

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0020

BETWEEN:

GEMINIS INVESTORS LIMITED

Appellant

and

GOODS TECHNOLOGY STARTING INTERNATIONAL LIMITED

Respondent

Consolidated with:

BVIHCMAP2022/0043

BETWEEN:

GEMINIS INVESTORS LIMITED

Appellant

and

[1] GOODS TECHNOLOGY STARTING INTERNATIONAL LIMITED

[2] G-FORCE INT'L CO LTD

Respondents

Before

The Hon. Mr. Mario Michel

Chief Justice [Ag.]

The Hon. Mr. Eddy D. Ventose

Justice of Appeal

The Hon. Mde. Petra Nicola Byer

Justice of Appeal [Ag.]

Appearances:

Mr. Oliver Clifton with him Ms. Colleen Farrington and Ms. McKay Drigo for the Appellant

Ms. Angeline Welsh, KC with her Ms. Sophia Hurst and Ms. Sara-Jane Knock for the Respondents

2024: October 31;

2025: January 30.

Commercial Appeal – Asset Settlement – Statutory Demand – Whether the appellant was entitled to invoke the asset settlement provision contained in the Notes to claim that the debt had been extinguished - Whether there exists a substantial dispute regarding the existence of the debt or a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum as owing or due

Between 31st December 2019, and 31st May 2020, the respondents subscribed to nine short-term notes issued by the appellant. The first respondent subscribed to eight of these notes, while the second respondent subscribed to one. Of the eight notes subscribed to by the first respondent, six notes (Notes 1, 2, 3, 6, 7, and 8) were included in a statutory demand (“the Demand Notes”) filed by the second respondent in the lower court as part of the “demand proceedings”. However, all nine notes became the focus of a substantive claim filed by both respondents on 18th January 2022 in the lower court (the “substantive proceedings”). The 9 short-term notes had similar terms and were governed by New York law.

The first respondent advanced a principal amount of US\$6,200,000.00 for the Demand Notes. On 23rd December 2021, the first respondent served the appellant with a statutory demand (the “Demand” or “Statutory Demand”), seeking payment of US\$5,642,060.27. The amount demanded by the first respondent, US \$5,642,060.27, represented the total principal owed on the Demand Notes, along with accrued interest. This sum was calculated after deducting US\$700,000.00, which had been paid by the appellant and accepted by the first respondent.

By application filed by the appellant on 6th January 2022 in the lower court, the appellant sought to set aside the Demand on the ground that the alleged debt was not due and owing. The appellant further alleged that they had a right to set off their liability under the Demand Notes and that even if there had been an event of default, they had the right to make full or partial payment by way of asset settlement. The appellant proposed to redeem the Demand Notes with shares in an investment fund called Evenstar (the “Evenstar shares”).

By so doing, the appellant claimed they had two rights: either to set off their liability under the Statutory Demand or, in the event of a default, to invoke the asset settlement provisions of the demand notes.

At the time the Demand was served, the Demand Notes had already matured, a fact that the appellant did not dispute. The first respondent opposed the appellant’s application to set aside the Demand by arguing that the appellant’s reliance on the set-off provisions was unfounded. According to the first respondent, the appellant needed to demonstrate that the first respondent had an outstanding liability against which the appellant was entitled to set off its debt. However, the appellant failed to identify any such liability. Additionally, and in any event, the first respondent contended that the appellant could not invoke the asset settlement provisions to redeem the Demand Notes with shares in an investment fund because the first respondent had not issued a default notice. Without a default notice, the asset settlement provisions did not apply. In rebuttal, counsel for the appellant contended that the asset settlement provisions applied, and it was not open to the first respondent to fail or refuse to serve a default notice to prevent the appellant from relying on those provisions.

By order dated 1st March 2022, the learned judge dismissed the appellant's application to set aside the Demand. The court also permitted the first respondent to make an application for the appointment of a liquidator over the appellant. The judge's order was followed by a written judgment dated 30th May 2022. In his judgment, the trial judge observed that the Evenstar shares proposed by the appellant were valued at approximately US\$4.9 million, leaving a shortfall of US\$700,000.00. The trial judge therefore noted that the appellant having not made a proposal to pay this outstanding shortfall, that shortfall, which exceeded the statutory limit of US\$2,000.00 for deeming a company insolvent under the **Insolvency Act**¹, justified his refusal to set aside the Demand. The judge also found that the Evenstar shares had not been allocated to the first respondent's account, and that the appellant's right to rely on the set off provisions had been lost upon the maturity of the Demand Notes.

In relation to the asset settlement provisions, the trial judge disagreed with counsel for the appellant's argument that these provisions were applicable. The judge rejected the assertion that the first respondent could not refuse to serve a default notice, stating that the provision concerning events of default was intended to address non-payments of ongoing principal and interest. He further explained that, until the Demand Notes matured, the noteholder (in this case, the first respondent) had the discretion, in cases of non-payment of an instalment of principal and interest, to either sue for the outstanding amounts or accelerate the payment of the monies due under the Notes by the issuance of a notice of default.

The judge found that, based on the facts, no complaint had been made under the notice of default provision, whilst the Demand Notes were current. Once the Demand Notes had matured, the judge found that that was the end of the matter. The issuer (the appellant) was obliged to pay the Demand Notes and if the issuer failed to so do, there was a money debt owed to the noteholder (the first respondent).

The court below therefore having regard to the parameters of the test to set aside a statutory demand as set out in this Court's decision in **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation**,² found that there was nothing put forward by the appellant to meet the threshold for acceding to the setting aside application, quite apart from the US \$744,000 which they claimed (but failed to prove) that they had paid and for which they had not received credit. The judge found that the terms of the provision as to "events of default" were sufficiently clear, and the appellant had no realistic chance of showing that the provision applied in a way that would allow it to transfer the Evenstar shares to the first respondent. In those circumstances, the judge refused to set aside the Demand. Being dissatisfied with the judge's ruling, the appellant appealed by way of notice of appeal filed on 12th April 2022.

As regards the substantive proceedings, the respondents, as stated earlier, had subscribed to nine (9) short-term notes issued by the appellant. Whilst only the Demand Notes issued to the first respondent were the subject of the statutory demand, all 9 Notes were subject to the substantive proceedings in the lower court. On 18th January 2022, the respondents

¹ Act No. 5 of 2003 of the Laws of the British Virgin Islands.

² BVIHCVAP2002/0010 (delivered 18th June 2003, unreported).

commenced a claim, seeking the recovery of the principal amount and interest due under the 9 Notes, as they had all matured by that time and remained unpaid. On 20th January 2022, the appellant filed and served an acknowledgement of service in response to the claim. Pursuant to rule 10.3 of the Civil Procedure Rules 2000 (the “CPR 2000”), the deadline for the appellant to file and serve its defence was 17th February 2022. However, the appellant failed to file a defence by that date.

In the substantive proceedings, the learned judge in the lower court ordered, *inter alia*, that

- (i) the extension application be dismissed; and
- (ii) the request for default judgment be granted and judgment in default be entered in favour of the respondents. This order was reduced to a written judgment of the same date. The judge recognised that before him were cross applications which had been filed on the same date; the first a default judgment application by the respondents and the second, an extension of time application by the appellant. The judge determined that the first question he had to decide was whether he was obliged to deal with the application for judgment in default before he dealt with the appellant’s extension application, or whether he had some discretion to determine the appellant’s application first.

The learned judge recognised, however, that on the authority of **Re Keystone Knitting Mills’ Trademark**³, once the respondents filed their application for judgment in default, they ought not to be penalised by the court’s delay in granting the relief sought. The fact that the court did not grant the default judgment in the 4 hours before the cross-application was filed ought not to rob the respondents of their right to default judgment. He further recognised that on the authority of **Matthew and others v Sedman and others**,⁴ the court had the power to disregard parts of a day so that the two cross-applications may be treated, as a matter of law, as being at the same time.

Nevertheless, the judge determined that he ought to be guided by the principles enunciated in this Court’s decision of **Digital Security Services et al v Nevis International Bank & Trust Ltd**,⁵ where this Court held that as a general rule, the court at first instance has a discretion as to the order in which it considered applications (albeit that the starting point was the order in which the applications had been filed). The judge thus ruled that he had the discretion to determine either the respondents’ application or the appellant’s application first.

In exercising his discretion, the learned judge found that the most important factor was that the respondents would be entitled to summary judgment if the appellant had been permitted an extension of time in which to serve its defence. He noted that there was thus no purpose in granting an extension of time since it would be contrary to the overriding objective to permit litigation to continue if the only result would be for additional costs to be incurred on an

³ [1929] 1 Ch 92.

⁴ [2021] UKSC 19.

⁵ NEVHCVP2021/0003 (delivered 7th April 2022, unreported).

application for summary judgment, which (unless this Court overturned his decision in the Demand Proceedings) would inevitably succeed.

Following **Digital Security Services**⁶, the judge noted that the usual practice would be to consider the default judgment application first, as it had been filed first. However, having regard to his earlier decision in the Demand Proceedings, the trial judge observed that if the appellant had reasonable prospects of success in its defence, then that may have afforded a reason for not following the usual practice. However, he ruled that as it pertained to the demand notes, the appellant did not have a reasonable prospect of success in defending the substantive claim. He therefore determined that there was nothing before him to exercise his discretion to consider the extension application first. Accordingly, he granted the application for judgment in default and dismissed the cross-application for an extension of time.

As to the remaining three notes (4, 5 and 9) which were not the subject of the Demand, the judge also found that the appellant had no reasonable prospect of successfully defending the claim with respect to these three notes. He found that the respondents had adequately pleaded the amounts notionally paid in respect of notes 4, 5 and 9 and that the same were now due and owing. However, he found that the appellant's defence, seeking to plead that the notional value of the shares was variable, had no reasonable prospect of success in that none of the evidence upon which the appellants could rely upon made any difference to the sums, in fact, due and owing.

Being dissatisfied with the decision of the learned judge, the appellant appealed by notice of appeal filed on 16th August 2022.

The sole issue before this Court, as distilled from the seven grounds of appeal set out in the notice of appeal - particularly grounds 1 and 2 - is whether the appellant was entitled to invoke the asset settlement provision contained in the Notes to claim that the debt had been extinguished. This issue also encompasses whether there exists a "substantial dispute regarding (i) the existence of the debt or (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum [as] owing or due."

Held: dismissing the appeals, costs to the respondent to be assessed if not agreed within 21 days of the date of this judgment, that:

1. The evidence in support of the application to set aside never addressed the contention of the respondents that the asset settlement provisions had not been invoked. The appellant, having failed to complete the transactions regarding the assets (whether the same had been triggered or not) belies the contention that the court should have considered that a substantial dispute had been raised. Perhaps, if the transaction had been completed, that is, that there was in fact a transfer of the assets, registration in their name, and allocation to the Anuenue account of the USD\$4.5 million dollars that the appellant had indicated was to be done, that would have presented as a different factual matrix of whether the debt still in fact existed

⁶ Supra.

and whether it was open to the respondents to say otherwise. But this was not the case. A simple assertion by a party without the necessary actions could not enable the appellant to rely on the provision to create a non-existent dispute.

Western Bulk Carriers k/s v Li Hai Maritime Inc. 2005 2 Lloyd's Rep 389 applied, Vitol SA v Genser Energy Ghana Ltd [2022] EWHC 1812 applied.

2. It is clear that the judge below could come to no other determination that there was no need to take further evidence on the issue of the additional payment having been made but not taken into consideration by the respondents in their calculations on the Demand, when the appellants had clearly been put on notice. Indeed, there was no submission made to the court below that the appellants were seeking an opportunity to do so but rather they told the court that “they suspect they may have to put in evidence at some point that there was an additional payment of \$744,000.00 made to the respondent”. There having been no evidence before the court below, I agree that even if the court had accepted that the purported asset settlement was operative, such settlement still left a balance well over the statutory maximum. A position which the court below found. It is therefore clear, taking the arguments of the appellant at its most generous, that the appeal against the finding of the learned judge below cannot be sustained. The findings of the judge were entirely within his remit to find based on the evidence and the arguments before him, and as such the Demand appeal is dismissed.

JUDGMENT

- [1] **BYER JA [AG.]:** Before the Court were consolidated appeals **BVIHCMAP2022/0020** (the “statutory demand appeal”) and **BVIHCMAP2022/0043** (the “substantive appeal”), which arose out of separate claims in the lower court. As the appeals were connected, by consent of the parties, they were consolidated in September 2022. As a starting point, it would be useful to provide a short background to the lower court claims and illustrate how the appeals came before this Court.

Background

- [2] Geminis Investors Limited (“Geminis” or the “appellant”) is a company incorporated in the Territory of the Virgin Islands (the “BVI”), Goods Technology Starting International Limited (“Goods” or the “first respondent”) is a company incorporated in Samoa and G-Force Int’l Co Ltd (“G-Force” or the “second respondent”) is a company incorporated in Anguilla.

- [3] Between 31st December 2019, and 31st May 2020, the respondents subscribed to nine short-term notes (the "9 Notes") issued by the appellant. Goods subscribed to eight of these notes, while G-Force subscribed to one. Of the eight notes subscribed to by Goods, six notes (Notes 1, 2, 3, 6, 7, and 8) were included in a statutory demand (the "Demand Notes") filed by Goods in the lower court as part of the "demand proceedings." However, all nine notes became the focus of a substantive claim filed by both respondents on 18th January 2022 in the lower court (the "substantive proceedings"). The 9 Notes had similar terms and were governed by New York law.

The Demand Proceedings

- [4] Goods advanced a principal amount of US\$6,200,000.00 for the Demand Notes. On 23rd December 2021, Goods, served the appellant with a statutory demand (the "Demand"), seeking payment of US\$5,642,060.27. The amount demanded by Goods, US \$5,642,060.27, represented the total principal owed on the Demand Notes, along with accrued interest. This sum was calculated after deducting US\$700,000.00, which had been paid by the appellant and accepted by Goods. Indeed, although the appellants at the hearing of the matter from the bar table sought to make representations as to a further payment of US\$744,000.00 having been made, this payment was never substantiated.
- [5] By application filed by the appellant on 6th January 2022 in the lower court, the appellant sought to set aside the Demand on the ground that the alleged debt was not due and owing. The appellant further alleged that they had a right to set off their liability under the Demand Notes and that even if there had been an event of default, they had the right to make full or partial payment by way of asset settlement. The appellant proposed to redeem the Demand Notes with shares in an investment fund called Evenstar (the "Evenstar shares").

[6] By so doing, the appellant claimed they had two rights: either to set off their liability under the Demandor, in the event of a default, to invoke the asset settlement provisions of the Demand Notes.

[7] At the time the Demand was served, the Demand Notes had already matured, a fact that the appellant did not dispute. Goods opposed the appellant's application to set aside the Demand by arguing that the appellant's reliance on the set-off provisions was unfounded. According to Goods, the appellant needed to demonstrate that Goods had an outstanding liability against which the appellant was entitled to set off its debt. However, the appellant failed to identify any such liability. Additionally, and in any event, Goods contended that the appellant could not invoke the asset settlement provisions to redeem the Demand Notes with shares in an investment fund because Goods had not issued a default notice. Without a default notice, the asset settlement provisions did not apply. In rebuttal, counsel for the appellant contended that the asset settlement provisions applied, and it was not open to Goods to fail or refuse to serve a default notice to prevent the appellant from relying on those provisions.

The lower court's decision (The demand proceedings)

[8] By order dated 1st March 2022, the learned judge dismissed the appellant's application to set aside the Demand. The court also permitted Goods to make an application for the appointment of a liquidator over the appellant. The judge's order was followed by a written judgment dated 30th May 2022. In his judgment, the trial judge observed that the Evenstar shares proposed by the appellant were valued at approximately US\$4.9 million, leaving a shortfall of US\$700,000.00. The trial judge therefore noted that the appellant having not made a proposal to pay this outstanding shortfall, that shortfall, which exceeded the statutory limit of US\$2,000.00 for deeming a company insolvent under the **Insolvency Act**⁷, justified his refusal to set aside the Demand. The judge also found that the Evenstar shares

⁷ Act No. 5 of 2003 of the Laws of the British Virgin Islands.

having not been allocated to Goods' account, that, the appellant's right to rely on the set off provisions had been lost upon the maturity of the Demand Notes.

[9] In relation to the asset settlement provisions, the trial judge disagreed with counsel for the appellant's argument that these provisions were applicable. The judge rejected the assertion that Goods could not refuse to serve a default notice, stating that the provision concerning events of default was intended to address non-payments of ongoing principal and interest. He further explained that, until the Demand Notes matured, the noteholder (in this case, Goods) had the discretion, in cases of non-payment of an instalment of principal and interest, to either sue for the outstanding amounts or accelerate the payment of the monies due under the Notes by the issuance of a notice of default.

[10] The judge found that on the facts, no complaint had been made under the notice of default provision whilst the Demand Notes were current. Once the Demand Notes had matured, the judge found that that was the end of the matter. The issuer (the appellant) was obliged to pay the Demand Notes and if the issuer failed to so do, there was a money debt owed to the noteholder (Goods).

[11] The court below therefore having regard to the parameters of the test to set aside a statutory demand as set out in this Court's decision in **Sparkasse Bregenz Bank AG v Associated Capital Corporation**,⁸ found that there was nothing put forward by the appellant to meet the threshold for acceding to the setting aside application, quite apart from the US \$744,000.00 which they claimed (but failed to prove) that they had paid and for which they had not received credit. The judge found that the terms of the provision as to "events of default" were sufficiently clear and the appellant had no realistic chance of showing that the provision applied in a way which would allow it to transfer the Evenstar shares to Goods. In those circumstances, the judge refused to set aside the Demand.

⁸ BVIHCVAP2002/0010 (delivered 18th June 2003, unreported).

- [12] Being dissatisfied with the judge's ruling, the appellant appealed by way of notice of appeal filed on 12th April 2022.

The substantive proceedings

- [13] As stated earlier, the respondents had subscribed to nine (9) short-term notes issued by the appellant. Whilst only the Demand Notes issued to Goods were the subject of the Demand, all 9 Notes were subject to the substantive proceedings in the lower court. On 18th January 2022, the respondents commenced a claim, seeking the recovery of the principal amount and interest due under the 9 Notes, as they had all matured by that time and remained unpaid. On 20th January 2022, the appellant filed and served an acknowledgement of service in response to the claim. Pursuant to rule 10.3 of the Civil Procedure Rules 2000 (the "CPR 2000"), the deadline for the appellant to file and serve its defence was 17th February 2022. However, the appellant failed to file a defence by that date.

- [14] Instead, the appellant sought an extension of time to file the defence by application filed on 1st March 2022. On the same date, but earlier in time, the respondents requested default judgment against the appellant for the failure to file a defence. Notably, the default judgment application was filed at 8:38 am whereas the extension application was filed at 12:48 pm. On 25th April 2022, the appellant filed and served its defence in the substantive proceedings. The applications came on for hearing before the trial judge on the 2nd to 4th May 2022.

The lower court's decision (The substantive proceedings)

- [15] On 30th May 2022, the learned judge ordered, *inter alia*, that:
- (iii) the extension application be dismissed; and
 - (iv) the request for default judgment be granted and judgment in default be entered in favour of the respondents. This order was reduced to a written judgment of the same date. The judge recognised that before him were cross applications which had been filed on the same date; the first a default judgment application by the respondents and the second, an extension of

time application by the appellant. The judge determined that the first question he had to decide was whether he was obliged to deal with the application for judgment in default before he dealt with the appellant's extension application, or whether he had some discretion to determine the appellant's application first.

[16] He recognised, however, that on the authority of **Re Keystone Knitting Mills' Trademark**⁹, once the respondents filed their application for judgment in default, they ought not to be penalised by the court's delay in granting the relief sought. The fact that the court did not grant the default judgment in the 4 hours before the cross-application was filed ought not to rob the respondents of their right to default judgment. He further recognised that on the authority of **Matthew and others v Sedman and others**,¹⁰ the court had the power to disregard parts of a day so that the two cross-applications may be treated, as a matter of law, as being at the same time.

[17] Nevertheless, the judge determined that he ought to be guided by the principles enunciated in this Court's decision of **Digital Security Services et al v Nevis International Bank & Trust Ltd**,¹¹ where this Court held that as a general rule, the court at first instance has a discretion as to the order in which it considered applications (albeit that the starting point was the order in which the applications had been filed). The judge thus ruled that he had the discretion to determine either the respondents' application or the appellant's application first.

[18] In exercising his discretion, the learned judge found that the most important factor was that the respondents would be entitled to summary judgment if the appellant had been permitted an extension of time in which to file and serve its defence. He noted that there was thus no purpose in granting an extension of time since it would be contrary to the overriding objective to permit litigation to continue if the only result

⁹ [1929] 1 Ch 92.

¹⁰ [2021] UKSC 19.

¹¹ NEVHCVAP2021/0003 (delivered 7th April 2022, unreported).

would be for additional costs to be incurred on an application for summary judgment, which (unless this Court overturned his decision in the Demand Proceedings) would inevitably succeed.

[19] Following **Digital Security Services**¹², the judge noted that the usual practice would be to consider the default judgment application first, as it had been filed first. However, having regard to his earlier decision in the Demand Proceedings, the trial judge observed that if the appellant had reasonable prospects of success in its defence, then that may have afforded a reason for not following the usual practice. However, he ruled that as it pertained to the Demand Notes, the appellant did not have a reasonable prospect of success in defending the substantive claim. He therefore determined that there was nothing before him to exercise his discretion to consider the extension application first. Accordingly, he granted the application for judgment in default and dismissed the cross-application for an extension of time.

[20] As to the remaining three notes (4, 5 and 9) which were not the subject of the Demand, the judge also found that the appellant had no reasonable prospect of successfully defending the claim with respect to these three notes. He found that the respondents had adequately pleaded the amounts notionally paid in respect of notes 4, 5 and 9 and that the same were now due and owing. However, he found that the appellant's defence, seeking to plead that the notional value of the shares was variable, had no reasonable prospect of success in that none of the evidence upon which the appellants could rely upon made any difference to the sums in fact due and owing.

[21] Being dissatisfied with this decision, the appellant appealed by notice of appeal filed on 16th August 2022.

¹² Supra.

The Appellant's submissions

- [22] In both oral and written submissions, the appellant contended that at the heart of the appeal was the learned judge's failure to correctly assess that, at minimum, there was a genuine and substantial dispute regarding whether a debt had become due in favour of the respondents.
- [23] During the hearing, learned counsel for the appellant conceded that the success of the substantive appeal depended on the outcome of the statutory demand appeal. As it pertained to the statutory demand appeal, counsel for the appellant argued that the trial judge ultimately erred in finding that the appellant's application to set aside the demand, based on the events of default provision in the Demand Notes, did not give rise to a genuine and substantial dispute as to the debt, pursuant to section 157(1) (a) of the **Insolvency Act**.¹³
- [24] As to the substantive appeal, counsel asserted that the judge erred in finding that the appellant did not have a reasonable prospect of success in its defence owing to the reasons in his judgment in the demand proceedings. Counsel contended that the focus of their consolidated appeals was on the asset settlement provision as set out in the Notes, and they were no longer pursuing the set-off argument as originally set out in their notices of appeal.
- [25] Counsel for the appellant accepted that by the time the demand had been served on the appellant and the proceedings in the substantive claim had commenced in the lower court, the 9 Notes had all matured, interest had accrued, and no payment had been made. Counsel however further contended that this non-payment amounted to an "event of default" as set out in the Notes. Such an event of default could have only occurred after the maturity date of the Notes had passed. He posited that once the event of default had taken place, then the recourse was for the noteholders (the respondents) to issue the default notice and declare that payment as due. In that event, the asset settlement provisions would be triggered

¹³ Supra.

and the appellant asserted that it was then open to them to effect repayment of the principal and interest by way of a transfer of assets rather than by cash payment, under the provisions of the asset settlement criteria contained in the Notes.

[26] Counsel for the appellant argued that even though “default notice” was not defined in the Notes, a letter dated 26th November 2021 from Withers BVI (counsel for the respondents) to Harney Westwood and Riegels (the appellant’s then legal practitioners), wherein a demand was made for payment of the principal and interest, constituted a “default notice” within the meaning of the terms of the Notes.

[27] Counsel accepted that there was no dispute regarding the appellant’s liability for the owed sum. However, counsel maintained that the central issue for this Court to determine was the effect of the appellant’s offer of asset settlement to Goods in the statutory demand appeal. Specifically, the question was whether the asset settlement provision, when invoked, effectively extinguished the debt. If the Court agreed with them in this regard, then the trial judge was incorrect in his decision on the statutory demand appeal and by using his reasoning from that decision to ground his judgment in the substantive appeal, he would have erred.

[28] Counsel for the appellant contended that the debt under the Demand Notes was extinguished by the appellant’s compliance with the asset settlement provisions. By letter dated 17th February 2022, the appellant’s then counsel sent a draft “bought and sold” note to counsel for Goods, for signature, proposing the transfer of US \$4,945,801.00 to Goods to settle the Demand Notes. Counsel argued that the asset settlement provision created an obligation for Goods to accept this asset settlement. The appellant emphasised the sequence of events: the non-payment of the debt occurred; the letter initiating the asset settlement was sent in November 2021; the Demand was served in December 2021; and the relevant documentation was forwarded to Goods in February 2022. Taken all together, the appellant argued that these factors fulfilled their repayment obligations under the Demand Notes, effectively discharging the debt.

- [29] Counsel for the appellant, however, conceded that no actual transfer of assets had taken place. There was no evidence that the appellant had registered any assets in Goods' name or had transferred/deposited such assets in Goods' designated account outside of Hong Kong, which was a specific requirement of the asset settlement provision. Notwithstanding, counsel argued that taken together, the above factors raised a genuine and substantial dispute as to the debt and the learned judge was wrong to hold otherwise. Although the debt remained outstanding when the Demand was served and the application to set it aside was filed, by the time of the hearing on 1st March 2022 before the learned judge, the asset settlement provisions had been properly invoked and fulfilled, thereby extinguishing the liability.
- [30] With respect to the substantive appeal itself, the appellant highlighted that the judge's finding that there was no substantial dispute in relation to the Demand Notes carried through to the substantive appeal. Whilst conceding that there was little that could be done by way of challenging the approach taken by the learned judge in respect of challenging his ultimate discretion in determining the order of hearing the extension of time and default judgment applications, counsel argued that if the judge was wrong about his ruling in the statutory demand appeal, then the whole basis of his decision to grant the judgment in the default application and deny the extension of time application was wrong.
- [31] As to Notes 4, 5, and 9, the appellant further contended that the judge erred by rejecting their argument that the subscription amounts in respect of these Notes were uncertain. He further erred by failing to fully consider that the subscription amounts for Notes 4 and 5 were never agreed between the appellant and Goods, and that the subscription amount for Note 9 was never agreed between the appellant and G-force. These matters were issues of fact which would require a trial and without a trial on the merits, the judge was wrong to summarily determine this based on the pleadings and limited evidence before him. Lastly, the appellant contended that since the judge's approach in accepting the notional sums as the subscription

amounts for Notes 4, 5 and 9 had been flawed, his acceptance of the calculations of interest on Notes 4, 5 and 9 based on the notional sums was equally flawed.

The Respondents' submissions

- [32] During oral arguments concerning the statutory demand appeal, counsel for the respondents made the short point that the appellant's previous counsel miscalculated the sum owed, and the amount that had been offered was less than US \$700,000.00. There was no evidence of further payments totalling US \$700,000.00 (a point conceded by counsel for the appellants during the hearing), and so the amount of the disputed debt was significantly higher than the statutory minimum of US \$2,000. Learned King's Counsel argued that this was sufficient to refuse the application to set aside the Demand and the judge was correct in so doing. If the Court were to agree with the respondents on this point, this would be sufficient to dispose of the statutory demand appeal as the appellant has not offered to repay an amount well above the statutory prescribed minimum.
- [33] The respondents' principal argument, however, concerned the construction and interpretation of the asset settlement provisions that they say did not apply because the maturity date for the Notes had already passed. A finding that they submit was correctly made by the learned judge. The respondents argue that the appellant has never actually disputed that it is liable to repay the respondents under the Notes, rather, their main contention on the appeal is a purported entitlement to rely on the asset settlement provision. This, they say, cannot amount to a genuine and substantial dispute as to the debt as is required under the provisions of statute leading to the setting aside of the statutory demand.
- [34] Counsel for the respondents argued, that no default notice was served on the appellant by the respondents. In fact, a decision of whether to do so or not was entirely within the respondents' discretion. However, having opted not to, there was no other document that the appellants could rely on as amounting to such a notice. There was nothing in the Demand that constituted a default notice and the Demand

itself was served to invoke the insolvency regime in the BVI against the appellant. The respondents in relying on the decision of **Vitol SA v Genser Energy Ghana Ltd**¹⁴ made it clear that ultimately, whether the provisions of the Notes had been engaged regarding the asset settlement option and default notice, was a question of contractual construction. In looking at the provisions under the Notes concerning default notice, the respondents argued that any such notice had to clearly state that the respondents were exercising their discretion to serve such a notice, as doing so, would have ultimately invoked the asset settlement provision. The notice therefore had to make it clear that the election was being made by the respondents since the effect of such notice would have been to accelerate payment under the Notes.

[35] Learned counsel further submitted, that whether such a notice had been issued was of no moment, as an event of default for non-payment could only occur prior to maturity of the Notes, such as in the case of the early redemption provision under the Notes. Upon maturity, the principal and interest would automatically become due, rendering the need for such a notice inconsequential. Thus, the effect of an event of default was to accelerate payment prior to maturity. The default repayment provision, therefore, would have been inapplicable upon maturity since it would be illogical to accelerate a payment which was already due. Counsel asserted that it was, therefore, insufficient for the correspondence between the parties or the Demand itself to constitute the default notice. The correspondence only made vague reference to the monies due and owing and never made it clear that the respondents were exercising their rights under that specific clause in the Notes. Counsel argued that even if the court did not agree with them on these points, they would still succeed since the conditions of the asset settlement provisions had not been met.

[36] Counsel made the point that the asset settlement argument appeared to be an afterthought by the appellant since the appellant's entire original argument was seeking to rely on the set-off provisions under the Notes. However, the appellants abandoned that argument in relation to set off. Counsel for the respondents further

¹⁴ [2022] EWHC 1812.

contended that even if the appellants sought to rely on the asset settlement provisions, the appellant could only do so if they were prepared to offer the market value of the Evenstar shares and had undertaken the requirements to transfer the shares (assets) into the name of the respondents or deposited the shares (assets) into an account in the name of the respondents outside of Hong Kong. Counsel highlighted in relation to this contention two points. Firstly, the Evenstar shares were essentially worthless, and it was not possible to obtain a market value for the shares since they had been embroiled in proceedings for years, and it was clear from the evidence that there had been a ban on the redemption of the shares. Secondly, there had been no attempt or actual transfer by the appellants of any of these shares to the respondents, and it was not the respondents' responsibility to take any action in that regard.

[37] As to the substantive appeal, King's Counsel made the short point that the judge's decision to determine the applications in the order that he did was a matter entirely within his discretion and there was a high threshold for the appellant to overcome to prove that his decision was blatantly wrong. This, they argue, the appellant has not done. Unless and until the judgment in the demand proceedings had been overturned, the respondents had a good claim for summary judgment on all the Notes. The judge was therefore entirely correct to proceed on the basis that he did, and the judgment obtained was entirely justified.

[38] As to the issue, which was raised by the appellant concerning Notes 4, 5 and 9¹⁵, learned counsel argued that the learned judge was right in coming to the decision that he had. Whilst asserting the sums were 'uncertain', the appellants offered no alternative as to what the subscription amount may be and had no explanation for why there were clear USD amounts on the face of the Notes. It was entirely open to the judge to consider the pleadings and evidence before him and conclude that the appellants had no real prospect of successfully arguing that the subscription amounts were uncertain.

¹⁵ Paragraph 20 above.

[39] In the round, counsel highlighted that as stated in their submissions on the statutory demand appeal, the judge was correct to hold that the appellant had no realistic prospect of defending the claim in the substantive proceedings. Consequently, the statutory demand and substantive appeals ought to be dismissed, and the judge's orders ought to stand.

Issues for determination on the demand appeal

[40] The sole issue before this court, as distilled from the seven grounds of appeal set out in the notice of appeal - particularly grounds 1 and 2 - is whether the appellant was entitled to invoke the asset settlement provision contained in the Notes to claim that the debt had been extinguished. This issue also encompasses whether there exists a "substantial dispute regarding:

- (i) the existence of the debt or
- (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum [as] owing or due." ¹⁶

[41] At the hearing, counsel for the appellant made it clear that they would no longer be pursuing ground 4 in relation to the argument of set off that was argued in the court below, and no argument was advanced on ground 5 in relation to seeking to adduce expert evidence before this court, the application to do so having been dismissed by this court on the 23rd August 2023.

[42] Therefore, the sole remaining grounds were grounds 3 and 6 which in my mind were simply subsets of grounds 1 and 2 and as such, will be dealt with under my determination of the identified sole issue.

[43] At this juncture, it may therefore be of some assistance to be reminded as to what the court below had to be satisfied of to set aside the statutory demand and what in fact was before the court in that regard.

¹⁶ Section 157(1) (a) Insolvency Act; prescribed amount being \$2000.00 per Insolvency Rules S.I 45/2005 Rule 149(1).

[44] This Court in **Jinpeng Group Ltd v Peak Hotels** ¹⁷ restated the principles almost universally relied on in this jurisdiction in relation to what amounts to a substantial dispute from the case of **Sparkasse Bregenz AG v Associated Capital Corporation** ¹⁸ which in part states that:

“... to amount to a substantial dispute as to the debt, “...substantial means having substance and not frivolous disputes which the court should ignore. There must be so much doubt and question about the liability to pay the debt that the court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the court that there is something which ought to be tried either before the court itself or in an action or some other proceeding.”

[45] Indeed this test has been re-formulated in many mutations, but the essential aspect of the test is that there must be an authenticity or genuineness to the dispute that is raised by the defendant to the statutory demand.¹⁹ The need for this, as Farara JA stated in **Goldin Investment Intermediary Ltd v China CITIC Bank (International) Ltd**²⁰ was that since the court is mandated to set aside a statutory demand once there is a substantial dispute, the creditor who has issued the statutory demand is in fact not a creditor in law until they can establish their right and invoke the winding up jurisdiction of the court. To allow a demand to continue where there was in fact a substantial dispute would be “...an abuse of the statutory demand process by which, if the demand remains unsatisfied the company is deemed insolvent.”

[46] Therefore, let me consider what was before the court below.

[47] On the evidence in support of the application to set aside the statutory demand, the appellant had argued their case on two bases:

(i) that they could set off the debt as owed and

¹⁷ Consolidated appeal BVIHCPMAP 2014/0025 AND BVIHCPMAP 2015/0003 (delivered 8th December 2015, unreported).

¹⁸ BVIHCVAP2002/0010 (delivered 18th June 2003, unreported). per Sir Dennis Byron CJ.

¹⁹ Modern Finance Ltd v Benono Holdings Ltd BVIHCPMAP2022/0027 (delivered 20th September 2023, unreported) at paragraph 18 per Price Findlay JA.

²⁰ BVIHCPMAP2022/0010 (delivered 5th July 2023, unreported) at paragraph 50.

- (ii) that they could make a full or partial payment by way of asset settlement.²¹ As noted previously, the argument by way of set-off was not pursued on appeal, and the arguments as outlined above centered on the triggering of the asset settlement provisions under the Notes.

[48] The wording of this provision which the appellant sought to rely on is therefore imperative. It is also necessary to take cognisance of how this issue was argued before the court below and the evidence that was presented to the court below in support of the same.

[49] It is important to therefore set out those provisions that were relied upon in a fulsome manner as is applicable:

“The Terms and Conditions of the Notes - Events of Default

Events of Default:

Each of the following will constitute an event of Default (each an Event of Default) with respect to the Notes

- Non-payment: failure to pay principal of or any interest on the Notes when due, continued for thirty (30) business days
- Other obligations: failure to perform any other material obligations of the Issuer under the Transaction Document, continued for sixty (60) business days after written notice had been given by the Noteholder

Default Repayment:

If any Event of Default with respect to the Notes shall occur and be continuing and not remedied, the Noteholder at its discretion, may give notice (the Default Notice) to the Issuer and declare the principal amount of the Notes to be due and payable immediately.

Asset Settlement:

Pursuant to a Default Notice filed by the Noteholder to the Issuer in lieu of cash, the issuer shall (at its absolute and sole discretion) have the right to transfer any investment products or other assets it designates (the Assets) from time to time to the Noteholder in full or partial payment (as the case may be) of such amounts owed (each an Asset settlement) ...

²¹ Paragraphs 11 and 12 of the Affirmation of Kuo Chih-Wei filed 6/1/2022.

Pursuant to each Asset settlement, the Issuer shall transfer the Assets to the Noteholder by registering such Assets in the Noteholder's name or transfer/deposit such Assets to the Noteholder's designated account outside of Hong Kong..." (Emphasis added)

- [50] The application in the court below was thus argued on the premise that the asset settlement provisions had been triggered and that the appellant, having fulfilled their obligation by *offering* the transfer of shares, effectively extinguished the debt – a position counsel advanced before this court with considerable vigour.
- [51] With that said, it is important to emphasise that, however enticing it may be to follow counsel's arguments before this court, my role is not to reconsider the matter afresh or assess how the matter may be better argued before it at this juncture. Bearing that at the forefront of my mind, the starting premise for triggering the asset settlement provisions remains the issuance of a default notice.
- [52] It is this default notice (though notably undefined within the Notes themselves) that moves the issuer (the appellant) into action. In this Court, it was argued that the statutory demand together with correspondence that flowed between the parties prior to the issuance of the statutory demand, amounted to the required default notice. However, before I delve into these arguments, I wish to examine how this argument was made before the court below.
- [53] Recalling, that the main launch of attack against the statutory demand by the appellants was initially the ability to set off (reiterated in evidence and in correspondence between the parties), in the first Affirmation of Kuo Chih- Wei²² at paragraph 12 he said this:
- "12. Even, if there is an Event of Default the Applicant has the right to make full or partial payment of such amounts owed by way of "Asset settlement" under the Terms."

²² Supra.

The respondents by Lui Chih-Kang²³ stated in response to this one-line assertion, at paragraph 12:

“12. Third, Geminis has asserted that it has a right to settle the debt by way of an asset settlement. Again, this is wrong. No Default notice has been served by Goods Technology on Geminis, and consequently, the contractual provision for asset settlement found in the Notes is not engaged.”

This affiant then went on to speak to the attempts to obtain payment of the monies due and owing and the questionable value of the shares. In response, the second Affirmation of Kuo Chih- Wei²⁴ never responded to the contention that the asset settlement provisions had not been triggered.

[54] At the hearing before the judge below on the basis of submissions filed and oral arguments, the very first time that the appellants advanced to the court that they were relying on the issuance of the statutory demand (alone) as the required default notice under the provisions of asset settlement was at the completion of the delivery of the judge’s *ex tempore* judgment where counsel said this:²⁵

“Mr Duncan: Yes, My Lord, I will accept that. The court has already rendered its decision. However, for the record, I would also say that we were to argue that the default, the statutory demand itself could have qualified as a Default Notice under the section because it does exactly what the Default Notice was meant to do, call in the repayment of the Note.

The Court: Mr Duncan, it’s a bit late to be putting further arguments forward. But in any event, it’s a bad argument, they’re simply wanting their money. They are not saying you’ve defaulted, they are just saying you owe them money.”

[55] Certainly, before the court below, the court heard the last ditched argument proffered after judgment had already been delivered, and in any event, the court found that the argument had no merit. Furthermore, it had not been raised in the alternative that earlier correspondence between the parties could, in any event, constitute a default notice.

²³Filed 21st January /2022.

²⁴ Filed on the 24th February/2022.

²⁵ Transcript 1st March 2022 page 20 lines 15-22.

- [56] As I see it, these were entirely new arguments raised on appeal to salvage the less than stellar manner, in which the matter had been argued in the court below.
- [57] There was no evidence led and there was no argument made that a default notice had been sent, triggering the asset settlement provision. Even though it is not the remit of this court to consider arguments not raised in the court below, the argument raised before this court as to what constitutes a default notice and whether the statutory demand and/or the correspondence flowing between the parties could amount to such has not found favour with me as will become clear.
- [58] When I consider the two documents relied upon by the appellant to stand as the default notice, it is clear that the content of those documents falls woefully short of what would be required to stand as such. In the case of **Western Bulk Carriers k/s v Li Hai Maritime Inc, The “Li Hai”**²⁶ the court there considered the validity of a notice that was to be sent pursuant to the terms of a charter party agreement by the owners of the vessel if they wished to withdraw the vessel from the operation of the hirers. The court held that the notice which would be sent in those circumstances, similar in nature to the notice here where the recipient of the notice must clearly understand its terms and what is being invoked, must be unambiguous with “...the notice [being] judged objectively; the question is whether the notice complied with the contractual requirements...not how the recipient understood it. Furthermore, although the notice must be construed in the context of what has been passing between the parties, I think it must stand alone. It is intended to be an official or formal warning.”²⁷
- [59] This issue was also considered in the more recent case of **Vitol SA v Genser Energy Ghana Ltd**²⁸ where the court had to determine whether an email sent to the defendant amounted to a default notice under the events of default provisions in a sale and purchase agreement as between the parties. The court found that a default

²⁶ 2005 2 Lloyd's Rep 389.

²⁷ Ibid paragraph 87.

²⁸ [2022] EWHC 1812.

notice to amount to such had to be clear, definite, and unambiguous, with the starting point being the contract itself. In that case, the court held that the email that was sent, which requested payment of outstanding sums immediately met the contractual requirement under review of a notice to the defaulting party requiring payment as the only trigger that was needed to bring the agreement to an end by virtue of default.

[60] It is therefore clear that the starting point in this case must be the Notes. Under the provision of the terms and conditions, we are reminded that under the heading 'default payment', it was open to the noteholder to issue a default notice, if they wished, giving notice to the issuer that (and the important words being) "the principal amount of the Notes to be due and payable immediately." This contrasts sharply with the statutory demand, which included both the principal and interest as due upon maturity of the Notes or as stated in the correspondence 26th November 2021 which clearly stated that the correspondence was to answer several contentions by the appellant, including debunking the reliance placed on the asset settlement provisions by the appellant and seeking payment of both principal and interest due under the Notes.

[61] It is therefore clear that the default notice must be specific to what the contract provided for and clearly state the reason for its issuance. Neither the statutory demand nor the letter of the 26th November 2021 met those requirements. As the learned judge below correctly noted, and with which I concur, by the time the statutory demand was issued and even the correspondence relied on, the Notes had already matured, and both the principal and interest were already due and owing. As the learned judge below put it so succinctly, the respondents just wanted their money.

[62] Indeed, the court below considered whether the admitted non-payment of the Notes by the appellant amounted to an event of default that would allow reliance on the asset settlement provisions without more. In doing so, the court determined that the appellant could not invoke such provisions, as the non-payment that had occurred was not due to the failure to act during the currency of the Notes, but was a non-

payment that occurred after the Notes had fully matured and were due to be redeemed. On such redemption, the learned judge found that there was nothing for the appellants to do but to pay the respondents the monies as due and owing. I can therefore find no fault with the reasoning of the learned judge in this regard. The argument of the appellants however went further than this.

[63] In the court below and in this Court, the appellants relying on the triggering event went on to argue that its case at its highest was that the event of default provisions had been triggered and that they had been fulfilled by the “intention” to transfer Evenstar shares to the respondent. Beyond the finding of the learned judge that at maturity, there was no right to rely on any such asset settlement, he also found as a fact that there had not been any transfer or allocation of the said shares to an account of the respondent as required under the Notes for the completion of the asset settlement provision. In this Court, in an attempt to address this clear requirement under the asset settlement provision upon which the appellants relied, counsel for the appellant’s argument was that the obligation of the appellant was to present an identifiable package of assets to the respondent and the instruments to effect the transfer and allocation. There was no concomitant need to actually do so.

[64] In my mind, this is indeed a curious argument when it is considered in the context in which it was in fact made. The purpose of this entire argument was to satisfy the court below that the debt was not owing, that it had been extinguished and as such there was no basis for the respondents to send the appellant into insolvency. It is therefore of some interest that in arguing that the debt was satisfied, it was admitted in this Court and the court below that in fact, the appellants had not actually completed what was required under the asset settlement provision.

[65] It would be recalled²⁹ that the actual requirement of the asset settlement provision includes, the requirement of the appellant to transfer the assets that they intend to use to satisfy the debt by either registering the assets in the name of the respondent

²⁹ See paragraph 42 above.

or by transferring the assets into an account designated to the respondent outside of Hong Kong. The appellants have unequivocally stated that neither of these were done. Indeed, their argument was that by “offering” the Evenstar shares to the respondents and providing the means by which the shares would be allocated to the respondents, they had fulfilled their obligations.³⁰ This argument was maintained before this Court and the court below in the face of repeated questions as to whether the appellants had in fact done all that they were required to do. In the contention of the appellants, once it was raised that they had in fact done all that was required of them to complete the asset transfer, the sole question for the judge below was, therefore, whether the debt had been extinguished or was capable of being extinguished – and that was the substantial dispute that the court had to determine and therefore set aside the statutory demand.

[66] Once again, I do not find favour with the logic of this argument. Before the court below, it was clear that the only evidence as to this “transfer” was the correspondence mentioned earlier. Further, it cannot be lost sight that the evidence in support of the application to set aside never addressed the contention of the respondents that the asset settlement provisions had not been invoked. The appellant, having failed to complete the transactions regarding the assets (whether the same had been triggered or not) belies the contention that the court should have considered that a substantial dispute had been raised. Perhaps, if the transaction had been completed, that is, that there was in fact a transfer of the assets, registration in their name, and allocation to the Anuenue account of the USD\$4.5 million dollars that the appellant had indicated was to be done, that would have presented as a different factual matrix of whether the debt still in fact existed and whether it was open to the respondents to say otherwise. But this was not the case.

³⁰ 17th February 2022 letter from Harneys (attorneys for the Appellants at the time) to Withers (attorneys for the respondents) disputing the debt claimed but then saying “notwithstanding the above the client will transfer US\$4,4945,801.00 by 28th February 2022 into GT’s Aneunue securities account ...in payment under the 6 Notes subscribed to by GT. Please see enclosed draft bought and sold notes for your client’s attention.”

- [67] A simple assertion by a party without the necessary actions could not enable the appellant to rely on the provision to create a non-existent dispute.
- [68] The final argument raised on this point regarding whether a substantial dispute had been raised was the evidence that was led from the bar table in the court below as to the payment of an additional sum by the appellants which the respondents had not acknowledged and if had been taken together with the transfer of the assets, the debt would have indeed been satisfied.
- [69] This point surrounds the provision within the **Insolvency Act** that if there is a substantial dispute as to a portion of the debt which would make the undisputed portion of the debt less than \$2000.00, the statutory demand must be set aside. In this case, the appellants argue that even though there was no evidence before the learned judge that there had in fact been any additional payments, the fact that counsel raised it in oral submissions that there was some evidence of such payments, the court should have allowed the appellants an opportunity to place that evidence before the court.
- [70] In the judgment of the learned judge, he expressed surprise at the contention made from the bar table by counsel that the appellants were not aware that there had in fact been a miscalculation of payments acknowledged until just before the hearing of the matter. It was at this juncture that counsel raised the instructions from his client that there had in fact been this further payment of some US\$744,000.00. I too find this indication made by counsel as surprising. The evidence before the learned judge included several exhibits placed into evidence and relied upon by the parties. These included the following:
- (a) Letter dated the 17th February 2022 exhibited to the second affirmation of Lu Chih- Kang in response to the set-aside application – where the appellants had made the “offer” of the transfer of shares.
 - (b) Letter dated the 22nd February 2022 exhibited to the second affirmation of Lu Chih-Kang in response to the set-aside application – where the respondents acknowledge the correspondence of the appellants, and respond in no uncertain terms that even if the asset settlement provision was triggered, which they say it

was not, that the 'proposed Asset settlement is substantially less than the sum due and owing Goods Technology'.

(c) Letter dated the 24th February 2022 exhibited to the second affirmation of Kuo Chih-Wei in support of the application to set aside – where the appellants in response to the letter of the 22nd February, reiterate that they are relying on the set-off provisions in the Notes and that further as far as they were concerned “the transfer of the Evenstar shares amounting to a NAV of US\$4,945,801.00 together with the principal already paid by the company to Goods Technology under Note 1 on the amount of US\$200,000.00 and US\$500,000.00 on the 21st January 2021 and 14th April 2021 respectively, is sufficient to satisfy the amount stated in the Demand”.

[71] Coupled with the clear indication in the statutory demand issued on 23rd December 2021 that those payments identified (and upon which they relied) had already been taken into account and that the respondents clearly informed the appellants that any purported asset settlement they were making was inadequate to cover the debt, it becomes even more than surprising that the appellants were emboldened to attend court at the hearing of the matter on the 1st March 2022 and simply state at that point “oh we made a further payment too and we only realised that yesterday”.

[72] It is therefore clear that the judge below having had this information, which the appellants also had, could come to no other determination than the one where he felt there was no need to take further evidence when the appellants had clearly been put on notice. Indeed, there was no submission made to the court below that the appellants were seeking an opportunity to do so but rather they told the court that “they suspect they may have put in evidence at some point that there was an additional payment of \$744,000.00 made to the respondent”. There having been no evidence before the court below, I agree that even if the court had accepted that the purported asset settlement was operative, such settlement still left a balance well over the statutory maximum. A position which the court below found.

[73] It is therefore clear, taking the arguments of the appellant at its most generous, that the appeal against the finding of the learned judge below cannot be sustained. The

findings of the judge were entirely within his remit to find based on the evidence and the arguments before him and as such the demand appeal is dismissed.

[74] That being said and considering the previous indication as to how this appeal will be dealt with given the concessions of counsel at the hearing and having found that the appeal on the set aside of the statutory demand is dismissed, there is no basis for the arguments advanced by the appellants on the substantive appeal.

[75] Upholding the premise that there was no substantial dispute in the demand appeal and that there is nothing to displace the learned judge's case management decision to hear the application for judgment in default before the application for an extension of time having been filed first in time, the appeal on the substantive appeal also stands dismissed.

Disposition:

[76] Accordingly, the Court makes the following orders:

- (1) The appeals are dismissed.
- (2) Costs to the respondent to be assessed by a judge of the commercial court if not agreed within 21 days of the date of this judgment.

I concur
Mario Michel
Chief Justice [Ag.]

I concur
Eddy D. Ventose
Justice of Appeal

By the Court

Chief Registrar