

BRITISH VIRGIN ISLANDS SUPREME COURT

New Plantations Limited -v- Emerald Plantation Holdings Limited BVIHC (Com) 112 of 2017 (Delivered (orally) on the 22 November 2017)

BVI LITIGATION AND RESTRUCTURING - SECTION 156 OF THE INSOLVENCY ACT - APPLICATION TO SET ASIDE A STATUTORY DEMAND - SET-OFF AND/OR CROSS-CLAIM - REASONABLE PROSPECT OF ESTABLISHING A SET-OFF OR CROSS-CLAIM THAT EQUALED OR EXCEEDED (LESS THE STATUTORY PRESCRIBED MINIMUM)

This was an Application by New Plantations Limited (“NPL”) pursuant to Section 156 of the *Insolvency Act, 2003* (the “2003 Act”) to set aside a statutory demand that had been served on it by Emerald Plantation Holdings Limited (“Holdings”). By the statutory demand the (the “Statutory Demand”), Holdings claimed that NPL was indebted to it in the sum of approximately US\$23 million (the “Debt”), under the terms of a share purchase agreement (“SPA”).

In support of its application to set aside the Statutory Demand, NPL claimed that it had a set-off or cross-claim against Holdings that exceeded the Debt. That set-off or cross-claim was said to arise, *inter alia*, from: (a) an alleged misrepresentation claim; and (b) a claim for damages based on an alleged breach of one or more of the warranties in the SPA. NPL also argued - initially at least - that the service of the statutory demand was an abuse of process, for it had been served in the face of an arbitration clause in the SPA. However, that latter argument was dropped at the final hearing, no doubt in light of the Court of Appeal’s decision in *C-Mobile Service Ltd -v- Huawei Technologies Co Ltd* (BVIHCMAP 2014/0006).

Ultimately after hearing the parties’ submissions, and considering the test in Section 157(1)(b) of the 2003 Act, the Honourable Justice Wallbank determined on the basis of the evidence before him, that NPL had failed to prove that it had a reasonable prospect of establishing a set-off or cross-claim that equaled or exceeded (less the statutory prescribed minimum) the

Debt. On that basis, the Application was dismissed and Holdings was awarded its costs of the proceedings. Tom Smith QC and Conyers’ Matthew Brown appeared on behalf of the successful Respondent to set aside the Application. Stephen Moverley Smith QC and James Noble of Harneys appeared on behalf of the Applicant.

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