

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2021/0009

BETWEEN:

ARRICANO REAL ESTATE PLC

Appellant

and

STOCKMAN INTERHOLD S.A.

Respondent

Before:

The Hon. Mde Louise Esther Blenman

Justice of Appeal

The Hon. Mde. Gertel Thom

Justice of Appeal

The Hon. Mr. Dexter Theodore

Justice of Appeal [Ag.]

Appearances:

Ms. Blair Leahy QC, with her, Mr. Dave Marshall for the Appellant

Mr. Andrew Willins for the Respondent

2021: October 8;
2022: February 8.

Commercial appeal – Insolvency proceedings – The Insolvency Act, 2003 – Winding up proceedings - Appointment of liquidators of a company – Genuine and substantial grounds of dispute - Exercise of discretion - Whether learned judge erred in holding that there was a genuine and substantial dispute in relation to the satisfaction of the obligations under the 2011 Award - Cross-claim – Whether in dismissing application, learned judge wrong to conclude that there was a genuine and substantial dispute of an enforceable cross-claim for damages by Stockman – Whether learned judge erred in holding that there was a genuine and substantial dispute if the value of Stockman’s alleged cross-claim exceeded application debt – Costs – Whether the learned judge erred in ordering Arricano to pay all of Stockman’s costs of the application – Whether the learned judge erred in failing to dismiss Arricano’s application for leave to rely on expert evidence on the question of limitation

In February 2010, Arricano Real Estate PLC (“Arricano”) and Stockman Interhold S.A. (“Stockman”) entered into a Shareholders Agreement (“the SHA”) and a Call Option Agreement (“the COA”). Under the SHA, Arricano came under an obligation to transfer a series of five loans (“the Filgate Loans”) advanced by Filgate Credit Enterprise Limited

("Filgate") to Prisma Beta LLC ("Prisma Beta") in the amount of no more than US\$100 million with interest.

In November 2010, Arricano issued a notice to exercise its call option under the COA and Stockman gave notice terminating the SHA and the COA. This led to the UNCITRAL Arbitration and the LCIA Arbitration. In June 2011, the UNCITRAL Arbitration Tribunal ruled that Stockman validly terminated the SHA and ordered Arricano to 'take all steps required for the Filgate Loan to Prisma Beta to be brought under the control of Arricano and Stockman by Arricano arranging for the transfer of the loan from Filgate to a Cypriot company' ("the 2011 Award").

Four of the loans were transferred to Assofit Holdings Limited pursuant to a Ukrainian judgment in February 2013. The fifth loan dated 1st March 2006 ("the March 2006 Loan"), was for a total of US\$5 million plus interest at the rate of 10% per 360-day year. The date of repayment was extended to 28th February 2014. It remains unpaid.

The LCIA Arbitration Tribunal made a costs award in favour of Arricano in the amount of US\$158,198.27 and £22,547.48 plus interest from 1st September 2014 until payment at the rate of 1.5% per annum ("the 2014 Award"). Arricano was later granted permission to enforce the 2014 Award against Stockman ("the BVI Order"). Stockman was later ordered to pay Arricano £77,205.85 and US\$789,399.00 in respect of its costs of the LCIA Arbitration Tribunal's sixth, seventh and eight awards and simple interest from 1st September 2016 until payment at 1% per annum above One-Week GBP and USD LIBOR respectively. This arose in terms of an LCIA Award dated 17th August 2016 ("the Eighth Award"). Arricano served a statutory demand on Stockman on 30th April 2020 insisting on payment of the costs orders pursuant to the BVI Order and the Eighth Award. Stockman took no steps to satisfy the statutory demand or to have it set aside.

On 2nd November 2020, Arricano filed an application to liquidate Stockman and to appoint liquidators. On 8th January 2021, Stockman filed an affidavit opposing the application and argued that it had a cross-claim which equalled or exceeded the debt sought in Arricano's application. The learned judge dismissed Arricano's application to wind up Stockman and concluded that there was a sufficient defence put forward of a cross-claim to fall within the **Sparkasse Bregenz** test. He also ordered Arricano to pay the costs of the application to be assessed if not agreed.

Being dissatisfied with the judge's findings of law and fact and his conclusion, Arricano appealed. The appeal consists of a number of grounds and sub-grounds which challenge the judge's findings of law and fact and his conclusion that Stockman's cross-claim gives rise to a genuine and substantial dispute to the application debt. Stockman has crossed appealed on the basis that there were alternative grounds on which the learned judge could have dismissed the application to wind up. The issues on appeal and counter appeal can be summarised as follows: i.) whether the learned judge erred in holding that there was a genuine and substantial dispute in relation to the satisfaction of the obligations under the 2011 Award; ii.) whether in dismissing application, the learned judge was wrong to conclude that there was a genuine and substantial dispute of an enforceable cross-claim for damages by Stockman; iii.) whether the learned judge erred in holding that there was a genuine and substantial dispute if the value of Stockman's alleged cross-claim exceeded the application debt; iv.) whether the learned judge erred in ordering Arricano to pay all of Stockman's costs

of the application; and v.) whether the learned judge erred in failing to dismiss Arricano's application for leave to rely on expert evidence on the question of limitation.

Held: dismissing the appeal and affirming the decision of the learned judge in its entirety; awarding costs of the application in the court below to Stockman, to be assessed by a judge of the Commercial Court unless otherwise agreed within 21 days of the date of this judgment; and awarding costs of the appeal to Stockman which are to be assessed at no more than two-thirds of the costs in the court below, unless otherwise agreed within 21 days of the date of this judgment, that:

1. Where a company asserts a cross-claim in response to an application to wind it up and to appoint liquidators, the company must also show that its cross-claim is equal to or larger than the disputed debt and that the cross-claim is based on substantial grounds. In determining whether the cross-claim is genuine and based on substantial grounds, the court employs the **Sparkasse Bregenz** test. Accordingly, the cross-claim must be genuine and serious and not based on frivolous grounds.

Section 162(1) of the **Insolvency Act**, No. 5 of 2003, Revised Laws of the Virgin Islands applied; **Re Bayoil SA** [1999] 1 WLR 147 applied; **Montgomery v Wanda Modes Ltd.** [2002] 1 BCLC 289 applied; **Dennis Rye Limited v Bolsover District Council** [2009] EWCA Civ 372 applied; **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation British Virgin Islands** Civil Appeal No. 10 of 2002 (delivered 18th June 2003, unreported) applied; **Re Ringinfo Ltd** [2002] 1 BCLC 210 considered; **Abbey National plc v JSF Finance and Currency Exchange Co. Ltd** [2006] EWCA Civ. 328 considered; **Re Richbell Strategic Holdings Ltd.** [1997] 2 BCLC 429 applied.

2. In the case below, in the face of Stockman's assertion of its cross-claim, most of the matters on which Arricano has sought to undergird its application need to be tested in cross-examination to verify their veracity. The necessity for cross-examination in itself indicates that there are genuine and substantial grounds of dispute. This is consistent with the judge's finding that there is a genuine and substantial defence of a cross-claim by Stockman and there is therefore no need for this Court to interfere with the judge's findings in this regard.

Re Janeash Ltd. [1990] BCC 250 applied.

3. Appellate courts exercise a high threshold of appellate restraint in relation to both interferences with a first instance judge's findings of facts and exercise of discretion. An appellate court ought not to overturn a trial judge's findings of facts, the evaluation of those facts and the inferences drawn from them unless those findings were not open to the judge on the evidence. Similarly, an appellate court would only interfere with a trial judge's exercise of his or her judicial discretion if the judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors, or by taking into account or being influenced by irrelevant factors

and considerations; and that as a result of the error or degree of error, in principle the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong. Upon consideration of the issues raised on appeal by Arricano and having given deliberate consideration to the judge's reasoning and holdings, it is clear that the learned judge carefully addressed all of the matters that were taken by Arricano, against the cross-claim Stockman had asserted. The learned judge was fully seized of the relevant facts and made findings that were clearly open to him and in the totality of the circumstances, the judge properly exercised his discretion not to appoint liquidators pursuant to section 167 of the Insolvency Act. Consequently, there is no basis for this Court to impugn the judge's decision and the appeal in relation to the first three issues is dismissed.

Yates Associated Construction Company Ltd. v Blue Sand Investments Limited [2016] ECSCJ No. 71 (delivered 20th April 2016) applied; **Fage UK Ltd. v Chobani UK Ltd.** [2016] ECSCJ No. 71 (delivered 20th April 2016) applied; **Shankar Khushalani and another v Lindsay Mason (Trading as Tropical Home Designs Architectural & Construction Services)** [2021] ECSCJ No. 593 (delivered 11th June 2021) applied; **Webster Dyrud Mitchell (A partnership) et al v Jenny Lindsay** AXAHCVP2017/0001 (delivered 20th September 2021, unreported) considered; **Michel Dufour and others v Helenair Corporation Ltd. and others** [1996] ECSCJ No. 11 (delivered 12th February 1996) applied; **JTrust Asia PTE v Mitsui Konoshita and others** [2021] ECSCJ No. 571 (delivered 31st May 2021) applied; **Ming Siu Hung and others v JF Ming and another** [2021] UKPC 1 applied; **Yates Construction Company Ltd. v Blue Sand Investments Limited** BVIHCVAP2012/0028 (delivered 20th April, 2016, unreported) applied; **Depraska v Cherney** [2012] EWCA Civ 1235 applied; **Khouly Construction Engineering Ltd v Edmond Mansoor** [2021] ECSCJ No. 527 (delivered 15th April 2021) considered; **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited** [2021] ECSCJ No. 529 (delivered 9th July 2020) considered.

4. An award of costs is a matter within the discretion of a judge and the Court of Appeal will only interfere with an award if the judge's exercise of discretion exceeded the generous ambit within which reasonable disagreement is possible and is clearly or blatantly wrong. The judge showed fidelity to the established principle that a successful party is entitled to costs and may only be deprived of its costs in limited circumstances such as dishonesty or misconduct. There was therefore no basis for the learned judge to disapply the established principle that costs follow the event. Consequently, the appeal is dismissed on this issue.

Throne Capable Investment v Agile Star Group Limited BVIHCMAP2020/0014 (delivered 14th January 2021, unreported) applied.

JUDGMENT

- [1] **BLENMAN JA:** This is an appeal by Arricano Real Estate PLC (“Arricano”) against the oral judgment of the learned Jack J [Ag.] which was rendered on 18th February 2021 and his order of the same date. By the order, the learned judge dismissed an originating application (“the application”) for the appointment of liquidators over the respondent, Stockman Interhold S.A. (“Stockman”) under section 162(1)(a) of the **Insolvency Act 2003**¹ (“the Insolvency Act” or “the Act”) and ordered Arricano to pay the costs of its unsuccessful application for the appointment of liquidators.
- [2] Arricano appeals the learned judge’s decision on the basis that he erred both in law and in fact in dismissing the application. The learned judge dismissed the application on the basis that Stockman had a genuine and substantial basis for asserting a cross-claim which would exceed the debt in respect of which Arricano petitioned, arising out of Arricano’s obligations pursuant to an arbitral award to transfer certain loan agreements. The appeal is vigorously opposed by Stockman.
- [3] Stockman has also cross-appealed, essentially contending that though the learned judge was correct in both law and fact in dismissing the application, there were other bases on which he could have done so. In its written submissions however, Stockman raised mainly the issues of the judge’s treatment of Arricano’s application for leave to rely on expert evidence in the court below and costs.
- [4] It is necessary to set out the relevant background in some detail in order to provide the requisite context. I do so now.

Background

- [5] Arricano is a Cypriot company involved in real estate development, construction and investment and was formerly controlled by Mr. Hillar Teder (“Mr. Teder”). In 2009,

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

Mr. Teder's group was in financial difficulties and needed a cash injection, which led to an investment by Stockman, a company incorporated in the Territory of the Virgin Islands (the "BVI"). Stockman was involved in a Cypriot company called Assofit Holdings Limited ("Assofit"), which ultimately held the interest to a real estate development known as "Sky Mall", a shopping centre complex in Kyiv, Ukraine. Assofit held 100% interest in Prisma Beta LLC ("Prisma Beta" or "PB"), a Ukrainian company, which in turn held the interest in Sky Mall.

- [6] Arricano and Stockman entered into a Shareholders Agreement on 25th February 2010 ("the SHA") and a Call Option Agreement ("the COA"). These were both governed by English law. Under the SHA, Stockman held a 50.03% interest in Assofit with the remaining 49.97% being held by Arricano. By virtue of clause 3.4 of the SHA, Arricano came under an obligation to transfer a series of loans ("the Filgate Loans") which were advanced by Filgate Credit Enterprise Limited ("Filgate"), indirectly owned and/or controlled by Mr. Teder, to Prisma Beta in the amount of no more than US\$100 million with interest.
- [7] On 8th November 2010, Stockman gave notice terminating the SHA and the COA relying on a series of breaches by Arricano of its obligations under that agreement. On 5th November 2010, Arricano issued a notice to exercise its call option under the COA. This led to a series of arbitrations as follows:
- (i) On 9th November 2010, Stockman initiated arbitral proceedings before the London Court of International Arbitration ("LCIA") in respect of the termination of the COA ("the LCIA Arbitration"). Stockman sought declaratory relief to the effect that the COA was validly terminated and Arricano was not entitled to exercise the call option.
 - (ii) On 21st December 2010, Arricano issued a notice of arbitration in relation to whether Stockman was entitled to terminate the SHA ("the UNCITRAL Arbitration"). The LCIA Arbitration was stayed pending the outcome of the UNCITRAL Arbitration. The UNCITRAL Arbitration led to a Final Award dated 9th June 2011 ("the 2011 Award"). In the UNCITRAL Arbitration,

Stockman contended that Arricano was in breach of certain confidentiality clauses in the SHA and was also in breach of clause 3.4. Amongst the relief sought in the UNCITRAL Arbitration by Stockman, was an order requiring Arricano to bring about the transfer of the Filgate Loans. The Tribunal found that Arricano was in breach of the confidentiality provisions and clause 3.4. The Tribunal declared that Stockman had validly terminated the SHA and gave relief by way of specific performance. The Tribunal ruled that Arricano must 'take all steps required for the Filgate Loan (to PB) to be brought under the control of Arricano and Stockman by Arricano arranging for the transfer of the loan from Filgate to a Cypriot company'. Arricano failed to comply with the 2011 Award.

- [8] There were five Filgate Loans. Four of the loans were transferred to Assofit pursuant to a Ukrainian judgment dated 11th February 2013 ("the First Ukrainian judgment").
- [9] The basis for Stockman's cross-claim was the remaining Filgate Loan dated 1st March 2006 ("the March 2006 Loan"). The March 2006 Loan was for a total of US\$5 million plus interest at the rate of 10% per 360-day year. By a supplemental agreement dated 14th December 2006, the date for repayment was amended to 28th February 2014.
- [10] During the course of the LCIA Arbitration, the LCIA Tribunal made a costs award in favour of Arricano in the amount of US\$158,198.27 and £22,547.48 plus interest from 1st September 2014 until payment at the rate of 1.5% per annum ("the 2014 Award"). By order dated 5th November 2014, Bannister J granted permission to enforce the 2014 Award against Stockman ("the BVI Order").
- [11] Stockman was also ordered to pay Arricano £77,205.85 and US\$789,399 in respect of its costs of the LCIA Tribunal's sixth, seventh and eighth awards and simple interest from 1st September 2016 until payment at 1% per annum above One-Week

GBP and USD LIBOR respectively. This arose in terms of an LCIA Award dated 17th August 2016 (“the Eighth Award”).

- [12] On 30th April 2020, Arricano served a statutory demand on Stockman insisting on payment of the above costs orders pursuant to the BVI Order and the Eighth Award. Stockman took no steps to satisfy the statutory demand or to have it set aside.
- [13] On 2nd November 2020, Arricano filed an application in the BVI Court to liquidate Stockman under section 162 (1) (a) of the Insolvency Act and to appoint Mr. Nathan Mills and Mr. Owen Walker as joint and several liquidators of Stockman. The application and the supporting evidence were served on Stockman on 5th November 2020. The application was listed for hearing on 18th January 2021.
- [14] On 8th January 2021, Stockman filed the affidavit of Kostiantyn Likarchuk together with exhibits opposing the application. Stockman, as stated before, argued that it had a cross-claim which equalled or exceeded the debt sought in the application. The hearing was therefore adjourned to 18th February 2021.

Order in the court below

- [15] On 18th February 2021, the learned judge having heard submissions on behalf of Arricano, dismissed its application and ordered that Arricano pay costs of the action, to be assessed if not agreed. He concluded that, ‘... in my judgment, there is a sufficient defence put forward of a cross-claim to fall within the **Sparkasse Bregenz** test and...in those circumstances, I have no alternative but to dismiss the application for the appointment of a liquidator.’ Shortly, I will refer to the judgment in greater detail, but for present purposes this suffices.

The Appeal

- [16] Arricano, being dissatisfied with the decision of the learned judge, appealed to this Court against the judge’s dismissal and costs orders. The notice of appeal against the dismissal of the application contains a number of sub-grounds essentially

challenging the judge's findings of law and fact, all to the effect that Stockman's cross-claim gives rise to a genuine substantial dispute to the application debt. Stockman resists the appeal and filed a counter-appeal. Though in agreement with the judge's ultimate findings and conclusion, Stockman filed a counter appeal in which it asserts additional and alternative grounds on which the learned judge could have dismissed the application.

Issues on Appeal and Counter Appeal

[17] The following are the five issues, which arise to be resolved:

- (i) whether the learned judge erred in holding that there was a genuine and substantial dispute in relation to the satisfaction of the obligations under the 2011 Award and/or there was a breach of the 2011 Award;
- (ii) whether in dismissing application, the learned judge was wrong to conclude that there was a genuine and substantial dispute of an enforceable cross-claim for damages by Stockman;
- (iii) whether the learned judge erred in holding that there was a genuine and substantial dispute if the value of Stockman's alleged cross-claim exceeded the application debt;
- (iv) whether the learned judge erred in ordering Arricano to pay all of Stockman's costs of the application; and
- (v) whether the learned judge erred in failing to dismiss Arricano's application for leave to rely on expert evidence on the question of limitation.

Stockman's application to adduce further evidence

[18] Before hearing the submissions of each party, the Court dealt with an application by Stockman for permission to adduce the Cypriot Statement of Claim as new evidence pursuant to the principles in **Ladd v. Marshall**² on the basis that:

² [1954] 1 WLR 1489.

- (i) Stockman, self-evidently, could not with reasonable diligence have anticipated a point which Arricano did not itself run, and which is inconsistent with Arricano's own position;
- (ii) The evidence would likely have had an important influence on the outcome of the litigation, since Arricano's own position is that the Filgate Loans were in an amount less than \$100 million, contrary to the argument which it now seeks to run on appeal; and
- (iii) Arricano cannot suggest that the new evidence is not credible; it is its own document.

[19] Learned Queen's Counsel, Ms. Leahy made no objections to the application.

[20] The Court was of the considered view that, having regard to the principle in **Ladd v Marshall** and taking into account the objectives of the **Civil Procedure Rules 2000**, it ought to exercise its discretion to allow the document to be introduced into evidence and relied on in the appeal. With the consent of the parties, the Court so ordered accordingly.

Submissions on behalf of Arricano

[21] Before addressing the Court on the issues raised in the appeal, Ms. Leahy briefly referred this Court to some of the settled applicable legal principles as they relate to appellate interference with the findings of the lower courts and the exercise of discretion of lower courts in making winding up orders under section 162(1) of the Insolvency Act.

[22] Ms. Leahy said that the applicable test in relation to appellate restraint is well-known. She submitted that an appellate court may only interfere if it believes that the lower court reached a conclusion that was wrong in substance or process. She contended that there is a difference in approach in an appeal against an evaluation of facts as

distinct from one against the exercise of discretion. She maintained that a lower level of generosity is accorded to decisions which turn on an evaluation of the facts.

[23] She also argued that there is a distinction between an appeal against a decision where there has been oral evidence and one where the matter was determined on written evidence, as in this case. She submitted that in the circumstances, the trial judge had no particular advantage over the appellate court and therefore the constraint on appellate interference is lower. Ms. Leahy purported to rely on **Re B (A Child) (Care Proceedings: Threshold Criteria)**³ in support of both contentions.

[24] In so far as it relates to the winding up order, Ms. Leahy contended that in summary, save in exceptional circumstances, it is not the practice of the commercial court to wind up a company where there is a serious and genuine cross-claim which equals or exceeds the amount of the application debt. She argued that despite this common ground, there are three points on the law that bear some emphasis. Firstly, she stated that the burden is always on respondent company, in this case – Stockman, to show that it has a serious and genuine cross-claim which exceeds the application debt. She relied on **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation**⁴ in support of this. Secondly, she maintained that the mere assertion of a cross-claim on affidavit evidence is not sufficient and further that Stockman cannot and should not seek to hide behind the complexities of a claim. Finally, she contended that the question of delay is a factor to be taken into account in testing the *bona fides* of the cross-claim. She submitted that the significant delay between the 2011 award and the cross-claim though not determinative, is a material factor. She maintained that the learned judge failed to consider this.

[25] On the first issue raised in the appeal, Ms. Leahy reminded the Court that the 2011 Award required steps to be taken to transfer the Filgate Loans with a value of no more than US\$100 million from Filgate into a corporate entity under the majority

³ [2013] UKSC 33.

⁴ British Virgin Islands Civil Appeal No. 10 of 2002 (delivered 18th June 2003, unreported).

control of Stockman. She stated that this was duly complied with, with at least a value of US\$100 million being transferred to Assofit, which was under the majority control of Stockman, and then to Torsem, which was under Stockman's sole control. In support of her contention, Ms. Leahy took this Court through the relevant Ukrainian judgments, the decision of the LCIA Tribunal, the Letter of Acknowledgment by Stockman dated 6th November 2013 ("the Stockman Letter") and Stockman's submissions.

[26] Ms. Leahy complained that the learned judge did not make any reference at all to the above-mentioned documents, all of which were in evidence. She pointed out that in relation to the seventh award, which the judge was taken through in oral submissions at length, he said: 'It's not apparent to me that that Award does, in fact, do anything to set aside the Order for specific performance of the obligation to transfer the 1st of March 2006 loan'. Ms. Leahy posited it was not Arricano's case that the seventh award 'set aside the Order for specific performance'. She reminded the Court that their case was that the Filgate Loans had been assigned and repaid in full and that this was clear from the evidence.

[27] Accordingly, Ms. Leahy concluded that against the above background, the learned judge erred in holding that there was a genuine and serious dispute as to whether the obligations under the 2011 Award had been satisfied and the appeal should be allowed on this ground alone.

[28] Turning to the question of whether there was a genuine and serious dispute as to whether Stockman had an enforceable cross-claim for damages, Ms. Leahy argued that this ground proceeds on the hypothesis that, contrary to the primary case, the 2011 Award was not satisfied. On this ground, Ms. Leahy submitted that Stockman's case was prosecuted on the assumption that they are entitled to damages for breach of the 2011 Award. She maintained, however, that the 2011 Award was not an award for damages but an order for specific performance. The court she said,

therefore could not reward damages in lieu of specific performance, in the present circumstances.

[29] Alternatively, Ms. Leahy said that even if a court had jurisdiction to order damages in lieu of specific performance, this would take Stockman nowhere. She stated that the SHA is governed by English law and under section 7 of the English Limitation Act 1980, enforcement action in relation to the 2011 Award became statute barred in June 2017. She maintained that it is accordingly now too late for Stockman to bring any claim for damages for breach of the 2011 Award and/or for damages in lieu of specific performance.

[30] Ms. Leahy then asserted that in circumstances where there is a breach of an order for specific performance, the party in whose favour the order was made has two options. The first, she stated, is to apply to the Court for an unless order specifying the period in which performance must take place. She opined that the second option is to apply to the court for an order that the decree of specific performance be dissolved and for the court to order damages in lieu. However, she was adamant that in the circumstances of the case, the latter is not an option available to Stockman. This, she said, is due to the fact that the SHA was terminated and a court can only order damages in lieu of specific performance where the contract is still extant. Ms. Leahy also maintained that the power to award damages in lieu of specific performance is discretionary, and the court would not make such an order in circumstances where it would cause extreme prejudice, as in this case. She relied on **Snell's Equity**⁵ in support of her submissions on this ground.

[31] Ms. Leahy then turned to ground 3 and pointed out to this Court that if the appeal succeeded on either ground 1 or 2 then this ground would become irrelevant.

⁵ (34th edn., Sweet & Maxwell 2009).

[32] Ms. Leahy submitted that the main issue is whether the judge was wrong to hold that there was a serious dispute as to whether the value of the cross-claim exceeded the amount of the application debt. She explained that for the purposes of this ground, the value of the alleged cross-claim is nominal or nil and that is so for three broad reasons. The first is on the basis of the findings in the seventh award which was binding on Stockman. She said that the LCIA Tribunal held that the Filgate Loans were not to be repaid at all or only in the event that PB repaid Filgate and that Stockman was to be repaid through the payment of the Option Price of US\$51,387,260.27. The second reason, she submitted, was that the March 2006 Loan was statute barred so that PB, if it had not been dissolved would have a complete defence to any action to enforce the loan. Therefore, the loan is of no value and consequently, so is the cross-claim against Arricano. Finally, Ms. Leahy argued that the cross-claim has no value as the party who is supposed to repay the loan (PB) has no assets and has been dissolved.

[33] Ms. Leahy maintained that the learned judge was wrong to reject these arguments and submitted that the appeal should also be allowed on this ground.

[34] On the issue of costs, Ms. Leahy submitted that the learned judge was wrong to order Arricano to pay all of Stockman's costs of the application. She explained that in the court below, the judge was invited to make no order as to costs in light of Stockman's failure to apply to set aside the statutory demand and other aspects of their conduct. The judge declined this invitation and instead cited **Throne Capable Investment Limited v Agile Stat Group Limited**⁶ for the general rule that the unsuccessful party should pay the costs of the successful party. He so ordered. She submitted that the learned judge erred in principle and/or his decision on costs was plainly wrong and this Court is accordingly fully justified in exercising the discretion in relation to costs afresh. She stated that the judge misdirected himself on the law as he was not bound by the decision in **Throne Capable** to make a costs award against Arricano. She posited that what he was required to do, was to consider

⁶ BVIHCP2020/0014 (delivered 14th January 2021, unreported).

whether the ‘totality of the circumstances’ justified departure from the general rule that the losing party should pay the successful party’s costs.

[35] Ms. Leahy stated that in the present case, the ‘totality of the circumstances’ justified departure from the general rule and in light of the circumstances of this case, as set out above, the learned judge should have made no order as to costs or alternatively, discounted Stockman’s costs to reflect Stockman’s failure to engage in relation to the application debt for many years, and its failure to raise its cross-claim until after the application had been issued.

[36] She therefore urged this Court to also overturn the learned judge’s decision on costs.

Submissions on behalf of Stockman

[37] Learned Counsel Mr. Willins began his submissions by reminding the Court that appellate courts are strictly constrained in their interference with findings of facts and evaluation of those facts by the lower courts. He highlighted that the scope for an appeal court to intervene on this case is extremely narrow. In doing so he reminded this Court of the recent Privy Council decision of **Ming Siu Hung and others v JF Ming and another**.⁷ Relying on the English decision of **Deripaska v Cherney**,⁸ he stated that it makes no difference that facts were based on written evidence as opposed to cross-examination. He further submitted that a similar restraint ought to be exercised in respect of appeals against the exercise of discretion. He relied on the cases of **ABN AMRO Fund Services (Isle of Man) 24 Nominees Limited formerly Fortis (Isle of Man) Nominees Limited and others v Krys and others**,⁹ **Hadmor Productions and others v Hamilton and another**¹⁰ and **JTrust Asia Pte v Mitsui Konoshita and others**¹¹ in support of this contention.

⁷ [2021] UKPC 1.

⁸ [2009] 2 CLC 408.

⁹ BVIHCP2016/0011 (delivered 20th November 2017, unreported).

¹⁰ [1983] 1 AC 191.

¹¹ [2021] ECSCJ No. 571 (delivered 31st May 2021).

- [38] He reiterated that it must keep firmly in mind the task of the first instance court, namely, that if there is a genuine and substantial cross-claim, the court will refuse to wind up a company.¹² He stated that the threshold of this test is not a high one and the English Court of Appeal has held it can apply even if a defence is “shadowy”.¹³
- [39] Citing the cases of **Montgomery v Wanda Modes Ltd.**¹⁴ and **Dennis Rye Limited v Bolsover District Council**,¹⁵ in support, Mr. Willins asserted that it is neither objectionable that a company asserts a cross-claim in response to attempts to commence winding up proceedings nor is there any requirement that Stockman should have been unable to litigate the cross-claim beforehand.
- [40] Mr. Willins took issue with the arguments that were advanced on behalf of Arricano. He strongly disagreed that no genuine and substantial dispute or cross-claim existed. He contended that Arricano took a number of points which were not canvassed in the court below. Firstly, he argued that the obligation that Stockman alleged Arricano to have breached for the purpose of the cross-claim is not clause 3.4 of the SHA but the 2011 Award. To support this argument, he stated that the wording of the 2011 Award makes no reference to a limit of US\$100 million nor does it refer to clause 3.4 and therefore, there is at the very least a serious and substantial dispute that the US\$100 million limitation does not apply to the obligation created by the 2011 Award. Following on this point, he submitted that applying the doctrine of merger, the SHA has merged into the decree of specific performance which supersedes and excludes all other evidence.

¹² Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation British Virgin Islands Civil Appeal No. 10 of 2002 (delivered 18th June 2003, unreported).

¹³ [2012] EWCA Civ 743 at [22].

¹⁴ [2002] 1 BCLC 289.

¹⁵ [2009] EWCA Civ 372.

[41] Mr. Willins continued by arguing that there is a real dispute as to the value of the other loans and that this is demonstrated by reference to the First Ukrainian Judgment. He maintained that the uncertainty is reflected in the terms of the seventh award. He posited that even on Arricano's own case, the value of the Filgate Loans was only about US\$96.7 million. He relied on the Cypriot Statement of Claim which was filed by Arricano in Cyprus in support of this contention. Mr. Willins posited that this demonstrates perfectly why the practice of the Court is not to permit new points to be sprung on the Court of Appeal. However, even if permitted to raise these new points on appeal for the first time, he submitted that none of them assists Arricano. Instead, he insisted that the documents relied on by Arricano amount to a series of carefully selected quotations taken out of their proper context without explanation of what the legal significance of these points are. He took the Court through each of the documents and explained why in his view, they did nothing to advance Arricano's appeal. He submitted that the learned judge decided the case as it was put to him and was right to conclude as he did.

[42] As to the final submission about the effect of not applying to set aside the statutory demand, Mr. Willins complained that Ms. Leahy's skeleton arguments refer to the learned judge's judgment on costs rather than the main judgment. However, he stated that the issue of failing to take any prior steps was a live issue before the judge and it is a matter for the Court's discretion how to treat a failure to litigate a cross-claim earlier. He therefore urged this Court to dismiss this ground of appeal as there is no identifiable basis to interfere with the learned judge's finding that there was a genuine and substantial cross-claim.

[43] In relation to Arricano's argument on damages not being available in the circumstances that obtain, Mr. Willins strenuously resisted Ms. Leahy's contention that a party is not entitled to claim damages in the event that an arbitration award is not satisfied. He argued that the basis of the cross-claim is the failure to comply with the 2011 Award, and its subsequent enforcement in the Cypriot Courts by the

Enforcement Order.¹⁶ He said that it would be enforced by either an action on the award or an action on the (Cypriot) judgment. He relied on the case of **A v B**¹⁷ and submitted that per Foxton J, an action on the award sounds in damages and so it is not a question about damages in lieu of specific performance at all. He was adamant that Stockman is entitled to assert a claim for damages and is not limited to the remedy of specific performance.

[44] The court, he stated, may give judgment for the sum in the award, for damages for failure to perform the award, and in certain circumstances an order for specific performance of the award.¹⁸ He maintained that this equally applies to awards that are declaratory in nature, just as much as those which provide for a monetary judgment.¹⁹

[45] Mr. Willins took issue with most of the arguments that were advanced on behalf of Arricano. He submitted that the contention that a party must apply to a court for an unless order before enforcing an order for specific performance is not relevant to this case. He argued that this was because it is a new point which was not argued below and that the order Stockman is seeking to enforce is not an order of specific performance per se. He said that rather, it is in the case of the Enforcement Order, an order recognising the terms of the 2011 Award and the implied promise by Arricano to comply with it.

[46] Further, he stated, even if construed as an order for specific performance, Stockman is not seeking to enforce the order by some form of contempt or sequestration procedure; it is simply seeking damages for a failure to comply with the order for specific performance. He relied on the cases of **Shuttleworth v Clews**²⁰ and

¹⁶ The 2011 Award was recognised by an order of the Cypriot Court on 21 February 2014 ("Enforcement Order").

¹⁷ [2020] EWHC 2790 (Comm) at [29]-[30].

¹⁸ Mustill & Boyd, *Commercial Arbitration* (2nd ed) at p.417; *Associated Electric & Gas Insurance Services Ltd v European Reinsurance Co of Zurich* [2003] 1 WLR 1041 (PC, Bermuda) at [9].

¹⁹ *African Fertilizers and Chemicals NIG Ltd (Nigeria) v BD Shipsnavo GmbH & Co Reederei KG* [2011] 2 CLC 761 at [15]-[17].

²⁰ [1910] 1 Ch. 176.

Mahmut and another v Jones and others²¹ in support of his contention that this is permissible.

[47] Mr. Willins then addressed Ms. Leahy's submission on the limitation of the action on the award. He noted that it was not argued below and complained that Arricano should not be permitted to rely on that point on appeal. In any event he submitted, the argument takes Arricano nowhere because (i) Stockman can still rely on the action on the award under the 2011 Award by means of an equitable set off against the various costs orders²² and (ii) the limitation period for an action under the Enforcement Order under BVI law is 12 years, as the learned judge found.

[48] Finally, Mr. Willins addressed Arricano's argument that in any action for damages the Court would have a discretion, which, in this case, would not be exercised in Stockman's favour. He stated that in the instant appeal, where the damages claim is based ultimately on an action on the award, the Court's discretion would not come into the mix. However, he argued, how a court would or would not exercise its discretion is plainly a matter which would be resolved on the evidence before it and this, in and of itself gives rise to a genuine and substantial dispute.

[49] Mr. Willins submitted that none of the three points made by Ms. Leahy on this issue surpasses the very high threshold of finding that there is no genuine and substantial dispute that despite having a claim in damages, the award of damages would be less than the debt on which the application is based. He took the Court through each of the arguments made on behalf of Arricano, explaining at each juncture the reason in his opinion, why this Court should also dismiss ground three of the appeal and why the learned judge's decision ought to be upheld.

[50] He argued that Ms. Leahy made an attempt to buttress her argument under the second and third points under this ground, by taking an entirely new point that the

²¹ [2017] EWCA Civ 2362.

²² See: National Westminster Bank v Frankham [2013] EWHC 1199 (QB) at [49] to [52].

Court can depart from the date of assessment of damages when the interests of justice require: per **Johnson v Agnew**.²³ However, he said that this does not take the matter further as any decision to change the date of assessment is one for the trial judge to consider, upon considering all the evidence in that action. Further, he posited in circumstances where it was claimed by Ms. Leahy that losses have crystallised since the breach (i.e. because of their argument on limitation) it is not clear that a later date of assessment would assist their argument in any event.

[51] On the issue of costs, Mr. Willins disagreed with Ms. Leahy's submission that Stockman, having failed to apply to set aside the statutory demand, should be disentitled from receiving its costs. He reminded the Court that it rejected a similar submission in **Throne Capable Investment Ltd**, and the learned judge followed that decision and was correct in his reading and interpretation of it. He submitted that moreover and in light of the above, Arricano failed to overcome the very high threshold required to interfere with the first instance decision on costs as there is neither an error of principle nor is the decision plainly wrong that no reasonable judge could have reached the same conclusion.

[52] Finally, he stated, if the Court were to interfere with the costs order, the Court is invited to consider the offer made by Stockman on 9th January 2020 inviting Arricano to withdraw its application for the appointment of liquidators with no order to costs. He maintained that the costs order can further be supported, or alternatively supported from 9th January 2020 for the additional reason that Arricano unreasonably refused to accept that offer. Stockman was not called upon to reply on the question of costs, and that point would have been made had the learned judge invited reply to submissions.

[53] At the centre of this appeal are several important sections of the Insolvency Act. Now, I will refer to them in some detail.

²³ [1980] AC 367.

The Insolvency Act

[54] Section 8 (1) of the Act states that:

- “A company or a foreign company is insolvent if
- (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;
 - (b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partially unsatisfied; or
 - (c) either
 - (i) the value of the company’s liabilities exceeds its assets, or
 - (ii) the company is unable to pay its debts as they fall due.”

[55] The issuance of the statutory demand is provided for in section 155 of the Act. Indeed, section 155 (1) of the Act enables a creditor to make demand on a person for payment of a debt owned by that person to him.

[56] Section 155 (2) of the Act provides that a demand under subsection (1) shall

- “(a) be in respect of a debt that is due and payable at the time of the demand and that is not less than the prescribed minimum;
- (b) be in writing and shall specify the nature of the debt and its amount;
- (c) be dated and shall be signed by the creditor or by a person authorised to make demand on the creditor’s behalf;
- (d) require the person to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the demand and on him or such longer period as may be prescribed;
- (e) state that if the demand is not complied with, application may be made to the Court for the appointment of a liquidator or a bankruptcy trustee, as the case may be;
- (f) set out the rights of the person to make application to set the demand aside under section **156**; and
- (g) comply with and be served in accordance with the Rules.”

[57] Section 153 (3) of the Act states that if the creditor making demand under subsection (1) is a secured creditor in respect of the debt, the full amount of the debt shall be specified in the demand, but:

- (a) The demand shall specify the nature of the security interest and the value which the creditor places on it at the date of the demand; and
- (b) The amount claimed shall: (i) be the full amount of the debt less the amount specified as the value of the security interest, and (ii) equal or exceed the prescribed minimum.

[58] Section 156 (1) of the Act enables a person who has been served with a statutory demand to apply to the court to set it aside. Section 156 (2) of the Act stipulates that the application under subsection (1) shall be made within fourteen days of the date of service of demand on him.

[59] Section 157 (1) of the Act enables the court to set aside a statutory demand. It states as follows:

“The court shall set aside a statutory demand under this section if it is satisfied that:

- (a) there is a substantial dispute as to whether
 - (i) the debt or
 - (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum, is owing or due.
- (b) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross-claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum; or

...”

[60] It is clear from the above that the statutory demand may be set aside if the person on whom the statutory demand was served demonstrates to the court that it has a reasonable prospect of establishing a set-off, counterclaim or cross-claim in an amount equal to or greater than the amount specified in the demand less prescribed minimum of the debt.

[61] Section 162 enables the court to appoint liquidators if the company is insolvent. Section 162(2) states that an application under subsection 1 may be made by a creditor.

[62] Section 167 (1) of the Act provides that on hearing an application for the appointment of a liquidator, the court may appoint a liquidator.

Discussion and Conclusion

Applicable Legal Principles

[63] I have given deliberate consideration to the arguments that were advanced on behalf of Arricano and the countervailing arguments put forward on behalf of Stockman; in my view, it is apposite that I remind myself of the well-known principles that are applicable to the appellate court's review of the judge's evaluation of evidence/findings of fact and to his exercise of discretion. All of these are viewed in the context of the requisite appellate restraint. The law, in this regard, is well settled namely an appellate court ought only to interfere with a judge's exercise of discretion if satisfied that the exercise of discretion or evaluations of the evidence and findings of fact fall outside the high threshold for appellate interference. Indeed, several decisions of this Court have consistently held that the appellate court is constrained from interfering with the findings of the lower court and exercise of discretion by the judge outside of some narrow circumstances.

Appellate Restraint

[64] In writing on behalf of this Court in **Yates Associated Construction Company Ltd. v Blue Sand Investments Limited**²⁴, I stated at paragraph 46 as follows:

“The Court of Appeal should apply restraint not only to the judge's findings of fact but also to the evaluation of those facts and the inferences drawn from them. It is axiomatic that the critical question which is before the court is whether there was evidence before the learned judge from which she could properly have reached the conclusions that she did or whether on the evidence the reliability of which it was for her to assess, she was plainly wrong.”

²⁴ [2016] ECSCJ No. 71 (delivered 20th April 2016).

[65] The general principles of appellate restraint are well summarised by Levison LJ in his well-known judgment in **Fage UK Ltd. v Chobani UK Ltd**²⁵ as follows:

“Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them.”

[66] In **Shankar Khushalani and another v Lindsay Mason (Trading as Tropical Home Designs Architectural & Construction Services)**²⁶ writing on behalf of the Court, I stated at paragraph 35 that:

“...it is not open to the appellate court to overturn the learned trial judge’s findings of facts and evaluations of those facts, unless those were not open to the judge on the evidence...”

It is settled law that an appellate court must show fidelity to the well-settled principles that govern the appellate review of a trial judge’s findings of facts, the evaluation of those facts and the inferences drawn from them by the trial judge.²⁷

[67] In relation to the appellate court’s review of the exercise of discretion by the first instance judge, Sir Vincent Floissac, former Chief Justice, in **Michel Dufour and others v Helenair Corporation Ltd. and others**²⁸ enunciated that the appellate Court could only interfere if it is satisfied:

“(1)...that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or degree of error, in principle the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong.”

²⁵ [2014] EWCA Civ 5.

²⁶ [2021] ECSCJ No. 593 (delivered 11th June 2021).

²⁷ Webster Dyrud Mitchell (A partnership) et al v Jenny Lindsay AXAHCVP2017/0001 (delivered 20th September 2021, unreported).

²⁸ [1996] ECSCJ No. 11 (delivered 12th February 1996).

[68] In **Ming Siu Hung**, the Board stated at paragraph 20 as follows:

“It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties’ dispute is not rendered ineffective by undue appellate activism.”

[69] In **JTrust Asia PTE**,²⁹ writing on behalf of this Court, I indicated that the appellate court should not interfere with the judge’s exercise of discretion except, in limited circumstances. The appellate court should only interfere if it is satisfied that in exercising his or her judicial discretion, the trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors, or by taking into account irrelevant factors; and that, as a result of the error, in principle, the trial judge’s decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong. Therefore, the appellate court should not easily substitute its own exercise of discretion for the discretion already exercised by the judge unless the decision of the judge was plainly wrong.

[70] In **Ming Siu Hung**, the Board discussed the need for appellate restraint both in relation to appeals from exercises of discretion and findings of fact. Lord Briggs, at paragraph 22, stated as follows:

“Finally, it is not an answer to the need for the exercise of appellate restraint for the appeal court to regard itself as well placed as the judge to carry out the relevant task. In *Zuckerman on Civil Procedure: Principles of Practice*, 3rd ed (2013), at para 24.204 it is observed:

‘It has been said that a preview of the lower court’s decision on a question of fact is different from a review of the lower court’s exercise of discretion. The difference between the two kinds of judicial exercise is undeniable, but it does not call for a difference in appellate restraint to interference with the lower court’s decision. For while it is true that in the case of discretion the appeal court may be as well placed as the trial court to exercise it, the primary responsibility rests with the trial court not the appeal court. This is

²⁹ [2021] ECSCJ No. 571 (delivered 31st May 2021).

true not only with regard to case management decisions but also other decisions requiring the balancing of different factors as in care proceedings for instance.'

Other Relevant Legal Principles

[71] In seeking to resolve the critical issues in this appeal it is evident that other important relevant legal principles are engaged. In this context, the principles that are applicable to the winding up of a company and the countervailing circumstances in which a court would refrain from winding up a company including matters of the genuine and substantial dispute of the debt have to be investigated.

[72] It is well settled that the Court will not make a winding up order under section 162(1) of the Insolvency Act if the debt demanded in the statutory demand is disputed on genuine and substantial grounds. Very helpful guidance on the requisite threshold has been provided by Sir Dennis Byron, Chief Justice, as he then was, at paragraph 14 in **Sparkasse Bregenz**. His Lordship formulated the applicable test, which has become the *locus classicus* thusly:

"...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...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 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...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..."

[73] In **Montgomery v Wanda Modes**³⁰ it has also been recognised that it is not objectionable that a company asserts a cross-claim in response to attempts to commence winding up proceedings.

[74] In an application to appoint liquidators, the burden is on the respondent company to prove: (i) that it has a cross-claim which is equal to or larger than the debt; and (ii) that its cross-claim is based on substantial grounds.³¹ It is the law that in considering whether or not there is a cross-claim which equals or exceeds the applicant's debts, the court applies the same test as that applied where the applicant's debt is disputed. In **Re Bayoil SA**,³² Nourse LJ stated as follows:

"I emphasise that the cross-claim must be genuine and serious, or if you prefer, one of substance; that it must be one which the company has been unable to litigate; and that it must be in an amount exceeding the amount of the petitioner's debt."

Issues 1, 2 and 3.

[75] In my considered view, issues 1, 2 and 3 are closely related and therefore should be dealt with together. I therefore do so. In sum, the issues are: (i) whether there was a genuine and substantial dispute under the 2011 Award; (ii) whether there was a genuine and substantial dispute in relation to the cross-claim for damages; and (iii) whether the value of the cross-claim exceeded the application debt. The overarching complaint that Arricano asserts is the learned judge erred in his conclusions in these regards.

[76] In so far as there is common ground that the appeal revolves around the judge's evaluation of the evidence and his findings of fact, let me say straight away that even though the need for appellate restraint is the guiding principle that is at the heart of this appeal, it is passing strange that learned Queen's Counsel Leahy did not focus largely on this. To the contrary, in my considered view, she invited this Court to do precisely what appellate courts are enjoined from doing based on the

³⁰ [2002] 1 BCLC 289.

³¹ See the pronouncements of Nourse LJ in *Re Bayoil SA* at p.155.

³² [1999] 1 WLR 147.

consistent stream of jurisprudence that has been applied and followed in this Court. This was so even though she acknowledged the need for appellate restraint. It will become apparent shortly that the authorities which are well established indicate principles that are contradictory to those advanced on behalf of Arricano.

[77] Contrary to what Ms. Leahy urged on this Court, there is no difference in approach to restraint in an appeal against an evaluation of evidence and findings and that in relation to the exercise of discretion. This much is clear based on the settled principles which were crystallised by the Board in **Ming Siu Hung** which I have indicated above, namely that the appellate court is constrained from interfering with the evaluation of facts, findings of facts and the exercise of discretion, except in very limited and narrow circumstances. There is no principle, as asserted by Ms. Leahy that ‘a lower level of generosity is always accorded to decisions which turn on the evaluation of facts than those that turn on the exercise of discretion’. In fact and very instructively, the Board in **Ming Siu Hung** took the time to specifically reinforce the fact that the contrary represented the law. Consequently, Mr. Willins has the more persuasive and better argument in relation to the approach this Court should adopt in reviewing the judge’s evaluation of facts and his findings of fact. This is consistent with the principles that were stated in **Yates Construction Company Ltd. v Blue Sand Investments Limited**³³; **JTrust Asia PTE; Ming Siu Hung; Depraska v Cherney**³⁴; **Khouly Construction & Engineering Ltd v Edmond Mansoor**.³⁵

[78] Recently, Farara JA [Ag.], in writing on behalf of this Court in **Khouly Construction & Engineering Limited** held that where the evidence before the court below is largely documentary, the unique position of the trial judge in assessing the credibility of witnesses and the weight to be attributed to their evidence is of less significance

³³ BVIHCVAP2012/0028 (delivered 20th April 2016, unreported).

³⁴ [2012] EWCA Civ 1235.

³⁵ [2021] ECSCJ No. 527 (delivered 15th April 2021).

than it should be in cases decided on the basis of mostly oral evidence. However, the restraint required of an appellate court in cases involving the findings of fact by the trial judge is not overcome by the view of an appellate court that it is suitably suited to make the decision under review.

[79] It is evident therefore that the appellant must therefore demonstrate that the trial judge was plainly wrong in the approach to and assessment of the evidence and the application of it to the issues before the court for determination; that he came to a wrong conclusion on the applicable law; that he omitted relevant evidence from his consideration and assessment; or that there was no evidence before the trial judge from which he could properly have reached the conclusions that he did; or that on the evidence the reliability of which it was for him to assess, his decision was plainly wrong. There is a high threshold for appellate restraint both in relation to interference with the judge at first instance findings of fact and exercise of discretion.

[80] It is noteworthy that the learned judge in the case below, having heard the submissions from counsel who then appeared on behalf of Arricano felt able to render his comprehensive oral ruling without even calling on counsel for Stockman to reply. Be that as it may, and having given consideration to the complaints raised before this Court by Arricano, there is no doubt that the judge was careful and comprehensive in his oral judgment which is reflected in the transcript of proceedings. Indeed, in my clear view, the judge carefully addressed all of the matters that were taken by Arricano, against the cross-claim Stockman had asserted. The judge addressed each of the objections that were canvassed by Arricano and made findings of fact and law in relation to them. He thereafter made several conclusions. The judge's holdings, as evidenced in the transcript, are reflected at pages 53 to 65 of the core bundle. I will only reproduce the salient aspects of the judge's reasons and conclusions in some detail since they lie at the crux of this appeal. They are in relation to five objections that were taken by Arricano and are as follows:

“The basis for the cross-claim, where it's said that the 1st of March 2006 loan was for some \$5 million and that, therefore, Stockman has a cross-

claim which more that (sic) exceeds the sums which are the subject of the application to appoint liquidators.

Mr. Harby makes a number of points against that. He first of all points to a later Award, the Seventh Arbitration Award, which he says gives rise to res judicata. It's not apparent to me that that Award does, in fact, do anything to set aside the Order for specific performance of the obligation to transfer the 1st of March 2006 loan.

His second point is that any claim by Stockman would be for nominal damages only, because the underlying loan is now statute barred, according to Ukrainian law.

The difficulty with that is that the claim which would be made for damages would be in respect of the loan at the time when performance of the specific obligation, specific performance obligation arose. That would not have been at the time when the underlying loan was statute barred. And in those circumstances, it seems to me that there is an arguable case that there is a cross-claim made by Stockman.

The test both parties are agreed is that set out in the well-known case of Sparkasse Bregenz and that test applies equally to questions of cross-claims as I held in Everbright Sun Hung Kai Company Limited v Walton Enterprise Limited, BVIHC (COM) 2020/0022. I am not going to read the whole of Sparkasse Bregenz test...Now, it may be that if the matter were tried out, it would become apparent that the order for specific performance which was made by the earlier Tribunal had been superseded by events and that in any event there was no credible claim for damage by Stockman. In particular, I note that extremely adverse findings were made against Stockman in that set of Arbitration Award, but largely for the reasons put forward in Mr. Willins skeleton argument, it doesn't seem to me that this is a matter which I can determine at this point.

He makes a number of objections. The first one is that the March 2006 loan was not transferred pursuant to a judgment given by the Ukrainian Court, and instead remained unassigned.

Objection two was that the Filgate Loans were not to be repaid. That Mr. Willins says is a surprising contention, first of all, because Filgate was not a party of the SHA. That has less force in the light of the Seventh Arbitration Award...The third objection is that the transfer of the March 2006 [loan] were subject to rules relating to specific performance. Mr. Harby said that because of the manifest bad faith of Stockman, as evidenced by the Seventh Arbitration Award, any claim for specific performance had gone.

The difficulty, in my judgment, however, is that the obligation to specifically perform was the subject of a final and binding arbitration award. The mere

fact that Stockman subsequently behaved in a manner which, according to the arbitrator, was fraudulent and disgraceful is not, in my judgment, sufficient to set aside an obligation arising from a final arbitration award specifically to perform. At least that point is properly arguable, in my judgment.

So far as limitation is concerned, there is a problem in that the expert evidence was served at a late stage and that there has been no opportunity to answer it with evidence from the Ukrainian law expert on the other side. If it were dispositive, then I would adjourn the matter in order that there could be further evidence adduced. But as Mr. Willins points out, the obligation and, therefore, the question of Ukrainian limitation period is irrelevant to that.

Moreover, once claims are brought by Stockman against Arricano before the Arbitration Tribunal, time stop running for limitation purposes. That's Section 14 of the UK Arbitration Act 1986.

Once there was the order made by the earlier Award for specific performance, that became a binding enforceable obligation. The limitation period here for those obligations is 12 years and that has not been expired.

The other problem with the Ukrainian legal expert is that he doesn't discuss any of the overall facts. He merely looks at the loan agreements and gives a view on when the limitation period would expire in respect of those. This raises a difficulty because of things like the rules on set-off where there are quite complicated provisions in various legal systems as to whether set-off is possible at all or whether it occurs automatically or whether there has to be some form of legal step taken by the party seeking to rely on the set-off. None of that has been investigated by the Ukrainian legal expert.

Then there is a fifth objection about reflective loss. Mr. Harby says that in any event the loss from the failure to transfer the loan agreements will be suffered by the recipient of the transfer.

However, it does not appear to me that that is actually the correct analysis where one has an obligation specifically performed which is not honoured. In those circumstances, normally the person claiming specific performance would be entitled to damages for the failure specifically to perform.

I don't need to deal with the sixth objection raised by Mr. Willins.

...

- [81] The learned judge having addressed and analysed the matters above reasoned in conclusion that, 'there is a sufficient defence put forward of a cross-claim to fall

within the **Sparkasse Bregenz** test and that in these circumstances, [he has] no alternative but to dismiss the application for the appointment of a liquidator’.

[82] It is imperative that regard be had to other guiding principles in seeking to resolve the above three main issues identified. In **Re Ringinfo Ltd**,³⁶ Pumfrey J had reason to acknowledge that deciding whether a company’s dispute with a petitioner is based on sufficiently substantial grounds to justify preventing the petition proceeding is ‘often quite exceptionally difficult.’ In my view, this does not negate the fact that the Court should not shy away from undertaking the requisite task, irrespective of how difficult it may be.

[83] I remind myself that in a case where the debt is disputed, it is settled law that unless the court is satisfied that ‘the debt is disputed on some substantial ground’ (and not just on some ground which is frivolous), it ought not to prevent the application to wind up the company from moving forward. It is noteworthy, as Mr. Willins has quite properly pointed out, that the petition will be dismissed even if the company’s case is “shadowy”. This was judicially recognised in **Abbey National plc v JSF Finance and Currency Exchange Co. Ltd**.³⁷

[84] I turn now to consider the pronouncements of Neuberger J in **Re Richbell Strategic Holdings Ltd**.³⁸ at p. 435:

“However, it is equally important to emphasise that a judge, whether sitting in the Companies Court or elsewhere, should be astute to ensure that, however complicated and extensive the evidence might appear to be, the very extensiveness and complexity is not being invoked to mask the fact that there is, on proper analysis, no arguable defence to a claim, whether on the facts or the law.”

[85] In my considered view, most of the matters on which Arricano has sought to undergird its application would need to be tested in cross-examination in order to ascertain their veracity, particularly in view of Stockman’s ascertainment of its cross-

³⁶ [2002] 1 BCLC 210.

³⁷ [2006] EWCA Civ. 328.

³⁸ [1997] 2 BCLC 429.

claim. Since cross-examination is required to resolve the issues that arise, this would, in itself, normally indicate that there are substantial grounds of dispute. In this regard, I note the observation of the learned judge in **Re Janeash Ltd**³⁹ where he accepted that resolving some of the disputes would warrant cross-examination and therefore inappropriate for the issuance of a winding up order. It is clear that the court must approach the evidence with a wholly critical eye. This much is evident and recognised in several cases which require no specific attribution or recitation. Consequently, an appellate court ought not to take too mechanistic or literalistic an approach to a lower court's decision with a view to justifying undue appellate activism in relation to findings of fact and the exercise of discretion.

[86] As I indicated earlier and is apparent, that since Arricano's appeal challenges evaluation and findings of fact and ultimately the judge's exercise of his discretion to appoint a liquidator, and there being no discernible error by the judge, the appeal cannot be sustained.

[87] In relation to the legal principles that are applicable to the issue of specific performance vis-a-vis damages, I am attracted to Mr. Willins arguments. However, for the present purposes it is unnecessary for me to form a settled view and I will refrain from so doing. It suffices for present purposes for me to indicate that all of this fortifies my view that the learned judge was correct in concluding that there is a genuine and substantial dispute.

[88] In my considered opinion, there is no discernible error of law or fact on the record, in relation to the learned judge's overall approach to and evaluation of the evidence. It is apparent that the learned judge was fully seized of the relevant evidence and did not err in his approach to the evidence and his findings of fact and law and ultimately his conclusions. Being mindful of the settled principles enunciated in several cases cited above, there is no basis upon which the judge's decision can be impugned.

³⁹ [1990] BCC 250.

[89] In my view, it was clearly open to the judge to reach the conclusion that he reached on documentary evidence before him. Indeed, the evidence discloses, as I have earlier stated the learned judge did not err in his conclusions that the defence that was put forward by Stockman indicates that there is a genuine and substantial dispute based on the cross-claim.

[90] In the totality of the circumstances, the judge was entitled to exercise his discretion not to appoint liquidators pursuant to section 167 of the Act. In **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited**⁴⁰ this Court considered whether the learned judge erred in the exercise of his discretion in appointing liquidators over Novel Blaze. Having considered the relevant principles in **Dufour v Helenair**, the leading authority on the exercise of discretion, the Court held at paragraph 51 as follows:

“Having reviewed the totality of circumstances, I am of the considered view that the learned judge committed no error in principle of the nature set out in Dufour.

Chance Talent having proven that Novel Blaze was clearly insolvent within the meaning of section 162(1)(a) of the Act, it was open to the learned judge to exercise his discretion to appoint liquidators over Novel Blaze and to make an order to that effect. I find therefore, in the circumstances, that the learned judge was entitled to exercise his discretion as he did. His decision on this issue cannot be impugned. Consequently, the arguments on this issue fail and the learned judge’s exercise of discretion to appoint liquidators over Novel Blaze is affirmed.”

[91] Consistent with those principles it is evident that the learned judge’s decision not to appoint liquidators to Stockman cannot be impugned since there is no discernible error of principle on record.

[92] Based on all that I have foreshadowed it is evident that Arricano’s appeal fails in relation to the first three issues.

⁴⁰ [2021] ECSCJ No. 529 (delivered 9th July 2020).

[93] I turn now to the issue of costs.

Issue 4

[94] Stockman has prevailed in the lower court and on this appeal and it is in this context that Arricano's criticism of the judge's exercise of discretion to award Stockman its costs must be examined. It is settled law that costs are in the discretion of the Court. In **Throne Capable Investment**, this Court held that the award of costs is a matter within the discretion of the judge. This discretion, like any other discretion, must be exercised judicially and based on cogent reasons connected with the case. The general principle is that a successful party is entitled to its costs. A successful party, however, may be deprived of its costs, as a departure from the general rules, but only in restricted circumstances including misconduct or dishonesty. The Court also held that an appellate court may interfere if the exercise of the discretion in relation to cost where the judge in the court below committed an error of principle or was plainly wrong in the exercise of his or her discretion. An appellant must therefore satisfy this court that the judge's exercise of discretion exceeded the generous ambit within which reasonable disagreement is possible and is clearly or blatantly wrong. In the case at bar, the learned judge quite properly showed fidelity to the principles that were stated in **Throne Capable Investment** and was unfairly criticised for doing so.

[95] This is a short point in my clear view. There is no basis to disapply the established rule that costs follow the event. Consequently, Stockman shall have its costs in the court below which are to be assessed by a judge of the Commercial Court unless otherwise agreed within 21 days of this judgment. On the appeal Stockman is entitled to no more than two-thirds of the costs below which are to be assessed unless otherwise agreed within 21 days of the date of this judgment.

Issue 5

[96] Based on what has been foreshadowed it is unnecessary from discussing this issue and I will therefore refrain from doing so.

Disposition

[97] For the above reasons I make the following order.

- (1) Arricano's appeal against the decision of the judge is dismissed and the learned judge's decision is affirmed in its entirety.
- (2) Arricano shall pay Stockman the costs of the application in the court below, which are to be assessed by a judge of the Commercial Court unless otherwise agreed within 21 days of this judgment.
- (3) Arricano shall pay Stockman the costs of the appeal which shall be assessed at no more than two-thirds of the costs in the court below, unless otherwise agreed within 21 days of the date of this judgment.

[98] I am grateful to all learned counsel for their very helpful oral and written submissions.

I concur.
Gertel Thom
Justice of Appeal

I concur.
Dexter Theodore
Justice of Appeal [Ag.]

By the Court

Chief Registrar