

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHC (COM) 2015/0117

CLAIM NO. BVIHC (COM) 2019/0067

BETWEEN:

TALL TRADE

Claimant

and

WWW CAPITAL

Defendant

Appearances:

Mr. Iain Tucker and Ms. Rhona Brown of Walkers for the Claimant

Mr. Charles Samek QC, with him Marcia McFarlane of Harneys for the Defendant

2020: February 5 (Oral Delivery)
December 3 (Approved Written Version)

APPROVED ORAL JUDGMENT

- [1] **JACK, J [Ag.]:** This is the hearing of an application dated 27th December 2019 in which the claimant, which I shall call Capital, seeks to set aside the statutory demand dated 13th December 2019 served on it by the defendant, which I shall call Tall Trade.
- [2] The legal test for setting aside a statutory demand is well established. In **Sparkasse Bregenz Bank AG and in the Matter of Associated Capital**

Corporation,¹ at para [3] Byron CJ said as regards the test of setting aside the statutory demand:

“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 must ignore... If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court. The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions.”

[3] That was a case of a winding up petition, but it is well established that the same principle applies to an application to set aside a statutory demand.

[4] In **Jing Peng Group Limited v Peak Hotels and Resorts**² the Court of Appeal said:

“The judge was correct to observe that the winding up court should not be used to resolve disputes about debts or to decide issues of fact on a summary basis. But the court has a duty to carry out a preliminary investigation of the facts to determine whether the dispute that the company has raised about the debt is on genuine and substantial grounds. The analysis that the judge carried out was limited to referring to the appellant’s ‘considerable swerve’ regarding its status which he said did not ‘contribute to a feeling that the [respondent] has nothing to argue about’. He expressed doubts about the respondent’s chances of proving that the appellant had accepted an allotment of shares in the respondent, but decided that ‘serious doubts are not enough’. And finally, he suggested that any challenge, other than a ‘hopeless challenge’ by the respondent would be sufficient to establish a sufficient dispute for the purpose of removing the appellant’s status as a creditor. The question that the judge did not ask himself was whether the dispute raised by the respondent is one that is on genuine and substantial grounds. In my opinion, this is a higher standard than one that I would associate with

¹ Civil Appeal No 10 of 2002 (decided 18th June 2003, unreported) at para [3].

² BVIHCPMAP 2014/0005, (decided 8th December 2015) at para [29].

expressions used by the judge such as 'serious doubts are not enough' and 'hopeless challenge'. The judge did not assess the dispute by the tried and tested expression that the debt and appellant's status as a creditor are 'disputed on genuine and substantial grounds'. He did not apply the standard set by the former Chief Justice Sir Dennis Byron's judgment in the **Sparkasse Bregenz Bank** case."

- [5] The Court of Appeal accordingly allowed the appeal in that matter.
- [6] I reviewed all the relevant authorities in my recent judgment in **Pacific Fertility Institutes Holdings Co Ltd v Pacific Fertility Institutes (HK) Holding Co Ltd**.³
- [7] In addition to the ground in section 157(1), Mr. Tucker sought to rely on the head of serious injustice in section 157(2)(b) of the **Insolvency Act 2003**.⁴ He cited no authority to me on the provision. In my judgment it adds nothing to the case on the facts of this particular matter. If there is a dispute as to indebtedness which passes the **Sparkasse Bregenz** test, then Capital are entitled to have the statutory demand set aside as of right. If there is no substantial dispute, then they are not.
- [8] Section 157(2)(b) is very much a fall-back position which cannot be elevated into a general catch all for debtors who fail to establish a ground under section 157(1).
- [9] The current case concerns a dispute between shareholders. The underlying business is an internet gambling operation called Softswiss. The trading company for Softswiss is a Cypriot company called Direx Limited. The hundred percent shareholder in Direx Limited is a Curacao company called Direx NV. In turn Direx NV is held a hundred percent by Befree a Cypriot company.
- [10] Until the events to which I shall come, Befree was owned beneficially by Mr. Yaikau and Mr. Montik who were the founders of Softswiss. They held the shares

³ BVIHC(COM) 142 of 2019 (decided 22nd January 2020).

⁴ No 5 of 2003, Revised Laws of the Virgin Islands.

in Befree through two Cypriot single purpose vehicles, Primefuture Ltd. and Bitcapital Ltd respectively.

- [11] In 2017 Mr. Revaz Megrelishvili became aware that Mr. Yaikau and Mr. Montik were interested in cashing out their interests in Softswiss. Mr. Megrelishvili is the majority shareholder in Capital.

- [12] Negotiations ensued in January 2019. It was agreed that Mr. Yaikau and Mr. Montik would sell Capital a 60 percent stake in Befree, for €21,130,610. It was understood that Capital would need to find an outside investor in order to pay the 21 million odd.

- [13] Mr. Megrelishvili knew of the existence of Mr. Roland Iakovlevich Isaev and they in turn entered negotiations with each other. At the outcome of these negotiations in broad outline was that Mr. Isaev would, through Tall Trade, lend Capital €17 million in return for 33.4 percent stake in Capital shares. It was intended that there would be interest on the loan of 2 percent per annum. The €17 million would be repaid out of dividends received by Capital from Befree over two years.

- [14] Pursuant to that agreement they entered what is described as the Russian Agreement. This was an agreement between four natural persons, Mr. Isaev on the one hand (described as the investor in the agreement) and then Mr. Megrelishvili and two other men, Mr. Ofer and Mr. Avraham, who were business associates of Mr. Megrelishvili, who are described as the guarantors. That agreement is dated 23rd April 2019.

- [15] The agreement is governed by Russian law with a Russian jurisdiction clause. Although it is not entirely clear whether the clause is an exclusive or non-exclusive jurisdiction clause, nothing turns on that.

- [16] Clauses 2.1 and 2.2 define the obligation to make the €17 million loan in return for the 33.4 percent shareholding. Clauses 2.5 and 2.6 are important. 2.5 says:

“After closing the Transaction, Guarantors shall ensure that all profits earned by Befree Ltd according to its confirmed financial statements, are directed in full to the payment of dividends in favour of WW Capital, which in turn is obliged to redirect all received funds for the repayment of the loan to the Investor. Thus, until the Financing is fully repaid to the Investor, the Guarantors voluntarily waive any of their rights and/or claims for dividends from WW Capital. In this case, the Guarantors are obliged to ensure the adoption and execution of all resolutions and/or corporate documents of Befree Ltd. and WW Capital on the corporate level, which are required by law in the relevant jurisdiction in order to implement the repayment of the Financing to the Investor.”

[17] 2.6 provides:

“Repayment of the Financing to the Investor in accordance with clause 2.5 shall be on a quarterly basis, starting from the first Quarter after closing the Transaction and as follows:

In the full amount received by Befree Ltd. as a quarterly profit, but in any case not less than €2 million (two million) at the end of each Quarter, with the exception of the last Quarter, if the amount of the Financing balance due to be repaid to the Investor is less than €2 million. The full amount of Financing must be repaid to the Investor in any case no later than 24 months from the date of the Transaction.”

[18] Annexed to the Russian Agreement is the Loan Facility Agreement which is written in English. It is said to take effect from the 24th of May 2019, the Parties of Tall Trade on the one hand and Capital on the other. And recites that:

“Whereas the Lender does hereby agree that from 24th May 2019 a loan facility (‘the Loan’) shall be made available to the Borrower, on the following terms and conditions:

1. Principal amount of the loan.
Seventeen Million Euros (€17,000,000) with an option to draw additional one million and five hundred Thousand Euros (€1,500,000) if required by the investor.

2. Availability.

The Lender will make available the entire principal amount of the Loan or any portion thereof up to the specified limit of the principal amount of the

Loan as may be requested by the Borrower from time to time hereafter or until this offer of a loan facility is withdrawn.

3. Term.

The term of the Loan is 24 months commencing on the date of first drawdown.

4. Interest and Security.

The Loan is to bear simple interest at a rate of 2 percent per annum, payable quarterly in arrears. The loan interest commencing on the date of first drawdown being the 28th of May 2019..."

Pausing there, in fact the drawdown was on 7th June, 2019. The agreement then continues:

"The borrower hereby agrees to provide security in an agreed form for whatever period remains of the term of the Loan as may at the sole discretion of the Lender be requested from time to time. It is agreed between the parties that said security shall be partly fixed and partly commensurate with the Principal outstanding at the time of the demand and may be reduced as the amount of the Principal is repaid.

5. Repayment provision.

Notwithstanding the terms and provision of Clause 2ss of this Agreement, the Loan (together with all or any accrued interest) will automatically and immediately fall due for first repayment starting from the first quarter following the date of the transaction. Notwithstanding the amount of the total quarterly profit received by Befree Ltd. the minimum amount of quarterly repayment shall be no less than €2 million with the exception of the last quarter if amount of the outstanding loan will be less than €2 million. Therefore, total repayment of the loan facility is due not later than 24 months."

There is then a provision for execution and counterparts.

[20] The governing law is that of the British Virgin Islands, and the parties submit to the non-exclusive jurisdiction of the courts of the BVI. And that is signed by all the relevant parties.

[21] It is the Facility Agreement which creates the obligation under which the statutory demand was served.

- [22] The drawdown, as I have said, of €17 million took place on 7th June 2019. On that date there was a meeting between all six men involved, that is to say Mr. Isaev, Mr. Megrelishvili, Mr. Avraham, Mr. Yaikau and Mr. Montik.
- [23] It is worth noting that despite completion occurring, there were a number of outstanding matters such as the provision of security for the loan from Tall Trade to Capital, and the issue of Capital's shares to Tall Trade.
- [24] As regards the former, negotiations took place between lawyers but nothing was finalized. As regards the latter, Capital originally allocated 16,655 shares in Tall Trade instead of the 16,700 to which Tall Trade were entitled, but the share register only shows 16,500 shares allocated.
- [25] While these further matters were occurring, Mr. Isaev said that he wanted a direct share in Befree. However, because that would reduce Capital to a minority shareholder in Befree, Mr. Megrelishvili refused that offer.
- [26] What I have said so far is common ground. The picture, in my judgment, is one of still quite fluid situation. Whereas often completion of a transaction will mark the conclusion of negotiations — indeed that is the purpose of completion — that is not the case here.
- [27] Now it is true that the Russian Agreement has in Clause 9.2 a prohibition on oral variations of that contract, but the Facility Agreement does not. As a matter of law, therefore, there is no difficulty with Capital and Tall Trade varying the terms of the Facility Agreement orally.
- [28] It is common ground that at 7th June 2019 meeting Mr. Isaev's role was discussed. What Mr. Megrelishvili says is this:

"56. On 7th June 2019 (that being the same day that Capital WW drew down the €17 million pursuant to the Facility Agreement) the Befree Founders, Mr. Isaev (as representative of Tall Trade), my business partners and I (together the 'Attendees') attended a meeting at the Softswiss Group's offices in Minsk, Belarus (the 'June Meeting').

57. Although at the time of the June meeting, the purchase of the Befree shares by Capital WW and the issue of Capital WW shares to Tall Trade, had not been effected, the Attendees discussed various matters pertaining to the Company and the Softswiss Group.

58. At the June Meeting, Mr. Isaev asked the Attendees whether they objected to him being appointed as Capital WW's financial representative with respect to Capital WW's affairs and its investment into the Softswiss Group.

59. At that time, I did not foresee any issues with this proposal. In assuming such a position, Mr. Isaev would be responsible for supervising the financial position of Softswiss and would have a strong level of control over the timing upon which the Befree Dividends would be paid by Befree to Capital WW. In his position, Mr. Isaev would have an unparalleled insight into the financial status of both Capital WW and the wider Softswiss Group.

60. The Attendees therefore consented to Mr. Isaev's appointment as Capital WW's financial representative. Mr. Isaev continues to hold that position with the Company (in parallel with his position, as Tall Trade's agent and representative) however, that is under review and I am considering what steps may be necessary to remove him from that role."

[29] He then continues to discuss further matters, and in paragraph 65 he says:

"Towards the end of July 2019, I spoke to Mr. Isaev on the telephone and (with my business partner, Mr. Avraham) met with Mr. Isaev personally in Moscow. During the course of those discussions, Mr. Isaev informed us that he (in his personal capacity) required a loan of €2 million and he requested that the Softswiss Group provide that funding. Mr. Isaev repeated that request in a subsequent call attended by my business partner, Mr. Montik (one of the Befree Founders) and me.

Mr. Avraham and I supported the granting of the loan to Mr. Isaev, whereas Mr. Baazov and Mr. Montik objected to it. On 7th and 8th August 2019, the Befree Founders traveled to Moscow with the Softswiss Group's Chief Financial Officer and met with Mr. Isaev and Mr. Avraham (the 'August Meeting'). At the August meeting, the Befree Founders stated that the Befree Dividends would only be distributed to Capital WW after the Direx Loan had been repaid.

Mr. Isaev asked the attendees of the August meeting for guidance on when they required the repayment of the Direx Loan. It was agreed that

the repayment of the Direx Loan was not urgent. As a consequence it was clear between and agreed by all parties that the Befree Dividends would not be paid until a date further in the future — that being a significant variation in timetable of payments that had been originally anticipated by me and my business partners.

I understand the Direx Loan was ultimately repaid shortly before the issue of the Loan Acceleration Notice (as defined below). However, the Befree dividends remain unpaid.

I consider that the repayment of the Direx Loan by Mr. Isaev illustrates how he is seeking to manipulate the situation to his and Tall Trade's benefit. Mr. Isaev was content to use funds within the Softswiss Group for his personal benefit, in circumstances where it was accepted and agreed that this would mean that the repayment provisions as anticipated under the Facility Agreement would no longer apply, by virtue of the delayed payment of the Befree Dividends. However, now that Mr. Isaev is embarking upon an aggressive course of action against Capital WW, he has adopted a different approach and repaid the Direx Loan. I view this as nothing more than a presumptive attempt to try and nullify the arguments Capital WW has against him."

[30] Mr. Isaev's evidence is in two parts, the first at Paragraph 18. He says:

"Referring to paragraphs 43 to 53 of Mr. Megrelishvili's affidavit, I confirm the description of how I met the beneficiaries of Capital. I confirm that Tall Trade's statutory demand accurately summarises the terms of the Facility Agreement, the Russian Agreement and the basis for demanding the sums claimed. Paragraph 47 of Mr. Megrelishvili's affidavit refers to an understanding and agreement between the parties to the Russian Agreement that any debt repayments by Capital would be financed by the Befree dividends. Although I accept that the parties may have envisaged that repayment of the Tall Trade loan should be from the Befree dividends, nevertheless the Russian Agreement and Facility Agreement are, I believe, clear that Capital had to make the minimum quarterly repayment of €2 million whether or not it had received any Befree dividends and if it did, if the Befree dividends be lower than that amount. That obligation was not in any way tied to Capital first having received any dividends from Befree. Indeed that was the whole point of paragraph 2.6 of the Russian Agreement and paragraph 5 of the Facility Agreement as the wording makes clear."

And then he explains how Tall Trade financed 80 percent of the purchase price for the Befree shares, but was receiving only 33.4 percent of the shares, and says

that the main motivation was the additional security from Mr. Megrelishvili's shares in Capital and the guarantees being given.

- [31] He then deals with the meeting of 7th June and the subsequent conduct and says, (paragraph 25):

“I deny that I was appointed at any stage as a financial representative of Capital. In the meeting held on 7th June 2019 and referred to in Mr. Megrelishvili's affidavit, I was promised by the beneficiaries of Capital that I would have a right to veto, on behalf of Tall Trade, any investments proposed to be made by Befree into new ventures which would have been outside its ordinary course of business. This was a concession given to Tall Trade in order to provide comfort that there would be no dissipation of the loan monies of €17 million and that Befree and Capital would prioritize the repayment of the loan.

Mr. Megrelishvili's affidavit, paragraphs 61 to 64, makes very vague and untrue allegations that I engaged in a process and took a series of steps to procure the delay of the payment of Befree dividends to Capital but has failed to say what that process was. This is denied. I had no authority to influence the payment of dividends by Befree to Capital and it is nowhere explained how I did as alleged.

Mr. Megrelishvili's affidavit contends in paragraph 64 that the unidentified alleged steps that I took represented a variation to any legal arrangement that required Capital to repay pursuant to the Facility Agreement. Again, this is completely untrue.”

- [32] Skipping the next paragraph, he says the Direx loan is irrelevant, and then in paragraph 31:

“As previously stated, I did not have and could not exercise any power over Befree to delay the payment of dividends to Capital. At no time did I agree on behalf of Tall Trade that the terms of the Facility Agreement should be varied in any way. Tall Trade and I in any event would not agree anything of this nature without a long form agreement or a mortgage of Capital's shares as was envisaged by the Russian Agreement, neither of which was entered into.

Allegations in paragraph 62 of Mr. Megrelishvili's affidavit are untrue. I did not request for the loan repayment to be delayed. On the contrary, since early September 2019 I have been repeatedly requesting from Mr. Megrelishvili to effect the loan repayment.

I deny that there was any oral agreement set out in paragraph 76 of Mr. Megrelishvili's affidavit to dispense with the payment of interest. While there was some discussion, and a draft unsigned side letter was received, the terms were rejected. There was no agreement between Capital and Tall Trade to avoid interest being payable under the Facility Agreement."

[33] Mr. Samek Q.C. for Tall Trade criticizes Mr. Megrelishvili's evidence. He says that the evidence is vague and the allegation of an actual agreement regarding the delay in repayment of the loan only comes in Mr. Megrelishvili's second affidavit. He points out that no one from Befree has given evidence.

[34] In my judgment, this is putting an unfair burden on Capital. The timeframe for challenging a statutory demand is extremely tight and is not extendable. In this case the 14 days spanned Christmas. Getting the evidence (such as it is) over Christmas and the New Year is a daunting endeavor. It is unrealistic to expect an applicant to be able to prepare its evidence with the rigour to be expected at trial. Likewise, I do not accept Mr. Samek's submission that even if there had been an agreement between Mr. Megrelishvili on behalf of Capital and Mr. Isaev on behalf of Tall Trade to postpone repayment of the loan, there was no consideration for the agreement. He submitted there was no consideration passing from Capital. That is true, but there would in my judgment be considering passing from Befree. Befree would be able to use the money otherwise needed to pay dividends to expand its business. That is sufficient consideration in my judgment.

[35] In English law, unlike the position in American law, consideration need not be provided by the contractual counter party. It can come from a third party, as here, if the agreement was made. Accordingly, it is exceptionally rare in English law that a genuine commercial agreement will fail for want of consideration.

[36] I then turn to Mr. Samek's main submission, namely that the oral agreement alleged by Mr. Megrelishvili is belied by the contemporaneous documentation. Here he relies on a series of documents starting on 29th October 2019.

[37] On that date, Tall Trade wrote a letter to Mr. Megrelishvili and Capital saying:

"Dear sir,

We refer to the loan of Euro 17,000,000 which was granted and paid by Tall Trade Ltd... on 7th June 2019.

Loan agreement:

We have drafted the first iteration more than a month ago. Following the exchanges between the parties we believe the attached to be the final draft, the content and form which is in line with the agreement of the parties and obligations of the Borrower and is acceptable to both parties. You are kindly requested to sign the attached loan agreement without undue delay."

[38] Then, it produces a mortgage document which they invite Capital to sign. The issue of shares is then discussed, and it concludes:

"Repayment of the loan:

We remind you of your contractual obligation under the Framework Agreement to procure that all of the profits of Befree Ltd for the past quarter be declared and paid to its shareholders as interim dividend, and that consequently all such dividend received by the Borrower is immediately used to repay the loan.

The loan was provided to you on 7th June 2019. The first tranche of loan repayment became due and payable on 8th September 2019, but has not been paid to date and remains outstanding. Accordingly, you are kindly requested to, without further delay:

1. Make the first repayment tranche in the amount of the higher of €2 million and Q1 payment."

[39] At the same time there was an email from a Miri Levy Turner who was working for the corporate director of Capital. On 29th she says:

"Please note that we are sending a registered letter out today with the original apostilled in the BVI certificate of incumbency as well as the original loan between Capital and Tall Trade.

The above two documents are the last of the documents requested by you. Pending on our side is the stock transfer form countersigned as well as a confirmation of the bank account Tall Trade will be receiving the funds. Please note the funds will be sent from the majority shareholder's, Mr. Megrelishvili Revaz', private account with Gazprom Bank in Russia.

Rezo” — that is to say Mr. Megrelishvili — “will be financially supporting the next few loan repayments and the company will thereon after reimburse him these funds. We verified for your benefit that both on JB side and contractual terms it should be acceptable. We look forward to receiving your confirmation so we can proceed and comply with the loan contract settlements. Many thanks for your assistance in the matter.”

Of significance is that email as cc'ed to Mr. Megrelishvili. There was then a later exchange of e-mails between Ms. Turner and someone on behalf of Tall Trade, and Ms. Turner's email says:

“Dear Anna.

Capital WW has the right to assign temporarily the payment of the loan to any third party. Capital has opted this to be paid by Mr. Megrelishvili in order to comply with the loan agreement. I am sure JB will accept this payment as Revaz is a director and majority shareholder of Capital. Both parties wish to respect the payments, already delayed. JB already knows Befree is held by Capital WW. Let us simplify this back and forth. There are two choices: payment from Befree directly or from Revaz Megrelishvili. We have already discussed with JB compliance and know this is not a problem. Let us move forward.

Many thanks for your understanding.

Miriam.”

[40] And on the same date there is a proposal:

“Clause 7: Borrower proposes that: (a) the quarterly repayments amount to €2 million exactly; (b) if in any quarter Borrower repays more, this excess should be kept on account to be offset against the next quarter's tranche. This does not seem to be in line with the original agreement, which stipulates that the repayment will consist of all dividends received quarterly from Befree but in no event less than €2 million; so that all amounts in a quarter above €2 million would be considered a repayment received on the date funds were received by the Lender.”

[41] About a fortnight later on 11th of November, there is a further letter from Capital to White Cliff. The subject line says:

“Concern: Request of delay in repayment of shareholders loan ('facility'/'loan')”

And the letter continues:

“Dear Sirs,

With reference to the subject, we are addressing you this letter to direct your attention to the exceptional facts that, unfortunately, prevent the Company from complying with clause 5 of the valid 'facility' agreements signed with you, namely: Tall Trade- Limited on April 2019 with effect from 7th June 2019 and- Revaz Megrelishvili on 26th June 2019 with same day effect.

As all parties are aware, the repayment of the facility agreements is through the receipt in regular intervals of dividends from Befree Limited, in which the Company holds 60 percent of the issued and outstanding share capital. Softswiss is a highly successful business and was successful even before the Company made its initial investment into Befree. The latter is preparing for its next dividend distribution, which resulted in the distribution of a quarterly repayment installment of €2 million to Tall Trade Ltd as per its facility agreement.

We believe that due to the gaming regulatory landscape and tax issues of different jurisdictions, we all wish to ensure that Befree distributes its dividends to the Company in Compliance with all applicable regulatory requirements and in the most tax efficient way available.

A team of administrators, the group financial controllers and the legal and tax advisors, are currently working diligently to ensure that Befree distributes dividends to its shareholders within the timeline set out in their shareholders' agreement and notwithstanding the processes of Befree, the Company has suffered a delay independent to its will and out of its control which prevents any payment of dividends by Befree to the Company.

The compliance department of the Company's bank has informed the company that no dividend or any other income which originates from Befree may be deposited into the Company's bank account. Any attempt to deposit such funds into the company's bank account will result in the funds being blocked and/or the bank account being closed.”

And it then says identifying different matters, and they make a proposal for amending the repayment provisions in which it recites that:

"Lender recognises that it has received a quarterly installment of €2 million and as a result the remainder of the loan (together with any accrued interest) is €15 million. Notwithstanding the amount of the total quarterly profit received by Befree Ltd, the next quarterly installment shall be no less than €4 million and the minimum amount of subsequent quarterly installment, shall be no less than €2 million..."

- [42] It is simply untrue that there was a payment of €2 million as recited in that letter. There was a reply on 14th November from Tall Trade to Capital. It says:

"Your letter seems to suggest that you had repaid a sum of €2 million which is hereby denied in no unclear terms. Your letter further suggests that the Borrower intends not to make any repayment until 28th February 2020, which is unacceptable."

- [43] It then recites the obligations under the Loan Facility and the Russian Agreement. It purports to accelerate repayment of all the loan principal. That is not a matter which arises before me today. There is then a chasing letter on 18th November from White Cliff which does not receive any reply until on 22nd November 2019 there is a letter from Walkers, who represent Capital, to Harneys who represent Tall Trade, in which Walkers in paragraph 5 say:

"Our client accepts that Clause 5 of the Loan Agreement provides for the quarterly repayment of a sum of no less than €2 million (the 'Quarterly Payment'). However, to the extent that any Quarterly Payment remains outstanding, then it is the Company's position that such outstanding amount owing is attributable to the improper actions and omissions of Tall Trade and its controlling minds.

As your client is well aware, it was always anticipated and agreed by the parties that the Company's obligations under the Loan Agreement were to be met by the Company out of the dividends it receives from Befree Ltd. ('Befree'). With this in mind, the Company through its director, WTS Directors Ltd repeatedly notified Tall Trade that there was a significant risk that the Company's existing bank account providers would block or otherwise withdraw banking services for any funds related or connected with Befree would impact its ability to effect repayment from such distributions. Furthermore, our client made your client aware from the early stage of their relationship that should the company's bank accounts be impacted by such circumstances, our client would need to find an alternative banking provider or identify other solutions to allow it to make and receive payments. Our client also made your client aware that such

process would likely affect the timing of payments under the Loan Agreement, and relied upon your client's agreement in relation to the same."

In my judgment, these documents are wholly inconsistent with what is now Mr. Megrelishvili's case that there was an agreement to waive the €2 million quarterly repayment. In my judgment, I can confidently reject his evidence on this. It follows that Capital has not established a substantial defence within the **Sparkasse Bregenz** test.

[44] Accordingly, I refuse to set aside the statutory demand. I should add, for completeness, that even if I was wrong in law on the serious injustice point under section 157(2)(b), I would still reject the point on the facts. There is simply no adequate evidence that Mr. Isaev had orchestrated the failure of Befree to pay dividends to Capital. So on the facts I refuse to set aside the statutory demand and refuse the application.

Adrian Jack
Commercial Court Judge [Ag.]

By the Court

Registrar