JJW HOTELS & RESORTS HOLDING INC V RHODES & ANOR

BVIHC (COM) 2025/0296

KEY TAKEAWAYS:

1. The BVI's approach to unrecognised foreign judgments is aligned with the English Court of Appeal's in Servis-Terminal LLC v Drelle [2025] EWCA Civ 62 (see Case Digest No. 3).
2. Where the foreign judgment is the sole source of the alleged debt, recognition is required before the judgment can properly found a statutory demand in the jurisdiction.

ISSUE

The interrelationship between insolvency law and private international law: namely, whether a foreign judgment that remains unrecognised within the jurisdiction may properly found a statutory demand.

FACTUAL BACKGROUND

JJW Hotels & Resorts Holding Inc (the Applicant) applied, pursuant to section 156 Insolvency Act 2003, to set aside a statutory demand served on it by its joint liquidators (the Respondents). The Applicant brought proceedings in Guernsey against the Respondents seeking declarations that the Applicant was the beneficial owner of shares held by JJW Ltd in certain subsidiaries. The Applicant's claims were dismissed and costs orders were made against it at first instance and on appeal. Permission to appeal to the Privy Council was refused, generating further costs orders in the Respondents' favour. Bills of costs were served by the Respondent and the Applicant did not challenge them within the time permitted by the applicable Guernsey procedural rules. As a result, the Respondents contended that the costs thereby crystallised as judgment debts. The statutory demand, seeking payment of £229,735, was served in the BVI and the Applicant applied to have that demand set aside.

SECTION 155
Insolvency Act 2003

(1) A creditor may make demand on a person for payment of a debt owed by that person to him or her.

(2) A demand under subsection (1) shall [inter alia] …

(a) be in respect of a debt that is due and payable at the time of the demand and that is not less than the prescribed minimum; …

(d) require the person to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the demand on him or her or such longer period as may be prescribed …

SECTION 156
Insolvency Act 2003

(1) Where a person has been served with a statutory demand he or she may apply to the Court to set it aside…

SECTION 157
Insolvency Act 2003

(1) The Court SHALL set aside a statutory demand if it is satisfied that -

(a) there is a substantial dispute as to whether - (i) the debt; or (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum, is owing or due;

(b) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross-claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum; or

(c) the creditor holds a security interest in respect of the debt claimed and the value of the security interest is equal to or greater than the amount specified in the demand less the prescribed minimum.

(2) The Court MAY set aside a statutory 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); or

(b) for some other reason.

(3) Where the Court is satisfied that the security interest of a secured creditor has been under-valued in the statutory demand, the Court may require the creditor to amend the demand accordingly, but without prejudice to his right to make application for the appointment of a liquidator or bankruptcy order, as the case may be.

ARGUMENTS

The Applicant relied principally upon the decision of the English Court of Appeal in Servis-Terminal LLC v Drelle [2025] EWCA Civ 62 that a foreign judgment which had not been recognised in England could not found bankruptcy proceedings. The Applicant further submitted that the decision of the Privy Council in Vendort Traders Inc v Evrostroy Grupp LLC [2016] UKPC 15, providing that a statutory demand may be issued on the basis of a foreign judgment without prior recognition, was distinguishable.

The Respondents contended that the Applicant's reliance on Drelle was misplaced, as the decision was neither binding nor persuasive in the BVI. The Respondents submitted instead that the governing authority was Vendort.

JUDGMENT

The central issue was whether the statutory demand was founded upon a debt that was due and payable within the meaning of section 155 Insolvency Act 2003.

The BVI Commercial Court held that the Respondents were correct that Vendort constituted the binding authority for the purposes of this case.

However, the Court did not consider there to be any true inconsistency between Vendort and Drelle.

The Court recognised that the decision in Drelle has attracted academic criticism (eg Lewison J, "Can a foreign judgment form the basis of a bankruptcy petition? Servis-Terminal v Drelle: a dissenting view"), but held that whether Drelle was correctly decided is a matter for the Supreme Court.

The Court observed that had the facts of Drelle arisen in the jurisdiction, it would not have been open to the Applicant to proceed with its application, by reason of the debarring provisions of section 296 Insolvency Act 2003 (see next page).

SECTION 296
Insolvency Act 2003

(1) A creditor's application for a bankruptcy order shall be made in respect of a liability or liabilities where, at the time of the application -

(a) the amount of the liability, or the aggregate amount of the liabilities, exceeds the prescribed minimum; and

(b) the liability, or each of the liabilities, is for a liquidated sum payable to the applicant creditor immediately.

<u>(2) An application under subsection (1) may not be made in respect of a liability incurred outside the Virgin Islands unless the liability is payable by the debtor to the creditor by virtue of a judgment or award enforceable by execution in the Virgin Islands.</u>

The Court agreed with the Applicant that Vendort was clearly distinguishable from the case at hand and Drelle as:

- the <u>debt in Vendort</u> arose from a contractual agreement, and so <u>existed independently of the award</u>; but
- as <u>foreign costs orders were the sole source of the alleged indebtedness in this case</u>, <u>recognition was required</u> as the <u>debt was not "due and payable"</u> (section 155 Insolvency Act 2003).

"The critical point is that the Applicant must, at the very least, be afforded the opportunity to contest enforcement in the jurisdiction before the alleged debt can be treated as undisputed and capable of founding a statutory demand or liquidation application. To permit the Respondents to proceed immediately to such relief would be to deploy insolvency proceedings as a means of circumventing the important safeguard which the legislature has provided to those against whom a foreign judgment has been obtained: namely, the right to challenge its recognition and enforcement" (para 58).

The Court held that, absent recognition in the BVI, the debt alleged to arise under the statutory demand was <u>not</u> considered to be due.

The Court agreed with the Applicant that the costs orders in this case had to first be recognised in the BVI before they could be relied upon as the foundation of a statutory demand and, therefore, insolvency proceedings could <u>not</u> lawfully be founded upon the costs orders.

In the Court's judgment, the law required the Respondents not merely to establish insolvency, but to demonstrate that the debt relief upon was presently due and payable. Where the only asserted liability derives from a foreign judgment which had not been recognised in the jurisdiction, the Court held that that requirement was <u>not</u> satisfied.

Given the strict words of section 157(1) Insolvency Act 2003, that "the Court <u>SHALL</u> set aside a statutory demand", it followed that the <u>statutory demand had to be set aside</u> and it <u>could not be maintained that the debt was not disputed on substantial grounds</u>.

The <u>only source of unease</u> that the Court had in reaching this conclusion was the effect of section 296(2) Insolvency Act 2003, as the fact that section 296(2) is not expressed to apply to a liquidation application creates uncertainty about whether the rule differs in that context.

ALEXANDER'S PRACTICE ENCOMPASSES INSOLVENCY, ARBITRATION AND COMMERCIAL CHANCERY. THIS INCLUDES CONSIDERABLE CROSS-BORDER AND OFFSHORE EXPERIENCE.

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