set aside a statutory demand, the Court is satisfied that no grounds for setting it aside exist, it may extend the time for compliance. Accordingly, if the demand is not set aside, the company will ordinarily be afforded an opportunity to pay the established debt under this provision.

[47] A statutory demand is commonly served to demonstrate the existence of a debt and to establish insolvency, because a court's refusal to set it aside precludes any subsequent argument either that the sum alleged to be due was not in fact owed or that the company was not insolvent. This has been made clear in numerous cases in England and Wales. The leading authority is **Turner v Royal Bank of Scotland** [2000] BPIR 683, a bankruptcy case, in which Chadwick LJ approved the decision of Vinelott J in **Brillouett v Hachette Magazines Ltd**.⁹, stating:

"There may be rare cases in which it can be said that a debt claimed in a statutory demand against which there has been an unsuccessful attempt to set it aside and which has not been paid or secured or compounded for is not payable at the date of the petition, for instance, if as a result of legislation it were to become unenforceable between those two dates. But unless there is some change of circumstance of that kind it seems to me that all that the petitioning creditor is required to do is to show that he has made a statutory demand, that either no attempt has been made to set it aside or an unsuccessful attempt has been made, and that the amount of the debt has neither been paid nor secured nor compounded for. The debtor cannot go back and reargue the very grounds on which he unsuccessfully sought to have the statutory demand set aside."

⁷ [1990] BCLC 216

⁸ [1983] BCLC 492

⁹ [1996] BPIR 518

- [48] The decision in *Drelle* has attracted academic criticism: see, for example, Lewison J, "Can a foreign judgment form the basis of a bankruptcy petition? **Servis-Terminal v Drelle**: a dissenting view"¹⁰. Whether *Drelle* was correctly decided is, however, a matter for the Supreme Court and not for this Court. I have already observed that had the facts of *Drelle* arisen in this jurisdiction, it would not have been open to the bankruptcy applicant to proceed with its application, by reason of the debarring provisions of section 296 of the Insolvency Act.
- [49] *Vendort* was not cited in *Drelle*. Even if it had been, I do not consider that the decision or the reasoning in *Drelle* would have been any different.
- [50] I agree with the Applicant that *Vendort* is clearly distinguishable from *Drelle*.
- [51] The debt in *Vendort* arose from a contractual agreement between the parties, the obligations under which the arbitral tribunal determined to be due and payable. The indebtedness, though subsequently confirmed by the arbitral proceedings, was founded upon a contract.
- [52] Subject to the usual principles governing the prosecution of a liquidation application in the face of an arbitration clause (see, by way of example, **FamilyMart China Holding Co Ltd v Ting Chuan (Cayman Islands) Holding Corp**¹¹ and **Sian Participation Corp (in liquidation) v Halimeda International Ltd**¹², there is no requirement that an applicant for a liquidation order must first obtain judgment on, or recognition of, an arbitral award in the jurisdiction in which the liquidation is to be brought before seeking such an order. It would, however, be prudent to do so, since recognition will ordinarily preclude the court from going behind the award. Indeed, as Lord Sumption observed in *Vendort*, the contractual debt falls due the moment the award is issued, and even in the absence of recognition — *a fortiori* where the award is a convention award — the court will not ordinarily look behind it. The appropriate course for the unsuccessful party is to challenge the award through the proper legal channels: to attempt to do so in subsequent insolvency proceedings is unlikely to succeed (see section 84 of the BVI Arbitration Act 2013).

¹⁰ (2025) 2 CRI 31

¹¹ [2023] UKPC 33

¹² [2024] UKPC 16)

- [53] I do not consider that Lord Sumption's reference to the award giving rise to "an enforceable debt as soon as it was issued" was intended to convey that the amount claimed only became due upon the issuance of the award. In my judgment, a statutory demand could have been served on the basis of the contractual debt as soon as it accrued under the terms of the agreement, provided that the agreement was valid and enforceable. The award's issuance simply strengthened the creditor's position by establishing that the amount claimed was not open to challenge. In the absence of an award or a recognised judgment, the task of establishing both the debt and the company's insolvency would be more demanding, but that would not, of itself, compel the Court to set aside the demand. It would not do so if it were manifest, even in the absence of an award or judgment, that the debt could not seriously be disputed on substantial grounds — see the authorities cited above.
- [54] The position in *Vendort* is, however, markedly different from that which obtains in the present case.
- [55] The indebtedness claimed here does not arise from any contractual liability. The only basis upon which the Applicant is alleged to be indebted to the Respondents is under the terms of costs orders made by the Guernsey Courts and the Privy Council, following judgments given by those Courts against the Applicant.
- [56] The Respondents have produced orders of the Royal Court of Guernsey declaring that the relevant costs liabilities have become final and constitute judgment debts for definite and ascertained sums. That does not, however, alter the fundamental principle discussed in this judgment: absent recognition, the indebtedness upon which the Respondents rely cannot be treated as due in this jurisdiction.
- [57] It is not disputed by the Respondents that the Guernsey Costs Orders — including those made by the Privy Council — have not yet been recognised as judgment debts enforceable in this jurisdiction. They are capable of recognition, but recognition requires a formal order of this Court. Formal recognition is not a mere formality or administrative act with which the courts of this jurisdiction are routinely charged. It is a court procedure requiring proper judicial scrutiny. The Court could, in principle, decline to recognise the costs orders, although I accept that no material is presently before me that would warrant the Court taking such a course. That requirement is not merely procedural but

substantive, and reflects the fundamental principle that foreign judgments do not operate of their own force within this jurisdiction.

- [58] The critical point is that the Applicant must, at the very least, be afforded the opportunity to contest enforcement in this jurisdiction before the alleged debt can be treated as undisputed and capable of founding a statutory demand or liquidation application. To permit the Respondents to proceed immediately to such relief would be to deploy insolvency proceedings as a means of circumventing the important safeguard which the legislature has provided to those against whom a foreign judgment has been obtained: namely, the right to challenge its recognition and enforcement.
- [59] The applicable test for setting aside a statutory demand is well established. The Court must determine whether the alleged debt is disputed on genuine and substantial grounds. The governing principles were set out by the Court of Appeal in **Sparkasse Bregenz Bank AG v Associated Capital Corporation**¹³. The Court is not required to resolve the dispute or determine whether the defence will ultimately succeed; the question is whether a real dispute exists which is not frivolous and which warrants resolution in ordinary proceedings rather than through the insolvency process.
- [60] The test for determining whether a debt is disputed on genuine and substantial grounds has been said to correspond to the summary judgment threshold under Rule 15.2 of the **ECSC CPR**: see, for example, **Demand Holdings Ltd v VB6 Ltd**.¹⁴, and, in the context of English authorities on the equivalent provisions of the English and Welsh **CPR 24.2**, **Wagner v White**¹⁵; **Ashworth v Newnote Ltd**.¹⁶; and **Collier v P & MJ Wright (Holdings) Ltd**.¹⁷.
- [61] In the present case, the Applicant does not dispute that the Guernsey Courts and the Privy Council made the relevant costs orders, nor that the bills of costs were served and not challenged within the prescribed time. The central point, however, is that absent recognition in this jurisdiction, the debt

¹³ BVI Civil Appeal No 10/2002, 18 June 2001

¹⁴ (BVIHCM 2019/0045)

¹⁵ [2018] EWHC 2882 (Ch), [2019] BPIR 234

¹⁶ [2007] EWCA Civ 793, [2007] BPIR 1012

¹⁷ [2007] EWCA Civ 1329, [2007] BPIR 1452

alleged to arise under the Statutory Demand is not considered to be due. That conclusion flows naturally from **Drelle** and is consistent with the Privy Council's observations in **Vendort**.

[62] The Applicant's argument raises the legal question of whether the Guernsey Costs Orders must first be recognised in the BVI before they can be relied upon as the foundation of a statutory demand. I respectfully agree that they must.

[63] In my judgment, absent such recognition, insolvency proceedings cannot lawfully be founded upon the Guernsey Costs Orders. The law requires the Respondents not merely to establish insolvency, but to demonstrate that the debt relied upon is presently due and payable. Where, as here, the only asserted liability derives from a foreign judgment which has not been recognised in this jurisdiction, that requirement is not satisfied. It follows that the Statutory Demand falls to be set aside as a matter of law, and not merely as an exercise of discretion, which, according to the strict words of **section 157(1)** ("the Court shall set aside a statutory demand"), the Court does not, in any event, have. (Emphasis supplied). It follows that the Statutory Demand must be set aside. To hold otherwise would permit insolvency proceedings to be deployed as a substitute for recognition proceedings, thereby circumventing the procedural safeguards which the law affords to a party against whom a foreign judgment is relied upon.

[64] In those circumstances, it cannot be maintained that the debt is not disputed on substantial grounds.

[65] As noted above, in the context of a liquidation application, the service of a statutory demand is one means of establishing that a debt is due and that the company is insolvent: see section 8(1) of the Insolvency Act. An applicant may, however, establish those conditions by other means: *ibid*. Where an applicant resorts to the service of a statutory demand, the company may apply to set it aside. In England and Wales, no equivalent mechanism exists for companies: the company must instead seek an injunction to restrain presentation of a winding-up petition or, if the petition has already been served, to prevent its advertisement. It could, of course, defend the petition at the hearing; but given the potentially devastating consequences of advertising a petition — in particular the "relation back" provisions of section 127 of the Insolvency Act 1986 — it would be imprudent to delay action until that stage.

[66] In bankruptcy, the position is different. It is a precondition of the making of a bankruptcy order that the applicant must first have served a statutory demand. In *Drelle*, the petition was founded upon a statutory demand premised upon a debt said to be immediately due and owing. Whether the outcome would have differed had the statutory demand instead been served on the basis of a future debt under sections 267(2)(b) and 268(2)(b) of the Insolvency Act 1986 is unclear, but is in any event irrelevant in the present context, given that no equivalent provision exists in the BVI. The Court of Appeal had no need to consider the point. Arguably, had the demand been issued on the basis of a contingent debt, the first-instance decision — if premised on the ground that recognition was unlikely to be refused — might have been less vulnerable to appellate intervention, given that the court may decide unmeritorious factual disputes and discrete points of law on a set-aside application, but not conduct a mini trial, still less a full trial: see, by way of examples, **Steel v Spencer Road LLP**¹⁸; **Cale v Assiuodoman KPS (Harrow) Ltd.**¹⁹; and **Sparkasse Bregenz**, above.

[67] In this jurisdiction, the position concerning the refusal to set aside a statutory demand in bankruptcy proceedings is broadly similar to that in England. Although in both jurisdictions the applicant may rely upon **section 8(1)(b) of the Insolvency Act** (unsatisfied execution) to establish insolvency, where a statutory demand is served, the applicant must demonstrate that either it has been set aside or no application to set it aside has been made within the prescribed period. Sometimes, a person served with a statutory demand takes no steps to set it aside. That, however, does not preclude him from disputing the debt at the hearing of the petition: see **Barnes v Whitehead**²⁰. The position is otherwise if he has applied to set the demand aside and his application has been refused: in those circumstances, an issue estoppel arises, and the underlying merits of the debt cannot be reopened at the hearing: see **Turner v Royal Bank of Scotland**²¹.

[68] As already noted, the position differs in the case of company liquidations.

[69] **Section 8(1) of the Insolvency Act** makes clear that an applicant may resort to any of the specified means of establishing its debt and the company's insolvency.

¹⁸ [2023] EWHC 2492 (Ch)

¹⁹ [1996] BPIR 245

²⁰ [2004] BPIR 693

²¹ [2000] BPIR 683

- [70] Had the Respondents relied upon either of the grounds specified in **section 8(1)(c)**, this Court might have been required to consider the prospects of a recognition order being obtained, by reference to the applicable test. The Respondents did not. They relied upon the ground in **section 8(1)(a)** (unsatisfied statutory demand). On that footing, the reasoning in both **Drelle** and **Vendort** makes clear that there is no basis upon which the Respondents may proceed with their petition, since, absent formal recognition, there is no underlying debt that can be said to be due.
- [71] The only source of unease I have in reaching this conclusion is the effect of **section 296(2) of the Insolvency Act**.
- [72] As I have noted above, **section 296(2)** provides that an application for a bankruptcy order may not be made in respect of a liability incurred outside the Virgin Islands "unless the liability is payable by the debtor to the creditor by virtue of a judgment or award enforceable by execution in the Virgin Islands". (Emphasis supplied).
- [73] **Section 296(2)** is not expressed to apply to a liquidation application. That creates uncertainty about whether the rule differs in that context.
- [74] It may be argued that because **section 296(2)** does not expressly extend to liquidation applications, the legislature cannot have intended the requirement it prescribes to apply in that context. On that view, there is no need for a liability incurred outside the Virgin Islands — such as the costs orders upon which the Respondents rely — to be enforceable by execution in this jurisdiction before it may form the basis of a liquidation application.
- [75] This point was not raised before Bannister J, the Court of Appeal, or the Privy Council in **Vendort**. It is possible that this was because the liability in that case involved a company rather than an individual. Whether that explains the omission — or whether the point was simply overlooked — seems to me to matter little. What is significant is that the failure of **section 296(2)** to extend to liquidation applications could arguably indicate that recognition was not intended to be a precondition of such applications. Had that been the legislative intent, one would have expected **section 296(2)**

— or another provision of the **Insolvency Act** — to have been expressed to apply to company liquidations as well.

[76] That omission is not, however, determinative. The absence of an express provision does not necessarily indicate that the legislature intended to disapply established principles of private international law in the context of corporate insolvency.

[77] The absence of any specific provision in the **Insolvency Act** requiring recognition to be obtained before a foreign liability may be enforced in a company liquidation may mean that, unlike in bankruptcy, recognition is not required in such proceedings. That would align with the well-known principle of statutory construction known as the "*expressio unius*" rule — that the express mention of one matter impliedly excludes others of the same kind (*expressio unius est exclusio alterius*). As the authors of **Bennion, Bailey and Norbury on Statutory Interpretation**²²:

"(1) Where an Act mentions one or more things, by implication it excludes other things of the same kind. (2) This principle is often expressed in the Latin maxim *expressio unius est exclusio alterius* (to express one thing is to exclude another), or for short, the *expressio unius* principle. (3) It applies in particular where a general formula is accompanied by words of extension or exception naming only some members of that class. The remaining members of the class are taken to be excluded from these words. (4) There is no room for the application of this principle where some reason other than the intention to exclude certain things exists for mentioning some but not others."

[78] Among the illustrations Bennion gives is the following:

"An Act authorised a company to build bridges 'of the heights and spans' shown on the deposited plan. The plan also showed inclinations. While conforming to the specified heights and spans, the company departed from the inclinations. In **R v Caledonian Railway Co** (1850) 16 QB 19, it was held the company had not infringed the Act. Lord Campbell CJ said: '... we are clearly of opinion that there is no obligation beyond the heights and spans of the bridges as delineated on the plans. These are mentioned in the enactment; and nothing is said as to the rates of inclination of the road. *Expressio unius est exclusio alterius*'."

²² 8th Edition (2020) ("Bennion"), explain at paragraph [23.12]

[79] Like all canons of construction, however, the *expressio unius* rule is subject to limitations. Bennion observes at paragraph [23.13]:

"There is no room for the application of the *expressio unius* principle where some reason other than the intention to exclude certain things exists for mentioning some but not others. The fact that some things within a class are mentioned expressly while others are not may be attributable to any number of reasons. Like all linguistic canons of construction, the *expressio unius* principle is a useful starting point rather than an absolute rule and it may be displaced in cases where some other reason can be found for why some things were mentioned but not others."

[80] Bennion sounds a note of caution which it is worth bearing in mind:

"An item may have been singled out for mention out of an abundance of caution, perhaps under pressure from persons with a vested interest. Its mention then has little significance in relation to items not mentioned." ...

"It is also worth bearing in mind that different drafters take different views about how much to spell out and how much to leave to implication. So the fact that one Act specifies something and another is silent does not necessarily indicate that a difference in meaning was intended. Even within the same Act different provisions may have been drafted by different drafters."

[81] If the *expressio unius* rule applies to the omission to extend **section 296 of the Insolvency Act** to company liquidations, it might follow that recognition is not required to enforce the Guernsey Costs Orders and that the Statutory Demand should not be set aside.

[82] Although **Vendort** was decided on its own facts and cannot, on that account, be said to be *per incuriam*, it is at least arguable that it has no application to the present facts, and that **Drelle** (even if correctly decided) is inapplicable because it concerned a bankruptcy application and the law of a jurisdiction which has no equivalent of **section 296(2)**.

Parties' further written submissions

[82] As neither party raised this issue, and I only identified it in the course of writing this judgment while reviewing the authorities, I decided to afford both parties the opportunity to make further written or oral submissions on the point — specifically, to contend that the present case falls outside the ambit

of both **Drelle** and **Vendort**, and to address the consequences of that. As Ms Jenkins rightly submitted, **Drelle** is not binding upon me.

- [83] The parties declined to make oral submissions, but both filed detailed further written submissions. I am grateful to them for that.
- [84] The Respondents' submissions address three main issues.
- [85] The Respondents argue that the requirement under **section 296(2) of the BVI Insolvency Act** — that a foreign liability must be enforceable by execution in the BVI before bankruptcy proceedings can be brought — applies only to personal bankruptcy, not corporate liquidation. They invoke the *expressio unius* principle (the express mention of one thing excludes others of the same kind), noting that section 296(2) refers only to bankruptcy orders and is found in **Part XII of the Insolvency Act** (personal bankruptcy), while corporate liquidation is governed separately under **Part VI**. They rely on *Fletcher on The Law of Insolvency*,²³ at 1-025, to support the historical divergence between personal bankruptcy and corporate insolvency regimes.
- [86] The Respondents contend that the Applicant is insolvent under **section 8(1)(c)(ii) of the Insolvency Act** as it is unable to pay its debts as they fall due. They rely on English case law — including **Re Taylor's Industrial Flooring Ltd and Cornhill Insurance plc v Improvement Services Ltd** — for the proposition that failure to pay a single undisputed debt is sufficient evidence of insolvency to support a winding-up order, even if the company appears to have assets.
- [87] The Respondents further contend that the Guernsey Costs Orders are not covered by the BVI's Reciprocal Enforcement of Judgments Act and must be recognised under common law. The Respondents argue that all four common law requirements are met: the orders are for definite sums of money, are final and conclusive, were made on the merits, and were issued by a court with proper jurisdiction (the Applicant having both brought the Guernsey proceedings and voluntarily appeared in them).

²³ Fletcher on The Law of Insolvency, 5th Edition, (Ed Fletcher, I), 2017.

- [88] The Respondents ask the court to declare the debt established, declare the Applicant insolvent, grant permission to apply for the appointment of a liquidator, and award costs.
- [89] The Applicant's primary submission is that the Respondents' *expressio unius* argument inverts the correct legal logic. The common law is presumed to apply unless the legislature clearly provides otherwise — either expressly or by necessary implication. The Applicant relies on Bennion on Statutory Interpretation and the House of Lords authority of **R v Secretary of State for the Home Department, ex p Pierson**²⁴, for that proposition. The threshold for displacing the common law by implication is high: the common law rule must be so inconsistent with the statute that the two cannot stand together. That threshold is plainly not met here, where the alleged disapplication must be inferred from silence in one part of the Act by cross-reference to a provision hundreds of sections away.
- [90] The Applicant further argues that *expressio unius* is a rule designed for lists — it operates where a legislative provision sets out who or what falls within an expression, such that others are impliedly excluded. There is no such list here. The submissions note that, as far as the Applicant is aware, there is no judicial precedent in the BVI or England for applying *expressio unius* to the situation where a common law rule is stated in one part of a statute but not another.
- [91] The Applicant further submits that even were *expressio unius* capable of applying, it cannot operate where there is another plausible reason for the selective mention. The Applicant submits that **section 296(2)** is most naturally read as included *ex abundante cautela* — out of an abundance of caution — particularly given its location in the personal bankruptcy provisions, where the legislature has historically been more protective of individuals' interests.
- [92] Finally, the Applicant states that **section 296(2)** is broader in scope than the common law rule in **Drelle**, since it applies to any judgment or award regardless of whether there is a separate basis (such as a contractual debt) for a statutory demand. This further supports the reading that **section 296(2)** provides additional statutory protection for individuals rather than codifying or limiting the common law position applicable to companies.

²⁴ [1997] 3 W.L.R. 492

[93] Having considered these submissions, I agree with the substance of what the Applicant says.

[94] I do not accept that the position advanced by the Respondents supports the application of the *expressio unius* rule. While the Respondents correctly identify that **section 296(2)** is found within the personal bankruptcy provisions of **Part XII** and is not expressly replicated in **Part VI**, the *expressio unius* principle requires more than silence or structural separation: it requires that the omission from one category be sufficiently deliberate and unambiguous to justify inferring that the legislature intended to exclude it. The submissions do not demonstrate that the BVI legislature specifically considered the question of foreign liabilities in the corporate insolvency context and consciously chose to omit any equivalent restriction. The structural division between **Parts VI and XII** may equally reflect drafting convention rather than the legislative intent to treat foreign debts differently depending on whether the debtor is an individual or a company. Absent clearer evidence of deliberate exclusion, the *expressio unius* argument as advanced here is not persuasive.

[95] Nor have the Respondents been able to point to any authority which supports the application of the *expressio unius* principle in this context, or in the context of any other statutory provision in which a similar argument has arisen. At most, they say that they agree with the analysis set out in Bennion.

[96] As noted above, the Applicant is correct that the *expressio unius* principle is ill-suited to this context. It is a canon of construction designed for closed lists and exhaustive expressions, not for inferring the displacement of established common law rules from structural silence across different parts of a statute. The stronger and more orthodox starting point is the presumption that the common law continues to apply unless Parliament has clearly indicated otherwise. The Respondents' argument requires the court to derive a substantive change in the law — the removal of a fundamental private international law protection — from an absence of words rather than from their presence. That is precisely the kind of reasoning that the high threshold for implied disapplication of common law is designed to guard against. The point that **section 296(2)** may simply have been included out of an abundance of caution in the personal bankruptcy context is compelling and entirely consistent with the legislative structure.

[97] Having considered the additional submissions, I come to the conclusion that the Statutory Demand ought to be set aside.

[98] It is, of course, open to the Respondents to seek recognition of the costs orders in this jurisdiction and, if successful, to serve a fresh demand. I have considered whether I ought to stay the application pending resolution of the recognition question. I do not consider that I can do so. The provisions of **sections 8 and 296** require that where a statutory demand is relied upon to establish insolvency, the demand must be in respect of a debt that is immediately due and owing; and even if the recognition question were ultimately resolved in the Respondents' favour, they would be unable to satisfy that requirement. The debt under the Guernsey Costs Orders cannot be said to be due until those orders are recognised. It follows that the Respondents would not be able to demonstrate that the debt was due at the time the Statutory Demand was served. Furthermore, it is well established that a statutory demand, once served, takes effect at the date of service: it cannot be retrospectively validated by subsequent events, including the later obtaining of a recognition order. Accordingly, a stay would serve no purpose.

[99] A few further observations are warranted.

[100] First, I am informed that permission to appeal has been granted in **Drelle** to the unsuccessful party to appeal to the Supreme Court. As I indicated to the parties, this would not justify a stay pending the determination of that appeal, particularly as the appeal will not be heard until 24 – 25 June 2026 and it will likely be at least a few months after that before the judgment is handed down. It would be wrong for the Statutory Demand to be left hanging over the Applicant for so prolonged a period.

[101] Second, if Guernsey's insolvency law is analogous to that of England and Wales, the Respondents may wish to consider bringing insolvency proceedings there. That is, of course, a matter for them; as Ms Jenkins rightly acknowledged, it would not be possible to take that step without first obtaining appropriate advice from Guernsey lawyers.

[102] Third, since the making of a bankruptcy order against an individual or a winding-up order against a company represents the final step that brings the financial affairs of that person or entity to an end, the Court will be vigilant to ensure that such relief is not sought so as to amount to an abuse of process — for example, where the application is driven by a desire on the part of the applicant to obtain a personal advantage from the liquidation. The same principle must apply where the debt upon which the application is founded can only be enforced once formally recognised in this jurisdiction.

Decision and Acknowledgments

[103] I shall allow the Application and set aside the Statutory Demand. As ever, I am grateful to counsel for the clarity, economy and quality of their written and oral submissions, and for their considerable assistance throughout the hearing of this Application.

Abbas Mithani KC
High Court Judge (Ag)

By the Court

Registrar