

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0020

BETWEEN:

GEMINIS INVESTORS LIMITED

Appellant

and

GOODS TECHNOLOGY STARTING INTERNATIONAL LIMITED

Respondent

Consolidated with:

BVIHCMAP2022/0043

BETWEEN:

GEMINIS INVESTORS LIMITED

Appellant

and

**[1] GOODS TECHNOLOGY STARTING INTERNATIONAL LIMITED
[2] G-FORCE INT'L CO LTD**

Respondents

Before:

The Hon. Mde. Margaret Price Findlay
The Hon. Mde. Vicki Ann Ellis
The Hon. Mr. Reginald T. A. Armour

Chief Justice [Ag.]
Justice of Appeal
Justice of Appeal

[Ag.]

Appearances:

Mr. David Lord KC, with him Mr. Jomokie Phillips
Ms. Angeline Welsh KC, with her Ms. Sara-Jane Knock

2025: October 16;
2026: April 2.

Leave to appeal to His Majesty in Council - Section 3(1)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967 - Appeal as of right - Whether a refusal to set aside a statutory demand involves a claim to or question respecting property or right of the value of £300 sterling or upwards - Whether the debt is quantified at the statutory demand stage - Application for conditional leave to appeal - Great general or public importance - Section 3(2)(a) of the 1967 Order - Whether the interests of justice satisfy the requirement for a genuinely disputable question of law - Insolvency - Statutory Demand - Winding up proceedings - Stay of Execution - Principles for granting a stay - Whether an appeal against a declaratory order is capable of being stayed - Requirement for cogent evidence to prove an appeal would be rendered nugatory

The appellant, Geminis Investors Limited (“the appellant”), applied for conditional leave to appeal to His Majesty in Council against the Court of Appeal’s order dated 30th January 2025. This order dismissed consolidated appeals from two related High Court proceedings: (i) the refusal to set aside a statutory demand (“the Demand Proceedings”), and (ii) the entry of default judgment following the appellant’s failure to file a defence (“the Substantive Proceedings”). Although the appellant filed two separate applications for leave to the Privy Council, the matters were consolidated by Consent Order in September 2022 and treated as a single set of proceedings in law.

The underlying dispute arose out of nine short-term notes issued by the appellant between 31st December 2019 and 31st May 2020, all of which were governed by New York law and contained materially similar terms. The first respondent, Goods Technology Starting International Limited, subscribed to eight of the notes, while the second respondent, G-Force Int’l Co. Ltd., subscribed to one. In respect of the Demand Proceedings, six of the notes held by the first respondent (“the Demand Notes”) formed the basis of a statutory demand served on the appellant on 23rd December 2021, seeking payment of US\$5,642,060.27, representing the principal sum due together with accrued interest, after accounting for a prior payment of US\$700,000 made by the appellant.

On 6th January 2022, the appellant applied to set aside the demand, asserting a right of set-off or a contractual right to discharge the debt via an “asset settlement.” The appellant proposed transferring shares in the “Evenstar” investment fund to satisfy the debt. On 1st March 2022, the learned judge refused to set aside the demand and authorized the first respondent to seek a liquidator. The judge found the Evenstar shares were valued at approximately US\$4.9 million, leaving a shortfall significantly above the statutory insolvency minimum, and noted the shares had not been transferred to the respondent. Furthermore, the judge ruled the appellant’s right to invoke asset settlement had not been properly exercised post-maturity.

In relation to the Substantive Proceedings, the respondents commenced a claim on 18th January 2022 seeking recovery of the principal sums and interest due under all nine notes, all of which had matured and remained unpaid. The appellant filed an acknowledgment of service but failed to file a defence within the time prescribed by rule 10.3 of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000**. The appellant subsequently applied for an extension of time to file its defence, while the respondents applied for default

judgment. The learned judge dismissed the appellant's application for an extension of time and granted default judgment in favour of the respondents in the sums claimed.

The appellant appealed both decisions. The Court of Appeal, having identified the sole issue as whether the appellant was entitled to invoke the asset settlement provisions to extinguish the debt, dismissed the appeals by judgment dated 30th January 2025. The Court found that the appellant had not transferred or registered the assets in accordance with the contractual requirements and that there was no substantial dispute as to the debt. The appellant thereafter applied for leave to appeal to His Majesty in Council. In respect of the statutory demand, it contended that it was entitled to appeal as of right under section 3(1)(a) of the Virgin Islands (Appeals to Privy Council) Order 1967. In respect of the default judgment, it contended that the appeal raised issues of great general or public importance or alternatively fell within the "or otherwise" limb of section 3(2)(a).

The respondents opposed the applications, contending that the statutory demand proceedings did not engage the value threshold, that no genuine and substantial dispute existed as to the debt, and that the proposed appeals raised no issue of general importance but rather involved fact-specific matters of contractual construction. The appellant also applied for a stay of execution of the default judgment pending the determination of the proposed appeal.

Held, refusing the applications for conditional leave to appeal and the application for a stay of execution, with costs to the respondents to be assessed by a judge of the Commercial Court in default of agreement within 21 days of this judgment, that:

1. In relation to the claim for leave to appeal as of right in the Demand Proceedings, the refusal to set aside a statutory demand does not involve a claim to or question respecting property or right of the value of £300 Sterling or upwards. Applying a strict construction of section 3(1)(a) of the 1967 Order, at this stage there is not a quantification of the debt, and the Value Threshold does not come into play. The application to set aside a statutory demand does not involve directly or indirectly a claim to a right of the required value because the resulting order is a *sui generis* mechanism that does not result in an enforceable order for a liquidated sum but is instead a procedural prerequisite to the filing of substantive winding-up proceedings. Because the statutory demand process is a standalone mechanism where the debt remains unquantified until the subsequent liquidation phase, the £300 Sterling threshold is not legally engaged.

Sian Participation Corp (In Liquidation) v Halimedia Ltd [2024] UKPC 16 applied; **BEC Limited v A2 and A1** BVIHCMAP2022/044 (delivered 9th September 2022, unreported) considered.

2. Even if the Value Threshold were met, the proposed appeal does not raise a genuinely disputable triable issue to satisfy the Sparkasse Bregenz Bank AG test and that line of authority which the Privy Council in Sian Corporation has endorsed. The Court of Appeal was clear on the evidence which it accepts was before the lower court including the contractual construction of the Demand Notes,

as well as the concessions made by appellant's counsel in the lower court and the court of appeal. These concessions, which confirmed that the appellant had not satisfied the mandatory conditions for an asset settlement, left an undisputed and admitted debt balance well in excess of the statutory minimum required to deem the company insolvent. In the absence of a genuine dispute on substantial grounds, there is no basis upon which the court could conclude that the appeal has a reasonable prospect of success.

Sparkasse Bregenz Bank AG v Associated Corporation BVIHCVAP2002/0010 (18th June 2003, unreported) followed; **Sian Participation Corp (In Liquidation) v Halimedia Ltd** [2024] UKPC 16 followed.

3. Regarding the application for discretionary leave in the Substantive Proceedings, the applicant failed to identify a specific question of law of great general or public importance. An intended appellant must satisfy the court that the question of law is one of great general or public importance such that it ought to be submitted to His Majesty in Council. The questions proposed by the applicant, which centered on the interests of justice following a failure to file a defence, are not questions of law of great general or public importance but are rather questions of fact or of the application of well-settled principles of law to the specific circumstances of the case. The discretion to grant leave under section 3(2)(a) is to be exercised sparingly and only where the question involves a serious issue of law or a matter of constitutional significance that impacts the public at large.

Section 3(2)(a) of the **Virgin Islands (Appeals to Privy Council) Order 1967** applied; **Kenneth M. Kryss v Farnum Place LLC** BVIHCVAP2013/0014 (delivered 23rd August 2023, unreported) applied.

4. A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. On this application the applicant has put no evidence far less cogent evidence to make out the application for the stay or that refusing the stay means that the proposed appeal will be rendered nugatory. The general rule remains that a successful litigant is entitled to the fruits of their judgment, and the mere obligation to pay a sum of money or face insolvency proceedings does not, without more, constitute a ground for a stay. Furthermore, because the order in the Demand Proceedings was declaratory in nature—merely authorizing the creditors to apply for the appointment of liquidators without requiring them to do so—it did not create enforceable rights and was therefore not capable of being stayed. The appropriate course of action would have been for the company to apply for an injunction to restrain the creditors, rather than a stay of the order itself.

C-Mobile Services Limited v Huawei Technologies Co Ltd BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported) applied; **BEC Limited v A2 and A1** BVIHCMAP2022/0044 (delivered 9th September 2022, unreported) followed; **ICM SPC On behalf of Ancile Special Opportunity and Recovery Fund Segregated Portfolio v Ryan Paul Jarvis and Rachelle Frisby**

[As Joint Liquidators] BVIHCMAP2024/0019 (delivered 17th February 2026, unreported) considered.

JUDGMENT

- [1] **ARMOUR JA [AG.]:** These are two (2) applications both filed on 20th February 2025 by Geminis Investors Limited, the applicant/the appellant (hereinafter “the appellant”) for leave to appeal to His Majesty in Council from the Court of Appeal’s single order dated the 30th January 2025, by which order (“the 30th January 2025 Order”) the Court of Appeal in its judgment dated the 30th January 2025 (“the appealed judgment”) dismissed the consolidated appeals from two (2) separate orders made by the same Judge in the court below in two separate High Court proceedings.
- [2] During the oral hearing of these applications, the Court sought confirmation from King’s Counsel for the parties that these two applications for leave to appeal stem from a single consolidated appeal. Counsel confirmed this consolidation, which was established by a consent order entered and dated 5th September 2022, as appears on the record.¹ See also paragraph one (1) of the appealed judgment. The Court requested this clarification because, despite the consolidation, the appellant has filed two separate notices of application for leave to appeal to the Judicial Committee: one in appeal number 0020 of 2022, filed on 20th February 2022,² and the other notice of application also filed on 20th February 2022 in appeal number 0043 of 2022.³ I shall refer to the application for conditional leave in appeal number 0020 of 2022 as “the Demand Proceedings application” and the application for conditional leave in appeal number 0043 of 2022 as “the Substantive Proceedings application”.

¹ Consent Order of Baptiste JA (Hearing Bundle B, p 1265).

² Notice of Motion for Leave to Appeal to His Majesty in Council: Statutory Demand Appeal (Hearing Bundle A, p 2).

³ Notice of Motion for Leave to Appeal to His Majesty in Council: Default Judgment Appeal (Hearing Bundle A, p 126).

- [3] Both the appellant and the respondents accept that paragraph three (3) of the **Virgin Islands (Appeals To Privy Council) Order 1967** (“the 1967 Order”)⁴ sets out the basis upon which the court may grant permission to appeal to the Judicial Committee.
- [4] In the Demand Proceedings application, the appellant argues that it is entitled to appeal “*as of right*”, pursuant to section 3(1)(a) of the 1967 Order. In the Substantive Proceedings application the appellant argues that it is entitled to leave under section 3(2) (a) of the 1967 Order, either because that application raises an appeal which involves an issue of “*great general or public importance*” or alternatively, that it is entitled to leave under the “*or otherwise*” discretionary jurisdiction conferred by that section.
- [5] In their consolidated written submissions filed on 13th March 2025 opposing these two applications for leave to appeal,⁵ the respondents make the point that by reason of the existence of the Consolidation Consent Order there is only one set of proceedings before this Court, not two, contending that the appellant wrongly appeared so to assume. Given the clarifications sought and obtained by this Court at the oral hearing⁶ of the indisputable record of the Consolidation Consent Order, I proceed on the basis that these consolidated applications made by the appellant/applicant are superfluous and need not be pursued. Accordingly, this judgment proceeds on the basis that there is already only one set of consolidated proceedings before this Court, as indeed was the case before and accepted before the Court of Appeal.
- [6] As stated, by the Demand Proceedings application the appellant/ applicant seeks leave to appeal to His Majesty in Council “*as of right*” from the judgment of this Court dated 30th January 2025 dismissing its appeal from the Order of Mr. Justice

⁴ Appeals to Her Majesty in Council.

⁵ Consolidated written submissions of the Respondents (Hearing Bundle A, p 460).

⁶ Para. 2, *supra*.

Jack dated 1st March 2022 refusing its application to set aside a statutory demand.⁷

- [7] In the Substantive Proceedings application, the appellant/applicant seeks leave to appeal to His Majesty in Council against the default judgment appeal.

Background

Proceedings in the Lower Court

- [8] The underlying proceedings concern nine short term notes issued by the appellant to the respondents between 31st December 2019 and 31st May 2020. Goods Technology Starting International Limited (“the first respondent”) subscribed to eight of these notes, while G-Force Int’l Co. Ltd. (“the second respondent”) subscribed to one. Of the eight notes subscribed by the first respondent, six notes (Notes 1,2,3,6,7 and 8) were included in a statutory demand (“the Demand Notes”) filed by the second respondent in the lower court as part of the “demand proceedings”. However, all nine notes became the focus of a substantive claim filed by both respondents on 18th January 2022 in the lower court (“the Substantive Proceedings”). All nine-short term notes had similar terms and were governed by New York law.
- [9] The first respondent advanced a principal amount of US\$6,200,000.00 for the Demand Notes. On 23rd December 2021, after the passage of the maturity dates of the Demand Notes, the first respondent served the appellant with a statutory demand (“Statutory Demand”), seeking payment of US\$5,642.060.27. The amount demanded by the first respondent, US\$5,642.060.27, represented the total principal owed on the Demand Notes, along with accrued interest. This sum was calculated after deducting US\$700,000.00, which had been paid by the appellant and accepted by the first respondent.

⁷ Consolidated appeals BVIHCCOM2022/0020 and BVIHCMAP2022/0043 (delivered 30th January 2025, unreported) (Hearing Bundle A, p 1130).

- [10] By application filed by the appellant on 6th January 2022 in the lower court, the appellant sought to set aside the Statutory Demand on the ground that it had a right to set off⁸ its liability under the Demand Notes and that, even if there had been an event of default, it had the right to make full or partial payment by way of asset settlement. The appellant proposed to redeem the Demand Notes with shares in an investment fund called Evenstar (“the Evenstar shares”).
- [11] By Order dated 1st March 2022,⁹ the learned judge dismissed the application to set aside the Statutory Demand. The court also ordered that the first respondent be authorised to make an application for the appointment of a liquidator in respect of the appellant. The judge’s order was followed by a written judgment dated 30th May 2022. In his judgment, the trial judge observed that the Evenstar shares proposed by the appellant were valued at approximately US\$4.9 million, leaving a shortfall of US\$700,000.00. The trial judge therefore noted that the appellant, having not made a proposal to pay this outstanding shortfall, which exceeded the statutory limit of US\$2,000.00 for deeming a company insolvent under the **Insolvency Act**,¹⁰ justified his refusal to set aside the Statutory Demand. The judge also found that the Evenstar shares had not been allocated to the first respondent’s account. Furthermore, the judge ruled that once the Notes had matured, it was too late for the appellant/applicant to seek to allocate security to an account of a Noteholder; the appellant’s right to rely on the set off provisions was lost upon the maturity of the Demand Notes.
- [12] With respect to the Substantive Proceedings, the respondents, as stated earlier, had subscribed to nine short-term notes issued by the appellant. Whilst only the Demand Notes issued to the first respondent were the subject of the Statutory Demand, all nine notes were the subject of Substantive Proceedings in the lower court. On 18th January 2022, the respondents commenced a claim, seeking the recovery of the principal amount and interest due under the nine notes, as they

⁸ Abandoned before the Court of Appeal.

⁹ Order of Jack J (Hearing Bundle C, p 726).

¹⁰ Act No. 5 of 2003 of the Laws of the Virgin Islands.

had all matured by that time and remained unpaid. On 20th January 2022, the appellant filed and served an acknowledgment of service in response to that claim. Pursuant to Rule 10.3 of the **Civil Procedure Rules 2000** (“the CPR”), the deadline for the appellant to file and serve its defence was 17th February 2022 but, the appellant failed to file a defence by that date.

[13] In these Substantive Proceedings, two applications came before the very judge who had earlier heard and dismissed the application to set aside the Statutory Demand by his Order of the 1st March 2022. The first was an application by the appellant for an extension of time to file its defence. The second was a cross application by the respondents requesting that a default judgment be granted and judgment in default be entered in favour of the respondents. After considering both the extension application and the cross application the learned judge in the lower court ordered, inter alia, that:

- (1) The extension application be dismissed; and
- (2) The request for default judgment in the amount of US\$8,580,627.09 be granted and judgment in default be entered in favour of the respondents.

The Appeals

[14] Being dissatisfied with these decisions of the learned judge (in respect of the Statutory Demand and the Substantive Proceedings), the appellant appealed both these decisions by notices of appeal, in the case of the Statutory Demand filed on the 12th April 2020¹¹ and, in the case of the Substantive Proceedings filed on 16th August 2022.¹²

[15] As earlier noted above, the appellant filed two appeals. By notice of appeal filed in BVIHCMAP2022/0020, the appellant appealed against the order of the learned judge wherein he dismissed the appellant’s application to set aside the Statutory Demand issued by the respondent dated 23rd December 2021 (“the statutory

¹¹ BVIHCMAP2020/0020.

¹² BVIHCMAP2020/0043.

demand appeal”). By notice of appeal filed in BVIHCMAP2022/0043, the appellant appealed against the order of the learned judge wherein he dismissed the appellant’s application seeking an extension of time for filing and service of the appellant’s defence in the claim and inter alia entered judgment in default in the claim in favour of the respondents (“the default judgment appeal”).

[16] The consolidation of these appeals was formally established by a Consent Order dated 5th September 2022 before Justice Baptiste.¹³ These consolidated appeals came up for hearing before the Court of Appeal on 31st October 2024. The sole issue before the Court, as distilled from the seven grounds of appeal set out in the notices of appeal, particularly grounds 1 and 2 was, *whether the appellant/applicant was entitled to invoke the asset settlement provision contained in the Notes to claim that the debt had been extinguished*. The Court stated that sole issue to encompass the following sub issues, *whether there existed a “substantial dispute regarding (i) the existence of the debt or (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum as owing or due.”*¹⁴

[17] It is prudent to note here that in its written judgment the Court of Appeal recorded¹⁵ that the appellant made it clear that it was no longer pursuing the ground of appeal in relation to the argument of set-off, which had been argued before the court below and, accordingly, all of the remaining grounds of appeal fell to be dealt with under the Court’s determination of the identified sole issue.

[18] By its unanimous judgment delivered 30th January 2025, the Court dismissed the appellant’s appeal and ordered costs to the respondents within 21 days thereof.

¹³ Consent Order of Baptiste JA (Hearing Bundle B, p 1265).

¹⁴ Consolidated appeals BVIHCCOM2022/0020 and BVIHCMAP2022/0043 (delivered 30th January 2025, unreported), [40] (Hearing Bundle A, p 1130).

¹⁵ Ibid [41]-[42] (Hearing Bundle A, p 1130).

[19] Having reviewed the evidence and the arguments in the court below in its consideration of the identified sole issue, the Court of Appeal reminded itself that the actual requirement of the asset settlement provision required the appellant to transfer the assets that they intend to use to satisfy the debt by either registering the assets in the name of the respondents or, by transferring the assets into an account designated to the respondents outside of Hong Kong and, that the appellant had unequivocally stated that neither of these had been done. The Court held that the evidence in support of the appellant's application to set aside the Statutory Demand never addressed the contention of the respondents that the asset settlement provisions had not been invoked.

[20] The Court also held that it was clear that the judge below could come to no other determination that there was no need to take further evidence on the issue of the additional payment having been made but not taken into consideration by the respondents in their calculations on the Demand, when the appellant had clearly been put on notice. Indeed, there was no submission made to the court below that the appellant was seeking an opportunity to do so but rather, informed the court that 'they suspect they may have to put in evidence at some point that there was an additional payment of \$744,000.00 made to the respondent'. There having been no evidence before the court below, even if the court had accepted that the purported asset settlement was operative, such settlement still left a balance well over the statutory maximum and which the court below found. The Court of Appeal found it to be clear, taking the arguments of the appellant at its most generous, that the appeal against the finding of the learned judge below cannot be sustained and that the findings of the judge were entirely within his remit to find based on the evidence and the arguments before him.

Application for Leave To Appeal to His Majesty in Council

[21] By notice of motion filed on 20th February 2025, the appellant sought leave to appeal to His Majesty in Council against the Statutory Demand appeal, seeking inter alia the following orders:

“That the Applicant be granted conditional leave to appeal to His Majesty in Council as of right from the Order of this Court (the Hon. Mr Mario Michel, the Hon. Mr Eddy D. Ventose, and the Hon. Mde. Petra Nicola Byer) dated 30 January 2025 dismissing the Applicant’s appeal from the Order of Mr Justice Jack dated 1 March 2022 refusing the Applicant’s application to set aside a statutory demand, on the grounds that the appeal involves a dispute over a matter of the value of £300.00 sterling or upwards and the appeal involves a claim to or a question respecting property or a right of the value of £300.00 sterling or upwards and is a final decision in a civil proceeding;”

- [22] Additionally, by notice of motion also filed on 20th February 2025, the appellant sought leave to appeal to His Majesty in Council against the Default Judgment appeal. The appellant sought, inter alia the following orders:

“That the Applicant be granted conditional leave to appeal to His Majesty in Council the Order of this Court (the Hon. Mr Mario Michel, the Hon. Mr Eddy D. Ventose, and the Hon. Mde. Petra Nicola Byer) dated 30 January 2025 dismissing the Applicant’s appeal from the Order of Mr Justice Jack dated 30 May 2022 entering judgment in default against the Applicant in the sum of US\$8,580,627.09 in favour of the First Claimant and in the sum of US\$3,158,490.38 in favour of the Second Claimant plus interest and costs and refusing the Applicant’s application for an extension of time to file its Defence.”

- [23] The appellant proposed eight (8) grounds of appeal which are identical in both the proposed appeal in respect of the Statutory Demand and the proposed appeal in respect of the Default Judgment, as follows:

- (1) The Court of Appeal erred in law and on the true construction of the Notes in finding that no Event of Default for non-payment could occur after the Maturity Date.
- (2) The Court of Appeal erred in law and on the true construction of the Notes in finding that following an Event of Default the Noteholder did not have to issue a Default Notice as a pre- requisite to claiming the sums due on the Notes.
- (3) The Court of Appeal having found that no Default Notice had been served on the applicant, on the true construction of the Notes, and notwithstanding that the Maturity Date under the Notes had passed, the respondents were not entitled to claim any sums pursuant to the Notes as no Default Notice had been served.

- (4) Further or alternatively to Grounds 2 and 3, the “Risks of Redemption in Kind” provisions of the Notes provided a contractual right to the Issuer in its absolute and sole discretion to transfer any investment products or any other assets as it may specify (an “in specie transfer”), in lieu of cash, to the Noteholder in full or partial payment of any amounts owed to the Noteholder pursuant to the Notes, which right Geminis purported to exercise.
- (5) The Court of Appeal erred as a matter of fact and law in concluding that the Statutory Demand and the correspondence from the Respondents’ lawyers dated 26th November 2021 did not amount to Default Notices pursuant to the Notes so that the Appellant was entitled to invoke the Asset Settlement provisions in the Notes.
- (6) The Court of Appeal erred in concluding that the Appellant had not complied with the Asset Settlement provisions. The Appellant had done everything in its power to do so and the only reason why other investment products had not been transferred to the Respondents was because the Respondents had refused to co-operate in that transfer.
- (7) As for sums allegedly due to the respondents? and without prejudice to the other grounds of appeal:
 - (a) The Judge and the Court of Appeal were wrong to conclude on a summary basis that even if there had been an In Specie Transfer or an Asset Settlement there was still a discernible sum owing to Goods Technology.
 - (b) The Judge and the Court of Appeal should have found that there was uncertainty as to the amounts that would otherwise be due to the Respondents (assuming that the Respondents were entitled to claim such sums) and the amounts that had been paid to them that would have to be the subject of a trial and/or an account or inquiry.
 - (c) Further if there was, nevertheless, a discernible sum still owing to Goods Technology, Geminis has the right to make a further In Specie Transfer or Asset Settlement to satisfy that sum.
- (8) In the premises, the Judge and the Court of Appeal erred in finding that there was no genuine and substantial dispute as to the sums claimed pursuant to the Statutory Demand.

The Parties' Submissions

Appellant's Submissions in support of the Application

- [24] As already recorded earlier in this judgment, Counsel for the appellant accepted that although two notices of motion had been filed by the appellant, one concerning the statutory demand appeal and the other concerning the default judgment appeal, there is in law only one appeal to the Judicial Committee of Privy Council, because there is only one Order of the Court of Appeal. The Court of Appeal consolidated the matters and dismissed the appeals through a single order. Accordingly, the appellant submitted that the statutory demand appeal gives rise to an appeal as of right, and that right carries the entire order with it. He further argued that, even if the appeals were to be considered separately, permission should in any event be granted in respect of the default judgment appeal by virtue of the “*or otherwise*” limb.
- [25] The appellant submitted that the statutory demand appeal is an appeal as of right because the judge’s decision at first instance was final, given that, whichever way he had decided the application to set aside the statutory demand, it would have finally determined those proceedings.¹⁶ The appellant also relied on **BEC Limited v A2 and A1**¹⁷ in which this Court held that an order following an application to set aside a statutory demand was a final order that leave to appeal is not required.
- [26] Appellant’s Counsel nonetheless addressed the value threshold requirement under paragraph 3 of the 1967 Order, submitting that it is satisfied. In the statutory demand, the first respondent sought payment of US\$5,642,060.27 (“the Debt”). The sole issue on the application to set aside the demand was whether there existed a substantial dispute as to the validity of that debt. The governing test is

¹⁶ Inderjit Chhina v Muhammed Nazir Muhammed Ismain and Anr [2024] UKPC 10.

¹⁷ BVIHCMAP2022/0044 (delivered 9th September 2022, unreported).

settled. In **Vendort Traders Inc v Evrostroy Grupp LLC**,¹⁸ the Privy Council confirmed that a statutory demand may be set aside only where there is a substantial dispute as to whether the debt is “owing or due”, applying the same standard as summary judgment, namely, whether the debtor can raise a triable issue.

[27] The Court of Appeal has articulated the same principle that is, a statutory demand should be set aside only where there is ‘so much doubt and question about the validity of the debt that the Court sees that there is a question to be decided’ in **Sparkasse Bregenz Bank AG v Associated Corporation** as cited in **Vendort Traders**.

[28] In the premises, argued the appellant, what was decided in the statutory demand judgment was that the debt, which exceeded the £300 threshold, was due.

[29] Furthermore, as the respondents argued before Jack J in the default judgment application in the court below, the statutory demand judgment gives rise to an issue estoppel on the question of the appellant’s liability for the debt. This follows the analysis of **Harvey v Dunbar Assets Plc**,¹⁹ at both first instance and on appeal, where the authorities on issue estoppel arising from statutory demand proceedings are reviewed. The only reason an estoppel did not arise in Harvey was because the first statutory demand had been successfully appealed.

[30] The appellant submitted that the respondents’ reliance on **Sian Participation Corporation (In Liquidation) v Halimedia**²⁰ is misplaced. The appellant submitted that the **Sian Participation** case concerned an appeal from a winding up order, not an appeal from a refusal to set aside a statutory demand. The appellant accepted that an appeal from a winding up order would not satisfy the £300 value threshold, nor would such an order constitute a final decision for the

¹⁸ [2016] UKPC 15.

¹⁹ [2015] EWHC 3355 (Ch) and [2017] EWCA Civ 60.

²⁰ [2014] UKPC 16.

purposes of the 1967 Order. The appellant/applicant noted that in **Sian Participation**, the Privy Council expressly stated that the making of a winding up order 'leaves the debt of the appellant untouched'.²¹ There was therefore no judicial determination of the existence or validity of an underlying debt. By contrast, the refusal by Jack J to set aside the statutory demand in the present case did involve a determination that the debt was due, and that determination is central to the matter in dispute on the proposed appeal.

- [31] Accordingly, the appellant/applicant submitted that the statutory demand appeal 'involves directly or indirectly ... a right to the value of £300 sterling or upwards', such that the threshold requirement is met and, the appeal is an appeal as of right.

Respondents' Submissions

- [32] Counsel for the respondents firstly addressed the statutory demand appeal. Counsel submitted that for the appellant's application for the appeal to be as of right under paragraph 3(1)(a) of the 1967 Order the appeal must also meet the £300 Sterling value threshold and it does not in this case.
- [33] The respondents argued that consistent with **Sian Participation**, an application to set aside a statutory demand does not engage the £300 threshold and therefore the appellant has no appeal as of right.
- [34] Furthermore, the respondents submitted that even if the value threshold were met, the proposed appeal does not raise any genuinely disputable or triable issue.
- [35] With regard to substantial dispute and the prescribed minimum, the respondents emphasized that a statutory demand may be set aside under section 157 of the Insolvency Act 2003 only where there is a substantial dispute as to the debt, or where part of the debt is disputed such that, the undisputed portion falls below the statutory minimum of US\$2000.00. The respondents argued that the

²¹ Ibid [116].

appellant/applicant's own offer left an admitted balance of US\$744,000.00, vastly above the prescribed minimum. As the Court of Appeal recorded at paragraphs 70-72 of the statutory demand judgment, there was no evidence before Jack J of any payment or adjustment that could have reduced the debt below the threshold. It would be highly inappropriate for fresh evidence to be adduced at this stage.

[36] With respect to ground 6 of the appellant's proposed grounds of appeal, the respondents submitted that there was no evidential basis for asserting that the transfer of the Evenstar Shares could not be completed because the first respondent failed to accept them. The respondents contended that no such acceptance was required and that the appellant could have unilaterally registered the shares in the first respondent's name. The respondents further relied on the appellant's concession before the Court of Appeal that no transfer of assets had occurred, a concession described as central to the Court of Appeal's conclusion at paragraph 29 of its judgment. Therefore, the respondents submitted, there is no basis to reopen that issue.

[37] The respondents contended that the appellant has not demonstrated how the Privy Council could interfere with the trial judge's factual findings or his exercise of procedural discretion. The respondents relied on the principles articulated by Lord Neuberger in **Re B (A Child)**²² emphasising the 'due deference' owed to a trial judge's assessments. Furthermore, the appellant/applicant has accepted that the Court of Appeal could not interfere with Justice Jack's exercise of procedural discretion unless satisfied that his decision exceeds the general ambit within which reasonable disagreement is possible and may be said to be clearly or blatantly wrong as outlined in **Dufour v Helenair Corporation Ltd.**²³

[38] Therefore, on this basis, the respondents submitted that the proposed statutory demand appeal cannot on any view succeed as there is not a genuinely disputable issue and leave to appeal should be refused.

²² [2013] 1 WLR 1911.

²³ (1996) 52 WIR 188.

- [39] With respect to the Default Judgment appeal, the respondents submitted that the applicant has proposed 3 grounds in support of same, however none of these grounds justifies the grant of leave to appeal to His Majesty in Council.
- [40] The applicant's reliance on the "*or otherwise*" limb in that provision is misplaced. As explained in **Kenneth M. Kryz v Farnum Place LLC**,²⁴ "*or otherwise*" may cover questions where a definitive ruling from the Privy Council would be beneficial or where there is genuine uncertainty as to the correctness of the decision below, matters typically associated with issues of great general or public importance. The respondents submitted that no such issue arises here. The respondents further submitted that there is no procedural discretion permitting the Court to grant leave in respect of questions that do not satisfy the requirements of paragraph 3(2)(a) of the 1967 Order, even if other questions do.
- [41] The respondents further submitted that there is no real risk of inconsistent decisions, even if leave were granted in respect of the statutory demand but refused in relation to the default judgment appeal. The well-established distinction exists between insolvency proceedings and proceedings concerning judgment debt liability, a distinction reaffirmed by the 2024 Privy Council decision in **Sian Participation**. The liquidation process could not continue if the statutory demand were set aside, but the default judgment could stand; conversely, the Privy Council could set aside the default judgment without affecting the statutory demand appeal. In any event, the respondent maintained that leave should not be granted for the statutory demand.
- [42] The respondents then addressed the appellant/applicant's attempt to identify four issues of 'great general or public importance' and submitted that none of these issues meet that threshold. Each issue is said to turn on the specific terms of the notes and therefore raises no general issue of law. It was common ground and

²⁴ BVIHCVAP2013/0014 (delivered 23rd August 2023, unreported).

uncontroversial before the Court of Appeal that the classification of a document as a default notice is a matter of contractual construction. The Court of Appeal's determination accordingly involved a fact-specific construction exercise, not a point of general principle. Ground 5 which the applicant relies upon in this context, merely alleges a misconstruction of the notes not an error of legal principle. Therefore, such a point is case-specific and incapable of giving rise to broader legal ramifications.

[43] The respondents also submitted that the appellant's argument that leave may be granted on the basis that the proposed appeal raises difficult or serious questions of law, does not assist the appellant. The case does not fall within any such category, and the appellant has provided no explanation as to how it does.

[44] For the above reasons, the respondents submitted that the proposed appeal of the default judgment matter discloses no proper basis for the grant of leave.

Issue

[45] The applicants have placed before this Court several grounds to support its application for conditional leave to appeal both the Statutory Demand and Substantive Proceedings. Nevertheless, it appears to me that there are essentially two issues before this Court on those applications.

Firstly: [S. 3(1)(a)] whether the decision of the Court of Appeal of 30th of January 2025 dismissing the applicant's appeal from the judgment of Jack J on the Statutory Demand involves directly or indirectly a claim to or question respecting property or a right of the value of £300 Sterling or upwards amounting to a final decision in any civil proceedings;

Secondly: [S. 3(2)(a)] with respect to the Substantive Proceedings matter, whether any of the issues raised on that matter entitle the appellant to be granted leave because the issues involved in the appeal fall within either of the statutory limbs - (i) 'great general or public importance' or (ii) 'otherwise'.

Discussion and Analysis

- [46] In addressing the applications for conditional leave, I have reviewed the authorities and materials cited on both sides, including the written submissions and the very useful oral submissions made before this Court.
- [47] As aforementioned, the 2024 decision of the Privy Council in **Sian Participation**²⁵ is the latest authoritative decision from the Privy Council on the applicability and true construction of section 3(1)(a) of the 1967 Order.
- [48] For the reasons which follow I consider **Sian Participation** to be authoritative and binding on this Court in the guidance which it gives, specifically in respect of the proper construction and application of the 1967 Order and, generally with respect to the applicable sections of the Insolvency Act 2003 which are at the heart of the leave applications before this very Court. I do not consider that decision to be distinguishable or not applicable for the reasons which the appellant advances.
- [49] In the very first paragraph of their advice, Lords Briggs and Hamblen of the Privy Council were explicit in the significance of the overarching legal principle which concerned the Board:
- ‘This appeal is about the dividing line between two areas of public policy In the British Virgin Islands (“the BVI”), namely insolvency and arbitration. Put in the broadest terms, it is in the public interest that there should be a relatively simple means whereby a company which is insolvent, because it is unable to pay its debts in full as they fall due, should (unless it can be reconstructed) be placed without undue delay into an insolvency process whereby its assets are divided fairly (mainly *pari passu*) between all its creditors. At the same time there is a public policy that those who agree together to resolve their disputes by arbitration should be held to that agreement without interference from the courts.’ (emphasis supplied).
- [50] This opening dictum demonstrates in pellucid terms that the Privy Council understood and accepted the quintessential role and function which fell to it as the

²⁵ [2014] UKPC 16.

apex court of this country to resolve differences, to clarify obscurity and to provide guidance on an issue of principle when the need arises, as opposed to too narrowly resolving the particular inter partes dispute and issue which was before it for decision.

[51] The facts and the procedural history of **Sian Participation** are set out at paragraphs 10 through 25 of the Board's Advice. Briefly, this was a dispute between the parties for a USD \$150 million loan by the respondent to the appellant under a Facility Agreement which contained an arbitration clause. The respondent applied to have liquidators appointed in respect of the appellant, which application was heard by Wallbank J. The judge delivered an oral judgment in which he held that the appellant had failed to show that the debt was disputed on genuine and substantial grounds or that there were other reasons why the liquidation application ought to be stayed or dismissed. He therefore appointed liquidators and ordered the appellant to be put into liquidation. The appellant's appeal from Wallbank J came before the Privy Council, with the Board indicating to the parties that they should address the issue of whether the appellant was entitled to appeal as of right. Four issues arose for determination.

[52] The dividing line between the two areas of public policy which the Board was concerned to address and to reconcile was highlighted in the first and fourth issues. The first issue was, as a matter of BVI law, what is the correct test for the Board to apply in the exercise of its discretion to make an order for the liquidation of a company where the debt is subject to an arbitration agreement. The fourth issue was whether the appeal falls within section 3(1)(a) of the 1967 Order. In particular, does *'the appeal [involve] directly or indirectly a claim to or question respecting property rights or a right of the value of £300 sterling or upwards'*?

[53] In affirming the decision of Wallbank J in its construing and applying the relevant provisions of the BVI Insolvency Act 2003, the Board pronounced²⁶ on four

²⁶ Ibid [32]-[35].

aspects of the nature and effect of the process for the initiation of an insolvency liquidation in the BVI, two of which are particularly relevant and are worth quoting:

“Secondly, the process of seeking and obtaining an order for the appointment of a liquidator ... does not require or involve any pursuit or adjudication of the applicant's claim to be a creditor either as to liability or quantum”;²⁷ and “Fourthly, in sharp contrast with the role of the court (or arbitrator) in proceedings for the enforcement of a debt, the court's powers on the hearing of a liquidation application ... are discretionary. That is not to say that the court's discretion is entirely unfettered. In principle, a petitioning creditor with an unpaid debt which is not genuinely disputed on substantial grounds is often described as being in substance entitled to an order, as a statutory right, ex debito justitiae.”²⁸ (all emphasis supplied).

[54] From paragraph 67 of its Advice, the Board went on to examine the Threshold Question, that is, What is a Disputed Debt? It accepted and endorsed the law applied by the jurisprudence emanating from this jurisdiction on that Threshold Question, where a challenge is brought to disable a creditor from seeking the appointment of a liquidator on the insolvency ground, relying upon nonpayment. The Board cited and endorsed the BVI test settled in **Sparkasse Bregenz Bank AG v Associated Corporation**²⁹ that the debt must be the subject of a genuine dispute on substantial grounds. The **Sparkasse Bregenz Bank AG** test endorsed by the Board is articulated in these terms:

“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 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.”³⁰

[55] The Board went on to refer to the further BVI decision of **Jinpeng Group Limited v Peak Hotels and Resorts Ltd**³¹ expressly approving that decision as the leading authority for the continued adoption of the traditional approach that a

²⁷ Ibid [33].

²⁸ Ibid [35].

²⁹ BVIHCVP2002/0010 (18th June 2003, unreported) [68].

³⁰ Ibid [3] (per Sir Dennis Byron).

³¹ Consolidated Appeals BVIHCP2014/0025 & BVIHCP2015/0003 (delivered 8th December 2015, unreported) [83]–[85].

liquidator should ordinarily be appointed on the application of an unpaid creditor in the absence of a genuine dispute about the debt on substantial grounds.

[56] The Board addressed what it had identified as the Fourth Issue from paragraph 109 *et sequentia*, re-stating the issue: *Does the appeal fall within section 3(1)(a) of the 1967 Order, in particular does the appeal involve directly or indirectly a claim to or question respecting property or right of the value of £300 sterling or upwards.* Their Lordships affirmed that issues arising under section 3(1) of the 1967 Order have commonly been referred to as raising the question of whether *the value threshold* has been met. It further affirmed as being well established that *‘the provisions governing appeals as of right are normally to be strictly construed’*.³² (emphasis supplied). In affirming the decision of Wallbank J, the Board reiterated the point already previously made in its Advice, that *‘the process of seeking and obtaining an order for the appointment of a liquidator ... does not require or involve any pursuit or adjudication of the applicant’s claim to be a creditor, either as to liability or quantum.*³³ (emphasis supplied).

[57] The point of significance which emerges from this analysis in **Sian Corporation** is this: Insofar as the Court of Appeal in the appealed judgment has affirmed the decision of the lower court to refuse to set aside the Statutory Demand, the Court’s Order refusing to set aside the Statutory Demand thereby authorizes the respondent to apply under section 163 of the Insolvency Act to appoint liquidators over the appellant. No more.

[58] The decision in **BEC Limited v A2 & A1**³⁴ relied on by the Applicant does not assist the Applicant to entitle it to an “*as of right*” argument when properly understood. In that case, the Commercial Court refused BEC’s application to set aside a statutory demand issued by certain creditors in respect of a debt owed by BEC and its wholly-owned subsidiary as a result of a costs award in arbitration

³² Sian Participation Corp (In Liquidation) v Halimedia Ltd [2014] UKPC 16 [110].

³³ Ibid [115].

³⁴ BVIHCMAP2022/0044 (delivered 9th September 2022, unreported) [18]-[19] (Webster JA(Ag.)).

proceedings before the London Court of International Arbitration. BEC appealed to the Court of Appeal without seeking leave and in response, the creditors applied to strike out BEC's appeal as being a nullity on the ground that the order was interlocutory and leave was required to appeal it. It was not disputed that if leave was indeed required, BEC's appeal would be liable to be set aside as a nullity.

[59] The creditors argued that an order arising out of an application to set aside a statutory demand is an "intermediary question" in the procedure to wind up the company and therefore interlocutory. In assessing whether the order was final or interlocutory, the Court of Appeal applied the well-known "application test" as set out at rule 62.1(3)(b) of the CPR and explained in **Oliver McDonna v Benjamin Wilson Richardson**:³⁵ an order or judgment is final if it would be determinative of the issues that arise on a claim, whichever way the application could have been decided. The Court of Appeal considered that an application to set aside a statutory demand was not a claim in the true sense as it is not determinative of any rights or obligations of the parties to the claim and does not result in an enforceable order; it is instead *sui generis* (or "of its own kind") and is not governed by the principles relating to orders that are a prerequisite to filing substantive proceedings. It is simply a mechanism by which a creditor can obtain an order as to the company's deemed insolvency based on the unpaid debt in question, and nothing more.

[60] The Court of Appeal also held that although a statutory demand is usually issued with a view to commencing liquidation proceedings, it is not a prerequisite and a creditor can apply to appoint liquidators on any of the alternative grounds of insolvency set out in the BVI Insolvency Act, with or without the aid of an unsatisfied statutory demand. In other words, a creditor can either issue a statutory demand and proceed to winding up proceedings regardless of the outcome of any application to set aside the statutory demand or it can proceed directly to apply to wind up the company and prove its case that the company is

³⁵ ANUHCVP2005/0003 (delivered 29th June 2007, unreported).

insolvent at that stage. Accordingly, a statutory demand and any application to set it aside is a standalone process and not a procedural "intermediary" step in the winding up of a company. The resulting order was therefore final, and not interlocutory.

[61] The Court of Appeal also confirmed that where a ground on an application to set aside a statutory demand has been fully ventilated, the debtor company cannot resurrect the same ground in the subsequent winding up proceedings for the purposes of opposing them on the basis of the issue estoppel principle. Conversely, if a company elects not to apply to set aside a statutory demand, it is not precluded from disputing the debt at the hearing of the winding up application.

[62] I remind myself that the Order of the 1st March, 2022, affirmed by the appealed judgment by the refusal to set aside the Statutory Demand, is “[*The First respondent*] be authorized to make an application for the appointment of a liquidator in respect of [*the appellant*]”.³⁶ At this stage there is not a quantification of the debt and the Value Threshold of section 3(1)(a) does not come into play, that is to say the application for conditional leave to appeal from the refusal of the Court of Appeal order of 25th January 2025 to set aside the Statutory Demand does not *involve directly or indirectly a claim to or question respecting property or right of the value of £300 sterling or upwards*. Therefore, applying **Sian Corporation**, an application to set aside this statutory demand does not affect the applicant’s interest to the extent of at least the £300 Sterling Value Threshold and accordingly, the appellant has no appeal as of right in relation to it.

[63] Equally, I accept the submission of the respondents that, even if the Value Threshold was met, which it clearly was not, on the **Sian Corporation** analysis the proposed appeal does not raise a genuinely disputable triable issue to satisfy the **Sparkasse Bregenz Bank AG** test. Following the Privy Council’s guidance in **Sian Corporation**, section 3(1)(a) must be strictly construed to prevent the “as of

³⁶ Para. 11, *supra*.

right” gateway from being used to delay insolvency processes where no final determination of property has occurred. **Sian Corporation** underscores that at this preliminary stage of the process, where a party is merely seeking leave to appeal the refusal to set aside a statutory demand, the Court is not engaged in a final adjudication of the debt’s quantum. Rather, the Court is merely determining whether a ‘genuine dispute’ exists to prevent the demand from serving as a basis for a future winding-up petition. The actual quantification of the debt is a function of the liquidation process itself, where the liquidator about admit or reject proofs of debt. Consequently, because this application is a *sui generis* procedural step and not a final money judgment, the £300 Sterling threshold is not legally engaged. Furthermore, the Court of Appeal was clear on the evidence which it accepts was before the lower court, including the contractual construction of the Demand Notes, as well as the concessions made by appellant’s counsel in the lower court and the Court of Appeal.

[64] With respect to the Default Judgment matter, that application also has no prospect of succeeding; the application falls to be dismissed, and I so find for the reasons which follow.

[65] The appellant submits firstly that the identical questions which arise on the Statutory Demand appeal also arise on this Default Judgment appeal and, it is therefore desirable that the Privy Council should have before it both appeals at the same time. The question is, rather, whether the Default Judgment appeal falls within either of the limbs.

[66] For all of the reasons which I have already addressed on the Statutory Demand appeal the applicant’s argument takes it no further. This has been addressed and I do not propose to spend more time on it. The only ground for leave pursued in the statutory demand appeal was “as of right”. No other ground was advanced. That application, having failed the arguments based on consolidation do not arise. It

may well have been arguable that if the statutory demand fell away the foundation of the default judgment appeal would be gone as well but that is not the case here.

[67] I am not persuaded by the appellant's arguments that the proposed default judgment appeal raises questions of *great general or public importance* concerning the Demand Notes under consideration in these proceedings. For a relatively recent and useful dissertation of *great general or public importance*, see **Kenneth M. Krys v Farnum Place LLC**.³⁷ The Demand Notes under consideration are, pure and simple matters of contractual construction. The analysis undertaken by the Court of Appeal was fact sensitive and dependent on the terms of the contracts in question. Consistent with the authorities cited on both sides, none of the arguments raised by the appellant approach closely the threshold for satisfying this Court that any question of great general or public importance arises. I therefore dismiss the arguments in that regard.

[68] On this limb I accept the submissions of the respondent that there is no procedural discretion to grant permission for questions that do not meet the requirements of section 3(2)(a) of the 1967 Order if other questions do. This cannot be imported through the term "*otherwise*". The 2023 decision of this Court of **Kenneth M. Krys v Farnum Place LLC**³⁸ has very usefully reviewed the applicability of the respective bases on which an applicant could be permitted conditional leave to appeal to the judicial committee under the 1967 Order, section 3(1)(a), the value threshold or, section 3(2)(a) "*great general or public importance or otherwise*". That decision very comprehensively reviewed a number of the previous decisions emanating from this jurisdiction, none of which assist the appellant.

Stay Application

[69] I turn to the appellant/applicant's Stay application, which was notably confined to the Substantive Proceedings concerning the proposed Default Judgment Appeal,

³⁷ BVIHCVAP2013/0014 (delivered 23rd August 2023, unreported).

³⁸ Ibid.

which I refer to as the 'Default Judgment Stay Application'. The decision to limit the scope of this application in this manner is consistent with the principles established in **BEC Limited v A2 and A1**, which I have addressed earlier in this judgment. In that authority. The Court clarified that because an order of this nature is essentially declaratory in nature and does not create enforceable rights in the traditional sense, it is not capable of being stayed. Although the order authorised the creditors to apply for the appointment of liquidators, the Court viewed this as a mere option to proceed rather than a mandatory directive. Consequently, the Court of Appeal suggests that the appropriate procedural remedy in such circumstances is not a stay of the order itself, but rather an application for an injunction to restrain the creditors from exercising their right to initiate winding-up proceedings.

[70] The applicant seeks this stay relying on Section 7 of the 1967 Order. No evidence is filed in support of this Default Judgement Stay Application. In brief, the argument made by the applicant in its application to the court to grant a stay is to refer to the fact that as as a stay of the default judgment had been granted by the Court of Appeal from the court below, pending the outcome of the appeal before the Court of Appeal, that therefore this same course should be taken with respect to any appeal pending before the Privy Council.

[71] The locus classicus which guides the courts on applications for a stay pending appeal is the well-known authority of **C-Mobile Services Limited v Huawei Technologies Co. Ltd**³⁹ to which I turn. The guidelines are well known as follows:

- (1) The court must take into account all the circumstances of the case;
- (2) A stay is the exception rather than the general rule;
- (3) A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted;
- (4) In exercising its discretion the court applies what is in effect a balance of harm test, in which the likely prejudice to the successful party must be carefully considered;

³⁹ BVIHCMAP2014/0017 (delivered 2nd October 2014, unreported).

- (5) The court should take into account the prospects of the appeal succeeding but only where strong grounds of appeal or a strong likelihood that the appeal will succeed is shown (which will usually enable a stay to be granted).

[72] Addressing the application for this stay therefore through the lens of **C- Mobile Services Limited**, under each heading.

Firstly: All the circumstances of the case. I take into account the fact that there have been three separate applications by the applicant before the courts; two in the lower court and one in the Court of Appeal, all of which have been refused and, the current reality is that the Respondents have in their favour a Statutory Demand under the Insolvency Act and a Default judgment against the applicant. I take into consideration the operation of the Insolvency Act of the British Virgin Islands limited and the applicable jurisprudence, most notably and recently the cases already examined in this judgment. Additionally, I take into account the most recent decision of this court, in which a stay of execution pending appeal was refused. This is the 27th February 2026 Court of Appeal decision of **ICM SPC On behalf of Ancile Special Opportunity and Recovery Fund Segregated Portfolio v Ryan Paul Jarvis and Rachelle Frisby [As Joint Liquidators]**,⁴⁰ which I refer to as “the ICM SPC decision”. Among the several useful points to be taken away from the ICM SPC decision is the ratio no. 3, that liquidators appointed to wind up the company have several options available to them, including pursuing the appeal if it is considered meritorious and beneficial to those concerned. All the circumstances of the case permit me to take into consideration the arguments already exhaustively reviewed in this judgment and to which I have already referred, most notably the cases of **Sian**, **Sparkase** and **BEC**, all already referred to and considered.

Secondly: A stay is the exception rather than the general rule. I have already referred to the dictum from the applicable cases which in my view reinforce this second C-Mobile consideration.

⁴⁰ BVIHCMAP2024/0019 (delivered 27th February 2026, unreported).

Thirdly: A party seeking a stay should provide cogent evidence that the appeal will be stifled or rendered nugatory unless a stay is granted. As observed by Rawlins JA in **Michael Antonio Smith et al v Linton Wheatley et al**,⁴¹ the Party in whose favour the award was made is entitled to the fruits of the award. On this application the applicant has put no evidence far less cogent evidence to make out the application for the stay or that refusing the stay means that the proposed appeal will be rendered nugatory. Additionally, the mere obligation to pay a sum of money does not, of itself, render an appeal nugatory. Furthermore, as the enforcement sought involves the initiation of liquidation proceedings, the reasoning in **BEC Limited v A2 and A1** is instructive. Because the underlying order is declaratory and merely authorised the creditors to apply for the appointment of liquidators without insisting that it be done, a stay of the order itself is procedurally ineffective. The applicant's failure to pursue an injunction to restrain the creditors, rather than a stay of a declaratory order, reinforces the conclusion that the "nugatory" threshold has not been met.

Fourthly: Balance of Harm and Likely Prejudice. In exercising its discretion, the Court must balance the potential for irremediable injustice to the applicant against the right of the respondents to enforce their judgment. As established in **Andrew Popely v Ayton Limited et al**,⁴² the court will not refuse to order security [or grant a stay] on the ground that it would unfairly stifle a valid claim unless it is satisfied that in all the circumstances that it is probable that the claim would be stifled. The burden rests squarely on the applicant to satisfy the court of this probability. In the present case, there is a total absence of evidence to suggest that the balance of harm favours the applicant.

Fifthly: I take into consideration the arguments already made which I have considered and do not consider the applicant has strong grounds on its proposed appeal or a strong likelihood that the proposed appeal will succeed.

⁴¹ BVICA2005/0004 (delivered 25th July 2005, unreported).

⁴² SVGHCV2005/0001 (delivered 8th November 2005, unreported).

- [73] Taking all of the C-Mobile guidelines and considerations into account and, in all of the circumstances, the applicant has made out no case for a stay and I accordingly refuse to grant the same.
- [74] Whilst I was in the process of finalising this judgment, the Deputy Chief Registrar brought to my attention an Application dated 3rd March 2026 and a Certificate of Urgency, filed by the applicant for an Interim Stay, directed to be brought to the attention of the Court of Appeal by the High Court. A perusal of that 3rd March Application reveals that this applicant had sought to move the High Court to stay an application filed by the 1st respondent in the High Court on the 22nd of January 2026 to appoint a liquidator over this applicant.
- [75] Given that this judgment will now shortly be ready for delivery, I consider that the appropriate course should be, and this Court accordingly directs that the High Court should be advised by the Registrar of the status of the imminent issuance of this judgment, so that the applicant's Stay application may properly be referred to the High Court for its consideration.
- [76] I address this by way of postscript since I do not consider that in the circumstances of this judgment which I have now rendered that this further Stay application falls to this Court to address.

Orders

- [77] Accordingly, the two Applications for conditional leave to appeal to the Privy Council and the Stay Application in the Default Judgment Leave Application are refused, with costs to the respondents to be assessed by a judge of the Commercial Court in default of agreement within 21 days of this judgment.

I concur.

Margaret Price Findlay
Chief Justice [Ag.]

I concur.

Vicki Ann Ellis
Justice of Appeal

By the Court

Chief Registrar