

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2022/0010

BETWEEN:-

GEMINIS INVESTORS LIMITED

Applicant

-v-

GOODS TECHNOLOGY STARTING INTERNATIONAL LIMITED

Respondent

Appearances:

Mr. Romane Duncan and Ms. Urmi Ahmed of Harneys for the Applicant
Ms. Angeline Welsh, with her Mr. Niki Olympitis and Ms. Sara-Jane Knock of Withers BVI for the Respondent

2022 March 1 (oral judgment)
May 30 (written judgment)

JUDGMENT

[1] **JACK, J [Ag.]** This is an application to set aside a statutory demand which was served on 23rd December of last year for a sum of just over \$5.6 million owed in respect of six Notes issued by the applicant to the respondent.

[2] The issues which are raised are these. Mr. Duncan for the applicant says that the applicant has offered to redeem the Notes with shares in an investment fund called Evenstar. There is a problem with that. The Evenstar shares, even on the applicant's account, are only worth \$4.9 million, which leaves a shortfall of some \$700,000. Mr. Duncan says that they have only recently realised that there was this discrepancy. That I find surprising.

[3] In my judgment, at the moment the applicant does not propose that the statutory demand should be set aside on payment of that missing \$700,000. That is sufficient to refuse to set aside the statutory demand. There is a shortfall which exceeds the \$2,000 limit for making a company insolvent.

[4] The main issue as to the Evenstar shares is this. The Notes are all in the same terms and they have first of all a term as to set off. This says:

"Notwithstanding anything contained in the Transaction Document or in any other agreement between the Noteholder and any Relevant Party, the Noteholder agrees that any Relevant Party may, without notice, (for itself as an agent on behalf of any Relevant Party) set off, withhold, apply and/or transfer (as the case may be) any securities, receivables, monies or other properties held in or for the account of the Noteholder or any of its affiliates (including, without limitation, securities, securities margin, futures and options and/or any other account, if applicable) with Relevant Party in or towards satisfaction of any obligation or Liability of whatsoever nature by the Issuer or any of its affiliates to the Issuer, the Calculation Agent or any Relevant Party that is not discharged in full.

For the purpose of exercising the right of set off, the Relevant Party may sell or dispose of any of the securities, receivables and/or other properties from time to time held in or for the accounts of the Noteholder or any of its affiliates. The Relevant Party shall be under no duty to the Noteholder or its affiliates as to the price obtained in respect of any such sale or disposal."

[5] Pausing there, there are no affiliates so that that reference can be ignored. It is also right to say that the Evenstar Shares have not been allocated to the Noteholders' account and in any event, in my judgment, once the Notes have matured, it is too late for the Issuer to allocate security to an account of a Noteholder.

[6] As a result, what Mr. Duncan argued was that the provision as to Asset Settlement applies. This says (substituting the current status of the parties):¹

¹ The provision cited is preceded by these terms: "Each of the following will constitute an event of default (each, an 'Event of Default') with respect to the Notes: Non-payment: failure to pay principal of or any interest on the Notes when due, continued for thirty (30) Business Days; or Other Obligations: Failure to perform any other material obligations of the Issue under the Transaction Document, continued for sixty (60) Business Days after written notice has been given

“Pursuant to a Default Notice filed by the respondent to the applicant, in lieu of cash, the applicant shall (at its absolute and sole discretion) have the right to transfer any Investment products or other assets it designates (the ‘Assets’), from time to time, to the respondent as full or partial payment (as the case may be) of such amounts owed (each an ‘Asset Settlement’). The value of each Asset Settlement shall be determined at its Market Value at such time by the applicant (each a ‘Valuation’).”

[7] Mr. Duncan says that it really was not open to Goods Technology to fail to serve a Default Notice. The provisions of the Note, he says, are clear that if the Issuer does not pay, then the Noteholder has to serve a Notice of Default. I disagree. The definition of Event of Default is designed to apply to non-payments of ongoing principal and interest. In other words, until the Note matures, the Noteholder has a choice if there is a non-payment of an installment of principal and interest. Either the Noteholder can sue for the outstanding principal and interest. That would be a claim which could be brought immediately after the non-payment of principal or interest. Or the Noteholder can accelerate the payment of the monies due under the Note. In order to do that, then the Noteholder has to wait 30 days of default and can then serve a Notice of Default.

[8] In this case, no complaint was made under the Notice of Default provision while the Notes were current. Once the Notes matured, in my judgment, that is the end of it. The Issuer is obliged to pay the Note and if the Issuer fails to do so, then there is a money debt owed to the Noteholder. I have of course regard to the fact that when one is deciding whether to set aside a statutory demand, one always has to apply the well-known test which is set out in **Sparkasse Bregenz**,² where Sir Dennis Byron CJ said that the terms of the **Insolvency Act 2003**³ which apply 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

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

² Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp [2003] ECSCJ No 47.

³ No 5 of 2003, Laws of the Virgin Islands.

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 proceeding.”

[9] In my judgment, there is nothing put forward by the applicant which passes that test — quite apart from the \$700,000 which is due in any event. In my judgment, the terms of the provision as to events of default is sufficiently clear that the applicant has no realistic chance of showing that the provision applies which would allow it to pass the Evenstar Shares to Goods Technology.

[10] In those circumstances, I refuse the application to set aside the statutory demand.

[There was then argument about costs which included the following exchange relevant to the substantive judgment. It follows discussion about the claim BVIHC (COM) 2022/0010 in respect of which a written judgment is being handed down at the same time as this judgment:]

THE COURT: The only matter before me today is the question of the costs of the application to set aside the statutory demand. And on that you’ve lost, haven’t you, Mr. Duncan?

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

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

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar