Neutral Citation Number: [2023] EWHC 1408 (Ch)

Case Nos: BR-2021-LDS-000011
BR-2021-LDS-000012
BR-2021-LDS-000014

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN LEEDS
INSOLVENCY AND COMPANIES LIST (ChD)

The Court House
Oxford Row
Leeds LS1 3BG

Before :

Her Honour Judge Kelly sitting as a Judge of the High Court

Between :

BR-2021-LDS-000011

SUSAN MAY KING

Applicant

- and -

BAR MUTUAL INDEMNITY FUND

Respondent

BR-2021-LDS-000012

JAMES PATRICK KING

Applicant

- and -

BAR MUTUAL INDEMNITY FUND

Respondent

BR-2021-LDS-000011
BR-2021-LDS-000011

BR-2021-LDS-000014

ANTHONY DOUGLAS KING

Applicant

- and -

BAR MUTUAL INDEMNITY FUND

Respondent

- -
- -

Mr Christopher Newman instructed directly by the **Applicants**
Mr Martin Ouwehand (instructed by DAC Beachcroft) for the **Respondent**

Hearing dates: 4, 5 and 8 August 2022
Date draft circulated to the Parties: 4 June 2023
Date handed down: 9 June 2023
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APPROVED JUDGMENT

This judgment was handed down by the Judge by circulation to the parties and the parties' representatives by email and release to The National Archives. The date and time for hand-down is deemed to be 10.30am on Friday 9 June 2023.

Her Honour Judge Kelly

1. This judgment follows the hearing of the applications by Susan May King, James Patrick King and Anthony Douglas King (collectively, 'the Kings') to set aside statutory demands dated 7 October 2021 (collectively, 'the Statutory Demand') for £219,700.00 ('the Statutory Demand Debt') issued against them by the Bar Mutual Indemnity Fund ('BMIF'), pursuant to s 268(1)(a) Insolvency Act 1986 ('IA 1986') ('the Set-Aside Application').

2. The Applicants were represented by counsel Mr Christopher Newman. The Respondent was represented by counsel Mr Martin Ouwehand. I had the benefit of skeleton arguments from both counsel.

3. The Statutory Demand Debt represents the sum payable under a costs order dated 10 June 2021 made against the Kings by Cockerill J ('Costs Order'). The Costs Order followed a strike out judgment in conspiracy proceedings against the Kings in *Anthony King & 2 Ors. v Barry Stiefel & 9 Ors.* [2021] EWHC 1045 (Comm) ("the Conspiracy Proceedings") heard by Cockerill J. That case in turn arose out of proceedings concerning misrepresentation ("the Misrepresentation Proceedings") before Marcus Smith J. There are two other ongoing sets of proceedings that are relevant to this case arising from alleged professional negligence and unfair prejudice ("the Professional Negligence Proceedings" and "the Unfair Prejudice Proceedings").

4. As that short summary shows, this case has had some history in the courts and some background is necessary to understand the context of the present application.

Background

5. The Kings operated a family business called Kings Solution Group Ltd ('KSG'). In 2013 they got into financial difficulty and explored external investment from some private equity investors who set up Primekings Holdings Limited ("Primekings") as a Special Purpose Vehicle ("SPV") for this purpose.

6. In December 2013, the Kings sold their shares in KSG to Primekings. They alleged that they did so on the terms agreed only because of a representation by Primekings that KSG's main credit provider, GE Money ("GE"), told Primekings that:
   (1) the KSG company accounts were frozen;
   (2) GE had lost faith in the KSG management; and
   (3) GE would no longer support and finance KSG.

   The Kings say they later found out that none of this was true and, as a result of these misrepresentations, agreed to a less advantageous deal.

7. The Kings therefore brought the Misrepresentation Proceedings before Marcus Smith J against Primekings seeking, amongst other things, a rescission of the share transfer. The trial began on 27 April 2017. The Kings' solicitors were DWF. Their barristers were Mr Hall Taylor and Mr Morcos. Primekings solicitors were Teacher Stern LLP. Their barristers were Paul Downes QC and Joseph Sullivan.

8. It seems that Primekings' main defence was that the statements were true and/or that they believed them to be true. On the morning of day 10 of the trial, and following advice from their legal team, the Kings withdrew allegations against Primekings and filed a notice of discontinuance. The Kings were ordered to pay Primekings' costs of approximately £1.7m. The £1.7m was eventually paid on behalf of the Kings by the professional indemnity insurers of their solicitors, DWF.

9. The subsequent proceedings, all initiated by the Kings, arise out of those failed Misrepresentation Proceedings.

10. In 2020-21 the Kings sued Primekings, their solicitors Teacher Stern LLP and barrister Mr Downes QC alleging unlawful means conspiracy in the Conspiracy Proceedings. The defendants in turn applied for strike out and/ or summary judgment to be entered into in their favour. The case was heard by Cockerill J in February 2021 who struck out the Kings' action and made the Costs Order against them.

11. The Kings have also commenced proceedings against their own solicitors DWF and counsel Mr Hall Taylor and Mr Morcos (collectively, 'the Misrepresentation Team')

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for professional negligence in their conduct of the Misrepresentation Proceedings - the Professional Negligence Proceedings. The Kings say that these claims are due to be heard in 2023. They also say that these claims are significantly valuable, worth around £58m.

12. The Kings also have another claim against Primekings and others on the KSG board for unfair prejudice - the Unfair Prejudice Claim. These proceedings commenced in March 2018. This claim arises out of conduct following the Misrepresentation Proceedings. The Kings say that these claims are worth between £5m and £20m.

The Conspiracy Proceedings

13. There were two allegations of conspiracy made against Primekings and their legal team. First, that they conspired to provide false and inflated costs information to improperly pressure the Kings into settling the dispute and, in the event, to obtain more costs in the order than they deserved.

14. Second, that the Defendants in the Misrepresentation Proceedings identified mistakes made by the Misrepresentation Team during those Misrepresentation Proceedings and threatened to "expose the full extent of the legal team's negligence to the Kings and the Court if the legal team did not cause the Kings to discontinue the case on terms specified by Primekings" – see paragraph 180 of the judgment of Cockerill J (**"**the Strike Out Judgment"). Cockerill J said this was the unpleaded threat which she called "the Threat" and which was "the heart of the Kings' case". Those mistakes are the subject of the Professional Negligence Proceedings.

15. Cockerill J struck out the Kings' conspiracy claim because "no complete cause of action is currently pleaded or could be pleaded". In brief the reasons for her judgment were:
    (1) The costs fraud was accepted by counsel for the Kings not to have caused the discontinuance of proceedings.
    (2) With regard to the Threat, it was never pleaded by the claimants that the defendants had knowledge of the asserted Misrepresentation Team's negligence. Therefore, this claim was fundamentally flawed and could not succeed.

(3) In any event, the defendants submitted that the Threat did not cause the Discontinuance because the Kings themselves say (in the Professional Negligence Proceedings) that it was the Misrepresentation Team's grossly negligent advice that led to the Discontinuance.

(4) Further, the Kings' action constituted an abuse of process and/ or a breach of CPR 38.7, which provides that:

> "A claimant who discontinues a claim needs the permission of the court to make another claim against the same defendant if –
> (a) he discontinued the claim after the defendant filed a defence; and
> (b) the other claim arises out of facts which are the same or substantially the same as those relating to the discontinued claim".

For the conspiracy claims to succeed, the Kings would have had to show that the Misrepresentation Claim before Marcus Smith J would have succeeded but for the conspiracy. In other words, the Kings would have to prove the merits of that claim and, in effect, seek to go behind the discontinuance. It was therefore abusive for the Kings to bring this claim without permission of the court.

16. The Kings applied for permission to appeal. Permission was refused by Males LJ in a paper application dated 26 July 2021.

17. In addition to the issued proceedings, proceedings have also been intimated, but not yet commenced, against Mr Downes in respect of representations made by Mr Downes, through his counsel, to Cockerill J during the Conspiracy Proceedings . Those representations are alleged to be untrue and to have had the effect of positively misleading the judge. Although proceedings have not been commenced, the alleged cross-claim has been raised in correspondence before action as part of the pre-action protocol. Mr Downes asserts that he has immunity as an advocate in respect of what he said to Cockerill J through his counsel. The Kings argue that there would be no need for the assertion of an immunity defence unless it was recognised that there was an arguable case to answer.

<u>The Costs Order and Statutory Demand</u>

18. Following the strike-out, Cockerill J made the Costs Order dated 10 June 2021. It recited that the claim in the Conspiracy Proceedings was totally without merit and that

"[t]he Claim against all of the Defendants be struck out and judgment hereby entered against the Claimants".

19. It also ordered that "[t]he Claimants do pay the Defendants' costs of the Defendants' Applications, the Claimants' Unless Order Application and the Claim, such costs to be subject to detailed assessment on the indemnity basis if not agreed". The payment of "£219,700 to the 9th Defendant", Mr Downes, was due by no later than 4pm on 24 June 2021. The Kings failed to pay the sum on time.

20. Mr Downes' right in respect of the £219,700 in the Costs Order was assigned to his insurer, BMIF, the Defendant in these proceedings, on 30 September 2021. The Kings were notified of this assignment on 7 October 2021.

21. In their evidence, they Kings set out that there was legitimate reason to consider that the costs claimed (on which the Costs Order was made by Cockerill J) could be successfully challenged. Those matters included that no one had signed or given any certification that the costs claimed do not exceed the costs which the paying party is required to pay.

22. In addition, there had been some correspondence between the Kings and the BMIF about the costs and there was good reason to consider that some of the costs could be in respect of work done on some of the other closely related cases. In August 2021, the BMIF asked the Kings if they required detailed assessment proceedings "to crystallise the full amount of the costs debt". The BMIF said it would arrange for a full bill of costs to be drawn up. On 8 September 2021, the Kings had asked a question in relation to the costs. They asked how many of the hours claimed allegedly were spent just dealing with documents and asked for a detailed breakdown. However, a bill of costs was not drawn up and the queries raised by the Kings were not answered.

23. The BMIF made the Statutory Demand pursuant to s 268(1)(a) IA 1986 and served it by letter dated 7 October 2021 on the Kings. It was served on Susan May King, James

Patrick King and Anthony Douglas King on 11 October, 15 October and 18 October 2021 respectively.

24. On 12 October 2021 the BMIF sent a 'without prejudice' letter proposing a settlement. They agreed to withdraw the Statutory Demand if the Kings ceased to pursue the Professional Negligence Proceedings against the Misrepresentation Team. The Kings say this shows that BMIF is the 'real defendant' in those proceedings because BMIF is also the insurer for Mr Morcos and Mr Hall Taylor. It is disputed that the BMIF is the real defendant in the proceedings.

The Set-Aside Application

25. The Kings applied to set aside the Statutory Demand within time by 1 November 2021. That application is the subject of this judgment.

26. Before the hearing, I had the benefit of reading the following witness statements:
    (1) Anthony Douglas King dated 1 November 2021 and 19 July 2022;
    (2) James Patrick King dated 1 November 2021;
    (3) Susan May King dated 27 October 2021; and
    (4) Mr Ross Robertson Risby ("Mr Risby") dated 22 December 2021.

27. In addition to having had the benefit of reading all of the witness statements, I have also had the benefit of reading the various documents to which I was taken during the course of the hearing and directed to in skeleton arguments.

28. During the hearing, I had the benefit of hearing oral evidence from Mr Risby for the Respondent as a result of an order of District Judge Shepherd. On 6 January 2022, she ordered that Mr Risby attend on the first day of the hearing for cross-examination, such cross-examination to be limited to one hour on the issues of whether the effect of a bankruptcy of the Kings would be to stifle the Professional Negligence Proceedings or the Unfair Prejudice Proceedings, and whether the statutory demands have been issued for an improper purpose.

29. This is a case which does not particularly turn on the credibility of the written and the limited oral evidence. Many of the facts are not in dispute. It mainly turns on the documentary evidence contained within the trial bundles and on the law.

30. The only oral evidence I received was from Mr Risby. His evidence in cross examination did not takes matters much further than what was set out in his witness statement. He accepted that all he knew about the motives of the BMIF was from his instructions from the BMIF and he could not give direct evidence about its motives. He did not accept that when the BMIF is acting as insurer that it necessarily takes over the defence of a claim.

31. I do not propose to rehearse all of the arguments raised, nor all of the evidence referred to during the course of the hearing. It is not necessary to do so. However, I record that I read and considered the evidence as a whole, as well as various documents within the trial bundle to which my attention was drawn, in addition to all those arguments before coming to my decision. Relevant evidence will be set out when considering each of the issues.

The Law

32. Happily, counsel largely agree on the legal principles, even if they disagree as to whether some of the principles apply on the facts of this case.

The insolvency regime: Insolvency Act 1986 and Insolvency Rules 2016

33. The relevant insolvency regime works in the following way. The starting points are the Insolvency Act 1986 ("IA 1986") and the Insolvency Rules 2016 ("IR 2016"). In the IA 1986, section 267 provides the four requirements for presenting a creditor's petition to the court:

"267 Grounds of creditor's petition**.**

"(1)A creditor's petition must be in respect of one or more debts owed by the debtor, and the petitioning creditor or each of the petitioning creditors must be a person to whom the debt or (as the case may be) at least one of the debts is owed.

"(2)Subject to the next three sections, a creditor's petition may be presented to the court in respect of a debt or debts only if, at the time the petition is presented—

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(a)the amount of the debt, or the aggregate amount of the debts, is equal to or exceeds the bankruptcy level,
(b)the debt, or each of the debts, is for a liquidated sum payable to the petitioning creditor, or one or more of the petitioning creditors, either immediately or at some certain, future time, and is unsecured,
(c)the debt, or each of the debts, is a debt which the debtor appears either to be unable to pay or to have no reasonable prospect of being able to pay, and
(d)there is no outstanding application to set aside a statutory demand served (under section 268 below) in respect of the debt or any of the debts."

34. The Statutory Demand Debt in this case of £219,700 exceeds the relevant bankruptcy level. In order to establish a debtor's inability to pay, a creditor may issue a statutory demand pursuant to section 268 IA 1986:

"268 Definition of 'inability to pay', etc.; the statutory demand.

"(1)For the purposes of section 267(2)(c), the debtor appears to be unable to pay a debt if, but only if, the debt is payable immediately and either—
(a)the petitioning creditor to whom the debt is owed has served on the debtor a demand (known as "the statutory demand") in the prescribed form requiring him to pay the debt or to secure or compound for it to the satisfaction of the creditor, at least 3 weeks have elapsed since the demand was served and the demand has been neither complied with nor set aside in accordance with the rules…"

35. More provisions relating to the statutory demand are found in Part 10 IR 2016. The statutory demand has to comply with several formal requirements as set out in rule 10.1 IR 2016. It also has to be served on the debtor personally "if practicable" (rule 10.2 IR 2016). A debtor can apply to the court for an order setting aside the statutory demand within 18 days from the date of the service of the statutory demand (rule 10.4 IR 2016). The court is required to consider the following factors by rule 10.5 IR 2016:

"10.5 Hearing of application to set aside

"(4) On the hearing of the application, the court must consider the evidence then available to it, and may either determine the application or adjourn it, giving such directions as it thinks appropriate.
"(5) The court may grant the application if—
(a)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;
(b)the debt is disputed on grounds which appear to the court to be substantial;
(c)it appears that the creditor holds some security in relation to the debt claimed by the demand, and either rule 10.1(9) is not complied with in relation to it, or the court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
(d)the court is satisfied, on other grounds, that the demand ought to be set aside."

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36. The Practice Direction: Insolvency Proceedings [2020] BCC 698 provides at paragraph 11.4.4 that:

> "Where the debt claimed in the statutory demand is based on a judgment, order, liability order, costs certificate, tax assessment or decision of a tribunal, the court will not at this stage inquire into the validity of the debt nor, as a general rule, will it adjourn the application to await the result of an application to set aside the judgment, order, decision, costs certificate or any appeal".

37. In addition to the IA 1986 and the IR 2016, I was referred by the parties to various authorities and cases. The relevant principles extracted from the authorities and cases are set out below in the context of each of the issues to be considered.

<u>The Issues</u>

38. The parties are agreed on the issues which I have to decide. They are:

    (1) Whether or not the Statutory Demand Debt is a liquidated sum pursuant to section 267(2)(b) IA 1986 because the Costs Order expressly provides that the interim payment ordered of £219,700 is "subject to detailed assessment on the indemnity basis if not agreed".

    (2) Whether there is a genuine triable issue as to the existence of a cross demand, pursuant to IR 2016 rule 10.5(5)(a) which provides a defence to the enforcement of a statutory demand where the debtor has the benefit of a cross demand which equals or exceeds the amount of the debt:

        (a) in respect of the Professional Negligence Proceedings against the Misrepresentation Team because the BMIF is the 'real defendant';
        (b) against the assignor of the debt, Mr Downes, as a result of alleged misleading submissions made by his counsel to Cockerill J during the Conspiracy Proceedings, or do these allegations amount to an attempt to inquire into the validity of Cockerill J's judgment in the Conspiracy Proceedings.

    (3) Whether, pursuant to rule 10.5(5)(b) IR 2016, the Statutory Demand Debt is disputed on grounds which appear to the court to be substantial by virtue of it being subject to a 'detailed assessment'.

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(4) Whether, pursuant to rule 10.5(5)(d) IR 2016, I should be otherwise satisfied, on other grounds, that the demand ought to be set aside. There are three sub -issues here:

(a) That the Statutory Demand was issued for an improper purpose. In essence, the Kings say that BMIF's intention in bringing the Statutory Demand was not to recover the £219,700 but to threaten them with bankruptcy such that they would discontinue the Professional Negligence Proceedings.
(b) That the effect of any bankruptcy order would be to stifle the Unfair Prejudice Proceedings against Primekings and the Professional Negligence Proceedings (collectively, ("the Future Proceedings"); and
(c) That there is no useful purpose in bankrupting the Kings. The Kings say they have no money or substantial assets, so bankruptcy will not get the BMIF any money, but what it will do is help to get the BMIF out of a liability that the BMIF is likely to have to the Kings in 2023 for tens of millions of pounds.

Issue 1: Is the Statutory Demand Debt a '*liquidated sum*' under s 267(2)(b) IA 1986

39. Before one can present a creditor's petition under s 267 IA 1986 the relevant debt must be liquidated and unsecured. It is not in issue that the debt is unsecured. The Kings argue that the Costs Order is not a liquidated debt. The issue is relevant here because if the Set-Aside Application is rejected, a court "must make an order authorising the creditor to present a bankruptcy petition" (rule 10.5(8) IR 2016). Therefore, the issue must be determined.

Applicable legal principles

40. The general principle is stated in *Muir Hunter on Personal Insolvency, Vol 1* at paragraph 3-308 and 6-047:

> "3-308: It is, and always has been, essential (see, e.g., *In the Matter of John Charles, a Bankrupt* (1811) 14 East. 197 KB) for the petitioning creditor's claim of indebtedness against the debtor to be "liquidated" in order to sustain, under the old law, a bankruptcy notice or petition, and now, under the new law, a statutory demand or a petition. As appears from the terms of subs.(2), and as emphasised by Registrar Simmonds in *Re Le Winton* unreported 31 July 2007, the debt must have

been liquidated at the time the petition was presented; any post-petition agreement or conduct is irrelevant…

"6-047: The decisive hallmark of a liquidated claim is that the process of quantification is already complete…".

41. The Kings also rely upon the CPR. As there has been no detailed assessment, the Court could disallow all the costs. The Court could also find that the costs are as unreasonable as the Kings assert, or that a challenge under CPR 44.11 may succeed.

42. The Kings rely primarily on the decision of Proudman J in *Truex v Toll* [2009] EWHC 396 (Ch). Mrs Toll retained her solicitor Mr Truex to act in matrimonial proceedings. Mr Truex issued a statutory demand for his fees due. Mrs Toll applied to have it set aside on the basis that it was unliquidated. Proudman J accepted as uncontroversial that solicitors' costs which have not been "assessed by the costs judge or determined in an action" are not a liquidated sum.

43. However, agreement of the costs bill between solicitor and client can convert an unassessed bill into a debt capable of founding a bankruptcy petition. She cited the principle in *Muir Hunter* that:

"…in order to convert what is clearly an unliquidated sum to a liquidated sum there must be…clear and unequivocal conduct or agreement on the part of the debtor to demonstrate acceptance of those bills of costs such as to forego the right of assessment and to convert them to a liquidated sum."

44. The question was therefore whether Mrs Toll had accepted Mr Truex's invoices. As set out at paragraphs 26 and 27 of the judgment, Counsel for Mrs Toll said that a bare acceptance was not sufficient:

"Mr Macpherson, Counsel for the debtor, submitted that it was insufficient to find a bare admission, agreement or acknowledgement that Mr Truex's invoices were correct. Where a debt is of an unliquidated sum because it has not been judicially assessed or determined that sum can only become liquidated if the client is bound by the admission, agreement or acknowledgment relied upon. Thus Mr Macpherson said that one must look for a waiver of the right to assessment or determination. In order to constitute such a waiver, the client's conduct must be supported by consideration or give rise to an estoppel.

"Doubtless a bare admission coupled with failure over a long period to challenge the bill would be strong evidence that the bill was reasonable. However, submitted Mr

> Macpherson, such conduct would not be enough to convert the amount of the bill from an unliquidated to a liquidated sum…"

45. Proudman J accepted this at paragraph 36, holding that:

> "any admission, acknowledgment or agreement converting the amount claimed from an unliquidated to a liquidated sum must be one from which the client has bound himself not to resile. A mere acknowledgment would be insufficient to bind him to forego judicial assessment or determination."

An agreement for consideration or conduct giving rise to an estoppel according to established principles was necessary.

46. One reason for her decision was that she found it absurd that whenever the client changed their mind about whether to agree to the costs bill, the debt would change from being liquidated to unliquidated or vice versa.

47. On the facts, she found that there was neither consideration for Mrs Toll's agreement nor an estoppel to bind her. Mr Truex did not act "to his detriment in incurring the cost of the statutory demand and the petition" and "seeking to enforce the debt itself cannot constitute a sufficient alteration of position to found an estoppel. If it could there would be an estoppel in virtually every case". Therefore, Proudman J set aside the creditor's petition on the basis that the debt was unliquidated. She noted that in any event, even if consideration or estoppel were unnecessary, Mrs Toll's alleged acceptance was not sufficiently clear and unequivocal.

48. The BMIF asserts that *Truex v Toll* is not directly relevant to this case. Even accepting Proudman J's dicta, the BMIF says that the amount of the claim for costs in that case was not judicially determined, whereas it has been in the Costs Order in the sum of £219,700. This they assert is the starting point. The only issue is whether the fact that the £219,700 is subject to a right of assessment turns the otherwise liquidated sum into an unliquidated sum.

49. However, Proudman J did make some relevant observations at paragraph 40, albeit obiter, on this point. She said:

> "However it seems to me that the fact (if such is the case) that public policy requires the client to be able to seek assessment of a solicitor's bill even after having reached an otherwise binding agreement is merely a reason why the court ought not to make

a bankruptcy order on a petition likely to be the subject of assessment under the Act. The availability of assessment does not prevent an otherwise binding agreement converting what was previously the solicitor's mere estimate of proper costs into a liquidated sum capable of founding a petition under s.267 of the 1986 Act" (emphasis added).

50. The directly relevant case the BMIF cited was *Rocha-Afodu v Mortgage Express* [2013] 9 WLUK 4. The statutory demand there also arose out of a costs order made by a District Judge where:

> "it was ordered that the Applicant's claim be dismissed and he pay the Respondent's costs of the case, subject to detailed assessment on the standard basis if not agreed, and further that the Applicant make an interim payment on account of costs to the Respondent in the sum of £50,000, to be paid by 4.00 pm on 27 April 2012."

51. In her judgment, Registrar Derrett said:

> "The Applicant has put forward a number of grounds as the basis for setting aside the Demand. … In addition he maintains that the sum claimed is not a liquidated debt which can be relied upon for the purposes of a Demand. I do not agree[.][T]he district judge's order, a copy of which is in the papers before me, provided for an interim payment on account of costs in the sum of £50,000 to be paid by 4 pm 27 April 2012. There is no stay in place and no appeal in relation to that sum; therefore it is, for the purposes of a Demand, a liquidated debt."

52. The BMIF also rely by analogy on other cases. Firstly, they rely on *Irving v Penguin Books Ltd* [2002] EWHC 1387 (Ch). The statutory demand there arose out of an interim order for costs. Peter Smith J observed at paragraph 14 of the judgment:

> "…the order for the interim payment can form the subject matter of the bankruptcy petition, whether or not on the subsequent detailed assessment the order would be reversed. […] It is perfectly open to a judgment creditor in respect of an interim payment to enforce that (if that is the right word) by way of bankruptcy proceedings" (emphasis added).

53. Secondly, they rely on *Blavo v Law Society* [2018] EWCA Civ 2250. The statutory demand there arose out of an order pursuant to paragraph 13 of schedule 1 of the Solicitors Act 1974, which provided that some costs incurred by the Law Society "shall be paid by the Solicitor or his personal representatives and shall be recoverable from him or them as a debt owing to the Society".

54. The Court of Appeal considered whether this debt was a liquidated sum within section 267(2)(b) IA 1986. Moylan LJ, in giving the judgment of the court, held that it was. He took as his starting point *McGuiness v Norwich & Peterborough Building Society*

[2011] EWCA Civ 1286, where Patten LJ held that "a debt for a liquidated sum must be a pre-ascertained liability".

55. Moylan LJ said that the reason why in general a claim by a solicitor for their bill is unliquidated is because the solicitor was entitled to a "reasonable and fair remuneration for the work they have done" and that was unquantified. However, the judge went on to say:

> "107. I would emphasise "in general" because it is possible for a claim by a solicitor to be for a predetermined amount. For example, as was said by Evans LJ in *Turner & Co v O Paloma SA* [2000] 1 WLR 37, 40 G: 'If a solicitor wishes to be paid and is not in funds he will need to sue and prove that his charges were *either* expressly agreed *or* are reasonable charges'. (My emphasis)…
>
> "108. …if the amount of the fees has been expressly agreed, there is no reason why they cannot be for a liquidated sum.
>
> "109. I do not see that *Truex v Toll* [2009] 1 WLR 2121 decided other than in accordance with these principles…
>
> "110. Further, I would agree with Proudman J when she said that the "availability of assessment does not prevent an otherwise binding agreement converting what was previously the solicitor's mere estimate of proper costs into a liquidated sum capable of founding a petition": para 40…
>
> "111. It is clear to me that the basis or nature of a solicitor's claim for their charges is separate from the ability to seek an assessment. The existence of such a right does not turn what is otherwise a claim for a liquidated sum into a claim for an unliquidated sum." (emphasis added).

56. The test was whether the instrument creating the debt created a "pre-ascertained liability" and, accordingly, a debt for a liquidated sum. On the facts, Moylan LJ held that the order pursuant to paragraph 13 schedule 1of the Solicitors Act 1974 was a pre-ascertained liability.

> "115 Applying the approach set out in *McGuiness's* case… is the sum due under paragraph 13 a pre-ascertained liability? Is it, adapting Patten LJ's words, a liability where the amount due is to be ascertained in accordance with a pre-determined formula or machinery which, when operated, will produce a figure? In my view, the unequivocal answer to both questions is yes. The statutory provisions, namely "any costs incurred by the Society for the purposes of this Schedule … shall be paid by the Solicitor", constitute a pre-determined formula or machinery which, when applied, will produce a figure. This creates a debt for a liquidated sum.

> "116 As referred to above, I do not consider that it is now open to Mr Blavo to seek to challenge the sums claimed in the statutory demands as not being "costs incurred". This does not mean, of course, that a defence cannot otherwise be advanced, or r. 6.5(4)(b) of the 1986 Rules, would be otiose. Nor does it mean that, subject to the relevant provisions, an assessment cannot be sought. But neither of these issues affect the liquidated character of the sum due.
>
> "117 In contrast, the judge considered that the existence of a right to an assessment was "inconsistent with the proposition that, as a generality, the liability under paragraph 13 is a pre-ascertained one" : para 42, and that it would be odd if "the underlying basis for the statutory debt was generally an unliquidated sum … but the statutory debt was not": para 45. I do not agree. First, as referred to above, the right to an assessment does not mean that the debt is not a liquidated sum" (emphasis added).

57. Thirdly, they rely on *Axnoller Events Ltd v Brake* [2021] EWHC 1500 (Ch). This case also concerned a debt arising out of a costs order subject to a right of assessment, pursuant to CPR 44.2(8). However, it was relied on not for the purposes of issuing a statutory demand. Rather, the debtor was seeking to argue that it was a '*moratorium debt*' under the Debt Respite Scheme (Breathing Space Moratorium and Mental Health Crisis Moratorium) (England and Wales) Regulations 2020, in which case the creditor would temporarily be prevented from enforcing the debt. Although the term 'debt' was not defined in the Regulations, HHJ Paul Matthews sitting as a judge of the High Court decided that, as in ordinary language, it could only arise over liquidated sums.

58. On the facts, he distinguished between two types of orders. The first was an order he made on 2 May 2021 that the Brakes pay the Guy parties' costs on an indemnity basis, to be subject to detailed assessment if not agreed. He did not have a costs statement and so was unable to order a payment on account pursuant to CPR 44.2(8). He held that this order did not give rise to a liquidated sum being payable.

59. However, a costs statement having been sent to the court, he held that he would make an order under CPR 44.2(8) and, on this order, the judge assumed that it would qualify as a liquidated sum. The crucial passage is at [22] of the judgment:

> "In the present case I made an order on 2 May 2021 that the Brakes pay the costs, to be assessed, if not agreed. That was a few days before the moratorium for Mr Brake began on 6 May. The order of 2 May undoubtedly created a contingent liability of uncertain amount. But it could not be enforced before being liquidated (by

agreement or assessment) in a certain sum. Any order I make now will (partly) liquidate that contingent liability. In ordinary language a "debt" is a liquidated sum that is due and owing: see eg *Webb v Stenton* (1883) 11 QBD 518 , CA. In my judgment that is also its meaning in the regulations. Thus, the order of 2 May 2021 did not create a debt for the purposes of the regulations. On the other hand, any order I now make ordering a sum to be paid on account will create a debt, which will be a qualifying debt…".

Discussion

60. The Kings assert that the Statutory Demand Debt is an unliquidated sum and therefore incapable of forming the basis of a creditor's petition per s 267(2)(b) IA 1986. Firstly, they say the sum which the Statutory Demand Debt is based on is subject to change. Secondly, they say that a "liquidated sum is a sum the quantum of which cannot be open to later challenge" and therefore a detailed assessment must have taken place (unless there was an agreement on costs) for the debt to be liquidated.

61. I accept that the sum on which the statutory demand is based may change. The Costs Order was made relying on the court's jurisdiction under CPR 44.6(1)(b):

    "(1) Where the court orders a party to pay costs to another party (other than fixed costs) it may… order detailed assessment of the costs by a costs officer"

    and 44.2(8):

    "(8) Where the court orders a party to pay costs subject to detailed assessment, it will order that party to pay a reasonable sum on account of costs, unless there is good reason not to do so."

62. As noted above, Cockerill J made the order that "the Claimants do pay the Defendants' costs of the Defendants' Applications, the Claimants' Unless Order Application and the Claim, such costs to be subject to detailed assessment on the indemnity basis if not agreed" (emphasis added).

63. I accept that the sum ordered by way of interim payment £219,700 might be varied in the future. The Kings' submissions emphasised the fact that the Statutory Demand Debt is a figure based on a pre-estimate, formulated by the Court on the basis of information provided by the holder of the costs order on the basis of trust only and therefore open to challenge on assessment, where the final amount payable could go up or it could go down. There may be legitimate grounds for challenge to be made to

the costs claimed in a detailed assessment on the basis of unreasonable or improper conduct of either a party or a legal representative.

64. However, in my judgment, the first submission does not get to the heart of the key point, that being whether or not the interim costs order was for a liquidated sum. The Costs Order was made after an assessment by Cockerill J. It may have been that she decided the figure by taking various matters on trust. She did however decide and assess what sum should be paid on an interim basis. The interim assessment procedure has therefore been completed. The Kings' second submission is more controversial. They assert that for a debt created by a costs order to be liquidated, a detailed assessment must have taken place such that the sum is not open to later challenge.

65. I do not accept this. In my judgment, the mere fact that the £219,700 is subject to a right of assessment and may change in amount does not turn an otherwise liquidated sum into an unliquidated sum. The authorities cited above point towards this conclusion. This includes the authority relied upon by the Kings' of *Truex v Toll*. Further and in any event, in my judgment the facts of that case can be distinguished. *Truex* concerned a debt arising out of an unassessed solicitor's bill which needs to be determined by principles such as reasonableness and fairness. In this case, the Statutory Demand Debt was based on a court order. The court crystallised the amount payable on an interim basis at £219,700.

66. The Kings' argument effectively equates 'liquidated' with 'final'. I do not accept that this is right as a matter of principle. The argument conflates arguments under sections 267(2)(b) IA 1986 (liquidated sum) with rule 10.5(5)(b) IR 2016 (disputed debt). The mere fact that a sum of money is subject to change does not alter its nature as a liquidated sum.

67. Further and in any event, given that most costs orders will be made subject to a detailed assessment if not agreed, the Kings' argument would essentially rule out all interim costs orders as being capable of founding a statutory demand. In my judgment, that cannot be right.

Issue 2: Whether or not the Kings have a counterclaim, set-off or cross demand under rule 10.5(5)(a) IR 2016

68. The Kings argue that they have two relevant and valuable cross demands: the Professional Negligence Proceedings, due to be heard in 2023, and the Misleading Submissions Proceedings, which have not commenced yet. A defence is therefore asserted to the Statutory Demand under IR rule 10.5(5)(a) IR 2016.

69. The Kings assert that although the Professional Negligence Proceedings are against their former barristers, in reality, it is the BMIF which is the real defendant. They say that must be the position as it is the BMIF as insurer which will satisfy any judgment on behalf of the defendant barristers. Further, they assert that this is demonstrated by the fact that the BMIF served the statutory demands in respect of the costs order and then, within days, made a without prejudice offer to the Kings to surrender their claim in the Professional Negligence Proceedings, which the Kings value at approximately £58 million, as part of a global settlement of the costs ordered against the Kings following the dismissal of the Conspiracy Proceedings.

70. Mr Ouwehand accepted that if I accept the argument made by the Kings that the BMIF is the real defendant in the Professional Negligence Proceedings, then the Kings have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt specified in the statutory demand. However, the BMIF contends that it is not in fact the real defendant. The Professional Negligence Proceedings are not brought against BMIF but the Misrepresentation Team, of whom the BMIF insure the barrister defendants.

71. In respect of the potential Misleading Submissions Proceedings, the BMIF assert that this is simply an attempt to have the court inquire into the validity of a judgment debt which they say is not allowed.

Applicable legal principles

(1) Real prospect of success

72. There is no dispute that for a claim to qualify under rule 10.5(5)(a) it must have a 'real prospect of success'. In this case, there is no argument that the Professional Negligence Proceedings satisfy this test. Firstly, that was accepted on behalf of the BMIF. The point it takes is that the parties are different and therefore it is not a cross claim. Secondly, I accept the point made by the Kings that if the case was not a genuine and substantial case, it is unlikely that the Kings would have received a payment of nearly £2 million in 2018 in respect of this litigation.

73. In circumstances where, if the argument succeeds that the BMIF is in fact the real defendant, there will be a cross claim in respect of the Professional Negligence Proceedings, it is not necessary to consider whether or not the potential Misleading Submissions Proceedings have a real prospect of success or not. It is also not necessary to consider in any detail the various legal arguments raised by the Kings in relation to the ability to litigate the Misleading Submissions Proceedings even though they have not yet been issued and whether or not there has been a delay in bringing those proceedings.

(2) Ability to litigate

74. The authorities suggest that an ability to litigate the '*set-off, counterclaim or cross demand*' is not necessary for it to so qualify. Although *In re Bayoil S.A.* [1999] 1 WLR 147 suggested that this was a requirement, "[l]ater cases discussing *In Re Bayoil* make it clear that the ability, or inability, to litigate the counterclaim is not of the essence of the principle": *Victory House General Partner Ltd v RGB P&C Ltd* [2018] EWHC 1143.

75. Indeed, in *Re A Debtor (No.87 of 1999)* [2000] BPIR 589, there was some delay in bringing the cross claim but Rimer J held that this was not fatal to the cross demand argument:

"If I may respectfully say so, however, I confess to some uncertainty as to whether the Court of Appeal was intending to say in the *Bayoil* case that delay of this type — that is arising largely during the period prior to the arising of the petition debt — should, by itself, be a bar to the dismissal of a petition. Delay in making the cross

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claim was not a feature of the *Bayoil* case itself so that the point was not one which the court needed to consider…

"Having confessed to my uncertainty as to the precise scope of the "unable to litigate" part of the principles established by *Bayoil* , I have come to the conclusion that I should not regard the debtor's delay in bringing his claim against Mrs. Johnson as, by itself, fatal to the success of his cross demand argument. Whilst I recognise, with some concern, that this conclusion might not appear to lie easily with Lord Justice Nourse's statement of the requisite criteria, I consider it does reflect an approach which is consistent with the actual decision in Portman , which Lord Justice Nourse regarded as establishing the correct view".

76. This is also consistent with the fact that the rule 10.5(5)(a) refers to the 'appearance' of a counterclaim, set-off or cross demand (rather than simply "the debtor has a counterclaim, set-off or cross demand").

(3) The meaning of counterclaim, set-off or cross demand

77. As a matter of principle, there must be some link between the alleged counterclaim, set-off or cross demand and the statutory demand that connects the creditor and debtor. The issue the cases often have had to grapple with is the extent of this link. At the outset, it should be noted that the link required for a cross demand is less than for a counterclaim which is less in turn than for a set-off. This may be why the Kings put their case as a cross-demand.

78. The parties took me to *Popely v Popely* [2004] EWCA Civ 463. In *Popely*, John Popely ("P1") sought permission in the Crown Court to use documents that had been seized by Customs (with a view to bringing criminal proceedings against P1 and Ronald Popely ("P2")) against P2, alleging that P2 breached an agreement. P1's application was dismissed with costs and the costs order generated the statutory demand in question. P1 subsequently commenced a High Court action claiming breach of agreement. The Court of Appeal held that the High Court action was a cross demand against P2 stating at paragraphs 113 and 114:

"…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, i.e. that it is a 'demand' by the debtor on the creditor.

"…In my judgment, the meaning of the expression 'cross demand' in r.6.5(4)(a) 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" (emphasis added).

79. The significance of *Popely* is twofold. Firstly, it is authority for the proposition that the claim that is alleged to qualify as a cross demand does not have to arise in the same proceedings as those which gave rise to the statutory demand. On the facts of this case, this means that the Statutory Demand based on a costs order can in principle be set aside under rule 10.5(5)(a).

80. Secondly, *Popely* suggests also that it is necessary, but also sufficient, that it is the debtor who pursues the creditor in that later claim. In other words, the relevant link is simply the identity of the parties.

81. The related question is then the principle of mutuality – i.e. is the BMIF the real Defendant? In *Re A Debtor (No.87 of 1999)* [2000] BPIR 589 (considered in *Hurst v Bennett* and cited by the Applicant on a different point) a statutory demand was issued by J against D in her personal capacity. D served a cross demand on J in her capacity as executrix of her late husband's estate. Rimer J held that:

"If I may respectfully say so, I consider that the judge was in error in his general assertion that if A sues B to enforce a claim which he has in his personal capacity, B cannot make a counterclaim against A in the same action in respect of a liability to which A is subject in a capacity other than a personal one, for example, as a personal representative or trustee…

"It follows, in my view, that the judge erroneously approached the matter on too narrow a basis. I consider that he should have held that the debtor did have a relevant cross demand, whose effect he had to consider. He should then have gone on to consider whether, in the circumstances of the case, the existence of the cross demand justified the setting aside of the statutory demand" (emphasis added).

82. Rimer J's reasoning was based on the definition of 'counterclaim' in Part 20 CPR 1998. He said that there was no reason why "a claimant suing personally cannot be made the object of a counterclaim against him in some different capacity" and the claim and counterclaim to be raised in the same proceedings.

83. This case was however distinguished in *Hurst v Bennett* [2001] EWCA Civ 182, a case which BMIF relies on. A statutory demand was served on H by B, his former

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partner in a firm of solicitors, based on a debt for H's share of outstanding rent payable in respect of the partnership premises. H applied to set aside the statutory demand on the basis of a cross demand. However, that was a claim against the partners jointly. B accordingly submitted that there was no mutuality between the debt and the claim:

> "As already explained, Mr Adair's submission is that the debt on which the statutory demand is based is due to the trustees in their capacity as such and the cross-claim which Mr Hurst raises is against them as partners, and therefore the claims lack mutuality. More precisely the amount in the statutory demand is due to the respondents personally whereas that due to Mr Hurst (if it is due) is due to him from all the other partners jointly. (Partnership Act 1890, s 9 and see generally *Hurst v Bryk* , above). If this submission is right that is the end of the case."

84. The relevant passage on the requirement of mutuality in paragraph 52 and 53 of the judgment is worth setting out in full:

> "…Despite the generality of the language used [in rule 10.5(5)(a)] it is clear that limits must be implied. Thus, in the case of set-off the claims must exist between the same parties and, subject to immaterial exceptions, in the same right (see Halsbury's Laws (4 th ed. Reissue) para. 438). The set-off directly reduces the amount of the debt claimed by the creditor. But it was obviously thought that to limit claims to liquidated sums due between the parties at the time of the hearing of the application to set aside was unfair to the debtor and that other claims yet to be proved should be allowed to be taken into account. Hence, a counterclaim or a cross demand may be relevant. A counterclaim may be permitted procedurally even if the claim and counterclaim are not between the parties in the same right. However, as Rimer J. said in *Re a Debtor* (No. 87 of 1999) The Times, 14 February 2000 , when the claim and counterclaim are heard, the court will not be compelled to set the claim and counterclaim off against each other and merely give judgment to one party for the balance, as in many cases that might produce a gross injustice.
>
> "The reference in r. 6. 5 (4)(a) to "cross demand" must be interpreted more widely than "counterclaim" or "set-off" (see *Re a Bankruptcy Notice* [1934] Ch. 431, a case on the similar concatenation of "counterclaim, set off or cross demand" in s. 1 (1)(g) Bankruptcy Act 1914 and r. 140 (2) Bankruptcy Rules 1915, replaced by r. 137 (b) Bankruptcy Rules 1952). But I am not aware of any case where a cross demand has been held relevant despite an absence of mutuality between the debtor and creditor in their rival claims…
>
> "If the creditor claims in one right and is claimed against in another right, it will by no means follow from the eventual establishment of the cross claim that the creditor's debt will be reduced accordingly" (emphasis added).

85. Mutuality was defined by Arden LJ (as she then was):

> "In this context mutuality means that the legal character in which the creditor is or may be liable to the debtor by virtue of the counterclaim or cross-claim raised by the

debtor is the same as the legal character in which the creditor is entitled to the debt the subject of the statutory demand. It does not mean that the claims have to arise out of the same contract or transaction. An example of a situation in which there is no mutuality is where a person brings a claim in his personal right and the defendant seeks to set off a claim against him in his capacity as a trustee for others. But the courts are prepared in certain situations to look at the reality of the situation, as Rimer J was prepared to do: see also for example *Re Chapman ex parte Parker* (1887) 4 Morr. 109, where a defaulting trustee of a will was entitled to set off against a claim by the continuing trustees the amount to which he was entitled as a residuary legatee" (emphasis added).

86. The court also sought to limit the effect of *Re A Debtor (No.87 of 1999)*:

> "The approach of the Judge is to be contrasted with that of Rimer J in *In re a Debtor* (No 87 of 1999) (Times Law Reports 14 February 2000)…
>
> "In fact, Rimer J's conclusion on the particular facts of the case was that he could regard the action as brought against the executrix personally. Accordingly the question whether it was a requirement of a counterclaim or cross-demand that there should be mutuality between the debtor and the creditor was not necessary for his decision."

87. In particular, it doubted Rimer J's reliance on the meaning of 'counterclaim' in the CPR:

> "I have no reason to doubt the point made by Rimer J that procedurally a party can raise a counterclaim against another party in some different capacity than that in which he is himself sued by that party. Insolvency Rule 6 5(4) is not, however, dealing with procedural matters but whether there is good reason to set aside a statutory demand. There is little point in setting aside a statutory demand if the debt on which it is based cannot be liquidated by the cross-claim. That this is the purpose of the provision is confirmed by the requirement that the cross-claim should equal or exceed the debt on which the statutory demand is based."

88. On the facts, the majority (Arden and Peter Gibson LJJ) found there to be a lack of mutuality. In so doing, however, they seem to evince an interpretation of "cross-demand" that comes close to "set-off":

> "There is little point in setting aside a statutory demand if the debt on which it is based cannot be liquidated by the cross-claim. That this is the purpose of the provision is confirmed by the requirement that the cross-claim should equal or exceed the debt on which the statutory demand is based…
>
> "It would follow that in this case the court should not exercise its powers under Insolvency Rule 6.5(4) because the debt on which the statutory demand is based is one to which the respondents (alone) are entitled whereas the proposed cross-claim would be against all the partners jointly" (emphasis added).

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89. Sir Christopher Staughton dissented on the facts. He seemed to suggest that there was sufficient mutuality because both the debt and cross demand arose out of the partnership:

> "I agree that this appeal should be dismissed. For my part I would not base that conclusion on lack of mutuality. The respondents are indeed trustees. But the demand that they make is not, as I see it, for trust money. They are asking for an indemnity, for compensation in respect of the losses they have suffered. If and when they receive any money from Mr Hurst, they will put it in their own pockets. On the other hand Mr Hurst's liability is as a partner, or a former partner. It is not clear to me that this gives rise to such a lack of mutuality that the law should refuse him any relief under Rule 6.5(4)(a)."

90. To summarise, therefore, it seems clear that *Hurst v Bennett* is authority for the proposition that there is a requirement of mutuality between the statutory demand debt and the cross demand, which means they must be of the same legal character or indeed the cross demand must be able to "liquidate" the statutory demand debt.

91. The waters have however been muddied by *Makki v Bank of Beirut SAL* [2022] EWHC 733 (Ch). Mr Makki lived both in Lebanon and the UK and operated two bank accounts: one with Barclays and one with his Lebanese Bank. In 2019 he wanted to move some US dollars, the equivalent of about £800,000, from his Lebanese account to the Barclays account. The Lebanese Bank issued banker's cheques to Mr Makki and the deduction was made to his Lebanese accounts accordingly. However, Barclays subsequently rejected the cheques saying that they were not valid.

92. These facts gave rise to two sets of proceedings, one in England and the other in Lebanon. In July 2020, Mr Makki brought a private prosecution against the Lebanese Bank pursuant to the Fraud Act 2006 in the Southwark Crown Court. However, it was discontinued, giving rise to a costs order of £209,000 which was the subject of the statutory demand. Mr Makki also launched proceedings against the Lebanese Bank in Lebanon in March 2021 which they actively contested.

93. The issue before Deputy ICC Judge Greenwood was therefore whether the Lebanese proceedings constituted a set-off, counterclaim or cross demand to the statutory demand debt. He held that it was for two reasons. Firstly, there was no requirement of mutuality. After citing *Hurst v Bennett*, he said:

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> "For the purposes of Rule 10.5(5)(a) therefore, I agree with Dr Mokal that:
>
> a. a set-off depends on establishing that the claims in question are between the same parties and in the same right;
>
> b. a counterclaim may exist even if the claim and counterclaim are not between the same parties in the same right; and,
>
> c. a cross-demand appears to be wider than either a set-off or a counterclaim (even if generally it has been found to exist where there is mutuality between the debtor and creditor in their respective claims).
>
> "In my judgment therefore, there is no requirement of mutuality…"

It is not clear why the judge thought *Hurst v Bennett* was authority for the proposition that there is no requirement of mutuality.

94. Secondly, he went on to say that even if there was such a requirement, there was mutuality on the facts:

> "…As to whether (if I am wrong about that) there is mutuality in the present case, Mr Heylin submitted that Mr Makki is comparing "*apples and oranges*". He said:
>
> a. that Mr Makki's discontinuance of the Private Prosecution in the Crown Court was in " *a totally different venue and jurisdiction to the proceedings in Lebanon* "; a criminal action, he said, is not a debt recovery exercise;
>
> b. that the existence of a disputed debt claim (the Makki Claim) between the same parties does not "*have the effect of discharging Mr Makki's liability*" under the costs order (the Makki Debt);
>
> c. that a liquidated sum is due under the costs order in England, but that no liquidated sum is due in the Lebanese proceedings, even if successful.
>
> "None of those submissions in my judgment affect the relevance of the Makki Claim to the Application, in the context of which Mr Makki must establish that he has (or that there is a genuinely triable issue in respect of) a "*counterclaim, set-off or cross demand*".
>
> a. First, whether or not required, there is mutuality between the parties' rival rights and claims - in both cases, the parties act or acted in the same right and capacity. The fact of different venues and jurisdictions is immaterial.
>
> b. Second, it is not necessary for the Makki Claim to "*have the effect of discharging Mr Makki's liability*", and it is not necessary for the Makki Claim to be for a liquidated sum – although in fact, as I understand it, and explain below, it is a claim for a liquidated sum (advanced in respect of various dishonored cheques)."

95. If there is a set-off, counterclaim or cross demand which exceeds the value of the statutory demand debt, the court would, in the absence of special circumstances, exercise its discretion by dismissing or staying the petition: *In re Bayoil S.A.* [1999] 1 WLR 147.

Discussion: Professional Negligence Proceedings

96. Given that BMIF does not take issue with whether the Professional Negligence Proceedings have a real prospect of success, I do not consider it appropriate to discuss the merits of those proceedings (due to be heard in 2023). The only issue that remains is whether the Professional Negligence Claim qualifies as a counterclaim, set-off or cross demand to the Statutory Demand Debt and/or satisfies the principle of mutuality.

97. The BMIF's argument is short and straightforward. They say that the Professional Negligence Proceedings are brought against the Misrepresentation Team, including the two barristers Mr Hall Taylor and Mr Morcos, as defendants. BMIF is not a party to those proceedings. Whether or not there is a requirement of mutuality, therefore, the Professional Negligence Claim cannot even satisfy the *Popley* principle that a cross demand means a "'demand' is one which goes the other way, i.e. that it is a 'demand' by the debtor on the creditor". There is no mutuality of identity of parties.

98. The Kings say that this ignores BMIF's position as insurers for both Mr Hall Taylor and Mr Morcos. Clause 6.1 of their terms & conditions state that "Bar Mutual shall be entitled to take over and conduct in the name of the Insured the defence of any Claim or Disciplinary Proceedings". Similarly, in *Pendennis Shipyard v Magrathea* [1998] 1 Lloyd's Rep 315, it was held that where insurers assumed the defence of an action to which they were not a party, conducting it for their own benefit, the court would ordinarily exercise its discretion under s 51 Supreme Court Act 1981 to order the insurers to pay the plaintiff's costs if the defence failed. This makes the insurers the "real defendant".

99. The situation is also complicated by what the Kings describe as the "reality on the ground". They rely on what they say is a crucial "without prejudice" letter dated 12 October 2021 from DAC, acting on behalf of BMIF, addressed to the Kings. In it BMIF offered to drop the statutory demand and creditor's petition if the Kings agreed to drop the Professional Negligence Proceedings against Mr Hall Taylor and Mr Morcos. The Kings say this shows that "BMIF must have fully taken over the conduct of the [Professional Negligence] claim in all respects".

100. Mr Risby is a solicitor in DAC Beachcroft LLP. His evidence was that the 12 October 2021 Letter was not BMIF's initiative. He says it was Mr King who first suggested in a letter dated 25 August 2021 (before the service of the Statutory Demand) that "[s]ince my family and I obviously have a large cross claim against the BMIF [referring to the Professional Negligence Proceedings], another route forward might be to have settlement discussions. For example, it might be possible to wrap up the costs order in a global settlement, that allows the BMIF to bring its exposure to an end once and for all".

101. Mr Risby responded at the time by saying that there were separate case handlers at BMIF for the Conspiracy and Professional Negligence Proceedings. Mr King replied in a letter dated 8 September 2021 "[t]hank you for confirming my previous letter will be passed on to the appropriate claim handler at the BMIF" and, on 12 October 2021, BMIF replied with the 'without prejudice letter'. It stated that the Professional Negligence Proceedings were "being handled completely separately" but that there was an interest "in achieving a global agreement", the terms of which would have to be agreed.

102. I consider that *Popely v Popely* is the starting point for analysis. It is Court of Appeal authority that (1) a cross demand does not have to arise in the same set of proceedings from which the statutory demand debt arose and (2) a mutuality of the identity of parties is necessary and sufficient.

103. Applying *Popely* to the facts, the question is whether BMIF was the defendant in the Professional Negligence Proceedings, taking into account the observation in *Hurst v Bennett* that "the courts are prepared in certain situations to look at the reality of the situation". In my judgment the BMIF is the real defendant.

104. Although the arguments here are finely balanced, in my judgment, the 12 October 2021 letter shows that the BMIF recognised they were in substance the real defendant in the Professional Negligence Proceedings and the Conspiracy Proceedings. The letter emphasised that "Bar Mutual" was not prepared to countenance any payment to

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the Kings in either claim. Although different claims handlers were dealing with the different claims, the BMIF was able to make an offer of settlement concerning both claims. In my judgment, it is irrelevant that the first suggestion of a settlement came from the Kings. The BMIF was able to make a global offer.

105. There is then the debated requirement of mutuality. The principle of mutuality (if accepted) is, in my judgment, an additional requirement to *Popely*'s identity of parties test: i.e. even though the parties may be identical in the subsequent claims, that may not be enough.

106. The first issue is whether mutuality exists as a requirement. In my judgment *Makki v Beirut Bank* contradicts *Hurst v Bennett* on its face and, the latter being a Court of Appeal authority, it should be preferred over *Makki*. Mutuality does exist as a requirement.

107. The second is whether mutuality exists on the facts of this case. *Hurst v Bennett* suggests that the test is whether the proceedings claimed to be capable of being a cross demand are of the same legal character as the statutory demand debt. *Makki v Beirut Bank* suggests that the test is whether the parties were acting in the same right and capacity. Both tests are satisfied on the facts of this case. The BMIF is acting in their capacity as insurers in both the Conspiracy and Professional Negligence proceedings. Both proceedings take issue with barristers' conduct and both proceedings arise out of the same set of facts, i.e. the Misrepresentation Proceedings.

108. Insofar as *Hurst v Bennett* suggests that mutuality requires that the proceedings claimed to be capable of being a cross demand are able to liquidate the statutory demand debt, that cannot be right. That equates a cross demand to a set-off, whereas the cases unequivocally say that cross demands are a broader category.

109. The conclusion therefore is that the Professional Negligence Proceedings are a cross demand sufficient to set aside the Statutory Demand under rule 10.5(5)(a).

Discussion: Misleading Submissions Proceedings

110. The Kings argue that they have another relevant counterclaim, set-off or cross demand against the Statutory Demand Debt. They say that they may well succeed in proceedings to set aside Cockerill J's Strike Out Judgment.

111. The first point to note is that the fact that the Misleading Submissions Proceedings have not yet commenced is not a bar against rule 10.5(5)(a) applying. The authorities cited above make it clear that neither an inability to litigate nor the fact that proceedings are not delayed are requirements under this rule.

112. More importantly, the parties disagree as to whether the Misleading Submissions Proceedings have a real prospect of success.

113. The Kings say they do. They say that Cockerill J was misled by submissions made by Mr Hollander QC (counsel for Mr Downes QC) during the Conspiracy Proceedings. For example, they say that it was falsely represented to Cockerill J that Mr Howard Smith, an employee of KPMG who monitors KSG's accounts with GE, was not a willing witness (when in fact they say he was), thereby suggesting that Mr Smith's witness summary "was some sort of false document concocted by DWF". The Kings say that Mr Smith is a key witness to their case because he could prove that GE was still willing to finance KSG at that stage and therefore that Primekings' representation to the Kings was false.

114. Another example they give is a representation to Cockerill J that the Kings had previously accused Joanna Smith QC (as she then was, now a High Court Judge) of misconduct and dishonesty when in fact they say they had not. This they say was an attempt to discredit the Kings.

115. The Kings also rely on what they call a "candid admission" by Cockerill J in the consequentials hearing that "I have tried in the judgment to make clear that my

criticisms were based on what was known to me, and… I would be well open to persuasion that if I have gone too far in the judgment I should accept that".

116. However, it is unclear what exactly they say to be the cause of action that has a real prospect of success. The Kings referred to *Park v CNH Industrial Capital Europe Ltd (t/a CNH Capital)* [2021] EWCA Civ 1766 and *Takhar v Gracefield* [2020] AC 450 but these cases were concerned with the court being misled by fraudulent documents. They are not directly relevant to what the Kings describe as misleading submissions made by counsel to a judge.

117. Thus, BMIF say, and I accept, that the Kings are in substance attacking the validity of the Statutory Demand Debt by asking this court to go behind the Costs Order. That is not permissible. Paragraph 11.4.4 of the Practice Direction: Insolvency Proceedings [2020] BCC 698, provides that:

> "Where the debt claimed in the statutory demand is based on a judgment, order, liability order, costs certificate, tax assessment or decision of a tribunal, the court will not at this stage inquire into the validity of the debt nor, as general rule, will it adjourn the application to await the result of an application to set aside the judgment, order, decision, costs certificate or any appeal".

The Practice Direction is a form of secondary legislation which must be given effect by the courts: *Vieira v Revenue and Customs Commissioners* [2017] EWHC 936 (Ch), [83] (Arnold J).

118. In any event, the serious allegations made by the Kings were already included in their grounds of appeal. Permission to appeal was refused by Males LJ on 26 July 2021 who found that there was "no substance in the allegation that the hearing was unfair".

119. To conclude therefore, in my judgment the Kings have no realistic prospect of succeeding in the Misleading Submissions Proceedings.

<u>Issue 3: whether the Statutory Demand Debt is disputed on grounds which appear to the court to be substantial under rule 10.5(5)(b) IR 2016</u>

120. The Kings say that the Statutory Demand Debt is substantially disputed on the basis that it is subject to detailed assessment.

121. However, again, this goes behind Paragraph 11.4.4 of the Practice Direction: Insolvency Proceedings [2020] BCC 698. Moreover, the Costs Order is not even subject to any appeal or application to set it aside. It is therefore unrealistic to suggest that it is "disputed".

122. Indeed, if the Kings were right on this, then any costs order with a built-in right of assessment cannot give rise to a statutory demand debt. That cannot be right. As was said in *Popely*, "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".

Issue 4: whether the court should be otherwise satisfied, on other grounds, that the demand ought to be set aside under rule 10.5(5)(d) IR 2016

Rule 10.5(5)(d) IR 2016 generally

123. Rule 10.5(5)(d) IR 2016 vests a broad discretion in the court to set aside statutory demands. In *Jones v Sky Wheels Group* [2020] EWHC 1112 (Ch), Snowden J summarised the position:

> "IR 10.5(5)(d) provides the court with a discretion to set aside a statutory demand "on other grounds" to those set out in sub-paragraphs (a)-(c). Although sub-paragraph (d) appears on its face to provide a very wide discretion, both counsel accepted that it is not unlimited or unfettered.
>
> "The width of the discretion under sub-paragraph (d) has been discussed in a number of cases. One of the first statements on the provision (or more accurately, its predecessor under the Insolvency Rules 1986) was by Nicholls LJ in *Re a Debtor* [1989] 1 W.L.R. 271 , who stated:
>
>> 'When therefore the rules provide…for the court to have a residual discretion to set aside a statutory demand, the circumstances which normally will be required before a court can be satisfied that the demand 'ought' to be set aside, are circumstances which would make it unjust for the statutory demand to give rise to those consequences in the particular case. The court's intervention is called for to prevent that injustice.'

"However, it cannot be the case that the court has an unlimited freedom to take its own view of what is just and unjust. There must be recourse to some relevant legal principles. That was what Peter Gibson LJ was alluding to in *Budge v A.F. Budge (Contractors) Ltd* [1997] BPIR 366 when he indicated that it was necessary to "show a substantial reason comparable to the sort of reason one sees in paras (a), (b) and (c)" why the demand ought to be set aside.

"As examples, cases in which the discretion in sub-paragraph (d) has been exercised, include *Re A Debtor* (where the demand was so confusing that it may have caused genuine prejudice to the debtor); *Maud v Libyan Investment Authority* [2016] EWCA Civ 788 (where paying the demand would have been illegal); and *John Remblance v Octagon Assets Ltd* [2009] EWCA Civ 581 (where a creditor pursued a guarantor in circumstances where they could not proceed against the debtor)".

124. The Kings say that I should exercise my discretion to set aside the Statutory Demand for three reasons. Firstly, because the Statutory Demand has been issued for an improper purpose. Secondly, because a bankruptcy order would have the effect of stifling the Future Proceedings. Thirdly, because there is no useful purpose in bankrupting the Kings. I will take these submissions in turn, dealing with the first and second together.

Improper Purpose and/or Stifling Future Proceedings

125. This submission is built on the previous discussion that the 12 October 2021 Letter shows BMIF is the 'real defendant' in the Professional Negligence Proceedings.

Applicable legal principles

126. Bankruptcy proceedings may not be used or threatened for the purpose of obtaining some collateral advantage ("the Rule in Bankruptcy"). In *re Majory* [1955] Ch 600, a creditor agreed that a debtor could pay off his debt in instalments if the latter also paid his costs. The debtor later contended that this was an extortion. In a crucial passage the court said:

"(1) There is no such hard and fast rule as Mr. Duveen suggested, namely, that any arrangement or agreement made by a petitioning creditor with his debtor, after the institution or under the shadow of bankruptcy proceedings, whereby the creditor is able to get more than that "to which he was legally entitled" (that is, more than he could have recovered at law at the time of the bankruptcy proceedings being started or threatened) amounts to extortion in bankruptcy law notwithstanding the absence of

any mala fides or anything amounting to oppression in fact. In our judgment, the decision in *In re Bebro* involves necessarily the rejection of such proposition.

"(2) There is equally no rule that extortion has in bankruptcy law a special and artificial significance divorced altogether from the ordinary implication of the word.

"(3) The so-called "rule" in bankruptcy is, in truth, no more than an application of a more general rule that court proceedings may not be used or threatened for the purpose of obtaining for the person so using or threatening them some collateral advantage to himself, and not for the purpose for which such proceedings are properly designed and exist; and a party so using or threatening proceedings will be liable to be held guilty of abusing the process of the court and therefore disqualified from invoking the powers of the court by proceedings he has abused.

"(4) On the other hand, having regard to what Jenkins LJ called "the potent instrument of oppression" which bankruptcy proceedings (with their potential consequences upon property and status) provide, the court will always look strictly at the conduct of a creditor using or threatening such proceedings; and if it concludes that the creditor has used or threatened the proceedings at all oppressively, for example, in order to obtain some payment or promise from the debtor or some other collateral advantage to himself properly attributable to the use of the threat, the court will not hesitate to declare the creditor's conduct extortionate and will not allow him to make use of the process which he has abused.

"(5) In every case it is a question of fact in all the circumstances of the case whether there has been, in truth, extortion."

127. In *In Re Maud* [2015] EWHC 1626 (Ch) Rose J said that the Rule in Bankruptcy was triggered in two situations:

"In the light of these authorities I conclude that the pursuit of insolvency proceedings in respect of a debt which is otherwise undisputed will amount to an abuse in two situations. The first is where the petitioner does not really want to obtain the liquidation or bankruptcy of the company or individual at all, but issues or threatens to issue the proceedings to put pressure on the target to take some other action which the target is otherwise unwilling to take. The second is where the petitioner does want to achieve the relief sought but he is not acting in the interests of the class of creditors of which he is one or where the success of his petition will operate to the disadvantage of the body of creditors. It is also clear from those authorities, and as a matter of common sense, that the jurisdiction of the court to dismiss a petition based on an undisputed debt on the grounds of collateral purpose must be exercised sparingly. Bankruptcy proceedings cannot be allowed to become the forum for a detailed investigation into past and present relationships or an exploration of what the petitioner hopes to gain from the insolvency of the company or individual, in financial or personal terms and a consideration of whether those hopes are legitimate or not."

128. The facts of *Maud* are complicated. For present purposes it suffices to note that Rose J dismissed the argument on the bases that: (1) the respondents did want to bankrupt the

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applicant because it was the applicant's bankruptcy that triggered the 'collateral' advantage; and (2) "it has not been suggested that the bankruptcy would damage the prospects of Mr Maud's other creditors. There is no reason to suppose Mr Maud's Ramblas shares will be sold under the pre-emption provisions of the Ramblas articles of association at less than their proper price. Those monies will then be available for the general body of Mr Maud's creditors".

129. The standard of proof to show a breach of the Rule in Bankruptcy is high. In *In re Amalgamated Properties of Rhodesia (1913) Ltd* [1917] 2 Ch 115 Sargant J said:

> "the petitioners, as judgment creditors for this very large sum, are prima facie entitled ex debito justitiae to a winding up order, and it seems to me to be impossible to displace that prima facie position without the very strongest proof that the petition is being improperly made use of for some ulterior motive".

130. A mixed motive on behalf of the petitioner does not amount to abuse of process. In *Hicks v Gulliver* [2002] BPIR 518, H sought to have the bankruptcy petition filed by G dismissed because she said it was designed to stifle her claim against another party in related litigation. HHJ Weeks QC rejected the argument, holding that even though stifling may have been the effect of the petition, it was plain that G just wanted to be paid the costs or some part of them. He said:

> "…The sole argument presented to me on behalf of Mrs Hicks on this appeal is that under subs (3) of s 266, which I have read, the application should have been dismissed as an abuse of the court's process because the intention of the petitioners was to stifle the proceedings against Mr Gosland and that that is not a legitimate purpose…
>
> "…if the presenter of a petition has two purposes, one of which is the lawful purpose of seeking to obtain a dividend in the bankruptcy, a second purpose, however important that might seem to the presenter, is insufficient to justify stigmatising the petition as an abuse of the court's process. […] I think I am bound to hold that if at least one genuine purpose of the petitioner is to obtain a dividend in the bankruptcy if one is forthcoming, that is sufficient to justify the presentation of a petition…
>
> "Furthermore, I am not entirely satisfied that the stifling of an action in itself is an illegitimate purpose. It may well be legitimate for a creditor to take the view that the debtor ought not to be spending his money – or what is his money until the bankruptcy order is obtained – on an action which has no prospect of success and which may result in an entirely unjustified increase of the liabilities which will compete with the petitioning creditor eventually when the bankruptcy petition is presented" (emphasis added).

131. That said BMIF fairly took me to the decision of Snowden J in *re Maud* [2016] EWHC 2175 (Ch) which made it clear that a court must be realistic about what the petitioning party actually wanted:

"It also appears that a petitioner who has more than one objective or purpose in presenting and pursuing a petition may be able to avoid a finding of abuse of process if one of his purposes is legitimate, even though that is not his principal purpose. However, as regards the decision in *Hicks v Gulliver* , I would observe in passing that I do not think that it can be the law that just because a petitioner can say that one of its purposes is to obtain a dividend (however small) on its debt in the bankruptcy, its petition cannot be an abuse of process, no matter what its other purposes might be. As I observed in argument, and none of the counsel who appeared before me disagreed, the effect of a petitioner who is seeking a winding-up or bankruptcy order with the illegitimate purpose of obtaining a benefit for himself at the expense of the other creditors may well be merely to reduce, rather than eliminate altogether, the dividend payable on the unsecured debts in the bankruptcy. Such a case may be no less an abuse of the collective process because the petitioner can say that he would (in addition to obtaining the singular benefit for himself at the expense of the other members of the class) also wish to receive the (reduced) dividend on his debt" (emphasis added).

132. *Jones v Sky Wheels Group* [2020] EWHC 1112 (Ch) is another decision of Snowden J. A statutory demand was set aside by a judge on the basis that "the situation has been manipulated to enable [the creditor] to obtain a bankruptcy order which would avoid him potentially facing the unfair prejudice proceedings from [the debtor]". Counsel criticised this as being too general and vague a concern but Snowden J upheld the decision on appeal.

133. The creditors had earlier stated a clear intention to pursue damages for the non-payment of debt. At some point they then chose "instead to go down the path of bankruptcy proceedings", and there was "no credible explanation" for this other than the fact that it became apparent to them that the debtor was serious about bringing an unfair prejudice claim. Snowden J concluded:

"In the absence of any other coherent explanation, I am driven to the same conclusion which Judge Watkin reached, namely that Company's decision to change tack and commence bankruptcy proceedings was driven by a desire to bankrupt Mr. Jones in order to forestall his threatened Section 994 Petition against Mr. Schofield. Consistent with the approach of Nicholls LJ in *Re a Debtor* , Judge Watkin concluded - and I believe she had ample basis for concluding - that this rendered it unjust for Mr. Jones to face the consequences of bankruptcy proceedings before his Petition could be heard, so that it was appropriate for her to exercise her discretion under IR 10.5(5)(d)".

134. Snowden J also made it clear that the Rule in Bankruptcy can be considered in a rule 10.5(5)(d) set aside application:

> "I also consider that Judge Watkin's conclusion could have been justified by analogy to the principles which apply when the Court is considering, under its inherent jurisdiction, whether a bankruptcy petition is an abuse of process. Bankruptcy proceedings are a class remedy, and even if a statutory demand is served in respect of a debt that is otherwise undisputed, if the bankruptcy process is being used to enable the petitioner to achieve an illegitimate purpose to the detriment of the class of creditors, this will constitute an abuse of the process of the court".

Discussion

135. The Kings say firstly that the letter, proposing that if the Kings discontinued the Professional Negligence Proceedings, the BMIF would likewise do so for the Statutory Demand, amounted to a form of blackmail; secondly, that by the letter, the BMIF was trying to stifle the Kings' future claims against them; and thirdly, that the BMIF was misusing bankruptcy proceedings to pursue a collateral advantage – that is the discontinuance of the Professional Negligence Proceedings – to the disadvantage of other creditors.

136. The Kings say that BMIF's pursuit of the Statutory Demand (and, inevitably, a creditor's petition) has nothing to do with recovering money. Instead, their true purpose was to stifle the Professional Negligence Proceedings.

137. The Kings say this is evidenced by two points. Firstly, the 12 October 2021 Letter, proposing a settlement, was issued so shortly after the Statutory Demand that the only reasonable inference is that the purpose of the latter was to gain leverage for the former. Secondly, they emphasise the fact that they offered BMIF a charge over the benefit of the Future Proceedings which BMIF (they say) inexplicably rejected, given that they are a highly liquid fund.

138. The Kings also say that the Professional Negligence Proceedings are worth circa £58m and that the BMIF recognised its significant value. The BMIF would, on its own admission, obtain "a commercial advantage… should a Trustee in Bankruptcy for the Kings elect not to continue the Professional Negligence Proceedings".

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139. I reject this argument for the following reasons. Firstly, the mere fact that BMIF would gain a commercial advantage from pursuing bankruptcy proceedings does not mean they fall foul of the Rule in Bankruptcy. The authorities above make it clear that although this might be one of BMIF's purposes, it does not mean they are abusing the bankruptcy process. Mr Risby has stated, and I accept, that it is BMIF's policy to attempt to recover costs whenever possible. I of course accept Snowden J's warning that a court must be realistic about a petitioning creditor's motives – £58m is far more substantial than £219,700. However, it is far from clear that the Kings will win the Professional Negligence Proceedings, nor, if they do, what the damages would be.

140. It is true that the debtor in *Jones v Sky Wheels Group* succeeded in his set aside application on similar grounds. However, that case may be distinguished on the basis that there was a clear change in the approach of the creditor (pursuing damages to pursuing bankruptcy proceedings) which could not be explained otherwise than that the statutory demand was, as the Kings say, "cynically set up" to pressure the debtor to drop the future claims. There is no similarity to the facts of this case. The BMIF's stated policy has always been to recover costs where possible.

141. Secondly, it is in any event unclear that BMIF would gain any commercial advantage by "stifling" the Future Claims by forcing bankruptcy. By sections 283 and 436 IA 1986, the Kings' "property" which would vest in the Trustee in Bankruptcy include "things in action". Even if the Kings were bankrupted, there is no reason to think that a Trustee in Bankruptcy would not bring the Future Claims if they are as strong and as valuable as the Kings assert.

142. Thirdly, it cannot be otherwise than sensible for both parties to aim to achieve a global settlement. If I were to hold in favour of the Kings on this point, that would discourage parties from settling for fear of being accused of abusing the court's processes.

143. The Kings make several other ancillary points they call 'aggravating factors'. For example, they say that the Kings were misled about the merits of the Professional

Negligence Proceedings: apparently DAC Beachcroft (BMIF's solicitors) represented to the Kings that their claim had "no legal merit and [was] unsustainable". They also say that BMIF gave misleading statements to this court about the Kings' asset position and misleading impressions about the decisions of Cockerill J and Males LJ. Finally, that BMIF delayed the service of the Statutory Demand for some nefarious purpose. However, the Kings have not shown how any of these are relevant to the question I have to decide.

No useful purpose

144. The Kings say that bankruptcy proceedings would serve no useful purpose in any event because the Kings have no assets that are not already heavily charged and therefore I should set aside the statutory demand.

145. At the outset it is unclear to me whether this is a relevant consideration for the Set-Aside Application. It seems to me that this goes more towards the injustice of a creditor's petition. Nevertheless, the BMIF has made submissions on this issue and I will proceed to address them.

146. It is true that in exceptional cases, the court can exercise its discretion to decline to make a bankruptcy order if it is satisfied that making an order would serve no useful purpose because there would be no assets in the estate available for creditors. The test is whether there is no possibility of any benefit to creditors and the burden is on the debtor to show this. However,

> "If there is a reasonable probability, or even a reasonable possibility—I think it may be put as high as that—that the unsecured creditors will derive any advantage from a winding-up, the order ought to be made in order that they may be heard in the debenture-holders' action, and not have the proceedings left in the hands of other persons who are antagonistic to their interests" (*Re Crigglestone Coal Company Ltd* [1906] 2 Ch 327).

147. A debtor's own uncorroborated evidence that they have no assets and no prospects of having any will not be sufficient: *Re Field (a debtor)* [1978] 1 Ch 371 at 375F-G; 376C-F; *Re Betts* [1897] 1 QB 50 at 52.

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148. The short answer therefore is that the Kings have not provided me with any evidence that corroborates their claim that they have no assets, and so this submission must be rejected.

Conclusion

149. Therefore, I have concluded that the Statutory Demand should be set aside because there is a cross-demand in the form of the Professional Negligence Proceedings which exceeds the value of the debt.

150. I am grateful to counsel for their very able assistance in this matter.