Neutral Citation Number: 2022 EWHC 2682 (Ch)

Case No: BR 2021 000147

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCH AND COMPANIES COURT LIST (Ch)

Date: 24/10/2022

Before :

Deputy ICC Judge Kyriakides

- -

Between :

JOHN FORSTER EMMOTT **Applicant**

- and –

MICHAEL WILSON & PARTNERS LTD **Respondent**

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- -

John Forster Emmott, acting in person
Michael Wilson & Partners Limited, acting in person by Michael Wilson

Hearing dates: 19 and 20 May 2022

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Deputy ICC Judge Kyriakides :

1. This is an application ("**the Application**") by John Forster Emmott ("**Mr Emmott**") to set aside a statutory demand dated 31 March 2021 ("**the Statutory Demand**"), which was served on him by Michael Wilson & Partners Ltd ("**MWP**"). In the Statutory Demand MWP claims that Mr Emmott owes it a judgment debt in the sum of £165,374 ("**the Statutory Demand Debt**"). Under details of the debt, it is claimed that Mr Emmott *"was ordered by the judgment of Tomlinson J (as he then was) at [2007] EWHC 1949 (Comm), and related orders of Simon J of 12 January 2007 (injuncting Kerman), and also of Tomlinson J (as he then was) of 24 July 2007, as well as Default Costs Certificate No. DCC/00539/07 of December 2007 that were issued against the Judgment Debtor in the principal sum of £78,923.55, and which accrues interest at 8% per annum, so that the total principal judgment debt long overdue is £165,373*".

2. Mr Emmott invites the court to set aside the statutory demand on the following grounds:

   2.1. first, the Statutory Demand Debt is not a debt owed by him to MWP;

   2.2. secondly, the Statutory Demand Debt is time-barred under s 24 of the Limitation Act 1980 ("**LA**");

   2.3. thirdly, he has a judgment debt which is due and owing to him by MWP which constitutes a set-off, counterclaim or cross-demand against the Statutory Demand Debt; and

   2.4. finally, the Statutory Demand is an abuse of process.

3. I deal with each of the grounds below.

4. Mr Emmott appeared before me in person and MWP was represented by Michael Wilson.

Preliminary Matters

5. There are two preliminary matters that I first need to deal with: the first concerns whether the Application to set aside the Statutory Demand was made out of time; the second relates to the conduct of this Application.

Whether the Application was made out of time

6. MWP contended that service of the Statutory Demand was effected on 31 March 2021 by the following means:

   6.1. by sending a copy of it and an accompanying letter on 31 March 2021 by first class post addressed to Mr Emmott at Kemp House, 152-160 City Road, London EC1V 2NX ("**City Road**"), being the service address shown at Companies House for Mr Emmott in his capacity as a director of Scythian Mining Group Limited;

   6.2. by sending a copy of the Statutory Demand and an accompanying letter on 30 March 2021 by first class post to 4 The Courtyard, Sheffield Park, Uckfield ("**The Courtyard**").

7. Mr Wilson did draw not my attention to any provisions in the insolvency legislation which supported his contention that service was effected on 31 March 2021.

8. A further copy of the Statutory Demand was sent by MWP by WeTransfer to Mr Emmott's email address on 4 May 2021. Mr Emmott's evidence was that he did not receive any of the documents allegedly sent on 31 March 2021, but he did receive the email dated 4 May 2021.

9. Rule 10.2 of the Insolvency (England and Wales) Rules 2016 ("**IR**") provides that a creditor must do "*all that is reasonable to bring the statutory demand to the debtor's attention and, if practicable in the particular circumstances, serve the demand personally*".

10. Paragraph 11.2 of Practice Direction: Insolvency Proceedings [2020] BCC 698 ("**IPD**") provides:

> "*Rule 10.2 applies to service of a statutory demand whether within or out of the jurisdiction. If personal service is not practicable in the particular circumstances, a creditor must do all that is reasonable to bring the statutory demand to the debtor's attention. This could include taking those steps set out at para.12.7 below which justify the court making an order for service of a bankruptcy petition other than by personal service. It may also include any other form of physical or electronic communication which will bring the statutory demand to the notice of the debtor.*"

11. Paragraph 12.7 of the IPD states:

> *"12.7 Service of bankruptcy petitions other than by personal service*
> *12.7.1*
> *Where personal service of the bankruptcy petition is not practicable service by other means may be permitted. In most cases, evidence that the steps set out in the following paragraphs have been taken will suffice to justify an order for service of the bankruptcy petition other than by personal service:*
> *(1)One personal call at the residence and place of business of the debtor. Where it is known that the debtor has more than one residential or business addresses, personal calls should be made at all the addresses.*
> *(2)Should the creditor fail to effect personal service, a letter should be written to the debtor referring to the call(s), the purpose of the same, and the failure to meet the debtor, adding that a further call will be made for the same purpose on the [day] of [month] 20[ ] at [ ] hours at [place]. Such letter may be sent by first class prepaid post or left at or delivered to the debtor's address in such a way as it is reasonably likely to come to the debtor's attention. At least two business days' notice should be given of the appointment and copies of the letter sent to or left at all known addresses of the debtor. The appointment letter should also state that:*
> > *(a) in the event of the time and place not being convenient, the debtor should propose some other time and lace reasonably convenient for the purpose;*
> > *(b))in the case of a statutory demand as suggested in para.11.2 above, reference is being made to this paragraph for the purpose of service of a statutory demand, the appointment letter should state that if the debtor fails to keep the appointment the creditor proposes to serve the demand by advertisement/ post/ insertion through a letter box as the case may be, and that, in the event of a bankruptcy petition being presented, the court will be asked to treat such service as service of the demand on the debtor;*
> > *(c)(in the case of a petition) if the debtor fails to keep the appointment, an application will be made to the court for an order that service be effected either by advertisement or in such other manner as the court may think fit*
> *(3) When attending any appointment made by letter, inquiry should be made as to whether the debtor is still resident at the address or still frequents the address, and/or other enquiries should be made to ascertain receipt of all letters left for them. If the debtor is away, inquiry should also be made as to when they are returning and whether the letters are being forwarded to an address within the jurisdiction (England and Wales) or elsewhere.*
> *(4)If the debtor is represented by a solicitor, an attempt should be made to arrange an appointment for personal service through such solicitor. The Insolvency Rules permit a solicitor to accept service of a statutory demand on behalf of their client but not the service of a bankruptcy petition.*"

12. In the present case, no attempt was made by MWP to serve Mr Emmott personally. Further, none of the procedure set out in paragraph 12.7 of the IPD was followed by MWP. Whilst Mr Wilson claimed that letters were sent to the City Road and The Courtyard addresses, he did not produce any documents to evidence this, for example, a

photograph of the envelope with the stamp on it and, indeed, in the case of The Courtyard address, he did not even produce the alleged covering letter.

13. It is also extraordinary, having regard to MWP's obligations to do all that is reasonable to bring the Statutory Demand to Mr Emmott's attention, that MWP claims to have tried to serve Mr Emmott with the Statutory Demand at The Courtyard address when Mr Wilson's evidence was that Mr Emmott did not reside at this address and that he was resident in Kazakhstan (I do note, however, that The Courtyard address is the address given by Mr Emmott in both his application notice and his witness statement). Whatever the true position relating The Courtyard address, what is clear is that MWP carried out no checks whatsoever at either The Courtyard address or the City Road address as envisaged by paragraph 12.7 of the IPD for the purposes of ascertaining whether or not the Statutory Demand was likely to come to Mr Emmott's attention if sent to these addresses.

14. By reason of the matters referred to above, in my judgment service of the Statutory Demand on Mr Emmott was not effected on 31 March 2021 as contended by MWP.

15. Mr Emmott, however, accepted that on 4 May 2021 he received an email with the Statutory Demand from MWP and does not dispute that he was served on that day. If Mr Emmott was in Kazakhstan at the time that the Statutory Demand was served on him, by reason of the provisions of IR 10.1(1), his application to set aside the demand, which was issued on 24 May 2021, would have been made within the requisite time period.

16. If, however, Mr. Emmott was in this jurisdiction when service was effected on him, he should have issued his application to set aside the Statutory Demand by 22 May 2021. As his application was issued on 24 May 2021, he would, therefore, have been out of time by two days.

17. This court has jurisdiction pursuant to section 376 of the Insolvency Act 1986 to extend time. If and insofar as it is required, in the exercise of my discretion, I will extend time for making the application to 24 May 2021 and will waive the need for Mr Emmott to make a formal application to this court. The reasons for my decision to extend time are:

    17.1. the period of delay was only two days;

17.2. by the time of the hearing, both parties had filed and served their evidence and were fully prepared to argue the merits of the Application;

17.3. no prejudice has been suffered by MWP as a result of the short delay;

17.4. on the other hand, prejudice will be suffered by Mr Emmott if I were now to dismiss his Application on the basis of his delay as a bankruptcy petition would be presented against him;

17.5. if the Application were to be dismissed on the grounds of delay, the same arguments as have been raised in this Application will be raised again on the bankruptcy petition. Not to have dealt with the merits of the Application, when one and a half days of court time had been set aside for it and when both parties were fully prepared to argue it would have been a waste of the court's resources and a disproportionate way of dealing with this case.

Conduct of the hearing

18. This Application has suffered from the many failings that have been noted in other judgments in this jurisdiction. In particular, I would highlight the following matters:

18.1. it is yet another saga in the 17 years of litigation between these two parties, litigation which has been described by the Court of Appeal in *Michael Wilson & Partners Limited v* Emmott [2019] EWCA Civ 2019 ("**the 2019 Court of Appeal Judgment**") as "*seemingly* interminable" (Gross LJ) and "*pathological*" (Peter Jackson LJ). The parties have already used up a disproportionate amount of the courts' resources. Indeed, this case could easily have been dealt with in a much shorter time and much more efficiently had I not been met with the prolix materials (all of which I was expected to read and, indeed, did read) and oral submissions of Mr Wilson, much of which was irrelevant;

18.2. I found Mr Wilson's conduct of the hearing at times to be truculent, evasive and needlessly argumentative and aggressive. Indeed, he showed little respect for the court. By way of example, regarding the numerous claims, proceedings and

authorities that he sought to rely upon, coupled with the lack of clarity in some respects in his evidence and written submissions, at the beginning of the hearing I asked him to assist me by referring me to the relevant parts of his evidence as well as the relevant paragraphs in the authorities that he was relying upon. This simple request to assist the court resulted in 30 minutes of wasted court time whilst Mr Wilson argued against having to do what I had requested, coupled with his refusal to move on with his submissions after it had become obvious that he did not want to assist the court;

18.3. I have also borne in mind the comments made by HHJ Pelling in his judgment in *Michael Wilson & Partners Ltd v John Forster Emmott* [2020] EWHC 2418 where he stated at [12]:

> "Given the Court of Appeal's acceptance that " … *MWP had sought to delay enforcement by mounting appeals which were and were known to be hopeless (at [33]) and presenting a distorted picture of those appeals to foreign courts (at [34] – [35])* …" and its conclusion that " … *such conduct of litigation by MWP has been deplorable* …" means that a court considering an application of the sort now before me must be very cautious in relation to an application that is not for a specific sum for a specific step in specific litigation supported by evidence as to the merits of the step proposed."

I have likewise adopted a cautious approach to matters where there has not been any supportive evidence or judgments before me. This cautious approach has further been necessary in light of what can only be described as the misleading way that Mr Wilson presented the proceedings in Australia to me, which I deal with below;

18.4. finally, I need to comment on Mr Wilson's attempts to persuade me that I should decide this Application in MWP's favour on the basis that in the arbitration proceedings referred to below, Mr Emmott had been found to have forged documents and was, therefore, a deceiver (a matter that is recorded in paragraph 12 of the 2019 Court of Appeal Judgment, although I also note that that paragraph shows that the arbitrators found that Mr Wilson was not a witness on whom they could rely)). Mr Wilson did not, however, appreciate that this Application was not a trial and that, despite his deceit, Mr Emmott still had a judgment in his favour which this court is not entitled to go behind (paragraph 11.4.4 of the IPD).

Whether the Statutory Demand should be set aside

The Law

19. The grounds upon which a statutory demand may be set aside are set out in rule 10.4(5) of the Insolvency (England and Wales) Rules 2016 ("**IR**"). There are four grounds there stated, but only three of them are relied upon in the present application, namely: the debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt specified in the statutory demand (IR10.4(5)(a); the debt is disputed on grounds that appear to the court to be substantial (IR10.4(5)(b)); and the court is satisfied, on other grounds, that the demand ought to be set aside (IR10.4(5)(d)).

20. In relation to the ground set out in IR r. 10.5(5)(a), the test that is normally applied by the courts is that there must be shown to be "a genuinely triable issue" (as set out in the IPD) or a "real prospect of succeeding" (*Ashworth v Newnote Limited* [2007] EWCA Civ 793), although in reality there is no practical difference between the two tets.

Whether the Statutory Demand Debt is owed by Mr Emmott

21. On 12 January 2007, on the application of Arduina Holdings BV ("**Arduina**") in proceedings it had brought in the Commercial Court against Mr Emmott (Case No. 2007 FOLIO 56) ("**the Arduina Application**"), Simon J (as he then was) made a without notice order against Mr Emmott restraining him until the return day from disclosing to Kerman & Co. LLP ("**Kerman**") confidential and privileged information obtained by him while acting as the solicitors for Arduina in proceedings in London, Australia and Russia arising out of dispute with Celtic Resources (holdings) Plc, including documents and information relating to the application and claim brought by Arduina against Mr Emmott.

22. Whilst MWP seeks in the Statutory Demand to rely on the order of Simon J made on 12 January 2007, no monetary order was made by Simon J against Mr Emmott, whether for costs or otherwise.

23. The return date of Arduina's application was 24 July 2007. At that hearing Arduina and MWP also sought to restrain Mr Emmott from instructing Kerman to act for him in arbitration proceedings between MWP and himself ("**the Arbitration Proceedings**"). At the same time, the court heard an application by Mr and Mrs Emmott to set aside a worldwide freezing order which had been imposed on them by Morison J on 20

December 2006 and continued by Cresswell J on 19 January 2007 in proceedings which had been issued in the Commercial Court by MWP against them and others (Case No. 2006 FOLIO 9210 ("**the Commercial Court proceedings**").

24. At the hearing, as shown by paragraph 100 of the judgment of Tomlinson J ([2007] EWHC 1949 (Comm)), the court acceded to Arduina's application and ordered that Kerman was not to be retained by Mr Emmott unless and until the Arduina matters had been abandoned or were finally disposed of. In paragraph 101, he stated that to the extent that the same relief had been claimed by MWP, it was unnecessary and duplicative and dismissed the application if and insofar as it sought to restrain Mr Emmott from instructing Kerman to act in the Arbitration even if the allegations concerning Arduina fell away.

25. For some reason, neither party has produced the order made by Tomlinson J in the Arduina Application, although both parties agree that the Judge ordered Mr Emmott to pay Arduina's costs. On 5 December 2007 those costs were assessed by a default costs certificate in the sum of £78,793.55, together with fixed costs of £130.00 ("**the Arduina DCC**"). The certificate provided that interest was to run on the above sums from the date of the certificate. It is these sums, together with interest on them at the judgment rate, that form the Statutory Demand Debt.

26. In relation to Mr and Mrs Emmott's application in the Commercial Court proceedings, the parties agreed to set aside the freezing order against Mrs Emmott, but the Judge dismissed Mr Emmott's application and ordered him to pay 50% of MWP's costs occasioned by Mr and Mrs Emmott's application, together with a payment on account of costs in the sum of £17,000. On 13 September 2018 MWP obtained a Default Costs Certificate in the sum of £62,600.60 plus £146 fixed costs, with interest running at the judgment rate on the principal from 24 July 2007 and on the costs from the date of the Costs Certificate. This sum does not form part of any part of the debt claimed in the Statutory Demand.

27. Mr Emmott submitted to me that the Statutory Demand Debt was, therefore, a debt owed by him to Arduina and not to MWP and that the Statutory Demand should accordingly be set aside. In support of his argument, he drew my attention to the fact that MWP in the Statutory Demand had claimed that it was owed the Statutory Demand Debt in its own

right and had left blank Part C of the Statutory Demand, which should have been completed had it been claiming to be an assignee of the Arduina DCC.

28. Mr Wilson argued, on the other hand, that MWP was an assignee of the Statutory Demand Debt. However, the only evidence that he produced to the court to support his claim was one sentence in paragraph 13 of his witness statement dated 6 September 2021 (**MW w/s**) in which he merely asserts that the Statutory Demand Debt was assigned to MWP. Mr Wilson did not provide any details whatsoever of the alleged assignment nor did he produce a copy of the document as part of his exhibit. Further, Mr Wilson did not contend that Mr Emmott had ever been given any notice of the "assignment" and, indeed, there is no evidence of any such notice having been served.

29. In his oral submissions, Mr Wilson described the "assignment" as "a novation", although it was not contended that Mr Emmott was a party to it. He further contended that I should just accept his word that there had been an assignment on the basis that he was a solicitor of the Supreme Court. At 5pm on the first day of the hearing, Mr Wilson emailed to the court what purported to be the "novation". Considering its extreme lateness and the consequent unfairness to Mr Emmott and its not being verified by any witness statement with a statement of truth (although had it been, an application for relief from sanctions would have had to have been made), I did not look at it and refused on the following day to allow MWP to rely upon it.

30. In my judgment, the bare assertion by Mr Wilson that there was an assignment is not sufficient to discharge the burden on MWP to show that it had indisputably acquired by assignment the rights of Arduina to the Statutory Demand Debt. If indeed there has been written assignment, it would have been important for both the court and Mr Emmott to have seen the document (in the case of Mr Emmott, at least in good time before the hearing) in order to check whether it did indeed assign the rights alleged and whether, it was supported by consideration as it would at best have taken effect as an equitable assignment due to the lack of notice of it to Mr Emmott. As a solicitor of the Supreme Court, Mr Wilson should have been aware that proper evidence to support MWP's contention was required and although MWP had had every opportunity to do this, it chose not to produce such evidence.

31. In light of the lack of evidence before the court, I cannot be satisfied that the Statutory Debt was assigned to MWP and that it has indisputable title to the Statutory Demand Debt. In my judgment, a substantial dispute has been raised by Mr Emmott and this is sufficient in itself for the Statutory Demand to be set aside.

Whether the Petition Debt is statute-barred

32. Mr Emmott submitted that if the Petition Debt had been assigned to Mr Wilson, it was statute-barred under LA s 24. Section 24 states:

> "*An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable*".

33. Mr Emmott submitted that the Arduina DCC was a judgment and that time for the purposes of the limitation period ran from 5 December 2007. In so doing, he relied upon the case of *Times Newspapers Limited v Chohan* [2001] EWCA Civ 964 where the Court of Appeal held that time in relation to a costs order commences not from the date when the order is made, but from the date that the costs are certified. Mr Emmott argued that pursuant to LA s 24, the Arduina DCC, therefore, became statute-barred on 5 December 2013 and that as it would be futile to allow the demand to stand when no action could subsequently be taken on the demand, the Statutory Demand should be set aside under IR 10.5(5)(d).

34. During the course of the hearing I drew Mr Emmott's attention to the case of *Thomas Anthony Bailey v John Robin Betram Hill* [2003] EWHC 2646, which established at [16] that LA s 24 has no application to a statutory demand, since a demand is not an action. Further, in *Ridgeway Motors (Isleworth) Ltd v ALTS Ltd* [2005] 2 BCLC 61, in the context of a winding-up petition, the Court of Appeal held that a petition by a judgment creditor was not subject to the six-year limitation period in LA s 24. It stated that "*an action upon a judgment*" had the special or technical meaning of a "*fresh action*" brought upon a judgment in order to obtain a second judgment which could then be executed and that a winding-petition was not such a proceeding.

35. The same reasoning applies to a bankruptcy petition and accordingly, I reject Mr Emmott's submissions and find that it would not be futile to allow the Statutory Demand to stand as MWP would not be barred by the LA from presenting a bankruptcy petition against Mr Emmott.

Set-off, counterclaim and cross- demand

36. There are two issues that need to be considered in relation to this ground:

    36.1. first, whether Mt Emmott has a set-off, counterclaim or cross-demand, which equals or exceeds the Statutory Demand Debt;

    36.2. secondly, if he has a set-off, counterclaim or cross-demand, whether MWP is entitled to offset against that set-off, counterclaim or cross-demand any other set-off, counterclaim or cross-demand, which it may have against Mr Emmott.

Whether Mr Emmott has a set-off, counterclaim or cross-demand

37. Mr Emmott claims that he has a set-off, counterclaim or cross-demand arising out of an arbitration award made in his favour on 5 September 2014 in the sums of £3,209,213 and US$841,213 plus interest at 8% per annum ("**the Arbitration Award**").

38. The circumstances which gave rise to the Arbitration Award are to be found in various judgments in this and other jurisdictions concerning the dealings between Mr Emmott and MWP. A brief summary of those dealings, insofar as they provide relevant background relating to the Arbitration Award and as they are recorded in the judgments, is set out below.

39. MWP is an entity incorporated in the British Virgin Islands. At all material times, it has practiced as a law firm and business consultancy with its headquarters in Kazakhstan. The ultimate beneficial owner and controller of MWP is Mr. Wilson. Mr Emmott, whether or not he still practices, is an Australian and English qualified solicitor.

40. The disputes between Mr Emmott and Mr Wilson, which have so far lasted about 17 years and have involved multi-jurisdictional proceedings, including numerous proceedings and applications in this jurisdiction, have their origins in an agreement dated

7 December 2001 made between Mr Emmott and MWP ("**the Original Agreement**"). Pursuant to the Original Agreement, in consideration for Mr Emmott's services and for relinquishing rights to share in MWP's net profits, Mr Emmott was to become a director of MWP and to receive a 33% shareholding in MWP, while Mr Wilson was to retain a 67% shareholding (via a corporate vehicle). The Original Agreement provided that if Mr Emmott resigned his directorship, he was to sell his shares in MWP to MWP or to its nominee and that English law would govern. It also contained a London arbitration clause.

41. On 20 December 2005, Mr Emmott entered into a secret agreement with two other MWP employees, Mr Nicholls and Mr Slater, which provided for the establishment of a rival business in Kazakhstan. Ultimately, Mr Emmott, Mr Nicholls and Mr Slater left MWP to work there.

42. In 2005 MWP commenced arbitration proceedings against Mr. Emmott before an arbitration tribunal in London for breach of contract, breach of fiduciary duty and conspiracy. By their Second Interim Award dated 19 February 2010, the arbitrators found that Mr Emmott had been guilty of deliberate, serious and dishonest breaches of his fiduciary obligations to MWP, but that he had also satisfied the conditions for obtaining a 33% shareholding in MWP. By the Third Interim Award dated 5 September 2014, the arbitrators held that the quantum of the latter award exceeded the former and accordingly ordered MWP to pay to Mr Emmott the sums referred to in paragraph 37 above.

43. On 26 June 2015 Mr Justice Burton gave Mr Emmott leave to enforce the Arbitration Award in the same manner as a Judgment or Order of this Court and also entered judgment against MWP in the amount of the Arbitration Award ("**the Judgment Debt**"). Various appeals were made by MPW against the Arbitration Award, all of which failed.

44. Since 26 June 2015, the Judgment Debt has been reduced. Mr Emmott in his witness statement states that as at 23 May 2021, after various recoveries and set-offs (I understand that the set-offs offs arose either by order of the court or agreement between the parties), the balance outstanding of the Judgment Debt amounted to £2,006,461 plus about US$1,000,000 and interest ("**the Balance Outstanding**").

45. Subject to whether there have been any further set-offs (which is discussed under the next heading), Mr Emmott submitted that he was entitled to set-off the Balance Outstanding against the Statutory Demand Debt, alternatively, that the Balance Outstanding Debt was a counterclaim or cross-demand, which exceeded the amount of the Statutory Demand Demand.

46. Mr Wilson argued that Mr Emmott was not entitled to set-off the Balance Outstanding against the Statutory Demand debt for two reasons:

    46.1. first, because the Statutory Debt was based on an assignment of a debt originally owned by Arduina to MWP and was, therefore, incapable of being set-off against the Balance Outstanding;

    46.2. secondly, Mr Emmott could not set off a judgment debt against another monetary order of the court unless he first obtained the permission of the court under CPR 44.12.

47. I accept Mr Wilson's submission that Mr Emmott is not entitled to set-off the Statutory Debt against the Outstanding Balance unless he applies to the court for an order permitting such a set-off and an order is granted. Mr Emmott has not done this. I would also add, however, that neither has MWP made any application, despite Mr Wilson's representations to me during the course of the hearing that MWP was itself willing to agree such a set-off. I note that this representation is contrary to statements in some of the judgments that the Judgment Debt has not yet been satisfied, not because MWP "*can't pay*", but because it *won't pay*".

48. IR r. 10.5(5)(a) is not, however, limited to set-offs, but also extends to counterclaims and cross-demands. Although the Outstanding Balance, which arises pursuant to the Arbitration Award and the Judgment of Burton J, is not a counterclaim, the question that needs to be considered is whether it is a cross-demand.

49. The meaning of "cross-demand" in IR r.10.5(5(a) was considered by the Court of Appeal in the case of *Popely v Popely* [2004] EWCA Civ 463. In that case Jonathan Parker LJ stated at [113] – [114] as follows:

"*[113] With all respect to Mr Briggs, on this issue he was in my judgment attempting to argue the unarguable. Either the underlying claim is a 'cross-demand' within the meaning of the rule, or it is not; and whether it is or not cannot in my judgment depend on the nature of the debt which is the subject of the statutory demand. In contrast to the words 'counterclaim' and 'set-off', the word 'cross' in the expression 'cross-demand' does not imply any kind of procedural or juridical relationship to the debt which is the subject of the statutory demand: all it means, in my judgment, is that the 'demand' is one which goes the other way, ie that it is a 'demand' by the debtor on the creditor.*

[114] In my judgment, therefore, as a matter of construction of the rule, just as the underlying claim would be a 'cross-demand' in the context of a statutory demand based on a judgment (including a default judgment: see para 12.3 of the 1999 Practice Direction), so is it a 'cross-demand' in the context of a statutory demand based on the debtor's liability under a costs order; and the deputy judge was right so to conclude. In my judgment, the meaning of the expression 'cross-demand' in r 6.5(4)(a) of the Rules cannot change according to whether the judgment or order on which the statutory demand is based was obtained in the same proceedings as those in which the claim relied on as a 'cross-demand' is being advanced."

50. In light of that definition, although the order and award under which it arises were not made in the same proceedings as the Statutory Demand Debt, in my judgment, the Outstanding Balance is a cross-demand. Subject, therefore, to the next issue discussed below, as the Outstanding Balance exceeds the Statutory Demand Debt, it is a sufficient ground for setting aside the Statutory Demand.

Whether MWP has any other claims which it is entitled to set-off against the Balance Outstanding

51. The issue of whether a creditor is entitled to raise other claims it might have against a counterclaim or cross-demand raised by a debtor was considered by the Court of Appeal in the case of *TSB Bank plc v Platts* [1998] 2 BCLC 1. In that case, a bank served a statutory demand on a debtor claiming that the debtor owed it the sum of £377,474.52, being the amount it was owed by the debtor less the estimated value of the security it held over the debtor's property. Although the debtor had originally applied to set aside the statutory demand, he later withdrew that application. The debtor's property was subsequently sold by the bank and the bank presented a bankruptcy petition against him. In his defence of the bankruptcy petition, the debtor claimed that the bank had sold his property at an undervalue. The debtor's claim exceeded the debt claimed in the bankruptcy petition.

52. One of the issues that the Court of Appeal was asked to decide was whether the court, as a matter of its discretion, should in relation to the debtor's cross-claim or set-off, take into account the state of the overall state of the account between the bank and the debtor. This showed that, taking into account the petition debt, the debtor's set-off or counterclaim, and the overall state of the account between the bank and the debtor, the bank's total claims exceeded the debtor's claim. Although the Court of Appeal ultimately did not have to give a definitive answer on this point, because the debtor conceded that his counterclaim was subject to an equitable set-off by the bank, it stated obiter as follows (at page 7):

> "*We have doubts as to whether that is the right approach. Take a case of a cross-claim, which does not amount to an equitable set-off. By reason of r 6.5(4) that cross-claim can be seen to be a relevant matter in determining whether the statutory demand should be set aside, and, it is not in dispute, it is also relevant at the hearing of the petition when the court is considering whether to make a bankruptcy order. The rationale for that must be that the cross-claim undermines the apparent inability of the debtor to pay the statutory demand debt. We see force in Mr Mortimore's objection that the creditor cannot rely on a further debt (in circumstances not amounting to an equitable set-off against a cross-claim) which has not been the subject of the statutory demand as that would run counter to the statutory scheme, based as it is on the necessity for the creditor to found his petition on a debt the subject of a statutory demand and to prove that that debt was payable but not paid. Nowhere in the 1986 Act or the 1986 rules is it contemplated that a further debt could be relevant. If it were possible to take account of other indebtedness, it would undermine an essential safeguard for the debtor in the statutory scheme, whereby the debtor is only faced with a debt claimed in the statutory demand which he can seek to set aside. A creditor faced with a cross-claim after service of the statutory demand but who has a further debt on which he can rely can always serve a further statutory demand and petition on the greater debt.*"

53. In light of the above, in my judgment, unless MWP is able to demonstrate that it has a claim by way of equitable set-off against the Balance Outstanding, which would have the effect of extinguishing that debt or at least extinguishing it to the extent that the Statutory Demand Debt was still greater than the bankruptcy level, in my judgment, such further claims of MWP should not be taken into account in the context of this Application.

54. In the exhibit to his witness statement, Mr Wilson produced two schedules in which MWP set out what it alleged should be the reductions that should be made to the Balance Outstanding. According to that schedule, MWP claims that monies are owed to it by Mr Emmott and not the other way round. Whilst in his evidence Mr Emmott set out the total

amount of the sum that he claims is still outstanding to him in respect of the Judgment Debt, after taking into account agreed set-offs and set-offs ordered by the court, no such exercise has been carried out by Mr Wilson in his evidence in order to clarify for the court those claims where no set-off has been agreed or ordered and those where there have been such agreements or orders. Whilst Mr Wilson sought orally during the course of the hearing to carry out this exercise, I am not prepared to accept such oral submissions without their being any proper evidential basis for them.

55. Further, I asked Mr Wilson which claims in the schedules he claimed amounted to an equitable set-off against the Outstanding Balance. I would add here that none of these claims has been explained or properly explained in MWP's evidence. In response to my question Mr Wilson told me that essentially two matters were relied upon:

    55.1. first, MWP relied on proceedings pending in the Australian court. Mr Wilson claimed these effectively formed part and parcel of the same disputes which had been raised in the Arbitration Proceedings. He said that there had been bifurcated awards, namely, those made in the arbitration and those made in Australia, that had dealt with the same claims and that this had been recognised by HHJ Pelling QC;

    55.2. secondly, MWP relied on an application which was then due to be heard shortly by HHJ Pelling QC in the Commercial Court.

<u>The Australian Proceedings</u>

56. During the course of the hearing, the impression that I was given by Mr Wilson was that MWP had issued proceedings in Australia against Mr Emmott, that the Australian court was dealing with the same issues and claims that had arisen in the Arbitration Proceedings, that in connection with the partnership with Mr Emmott (the implication being that it was MWP's partnership with Mr Emmott), the Australian court had ordered an account and that the account would show that MWP was owed millions of pounds.

57. I have now had an opportunity to read the numerous judgments that Mr Wilson produced, both prior to and during the course of the hearing. However, they have shown that what I was told by Mr Wilson was misleading. I set out below my understanding of the

Australian proceedings (and, insofar as is relevant, the English proceedings) based on the matters set out in the various relevant judgments.

58. In October 2006 MWP, shortly after the commencement of the Arbitration Proceedings, MWP commenced proceedings in New South Wales against Mr Slater and Mr Nicholls (who at the time were Australian citizens and residents) and Temujin entities associated with them, including, Temujin International Ltd ("**TIL**"), Temujin International FZE ("**TFZE**") and Temujin Services Ltd ("**TSL**") (together the "**Temujin Entities**"). In the proceedings (which, consistently with later judgments, I shall refer to as "**NWS1**"), MWP claimed, among other things, that Messrs. Nicholls and Slater had breached their contractual and equitable duties to MWP, had conspired with Mr Emmott to divert clients and business opportunities from MWP to their own companies, induced Mr Emmott to breach his own contractual duties to MWP and had knowingly assisted Mr Emmott to breach his fiduciary duties to MWP.

59. On 6 October 2009 and 11 December 2009 Einstein J, the primary judge, delivered his judgments. He upheld MWP's claims against Messrs Nicholls and Slater and the Temujin Entities, granting declaratory relief and ordering those parties to pay compensation or damages to MWP in the sums of US$3,508,793.91, €555,258.94 and $A4,000,000. He also made a finding that the agreement under which the Temujin Entities' business was formed was in reality a partnership between Mr Emmott, Mr Slater and Mr Nicholls. As Mr Emmott was not a party to NSW1, he was not bound by this finding.

60. The judgment of Einstein J was appealed. Ultimately, the appeal led to the award being reduced to US$676,335.00 and €378,160, which together with pre-judgment interest, totalled US$1,106,090 and €618,449. Subsequently, Mr Nicholls and Mr Slater were made bankrupt and TIL and TSL were wound up.

61. In February 2016 MWP took an assignment of the rights of the trustees in the bankruptcies of Messrs Nicholls and Slater and of the liquidators of TIL and TSL against Mr Emmott and in February 2016, in its capacity as assignee, MWP commenced proceedings in New South Wales against Mr Emmott (consistently with the various judgments, I shall refer to these proceedings as "**NSW2**"). In NSW2, MWP initially sought: (1) a contribution from Mr Emmott in respect of the liability of Mr Nicholls, Mr

Slater, TIL and TSL under the NSW1 judgment ("**the contribution claims**"); and (ii) declarations to the effect that Messrs Emmott, Nicholls and Slater had established a partnership ("**the Temujin Partnership**") and an account for all benefits received by Mr Emmott (and related entities) as partner ("**the partnership claims**").

62. Mr Emmott sought an anti-suit injunction in this jurisdiction restraining MWP from pursuing the NSW2 proceedings on the grounds that the claims in NSW2 fell within the ambit of the arbitration or were claims by MWP to enforce its own rights. The injunction was initially granted by O' Farrell J on 24 November 2016, but was set aside by the Court of Appeal, which rejected Mr Emmott's contentions. However, the Court of Appeal did grant limited injunctive relief restraining MWP from advancing in NSW2: (i) claims which it had lost in the arbitration; (ii) matters contrary to the findings in the arbitration which were adverse to MWP; and (iii) claims for fraud and conspiracy. The Court of Appeal held that it was, however, for the Australian courts to decide the contribution claims and the partnership claims. MWP then amended its pleadings in NSW2 to comply with the decision of the Court of Appeal.

63. Mr Emmott subsequently issued an application in NSW2 seeking an order setting aside service on him on the ground that permission was required from the Australian court to serve proceedings outside Australia which had not been obtained and/or a stay on forum non conveniens grounds. The judge at first instance ordered that the NSW2 proceedings be stayed permanently. On appeal, however, the Court of Appeal Supreme Court of New South Wales ("**NSWCA**") by an order made on 17 December 2021 ([2021] NSWCA 315) continued the stay in respect of the contribution claims, in effect, finding that there was no right to claim any contribution against Mr Emmott in respect of the awards made under NSW1, but lifting the stay in relation to the partnership claims on the grounds that Australia had jurisdiction over the partnership disputes because there were partnership assets in Australia. The NSWCA also gave leave to serve the proceedings relating to the partnership claims out of the jurisdiction. Subsequently, on 22 February 2022 ([2022] NSWCA 48) the NSWCA made an order releasing MWP from its obligation to provide security to Mr Emmott for various costs.

64. In his skeleton argument, Mr Wilson claimed that the judgments handed down by the NSWCA on 17 December 2021 and 25 February 2022 in NSW2 were judgments in

MWP's favour as to the Temujin Partnership with the result that the Temujin Partnership "*inspection, disclosure, inquiry, account and proprietary tracing are now underway as to US$76 million of Temujin Partnership assets*". As will be seen from the actual judgments, this description is highly misleading and does not accurately reflect what the NSWCA actually decided.

65. Mr Emmott disputes that there was a partnership between him, Mr Slater and Mr Nicholls. No evidence was adduced before me to show that there had been any trial of this issue to date and/or that MWP has obtained a judgment against Mr Emmott establishing that there was such a partnership, that it should be wound up and that appropriate accounts and inquiries should be taken.

66. In light of the above matters, I reject Mr Wilson's submissions that the claims being pursued by MWP in Australia against Mr Emmott are claims which give rise to an equitable set-off against the Balance Outstanding. The Balance Outstanding is the balance of the Judgment Debt which Mr Emmott is entitled to recover from MWP relating to his 33% interest in MWP less the amount of the damages awarded against him in the Arbitration Proceedings in respect of MWP's claims against him. The partnership claims made in NSW2 are claims which MWP does not assert in its own right against Mr Emmott, but as an assignee of the partnership rights, if a partnership is established, that Mr Slater and Mr Nicholls had against Mr Emmott. There is no substantial connection between the Judgment Debt and the partnership claims in NWS2 and, therefore, no equitable set-off which can arise between them.

67. In conclusion, in my judgment, the partnership claims in NSW2 should not be taken into account when considering Mr Emmott's cross-demand.

<u>The Application before HHJ Pelling QC</u>

68. On 5 December 2014 HHJ Mackie QC granted a post-judgment freezing order in favour of Mr Emmott ("**the Freezing Order**"). The order contained the usual "Angel Bell" exception. The Freezing Order has since be revised by reducing the monetary limit of the order and removing the Angel Bell exception.

69. During the course of the proceedings, Mr Wilson informed me that a hearing was due to take place before HHJ Pelling QC concerning whether the limit of the freezing order should be further reduced as a result of some substantial debts which it was claimed were owed by Mr Emmott to a Mr Sinclair, but which had subsequently been assigned to MWP. Mr Wilson submitted that if the Judge made a decision in MWP's favour, then no amount would be owed by MWP to Mr Emmott. No evidence relating to this application had, however, been adduced in MWP's evidence, for example, the relevant application notice and witness statement in support.

70. Subsequent to the hearing, on 21 June 2022 MWP sent an email to me stating that HHJ Pelling QC had given an ex temporare judgment on 17 June 2022 and that as a result of his findings *it was crystal clear that there are no sums due or owing by MWP to the Judgment Debtor…so that the former Freezing and related Orders to which the Judgment Debtor refers, and on which he seeks to rely in these proceedings, are no longer relevant and have in substance, and effect, fallen away, and have been rescinded and set aside*".

71. He also stated that a further hearing had been set for 24 June 2022 shortly after which MWP expected to receive a sealed order, a copy of which it would provide.

72. In view of the representations made to me, I asked MWP to provide me with a transcript of the judgment as soon as possible and stated that once it was received the parties would have 7 days to make short submissions on the effect of the judgment. I heard nothing further from MWP until 8 July 2022 when MWP wrote a further email stating that there had been important further developments that I should also be aware of and that MWP would write to me the following week.

73. I have heard nothing further from MWP and no update or transcript has been provided to me. MWP has been given more than sufficient time to comply with my request. Further, in view of the tendency that Mr Wilson has to mispresent the effect of proceedings, I am not prepared to accept the statements made by him in his emails to me at face value.

74. Accordingly, I am not prepared to find that HHJ Pelling QC has made findings the effect of which has been to reduce the Balance Outstanding to zero. Further, and in any event, it would appear that HHJ Pelling QC was not performing a function whereby he was

making orders for the set-off of various claims, otherwise he would not have required Mr Emmott to make a specific application to set-off the Balance Outstanding. What I understand is before HHJ Pelling QC is an application to reduce the limit of the Freezing Order, because of claims that MWP has against Mr Emmott. Accordingly, even if MWP succeeds, this does not mean that, for the purposes of this Application, MWP has established that it has one or more equitable set-offs against the Outstanding Balance. In particular, the substantial claim that MWP claims it has against Mr Emmott arising from the rights claimed to have been assigned to it by Mr Sinclair suffers from the same problems as the claims arising from the partnership rights assigned to it by the trustees of the estates of Messrs Slater and Nicholls. On its face, there is no substantial connection between the Sinclair claim and the Balance Outstanding which would be sufficient to enable one to be set-off against the other by way of equitable set-off.

75. In conclusion, MWP has not established before me that it has any equitable set-offs against the Outstanding Balance, which I should in my discretion take into account.

Abuse of process

76. Finally, Mr Emmott argues that the Statutory Demand is an abuse of process and refers me to the fact that this is the tenth statutory demand that MWP or its "alter ego", Mr Wilson has served on him, all of the previous statutory demands having been set aside.

77. Whilst MWP's conduct is not to be condoned in any way, this point must fail on the basis that a statutory demand is not a proceeding (*Thomas Anthony Bailey v John Robin Betram Hill* [2003] EWHC 2646) with the result that service of such a demand cannot be an abuse of process.

Conclusion

78. In my judgment, the Statutory Demand should be set aside on the following two grounds:

78.1. there is a substantial dispute about whether or not the Statutory Demand Debt was assigned to MWP;

78.2. Mr Emmott has established that he has a cross-demand which exceeds the amount of the Statutory Demand Debt.

79. Accordingly, I will allow the application.

Postscript

80. Shortly after my draft judgment was sent to the parties, Mr Wilson sent to the court without explanation various documents, including a judgment of HH Judge Pelling Q.C sealed on 30 August 2022. As it appeared that MWP might want to argue that there was a change of circumstance since my draft judgment arising from the judgment of HH Judge Pelling QC and for me to consider changing my draft judgment in consequence, on 20 September 2022 I directed that if MWP wished to make any submissions on the draft judgment prior to its being handed down, then it had to file and serve further short written submissions by 10 am on 12 October 2022, which would have to deal with both my jurisdiction to do so and the grounds for exercising my discretion, and that it should also file and serve a compliant bundle of any further documents that it wished to rely upon. I then gave Mr Emmott the right to file and serve any short submissions in answer by 10 am 19 October 2022.

81. On 19 October 2022 Mr Emmott sent the court an email, copied to Mr Wilson, in the following terms:

> "*At 6.56 am this morning 19 October 2022 I received MWP's "Supplemental Skeleton Argument". This was 16 pages long.*
> *At 7.00 am this morning I received an index to a supplemental bundle. This consisted of 21 documents and a total of 420 pages. I have not yet received a copy of the supplemental bundle either electronically or, as is required by CPR PD6A, by hard copy to my address for service.*
>
> *There has been no request from MWP for an extension of time to serve its supplemental submissions and bundle. It is almost exactly 7 days late and not once during those 7 days did Mr Wilson or MWP make a formal application for an extension of time within which to file and serve the documents. No request was made to the court and no request was made to me. The court gave MWP a generous time from 20 September 2022 to 12 October 2022 to file and serve the submissions and bundle.*
>
> *In all the circumstances I submit that MWPs Supplemental Skeleton and Bundle be disregarded by the court and it proceed to deliver the draft judgment on 24 October 2022 as originally drafted.*"

82. I gave the directions that I did in order: (i) to give MWP a fair opportunity to make any further submissions it felt necessary, in light of the judgment of HH Judge Pelling Q.C; (ii) to give Mr Emmott a fair opportunity to file and serve any rely, if he so wished; and

(iii) to give me the time to consider the further skeletons and documents filed. MWP was given a generous time limit of 22 days to file and serve its submissions and bundle. In a manner reminiscent of the filing and service of its skeleton in relation to the main application, MWP has failed without excuse to comply with my directions. It filed and served its skeleton on 19 October 2022, the very day that Mr Emmott was to file and serve his skeleton argument. In addition, whilst Mr Wilson filed the additional bundle with the court on 13 October 2022, he has still not served Mr Emmott with that bundle.

83. As a result of MWP's failures, Mr Emmott will not have a fair and proper opportunity to prepare his skeleton prior to the judgment hearing on 24 October 2022 and will accordingly be at a real disadvantage in having to deal with the additional points that MWP seeks to make. The drafting of my judgment was delayed because of representations made by MWP and the judgment hearing has already been delayed for nearly two months because of the availability of the parties. Having regard to the overriding objective and court resources, I am not prepared to adjourn it.

84. In the circumstances, I shall not consider any of the further material and submissions filed by MWP. It is just too late.