CAREY OLSEN

Statutory demands in the BVI: no longer truly optional?

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Statutory demands in the British Virgin Islands have long been a useful option for creditors of defaulting companies. Properly utilised, they either secure payment of the outstanding debt or provide the creditor with the benefit of a statutory presumption of insolvency to assist in their application to appoint a liquidator over the company. However, in light of the recent decisions in *Rangecroft Ltd v Lenox International Holdings Ltd*[1], *IS Investment Fund Segregated Portfolio Company v Fair Cheerful Ltd*[2], and most recently in *A Creditor v Anonymous Company Ltd*[3], a reassessment is required as to whether the procedure is truly optional.

The Court in *Lenox International* highlighted the importance of following the "two-step process" to wind up a company on the basis of its insolvency. In its view, the creditor should first serve a statutory demand before then issuing an application for the appointment of a liquidator. Although the Court recognised that a creditor is not obliged to serve a statutory demand, it went on to make it clear that the Court did not encourage proceeding without a statutory demand and asked whether there was a "good reason" for "failing" to serve a statutory demand. The underlying rationale was informed by a desire to prevent the debtor from being prejudiced by the creditor's failure to serve a statute demand in the context of an arbitration clause of disputed effect. In the Court's view, the "two-step process" provided an important safeguard for the company.

1 BVIHC (COM) No 37 of 2020, unreported, 6 July 2020
2 BVIHC (COM) 2020/0034, unreported, 16 July 2020
3 BVIHC (COMC), anonymised hand down, 28 January 2021
4 at paragraphs 13 – 15

This marks a shift in approach and language which was also echoed in *Fair Cheerful*. In circumstances where a creditor may be called to upon to explain its "failure" to serve a statutory demand, it is arguable that the procedure is no longer truly optional in the traditional sense. Rather, the reasoning in *Lenox International* and *Fair Cheerful* suggests that the statutory demand route should be regarded as the default position and sounds a note of caution that a creditor will be required to justify electing to proceed directly to an application to appoint a liquidator without first serving a statutory demand.

Most recently, in *A Creditor v Anonymous Company Ltd*, Jack J reaffirmed his view in *Rangecroft* and *Fair Cheerful*. In particular, he opined that the Court will generally not exercise its discretion to appoint liquidators if as a result of the failure to serve a statutory demand, the debtor was deprived of an opportunity to refer the matter to arbitration.[4]

This will be unwelcome news to creditors who previously would often proceed directly to an application to appoint a liquidator. It is likely to result in an increased use of the statutory demand procedure and, as a result, more disputes coming before the BVI Court by way of application to set aside a statutory demand, as opposed to at the stage of a contested application to appoint a liquidator.

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FIND US

Carey Olsen
Rodus Building
PO Box 3093
Road Town
Tortola VG1110
British Virgin Islands

T +1 284 394 4030
E bvi@careyolsen.com

Carey Olsen Hong Kong LLP
Suites 3610-13
Jardine House
1 Connaught Place
Central
Hong Kong SAR

T +852 3628 9000
E hongkong@careyolsen.com

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