

**EASTERN CARIBBEAN SUPREME COURT
IN THE HIGH COURT OF JUSTICE
BRITISH VIRGIN ISLANDS
(COMMERCIAL DIVISION)**

CLAIM No: BVIHC (COM) 2022/0019

BETWEEN:

MORDEN FINANCE LTD

Applicant

and

BENONO HOLDINGS LTD

Respondent

Appearances:

Ms. Olga Osadchaya and Mr. Richard Parchment of Harneys for the Applicant
Mr. Andrew Emery of Emery Cooke for the Respondent

2022 March 15 (Argument; Oral Judgment)
March 28 (Written Judgment)

JUDGMENT

[1] **JACK, J [Ag]:** This is an application dated 28th January 2022 to set aside a statutory demand served by Benono Holdings Ltd on Morden Finance Ltd. The statutory demand is dated 14th January 2022 for the sum of \$13,281,972.60. Ms. Osadchaya who appears for Morden makes two points. The first is a formal point; the second a substantive point.

[2] So far as the formal point is concerned, this concerns what has to be put in a statutory demand. Section 155 of the **Insolvency Act 2003**,¹ so far as relevant, reads as follows:

¹ No 5 of 2003, Laws of the Virgin Islands.

“(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;
- (b) be in writing and shall specify the nature of the debt and its amount;
- (c) be dated and shall be signed by the creditor or by a person authorized to make demand on the creditor’s behalf;
- (d) require the person to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the demand on him;
- (e) state that if the demand is not complied with, application may be made to the Court for the appointment of a liquidator or a trustee, as the case may be;
- (f) set out the rights of the person to make application to set the demand aside under section 156; and
- (g) comply with and be served in accordance with the Rules.”

[3] Ms. Osadchaya relies particularly on section 155(2)(b), the requirement to specify the nature of the debt and its amount. I do not need to read the rest of section 155. Section 156 gives the right to apply to set aside a statutory demand. It is that right which Morden are exercising. Section 157 provides as follows:

“(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) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum; or
- (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.

(2) The Court may set aside a statutory demand if it is satisfied that substantial injustice would otherwise be caused

- (a) because of a defect in the demand, including a failure to comply with section 155(3); or
- (b) for some other reason.”

[3] I do not need to read the rest of that section. As to the formal matter raised by Ms. Osadchaya, the question of amount is, in my judgment, not relevant under section 155 so long as the nature of the debt is identified — as it is in this demand —, and that the amount claimed is specified. There is no need to explain how the amount is calculated under section 155. That may be relevant to the discretionary ground under section 157(2) if the creditor is caused prejudice by the way in which the amount is set out in the statutory demand. However, in my judgment, there has been no evidence of prejudice caused by the absence of any calculation on the facts of this case. The case put forward by Morden is that it owes nothing, not that it owes a different figure to that claimed.

[4] I therefore reject the formal objection made by Morden to the statutory demand.

[5] I turn then to the substantive question of whether the statutory demand should be set aside. The test which needs to be applied here is that set out by Byron CJ in the well-known case of **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp.**² There he said:

“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 genuine question to be decided.”

[6] I turn then to the chronology. On 12th September 2012, Credit Prive lent \$22,653,566 to Galantor. Among the terms of the loan were terms that the money had to be repaid, but there is no requirement for there to be a formal notice of default to be served in respect of that Loan Agreement.

[7] On 4th January 2013, Morden was incorporated; then on 9th April 2013, Morden acquired 50 percent of the share capital of Galantor under a Share Purchase Agreement with Narwell.

² [2003] ECSCJ No 47.

That is described as the Narwell Assignment Agreement. By the terms of a Novation Agreement of the same date, Morden agreed that it owed Credit Prive \$11 million and that Narwell would owe Credit Prive only \$13,302,820.

[8] On 1st May 2013, Morden assigned its creditor rights of \$11 million to Credit Prive in exchange for Credit Prive settling Morden's obligations to it. It said that that day Morden assigned \$11 million owed by Honberg Enterprises to it to Credit Prive and that that is the way in which the settlement with Credit Prive was arranged. This is the main substantive issue in this case.

[9] On 7th November 2013, a Share Pledge Agreement was made between Morden and Credit Prive for the sum of \$22,653,566. That document was executed as a deed. Among the recitals to the deed was recital (B):

"The Pledgee, pursuant to a Loan Agreement dated 12th September 2012 (as amended and restated from time to time) (the 'Loan Agreement'), concluded between the Pledgee as lender and the Company as borrower, has agreed to provide a US\$22,653,566 facility to the Company, such facility to be secured, among others, by a pledge and charge over the Shares (as are hereinafter defined)."

[10] On 10th January 2019, Morden's nominal directors and the law firm acting for it changed. The new nominee director was Abacus. On 11th June 2019, various notices of assignment were delivered to Abacus. This showed how the sum of US\$14.6 million approximately was owed to the predecessor of Benono. Then on 26th August 2019, Morden wrote to various of the assignees who are named. I will cite from one of those letters to Dana Overseas. What Morden said in that letter is this:

"Dear Sirs:

Share Pledge Agreement dated 7th November 2013 between Morden Finance Ltd and Credit Prive Private Strategy Investment Fund Ltd, (the 'Share Pledge Agreement'); and Assignment and Setoff Agreement dated 3rd January 2019 between Dana Overseas Ltd (the Assignor) and Mydinami Finance Limited (the Assignee), a company duly incorporated and validly existing under the laws of Cyprus under registration number 154128 (hereinafter the 'Deed of Assignment').

In our capacity as the Pledgors under the Share Pledge Agreement, we would like to make reference to the Share Pledge Agreement, the Deed of Assignment and the notice of assignment and Setoff Agreement dated the 3rd January 2019 sent by the Assignor to us which was received on 11th June 2019.

[11] It then refers to various assignments which related to the rights under the Share Pledge Agreement and asks that various information be provided and other matters. It is fair to say that there was no reply to these, but the importance of the letter is that it clearly accepts that there is an obligation under the Share Pledge Agreement. It is said by Mr. Yusov that it was only in late 2019 that the ultimate beneficial owners of Morden became aware of the Share Pledge. I will come on to Mr. Yusov's evidence in a moment, but he does not name the UBOs and does not explain how it is only in late 2019 that that information became available to them.

[12] The last key date is 5th November 2021. That was when Cypriot litigation was begun between effectively the same parties under a double derivative action. It is said that the current claim is a means of pursuing that litigation by other means. I do not accept that. It seems to me that the current case has to be determined on its own merits regardless of any litigation which might be taking place in Cyprus.

[13] The evidence, as I have said, on Morden's behalf is given by Mr. Dmitry Yusov. He explains in his first affidavit:

"I am a lawyer qualified to practice in Russia. Since 2013 I have been providing private legal consulting services. Since 18th March 2021, I have been an authorised representative of the Applicant, Morden Finance Ltd, and I am authorised to make this affidavit on its behalf...

Save as otherwise indicated, my knowledge of the facts and matters disposed to in this Affidavit are derived from my review of Morden's documents and I believe them to be true. Where facts and matters are not within my own knowledge, the source of my information is stated and the facts and matters are true to the best of my information and belief."

[14] So pausing there, it appears that he has no personal knowledge of the matters pre-dating 18th March 2021. Later he says:

“14. In 2013, Morden was used to effect a series of transactions for the purposes of acquiring shares in companies involved in international development and construction projects.

15. To this end and as far as it is relevant to the Demand:

(a) On 9 April 2013:

(i) Morden acquired 50% in the share capital of Galantor under a Sale Purchase Agreement of the same date from a BVI company, Narwell Holdings Limited (Narwell) for US\$11m (Galantor SPA). As mentioned above, Galantor was the borrower of the sum of US\$22,653,566 from CP [i.e. Credit Prive], but CP had since assigned its rights under the Loan Agreement to Narwell under an Assignment Agreement dated 21 December 2012 (Narwell Assignment Agreement). As such, Narwell became Galantor's creditor under the Loan Agreement in the amount of US\$24,302,820 as at that date (the sum comprising principal and accrued interest). Further, on the same day, i.e. 21 December 2012, Narwell effected a debt for equity swap under a Financial Contribution Agreement with Galantor, thereby converting Galantor's debt into shares in Galantor. Therefore, as at 21 December 2012, Galantor had no debt obligations under the Loan Agreement either to CP or to Narwell.

(ii) Under the Narwell Assignment Agreement, Narwell owed CP the consideration of US\$24,302,820. As Morden had just acquired 50% of the shares in Galantor, it was agreed that Morden and Narwell would each become indebted to CP for approximately half of that total sum. In particular, under the Novation Agreement dated 9 April 2013

- i) Morden became indebted to CP in the amount of US\$11m,
- ii) Narwell's indebtedness to CP was reduced to US\$13,302,820, and
- iii) Narwell's obligations to Morden were considered fulfilled by way of a set-off against Morden's obligations to Narwell under the Galantor SPA (the Novation Agreement).

(b) On 31 May 2013:

(i) Morden assigned its creditor rights against a BVI entity Honberg Enterprises Ltd in the amount of US\$11m (the Morden Assignment Agreement) to CP under a Deed of Assignment (CP Assignment Agreement), which specifically states at paragraphs 3.1 to 3.4 that:

- CP acquires Morden's rights under the Morden Assignment Agreement in exchange for settling Morden's obligations to CP under the Novation Agreement; and
- Morden and CP have agreed to set off their mutual obligations under the CP Assignment Agreement and the Novation Agreement and 'consider them to be fulfilled'.

16. Therefore, since 31 May 2013, Morden is no longer indebted to CP under the Novation Agreement. In its Demand, the Respondent does not dispute the transactions that took place on 9 April 2013, but fails to take into account the settlement of both i) the Loan Agreement on 21 December 2012, and ii) CP and Morden's obligations to each other on 31 May 2013."

[15] That is answered by Mr. Kosolapov. He says that he is a consultant to Benono and has charge of the matter. He says:

"The contents of this affidavit are made from my own knowledge and are true, save that where this affidavit contains matters of information or belief, I indicate where that is so and I believe those matters to be true."

[16] He notes that

"18. ...at para 10 of Mr. Yusov's affidavit he confirms and acknowledges that Morden, even on his version of events, acknowledges that Morden did owe obligations under the Loan Agreement. He, however, wrongly goes on to assert that those obligations were discharged on 21 December 2021 as regards Benono. They were not, as will be explained below.

19. At para 15 of his affidavit, Mr. Yusov attempts to go through the factual background to this matter. He claims that pursuant to a purported debt equity swap, the debt, now being claimed by Benono, was extinguished as he asserts that this renders all subsequent novations and assignments invalid.

20. He relies on a document entitled 'Financial Contribution Agreement' dated 21 December 2012 to support his assertion on the basis that the original party to the Loan Agreement, Galantor, issued additional shares to Narwell which canceled Galantor's debt which Narwell had acquired via assignment by Credit Prive by an

Assignment Agreement of the same date. However, a search in the public records in the electronic files of Galantor maintained by the Cyprus Register of Companies shows that there was no share increase by Galantor, only a share transfer dated 9 April 2013 of 50 percent of the shares of Galantor from Narwell to Morden. The transaction asserted in paragraph 15(a) of Mr. Yusov's affidavit was never actualized. There was, therefore, no consideration provided and no debt was extinguished.

21. For the avoidance of doubt, the document produced in Mr. Dmitry Yusov's Affidavit entitled Financial Contribution Agreement dated 21 December 2012 under which it is claimed that Galantor issued shares to Narwell, canceling Galantor's debt which Narwell had acquired from Credit Prive by an Assignment Agreement of the same date, 21 December 2012 cannot be valid as based on a search in the electronic files of the Registrar of Companies, there was no share increase by Galantor, only a share transfer dated 9 April 2013 of 50 percent of the shares of Galantor from Narwell to Morden, which agrees with the Share Purchase Agreement dated 9 April 2013. It follows that the debt now claimed was not extinguished and the Applicant's argument to that effect fails. There was no debt for equity swap as no consideration was provided under the Financial Contribution Agreement by either party.

23. Mr. Yusov continues at para 15(b) by referring to a purported Deed of Assignment dated 31 May 2013. This document is not known to Benono and I understand that no previous creditor of Morden is aware of it either. It is not true, therefore, that Benono 'failed to take into account the settlement of both (i) the Loan Agreement on 21 December 2021 and (ii) CP and Morden's obligations to each other on the 31 May 2013'.

24. According to Mr. Yusov's affidavit, Morden assigned its purported creditor rights against a BVI entity named Honberg Enterprises Ltd in the amount of US\$11 million to Credit Prive under the above Deed of Assignment dated 31 May 2013.

25. There is no evidence that the claim against Honberg ever belonged to Morden.

26. There is no reference in Credit Prive's financial records of ever having been notified of the alleged Honberg assignment. According to Credit Prive's financial records, the above debt of Morden remains outstanding. Indeed, pursuant to documents Benono has been able to obtain, the claim against Honberg was to be received by Morden from Legerio Enterprises Ltd under a Financial Contribution Deed dated 31 May 2013 whereby Morden would also receive from Legerio the shares of Neimar Ltd, this was not actualized as Morden was never a shareholder of Neimar, and no consideration was given either for the purchase of those shares or for the assignment of the claim.

27. It follows that the documents were never effected as shares of Neimar were never transferred to Morden, no consideration was ever paid by Morden for the purchase of those shares and therefore, no consideration was ever given to Morden,

in the form of the assignment of Legerio's claim against Honberg. I refer to a letter of Mr. Angelos Kapsis, the former liquidator of Credit Prive who confirms that as far as he is aware nothing was received from Honberg, certainly not US\$11 million.

28. Further the corporate records of Neimar prove that Morden was never a shareholder.

29. It follows that Mr. Yusov is incorrect when he asserts in his affidavit that Morden settled its obligations to Credit Prive, as the Honberg claim was never assigned to Morden. In addition, it is clear that Morden has, on multiple occasions post 31 May 2013, been informed of the debt owed by it under the various assignments and yet not once was it raised in correspondence that the debt had been extinguished in any way."

[17] The letter from Mr. Kapsis is at page 267 of the electronic bundle. It is dated 25th February 2022 and says:

"In response to your letter dated 2 February 2022, I hereby inform you that Credit Prive Private Strategy Investment Fund Ltd was liquidated on 22 November 2018 and I was the liquidator of this company. I would like to pay your attention that I was appointed as a liquidator of Credit Prive Fund in 2018 when this fund ceased all its business activities, and I did not examine or analyze the business and commercial activities of this company in 2012 to 2014 years.

I have checked Credit Prive Fund records and I can state only the following:

I have found and enclosed a copy of the Assignment Agreement dated 31 May 2013 with Morden Finance Limited signed by the parties. I do not have the original. In addition, together with a copy of this assignment I enclose other documents which may be related somehow to this Assignment:

Financial contribution dated 31 May 2013 concluded between the companies Legerio Enterprises Limited and Neimar Ltd;

Financial contribution dated 31 May 2013 concluded between companies Neimar Ltd and Morden Finance Limited;

Share sale and purchase agreement of Neimar Ltd shares dated 31 of May 2013.

All the documents are dated the same day.

Please note that in the management accounts and accounting records of Credit Prive Fund I have in my files, there is no record of receivable from Honberg Enterprises Ltd in the amount of US\$11million under the Loan Agreement dated 5 September 2013. Please also note that in the management accounts and accounting records of Credit Prive Fund I have in my file the receivable from Morden Finance Ltd in the amount of US\$11 million (plus accrued interest) is reflected as the asset of Credit

Prive Private Strategy Investment Fund Ltd in 2013 and it is further replaced by receivable from Anerson Holdings Limited in 2014.”

- [18] The Share Pledge Agreement, as I have indicated, is executed as a deed. The law relating to estoppel by deed is conveniently set out in **Chitty on Contracts**,³ which says quoting from a case: “A party who executes a deed is estopped in a Court of Law from saying that the facts stated in the deed are not truly stated.” The learned editors go on to say:

“The principle has been extended to statements in recitals in a deed. It is a question of the construction of the deed as a whole as to which parties are estopped by a recital. When a recital is intended to be a statement which all the parties to the deed have mutually agreed to admit as true, it is an estoppel upon all. But when it is intended to be the statement of one party only, the estoppel is confined to that party; and the intention is to be gathered by construing the instrument.

The scope of the doctrine is extremely limited in modern law. First, it only applies between the parties to the deed and those claiming through them. Secondly, it only applies when an action is brought to enforce rights arising out of the deed and not collateral to it. Thirdly, it only applies if the statement is clear and unambiguous. Fourthly, it does not prevent a party from relying on defences such as non est factum, fraud, illegality or incapacity. In such cases the facts may be pleaded in order to defeat the deed, even though they may contradict statements made on the face of the deed. And so, although a party to a deed may be estopped from denying facts which are stated in it, he is not estopped from saying that, on the facts so stated, the deed is void in law. Fifthly, where a deed is rectifiable (that is to say, ought to be rectified), the doctrine of estoppel by deed will not bind the parties to it.

However, it may be going too far to say that there is, given these restrictions, little point preserving a separate category of estoppel by deed on the basis that it appears to be covered by estoppel by representation or by convention.”

And **Chitty** then refers to a dictum of Lord Toulson.

- [19] Before dealing with other matters, I should say that Mr. Yusov says that the unidentified UBOs say that the nominee directors were not authorised to sign the Share Pledge Agreement. There is no explanation given for the circumstances in which it might have happened that the nominee directors would have signed the Share Pledge Agreement

³ 33rd Ed (2019) at para 1-108.

without any knowledge of the UBOs. But in any event, there is no allegation that the Pledgees knew of any want of authority on the part of the nominee directors. As directors, obviously the nominee directors have ostensible authority to enter the Share Pledge Agreement, so there is nothing in this point.

[20] I stand back then and ask whether Morden meet the **Sparkasse Bregenz** test. In my judgment, they do not. First of all, there is an estoppel by deed in the Share Pledge Agreement. Second, Morden acknowledged the obligations under the Share Pledge Agreement in its letters of 26th August 2019. No explanation has been given for how such mistake could arise. Third, Mr. Kapsis' account is inconsistent with Morden's case. For example, he denies there was a receivable from Honberg. Fourth, the evidence of Mr. Yusov, as I have said, is seriously defective in that he only refers to documents. Insofar as he identifies any evidence he has received from third parties, he does not actually identify who they are since he does not name who the former and current UBOs are.

[21] In my judgment, those four points are sufficient to dispose of the case but I should add this. That even if I were in some doubt about the case after consideration of these four points, there is simply no plausible narrative account given by Mr. Yusov as to what may have happened. As I have said, he has no personal knowledge of matter and he does not give any narrative account by the UBOs as to what has happened.

[22] I do not accept Ms. Osadchaya's submission that Morden has not had an adequate opportunity to put the full picture of the case in. There has been Cypriot litigation since November 2021 and there was ample opportunity to discover the background and then take instructions in the period from 14th January when the statutory demand was served. There has been no attempt in the second affidavit of Mr. Yusov to expand the account of what occurred, except that he does, as I have pointed out, correct the errors which he made in his first affidavit.

[23] Accordingly, I refuse to set aside the statutory demand.

Adrian Jack

Commercial Court Judge [Ag.]

By the Court

Registrar