



**Lam Developments Limited and Trident Limited v Elite
Properties PCC Limited and Trident Trust Limited**
Royal Court
4th October 2016

**JUDGMENT
42/2016**

Set aside of statutory demands.

**IN THE ROYAL COURT OF GUERNSEY
(ORDINARY DIVISION)**

**Between: LAM DEVELOPMENTS LIMITED
LAM INVESTMENTS LIMITED Applicants**

-and-

**TRIDENT CORPORATE SERVICES
(NO.1) LIMITED
TRIDENT TRUST COMPANY
(GUERNSEY) LIMITED Respondents**

-AND-

Also Between: ELITE PROPERTIES PCC LIMITED Applicant

-and-

**TRIDENT TRUST COMPANY
(GUERNSEY) LIMITED Respondent**

Case heard on: 30th, 31st August and 1st September, 2016

Judgment handed down on: 4th October 2016

Before: John Russell Finch, Esq., Judge of the Royal Court

Counsel for the Applicant: Advocate T W McGuffin

Counsel for the Respondents: Advocate J A Tee

Cases and Materials referred to in Judgment:

The Companies (Guernsey) Law, 2008, as amended, Sections 406 and 407.
Phipson on Evidence (16th Ed) paragraph 5.27.
Elite Properties PCC Limited v Trident Trust Company (Guernsey) Ltd Royal Court No. 35/2016;
Minister of the Public Services Department v Miller and Baird (CI) Limited 2009-10 GLR 142;
In the matter of Synergy Capital Limited 2011-12 GLR 605;
Baker Hughes Ltd v CCG Contracting Intl. Ltd 2005 1 SC 65;
In re Bayoil SA [1999] 1 WLR 147;
Re Claybridge Shipping Co SA [1997] 1BCLC (CA) 572;
Re a Company (No. 006685 of 1996) [1997] 1 BCLC 639;
The Indian Endurance [1998] AC 878;
Mann v Goldstein [1968] 1 WLR 147;
Niger Merchants v Capper [1877] 18 Ch D 557;
Popely v Popely [2004] EWCA 463;
Stonegate Securities Ltd v Gregory [1980] Ch 57.

Introduction

1. A list of the main individual protagonists, people and entities has been provided by Counsel and is appended here:

Dramatis Personae

Dramatis Personae	
Amir	Amir Limited, a Jersey company
Devonshires	Devonshires Solicitors LLP (Philip Barden and Tom Keya)
Elite	Elite Properties PCC Limited
Elite Cell A	Elite Properties PCC Ltd, Cell 'A'
GH	George Hadjidimitriou of Profim, TT's London agent
Grosvenor	Grosvenor Estates, whose consent was needed for development of the Property
KEB	Khaled El Bishlawi
Lam D	Lam Developments Limited
Lam I	Lam Investments Limited
MLT	Mark Le Tissier, director of TCS and TT
NJC	Nigel Carter, the sole director of the Applicants
TCS	Trident Corporate Services (No. 1) Limited
TT	Trident Trust Company (Guernsey) Limited
Westminster	Westminster City Council, the planning authority for the Property

2. Counsel also produced a summary of the statutory demands, the subject of these proceedings, which is also appended:

No.	By whom	To whom	Amount	Alleged ground
(1)	TT	Lam D	£81,264.99	Services purportedly provided.
(2)	TT	Lam I	£54,797.80	Services purportedly provided.
(3)	TT	Elite	£56,604.65	Services purportedly provided.
(4)	TCS	Lam D	£102,701.74	Fees payable to Collas Crill.
(5)	TCS	Lam I	£76,613.99	Fees payable to Collas Crill.

3. Counsel for A produced a "Brief Chronology" which is also useful, read in the context of what the judgment has attempted to determine:

Brief Chronology	
9.3.06	Agreement between Amir and TT
12.6.08	Incorporation of Elite
29.1.13	Lam D obtaining planning consent for the development of the Property.
10.4.15	Threat by TT to appoint administrators.
2.7.15	£20,000 paid to TT as agreed interim payment.
8.7.15	TT wrote demanding over £200,000 plus interest at 1% per month.
28.8.15	Respondents applied for the appointment of administrators of the Applicants.
2.9.15	IT refused to sanction any further work by Devonshires in relation to the basement.
9.9.15	IT emailed all professionals refusing to sanction any further work in relation to the basement
Sept 2015	“Without prejudice” meeting between Lam D and Grosvenor
10.11.15	Agreement between Lam D and Grosvenor
29.1.16	Expiry of planning consent; work had to start before this date
01.03.16	Removal of TCS as director of Elite and TT as resident agent; appointment of NJC as director
10.03.16	Removal of TCS as director of Lam D and TT as resident agent; appointment of NJC as director
18.03.16	Removal of TCS as director of Lam D and TT as resident agent; appointment of NJC as director
29.03.16	Statutory demands served by TCS and TT on Lam D and Lam I
01.04.16	Court dismissed TCS’s applications to put the Applicants into administration
05.04.16	Statutory demand served by TT on Elite

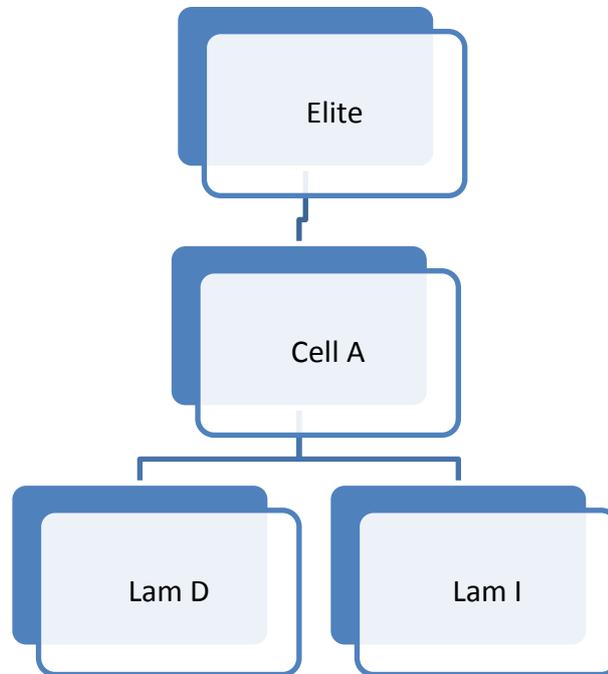
Background

4. This is an application by (1) Lam D and Lam I (“A”) to set aside (or restrain), four statutory demands by TCS and TT (“R”) dated 29th March 2016; and (2) Elite to set aside (or restrain) a statutory demand by TT dated 5th April, 2016. The two matters have been consolidated. The demands are set out in summary at paragraph 2 above. Throughout the abbreviations and descriptions used in paragraph 1 above will be employed in this judgment. Page numbers and references will be linked to the relevant volume of documentation and the appropriate abbreviation or description.
5. The relevant statutory provisions are sections 406(e) and 407 of the Companies (Guernsey) Law, 2008, as amended (A’s skeleton, tab 2). A company may be wound up by the Royal Court if it is unable to pay its debts within the meaning given by Section 407. Section 407(a) deems that such a situation exists if “a creditor to whom the company owes a sum exceeding £750” fails to pay within 21 days of service of a statutory notice, or to the reasonable satisfaction of the creditor. A asks the Royal Court to set aside the statutory demands. The case took 3 days of legal submissions and the consideration of a large amount of documentation and exhibits, including helpful skeleton arguments from A and R. At the end of the oral hearing, judgment was reserved and is now handed down.

Facts and Events

6. Before considering the way this unfortunate and costly dispute came to be litigated it will be of assistance first of all to look at the structure of the entities involved. This is set out

conveniently in A's skeleton at paragraphs 3-9. Elite was incorporated in 2008 as a protected cell company. Cell A is the beneficial owner of all the share capital in Lam D and Lam I. Cell A has the legal title of 50% of the share capital in Lam D. The remaining share capital in Lam D and all the share capital in Lam I is held on trust for Cell A by two Trident nominee companies. The ultimate beneficial owner of Elite is KEB, who is the beneficial owner of Cell A. For the purposes of the application Counsel were happy for a simplified model of the structure to be used:



7. Lam D's principal asset is a freehold property in Belgravia ("the property") with an equity put in the region of £25 million. Lam I's principal asset is White Lodge, also in London. This is subject to a mortgage in favour of the Bank of London and the Middle East PLC. A receiver has now been appointed to secure repayment (see NJC 5, paragraphs 11-12 in volume 2). The current equity is around £2.5 million.
8. TT is a Guernsey-registered corporate services provider. MLT and Mr Dekker are directors both of TT and the associated company TCS. The relationship between the various entities goes back to 2006 when KEB's interests were held in Amir, a Jersey entity of which he was the ultimate beneficial owner. TT agreed to provide administrative services. When Elite, Lam D and Lam I were incorporated, TCS became sole director of each and TT provided resident agent and corporate services to them. The relationship between KEB and R initially was good, even when considering the various earlier communications, rather cordial. It went downhill sharply in 2014 and 2015. Although this will need to be considered in more detail later on, it can be summarized by saying that on 10th April 2015 Mr Mealing, a director of TT, threatened to appoint external administrators. This caused serious offence to KEB (see MLT1, pages 307-308 in volume 3). Thereafter dealings between the parties deteriorated to outright conflict. The most important, by-product of this hostility relates to a central issue in the present case, planning permission for the property owned by Lam D.
9. It is pointed out (NJC 1, paragraph 9, in volume 1) that the business model of Lam D and Lam I is buying properties, obtaining planning permission and then selling them for a profit. Putting it briefly there is a "set-off or cross-claim" in this case involving R's alleged failure to take steps to implement in a timely fashion a "very advantageous" planning permission for the development of the property. A claim form has been issued (NJC 4, pages 352-361, in volume 2). The particulars are set out with NJC5, pages 3-20, settled by leading and junior

counsel. Grosvenor Estates had to give their consent to any development, not to be unreasonably withheld. In the end consent was refused and Lam D's London solicitors instructed counsel to draft proceedings for a declaration that consent was being unreasonably withheld. This had to be done before the planning consent expired. The solicitors requested R to authorize proceedings in the name of Lam D, but R refused or failed to do so. R also refused to authorize Lam D's professional advisors to incur further costs, negotiate or meet with Grosvenor. Lam D, it is suggested, had to settle for a much less advantageous deal with Grosvenor. The civil claim in the High Court is for £6.5 million against TCS and TT. TT allegedly controlling the "puppet" TCS.

10. Further developments, in summary, were that after payment of £20,000 by KEB, TT wrote on 8th July, 2015 requiring immediate payment of £200,000 and charging interest at 1% per month (MLT1, pages 327-329, in volume 3). Lam D had a loan facility with RBC to the tune of £1.5 million. Lam D was allowed a temporary draw-down of £250,000 for professional fees in connection with the Grosvenor consent. This was due for repayment on 28th August, 2015. On 27th August, 2015 Mr Mealing spoke to RBC and the conversation is noted at MLT1, pages 543-544, in volume 3. On the 28th August, 2015, TCS served applications for Lam D and Lam I to be placed into administration.

Previous Court Proceedings

11. On 1st April, 2016, TCS's applications to put Lam D and Lam I into administration failed. An order for 75% of the Respondents' costs on the indemnity basis and 25% on the recoverable basis was subsequently made. In June, 2016 A (and another company), now under new administrators, applied to the Royal Court for disclosure of documents held by TT. On 4th August, 2016 this claim succeeded. NJC was now the sole director. TT was ordered to pay A's costs on an 80% indemnity basis (Elite Properties PCC Limited v Trident Trust Company (Guernsey) Limited No. 35/2016, tab 3b of A's authorities). As previously mentioned, the statutory demands were issued on 29th March, and 5th April, 2016.

The Statutory Demands

12. The first four are exhibited at NJC1, pages 1-66 in volume 1. The one relating to Elite at NJC1 (numbered when the claims were separate), pages 1 to 112, both in volume 1. They have already been summarized at paragraph 2 above. To recapitulate, they are:

- (1) TT against Lam D for £81,264.99 - services provided.
- (2) TT against Lam I for £54,797.80 - services provided.
- (3) TT against Elite for £56,604.65 - services provided.
- (4) TCS against Lam D for £102,701.74 – fees to Collas Crill.
- (5) TCS against Lam I for £76,613.99 – fees to Collas Crill.

In respect of (1) and (2) TT claims these amounts for the costs of providing company administration services to Lam D and Lam I. In respect of (3) the amount is claimed for the same reason. In respect of (4) and (5) these are "totally separate" claims pursuant to an indemnity provided by Lam D and Lam I. The indemnity can be found at pages 118 and 147 of NJC 1 in volume 1. The amounts claimed relate to the costs of legal advice obtained by TCS "in the course of its role as director of Lam I and Lam D" (R's skeleton, paragraph 26). The indemnity is conveniently set out in paragraph 27 of R's skeleton and is Article 129 of the Companies' Articles of Association (volume 1, tab 3, page 147).

The Submissions - Introduction

13. Both Counsel painstakingly took the Court through a considerable, indeed at times oppressive, volume of detail, with numerous e-mails, faxes and other documents prayed in aid. As Advocate Tee observed, in this case, “The devil is in the detail”. This can be seen from the large volumes prepared for the hearing and the number of affidavits they contained. Not every submission, nor indeed every document, is necessary for the resolution of this case. Although everything provided has been considered, it is not necessary to mention and deal with every single point. There was no oral evidence, the documents were put forward and the Court had to evaluate them, decide their meaning and apply what it considered to be the relevant legal principles to them. The applicable legal authorities will be dealt with separately, later in the judgment.

A’s Principal Submissions

14. In relation to all of the demands A submits that from an early stage there was “an arrangement or course of dealing” between KEB and R that payments would be deferred until the properties were refinanced or sold. Another main element, strongly submitted on behalf of A, was that KEB and R both treated the assets and liabilities of the different entities as if they were a single fund. This should be given effect either by way of “informal contract”, or as came out much more strongly from A’s oral submissions, estoppel by representation or convention. In relation to what A submitted was the situation, it was emphasized, that the structures were “cash-flow constrained”. For many years the position was maintained by R, who adopted a large measure of risk. Payment was only to be made when there was cash in the structure. R cannot now make the claim that payment was due as soon as it was levied. So R took on a cash-poor structure with “huge assets”. Nothing was ever said or done about interest until the unilateral imposition by Mr Dekker in July 2015, which was the “trigger” for the dispute and subsequent litigation. It was particularly stressed in this part of the submissions that in paragraph 10 of MLT 2 (in volume 3) it was admitted that payments due from one company were taken from the assets of another company (see paragraph 38 of A’s skeleton).
15. In relation to demands (1), (2) and (3) it is suggested by A that there is no basis for them. Attention was drawn to the terms of these demands. Counsel for A stressed the phrase – “Pursuant to the terms of an administration agreement dated ... and/or the creditor’s terms of business and fee schedule” (emphasis supplied). Such a phrase would not be included if there were a clear contractual basis for the claims. There is no reference to TT’s standard terms of business in the agreement (at NJC1 pages 149 – 161, volume 1) and no basis for charging the 1% interest imposed later on. Despite the lack of reference to the terms of business in the Agreement, they are referred to in the statutory notice. Furthermore, there was no administration agreement with Elite nor any agreement obtained from KEB, the beneficial owner.
16. In relation also to demands (1), (2) and (3) A suggests the amounts sought are open to challenge and there was a failure to provide information. A also indicates that they have been hampered by R’s refusal to deliver-up documents including matters such as bank statements. KEB, it is alleged, merely received statements of account, such that he was unable to understand the basis of the charges, for example no time-sheets were included. In NJC4 at paragraph 8 of the affidavit, in volume 2, it is concluded that:

“On the basis of the information provided there is insufficient information from the bills and time sheets to determine what fee tariff has been applied and whether or not the hours spent on matters have been properly charged.”

Reference is made to MLT2, pages 32-52 in volume 3, showing a chain of e-mails from R. Again it is emphasized that no breakdowns are provided. The alleged deficiencies are particularized in paragraph 43 of A's skeleton.

17. In relation further to all the demands, A challenges not only the basis, and, the actual amounts, but also alleges that there was a failure to account for payments. Background to this is set out in NJC 3 at paragraph 12 in volume 2. At R's request KEB paid them £20,000 on 1st July 2015 and on 21st July, 2015 R took £15,000 from Lam D's account (table, page 11 attached to NJC 3). It is stressed on behalf of A that the £20,000 amount was credited to Elite (mostly Cell A), but Elite had been struck off on 15th May, 2015 without KEB being notified. Mr Dekker failed to advise KEB of this in his acknowledgement (MLT 1, page 329, in volume 3). At the time RBC was pressing for payment of an instalment on the £250,000 temporarily released, referred to in paragraph 10 above. KEB gave the bank an update after which they extended the time for repayment (MLT 1, page 536, in volume 3). A states that on 31st July, 2015, R's employee Miss Lucy Smith, advised RBC that there was no update on repayment (MLT 1, page 532). This e-mail was not apparently copied to KEB. According to Mr Carter (NJC 3 at paragraph 12b of his affidavit), the £35,000 total was available but R chose to pay off their own fees, which were not (in his contention) due.
18. In relation to the Collas Crill invoices (4) and (5) A submits that the work claimed for appears to relate essentially to advising TCS about Lam D and Lam I's insolvency and putting them into administration. This led to applications for administration which failed in the Royal Court. In fact Lam D and Lam I were not insolvent and as the work was manifestly not for their benefit they should not have to pay for it. In paragraph 46.3 of A's skeleton the argument proceeds further: it was "the worst possible step for the director to take". You cannot incur expenses that are of no benefit to the company whatsoever. The director's duty was owed to the company. The company cannot be expected to pay for advice obtained for the director's personal benefit and which, it is stated, the new director cannot see. A's oral submissions, however, were mainly directed to the question of the indemnity in the companies' Articles (see paragraph 12 above). The demands both use the wording that Lam D and Lam I are "jointly and severally liable to the creditor for the joint liability" (volume 1, tab 3, pages 3 and 35). There is, A submits, no reference to that in the indemnity Article; Lam D and Lam I cannot be mutually liable for each other's debts and there is no contractual provision to that effect. One cannot re-write this Article.
19. A also submits that Lam D and Lam I are both solvent under the balance sheet test and cash flow test. The property in Belgravia owned by Lam D has an equity of over £25 million. White Lodge, owned by Lam I, has an equity of £2.5 million as of an October 2011 valuation, although prices are currently falling. KEB, it is stated, will underwrite the ongoing liabilities of the companies (see his letter of undertaking at NJC 1, page 175, in volume 1). There is a suggestion that Lam D has £2.3 million liabilities, but the large majority relate to disputed HMRC assessments (NJC 4, affidavit, paragraph 4, in volume 2). It was apparent from the oral submissions that this particular issue was not regarded as of the greatest consequence at the hearing, but it is mentioned for the sake of completeness.
20. A's principal submission in relation to the statutory demands was that all they have to show is that the debts are disputed genuinely and in good faith. A claims (para 51 of skeleton) that "this is not a difficult hurdle to overcome and it has been comfortably overcome in this case". The procedure chosen by R is disproportionate. Such a summary application does not meet the facts and R should proceed in the normal way to recover alleged debts owed. The cause of action selected by R should only be for undisputed debts. R's legal rights are not being denied. Reference was made to the sum of £751, which is £1 over the statutory limit on these proceedings. A suggested that if the Royal Court found (say) such an amount was owing, in other words a small proportion of the claims, the opportunity should be afforded to pay it and

R restrained from petitioning. It would be unjust, in effect, to rely upon such a small sum being payable to enforce the demand. Then there is the question of whether the present case is a “fee dispute”. A refers to an e-mail by MLT on 17th August 2015 to the London solicitor Mr Barden, which states “Absolutely not a fee dispute ...” (PB1, page 29, in volume 1). Then A refers to Collas Crill’s letter to the same person of 8th September, 2015 (NJC 3, page 26, in volume 2), which indicates, “It is not disputed that there is a fee dispute between the Administrator and your client ...”. The letter continued to offer TT and TCS’s resignations as director and administrator in return for £180,000 towards their fees. In oral submissions, it was suggested that this shows R putting their own concerns before those of the creditors. It supports the proposition that R is exerting improper pressure to get paid, making use of a short-cut in order to avoid issuing ordinary proceedings. Such a course is not what this procedure under consideration is designed for. When Lam D was engaged in crucial negotiations/potential litigation with Grosvenor it was at it was at its “most vulnerable” (paragraph 58 of A’s skeleton).

21. A very important feature of A’s case was the “set-off or cross-claim”, which occupied a significant part of the oral submissions from both counsel. Reference has been made to it at paragraph 9 above. Lam D has issued the proceedings and at the time of the oral hearing, was seeking permission to serve on TCS and TT in Guernsey. It is specifically claimed that in breach of its duty of care and skill as a director, TCS refused to issue proceedings, authorize the cost of further negotiations or attend a “crucial” settlement meeting – all connected with what is considered a very advantageous planning consent due to expire and not be renewed in January 2016. A considers this action amounts to a set-off as well as a cross-claim. A further submission by A is that Lam D’s English action must also be taken account of when looking at the statutory demands against Lam I and Elite. R, it is submitted, is estopped from denying that A should be treated as a single fund (see paragraph 14 above). Lam D has a genuine cross-claim A submits, for much more than the total of the statutory demands and it must be beyond dispute that it is a serious claim, having been settled by leading counsel.
22. A concluded with observing that this action by R is all about short-cutting A’s rights. In effect it is a way of recouping costs for the failed administration applications. R knew throughout that they were dealing with a cash-strapped structure, but with huge assets and they have been paid a lot of money. The statutory demand procedure is not designed to solve commercial disputes. Towards the end of the oral submissions counsel for A produced the Bills of Costs from the 4th May, 2016 hearing on the disclosure of documents, indicating that these could be factored in as a counter-claim, based on orders of the Court.

R’s Principal Submissions

23. The nub of R’s case is set out in paragraphs 6-9 of the skeleton. A’s objections to the statutory demands should be “seen through” and the propositions set out in paragraph 10 are relied upon. In 2015 KEB ran out of liquid assets to pay R’s fees. He has followed a strategy of causing R as “much trouble and expense as possible to try to avoid paying his bills”. In relation to the present application KEB has put up a “smokescreen” to distract the Court from R’s “simple” propositions. R had become concerned at an early point, around October 2014 as the Grosvenor application over-stretched the companies, who had limited cash flow and were placed under immense financial stress. R’s oral submissions built upon the propositions advanced in paragraph 10 of the skeleton and KEB’s objections should therefore be seen through.
24. The five separate statutory demands must be considered individually, it was submitted, and if more than £750 is owed the demand must proceed. The demands do not rise or fall together. £750 in the context of the case represents a very small sum. Any counter-claim must be genuine and substantial and it is not appropriate for a debtor to invent excuses to avoid paying

after the event. The objections put forward by A amount to “noise and distraction”. On the facts there can be no doubt as to the validity of R’s claims for TT’s fees and TCS’s indemnities.

25. R dealt first of all with the specific submissions connected with item (3) TT against Elite in the sum of £54,064.65. This amount is for company administration fees. In oral submissions R emphasized that KEB has been fully aware of TT’s terms of business, and services were provided since 2006 on those terms. Invoices were paid until 2015 in accordance with them. At no stage were they challenged until the dispute arose. It was accepted that the breaking-point in the relationship was when R decided to charge interest. It was only after this decision that KEB started to query the invoices and TCS’s role. R submitted that specifically TT’s terms and conditions were known to KEB since at least 2008 (MLT2, pages 59-62, in volume 3). Reference is also made, in paragraph 22 of R’s skeleton to a counter-claim against TT, but that particular aspect of the case has proceeded no further – the substantive cross-claim or set-off is that against TCS and TT for negligence, already summarized. R also draws attention to the £750 figure in the legislation, and submits that there has been no misallocation of time demonstrated and that it is evident that TT must have provided services of well over this amount, and KEB has actually instigated many of them himself.
26. Next R’s submissions dealt with TCS’s claims against Lam I for £76,613.99 (5) and against Lam D for £102,701.74 (4). These amounts are claimed under an indemnity provided by each company (see paragraph 12 above). These were costs that were run up during the last 12 months of the relationship when R had serious concerns regarding the ability of Lam D and Lam I to pay off creditors. There was, as the oral submissions put it, an escalation of debt during that period, and very limited cash-flow. These cash-flow problems were pointed out at an early stage R submitted, and attention was drawn to Lam D board resolutions at MLT1, pages 246-249, in volume 3. Reference was made to pages 261, 263, 264, 271, 274, 276, 280 and 290, all on the same theme and it is noteworthy that at page 280, a meeting on 3rd February, 2015, the Directors threatened to place Lam D into administration if further funds were not received. The documents demonstrate, R suggested, that R was under continued pressure as directors from around August 2014 with creditors chasing them for genuine debts. No funds emerged to pay them. The directors’ duties were in relation to creditors and not KEB, whose modus operandi was that fees do not get paid unless he gets what he wants.
27. The expenses for which the indemnities are claimed plainly fall within their scope, which is in a broad form. They were for the benefit of the companies and not TCS. TCS indeed was obliged to take advice in the circumstances of Summer 2015 and there was need to pay regard to the terms of Section 434 of the Companies Law on liability for wrongful trading. In addition, the terms of the indemnity cover “all losses or liabilities sustained or incurred in or about the execution of his duties or otherwise in relation thereto”. There were 3 parts of the costs:
- (i) those incurred regarding the solvency of Lam D and Lam I, who had no funds;
 - (ii) those concerned in pursuing Administration Orders; and
 - (iii) those incurred in relation to the possible realization of assets.

The costs, it is submitted, were incurred in good faith vis-à-vis the role of director and therefore fall squarely within the terms of the indemnities. The argument on the indemnities does not, it was suggested, amount to a serious dispute as a good deal of what R did (e.g. in regard to realizing assets) was done at KEB’s direction, but more importantly on the oral submissions, it was largely done in the interests of creditors as the companies were insolvent.

28. R's submissions next dealt with TT's claims against Lam D for £81,264.99 (1) and against Lam I for £54,797.80 (2). These represent the costs of supplying company administration for these companies. The companies, it is accepted, were not parties to the agreement with Amir in 2006, but there has been a course of dealing between them and a "well-established contractual relationship" (paragraph 33 of skeleton). TT would, it is claimed, provide corporate services to the companies and invoices "would be paid by one of the entities within the structure on behalf of the relevant company". In oral submissions it was pointed out that payments were made in time for around 6 years and invoices were regularly provided. Reference was made to various documents exhibited with MLT1, on pages 11, 13, 14, 91, 93, 94, 95 and 103 in volume 3. Examples include a demand for payment on 24th October, 2008 (page 91) and a reminder plus demand dated 23rd January, 2009 (page 94). This carried on until 2014 and is outlined at paragraph 33b of the skeleton.
29. R next dealt with A's suggestion, applicable to all five statutory demands, that there was an arrangement or course of dealing between KEB and R under which payment would be deferred (see paragraph 14 above). R rejects any contention to the effect that TT was only entitled to be paid upon the completion of property transactions. There was no evidence to show there was such a course of dealing or arrangement to that effect. In oral submissions the question was posed that if no property transactions had ever taken place, would R have never been paid? This makes no sense - the risk would be partly shifted to TT whilst KEB received all of the benefit. Indeed numerous payments were made that did not coincide with any property transaction. TT expected its invoices to be paid and this was not dependent on any property transactions by the companies. At MLT1, pages 7-8 in volume 3, MLT outlines on 31st January, 2007, the basis of charges, including for annual requirements and on a time spent basis. Accordingly there is no substance to the submission that there is a "genuine dispute" on the invoices; fees were outstanding and due.
30. In relation to the estoppel point, i.e., R treating the assets and liabilities of the companies as if they were a single fund, it was submitted that there was neither acquiescence nor any assumption on behalf of R that would lead to such a conclusion. The companies had entirely separate legal personalities, and reference was made to a report on Lam D, dated May 2008 (MLT 1, page 41, in volume 3) which, at page 45, set out a separate treatment of Lam D and Lam I for tax purposes. Each entity was treated separately in minutes and invoices and they should not be amalgamated behind the corporate veil.
31. R next dealt with the cross-claim (to use A's term). In paragraph 38 of the skeleton this is described as "entirely spurious and is obviously raised only for the purpose of defeating TT's statutory demand". In oral submissions it was put forward that the Grosvenor litigation would entail massive costs that there were not funds to pay for. The Directors had no money. MLT laid out the financial position in his e-mail to KEB dated 17th August, 2015 (MLT 2, pages 64-65, in volume 3). It was R's view that at that time KEB was not engaging with these problems and creditors had increased in number in 2015.
32. R summarized the submissions by stating that TT was the administrator. TCS's staff were the directors. There was never any issue on invoices until the statutory demands were issued and KEB was always aware of the terms and conditions – after 10 years it cannot be said that payments were not due. This was, in short, not a genuine dispute, it only came to a head when interest was charged. There is no requirement for terms and conditions of business to be attached to a statutory demand and the court should bear in mind that a £750 threshold is all that is needed. Duties, it was submitted, to shareholders change on insolvency to a duty owed to creditors. R provided services over a considerable time, invoices were issued and the vast majority paid. TT seeks outstanding fees. TCS has a different claim and was entirely indemnified under the Articles. A has failed to show that there is a genuine dispute.

Applicable Legal Principles

33. A placed strong reliance (see paragraph 32 of the skeleton) on a number of English cases that set out the principle that it is an abuse to present a winding-up petition on a debt which is disputed on substantial grounds. This, it was suggested, was because it is an abuse of the Court's jurisdiction to invoke the procedure for the purpose of settling commercial, or debt disputes – this was a refrain uttered frequently in the course of the oral submissions. Secondly, where a debt is genuinely resisted, there is no standing by a person in R's position as they cannot demonstrate that they are a creditor. The primary case referred to was Stonegate Securities Ltd v Gregory [1980] Ch 576 and 580B-D and 587C-E (tab 7 of A's authorities). The points are simply set out in the relevant parts of the headnote:

“... the Companies Court was not the forum for resolving the question of whether the plaintiff company's debt to the defendant was due, prospective or contingent, and since there was a bona fide dispute, as the defendant now conceded, whether the debt was presently due, the plaintiff company was entitled to an unconditional injunction restraining the defendant from presenting a petition based on a failure of the plaintiff company to pay within 21 days of the receipt of the statutory demand”

34. Importantly this principle has been followed in the Royal Court of Guernsey. In In the Matter of Synergy Capital Limited 2011-12 GLR 605 (tab 3). McMahon DB set out the United Kingdom authorities, including the important decision in Re Bayoil SA [1999] 1WLR 147 (tab 9) and, after a helpful summary, concluded (at paragraph 62):

“Because the three jurisdictions of the United Kingdom will, in comparable situations, dismiss a petition to wind up a company brought by someone claiming to be a creditor, but in circumstances in which the debt claimed is disputed in good faith and on real and substantial grounds, in my judgment it is appropriate for this court to adopt a similar approach when an application for the compulsory winding up of a Guernsey company is made under the 2008 Law.”

This is a clear authority and it will be followed in the present case.

35. The leading English authority in Mann v Goldstein [1968] 1 WLR 1091 (R's tab 6) in which Ungood-Thomas J showed the origins of the position, quoting Jessel MR in Niger Merchants v Capper [1877] 18 Ch D 557 at 559:

“... when a company is solvent the right course is to bring an action for the debt ...”

The Bayoil case (supra) sets out a comprehensive analysis by Nourse and Ward LJJ and deals with the situation where there is a cross-claim. This is a substantial aspect of the present matter and heavily relied upon in A's submissions. It will be recalled that the English action as formulated seeks £6.5 million, well in excess of R's pecuniary claims. As Nourse LJ concluded, at 155-F:

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

The “unable to litigate” point was explained in Popely v Popely [2004] EWCA 463 (A's tab 11) by Jonathan Parker LJ at paragraphs 123 and 124. In the latter paragraph it was said:

“... I understand Nourse LJ to be doing no more than indicating that ... where there has been delay in the prosecution of the cross-claim the delay must not be such as to throw real doubt on the genuineness of the cross-claim ...”

One other germane observation in Bayoil came from Ward LJ at 156-D:

“... a winding-up order is a draconian order. If wrongly made, the company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim or the cross-claim that seems to me to require that the court should proceed cautiously.”

36. R did not take issue with these well-established authorities (the UK ones are of high persuasive value in Guernsey and now there is also, as stated, plain Guernsey authority). The issue is encapsulated in the requirement that the dispute must be bona fide on substantial grounds, just as the cross-claim has to be “genuine and serious”. R cited the decision of Chadwick J in Re a Company (No. 006685 of 1996) [1997] 1 BCLC 639 (R’s tab 7). There, with characteristic robustness, Chadwick J found that “this was one of those cases in which an unwilling debtor was raising a cloud of objections in an affidavit” which could not be believed. Having examined the merits Chadwick J concluded (at 652 g-h):

“One of the things that the law can do in a case of this nature is to allow the petition to proceed. Accordingly, I dismiss the application.”

In coming to this decision reliance was placed on Re Claybridge Shipping Co SA [1997] 1 BCLC (CA) 572 (R’s tab 5). The observations of Oliver LJ are of particular interest (at 578, h-i and 579, a-e). After pointing out that the winding-up procedure is a draconian one and the court needs to keep “a watchful eye on proceedings which can so easily be abused” Oliver LJ went on to say:

“There may well be cases where to compel the creditor to go off to another division of the court to establish his debt would effectively deprive him of any remedy at all. That may, of course, be inevitable where the court is convinced that the dispute is a genuine one, genuinely raised and persisted in, and one which cannot conveniently be determined in a short space of time on hearing the one application ...”

Adding:

“But it ought not, in my judgment, to be an inflexible rule that the Companies Court should *never* take upon itself the burden of determining the matter on the hearing of the petition.”

And concluding:

“The court must, I think, reserve to itself the right to determine disputes – even perhaps in some cases, substantial disputes – where this can be done without undue inconvenience and where the position of the company ... is such that the likely result in effect of striking out the petition would be that the creditor, if he established his debt, would lose his remedy altogether.”

37. The cases leave the court to make two, conceptually very similar, if not like decisions. The first is whether or not the demands are disputed “in good faith and on real and substantial grounds”. The second, is whether the cross-claim set-off or counterclaim, whatever the nomenclature is “genuine and serious” or one of “substance”. The court has the right to

evaluate the merits on what is before it, in order to sweep away fatuous “smokescreens” put up to avoid the just demands of a creditor. A “watchful eye” is needed throughout.

38. A referred to the decision in The Indian Endurance [1998] AC 878 (A’s tab 8). There is a quote from the speech of Lord Steyn (at 913) in paragraph 36 of A’s skeleton. The most relevant part of Lord Steyn’s observations is:

“It is settled that an estoppel by convention may arise where parties to a transaction act on an assumed state of facts or law, the assumption being shared by them both or made by one and acquiesced in by the other. The effect of an estoppel by convention is to preclude a party from denying the assumed facts or law if it would be unjust to allow him to go back on the assumption ...”

A concluded agreement is not necessary. However, to quote the explanation given in Phipson on Evidence (16th Edition) at paragraph 5-27:

“On the other hand, a mere common assumption is insufficient; the party estopped must have said or done something which had the effect of communicating to the other that he held the assumption in question and reinforced the others belief in that assumption.”

Again the question in the present case is not so much what the legal authorities say, as they are not in dispute, but how to apply the facts to them. It will be necessary to look at A and R’s course of dealing, particularly over the years when no disputes or acrimony took place.

The Facts and the Merits

39. Quite often when a case comes before a court for resolution a multiplicity of issues arise for resolution. Then during a review of the facts one or more assumes greater significance than the others. Thus it is with A’s submissions to the effect that there was an arrangement/course of dealing between A and R in which payment would be deferred and that R treated the assets and liabilities of the different entities as if they were a single fund (see especially paragraph 14 above). To summarize once more, in the words of A’s Advocate, it was a “cash-flow constrained structure” and the arrangements were very flexible, with payments being made when there were funds. Interest was only charged from 8th July, 2015. Again as A’s Advocate put it, there were “huge assets in the structure” and no reward without risk, so R is now estopped from claiming everything was payable as soon as it was levied. This convention, it was suggested, arose over the years. The structures were never insolvent and A submits not so now; they had liquidity issues long accepted by R. The cash-flow problems in 2015, A submits, were no different in kind from earlier years, when R was content to proceed. As paragraph 38 of A’s skeleton alleges, “the only change in 2015 was the Respondents’ sudden volte-face, which occurred without any adequate warning”.

40. In support of these contentions, A relies upon NJC’s second affidavit, especially paragraphs 11-30. It is not necessary to précis all these observations, but of note is paragraph 13, referring to an e-mail of 23rd March 2012 from an employee of R saying that MLT “gave me clear instructions that he has agreed with you that [fees overdue from December] would be taken from completion monies [for a property which has just sold]”. In paragraph 14 there is reference to a chain of e-mails for monies due to a bank. Putting the matter shortly, KEB wanted to use funds to pay the bank rather than meet all of R’s invoices. MLT responded – “you have always kept to your word and of course we can wait for a couple of weeks for the next tranche”. Then we jump to paragraph 16 where NJC sets out another example of R’s forbearance. On 1st March 2013, TT was willing to defer a balance of £50,000, which is hardly an insubstantial amount, pending the receipt of further funds. Finally, at paragraph 19,

it is apparent that R is negotiating a part payment of £25,000 out of a £60,000 amount. It is also worthy of note that MLT has not, according to this affidavit, provided the whole picture, despite the “inordinate” length of his affidavit and exhibits; see paragraph 11 of NJC’s second affidavit. Notwithstanding R’s submissions, the documents speak for themselves and need no further exegesis.

41. A table was prepared on behalf of A showing all invoices rendered by R and payments credited, this is annexed to NJC3 in volume 2 and is a good effort, although not perfect due to the swiftness of preparation. In paragraph 9 of MLT2 in volume 3, it is not understood why references to the entity Entertainment Group Limited are found on page 12 of the Table. However, A observes (see paragraph 37 of the skeleton) that payments are depicted in respect of sums due from A and it is not explained why this has been done. Money was taken, A’s Advocate submitted, from this company, to discharge A’s debts. There are other examples put forward in support of the general submission that R treated assets and liabilities as if they related to a single fund. These are also set out in NJC3 9, a, b and c. If taken in isolation, these are hardly significant against the complex backdrop of transactions between R and A. If these were the sole basis of A’s claim then it would not amount to a great deal, but it is the whole picture which needs to be assessed.
42. Although jumping ahead in the submissions, it is appropriate to consider the other very substantial ground of contention put up on behalf of A, namely the “cross-claim”. A submits that these proceedings by Lam D in England should also be taken into account in relation to the statutory demands against Lam I and Elite. This is because A suggests R is estopped, for the reasons set out in paragraph 39 above from denying that the entities should not be treated as a single fund. A also submits that their English claim, in effect, amounts also to a set-off. The English proceedings are underway, a court fee of £10,000 has been paid, and as stated, leading and junior counsel have set out the claim, which was produced at the hearing. It amounts to 48 paragraphs and is based upon breaches of duty of skill and care and/or negligence, all in relation to the Grosvenor matter described at paragraph 21 above. On the papers this is a substantial and detailed claim; it is not when looked at insubstantial or frivolous. That does not mean that it will succeed, it is not the function of this hearing to adjudicate further than what has been said.
43. A further argued that TT demanded the wrong amounts and failed to explain their basis (demands (1), (2) and (3), and see paragraphs 15 and 16 above). Without intending any disrespect to either counsel, who dealt with this in oral submissions in some detail, this amounts to special pleading. Again the whole history of this relationship needs to be considered. There was no dispute for many years and invoices were in the end paid. KEB only raised objection after the decision to charge interest suddenly raised the temperature to boiling-point. TT’s terms and conditions were known to KEB and TT had provided services for seven years or so without objection. In MLT2 in volume 2, at pages 59-62, there is a Letter of Indemnity and Comfort signed by KEB, dated 14th May 2008. Paragraph 5, for example, speaks for itself: the fee scales are understood and the statements sent out by TT ditto. There is no real substance in this submission and it fails to impress.
44. A next referred to an alleged failure to account for payments received (this applies to all the demands). It is summarized in A’s skeleton at paragraphs 44 and 45 (and see paragraph 17 above). Whilst not so fundamental as the two (as it emerged in argument) main planks of A’s case, namely the course of dealing and the cross-claim, these facts require evaluation. Although R’s oral submissions were impressively constructed and wide-ranging, no satisfactory response emerged in the course of argument on this. KEB, the ultimate beneficial owner was not told, for example, that Elite had been struck-off, a process which takes several weeks. Similarly, the position set out in NJC 3, paragraph 12b, in volume 2, indicates R was

prioritising its fees above other considerations, particularly the £250,000 loan from RBC, which was not dealt with adequately by R in all the circumstances.

45. Demands (4) and (5) are based on advice given to TCS by Collas Crill. They are based, R submits, on the indemnity provided by Lam D and Lam I, and set out in paragraph 27 of R's skeleton. Paragraphs 26 and 27 above are relevant, as they set out R's position, which is summarized in R's paragraph 29 to the effect that where the solvency of a company is in doubt the duty of directors is altered from the interests of the members to the interests of the creditors. A submits that the advice cannot have been for the benefit of the companies, as they were not and are not insolvent. The work was of no benefit to them. Applications for Administration Orders were dismissed by this Court on 1st April, 2016. It is an abuse to seek to recover any of the costs for this (bad) advice by the back-door. A uses a somewhat involved analogy about turkeys and Christmas in paragraph 46.3 of the skeleton, but adds seeking to put the companies into administration was the worst possible step; getting them to pay "adds insult to injury". A's submissions are set out at paragraph 18 above and need not be repeated further. It will, however, be recalled that there is nothing in the indemnity to justify the "joint and several" liability in the statutory demands. That proposition is correct. The problem that R faces in respect of the part of the case is a stark one. There can be no satisfactory basis for claiming in respect of a failed application, for entities which turned out not to be insolvent.
46. Following on from this the material before the Court shows the companies are cash-flow and balance sheet solvent (see paragraph 19 above). Paragraph 10 of NJC4 in volume 2 also covers this. The large HMRC amount is an assessment, but it is correct to point out that on the facts, Lam D was not tax-resident in the UK. This will have to be resolved in England in the normal way.
47. This leads on to the question of R's motivation throughout these complex proceedings. There is the rather painful contradiction in the documents. First of all (as mentioned in paragraph 20 above), MLT told Mr Barden on 17th August 2015 – "Absolutely not a fee dispute" (PB1 at page 29 in volume 1). Then on 8th September, 2015, not so long after, Collas Crill wrote to Mr Barden, (NJC3, page 26, in volume 2) – "It is not disputed that there is a fee dispute between (TT and TCS) and your client". This, to put it mildly, ambiguous approach does not resound to R's credit. Then the attendance note by Mr Mealing dated 27th August 2015 needs to be considered (MLT1, page 543 in volume 3). This shows at 4 that the deadline for repayment of the RBC loan was being used "as leverage to attempt to secure capital, via (KEB), to enable the company to meet its financial obligation as it falls due"; and at 7 Mr Mealing "reiterated that the deadline of tomorrow was a useful tool to attempt to raise capital through (KEB)". The next day the failed applications for Administration Orders were made. These facts, again, stand out for themselves and demonstrate how R viewed the concluding period of its relationship with A. Various other points were raised by counsel mainly in oral submissions, and although they have been considered, it is not necessary to burden this judgment further with their analysis. The bills of costs for the two previous hearings were thrown in by A with some gusto at the end, but not considered here. There will, as R said, need to be taxation and they are not fixed.

Application of Legal Principles to the Facts

48. Whichever way this case is looked at, it comes down to the basic question of whether the procedure deployed by R is appropriate. The Guernsey authority of the Synergy case (supra) at paragraphs 61-62 sets it all out clearly. It adopts the Bayoil case and cites a helpful encapsulation of the underlying principle by Lady Smith in Baker Hughes Ltd v CCG Contracting Intl Ltd 2005 1SC 65:

“[I]f the debt claimed is disputed in good faith and on real and substantial grounds, then the petitioners cannot satisfy the statutory requirement that they are a creditor so as to have title to sue in a petition for winding up, whatever may be their lack of alternative remedy.”

As discussed, there is an argument that R’s course of dealing was such that payments would be deferred and that R also treated the various companies as one fund. That argument and the estoppel point may or may not turn out to be correct, but they are worthy of examination and resolution, not mere froth. One cannot escape the fact that the statutory demand procedure is obviously designed for simpler cases of debt. Indeed, A observed that MLT’s first affidavit and attachments, which come to an elephantine 750 pages, was an “own goal”, showing precisely why the procedure was not appropriate. One then turns to another Guernsey case: Minister of the Public Services Department v Miller and Baird (CI) Limited 2009-10 GLR142 (A’s tab 3a). The court should exercise its discretion (so as not to grant a winding-up application in that case) if “there is a serious and genuine cross-claim, or, as Nourse LJ explained it ... a claim of substance”, (paragraph 9 of decision). For the reasons already given, it appears there is a genuine and weighty cross-claim which may or may not succeed, but which is hardly upon examination trivial or an abuse of process. These points are sufficient to dispose of the case. It has to be made clear again that R’s claim may or may not be valid, but the appropriate way of establishing it is an action to recover the amounts in the Royal Court, not an effort to get in through the back using a summary type of procedure. They are not being deprived of a remedy, but asked to take a different road, passing through a gate that is less narrow.

49. When considering the voluminous documentation put forward, several points emerge with some clarity. They are:
- (i) KEB’s operations were asset heavy but cash constrained. R knew of this and rode in with it for a number of years;
 - (ii) the entities are not, on what is before the court, insolvent; and
 - (iii) R has lost twice, with heavy costs bills, in previous litigation. Administration Orders were refused and a mass of documents were ordered to be disclosed.

There is a tendency in late Victorian and early 20th century judgments in commercial or company law cases for judges to refer to “hard-headed men of business” or “practical men”. In this case and previous litigation, R seems, with great respect, to have acted outside this category and allowed exasperation with KEB to over-ride other considerations. Some sympathy is deserved for such a view, as many of KEB’s communications are frustrating and lack insight. But, that being said, the catalyst for this complex litigation was the decision to charge 1% interest per month in July, 2015. R is now left with the risk of loss flowing from the English litigation over their conduct in the Grosvenor matter. A review of the documents which emerged as this all hotted-up sometimes shows a tone more reminiscent of that displayed in heavily-contested matrimonial disputes than commercial cases.

50. Reference has already been made to the failed Administration application (especially at paragraph 45 above) and to how R’s motivation is viewed (paragraph 47), but the case can be resolved on the more basic principles summarized at paragraph 48. For these reasons, based on English authority - going back at least to 1877 in the Niger Merchants case (supra) and approved in Guernsey, A’s applications to set aside the demands succeed. This is manifestly not a case where the rather summary expedient of statutory demands is appropriate. It is not necessary to deal with the alternative relief sought in the application for restraint.

Costs

51. Counsel are requested to put in brief written submissions on costs within 7 days of the date of issue of the final approved version of this decision. That period can be extended by agreement if necessary without recourse to the Court.

52. Applications granted.

J R Finch
Judge of the Royal Court