

**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. Mde. Gertel Thom
The Hon. Mde. Margaret Price-Findlay
The Hon. Mr. Paul Webster

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

Appearances:

Mr. John McCarroll, SC with him Mr. Zachary Van Horn for the Appellant.
Ms. Angeline Welsh, KC with her Ms. Sophia Hurst and Ms. Sara-Jane Knock for the Respondents.

2023: February 9;
August 23.

Interlocutory appeal- Application to adduce fresh evidence on appeal – Ladd v Marshall principles- Whether the principles in Ladd v Marshall apply in full vigour in the context of an appeal against a decision to deny an application to set aside a statutory demand – Whether evidence could have been obtained with reasonable diligence for the use at hearings in lower court proceedings - Application for security for costs

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”) is a company incorporated in Samoa. Between 31st December 2019 and 31st May 2020, Geminis issued (as issuer) and Goods (as noteholder) subscribed to 6 short term notes (the “Notes”). The principal advanced by Goods under the Notes was US\$6,200,000.00. The notes were governed by the laws of New York, United States of America and all contained the same terms and conditions.

On 23rd December 2021, without having issued a default notice, Goods served a statutory demand (the “Demand”) on Geminis in respect of the Notes, demanding the payment of US\$5,642,060.27, being the principal amount of the Notes and interest. At the time that the Demand was served, the Notes had matured. Geminis sought to set aside the Demand by application filed on 6th January 2022 on the ground that the debt was not due and owing. Geminis further alleged that they had a right to set off their liability under the Notes and that even if there had been an event of default, they had a right to make full or partial payment by way of asset settlement. Geminis proposed to redeem the Notes with shares in an investment fund called Evenstar (the “Evenstar shares”). Goods resisted the application to set aside the Demand contending that Geminis failed to identify any outstanding liability by Goods which Geminis was entitled to.

By order dated 1st March 2022, the learned judge dismissed the application to set aside the Demand and granted Goods permission to make an application for the appointment of a liquidator over Geminis. By written judgment dated 30th May 2022, the learned judge found inter alia that as the Notes had matured, it was too late for Geminis to allocate security in Goods’ account and exercise the right to set off. The learned judge found that once the Notes matured, the issuer (Geminis) was obliged to pay the Notes and if the issuer failed to do so, there was a money debt owed to the noteholder (Goods). Being dissatisfied with the ruling of the learned judge, Geminis appealed by notice of appeal filed on 12th April 2022 (BVHCMAP2022/0020 or the “Statutory Demand Appeal”).

Between 31st December 2019 and 31st May 2021, Goods and G-Force Int’l Co Ltd (“G-Force”) (a company incorporated in Anguilla), subscribed to 9 short term notes (the “9 Notes”) issued by Geminis. Of the 9 Notes, Goods subscribed to 8 and G-Force subscribed to 1. The terms of the 9 Notes were similar and there were all governed by the laws of New York, United States of America. By 18th January 2022, Goods and G-Force 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, Geminis filed and served an acknowledgement of service in response to the claim. Geminis failed to file the defence by the deadline pursuant to Civil Procedure Rules 2000 and instead filed an application for an extension of time to file it on 1st March 2022. On that same date, Goods and G-Force requested default judgment against Geminis for the failure to file a defence. This application was filed a few hours before Geminis'. Geminis filed and served its defence on 25th April 2022.

On 30th May 2022, the learned judge dismissed the extension application and granted the request for default judgment in favour of Goods and G-Force. In his judgment, the learned judge found that Geminis did not have reasonable prospects of success in defending the Substantive Claim in BVHCOM2022/0001. Being dissatisfied with this decision, Geminis appealed by notice of appeal filed on 16th August 2022 (BVIHCMAP2022/0043 or the "Substantive Appeal").

By applications filed on 16th August 2022, Geminis sought leave to adduce as fresh evidence in both appeals, the expert report of one Yoram Miller dated 28th April 2022 concerning the laws of New York, the governing law of all 9 Notes. In both cases, Geminis contended that the evidence was credible and that it would have a significant impact on the appeals. As to the Statutory Demand Appeal, Geminis argued that the Court did not need to apply the principles established in *Ladd v Marshall* since the appeal concerned an application to set aside a statutory demand and was not a trial or hearing on the merits of the debt or the Notes and was therefore not dispositive of the underlying cause. In the Substantive Appeal, Geminis argued that although the evidence was available for use before the learned judge at the hearing of the extension application and the request for default judgment, it was not relied upon as the Statutory Demand Appeal was interconnected with the Substantive Appeal.

By application filed on 14th September 2022, the Respondents made an application for security for their costs in both appeals in the amount of US\$71,464.29 ("the Security Sum") to be paid by Geminis into court within 7 days of the Court's order and an order that it be a condition of the further progression of the appeals that Geminis pay into court the Default Judgment Sums, the Statutory Demand Costs Order, and the Claim Costs Order.

The central issue before the Court is whether or not the *Ladd v Marshall* principles apply in all their rigour to an application to adduce fresh evidence made in the context of an appeal against a decision to deny an application to set aside a statutory demand.

Held: dismissing the fresh evidence applications filed in BVIHCMAP2022/0020 and BVIHCMAP2022/0043, granting the respondents' application for security for costs and ordering that Geminis pays into Court the Security Sum and the Statutory Demand Costs Order within 7 days of the date of circulation of the written judgment, that date being 25th August 2023, failing which the appeals will be struck out, that:

1. When an appellate court is dealing with an application to adduce fresh evidence, the overall question is whether it is in furtherance of the overriding objective to do

justice to permit the applicant to rely on evidence not relied on in the lower court. To determine this, the Court will be guided by the principles established in *Ladd v Marshall* namely that: 1.) it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; 2.) the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; 3.) the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible. However, the first limb would be relaxed in an interlocutory application where a full hearing or trial determinative of the claim is yet to take place but would not be where there had been a trial or a full hearing on the merits.

Ladd v Marshall [1954] 3 All ER 745 applied; **Honourable Guy Joseph v The Constituency Boundaries Commission et al** SLUHCVP2015/0013 (delivered 1st October 2015, unreported) considered; **Premier Experts London Ltd and another v Rajwani** [2022] EWHC 1188 (QB) applied; **BEC Limited v A2 et al** BVIHCMAP2022/0044 (delivered 9th September 2022, unreported) applied; **AIB Finance Ltd v Debtors** [1998] 2 All ER 929 considered; **Bilzerian v Weiner et al** SKBHCVAP2019/0028, SKBHCVAP2019/0030, SKBHCVAP2019/0031, SKBHCVAP2019/0032, SKBHCVAP2019/0033 (delivered 21st July 2020, unreported) applied; **Abernethy v Hotbed Ltd** [2011] EWHC 1476 (Ch) distinguished; **WWRT** considered; **Angel Wise Limited v Stark Moly Limited** BVIHCVP2010/0030 (delivered 13th February 2012, unreported) considered; **Heavy Duty Parts Ltd v Anelay Vendort** [2004] EWHC 960 (Ch) distinguished; **re a Debtor** [1996] 1 WLR 379 considered.

2. In the context of insolvency proceedings concerning a company in the BVI, a decision on an application to set aside a statutory demand is a final order. It is not a step in the winding up of a company and the winding up can take place separate and apart from the issuing of a statutory demand. It is not a claim in the true sense and so, it is not the “early stage of litigation” so as to warrant a relaxation of the *Ladd v Marshall* principles. Being of the nature of a final order, it would not be unreasonable to expect an applicant to deploy reasonable diligence to put all the evidence forward which he seeks to rely on to support his application to set aside the demand. The *Ladd v Marshall* principles therefore apply in their full rigour in the circumstances.

Ladd v Marshall [1954] 3 All ER 745 applied; **BEC Limited v A2 et al** BVIHCMAP2022/0044 (delivered 9th September 2022, unreported) applied.

3. In this case, Geminis had all the information necessary to instruct Mr. Miller before the hearing of the application and with reasonable diligence they could have procured the opinion and sought to have it adduced before the lower court. In relation to the Substantive Appeal, there is no dispute that the opinion was available at the hearing of the extension of time and default judgment applications and Geminis chose not to rely on it. To allow a party to deliberately withhold evidence in the lower court and then seek to rely on it in an appeal would be contrary to the

overriding objective. Accordingly, the first limb of *Ladd v Marshall* also fails in both the Statutory Demand Appeal and the Substantive Appeal.

4. The role of an expert in the construction of foreign documents is that the expert merely proves the foreign rules of construction and the court itself determines the meanings of these documents. In examining the opinion, there is nothing to say that the rules of construction under New York law differ materially from the rules under BVI law. Although Mr. Miller's opinion would be likely to be regarded as credible given his years of experience and credentials, to fulfil only one of the three limbs of *Ladd v Marshall* would not be sufficient to allow the evidence to be adduced. Given the foregoing, the application adduce fresh evidence is dismissed.

Ladd v Marshall [1954] 3 All ER 745 applied.

5. The court may order a claimant to put up security for the defendant's costs if the court is satisfied, on an application for security for costs, that there is a significant risk of the defendant suffering an injustice by having to pay to defend the proceedings with no real prospect of being able to recover his costs if he is eventually successful. The court may also make such a security for costs order subject to conditions. In this case, apart from the Evenstar shares and the sums in a Japanese account, Geminis has denied having any assets in the BVI and has failed to provide other evidence of their financial status. Further, the Evenstar shares (at the time of the judgment of the learned judge) were worth less than the amount due under the Demand and the Court has no updated evidence as to their current value. Geminis has also failed to pay any of the previous lower court orders and has failed to provide any explanation for this. There is a significant risk of the respondents suffering an injustice by having to pay to defend proceedings on appeal, with no real prospect of being able to recover their costs if they were eventually successful. In all the circumstances of the case, it would be just for the security for costs application be granted.

Rules 26.1(3), 26.1(4) and 62.17 of the **Civil Procedure Rules 2000** applied; **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd** SLUHCVP2017/0051 (delivered 18th September 2018, unreported).

JUDGMENT

- [1] **PRICE-FINDLAY JA:** Before the Court were applications filed by the parties in both appeals; applications to adduce fresh evidence filed by Geminis Investors Limited ("Geminis" or "the Appellant") and an application for security for costs filed by Goods Technology Starting International Limited and G-Force Int'l Co Ltd (together "the Respondents"). The appeals arose out of two claims in the lower court **BVIHCOM2022/0001** (the "Statutory Demand Proceedings") and

BVIHCOM2022/0010 (the “Substantive Claim”). The appeals were consolidated in September 2022 by consent of the parties, and the Court heard the applications on 9th February 2023. As a starting point, it would be useful to provide a short background to each of the lower court claims and demonstrate how the applications came to be filed before this Court.

The Statutory Demand Proceedings in the lower court – BVIHCOM2022/0001

- [2] Geminis is a company incorporated in the Territory of the Virgin Islands (the “BVI”). Goods Technology Starting International Limited (“Goods”) is a company incorporated in Samoa. During the period 31st December 2019 to 31st May 2020 Geminis issued (as issuer) and Goods (as noteholder) subscribed to 6 short term notes (the “Notes”). The principal advanced by Goods under the Notes was US\$6,200,000.00. The Notes all contained the same terms and conditions and were governed by the laws of New York, United States of America.
- [3] On 23rd December 2021, a statutory demand (the “Demand”) was served on Geminis by Goods in respect of the Notes demanding the payment of US\$5,642,060.27, being the principal amount of the Notes and interest. There was no default notice issued by Goods to Geminis. By application filed by Geminis on 6th January 2022, Geminis sought to set aside the Demand on the ground that the alleged debt was not due and owing. Geminis further alleged that they had a right to set off their liability under the 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. Geminis proposed to redeem the Notes with shares in an investment fund called Evenstar (the “Evenstar shares”).
- [4] At the time the Demand was served, all the Notes had matured, and this was not disputed by Geminis. Goods resisted the application to set aside the Demand contending that, for the set off provisions to apply, Geminis was required to show that Goods had an outstanding liability which Geminis was entitled to set off and, as Goods contended, Geminis had not identified what that liability was. As to the asset

settlement provisions, Goods argued that they had not served a default notice and so this provision did not apply.

Decision of the lower court – BVIHCOM2022/0001

[5] By order dated 1st March 2022, the learned judge dismissed the application to set aside the Demand and granted Goods permission to make an application for the appointment of a liquidator over Geminis. The judge's order was followed by a written judgement dated 30th May 2022. In his judgment, the trial judge noted that the Evenstar shares were only worth approximately US\$4.9 million and that left a shortfall of some US\$700,000.00 and there was no proposal by Geminis that the Demand be set aside on payment of that missing amount. Further, the judge found that as the Notes had matured, it was too late for Geminis to allocate security in Goods' account and exercise the right of set off. As to the asset settlement provision relied on by Geminis, the judge ruled that the definition of event of default was designed to apply to non-payments of ongoing principal and interest.

[6] Thus, until the Notes matured, the noteholder (in this case Goods) had a choice if there was non-payment of an instalment of principal and interest. The judge found that on the facts, no complaint was made under the notice of default provision while the Notes were current. However, once the Notes matured, the judge found that that was the end of it. The issuer (Geminis) was obliged to pay the Notes and if the issuer failed to so do, there was a money debt owed to the noteholder (Goods). Being dissatisfied with the judge's ruling, Geminis appealed by way of notice of appeal filed on 12th April 2022 (**BVIHCOM2022/0020** – the "Statutory Demand Appeal").

The Substantive Claim in the lower court – BVIHCOM2022/0010

[7] Between 31st December 2019 and 31st May 2021, Goods and G-Force Int'l Co Ltd ("G-Force") (a company incorporated in Anguilla), subscribed to 9 short term notes (the "9 Notes") issued by Geminis. Of the 9 Notes, Goods subscribed to 8 and G-Force subscribed to 1. It is to be noted that of the 8 short-term notes entered into by

Goods, 6 notes were the subject of the Demand referred to above in claim **BVIHCOM2022/0001**.

[8] The terms of the 9 Notes were similar and they were all governed by the laws of New York. By 18th January 2022, Goods and G-Force 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, Geminis filed and served an acknowledgment of service in response to the claim. Pursuant to rule 10.3 of the **Civil Procedure Rules 2000** (“CPR”), the deadline for Geminis to file and serve its defence was 17th February 2022. However, Geminis failed to file the defence by that date.

[9] Instead, Geminis sought an extension of time to file the defence by application filed on 1st March 2022. On the same date, Goods and G-Force requested default judgment against Geminis 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, Geminis filed and served its defence in the Substantive Claim. The hearing of the application to extend time and the application for default judgment came before the judge between 2nd – 4th May 2022.

Decision of the lower court – BVIHCOM2022/0010

[10] On 30th May 2022, the learned judge ordered, *inter alia*, that (i) the extension application be dismissed; and (ii) the request be granted and judgment in default be entered in favour of Goods and G-Force. In his judgment, the judge found that Geminis did not have reasonable prospects of success in defending the Substantive Claim. Being dissatisfied with this decision, Geminis appealed by notice of appeal filed on 16th August 2022 (**BVIHCOMAP2022/0043** – the “Substantive Appeal”). It is noted that as the appeals were connected, by consent order dated 5th September 2022, both the Statutory Demand Appeal and the Substantive Appeal were consolidated.

The applications to adduce fresh evidence in the appeals

- [11] Subsequent to the filing of the notices of appeal in both appeals, by applications filed on 16th August 2022, Geminis sought leave to adduce as fresh evidence, the expert report of one Yoram Miller dated 28th April 2022 concerning the laws of New York, the governing law of all 9 Notes. A fresh evidence application was filed in each of the appeals, albeit with minor differences in terms of the grounds of the applications in relation to each appeal. In both appeals, permission was sought on the basis of rules 32.6 and 26.1 of the CPR to adduce the new evidence. Mr. Miller's report, Geminis contended, concerned his opinion that *in specie* transfers of assets were permissible for payment generally, and in this case. In both appeals, Geminis contended that the evidence was credible and that it would have a significant impact on the appeals.
- [12] As to the Statutory Demand Appeal, Geminis argued that the Court did not need to apply the principles established in **Ladd v Marshall**¹ since the appeal concerned an application to set aside a statutory demand and was not a trial or hearing on the merits of the debt or the Notes and was therefore not dispositive of the underlying cause. Geminis further argued that if the Court was of the view that the **Ladd v Marshall** principles applied then the evidence could not have been obtained with reasonable diligence for use at the hearing of the application to set aside the Demand since it did not occur to them that the judge would make a finding on New York law that *in specie* transfer of assets was impermissible after the Notes matured.
- [13] As to the Substantive Appeal, there was no argument that the **Ladd v Marshall** principles did not apply. Instead, Geminis argued that although the evidence was available for use at the hearing before the judge at the hearing of the extension application and the request for default judgment, it was not relied upon as the Statutory Demand Appeal and this appeal were interconnected.

¹ [1954] 3 All ER 745.

Whether Ladd v Marshall applies in all its rigour in respect of the Statutory Demand Appeal

- [14] In both oral and written submissions, counsel for Geminis argued that an application to set aside a statutory demand was not a full hearing on the merits. Learned counsel cited the case of **Honourable Guy Joseph v The Constituency Boundaries Commission et al**² for the authority that in relation to interlocutory applications on appeal, where there had not been a full hearing on the merits, an appellate court had a general discretion to admit fresh evidence and that in these applications, a court adopts a more relaxed approach as it seeks to give effect to the overriding objective. Counsel asserted that the reason why the evidence was not adduced was an important consideration. Counsel also cited the case of **Bilzerian v Weiner et al**³ which noted that it was no longer necessary for an applicant to show some special ground for the grant of permission to rely on fresh evidence upon the hearing of an appeal and that when considering an appeal from a decision on an interlocutory application, a relaxation of the **Ladd v Marshall** principles would be appropriate. Counsel therefore submitted that as there had been no full hearing on the merits of the case in the lower court, the application to adduce fresh evidence merited the “relaxation principles” espoused in **Guy Joseph** and **Bilzerian** and the Court should therefore not apply **Ladd v Marshall** in its full rigour.
- [15] During the hearing of the appeal, counsel for Geminis argued that this Court’s decision in **BEC Limited v A2 et al**⁴ was distinguished from the present facts on the basis that what triggered the “relaxation principles” was whether or not there had been a full trial or hearing on the merits. Counsel then cited various English decisions where the courts found that **Ladd v Marshall** either did not apply or the first limb was not applied rigidly. He cited the decision of **re A Debtor**⁵ where it was held that an application to set aside a statutory demand was not, whatever the result,

² SLUHCVP2015/0013 (delivered 1st October 2015, unreported).

³ SKBHCVP2019/0028, SKBHCVP2019/0030, SKBHCVP2019/0031, SKBHCVP2019/0032, SKBHCVA2019/0033 (delivered 21st July 2020, unreported).

⁴ BVIHCP2022/0044 (delivered 9th September 2022, unreported).

⁵ [1996] 1 WLR 379.

a trial on the merits that would have determined the existence or otherwise of an alleged debt.

[16] Counsel asserted that with a statutory demand, the only issue to be determined is whether or not there is a *bona fide* dispute as to the existence of the debt and the existence of the debt is itself not determined. He argued that in the lower court, there was no trial as to the merits of the debt or the Notes, and Jack J [Ag.]’s decision was not dispositive of the underlying cause, that is, the issue of whether Geminis is insolvent and whether a liquidator should be appointed. Counsel submitted that the issuing of and an application to set aside a statutory demand did not follow the normal course of pleadings, discovery, applications to adduce expert evidence etc. Rather, this was a truncated procedure which did not form part of any plenary proceedings and on appeal, the English courts traditionally treated them with more flexibility.

[17] Counsel also highlighted the case of **Salvidge v Hussein**,⁶ arguing that the decision affirmed Weeks J’s decision in **re A Debtor**. Counsel asserted that **Salvidge** was further authority for the position that in cases of a statutory demand, **Ladd v Marshall**’s principles did not strictly apply and that instead the court should focus on an applicant’s reasons for not adducing the evidence in the court below and the extent of any prejudice caused to the other side by its admission on appeal. Counsel further cited the decisions of **AIB Finance Ltd v Debtors**,⁷ **Heavy Duty Parts Ltd v Anelay**⁸ and **Abernethy v Hotbed Ltd**⁹ to support his submission.

[18] In written submissions, Goods countered that Geminis misconstrued the relevant case law and that in any event, no relaxing was appropriate in the circumstances. Goods argued that Geminis would be unable to satisfy the first two limbs of **Ladd v Marshall** and as a result, sought to draw a distinction between an interlocutory

⁶ [1999] BPIR 410.

⁷ [1998] 2 All ER 929.

⁸ [2004] EWHC 960 (Ch).

⁹ [2011] EWHC 1476 (Ch).

application and appeals of decisions after a trial on the merits. Goods asserted that in **Guy Joseph**, this Court established that the starting point remained **Ladd v Marshall**, even in interlocutory cases. There was thus, no general discretion *per se*, (that is, without reference to **Ladd v Marshall**) to admit fresh evidence on appeal. They argued that on a proper reading of **Guy Joseph**, the point was made that in determining what constitutes reasonable diligence for the purposes of the first limb of the **Ladd v Marshall** test, the Court will have regard to the interlocutory context. In any event, there remained a clear duty on the parties to present their full case at first instance.

- [19] Citing this Court's decision in **WWRT Limited v Carosan Trading Limited et al**,¹⁰ Goods argued that the **Ladd v Marshall** test remained authoritative in determining whether to admit fresh evidence and even if there was scope for relaxing the principles to give effect to the overriding objective, an applicant should nonetheless, produce strong grounds to merit the appellate court exercising its discretion in the applicant's favour. Goods asserted that what was not in contemplation in any of these cases was that the evidence which the party sought to introduce was evidence which the party procured but chose not to put before the court below.
- [20] Goods submitted that it was Geminis' position that **Ladd v Marshall** either did not apply, or ought not be rigidly applied to an appeal of a decision on an application to set aside a statutory demand. Goods argued that this position was flawed since it had never been suggested in any of the authorities that the appellate court would not have regard to the principles at all. Goods also submitted that **Ladd v Marshall** had been applied in similar circumstances by the BVI courts: see **Angel Wise Limited v Stark Moly Limited**,¹¹ **Vendort Traders Inc. v Evrostroy Grupp LLC**¹² and **Kwok Kin Kwok et al v Yao Juan**.¹³

¹⁰ BVIHMAP2022/0002 (delivered 20th July 2022, unreported).

¹¹ BVIHCVAP2010/0030 (delivered 13th February 2012, unreported).

¹² BVIHCVAP2012/0041 (delivered 26th May 2014, unreported).

¹³ BVIHMAP2018/0042 (delivered 14th March 2019, unreported); see also the Privy Council decision *Kwon Kin Kwok v Yao Jun* [2022] UKPC 52.

[21] Goods also argued that in **Elite Property Holdings Ltd and another v Barclays Bank plc**,¹⁴ the court declined to admit new evidence which could have been produced in the court below and noted that there was nothing in the history of litigation which would make it appropriate to adopt a more generous approach than that which would otherwise apply. Further, Goods submitted that in so far as the case of **Mansoor Malik v National Bank of Ras-Al-Khaimah**¹⁵ (relied on by Geminis) suggested that the **Ladd v Marshall** principles did not apply to an appeal against a refusal to set aside a statutory demand, this was not good law in the BVI.

Discussion

[22] The issue to be determined here is where or not the **Ladd v Marshall** principles apply in all their rigour to an application to adduce fresh evidence made in the context of an appeal against a decision to deny an application to set aside a statutory demand. In **Guy Joseph**, this Court recognised that the CPR did not contain a specific rule governing the admission of fresh evidence on appeal. Thus, in civil matters, we look to case law to guide the appellate court in this regard. In **Guy Joseph**, the Court noted that the authoritative statement of the principles was laid down by Denning LJ in **Ladd v Marshall** where he said:

“To justify the reception of fresh evidence ... three conditions must be fulfilled: first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial; secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive; thirdly, the evidence must be such as is presumably to be believed, or in other words it must be apparently credible, though it need not be incontrovertible.”

[23] In **Premier Experts London Ltd and another v Rajwani**,¹⁶ the court made it clear that the three conditions were cumulative and a failure of even one condition under **Ladd v Marshall** meant that the fresh evidence would not be admitted.

¹⁴ [2019] EWCA Civ 2212.

¹⁵ [2022] EWHC 716 (Ch).

¹⁶ [2022] EWHC 1188 (QB).

- [24] In **Guy Joseph**, the Court spoke of a relaxation of the **Ladd v Marshall** principles in these terms:

“It is common ground that the test as set out in **Ladd v Marshall** applies in all its rigour when fresh evidence is sought to be introduced on appeal following a trial or full hearing on the merits. Other judicial authorities of more recent vintage suggest however, that in relation to interlocutory applications on appeal, the strict principles set out in **Ladd v Marshall** are relaxed as the court seeks to give effect to the overriding objective in circumstances where the issues between the parties are yet to be fully determined on their merits.”

- [25] In **Bilzerian**, this Court recognised that the power to permit a party to adduce fresh evidence on an appeal fell under the Court’s inherent jurisdiction. This was a discretionary power which must be exercised judicially. The Court then expressed the relaxation of **Ladd v Marshall** as follows:

“However, these principles or criteria have been developed somewhat from when **Ladd v Marshall** was decided in 1954. This has taken place in two important respects. Firstly, it is now clear that the **Ladd v Marshall** principles are to receive a somewhat more relaxed application when treating with appeals from interlocutory matters, as distinct from when treating with an appeal from a decision of a court after a trial on the merits.”

- [26] **Guy Joseph** and **Bilzerian** therefore sought to distinguish between cases following a trial or full hearing on the merits as opposed to interlocutory applications on appeal where the issues between the parties were yet to be fully determined. The former cases merited the full rigour of the **Ladd v Marshall** principles whereas the latter did not.

- [27] Farara JA [Ag.] in **Bilzerian** noted that the relaxation referred to the standard of diligence expected of the applicant. At paragraphs 26 and 27 of the judgment he stated:

“...This relaxation in the application of the **Ladd v Marshall** principles in interlocutory appeals is for sound reasons. Where there has been a trial on the merits with witnesses, a more stringent approach is warranted by the appellate court when considering an application by a party to adduce on appeal further or fresh evidence not relied upon in the court below. In such circumstances, an appellate court ought to apply the **Ladd v Marshall** principles with their full import and vigour, since the parties have a clear

duty to fully and completely prepare for and to deploy their full case at trial covering or addressing all the relevant factual and legal issues in dispute between the parties.

[27] However, courts have recognised since the decision in **Ladd v Marshall**, that a more flexible or relaxed approach is called for, in the interest of justice, when dealing with applications to adduce fresh evidence in an appeal from a decision on an interlocutory application or an application which was not decisive of the merits of the matter. This is considered prudent because the level of diligence required in dealing with such an application is very different to that required when preparing for a trial.” (Emphasis added)

[28] Consequently, in neither **Guy Joseph** nor in **Bilzerian** did the Court do away with the **Ladd v Marshall** principles. Instead, focus was placed on relaxing the level of diligence required of an applicant in an interlocutory application. The standard of diligence relates directly to the first limb of **Ladd v Marshall** and as counsel for Goods pointed out, as to what constitutes reasonable diligence under this limb, the Court will have regard to the interlocutory context. Ordinarily a party is expected to argue its case fully before the lower court. However, in an interlocutory application, there is the recognition that a full hearing has yet to take place. I therefore agree with counsel for Goods that contrary to what was stated by counsel for Geminis, there is no general discretion *per se* (that is, without reference to **Ladd v Marshall**) to adduce fresh evidence in interlocutory cases.

[29] A proper reading of **Guy Joseph** and **Bilzerian** suggests that the **Ladd v Marshall** principles would still apply, with a relaxing of the standard of diligence expected of an applicant in interlocutory cases so as to give effect to the overriding objective to deal with cases justly. Further, as noted in **Bilzerian**, the **Ladd v Marshall** principles are just that; they are principles and not rules of court. The Court said:

“[29] ...[The **Ladd v Marshall** principles] are principles, not rules, which must be applied broadly, but relaxed, in appropriate cases, having regard to the overriding objective to do justice.

[30] ...while an applicant must produce strong grounds to merit the appellate court exercising its discretion to admit further or fresh evidence not relied on at the hearing below, the bottom line is whether, in all the circumstances, it is in furtherance of the overriding objective to do justice to

permit a party, at the hearing of the appeal, to rely on evidence which was not before the lower court. This is especially so when dealing with an appeal from a decision on an interlocutory application or matter not determinative of the claim before the lower court.

[31] In seeking to do justice between the parties, an appellate court must approach the matter with considerable care to determine whether the **Ladd v Marshall** principles, or any of them, have been fulfilled. If the evidence was clearly available at the trial or at the hearing of the interlocutory application the subject of the appeal, this may well be a decisive reason for refusing the application, albeit a more relaxed approach to the application of this first principle may be warranted in an appeal from an interlocutory application." (Emphasis added)

- [30] Consequently, when an appellate court is dealing with an application to adduce fresh evidence, the overall question is whether it is in furtherance of the overriding objective to do justice to permit the applicant to rely on evidence not relied on in the lower court. To determine this, the Court will be guided by the principles as established in **Ladd v Marshall**, however, the first limb of **Ladd v Marshall** would be relaxed in an appeal from an interlocutory application where a full hearing or trial determinative of the claim is yet to take place.
- [31] Counsel for Geminis argued that an appeal against a decision on an application to set aside a statutory demand fell under this category of interlocutory applications and therefore warranted a relaxation of the standard of diligence required under **Ladd v Marshall** since the application in the lower court was not a full hearing on the merits. Counsel for Goods cited the cases of **Angel Wise Limited** and **Vendort Traders Inc.** to illustrate that **Ladd v Marshall** still applied even in fresh evidence applications in the statutory demand context. However, **Angel Wise Limited** and **Vendort Traders Inc.** were both decided before **Guy Joseph** and so the possibility of a relaxation of **Ladd v Marshall** was not discussed therein. Further, the case **Kwok Kin Kwok**, relied on by Goods did not specifically address fresh evidence applications in the statutory demand context.

[32] In examining the English authorities referred to by Geminis at paragraphs 22 to 24 of its written submissions,¹⁷ a few observations are made:

- (i) The decisions are all high court decisions and the cases recognised that there were conflicting authorities on the issue; and
- (ii) Whilst the **AIB Finance**¹⁸ was a Court of Appeal decision, the appellate court did not engage the **Ladd v Marshall** principles, rather it was the high court judgment where the discussion took place.¹⁹

[33] In **re A Debtor**, a 1995 decision, Weeks J stated at page 382 that:

“...the decision not to set aside a statutory demand was not a decision on the merits or, as it is put in the wording of Ord. 59, r. 10(2), “a judgment after trial or hearing of any cause or matter on the merits.” The decision on an application to set aside a statutory demand is in my judgment very far from being a judgment after trial, and the inclusion of those words affect the subsequent wording “hearing of any cause or matter on the merits.” The decision made by the registrar in this case is so far from being a judgment after trial that I think I ought not to apply Ord. 59, r. 10(2) and I respectfully agree with Morritt J.’s decision that I am not restricted by the **Ladd v Marshall** [1954] 1 W.L.R. 1489 principle in allowing further evidence.”

[34] In this case it was noted that the existence or otherwise of the underlying debt or counterclaim was not determined by the application but will only arise, if at all, on subsequent proceedings in the bankruptcy petition. A few observations are important here: (i) the court was interpreting the words of Order 59 rule 10(2) of the Rules of the Supreme Court 1965 which specified that the court of appeal would have the power to receive further evidence on questions of fact but that in cases of appeals from a judgment after trial or hearing of any cause or matter on the merits, no such further evidence.....shall be admitted except on special grounds. The “special grounds” were recognised in this case as being the **Ladd v Marshall** principles. There is no equivalent rule in the CPR of the Eastern Caribbean (“ECSC

¹⁷ See Geminis’ skeleton arguments filed on 30th December 2022.

¹⁸ [1998] 2 All ER 929.

¹⁹ See **AIB Finance Ltd v Debtors** [1997] 4 All ER.

CPR”) like Order 59; (ii) Weeks J recognised that on the issue of whether the case involved an appeal from a “judgment after trial or hearing of any cause or matter on the merits,” there were conflicting high court decisions.²⁰ Weeks J ultimately chose to agree with the decision of Morritt J in **Royal Bank of Scotland Plc v Binnell and another**²¹ where he said that an application to set aside a statutory demand was not, whatever the result, a triable hearing on the merits; (iii) Weeks J approved the words of Morritt J in **RBS v Binnell** when he stated that the underlying debt would arise on subsequent proceedings on bankruptcy petitions. Under the UK Insolvency Act 1986 (“the UK Act”) and the UK Insolvency Rules 1986 (“the UK Rules”), a statutory demand was always the first step in lodging a bankruptcy petition. Consequently, after the statutory demand procedure the bankruptcy petition was the subsequent “full hearing on the merits”. This is not the position in the BVI as a statutory demand is not some intermediary question in the procedure to wind up a company. In the BVI the appointment of liquidators and the winding up of the company can occur with or without the issuing of a statutory demand; and (iv) this case dealt with the bankruptcy of an individual whereas on the present facts, we are dealing with a company and the question as to its solvency.

- [35] In **AIB Finance**, a 1997 decision, the court, interpreting Order 59 rule 10(2), noted that in the context of an application to set aside a statutory demand in bankruptcy proceedings, the merits in question were the merits of the potential defences specified in paragraphs (a) to (d) of rule 6.5(4) of the UK Rules. Paragraphs (a) to (c) were similar to section 157(1)(a) – (c) of the **BVI Insolvency Act 2003** (the “**BVI Act**”),²² and paragraph (d) of the UK Rules stipulated that the court was satisfied, on other grounds, that the demand ought to be set aside. Carnwath J found that there could only be said to have been a final decision on the merits where the application to set aside the statutory demand had failed. Once the application failed, then Order 59 rule 10(2) applied and special grounds (i.e. **Ladd v Marshall**) had to

²⁰ The decision of Knox J in *re A Debtor* (No. 59 of 1987) *The Independent*, 1 February 1988 contrasted Morritt J’s decision in *Royal Bank of Scotland Plc v Binnell and another* [1996] BPIR 352.

²¹ [1996] BPIR 352.

²² Act No. 5 of 2003, Revised Laws of the Virgin Islands.

be shown for the introduction of new evidence. Where the application succeeded, then there had been no hearing on the merits and so, the court had a general discretion whether to admit fresh evidence which was not confined by the conditions laid down in **Ladd v Marshall**.

[36] The observation here is that the position taken in **AIB Finance** contrasts sharply with that taken in **re A Debtor**. In **re A Debtor** the court found that whatever the result, an application to set aside a demand was not a hearing on the merits, whereas **AIB Finance** drew the distinction in terms of the result of the application, i.e. whether the application failed or succeeded. Even so, once again we see that in **AIB Finance**, the issue at hand was bankruptcy proceedings and not the solvency of a company.

[37] In **Salvidge v Hussein**, the court noted that there were conflicting decisions at first instance as to whether the rule in **Ladd v Marshall** applied, citing Morritt J's decision in **RBS v Binnell** and Carnwath J in **AIB Finance**. Ultimately the court chose to follow a later decision of Weeks J²³ which stated that the **Ladd v Marshall** principles did not apply to fresh evidence applications in the statutory demand context. The court however, expressed the view that at some point the conflict may have to be resolved by the Court of Appeal. It has to be pointed out that again, this case dealt with bankruptcy proceedings and not the solvency of a company.

[38] By the time the decision of **Heavy Duty Parts** was made (2004), Order 59 had been replaced by rule 52.11(2) of the UK Civil Procedure Rules 1998 ("the UK CPR"). The court noted that special grounds were no longer required. Instead, the court would not allow evidence on appeal that was not before the lower court unless it ordered otherwise. The court also noted that the principles enunciated in **Ladd v Marshall** remained highly relevant to the exercise of the court's discretion whether to admit evidence on appeal. This was another case of the bankruptcy of an individual as opposed to company insolvency.

²³ See *Norman Laurier v United Overseas Bank Ltd* [1996] BPIR 635.

- [39] In **Abernethy** without reference to any case law, the judge stated that it was common ground between the parties that the conditions laid down in **Ladd v Marshall** did not apply. In **Mansoor Malik v The National Bank of Ras-Al-Khaimah**,²⁴ the court said that **Ladd v Marshall** should not be applied too rigidly. **Abernethy**, like **Mansoor Malik**, were cases of individual insolvency.
- [40] The English cases cited by Geminis in support, can be distinguished for a number of reasons. Firstly, the cases were all lower court decisions with conflicting views expressed. The cases gave different reasons for disapplying **Ladd v Marshall**. Secondly, the discussion in the earlier cases as to “hearing on the merits” was owing to the fact that Order 59 required there to be a hearing or trial on the merits before fresh evidence could be admitted. The different principles espoused in the cases reflected the changes which occurred over time in the rules of court in the UK. It went from Order 59 requiring there to have been a full hearing or trial on the merits, to the UK CPR allowing the court a wide discretion to permit fresh evidence on appeal.
- [41] In the Eastern Caribbean, the fact is that in civil proceedings, there has never been a definitive rule on the matter. Thus, to take the English cases wholesale, without recognizing the nuanced differences between the English and Eastern Caribbean context would be inappropriate. Thirdly, the most important distinction is the fact that in all the cases cited by counsel for Geminis, not one dealt with the insolvency of a company. The cases all dealt with individual insolvency/bankruptcy. As stated at paragraph 34 of this judgment, in the UK, a statutory demand was always the first step in lodging a bankruptcy petition in cases of individual insolvency. The bankruptcy petition was the subsequent “full hearing on the merits.” Thus, in the UK context, the statutory demand was an interim procedure, and a relaxation of **Ladd v Marshall** would be understandable in that context as the parties were yet to fully present their cases in the bankruptcy petition.

²⁴ [2022] EWHC 716 (Ch).

[42] On the present facts, we are dealing with a company's deemed insolvency and in the BVI, a statutory demand is not an intermediary question in the procedure to wind up a company or appoint liquidators. The appointment of liquidators and the winding up of the company can occur with or without issuing a statutory demand. In all of the cases dealt with by counsel for Geminis, the "full hearing on the merits" had yet to take place since the statutory demand was within the wider procedure of a bankruptcy petition. The cases cited therefore cannot compare to the present situation.

[43] **Guy Joseph** and **Bilzerian** recognised that the ECSC CPR was silent on the introduction of fresh evidence on appeals in civil matters. Thus, whilst recognizing that the ultimate consideration is the interests of justice, extracting the relevant principles from the English authorities like **Langdale and another v Danby**²⁵ the distinction drawn in the Eastern Caribbean is really whether the application on appeal is interlocutory or final.

[44] In **BEC Limited**, this Court dealt with an application to adduce fresh evidence in circumstances where the lower court judge had refused BEC Limited's application to set aside a statutory demand served on it. This case was not dealing with an individual's bankruptcy, but rather a company's insolvency. At paragraph 9 of the judgement Webster JA [Ag.] stated:

"[9]...A statutory demand, as the name suggests, is a statutory procedure by which a creditor can demand payment of an outstanding debt. It was introduced in the BVI by sections 155–157 of the Act. It is a formal demand, in writing, for payment of a debt within 21 days of service of the demand. It does not replace a creditor's right to demand payment of a debt in any form that he sees fit, or make no demand because the debt is due and payable in accordance with its terms. If a demand is made under the provisions of the Act, and is not set aside, the debtor company will be deemed to be insolvent and the creditor can use the deemed insolvency as a ground for appointing liquidators over the company."

²⁵ [1982] 1 WLR 1123.

[45] In dealing with whether the judge's decision was interlocutory or final this Court noted that:

"[16] The test in the Eastern Caribbean whether an order is final or interlocutory is the application test. This was settled by part 62.1 (3) of the Civil Procedure Rules 2000 ("CPR") and several decisions of this Court. Rule 62.1(3)(b) defines the application test as: "an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided."

[46] At paragraphs 18 and 19 Webster JA [Ag.] continued:

"[18]...An application to set aside a statutory demand is not a claim in the true sense – it does not determine the rights or obligations of any of the parties to the claim and it does not contain an order that can be enforced. It is a mechanism by which a creditor can obtain an order from the court that the debtor company is insolvent which is a ground under section 163 (read with section 8(a)) for appointing liquidators over the company. If the application fails and the statutory demand is not set aside, the court's order will authorise the creditor to apply under section 163 of the Act to appoint liquidators over the company. However, this is not an enforceable order and the creditor does not have to apply for the appointment of liquidators. If the application succeeds and the statutory demand is set aside the creditor can still proceed, if it so desires, to apply to appoint liquidators of the debtor company on any of the other grounds for insolvency in section 8 of the Act, provided it has evidence to support the alternative grounds.

[19] The orders that can be made on an application to set aside a statutory demand should not be bifurcated into a result where the claim will continue if the application fails, but will come to an end if the application succeeds. In both situations the issue of the insolvency of the company based on the alleged debt is resolved – the company is either deemed to be insolvent (if the Set Aside Application fails) or not (if the application succeeds). The separate issues of the appointment of liquidators and the winding up of the Company remain to be initiated and resolved. The Respondents can do this regardless of the result of the Set Aside Application. In fact, the Respondents did not need to issue a statutory demand. They could have applied directly under section 163 of the Act and proved the Company's insolvency on any of the grounds of insolvency in section 8, namely, insolvency based the Company's failure to satisfy an execution or other process issued on a judgment in favour of a creditor, proof that the Company's liabilities exceed its assets (balance sheet insolvency), or proof that the Company is unable to pay its debts as they fall due. The Respondents could have applied for the appointment of liquidators over the Company on any of these grounds with or without the aid of an unsatisfied statutory demand." (Emphasis added)

[47] The fact is that, as Webster JA [Ag.] highlights, an order on a statutory demand is not some “intermediary question” in the procedure to wind up the company. It is only one of the grounds for insolvency under the **BVI Act**. He went on to state at paragraph 23 that:

“...the issuing of a statutory demand and/or a subsequent order not setting aside the statutory demand is not “a procedural first step; a sine qua non” for a creditor seeking to wind up a company. The creditor can either issue the statutory demand and proceed to winding up proceedings regardless of the outcome of an application to set aside the demand, or it can proceed directly under section 162 of the Act and prove its case that the company is insolvent based on any of the reasons set out in section 8 of the Act. An application to set aside a statutory demand is sui generis and is not governed by the principles relating to orders that are a pre-requisite to filing substantive proceedings as in cases like Harvest Network, or cases dealing with interlocutory orders in ongoing proceedings. The application to set aside a statutory demand has the effect of resolving the company’s deemed insolvency based on the unpaid debt in question, and nothing more. It is, in my opinion, a final order.” (Emphasis added)

[48] As **BEC Limited** points out, in the context of insolvency proceedings concerning a company in the BVI, a decision on an application to set aside a statutory demand is a final order. It is not the first step in the winding up of a company and the winding up can take place separate and apart from the issuing of a statutory demand. It is not a claim in the true sense and so, it is not the “early stage of the litigation”²⁶ so as to warrant a relaxation of the **Ladd v Marshall** principles. Being of the nature of a final order, it would not be unreasonable to expect an applicant to deploy reasonable diligence to put all the evidence forward which he seeks to rely on to support his application to set aside the demand. I would therefore consider that **Ladd v Marshall** applies in all its rigour to the present circumstances.

Whether the opinion could have been obtained with reasonable diligence for use at the hearings in both lower court proceedings

Geminis claimed that the opinion could not have been obtained with reasonable diligence before the hearing of the set aside application since the issue of whether

²⁶ See para. 26 of Geminis’ skeleton arguments filed on 30th December 2022.

the asset settlement provisions could be enforced after maturity of the Notes only arose at the hearing and in the judgment. They argued that it was never in either parties' contemplation that the provisions would cease to be applicable after maturity. Goods countered that this was Geminis' application which was not determined on any urgent basis. The application was premised on a construction of the asset settlement provisions in the Notes on which Geminis made submissions. Goods argued that Geminis knew that the judge had to consider the provisions and to the extent that they wished to rely on New York law, it was incumbent upon them to put that evidence before the court. Goods also submitted that as admitted by paragraph 25 of Geminis' submissions, they had all the material necessary to instruct Mr. Miller well before the hearing on 1st March.

[49] I agree with Goods' submissions on this point. Geminis knew the Notes had all matured by the time the Demand had been served. Moreover, it was no secret that under the asset settlement provisions, a default notice had to have been issued and Geminis always knew that no such notice had been issued by Goods. It was Geminis' entire argument in the lower court that they could still proceed to transfer the Evenstar shares at a time when they knew that the Notes had all matured and no default notice had been issued. It was incumbent upon them to argue their own case. To blame their lack of diligence on the judge when it was the thrust of their whole contention that they could still complete the share transfer is absurd. Geminis had all the information necessary to instruct Mr. Miller before the hearing of the application and the application was not urgent. With reasonable diligence they could have procured the opinion and sought to have it adduced before the lower court. This they did not do. In relation to the Statutory Demand Appeal, I believe that Geminis could have obtained the opinion with reasonable diligence and the first limb of **Ladd v Marshall** fails.

[50] In relation to Substantive Appeal, there is no dispute that the opinion was available at the hearing of the extension of time and default judgment applications and Geminis chose not to rely on it. This was noted in the Substantive Claim judgment

at paragraph 4. Geminis' argument that the two appeals were related and so they chose not to adduce the evidence is absurd. Goods argued that this was a deliberate withholding of evidence and I agree. To allow a party to deliberately withhold evidence in the lower court and then seek to rely on it in an appeal would be contrary to the overriding objective. Thus, the opinion was available for use and the first limb of **Ladd v Marshall** also fails in the Substantive Appeal. As the **Ladd v Marshall** limbs are cumulative and Geminis has failed the first limb, it would not be necessary to consider the second and third limbs, however, for completeness, I will consider them briefly.

Whether the opinion would have had an important influence on the results of the lower court decisions

- [51] Geminis argued that the opinion would have provided crucial evidence in assisting the court on how the Notes, under New York law should operate, especially as it pertains to the asset settlement provisions after maturity. They asserted that had the court had the benefit of the opinion on the set aside application, it would have had a significant influence in deciding the matter. They continued that the judge would not have then relied on the judgment in the Statutory Demand Proceedings to decide in the Substantive Claim that Geminis had no reasonable prospect of defending the claim. Goods countered that the Evenstar shares were insufficient and left a shortfall and nothing in the opinion went to this point. Further, they argued that the judge's exercise was one of construction of the terms of the Notes and the judge was entitled to undertake this exercise in the absence of any evidence that the principles of contractual construction differed under New York law from BVI law.
- [52] Goods, citing **Dicey, Morris & Collins on the Conflict of Laws**²⁷ at 3-018 (as approved in **WWRT Limited v Carosan Trading Limited et al**),²⁸ noted that the role of an expert in the construction of foreign documents is that the expert merely proves the foreign rules of construction and the court itself determines the meanings

²⁷ 16th Edn.

²⁸ BVIHMAP2022/0002 (delivered 20th July 2022, unreported).

of these documents. Goods submitted that at paragraphs 38 – 45 of the opinion, Mr. Miller provided the canons of construction under New York law and they were similar to the principles of contractual construction under BVI law. Goods noted that the opinion went beyond providing rules of construction and purported to give a conclusion on the correct construction of the Notes. They argued that even if this part of the opinion were admissible, the judge would have been entitled to reject it and ultimately, the opinion would not have had an important impact on either of the lower court proceedings.

- [53] I agree with Goods' submissions in this regard. Geminis has argued that as a matter of construction of the asset settlement provisions, they were entitled to still carry out the *in specie* transfer of Evenstar shares despite the fact that the Notes had matured. In examining the opinion, there is nothing to say that the rules of construction under New York law differ materially from the rules under BVI law. As **Dicey** stated, the role of the expert is to prove the foreign rules of construction but ultimately, it is up to the judge to determine the meaning of the words. Geminis has not identified some special rule of construction which applied to the Notes. The rules of construction identified at paragraphs 38 – 45 of the opinion mirror the very principles which are now trite in the BVI as to the construction of commercial agreements. Geminis has therefore failed the 2nd limb of **Ladd v Marshall**.

Whether the opinion is credible

- [54] Given Mr. Miller's years of experience and credentials, it is likely that the opinion would be regarded as credible. However, to fulfil only one of the three **Ladd v Marshall** limbs would not be sufficient to allow the evidence to be adduced.
- [55] Given the foregoing, Geminis' applications to adduce the expert opinion of Mr. Miller as fresh evidence in the appeals are dismissed.
- [56] Before turning to the Respondents' security for costs application, I make the point that had the evidence been admissible, I believe it would have also been necessary

for the opinion to satisfy the elements of Part 32 of the ECSC CPR as to expert evidence. This is so since, to allow a party to circumvent the strict rules under Part 32 and have an expert's evidence adduced on appeal under the guise of "fresh evidence," would not be consistent with the overriding objective.

The Respondents' application for security for costs

[57] By application filed on 14th September 2022, the Respondents made an application for security for their costs in both appeals in the amount of US\$71,464.29 ("the Security Sum") to be paid by Geminis into court within 7 days of the Court's order. The Respondents also sought an order that it be a condition of the further progression of the appeals that Geminis pay into court:

- (i) the Default Judgment Sums;²⁹
- (iii) the Statutory Demand Costs Order;³⁰ and
- (iv) the Claim Costs Order³¹

within 7 days of the date of the Court's order, failing which the appeals would be dismissed with costs.

[58] The grounds of the application were that Geminis had failed to pay: (i) the sum due under the Demand; (ii) the Statutory Demand Costs Order; (iii) the Default Judgment Sums; and (iv) the Claim Costs Order. By letter dated 8th August 2022, the Respondents wrote to Geminis making a request for security. On 15th August 2022, Geminis responded with an offer to provide an undertaking to hold the sum of US \$71,464.29 in its account with Sumitomo Mitsui Banking Corporation in Japan ("the Japanese account").

²⁹ By order dated 30th May 2022 and entered 14th June 2022 the judge ordered Geminis to pay the sum of US \$8,580,627.09 to Goods and the sum of US \$3,158,490.38 to G-Force in the Substantive Claim (BVIHCOM2022/0010).

³⁰ By order dated 1st March 2022 and entered 3rd March 2022 the judge ordered Geminis to pay Goods costs in the Statutory Demand Proceedings (BVIHCOM2022/0001) in the sum of US\$ 38,580.40.

³¹ By order dated 30th May 2022 and entered 14th June 2022, the judge ordered that Geminis pay Goods and G-Force's costs in the Substantive Claim in the sum of US \$68,616.03.

[59] On 19th August, the Respondents requested confirmation that the Security Sum would be transferred to the BVI and they further requested proof that Geminis had assets in excess of US \$11,917,778.19 (being the security of costs for the appeals, the combined debt and the costs orders in the lower court proceedings). Geminis declined to transfer the Security Sum stating that this would attract significant costs and fees and further denied that it was impecunious. The Respondents argued that they were not aware of any assets in the jurisdiction owned by Geminis against which a costs order could be enforced, and that Geminis had failed to comply with previous court orders without justification. In the circumstances, they submitted that Geminis would not likely be able to pay the Respondents' costs of the appeals should the appeals be unsuccessful and so this Court should make an order for security for costs.

[60] It is noteworthy to point out that by order dated 25th October 2022, a stay of execution was granted by this Court against the order (dated 30th May 2022 and entered 14th June 2022) and judgment (dated 30th May 2022) of Jack J [Ag.] in the Substantive Claim (BVIHCOM2022/0010). The Default Judgment Sums and the Claim Costs Order were the orders made by Jack J [Ag.] in the Substantive Claim. In light of the stay, it would therefore not be appropriate to grant the Respondents' request that the Default Judgment Sums and Claim Costs Order be paid by Geminis.

The Law

[61] An application for security for costs is governed by CPR 62.17 which provides as follows:

“Security for costs of appeal

62.17

1. The court may order –
 - a. an appellant; or
 - b. a respondent who files a counter notice asking the court to vary or set aside an order of a lower court; to give security for the costs of the appeal.
2. An application for security may not be made unless the applicant has made a prior written request for such security.
3. In deciding whether to order a party to give security for the costs of the appeal, the court must consider –

- i. the likely ability of that party to pay the costs of the appeal if ordered to do so; and
 - ii. whether in all the circumstances it is just to make the order.
4. On making an order for security for costs the court must order that the appeal be dismissed with costs if the security is not provided in the amount, in the manner and by the time ordered.
 5. Any costs to be paid under paragraph (4) must be assessed by the court.
- Rule 65.12 deals with the assessment of costs.”

[62] As the Respondents have made a prior written request for security, rule 62.17(2) has been satisfied. In making the order, the Court will consider whether or not Geminis would be able to satisfy a costs order on the appeal and whether it would be just in the circumstances to make the order. It is evident from 62.17(4) that the Court must make it a stipulation that the appeal be dismissed if the security order is not complied with.

[63] In **Dr. Martin Didier et al v Royal Caribbean Cruises Ltd.**³² at paragraph 9 this Court stated that:

“The court may order the claimant to put up security for the defendant’s costs if the court is satisfied, on an application for security for costs, that there is a significant risk of the defendant suffering an injustice by having to pay to defend the proceedings, with no real prospect of being able to recover his costs if he is eventually successful. The object of an order for security for costs is to provide a successful defendant with a relatively simple way of obtaining payment of any costs that the court may order an unsuccessful claimant to pay.” (Emphasis added)

[64] As to the Court’s power to make it a condition of the security order that Geminis comply with the Statutory Demand Costs Order, CPR 26.1(3) provides:

“3. When the court makes an order or gives a direction, it may make the order or direction subject to conditions.”

[65] Further, CPR 26.1(4) notes that:

- “4. The conditions which the court may impose include a condition –
- a. requiring a party to give an undertaking;
 - b. requiring a party to give security;
 - c. requiring a party to pay all or part of the costs of the proceedings;

³² SLUHCVP2017/0051 (delivered 18th September 2018, unreported).

d. requiring the payment of money into court or as the court may direct; and
e. that a party permit entry to property owned or occupied by that party to another party or someone acting on behalf of another party.”

[66] Thus, it is well within the Court’s power to make the security order subject to the condition that the Statutory Demand Costs Order be paid by Geminis.

Parties’ submissions

[67] Goods argued that it was not open to Geminis to assert that they did not have the money to pay the security. They further argued that Geminis could not assert that they considered raising the sum from others but had not actually done so. Geminis had to put before the Court full and frank evidence as to its financial means and any evidence as to assets in the BVI. Moreover, Goods argued that Geminis failed to comply with previous costs orders and this was highly relevant to the Court’s decision as to whether or not to grant security. Lastly, Goods submitted that security was usually given in the form of a payment into court so that the court had a readily accessible means of enforcing the security. Goods noted that they were unaware of any cases where it was suggested that funds outside the jurisdiction would be sufficient security.

[68] Goods submitted that despite their requests for confirmation that Geminis had sufficient funds to cover not only the security sum, but also the outstanding costs orders and lower court awards, Geminis failed to provide evidence of its broader financial position. The only assets identified were the Evenstar shares (which were suspended and could not be redeemed, and in any event, were proposed by Geminis to satisfy the Demand) and the funds in the Japanese account (which are beyond this Court’s jurisdiction). In the circumstances, they argued that it would be just to make the order for security as they had been denied the fruits of their litigation for several months.

[69] Geminis countered that their evidence had always been that the Evenstar shares had significant value. They further argued that they had already made an

undertaking to hold the security sum in their Japanese account. They however conceded that despite being a BVI company, they had no assets in the jurisdiction. Even so, they argued that this should not be determinative in making an order for security. They also asserted that the Respondents had already filed an application in Hong Kong for the recognition and enforcement of the Substantive Claim judgment and order. Thus, any argument by the Respondents that enforcement of a future costs order would be impossible was inconsistent with the Respondents' actions taken in Hong Kong.

Discussion

[70] Having regard to the parties' submissions and the evidence before the Court, it would be just in all the circumstances for the security application to be granted. Apart from the Evenstar shares and the sums in the Japanese account, Geminis has outright denied having any assets in this jurisdiction, and has not provided any other evidence of their financial status. The fact is that the Evenstar shares (at the time of Jack J [Ag.]'s judgment) were worth less than the amount due under the Demand and the Court has no updated evidence as to their current value. Geminis has also not indicated that the Evenstar shares are no longer suspended and capable of being redeemed. Geminis has failed to pay any of the previous lower court orders and has failed to provide any explanation for this. Moreover, Geminis has not made any proposal to raise the funds from any other source. It is noted that Geminis has not contested the amount of the security but has only refused to transfer it to the BVI on the basis of unknown costs and fees. There is a significant risk of the Respondents suffering an injustice by having to pay to defend the proceedings on appeal, with no real prospect of being able to recover their costs if they were eventually successful.

[71] I would also add that it would be appropriate in the circumstances, to add the condition that the Statutory Demand Costs Order be paid. Given the Court's powers to grant unless orders, the fact that CPR 26.1(3) and (4) permit the Court to attach conditions to its orders, and the fact that in any event, in a security order, the Court

must make an order that the appeal be dismissed if the security is not paid, it would be just in the circumstances to add the condition as requested by the Respondents.

- [72] Given the foregoing, I am of the view that the Respondents' security for costs application should be granted.

Order

- [73] Accordingly, the orders of the Court are as follows:

- (i) Geminis' fresh evidence applications filed in appeals BVIHCMAP2022/0020 and BVIHCMAP2022/0043 on 16th August 2022 are dismissed.
- (ii) The Respondents' security for costs application filed on 14th September 2022 is granted.
- (iii) Geminis shall pay into Court the Security Sum and the Statutory Demand Costs Order within 7 days of the date of circulation of the written judgment, that date being 25th August 2023, failing which its appeals will be struck out.

I concur.
Paul Webster
Justice of Appeal [Ag.]

I concur.
Gertel Thom
Justice of Appeal

By the Court

Deputy Chief Registrar