



**IN THE SUPREME COURT OF  
THE TURKS AND CAICOS ISLANDS**

**W1/2023**

**IN THE MATTER OF THE LIQUIDATION OF EAST WIND DEVELOPMENT  
COMPANY LTD.**

**AND IN THE MATTER OF THE INSOLVENCY ORDINANCE 2017 AND THE  
INSOLVENCY RULES 2019**

**BETWEEN**

**DUNCANSON & CO. (Beryn Duncanson dba)**

**Petitioner**

**-and-**

**EAST WIND DEVELOPMENT COMPANY LIMITED**

**Respondent**



**IN THE SUPREME COURT OF  
THE TURKS AND CAICOS ISLANDS**

**ACTION CL 125/23**

**IN THE MATTER OF THE LIQUIDATION OF EAST WIND DEVELOPMENT  
COMPANY LTD.**

**AND IN THE MATTER OF THE INSOLVENCY ORDINANCE 2017 AND THE  
INSOLVENCY RULES 2019**

**BETWEEN**

**EAST WIND DEVELOPMENT COMPANY LIMITED**

**PLAINTIFF**

**-and-**

**BERYN DUNCANSON & CO.**

**PRACTISING AS DUNCANSON & CO.**

**RESPONDENT**

**DECISION OF THE COURT**

**Before: The Honourable Justice Chris Selochan**

**Appearances: Mr. Beryn Duncanson for Duncanson and Co.**

**Mr. Conrad Griffiths KC instructed by Mr. Smith  
of Griffiths and Partners for East Wind  
Development Company Limited**

**Ms. Clemar Hippolyte of the Attorney**

**General's Chambers representing the interests of  
the Registrar General**

**Venue: Court Room #1, Supreme Court, Providenciales**

**Handed Down: 14<sup>th</sup> June 2024**

## **What is before the Court**

1. W1/23 is a Winding Up Petition issued by Duncanson & Co. ("D&C").
2. CL 125/23 is an Originating Summons filed by East Wind Development Company Limited ("EWD") to set aside the statutory demand which is one of the grounds in support of the Petition.
3. EWD has applied to strike out the Petition as an abuse of process and for other relief if necessary. EWD have contended that the same principles apply in Action CL 125/23 on EWD's Originating Application to set aside a statutory demand served by the Petitioner for the same debt.
4. On Monday 25<sup>th</sup> September 2023 the Petitioner gave an undertaking not to advertise the Petition.

## **Background**

5. These proceedings commenced by Originating Summons filed on 11<sup>th</sup> October 2022 (CL150-22) wherein the Plaintiff, Duncanson and Co., in summary, is claiming, inter alia, that there was a written contract with the First Defendant, East Wind Development Company Ltd., for legal services to be provided to the First Defendant. According to the Plaintiff, certain sums became due and owing to the Plaintiff under the written contract, culminating in a settlement agreement dated 14<sup>th</sup> June, 2007. The Plaintiff contends that Defendants 2 to 7 acted fraudulently by transferring and selling various parcels of land. The Plaintiff is also asking for, inter alia, full disclosure and accounting by the Defendants. The Plaintiff claims in the alternative that even if there was no concluded contract for legal services between the parties, the Plaintiff would still be entitled to a quantum meruit for all their work produced assessed up until 2004 and 2007, plus interest for the legal services in equity and under the general principles of Restitution due to what it says are the Defendant's delay and acts of fraud.

6. The reliefs sought by the Plaintiff in its Originating Summons are as follows:
- i. An order for accounting by all the Defendants to the Plaintiff.
  - ii. An order for payment of all sums due under the aforesaid settlement agreement of 14<sup>th</sup> June 2007 including all contract @ 2% per month for the avoidance of doubt compounded monthly not only by virtue of the express terms for said interest in the contract, but also by virtue of the following additional considerations where the Defendants have operated in mala fides:- a) their joint and several breaches of contract; b) breach of directors' duties; c) in consequence of both proprietary and promissory estoppel; d) repeated fraudulent misrepresentations; e) conspiracy between all Defendants and 3<sup>rd</sup> Parties unknown; f) failure to act in good faith; g) breach of statutory duties under the Companies Ordinance; and h) the unconscionable conduct of the Directors with regard to the Plaintiff, but with special reference to Director William Dean Reeves by the additional appearance of accessory to 'cheating the public revenue' to further the aforesaid fraud upon the Plaintiff, as evident in the aforesaid Transfer of the 4 lots 40311/27-30 (inclusive), and in respective contemporaneous emails and in those deeds as registered.
  - iii. That a declaration be made for a Charging Order be registered for the benefit of the Plaintiff as against all the 1<sup>st</sup> Defendant's known TCI properties – all those parcels remaining in the name of the 1<sup>st</sup> Defendant within the Phase II parcels at Block 40311, East, Middle Caicos – without prejudice to generality namely- 40311/44, 45, 46, 47,48, 49, 50, 53, 54, 55, 56, 61, 62, 63, 64, 65, 66, 67, 68, 69, 70, 71, 72, 73, 74 & 75, EAST, MIDDLE CAICOS (COMPRISING FORMER 40311/42; WHICH ITSELF FORMER 40311/31 & 32).
  - iv. That all the fraudulent and irregular transfers from out of East Wind Development Company Ltd these past 3 years – all such as are lacking signatures by the Transferees, in clear breach of Land Registry protocol, and/or also where they have closed at a substantial and considerable

undervalue thus cheating the public revenue – be hereby ordered to be set aside and reversed at the Land Registry, without prejudice to generality namely:-

- a) Those hasty transfers out of EWD's name from Phase 1 last year of the following 4 lots – namely 40311/27-30 (inclusive);
  - b) Those transfers out of EWD's name from Phase II the past 3 years of the following 6 lots – 40311/51 & 52; 57 & 58; and 59 & 60.
- v. Such further relief as may be advised and should occur to this Court to be met.

7. The First to Seventh Defendants have also filed an interlocutory summons to strike out the Originating Summons filed by the Plaintiff.
8. However, as a result of the filing and service of the Originating Summons in CL 150-22, the Registrar of Lands imposed a restriction on the disposition of lands of the First Defendant in that action (being the Interested Party in CL 97-22) on 20<sup>th</sup> October 2022 pending the outcome of CL150-22. Prior to doing so, the Registrar of Lands had refused to register cautions in respect of these lands and this decision was the subject of an appeal (Civil Appeal CL 97-22), which was also before me.
9. The Appellant in CL 97 of 2022 (being the Plaintiff in CL 150-22) had applied for cautions over all the Interested Party's properties in Middle Caicos, which was rejected by letter from the Registrar on 16<sup>th</sup> September 2022. As stated in the previous paragraph, this decision was the subject of an appeal (Civil Appeal CL 97-22), which was also before this court. The Appellant had appealed these rejections by separate notices on 26<sup>th</sup> September 2022 and 4<sup>th</sup> October 2022.
10. The matters to be dealt with initially were therefore as follows:
  - i. The Plaintiff's Originating Summons in CL 150-22
  - ii. The strike out summons filed by the First to Seventh Defendants
  - iii. Civil Appeal CL 97/22

11. The restriction referred to above was entered pursuant to *section 132* of the Ordinance, which provides:

*132(1) For the prevention of any fraud or improper dealing or for any other sufficient cause, the Registrar may, either with or without the application of any person interested in the land, lease or charge, after directing such inquiries to be made and notices to be served and hearing such persons as he thinks fit, make an order (hereinafter referred to as a restriction) prohibiting or restricting dealings with any particular land lease or charge.*

*(2) A restriction may be expressed to endure –*

*(a) for a particular period; or*

*(b) until the occurrence of a particular event; or*

*(c) until the making of a further order, and may prohibit or restrict all dealings or only such dealings as do not comply with specified conditions, and the restriction shall be registered in the appropriate register.*

*(3) The Register shall order a restriction to be entered in any case where it appears to him that the power of the proprietor to deal with the land, lease or charge is restricted.'*

12. Pursuant to *section 133(2)* of the Ordinance, once a restriction remains registered, no instrument which is inconsistent with it shall be registered except by order of the court or of the Registrar.

13. Having entered the restriction, the Registrar served a Notice of a Statement of Questions on 12<sup>th</sup> December 2023 making the Interested Party a party to CL AP 97/22. The Statement of Questions contained six questions in relation to the refusal of the Registrar to enter the cautions and one question (Question 7) in respect of the registration of the restriction, being:

**Question 7:** *Whether as a further issue, the Registrar was correct to have ordered and registered a restriction against disposition pending determination of case CL150/22 on*

*his determination that the service of proceedings gives 'sufficient cause' for such restriction on disposition.*

14. The Statement of Questions was filed pursuant to *section 146* of the *Registered Land Ordinance CAP 9:01* ("the Ordinance") which provides:

*Whenever any question arises with regard to the exercise of any power or the performance of any duty conferred or imposed on him by the Ordinance, the Registrar may and shall if required to do so by an aggrieved party state a case for the opinion of the Supreme Court, and thereupon the Supreme Court shall give its opinion thereon, which shall be binding upon the Registrar.*

15. In accordance with *section 146* of the Ordinance, the Registrar, being in doubt about whether he had acted correctly in registering the restriction, therefore sought the opinion of the Supreme Court, as he was entitled to.

16. This Court made the following findings in relation to the entering of the Restrictions in giving an Opinion on 18<sup>th</sup> August 2023:

*I have extracted the following principles from the authorities as they relate to the instant matter:*

- a. There was no charging order at the time of the registration of the restriction and the Plaintiff's claim could not have created a charge over the Interested Party's lands, the claim being primarily a contractual claim which acts in personam and which would not affect the lands of the Interested Party unless and until a charging order is made.*
- b. The Plaintiff's claim at this stage is for an unliquidated debt. Even if the Plaintiff is successful in his action on the issue of liability, the issue of quantum would remain in dispute.*

*It is therefore the considered opinion of this court that the Register erred in registering the restriction.*

*Put another way, and in direct answer to the Registrar's Question 7, the court is of the opinion that the Registrar was incorrect to have ordered and registered a restriction against disposition pending determination of case CL150/22 on his determination that the service of proceedings gives 'sufficient cause' for such restriction on disposition.*

17. In a written decision dated 3<sup>rd</sup> November 2023, the Court gave the following decision in Civil Appeal CL 97-22:

*In light of the authorities, the Court finds that the Registrar correctly rejected the Appellant's application for the registration of a caution over 26 titles registered to the Interested Party in the Land Registry.*

**Decision**

*The appeal is dismissed and the Appellant shall pay the Respondents' and the Interested Party's costs to be taxed in default of agreement.*

**Post decision of 18<sup>th</sup> August 2023**

18. Following the judgment given by this court dated 18<sup>th</sup> August 2023 in which the restrictions were removed, Duncanson and Co. (D&C) issued a Statutory Demand dated 28<sup>th</sup> August 2023 in respect of the same fee which is the subject matter of Action CL 150/22. Duncanson & Co. also issued W1/23, being a Winding Up Petition in respect of East Wind Development Company Limited. East Wind Development Company Limited (EWD) considers this to be an abuse of process. EWD further contends that the subject matter of the Statutory Demand and Petition is a disputed fee claim which dates from 2007 and is therefore barred under the *Limitation of Actions Ordinance 2021*. EWD further argues that this is a tactical maneuver on the part of D&C to register a new caution against EWD's land based on the pending Petition.

19. In other words, EWD contends that D&C is pursuing the same disputed debt in Action CL 150/22 under the Petition and the Statutory Demand.



20. Pursuant to section 167(3) of the *Insolvency Ordinance 2017*, an application to appoint a liquidator is deemed to be dismissed if it is not determined within six (6) months. There was no application to extend time in respect of the reliefs seeking the appointment of a liquidator in W1/23. If same had been filed, it would have been favourably considered, having regard to the fact that the strike out and setting aside applications in W1/23 and CL 125/23 were pending. Section 167(3) provides that the application to extend must be made within the six-month period. Time cannot be extended retrospectively: see sections 167(4) and section 474(1).
21. As a result, and undoubtedly recognizing this, the Petitioner filed a new winding up Petition (W1/24) dated 15<sup>th</sup> March 2024 before time had expired under W1/23. EWD has filed an application to strike out W1/24 on the ground that it amounts to an abuse of the process of the Court.
22. Notwithstanding this, the Court still proceeded to deliver its rulings in the applications in W1/23 and CL 125/23. In respect of W1/23, the Court was of the view that a ruling on the merits of the appointment of a liquidator in W1/23 should still be delivered. In addition, and any event, whilst the time limit for the appointment of a liquidator had lapsed, there was the alternative relief in W1/23 seeking the appointment of an administrator which still required a ruling in respect of whether it constituted an abuse of the process of the Court. The rulings were delivered orally on 14<sup>th</sup> June 2024 and the Court will now provide its detailed reasons for its rulings.

### **The Statutory Demand**

23. The Statutory Demand was served on EWD on 28<sup>th</sup> August 2023 setting out what D&C claimed was EWD's indebtedness with accrued interest at 2% per month under what it described as a Settlement Agreement of 14<sup>th</sup> June 2007 totaling US \$12,241,382.29 due for 16 years as at that date.

### **The Petition for Winding Up**

24. The Petition contained the following grounds:

## 1. The Just and Equitable Ground

- a. The Company is indebted to the Petitioner under a Settlement Agreement mutually signed by the parties 14<sup>th</sup> June 2007 for the payment of then 3-year outstanding legal fees (originally invoiced for \$107,750 on 27<sup>th</sup> August 2004) which by the settlement date of 14<sup>th</sup> June 2007 then had a face value of at least \$290,000, said debt then continuing to accrue contract compound interest expressly provided for at 2% per month, of which debt the Company has for years defrauded the Petitioner from any share of the agreed payments from the sales of the subject properties. By signing the said Settlement Agreement the Company had immediately acknowledged its debt, and the debt immediately thereby by admission became a 'liquidated debt' at law, and the Petitioner is undoubtedly a creditor.
- b. The Company has manifestly succeeded for 19 years in fraudulent strategy in dodging payment of its debt to the Petitioner.
- c. The Company is unable to pay its debts as they fall due.
- d. Irrespective of its failure to satisfy the Statutory Demand, the Company's liabilities purely to the Petitioner now far exceed the total assets known to be left in its name. Over \$12 million in debt and continuing litigation liability for claims in tort etc. vs only approximately \$3 million in land, which the Company is actively rushing to litigate.
- e. IN ANY EVENT were there to be held to be any genuine dispute over the debt, there could be no dispute whatsoever as to the Company's signature to the Settlement Agreement of the 14<sup>th</sup> June 2007, and that therefore in all the circumstances, at common law, equity does not abide two or more parties being locked in perpetuity into any 'Trusts for Sale' scenario. Such that in any event, irrespective of any argument over what might constitute 'a liquidated debt' or a 'genuinely disputed debt', there it is now beyond doubt that the Company signed the Settlement Agreement of 14<sup>th</sup> June 2007, acknowledging a debt for legal services already performed before that date and an express formula to be applied for concluding payment. In all the circumstances it is therefore on this ground alone 'Just and Equitable' that the company should be liquidated.
- f. IN ANY EVENT therefore the Court should appoint a liquidator upon the Just and Equitable ground in accordance with S. 161(2) of the Insolvency Ordinance.

## **Alternative Ground in the Petition**

- a. If for any reason the Court were to doubt the question of what legally defines a 'liquidated debt', and/or what satisfies for 'evidence of insolvency', this Court ought at the very least to appoint an Administrator under s.64(1) of the Insolvency Ordinance, in that if the company "is not yet insolvent it is likely to become insolvent", and in consideration thereof if only due to the abject failure of the Company to make any payment in 15 years, and clear evidence of its continued attempts to hide prior sales, and even now to continue scuttle the corporate ship of most remaining property without any offering to the Petitioner whatsoever in undertakings, nor the slightest attempt to secure or compound to the satisfaction of the creditor Petitioner.

### **2. The Statutory Demand**

- a. Upon the 28<sup>th</sup> August 2023 the Company was served a statutory demand setting out its indebtedness with accrued @ 2% per month under the Settlement Agreement of 14<sup>th</sup> June 2007 totaling US\$12,241,382.29 due for 16 years as at that date.
- b. To the date of the filing of the Petition the Company has failed to either pay, nor to offer, nor to satisfy, not to secure, nor to compound to the satisfaction of the creditor, in any manner whatsoever, as to any portion of the outstanding debt claimed in the aforementioned statutory demand. There are no other assets known to be held by the Company outside of those already identified in Action CL-150/2022.
- c. The Company is therefore legally insolvent.

IN ANY EVENT therefore the Court should appoint a liquidator arising from the failure to satisfy the Statutory Demand within 21 days (and/or within any extension calculated therefrom) ground in accordance with section 161(1) of the Insolvency Ordinance

## **Summary of D&C's Arguments**

25. D&C has argued as follows:

- a. There is no abuse of process and the Petitioner as creditor was entitled to file bankruptcy proceedings even after filing a lawsuit for the same debt in

contract. The same factual matrix can support a lawsuit having multiple causes of action.

- b. There is no genuinely disputed debt and the fact that the debtor claims that he disputes the debt is neither here nor there. Any conduct or act acknowledging the debt makes it a liquidated sum. There was a settlement agreement signed by Mr. William Dean Reeves on behalf of EWD without any compulsion or duress and the act of Mr. Reeves signing it was an acknowledgment of the debt billed originally three (3) years prior at August and September 2024 as at \$107,750 (for 50% of work estimated then completed at that stage).
- c. In support of his submission that there is no disputed debt, Mr. Duncanson relied on the judgment of Justice Indra Charles in *Metalloyd Ltd v Burwill Resources Ltd [BVIHCV 2006/0083]* (which he contends entailed parallel considerations to this matter) and in particular paragraphs 61 to 65:

*“61. Burwill’s assertion that the third limb of the Settlement Agreement was ‘no more than a gesture of goodwill...’ is unattractive. The covenant was contained in the Settlement Agreement: it is extremely unlikely that provisions merely carrying the force of a gesture of goodwill would be contained in what was plainly a negotiated, contractual settlement.*

*62. Mr. Evans in his admirably succinct submission submitted that Metalloyd’s account is cogent, accords with commercial reality and significantly, it has the marked advantage of being provided by two deponents who actually negotiated and executed the Settlement agreement on its behalf. On the contrary, Mr. Chiu, for Burwill was not a party at those negotiations. Certainly the source of his information concerning the effect of the third limb of the Settlement Agreement is not entirely clear.*

*63. Metalloyd’s account is that the Settlement Agreement was negotiated in such a manner so as to enable it to recover a definite sum. This, according to Mr. Evans, makes good commercial sense. The reference to new business merely recorded how it was intended Burwill would fund the making of the payment. For all intents and purposes, it was a concession to Burwill to allow delayed payment to be made.*

*64. In short, there is no substance in Burwill’s assertions which amount to no more than inferences and are contrary to the direct evidence of the true position.*

*65. I find that there is no disputed debt on any ground; be it substantial or frivolous. The reality is that Burwill owes the sum of US\$94,578.39 to Metalloyd.”*

- d. No abuse of process exists purely because of multiple proceedings and that multiple proceedings is a common feature in complex commercial litigation.

- e. The defence of laches cannot oust even the purely equitable remedies and causes of action in his claim since time cannot run against the claimant until he has knowledge of his claim by virtue of the misconduct of the defendant. In any event, the issue of limitation fails as a result of *section 47(1)* of the *Limitation Ordinance* which provides, inter alia:

*For the purpose of this Ordinance, any new claim made in the course of any action shall be deemed to be a separate action and to have been commenced 1(b) in the case of any other new claim, on the same date as the original action... (2) in this section a new claim means... 2(a) the addition or substitution of a new cause of action.*

- f. Even if the Court finds the debt to be genuinely disputed, that is that it is an unliquidated debt, the court should not deem the winding up proceedings to be an abuse of process. Reference is made to the decision of the Cayman Court of Appeal in *In the Matter of Parmalat Capital Finance Limited [2006] CILR 480* where D&C contends that it was held that even where the debt is genuinely disputed, the court would still refuse to dismiss where otherwise the creditor would then be deprived of a remedy as against that company, and the company needs winding up and investigation.
- g. The application for an extension of time to set aside a statutory demand was not made within the 21 days as required under the Insolvency Ordinance. D&C distinguishes between the filing of an application and the making of an application, the latter of which he contends requires you to come to court and actually make the application.
- h. EWD's Originating Summons, Action CL 125/2023, was not served personally on Mr. Duncanson and was served improperly on an office secretary outside of the requisite 21-day period.
- i. Abuse of process can be argued if there was purely a collateral purpose or no intent of the Petitioner to obtain any real relief. Reference was made to *Lonrho v Fayed (No. 5) (1993) 1 W.L.R. 1489* where it was held that if an action is not brought bona fide for the purpose of obtaining relief but for some other ulterior or collateral purpose, it may be struck out as an abuse of process. Mr. Duncanson contends that he is of the genuine belief that EWD is clearly and manifestly insolvent and that it be urgently stopped from trading and dissipating its own inadequate remaining assets by this court quickly appointing a liquidator or at least an administrator in the alternative.
- j. In respect of the arguments that the Petitioner's own invoice of 27<sup>th</sup> August 2004 shows that \$30,000.00 was paid and a that subsequent invoice also showed a new zero balance, Mr. Duncanson contended that this sum was not a full

payment but provided a breakdown of further instalments being \$30,000.00 now as agreed, \$20,000.00 on any demise from Crown of Phase II lands, 3% of full market value of all closings of all sales and transfers in 2<sup>nd</sup> phase and firm entitled to 10% for any independently brokered sale of EWD land.

- k. Shortly after the Court had ruled that the Registrar of Lands was right to refuse the caution application and that the Note in the Land Registers as to a Caution Appeal pending as Action CL-97/2022 ought to be removed, EWD by its lawyers and agents caused what D&C described as 'certain illegal further transactions' to occur. The Land Registry has confirmed that they were only able to register the bankruptcy cautions against nine of twenty-six parcels due to innocent mistake. On 17<sup>th</sup> November 2023, D&C filed a Motion seeking, inter alia, that the court should therefore grant a declaration as hereby void all those transactions submitted to the Land Registry since the date these bankruptcy commenced on 18<sup>th</sup> September 2023 as well as an 'Order rectification' titles back in the name of East Wind Development Company Ltd of those parcels registered by the now 'formally admitted' negligence, inadvertence and/or innocent mistake of the Land Registry. This Motion has not yet been listed for hearing.

### **EWD's Arguments**

26. EWD contends that the fee claim is strenuously denied but that even if there were such a liability, it is for an unliquidated amount which cannot form the basis for the Statutory Demand or the Petition.

27. EWD further contends as follows:

- i. The Statutory Demand and the Petition are in respect of the same disputed fee claim which forms the subject matter of Action CL 150/22 and is therefore an abuse of process.
- ii. The debt is an unliquidated debt and the claim for fees could not have been determined or ascertain since 2007 because all sales have not taken place and it would be impossible to determine a percentage of the final sale price until a sale was concluded. In addition, there has never been an invoice or demand for such payment as a necessary predicate to action upon the invoice or the trigger for alleged interest.
- iii. The judgment was delivered on 18<sup>th</sup> August 2023 and the Statutory Demand was issued on 28<sup>th</sup> August 2023.

- iv. Because the subject matter of the Statutory Demand and the Petition is a disputed fee claim which dates from 2007 it is statute barred under the *Limitation of Actions Ordinance 2021*, particularly since it does not form the basis of an existing action.
- v. This is a tactical maneuver on the part of D&C to register a new caution against EWD's land based on the pending position. In this regard, reference is made to section 127(1) of the *Registered Land Ordinance CAP 9:01* which provides:
- “Lodging of cautions***  
 127(1) Any person who –  
 (a) *claims any unregistrable interest whatsoever, in land or a lease or a charge; or*  
 (b) *is entitled to a licence; or*  
 (c) *has presented a bankruptcy petition against the proprietor of any registered land, lease or charge;*
- may lodge a caution with the Registrar forbidding the registration of dispositions of the land, lease or charge concerned and the making of entries affecting same.”*
- vi. The Statutory Demand should have been served twenty-one (21) clear days before the Petition in accordance with *section 155(3)(d)* of the *Insolvency Ordinance* and it was not so served.
- vii. The Statutory Demand was made the subject of an Originating Summons (as amended) from EWD to set aside the Statutory Demand as an abuse of process. This was filed under Action CL 125/23 and sent to the Court for filing and copied to D&C on Thursday 14<sup>th</sup> September 2023. It was then issued and served within 21 days service of the Statutory Demand.
- viii. In response to this, D&C then issued the Petition which was filed and served on Monday 18<sup>th</sup> September 2023. EWD contend that this is not 21 clear days and is a further abuse of process in that the time period is only 20 days after service of the Statutory Demand and so the part of the Petition which seeks to rely on the Statutory Demand is plainly defective. In this regard, EWD rely on the following extract from the judgment of Megarry J in *Re Lympne Investments Ltd [1972] 2 All ER 385* at 387 e-f:
- “The general rule in the computation of periods of time is that unless there is sufficient indication to the contrary, fractions of a day should be ignored, at all events when the period is expressed in days or longer units and not in hours or shorter units, **and that the day on which the initial event occurs is to be excluded...**”* [emphasis added]

- ix. The request for an Administrator is legally and fatally flawed.

## ANALYSIS OF THE COURT

### General learning on abuse of process

28. The Court has an inherent power to prevent misuse of its procedure. In *Hunter v Chief Constable of the West Midlands Police*<sup>1</sup>, Lord Diplock said that the circumstances under which abuse of process can arise are very varied and should not be limited to fixed categories, and that where there is such an abuse, the court has a duty, and not a discretion, to prevent it:

*“My Lords, this is a case about abuse of process of the High Court. It concerns the inherent power which any court of justice must possess to prevent misuse of its procedure in a way which, although not inconsistent with the literal application of its procedural rules, would nevertheless be manifestly unfair to a party to litigation before it, or would otherwise bring the administration of justice into disrepute among right-thinking people. The circumstances in which abuse of process can arise are very varied: those which give rise to the instant appeal must surely be unique. It would, in my view, be most unwise if this House were to use this occasion to say anything that might be taken as limiting to fixed categories the kinds of circumstances in which the court has a duty (I disavow the word discretion) to exercise this salutary power.” (Emphasis mine).*

### Is there a genuinely disputed unliquidated debt?

29. A central issue which the Court has to address its mind to is whether the debt referred to in the statutory demand and the Winding Up petition is a liquidated

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<sup>1</sup> [1982] AC 529 at 536.



debt. In addition, the Court has to determine whether it is a genuinely disputed debt.

30. This Court had already ruled on the issue of whether it is a liquidated debt in its judgment of 17<sup>th</sup> August 2023 when it had come to the following conclusion:

*“The Plaintiff’s claim at this stage is for an unliquidated debt. Even if the Plaintiff is successful in his action on the issue of liability, the issue of quantum would remain in dispute.”*

30. In CL AP 14 of 2023, the learned Justice of Appeal Adderley had said the following at paragraphs 27 and 28 in respect of my ruling:

*[27] However, the judge by his judgment dated 17th day of August, 2023 after hearing all the parties found at paragraph 54 of his judgment that:*

*a. The Plaintiff has failed to establish any legal or equitable interest in any of the Interested party’s properties so as to justify the registering of the restriction.*

*b. There was no charging order at the time of the registration of the restriction and the Plaintiff’s claim could not have created a charge over the Interested Party’s lands, the claim being primarily a contractual claim which acts in personam and which would not affect the lands of the Interested Party unless and until a charging order is made.*

***c. The Plaintiff’s claim at this stage is for an unliquidated debt. Even if the Plaintiff is successful in his action on the issue of liability, the issue of quantum would remain in dispute.***

***[28] We would only question paragraph c. of that conclusion because in the settlement contract there appears to be a formula to make the quantum of damages certain.***

31. At the hearing of this matter, Mr. Duncanson had submitted that this was a final finding of the Court of Appeal, by which I was bound.

32. During oral submissions, I questioned both counsel for EWD, Mr. Griffiths KC, (who represented his client at the appeal) and Ms. Clemar Hippolite (who appeared for the Attorney General and the Registrar of Lands at the appeal) on this issue. Both expressed the view that this was not a final finding of the Court of Appeal, but rather an obiter statement, and that I was not bound by it. In other words, there has been no

finding by the Court of Appeal in respect of whether the Plaintiff's claim is for a liquidated debt.

33. I have re-read paragraph 28 of the judgment and find myself in agreement with Mr. Griffiths KC and Ms. Hippolite that there was no final finding by the Court of Appeal that the claim was for a liquidated debt. It seems to me that this was an obiter statement made by way of a preliminary observation of what appeared to be a formula to make the quantum of damages certain, but that the issue would be more fully considered if the need arose. If I am wrong in my interpretation, I stand to be corrected and mean no disrespect to the learned Justice of Appeal.

34. As such, I maintain my previous finding that the claim was for an unliquidated debt. The Court also notes that the initial claim is based on a written contract for services and that one of the reliefs sought is an assessment of damages.

35. *Section 157 of the Insolvency Ordinance* provides that the court shall set aside a statutory demand if it is satisfied that there is a substantial dispute as to whether the debt is owing or due.

36. In *Re Laceward Ltd* [1981] 1 All ER 254, Slade J said, inter alia, at page 256e:

*"It is the well established practice of this court to refuse to allow petitions for the winding up of companies brought at the suit of alleged creditors whose debts are disputed bona fide on substantial grounds. It has been said in several reported cases that the procedure of a winding up petition is not an appropriate course by which to attempt to resolve such a dispute..."*

37. The issue which then arises is whether there is a substantial dispute as to whether the debt is owing. In *Re a Company (No 0010656 of 1990)* [1991] BCLC 464, Harman J (at p 466) outlined the test for substantiality as follows:

*"It is clear that a mere honest belief that payment is not due is not sufficient. There has to be a substantial ground for disputing liability to justify non-payment."*

38. The alleged debt in this matter is the subject of very contentious litigation in Action CL 150/22 that involves, inter alia, the effect of a purported Settlement Agreement. It is clear from the pleadings in CL 150/22 that EWD is disputing that there is a debt owed as well as how the purported Settlement Agreement should be construed. I have

considered D&C's arguments in respect of the decision in *Metalloyd Ltd v Burwill Resources Ltd* [BVIHCV 2006/0083] but do not form the view that the situations are parallel.

39. The Court therefore considers that the debt in this matter is disputed bona fide on substantial grounds.

40. In addition to what has already been said, it should also be noted that the petition procedure is generally not suitable for determining a debt claim by a petitioner. In *Re Lympne Investments Ltd* [1972] 1 WLR 523, Megarry J said, inter alia, at page 527:

*"The effects on a company of the presentation of a winding-up petition against it are such that it would be wrong to allow the machinery designed for such petitions to be used as a means of resolving disputes which ought to be settled in ordinary litigation."*

#### **Findings on the Statutory Demand**

41. The Court therefore makes the following findings in respect of the Statutory Demand:

- i. The Statutory Demand is in respect of the same fee claim which forms the subject matter of Action CL 150/22, which has yet to be determined. The fee claim in CL 150/22 is clearly disputed.
- ii. The Statutory Demand was issued on 28<sup>th</sup> August 2023, days after the judgment removing the restrictions was delivered on 18<sup>th</sup> August 2023.
- iii. It is clear to the Court that the Statutory Demand represents an attempt by D&C to litigate a matter, being a disputed fee claim, which is already the subject of Action CL 150/22.
- iv. The disputed fee claim which is the subject matter of the Statutory Demand dates from 2007 and so is statute barred under the Limitation of Actions Ordinance 2021.
- v. In all of the circumstances, the Statutory Demand is an abuse of the process of this Court and should be struck out.
- vi. In addition, the statutory demand is in respect of an unliquidated debt. There is a substantial dispute as to whether the debt is owing. Pursuant to section 157(1) of the Insolvency Ordinance, it should be set aside.

## **Findings on the Winding Up Petition**

42. The Winding Up Petition contains the following grounds:

- i. The 'Just and Equitable' and Statutory Demand Grounds
- ii. An alternative remedy which seeks the appointment of an Administrator section 64(1) of the Insolvency Ordinance.

### **The 'Just and Equitable' and Statutory Demand Grounds**

43. These ground covered the following:

- a. The Company is indebted to the Petitioner under a Settlement Agreement mutually signed by the parties 14<sup>th</sup> June 2007 for the payment of then 3-year outstanding legal fees (originally invoiced for \$107,750 on 27<sup>th</sup> August 2004) which by the settlement date of 14<sup>th</sup> June 2007 then had a face value of at least \$290,000, said debt then continuing to accrue contract compound interest expressly provided for at 2% per month, of which debt the Company has for years defrauded the Petitioner from any share of the agreed payments from the sales of the subject properties. By signing the said Settlement Agreement the Company had immediately acknowledged its debt, and the debt immediately thereby by admission became a 'liquidated debt' at law, and the Petitioner is undoubtedly a creditor.
- b. The Company has manifestly succeeded for 19 years in fraudulent strategy in dodging payment of its debt to the Petitioner.
- c. The Company is unable to pay its debts as they fall due.
- d. Irrespective of its failure to satisfy the Statutory Demand, the Company's liabilities purely to the Petitioner now far exceed the total assets known to be left in its name. Over \$12 million in debt and continuing litigation liability for claims in tort etc. vs only approximately \$3 million in land, which the Company is actively rushing to litigate.
- e. IN ANY EVENT were there to be held to be any genuine dispute over the debt, there could be no dispute whatsoever as to the Company's signature to the Settlement Agreement of the 14<sup>th</sup> June 2007, and that therefore in all the circumstances, at common law, equity does not abide two or more parties being locked in perpetuity into any 'Trusts for Sale' scenario. Such that in any event, irrespective of any argument over what might constitute 'a liquidated debt' or a 'genuinely disputed debt', there it is now beyond doubt that the Company signed the Settlement Agreement of 14<sup>th</sup> June 2007, acknowledging a debt for legal services

already performed before that date and an express formula to be applied for concluding payment. In all the circumstances it is therefore on this ground alone 'Just and Equitable' that the company should be liquidated.

- f. IN ANY EVENT therefore the Court should appoint a liquidator upon the Just and Equitable ground in accordance with S. 161(2) of the Insolvency Ordinance.

44. These grounds are clearly hinged on the Settlement Agreement as well as the Statutory Demand.

45. In respect of the Settlement Agreement, this is a matter which is the subject of hotly contested litigation and relates to the fee claim which forms the subject matter of Action CL 150/22, which has yet to be determined. The fee claim in CL 150/22 is clearly disputed.

46. The Court has already made findings in respect of the Statutory Demand.

47. The Court therefore makes the following observations and findings on the 'Just and Equitable' and Statutory Demand Grounds in the Winding Up Petition:

- a. The Court's Dismissal of the Statutory Demand means that the Petition's grounds in this regard cannot stand.
- b. These grounds in the Petition deals with matters which are already the subject of Action CL 150/22.
- c. The disputed fee claim which is the subject matter of the Statutory Demand dates from 2007 and so is statute barred under the *Limitation of Actions Ordinance 2021*.
- d. As such, these two grounds of the Petition constitute an abuse of the process of this Court and should be struck out.
- e. In addition, the Petition was filed only 20 days after the service of the Statutory Demand. To this extent, the reliefs claimed in the Petition in respect of the Statutory Demand cannot be claimed.

48. I should note that the Court has also come to the following decisions in respect of D&C's other submissions:

- i. *Section 47 of the Limitation of Certain Actions Ordinance* refers to a new claim in an existing action. The Statutory Demand was not made in Action Cl 150/22 so this provision does not assist D&C.

- ii. There is no requirement for the serving of an application to set aside a statutory demand within 21 days. In addition, there is no requirement for personal service. (See Order 81 Rule 3 and Order 81 Rule 8).

### **The appointment of the Administrator**

49. What of the alternative remedy, which seeks to have an Administrator appointed pursuant to *section 64(1)* of the *Insolvency Ordinance*?

50. *Section 64(1)* of the *Insolvency Ordinance* CAP 16.18 provides as follows:

*An application to the Court for an administration order in relation to a company may be made by one or more of the following-*

- (a) the company;*
- (b) the directors of the company;*
- (c) a creditor of the company, including the holder of a qualifying floating charge;*
- (d) the supervisor of a company arrangement in respect of the company.*
- (e) The Commission, if the Company –*
  - (i) is or at any time has been a licensee; or*
  - (ii) is carrying on, or at any time has carried on, unauthorized financial services business; or*
  - (iii) if the company is in liquidation, the liquidator.*

51. The application for the appointment of an administrator makes reference to the “abject failure of the Company to make any payments in 15 years” as well as to the Petitioner as “the creditor Petitioner”, thereby alluding to the relief sought in the principal action. It is clear that the application is being done under *section 64(1)(c)* of the *Insolvency Ordinance*.

52. The Court is of the view that the application to appoint an Administrator is of a different nature from the claim in the substantive action, particularly since the relevant statutory provision requires the Court to consider whether the company is likely to become insolvent if it is not yet insolvent. Unlike the appointment of a liquidator, the appointment of an administrator does not involve the winding up of a company but, rather, is aimed at assisting a company to escape from insolvency. In addition, the company is not possibly prejudiced in the same way as the application for the appointment of a liquidator in that there are no advertising requirements.

53. The issue of the appointment of an administrator therefore merits separate consideration and I am of the view that to hold that it amounts to an abuse of process would involve widening the scope of abuse of process to an unnecessarily large degree. In addition, this relief is not dependent on the validity of the Statutory Demand.
54. The Court also cannot turn a blind eye to the alleged dissipation of assets by EWD and whilst it cannot grant the reliefs sought in the Motion filed on 17<sup>th</sup> November 2023 for the reasons outlined below, this may be an issue that can be relevant to the appointment of an Administrator. For these reasons, the Court is of the view that the Application for the appointment of an Administrator should not be dismissed at this stage.
55. This is not to say that the application for the appointment of an administrator necessarily stands on strong grounds. In its points in Response, EWD had argued that the request for an administrator was 'legally and fatally flawed'. However, this was not elaborated on and may perhaps be the subject of separate arguments presently. The Court has to draw a line between what amounts to an abuse of process and what does not. The fact that an action may be 'legally and fatally flawed' on its merits does not necessarily mean that it amounts to an abuse of process. The danger in not drawing this line is that it will open the door for litigants to make applications to strike out proceedings on the grounds of abuse of process when in fact the proper objection should be taken at the substantive hearing of the matter.
56. Following the delivery of my oral decision in this matter, Counsel for EWD, Mr. Griffiths KC, had written to the Registrar of the Supreme Court by letter dated 1<sup>st</sup> July 2024 (and copied to Duncanson & Co.) with a request that the contents of the letter be brought to my attention. In his letter, Mr. Griffiths KC urged that the Court revisit its ruling not to dismiss the application for the appointment of an Administration on the basis that, inter alia, the Insolvency Ordinance 2017 only refers to 'creditor' and does not include 'contingent' or 'prospective creditors'. I was quite surprised by this letter since shortly after the delivery of my oral judgment, Mr. Griffiths KC had raised similar protests and I had, at the time, made it clear that the Court was maintaining its decision and had even gone on to give further directions (as outlined below). With the greatest of respect to Mr. Griffiths KC, EWD had the opportunity to raise this issue in its submissions and failed to do so and it would be manifestly unfair to D&C for the Court to at this stage consider this

point without giving D&C an opportunity to respond. In any event, the Court is of the view that the issue of whether D&C falls within the meaning of 'creditor' for the purpose of the Insolvency Ordinance is one that can be properly raised and determined at the hearing of the application for the appointment of an administrator (a date for which has already been set). As such, at the hearing of the appointment of an administrator, the onus will be on D&C to establish, inter alia, that it falls within the definition of 'creditor' for the purpose of the appointment of an administrator.

57. In the circumstances, the Court is of the view that the Alternative Relief in the Petition seeking the appointment of an Administrator under *section 64(1)* of the *Insolvency Ordinance* should not be dismissed.
58. The effect of this is that what remains under W1/23 is an Application for the appointment of an Administrator under *section 64(1)* of the *Insolvency Ordinance*. Such an application is not a winding up action (although the practice has been to include this as part of Winding Up Petitions).
59. Upon the delivery of its decision on 14<sup>th</sup> June 2024, counsel for EWD asked the Court to direct that the remaining relief sought under W1/23 be treated as an application to appoint an administrator and not a winding up petition. After hearing submissions from both parties on this point, the Court was so persuaded.
60. The parties also addressed the Court on the issue of costs. EWD argued that in respect of the statutory demand, costs should be awarded on an indemnity basis. This was opposed by D&C. After entertaining arguments, the Court declined to order costs in favour of EWD on the statutory demand on an indemnity basis.
61. The Court reserved the issue of costs on the Winding Up Petition for further consideration after hearing arguments. The Court has since further considered the issue of costs on the Winding Up Petition, and has come to the conclusion that the Petitioner should pay two thirds of the Respondent's costs to be assessed in default of agreement.
62. By consent, leave was also granted to both parties to appeal the rulings of the Court.
63. The parties also requested a hearing date for the substantive action, being CL150/22, prior to the Court vacation (which commences in August 2024). However, due to its schedule, the Court was unable to facilitate this request. As such, upon the joint request of the parties, the Court granted liberty to the parties



to apply as to the listing of CL 150/2022 before another judge in order to attempt to get an earlier hearing date.

64. Finally, I wish to address Mr. Duncanson's submission that the Court should grant a declaration as hereby void all those transactions submitted to the Land Registry since the date these bankruptcy commenced on 18<sup>th</sup> September 2023 as well as an 'Order rectification' titles back in the name of East Wind Development Company Ltd of those parcels registered by the now 'formally admitted' negligence, inadvertence and/or innocent mistake of the Land Registry. The Court cannot grant such reliefs unless all the parties affected by same are properly served with the relevant proceedings (being D&C's Application dated 17<sup>th</sup> November 2023) and have been afforded the opportunity to make representations before the Court. Thus far, Mr. Duncanson has provided no evidence that affected parties have been served with his application seeking these reliefs and, indeed, this application has never even been properly listed before the Court for hearing.

#### **ORDERS OF THE COURT:**

1. **In respect of the application in CL 125/23 to strike out the Statutory Demand:**
  - a. The Statutory Demand is dismissed as an abuse of the process of this Court and as being in contravention of *section 157* of the *Insolvency Ordinance*.
  - b. The Defendant shall pay the Plaintiff the costs of this application to be assessed in default of agreement.
  
2. **In respect of the application to strike out W1/23:**
  - a. The reliefs in W1/23 (The Winding Up Petition) under the 'Just and Equitable' ground and the 'Statutory Demand' ground are dismissed as an abuse of the process of this Court.
  - b. The remaining relief sought under W1/23 being the relief seeking the alternative remedy of the appointment of an Administrator under *section 64(1)* of the *Insolvency Ordinance* is to be treated as an application to appoint an administrator and not as part of a winding up petition.
  - c. The Petitioner shall pay two thirds of the Respondent's costs on the Winding Up Petition to be assessed in default of agreement.
  
3. Leave is granted to both parties to appeal the rulings of the Court.

## **FURTHER DIRECTIONS**

The following further directions were given:

### **W1/2023: Application for the appointment of the Administrator**

1. EWD to file its affidavit evidence in response to the narrative affidavit which was filed in support of the application on or before 3<sup>rd</sup> July 2024.
2. D&C to file its affidavit in reply to new issues only on or before 17<sup>th</sup> July 2024.
3. Parties to file and exchange submissions on or before 23<sup>rd</sup> July 2024.

### **Application to strike out W1/2024:**

1. EWD to file any amended application and evidence by 3<sup>rd</sup> July 2024.
2. D&C to file evidence in response by 17<sup>th</sup> July 2024.
3. EWD to file and evidence in response on or before 22<sup>nd</sup> Monday 2024.
4. Parties to file and exchange submissions on or before 23<sup>rd</sup> July 2024.

### **CL 150/22**

Upon the joint request of the attorneys for the parties:

1. Liberty to the parties to apply as to the listing of CL 150/2022.

**The applications in W1/2023 and W1/2024 will be heard on 25<sup>th</sup> July 2024 at 1:00 p.m. and to continue (if necessary) on 26<sup>th</sup> July 2024 at 9:30 a.m.**

**The Honourable Justice Chris Selochan**

**Judge of the Supreme Court**

