

TERRITORY OF THE VIRGIN ISLANDS

IN THE COURT OF APPEAL

HCVAP 2009/12

On appeal from the Commercial Division

BETWEEN:

TRADE AND COMMERCE BANK  
(THROUGH RICHARD FOGERTY, ITS JOINT OFFICIAL LIQUIDATOR)

Appellant

and

ISLAND POINT PROPERTIES S.A.

First Respondent

and

JACOB UNGAR

Second Respondent

Before:

The Hon. Mr. Hugh A. Rawlins

Chief Justice

The Hon. Mde. Janice George Creque

Justice of Appeal

The Hon. Mr. Davidson Baptiste

Justice of Appeal

Appearances:

Mr. Robert Nader of Forbes Hare for the Appellant

Ms. Claire Robey of Martin Kenney & Co. for the Respondents

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2010: May 21;  
August 13.

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*Civil Appeal – appointment of liquidator, originating application – whether statutory demand was bad – whether court's inherent jurisdiction circumscribed by the Insolvency Act – whether an equitable restitutionary claim could constitute a debt immediately due and payable – whether party has locus standi to appear on the originating application – sections 8(1)(a), 10, 55, 155, 156, and 167(1)(a) of the Insolvency Act No. 5 of 2003. Costs - member's entitlement to costs.*

The appellant (TCB) applied to liquidate the 1<sup>st</sup> respondent company (Island Point) based on an unsatisfied statutory demand. The 2<sup>nd</sup> respondent (Mr. Ungar) filed a Notice of Intention to appear on the hearing of the application on the basis that he was a member of Island point and a putative creditor. Island Point took no part in the proceedings. It was alleged that TCB wrongly transferred funds to the company that owned Island Point (Tarbet) which Tarbet in turn transferred to Island Point. Upon being served with a statutory demand for the debt, Island Point failed to make an application to set aside the statutory demand in time. The debt was not paid, resulting in TCB's application to liquidate Island Point. At the hearing of the application TCB asserted that it had a restitutionary claim against Island Point through Tarbet.

In dismissing the application the learned trial judge reasoned that TCB's statutory demand was bad. He also concluded that on the evidence in support of the application there was no viable cause of action against Island Point. Additionally, he found that Mr. Ungar had no locus to be heard on the application. TCB appealed the decision on numerous grounds, summarily that the learned trial judge erred: (1) in considering the evidence of Mr. Ungar; (2) in failing to apply or give effect to the decision in *Metalloyd Ltd v Burwill Resources Ltd* [BVIHCV 2006/0083] by finding that the court's inherent jurisdiction was not curtailed by s.8 of the Insolvency Act 2003; (3) in construing s.155 of the Act and concluding that an equitable restitutionary claim could not constitute a debt "immediately due and payable" within the meaning of s.55 and/or cannot form the basis of a statutory demand and; (4) in exercising his discretion as to costs so as to deprive TCB of some or all of the costs incurred on the hearing of the originating application. The 1<sup>st</sup> and 2<sup>nd</sup> respondents based their cross appeal on a challenge to the trial judge's findings that Mr. Ungar had no standing to appear at the hearing and his decision not to award Mr. Ungar costs.

**Held:** dismissing the appeal and allowing the cross appeal; with costs to the respondents to be assessed, if not agreed:

1. TCB's complaint that the trial judge wrongly considered evidence by Mr. Ungar is erroneous as the learned trial judge made it plain that he was not entertaining Mr. Ungar's evidence and submissions.
2. In ***Metalloyd*** the trial judge was not asked to consider whether the court had jurisdiction to review or examine a statutory demand. ***Metalloyd*** did not decide that a company's failure to challenge a statutory demand resulted in depriving the court of its inherent jurisdiction to review the statutory demand. If the construction placed on s. 8(1) (a), following ***Metalloyd***, is to the effect that a state of statutory insolvency brought about by a failure to challenge a statutory demand makes it impregnable or wholly unassailable with the inevitable result that winding up must follow, then, such a construction is quite wrong as a matter of law and principle. Such a construction would in effect render otiose the clearly expressed discretion the court is given under s.167 of the Act which preserves the court's inherent jurisdiction. The trial judge, presiding in a court of concurrent jurisdiction with that of his sister's court in ***Metalloyd***, was not bound by the decision.

***Metalloyd Ltd v Burwill Resources Ltd*** [BVIHCV 2006/0083], distinguished.

**Danone Asia PTE Ltd Et.al -v- Golden Dynasty Enterprise Ltd. Et al.** BVI Civ. App. 2/2009, followed.

3. The appellant's reliance on s.10 of the Act and **OPC Managed Rehab Ltd v Accident Compensation Corporation** [2006] 1 NZLR 788 is futile as they lend no assistance to its case. The trial judge was right in concluding that TCB's asserted restitutionary claim against Island Point was not a debt and that accordingly the statutory demand was bad. He was also right to hold that in the circumstances, the consequence of 'statutory insolvency' under s. 8(1) did not arise given the absence of a present obligation on the part of Island Point to repay.

**OPC Managed rehab Ltd v Accident Compensation Corporation** [2006] 1 NZLR 778, distinguished.

4. The learned trial judge was wrong to conclude that Mr. Ungar had no standing as a member to be heard on the originating application and was counter to the well established right of a member to be heard on an application for winding up a company.

**Re Tamarind Club II Limited** [BVIHCV 245/2009, delivered on 1<sup>st</sup> December, 2009, followed.

5. Applying the general principle that cost follows the event, TCB is not entitled to costs. The court is minded to award costs to Island Point on the dismissal of the appeal and to Mr. Ungar, on the cross appeal, not by way of applying any general principle as regards entitlement to costs, or by way of stating any general proposition on the matter, but merely to reflect the assistance rendered by counsel for Island Point and Mr. Ungar, and having regard to the unique circumstances of the case. The court is not minded, however, to trouble the costs order made by the trial judge. In the circumstances costs should be assessed unless agreed within 21 days.

**Re Times Life Assurance and Guarantee Company (1870)** L.R.5 Ch. App. 381, considered.

## JUDGMENT

- [1] **GEORGE-CREQUE, J.A.:** This appeal arose from the decision of the trial judge of the Commercial Division whereby he dismissed the appellant's ("TCB") originating application for the appointment of liquidators in respect of the 1<sup>st</sup> respondent ("Island Point"). The originating application was brought pursuant to s.

162(a) of the **Insolvency Act**<sup>1</sup> ("the Act") of the Virgin Islands, grounded on what was said to be an unsatisfied statutory demand, no timely application having been made to set it aside pursuant to s.156 of the Act. The learned judge, in essence, concluded that TCB's statutory demand was bad and further found that the evidence adduced in support of the application did not in any event disclose any viable cause of action, whether in debt or otherwise, against Island Point. Accordingly, he exercised his discretion and dismissed TCB's originating application. He also made no order as to costs.

- [2] TCB's appeal against the dismissal of its application was heard by the court on 21<sup>st</sup> May, 2010 and was dismissed with reasons to be given later. Island Point and the 2<sup>nd</sup> respondent ("Mr. Ungar") also cross- appealed and the decision of the court was reserved. This judgment now sets out the reasons for the dismissal of TCB's appeal and addresses the issues raised by Island Point and Mr. Ungar in their cross - appeal.

### **The Background**

- [3] A background summary is necessary for placing the matter into context:
- (a) On 29<sup>th</sup> August, 2002, liquidators were appointed in respect of TCB, a bank registered in and operating out of the Cayman Islands.
  - (b) Island Point is a company registered in the Virgin Islands but is said to be part of a group of companies called the Velox Group said to be operating in Latin America. Island Point is also said to be wholly owned by and is the sole asset of Tarbet Trading S.A. ("Tarbet"), a Uruguayan company.
  - (c) In the course of liquidation, records of TCB were retrieved and reviewed. These records showed a debt of US\$5,650,030.10 as being owed by

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<sup>1</sup> No.5 of 2003, 2003 Acts and Statutory Instruments and Imperial legislation of the Virgin Islands

Tarbet to TCB. Tarbet's balance sheet as at February, 2001 showed TCB as a creditor of Tarbet in the sum of \$5,683,596. Tarbet's balance sheet showed an entity called 'Island Point' as being a debtor of Tarbet in a sum in excess of a million dollars.

- (d) Island Point is said to hold land in Brazil apparently acquired for in excess of \$4million.
- (e) From this information it was concluded or so the argument goes, that TCB had gratuitously and wrongly transferred those funds to Tarbet and that Tarbet had in turn transferred those funds to Island Point. On this basis, it was argued that TCB had a restitutionary claim as against Tarbet and similarly, via Tarbet, a restitutionary claim against Island Point.
- (f) On 5<sup>th</sup> February 2008, TCB served what was said to be a statutory demand on Island Point for a debt of 5 million plus dollars said to be owing by Island Point to TCB by way of equitable restitution.
- (g) Under the Act as amended, Island Point is allowed 14 days from the date of service within which to apply to set aside the statutory demand.<sup>2</sup> That period expired before Island Point made its application on 28<sup>th</sup> March, 2008.
- (h) The Act expressly states that the court may not extend time for making or for service of an application to set aside a statutory demand. [See s. 156(3)].
- (i) Island Point in any event, on 11<sup>th</sup> April, 2008, discontinued its application to set aside the statutory demand. The debt asserted by TCB was not paid.

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<sup>2</sup> See: The Insolvency Act 2003 as amended, s. 156.

- (j) On 28<sup>th</sup> August, 2008, TCB applied to liquidate Island Point based on its unsatisfied statutory demand and served its application on Island Point on 12<sup>th</sup> September, 2008.
- (k) Mr. Ungar filed a Notice of Intention to Appear on the hearing of TCB's application grounding his standing in the matter as a putative creditor and as a member of Island Point.

#### **TCB's grounds of appeal**

[4] TCB contends that the learned judge erred in several respects the essence of which, as set out in TCB's submissions, are as follows:

- (a) Proceeding to consider evidence as to the identity of the registered owners of Island Point and in concluding that Mr. Ungar was a member of Island Point;
- (b) Having regard to the evidence and submissions adduced and made on behalf of Mr. Ungar and/or reviewing any evidence other than that referred to in the statutory demand and/or making factual determinations in respect of the 'underlying validity' of TCB's claim against Island Point;
- (c) Failing to distinguish and/or failing to follow and/or properly apply and /or give effect to the material aspects of the judgment of the Honourable Hariprashad - Charles J. in **Metalloyd Ltd. -v- Burwill Resources Ltd.** [BVIHCV 2006/0083] ("**Metalloyd**")
- (d) Rejecting the construction and effect of ss. 8(1)(a) and 167(1)(a) of the Act advanced by TCB;

- (e) Finding as he did [paras.13-14] that Island Point's failure to set aside the statutory demand did not deprive the Court of its "inherent jurisdiction ... to see that its processes are not abused" and / or failing to find that the failure of Island Point to set aside the statutory demand at least fettered or reduced the scope of any such inherent jurisdiction in relation to the review of the statutory demand in the manner described at paragraphs 49 - 51 of **Metalloyd**;
- (f) Finding as he did [para.16] that the purported inherent jurisdiction of the court was not in any way circumscribed by s.8 (1)(a) of the Act;
- (g) Finding and /or indicating, [para. 17] that in spite of its having failed to set aside the statutory demand within the statutory time limit or at all, Island Point would nevertheless have been entitled to appear and oppose TCB's originating application;
- (h) In light of the foregoing, finding [para. 18] that it was open to him to review the debt alleged to be due from Island Point to TCB and, indeed, to do so irrespective of whether or not the originating application was opposed;
- (i) In construing s.155 of the Act, [para. 19] and concluding that an equitable restitutionary claim could not constitute a debt "immediately due and payable" within the meaning of s. 55 and/or cannot form the basis of a statutory demand; and
- (j) Exercising his discretion as to costs so as to deprive TCB of some or all of the costs incurred on the hearing of the originating application.

### Island Point's and Mr. Ungar's cross appeal

- [5] Island Point and Mr. Ungar challenge the judge's finding, in particular at paragraphs [5] and [6] of the judgment, that Mr. Ungar had no standing in his capacity as sole registered member of Island Point to appear on the originating application, make submissions and present evidence. They also challenge the decision not to award costs to Mr. Ungar. It must be remembered however, that Island Point, (apparently because of **Metalloyd**), took no part in the proceedings below.
- [6] I propose to deal with the challenges as set out in the appeal as far as possible seriatim and in so doing incorporate, where relevant, the challenges raised in the cross - appeal.

### Evidence of shareholding in Island Point - Mr. Ungar's standing as a member

- [7] The learned judge at paragraph 4 of his judgment, whilst commenting on the conflict of evidence placed before him (on the part of Mr. Ungar to show that he was the sole beneficial owner of Island Point and on the part of TCB to show that Mr. Ungar was not) and the fact that the hearing of the originating application was not the proper forum for the resolution of the issue of ownership, opined as follows:
- " ..... For present purposes it is sufficient ... that Mr. Ungar has produced evidence that he is presently the sole registered shareholder of the company [Island Point]. He is thus entitled to the benefit of the presumption in section 42(1) of the Business Companies Act 2004 which, for the reasons I have just given, I am not prepared to go behind on this application."
- [8] The learned judge then went on at paragraphs 5 and 6 to state as follows:
- "[5] Mr. Ungar therefore satisfies me, for present purposes, that he is a member of the Company. But Ms. Troy says, and I agree with her, that in the absence of any other explanation, the failure of the Company to contest these proceedings, while leaving its sole owner to oppose it in his character as a member, is nothing more than a forensic conjuring trick designed to avoid a perceived effect of the decision of Hariprahshad –Charles J in ... **Metalloyd**

and that Mr. Ungar has no standing as a mere member to challenge the validity of the demand or dispute the alleged debt.

[6] In those circumstances I expressed reservations, at the onset of the hearing, as to whether I should listen to submissions from Mr. Ungar at all. Given the stage the proceedings had reached and given that she had already appeared in the case at an earlier stage, I decided I would hear Ms. Robey de bene esse and I have been assisted by her submissions. It remains the case, however, that the application was never opposed by the Company and that is a fact that I have to keep in mind in deciding it. Mr. Ungar has never had locus in his character as a member to apply to set aside the demand, because he was not the person served with it [see: section 156(1) of the Act]. Similarly, I very much doubt whether the court should entertain submissions from a member about the truth of a person's claim to be a creditor of a company or about any dispute that the company might have had about creditor's debt. That seems to me to be something for the company and its directors (and, perhaps, for other creditors), but not a matter on which members should ordinarily be entitled to be heard separately in their character as such. The approach of Lord Justice Giffard in *re Times Life Assurance and Guarantee Company* [(1870) LR 5Ch App 381] seems to me to cover the point and to be correct in principle."<sup>3</sup>

[9] TCB contends that the learned judge was right in concluding at [para. 4 of his judgment] that it would be wrong to decide the issue of beneficial ownership of Island Point but was wrong and inconsistent to go on to say [para. 5 of his judgment] that Mr. Ungar had satisfied him for present purposes that he is a member of the company. Island Point and Mr. Ungar, on the other hand, contend that the learned judge was correct. I agree. The learned judge had before him a Notice of Intention to Appear by Mr. Ungar stated to be in his capacity as a member and a creditor. The learned judge perforce would have been required to consider Mr. Ungar's status, at least on a prima facie basis, so as to decide whether he was entitled to be heard on the hearing of the originating application, particularly having regard to the fact that Mr. Ungar's status as a member was under serious challenge by TCB. It is trite law (and the Act has not changed this),

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<sup>3</sup> Lord Justice Giffard *re Time Life Assurance* ( at p. 396) expressed the view, in refusing to give costs to shareholders , that the company are the proper parties to resist an application for a winding up order, and that the appearance of shareholders is unnecessary.

that persons who are capable of being parties to the originating application have a right to be heard. Indeed, s.162 of the Act says, in effect, and among other things, that a member of a company may apply to appoint a liquidator.<sup>4</sup> The tenor of s. 166 of the Act is along the same lines in terms of who may be substituted as a party in various circumstances. Further, the advertisement requirement [see. s. 165] has as one of its objectives, informing those persons such as members and creditors who may wish to be heard on the application. S. 165(2) goes so far as to give to the court a discretion to dismiss the originating application for failure to advertise. The learned judge went no further, in my view quite rightly, than to satisfy himself, prima facie, of Mr. Ungar's status by according him the benefit of the presumption in section 42(1) of the Business Companies Act in respect of entries noted on a Register of Members of a company. I find nothing wrong or inconsistent with the learned judge's approach. Accordingly, this complaint is without merit.

[10] Mr. Ungar however, takes issue with the learned judge's statements in paragraphs 5 and 6 as to his lack of standing. He says, in essence, that the learned judge concluded that he did not have standing as a contributory to be heard. He goes on to say that this is surprising, particularly having regard to the learned judge's more recent decision in **Re Tamarind Club II Limited**<sup>5</sup>, a case in which the company failed to challenge the statutory demand and did not appear on the originating application but where the judge gave leave to a shareholder of the company to be heard on the originating application to wind up. At paragraph [21] of the judgment in **Re Tamarind Club II Limited** the learned judge had this to say:

".... Ms Clayton certainly has locus as a member to appear on the application and the same applies to Mr. Lettsome and Ms. Wright."

In that case the judge, after considering the evidence given and submissions made on behalf of the shareholder, concluded that there was a substantial dispute as to whether a debt was owed to the applicant and dismissed the application

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<sup>4</sup> See also **Derek French** 2<sup>nd</sup> Ed. – Applications To Wind Up Companies para. 4.2.1

<sup>5</sup>[BVIHCV –245/2009] decision delivered on 1<sup>st</sup> December, 2009.

notwithstanding that the company had failed to make an application to set aside the statutory demand.

[11] In my view, the opinion expressed by the learned judge in para. 21 of **Re Tamarind Club II Limited** is a correct application of the law. The learned judge's statement in para. 6 of his judgment in the instant case to the effect that "Mr. Ungar has never had locus in his character as a member to apply to set aside the demand, because he was not the person served with it [see: section 156(1) of the Act]" is also, in my view, strictly speaking, correct. To the extent that the learned judge's statements in paragraphs 5 and 6 of his judgment to the effect that "Mr. Ungar has no standing as a mere member to challenge the validity of the demand or dispute the alleged debt" and as to whether, in effect, submissions from Mr. Ungar should be entertained at all, or, as stated in paragraph 17 that "Mr. Ungar has no standing to oppose the originating application" may be construed (and I think it must) as not according Mr. Ungar a right to be heard as a member on the hearing of the originating application would not be correct and would, in my view, be at odds with the opinion expressed in **Re Tamarind Club II Limited** (which was right) and counter to the well established right of a member to be heard on an application for winding up a company. How much weight is to be given to a member's views is another matter, which need not be addressed for the purposes this appeal, but the right to be heard remains alive and well as was clearly recognised and applied by the learned judge in his subsequent decision in **Re Tamarind Club II Limited**.

[12] Derek French, in his treatise on **Applications To Wind Up Companies**<sup>6</sup> puts it this way:

"A winding up order is a collective remedy and the order operates in favour of all creditors and contributories each of whom can appear at the hearing of the petition to support or **oppose** (my emphasis) it .... The advertisement serves to invite creditors and contributories to appear on the hearing and submit their views to the court: the advertisement is a substitute for, and renders unnecessary, service of the petition on them."

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<sup>6</sup> 2<sup>nd</sup> Ed. Para. 3.4.1.1

This principle, to my mind, is a sound one and accords with the basic and fundamental principles of natural justice. There is nothing in the Act which may be read as taking away or circumscribing this right. In fact, the Act may be said, given the provisions contained in ss. 165 and 166, to embrace it.

#### **Regard for the evidence and submissions of Mr. Ungar**

- [13] This ground of challenge can only be taken to be erroneous as the learned trial judge made it plain that he was not entertaining Mr. Ungar's evidence and submissions. Indeed, it is with this approach that Mr. Ungar takes issue on his cross appeal. This has already been addressed above and nothing further need be said on this point.

#### **Determining the underlying validity of TCB's claim against Island Point / the court's inherent jurisdiction / the scope of the court's discretion / the decision in Metalloyd**

- [14] Grounds c, d, e, f, g and h and the **Metalloyd** decision may conveniently be addressed together since they raise inter-connected issues as to the scope of the court's discretion, its inherent jurisdiction and the construction to be placed on ss. 8(1) (a) and 167 of the Act. A convenient starting point at which to address these issues, in my view, is with a consideration of the **Metalloyd** decision on which TCB heavily relies. Further, **Metalloyd** is said to be the basis on which Island Point apparently, felt constrained not to appear and oppose the originating application.
- [15] The facts of **Metalloyd** may be summarised as follows: Metalloyd, the Applicant, claimed from a company called Burwill Resources Limited ("Burwill") a sum of money as the balance said to be due and owing under an agreement. Metalloyd served a statutory demand on Burwill in respect of that sum. Burwill did not apply to set aside the statutory demand within the 14 day period allowed under the Act. At the hearing of the application for appointment of liquidators Burwill sought to dispute the debt. Metalloyd argued that Burwill, having failed to set aside the

statutory demand within the time frame allowed under the Act, was now too late in seeking to dispute the debt. The Trial judge, Hariprashad-Charles J., agreed. She also found however, that Burwill was indebted to Metalloyd.

[16] Hariprashad-Charles J., after quoting various sections of the Act, in particular s. 8(1), and considering the arguments advanced by both sides had this to say at paragraph [25] of her judgment:

“Both sections 162 and 167 use the word ‘may’ which connotes that the court has a discretion in the appointment of a liquidator. But, the discretion cannot be exercised in such a way as to undermine the statutory provisions relating to the determination of insolvency. It seems to me that section 8(1) is strict: a company is insolvent if it fails to comply with the requirements of the statutory demand that has not been set aside under section 157. Failure to comply with the statutory demand does not, in my opinion, raise the presumption of insolvency. If that were the case, the Act would have clearly said that ‘a company is presumed to be insolvent if it fails to comply with the requirements of the statutory demand that has not been set aside under section 157’. ....”

At para. [26], she continued as follows:

“In my judgment, section 8(1) is explicit: a company is insolvent if it fails to comply with the requirements of a statutory demand that has not been set aside under section 157. It therefore follows that Burwill is insolvent.”

[17] Hariprashad-Charles J., then went on to consider whether the court is precluded at the hearing of the application to appoint a liquidator from considering matters which could have been raised in the application to set aside a statutory demand. She referred to two cases from Australia: **David Grant & Co. Pty Ltd -v- Westpac Banking Corp**<sup>7</sup> [(1995) 184 CLR 265], a high court decision and **Braams Group Pty Limited -v- Miric** ([ 2002] NSWCA 417), a decision of the New South Wales Court of Appeal. These cases involved a consideration of s. 459 of the Corporations Law of that country which also has a legislative regime for the service of a statutory demand and a time period for setting it aside. I hasten to point out however, that the provisions of the Corporations Law are not on all

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<sup>7</sup> The power of the court to check abuse of its process did not arise for consideration in this case in connection with s495S of the Corporations Law. See: the case of **Braams** pg. 249

fours with the provisions of the Act. Hariprashad–Charles J., recited s.459G of the Australian Corporations Law. At paragraph [48] in relation to the **Braams** case she stated as follows:

“Because of its failure to contest the statutory demand within the prescribed time period, Braams was required to show its solvency. This decision demonstrates the court’s view on statutory demands: that a company must seek to set aside the demand within the time limit, as it cannot later bring evidence in support of its application that could have been adduced to set aside the demand. (Emphasis added)”

[18] She then concluded at paragraphs [49], [50] and [51] thus:

“[49] In my opinion the scheme of these provisions under the present Act, plainly is to ensure that if a debtor wishes to dispute the debt, ..., he should do so by an application to set aside the statutory demand; ... If he fails to avail himself of that opportunity, then he cannot later bring evidence in support of its application that could have been adduced to set aside the demand.

[50] As Mr. Evans rightly suggested, the discretion under sections 162 and 167 must be exercised in such a way so as not to undermine section 156. The discretion is not at large. If the Court could deal with the issue of disputed debt at the hearing of the appointment of a liquidator, then what is the purpose of section 156? Surely, the legislature could not have intended that debtors would choose at what stage they dispute a debt: whether 14 days after the statutory demand has been served or at the hearing of the application for the appointment of liquidator. If that is the case, then there would be no inducement for a debtor company to challenge a statutory demand if, instead, it could simply raise the same argument when the application to appoint a liquidator came on for hearing.

[51] It follows that the matters which Burwill raise, simply cannot be raised at this juncture as a defence to the application. If it wishes to rely upon such matters, it ought to have applied to set aside the statutory demand. It failed to do so and it is very late in the day to do so now.”

[19] It is clear that the statement in paragraph 51 of the judgment of Hariprashad–Charles J., is a principle extracted from the Australian case of **Braams**. However, a full reading of the judgment of the New South Wales Court of Appeal discloses that this principle as applied in **Braams** flows from an express provision in the

**Corporations Law** namely s. 459S set out in paragraph 29 of the judgment of the court. That provision states:

- “(1) In so far as an application for a company to be wound up in insolvency relies on a failure by the company to comply with a statutory demand, the company may not, without the leave of the court, oppose the application on a ground:
  - (a) That the company relied on for the purposes of an application by it for the demand to be set aside; or
  - (b) That the company could have so relied on but did not so rely on (whether it made such application or not).
- (2) The court is not to grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent.”

[20] There is no similar or corresponding provision in the Act and I would be loath to import wholesale such a principle into the Insolvency legislative scheme and law of the Virgin Islands having regard to the very nature of International Business Companies which to all intents and purposes are ‘offshore’ with the only presence in the Virgin Islands being a registered office and registered agent and a mere 14 - day time line within which someone at the registered office in the Virgin Islands may bring the statutory demand to the attention of a director perhaps on the other side of the world, who then has to find and instruct solicitors in the Virgin Islands to make an application to set it aside. But even so, it does not appear that s. 495S was brought to the attention of Hariprashad -Charles J. Had this been done, I have no doubt that it would have been appreciated that even in Australia the position is not in the strict terms as set out in paragraphs 49 and 51 of **Metalloyd**. As can be appreciated from s. 495S as recited above, a safety mechanism has been built into the legislation. It provides an avenue to the court where, in proper circumstances, even the argument which may have been run at the setting aside stage of a demand may be re-run at the winding-up stage, once the company successfully rebuts the presumption of insolvency. This approach shows the clear undesirability of seeking to wind up a successful company despite strict provisions.

I do not consider that the objectives of the Insolvency Laws of the Virgin Islands are any different to those of Australia. Were it otherwise, I dare say it would strike me as being detrimental to an offshore financial centre such as the Virgin Islands.

[21] Lest I be misunderstood, I hasten to make clear that I am in total agreement with the proposition that where a company has been unsuccessful in setting aside a statutory demand having made a timely application to do so, the company may not seek to resist the application for appointment of a liquidator on the same grounds relied on for setting aside the demand, **absent good and substantial reasons**. This simply accords with the well settled principles of estoppel.

[22] However, if TCB was to have its way, based on its urging of the construction to be placed on s. 8(1)(a) following and giving effect, it says, to the decision in **Metalloyd**, a perfectly healthy and profitable company actively engaged in its business could find itself being killed off on a wholly fallacious or contrived basis and being wholly deprived of the ability to defend itself from the attack merely because, due to no fault of its own, it missed the deadline for setting aside an utterly bad demand. TCB contends that s. 8(1)(a) of the Act should be construed as per the construction placed thereon in **Metalloyd** and that this precludes the judge from reviewing the debt alleged by TCB and assessing the validity of the statutory demand. This effect, it says, is the plain intention of the statute. TCB also says that the approach of the BVI courts is, in essence, to read down the discretions expressly conferred on the court by s.167 of the Act so as not to undermine the plain meaning of s. 8(1)(a) of the Act.

[23] In my view, such an approach would be disastrous, and simply cannot be right for several reasons:

Firstly, it strikes me as cutting a deep inroad into the very basic and fundamental principles of natural justice. Secondly, it would mean that no matter how bad or defective a statutory demand, once it has not been set aside, the court must perforce proceed to appoint a liquidator, as the company "is insolvent," albeit on

a wholly erroneous or legally flawed basis, under s. 8(1)(a). In short, such a construction of s. 8(1)(a) would mean, in effect, that a bad statutory demand is 'converted' by mere failure to set it aside, into a good one. Locus standi would be established, not on the merits of the claim, but merely by failure to set aside the bad demand. The application stage would be reduced to a mere formality quite contrary, in my view, to the intention behind section 167. This, is unsound both as a matter of law and principle. Thirdly, and of utmost importance as I see it, is that this would amount to a complete emasculatation of the discretion contained in s. 167 of the Act; in particular, s. 167(1)(b) and indeed an emasculatation of the court's inherent jurisdiction which is clearly recognized by s.167(1)(b). This subsection gives the court power to dismiss the application even if a ground on which the court could appoint a liquidator has been proved. It is trite law that fetters or restrictions on the court's inherent jurisdiction can only be brought about by statute in clear and unequivocal language.<sup>8</sup>

[24] It seems to me that the mischief behind s.156 which sets the time line for setting aside a statutory demand must be the desirability of reducing the occasions when disputes would arise about the debt at the hearing of the originating application by providing for the speedy resolution of disputes involving statutory demands in such a way that at the winding-up stage, the proceedings do not become protracted in resolving disputes on the statutory demand. It serves to defeat or minimize spurious attempts to delay payment of just debts, and to my mind, that is the key: the prompt payment of 'just debts' and not some other claim passing off as a debt which does not amount to a debt at all.

[25] Whilst recognizing, on the one hand, that strict provisions are desirable for achieving speedy resolutions on any dispute involving a statutory demand, it is also recognized that such provisions are invariably susceptible to abuse and accordingly there is always the countervailing requirement, on the other hand, for a safety mechanism which safeguards against abuse and ensures that a statutory

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<sup>8</sup> See: *Danone Asia PTE Ltd Et.al –v- Golden Dynasty Enterprise Ltd. Et al.* BVI Civ. App. 2/2009.

demand is properly grounded in a just debt. It is in this regard that I consider that the discretions expressly given in ss. 162 and 167 of the Act are critical in providing the countervailing balance in the application of the strict provisions. I can see no justification for the reading down of the power of the court under s. 167 so as to give effect to s. 8(1)(a). In my view, there is no conflict between the provisions. As is now well established, "When it is clearly established that there is no debt ... there is no creditor ... the person claiming to be such has no locus standi and his application is bound to fail".<sup>9</sup>

[26] It is worthwhile to note that in **Metalloyd** the trial judge was not asked to consider whether the court had jurisdiction to review or examine a statutory demand. I agree with counsel for Island Point and Mr. Ungar that **Metalloyd** did not decide that a company's failure to challenge a statutory demand resulted in depriving the court of its jurisdiction to review the statutory demand. If however, the construction placed on s. 8(1)(a) in **Metalloyd** is to the effect that a state of 'statutory insolvency' brought about by a failure to challenge a statutory demand makes it impregnable or wholly unassailable with the inevitable result that winding up must follow, then, in my view, such a construction is quite wrong as a matter of law and principle. Such a construction would, in effect, render otiose the clearly expressed discretion of the court given under s. 167 of the Act, with potentially, the undesirable consequences alluded to above.

[27] What **Metalloyd** seems to have categorically decided is that where a company served with a statutory demand fails to apply timeously to set it aside then the company cannot later adduce evidence or arguments which it could have adduced or deployed in opposing the originating application. As I alluded to earlier, I am not inclined to agree with this statement as being correct in principle without qualification.<sup>10</sup>

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<sup>9</sup> See: Mann -v- Goldstein [1968] 2 All ER 769

<sup>10</sup> See para. 21 above

- [28] It is useful to note that s.156 of the Act does not go on to say, as does the **Australian Corporations Law**, that where a company fails to challenge a statutory demand, then the company cannot later bring evidence in support of its application that could have been adduced to set aside the demand. Further, it does not say that the company is thereby precluded from being heard and from opposing the originating application. In my view, the failure to set aside is left to be weighed by the court at the originating application stage when the court is exercising its discretionary powers. Obviously, a company which has failed to challenge a statutory demand, in seeking to oppose the appointment of a liquidator will be saddled with the burden at that stage of establishing its solvency by way of countering its state of 'statutory insolvency' under s. 8(1)(a) brought about by such failure.
- [29] Section 8(1) of the Act, in my view, does no more than set out the circumstances under which a company is considered to be insolvent. It does not go on to say that the appointment of a liquidator **must** follow as a consequence. In short, it contains no language which may be interpreted as limiting or removing the court's inherent jurisdiction. Further, s. 167 of the Act does not contain any language which may be construed as limiting the court's discretionary powers expressly granted thereunder, or which in any way subjugates that discretion so as to accord force to either s. 8(1)(a) or s.156. As I have sought to show above, each of these provisions independently serve their own purposes under the Insolvency scheme and are quite capable of being applied harmoniously without the necessity for reading down or up any particular provision in favour of the other. There is no inconsistency.
- [30] It is also of note that under s.157 of the Act, the court on hearing a set-aside application is empowered to set aside a demand if it is satisfied that substantial injustice would otherwise be caused :

- “(a) Because of a defect in the demand, including a failure to comply with section 155(3)<sup>11</sup>; or
- (b) For some other reason.”

Assuming that no set-aside application was made, can it be seriously argued that the court thereafter lost its power and is precluded from a review or examination of the statutory demand at the hearing of the originating application for the appointment of a liquidator and proceed to appoint a liquidator based on a bad demand? I think not. In my view, it is to address such circumstances that the court's inherent power was expressly reserved by section 167(2).

#### **Conclusion on findings of court below**

[31] From all I have said above, it would be apparent, that I consider that the learned judge was quite correct in holding that:

- (1) The court has an inherent jurisdiction and indeed an obligation to see that its processes are not abused [para. 13];
- (2) The effect of a company's failure to set aside a statutory demand is not to deprive the court of its inherent jurisdiction [para.14];
- (3) The inherent jurisdiction of the court is not circumscribed by section 8(1)(a) of the Act and in rejecting the construction and effect of ss. 8(1)(a) and 167(1)(a) of the Act as advanced by TCB [para. 16];
- (4) In spite of having failed to set aside the statutory demand that Island Point was nevertheless entitled to appear and oppose the originating application albeit obiter [para. 17];

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<sup>11</sup> Section 155 (3) deals with a demand made by a secured creditor.

(5) The court was empowered to review the statutory demand and the alleged debt irrespective of whether or not the originating application was opposed [para. 18].

[32] As for the complaint of failing to follow and/or apply or give effect to the decision in **Metalloyd**, I say this: Whilst it is highly desirable to ensure consistency in decisions where similar legal principles are considered it must also be borne in mind that each case would invariably turn on its peculiar facts. Further, it should also be borne in mind, that the **Metalloyd** decision is one of a court with concurrent jurisdiction as that of the trial judge in this case, and as such the decision is not binding on him. It will no doubt be recalled that the trial judge in **Metalloyd** chose, as she was free to do, not to follow the decisions in **Haldanes -v- China North Industries Investment Management Ltd and Haldanes -v- TL Management Ltd**.<sup>12</sup> being prior decisions of another court but of concurrent jurisdiction.

**Whether the statutory demand was in respect of a debt / the underlying validity of TCB's claim against Island Point**

[33] The Learned trial judge, having reviewed TCB's statutory demand and its evidence in support based upon an asserted equitable restitutionary claim against Island Point, and having considered s. 155 of the Act as to what amounts to a statutory demand which must be in respect of a debt **that is due and payable at the time of the demand**, as well as s. 10 of the Act in which the word 'liability' is defined, concluded [para. 22] that TCB neither had nor asserted a claim in debt against Island Point and accordingly TCB's statutory demand was bad and therefore, Island Point could not be said to have failed to comply with it. As such, a s. 8(1)(a) insolvency had not occurred.

[34] TCB, whilst accepting that its claim was an equitable restitutionary claim against Island Point, says that the judge was wrong in holding that such a claim did not

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<sup>12</sup> BVIHCV 2006/0022 and 0023 judgments of Joseph –Olivetti J delivered 10<sup>th</sup> April, 2006

amount to a debt. Much reliance was placed on the definition of the word “liability” as defined in s.10 of the Act. In my view s.10 offers no assistance to TCB. This section, in essence, includes among the categories of things amounting to a ‘liability’ ‘a liability arising out of an obligation to make restitution,’ and says further that “liability” includes a debt”. This makes it clear that whilst a debt is also “a liability”, it is equally clear, in my view, that not all “liabilities” are “debts”. I consider this sufficient to dispose of this point.

- [35] TCB also places reliance on the case of **OPC Managed Rehab Ltd. -v- Accident Compensation Corporation**<sup>13</sup>. I agree with counsel for Island Point and Mr. Ungar, that this case does not support TCB. It is not authority for the proposition that an equitable restitutionary claim amounts to a debt. It makes clear that a present obligation to repay must arise out of a contractual relationship or under some statutory provision or out of circumstances giving rise to an obligation to repay on the basis of money had and received, in order to be treated as a debt. Having reviewed the statutory demand and the evidence in support of it, this is not the case here. No contractual relationship can be discerned as between TCB and Island Point, either on the statutory demand or the evidence in support of it, much of which can only be classified as conjecture and speculation. The trial judge was right in concluding that TCB’s asserted restitutionary claim against Island Point was not a debt and that accordingly the statutory demand was bad. He was also right to hold that in the circumstances, the consequence of ‘statutory insolvency’ under s. 8(1) did not arise given the absence of a present obligation on the part of Island Point to repay. The equitable restitutionary claim advanced by TCB is, in my view, no more than a claim which, if eventually proven, may at that stage crystallize into a debt.

- [36] TCB also complained that it was wrong of the trial judge to make factual determinations in respect of the underlying validity of TCB’s claim against Island Point. Much was not made of this however, and perhaps for good reason given

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<sup>13</sup> [2006] 1 NZLR 778

the fact that it was at TCB's invitation to so do in the event it was found as being capable of supporting TCB's application. [para. 23] I do not consider, therefore, that anything further need be added in this regard save for stating by way of completeness that the judge's conclusion, in finding that no viable cause of action had been made out (whether in debt or otherwise) was correct.

### Conclusion

- [37] For the foregoing reasons, I would dismiss TCB's appeal. On Island Point's and Mr. Ungar's counter-notice I would allow the challenge to the trial judge's decision in respect of Mr. Ungar's locus standi on the hearing of the originating application.

### Costs

- [38] The last issue remaining is that of costs. TCB says that it should have been awarded its costs below at least on the basis of Mr. Ungar's lack of standing to oppose the originating application and having to respond to the voluminous evidence and submissions put in by Mr. Ungar. Having concluded that Mr. Ungar did have standing as a member to appear and oppose the originating application, applying the general principle that costs follows the event, I do not consider that TCB is entitled to costs. There is no good reason for ordering otherwise. The peculiar circumstances of this case, where the company felt constrained not to appear based on the decision in **Mettalloyd**, reinforces my view in this regard.

- [39] For Mr. Ungar, counsel says, in essence, that if it is found that Mr. Ungar had locus ( and I have so found) then as an opposing contributory on an unsuccessful originating application he is entitled to costs and relies on the statement set out in **French's Treatise** Para. 4.6.5.2 which says in part that:

"Creditors who appear to oppose an unsuccessful petition may be given one set of costs between them from the petitioner and so may opposing contributories, if their interest are distinct from the company's." It goes on further to say, in reliance on the case of **re Times Life Assurance and**

**Guarantee Company (“re Times Life Assurance”)**<sup>14</sup>, that “a contributory whose interests are not distinct from the company’s will not be awarded costs.”

TCB relies on **re Times Life Assurance** in opposing Mr. Ungar’s claim for costs. In **re Times Life Assurance**, Lord Justice Giffard had this to say: “It is my invariable rule not to give costs to shareholders in such a case. The company is the proper party to resist the application for a winding-up order, and the appearance of shareholders is unnecessary.”

[40] Counsel for Mr. Ungar says that the circumstances of this case are quite different from **re Times Life Assurance** in this respect: In that case the company did appear and a shareholder also intervened. In the instant case she says, in essence, that the circumstances are unique in that:

- (a) The company, normally the proper party to resist the application, was shut out from so doing given the decision in **Metalloyd**, and did not appear; and
- (b) Rather than risk the originating application going unopposed, it was necessary for Mr. Ungar to appear and be heard. As it turned out however, he was not heard. He was entitled to be heard on the originating application.

The trial judge stated at paragraph 6 of his judgment, notwithstanding that he considered Mr. Ungar not to have locus standi, that he was assisted by his counsel’s submissions.

[41] Whilst I do not consider in the circumstances of this case that Mr. Ungar’s interest was distinct from that of the company, I am minded to award costs to Island Point on the dismissal of this appeal and to Mr. Ungar, on the cross appeal, not by way

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<sup>14</sup> (1870) LR 5 Ch. App. 381

of applying any general principle as regards entitlement to costs, or by way of stating any general proposition on the matter, but merely to reflect the assistance rendered by counsel for Island Point and Mr. Ungar, and having regard to the unique circumstances of this case. I am not minded however, to trouble the costs order made by the trial judge. The CPR does not apply to insolvency or winding-up proceedings. In the circumstances I would order that costs be assessed unless agreed within 21 days.

**Janice George-Creque**  
Justice of Appeal

I concur.

**Hugh. A. Rawlins**  
Chief Justice

I concur.

**Davidson Baptiste**  
Justice of Appeal