



## Cayman Litigation & Dispute Resolution Q1 2016 Review

Welcome to the Q1 2016 Stuarts litigation and dispute resolution review. Stuarts' litigation and dispute resolution team acts in a wide range of commercial and insolvency related disputes arising under Cayman Islands law. The April 2016 Quarterly Review addresses Statutory Demands issued in accordance with the Cayman Islands Companies Law (2013 Revision) (the "Companies Law") and the Cayman Islands Companies Winding-up Rules, 2008 (As Amended). We hope you will find the review of interest.

### Cayman Islands Statutory Demands

Where a debt is owed by a Cayman Islands company and negotiations have not resulted in payment, it is worthwhile considering whether service of a Statutory Demand in accordance with Section 93 of the Companies Law may be an effective method of both ensuring quick payment and avoiding significant legal costs, where there is no *bona fide* dispute as to the debt owed and the debtor is in a position to pay.

#### *Winding-Up by the Grand Court*

The practical relevance of a Statutory Demand is its effect, should payment not be obtained, in any subsequent winding-up proceedings that may be commenced.

In that respect, pursuant to Section 92 (d) of the Companies Law a ground upon which a company may be wound up by the Cayman Islands Grand Court is if "*the company is unable to pay its debts*".

Importantly, pursuant to Section 93 (a) of the Companies Law, a company shall be *deemed* to be *unable to pay its debts* in the event that it fails to satisfy a Statutory Demand within three weeks of service upon the company; the failure to pay operates as proof that the company is unable to pay its debts and provides the Court with a ground upon which to wind-up the company.<sup>1</sup>

As a result, service of a Statutory Demand has the potential to be a very effective way of awaking an intransigent debtor and motivating the proper payment of the debt due, given the risks for the debtor company in taking no action.

Further, utilising a Statutory Demand is a cost effective method to demand payment of a debt that is due and payable because it is in a prescribed short and simple form, it is consequently not time consuming to produce, there is no need for the debt to be supported by a Court Order and it is served directly on the debtor (not filed at Court) and so incurs no Court fees in order to operate and be effective.

Likewise, if the objective is to wind-up a company and to obtain the appointment of independent liquidators, then service of a Statutory Demand will assist in that process, through the company being deemed to be unable to pay its debts in the event payment is not made within 21 days.

<sup>1</sup>... having established the existence of the debt and the insolvency of the company, a petitioning creditor is *prima facie* entitled *ex debito justitiae* to the winding up order which he seeks ..." (*In the Matter of Swiss Oil Corporation* [1988-89 CILR 319 at pages 328 and 329]).



### Key Contacts



**Richard Annette**  
Head of Litigation  
Tel: (345) 814-7920

[richard.annette@stuartslaw.com](mailto:richard.annette@stuartslaw.com)

## The Debt Due

The debt, at the date of the Statutory Demand, must be both due and payable, i.e., the creditor must be entitled to immediate payment. It should be for a fixed amount in excess of CI\$100 and not be for unliquidated damages. A demand can be made in either Cayman Islands dollars or any other currency in respect of which the debt is due.

## Contents of a Cayman Islands Statutory Demand

The contents of a Statutory Demand are prescribed by the Cayman Islands Companies Winding-Up Rules, 2008 (As Amended). The key requirements are that:-

1. a statutory demand must be in a prescribed form;
2. a statutory demand must be signed by: –
  - the creditor; or
  - if the creditor is a firm, any partner of the firm; or
  - if the creditor is a body corporate, any director or officer who is duly authorised to make the demand;
3. a statutory demand must state the amount, the date on which the debt fell due, the currency of the debt and the consideration for it (i.e., the services rendered);
4. the statutory demand must state the grounds upon which the company is liable to pay any interest and contain particulars of the way in which such interest is calculated;
5. a statutory demand must contain the creditor's address and, if it is signed by anyone other than the creditor himself, the contact details of the partner, director or officer who signed it on behalf of the creditor;
6. a statutory demand must include a statement that if payment is not made within 21 days of the date upon which it was served on the company, the company will be deemed to be insolvent and a winding-up petition may be presented against the company in accordance with section 92 (d) of the Companies Law; and
7. a statutory demand must contain information as to how the company may make payment, including details of any bank account to which the amount owing may be wire transferred.

## Service of a Statutory Demand

There are strict rules concerning service of a Statutory Demand. The original hard copy of the Statutory Demand must be delivered by hand to the debtor company's registered office in the Cayman Islands; consistent with this, transmission of a copy by facsimile or e-mail shall not, by itself, be sufficient to constitute good service for the purposes of the Companies Law.<sup>2</sup> In practice, the Statutory Demand will often also be sent directly to the Directors of the debtor company in the hope of promoting quick payment once the formal rules in respect of service have been met.

## The Debt must be undisputed

The Statutory Demand procedure should not be used if there is a *bona fide* dispute on substantial grounds as to the debt owed. A Demand also will not be effective if the debtor has a claim which it can set-off against the debt thereby extinguishing it.

Not only should a Statutory Demand not be issued where there is a *bona fide* dispute on substantial grounds but also the winding-up jurisdiction of the Cayman Islands Court should, as a rule of practice, not be invoked by a purported creditor in respect of such a disputed debt (*In the Matter of Times Property Holdings Limited* [2011 (1) CILR 223]).<sup>3</sup> In this respect, it should be noted that a winding-up petition needs to be verified by Affidavit confirming that the debt is due.<sup>4</sup>

It is therefore important not only to determine the claimant's status as a creditor but also to evaluate whether there is any such dispute *before* proceeding with a Statutory Demand.

<sup>2</sup> Companies Winding Up Rules, 2008 (As Amended), Order 2 Rule 3 (2).

<sup>3</sup> This is not to say that the Court does not have the ability to direct that a dispute be resolved in the context of a Winding-Up Hearing (*In the matter of GFN Corporation Limited* [2009, CILR 650], *Cayman Islands Court of Appeal*).

<sup>4</sup> Companies Winding Up Rules, 2008 (As Amended), Order 3, Rule 3.



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## Potential Adverse Costs Consequences

The effectiveness of a Statutory Demand lies largely in the implicit threat to commence winding-up proceedings and the statutory effect of non-payment if such proceedings are commenced. However, it is important that a Statutory Demand is only utilised when the debt is, upon a proper assessment, not subject to a *bona fide* dispute.

If there is such a dispute in respect of the debt, a company faced with a Statutory Demand has the option of applying to Court for an Injunction to restrain the presentation of any winding-up petition. If an Injunction is found to have been properly granted, then the party which served the Statutory Demand will, in all likelihood, be liable under Cayman Islands costs rules to pay the company's legal costs, as assessed by the Court in the absence of agreement.

Likewise, if a winding-up petition is served but then subsequently withdrawn (given that there is, in fact, a *bona fide* dispute as to the debt), then the Petitioner will, save for in exceptional circumstances, have to pay the company's assessed costs (*Aramid Entertainment Fund Limited-v- KBC Investments V Limited* [2014 (1) CILR 455]).

As the Cayman Islands Court of Appeal held in the *Aramid* case, debtors who chose to take the shortcut of a Statutory Demand followed by serving a petition for winding-up, rather than first issuing a Writ to establish their claim, do so at their own risk as to costs in the event that the petition fails or is withdrawn.

As set out above, for these reasons, there should be a proper assessment of the claimant's status as a creditor and whether there is a dispute over the debt before serving a Statutory Demand and before commencing any winding-up proceedings.

## Effect of Non-Payment

The effect of non-payment is that, after the 21 day period, should the creditor then proceed to apply to Court to wind-up the company, the company is, as set out above, *deemed* to be unable to pay its debts. It is this risk and the risk of commencement of winding-up proceedings which service of a Statutory Demand foreshadows and which will often result in satisfaction of the debt where there is no *bona fide* dispute as to the amount owing. Utilising a Statutory Demand can therefore be an effective step in obtaining recovery where the above factors apply and for relatively minimal cost.

## Risk of Dissipation of Assets

If there is concern over the debtor dissipating its assets or otherwise acting fraudulently to avoid payment, then serving a Statutory Demand may not be the best option as it is inherent in its operation that the debtor is given notice of the creditor's intention to take Court action and that the debtor has three weeks to pay, so that period of time could be utilised by the debtor to the creditor's prejudice. In such circumstances, other action such as commencing proceedings by way of Writ and obtaining a Freezing Injunction may be more appropriate.

## Conclusion

Statutory Demands can be cost effective in ensuring quick payment of a debt that is due and payable. However, they should only be used in the circumstances for which they were designed and where there is a genuine undisputed debt.

If there is a dispute and a Statutory Demand is used wrongfully to bring pressure on an alleged debtor, there is a real risk of injunctive relief being ordered and/or of adverse cost consequences for the claimant.

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*This publication is for general guidance and is not intended to be a substitute for specific legal advice. Advice should be sought about specific circumstances. This review relates to Cayman Islands Law only as at 1 April 2016. If you would like further information please contact Richard Annette of Stuarts Humphries.*



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### Key Contacts



**Richard Annette**

Head of Litigation

Tel: (345) 814-7920

[richard.annette@stuartslaw.com](mailto:richard.annette@stuartslaw.com)



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