

**THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL**

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2022/0027

BETWEEN:

MORDEN FINANCE LTD.

Appellant

and

BENONO HOLDINGS LTD.

Respondent

Before:

The Hon. Dame Janice M. Pereira, DBE
The Hon. Mde. Margaret Price-Findlay
The Hon. Mr. Trevor Ward

Chief Justice
Justice of Appeal
Justice of Appeal

Appearances:

Mr. Robert Nader and Mr. Ben Giblin for the Appellant.
Mr. Andrew Emery for the Respondent.

2023: February 6;
September 20.

Commercial appeal – Statutory demand – Application to set aside statutory demand – Appellate court’s exercise of discretion – Whether the judge erred in the exercise of his discretion by applying the Sparkasse test incorrectly to the facts – Whether the estoppel by deed argument was capable of dispute on the facts – Whether the way in which the estoppel by deed point was raised and dealt with rendered the hearing unfair – Whether the learned judge erred in his treatment of the evidence

In January 2022, Benono Holdings Ltd (“Benono” or the “Respondent”) served a statutory demand (the “Demand”) on Morden Finance Limited (“Morden” or the “Appellant”) demanding payment of US \$13,281,972.60 (the “Debt”). Morden disputed the existence of the alleged Debt, and filed an application in January 2022, seeking to have the Demand set aside on the basis that the Debt was not due and payable as at the date of the Demand (as per section 155(2) of the Insolvency Act 2003 (the “Act”)) and that the Debt was

unparticularized and unsubstantiated, contrary to the requirements of section 155(2)(b) of the Act. Benono resisted this application, arguing that the Debt was in fact due. Benono argued that by a loan agreement dated 12th September 2012 (“the Loan”), Credit Privé Private Strategy Fund Limited (“CP”), lent US \$22,653,566.00 to Galantor Finance Limited (“Galantor”). By virtue of a Share Pledge Agreement dated 7th November 2013 (the “SPA”), Morden covenanted with CP to discharge Galantor’s obligations under the Loan and pledged its interest in Galantor to CP. Additionally, by various novations, assignments and subscription agreements, Benono acquired the benefit of CP’s rights under the SPA and by extension, the Loan. Morden however rejected this argument, contending that the Debt had already been settled by December 2012 and there was nothing due and owing at the time the SPA was executed. Morden further contended that the nominee directors would have signed the SPA without any knowledge of Morden’s ultimate beneficial owners (“UBOs”). This was supported by affidavits filed by Mr. Dmitry Yusov’s (“Mr. Yusov”) on behalf of Morden.

The application was heard before the judge in March 2022. The learned judge dismissed the application to set aside the Demand, awarded costs to the Benono, and further authorised Benono to make an application to appoint a liquidator over Morden. The judge relied on the test set out in **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation**, and held that Morden failed to meet the test since: (i) there was an estoppel by deed in the SPA; (ii) Morden acknowledged its obligations under the SPA in its letters of 26th August 2019 and no explanation was given as to how this so-called mistake arose; (iii) Mr. Angelos Kapsis’ (former liquidator of CP) account was inconsistent with Morden’s case since he denied that there was a receivable from Honberg Enterprises Limited; and (iv) Mr. Yusov’s evidence was seriously defective as he only referred to documents and insofar as he identified any evidence he received from third parties, he did not identify who they were since he did not name the former and current UBOs. The judge also found that the question of the amount was not relevant under section 155 so long as the nature of the Debt was identified (as it had been in the Demand) and that the amount claimed was specified. The judge found that there was no need to explain how the amount was calculated under section 155.

Being dissatisfied with the judge’s ruling, Morden appealed to this Court, listing four grounds of appeal. The main issue to be determined is whether the judge erred in the exercise of his discretion by applying the **Sparkasse** test incorrectly to the facts and in so doing, arrived at a decision which was outside the generous ambit within which reasonable disagreement was possible and was therefore blatantly wrong.

Held: dismissing the appeal; affirming the order of the learned judge; and awarding costs of the appeal to the Respondent to be assessed by a judge of the Commercial Court if not agreed within 21 days of the date of the judgment, that:

1. An appellate court will not interfere with the exercise of the trial judge’s discretion unless the judge erred by failing to take into account relevant factors or by taking into account irrelevant factors and as a result of the error the decision exceeded

the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong.

Dufour and Others v Helenair Corporation Ltd and Others (1995) 52 WIR 188 followed.

2. The learned judge made no error in his statement of the **Sparkasse** test. The insertion of the word “genuine” in his final sentence in no way meant that he misconceived or misconstrued the test as being more onerous. When one has regard to the full text at paragraph 3 of the **Sparkasse** decision, it is evident that the authenticity or “genuineness” of the dispute as to the debt’s existence is the central element. Further, the learned judge clearly had in mind that for Morden to successfully dispute the existence of the Debt, they had to provide subjective evidence that they did not genuinely believe the Debt existed, and this belief must have been based on substantial or reasonable grounds.

Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation BVIHCVAP2002/0010 (delivered 18th June 2003, unreported) followed.

3. There was no error in construction of the SPA by the judge. At paragraph 9 of the judgment, the judge stated quite clearly that the SPA was executed between Morden and CP. When one has regard to the SPA, it states that Morden was the pledgor and CP, the pledgee. It mentions that CP and Galantor entered into the Loan and that Morden owned shares in Galantor. At paragraph 1, under the heading, “Pledge” it stated clearly that in the event of a default by Galantor as specified in the Loan, Morden pledged to discharge and pay all of Galantor’s obligations under the Loan to CP. Further the judge merely quoting one paragraph from the recitals and not the entirety or more of the SPA, is of no consequence. The learned judge had the SPA before him and he would have taken it into account when coming to his decision. Any argument that for an estoppel to arise there must have been a clear statement of Morden’s indebtedness is therefore otiose since the SPA pellucidly sets out Morden’s obligations to CP in the event of a default under the Loan by Galantor.

Bensley v Burdon (1830) 8 L.J. (O.S.) Ch. 85, 87 cited; **Carpenter v Buller** (1841) 8 M and W 209 cited; **Collins v Blantern** (1767) 2 Wils KB 341 cited.

4. The learned judge was entitled to find that Mr. Yusov’s evidence simply was not sufficient, as his explanation that the SPA was executed by nominee directors on instructions from persons not known to the UBOs, was lacking. The judge was entitled to look at the totality of the evidence including the letter of Mr. Kapsis’ in which Morden acknowledged its obligations under the SPA. The judge made no error by relying on and having regard to it as it was properly exhibited as part of Benono’s evidence. Whilst his evidence was not in the form of a sworn affidavit, it was still part of Benono’s evidence, and the judge was entitled to have regard to the totality of the evidence before him. There was no error by the judge in finding

that the estoppel point was not capable of dispute, since having regard to the evidence, Morden simply failed to put before the judge a strong case.

Eyota Pty Ltd v Hanave Pty Limited (1994) 12 ACSR 785 cited; **Angel Wise Limited v Stark Moly Limited** BVIHCVAP2010/0030 (delivered 13th February 2012, unreported) cited.

5. There was no error by the judge in directing the parties to the main issues. Rather, this is in keeping with the overriding objective to deal with cases justly as per Rule 1.1 of the **Civil Procedure Rules (Revised Edition) 2023** (the “CPR”). Under Rule 1.1(2)(4), dealing with cases justly means ensuring that cases are dealt with expeditiously. Additionally, it was evident that the judge found that Morden was unable to overcome the hurdle of the evidential basis to displace the SPA and their own letter acknowledging the Debt. Having found that they were unable to overcome this, the judge did not deem it necessary to prolong the hearing nor did he deem it necessary for counsel for Benono to address him. The judge, as arbiter of the evidence, was entitled to do so and properly considered all that was before him. There was no error in his consideration.

Rule 1.1 of the **Civil Procedure Rules (Revised Edition) 2023** applied.

6. An appellate court should be slow to interfere with a trial judge’s findings of fact. It should only interfere with the findings of fact made by a trial judge if it is satisfied that his decision cannot reasonably be explained or justified. In this case, the findings made by the judge as to the veracity of Mr. Yusov’s evidence were entirely open to him based on the evidence that was before him and the findings made were entirely connected to the question of whether Morden had raised a sufficient dispute as to the existence of the Debt. It cannot be disputed that Mr. Yusov had no personal knowledge of the matters or that he could only rely on the documentary record. These facts were affirmed in his affidavit and it was proper for the judge to have had regard to such matters. The judge also made no error in taking into consideration the fact that Mr. Yusov, in neither of his affidavits, failed to expand on how the SPA came to be executed without the knowledge of the UBOs. The learned judge did not err in this regard.

Henderson v Foxworth Investments Limited [2014] UKSC 41 followed.

JUDGMENT

- [1] **PRICE-FINDLAY JA:** Before the Court is an appeal against the trial judge’s decision dismissing the Appellant’s application to set aside a statutory demand served on it by the Respondent on 14th January 2022.

Background

- [2] On 14th January 2022, Benono Holdings Ltd (“Benono” or the “Respondent”) served a statutory demand (the “Demand”) on Morden Finance Limited (“Morden” or the “Appellant”) demanding payment of US \$13,281,972.60 (the “Debt”). Morden, disputing the existence of the alleged Debt, by application filed on 28th January 2022, sought to have the Demand set aside. Morden’s application was based on two grounds:
- (i) that the Debt was not due and payable as at the date of the Demand (as per section 155(2) of the **Insolvency Act 2003** (the “**Act**”)) and that the dispute in respect of same required the court to set aside the Demand pursuant to section 157 of the **Act**;¹ and
 - (ii) that the Debt was unparticularised and unsubstantiated, contrary to the requirements of section 155(2)(b) of the **Act**.
- [3] Benono’s position was that the Debt was due and arose in the following circumstances. By a loan agreement dated 12th September 2012 (“the Loan”), a St. Lucian company, Credit Privé Private Strategy Fund Limited (“CP”), lent US \$22,653,566.00 to the Cyprus company Galantor Finance Limited (“Galantor”). On 4th January 2013, Morden was incorporated. By virtue of a Share Pledge Agreement dated 7th November 2013 (the “SPA”), Morden covenanted with CP to discharge Galantor’s obligations under the Loan and pledged its interest in Galantor to CP. By various novations, assignments and subscription agreements, Benono acquired the benefit of CP’s rights under the SPA and by extension, the Loan.
- [4] Morden, on the other hand, disagreed and asserted that the Debt had already been settled by 21st December 2012. How the Debt had purportedly been settled was set out at paragraphs 15 and 16 of Mr. Dmitry Yusov’s (“Mr. Yusov”) first affidavit filed on 28th January 2022 and at paragraph 25 of his second affidavit filed on 15th March 2022. I set them out here for ease of reference:

¹ Act No. 5 of 2003, Revised Laws of the Virgin Islands.

“15. To this end and as far as is relevant to the Demand:

(a) On 9 April 2013:

- (i) Morden acquired 50% in the share capital of Galantor under a Sale Purchase Agreement of the same date from a BVI company, Narwell Holdings Limited (Narwell) for US \$11m (Galantor SPA)...Galantor was the borrower of the sum of US \$22,653,566 from CP, but CP had since assigned its rights under the Loan Agreement to Narwell under an Assignment Agreement dated 21 December 2012 (Narwell Assignment Agreement)...As such, Narwell became Galantor's creditor under the Loan Agreement in the amount of US \$24,302,820 as at that date (the sum comprising principal and accrued interest). Further, on the same day, i.e. 21 December 2012, Narwell effected a debt for equity swap under a Financial Contribution Agreement with Galantor, thereby converting Galantor's debt into shares in Galantor...Therefore, as at 21 December 2012, Galantor had no debt obligations under the Loan Agreement either to CP or to Narwell.
- (ii) Under the Narwell Assignment Agreement, Narwell owed CP the consideration of US \$24,302,820. As Morden had just acquired 50% of the shares in Galantor, it was agreed that Morden and Narwell would each become indebted to CP for approximately half of that total sum. In particular, under the Novation Agreement dated 9 April 2013 (i) Morden became indebted to CP in the amount of US \$11m, (ii) Narwell's indebtedness to CP was reduced to US \$13,302,820 and (iii) Narwell's obligations to Morden were considered fulfilled by way of set-off against Morden's obligations to Narwell under the Galantor SPA (the Novation Agreement...).

(b) On 31 May 2013:

- (i) Morden assigned its creditor rights against a BVI entity Honberg Enterprises Limited in the amount of US \$11m (the Morden Assignment Agreement) to CP under a Deed of Assignment (CP Assignment Agreement...), which specifically states at paragraphs 3.1 to 3.4 that:
 - CP acquires Morden's rights under the Morden Assignment Agreement in exchange for settling Morden's obligations to CP under the Novation Agreement; and
 - Morden and CP have agreed to set off their mutual obligations under the CP Assignment Agreement and

the Novation Agreement and “consider them to be fulfilled.”

16. Therefore since 31 May 2013, Morden is no longer indebted to CP under the Novation Agreement. In its Demand, the Respondent does not dispute the transactions that took place on 9 April 2013, but failed to take into account the settlement of both (i) the Loan Agreement on 21 December 2012, and (ii) CP and Morden’s obligations to each other on 31 May 2013.”

[5] Paragraph 25 of his second affidavit reads:

“25. However, as I explained at paragraphs 15 and 16 of Yusov 1 and further below:

- (a) Galantor’s obligations to CP under the Loan Agreement were extinguished as of 21 December 2012 as a result of the Narwell Assignment Agreement;
- (b) Galantor’s obligations to Narwell under the Narwell Assignment Agreement were extinguished by way of the Financial Contribution Agreement of 21 December 2012; and
- (c) Morden never had any obligations to CP or any 3rd parties under the Loan Agreement and/nor was ever a party to the Loan Agreement; and
- (d) Any obligations between Narwell, Morden, and CP were extinguished on 9 April 2013.”

[6] Essentially, it was Morden’s position that the Debt had already been settled by December 2012 and there was nothing due and owing at the time the SPA was executed. Morden further contended that the nominee directors signed the SPA without any knowledge of Morden’s ultimate beneficial owners (“UBOs”).

The lower court’s ruling

[7] The application was heard before the judge on 15th March 2022 and by order of the same date, he dismissed the application to set aside the Demand, awarded costs to the Benono, and further authorised Benono to make an application to appoint a liquidator over Morden. A judgment was subsequently produced dated 28th March 2022 in which the judge gave written reasons for his ruling.

- [8] In relation to Morden's claim that the Debt was unparticularized and unsubstantiated, the judge found that the question of the amount was not relevant under section 155 so long as the nature of the Debt was identified (as it had been in the Demand) and that the amount claimed was specified. The judge found that there was no need to explain how the amount was calculated under section 155.
- [9] In turning to the substantive question of whether the Demand ought to be set aside, the judge cited the test as laid down in **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation**.² He found that Mr. Yusov (who gave evidence on Morden's behalf) had no personal knowledge of any matters pre-dating 18th March 2021. Further, as regards the SPA, which the judge found had been executed as a deed, Morden was estopped from saying that the facts stated in the SPA were not truly stated. The judge relied on a passage from the learned authors of **Chitty on Contracts**.³ The judge also found that there was no explanation given for the circumstances in which it might have happened that the nominee directors would have signed the SPA without any knowledge of Morden's UBOs. He stated that in any event, there was no allegation that the pledgees (CP) knew of any want of authority on the part of the nominee directors.
- [10] Ultimately the judge held that Morden failed to meet the test in **Sparkasse** since: (i) there was an estoppel by deed in the SPA; (ii) Morden acknowledged its obligations under the SPA in its letters of 26th August 2019 and no explanation was given as to how this so-called mistake arose; (iii) Mr. Angelos Kapsis' (former liquidator of CP) account was inconsistent with Morden's case since he denied that there was a receivable from Honberg Enterprises Limited ("Honberg"); and (iv) Mr. Yusov's evidence was seriously defective as he only referred to documents and insofar as he identified any evidence he received from third parties, he did not identify who they were since he did not name the former and current UBOs.

² BVIHCVAP2002/0010 (delivered 18th June 2003, unreported).

³ 33rd Ed. (2019) at para. 1-108.

- [11] The judge ruled that these four points were sufficient to dispose of the case but that even if there were some doubts about the case, there simply was no plausible narrative account given by Mr. Yusov. Disagreeing with Morden's then legal counsel, the judge found that Morden had an adequate opportunity to put the full picture of the case before the court. There had been Cypriot litigation since November 2021 and there was no attempt in Mr. Yusov's second affidavit to expand the account of what happened, except to correct the errors made in his first affidavit.

The appeal

- [12] Being dissatisfied with the judge's ruling, Morden appealed. In an amended notice of appeal filed on 26th August 2022, Morden listed four grounds of appeal. They are neatly summarised as follows:

- (i) That the judge erred in law in applying the test in **Sparkasse** in a manner inconsistent with the authorities of this Court and the court below, in particular by applying that test in a manner that placed an excessive burden on Morden to make out its substantive case at the hearing of the set aside application.
- (ii) That the judge erred in law, or in fact and law, by wrongly construing the words of the SPA and by concluding that the Appellant was estopped, on the basis of that construction, from arguing that the Debt was due and payable.
- (iii) That the Judge erred in fact and law in finding that the Appellant's evidence was "seriously defective" as compared to the evidence presented by the Respondent and in preferring the evidence supplied by the latter; and
- (iv) That the judge erred generally in his approach to the hearing in that, the judge did not afford the Appellant with sufficient opportunity to answer the contention that the terms of the SPA gave rise to an estoppel by deed and ought to have afforded the Appellant with the

opportunity to answer the same contention (which had not been raised by the Respondent) before cutting the hearing short and delivering an *ex tempore* judgment (in a context in which the Respondent made no presentation, the judge apparently regarding that as unnecessary, and there was therefore no opportunity for the Appellant to reply).

Issues on appeal

- [13] Despite there being four grounds of the appeal, there is, in essence, one main issue to be determined, that is, whether the judge erred in the exercise of his discretion by applying the **Sparkasse** test incorrectly to the facts and in so doing, arrived at a decision which was outside the generous ambit within which reasonable disagreement was possible and was therefore blatantly wrong.

The appellate court's role

- [14] In the appeal, Morden is essentially asking this Court to review the exercise of the trial judge's discretion. As has been stated in numerous decisions of this Court, most notably in the decision of **Dufour and Others v Helenair Corporation Ltd and Others**,⁴ an appellate court will not interfere with the exercise of the trial judge's discretion unless the judge erred by failing to take into account relevant factors or by taking into account irrelevant factors and as a result of the error the decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong. Thus, this Court should only intervene if the learned trial judge, in arriving at his decision to refuse to set aside the Demand, placed too much emphasis on irrelevant considerations or failed to adequately consider relevant factors.

The judge's statement of the test in Sparkasse

- [15] As a starting point, it is accepted by both parties that the judge had recourse to the correct legal principles as set out in **Sparkasse** when dealing with an application to set aside a statutory demand. The first point made by Morden in Ground 1 of their

⁴ (1995) 52 WIR 188.

written submissions, was that the judge misconstrued the test as being more onerous than it really is, which placed a higher burden on Morden. He essentially adopted a narrow reading of the test which was out of context.

[16] At paragraph 5 of the judgment, the judge set out the test and stated as follows:

“I turn then to the substantive question of whether the statutory demand should be set aside. The test which needs to be applied here is that set out by Byron CJ in the well-known case of **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corp.** There he said:

“The reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a genuine question to be decided.”

[17] Whilst acknowledging that the judge had, for the most part, correctly stated the test, the word “genuine”, as counsel for Morden argued, appears to have been added in the final sentence. Counsel submitted that as extracted, modified and divorced of its surrounding text, the test appears to have been understood by the judge to be more onerous than it was. Citing the full extract of the test as stated at paragraph 3 of the **Sparkasse** decision, counsel asserted that the judge’s approach was inconsistent with the approach contemplated by the full text of the test and also inconsistent with this Court’s approach. Essentially, the judge conducted a mini-trial which resulted in a process that was wrong and unfair to Morden. Counsel for Benono countered that there was no such error on the part of the judge.

Discussion

[18] In my opinion, the judge made no error in his statement of the test. The insertion of the word “genuine” in his final sentence in no way meant that he misconceived or misconstrued the test as being more onerous. When one has regard to the full text at paragraph 3 of the **Sparkasse** decision, it is evident that the authenticity or “genuineness” of the dispute as to the debt’s existence is the central element. As Byron CJ said -

“The law governing the making of winding up orders is well settled and could easily be set out at this stage. The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly. But if the dispute is simply as to the amount of the debt and there is evidence of insolvency the company could be wound up. To fall within the principle, the dispute must be genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceeding. A creditor who has served a statutory notice on the company is not entitled to a winding up order if the company bona fide disputes the debt and there is no evidence of the insolvency of the company. If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court. The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions. A debt disputed on genuine and substantial grounds could not support a winding up petition. Invoking the process of the Court in relation to a debt which was known to be disputed on genuine and substantial grounds was an abuse of the process of the Court.” (Emphasis added)

- [19] The judge clearly sets out both the subjective and objective elements of the test when he says:

“The reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds.”

- [20] The fact that he does not go on to cite the majority of paragraph 3 of **Sparkasse** or that he inserted the word “genuine” in the final sentence is of no moment. He would have clearly had in mind that for Morden to successfully dispute the existence of the Debt, they had to provide subjective evidence that they did not genuinely believe the Debt existed, and this belief must have been based on substantial or reasonable

grounds (the objective element). I therefore find that there was no error by the judge in this regard and he did not understand the test to be more onerous than it is.

The “errors” by the judge in his application of the Sparkasse test

- [21] The essence of Morden’s argument is that in applying the **Sparkasse** test, the judge made several errors which ultimately led to him applying the test in a manner that placed a substantial burden on them which was ultimately unfair and resulted in a mini trial. Whilst Morden has argued four grounds of appeal, the grounds are interconnected and related. Having regard to Morden’s written submissions, they really make two substantive points as to the errors made by the learned judge; that is, the estoppel point and his treatment of Mr. Yusov’s evidence as opposed to Benono’s evidence. Each point will be discussed in turn to determine whether the judge erred in the exercise of his discretion.

The estoppel point

- [22] Morden makes several critiques as to the judge’s approach to the estoppel by deed point. Their principal arguments are that the judge erred in his construction of the SPA, he erred by failing to consider that the estoppel by deed argument was capable of dispute on the facts and the manner in which the point was raised and dealt with rendered the hearing unfair.

The construction of the SPA

- [23] Morden argued that the judge misstated the recitals when he said that “you’ve got in the recitals that this money is owing”. In quoting an extract from the recitals of the SPA, Morden argued that the statement did not demonstrate Morden’s indebtedness to Benono (or CP) but rather was simply a statement that Galantor and CP entered into the Loan. They argued that for an estoppel to truly arise, there ought to have been a clear statement along the lines of “Whereas [Morden] owes [Benono] the sum of x” as per the authority of **Bensley v Burdon**.⁵ They further argued that an estoppel could only arise where an action was brought to enforce

⁵ (1830) 8 L.J. (O.S.) Ch. 85, 87.

the rights arising out of the deed (as per the authority of **Carpenter v Buller**)⁶ and an application to set aside a statutory demand did not meet this requirement. Moreover, an estoppel could not defeat the allegation that the deed had been executed as the result of a fraud (as per **Collins v Blantern**).⁷ They surmised that the judge's analysis was therefore wrong in law, and this was not a killer point that could resolve the dispute at this stage.

- [24] Benono argued that having confirmed that he read the skeleton argument, the judge was entitled to direct counsel to the salient argument. The judge was also entitled to ask "how do you get around that [estoppel] point". They contend that there was no error in principle made by the judge.

Discussion

- [25] I disagree with Morden's argument on this point. There was no error in construction of the SPA by the judge. At paragraph 9 of the judgment, the judge stated quite clearly that the SPA was executed between Morden and CP. He then went on to cite paragraph B of the recitals of the SPA. There was no misstatement by the judge when he indicated that the recitals reflected that money was owing. When one has regard to the SPA, it states that Morden was the pledgor and CP, the pledgee. It mentions that CP and Galantor entered into the Loan and that Morden owned shares in Galantor. At paragraph 1, under the heading, "Pledge" it stated quite clearly that in the event of a default by Galantor as specified in the Loan, Morden pledged to discharge and pay all of Galantor's obligations under the Loan to CP.
- [26] The fact that the judge merely quotes one paragraph from the recitals and not the entirety or more of the SPA, is of no consequence. He had the SPA before him, and he would have taken it into account when coming to his decision. Morden's argument that for an estoppel to arise there must have been a clear statement of Morden's indebtedness is therefore otiose since the SPA pellucidly sets out

⁶ (1841) 8 M and W 209.

⁷ (1767) 2 Wils KB 341.

Morden's obligations to CP in the event of a default under the Loan by Galantor. The judge therefore did not err in this regard.

Whether the estoppel by deed argument was capable of dispute on the facts

- [27] Morden submitted that the judge did not consider that this point was capable of dispute on the facts, particularly in circumstances where Mr. Yusov's evidence was that the then UBOs had no knowledge of the existence of the SPA until late 2019 and that it had been signed by nominee directors on the instructions of persons unknown to Morden, who had no authority to give them such instructions. Morden submitted that this explanation provided by Mr. Yusov was all that he could have properly said in the circumstances and that the circumstances demanded an enquiry into, for example, what instructions had been sent at the instance of the pledgees (CP).
- [28] They argued that the estoppel matter was not to be determined on the affidavits at the hearing without disclosure, a sufficient enquiry and live evidence. Further, they posited that none of the witnesses whose affidavits were before the court could properly give evidence as to the state of the pledgees' knowledge (CP). CP was not a party to the application and the judge could not have properly drawn conclusions out of Mr. Yusov's inability to volunteer evidence as to CP's knowledge.
- [29] Further, as regards Morden's purported acknowledgment of its obligations under the SPA in its letters dated 26th August 2019, they argued that the judge placed far too much emphasis on the lack of an explanation as to the mistake. They argued that in circumstances where Benono's evidence was filed late (three clear days before the hearing), the judge should have borne this in mind before placing any weight on Morden's failure to answer points made by Benono.
- [30] Morden also submitted that the judge erred in finding that Mr. Kapsis' account was inconsistent with Morden's since Mr. Kapsis was not a witness and had not given sworn evidence in the matter. Moreover, Mr. Kapsis' letter also acknowledged that

he did not examine the business and commercial activities of CP between 2012 – 2014, which was the crucial period. As such, the judge ought to have given no weight to his statement that “there [was] no record of receivable from Honberg Enterprises in the amount of US \$11 million under the Loan Agreement dated 5 September 2013.” Given Mr. Kapsis’ misstatement of the Loan’s date and the fact that he would not have examined CP’s records at the relevant time, Morden posited that Mr. Kapsis’ letter was of no particular weight.

[31] Ultimately Morden argued that they demonstrated the existence of a substantial dispute to the required standard in respect of the estoppel point itself and it follows that the appeal should be allowed, and the judge’s order set aside. Morden relied on the passage of McLelland CJ in the decision of **Eyota Pty Ltd v Hanave Pty Limited**⁸ as cited with approval in this Court’s decision of **Angel Wise Limited v Stark Moly Limited**.⁹

[32] Benono countered that Morden had been written to and a demand had been made for the repayment of the monies owed to them. They asserted that Morden had received those letters but had chosen not to dispute the fact that money was owed. Benono argued that the judge did not place emphasis on this “killer point”. Instead, they argue that their written submissions placed greater reliance on the fact that Morden always knew the monies were owed and acknowledged this fact in writing. They argued that the judge considered the skeleton arguments of both parties and relied on them in reaching his decision. Thus, the point that Morden acknowledged the Debt in writing by way of the SPA was not a “killer point” of the judge’s own devising, but rather, it had been put before him in written submissions.

[33] Benono also posited that the judge clearly accepted that if it had been the case that the nominee directors had entered the SPA without instructions then this was not a matter that concerned Benono but rather was an internal matter between the UBOs

⁸ (1994) 12 ACSR 785.

⁹ BVIHCVAP2010/0030 (delivered 13th February 2012, unreported).

and the nominee directors. The judge accepted that there was no evidence before him that the UBOs had commenced legal proceedings against the directors as well as no evidence that the directors had acted in bad faith or without instructions.

- [34] The judge also made no error in relying on Mr. Kapsis' letter since the evidence was properly exhibited. The judge was also entitled to find, based on the evidence before him, that Mr. Yusov had not provided a plausible explanation as to what had occurred, and the Court of Appeal ought not to second guess a first instance judge who had the benefit of the evidence before him.

Discussion

- [35] The main point raised by the judge as regards to the estoppel point is really that on the face of it, the wording of the SPA was clear, and Morden was a party to it. Under the SPA, it stated that in the event of Galantor's default under the Loan, Morden would step in to discharge Galantor's obligations to CP. The judge's main point was that Morden's evidence had to be substantial and reasonable to displace the clear wording of the SPA. The judge found that Mr. Yusov's evidence simply was not sufficient. His explanation that the SPA was executed by nominee directors on instructions from persons not known to the UBOs, was lacking. As the judge rightly pointed out, the SPA was executed as a deed and entered into by Morden's nominee directors on its behalf. The judge was entitled to look at the totality of the evidence including the letter in which Morden acknowledged its obligations under the SPA.

- [36] As regards Mr. Kapsis' letter, again the judge made no error by relying on and having regard to it. It was properly exhibited as part of Benono's evidence. Despite Mr. Kapsis' statement that he was only appointed liquidator in 2018 and he did not analyse the business activities of CP for the period 2012 – 2014, he did state that he checked CP's records. Amongst the records, he was able to locate and refer to documents dated in 2013, which would have been within the relevant period. Although he was able to indicate that he found documents from 2013, he noted

specifically that there was no record of receivable from Honberg in the amount of US \$11 million. Whilst his evidence was not in the form of a sworn affidavit, it was still part of Benono's evidence, and the judge was entitled to have regard to the totality of the evidence before him. There was no error by the judge in finding that the estoppel point was not capable of dispute, since having regard to the evidence, Morden simply failed to put before him a strong case. He found Mr. Yusov's explanation to be lacking and without more, the Demand would not be set aside.

Whether the way in which the estoppel by deed point was raised and dealt with rendered the hearing unfair

[37] Counsel for Morden asserted that the judge placed substantial emphasis on the estoppel by deed point which had not been raised by Benono, but instead by him at the hearing of the set aside application. Making references to the transcript of proceedings in the lower court, Morden argued that the matter was simply put to Morden's counsel at the hearing and counsel was not afforded the opportunity to properly address what was essentially a legal matter. They asserted that counsel was not shown the text from **Chitty on Contracts** which appeared in the judgment and thus, the overall approach by the judge was unfair. As to the structure of the hearing, reflected in the transcript, Morden makes the point that the judge declined to hear from Benono and delivered *an extempore* judgment immediately after the lunch break. He further failed to give Morden an opportunity to make submissions on the matter and disposed of their right to reply.

[38] Benono made the short point that the judge gave Morden ample opportunity to put its case before him and answer any and all queries he had in relation to the evidence. The judge was entitled to rely on the written submissions and to ask counsel to address him on the pertinent points as they occurred to him.

Discussion

[39] In reading the transcript of the hearing, the judge first acknowledged that he had the electronic bundle, Mr. Yusov's second affidavit and the written submissions. Very

early in the hearing he directed counsel for Morden to the main issue, which counsel agreed was whether Morden had an arguable case that the effect of the 21st December 2012 agreement was such that there was no debt owed. The judge further pointed out that the wording of the SPA was clear. There was no error by the judge in directing the parties to the main issues. Rather, this is in keeping with the overriding objective to deal with cases justly as per Rule 1.1 of the **Civil Procedure Rules (Revised Edition) 2023** (the “CPR”). Under Rule 1.1(2)(4), dealing with cases justly means ensuring that cases are dealt with expeditiously.

[40] At the hearing counsel for Morden made oral submissions and then the court took a break at 11:22 am for the judge to consider the issues and decide what points he needed counsel for Benono to address him on. When court resumed at 12 noon, the judge indicated to counsel for Benono that he did not need to hear him and that he would render judgment in a short while. Reading the transcript, it was evident that the judge found the major hurdle for Morden to overcome was the evidential basis to displace the SPA and their own letter acknowledging the Debt. Having found that they were unable to overcome this hurdle, the judge did not deem it necessary to prolong the hearing nor did he deem it necessary for counsel for Benono to address him. There was no error on his part in this regard.

[41] This was Morden’s application, and it is trite law that he who asserts must prove. Ultimately, as per the transcript, the judge found that Morden’s evidence was insufficient to explain how the SPA could have come about and how the letter could have been sent. During the hearing, Morden was given the opportunity to put its case before the judge and answer any questions raised by him. There was nothing inherently unfair with the way the judge proceeded with the hearing.

[42] Furthermore, the SPA was exhibited to Mr. Evgeny Kosolapov’s affidavit filed on 8th March 2022. Morden had an opportunity to reply to this affidavit, which they did. In Mr. Yusov’s second affidavit, as the judge pointed out, he failed to expand on his narrative that the nominee directors entered the SPA without the UBOs’ knowledge.

Instead, the second affidavit mainly sought to correct statements made in the first. Morden therefore had the opportunity both in writing and orally to address the evidential challenge posed by the SPA and their own letter acknowledging it. The judge, as arbiter of the evidence, found that they failed to do so. He properly considered all that was before him and there was no error in his consideration. Contrary to Morden's assertion, the hearing was not unfair, and the judge did not err.

The judge's treatment of the evidence

- [43] Morden posited that the judge's conclusions as to the veracity of Mr. Yusov's evidence as opposed to that of Mr. Kosolapov's was erroneous. They argue that the hearing was not an appropriate forum for him to reach conclusions of this sort without the benefit of live evidence, proper notice and disclosure. They argued that in the context of raising a sufficient dispute as to whether the Debt was due and owing, the judge's findings that Mr. Yusov's evidence was seriously defective, in that he only referred to documents, was of no moment. As the relevant matters had occurred almost a decade before the hearing, neither Morden's nor Benono's witnesses could do anything other than rely on the documentary record.

- [44] Morden also asserted that the judge's finding that Mr. Yusov had no personal knowledge of the matter coloured his entire approach to the matter. They argue that this finding is misconceived given the state of knowledge of Benono's witness since Mr. Kosolapov was only a consultant to Benono and claimed no special knowledge of the matter. They therefore argued that the judge was wrong to give greater weight to Mr. Kosolapov's evidence than to Mr. Yusov.

- [45] Further, they submitted that a minor deficiency such as the failure to name the UBOs was hardly sufficient to put the veracity of Mr. Yusov's evidence in doubt. In regards to the judge's statement that there was no plausible narrative given by Mr. Yusov, Morden asserted that he gave an account in both of his affidavits and the judge failed to explain what about Mr. Yusov's account took it beyond the pale. The judge,

they posited, ought to have had regard to the late service of Benono's evidence, but instead he engaged in a mini trial at the hearing. Morden submitted that the matter was sufficiently disputable to require a determination at trial, rather than in the summary process of the hearing.

- [46] Benono countered that the judge was entitled to find that Mr. Yusov's evidence was both inconsistent and not a first-hand account. Based on the evidence, the judge was entitled to find that Morden failed to explain why the Debt was allowed to go unchallenged and instead acknowledged in correspondence and the SPA. He was also entitled to find that as Cypriot litigation had commenced since November 2021, Morden had ample opportunity to establish what was going on. The judge was further entitled to draw the distinction between Mr. Yusov's and Mr. Kosolapov's evidence in placing weight on each person's evidence. The judge therefore did not err.

Discussion

- [47] An appellate court should be slow to interfere with a trial judge's findings of fact. As Lord Reed stated in **Henderson v Foxworth Investments Limited**:¹⁰

"It follows that, in the absence of some other identifiable error such as ... a material error of law, or the making of a critical finding of fact which has no basis in evidence, or a demonstrable misunderstanding of relevant evidence, or a demonstrable failure to consider relevant evidence, an appellate court will interfere with the findings of fact made by a trial judge only if it is satisfied that his decision cannot reasonably be explained or justified."

- [48] The findings made by the judge as to the veracity of Mr. Yusov's evidence were entirely open to him based on the evidence that was before him and the findings made were entirely connected to the question of whether Morden had raised a sufficient dispute as to the existence of the Debt. It cannot be disputed that Mr. Yusov had no personal knowledge of the matters or that he could only rely on the documentary record. These facts were affirmed in his affidavit and it was proper for

¹⁰ [2014] UKSC 41 at paragraph 67.

the judge to have had regard to such matters. The judge also made no error in taking into consideration the fact that Mr. Yusov, in neither of his affidavits, failed to expand on how the SPA came to be executed without the knowledge of the UBOs.

[49] At the hearing (as evidenced in the transcript), these points were raised by the judge. He repeatedly pointed out the deficiencies in Mr. Yusov's evidence to which Morden's then counsel had little to no answer. As stated previously, the judge is the arbiter of the dispute and as arbiter he is entitled to make findings of fact based on the evidence before him. Unless his findings are unsupported, an appellate court would be slow to interfere with his findings.

[50] Ultimately, the judge made no error in his consideration of the evidence put forth by either party. At paragraphs 20 and 21 of his judgment, he reasoned why he came to his decision and the factors he took into account. At the heart of the matter, the judge placed substantial weight on the lack of evidence supplied by Morden. He found that Morden's account and explanation failed to displace the SPA and their own letter acknowledging the Debt. I do not believe that he erred in this regard.

Conclusion

[51] Ultimately, I am of the view that the judge's approach was consistent with established principles as enunciated in **Sparkasse**. This was not a wrong exercise of his discretion and I do not believe that there are valid reasons to interfere with his decision. He therefore did not err in his application of the **Sparkasse** test to the facts as presented to him, and his decision to refuse to set aside the Demand was not blatantly wrong. Morden failed to put before him sufficient evidence to show that the reason for not paying the Debt was honestly believed to exist and was based on substantial or reasonable grounds.

Order

[52] I would therefore order that:

- (i) The appeal is dismissed;

- (ii) The order of the learned judge dated 15th March 2022 and entered 24th March 2022 is affirmed; and
- (iii) Costs of the appeal are awarded to the Respondent to be assessed by a judge of the Commercial Court if not agreed within 21 days of the date of the judgment.

I concur.
Dame Janice M. Pereira, DBE
Chief Justice

I concur.
Trevor Ward
Justice of Appeal

By the Court

Chief Registrar