

**EASTERN CARIBBEAN SUPREME COURT  
BRITISH VIRGIN ISLANDS**

**IN THE HIGH COURT OF JUSTICE  
(COMMERCIAL DIVISION)**

**CLAIM NO. BVIHC (COM) 2022/0010**

**BETWEEN:**

**(1) GOODS TECHNOLOGY STARTING INTERNATIONAL LIMITED**

**(2) G-FORCE INT'L CO LTD**

**Claimants**

**-v-**

**GEMINIS INVESTORS LIMITED**

**Defendant**

**Appearances:**

Ms. Angeline Welsh, with her Ms. Sara-Jane Knock of Withers BVI for the Claimants  
Mr. John McCarroll SC and Ms Umi Ahmed of Harneys for the Defendant

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2022 May 2, 3 and 4  
May 30

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**JUDGMENT**

- [1] **JACK, J [Ag.]:** In this matter I have two cross-applications, both dated 1<sup>st</sup> March 2022. The first is an application by the claimants (“Goods Tech” and “G-Force” respectively) for judgment by default. It was filed at 8.38am. The second is an application by the defendant (“Geminis”) for an extension of time for filing its defence. This application was filed at 12.48pm, four hours and ten minutes after the claimants’ application. Geminis’ cross-application included an application for relief from sanctions, however this was abandoned in the course of argument, because the rules for setting aside default

judgments are self-contained and do not incorporate the general rules on relief from sanction.

- [2] The claim is brought in respect of monies owed on the maturity of nine notes issued by Geminis. The first eight notes were issued to Goods Tech; the ninth note was issued to G-Force. The amounts and maturities are as follows:

|    | Issue date | Maturity date | Interest stated | Subscription amount                                                        |
|----|------------|---------------|-----------------|----------------------------------------------------------------------------|
| 1. | 31.12.19   | 30.6.20       | 3.1%p6mths      | \$1,000,000.00                                                             |
| 2. | 31.12.19   | 30.6.20       | 3.1%p6mths      | \$1,000,000.00                                                             |
| 3. | 10.2.20    | 28.2.21       | 6.5%pa          | \$1,000,000.00                                                             |
| 4. | 31.3.20    | 31.3.21       | 6.5%pa          | 158 Units of Evenstar Fund (Class D)<br>(Equivalent to \$803,565.88)       |
| 5. | 30.4.20    | 30.4.21       | 5.8%pa          | 364.865 Units of Evenstar Fund (Class D)<br>(Equivalent to \$1,847,873.38) |
| 6. | 31.5.20    | 31.8.20       | 1.45%p3mths     | \$2,000,000.00                                                             |
| 7. | 31.5.20    | 30.11.20      | 4%p6mths        | \$600,000.00                                                               |
| 8. | 31.5.20    | 30.11.20      | 4%p6mths        | \$600,000.00                                                               |
| 9. | 30.4.20    | 30.4.21       | 5.8%pa          | 595 Units of Evenstar Fund (Class D)<br>(Equivalent to \$3,013,401.30)     |

- [3] The monies due on notes 1, 2, 3, 6, 7 and 8 were the subject of a statutory demand served by Goods Tech on Geminis on 23<sup>rd</sup> December 2021. On 1<sup>st</sup> March 2022 I dismissed Geminis' application to set aside the statutory demand. I gave an *ex tempore* judgment on that date, which I have turned into written form in a judgment handed down at the same time as this judgment. An application for leave to appeal my refusal to set aside the statutory demand is due to be considered on 31<sup>st</sup> May 2022.

- [4] Ms. Welsh who appeared for Goods Tech and G-Force submitted that that judgment gave rise to an issue estoppel. This raises important issues as to the extent to which a refusal to set aside a statutory demand gives rise to an absolute (as opposed to a discretionary) bar on relitigation of the issues subsequently, for example when an application for the appointment of a liquidator is made. However, I do not need to determine this on this application: Mr. McCarroll SC, who appeared for Geminis, accepted that, unless and until the order made following my judgment of 1<sup>st</sup> March was set aside on appeal, the claimants

had a good claim for summary judgment in respect of all nine notes, not just the six notes in respect of which the statutory demand was served. (Geminis had obtained an expert opinion on New York law, but Mr. McCarroll did not seek to rely on it before me on the current cross-applications. Instead, he was going to seek the permission of the Court of Appeal to rely on it in the appeal against my refusal to set aside the statutory demand.)

- [5] Mr. McCarroll also accepted (but wished to keep the point open in the event of an appeal) that, if a default judgment was entered against Geminis, then the defendant would not be able to apply to set aside the default judgment under CPR 13.3(1). This is because Geminis could not satisfy the second cumulative condition for setting aside a default judgment in CPR 13.3(1)(b) (no good reason for failing to file a defence). He did not argue that CPR 13.3(2) (exceptional circumstances) applied. Thus, if the claimants are entitled to judgment by default, Geminis will not be able to have it set aside.

### **The order of applications**

- [6] The first question is therefore whether I am obliged to deal with the application for judgment by default, before I deal with Geminis' application for an extension of time, or whether I have some discretion which I should exercise in favour of determining Geminis' application first. There is certainly an argument that once the claimants filed their application for judgment by default they should not be penalised by the Court's delay in granting the relief sought. *Actus curiae neminem gravabit: Re Keystone Knitting Mills' Trademark*.<sup>1</sup> The fact that the Court did not enter judgment in the four hours before the cross-application was made should not, on this argument, rob the claimants of their right to judgment by default. On the other hand, the Court will generally disregard parts of a day, so it may be that the two cross-applications should be treated (as a matter of law) as being made at the same time: see most recently **Matthew v Sedman**.<sup>2</sup>

- [7] In my judgment, however, I should be guided by the recent Court of Appeal decision in **Digital Security Services Ltd and another v Nevis International Bank & Trust Ltd**.<sup>3</sup> In

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<sup>1</sup> [1929] 1 Ch 92 ("the Court's action should not harm anyone", often translated as "the Court's delay should not harm anyone"). See also *Islington London Borough Council v Harridge* [1993] *The Times* 30<sup>th</sup> June.

<sup>2</sup> [2021] UKSC 19, [2022] AC 299 at paras [25]ff.

<sup>3</sup> [2022] ECSCJ No 107 (7<sup>th</sup> April 2022).

that case, the time for service of a defence expired on 26<sup>th</sup> June 2020. On 29<sup>th</sup> June 2020 the claimant bank applied for judgment by default. On 30<sup>th</sup> June 2020 the defendants filed their defence and counterclaim. The Court entered judgment on 6<sup>th</sup> July 2020. On 13<sup>th</sup> July 2020 the defendants applied to set aside the default judgment and subsequently amended their application to seek an extension of time for service of the defence. The Court of Appeal held at [32]:

“[Counsel for the appellant defendants said] that the Judge should have dealt with the application for extension of time before the application to set aside the default judgment. This submission and the ground of appeal are rejected for two reasons. First, the application to set aside the default judgment was filed before the extension application and the court’s usual practice is to deal with applications in the order in which they are filed. Second, and more important, the court cannot deal with an extension of time to file a defence in the face of a regularly entered default judgment. As long as the default judgment remains on record the court does not have jurisdiction to extend the time for filing a defence. The hearing and disposal of an application to extend time to file a defence can only be in respect of a claim where the filing of a defence is still a live issue. Where a judgment in default of defence has been entered (as in this case) the option of filing of a defence is closed and the court must deal with the default judgment first. It is only if the judgment is set aside that the court can go on to consider whether a defendant should be given an extension of time to file a defence.”

[8] The Court of Appeal imply that in general the Court at first instance has a discretion as to the order in which it considers applications (albeit that the starting point was the order in which the applications had been filed). It was only the circumstance that judgment by default had actually been entered which precluded the Court from exercising that discretion. Accordingly, I hold that I do have a discretion as to whether to hear the claimants’ application or the defendant’s application first.

[9] I shall thus consider whether I should exercise a discretion in favour of determining Geminis’ application for an extension of time before deciding whether to grant judgment by default. Here the most important factor, in my judgment, is that the claimants would be entitled to summary judgment if Geminis was permitted an extension of time in which to serve its defence. There is thus no purpose granting an extension of time. It would be contrary to the overriding objective to permit litigation to continue, if the only result would

be for additional costs to be incurred on an application for summary judgment, which (unless the Court of Appeal allow the appeal against my refusal to set aside the statutory demand) would inevitably succeed.

[10] This does not, however, resolve the ultimate question. Should I consider the application for an extension of time first, and refuse it as a discretionary matter? Or should I consider the application for judgment by default first and grant it, leaving the application for an extension to be dismissed as a matter of right? Here, it seems to me in accordance with **Digital Securities** that the “usual practice” would be to consider the application for default judgment first, as the first in time. If Geminis had reasonable prospects of success on its defence, then that might afford a reason for not following the usual practice. However, since Geminis does not in my judgment have reasonable prospects, I find that there is no sufficient ground for considering its application for an extension first.

[11] Accordingly, I shall grant judgment by default and then dismiss the cross-application as a matter of right following the grant of judgment by default.

#### **Notes 4, 5 and 9**

[12] I turn then to the only issue not addressed in my judgment on the application to set aside the statutory demand. This relates to Notes 4,5 and 9. Strictly speaking it is not necessary for me to determine this issue, because the amount due in respect of these notes is adequately pleaded in paragraph 51 of the statement of claim. I merely have to certify the amount pleaded: CPR 25.8(2) and 25.10(1)(a). However, since the matter may go further, I should explain why, just as in relation to the other six notes, Geminis has no reasonable prospect of defending the claim in respect of these three notes.

[13] The statement of claim pleads the issues in relation to these notes in a discursive fashion. Evidence has been adduced in support, which bears out to the summary judgment standard what is asserted. What is pleaded is as follows:

“14. The 4<sup>th</sup> and 5<sup>th</sup> Notes issued to the 1<sup>st</sup> Claimant and the 9<sup>th</sup> Note issued to the 2<sup>nd</sup> Claimant differ from the other Notes identified... above in that the subscription amount is written in manuscript notes rather than typed as follows:

- (a) On the 4<sup>th</sup> Note issued to the 1<sup>st</sup> Claimant, the subscription amount is handwritten on the note in the amount of “158 UNITS OF EVENSTAR FUND (CLASS D @Feb 2020 NAV 5085.86 USD 803,565.88-”.
- (b) On the 5<sup>th</sup> Note issued to the 1<sup>st</sup> Claimant, the subscription amount is handwritten on the note in the amount of “364.865 UNITS OF EVENSTAR FUND (CLASS D @Mar 2020 NAV 5064.54 USD 1,847,873.38-”.
- (c) On the 9<sup>th</sup> Note issued to the 2<sup>nd</sup> Claimant, the subscription amount is handwritten on the note in the amount of “595 UNITS OF EVENSTAR FUND (CLASS D) @Mar 2020 NAV 5064.54 USD 3,013,401.3.- ”.
- (Together the ‘Manuscript Notations’).

15. As further set out below, the Defendant has wrongly denied that the Manuscript Notations on the 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> Notes were made by it or otherwise. This is disputed.

16. The Manuscript Notations refer to the fact that the Claimants agreed to enter into the [4<sup>th</sup>]<sup>4</sup>, 5<sup>th</sup> and 9<sup>th</sup> Notes as a replacement for and in lieu of subscriptions made by the Claimants in the Evenstar Funds SPC (the ‘Evenstar Fund’), which were failing. The following background is therefore relevant to the issue of these Notes, and explains the Manuscript Notations found on them.

17. In or around 2008, Chang and Yu introduced Lu and Chuang to the Evenstar Fund. Chang and Yu claimed that the Evenstar Fund was a hedge fund co-founded by Yang Ting-yeh James, Lien Sheng-Wen (son of the honorary chairman of Kuomintang (a major political party in Taiwan)) and other partners. They also claimed that the Evenstar Fund was growing steadily on an annual basis.

18. On the basis of representations made by Chang and Yu regarding the future growth of the Evenstar Fund, since 2008 the 1<sup>st</sup> Claimant subscribed to units in the Evenstar Fund (the ‘Evenstar Units’) and in 2016 the 2<sup>nd</sup> Claimant also subscribed. The payments for these subscriptions were made by the Claimants to Anue Securities Limited Client Trust A/C, which is also a predecessor of Anuenue.

19. On or around December 2018, the Claimants became aware from the Investment Account Statement issued by Anuenue that Evenstar Fund’s growth had ground to a halt and its value had started to decline, contrary to the representations previously made by Chang and Yu. Troubled by this development, Lu, on behalf of the Claimants, contacted Yu to express the Claimants’ intention to redeem the Evenstar Units subscribed through the Investment Accounts.

20. In or around June 2019, Lu, on behalf of the 1<sup>st</sup> Claimant, made a formal request to Yu to redeem the 158 Evenstar Units (Class D) Units subscribed under the 1<sup>st</sup> Claimant’s Investment Account. After receipt of the 1<sup>st</sup> Claimant’s formal request, Yu pleaded with Lu to consider postponing the redemption until

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<sup>4</sup> An obvious typographical error.

December 2019, to which Lu agreed, based on the trust he had built with Yu over the years.

21. In or around April 2020, Yu relayed to Lu a proposal made by Yang that the 1<sup>st</sup> Claimant could convert its 158 Evenstar Units (Class D) into a short-term note issued by the Defendant for the same value. Yu claimed that said short-term note would be issued on 31 March 2020 with a maturity date of 31 March 2021 and an interest of 6.5% per annum. Yu also claimed that the Defendant would immediately redeem the principal amount upon maturity (the '1<sup>st</sup> Proposal').

22. In or around April 2020, Lu agreed to the 1<sup>st</sup> Proposal on behalf of the 1<sup>st</sup> Claimant, and at around the same time, he, on behalf of the Claimants, made a formal request to Yu for the redemption of the 364.856 Evenstar Fund Units (Class D) subscribed by the 1<sup>st</sup> Claimant and the 595 Evenstar Units (Class D) subscribed to by the 2<sup>nd</sup> Claimant through their respective Investment Accounts.

23. Upon receipt of the Claimants' new request for redemption, Yu proposed that the 364.856 Evenstar Units (Class D) subscribed by the 1<sup>st</sup> Claimant and the 595 Evenstar Units (Class D) subscribed by the 2<sup>nd</sup> Claimant be converted into two other short-term notes issued by the Defendant for the same value. Yu further proposed that the short-term notes would be issued on 30 April 2020 with a maturity date of 30 April 2021 and an interest of 5.8% per annum (the '2<sup>nd</sup> Proposal').

24. After some consideration, the Claimants agreed to the 2<sup>nd</sup> Proposal. Yu, after receipt of the Claimants' acceptance, instructed his colleagues at Anuenue's Hong Kong office to prepare the relevant contractual documents for the notes.

25. On 22 April 2020, Yu delivered the three short-term notes to Lu for the Claimants' signatures. The subscription amount on the three short-term notes was left blank at that time.

26. On 23 April 2020, the Claimants signed the 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> Notes.

27. On 24 April 2020, Yu collected from the Claimants (at their office) the 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> Notes signed on behalf of the Claimants. On or around 11/12 May 2020 Yu informed the Claimants that those Notes had been delivered to Anuenue's Hong Kong office for further processing and for the Defendant's signatures.

28. On 11 and 12 May 2020, Anuenue debited the relevant Evenstar Units equivalent to the value of the subscription amounts of the 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> Notes from the Claimants' respective Investment Accounts.

29. On 12 June 2020, Yu informed Lu that he had received the 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> Notes signed by the Defendant.

30. On 15 June 2020, Yu delivered the 4<sup>th</sup>, 5<sup>th</sup>, 9<sup>th</sup> Notes to the Claimants at the Claimants' Office. The relevant Manuscript Notations had been inserted into and the Defendant's common seal affixed on to each of the 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> Notes. That the Manuscript Notations were inserted and the Notes signed by the Defendant after they were collected from the Claimants is entirely consistent with the scheme under the Notes which provides that there is a closing of the Notes, whereby the Claimants, as Noteholders, are obliged to deliver the Subscription [*sic*] Amount to the Defendant's designated account, and upon receipt of the Subscription Amount, the Defendant was obliged to deliver to the Claimants the 'executed definitive Notes, registered in the Noteholder's name': see Section E — Subscription of the Notes — Principal Terms.

31. In the premises, the Manuscript Notations form part of the terms of the 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> Notes:

(a) They were included on the executed definitive Notes delivered to the Claimants on 15 June 2020, and it is averred [*sic*] that they were written, or could only have been written, by or on behalf of the Defendant.

(b) Alternatively, the Manuscript Notations were agreed orally together with 4<sup>th</sup>, 5<sup>th</sup> and 9<sup>th</sup> Notes, as reflected in the fact that the Evenstar Units were debited from the Claimants' Investment Accounts in the same amount."

[14] In my judgment this adequately pleads that the amounts notionally paid in respect of notes 4, 5 and 9 were \$803,565.88, \$1,847,873.38 and \$3,013,401.30 respectively. The evidence and draft defence filed on Geminis' behalf assert that the notional value of the Evenstar units was variable. This defence in my judgment has no reasonable prospect of success. Firstly, it is apparent from the statements of account to which Ms. Welsh took me that the notional sums were the value of the units when the investments in the notes were made. The whole purpose of the conversion was to exit from the Evenstar investment. Secondly, it makes no sense to have interest calculated on units, the redemption of which is suspended, with the consequence that the value cannot be accurately assessed. Thirdly (but of less weight) the payments of interest when they were made before the notes fell due were calculated on the notional sums, not on any variable valuation of the units.

[15] Accordingly, had I not granted judgment by default, Goods Tech would be entitled to the judgment sought in respect of Notes 4 and 5 and G-Force in relation to Note 9. Geminis' defence has no reasonable prospect of success.

**Adrian Jack**  
Commercial Court Judge [Ag.]

**By the Court**

**Registrar**