



**IN THE GRAND COURT OF THE CAYMAN ISLANDS
FINANCIAL SERVICES DIVISION**

FSD CAUSE NO. 129 OF 2024 (IKJ)

**IN THE MATTER OF THE COMPANIES ACT (2023 REVISION)
AND IN THE MATTER OF FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED**

BETWEEN:

CREDIT SUISSE LONDON NOMINEES LTD

Petitioner

-and-

FLOREAT PRINCIPAL INVESTMENT MANAGEMENT LIMITED

Respondent

AND IN THE MATTER OF LV II INVESTMENT MANAGEMENT LIMITED

FSD CAUSE NO. 130 OF 2024 (IKJ)

BETWEEN:

CREDIT SUISSE LONDON NOMINEES LTD

Petitioner

-and-

*240808- Credit Suisse London Nominees Ltd -v- Floreat Principal Investment Management Limited – FSD 129,
FSD 130 & FSD 131 of 2024 (IKJ) Reasons for Decision*

LV II INVESTMENT MANAGEMENT LIMITED

Respondent

AND IN THE MATTER OF FLOREAT INVESTMENT MANAGEMENT LIMITED

FSD CAUSE 131 OF 2024 (IKJ)

BETWEEN:

CREDIT SUISSE LONDON NOMINEES LTD

Petitioner

-and-

FLOREAT INVESTMENT MANAGEMENT LIMITED

Respondent

IN COURT

Before: The Hon. Justice Kawaley

Appearances:

Mr James Collins KC of Counsel with Mr David Lee, Mr David Lewis-Hall and Mr Zuhair Farouki of Appleby (Cayman) Limited for the Petitioner

Mr Tom Richards KC of Counsel with Mr Alistair Abbott and Mr Alan Quigley of Forbes Hare for the Respondents

Mr Jason Mbakwe of Carey Olsen for the Joint Official Liquidators of Principal Investing Fund I Limited (In Official Liquidation) and Long View II Limited (In Official Liquidation) as supporting creditor

Heard: 19 July 2024

Date of decision: 19 July 2024

**Draft Reasons
circulated:** 30 July 2024

Reasons delivered: 8 August 2024

Creditors winding-up petitions-respondents' application to adjourn petitions on the grounds of a cross-claim against the equitable owner of the petitioners' shares-governing principles-relevance of pending application for leave to appeal against refusal of applications to stay enforcement of the costs orders upon which the petitions were based-Companies Act (2023 Revision), section 95 (1)

REASONS FOR DECISION

Background

1. While litigation law is generally celebrated for the infinite variety of issues that different cases raise, the sphere of contested creditors' winding-up petitions in this respect flatters only to deceive. The legal principles governing when a properly presented creditor's petition should be dismissed, stayed or adjourned have been settled, in England and Wales at least, for nearly 40 years. And while the commercial backdrop may vary from case to case, the legal and commercial factors which call for evaluation are almost always essentially the same.
2. Once a petitioner has established its right to present a petition against a respondent company which has failed to pay an undisputed debt, the scales of justice tip clearly in favour of granting a winding-up order. Why this is so was crisply explained in a judicial statement upon which the Petitioner aptly relied. In *Re Evergreen Holdings Limited*, FSD 349 of 2021 (MRHJ), Judgment dated 11 Jan 2022 (unreported)) Ramsay-Hale J (as she then was) opined as follows:

"55. It is well-settled that if a creditor with standing to make an application wants to have the company wound up, and if the Court is satisfied that the company is unable to pay its debts, a winding up order will follow, unless there are some special reasons why it should not. In Re Lummus Agricultural Services Ltd. [2001] 1 BCLC 137 at 141 which was cited by the learned Chief Justice in Sun Cheong, the Court said: 'It is sometimes said that in such a case, a petitioning creditor is entitled to a winding-up order 'ex debito justitiae'. I therefore start with the assumption that such an order should be made in this case, and the burden of argument rests on [the respondent company] to show me why it should not'."

3. In the present case not only was the Petitioner's standing and cashflow insolvency on the part of the Respondents not in dispute. In the contributory petition winding-up proceedings in which the Costs Orders which founded the Petition debts in these proceedings were made, an application to stay those Orders was refused on 2 July 2024. Reasons were subsequently delivered in *In the Matter*

of Principal Investing Fund Limited (In Official Liquidation), In the Matter of Long View II Limited (in Official Liquidation) and In the Matter of Global Fixed Income Fund I Limited (in Official Liquidation), FSD Nos 268, 269 and 270 of 2021(IKJ), Judgment dated 15 July 2024 (unreported). Although no formal concession to this effect was made in those proceedings, it was assumed by both the Petitioner and the Court that the rejection of those stay applications meant that the present Petitions would not be opposed. *“Hope springs eternal in the human breast.”*

4. The Petitions were listed for hearing on 5 July 2024. On or about 3 July 2024, the Court closed for an uncertain period in light of the approach of Hurricane Beryl. The Court reopened on 5 July 2024, and the Petitioner, keen to obtain the Orders it sought, marshalled its legal forces for battle, despite only learning that the hearing would proceed earlier that morning. Apparently, the Petitioner’s leading counsel was summoned from a social engagement to the legal battlefield. The Respondents were represented only by junior counsel and sought a short adjournment to enable them to properly respond to the Petitions.
5. As I recall, it was unclear at that juncture whether the Petition would be opposed or whether the Respondents would simply be applying for a stay pending appeal of the Orders of 2 July 2024 dismissing the applications to stay the Costs Orders in the contributory winding-up proceedings. Their central plea was, in substance, one for delay.
6. Upon the Respondents providing undertakings to preserve their assets, I adjourned the Petitions until 19 July 2024 for one hour, on a date when I was scheduled to be on annual leave, to ensure that these matters were not unduly delayed. With the Summer Vacation looming, I was keen to avoid denying justice through delaying justice on fortuitous grounds.
7. By the adjourned hearing date of the Petitions, the Respondents had, it seemed to me, cobbled together a somewhat surprising legal basis for opposing the Petitions. The central argument looked suspiciously like a recycled version of the crossclaim argument which had been dismissed on 2 July 2024.
8. FSD 106 of 2024 (IKJ), *Wang-v- LV II Investment Management Limited* (“LV2IM”) was heard together with the contributory winding-up petitions. On 2 July 2024 in that cause, I declared that Mr Wang as ultimate beneficial owner of Blue Water Limited (“Blue Water”) was not personally liable for that company’s debts. This finding formed a central plank of my refusing the

Respondents' applications (made by the "Stay Summonses" in FSD Nos. 268-270 of 2021) to stay the Costs Orders on the grounds that LV2IM had no valid basis for asserting that Mr Wang was liable for Blue Water's substantial debts under what were described in those proceedings as the 'LCIA Awards'. However, that stay decision was made in the context of the Court exercising its statutory and/or inherent jurisdiction to stay execution of a judgment.

9. The Respondents contended that the Court's jurisdiction stay and/or adjourn a winding-up petition on the grounds of a crossclaim against the real party behind a company required a distinct analysis and engaged a more flexible jurisdiction. This permitted the Court to have regard to the LCIA Awards and the proposed Swiss enforcement proceedings against Mr Wang's assets in the present proceedings. The Petitioners contended that advancing the point was an abuse of process. If that argument, which only LV2IM advanced was rejected, and as regard the other Respondents in any event, the Court was asked to postpone granting the winding-up orders until the recently filed applications for leave to appeal could be heard in respect of the 2 July 2024 Orders dismissing the Respondents' Stay Summonses in FSD 268-271 of 2021 (the "Stay Appeal").
10. Mr Richards KC also reserved LV2IM's right to seek a stay pending appeal of the Court's rejection of LV2IM's crossclaim 'defence', if that eventuality occurred (as it ultimately did).
11. On 19 July 2024, I rejected LV2IM's crossclaim arguments on their merits although I did not find that raising them was an abuse of process. However, I adjourned the Petitions pending the determination of the then recently filed applications for leave to appeal in the Stay Appeal. This adjournment was granted on the condition that those applications would be heard within 28 days and on the clear understanding that winding-up orders would be made if the applications for leave to appeal of the Costs Orders were refused by this Court and/or the Court of Appeal. I also indicated that the applications for leave to appeal were sufficiently urgent to be heard during the Vacation.
12. These are the reasons for that decision.

Governing legal principles

Staying or dismissing winding-up petitions presented by creditors with standing on the grounds of a crossclaim

13. Mr Richards KC relied pivotally on an English High Court decision on a point which does not appear to have been considered before in the Cayman Islands courts. In *King and others v Bar*

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Mutual Indemnity Fund [2023] EWHC 1408 (Ch), Judge Kelly (sitting as a High Court Judge) considered not only what qualified as a “cross demand” potentially conferring upon the court a statutory jurisdiction to set aside a statutory demand under rule 10.5 (5) (a) of the Insolvency Rules, which have no equivalent in our own Companies Winding Up Rules (2023 Consolidation). The parties to the winding-up proceedings had to be the same, it was held. Additionally, Judge Kelly held that when determining whether the petitioner and the party against whom the cross demand was asserted were the same, the court could look at the “*real situation*”:

“102 I consider that Popely v Popely [2004] BPIR 778 is the starting point for analysis. It is Court of Appeal authority that (1) a cross demand does not have to arise in the same set of proceedings from which the statutory demand debt arose and (2) a mutuality of the identity of parties is necessary and sufficient.

103 Applying Popely to the facts, the question is whether BMIF was the defendant in the Professional Negligence Proceedings, taking into account the observation in Hurst v Bennett [2001] 2 BCLC 290 that ‘the courts are prepared in certain situations to look at the reality of the situation’. In my judgment the BMIF is the real defendant.

104 Although the arguments here are finely balanced, in my judgment, the 12 October 2021 letter shows that the BMIF recognised they were in substance the real defendant in the Professional Negligence Proceedings and the Conspiracy Proceedings. The letter emphasised that the ‘Bar Mutual’ was not prepared to countenance any payment to the Kings in either claim. Although different claims handlers were dealing with the different claims, the BMIF was able to make an offer of settlement concerning both claims. In my judgment, it is irrelevant that the first suggestion of a settlement came from the Kings. The BMIF was able to make a global offer.

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

106 The first issue is whether mutuality exists as a requirement. In my judgment Makki v Beirut Bank SAL [2022] BPIR 1087 contradicts Hurst v Bennett on its face and, the latter being a Court of Appeal authority, it should be preferred over Makki. Mutuality does exist as a requirement.

107 The second is whether mutuality exists on the facts of this case. Hurst v Bennett suggests that the test is whether the proceedings claimed to be capable of being a cross demand are of the same legal character as the statutory demand debt. Makki suggests that the test is whether the parties were acting in the same right and capacity. Both tests are satisfied on

the facts of this case. The BMIF is acting in their capacity as insurers in both the Conspiracy and Professional Negligence proceedings. Both proceedings take issue with barristers' conduct and both proceedings arise out of the same set of facts, i e the Misrepresentation Proceedings.

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

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

14. Mr Collins KC was content for the Court to assume that these English law principles were applicable under Cayman Islands law despite the absence of a statutory basis for them here. In my judgment the Court's statutory winding-up jurisdiction, which broadly corresponds to pre-Insolvency Act 1986 UK law, is sufficiently broad to justify the exercise of a comparable jurisdiction in relation to a cross demand or crossclaim. The essence of a cross demand or crossclaim is that it does not provide a potential defence to the petition debt and arises in separate proceedings. It accordingly may only be raised by way of inviting a court exercising its winding-up jurisdiction to exercise its discretion to refuse to grant a winding-up order, despite the petitioner having established a *prima facie* case. Section 95 of the Companies Act (2023 Revision) provides:

“(1) Upon hearing the winding up petition the Court may —

(a) dismiss the petition;

(b) adjourn the hearing conditionally or unconditionally;

(c) make a provisional order; or

(d) any other order that it thinks fit...”

15. Section 95 (1) is derived from section 225 (1) of the Companies Act 1948 (UK), which the Court of Appeal of England and Wales applied in *Re L.H.F Wools Ltd* [1969] 1 Ch 27 at a time when there were no rules of court permitting setting aside a statutory demand on grounds including a cross demand. In that case it was confirmed that although the petitioning creditor was a judgment creditor entitled to winding-up order *ex debito justitiae*, because the company had a substantial

crossclaim (i.e. larger than the petitioner's debt) against the petitioner in foreign proceedings with realistic prospects of success, the court had a discretion to decline to grant a winding-up order. The Court of Appeal in that case held that the judge ought to have adjourned the petition rather than granting a winding-up order to allow further progress in the foreign proceedings to be monitored by the winding-up court.

16. So it is clear that this Court, despite the absence of a rule of court corresponding to rule 10.5(5)(a) of the UK Insolvency Rules, may decline to grant a winding-up order where the respondent to the petition has a substantial crossclaim with prospects of success, and exercise its statutory discretion to adjourn the petition.
17. Post-1986 Insolvency Act English case law clearly suggests that “*there is a practice that the company should not be wound up where there is a serious and genuine cross-claim save in special circumstances*”: *Re Bayoil* [1999] 1 W.L.R 147 at 156H (per Ward LJ, concurring with Nourse LJ). I respectfully find the view expressed by Nourse LJ that *Re L.H.F Wools Ltd* confirms this practice unpersuasive. The Court of Appeal in that case was keen to avoid positing any rule which circumscribed the Court's statutory discretion. As *McPherson* observes at paragraph 3-083 after reviewing case law contending for this practice:

“All of this suggests that no discretion exists where a substantial cross-claim is found to exist. Yet in Re LHF Wools Ltd there are comments by members of the Court of Appeal that indicate that a court has a discretion even where there is a substantial cross-claim. Edmund-Davies LJ said:

‘I am a little nervous, accordingly about any decision which appears to lay down almost as a statement or proposition of law that a discretion has to be exercised in any particular direction.’”

18. It is true that *obiter dicta* of the Privy Council in a disputed debt case suggests that there is no distinction in principle between a disputed debt case and a substantial crossclaim case: *Malayan Plant (Pie.) Ltd. v. Moscow Narodny Bank Ltd.* [1980] M.L.J. 53 at page 55 (cited by Nourse LJ in *Re Bayoil* at page 154H). There is an obvious legal distinction between a petitioner who lacks standing to present or pursue a petition and a petitioner who has a *prima facie* right to a winding-up order but who is subject to substantial and genuine crossclaim which the respondent company ought to be permitted to litigate. Lord Edmund-Davies did not recant from his earlier anxiety about the need for caution about fettering the Court's statutory winding-up discretion in *LF Wools*.

Indeed in the *Malayan Plant* case he affirmed (earlier in the same passage which was cited in *Bayoil*):

“It may be that the decision served a useful purpose in underlining yet again that section 225 (1) of the Companies Act, 1948-which is similar to section 221 (1) of the Singapore Act-vests in the Court a wide discretion.”

19. The suggestion that there is no distinction between the position where a debt is disputed on substantial grounds and where a substantial crossclaim exists can only sensibly be understood as a suggestion that they are similar in practical rather than in legal terms. The position is practically analogous because in both cases the respondent company has demonstrated that it would be inappropriate for a winding-up order to be made. This is the position under Cayman Islands law. The legal position in England and Wales appears to me to be materially different because the Insolvency Rules provide an express power to, *inter alia*, set aside a statutory demand on the basis of a cross demand. Where that power is available, the legal distinction between petition based on a disputed debt and a petition subject to a crossclaim arguably fades away. However, the starting position even where that set-aside power is available is that there is a clear legal distinction between a claim which may be set-off against another and a counterclaim or crossclaim which may not. As Neuberger J (as he then was) stated in *Hofer-v-Strawson* [1999] 2 BCLC 336 (at page 341a-b):

“...the difference between set-off, on the one hand, and a cross-demand or counterclaim, on the other hand, is as follows. A set-off is a claim which can be, as its name suggests, set off against another claim, i e in practice it operates as a defence to that other claim. On the other hand a counterclaim or cross-demand which is not a set-off is a claim or demand which, although perfectly valid in itself, cannot for some reason be invoked as a set-off or defence to another claim.”

20. This is why I observed in the course of argument that in my judgment this Court’s discretion was broader in the crossclaim context than it was in the disputed debt context. However, because the distinction between the Caymanian and English statutory position was not fully canvassed in argument, I saw no need to rely on these matters in reaching my decision. And having considered the matter further, it appears likely that the practical position may in many cases be far less distinguishable than the strict legal position.
21. In summary, I found that although the Petitioner had a *prima facie* right to seek a winding-up order, the Court could in its discretion decline to grant such relief if satisfied that:

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- (a) the Petitioner was subject to a crossclaim asserted by one of the Respondents (LV2IM) and that the identity and/or mutuality requirements were met;
 - (b) the crossclaim was substantial (greater than the Petition debt) and genuine in the sense that it had realistic prospects of success; and
 - (c) it was reasonable to permit the company to litigate the crossclaim rather than being wound-up.
22. The contentious issues in the present case were (1) whether the identity and /or mutuality requirements were met and (2) (if they were) whether the crossclaim relied upon LV2IM was a substantial one with realistic prospects of success. It was common ground that it was for LV2IM to establish that the requirements for a crossclaim were met.

The identity and mutuality requirements

23. The real controversy in the present case is whether the identity requirements are met. Only if the identity requirements are first met is it necessary to go further and consider the mutuality requirements. That the petitioner *qua* creditor and *qua* crossclaim debtor are the same is fundamental to the essence of a crossclaim. The mutuality requirements are an elaboration of the identity requirements described in the *King* case (by reference to *Hurst-v-Bennett* [2001] EWCA Civ 182) as follows:

“88. *Mutuality was defined by Arden LJ (as she then was):*

*11. In this context mutuality means that the legal character in which the creditor is or may be liable to the debtor by virtue of the counterclaim or cross-claim raised by the debtor is the same as the legal character in which the creditor is entitled to the debt the subject of the statutory demand. It does not mean that the claims have to arise out of the same contract or transaction. An example of a situation in which there is no mutuality is where a person brings a claim in his personal right and the defendant seeks to set-off a claim against him in his capacity as a trustee for others. But the courts are prepared in certain situations to look at the reality of the situation, as Rimer J was prepared to do: see also for example *In re Chapman, Ex p Parker* (1887) 4 Morr 109, where a defaulting trustee of a will was entitled to set-off against a claim by the continuing trustees the amount to which he was entitled as a residuary legatee.” [Emphasis added]*

24. The latter passage merely supports the proposition that, where the parties to petition and the crossclaim are the same, the additional requirement of mutuality (that the claims have the same character) will not be strictly adhered to if it is artificial to do so.

Findings: merits of the Petitions

The respective Respondents

25. Floreat Principal Investment Management Limited (“FPIML”) and Floreat Investment Management Limited (“FIML”) did not contest the merits of the Petitions presented against them. Only LV2IM relied on a crossclaim. The merits of the case for winding-up were only contested by the other two Respondents by reference to the Stay Appeal.

Was it an abuse of process for LV2IM to pursue the crossclaim point?

26. On superficial analysis it appeared to be an abuse of process to advance essentially the same argument that this Court had rejected on 2 July 2024, and which forms the subject of the Stay Appeal. However I found, focussing on the first of the two main limbs of the crossclaim, that the Petitioner’s case in this respect did not withstand rigorous analysis.
27. Whether or not enforcement of the Costs Order made against LV2IM which is subject to the Stay Appeal ought to be stayed because of a crossclaim against the ultimate beneficial owner of the relevant shares held by the judgment creditor is one question appropriate for determination in the proceedings in which the Costs Order was made. Whether or not a crossclaim founded on the same LCIA Awards make it inappropriate for a winding-up order to be made against LV2IM on the petition of another company which holds shares as a nominee¹ of the party against whom the crossclaim is asserted is:

- (a) a legally different question arising in relation to the Court’s winding-up jurisdiction;
and

¹ It was common ground between the parties in these proceedings and the contributory winding-up proceedings, as well as obvious from the Petitioner’s corporate name, that the Petitioner was a nominee shareholder of shares beneficially owned by Mr. Wang. In the draft of this Judgment circulated for editorial comments, I infelicitously transposed the terminology appropriately used in FSD 106/2024 and referred to Mr Wang as the Petitioner’s beneficial owner (in draft paragraphs 27, 32 and 35 (a)). Forbes Hare rejected Appleby’s proposed corrections as going beyond typographical corrections. I substantially accepted the proposed corrections to what I regarded as obvious drafting errors.

(b) a point which could only properly be raised in the present winding-up proceedings.

28. Mr Collins KC submitted that it was an abuse of process to pursue the crossclaim because it was at the very least an issue which should have been resolved by the 2 July 2024 Orders pursuant to a combined hearing which was designed to effectively determine whether or not the Respondents had any grounds to resist the present winding-up proceedings. That may well have been the tacit understanding when the Declaration, Jurisdiction and Stay Summonses disposed of on 2 July 2024 were listed for hearing and even heard. But there was no indication that the parties had explicitly agreed that any points which could be raised in opposition to the present Petitions should be determined at that consolidated hearing.
29. The fact that this Court had previously determined that Mr Wang was not personally liable for the debts arising from the LCIA Awards LV2IM had obtained against Blue Water was, albeit in a somewhat technical sense, a different question to whether or not LV2IM had a crossclaim against a party who was really indistinguishable from the Petitioner so that a winding-up order was inappropriate. The “real party” test was different, even though the merits of the crossclaim asserted in these proceedings were indistinguishable from the merits of the crossclaim rejected in the contributory winding-up proceedings as they were based on the same factual and legal matrices (LV2IM’s ability to enforce the LCIA Award against Mr Wang’s Swiss assets).
30. Although this appeared to me to me to a typical ‘straw-clutching’ argument advanced by the respondent to a winding-up petition, Mr Richards KC ultimately persuaded me for these reasons that raising the crossclaim ‘defence’ was not an abuse of process.
31. This conclusion was in hindsight overly charitable to LV2IM, because it ignored the reality that the crossclaim had two essential limbs to it and that the second limb (realistic prospects of success) had already effectively been resolved against this Respondent.

The identity requirement: is the ultimate beneficial owner of the relevant shares held by the Petitioner the “real party” to the present proceedings?

32. LV2IM’s case was that the identity of parties requirement was satisfied because, although it relied upon a crossclaim against Mr Wang and not the Petitioner, Mr Wang (as the beneficial owner of

the relevant shares held by the Petitioner as a nominee) was in effect the “real party” to the present proceedings in the sense described in *King and others v Bar Mutual Indemnity Fund* [2023] EWHC 1408. In my judgment *King* does support the proposition that Mr Richards KC contended for, despite Mr Collins KC’s valiant efforts to contend that the reasoning in that case dealt solely with the distinct mutuality requirement. However, *King* is only at best persuasive authority, so the critical question is whether it is indeed persuasive on this issue.

33. As Mr Collins KC rightly submitted, the judgment in *King* cited various *dicta*, notably from the Court of Appeal’s decision in *Popely v Popely* [2004] BPIR 778, which were in reality dealing with the mutuality requirement (*King*, at paragraphs 84-88, 90, 102-16). As recorded in paragraphs 19-20 above, the mutuality requirement is superimposed onto the identity of parties requirement. Judicial decisions where the mutuality requirement has not been strictly applied provide no valid support for the proposition that the identity of parties requirement may be dispensed with in favour of giving effect to the reality of the position. The English High Court in *King* framed the critical issue as follows:

“103 Applying *Popely* to the facts, the question is whether *BMIF* was the defendant in the *Professional Negligence Proceedings*, taking into account the observation in *Hurst v Bennett* [2001] 2 BCLC 290 that the courts are prepared in certain situations to look at the reality of the situation. In my judgment the *BMIF* is the real defendant.,,

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

34. So although Judge Kelly acknowledged the distinction between the identity of parties and mutuality requirements, learned Judge construed *Hurst v Bennett* [2001] 2 BCLC 290 in a way which I would respectfully view as impossible. It is clear from paragraph 11 of the Court of Appeal’s judgment in *Hurst-v-Bennett*, that Arden LJ (as she then was) was discussing mutuality, not identity. One example she provided of looking at the reality was *In re Chapman, Ex p Parker* (1887) 4 Morr 109, which was quite clearly a case where the identity requirement was satisfied but the capacity in which they sued was different. The other example cited by Arden LJ was Rimer J’s decision in *Re a Debtor (No 87 of 1999)* [2000] BPIR 589. In that case Rimer J, who viewed the position in relation to counterclaims to apply by analogy to crossclaims, held as follows (at page 592):

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

It follows, in my view, that the judge erroneously approached the matter on too narrow a basis. I consider that he should have held that the debtor did have a relevant cross-demand, whose effect he had to consider. He should then have gone on to consider whether, in the circumstances of the case, the existence of the cross-demand justified the setting aside of the statutory demand. He did not do so and it follows, in my view, that he misdirected himself on the issue before him...”

35. Even if the position of an insurer controlling litigation is viewed as special category of case justifying a departure from the usually inflexible identity requirement for crossclaims, which was Mr Collins KC’s fall-back position, *King* can be distinguished on the grounds that its reasoning has no application to the present case. In short, there was no authority cited which supported the proposition that:

- (a) a crossclaim against the ultimate beneficial owner of the shares held by the petitioning company could be relied upon to defeat a winding-up petition; or
- (b) the Court had a general discretion to ignore the identity of parties requirement as it saw fit.

36. For these reasons I found that the identity of parties requirement was not met because the Petitioner, as creditor herein, and Mr Wang as alleged debtor in respect of LV2IM’s crossclaim were different legal persons. No need to consider the mutuality requirement accordingly arose.

The realistic prospect of success requirement

37. However the crossclaim could in any event be rejected on the more prosaic basis that it had no realistic prospect of success. On 2 July 2024 in FSD 106 of 2023, for the reasons set out in the 15 July 2024 Judgment in that matter, I granted a declaration in the following terms:

“The Plaintiff is not liable as a matter of Cayman Islands law for the obligations of Blue Water under the LCIA Awards a Partial Award dated 22 November 2023 and Final Award dated 19 January 2024 (the “LCIA Awards”) in favour of LV2IM against Blue Water.”

38. That declaration was granted in circumstances where LV2IM had not yet commenced substantive enforcement proceedings in Switzerland against Mr Wang and the unchallenged expert evidence as to Swiss law was that the Swiss Court would likely apply Cayman Islands law to the personal liability of the ultimate beneficial owner question. Moreover LV2IM has dawdled over commencing substantive enforcement proceedings in Switzerland, preferring instead to extract maximum strategic advantage from the interim attachment proceedings. In these circumstances, the proposition that LV2IM's crossclaim against Mr Wang in Switzerland ultimately appeared to me to be *"the stuff that dreams are made of"* and wholly detached from reality. In *Hofer-v-Strawson* [1999] 2 BCLC 336, Neuberger J identified two competing policy considerations whenever a counterclaim or crossclaim is raised in response to a winding-up petition. One consideration is fairness to the respondent, assuming a genuine crossclaim exists. In the present case the second policy consideration is fairness to the petitioner. As regards this, Neuberger J opined (a page 343e) as follows:

"On the other hand, it seems to me that it would also be wrong in principle and unfair to creditors if it was made too easy for a debtor to avoid bankruptcy or liquidation by making it too easy for him to raise a smokescreen by suggesting that he may have a defence or counterclaim in circumstances where he has none."

39. In hindsight, my prior findings in FSD 106 of 2023 on an essential limb of LV2IM's crossclaim were binding on LV2IM. LV2IM's crossclaim was not merely fanciful but in fact was hopeless. It ought not to have been pursued. However, even this benign evaluation of LV2IM's crossclaim 'defence' did not alter the ultimate result. All three Respondents were liable to be wound-up unless they were able to obtain through the Stay Appeal a stay pending appeal of the 2 July 2024 Order dismissing the Stay Summons filed in the contributory winding-up proceedings. Absent such a reprieve, this was simply a standard case where the Petitioner had established an entitlement to a winding-up order as of right based on the unpaid Petition debts.

Conclusion

40. For these reasons, on 19 July 2024, I:

- (a) refused LV2IM's application for the Petition presented against it to be dismissed or stayed or adjourned pending the determination of its crossclaim asserted against Mr Wang based on the LCIA Awards LV2IM obtained against Blue Water;
- (b) adjourned the Petitions pending determination by this Court and/or the Court of Appeal of the Respondents' applications for leave to appeal the 2 July 2024 Orders dismissing their Stay Summonses in FSD Nos. 268-270 of 2021; and
- (c) reserved the costs of the present application.



THE HONOURABLE MR JUSTICE IAN RC KAWALEY
JUDGE OF THE GRAND COURT