[2024 Gib LR 605]

IN THE MATTER OF VELA DREAMS LIMITED

DEREC SARL v. VELA DREAMS LIMITED

SUPREME COURT (Happold, J.): December 11th, 2024

2024/GSC/048

Bankruptcy and Insolvency—statutory demand for payment—setting aside—company provided no evidence for its failure to apply to set aside statutory demand within 21-day time limit—company not granted leave under Insolvency Act 2011, s.158 to oppose application for appointment of liquidator

The applicant applied under s.149(1)(a) of the Insolvency Act 2011 for the appointment of a liquidator for Vela Dreams Ltd.

In August 2024, a statutory demand was served on Vela Dreams Ltd. ("the company") under s.141(1) of the Insolvency Act, claiming that the company owed DEREC SARL ("the applicant") US$208,500. The demand informed the company that it had the right to apply to set the demand aside under s.142 of the Insolvency Act but such an application had to be made within 21 days of service of the demand. No application was made. The applicant subsequently applied under s.149(1)(a) of the Insolvency Act for the appointment of a liquidator for the company on the basis that the company was presumed to be insolvent, under s.10(1)(a)(i) of the Insolvency Act, because it had failed to comply with the statutory demand. The application was served on the company and advertisements were placed in the *Gibraltar Gazette* and the *Gibraltar Chronicle*. Anyone intending to appear at the hearing was required to give notice of their intention to do so in accordance with r.88 of the Insolvency Rules 2014 by 4 p.m. on Tuesday December 10th, 2024, being the last business day before the application was to be heard.

Rule 88 provided:

> "(1) A person who intends to appear on the hearing of an application to appoint a liquidator, other than the company itself, shall send a notice of intention to appear to the applicant.
>
> (2) A notice of intention to appear shall be in writing and shall specify—
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> (a) the name and address of the person giving notice and his contact details, if any;

(b) whether it is his intention to support or oppose the application; and
(c) if he is a creditor, the amount of his debt or if he is not a creditor the grounds upon which he supports or opposes the application;

(3) A notice of intention to appear shall be sent so as to reach the applicant no later than 16.00 hours on the business day before the date fixed for the hearing of the application, or where the hearing has been adjourned, the adjourned hearing.

(4) A person who fails to comply with this rule may appear on the hearing of the application only with the leave of the Court."

At 9.44 a.m. on Tuesday December 10th, the company's lawyer emailed the applicant's lawyers informing them that he had been instructed by the company, enclosing an affidavit of the company's sole director and shareholder, and confirming that he would be attending court on the following day. At 4.13 p.m., the company's lawyer sent a second email to the applicant's lawyers stating that he had been instructed by the company, that he had written to the applicant's lawyers and to the Supreme Court registry informing them of this, that it was the company's intention that he appeared at the application on the following day for the appointment of a liquidator to oppose the application for the reasons set out in the evidence filed, that this was notice under r.88 of the Insolvency Rules, and that notice had already been given.

Mr. Vela appeared to accept that there was a debt owing to the applicant but asserted that it was not a debt owed by the company. It was asserted that the company was simply the "paymaster" of two other persons who were the parties to the relevant contract.

The company accepted that it could not seek to have the statutory demand set aside under s.142(1) of the Insolvency Act because, pursuant to s.142(2), an application to set aside had to be made within 21 days of the date of service of the demand (in the present case September 18th, 2024) and, pursuant to s.142(3), the court could not extend time for making an application. However, the company sought to persuade the court to grant it leave, under s.158 of the Insolvency Act, to oppose the application on the ground that the company could have applied to set aside the statutory demand under s.143(1)(a), *i.e.* because there was a substantial dispute as to whether the debt was owing or due. Section 158 provided:

"158.(1) In so far as an application for the appointment of a liquidator on the grounds that it is insolvent 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 an application or not).

(2) The Court shall not grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent."

Held, judgment as follows:

(1) Only the second email, sent by the company's lawyer after the 4 p.m. deadline on December 10th, was a notice for the purposes of r.88 of the Insolvency Rules because only it contained all the information required by r.88(2). The notice was therefore out of time (para. 7).

(2) Given the lack of any explanation as to why the company did not apply to set aside the statutory demand or take any step in the proceedings any earlier, the court would not grant leave under s.158(2) to the company to oppose the application (paras. 12–15).

(3) In relation to the application for the appointment of a liquidator, there was nothing to displace the presumption that the company was insolvent, and the court had a statement of consent and eligibility signed by the proposed liquidator. The court therefore made the order for his appointment (para. 16).

Cases cited:

(1) *Mount Grace Ins. Co. Ltd.*, *In re*, 2015 Gib LR 74, considered.

(2) *Rossocorsa Ltd.* v. *Cascade Marine Ltd.*, 2024 Gib LR 187, considered.

Legislation construed:

Insolvency Act 2011, s.158: The relevant terms of this section are set out at para. 12.

Insolvency Rules 2014, r.88: The relevant terms of this rule are set out at para. 5.

A. Hernández Cordero (instructed by Ellul & Cruz) for the applicant;
N. Gomez (instructed by Charles Gomez & Co.) for the respondent.

EXTEMPORE JUDGMENT

1 **HAPPOLD, J.:** This is my decision on an application by the applicant, DEREC SARL, a French company, under s.149(1)(a) of the Insolvency Act 2011 to have a liquidator appointed for Vela Dreams Ltd. ("the company"). The applicant does so on the basis that the company is insolvent because it has failed to comply with the requirements of a statutory demand that has not been set aside and therefore, under s.10(1)(a)(i) of the Insolvency Act, is presumed to be insolvent.

2 The statutory demand was served on the company under s.141(1) of the Insolvency Act on August 28th, 2024. No issue is taken on service, which

was effected pursuant to s.475 of the Companies Act 2014 at the company's registered office (on which, see Yeats, J. in *Rossocorsa Ltd.* v. *Cascade Marine Ltd.* (2) (2024 Gib LR 187, at paras. 11–12)). I was taken to a service slip signed by Mr. Vela and dated August 28th, 2024.

3 The statutory demand claimed that the company owed DEREC a debt of US$208,500 (equivalent to £157,631.21). The company was warned that it was required to deal with the demand within 21 days of service. As required by s.141(2) of the Insolvency Act, the demand, *inter alia*, informed that company that if the demand was not complied with, an application might be made to the court for the appointment of a liquidator and that the company had the right to apply to set the demand aside under s.142 of the Insolvency Act, but that such an application must be made within 21 days of service of the demand, which period could not be extended by the court. No such application was made.

4 On November 18th, 2024, the applicant's application to appoint a liquidator was served on the company, again at its registered office pursuant to s.475 of the Companies Act. I was taken to the affidavit of service of Mr. Mascarenhas. Advertisements of the application were placed in the *Gibraltar Gazette* and the *Gibraltar Chronicle* on November 28th, 2024. Notice was given that any person intending to appear at the hearing was required to give notice of their intention to do so in accordance with r.88 of the Insolvency Rules 2014 by 4 p.m. on Tuesday, December 10th, 2024 (that is, the last business day before the application was to be heard).

5 Rule 88 of the Insolvency Rules provides as follows:

> "(1) A person who intends to appear on the hearing of an application to appoint a liquidator, other than the company itself, shall send a notice of intention to appear to the applicant.
>
> (2) A notice of intention to appear shall be in writing and shall specify—
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> (a) the name and address of the person giving notice and his contact details, if any;
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> (b) whether it is his intention to support or oppose the application; and
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> (c) if he is a creditor, the amount of his debt or if he is not a creditor the grounds upon which he supports or opposes the application;
>
> (3) A notice of intention to appear shall be sent so as to reach the applicant no later than 16.00 hours on the business day before the date fixed for the hearing of the application, or where the hearing has been adjourned, the adjourned hearing.

(4) A person who fails to comply with this rule may appear on the hearing of the application only with the leave of the Court."

6 At 9.44 a.m. on Tuesday, December 10th, Mr. Gomez (who I understand was instructed only the day before) wrote to Ellul & Cruz, in relevant part, as follows:

"I have been instructed on behalf of Vela Dreams Ltd.

I enclose the affidavit of Mr. Vela with an exhibit.

I confirm that I will be attending Court tomorrow."

At 4.13 p.m., Mr. Gomez addressed another email to Ellul & Cruz:

"I confirm that I have been instructed by Vela Dreams Ltd. in relation to the abovementioned proceedings.

I have written to both Ellul and Cruz and to the Supreme Court registry informing of this.

I reiterate that it is Vela Dream's Ltd.'s intention that I appear on its behalf at tomorrow's application to appoint a liquidator and to oppose such application for the reasons set out in the evidence filed.

This notice is made under section 88 of the Insolvency Rules. In any event, this notice has already been given to Ellul and Cruz for the Applicant and the Court."

7 In my opinion, only the second email was a notice for the purposes of r.88, as only it contained all the information required in r.88(2). This means the notice was out of time. I permitted Mr. Gomez, however, to address me *de bene esse* and now give the company leave under r.88(4). This is not to say, however, that the company's tardiness is not otherwise relevant.

8 Mr. Vela is the sole director of and shareholder in the company. In his affidavit, dated December 9th, 2024, although he seems to accept that there is a debt owing to DEREC, he asserts that it is not a debt owed by the company. Vela Dreams Ltd. was simply the "paymaster" for a Mr. Samuel Gehman and a Mr. Tzvika Herscu. It was they who were the parties to the relevant contract. Vela Dreams Ltd. simply allowed them use of its bank account to receive payment.

9 Mr. Gomez took me to an email dated August 19th, 2024 from Mr. Vela to Mr. Nick Cruz of Cruz Law (the applicant's then lawyers) wherein Mr. Vela had at some length made this argument. He criticized the application for failing to disclose this letter in its application.

10 Neither, however, did Mr. Vela's affidavit annex Mr. Cruz's reply. In my view, it ill behoves one party to criticize another for a failure to disclose a communication in its possession which itself fails to provide to the court. In addition, as Ms. Hernández Cordero pointed out, the date of Mr. Vela's

email was the day after the expiry of the 21-day period that the company had to apply to have the statutory demand set aside. In my opinion, the most that can be said of the email is that it shows that the reason given by the company for disputing liability for the debt is not a last-minute concoction.

11 Mr. Gomez accepted that the company could no longer seek to have the statutory demand set aside under s.142(1) of the Insolvency Act. This must be right. Under s.142(2), an application must be made within 21 days of the date of service of the demand, which in this case meant by September 18th, 2024, and by operation of s.142(3) this court cannot extend the time for making an application. As Yeats, J. said in *Rossocorsa Ltd.* v. *Cascade Marine Ltd.* (2) (2024 Gib LR 187, at para. 18):

> "Section 142(3) is clear. The court cannot extend time . . . In my judgment, the court's discretion to extend time under the CPR is overridden by the express statutory provision contained in s.142(3)."

12 Mr. Gomez, however, argued that I could act pursuant to s.158 of the Insolvency Act, and sought to persuade me to do so. Section 158 provides that:

> "158.(1) In so far as an application for the appointment of a liquidator on the grounds that it is insolvent 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—
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> (a) that the company relied on for the purposes of an application by it for the demand to be set aside; or
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> (b) that the company could have so relied on, but did not so rely on (whether it made such an application or not).
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> (2) The Court shall not grant leave under subsection (1) unless it is satisfied that the ground is material to proving that the company is solvent."

Under s.158 I could grant leave to the company to oppose the application on the ground that the company could have applied to set aside the statutory demand under s.143(1)(a), that is, because there is a substantial dispute as to whether the debt is owing or due, the company saying that it owes nothing to the application because it was not a party to transaction giving rise to the debt.

13 I have already referred to the extent to which Mr. Vela's email of August 19th can be relied on. I also note that the contemporaneous documentation which I have, that is the "*bon de commande*" (which is DEREC's document) and the pro forma invoice (which is not) refer to Vela Dreams Ltd. But this is an aside. The principal issue, it seems to me, is Mr. Vela's failure in his affidavit to say anything about the reasons for the

company's failure to apply to have the statutory demand set aside or to give timeous notice of its intention to appear to be heard on this application.

14 Mr. Gomez told me that Mr. Vela was an Argentinian national and that English was not his first language. But that seems to me to provide neither justification nor excuse. The statutory demand, as required, and as I have set out above (see para. 3), was clear as to what the company needed to do to avoid appointment of a liquidator. Indeed, the company's failure is still more surprising given that this is not the first time it had been served with a statutory demand in respect of the debt. On March 17th, 2021, DEREC served a first statutory demand on the company for the debt, albeit that matters were not then pursued further. And Ms. Hernández informed me that a third demand had been served at another time. In any case, the demand of March 17th, 2021, which was included in the applicant's bundle, included the required information, so that the company had ample opportunity to determine the legal situation and to respond to it.

15 It seems to me that, given the lack of any explanation as to why the company did not apply to set aside the statutory demand or take any step in the proceedings before yesterday, I should not grant leave under s.158(2). I am fortified in my decision by comments made by Jack, J. in *In re Mount Grace Ins. Co. Ltd.* (1) (2015 Gib LR 74, at para. 16):

> "Even if the court has the power, under s.158(2), to give leave for the company to be heard in opposition on the basis that the debt, on which the statutory demand was founded, was disputed on genuine grounds, no doubt the court would be reluctant to permit a debtor, on the hearing of an application for the appointment of a liquidator, to go behind a statutory demand without good evidence as to why the debtor failed to apply timeously to set aside the statutory demand."

Here, no evidence at all has been provided. Accordingly, I do not give the company leave to oppose the application on the ground that there is a substantial dispute as to whether the debt is owing or due: a ground that could, but was not, relied upon to seek to set to aside the statutory demand.

16 Returning to the applicant's application, there is nothing to displace the presumption that the company is insolvent and I have a statement of consent and eligibility signed by Mr. Walsh, the proposed liquidator. I therefore make the order for his appointment in the terms set out in form L11. The applicant has asked for its costs of today occasioned by Mr. Gomez's appearance on behalf of the company, but as the form L11 provides for applicant's costs for the application be payable out of the assets of the company, I do not think I need make a separate order.

Judgment accordingly.