THE EASTERN CARIBBEAN SUPREME COURT
IN THE COURT OF APPEAL

TERRITORY OF THE VIRGIN ISLANDS

BVIHCMAP2020/0025
BVIHCMAP2020/0026

BETWEEN:

CAPITAL WW INVESTMENT LIMITED (IN LIQUIDATION)
acting through its Directors

Appellant

and

TALL TRADE LIMITED

Respondent

Before:

The Hon. Mr. Davidson Kelvin Baptiste — Justice of Appeal
The Hon. Mde. Louise Esther Blenman — Justice of Appeal
The Hon. Mr. Dexter Theodore — Justice of Appeal [Ag.]

Appearances:

Mr. Tom Smith, QC and with him Mr. Iain Tucker for the Appellant
Mr. Charles Samek, QC and with him Mr. Peter Ferrer, Ms. Marcia McFarlane and Mr. Romane Duncan for the Respondent

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2021: October 7;
2022 January 24.

Commercial appeal — Insolvency proceedings — The Insolvency Act, 2003 — Appointment of liquidators of a company — Actionable conspiracy — Genuinely disputed debt on substantial grounds — Whether the judge erred in fact and/or in law in failing to conclude that there was no genuinely disputed debt on the basis of an actionable conspiracy to form the appellant's cross-claim — Improper purpose — Whether the judge erred in law and/or in fact in failing to conclude that the application for appointment of liquidators was not being made for an improper purpose, namely in furtherance of the alleged conspiracy — Section 125 of the Evidence Act, 2006 — Admissibility of evidence — Whether the judge erred in law in not admitting the telegram messages into evidence — Whether the judge's exercise

of his discretion to abridge the hearing date of the second application resulted in the appointment of liquidators being irregular, void and of no effect — Whether foreign law was applicable to the conspiracy claim

In April 2019, Capital WW Investment Limited (In Liquidation) ("Capital WW") entered into a share purchase agreement with Primefuture Limited ("Primefuture") and Bitcapital Limited ("Bitcapital") (the "SPA") to acquire 60% of the shares in Befree Limited ("Befree"). Befree is a Cypriot company which was originally beneficially owned by certain shareholders through Primefuture and Bitcapital. The purchase price was in part funded with a loan advanced to Capital WW by Tall Trade Limited ("Tall Trade") under a loan agreement (the "Loan Agreement"). Clause 5 of the Loan Agreement required Capital WW to make quarterly repayments including interest of not less than €2 million. After Capital WW's payment of the consideration under the SPA, on 30th July 2019 it became the registered holder of 60% of the shares in Befree.

Under the terms of the Shareholders Agreement ("the SHA") which set out the rights and obligations of Capital WW, Primefuture and Bitcapital as shareholders, it was agreed that the shareholders (Capital WW, Primefuture and Bitcapital) would procure at least 50% of the net profits of Befree for the relevant period which would be distributed to shareholders at least every six months. No payment of any dividend has been paid to date. Under the Loan Agreement, Capital WW was required to repay the first quarterly tranche of the loan by the 8th September 2019 but has not done so. Further the repayment of the loan was to be effected irrespective of whether Capital WW had not received dividends, according to clause 5 of the Loan Agreement. As a result of Capital WW's non-repayment of the first tranche of the loan, on 13th December 2019 Tall Trade issued a statutory demand to Capital WW. Capital WW applied to the Commercial Court to set aside the statutory demand, however this application was dismissed by the learned judge. Consequently, on 17th February 2020 Tall Trade issued an originating application (the first application) for the appointment of liquidators to Capital WW. That application was automatically dismissed on 17th August 2020 as it was not determined within six months, as mandated by section 168 of the Insolvency Act.

On 1st October 2020, Tall Trade issued a second originating application (the second application) to wind up Capital WW based on the same non-payment of the first tranche of the loan. Capital WW filed an application to adduce evidence of telegram/text messages in which it sought to undergird its position that it had a cross-claim against Tall Trade and therefore its debt to Tall Trade was disputed on substantial grounds. Capital WW complained that the liquidation proceedings were brought for an improper purpose since there was a conspiracy against it involving Tall Trade and the beneficial owners of Primefuture and Bitcapital in relation to the non-payments of dividends from Befree, to which it was entitled, the effect of which starved Capital WW of monies that was to have been utilised in servicing its loan to Tall Trade.

The hearing of the second application to appoint liquidators was fixed for hearing on 9th November 2020. It was brought forward to 13th October 2020 from 9th November 2020. Due to the late issuance of the second application the need to advertise was dispensed with by

the judge who reasoned that in the specific circumstances that was the correct approach to take. There were five main issues before the judge in the court below, namely: (i) whether the hacked telegram/text messages were admissible in evidence; (ii) whether there was an actionable conspiracy to Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation standard; (iii) whether the applications for the appointment of a liquidator were brought for an improper purpose; (iv) whether advertisement of the second application should be dispensed with; and (v) whether issuing the statutory demands was an abuse of process. The learned judge concluded in summary, that the telegram messages were not admissible in the circumstances, that no adequate case of actionable conspiracy had been made out to form a cross-claim, that there was no reason to reject the application to wind up Capital WW on the ground of improper purpose, and that in circumstances where the first application had been advertised, this was a quintessential case for dispensing with the requirement to advertise the second application. Ultimately, in determining the application, the learned judge exercised his discretion to wind up Capital WW and appointed liquidators.

Being dissatisfied with the decision of the learned judge, Capital WW appealed on several grounds, with sub-grounds, challenging the learned judge's conclusions of both fact and law. Tall Trade has also counter appealed and urges this Court to affirm the judge's decision. The issues on the appeal and counter appeal may be summarised as: (i) whether the learned judge erred in fact and/or in law in failing to conclude that there was no genuine dispute to Tall Trade's debt, on the basis of an actionable conspiracy to form Capital WW's cross-claim; (ii) whether the judge erred in law and/or in fact in failing to conclude that the application for appointment of liquidators was not being made for an improper purpose, namely in furtherance of the alleged conspiracy ("the Improper Purpose Issue"); (iii) whether the judge erred in law in not admitting the telegram messages into evidence ('the Admissibility Issue"); (iv) whether the judge's exercise of his discretion to abridge the hearing date of the second application resulted in the appointment of liquidators being irregular, void and of no effect; and (v) whether foreign law was applicable to the conspiracy claim ("the Applicable Law Issue").

Held: dismissing the appeal, affirming the decision of the learned judge in its entirety and awarding costs on the appeal to the respondent, which costs shall be paid out of Capital WW's assets in the liquidation, shall be no more than two-thirds of the assessed cost in the court below, and which are to be assessed by a judge of the Commercial Division unless otherwise agreed within 21 days of the date of this judgment, that:

1. An appellate court should apply restraint not only to the judge's findings of fact but also to the evaluation of those facts and the inferences drawn from them. The critical question is whether there was evidence before the learned judge from which he could properly have reached the conclusions that he did or whether, on the evidence, the reliability of which it was for him to assess, he was plainly wrong. In this case it was clearly open to the learned judge to make the findings which he did on the evidence.

   Yates Associates Construction Company Ltd v Blue Sand Investments Limited [2016] ECSCJ No. 71 (delivered 20th April 2016) followed; **Fage UK Ltd and another v Chobani UK Ltd and another** [2014] EWCA Civ 5 at paragraph 114

followed; **Shankar Khushalani and another v Lindsay Mason (Trading as Tropical Home Designs Architectural & Construction Services)** [2021] ECSCJ No. 593 (delivered 11th June 2021) followed.

2. The court will not make a winding up order under section 157(1) of the Insolvency Act if the debt demanded in the statutory demand is disputed on substantial grounds. Furthermore, the court will not wind up a company in circumstances where there is a serious and genuine cross-claim save in special circumstances provided always that the cross-claim equals or exceeds the amount of the application's debt. The onus was on Capital WW to provide evidence which pointed to a case of conspiracy to found a cross-claim. The judge properly examined the evidence to determine whether it disclosed substantial and reasonable grounds for the allegation of conspiracy, however the evidence was found to be seriously wanting. That situation did not improve before this Court, and once the conspiracy allegations failed, the improper purpose complaints must of necessity suffer a similar fate. Consequently, there is no basis on which to impugn the judge's decision.

   Section 157(1) of the **Insolvency Act**, No. 5 of 2003, Revised Laws of the Virgin Islands applied; **Re Bayoil S.A**. [1999] 1 WLR 147 considered; **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation** British Virgin Islands Civil Appeal No. 10 of 2002 (delivered 18th June 2003, unreported) considered; **Taylor v Van Dutch Marine Holding Ltd and others** [2019] EWHC 1951 considered; **Kuwait Oil Tanker Co SAK and others v Al Bader and others** [2000] 2 All ER (Comm) 271 followed; **Re Amalgamate Properties of Rhodesia (1913), Limited [0082 of 1917.]** [1917] 2 Ch 115 followed; **Re H and others (Minors) (Sexual Abuse: Standard of Proof)** 1996 AC 563 followed.

3. The common law position that governs the admissibility of improperly obtained evidence cannot avail Capital WW. In the Virgin Islands, the legislature has provided a statutory scheme that must be applied in order for this Court to determine whether the learned judge erred by excluding the hacked telegram messages. Having reviewed the judge's careful treatment of the issue of the admissibility of the hacked telegram messages, there is no basis upon which this Court could conclude that the exercise of his discretion to exclude the hacked telegram messages was perverse.

   Section 125 of the **Evidence Act 2006,** Act No. 15 of 2006, Laws of the Virgin Islands applied; **Ras Al Khaimah Investment Authority v Azima** [2021] EWCA Civ 349 distinguished.

4. The appellate court should only interfere if it is satisfied that in exercising his or her judicial discretion, the trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors or being influenced by irrelevant factors; and that, as a result of the error, in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong. Applying these principles

to the circumstances of this case, it is clear that the learned judge committed no error in the exercise of his discretion.

Michel Dufour and others v Helenair Corporation Ltd. and others [1996] ECSCJ No. 11 (delivered 12th February 1996) followed; **Ming Sui Hung & others v JF Ming Inc and another** [2021] UKPC 1 followed; **J Trust Asia Pte Ltd. v Mitsuji Konoshita and another** [2021] ECSCJ No. 571 (delivered 31st May 2021) followed; **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited** [2021] ECSCJ No. 529 (delivered, 16th April 2021) followed; **Cherney v Deripaska No. 2** [2009] EWCA Civ 849 followed.

5. The judge was correct in determining that the real issue in relation to the acceleration of the hearing date was whether in the specific circumstances of the case he should have dispensed with the advertisement of the second application. It was part of the judge's essential function to case manage the second application and determine that since its advertisement was dispensed with, he could have exercised his discretion by bringing forward the date. No useful purpose would have been served in adjourning the matter. Therefore, there is no proper basis to impugn the exercise of the judge's discretion to abridge the hearing date of the second application, nor his decision to appoint liquidators over Capital WW.

JUDGMENT

Introduction

[1] **BLENMAN JA:** This is an appeal by Capital WW Investment Limited (In Liquidation) ("Capital WW"), acting through its directors, against the judgment of the learned judge Jack J (Ag.) dated 2nd November 2020, by which the judge ordered that Capital WW be wound up under the provisions of the Territory of the Virgin Islands ("BVI") **Insolvency Act, 2003**[1] ("the Insolvency Act"). Capital WW challenges the judge's decision on the basis that the judge erred both in law and fact by ordering that Capital WW be wound up. Capital WW says that the judge was wrong to do so since the debt which forms the basis of Tall Trade Limited ("Tall Trade")'s application, to appoint liquidators, is disputed on substantial grounds. Towards this end, Capital WW asserts that it has a genuine cross-claim for damages against Tall Trade for conspiracy. The appeal is strongly resisted by Tall Trade who argued that the learned judge did not err in appointing liquidators over Capital WW. Tall Trade urges this Court to affirm the decision of the learned judge.

[1] No 5 of 2003, Revised Laws of the Virgin Islands.

[2] Also, Tall Trade has counter appealed and seeks to have this Court uphold the decision of the judge on different bases, in addition to those that were utilised by the judge.

[3] I will provide the background in some detail in order to provide the requisite context.

Chronological Background

[4] At the heart of this appeal is a dispute in relation to an unpaid loan by Capital WW which has resulted in the underlying liquidation proceedings at the instance of Tall Trade. It arose in this way. Softswiss, an internet gambling business, is held by Befree Limited, a Cypriot company ("Befree"). Befree was originally beneficially owned by Mr. Dzmitry Yaikau ("Mr. Yaikau") and Mr. Ivan Montik ("Mr. Montik") who held their shareholdings through two companies respectively, Primefuture Limited ("Primefuture") and Bitcapital Limited ("Bitcapital").

[5] In April 2019, Capital WW entered into a share purchase agreement with Primefuture and Bitcapital (dated 17th April 2019) (the "SPA") to acquire 60% of the shares in Befree for a purchase price of €21 million. The majority shareholder in Capital WW is Mr. Reza Megrelishvili ("Mr. Megrelishvili"). The purchase price was in part funded with a loan of €17 million advanced to Capital WW by Tall Trade under a loan agreement dated 24th May 2019 (the "Loan Agreement"). On 7th June 2019, Capital WW made its first draw down under the Loan Agreement. Clause 5 of the Loan Agreement required Capital WW to make quarterly repayments including interest of not less than €2 million. On 2nd July 2019, the consideration of €21 million due under the SPA was paid by Capital WW to Primefuture and Bitcapital and on 30th July 2019 Capital WW became the registered holder of 60% of the shares in Befree. The rights and obligations of Capital WW, Primefuture and Bitcapital as shareholders are set out in a Shareholders Agreement ("the SHA") dated 17th April 2019. Under the terms of the SHA, it was agreed that, following the Completion Date (30th July 2019), the shareholders (Capital WW, Primefuture and

Bitcapital) would procure at least 50% of the net profits of Befree for the relevant period which would be distributed to shareholders at least every six months. The first payment of dividends under the SHA was due by no later than 30th April 2020, but no payment of any dividend was made by that date and has not been paid to date.

[6] Importantly, and as alluded to earlier, under the Loan Agreement Capital WW was required to repay the first quarterly tranche of the loan by the 8th September 2019 but has not done so. Further, the repayment of the loan was to be effected irrespective of whether Capital WW had not received dividends, according to clause 5 of the Loan Agreement. The subsequent quarterly repayments of the loan became due and, for completeness, they too have not been liquidated even though they ought to have been paid on each successive quarter. As a result of Capital WW's non repayment of the first tranche of the loan, on 13th December 2019 Tall Trade issued a statutory demand to Capital WW. Capital WW applied to the Commercial Court to set aside the statutory demand. On 5th February 2020, the learned judge dismissed Capital WW's application to set aside the statutory demand.

[7] Consequently, on 17th February 2020 Tall Trade issued an originating application 2020/0025 (the first application) for the appointment of liquidators to Capital WW. That application was automatically dismissed on 17th August 2020 as it was not determined within six months, as mandated by section 168 of the Insolvency Act. Capital WW had filed a notice of opposition to the first application, in any event.

[8] On 1st October 2020 Tall Trade issued a second originating application (the second application) to wind up Capital WW based on the same non-payment of the first tranche of the loan. Capital WW filed an application to adduce evidence of telegram/text messages in which it sought to undergird its position that it had a cross-claim against Tall Trade and therefore its debt to Tall Trade was disputed on substantial grounds. Indeed, Capital WW asserted that the damages to which it was entitled should exceed or equal Capital WW's debt to Tall Trade. It complained that

the conspiracy was in relation to the non-payments of dividends from Befree and to which it was entitled, the effect of which starved Capital WW of monies that was to have been utilised in servicing its loan to Tall Trade. Capital WW also asserted that the liquidation proceedings was brought for an improper purpose and was part of the wider conspiracy. It therefore urged the court below to dismiss Tall Trade's application to appoint the liquidators over it.

[9] It is noteworthy that subsequently Tall Trade had issued further statutory demands which Capital has applied to set aside. The subsequent statutory demands were issued due to Capital WW's consistent non-payment of the quarterly tranches of the loan to Tall Trade when they became due. To date Capital WW has not repaid any of the instalments of the loan that have become due and payable on successive quarters.

[10] The hearing of the second application to appoint liquidators was fixed for hearing on 9th November 2020. It was brought forward to 13th October 2020 from 9th November 2020. Capital WW opposed the application to appoint the liquidators. In particular, Capital WW alleged that Tall Trade, acting through Mr. Roland Isaev (a representative and beneficial owner of Tall Trade), had conspired with other persons to deprive it of dividends from Befree which resulted in its non-payment of the quarterly instalments of the loan. Due to the late issuance of the new application the need to advertise was dispensed with by the judge who reasoned that in the specific circumstances that was the correct approach to take. Capital WW is also aggrieved by the judge's decision to abridge the time for the hearing of the second application and even though the judge dispensed with the need to advertise the application it does not complain about that. Capital WW contends that the learned judge erred and says that the judge had no jurisdiction to accelerate the hearing date of the second application from 9th November to 13th October 2020. For its part, Tall Trade says that the learned judge committed no errors and that his decision to appoint liquidators over Capital WW cannot be impugned. Tall Trade contends that in so far as the judge dispensed with the advertisement of the second application

and there has been no appeal against that order, it was perfectly open to the judge to abridge the date for the hearing of the second application.

Issues in the court below

[11] Five main issues were addressed by the court below:

(i) Whether the hacked telegram/text messages were admissible in evidence;

(ii) Whether there was an actionable conspiracy to **Sparkasse Bregenz Bank AG v In the Matter of Associated Capital Corporation**[2] standard;

(iii) Whether the applications for the appointment of a liquidator were brought for an improper purpose;

(iv) Whether advertisement of the second application should be dispensed with; and

(v) Whether issuing the statutory demands was an abuse of process?

Judgment in court below

[12] In his closely reasoned and comprehensive written judgment the learned judge discussed and concluded on each of the issues in turn. In summary, on the issue of the admissibility of telegram messages the learned judge concluded at paragraph 79 of his judgment that:

> "…looking at the seven factors in section 125(3), the considerations are overall firmly against the admission of the Telegram messages. In the exercise of my discretion under section 125(1) I refuse to allow the messages to be adduced in evidence."

The judge correctly stated the telegram messages were relevant to both the conspiracy claim and the improper purpose claim.

[13] On the issue of actionable conspiracy, at paragraph 62 of the judgment the learned judge concluded that no adequate case of actionable conspiracy had been made out to form a cross-claim, even to the low **Sparkasse Bregenz** threshold.

[2] British Virgin Islands Civil Appeal No. 10 of 2002 (delivered 18th June 2003, unreported).

[14] With regard to the issue of improper purpose, the learned judge held that there was no reason to reject the application to wind up Capital WW on this ground. He found that there was hardly evidence of an improper purpose and the natural purchasers of any shares in Befree which a liquidator may seek to sell will be existing investors (including indirect investors like Tall Trade). The learned judge stated that even applying the low **Sparkasse Bregenz** test, the case at bar is not a case where the appointment of a liquidator should be refused on the grounds of the applicant having an improper purpose. He found that Tall Trade has no improper purpose in seeking the appointment of a liquidator over Capital WW at paragraph 71 of his judgment.

[15] In relation to the advertisement of the second application, the judge acknowledged Capital WW's request that the hearing of the application should have been adjourned. The judge however dealt with the matter more extensively and on the question of whether the advertisement of the second application should have dispensed with, the learned judge stated among other things, at paragraph 83 of his judgment, that:

> "Under section 165(1) of the Insolvency Act 2003 I have the power to dispense with advertisement. Given that the application in action number 2020/0025 has been advertised, this is in my judgment a quintessential case for dispensing with the requirement. Adjourning the current application for advertisement will simply increase costs and cause delay. Accordingly, in the exercise of my discretion I dispense with advertisement of the second application."

[16] The learned judge's written judgment is accompanied by an order of even date. The order states, among other things, as follows:

(1) the evidence filed by the appellant which was the subject of an application by the respondent pursuant to section 125 of the **Evidence Act 2006**[3] (the "Evidence Act") ('the Section 125 Application') be excluded;

[3] Act No. 15 of 2006, Laws of the Virgin Islands.

(2) the appellant be wound up by the court under the provisions of the Insolvency Act;

(3) Matthew Richardson and Mark McDonald of Grant Thornton BVI Ltd be appointed as joint liquidators of the appellant;

(4) the applications of BVI(Com) 2020/0043 and 2020/0095 be adjourned generally with liberty to restore; and

(5) the appellant to pay the costs of the BVIHC (Com) 2020/0157 and the Section 125 Application (and the costs of BVIHC (Com) 2020/0025, which is the subject of a separate application for leave to appeal).

Grounds of Appeal

[17] As I have indicated earlier, Capital WW, being dissatisfied with the learned judge's decision has appealed the order and judgment. Capital WW has filed several grounds of appeal, which have sub-grounds, challenging both the learned judge's conclusions of fact and law that there was no indication of a conspiracy. It takes issue with his overall determination that the debt under the Loan Agreement which was the basis of the application to appoint liquidators was not disputed on substantial grounds. Also, Capital WW seeks to impugn the judge's decision that Tall Trade's application was not brought for an improper purpose and his determination to abridge the date of hearing. Ultimately, Capital WW seeks to have this Court set aside the judge's decision in its entirety.

Counter Appeal

[18] Tall Trade has counter appealed and urges this Court to affirm the judge's decision. It has filed three main grounds namely:

(a) In the event that this Court rules that Capital WW's contentions that Tall Trade's application to appoint liquidators was brought for an improper purpose and/or that there was a conspiracy against Capital WW passed the **Sparkasse Bregenz** test, the correct test that the judge should have

applied was not the **Sparkasse Bregenz** test but a higher test namely 'of the very strongest proof' or 'the balance of probabilities' and applying that test, Capital WW does not discharge the same.

(b) The judge had in an earlier judgment ruled that Capital WW was obliged to make quarterly payment to Tall Trade of not less than €2 million irrespective of whether it was in receipt of any dividends from Befree which has not been appealed and binds Capital WW. The non-receipt of dividend by Capital WW and the reasons for that were irrelevant to Capital WW's obligation to repay €2 million per quarter.

(c) The applicable law for the alleged conspiracy cannot have been English (or common or BVI) law. Capital WW failed to establish that it was English law or BVI law. Accordingly, there was no basis for holding in any event that Capital WW has in law any cross-claim sufficient to prevent an order for liquidators to be appointed.

Issues on Appeal and Counter Appeal

[19] The following are the five main condensed issues, which arise to be resolved by this Court based on the grounds of appeal and counter-appeal and as a consequence of the oral submissions and a careful reading of the written submissions filed by both parties:

(a) Whether the learned judge erred in fact and/or in law in failing to conclude that there was no genuine dispute to Tall Trade's debt, on the basis of an actionable conspiracy to form Capital WW's cross-claim;

(b) Whether the judge erred in law and/or in fact in failing to conclude that the application for appointment of liquidators was not being made for an improper purpose, namely in furtherance of the alleged conspiracy. ("the Improper Purpose Issue");

(c) Whether the judge erred in law in not admitting the hacked telegram messages into evidence. ('the Admissibility Issue");

(d) Whether the judge's exercise of his discretion to abridge the hearing date of the second application resulted in the appointment of liquidators being irregular, void and of no effect; and

(e) Whether foreign law was applicable to the conspiracy claim ("the Applicable Law Issue").

Submissions on behalf of Capital WW
Issue 1
Genuine dispute – conspiracy

[20] Learned Queen's Counsel Mr. Tom Smith submitted that the learned judge erred in fact and/or in law in failing to conclude that there was on the evidence substantial grounds to consider that Mr. Yaikau, Mr. Montik, Mr. Paul Kashuba (the Chief Financial Officer of the Softswiss group) and Mr. Isaev ("the Alleged Conspirators") had reached an agreement, combination or understanding between themselves to cause Befree not to pay dividends to Capital WW with the intention of causing it to default under the Loan Agreement, in furtherance of the ultimate intention of depriving it of its shareholding in Befree. This he said would have been the basis for Tall Trade to seek to liquidate Capital WW.

[21] The main thrust of Mr. Smith's argument was that Capital WW had a genuine and substantial cross-claim which equaled or exceeded the debt it owed Tall Trade and that the conspiracy supported this claim. He asserted that various telegram messages between the alleged conspirators should have been found by the judge as prima facie evidence of the conspiracy against Capital WW. He argued that the learned judge failed to correctly apply the test in **Sparkasse Bregenz** to that evidence and this led to his incorrect conclusion. The **Sparkasse Bregenz** test, he said, would have required the judge to ask whether there were substantial or reasonable grounds for the case advanced by Capital WW bearing in mind that

neither the court nor Capital WW had the benefit of any discovery or cross-examination of witnesses which would take place in a trial process. The judge, he complained, instead erred by improperly purporting to make findings as to the non-existence of any agreement or conspiracy between the alleged conspirators. Further, Mr. Smith sought to buttress his arguments above by highlighting paragraphs of the judgment in which he said the learned judge failed to apply the **Sparkasse Bregenz** test. In this regard, he said that the main subject was the telegram messages which demonstrated that there existed ample material to substantiate a prima facie case of the alleged conspiracy to deliberately deprive Capital WW of the ability to repay the loan to Tall Trade.

[22] In relation to the conspiracy claim, he said that the judge did not properly apprehend the applicable elements of unlawful conspiracy. Mr. Smith further stated that the unlawful act does not have to be done on the same day that the conspiracy was entered into and that conspirators may enter into a conspiracy long before the act is committed. He said that by the time the matter came before the judge there has been an ongoing breach for 6 months. Mr. Smith argued that the judge should have asked whether if by the time the matter came in front of him if there existed any evidence of an unlawful act pursuant to the alleged conspiracy, the answer to which in Mr. Smith's opinion, would have been yes. Turning to the third element of the conspiracy claim, Mr. Smith posited in that the Alleged Conspirators through their alleged conspiracy intended to cause loss to Capital WW. He asserted that the learned judge erred in law by considering that intention to cause loss cannot be shown where the sole motivation of the alleged conspirators is to enrich themselves. Mr. Smith said that as a matter of law, there is no such principle, and the necessary intention may be shown where the intention of the alleged conspirators is to cause loss to the victim and to thereby enrich themselves. He said that the correct approach, which the judge ought to have adopted, was that of Lord Nicholls and Lord Hoffmann in **OBG Ltd and another v Allan and others; Douglas and others v Hello! Ltd and others No. 3; Mainstream Properties Ltd v Young**[4] and that in

[4] [2008] 1 AC 1.

treating with intention, the relevant principle is that once a party intends to enrich themselves, the consequence of which causes loss on another party, then the necessary state of mind to cause loss to another party exists. He reminded this Court that this principle was later adopted in **Constantin Medien AG v Ecclestone and others**[5] and **WH Newson Holding Limited and others v IMI plc and others**[6].

[23] Moving along, Mr. Smith said that for the purposes of the conspiracy it suffices to satisfy the requirement for the alleged conspirators to intend to cause loss to Capital WW that they intended to enrich themselves – by seizing Capital WW's shares in Befree – and that this would necessarily have the consequence of causing loss to Capital WW. Mr. Smith then turned to the question of loss and damage, in doing so, he complained that Capital WW was responding to an application for the appointment of liquidators, and, in that context, there was no requirement for them to produce a pleading. Rather, he said that the question which the judge ought to have addressed was whether on the evidence there were substantial or reasonable grounds for a claim for damages for conspiracy where, the quantum would exceed or match the debt owed under the Loan Agreement. He explained that Capital WW's loss and damage are represented by the loss suffered as a result of the conspiracy which resulted in its non-receipt of the dividends.

[24] Mr. Smith further submitted that the judge was also wrong to conclude Capital WW could not demonstrate causation as the loss was caused by its own failure to commence arbitration proceedings against Befree to obtain a remedy. Mr. Smith maintained that this was an incorrect approach, and it would be unrealistic to think that Capital WW could have commenced arbitration and received an award in time to prevent Befree from taking enforcement action given the length of time necessary for arbitration proceedings to be completed. He argued that it was Befree who failed to pay the dividends as per the SHA agreement and the question if any, would be whether Capital WW could be said to have taken steps to mitigate that loss by

[5] [2014] EWHC 387 (Ch).
[6] [2014] 1 All ER 1132.

commencing arbitration proceedings against Befree, and if the point was of any relevance at all it would have to be placed under a failure to mitigate as opposed to a failure to demonstrate causation. He was adamant that Capital WW had a genuine cross-claim for conspiracy against Tall Trade. He therefore said that the judge should have concluded that there was a dispute on substantial grounds.

Issue 2
Improper Purpose

[25] Mr. Smith further submitted that the judge erred in law and/or in fact in failing to conclude that the application for the appointment of liquidators was not made for an improper purpose, namely in furtherance of the alleged conspiracy. He reminded this Court that as a matter of well-established law that it is an abuse of process to present a winding up petition for a purpose which is adverse to the class interest of creditors as a whole. He underscored that winding up is a class remedy and has to be invoked in a way which is in the interest of the class as a whole and not by an applicant to further its private interest which is detrimental to the interests of the class. In support of his position, Mr. Smith referred to the relevant principles that were summarised by Justice Snowden in the decision of **Maud v Aabar Block SARL.**[7] In that case the learned judge stated that the pursuit of insolvency proceedings in respect to a debt will amount to abuse in two situations: (i) where the petitioner does not really want to obtain the liquidation bankruptcy of the company or individual at all but issues or threatens to issue the proceedings to put pressure on the target to take an action that the target is otherwise unwilling to take, or (ii) where the petitioner does want to achieve the relief sought but is not acting in the interest of the class of creditors of which he is one or where the success of his petition will operate or the disadvantage of creditors. Mr. Smith argued that the second situation was applicable to the case at bar. He maintained that the evidence shows that the second application was not brought by the Tall Trade for the benefit of the class as a whole and that Tall Trade is clear that it does not wish to be repaid its debt as they have been actively seeking to prejudice Capital WW by cutting off

[7] [2015] BPIR 845.

its flow of dividends. This action, Mr. Smith argued is directly contrary to the interest of the creditors of Capital WW and Capital WW itself. He was adamant that Tall Trade filed the application to wind up Capital WW for an improper purpose, and the judge should have so ruled.

Issue 3
Admissibility of the telegram messages

[26] Mr. Smith asserted that the learned judge's determination that the telegram messages should not be admitted into evidence pursuant to section 125 of the Evidence Act was wrong. He said that the judge should have concluded that the desirability of admitting the telegram messages outweighed any undesirability of admitting evidence that had been obtained in the manner which the evidence had been obtained. He pointed out that the common law position has always been that, aside from cases of torture, evidence is admissible if relevant to the issues and, if evidence is relevant, then it does not matter how it was obtained. In support of his submission, he referred to **Ras Al Khaimah Investment Authority v Azima**[8] which cited **Kuruma, Son of Kaniu v The Queen**[9], **Helliwell v Piggott-Sims**[10] and **Bell Cablemedia Plc v Simmons**[11]. In **Ras Al Khaimah Investment Authority** the English Court of Appeal concluded that, if it had been proved that the emails in that case had been obtained by unlawful hacking, it did not follow that they would be excluded from the evidence. He urged this Court to so conclude and to rule that the messages ought to have been admitted into evidence. Mr. Smith further submitted that section 125 of the Evidence Act does not deviate substantially, or indeed at all, from the established position. He said that it starts from the common law position that improperly obtained evidence should not be admitted, this is expressly subject to the desirability of admitting the evidence outweighing the desirability of not admitting the evidence. He argued that this involves carrying out the same balancing exercise, as at common law, and the prime factor is that there is a compelling public

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[8] [2021] EWCA Civ 349.
[9] [1955] AC 197.
[10] [1980] FSR 356.
[11] [2002] FSR 34.

interest in establishing the truth and therefore in admitting relevant evidence, no matter how obtained. The significance of this fundamental public interest, he contended was not reflected, or not reflected sufficiently, in the judge's reasoning. He therefore maintained that the judge was wrong not to admit the telegram messages into evidence and urged this Court to so rule.

Appointment of Liquidators

[27] Mr. Smith submitted that the second application for the appointment of liquidators is irregular and void and of no effect. He reminded this Court that on 1st October 2020, Tall Trade issued a second application for the appointment of liquidators in Capital WW. He pointed out that the application was listed for hearing on the 9th November 2020 and the judge dispensed with Tall Trade advertisement obligations and directed that the hearing of the second application be accelerated from 9th November 2020 to 13th October 2020. Mr. Smith complained that in accordance with rule 26.1(2)(a) of the **Civil Procedure Rules 2000** (the "CPR" or the "ECSC CPR") the court had no power to accelerate the hearing in that manner; and that rule 26.1(2)(a) was disapplied in insolvency proceedings pursuant to rule 4(2) and Schedule 1 of the BVI **Insolvency Rules, 2005** (the "Insolvency Rules"). Further, he argued that section 496 (2) of the Insolvency Act which provides that the court may hear an application in insolvency proceedings immediately, only applies where the court is satisfied that an application is urgent. He said that at no time was it stated or did the judge conclude that the application was urgent. Accordingly, Mr. Smith submitted that the judge erred in concluding that he had the power to accelerate hearing of the application and that the appointment of the liquidators is irregular and void and of no effect. He therefore urged this Court to allow Capital WW's appeal and set aside the decision of the judge in its entirety.

Issue 4
Applicable Law

[28] Mr. Smith pointed out that Tall Trade did not raise the point of evidence of the applicable foreign law on conspiracy before the learned judge. He submitted that to the contrary, Tall Trade's own position before the learned judge was that the well-

known English and BVI law principles applied to the conspiracy claim. He said that the argument advanced is that Capital WW did not adduce evidence of foreign law applicable to the conspiracy cause of action. Mr. Smith rejected this argument about proof of foreign law and reminded the Court that the hearing of the application to appoint liquidators was not a trial of the conspiracy claim. He said that the question was whether there was a dispute to the **Sparkasse Bregenz** standard about the alleged debt, and this did not require adducing evidence of foreign law. He said that, for these purposes there was no reason why the court below ought not to have applied the usual rule that, in the absence of evidence to the contrary, foreign law can be assumed to be same as BVI law.[12] Further, he submitted that the decision of the Board in **Livingston Properties Equities Inc and others v JSC MCC Eurochem and another**[13] referred to by the Tall Trade does not assist it. He pointed out that **Livingston Properties** concerned an application to set aside service out of the jurisdiction, not a disputed application to appoint liquidators. In any event, Mr. Smith said that the judge below did not err in his approach to the matter and utilising the common law in his determination of the issue were raised before the court.

Submissions on Behalf of Tall Trade Ltd.

[29] Learned Queen's Counsel Mr. Charles Samek urged this Court to uphold the decision of the learned judge and dismiss Capital WW's appeal since the judge did not err. He further urged this Court to allow Tall Trade's Counter-appeal.

Issue 1
Genuine dispute – Conspiracy

[30] Mr. Samek argued the fact that Capital WW relied on the alleged conspiracy, to support its contentions that (i) it had a genuine and substantial cross-claim which equalled or exceeded the debt it owed Tall Trade and (ii) the replacement application should be dismissed on the grounds that it had been brought for an

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[12] Dicey, Morris and Collins on the Conflict of Laws, (15th edn., Sweet & Maxwell Ltd., December 2018), paragraph 9R-001(2).
[13] [2020] UKPC 31.

'improper purpose'. He said that Capital WW was in a sense subject to two different standards of proof. He elaborated that in his view the **Sparkasse Bregenz** test should be applied to the former and the 'exceptional circumstances' test being applied to the latter. He highlighted that there was no complaint that the judge did not know the test. To the contrary the judge knew and applied the correct **Sparkasse Bregenz** test. He strongly took issue with Capital WW's complaint that the judge applied the test improperly.

[31] Mr. Samek maintained that Capital WW had conjured up the alleged conspiracy claim against Tall Trade so as to avoid repaying its debt. He indicated that the judge properly identified the elements of unlawful conspiracy and applied them to the case at bar. He reiterated that the judge correctly applied the **Sparkasse Bregenz** test and relevant principles to the evidence and arrived at the correct conclusion.

[32] Mr. Samek stressed that in light of the **Sparkasse Bregenz** test, when considering the issue of what is 'substantial' it is important also to keep in mind that where allegations of serious wrong doing or fraud are made, 'the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability' and that 'the more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established'. He referred to **Yates Associates Construction Company Ltd v Blue Sand Investments Limited**[14] in support of his contention. In the appeal at bar, he submitted that similar considerations should apply when evaluating the cross-claim based on the alleged commission of a serious tort such as 'conspiracy'. He argued that the court must be satisfied that the evidence before it really does suggest the existence of a cross-claim on 'genuine and substantial' grounds. Mr. Samek was adamant that the learned judge correctly applied the **Sparkasse Bregenz** test having regard to the seriousness of the alleged cross-claim and arrived at the correct conclusion.

[14] [2016] ECSCJ No. 71 (delivered 20th April 2016).

Issue 2
Improper Purpose

[33] Mr. Samek said that Capital WW's appeal is in effect against the judge's findings of fact and exercise of discretion. He therefore argued that the narrow and limited nature of Capital WW's purported challenge to the judge's exercise of discretion coupled with its being bound by the judge's conclusion as to the meaning of clause 5 of the Loan Agreement, are fatal to its appeal against his refusal to hold that the application had been brought for an 'improper purpose'. He disagreed with Capital WW's argument that the learned judge 'erred in law and/or in fact in failing to conclude that the application for the appointment of a liquidator was not being made for an improper purpose, namely, in furtherance of the alleged conspiracy'. He submitted that there is no proper basis to disturb the learned judge's conclusion that there was no 'improper purpose' on Tall Trade's part, in prosecuting the second application to wind up Capital WW. He therefore urged this Court to dismiss the appeal on this issue also.

[34] Mr. Samek indicated that there is a difference between the applicable test for a genuine and substantial claim and that for improper purpose. Relying on **Ebbvale Ltd v Hosking (Trustee in Bankruptcy of Andreas Sofroniou Michaelides**[15] he explained that the application of the 'exceptional circumstances' test proceeds on the basis that a creditor with an undisputed debt is entitled to a winding up order ex debito justitiae save where there is 'the very strongest proof that the petition is being improperly made use of for some ulterior motive'.

[35] He pointed out that as regards Capital WW's 'improper purpose' claim below, the learned judge in his judgment noted that counsel were agreed that the **Sparkasse Bregenz** test also applied. Mr. Samek pointed out that was not correct, as Tall Trade had submitted in its skeleton argument dated 9th October 2020 that, given how Capital WW had presented its case by way of opposition to the application to appoint liquidators, it was entitled to an order for the appointment of liquidators ex debito

[15] [2013] UKPC 1.

justitiae and that it was only in 'exceptional circumstances' that one should not be made. He highlighted that the judge had expressed his doubts that the **Sparkasse Bregenz** test was the correct threshold for the determination of whether an application to appoint liquidators was being brought for an 'improper purpose'. He underscored the fact that in his view the judge stated in relation to improper purpose the correct threshold was the ordinary civil standard, but nonetheless applied the **Sparkasse Bregenz** test. He said that although it made no difference to the result, Mr. Samek submitted that the judge should have applied the ordinary civil standard in relation to consideration of Capital WW's 'improper purpose' claim. He urged this Court to uphold the judge's ruling that Tall Trade's second application was not made for an improper purpose and dismiss Capital WW's application on this ground also.

Issue 3
The Admissibility of Telegram Messages

[36] Mr. Samek referred this Court to section 125 of the Evidence Act and posited that the issue of whether the hacked telegram messages should have been admitted into evidence was to be determined in accordance with this statutory provision. He submitted that section 125(1) mandates that evidence that was obtained in consequence of an impropriety is not to be admitted into evidence. However, he pointed out that the proviso provides that it may be admitted if: '... the desirability of admitting the evidence outweighs the undesirability of admitting evidence that has been obtained in the manner in which the evidence was obtained'. He also submitted that section 125(3) expressly indicates the various factors which the court must consider. He said that the court is required to take into account the matters as they are expressed in the sub-paragraphs (a) – (g). That requires the court in the exercise of its discretion to form a view, one way or the other, in relation to each particular factor. Mr. Samek argued that in relation to factor (a), the court must make a finding as to the 'probative value of the evidence'. He said that this means that the court must conduct an evaluation of the evidence, determining how probative it is (if at all). He said that similarly, in relation to factor (d), the court must make a finding as to the 'impropriety or contravention' in question and how grave it is. Mr. Samek said that means that the court must evaluate the impropriety and its gravity.

[37] Mr. Samek was adamant that the learned judge properly assessed the relevant factors and accorded them appropriate weight and exercised his discretion correctly. In relation to appellate court review of the exercise of discretion by a first instance judge Mr. Samek said that following **Ming Sui Hung & others v JF Ming Inc and another**[16] there are well-settled constraints upon the jurisdiction of appeal courts, when asked to set aside and re-exercise a discretion conferred upon a first instance judge. He said that those considerations apply also as regards Capital WW's challenge of the learned judge's exercise of discretion in refusing to admit telegram messages into evidence and ordering the appointment of liquidators under sections 162 & 167 of the Insolvency Act. Mr. Samek submitted that there is no proper basis upon which this Court could interfere with the judge's exercise of discretion not to admit the hacked telegram messages into evidence. He therefore urged this Court to refrain from so doing since the judge's exercise of discretion is not perverse. He said that Capital WW does not contend that the judge (i) failed to have regard to any of the factors laid down in section 125(3), or that; (ii) he failed to have regard to the relevant matters, or that; (iii) he had regard to irrelevant matters, or that; (iv) he reached a decision that was plainly irrational. To the contrary, he asserted that Capital WW's complaint merely indicated that it does not like the judge's decision.

Issue 4
Appointment of Liquidators

[38] Mr. Samek rejected Capital WW's submission that the learned judge had no power to 'accelerate' the hearing of the application to 13th October 2020. He emphasised the fact that Capital WW did not appeal against the learned judge's assessment that the real point in relation to abridging time was whether it would be right to dispense with advertisement of the application. He pointed out that neither have they appealed against the learned judge's decision to dispense with advertisement of the application pursuant to s. 165(1) of the Insolvency Act. He highlighted the fact that instead, Capital WW's only challenge is to the learned judge's actual abridgement

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[16] [2021] UKPC 1.

of time. He said that Capital WW's complaint about the abridgement of time has no merit. He argued that in circumstances where Capital WW does not challenge the decision to dispense with the advertisement, which had been its stated reason for not abridging time, there was no purpose whatsoever in adjourning. He agreed with the judge that there was no purpose whatsoever in adjourning and in any case, the learned judge plainly did have power under section 496(1)(b) of the Insolvency Act to abridge time so that the hearing of the 1st October 2020 application could proceed. Further, Mr. Samek noted that Capital WW does not contend that if the judge had the power, then the exercise of his discretion to abridge the time was open to challenge or was otherwise perverse. Mr. Samek was adamant that this ground of appeal also fails. He urged this Court to dismiss the appeal with costs and affirm the judgement below with costs.

Issue 5
The Applicable Law

[39] Mr. Samek reminded the Court that the learned judge had to engage in an assessment of whether there was sufficient evidence of an actionable conspiracy. However, he posited that the issue of actionability could not be assessed, without first determining what system of law was its proper or applicable law. He said that while Capital WW approached the matter on the basis that the BVI or common law governed the conspiracy, in the circumstances of this case, where Capital WW was alleging the commission of a serious tort – conspiracy – it was not appropriate for them simply to lead no evidence at all, or not make any submissions, on the issue of the applicable law. Mr. Samek further posited this was not a case where it would have been permissible to apply the presumption that BVI or common law applied as in **Livingston Properties** (on appeal from this Court). In this case, he distinguished, there was not insufficient evidence on the issue, rather (i) there was sufficient evidence and (ii) there were no relevant BVI linking factors at all. Beyond the irrelevant fact that Capital WW and Tall Trade were incorporated in the BVI, there was no evidence that the alleged conspiracy was hatched in the BVI; there was no evidence that any of the alleged actors were in the BVI at any material time; there was no evidence that any alleged unlawful means took place in the BVI or was

directed from the BVI; there was no evidence that any loss was suffered in the BVI. Consequently, Mr. Samek asserted, it would have been right for the judge to have rejected Capital WW's 'conspiracy' claim on the basis that without Capital WW leading cogent evidence as to the applicable law, it was impossible for the court to come to any conclusion as to whether it satisfied the relevant threshold. He therefore submitted that this Court should dismiss the appeal and affirm the decision of the judge on this additional basis also.

[40] It is apparent that in order to resolve the above issues, scrutiny of several provisions of various legislative provisions need to be undertaken. I will now refer to the relevant legislative provisions that are brought into sharp focus.

Insolvency Rules

[41] Rule 4(2) of the BVI Insolvency Rules states: 'The provisions of the CPR specified in Schedule 1 do not apply in insolvency proceedings.'

Civil Procedure Rules 2000

[42] The relevant CPR provisions also have to be considered. In the context of this appeal and in so far as is relevant, rule 26.1 (2)(a) of the **Eastern Caribbean Supreme Court Civil Procedure Rules 2000** ('CPR') provides: '(2) Except where these rules provide otherwise, the court may – (a) adjourn or bring forward a hearing to a specific date.'

[43] At the centre of this appeal are several important sections of the Insolvency Act. Now, I will refer to them in some detail.

Insolvency Act

[44] Section 8(1) of the Insolvency Act states that a company or a foreign company is insolvent if:

> (a) it fails to comply with the requirements of a statutory demand that has not been set aside under section 157;

(b) execution or other process issued on a judgment, decree or order of a Virgin Islands court in favour of a creditor of the company is returned wholly or partially unsatisfied; or

(c) further, the value of the company's liabilities exceeds its assets, or (ii) the company is unable to pay its debts as they fall due.

[45] The issuance of the statutory demand is provided for in section 155 of the Insolvency Act. Indeed, section 155(1) of the Insolvency Act enables a creditor to make demand on a person for payment of a debt owed by that person to him.

[46] Section 155(2) provides that:

"A demand under subsection (1) shall

(a) be in respect of a debt that is due and payable at the time of the demand and that is not less than the prescribed minimum;

(b) be in writing and shall specify the nature of the debt and its amount;

(c) be dated and shall be signed by the creditor or by a person authorized to make demand on the creditor's behalf;

(d) require the person to pay the debt or to secure or compound for the debt to the reasonable satisfaction of the creditor within 21 days of the date of service of the demand and on him or her or such longer period as may be prescribed;

(e) state that if the demand is not complied with, application may be made to the court for the appointment of a liquidator or a bankruptcy trustee, as the case may be;

(f) set out the rights of the person to make application to set the demand aside undo section 156; and

(g) comply with and be served in accordance with the Rules."

[47] Section 155 (3) states that:

> "If the creditor making demand under subsection (1) is a secured creditor in respect of the debt, the full amount of the debt shall be specified in the demand, but
>
> (a) the demand shall specify the nature of the security interest, and the value which the creditor places on it at the date of the demand; and
>
> (b) the amount claimed
> (i) shall be the full amount of the debt less the amount specified as the value of the security interest; and
> (ii) shall equal or exceed the prescribed minimum."

[48] Section 156(1) enables a person who has been served with a statutory demand to apply to the court to set it aside. Section 156(2) stipulates that the application under subsection (1) shall be made within fourteen days of the date of service of the demand on him.

[49] Section 157(1) enables the court to set aside a statutory demand. It states as follows:

> "The court shall set aside a statutory demand under this section if it is satisfied that
> (a) there is a substantial dispute as to whether
> (i) the debt or
> (ii) a part of the debt sufficient to reduce the undisputed debt to less than the prescribed minimum,
> is owing or due;
>
> (b) the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off, counterclaim or cross claim in an amount equal to or greater than the amount specified in the demand less the prescribed minimum…"

[50] It is clear from the above that the person on whom the statutory demand was served has a reasonable prospect of establishing a set-off counterclaim or cross-claim in an amount equal to or greater than the amount specified in the demand less prescribed minimum of the debt. Section 162(1) enables the court to appoint liquidators if the company is insolvent. Section 162(2) states that an application under subsection 1 may be made by a creditor.

[51] Section 165(1) states as follows:

> "Unless the Court otherwise orders, an application for the appointment of a liquidation shall be advertised,
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> (a) if the company is the applicant, not less than seven days before the date set for the application to be heard; or
>
> (b) if the company is not the applicant, not less than seven days after service of the application on the company and not less than seven days before the date set for the application to be heard."

[52] Section 165(2) is equally important and it states as follows:

> "If the application is not advertised in accordance with this section and the Rules, the Court may dismiss it."

[53] Section 167(1) states that on hearing an application for the appointment of a liquidators, the court may appoint a liquidator.

[54] Section 168(1) states that subject to 168(2) an application for the appointment of a liquidator shall be determined within six months after it is filed.

[55] Section 168(2) states:

> "The Court may, upon such conditions as it considers fit, extend the period referred to in subsection (1) for one or more periods not exceeding three months each if
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> (a) it is satisfied that special circumstances justify the extension; and
>
> (b) the order extending the period is made before the expiry of that period or, if a previous order has been made under this subsection, that period is extended."

[56] Section 496(2) provides:

> "(2) Without limiting subsection (1), where it is satisfied that an application is urgent, the Court may
>
> (a) hear the application immediately, either with or without notice to, or the attendance of, other parties; or

(b) authorize a shorter period of service than that provided for by the Act or the Rules."

[57] Undergirding both of the two main issues of (a) whether the judge erred in concluding that Capital WW had not met the threshold to resist the liquidation, namely a genuine dispute on substantial grounds, and (b) that the second application was not filed for an improper purpose, is the admissibility of the hacked telegram messages. Of necessity therefore, I will now refer to the relevant sections of the Evidence Act which addresses the issue of the admissibility of evidence that has been improperly obtained.

Evidence Act

[58] Part XXII of the Evidence Act 2006 is entitled 'Exclusion of Evidence in the Exercise of a Judicial Discretion'. Section 125(1) of the Evidence Act is contained therein and it mandates that evidence that was obtained improperly or in contravention of a law, or in consequence of an impropriety is not to be admitted into evidence. However, there is a proviso, namely that it may be admitted if:

> "… the desirability of admitting the evidence outweighs the undesirability of admitting the evidence that has been obtained in the manner in which the evidence was obtained."

[59] Section 125(3) provides that:

> "For the purposes of subsection (1), the court shall be taken into account, among other things, the following matters:
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> (a) the probative value of the evidence;
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> (b) the importance of the evidence in the proceedings;
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> (c) the nature of the relevant offence, cause of the action or defence and the nature of the subject-matter of the proceeding;
>
> (d) the gravity of the impropriety or contravention;
>
> (e) whether the impropriety or contravention was deliberate or reckless;

(f) whether any other proceeding, whether or not in a court, has been or is likely to be taken in relation to the impropriety or contravention;

(g) the difficulty, if any, of obtaining the evidence without impropriety or contravention of law."

Discussion

[60] As indicated earlier, the gravamen of Capital WW's appeal revolves around its complaints that the judge made erroneous findings of fact, evaluations of the evidence and exercises of discretion both in relation to the exclusion of the messages and his conclusion on the issue of improper purpose. More importantly, Capital WW's major complaint is that the learned judge erred in the exercise of his discretion by appointing liquidators over it. In essence, Capital WW's complaint centres around the judge's exercise of discretion and evaluation of the evidence and his conclusions of fact coupled with allegations that the learned judge misapprehended several legal principles and therefore erred in his application of them. The alleged infractions, Capital WW asserts, cumulatively undermine the judge's decision to appoint liquidators over it. It is in this context that Capital WW seeks to impugn the judge's decision.

Applicable Legal Principles

[61] Having given deliberate consideration to the arguments and countervailing arguments, in my view it is apposite that I remind myself of the well-known principles that are applicable to the appellate court's review of the judge's evaluation of evidence/findings of fact and to his exercise of discretion. All of these are viewed in the context of the requisite appellate restraint. The law in these regards is well settled, namely an appellate court ought only to interfere with a judge's exercise of discretion if satisfied that the exercise of discretion or evaluations of the evidence and findings of fact fall outside the high threshold for appellate interference. Indeed, several decisions of this Court have consistently held that the appellate court is constrained from interfering with the findings of the lower court and exercise of

discretion by the judge outside of some narrow circumstances. There is a settled stream of jurisprudence to this effect.

Appellate Restraint

[62] In writing on behalf of this Court in **Yates** I stated at paragraph 46 as follows:

> "The Court of Appeal should apply restraint not only to the judge's findings of fact but also to the evaluation of those facts and the inferences drawn from them. It is axiomatic that the critical question which is before this Court is whether there was evidence before the learned judge from which she could properly have reached the conclusions that she did or whether, on the evidence, the reliability of which it was for her to assess, she was plainly wrong."

[63] The general reasons for appellate restraint are well summarised by Levison LJ in his well-known judgment in **Fage UK Ltd and another v Chobani UK Ltd and another**[17] as follows:

> "114 Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them."

[64] In **Shankar Khushalani and another v Lindsay Mason (Trading as Tropical Home Designs Architectural & Construction Services)**[18] writing on behalf of this Court I stated at paragraph 35 that:

> "… it is not open to the appellate court to overturn the learned trial judge's findings of facts and evaluations of those facts, unless those facts were not open to the judge on the evidence."

[65] It is settled law that an appellate court must show fidelity to the well-settled principles that govern the appellate review of a trial judge's findings of facts, the evaluation of those facts and the inferences drawn from them by the trial judge.[19] In relation to appellate restraint in relation to the exercise of discretion by the judge, the law is settled.

[17] [2014] EWCA Civ 5 at paragraph 114.
[18] [2021] ECSCJ No. 593 (delivered 11th June 2021).
[19] See Webster Dyrud Mitchell (A partnership) et al v Jenny Lindsay [2021] ECSCJ No. 691 at paragraph 25.

[66] In relation to the appellate court's review of the exercise of discretion by the first instance judge, in **Michel Dufour and others v Helenair Corporation Ltd. and others**[20] Sir Vincent Floissac, former Chief Justice enunciated that the appellate court could only interfere if it is satisfied:

> "that in exercising his or her judicial discretion, the learned judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors and considerations or by taking into account or being influenced by irrelevant factors and considerations and (2) that as a result of the error or degree of error in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be clearly or blatantly wrong."

[67] In **Ming Sui Hing**, the Board stated at paragraph 20 as follows:

> "It is necessary at this point to bear in mind the well-settled constraints upon the appellate jurisdiction, when asked to re-exercise a discretion conferred upon the first instance judge. These constraints form part of a package, developed over many years, which ensure that the benefit of finality which should normally follow from the judicial determination of the parties' dispute is not rendered ineffective by undue appellate activism."

[68] In **J Trust Asia Pte Ltd. v Mitsuji Konoshita and another**[21] writing on behalf of this court I stated that the appellate court should not interfere with the judge's exercise of discretion except, in limited circumstances. The appellate court should only interfere if it is satisfied that in exercising his or her judicial discretion, the trial judge erred in principle either by failing to take into account or giving too little or too much weight to relevant factors or being influenced by irrelevant factors; and that, as a result of the error, in principle, the trial judge's decision exceeded the generous ambit within which reasonable disagreement is possible and may therefore be said to be blatantly wrong. Therefore, the appellate court should not easily substitute its own exercise of discretion for the discretion already exercised by the judge unless the decision of the judge was plainly wrong.

[20] [1996] ECSCJ No. 11 (delivered 12th February 1996).
[21] [2021] ECSCJ No. 571 (delivered 31st May 2021).

[69] In **Ming Sui Hung** the Board discussed the need for appellate restraint both in relation to appeals from exercises of discretion and findings of fact. Lord Briggs at paragraph 22 stated as follows:

> "Finally, it is not an answer to the need for the exercise of appellate restraint for the appeal court to regard itself as well placed as the judge to carry out the relevant task. In Zuckerman on Civil Procedure: Principles of Practice, 3rd ed (2013), at para 24.204 it is observed:
>
> > "It has been said that a review of the lower court's decision on a question of fact is different from a review of the lower court's exercise of discretion. The difference between the two kinds of judicial exercise is undeniable, but it does not call for a difference in appellate restraint to interference with the lower court's decision. For while it is true that in case of discretion the appeal court may be as well placed as the trial court to exercise it, the primary responsibility rests with the trial court not the appeal court. This is true not only with regard to case management decisions but also other decisions requiring the balancing of different factors as in care proceedings for instance".

Other Relevant Legal Principles

[70] In seeking to resolve the critical issues in this appeal it is evident that other important relevant legal principles are engaged. In this context the principles that are applicable to the winding up of a company and the countervailing circumstances in which a court would refrain from winding up a company including matters of the genuine and substantial dispute of the debt and the alleged improper purpose for the presentation of the application to wind up the company have to be investigated.

[71] It is well settled that the court will not make a winding up order under section 157(1) of the Insolvency Act if the debt demanded in the statutory demand is disputed on substantial grounds. Very helpful guidance on the requisite threshold has been provided by Sir Dennis Byron, Chief Justice, as he then was, at paragraph 3 in **Sparkasse Bregenz**. Indeed, His Lordship formulated the applicable test, which has become the locus classicus thusly:

> "The Court will order a winding up for failure to pay a due and undisputed debt over the statutory limit, without other evidence of insolvency. If the debt is disputed, the reason given must be substantial and it is not enough for a thoroughly bad reason to be put forward honestly …the dispute must be

> genuine in both a subjective and objective sense. That means that the reason for not paying the debt must be honestly believed to exist and must be based on substantial or reasonable grounds. Substantial means having substance and not frivolous, which disputes the Court should ignore. There must be so much doubt and question about the liability to pay the debt that the Court sees that there is a question to be decided. The onus is on the company to bring forward a prima facie case which satisfies the Court that there is something which ought to be tried either before the Court itself or in an action or by some other proceedings … If the existence of the debt on which the winding up petition is founded is disputed on grounds showing a substantial defence requiring investigation, the petitioner would not have established that he was a creditor and thus would not be entitled to present the petition, accordingly the presentation of such a petition would be an abuse of the process of the Court. The process of the Companies Court could not be used in cases where there were issues of disputed fact. Such questions must be resolved in actions."

[72] It is also law that the court will not wind up a company in the following circumstances 'where there is a serious and genuine cross-claim save in special circumstances' provided always that the cross-claim equals or exceeds the amount of the application's debt. This was judicially recognised in **Re Bayoil S.A**.[22]

[73] In **Montgomery v Wanda Modes Ltd**[23] it has been recognised that it is not objectionable that a company asserts a cross-claim in response to attempts to commence winding up proceedings.

[74] In an application to appoint liquidators the burden is on the respondent company to prove (i) that it has a cross-claim which is equal to or larger than the debt and (ii) that its cross-claim is either undisputed or is based on substantial grounds.[24] It is the law that in considering whether or not there is a cross-claim which equals or exceeds the applicant's debts, the court applies the same test as that applied where the applicant's debt is disputed. In **Re Bayoil S.A** Nourse LJ stated as follows:

> "I emphasise 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

[22] [1999] 1 WLR 147 at pp. 155F and 156H.
[23] [2002] 1 BCLC 289.
[24] See the pronouncements of Nourse LJ in Re Bayoil S.A [1999] 1 WLR 147 at p.155.

unable to litigate; and that it must be in an amount exceeding the amount of the petitioner's debt."

Issues 1, 2 and 3 (Genuine Dispute - Conspiracy, Improper Purpose and Admissibility of Evidence)

[75] In my view it is right to reiterate that in the case below the judge treated with the issues that were joined quite comprehensively and carefully. The judge first examined the telegram messages and accorded them in order to determine whether there was evidence which would point to a conspiracy and is consistent with a dispute on substantial grounds to the low standard as set. It was after the scrutiny of the evidence and having applied the relevant principles of conspiracy and improper purpose that the judge quite properly determined that there was no basis for the finding of a conspiracy, neither was there one to determine improper purpose. The judge, however, did not stop there, he proceeded to examine Capital WW's cross-claim on the basis that he was wrong about his conclusion on the conspiracy and it was in that context that he interrogated the issue of the admissibility of the hacked telegram messages, in order to determine whether he should have exercised his statutory discretion to allow them into evidence. Capital WW's primary complaints are in relation to the judge's evaluation of the hacked telegram messages. It is undisputed that there was serious impropriety in Capital WW obtaining those messages. This brought into question, as the judge quite correctly acknowledged, the question of whether they indeed pointed to a conspiracy in which Mr. Isaev and Tall Trade were implicated.

[76] Let me say straight away that a review of the judgment clearly indicated that the judge was alive to the tasks that he had to undertake and did so meticulously. It is worth mentioning that Capital WW's appeal is not specifically framed to challenge the judge's discretion in addressing the issues of whether or not there was a dispute on substantial grounds and improper purpose; also whether in the decision to appoint liquidators over Capital WW the judge had to evaluate the evidence, make findings and thereafter exercise his discretion. In my view, it must be borne in mind that unless the court below was satisfied that the debt is disputed on substantial

grounds, in the **Sparkasse Bregenz** sense and is not frivolous or without substance, the court should not have prevented the second application from moving forward.

[77] While I am of the opinion that the admissibility of the hacked telegram messages can properly be regarded as the first issue to be determined I will refrain from approaching this appeal in that manner. For the sake of convenience I would adopt the similar approach to that utilised by the judge namely: determine whether the judge erred in concluding that there was evidence that pointed to a conspiracy which undergirds Capital WW's contention of a dispute on substantial grounds. Interlinked is the examination of the improper purpose claim and thereafter the judge's refusal to admit the hacked telegram would be reviewed, on the basis that there was evidence which pointed to a conspiracy.

[78] As I have indicated above, the first three issues mentioned above are inextricably linked therefore I will treat with them together. I now turn to the judge's treatment of Capital WW's conspiracy claim and improper purpose complaints.

Actionable Conspiracy

[79] The judge quite properly acknowledged that there are two types of conspiracies: unlawful means conspiracies and lawful means conspiracies. He correctly focused on the former in the case below.

[80] One of the leading authorities on unlawful means conspiracy has been recognised as **Taylor v Van Dutch Marine Holding Ltd and others**[25] where it was held that the constituent elements of unlawful means conspiracy are:

(a) An agreement, combination or understanding involving two or more persons;

(b) To take action which is unlawful;

[25] [2019] EWHC 1951.

(c) With the intention (but not necessarily the predominant purpose) of injuring the claimant;

(d) Damage is caused to the claimant by unlawful means.

[81] So as to avoid lengthening this judgment unnecessarily, it suffices to say that Capital WW does not complain that the judge misunderstood the role that he was required to have performed. To the contrary, the judge was very careful in assessing the evidence, examining the relevant factors and weighing them and did not take into account any irrelevant actors in the exercise of his discretion. It must be remembered that Capital WW's potential claim for conspiracy was largely founded on the evidence of Mr. Megrelishvili and the hacked telegram messages. It is worth pointing out that the judge who dealt with the originating application and related applications, in setting out his analyses took the time to point out the reasons why he determined that Mr. Megrelishvili was not a credible witness. There remained only the hacked telegram messages upon which Capital WW could have sought to rely in support of the conspiracy claim. The judge carefully assessed all of the telegram messages and indicated the reasons he formed the view that they did not point to any conspiracy.

[82] In **Kuwait Oil Tanker Co SAK and others v Al Bader and others**[26] it was held that the burden of proof is on the claimant to establish all elements of his case. In the case below, it follows that the onus was on Capital WW to provide evidence which pointed to a case of conspiracy to the **Sparkasse Bregenz** standard.

[83] The learned judge in analysing this complaint gave deliberate consideration to the hacked telegram messages in paragraphs 27-56 of his judgment. A close review of the judgment indicates that the judge scrupulously reviewed Capital WW's allegation of conspiracy against Tall Trade (Mr. Isaev) and rejected it on its merits at paragraph 62 of the judgment. The judge rejected Capital WW's assertion that

[26] [2000] 2 All ER (Comm) 271.

the evidence including the hacked telegram messages it had deployed pointed to the conspiracy in which Tall Trade was allegedly involved, even to the low **Sparkasse Bregenz** standard. At paragraphs 60-62 of the judgment, the judge indicated that there was no sufficient evidence which pointed to a conspiracy in which Mr. Isaev (Tall Trade) was involved and that Befree's failure to pay the dividends and discussions as evidenced by the hacked telegram messages did not provide the proper basis for the alleged conspiracy. As indicated earlier, I would reiterate the fact that Capital WW's obligation to effect the quarterly repayment to Tall Trade existed contractually by virtue of clause 5 of the Loan Agreement irrespective of whether it obtained dividends from Befree. In addition, Mr. Megrelishvili, who was Capital WW's main witness, did not paint a good picture before the judge. The judge took care to point out the several inconsistencies and weaknesses in his evidence. All of this did not place Capital WW in a good position in so far as its conspiracy case was concerned.

[84] Of significance is the fact that the judge made several findings that cannot be impugned based on the settled legal principles that the findings of the lower court should not be rigidly constrained as stated in **Yates**. Capital WW has another great difficulty to grapple with and this is the fact that the judge was very comprehensive in his treatment of the matter of conspiracy. Consequently, the judge also examined Capital WW's case from the perspective that he was wrong in his conclusions as to the existence of a conspiracy and thereafter he sought to determine whether the hacked telegram messages should have been admitted into evidence. Be that as it may, I bear in mind the restraints that were enunciated in **Ming Sui Hung** and **Shankar Khushalani** which are applicable to appellate review of findings and evaluation of the evidence and apply them with force. There is no proper basis to impugn those findings and ultimately the judge's closely reasoned decision that the evidence did not point to a conspiracy even to the low **Sparkasse Bregenz** standard. There was no issue of the judge making inclusive findings but rather whether the evidence supported an assertion of conspiracy. It clearly did not.

[85] I turn now to the improper purpose assertion.

Improper purpose

[86] It is settled law that petitioners for the winding up of a company are prima facie entitled ex debito justitae to a winding up order, and it seems to me to be impossible to displace that prima facie position without the very strongest proof that the petition is being made use of for some ulterior motive. In **Re Amalgamate Properties of Rhodesia (1913), Limited [0082 of 1917.]**[27] this principle was given judicial acknowledgment.

[87] It must be remembered that the main thrust of this aspect of Capital WW's complaint was that it was improper and an abuse of the court's process and is part of the wider conspiracy between Mr. Kashuba and Mr. Isaev to deprive Capital WW of its dividends from Befree, with the intention that Capital WW would be forced into liquidation. In relation to the conspiracy and improper purpose allegations the judge stated that counsel were agreed that the standard Capital WW had to meet in order to defeat the application was the **Sparkasse Bregenz** test. In my view, the judge correctly expressed his doubts as to whether that test was applicable to the improper purpose assertion. However, there is no need for me to resolve that matter in this judgment, since the judge assessed Capital WW's allegations of improper purpose to the lower standard of proof namely **Sparkasse Bregenz** and yet Capital WW was unable to even meet that threshold both in relation to the conspiracy and improper purpose contentions. The learned judge having analysed and assessed Capital WW's assertion of conspiracy concluded that there was no sufficient evidence of agreement or combination which involved Tall Trade. Capital WW's position before this Court did not improve. The reasons for this are poor quality of evidence and the very scant evidence if any, and it did not point to any conspiracy involving Tall Trade. Even the manner in which learned Queen's Counsel Mr. Smith was forced 'to skip and jump' through material aspects of the hacked telegram messages and was placed in a position where he had to invite this this Court to give strained

[27] [1917] 2 Ch 115.

interpretation to the messages fortifies the decision of the judge. All of this gave this Court absolutely no comfort. It is simply no part of the function of this Court to go to trawling through various aspects of few of the hacked telegram messages and selecting some as distinct from others in an effort to reject the judge's findings.

[88] In my considered view the judge clearly indicated his knowledge of the principles of conspiracy at paragraphs 57 to 59 of his judgment. I am mindful that this was not a trial and that there was no discovery or cross examination of witnesses up to this stage. Nevertheless the evidence on which Capital WW relied in support of both the conspiracy assertion and the improper purpose contention were the hacked telegram messages. The judge in my view was entitled to form the view of the conspiracy theory and improper purpose allegations that he did.

[89] In this appeal, where serious allegations of impropriety in the form of conspiracy and improper purpose are levelled by Capital WW against Tall Trade in an effort to resist liquidation, in my view the quality of evidence adduced even at this stage should have been better. In **Yates**, writing on behalf of this Court, I applied the principles that were enunciated in **Re H and others (Minors) (Sexual Abuse: Standard of Proof)**[28] namely, where allegations are serious 'the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability' and that 'the more improbable the event, the stronger must be the evidence that it did occur before, on the balance probability, its occurrence will be established'. Those words apply with even greater force to the appeal at bar. It is important to place on the record the great difficulty that in my opinion Mr. Smith had in pointing to messages which in his view could substantiate the allegations of conspiracy and improper purpose and this issue was despite his best efforts. Even though I am fully cognisant that this is not the trial of the issues, it remains that the evidence that Capital WW deployed before this Court was unclear and of poor quality. I am unable to discern any error that the learned judge made in both his

[28] 1996 AC 563, p. 586 E-G.

evaluation of the evidence, findings of fact and exercise of discretion. In my view it is primarily because of the evidential difficulties that Capital WW were unable to surmount which militated against the judge concluding that the evidence pointed to a conspiracy in which Tall Trade was implicated.

[90] In my view, quite properly the judge examined the evidence in the context of seeking to determine whether it disclosed substantial and reasonable grounds for the allegation of conspiracy. The evidence was found by the judge to be seriously wanting. This situation did not improve before this Court. Once the conspiracy allegations faced those insurmountable difficulties, the improper purpose complaints must of necessity have suffered a similar fate. The appeal therefore fails on both issues.

[91] I now turn to examine the judge's exclusion of the hacked telegram messages.

Admissibility of Telegram Messages

[92] By way of reminder in the main, the evidence on which Capital WW sought to rely in order to substantiate its allegations were some telegram messages which had been obtained from hacking of the account of third parties. The resolution of the issue of the admissibility of the messages into evidence required the judge to determine whether he should exercise the discretion conferred upon the court by section 125 of the Evidence Act so as to allow them into evidence. The judge exercised his discretion and excluded the hacked telegram messages. It is worth emphasising at the outset, as I hereby do, that it is only if this Court were to conclude that the judge erred in the exercise of his discretion or that the judge's exercise of discretion was so perverse that this Court is entitled to interfere with that exercise of discretion. The principles of **Dufour**, **Ming Sui Hung** and **J Trust Asia** apply with great force. I am of the clear view that the considerable paragraphs of the judgment indicate the care with which the judge treated the matter. The judge in his judgment showed fidelity to both sections 125(1) and 125(3) of the Evidence Act and considered the probative value of the evidence together with the other factors that

are relevant. There is no law in the BVI which states that if the evidence has probative value it is mandatory that it should be admitted into evidence. I reiterate that section 125(3) requires the judge to consider all of the factors including the probative value of the hacked telegram messages in the exercise of his statutory discretion. This is precisely what the judge did at paragraphs 11, 15 and 16 read together with paragraphs 74 to 79 of the judgment. The latter paragraphs are of great significance to warrant their reproduction, as I hereby do:

> **"Admissibility of the Telegram messages**
>
> "[74] I turn then to the admissibility of the Telegram messages. Because I have rejected Capital's case on its merits, including the Telegram messages, this point is hypothetical. Nonetheless, since the matter may go further, it is right that I should deal with it. Obviously, on the facts as I have found them, the 'probative value of the evidence' is slight. That alone would be sufficient for me to exercise my discretion against allowing the messages into evidence."

[93] As a background to his decision, at paragraph 10 of the judgment, the judge quite properly acknowledged that both the conspiracy claim and improper purpose claim rely on the admission into evidence of the telegram messages. And at paragraph 15 of his judgment, he was alive to the fact that that the telegram messages had been obtained by reason of impropriety and therefore section 125(1) of the Evidence Act was engaged. He further indicated that he had to assess the various factors set out in section 125(3) to reach a value judgment under section 125(1). Further, the judge quite properly indicated that he had to assess the probative value and the importance of the evidence of the telegram messages. Shortly I will reproduce at some length to the judge's careful reasoning on the matter of the admissibility of the hacked telegram messages

[94] Further on the issue of the admissibility of the hacked telegram messages, the judge stated at paragraphs 76-79 as follows:

> [76] As to (g), it can no doubt be argued that Mr. Megrelishvili would never have known of the messages without the hacking. However, that is not the test under (g). The evidence could have been obtained if Capital had brought proceedings against the alleged conspirators. Mr. Montik and Mr. Kashuba would have been obliged to disclose the Telegram messages as

> part of their disclosure obligations. If they had not done so, then (g) would have been highly relevant to the admission of the hacked versions of the messages. Capital could rely on (g) to allow the admission of the hacked messages as the only way to show that Mr. Montik and Mr. Kashuba were in breach of their disclosure obligations. As it is, in my judgment (g) is another factor against admissibility at this stage of the case.
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> [77] As to (c), I need to take an overall view of the case. There is no doubt that Tall Trade has lent a large sum of money to Capital. Capital has taken no effective steps to obtain the payment of dividends from Befree. There were steps which it could have taken, like arbitrating a dispute under the shareholders' agreement or suing the alleged conspirators. (This Territory would probably have jurisdiction over the conspiracy claim based on Capital suffering the damage here: CPR 7.3(4).) It has done nothing. Mr. Megrelishvili put forward various defences to the statutory demand, all of which I rejected. He has offered to pay personally, but has not made any such payment, despite the long period since the hearing in February.
>
> [78] What the legislator was envisaging under (c) was the possibility of a serious miscarriage of justice occurring, if illicitly obtained evidence was not adduced. In the current case, appointing a liquidator may make pursuit of the alleged conspirators more difficult. However, it would not make it impossible. The liquidator might have sufficient funds to do it him or herself. Alternatively, Mr. Megrelishvili might finance the litigation. Lastly the liquidator might sell the claim to Mr. Megrelishvili or a litigation funder. In my judgment, 'the nature... of the defence and the nature of the subject-matter of the proceeding' are not such that great weight should be attached to this consideration, even on the hypothetical assumption which I am making that a case in conspiracy is made out.
>
> [79] Standing back and looking at the seven factors in section 125(3), the considerations are overall firmly against the admission of the Telegram messages. In the exercise of my discretion under section 125(1) I refuse to allow the messages to be adduced in evidence."

[95] It must be recalled that Capital WW's case theory was that Tall Trade had engaged in a conspiracy together with the founders and management of Capital WW's subsidiary Befree and Befree's Corporate group known as Softswiss Group, to improperly procure the liquidation of Capital WW. Also, that the Tall Trade was seeking to liquidate Capital WW for an improper purpose. In relation to Capital WW's complaint that the judge failed to apply the relevant principles of conspiracy, I have no doubt that the learned judge properly applied the legal principles that undergird conspiracy having given deliberate consideration to the learned judge's extensive

discussion of the alleged conspiracy and his analysis of the conspiracy which spans several paragraphs from 10 to 16 of the judgment and require no recitation, and I am unpersuaded that the judge misapprehended the relevant principles on conspiracy.[29] To the contrary, the judge was very careful at paragraphs 27 to 56 of his judgment in his evaluation and assessment of the hacked telegram messages. Read together with paragraphs 60 to 62 of the judgment, there is no discernible error of law or fact on the record. In my view the learned judge quite properly rejected Capital WW's case of conspiracy on its merits. However, the judge very prudently proceeded to examine the other issues of the admissibility of the hacked telegram messages on the basis that there was a case of conspiracy established.

[96] I have given deliberate considerations to the arguments advanced by Mr. Smith in my considered opinion. In my view the common law position that governs the admissibility of evidence that was improperly obtained cannot avail Capital WW. In the BVI the legislature has provided a statutory scheme and it is that scheme that must be applied in order for this Court to determine whether the learned judge erred by excluding the hacked telegram messages. By way of emphasis the common law principles that were enunciated in **Ras Al Khaimah Investment Authority**, as it relates to admissibility, are inapplicable to the appeal at bar, since unlike United Kingdom, evidence what has been obtained by impropriety is inadmissible save in the circumstances stated in the provisio.

[97] With the need for appellate restraint as established by the consistent stream of jurisprudence that emanate from **Dufour**, **Novel Blaze Limited (In Liquidation) v Chance Talent Management Limited**,[30] and **Ming Sui Hung** in my mind, I will now examine the merits of Capital WW's complaints against the learned judge in relation to the matter of the exclusion of the hacked telegram messages. A close review of the judgment indicates in summary that which the learned judge did and that can be expressed thus:

[29] See paragraphs 57 – 59 of the judgment below.
[30] [2021] ECSCJ No. 529 (delivered, 16th April 2021).

The judge in exercising his discretion under section 125 of the Evidence Act evaluated the telegram messages and held that they did not speak to an actionable conspiracy to the **Sparkasse Bregenz** standard. He therefore concluded that there was no basis to admit them into evidence. The judge was careful to examine the alternative position of exercising his discretion under section 125 of the Evidence Act on the basis that the telegram messages passed the **Sparkasse Bregenz** threshold. As would become apparent shortly, the learned judge carefully examined and evaluated the factors in section 125 of the Evidence Act and in the exercise of his discretion held that they should not have been admitted into evidence in any event.

[98] In relation to the judge's ruling on the non-admission of the telegram messages, cognisance must be paid to the fact that Capital WW did not approach this aspect of the appeal from the perspective of exercise of appellate review of the judge's discretion. Given the totality of the circumstances and in my clear view that the statute gives the judge a discretion whether or not to admit the evidence that was obtained improperly, Capital WW has a great hurdle in impugning the judge's decision to exclude the hacked telegram messages on the basis that it is perverse.

[99] Further on the matter of appellate review of the exercise of discretion by the first instance judge, I accept the very helpful principle that was stated in **Cherney v Deripaska No. 2**[31] namely that an appellate court should only interfere with the judge's exercise of discretion where it is clear that an error of principle had been made and 'it is not for this court to re-assess the weight to be given to the matters which the judge was entitled to take into account in exercising his own discretion'.

[100] It is only if this Court were to conclude that the learned judge exercised his discretion perversely in excluding the telegram messages, it will then fall to this Court to exercise its discretion afresh. In this regard, I am guided by the restated principles in **Ming Sui Hung**. The Board stated at paragraph 28:

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[31] [2009] EWCA Civ 849.

> "A view that a judge should have given 'more weight' to a relevant matter is not within the scope of appellate review. Matters of weight when exercising a discretion are for the judge, provided that his assessment of weight is not irrational."

[101] In my considered opinion and having reviewed the judge's careful treatment of the issue of the admissibility of the hacked telegram messages, there is no basis upon which this Court could conclude that the exercise of his discretion to exclude the hacked telegram messages was perverse.

[102] For the sake of completeness, even though I am mindful of the fact that this Court is not required to exercise its discretion afresh and therefore it is no part of the function of this Court to evaluate the evidence that was adduced including the hacked telegram messages, however, it is imperative to reinforce that the quality of those messages gave me great cause for pause that they pointed to any conspiracy in which Tall Trade was involved.

[103] Accepting that Capital WW's criticism of the judge must be examined against the background that even though the judge had quite correctly concluded that there was no sufficient evidence of any agreement or combination which involved Tall Trade, he nevertheless proceeded to consider the matter on the basis that he was wrong about that. Even in that context, the judge concluded that no adequate case of actionable conspiracy had been made out even to the low **Sparkasse Bregenz** standard. In my view in order for Capital WW to succeed on this appeal it will have to persuade this Court to interfere with the judge's exercise of discretion not only to exclude the hacked telegram messages but also to wind up Capital WW pursuant to sections 162 and 167 of the Insolvency Act. This does not negate the fact that there is some small merit in Mr. Samek's arguments that before this Court could get to the question of whether there is a genuine and substantial dispute as advocated by Capital WW to the debt claimed by Tall Trade, the question of the admissibility of the hacked telegram messages had to be addressed first. In my clear view the judge quite properly approached this matter from the point of view of whether Capital WW had a cross-claim which satisfied the **Sparkasse Bregenz** test. I agree with

the judge that Capital WW's assertion of improper purpose was linked to the conspiracy theory and both of these relied mainly on the hacked telegram messages as their foundation. I have no doubt that the learned judge was acutely aware of the nature of his task and approached it carefully. This much is obvious from a reading of paragraphs 8,10,11 and 16 of the judgment when read together with paragraphs 74 to 79 of the judgment.

[104] In his careful application of section 125(1) and 125(3) of the Evidence Act and throughout his closely reasoned judgment, the learned judge applied and analysed the evidence that was stated to give rise to the alleged conspiracy. He correctly applied the **Sparkasse Bregenz** test to the evidence. It must be recalled that Capital WW had placed numerous telegram messages before the judge in an effort to buttress their complaint of conspiracy. It must be highlighted that out of the numerous telegram messages only 6 instances of exchanges are now before this Court having regard to the complaints about the judge's treatment of them. In fact, there is no complaint by Capital WW that the judge did not understand the **Sparkasse Bregenz** test.

[105] In view of the consistent stream of jurisprudence to which I have referred in relation to appellate review of exercise of discretion I remind myself that it is no part of the function of this Court to evaluate the few hacked telegram messages and to determine the weight that should be accorded to it or findings that are made by the judge. This is eminently best suited to be executed by the judge below and it is an unfair criticism to say that he did not do so properly. I have no doubt that the judge knew the tasks he was required to undertake in assessing the hacked telegram messages and the **Sparkasse Bregenz** test and properly executed them. At no time did the judge purport to conduct a mini trial and make findings of fact as if it was a full-blown trial. The judge evaluated the messages as he was entitled to do, attaching the relevant weight to them and in the proper exercise of his discretion excluded them when viewed against Capital WW's assertions of conspiracy and improper purpose. In my considered view the judge took into account the relevant

matters and excluded the question of the hacked telegram messages in their context and concluded that they should have been excluded.

[106] Consequently, in relation to the admissibility of the hacked telegram messages, I am of the considered view that there is no basis upon which this Court can impugn the learned judge's exercise of discretion. It simply does not violate the principles that were enunciated in **Dufour**, **Novel Blaze**, **Ming Sui Hung** and **J Trust Asia**.

[107] Based on all that, I have foreshadowed Capital WW's appeal in relation to issues 1, 2 and 3 namely, the genuine dispute - the conspiracy, improper purpose and the admissibility of the telegram messages issues fail.

[108] This brings me now to consider the fourth issue.

Issue 4 - Abridgement

[109] In order to be able to properly interrogate this issue and in order to provide the requisite context, I will recite paragraph 21 of Capital WW's notice of appeal:

> "Further or alternatively, the application for the appointment of liquidators in BVIHC (Com) 2020/0157 was only served on 1 October 2020 and was listed for first hearing on 9 November 2020. The Court had no power to accelerate the hearing of BVIHC (Com) 2020/0157 to 13 October 2020 and no power to appoint liquidators on that application. Accordingly, the purported appointment of the liquidators is irregular and void and of no effect."

[110] In my considered view, in order to be able to properly examine the above, it is imperative that regard be placed on the sequence of events by way of recollection. As indicated earlier, Tall Trade had filed an originating application dated 17th February 2020 to wind up Capital WW on the basis of its failure to satisfy the statutory demand that was made by Tall Trade. However, the legislative mandate of six months for the completion of the application was not met and consequently that application stood dismissed. Whereupon 1st October 2020 Tall Trade issued the replacement application (the second application, which was similar to the first application) to wind up Capital WW. The hearing of the second application was

initially given the date of 9th November 2020. However, the leaned judge brought forward the hearing date of the second application to 13th October 2020.

[111] Learned Queen's Counsel who then appeared on behalf of Capital WW before the judge objected to the hearing of the second application on the abridged date. The learned judge, having given deliberate consideration to the objection, explained his reasons for proceeding with the hearing of the second application on the accelerated date. It is of note that a number of applications had been filed in the first originating application and the learned judge by order dated 2nd November 2020 ruled that those applications were to be considered as part of the second originating application.

[112] It is noteworthy that at paragraphs 81 to 83 of his judgment, the judge stated as follows:

> "[81] I turn to the question whether I should appoint a liquidator in action number 2020/0157. Mr. Levy QC submits that the failure to advertise this second application means that I should at least adjourn the matter, so that the application can be advertised. He pointed out that the purpose of advertisement was so that both supporting and opposing creditors could appear.
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> [82] In theory Mr. Levy is right. Advertising does allow opposing creditors to appear. However, on the facts of this case, this possibility is theoretical only. Capital is not a trading company (where different considerations might arise). There are, so far as appears from the evidence no creditors apart from Tall Trade and Mr. Megrelishvili himself. In these circumstances, advertisement serves no purpose in my judgment.
>
> [83] Under section 165(1) of the Insolvency Act 2003 I have the power to dispense with advertisement. Given that the application in action number 2020/0025 has been advertised, this is in my judgment a quintessential case for dispensing with the requirement. Adjourning the current application will simply increase costs and cause delay. Accordingly, in the exercise of my discretion, I dispense with advertisement of the second application."

[113] It is passing strange that Capital WW did not appeal against the judge's findings and conclusions on the non-advertisement of the second application. From the above, the learned judge quite properly characterised the real issue as being whether the

second advertisement of the application should have been dispensed with as distinct from whether he simply did or did not have the power to abridge time by bringing forward the hearing date of the second originating application.

[114] The crux of Capital WW's complaint on the issue of the hearing date is whether the judge should have properly accelerated the hearing date. However, in my considered view, Capital WW ought to have addressed the matter in the manner which the judge had approached it. The judge in my view was correct in determining that the real issue in relation to the acceleration of the hearing date, was whether in the specific circumstances of the case he should have dispensed with the advertisement of the second application. In this appeal I am of the view that Capital WW's focus is far too narrow. I agree with Mr. Samek that the focus of the judge was quite properly placed on the issue of whether the second application should have been advertised given that it was a replacement application and Capital WW was not trading, coupled with the specific fact that both Mr. Megrelishvili and Capital WW were before the court. The judge was satisfied that the only persons who would have been affected by the determination of the second application were Capital WW and Mr. Megrelishvili who, in any event, were integrally involved in resisting the application and therefore nothing would have been lost or no prejudice would have been suffered by dispensing with the advertisement.

[115] In my view it was part of the judge's essential function to manage the second application and determine that since the advertisement of the application was dispensed with, he could have exercised his discretion to manage the application by bringing forward the date. I do not hold the view that the judge committed any error in so doing. The judge was case managing the second application as he was perfectly entitled to do. Let me say straight away that even before the introduction of the CPR judges always managed their cases and applications. The CPR makes clear the modernised approach to the management of cases. The judge has powers of case management. This is consistent with the fact that the learned judge ordered that the applications that were filed in the first originating application, such as the

application to exclude the hacked telegram messages, be determined in the second originating application. Also, it was as a consequence of his case management of the second application that the judge was able to rule that the evidence that was filed in the first originating application be treated as being filed in the second originating application and hence his ability to rule on the application to have the telegram messages excluded.

[116] I am not of the considered view that, because CPR 26.1 is disapplied in relation to insolvency proceedings, the judge is prevented from dispensing with the advertisement of the second application and abridging its hearing date. In my considered view Capital WW's invitation to have this Court to interrogate the matter of whether the judge had power to accelerate the hearing date, with respect, does not reflect what the learned judge did. The judge carefully scrutinised the entire circumstances and determined that the advertisement of the second application given the circumstances that obtained, should have been dispensed with. There has been no appeal against the judge's determination to dispense with the advertisement of the second application and therefore I find attractive and persuasive Mr. Samek's submission namely: for the judge not to have abridged the hearing date would have made very little sense since he had dispensed with the need to advertise. By way of emphasis, it is passing strange, in my view, to say the least that there was only an appeal by Capital WW against the abridgement time for the hearing but no appeal against the dispensation of the need to advertise. In my deliberate view, this aspect of the appeal is fact sensitive and does not fall squarely within the issue of simply of whether the judge could properly abridge time but rather whether the judge having dispensed with the advertisement of the application erred in abridging the date for the hearing of the second application.

[117] Given the specific factual circumstances of the underlying case as stated at paragraphs 81 to 83 of the judgment below, I am unconvinced that the judge did not have power to abridge the date of hearing in circumstances where he had already dispensed with the advertisement of the application. In my opinion the judge's

approach was very sensible and I agree that no useful purpose would have been served in adjourning the matter given that the advertisement of the second application had been dispensed with. I underscore that the judge's approach is fact sensitive and there is no proper basis to impugn the exercise of his discretion to hear the second originating application on the abridged date having dispensed with its advertisement. For these reasons, Capital WW's appeal on this fourth issue also fails.

Issue 5 – Foreign Law

[118] In view of my conclusions, on the first to fourth issues, it has become unnecessary to address the fifth issue of foreign law. I will therefore refrain from doing so.

Appointment of Liquidators

[119] For all the above reasons and given the totality of circumstances, I am of the considered view that the judge was fully entitled to exercise his discretion to appoint liquidators over Capital WW. The judge's decision cannot properly be impugned. There is no basis to set aside the judge's decision, or his order dated 2nd November 2020.

[120] For completeness, I indicate that in **Novel Blaze** writing on behalf of this Court, I stated as follows:

> "The Court has a discretion under section 162 of the Insolvency Act to appoint liquidators over a company on the ground of insolvency. In order for this Court to interfere with the learned judge's decision to appoint liquidators, it must be demonstrated that the decision exceeded the generous ambit within which reasonable disagreement is possible and is therefore blatantly wrong."

[121] The above principles apply with equal force to this appeal.

Costs

[122] Tall Trade has prevailed in defending the appeal and shall have its costs. Costs of this appeal shall be paid out of Capital WW's assets and shall be no more than two-

thirds of the costs in the court below and are to be assessed, unless agreed to by the liquidators within 21 days of the date of this judgment.

Conclusion

[123] For the above reasons, I would dismiss Capital WW's appeal against the decision of the learned judge and affirm the decision in its entirety. In circumstances where the appeal has been dismissed, the counter appeal has been rendered otise. Tall Trade shall have its costs on the appeal which shall be no more than two thirds of the assessed cost in the court below. The costs shall be paid out of the company's assets in the liquidation, which are to be assessed by a judge of the Commercial Division, unless otherwise agreed within 21 days of the date of this judgment.

[124] I gratefully acknowledge the assistance of all learned counsel.

I concur.
Davidson Kelvin Baptiste
Justice of Appeal

I concur.
Dexter Theodore
Justice of Appeal [Ag.]

By the Court

Chief Registrar