

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

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0014

BETWEEN:

THRONE CAPABLE INVESTMENT LIMITED

Appellant

and

AGILE STAR GROUP LIMITED

Respondent

Before:

The Hon. Mde. Louise Esther Blenman	Justice of Appeal
The Hon. Mde. Gertel Thom	Justice of Appeal
The Hon. Mde. Esco Henry	Justice of Appeal [Ag.]

Appearances:

Mr. Andrew Ayres, QC with him, Ms. Daisy Bovingdon for the Appellant
Mr. Paul Chaisty, QC with him, Mr. Jerry Samuel for the Respondent

2020: November 25;
2021: January 14.

Commercial appeal – Exercise of judicial discretion – Costs – Rules 64.6(5) and (6) of the Civil Procedure Rules 2000 – Appellate court’s interference with judge’s discretion to award of costs – Refusal of costs upon successfully resisting application to appoint liquidators – Whether the judge erred as a matter of principle in refusing to award the appellant costs despite having successfully resisted liquidation application – Costs follow the event – Whether failure to set aside statutory demand was sufficient basis to justify departure from general rule that costs follow the event

The appellant, Throne Capable Investment Limited (“Throne”), and the respondent, Agile Star Group Limited (Agile”), are companies incorporated in the Territory of the Virgin Islands (the “BVI”).

Agile alleged that Throne owed it money. Following a shareholder’s dispute, Agile, by a letter of demand, sought repayment of the alleged debt. Agile served a statutory demand on Throne in relation to the alleged debt at their then-registered agents’ office, SBC Registration Limited (“SBC”). However, neither the directors for Throne, who were listed on the register, nor its legal counsel, were made aware of the statutory demand or were in receipt of the document. The statutory demand

stipulated that if Throne desired, it had fourteen days to set aside the statutory demand. There was no attempt by Throne to set aside the statutory demand as its officers were unaware of its existence.

Subsequently, Agile filed an application in the Commercial Court for the appointment of liquidators over Throne ("the liquidation application"). The liquidation application was dismissed by the learned judge after hearing oral submissions on behalf of Agile, but without calling for any oral submissions from counsel for Throne, who was also present. In addition to dismissing the liquidation application, the judge made no order as to costs and refused leave to appeal the costs order.

Throne was dissatisfied with the decision of the judge to make no order as to costs, and has appealed. The sole issue arising for this Court's determination is whether the learned judge erred as a matter of principle in refusing to award Throne costs despite it having successfully resisted Agile's liquidation application.

Held: allowing the appeal; setting aside the costs order of the learned judge and ordering that Throne is entitled to its costs on the liquidation application, to be assessed by a judge of the Commercial Court, if not agreed within 21 days of the date of this order; and awarding Throne its costs on the appeal, being no more than two-thirds of the costs in the court below, that:

1. The award of costs is a matter within the discretion of the judge. This discretion, like any other discretion, must be exercised judicially and 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 rule, but only in restricted circumstances. These circumstances include where there is some misconduct, or misguided or dishonest conduct by the successful party, like an omission to take some step which ought to have been taken, and which could have saved costs.

Rule 64.6 of the **Civil Procedure Rules 2000** considered; **Rochamel Construction Limited v National Insurance Corporation** Civil Appeal No. 10 of 2003 (delivered 24th November 2003, unreported) followed; **Donald Campbell & Co Ltd v Pollak** [1927] AC 732 considered; **Kierston v Joseph L Thompson & Sons** [1913] 1 KB 587 considered; **Re Fernforest Ltd** [1991] BCC 680 distinguished.

2. An appellate court may interfere with the exercise of the discretion in relation to costs 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, it is apparent that all of the factors, except one, which were considered by the learned judge in exercising his discretion, related to Throne's failure to set aside Agile's statutory demand. In the BVI, there is no legal principle that the failure of a party to apply to set aside a statutory demand will prevent it from receiving its costs if it is successful at resisting an application to appoint liquidators. Throne's

failure to apply to set aside Agile's statutory demand therefore could not amount to misconduct or an unreasonable act which ought to have operated against it in the exercise of the judge's discretion, in the context of Throne's success in defending the liquidation application. In so far as the learned judge was of a contrary view, and exercised his discretion on the basis of his contrary view, he erred in principle and the exercise of his discretion was plainly wrong.

Dufour v Helenair Corporation Limited (1996) 52 WIR 188 applied; **AEI Rediffusion Music Limited v Phonographic Performance Ltd** [1999] 1 WLR 1507 applied; **Scherer and another v Counting Instruments Ltd and another** [1986] 2 All ER 529 applied; **Everbright Sun Hung Kai Company Limited v Walton Enterprises Limited** BVIHC(COM)2020/0022 (delivered 9th April 2020, unreported) distinguished.

3. The learned judge having erred in the exercise of his discretion, it therefore falls to this Court to exercise the discretion as to costs afresh. This Court must have regard to the totality of the circumstances including whether it was reasonable for Agile to pursue the particular course that it did in seeking to appoint liquidators over Throne. Taking into account all the surrounding circumstances, including the fact that Agile was aware that Throne was disputing the debt, the Court must consider whether it was reasonable for Agile to pursue the particular course of action that it did. Agile's pursuit of the court's insolvency jurisdiction prior to obtaining a judgment on the debt, was a 'high risk strategy'. Agile therefore ought to have ensured that it was pursuing a viable application and not one which was futile in the circumstances. As it stands, Agile should not have filed the liquidation application and did so at the risk of incurring costs where it was unsuccessful. Throne having successfully resisted Agile's application to appoint joint liquidators, albeit without even being called upon to make oral submissions, is a sufficient basis upon which to conclude that Throne, having succeeded on the application, was entitled to its costs.

Rule 64.6(5) and (6) of the **Civil Procedure Rules 2000** applied; **Glaxosmithkline v UK (AID) Ltd** [2004] BPIR 528 applied.

JUDGMENT

Introduction

- [1] **BLENNAN JA:** This is an appeal by Throne Capable Investment Limited ("Throne") against a costs order made by a learned judge of the Commercial Court, consequent upon his refusal of an application by Agile Star Group Limited ("Agile") to appoint joint liquidators over Throne ("the liquidation application"). The judge declined to award costs to Throne and instead made

no order as to costs. Throne is dissatisfied with the decision of the judge and has appealed. Agile strenuously resists the appeal.

The Issue

- [2] The sole issue on this appeal is whether the learned judge erred, as a matter of principle, in refusing to award Throne costs despite it having successfully resisted Agile's liquidation application.
- [3] I will now provide a synopsis of the factual background in order to place the appeal in context.

Background

- [4] Throne is a company incorporated in the Territory of the Virgin Islands ("the BVI") and is a wholly owned subsidiary of the Advanced Logistics Properties Service Group ("ALPS Group"), which holds the Zheng Jiang Project. Agile is also a company incorporated in the BVI and is the ultimate parent company of the Shen Yang Project. The liquidation application, made in the court below, arose out of a shareholder dispute among the owners of the Shen Yang and Zhen Jiang Projects, which are two inter-related and cross-held joint ventures in the warehousing and logistics development sector in the People's Republic of China. The Zhen Jiang Project started out as a joint venture between Mr. Xu Bin and Mr. Wang Zheng, with a later investment in the project by Mr. Huang Wei who also took an equity stake. Mr. Xu Bin is also Agile's sole director and sole registered shareholder.
- [5] Mr. Xu Bin was responsible for the day-to-day management and administration of the companies through which the Shen Yang and Zheng Jiang Projects were operated. He was the sole administrative contact for the registered agents of the BVI companies in both the Agile and ALPS Groups. Throne contends that in August 2018, Mr. Xu Bin took a series of steps toward disrupting and generally interfering with the Zhen Jiang Project. In response, Mr. Wang Zheng and Mr. Huang Wei also took steps to protect the management of the Zhen Jiang Project. At meetings held on 8th and 10th October 2018 the shareholders of the ALPS Group and Throne passed

resolutions to remove Mr. Xu Bin as a director and as the companies' administrative contact for DBS Bank (Hong Kong) Limited and their then registered agent SBC Registration Limited ("SBC"),¹ and to appoint Mr. Wang Zheng as Mr. Xu Bin's replacement as director and administrative contact.

- [6] Mr. Xu Bin disputed his removal as director and administrative contact. Throne contended that through threats of legal action, Mr. Xu Bin caused SBC not to register the changes made at the meetings via the resolutions. Shortly thereafter, Mr. Xu Bin instructed the law firm Conyers Dill & Pearman ("Conyers"), on behalf of Agile, to recover an alleged debt from Throne resulting from the transfer of funds on 30th May 2018 from an account held in the name of Agile to one held in the name of Throne. By letter dated 31st January 2020, Conyers wrote to Throne demanding repayment of the debt within ten days. The letter of demand was sent by mail to Throne's registered office, SBC, and was emailed to the personal email addresses of Mr. Xu Bin, Mr. Huang Wei and Mr. Hu Kaijun, who were the three individuals listed on the register of directors for Throne, as then maintained by SBC.
- [7] On 12th February 2020, the law firm Collas Crill LP ("Collas Crill"), acting on behalf of Throne, responded to the letter of demand indicating that the transfer of funds was intended as a capital contribution to the Zheng Jiang Project, thereby disputing the alleged debt. Earlier that day, Agile had served a statutory demand on Throne in relation to the alleged debt at SBC's office, however neither Mr. Wang Zheng, Mr. Huang Wei, Mr. Hu Kaijun nor Collas Crill were made aware of the statutory demand or were in receipt of the document. The statutory demand made it clear that if Throne intended to set it aside, it had fourteen days within which to do so. There was no attempt thereafter by Throne to apply to set aside the statutory demand, as it was unaware of its existence.
- [8] On 26th March 2020, Agile filed the liquidation application in the Commercial Court and served it by hand on SBC. The statutory demand was exhibited to

¹ SBC subsequently changed its name to Overseas Company Services Limited.

the affidavit in support of the application. Throne contended that it became aware of the statutory demand on or about 30th March 2020 upon SBC emailing a copy of the liquidation application to Mr. Huang Wei and Mr. Hu Kaijun (as well as Mr. Xu Bin).

The Application in the Commercial Court

- [9] On 8th July 2020, upon hearing oral submissions on behalf of Agile, the judge dismissed the liquidation application without hearing oral submissions from counsel for Throne, who was present. The judge then went on to make the following orders:

“IT IS HEREBY ORDERED THAT:

- 1) The Application is dismissed.
- 2) No order as to costs.
- 3) The Respondent’s Application for Leave to Appeal against paragraph 2 of this Order is refused.”

Decision in the Court below

- [10] Although no formal written reasons for the decision were provided by the judge, this Court was furnished with a comprehensive transcript of proceedings (“the transcript”) which encapsulates the judge’s reasoning for arriving at the decision to make no order as to costs. At pages 43 to 46 of the transcript, the judge stated as follows:

“I am asked to consider the question of costs. The position here is the statutory demand was served on the 12th of February 2020. No response was made to it, save this, that the Respondent [Throne] instructed Collas Crill’s solicitors to reply to an earlier demand made on the 31st of January 2020 by Agile Star’s legal representatives.

Collas Crill’s letter was sent on the cover of an e-mail on the 13th of February, although due to time differences, it may have actually gone on the 12th of February 2020, but nothing particularly turns on that. The Collas Crill letter disputed the basis of the claim to repayment of the monies.

Now, it is right that the statutory demand was not the subject of any application to set it aside. The explanation given for that is not very satisfactory in that it seems that the registered agents, who at the time were SBC, did contact Mr. [Huang] Wei who in broad terms is in the Wang camp but for some reason the statutory demand never ended up being provided to Mr. [Huang] Wei, as a result of which there was never any formal application to set aside the statutory demand.

Mr. Ayres QC, says that when the current application of the 26th of March 2020 was issued, it would have been apparent to Agile Star that the alleged debt was disputed by Throne and, therefore, it was a matter where they shouldn't have issued the application for the appointment of a liquidator.

I don't agree with that. A statutory demand is something which needs to be treated seriously. If an application is to be made to set aside the statutory demand, then the matter would have been dealt with by the Court if the parties couldn't agree. Instead, when one has the application for the appointment of a liquidator, that starts to incur significantly more consequences in that the application has to be advertised, it comes to widespread knowledge.

And although the Respondent to such an application can oppose the appointment of a liquidator on the grounds which the Respondent has relied on today. It is undesirable that the matter should be left so late and, as I have said previously, the usual consequence of failing to set aside a properly served statutory demand is that there should be costs consequences.

In the current case, in my judgment, the appropriate costs consequence is there be no order for costs. This is a case in which the statutory demand was properly served. There were no legal representatives on the record at the time when it was served. There is no good excuse for not applying to set aside the statutory demand and in those circumstances the usual consequences that there be no order for costs should follow.”²

The Appeal

[11] Throne being dissatisfied with paragraph 2 of the order of the judge has appealed, having been granted leave to appeal by order of this Court dated 22nd September 2020.

[12] The notice of appeal bears several grounds of appeal with sub-grounds. I do not propose to rehearse the grounds of appeal and the various sub-grounds which flow from them. It is sufficient, however, to indicate that the grounds and sub-grounds challenge conclusions of both fact and law and allege that the judge improperly exercised his discretion in making no order as to costs. This appeal, as indicated earlier, relates to costs only, and the underlying substantive order of the judge is not the subject matter of Throne's appeal.

² See Hearing Bundle, pgs.51-54.

For emphasis, the sole issue is whether the learned judge erred as a matter of principle in refusing to award Throne costs despite it having successfully resisted Agile's liquidation application.

Appellant's Submissions

- [13] Learned Queen's Counsel, Mr. Andrew Ayres, reminded this Court of the provisions under Rule 64.6 of the **Civil Procedure Rules 2000** ("CPR"), emphasising the general rule that the court must order the unsuccessful party to pay the costs of the successful party, and the guiding considerations of the court in exercising its discretion when deciding who should be liable to pay costs. Mr. Ayres said that the judge made an error in not awarding Throne its costs. He stated that there were two fundamental mistakes in the exercise of the judge's discretion, namely that: (i) the judge erroneously disagreed with the proposition that Agile, having become aware that the alleged debt was disputed, should not have issued the liquidation application; and (ii) the judge's finding that Throne had no 'good excuse' for failing to apply to set aside the statutory demand and, in those circumstances, that there be no order as to costs as a consequence.
- [14] In his submissions, Mr. Ayres, acknowledged that this appeal challenges the exercise of a judicial discretion. He referred to the well-known case of **Dufour v Helenair Corporation Limited**³ in support of his submission that an appellate court is only allowed to interfere with a judge's exercise of his or her discretion in circumstances where the judge erred in principle by failing to take into account or giving too little weight to relevant factors or by taking into account or being influenced by irrelevant factors, and that, as a result the judge's decision may be said to be clearly or blatantly wrong. Mr. Ayres also relied on the decision of **AEI Rediffusion Music Limited v Phonographic Performance Ltd**,⁴ which affirmed that the considerations which apply generally to an appellate court's ability to interfere with a judge's discretion similarly apply to the question of interfering with the exercise of the judge's discretion on costs. Mr. Ayres argued that the learned judge improperly

³ (1996) 52 WIR 188.

⁴ [1999] 1 WLR 1507.

exercised his discretion in making no order as to costs in light of the general and well-established rule that where a company successfully resists a liquidation application, on the basis that the existence of the underlying debt is disputed, exceptional circumstances are required before it should be deprived of its costs. He relied on the cases of **Re Fernforest Ltd**⁵ and **Glaxosmithkline v UK (AID) Ltd**⁶ in support of this proposition and further argued that this rule is firmly in alignment with the usual position that costs follow the event set out in CPR 64.6 which, by virtue of rule 4(1) of the **Insolvency Rules**,⁷ is applicable to liquidation applications.

- [15] Mr. Ayres pointed out that the judge found that the case advanced by Throne ‘easily’ met the test set out in **Sparkasse Bregenz Bank AG v Associated Capital Corporation**,⁸ for refusing to appoint a liquidator on the basis that the purported debt was genuinely disputed on substantial grounds. He complained therefore that despite this finding, which indicates that the liquidation application amounted to a grave abuse of the court’s process, the learned judge seemed to have given no weight to that fact in arriving at the decision to make no order as to costs. Mr. Ayres submitted that, in circumstances where Collas Crill had indicated to Conyers by letter sent on 12th February 2020, that the alleged debt was being disputed, Mr. Xu Bin and Agile created unnecessary expense for both Agile (in filing and serving what was a hopeless application) and Throne (in needing to defend it). He insisted that on that basis, Agile’s act of filing a futile application ought to have been given significant weight in the judge’s exercise of his discretion. He further maintained, that the policy behind this approach to liquidation applications, based on an uncontested statutory demand, reflects that the act of an alleged creditor immediately turning to the Court’s insolvency jurisdiction without first issuing a claim and obtaining judgment on the debt is adopting a ‘high risk strategy’.⁹ The fact that no ‘good excuse’ was given for failing to set aside the statutory demand is therefore irrelevant, given that Agile was put on notice

⁵ [1991] BCC 680 at 682.

⁶ [2004] BPIR 528 at 530.

⁷ S.I No. 45 of 2005, Laws of the Virgin Islands.

⁸ Civil Appeal No. 10 of 2002 (delivered 18th June 2003, unreported).

⁹ Re a Company (No. 0012209 of 1991), [1992] 1 WLR 351 at 354 per Hoffmann J.

that the alleged debt was disputed, and any application to appoint liquidators would have been done at its own risk as to costs.

- [16] Mr. Ayres also stated that the judge's decision to award no costs against Agile proceeded mainly on the basis that Throne was required to rebut a presumption that it could only be awarded its costs if it had a 'good excuse' for not applying to set aside the statutory demand. He indicated that no authority was cited to the learned judge other than **Everbright Sun Hung Kai Company Limited v Walton Enterprises Limited**,¹⁰ in which none of the principles espoused in cases such as **Fernforest** or **Glaxosmithkline** were considered. He was adamant that there was therefore no legal authority on which the judge could have based his decision to consider Throne's failure to apply to set aside the statutory demand as a relevant factor. Mr. Ayres asserted further that the learned judge was also plainly wrong in finding that Throne had 'no good excuse' for its failure to apply to set aside the statutory demand. He maintained that Throne was not made aware of the service of the statutory demand on account of neither the 'true' directors of Throne nor Collas Crill (acting on Throne's behalf), having being made aware of it in the required time. He argued therefore that even if Throne's failure to apply to set aside the statutory demand was a relevant consideration, the judge was plainly wrong to find that Throne had given no 'good excuse' for its failure. On the above basis, Mr. Ayres urged this Court to find that the order of the learned judge, as it relates to costs, was perverse and to allow the appeal, set aside the costs order and grant Throne its costs for successfully resisting the application in the court below and the costs on pursuing this appeal.

Respondent's Submissions

- [17] Learned Queen's Counsel for Agile, Mr. Paul Chaisty, was in agreement with Mr. Ayres that this appeal is one which concerns an exercise of judicial discretion. He submitted that the court has wide discretionary powers to vary the application of the general rule that 'costs follow the event' and relied on the case of **Rochamel Construction Limited v National Insurance**

¹⁰ BVIHC(COM)2020/0022 (delivered 9th April 2020, unreported).

Corporation¹¹ in support of his submission. Mr. Chaisty submitted that although the 'costs follow the event' principle plays a significant role in the exercise of the discretion to award costs, the case of **AEI Rediffusion** provides that this principle is a starting point, from which the court can readily depart. He asserted that the appeal process is not intended for the Court to substitute its own discretionary remedy. Mr. Chaisty relied on the case of **G v G**¹² and an excerpt from **The Whitebook (Volume 1)** in support of this proposition.

[18] Mr. Chaisty, during oral submissions, also impressed upon this Court that one must approach with care the application of the principles set out in the English cases such as **Fernforest** and **Glaxosmithkline**, on which Throne relies. He argued that the English authorities may be distinguished in that there is no equivalent procedure in England, as there is in the BVI, whereby a party may apply to set aside the statutory demand. Mr. Chaisty noted that although that option exists in the BVI, by virtue of section 156 of the **Insolvency Act**,¹³ for both a company and an individual to apply to set aside a statutory demand, this option does not exist in England in respect of companies, therefore the courts in England would not take into consideration a party's failure to set aside a statutory demand. He submitted that this fact is highly significant, since when one considers the reasoning of the learned judge, the judge's exercise of his discretion to award costs may be accompanied by unique considerations that do not apply in England.

[19] Mr. Chaisty argued that, contrary to Mr. Ayres' submissions, there were no fundamental mistakes in the judge's reasoning which would warrant this Court's interference with the exercise of his discretion not to award costs. He submitted that the judge cannot be said to have been mistaken in disagreeing with Throne that Agile ought not to have issued the liquidation application, since there had been no response to the properly served statutory demand. He also disagreed with the proposition that, whatever the circumstances,

¹¹ Civil Appeal No. 10 of 2003 (delivered 24th November 2003, unreported).

¹² [1985] 1 WLR 647.

¹³ Act No. 5 of 2003, Laws of the Virgin Islands.

where a company has indicated that it disputes a debt simply by letter, costs must then flow in favour of the company thereafter if a liquidation application against it is dismissed. In the circumstances, Mr. Chaisty argued that the judge was entitled to find that Throne's failure to set aside the statutory demand was a factor that had to be taken into account.

- [20] Mr. Chaisty also advanced the position that the judge properly found that Throne had no 'good excuse' in failing to apply to set aside the statutory demand, in circumstances where it had been duly served on Throne's registered office (SBC), as required. Mr. Chaisty asserted that service of the statutory demand on the registered agent constituted valid service of the statutory demand on Throne. It was for Throne, therefore, to explain why there were no attempts made to set it aside. Mr. Chaisty argued therefore that where Throne merely indicated that it did not receive the statutory demand but failed to explain why, the judge was entitled to find that Throne had failed to provide any 'good excuse' for its failure. He asserted that the judge looked at all the circumstances in coming to his decision not to award costs and urged this Court therefore, in light of the above, to dismiss the appeal and find that the judge was entitled to exercise his discretion not to award costs, as he did.

Discussion

- [21] This appeal brings into sharp focus the circumstances in which an appellate court can properly interfere with the exercise of the discretion of a lower court, in relation to costs. It is therefore necessary that the relevant provisions of the CPR pertaining to costs are stated.

- [22] CPR 64.6 provides as follows:

"Successful party generally entitled to costs

- (1) Where the court, including the Court of Appeal, decides to make an order about the costs of any proceedings, the general rule is that it must order the unsuccessful party to pay the costs of the successful party.
- (2) The court may however order a successful party to pay all or part of the costs of an unsuccessful party or may make no order as to costs.

- (3) This rule gives the court power in particular to order a person to pay —
- (a) costs from or up to a certain date only;
 - (b) costs relating only to a certain distinct part of the proceedings; or
 - (c) only a specified proportion of another person's costs.
- ...
- (5) In deciding who should be liable to pay costs the court must have regards to all the circumstances.
- (6) In particular it must have regard to —
- (a) the conduct of the parties both before and during the proceedings;
 - (b) the manner in which a party has pursued —
 - (i) a particular allegation;
 - (ii) a particular issue; or
 - (iii) the case;
 - (c) whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings;
 - (d) whether it was reasonable for a party to —
 - (i) pursue a particular allegation; and/or
 - (ii) raise a particular issue; and
 - (e) whether the claimant gave reasonable notice of intention to issue a claim.”

[23] In **Rochamel**, the learned Chief Justice Sir Dennis Byron, as he then was, discussed the extent of a judge's discretion with respect to costs, provided under the CPR, as follows:

“CPR part 64.6 prescribes that where the Court decides to make an order about the costs of any proceedings, the general rule is that, it must order the unsuccessful party to pay the costs of the successful party. The Court is, however, given very wide discretionary powers to vary the application of the general rule. These include the power to order a successful party to pay all or part of the costs of an unsuccessful party or make no order as to costs or to pay only certain portions of another person's costs. In exercising these discretions as to costs the Court is required to have regard to all the circumstances. Particular consideration must be given to the conduct of the parties both before and during the proceedings and the manner in which a party has pursued the case in general and particular issues within the case. Thus the order can be affected by whether a party has succeeded on particular issues, even if the party has not been successful in the whole of the proceedings. The Court is also required to consider whether it was reasonable for a party to pursue a particular allegation or raise a particular issue and whether the claimant gave reasonable notice of intention to pursue a claim.”

[24] Costs may be dealt with at any stage of the proceedings. It is trite that whether to award of costs is within the discretion of the judge. This discretion, like any other discretion, must be exercised judicially and the judge ought not to exercise it against the successful party except on the basis of cogent reasons connected to the case. These principles were given judicial recognition by Viscount Cave in the case of **Donald Campbell & Co Ltd v Pollak**.¹⁴ Success, for the purposes of the CPR, is not a technical term but a result in real life, and the question as to who has succeeded is a matter for the exercise of common sense.¹⁵

[25] Generally, it is not a proper exercise of judicial discretion for the judge to order a party who has been completely successful and against whom no misconduct has been alleged, to pay costs. This principle was given judicial recognition in **Kierson v Joseph L Thompson & Sons**.¹⁶ As a departure from the general rule, a successful party may nevertheless be deprived of its costs, but only in restricted circumstances. CPR 64.6(2) and 64.6(3) are modifications of the general rule without restricting the generality of CPR 64.6(1). There are several matters, however, which enable the court to refuse to grant costs to a winning party. The following list is not exhaustive:

- (a) the omission to do that which ought to have been done and could have saved costs;
- (b) the doing of any act calculated to occasion, or in a manner or at a time calculated to occasion, unnecessary costs; or
- (c) any unnecessary delay in the filing of the application or claim.

Cases of a winning defendant being deprived of costs are well-known and need no recitation. These cases generally deal with instances of misconduct.¹⁷ Such misconduct is usually some misguided or dishonest

¹⁴ [1927] AC 732 at 811-812.

¹⁵ See *Bank of Credit and Commerce International SA v Ali* (no 3) [1999] NLJ 1734 Vol 149; *Day v Day* [2006] EWCA Civ 415.

¹⁶ [1913] 1 KB 587.

¹⁷ See for example *Groupama Insurance Company Limited v Overseas Partners Re Ltd and another* [2003] EWCA Civ 1846.

conduct by the defendant, which would enable the court to exercise its judicial discretion to deprive the successful party of his costs.

[26] It is beyond doubt that a judge can exercise his discretion to deprive a successful party of its costs. However, in doing so, it is incumbent upon the judge to give reasons for departing from the general rule that costs follow the event.¹⁸ The principle that 'costs follow the event' is a strong principle, and this is so despite the fact that costs orders are discretionary. In exercising this discretion, which must be judicially exercised and on the basis of reasons connected with the case, the judge is required to have regard to all of the circumstances of the case. It is well-established that an appellate court will intervene where a judge fails to give the principle that costs follow the event proper and careful consideration.

[27] There is a consistent stream of jurisprudence which demonstrates that a departure from the general rule that 'costs follow the event' occurs only in exceptional circumstances. In the case of **Fernforest**, a winding-up petition had been presented consequent to the non-satisfaction of a statutory demand. Following the service of the respondent company's evidence, the petition was dismissed by consent. The court considered whether, as the petitioners sought, the costs of the petition ought to be costs in separate proceedings which the petitioners had subsequently commenced against the company in order to establish their claim. In declining to depart from the usual practice, Warner J ordered that the petitioners should pay the company's costs of the winding up proceedings after pronouncing, as follows:

"[I]n my view as a matter of general approach to this type of case a claimant against a company who chooses to take the short cut of a statutory demand followed by a winding-up petition instead of the procedure of first issuing a writ to establish his claim, does so at his own risk that the claim will be disputed and that the petition will be dismissed or will have to be abandoned. It is no part of the duty of a person against whom a claim is made to formulate in detail, before proceedings are taken against him to enforce the claim, what his defence to those proceedings may be. ... Another material consideration is that experience in this court shows that, if in every case of the withdrawal or dismissal of a winding-up petition the court

¹⁸ See *Aspin v Metric Group Ltd* [2007] EWCA Civ 922 at para 12.

is to go into the whole history of the case to assess whose conduct at which stage was reasonable and whose unreasonable, an enormous amount of the court's time and consequent costs will be spent on disputes of this kind. I think the principle should be adhered to that unless there be exceptional circumstances a petitioner whose petition fails on the ground that the debt is bona fide disputed on substantial grounds should pay the costs of that failure."

- [28] In so far as Throne appeals against the exercise of the judge's discretion, in not awarding costs against Agile, it must satisfy this Court that the learned judge committed an error of principle or was plainly wrong in the exercise of his discretion. As alluded to earlier, the circumstances in which an appellate court may interfere with the exercise of a judge's discretion are well-known and have been restated in a strong stream of jurisprudence from this Court. In **Dufour** the learned Chief Justice Sir Vincent Floissac, as he then was, aptly adumbrated this Court's position on the appellate court's interference with the exercise of a judge's discretion, as follows:

"We are thus here concerned with an appeal against a judgment given by a trial judge in the exercise of a judicial discretion. Such an appeal will not be allowed unless the appellate court is satisfied (1) that in exercising his or her judicial discretion, the 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 the degree 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 clearly or blatantly wrong."

- [29] In **AEI Rediffusion**, the court was concerned specifically with the question of interfering with the judicial exercise of discretion in awarding costs. Woolf MR stated as follows:

"It was correctly accepted by the judge that his right to interfere with the tribunal decision on costs was constrained in the same way that this court's discretion is constrained in relation to decisions of judges of first instance. The conventional approach of this court is conveniently summarised by Stuart-Smith L.J. In *Roache v News Group Newspapers Ltd.* [1998] E.M.L.R. 161, 172 in these terms:

"Before the court can interfere it must be shown that the judge has either erred in principle in his approach, or has left out of account, or taken into account, some feature that he should, or should not, have considered, or that his decision is wholly wrong because the court is forced to the conclusion

that he has not balanced the various factors fairly in the scale.”

- [30] In **Scherer and another v Counting Instruments Ltd and another**¹⁹ the English Court of Appeal similarly made the following pronouncements on an appellate court’s interference with a trial judge’s discretion on costs:

“If there is any relevant ground available to the judge and he exercises, or appears to have exercised, his discretion judicially on it, this court cannot review that exercise of his discretion or interfere with his order because this court disagrees with the weight he appears to have attributed to any particular ground or because this court disagrees with the weight he appears to have attributed to any particular ground or because this court would have exercised the discretion in some other way but if, notwithstanding the availability of that ground, the judge has not, in the judgment of this court, exercised his discretion judicially, that is, if his decision is clearly wrong because the available ground could not in principle support the particular order he has made, it is in our judgment open to this court to correct it.”

- [31] In totality, I can do no more than adopt the above very helpful pronouncements as my own and apply them to the appeal at bar. In order to discern whether the learned judge erred in principle by awarding no order as to costs, this Court must assess the factors which were considered by the judge in exercising his discretion. Those factors, set out at pages 43 to 46 of the transcript, include that: (i) the statutory demand was duly served on Throne on 12th February 2020 with no response from Throne; (ii) Throne’s explanation for failing to apply to set aside the statutory demand was unsatisfactory; (iii) it was not improper for Agile to file the liquidation application despite having notice that the purported debt was being disputed by Throne; (iv) a liquidation application incurs significantly more consequences, in that it has to be advertised, becoming widespread knowledge, and it is therefore undesirable that the matter of disputing the debt is left so late; (v) the usual consequence of failing to set aside a properly served statutory demand is that there should be costs consequences; and (vi) it is appropriate that there be no order as to costs in circumstances where Throne had no good excuse for not applying to set aside the statutory demand. It is apparent that all except one of the judge’s considerations hinge

¹⁹ [1986] 2 All ER 529.

on Throne's failure to apply to set aside the statutory demand. The failure by Throne was therefore clearly a determinative factor which weighed heavily in the exercise of his discretion in making no orders as to costs on the liquidation application.

- [32] In fairness to the learned judge, he appeared to have had some misgivings, having considered that perhaps he ought not to have placed the weight which he did on the fact of Throne's failure to apply to set aside the statutory demand. At page 47, lines 5 to 10 of the transcript, the learned judge stated that:

"It's true that there is perhaps an issue of principle which might be suitable for determination by the Court of Appeal, namely whether it is right to attach significant weight to the fact that the Respondent doesn't apply to set aside the statutory demand..."²⁰

It is therefore fair to conclude that the learned judge accepted that it would be for this Court to determine whether he acted properly in applying that consideration to the exercise of his discretion.

- [33] Having reviewed the guiding principles and applied them to the appeal, I am of the considered view that the question of whether the failure by Throne to set aside the statutory demand was sufficient to disentitle it to its costs on the liquidation application, must be examined in the context of the general rule that a successful party ought not be denied its costs save in circumstances where there is some misconduct, unreasonable act or exceptional circumstance. **Everbright**, which was cited as an authority to the learned judge in support of ordering that there be no order as to costs, does not establish any principles on the discretion to award costs in a liquidation application, where the company had previously failed to set aside a statutory demand. The case merely enunciates that a company which does not seek to set aside a statutory demand can still defend a liquidation application on the same grounds on which it would have made an application to set aside the statutory demand. Further, in **Everbright**, there appears to be no discussion of the principles surrounding the discretion to award costs, and on

²⁰ See Hearing Bundle, pg. 55.

that basis, the learned judge could not have properly concluded from this case that the failure of a company to apply to set aside a statutory demand was a relevant factor when exercising his discretion on costs. In my view, in the BVI, the failure to apply to set aside a statutory demand cannot properly be regarded as misconduct. Also, I see no legal basis on which the judge could have found that there was a requirement for Throne to have applied to set aside the statutory demand, failing which the costs consequence of 'no order as to costs' would follow. Throne's failure to apply to set aside the statutory demand was therefore not an unreasonable act which ought to have operated against it in the exercise of the judge's discretion, despite Throne's success in defending the liquidation application.

- [34] In my view and for the sake of completeness, there seems to be a few inconsistencies in the reasoning of the judge as reflected in the transcript. Firstly, the judge found at page 44, lines 14 to 20 of the transcript that:

"[I]t seems that the registered agents, who at the time were SBC, did contact Mr. [Huang] Wei who in broad terms is in the Wang camp but for some reason the statutory demand never ended up being provided to Mr. Wang Wei, as a result of which there was never any formal application to set aside the statutory demand."

The learned judge however went on to determine that Throne failed to provide a good explanation for not applying to set aside the statutory demand. I am of the considered view that whether Throne's unawareness of the statutory demand was caused by Agile or by a third party (in this case SBC), there was still a valid explanation proffered to the judge as to why there had been no formal application to set it aside. In any event, nothing turns on this point since there is no pre-requisite that there should be an application to set aside the statutory demand, nor can it be considered unreasonable that Throne failed to apply to set it aside.

- [35] Secondly, despite the judge's consideration that a liquidation application incurs significantly more consequences such as widespread advertisement, and therefore it is undesirable that the matter of disputing the debt is left until so late, he failed to consider that it is Throne that would have been prejudiced

by those consequences. I am fortified in the view that it was for Agile to avoid causing those adverse consequences to materialise in circumstances where, it had knowledge that Throne was disputing the alleged debt long before filing the liquidation application. It is worth noting that Mr. Chaisty, during his oral submissions, accepted that despite his assertion that there is a difference in the procedure for company liquidation in England, in a case where the creditor was informed that the debt is being disputed and nonetheless issues an application for liquidation of a company, the English courts would still apply the general rule that costs follow the event. It is not necessary for me to take a definitive position on Mr. Ayres' submission that there is no distinction in principle between the approaches taken in England and in the BVI with respect to costs, and I refrain from so doing.

- [36] Returning to the question of whether the learned judge exercised his discretion properly in refusing to grant Throne its costs even though it was successful in refusing Agile's application to appoint liquidators, it is settled law that the question of costs falls within the discretion of the trial judge and it is unusual for an appellate court to interfere with the exercise of that discretion, save for exceptional circumstances. This Court will only interfere with the exercise of the judge's discretion, and exercise its discretion afresh, on the well-established principles that were enunciated in **Dufour** and **AEI Rediffusion**. Having reviewed the totality of the circumstances, especially in relation to the failure to set aside the statutory demand, I have no doubt that the learned judge exercised his discretion wrongly and in so doing took into account irrelevant matters. In so far as the learned judge's decision was hinged upon his conclusion that Throne's failure to apply to set aside the statutory demand disentitled it to its costs, the learned judge erred as a matter of principle in his approach, and his decision therefore 'exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong'. Depriving Throne of its costs simply on the basis of its failure to apply to set aside the statutory demand, was not a proper exercise of the judge's discretion. His decision was therefore plainly wrong and as consequence must be set aside. It

therefore falls to this Court to exercise the court's discretion as to costs, afresh.

Exercising the Discretion Afresh

- [37] When exercising its discretion as to costs, the court is required by CPR 64.6(5) and (6) to have regard to all the circumstances, including whether it was reasonable for a party to pursue a particular allegation. Bearing this in mind, Agile's act of filing the liquidation application, despite being aware that the alleged debt was being disputed, is clearly a relevant factor. In **Glaxosmithkline**, a winding-up petition had been dismissed on the basis that the debt upon which it was based, was disputed on substantial grounds. The petitioner applied for an order reserving costs to the hearing of the summary judgment application, which the petitioner intended to make in proceedings to be issued shortly thereafter. Concluding that the ordinary course should follow upon dismissing the petition and ordering the petitioner to pay the costs of the petition, Blackburne J stated as follows:

"In this case, although at the end of the day it may be when the matter comes to trial that the court will disbelieve him, Mr. Mitchell's stance on behalf of the company was set out at length by Bates, Wells & Brathwaite on behalf of the company in their letter of 17 October. Thus before these proceedings were launched, the petitioner was aware of the matters upon which the company would be relying. **No doubt believing that there was no substance to those various contentions, it nevertheless launched these proceedings. As Mr. Arnold (counsel for the company) submitted, and as I accept, that is a high risk strategy. It failed.**" (Emphasis mine)

- [38] In my considered view, given that pursuing the insolvency jurisdiction before obtaining a judgment on the debt is a 'high risk strategy', it was for Agile to ensure that it was pursuing a viable application and not one which was futile in the circumstances. I come, therefore, to the inescapable conclusion as the judge did, that Agile ought not to have filed the liquidation application and did so at the risk of incurring costs where it was unsuccessful.
- [39] Moreover, in my view, Throne's failure to apply to set aside the statutory demand is irrelevant, in light of Throne having disputed the debt and does not

constitute an exceptional circumstance to warrant departing from the general rule that costs follow the event. As indicated earlier, there is no requirement that Throne ought to have applied to set aside the statutory demand in order to be awarded its costs upon successfully resisting the liquidation application.

- [40] For what it is worth, even if applying to set aside the statutory demand was required, and I am of the view that it was not, I am satisfied that Throne had provided a valid explanation for its failure in circumstances where, whether by the fault of Agile or SBC (as Throne's registered agents), Throne was not made aware of the statutory demand until long after the time to apply to set it aside had passed. Throne, having successfully resisted the liquidation application, was therefore entitled to its costs on the liquidation application in keeping with the general rule that costs follow the event. In the absence of any exceptional circumstances which would warrant departure from the general rule, Agile ought to pay Throne's costs on the liquidation application. Taking into account the totality of the circumstances as above outlined, I would therefore exercise the discretion as to costs afresh and award Throne its costs of resisting the liquidation application in the court below.

Costs

- [41] Having prevailed on the appeal, Throne is entitled both to its costs on the liquidation application, to be assessed by a judge of the Commercial Court, if not agreed within 21 days of the date of this order, and to its costs on the appeal, being no more than two-thirds of the costs in the court below.

Conclusion

- [42] For all of the above reasons, I would therefore allow Throne's appeal and set aside paragraph 2 of the learned judge's order. Throne shall therefore have its costs below, to be assessed by a judge of the Commercial Court, if not agreed within 21 days of the date of this order, and its costs on appeal, being no more two-thirds of the costs in the court below.

[43] I gratefully acknowledge the helpful assistance of learned counsel.

I concur.

Gertel Thom

Justice of Appeal

I concur.

Esco Henry

Justice of Appeal [Ag.]

By the Court

Chief Registrar