

The BVI Commercial Court – a rich region for unpaid creditors?

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In *Rich Region Holdings Ltd v ICBC (Macau) Ltd*, [1] the BVI Commercial Court appointed liquidators over a debtor-company and refused to set aside a statutory demand served by the bank in respect of overdue sums under a loan agreement. In one of an increasing avalanche of cases involving financially-distressed real estate projects in Hong Kong and Mainland China, the decision confirms the BVI's status as a creditor-friendly jurisdiction and provides useful guidance for both unpaid lenders contemplating how best to protect their rights, and for borrowers seeking to restructure debts to avoid liquidation.

Background

Rich Region (the "**Company**") was indebted to ICBC Macau (the "**Bank**") in the sum of HK\$3,314,751,351.19 under a loan agreement entered into to finance a luxury real estate development project in Ho Man Tin, Kowloon. The loan was secured by a number of share charges over the borrower and other related group entities. The Company encountered financial difficulties which resulted in payment defaults in 2020 and discussions with the Bank about restructuring the loan.

Eventually, the Bank served a statutory demand on the Company demanding payment of the sums due under the loan. The Company failed to satisfy the statutory demand and instead applied to the BVI Commercial Court to set aside the statutory demand, arguing that (1) the debt was not immediately payable because of certain alleged representations made by the bank in relation to restructuring the loan; and/or (2) the Bank was a secured creditor and held security exceeding the sum due under the loan.

Decision

Small Davis J. dismissed the Company's application to set aside the statutory demand, holding

that the Bank was entitled to seek the appointment of liquidators and to recover its costs of defending the set aside application from the Company. Despite protracted correspondence about a potential restructuring which included circulation of additional draft security documentation in deed format which had been signed by the Company, the failure to execute the documents as deeds meant that the debt was never restructured in a valid and legally binding manner. Nor were subsequent draft documentation or statements (including WhatsApp messages) sufficient to restructure the debt or to estop the Bank from exercising its rights, as there had been no detrimental reliance by the Company upon those representations. Rather, the judge recognised that there had been restructuring discussions in the course of which the Bank had presented a proposal which the Company had refused to accept.

The comments of the Court on what constitutes secured debt for the purposes of setting aside a statutory demand were of particular interest in this case. Section 157 of the BVI Insolvency Act, 2003 (the "**Act**") permits the Court to set aside a statutory demand where the demand is made by a creditor who 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, which is US\$2,000). The Company argued that the security interest referred to in section 157 is not limited to security provided by the debtor and can include security provided by third parties. The Bank argued that section 157 had to be construed in a way which was consistent with the definition of "secured creditor" in section 9 of the Act. That definition was narrower in scope and required a security interest to have been provided by the debtor in order for the creditor to be classed as a secured creditor.

Small Davis J. found in favour of the Company on this point. The definition of secured creditor in section 9 exists to establish the priority in which secured and unsecured creditors rank in the distribution of assets upon the liquidation of a company. Section 157 relates to the setting aside of a statutory demand which can be served by secured and unsecured creditors alike. It does not use the term "secured creditor". In her judgment, the learned judge opined that *"It would be an undesirable end result if a statutory demand issued by a creditor who holds an enforceable security interest in relation to the debt may yet proceed to have the company wound up even though they can have recourse to the security without putting the debtor in jeopardy of liquidation"*.

Separately, the valuation of the Bank's security was hotly disputed by the Company, which was inflated by an "unsubstantiated" costs and expense deduction applied in the Bank's calculations. Despite obvious weaknesses in the Bank's valuation, the Company's inability to supply clear evidence to support what it considered to be the true valuation, combined with the reality that the Bank's security could not be enforced and realised without encountering substantial delays, led the judge to decline to set aside the statutory demand on this point.

While the Company was ultimately unsuccessful in setting aside the statutory demand, the judgment is significant for its treatment of the parameters of section 157 of the Act.

Lessons for borrowers and creditors

The decision of Small Davis J. in *Rich Region* contains several important lessons for borrowers and creditors alike considering whether the liquidation of a BVI company on the basis of unpaid debts is a viable legal strategy. These include:

1. Borrowers in financial strife seeking to restructure their debts to avoid liquidation should ensure that any restructuring is documented in a legally binding manner. The borrower's failure to properly execute draft deeds which would have restructured the loan in *Rich Region* meant that there was never any valid agreement to alter or defer the borrower's payment obligations.
2. Creditors holding security in respect of a debt must consider whether the value of their security equals or exceeds the value of the indebtedness. In such a scenario, a statutory demand served by the creditor will be vulnerable to a set-aside application. Conversely, debtors seeking to set aside a statutory demand on the basis of the creditor holding security equalling or exceeding the debt bear the burden of providing clear evidence of the value of the security. Despite demonstrating deficiencies in the Bank's overly conservative valuation of the security, the Company's failure to provide clear evidence of the true value of the security was fatal to its attempt to set aside the statutory demand on this ground.
3. Secured creditors holding security valued in excess of the debt who nonetheless wish to pursue the appointment of liquidators over a BVI company will need to consider whether they have proof of a debtor's actual insolvency, or the existence of grounds for liquidation on the just and equitable basis.
4. BVI legislation is modelled on similar legislation in other common law jurisdictions. It would be a mistake, however, not to consider carefully the details of the legislation and the local jurisprudence surrounding it. Creditors and debtors alike should seek the advice of offshore counsel in order to best protect and enforce their rights in the BVI. Ogier's Dispute Resolution Team in Hong Kong has extensive experience of BVI liquidations and the enforcement of security in that jurisdiction.

[1] BVIHC (COM) 134/2022, Small Davis J., 31 July 2023.

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