

# Costs in liquidation proceedings – does the failure to set aside a statutory demand subvert the general rule that costs follow the event?

UPDATE

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The Eastern Caribbean Court of Appeal held in *Throne Capable Investment Limited v Agile Star Group Limited*<sup>1</sup> that the failure to set aside a statutory demand does not constitute misconduct, an unreasonable act or an exceptional circumstance so as to warrant departure from the general rule that costs follow the event.

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## Introduction

The British Virgin Islands (the **BVI**) insolvency regime provides for the issuance of statutory demands against BVI companies. Where a statutory demand is not set aside within 14 days, a creditor can apply to appoint a liquidator to the alleged debtor.

The debtor can resist liquidation proceedings and, where the debtor can show that the debt is disputed on genuine and substantial grounds, the court will dismiss the application.

The general rule in proceedings subject to the Eastern Caribbean Civil Procedure Rules is that costs follow the event.<sup>2</sup> Accordingly, where an alleged debtor defeats an application for the appointment of a liquidator, it should recover its costs from the petitioning creditor, unless the court considers, having regard to all the circumstances of the case, that it ought to depart from that general rule.

## Background to *Throne Capable Investment Limited v Agile Star Group Limited*

The parties were involved in two interrelated cross held joint venture projects in warehousing and logistics development in the People's Republic of China. Disputes broke out between them which triggered Agile to issue a written demand for a debt which it claimed was owed by Throne (the **Debt**). Throne appointed legal practitioners who set out in a letter the basis upon which the Debt was disputed. Throne's position was that the Debt was in fact a capital injection into one of the joint venture projects.

On the same day that Throne issued its response, Agile served a statutory demand on Throne's registered agent. Throne's registered agent failed to timeously forward the statutory demand to Throne's directors. Throne did not apply to set aside the statutory demand because, it submitted, it was not aware of its existence.

## High Court dismisses the application but awards no order as to costs

The application to wind up Throne was heard by the BVI High Court and dismissed as the court found that the Debt was disputed on genuine and substantial grounds. Despite Throne's success in defending the winding up proceedings, the judge made no order as to costs on the basis that Throne had failed to apply to set the statutory demand aside and had 'no good excuse' for failing to do so. The judge decided that there should be cost consequences for that failure. Throne appealed.

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<sup>1</sup> BVIHCMAP2020/0014.

<sup>2</sup> Rule 64.6.

## Court of Appeal exercises discretion as to costs, afresh

Costs awards are a matter of judicial discretion. Typically, an appellate court is hesitant to intervene in matters of discretion. The appellate court may only do so where the decision of the judge below is blatantly wrong because the judge erred in principle by:

- (a) failing to take into account or giving too little weight to relevant factors; or
- (b) taking into account or being influenced by irrelevant factors.

The test is the same when the discretion in question relates to costs.

However, the Eastern Caribbean Court of Appeal (the **Court of Appeal**) intervened in *Throne* on the basis that there is a consistent stream of jurisprudence that demonstrates costs follow the event, and the general rule should only be departed from in exceptional circumstances.

The Court of Appeal held that a failure to set aside a statutory demand was not misconduct, nor was it an unreasonable act that should be weighed against *Throne* when the judge exercised his discretion on costs. Accordingly, 'the judge had erred as a matter of principle in his approach', which warranted the Court of Appeal to exercise the court's discretion as to costs, afresh.

The Court of Appeal determined that, having regard to all the circumstances of the case including whether it was reasonable for Agile to pursue the liquidation application, *Throne* ought to be awarded its costs in defending that application and of the appeal. In circumstances where *Throne's* defence against the alleged debt had been conveyed to Agile, the failure to set aside the statutory demand did not constitute an exceptional circumstance.

## Conclusion

The decision serves as a reminder that where there is a genuine dispute regarding a debt, and the purported creditor is aware of that dispute, liquidation proceedings should not be used as a 'cheaper' and/or 'quicker' shortcut for adjudicating the disagreement. To do so is a high risk strategy. Creditors are safer to issue a claim and can consider an application for summary judgment. Otherwise, even in circumstances where a statutory demand has been issued and not set aside, creditors may be fixed with the costs of an unsuccessful liquidation application.

## Contacts

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