

**EASTERN CARIBBEAN SUPREME COURT
BRITISH VIRGIN ISLANDS**

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

CLAIM NO. BVIHCM 2020/0093

BETWEEN:

TUNGSHU VENUS HOLDINGS LIMITED

Applicant

and

ZHANG RUI KANG

Respondent

CLAIM NO. BVIHCM 2020/0115

BETWEEN:

TUNGSHU VENUS HOLDINGS LIMITED

Applicant

and

LE HUAN-HSIN

Respondent

Appearances:

Mr. Grant Carroll, with him Ms. Ewelina Clyde-Smith, for the Applicant in both actions
Mr. Peter Ferrer, with him Mr. Christopher Pease, for the Respondents

2020: November 5

NOTE OF ORAL JUDGMENT

- [1] **WALLBANK, J. (Ag.):** This is a note of an oral judgment of the Court delivered at the conclusion of a hearing on 5th November 2020. I have reformulated and, in some instances, expanded upon the reasons given at the hearing. This note is not a transcript. Learned Counsel for both sides appropriately considered that it would be desirable for a note of this decision to be published, as the matter concerns the meaning of 'substantial injustice' in the

context of section 157(2)(b) of the **Insolvency Act, 2003**,¹ ('the Insolvency Act') an important concept on which there is relatively little authority.

- [2] This matter concerns applications made by the Applicant in each of these sets of proceedings, Tungshu Venus Holdings Limited, to set aside statutory demands made against it by the Respondent in each, Mr. Le Huan-Hsin ('Mr. Le') and Mr. Zhang Tui Kang ('Mr. Zhang') respectively. In the alternative, if the Court were to decide that the statutory demands should be maintained, Tungshu Venus Holdings Limited seeks an order extending the time for it to comply with the demands. For convenience I shall refer to Tungshu Venus Holdings Limited as 'the Applicant', although we are concerned with two applications being heard together. The application made in respect of Mr. Zhang's statutory demand was filed on 30th June 2020. The application made in respect of Mr. Le's statutory demand was made on 27th July 2020. They both concern the same underlying matrix of facts and were heard together.
- [3] For the reasons set out below, the Court's decision was that the applications should fail in their entirety and that the statutory demands should be allowed to stand.

Background

- [4] The following appear to be undisputed facts.
- [5] The Applicant is a wholly owned subsidiary of Tunghsu Group Co. Ltd (its 'Parent'). Its Parent is a company incorporated in the People's Republic of China ('PRC'). The company forms part of a group of companies that is an industrial conglomerate operating in approximately one hundred cities in the PRC.
- [6] The group has sought to raise money through the issuance of notes.
- [7] The Applicant company was incorporated in the Territory of the Virgin Islands ('BVI') on 18th April 2017 as a special purpose vehicle.

¹ Insolvency Act, 2003, No. 5 of 2003.

- [8] About two months after incorporation, in June 2017, the Applicant issued notes with a face value of US\$350million carrying 7% interest *per annum*. In December 2017, the Applicant issued additional notes at the same rate of interest with a face value of US\$90million. I will refer to these as 'the Notes'. In total the principal amount outstanding on the Notes is US\$440m.
- [9] These Notes were said to be fully and unconditionally guaranteed by the Parent.
- [10] The Notes were traded through a dealing facility operated by a company called Singapore Exchange Securities Trading Limited.
- [11] Interest on the Notes was payable twice yearly, on 12th June and 12th December of each year, until maturity.
- [12] The maturity date was agreed to be 12th June 2020.
- [13] The Applicant made timely interest payments since the Notes were issued. However, when the maturity date was imminent, on 8th June 2020, the Applicant made a formal announcement. In this, the Applicant stated that it anticipated that it would not have sufficient sources of financing to pay the principal and interest due on the notes. It cited liquidity problems. The Applicant stated that it was in discussions with certain Note holders with a view to a potential restructuring of the Notes. The terms thereof had yet to be finalized, but they might include, *inter alia*, an extension of the maturity date beyond 12th June 2020.
- [14] The Applicant defaulted entirely on its maturity date obligations.
- [15] Mr. Zhang invested in, and is the beneficial owner of, an aggregate principal amount of US\$84.9million in value of the Notes, which he bought between 17th August 2017 and 5th June 2020. He claims to be owed at least US\$87,871,500, inclusive of interest, which he says gives him a 24.82% share of the total owing under the Notes.
- [16] Mr. Le invested in, and is the beneficial owner of, an aggregate principle amount of US\$1,710,000 in value of the Notes. He claims that the Applicant owes him US\$1,769,850, representing 0.5% of the total amount owed.

- [17] Mr. Zhang and Mr. Le together claim a 25.32% share in the overall amount payable under the notes.
- [18] Mr. Zhang issued a statutory demand against the Applicant on 16th June 2020. Mr. Le issued a statutory demand against the Applicant on 14th July 2020.
- [19] The Applicant did not meet these demands. Rather, it applied on 30th June 2020 to set aside Mr. Zhang's demand and on 27th July 2020 to set aside Mr. Le's demand.

Legal bases and meaning of 'substantial injustice'

- [20] The applications to set aside the statutory demands were made pursuant to section 156(1) of the **Insolvency Act**, relying upon the grounds set out in s 157(2)(b).
- [21] Section 156(1) provides:
"156. (1) Where a person has been served with a statutory demand he may apply to the Court to set it aside."
- [22] Section 157(2)(b) provides:
"(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, ...; or
(b) for some other reason."
- [23] The exercise of this power is discretionary. For the Court to be able to exercise this discretion by setting aside the demand, the Court needs to be satisfied that substantial injustice would otherwise be caused. This entails the Applicant company having the burden of proof to show that maintenance of the statutory demand would cause a substantial injustice even though there is no defect in the demand.
- [24] The **Insolvency Act** does provide guidance as what is to be treated as 'substantial' in this context. It was urged before me that 'substantial' is a flexible concept, depending upon the circumstances. That must be right.

[25] The same word, 'substantial', is used in the context of s 157(1) of the **Insolvency Act**. That subsection materially provides:

“157. (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 ..., is owing or due;”

[26] That is of course a mandatory, as opposed to a discretionary, provision. In relation to that subsection, we have the authorities of **Sparkasse Bregenz Bank AG v Associated Capital Corporation**² and **C-Mobile Services Limited v Huawei Technologies Co. Limited**³ that provide guidance on what is to be treated as a 'substantial dispute'.

[27] In sum, a 'substantial dispute' is treated as being something distinct from fanciful, make-believe, mere trifling or frivolous differences.⁴ There would be a 'substantial dispute' if there is 'so much doubt' as to the existence of the debt that there is a question to be decided, a *prima facie* case that there is something that ought to be tried.⁵

[28] The use of the word 'substantial' does not translate readily from that context to the context of a 'substantial injustice'. As both sides' learned Counsel accepted, what amounts to a substantial injustice is difficult to define. Mr. Ferrer observed that in a sense any injustice is always serious. Here we are not so much concerned with what is meant by 'injustice' but with the term 'substantial'. It suffices for present purposes to say that 'injustice' is the converse of 'justice' and that justice is an objective standard which entails the rendering to a natural or legal person of what is due to him, her or it as a matter of right, as well as the upholding of procedural and substantive fairness.

[29] There appears to be no authority that provides firm guidance on the meaning of 'substantial' for the purposes of section 157(2)(b). I was taken to the decision of this Court in **Anchorman**

² BVI Civil Appeal 10 of 2002.

³ BVIHCMAP 2014/0006.

⁴ C-Mobile Services Limited v Huawei Technologies Co. Limited BVIHCMAP 2014/0006 (Unreported, delivered 15th September 2015) at paragraph [9] (Pereira, CJ).

⁵ Sparkasse Bregenz Bank AG v Associated Capital Corporation BVI Civil Appeal 10 of 2002 (Unreported, delivered 18th June 2003) at paragraph [3] (Byron, CJ).

Kavac Limited v Jonathan Capener and in particular paragraph [11] of the judgment.⁶ The Court there indicated that it should consider whether there exists any prejudice caused to the applicant that would amount to substantial injustice. That is of course useful and scarcely surprising, but it does not explain what ‘substantial injustice’ means.

[30] Mr. Ferrer, learned Counsel for the Respondents, submitted that it is perhaps easiest to identify what amounts to a ‘substantial injustice’ by first excluding what it is not. He powerfully likened this to drawing a circle by shading the outside of it.

[31] He urged that there cannot be a substantial injustice if that which is alleged to be a ‘substantial injustice’ is something a party has agreed to. I understand Mr. Ferrer to be saying that if a party agreed to issue notes on terms, and to submit himself to this jurisdiction’s insolvency regime, it would not be a substantial injustice to hold him to their terms.

[32] Secondly, he submitted that it would not be a substantial injustice to maintain a statutory demand if some other creditor would be entitled to issue and maintain one.

[33] Thirdly, Mr. Ferrer contended that at this stage it cannot be a substantial injustice to maintain the demands, because the issue whether or not the company should be wound up, immediately or at all, would have to await an ensuing application for the appointment of a liquidator. Thereupon, pursuant to section 167 of the **Insolvency Act**, the Court would have discretion whether or not to appoint a liquidator, to give more time for a company to reorganize its affairs or make some other order.

[34] Section 167(1) provides:

“(1) On the hearing of an application for the appointment of a liquidator, the Court may
(a) appoint a liquidator under section 159(1);
(b) dismiss the application, even if a ground on which the Court could appoint a liquidator has been proved;
(c) adjourn the hearing conditionally or unconditionally; or
(d) make any interim order or other order that it considers fit.”

[35] One can go further and recognize that the word ‘substantial’ in section 157(2)(b) cannot be otiose. It must mean something. It is safe to proceed from the basis that not every injustice,

⁶ BVIHCM 2018/0031 (Unreported, delivered 6th December 2018) at paragraph [11] (Adderley, J).

however conceptually serious it may be even if slight, suffices to allow a statutory demand to be set aside. Notional or theoretical injustices or minor injustices, with insignificant consequences, would not be substantial. An injustice that could be easily remedied might also not be 'substantial'. Similarly, a merely technical injustice of little or no practical moment would also not be 'substantial'. In the same way, a mere technical defect in a statutory demand is not enough to warrant it being set aside.

- [36] Take, as a further example, a case where a company is unable to pay its creditors because, although it has enough money, it cannot pay its debts as they fall due because the company's bank temporarily cannot, for some reason unrelated to the company, release funds. The company could not then meet a statutory demand and it would then formally be deemed to be insolvent. With the statutory demand hanging over it, the company may not be able to obtain credit from another financial institution. In such a case maintaining the statutory demand, and thereby allowing the creditor to apply to wind up the company, is likely to cause the company not only an injustice, but a substantial one. That is so because the existence of the demand itself prevents the company from raising the finance to meet the demand, and the company is in reality solvent. The existence of the demand there materially threatens the company's existence.
- [37] If, however, the affairs of the company are such that its assets are relatively unencumbered, and it could reasonably easily borrow money against them to get around the bank's inability to release funds, even with the statutory demand in place, then the statutory demand would not cause a substantial injustice.
- [38] Where, on the other hand, the existence of the statutory demand would make it reasonably difficult for the company to borrow money, then it could be said that maintaining the statutory demand causes a substantial injustice.
- [39] The concept of 'substantial injustice' in the context of section 157(2)(b) cannot be separated from the notion of causation. It is the existence, or maintenance, of the statutory demand which must cause the substantial injustice. If the financial state of a company is such that it cannot meet the debt and it cannot raise enough money to do so within its contractual deadlines even before a statutory demand is issued (as appears to be the case here) and the company's difficulties simply continue to subsist, then it is difficult to see that any injustice

would be caused by the statutory demand. If it is that maintenance of the statutory demand then makes it more difficult for the company to raise finance to remedy its contractual breach, the question arises how much more difficult the statutory demand has made this. A little more difficult only is unlikely to amount to a substantial injustice.

[40] The issue of causation is further inextricably linked to the quality of evidence demonstrating (a) such causation and (b) the degree to which a statutory demand has prevented or made raising additional finance more difficult. An applicant has the burden of proof of these matters.

[41] Mr. Carroll for the Applicant urges that the Court can take judicial notice of the pressure a statutory demand causes a company which seeks to reorganize itself. He submitted that cases warn against the use of statutory demands or winding up petitions to exert pressure on a solvent party against whom a winding up petition would not otherwise be granted. He relies upon **China Alarm Holdings Limited v China Alarm Acquisitions LLC et al.**,⁷ referring to the English Chancery Division case of **Re a Company**,⁸ in which it was stated:

“...the effect of presenting a winding up petition and advertising the petition is to put upon the company a pressure to pay... . The pressure arises from the fact that once the existence of the petition is known amongst those having dealings with the company, they are likely to withdraw credit or refuse to continue to trade with the company...”

[42] Mr. Carroll submits the same can be said for statutory demands.

[43] In this case, he says, such pressure could also prejudice the restructuring. That, he says, would be prejudicial to the company as well as to creditors. It would amount to a substantial injustice for creditors and the company, he urges, if the restructuring were not to proceed and the company is to be wound up.

[44] Mr. Carroll urges that the Applicant should be accorded the opportunity to pursue the restructuring without the pressure of statutory demands hanging over it, as that would be in the best interests of the company and of the creditors and avoid a substantial injustice to any of them. At least, he urges, the Applicant should be given the space of an extension of the time for compliance with the demands.

⁷ BVIHCM2008/0385 (unreported, delivered 20th April 2009) at paragraph [33] (Foster, J (Ag.)).

⁸ [1997] 1 BCLC 479 at page 642.

[45] In relation to the Applicant's alternative application for an extension of time in which to comply with the statutory demands, section 157(4) of the **Insolvency Act** provides:

"If, on hearing an application to set aside a statutory demand, the Court is satisfied that there are no grounds for setting aside the statutory demand, it may extend the time for compliance with the statutory demand."

[46] Again, this power is discretionary.

[47] The Applicant asks this Court to exercise its discretion in this regard, if the statutory demands are maintained, of granting an extension until 1st January 2021 to enable the restructuring to proceed.

[48] The Applicant explains in its evidence in support of the application that it intends to restructure the Notes by way of a scheme of arrangement pursuant to section 179A of the **BVI Business Companies Act, 2004**.⁹ That section materially provides:

"(3) If a majority in number representing 75% in value of the creditors or class of creditors or members or class of members, as the case may be, present and voting either in person or by proxy at the meeting, agree to any compromise or arrangement, the compromise or arrangement, if sanctioned by the Court, is binding on all the creditors or class of creditors, or the members or class of members, as the case may be, and also on the company or, in the case of a company in voluntary liquidation or in liquidation under the Insolvency Act, on the liquidator and on every person liable to contribute to the assets of the company in the event of its liquidation."

Additional factual considerations and submissions

[49] The Applicant explains in its evidence that, during 2019, some RMB 50billion in ostensibly available funds appear to have been depleted from the Parent and the Group's accounts, for reasons it does not explain.

[50] The Applicant asserted in its evidence, which was dated 29th June 2020 in respect of Mr. Zhang's demand, that the details of the proposed restructuring had not yet been finalized but that it was envisaged that interest payments could be postponed and the maturity date could be extended by three years.

⁹ No. 16 of 2004.

- [51] The Applicant said that it had been having discussions with its creditors and that the Applicant had garnered 'considerable support' for the restructuring.
- [52] It said it was 'in the process of contacting the noteholders' and 'in the process of completing the first draft of a Restructuring Support Agreement' for circulation to the major noteholders. It said the discussions were confidential at that stage but envisaged that the restructuring could be completed in late October or early November 2020, that is, around now.
- [53] The Applicant says that it considers that Mr. Zhang and Mr. Le made their statutory demands in order to gain a stronger negotiating position.
- [54] The Applicant says the proposed scheme is in the best interests of the creditors and that various measures were in the process of being implemented to increase liquidity and reduce costs.
- [55] The Applicant indicated that it is in essence seeking time to pay, hoping that the group can profit from industry growth and to be able to repay its debts gradually.
- [56] By contrast, the Applicant says that if it is wound up now, Mr. Zhang and Mr. Le stand to recover potentially less, if anything at all.
- [57] That does suggest that on the Applicant's own case the underlying guarantee is or may not be reliable. I was also informed that the Parent is currently undergoing a restructuring.
- [58] Mr. Zhang and Mr. Le oppose the application to set aside their demands. Their positions are materially similar. I will therefore, for convenience, refer primarily to the reasons given by Mr. Zhang.
- [59] Mr. Zhang says no details have been given by the Applicant as to what led to the financial difficulties, nor why a restructuring is expected to result in the applicant being able to pay the debt obligations in full.
- [60] Also, the reference by the Applicant to it having 'considerable support' overlooks the fact that at least 75% of creditors by value of the amounts owed would be required to approve a scheme of

arrangement, and Mr. Zhang and Mr. Le, together, have more than 25% of the vote and are thus in a position to block the scheme.

[61] Mr. Zhang says that ‘the current terms put forward by [the Applicant] would not be in my best interests or the interest of creditors as a whole’. Also, that ‘I am simply not in a position to accept the current economic terms or the Proposed Scheme’ and ‘I intend to vote against it’. He says that ‘it appears very unlikely’ that any scheme would be backed by at least 75% in value of creditors and so it ‘appears doomed to fail’.

[62] Mr. Zhang gives evidence that Mr. Le also ‘is currently not supportive of the economic terms’. This is borne out by Mr. Le’s evidence.

[63] I pause here to note that the key word in their evidence is ‘current’ and its adverbial variant ‘currently’. It implies that their degree of support or opposition to the restructuring might change. It appears that what they want to do is to keep hold of the statutory demands to use as negotiating weapons, so that they can threaten to apply for the appointment of a liquidator if their negotiating demands are not met.

[64] The overall position does not appear to have changed materially as at 5th November 2020. The restructuring that the Applicant had postulated could be complete by now still appears to be at the stage of a draft agreement document being circulated, and, so I was informed, the Respondents have not received that yet. So, the proposed restructuring is running behind the Applicant’s anticipated schedule.

[65] Mr. Ferrer submits:

- (1) an intention to apply for a Scheme of Arrangement is not a sufficiently good reason within the context of the **Insolvency Act** to set aside a statutory demand: a statutory demand does not operate to prevent a party from applying for a Scheme of Arrangement. They are not mutually exclusive.
- (2) The Applicant does not offer an explanation as to how there would be substantial injustice caused to it or its creditors if the statutory demand is not set aside.

- (3) The Applicant has had ample time since the issuing of the statutory demands to seek to apply to the Court prior to this hearing and has failed to do so. Such failure must go to the *bona fides* of the intention of the Company in seeking to set aside the statutory demands.
- (4) No evidence has been adduced of any creditor support at all for the proposal, despite the fact that the Company, by its own admission, has been liaising with certain Note holders.
- (5) Mr. Zhang and Mr. Le would in any event be able to block any scheme of arrangement since they hold together over 25% of the debt.
- (6) There are real and substantial concerns as to accounting practices at the Group which mean that further independent oversight will in any event be appropriate.
- (7) A creditor is entitled to have his debt recognised.
- (8) This is not an appropriate case in which to extend time for compliance with the statutory demands, because the Court has no information or evidence before it as to what it is that is to happen or be done in the meantime.
- (9) Lastly, Mr. Ferrer stressed that no prejudice would be caused by maintaining the demands, as the Applicant can still oppose an application for appointment of a liquidator.

DISCUSSION

[66] The crux of the matter before the Court in my respectful judgment lies in the Applicant's evidence of Mr. Guo Xuan, at paragraphs 30 and 31 (the reference, for convenience being to that evidence adduced in the application concerning Mr. Le, filed on 27th July 2020). There he stated:

"30. I am advised...that if the Statutory Demand is not set aside, the Creditor will have the option to apply for the appointment of a liquidator over the Company. The Company would be subsequently wound up which I do not believe to be in the best interests of creditors as a whole, nor do I believe that a liquidation would be in the best interests of the Creditor and I believe that this Statutory Demand has been served as an attempt to gain a stronger negotiating position.

31. The Proposed Scheme is in the best interest of the creditors because the Company envisages that it will pay the principal on the Notes by 12 June 2023. If the Company was wound up now, the creditors will not be able to recover their money in the same proportion, or at all, as promised under the Notes.”

[67] This appears to assume that the Applicant would be wound up now. That is misconceived. As we have seen from the terms of section 167 of the **Insolvency Act**, it is not at all inevitable, nor automatic, that the company would be wound up, even if the Respondents were to apply for that relief.

[68] The merits of a winding up application are for another day. The Applicant appears to have conflated a statutory demand with a winding up petition, or to have assumed that a winding up would follow as a matter of course upon a winding up petition being presented. That is not so.

[69] Moreover, there is no evidence whatsoever before the Court that the statutory demands are causing, or would cause, any injustice to anyone, let alone substantial injustice. That of itself means that the application to set aside the statutory demands must fail.

[70] There is moreover no evidence that maintenance of the statutory demands would jeopardize the restructuring in any way or make it more difficult for the company or its Parent or group to raise finance. Some form of risk of creditors withdrawing support might exist, as the cases referred to by Mr. Carroll recognize, but there is no evidence before the Court of that here. That assumption does not take the Applicant beyond presenting a general, unparticularized idea that the statutory demands are pressurizing the company in a way that is somehow debilitating it from raising the needed finance. This begs the question, ‘in what way, here, are the statutory demands hampering the restructuring efforts?’ It is evidence of this that the Applicant should have adduced. Without it, the Court cannot find that the statutory demands caused substantial injustice.

[71] Moreover, it is pertinent to ask what prejudicial effect, if any, the statutory demands in fact have had, because there is at least one other factor that could act as a deterrent to other creditors supporting or assisting the restructuring effort. Mr. Zhang and Mr. Le have a right to block a scheme of arrangement, by dint of their combined voting percentage. That power of veto arises as a matter of BVI law. Mr. Zhang and Mr. Le have become aware of it. There is no evidence that they are any more sophisticated than the other investors in the Notes. There is no reason

to suppose that other Note holders could not know this nor find out about it during their due diligence concerning the proposed scheme of arrangement. The knowledge that other creditors could block a scheme of arrangement merely by reason of their debt percentage could also act as a deterrent. The Applicant's evidence thus should also have addressed why it is that the statutory demands, specifically, (as opposed to other factors) are making it reasonably difficult for the company to raise sufficient finance.

[72] Absent such evidence, a risk of creditors withdrawing support by reason of the statutory demands remains in the realm of a speculative possibility. That is not sufficient to show that a substantial injustice would be caused if the statutory demands are not set aside.

[73] Additionally, I accept Mr. Ferrer's helpful analysis of what constitutes a substantial injustice (or rather, what does not constitute a substantial injustice). I note here that the Applicant has not given any reason, or produced any evidence, showing that another creditor would not be able to issue and maintain his own statutory demand.

Extension of time for compliance with Statutory Demands

[74] In terms of whether the time for compliance with the statutory demands should be extended, I was initially minded to exercise the Court's discretion to do so, as conceptually it seems sensible to allow some latitude for the company to be restructured. Upon reflection, I accept that there is insufficient evidence before me of why an extension of time would be necessary or indeed beneficial here.

[75] Additionally, an important factor that also goes against an extension is that a statutory demand provides a creditor with an important protective mechanism as part of this jurisdiction's insolvency regime. The factual circumstances are such that the Applicant's *bona fides* is not entirely clear, and there are question marks over a significant depletion of funds.

[76] Whilst it would, in my respectful opinion, be appropriate to give the Applicant the benefit of any doubt at this point as to its *bona fides* in respect of its intentions and its anticipated abilities eventually to meet its liabilities, equally it would in my view be appropriate and prudent to counterbalance that by leaving in place the protective mechanism that the Respondents have

taken advantage of, as was their right. Thus, in my respectful judgment, no additional time for compliance with the demand should be allowed.

- [77] I bear in mind that there is no direct evidence before the Court of the Applicant's *bona fides* in respect of its intentions to honour its obligations going forward (which of course of itself does not suggest or raise any assumption that it is not acting in good faith, and there is of course no requirement for the Applicant to demonstrate that it is acting in good faith), but there is evidence that substantial amounts of funds appear to have gone missing from the Applicant. The Respondents understandably have concerns about that unexplained fact.
- [78] There is also evidence that the Applicant has failed to pay anything **at all** upon the maturity date of the Notes. Whilst it paid the interim interest falling due before that date, no reasonably detailed explanation has been offered for the reasons behind the Applicant's complete default.
- [79] Furthermore, the Applicant has also indicated that it desires to extend the terms of its debts so that the group can profit from industry growth and repay the debts gradually. This suggests that the Applicant's future ability, and intentions, to meet its obligations will remain speculative, dependent upon external conditions, and not necessarily in line with the terms of any restructured contractual agreement. That cannot be reassuring for investors who have bought Notes on specific terms, who have a right to be paid, and who have already been abruptly let down. Let us not forget that investment is a two-way street. This matter is not just about the Applicant company, its guarantor Parent and its group. It is equally about the Respondents' rights and interests, which have been violated. Compounded with this are doubts that the Applicant itself has sown as to the reliability of the guarantee underlying the Notes. The fact that statutory demands form part of a statutory scheme which caters for the protection of creditors as well as of a company means there is a balance to be struck. In the present case I am of the respectful opinion that this balance is best established by maintaining the statutory demands.
- [80] It is right, I think, against the background I have set out, to retain the Respondents' ability to move without delay to seek to protect themselves by applying for the appointment of liquidators. It does not matter, in my respectful judgment, that the Respondents might want to use the existence of the statutory demands to strengthen their negotiating position in relation to the proposed scheme of arrangement. The Respondents are entitled to the protection the

statutory demands give them and there is no evidence for any basis to suspend that temporarily.

Disposition

- [81] For these reasons, the applications fail. Costs will follow the event, such that the Applicant will pay the Respondents' costs of the applications. The Respondents will be authorized to apply for the appointment of a liquidator over the Applicant company.
- [82] I additionally direct that where there is any discrepancy between this Note of Judgment and the oral judgment I handed down at the hearing on 5th November 2020, this Note of Judgment shall prevail. For that reason, the time for appeal from this decision shall run from the date this Note of Judgment is sealed and delivered to the parties.
- [83] I take this opportunity to thank learned Counsel for their assistance during this matter.

Gerhard Wallbank
High Court Judge

By the Court

Registrar