

BRITISH VIRGIN ISLANDS HIGH COURT (COMMERCIAL DIVISION)

Tiberius Investments & Capital Limited -v- Viken Securities Inc. Claim No. BVI HC (Com) 57 of 2012

STATUTORY DEMAND - WHETHER BONA FIDE DISPUTE ON SUBSTANTIAL GROUNDS - WHETHER DEBT DUE AND PAYABLE AT DATE OF SERVICE OF STATUTORY DEMAND - WHETHER DEBTOR COMPANY ESTOPPED BY CONVENTION FROM DENYING THAT DEBT DUE AND PAYABLE AT THE DATE OF SERVICE

On 19 June 2012 Tiberius Investments & Capital Limited (the “Applicant”) applied to set aside service on it of a statutory demand made by Viken Securities Inc. (the “Respondent”). On the facts the Court held that there was a substantial dispute as to whether any particular sum of money had become due and payable by the Applicant by the 5 June 2012, the date when the demand was served. The Judge held that based on the material produced it could not be shown that there was a shared assumption that the Applicant had incurred a liability to make a repayment by any particular date at all, such that when the statutory demand was served on 5 June 2012 the Company was already in default.

What is noteworthy about this case is the Judge’s treatment of the Respondent’s argument that the company was estopped by convention from asserting that an effective demand had not been made. The Respondent referred the Judge to the decision in, namely *ING Bank NV -v- Ros Roca SA* [2011] EWCA Civ 353, which stated that the principle of estoppel may apply where parties to a transaction acted on an assumed state of facts and law which would make it unconscionable for a party to repudiate it. The Learned Judge did not consider that a creditor faced with a dispute about whether or not a debt was payable at the date of service of a statutory demand is likely – outside of some exceptional factual circumstances – to be able to show that the dispute is at best fanciful by relying upon nothing more than an estoppel by convention. The Judge found that the insolvency ground for appointing liquidators under the *Insolvency Act* was

intended to operate in reliance on the sort of evidence which would persuade a properly qualified auditor that a debt was due and payable and unpaid, or that a particular company was unable to pay its debts as they fell due. He noted that no competent auditor would sign off a company’s financial statements on the basis of an alleged estoppel by convention and in his judgment, in the absence of exceptional circumstances, the Court should not appoint liquidators under the insolvency ground upon the basis of estoppel by convention.

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