THE EASTERN CARIBBEAN SUPREME COURT
TERRITORY OF THE VIRGIN ISLANDS

IN THE HIGH COURT OF JUSTICE

(COMMERCIAL DIVISION)
CLAIM NOS. BVIHC (COM) 2022/0134

IN THE MATTER OF THE INSOLVENCY ACT 2003

BETWEEN:

RICH REGION HOLDINGS LIMITED

Applicant

AND

INDUSTRIAL AND COMMERCIAL BANK OF CHINA (MACAU) LIMITED

Respondent

Appearances:
Mr. Andrew Westwood, KC and Mr Bhavesh Patel for the Applicant
Mr Matthew Hardwick, KC and Ms Rosalind Nicholson for the Respondent

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2022: December 13
2023: July 31

JUDGMENT

[1] **SMALL DAVIS, J [Ag.]**: The respondent Industrial and Commercial Bank of China (Macau) Limited ("the Bank") served a statutory demand on the applicant Rich Region Holdings Limited ("RRHL") on 5th July 2022 for the payment of HK$3,314,751,351.19 inclusive of interest ("the Debt"). RRHL seeks to set aside the statutory demand. RRHL does not dispute the Debt (although it does not admit the interest calculation) but disputes that the Debt is due and owing.

[2] The statutory demand set out the facts giving rise to the Debt. It also put the value of the Bank's security interest at HK$1,971,000,000.00. The security

comprises share charges over RRHL's own shares and shares in Goldin Financial Holdings Ltd. and a number of companies that form part of the Goldin Group. The Bank states that it has been unable to realise the security and it is therefore effectively an unsecured creditor.

[3] RRHL is a member of a group of companies known as the Goldin Group. The Debt arises out of a facility agreement RRHL entered into with the Bank dated 10th December 2018 to finance part of the funding requirement for a luxury residential real estate development project in Ho Man Tin, Hong Kong ("the Development") by Gold Brilliant Investment Limited ("GBIL"), in which RRHL holds 83.5% of the shares. The original facility agreement was for a loan facility of up to HK$3,300,000,000.00. There were three supplemental agreements which amended and supplemented the original facility agreement. The contractual documents are referred to collectively as the Facility Agreement.

[4] The repayment terms were initially that there were to be minimum repayment amounts on fixed dates, with the remaining principal due on the final maturity date. By the supplemental agreements, other members of the Goldin Group, Great Discovery Global Limited ("Great Discovery") and Glamorous Smart Limited ("Glamorous Smart") provided security by way of charges over all the shares in RRHL (the GD Share Charge and the GS Share Charge), Chariot Power gave security by way of its charge of its shares representing 40% of the shareholding in Gold Favour and the final maturity date was extended first to 10 October 2019, then to 10 April 2020.

[5] Following the failure to pay the outstanding sums under the Facility Agreement on 10th April 2020, on 15th July 2020 Goldin Global granted a charge to the Bank over its entire right title and interest in certain defined securities and related rights ("the Goldin Share Charge"). Between 30th July 2020 and 10th February 2021, the Bank issued three demand letters to RRHL, the Goldin Group, Great Discovery, Glamorous Smart and Chariot Power, informing them that the failure to pay on 10th April 2020 constituted an event of default under the Facility Agreement.

[6] On 24th February 2021 GBIL's rights and liabilities as the developer for the Project were novated to Magic Energy Holdings Limited, a subsidiary of Great Eagles Holdings Limited.

[7] The dispute of the Debt is said to be grounded on representations made by the Bank to RRHL and upon which RRHL relied and acted to its detriment and that therefore the Bank is estopped from enforcing the Facility Agreement and/ or that there is a collateral agreement between the parties which precludes its current enforcement.

[8] RRHL says further, that the dispute is one that should be resolved in the courts of Hong Kong, as the Facility Agreement is governed by Hong Kong law and the parties agreed that it was the most appropriate and convenient forum to settle any disputes.

[9] RRHL also relies on the fact that the Bank is a secured creditor, holding a security interest which exceeds the amount specified in the demand.

[10] The issues before me are:

(a) whether the Debt is disputed on substantial grounds;

(b) whether the Bank holds a security interest in respect of the Debt that equals or exceeds the amount demand.

Statutory Regime

[11] Section 155 of the Insolvency Act 2003 ("the Act") provides:

> "(1) A creditor may make demand on a person for payment of a debt owed by that person to him.
>
> (2) A demand under subsection (1) shall -

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

…

(3) If the creditor making demand under subsection (1) is a secured creditor in respect of the debt, the full amount of the debt shall be specified in the demand, but -

(a) the demand shall specify the nature of the security interest, and the value which the creditor places on it at the date of the demand; and

(b) the amount claimed -

(i) shall be the full amount of the debt less the amount specified as the value of the security interest; and

(ii) shall equal or exceed the prescribed minimum."

[12] Section 157 provides:

"(1) The Court shall set aside a statutory demand if it is satisfied that

(a) there is a substantial dispute as to whether -

(i) the debt, or

(ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum, is owing or due;

(b) …..

(c) the creditor holds a security interest in respect of the debt claimed and the value of the security interest is equal to or greater than the amount specified in the demand less the prescribed minimum.

…….

(4) If the Court dismisses an application to set aside a statutory demand, it shall make an order authorizing the creditor to make application for the appointment of a liquidator or for a bankruptcy order, as the case may be."

[13] The law is well settled. The applicable test in deciding if there is a substantial dispute as to whether a debt is due was authoritatively stated by Sir Dennis

Byron CJ in **Sparkasse Bregenz Bank AG v Associated Capital Corporation:**[1]

> "The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court 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 by some other proceedings."

[14] On an application to set aside a statutory demand on the basis that the alleged debt is the subject of a substantial dispute, the Court must be satisfied that there is such a dispute but it is not the Court's function to resolve it. As Foster J (Ag) stated in **China Alarm Holdings Ltd v China Alarm Holdings LLC:**[2]

> "It is not this court's function at this stage to resolve the issue as to whether there was an agreement to extend the maturity date. It is this court's function to inquire whether there is any bona fides in the allegation that an agreement or representation was made to extend the maturity date which would give rise to the finding of there being a substantial dispute as to whether the Debt is due now or at some future date."

[15] The issue of the substantial dispute identified by RRHL is a mixed one of law and fact. The facts that have to first be determined are:

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[1] Unreported, BVIHCVAP 2002/0010 (delivered 18th June 2003) at para. [3].
[2] Unreported, BVIHCV 2008/00385, delivered 20th April 2009

(a) Were the representations made as alleged;
(b) If the representations were made, did RRHL relied on them to its detriment?

[16] If the Representations were made and RRHL relied on them to its detriment such that the Bank is now estopped from enforcing the Facility Agreement because there was a collateral agreement is a question of law which ought properly to be reserved unto the court that the parties have elected to have jurisdiction over any disputes.

Substantial Dispute

The Representations

[17] On RRHL's case, in early January 2022 the Bank represented to it ("the Representations") that:

(a) it would provide a proposal to restructure the lending under the Facility Agreement ("the Restructuring Proposal") subject to:

(i) RRHL signing an undated blank charge over its shares in GBIL (which amounted to 83.5% of that company's shares) in favour of the Bank ("the GBIL Share Charge")

(ii) GBIL signing an undated blank debenture as a charge over its assets ("the GBIL Debenture").

(b) Once the GBIL Share Charge and GBIL Debenture (together, "the GBIL Security Documents") had been signed, the Bank would send the Restructuring Proposal to RRHL.

(c) The Restructuring Proposal would set out: new terms of the loan advanced under the Facility Agreement, to replace the existing terms; an extension of the maturity date; a six month or one year "observation

period"; and after the "observation period", the loan would become "normal debt" rather than "bad debt", so that the pressure from the Bank to enforce repayment from RRHL would be released.

[18] RRHL asserts that in reliance on the Representations, RRHL signed the GBIL Share Charge and GBIL signed the GBIL Debenture, together with other ancillary documents.

[19] It is RRHL's case that pending the Restructuring Proposal, the purported event of default under the Facility Agreement has not arisen as a result of the Representations having been made, the Bank having made the Representations and RRHL and GBIL having acted on them by executing the GBIL Security Documents. The Bank is estopped from enforcing the Facility Agreement and the relevant share charges and/ or that there was a collateral agreement that the Bank would not enforce the Facility Agreement pending the Restructuring Proposal.

[20] In its reply evidence, filed after the Bank criticized the absence of any corroborating evidence in RRHL's supporting affidavit sworn by Ms. Eila Cheng Ka Ya ("Ms. Cheng") as to the making of the Representations, including identification of the persons by and to whom they were made, Ms Cheng exhibited WhatsApp messages dated 10th January 2022 from Mr. Jiang Yi Sheng ("Mr. Jiang"), who at all material times was a chairman and managing and executive director of the Bank, to Mr. Pan Sutong, who was at all material times the ultimate beneficial owner of the Goldin Group. Mr Jiang stated**:**

> "…for now we should restructure the Debt. To restructure, you should quickly sign the documents now. If you do not sign them, there will be no way to restructure the Debt, signing is the prerequisite of restructuring the Debt.
>
> Once the documents [GBIL Share Charge and GBIL Debenture] have been signed, ICBCM would send the Restructuring Proposal to RRHL [the applicant] for review. I have told you about the gist of the Restructuring Proposal, that is to reset the Debt and to treat it as a new loan, (1) new

terms of the loan to be advanced replacing the existing terms of the Facility Agreement, (2) the new terms would involve extension of the maturity date…
…After the 'one- year observation period', the loan would become 'normal debt' rather than 'bad debt', so that the pressure from ICBCM [the respondent] to enforce any repayment from RRHL would be released."

And

"I am now anxiously waiting for you to quickly sign the documents, once the documents are signed, I will execute the restructuring proposal. It is best to have success in this restructuring proposal. Let's stabilize this matter because the biggest pressure is from this matter, ok?"

[21] RRHL says this is evidence that:

(a) There was a clear representation by Mr Jiang on behalf of the Bank to Mr Pan on behalf of RRHL that if the documents were signed the Bank would provide the Restructuring Proposal;

(b) The representation was meant to induce RRHL to rely on it.

(c) The representation did in fact induce RRHL to rely on it by signing the specified documents;

(d) As a result, the Bank is estopped from denying that it would provide the Restructuring Proposal indicated by Mr Jiang;

(e) Alternatively, there is a collateral agreement between the parties which precludes the Bank from reverting to its strict legal rights under the Facility Agreement.

[22] On the issue of detrimental reliance, RRHL contends that "the precise legal effect of signature where RRHL and GBIL have done what was asked of them in reliance on the Representations" is an issue of Hong Kong law and that this is not an issue which is appropriate for determination at this summary stage, nor should the insolvency procedures be used in such circumstances.

[23] According to RRHL, this is an issue that will be before the High Court in Hong Kong in ongoing proceedings filed by the Bank against Chariot Power and Gold Favour seeking (i) a declaration that the Gold Favour Share Charge is valid and enforceable; (ii) a declaration that the Bank is entitled to deal with and exercise the powers and rights incidental to the Gold Favour shares as it sees fit and (iii) a mandatory injunction requiring Gold Favour and Chariot Power to take all necessary steps to give effect to the Bank's enforcement of the Facility Agreement and the Gold Favour Share Charge.

[24] The Bank's claim in the Hong Kong proceedings against Gold Favour and Chariot Power is pleaded on the following facts as shown in the statement of claim:[3]

(a) The Facility Agreement was entered into with RRHL: see paras. 3-6;

(b) The loan to RRHL under the Facility Agreement was secured by, among other things, charges over shares in RRHL held by Great Discovery and Glamorous Smart and a conditional charge over 40% of the shares of Gold Favour by Chariot Power: para.7;

(c) The share charges referred to above (including the conditional charge of Gold Favour shares by Chariot Power) provided for certain consequences should there be an event of default, as defined, under the Facility Agreement: paras. 9- 12;

(d) RRHL has failed to repay sums due under the Facility Agreement, giving rise to an event of default: paras 13-17. The default relied on is the same as that which underlies the statutory demand and the statement of claim expressly pleads the statutory demand: para.15;

(e) The occurrence of an event of default under the Facility Agreement

[3] Bundle Volume C Tab 13.

has the effect of converting the conditional share charge over the Gold Favour shares into a charge over those shares, giving the Bank a security interest thereover: paras. 18-19;

(f) The Bank exercised its enforcement rights under the Facility Agreement and appointed certain individuals as receivers and managers over the shares, which receivers and managers have exercised their powers to remove the directors of RRHL in favour of themselves: paras. 20-21;

(g) RRHL disputes that the alleged debt is due and owing and claims that the Bank agreed to restructure the loans under the Facility Agreement, as a result of which the Bank is estopped from enforcing the share charges, including by the purported appointment of receivers, the validity of which is challenged by RRHL: paras. 22-31;

(h) The Bank has been unable effectively to enforce the charges over the shares in RRHL as a result of the refusal of RRHL and GBIL to recognise the valid appointment of receivers: paras. 30-47;

(i) Chariot Power has acted in breach of the charge over the shares in Gold Favour: paras. 48-51;

(j) The Bank believes that Chariot Power and Gold Favour will dispute any enforcement action in respect of the charge over the shares in the latter which, the Bank is now able to take as a result of the alleged default of RRHL under the Facility Agreement: paras. 55-57.

[25] Thus, the claim is founded on an event of default by RRHL under the Facility Agreement, which RRHL disputes that the Bank is entitled to assert based on the Representations. RRHL therefore argues that where: (i) the issue of whether the Debt is currently due and owing is before the Hong Kong courts; and (ii) those courts are much better placed to decide that issue (the issue being one of

Hong Kong law and the parties having agreed that the courts of Hong Kong are the most appropriate and convenient courts to settle any dispute in relation to the Facility Agreement), the statutory demand procedure is not appropriate.

[26] RRHL also adverts to further proceedings in Hong Kong filed by the receivers appointed pursuant to the GD Share Charge and the GS Share Charge in RRHL's name seeking to compel GBIL and a number of individuals to convene and extraordinary general meeting of GBIL and the removal of its directors and appointment of the receivers in their place.

[27] The Bank's response to this argument is that there is no bona fide dispute on substantial grounds. Counsel for the Bank Mr. Matthew Hardwick KC, invoking Oliver LJ in **In Re Claybridge Shipping Co. SA,**[4] cautioned the court against being swayed by a "cloud of objections on affidavit".

[28] To disperse the smoke cloud of the substantial dispute, Mr. Hardwick began first with the Bank's evidence which showed that the Bank had been requiring execution and registration of the GBIL Security Documents since October 2021 and had been in extensive negotiations with the Goldin team since that date. RRHL's claim then, that the Representations, and specifically that the requirement of the GBIL Security Documents (to be signed in blank) was first made in early January 2022 is inconsistent with the documentary evidence and is seriously misleading. It is true that the Bank was pressing for the signature of the GBIL Security Documents, but it had been doing so for three months. I consider this to be highly relevant to determining whether there is a bona fide dispute and the credibility of RRHL's assertion of misrepresentations made by the Bank.

[29] Next, Mr. Hardwick pointed out that RRHL only signed the GBIL Security Documents; they were never executed as deeds as required. They were never signed by the Bank and they were never registered. To further demonstrate that

[4] [1997] 1 BCLC 572, at 579c-d.

nothing turned on these documents, new drafts were circulated in May 2022, showing that neither party considered that the previous ones were valid and binding. There is considerable force in this argument.

[30] Next, Mr. Hardwick KC pointed out that the claim that the representation was that once the signed GBIL Security Documents were delivered, the Bank would then send a restructuring proposal falls flat because the Bank did in fact send a restructuring proposal. Mr. Hardwick pointed to the exchange of correspondence between the Bank and the Goldin team with the proposal and counterproposal for the restructuring, which included the extension of the maturity date. Therefore the representation (if made) was true.

[31] In addressing the WhatsApp messages between Mr. Jiang and Mr. Pan which are heavily relied on by RRHL, Mr. Hardwick described them as inconsequential because the Bank did not sue RRHL right after the date the GBIL Security Documents were received. The Bank did send a restructuring proposal and the Bank did try to negotiate a restructuring. What the Bank did not do, was accept the Goldin team's attempts to introduce unacceptable terms at the last minute. Even five months after the date of the Representations, the Bank was still proposing an extension of the final maturity date and restructuring of the loan under the Facility Agreement and there was ultimately no agreement because RRHL refused the terms offered with the deadline date of 30th June 2022.

[32] On the Representations, I accept that there was a conversation between Mr. Pan and Mr. Jiang in which Mr. Jiang communicated that RRHL should sign the GBIL Security Documents as a prerequisite to the Bank sending a restructuring proposal. RRHL did not rely on the Representations to its detriment. The onus is on RRHL to make that case and they have failed to do so. What RRHL was told was that the Bank would send a proposal. It was not until 28th January 2022 that lawyers on behalf of RRHL responding to the fourth demand letter alleged that the GBIL Security Documents were signed in reliance on the Representations. On 20th May 2022 the Bank's lawyers sent a term sheet setting out the key commercial terms and the documentation framework to progress

discussions for extending the final maturity date in exchange for the grant of additional security. From that date until 29th June 2022 there were exchanges of correspondence and discussions negotiating the terms of the restructuring. On 9th June 2022 the Bank's lawyers sent "revised drafts" of the restructuring deed, the form of amended and restated Facility Agreement, the Gold Favour Share Charge Supplemental Deed and revised drafts of the GBIL Security Documents to the Goldin team. The Bank wrote to the Goldin Group on 25th June 2022 with terms of "Extension and Restructuring Proposal No. 3" which proposed an extension of the final maturity date from 10th April 2020 to 10th January 2022 and a new term loan of two years from 30th June 2022 to 30th June 2024 and said that once the extension and restructuring proposal are implemented all connected legal actions and claims would be withdrawn. It seems to me that those terms were better or were certainly not less favourable than the terms that Mr. Jiang spoke of in the January 2022 WhatsApp messages.

[33] Counsel for RRHL Mr. Andrew Westwood KC argued that the restructuring proposal put forward by the Bank does not satisfy the representations made by Mr. Jiang. I do not agree. Mr. Jiang said, "the gist of the restructuring proposal was to reset the Debt and to treat it as a new loan, (1) new terms of the loan to be advanced replacing the existing terms of the Facility Agreement, (2) the new terms would involve extension of the maturity date." That is what the Bank's proposal did.

[34] RRHL did not protest or cry foul about the absence of a 12 month observation period or anything else forming part of the Representations. In any event, I accept Mr. Hardwick's point that the observation period would have been in the Bank's interest not RRHL's; instead of an observation period, the proposal moved straight into the new two year loan.

[35] Goldin's response on 29th June 2022, the day before the deadline given by the Bank for conclusion of the negotiations by the signing of the documents, was

that it was agreeable to sign the requested documents but introduced three conditions: that no event of default shall be imposed under the Facility Agreement and that "the lender shall not in any way rely on any provision in the to-be-signed agreements as a basis for commencing legal action, but would sit back and wait for sharing profit to be derived from the [Development] for repayment." I agree with Mr. Hardwick that these conditions would effectively nullify the Bank's rights and that on any view they would be commercially unacceptable.

[36] RRHL did not rely on the Representations to its detriment.

[37] This is a classic example of the wisdom of Neuberger J (as he then was) in **Re Richbell Strategic Holdings Ltd.:**[5]

> "A judge, whether sitting in the Companies Court or elsewhere, should be astute to ensure that, however complicated and extensive the evidence might appear to be, the very extensiveness and complexity [are] not being invoked to mask the fact that there is, on proper analysis, no arguable defence to a claim, whether on the facts or the law."

[38] Having enquired into to the allegations raising the dispute, I am satisfied that there is no substantial dispute honestly believed to exist by RRHL and it is not based on substantial or reasonable grounds.

Security Interest Point

[39] As an alternative argument, RRHL contends that the Bank has a security interest far greater that the amount specified in the statutory demand and therefore the court should set aside the demand pursuant to section 157(1)(c).

[5] [1997] 2 BCLC 429 at 435.

[40] In the statutory demand the Bank put a value on RRHL's shares at HK$1.4 billion. This was based on the valuation of the Development as per the Knight Frank valuation report dated 30th June 2020 at HK$25.6 billion, discounted by 30% due to the declining property market in Hong Kong and deducting estimated costs and expenses of the Development of HK$16.24 billion. This calculation results in the estimated value of RRHL's share in the surplus being HK$1.4 billion.

[41] As would be expected, RRHL considers the Bank's valuation is grossly undervalued. They say that on any reasonable and conservative analysis, the value is considerably greater. Ms Cheng's second affidavit criticizes Mr. Chan's estimation saying the 30% discount is based on two online articles and that no consideration should be given to them as there are other articles with much more favourable outlooks. Further, Centa-City Leading Index, which is based on contract prices in one of the largest real estate agency groups in Hong Kong, has put the decline at approximately 7.6% as opposed to the 30% applied by the Bank.

[42] Mr. Hardwick's first point, which he called a threshold point, in dealing with the security interest issue, was to dispute that the Bank is indeed a secured creditor as defined by section 9(2) of the Act which reads as follows:

> "A creditor is a secured creditor of a debtor if he has an enforceable security interest over an asset of the debtor in respect of his claim."

[43] Mr. Hardwick argued that the Bank does not hold a security interest in RRHL's assets; the security has been provided by third parties Great Discovery, Glamorous Smart, Chariot Power and Goldin Global over their assets.

[44] **Novel Blaze Limited (in liquidation) v Chance Talent Management Limited**[6] provides authority for the point. In **Novel Blaze**, the debtor company opposed

[6] Unreported, BVIHCVAP2020/0006, delivered 16th April 2021.

an application for the appointment of a liquidator on the ground that it was insolvent, on the basis that the applicant was a secured creditor. The learned judge considered section 9(2) of the Act and applied the principle set out in **Re Swiber Holdings Limited**[7] that "the assets of a subsidiary are not assets of the debtor and therefore a charge over the assets of the subsidiary are not such as to render the creditors secured by a security over an asset of the debtor." On appeal, the Court gave a lucid interpretation of section 9(2):

> "……[T]he words of section 9(2) must be given their natural and ordinary meaning. In my view, the natural and ordinary meaning of section 9(2) and in particular the words 'security interest over the assets of the debtor' (underlining supplied) mean that a creditor will be a secured creditor if a security interest is held by the creditor over the assets of the debtor, only. To say that the words of section 9(2) apply to security interests held by a creditor over assets of a third party is, in my view, an impermissible overextension of the clear words of the statute. A security interest held over the assets of a debtor's subsidiaries is simply not a security held over the assets of the debtor. When applied to this case, therefore, the effect of section 9(2) is that Novel Blaze will only be a secured creditor if it holds an enforceable security interest over the assets of Novel Blaze. The words of the section are clear and unambiguous. They mean what they say. On the plain words of the section alone, I am not persuaded that this Court should find that Chance Talent is a secured creditor of Novel Blaze, given that the security interest held by Chance Talent is not over the assets of Novel Blaze."

[45] On the hearing of an application to set aside the statutory demand the court will set aside the statutory demand if satisfied that the creditor holds a security interest in respect of the debt claimed and the security interest is equal to or greater than the amount specified in the demand less the prescribed minimum.

[7] [2018] SGHC 180

[46] Mr. Westwood's effective rebuttal of Mr. Hardwick's argument that the Bank is not a secured creditor and therefore the court need not be concerned with section 157(1)(c) was to point out that in the statutory demand, the Bank clearly identified itself as a secured creditor and in detailing its security interest in paragraph 13 of the statutory demand, the Bank referred to the assignment of the income receivables of "the Borrower, including the income receivables of Gold Brilliant executed by the Borrower as the assignor in favour of the Lender as the assignee…. which are currently valued at nil." Mr. Westwood argued that the Bank therefore meets the definition of secured creditor. I accept that point as validly made.

[47] Mr. Westwood's secondary but equally important argument on the security threshold point was that the wording of section 157(1)(c) is not limited to security over the assets of the debtor and it therefore remains pertinent for the court to consider all the security for the debt when determining an application to set aside a statutory demand. Mr. Westwood said if the limitation was intended, it would have been expressly provided, as it is in section 9((2). This argument was clearly meant to strengthen RRHL's argument that the Bank's debt was sufficiently secured and the statutory demand should therefore be set aside.

[48] Mr. Hardwick's counter argument is that even though section 157(1)(c) uses the words "holds a security interest in respect of the debt" and not "secured creditor", the meaning must be consistent since "secured creditor " is used in section 155(3) to define the steps that must be taken if demand is being made by a secured creditor. It therefore follows that where section 157 refers to "security interest", it is speaking about the same secured creditor as identified in section 155.

[49] Within the same section 157, "secured creditor" is otherwise used. See section 157 (3):

> "Where the Court is satisfied that the security interest of a secured creditor has been under-valued in the statutory demand, the Court may require the creditor to amend the demand accordingly, but without

prejudice to his right to make application for the appointment of a liquidator or for147 a bankruptcy order, as the case may be."

[50] It seems to me that I ought to take the use of a broader term, "the creditor who holds a security interest in respect of a debt claimed" in section 157(1)(c) as intentional on the part of the legislature.

[51] To resolve this issue, I turn to the guidance on interpretation of statute as given by Blenman JA in **Joseph Cadette v Saint Lucia Motor and General Insurance Co. Limited:**[8]

> "[43] It is settled law that this Court must give primacy to the natural ordinary meaning of words used in the context of the legislation, from which the court may only depart where the natural and ordinary meaning of the words give rise to an undesirable end result. This principle was given judicial recognition by this Court in **The Labour Tribunal v St. Lucia Electricity Services Limited**. This was recently affirmed in the Board in **Attorney General of the Turks and Caicos Islands v Misick and others** where the Board stated that '...the first question is what is the natural or ordinary meaning of the particular words or phrases in their context...". The Board in **Misick** further affirmed that:
>
> > "It is only when that [natural or ordinary] meaning leads to some result which cannot reasonably be supposed to have been the intention of the Governor when making or of the House of Assembly when approving the Regulations that it is proper to look for some other possible meaning of the word or phrase...".

[8] [2021] ECSCJ No. 472, delivered 22nd February 2021.

[44] Along similar lines, the learned President of the Caribbean Court of Justice ('the CCJ') Sir Dennis Byron PCCJ (as he then was) enunciated as follows in **Selby**:

> "[9] The principles which the judges must apply include respect for the language of Parliament, the context of the legislation, the primacy of the obligation to give effect to the intention of Parliament, coupled with the restraint to avoid imposing changes to conform with the judge's view of what is just and expedient."

[45] Critically, the learned Byron PCCJ stated as follows in relation to the use of the social and historical context when interpreting statutory words:

> "[10] **The social and historical context can be decisive in ensuring that the words are interpreted to give effect to the meaning and purpose of the Act. But that does not extend to distorting the language used by Parliament**. It must be remembered that the court's responsibility is to give effect to the intention of Parliament not to correct legislation to ensure that it is just and expedient. If the court considers that there is a variance between the language used and its understanding of the special purpose of the Act it should be left to Parliament to amend the legislation. **Where the words of the statute are not ambiguous there could be no justification for interpreting them in a manner that would alter their meaning, unless it may be necessary to resolve an inconsistency within the statute itself. So, the conjecture that Parliament may have intended a meaning that is different to the words used is not a sufficient reason for departing from their ordinary and natural meaning.**

> **[11] In giving effect to these principles the court, when interpreting any part of a statute, should review other parts of the Act which throw light upon the intention of the legislature and may show how the provision ought to be construed. The underlying principle is that the courts must use the available material to discover and give effect to the intention of Parliament. There can be no doubt that consideration of the purpose of an enactment is always a legitimate part of the process of interpretation. (emphasis supplied)"**

[52] A statutory demand may be issued by any creditor, not just a secured creditor. Therefore section 157 is applicable to any statutory demand which is sought to be set aside. It seems to me that the fact that section 157(1)(c) uses the words "the creditor holds a security interest in respect of the debt claimed" does not limit it to a secured creditor as defined in section 9(2). This is because the intent of section 157 is to enable a debtor to receive forbearance from a statutory demand if there is a proper challenge to it given the potential for it to be the precursor to a liquidation application. Indeed, section 157(4) requires the court to make an order authorizing the creditor to make an application for the appointment of a liquidator or a bankruptcy order if it dismisses an application to set aside a statutory demand. The primary intent of the legislature in its definition of secured creditor is identify a category of creditor who has an interest in the debtor's property that would be separated out of the debtor's estate in a liquidation. A creditor who holds a security interest but is not a secured creditor as defined by section 9(2) would effectively be an unsecured creditor in a liquidation. This is a significant difference in status and it is fitting; a creditor with a security interest in assets other than the debtor's cannot assert a protected interest in the liquidation.

[53] It would be an undesirable end result if a statutory demand issued by a creditor who holds an enforceable security interest in relation to the debt may yet

proceed to have the company wound up even though they can have recourse to the security without putting the debtor in jeopardy of liquidation. The consequence of having a statutory demand that is not set aside is that the debtor company is deemed insolvent and faces a much more difficult task of overcoming a liquidation application.

[54] In my determination, section 157(1)(c) is properly invoked and the security over the shares in RRHL provided by the other members of the Goldin Group are to be taken into account in considering whether to set aside the statutory demand.

Valuation of the Security Interest

[55] The value of the security provided by the Share Charges put up by Great Discovery and Glamorous Smart is hotly disputed. RRHL contends for a value in excess of HK$6 billion and the Bank puts it at HK$1.4 billion. The Bank has applied the highest estimate of decline in the Hong Kong real estate market. Mr. Westwood identified several sources which estimated much smaller decline in value, with the lowest being 7.6%. At that rate, the value would be HK$6.12 billion even using the Bank's unsubstantiated costs and expenses deduction.

[56] The onus is on RRHL to show that the security held is equal to or greater than the Debt. They have not done so convincingly other than to challenge the Bank's estimation.

[57] Undoubtedly, there is uncertainty about the value of the Share Charges. Importantly, the security cannot be realized any time in the near future. The valuation of the Share Charges is calculated by reference to RRHL's potential share of the surplus income from the sales of the residences in the Development. The date for completion of the Development is late 2024. RRHL will receive a share after settlement of what is due to the MTR, Great Eagle and GBIL. I accept the Bank's submission that at this point, the valuation is speculative and dependent on other variables. The Knight Frank report itself

stated that the valuation should be kept under frequent review and that there was material valuation uncertainty. There are no current assets to sell.

[58] There is undisputed evidence that the Bank has not had any success in its attempts to enforce the other security.

- Gold Favour Shares and GF Share Charge which is valued at HK$280 million. It appears steps have been taken to dispose of Chariot Power's interest in a pending project which gives the shares value. The Bank has had to initiate a claim in Hong Kong to enforce the GF Share Charge.

- Goldin Share Charge with an estimated value of HK$291 million. Trading in the shares of Goldin Financial has been suspended since 1st April 2022 and provisional liquidators have been appointed.

- The Share Charges of Glamorous Smart and Great Discovery which carries the highest estimate of value. The Bank's appointed receivers have been thwarted in all their efforts to gain control of the companies. They have initiated a claim in Hong Kong which is being defended on the basis that there has not been an event of default.

[59] I have taken all these circumstances into account in assessing whether substantial injustice would be caused to RRHL if the statutory demand were not set aside.

Conclusion

[60] I am satisfied that there is no substantial dispute as to the Debt and that the Bank is not holding a security interest that exceeds or equals the Debt less the prescribed minimum and finally that there would be no injustice to RRHL if the statutory demand were not set aside.

[61] The Bank has been owed a substantial sum of money for an extended period and RRHL has been in breach of the terms for repayment. The Bank has made genuine efforts to restructure the Debt. As at the date that it issued the statutory demand, there were no ongoing discussions, RRHL having failed to meet the deadline stated by the Bank to finalize the restructuring documentation.

Orders

[62] I therefore dismiss the application. The Bank is authorized to make an application for the appointment of a liquidator.

[63] The costs of this application are to be paid by RRHL to the Bank, such costs to be assessed if not agreed within 21 days.

Tana'ania Small Davis, KC

Commercial Court Judge [Ag]

By the Court

Registrar