

BRITISH VIRGIN ISLANDS COURT OF APPEAL

Infinitem Ventures Limited -v- Awendale Resources Inc BVIHC (Com) 186 of 2017 (Chivers J) (20 March 2018, unreported)

WHETHER OR NOT THERE WAS A 'SUBSTANTIAL DISPUTE' OVER DEBT DUE AND OWING – *INSOLVENCY ACT 2003, SECTION 157*

This decision arose from an application to set aside a statutory demand on the ground that there was a substantial dispute as to whether the debt in question was due and owing (pursuant to Section 157 of the *Insolvency Act, 2003*).

The applicant was the borrower under two loan agreements and the respondent (lender) issued a statutory demand for what it alleged to be outstanding sums due and owing under the agreements. Both parties agreed that the principal and standard interest stipulated in the agreements had been repaid. The dispute was whether additional "default interest" was due and payable to the lender. The applicant's case was that there was a substantial dispute regarding the respondent's entitlement to default interest on two grounds: (i) there was an oral variation of the loan agreements between the parties to exclude default interest and (ii) the default interest provision was an unenforceable penalty which did not amount to a genuine pre-estimate of loss.

Chivers J rejected the first ground on the basis that there was insufficient evidence of a binding oral agreement to exclude default interest. However, the Learned Judge granted the application to set aside the statutory demand on the second ground, that there was a substantial dispute about whether the default interest provision amounted to an unenforceable penalty. In so doing, Chivers J reaffirmed the applicable principles outlined in *Cavendish Square Holdings BV -v- El Makdessi; Parking Eye -v- Beavis* [2015] UKSC 67 regarding the test for contractual penalties.

The court also examined the decision of *Lordsvale Finance Plc -v- Bank of Zambia* [1996] 3 All ER 156 ("Lordsvale"), which specifically addressed the doctrine of penalties with respect to increases in interest rates. In *Lordsvale*, the Court outlined that with respect to exceptionally large increases, it may be possible to deduce that the dominant function is *in terrorem* the borrower and therefore penal. In the present case, the basic rate of interest under both agreements was 12% per annum; the default interest rate was respectively 36.5% and 73% per annum for the first and second loan agreements. Chivers J said that the effective percentage increase in interest rate was therefore 300% and 600% respectively and on that basis was exceptionally large so as to raise a substantial dispute as to whether the debt was due and owing.

Ultimately, the Court did not have to decide whether the provisions in question were penalties, only whether there was sufficient evidence so as to create a genuine and substantial dispute between the parties on this point.

Tameka Davis of Conyers appeared for the applicant along with Dr Alecia Johns.

This article is not intended to be a substitute for legal advice or a legal opinion. It deals in broad terms only and is intended to merely provide a brief overview and give general information.