IN THE COURT OF APPEAL OF THE CAYMAN ISLANDS
ON APPEAL FROM THE GRAND COURT FINANCIAL SERVICES DIVISION

CICA (CIVIL) APPEAL NO. 17 OF 2020
(Formerly FSD 30 OF 2020 (MRHJ))

BETWEEN:

KRISENERGY (GULF OF THAILAND) LTD

APPELLANT

- AND –

RUBICON VANTAGE INTERNATIONAL PTE LTD

RESPONDENT

Before:	**The Rt. Hon Sir John Goldring (President)** **The Hon Sir Richard Field, JA** **The Rt. Hon Sir Alan Moses, JA**
Appearances:	**Robert Levy QC, Shelley White and Jonathan Turner for the Appellant** **Tom Weisselberg QC, Nick Hoffman and Anya Park for the Respondent**
Heard:	**27 October 2020**
Draft judgment Circulated:	**12 November 2020**
Judgment delivered	**18 November 2020**

JUDGMENT

Sir Richard Field, JA

Introduction

1. The Respondent ("Rubicon"), a Singapore company, is seeking to wind up the appellant ("KEGOT") under sections 93 (a)[1] and 94 (1) (b)[2] of the *Companies Law (2020 Revision)* on the basis of a statutory demand for unpaid sums due under four invoices (Nos. 7/ 9/ 11 and 13)

[1] A company shall be deemed to be unable to pay its debts if- (a) a creditor by assignment or otherwise to whom the company is indebted at law or in equity in a sum exceeding one hundred dollars then due, has served on the company by leaving at its registered office a demand under that person's hand requiring the company to pay the sum so due, and the company has for the space of three weeks succeeding the service of such demand, neglected to pay such sum, or to secure or compound for the same to the satisfaction of the creditor; (b) …

[2] An application to the Court for the winding up of a company shall be by petition presented either by- (a) … (b) any creditor or creditors (including any contingent or prospective creditor or creditors); (c) ...

for work done on a floating storage and offloading vessel ("the FSO") chartered by Rubicon to KEGOT under a Bareboat Charter ("the Charter")[3] for an initial 5 year term, renewable for succeeding periods of 12 months up to a maximum of a further 5 years.

2. Clause 36.1 of the Charter provides that it shall be governed and construed in accordance with English law.

3. All four invoices referred to the work charged for as being in accordance with a numbered Variation Order.

4. Invoice No 7 is for US$1,523,107.94. It relates to the cost of the transportation to and installation and integration of a Custody Metering Skid ("the Skid") on the FSO. It is this invoice which is at the centre of the present appeal. Under the heading "Description" the invoice reads:

> Bareboat Charter of "Rubicon Vantage" FSO
> (For work carried out in respect of petroleum operations on
> BlockG10/48 in the Gulf of Thailand, offshore Kingdom of Thailand)
>
> Being integration of Rubicon Vantage Metering Skid in accordance to Variation Order 01 & Exhibit B, Clause 3.3.5

5. It is not disputed that the work to which invoice No 7 relates was done in accordance with all relevant specifications and was completed by 27 March 2015, prior to delivery of the FSO on 24 July 2015 to KEGOT in Thai waters where KEGOT required it to store hydrocarbons it was extracting from oil wells as operator of Block G10/48 offshore Thailand in the Wassana oil field ("the Field").

6. In July 2019, Rubicon succeeded in the Commercial Court in London in obtaining judgment against KEGOT's parent company on a parent company guarantee for the total sum due under the four invoices but enforcement of the judgment in Singapore was stayed under a moratorium to allow for the submission of a restructuring proposal.

7. The statutory demand was issued on 10 February 2020.

8. In proceedings begun 11 days later on 21 February 2020 in the Grand Court before Madam Justice Ramsay-Hale ("the judge"), KEGOT applied, inter alia, for an injunction restraining Rubicon from presenting a petition to wind it up on the ground that there was a genuine and substantial dispute concerning the debt claimed in the statutory demand and, further and alternatively, on the ground that it had a genuine cross-claim on substantial grounds for an amount exceeding the sums claimed in the statutory demand.

9. In addition to relying on a cross-claim brought in the Commercial Court in London, KEGOT submitted that it was under no present liability to pay anything for the work to which invoice No 7 related.

[3] Executed on 13 October 2014

10. The judge dismissed KEGOT's application for reasons I shall come to. KEGOT now appeals the judge's decision.

11. KEGOT's submission that it was under no present liability to pay anything under invoice No 7 had three limbs

The first limb

12. At the hearing below, KEGOT contended that in accordance with the terms of the Charter or by virtue of an agreement made between Rubicon and KEGOT, the work on the Skid ("the Skid Works") constituted a "*Variation"* and since the procedures in Clause 4 of the Charter in respect of Variations had not been followed, KEGOT was not obliged to pay invoice No 7 until the costs of the work had been agreed. In particular, KEGOT submitted that no Variation Order had been signed by both parties in respect of the Skid Works following a proposal from Rubicon for a variation, and KEGOT had not authorized the Skid Works Variations without requiring a Variation Order. Accordingly, as provided for in Clause 4.7 of the Charter, Rubicon could not invoice KEGOT for the Skid Works and KEGOT was not obliged to pay for that work.

The second limb

13. KEGOT contended that even if the Skid Works were not a variation subject to the procedures set out in Clause 4 of the Charter, by Clause 3.3.5 of Exhibit B to the Charter, reimbursement for the works was governed by Clause 3.3.7 of Exhibit B which obliged KEGOT only to pay for the works if the Charterer had approved the 3rd party costs charged for the work, which KEGOT had not.

14. I set out the Clauses in the Charter relevant to the first two limbs of KEGOT's case in Annex 1 to this judgment.

The third limb

15. Under this limb, KEGOT submitted that the situation was covered by the first two sentences of Clause 13.2 and by Clause 36.2 of the Charter, which provide:

> *Clause 13.2*
>
> In cases where an item billed is disputed in good faith, Charterer will promptly notify Owner in writing and the Parties shall in good faith attempt to resolve the dispute. Payment for the disputed item shall be withheld until settlement is made either by mutual agreement or as determined under Clause 36.
>
> Due to the requirements of the Thai VAT system, Charterer cannot make manual adjustments to Owner's invoices. Consequently, in the event of a dispute, Owner shall issue to Charterer either a revised invoice (cancelling the previous, disputed invoice) or a credit note to the value of the disputed item. Upon receipt of the revised invoice or credit note Charterer shall make payment of the undisputed amount within ten (10) Banking Days of receipt of the revised invoice.

Clause 36.2

> Save to the extent set out in Clause 36.3 below, any dispute or difference arising out of or under the Charter shall be referred to the High Court of Justice in London to whose exclusive jurisdiction each of the parties hereto irrevocably submits.

16. KEGOT submitted that it never agreed the cost of the Skid Works on the grounds that the cost proposed by Rubicon was far too high and the documents sent in justification thereof were inadequate to substantiate the sum claimed. It followed that the situation was covered by Clause 13.2 with the result that KEGOT was entitled to withhold payment for invoice No 7 until settlement, or as determined in proceedings in the High Court in London. KEGOT relied on a lengthy email correspondence between the parties over the cost of the Skid Works that began on 21 October 2014 when Rubicon sent to KEGOT the quotation for the Skid Works sent by the stipulated subcontractor ("Unithai") stating *"... we need to kick off this work we need your go ahead and acceptance of this yard quotation.*" KEGOT replied noting that the price was very high for only integration works. Then, on about 26 October 2014[4] Rubicon gave the go ahead to Unithai to start the work without having obtained KEGOT's prior approval. Later, Rubicon went back to Unithai and, on 29 December 2014, KEGOT was informed that Unithai was prepared to offer a 15% discount on the non-fixed costs element of its bid document and Rubicon was prepared to reduce its mark-up from 10% to 5%. However, KEGOT continued to dispute the resulting costs and until about June 2016 there was intermittent email correspondence and some meetings between KEGOT and Rubicon over the cost of the Skid Works with KEGOT refusing to accept the cost proposed by Rubicon on the basis they were too high and unsubstantiated by the documents provided. In the event, the sum due has never been agreed.

17. In paragraph 67 of his first affidavit, Mr Brian Helyer, KEGOT's Vice-President of operations, deposes that he "*would have expected the Skid Works to cost something not more than US$700,000 to US$800,000*".

18. Mr Alastair MacLean, the Engineering Director of Rubicon Offshore International Pte Ltd, a related entity of Rubicon, deposes in his affidavit that at a meeting in April 2018: (i) KEGOT accepted that the Skid had been integrated and that Rubicon should be compensated for some amount; (ii) Mr Helyer suggested that the cost of the Skid Works should have been in the vicinity of $700,000-800,000 and made it clear that KEGOT's real dispute with the Skid Works Invoice was its amount, not the fact that it is liable to pay some sum; and (iii) the figure would be discussed between the higher management of each company with their CEOs and KEGOT would invite Rubicon's COO to a meeting. However, after that meeting, KEGOT failed to propose any figure in spite of Rubicon's various attempts to follow the matter up.

19. In his second affidavit, Mr Helyer denies that there was any agreement by KEGOT in April 2018 that it was liable to pay some sum for the Skid Works and states that KEGOT's position is that the monies demanded for the Skid Works were not due because Rubicon had not complied with the variation procedure and other pre-approval procedure provided for in the Charter. He continues: "*However,* [KEGOT] *did recognise that the FSO Custody Metering Skid*

[4] See the email from Mr Rasmussen of Rubicon to Mr Romy Reyes of Unithai dated 26 October 2014 at HB6/25/783.

had in fact been transported, installed and integrated and was willing to pay for work done if and when an appropriate invoice was rendered in accordance with the Bareboat Charter."

The Cross-claim

20. The Claim Form for KEGOT's cross-claim was issued in the London Commercial Court on 14 April 2020 just two days before the hearing of KEGOT's application in the Grand Court to restrain Rubicon from presenting a winding up petition. In this short form pleading, KEGOT alleges that, during the pre-contract negotiations for the Charter, Rubicon represented that the FSO could operate as a floating storage and offloading vessel with a crude oil storage capacity of 597,205 barrels of crude oil and that the Charter contained a term, alternatively a condition, of the Charter, that the FSO would have a capacity to store 597,205 barrels of hydrocarbons having a specific density of 0.87 T/M^3 when in fact the FSO was not able to store more than about 460,000 to 480,000 barrels of hydrocarbons. KEGOT goes on to plead that, by reason of the alleged breach of the Charter, it had suffered loss and damage including: (a) paying a rate of hire that was excessive having regard to the specifications of the FSO; and (b) a reduced volume of hydrocarbons that could be sold in or about February 2016.

21. The first time KEGOT took issue with the storage capacity of the FSO was when it wrote to Rubicon by letter dated 8 April 2016 stating that it had been informed by the FSO Captain on 22 December 2015 that the vessel's actual crude oil capacity limit was 484,472 barrels and as a result KEGOT was severely restricted and limited in its operational parameters. The letter further stated that, notwithstanding that Exhibit C imposed no qualifications on the weight of the crude oil in respect of the FSO's capacity, the only reference to specific gravity of 0.87 was on the Tank Capacity Plan. The letter went on to note that restrictions imposed on KEGOT in respect of the off-loading on 22 March 2016 were excessive when KEGOT was limited to a storage capacity of 461,272 barrels when the FSO was still above the loadline which prevented KEGOT from off-loading an additional 15,000 barrels and this had caused a direct loss of approximately 25,000 barrels of production and hence a reduction in revenues. The letter concluded with a complaint that Rubicon had misrepresented the FSO's capacity and was in breach of warranty under the Charter.

22. Rubicon replied to KEGOT by letter dated 21 April 2016 stating, inter alia:

> "*There appears to be a fundamental failure by [KEGOT] to appreciate the difference between "capacity", "Volume" and "weight". The specified capacity is the volumetric capacity of the cargo tanks. There is no suggestion, nor could there ever be, that the capacities as recorded in the relevant drawings and in the Vessel's stability book are incorrect. Volume (measured in barrels) refers to how much oil is actually loaded into that capacity. The volume of oil is, in turn, affected by the maximum weight the Vessel can load to, as determined by its stability, the stress on the steel structure and/or hydrostatic curves. Fundamentally, the Vessel cannot load below her load line draught and for the Captain to do this would be a criminal offence. In measuring volume, the specific gravity ("SG") of the oil to be loaded must be taken into account to obtain the weight."*

> "*At no time was Owner asked to confirm the maximum cargo storage capacity in a specific operational condition, assuming the product was from the*

Wassana Field. In addition, such oil has a different and higher SG to the oil from the Bualuang Field. At no time did [KEGOT] make a statement or give notice to the Owner that it is of importance that the cargo storage capacity of the Vessel is a warranted minimum for her commercial use by [KEGOT]. The vessel and her drawings were inspected by [KEGOT]. It took her "as is where is".

"[KEGOT] appears to ignore that volume is a function of the allowable cargo weight which is, in turn, a function of the oil's SG and the vessel can only load and store such cargo that brings her down to her approved maximum draft. By ignoring the deadweight in the Capacity Plan, [KEGOT] has overestimated the maximum volume. The vessel specification including in section 3.1 of the Facility Profile shows a dead weight of 72,040 mt, being the deadweight after the load line convention necessitated a change."

23. Rubicon also observed that proper scheduling of shuttle tanker intervals would prevent the need to reduce the Field's production due to the reaching of tank tops on the FSO.

24. Rubicon denies misrepresenting the capacity of the FSO and challenges the averment that the specified capacity amounted to a warranty tied to a specific density of 0.87 T/M^3. The essence of its defence is contained in the above-quoted paragraphs of its letter of 21 April 2016.

25. Following its letter dated 8 April 2016, whilst the complaint as to capacity was aired in 2019 in the parent company guarantee proceedings in London, KEGOT took no steps to advance its complaint until, in the course of a letter dated 21 February 2020 from its attorneys to Rubicon's attorneys setting out KEGOT's case for an injunction restraining a winding up petition, notice was given "*of the long-standing cross-claim which our client has against yours under the Bareboat Charter*" and brief details of the claim were set out.

26. As stated above, the Claim Form was not issued until 14 April 2020, just two days before KEGOT's injunction application was heard in the Grand Court.

27. In his first affidavit, Mr Helyer says that KEGOT considers that both the actual capacity and the deadweight asserted by Rubicon are inconsistent with the Specification in Exhibit C of the Charter and therefore in breach of the warranty in Clause 6 of the Charter that, at Sailaway, the FSO would conform to the Specifications set out in Exhibit C. If KEGOT had known of the actual limited capacity before signing the Charter, it would have insisted on a lower hire rate. In fact, KEGOT had a specific reason for having an FSO with a cargo handling capacity of 600,000 barrels, because KEGOT's only off-taker, PTT Public Company, had a policy of accepting cargos no greater than 300,000 barrels. Therefore, KEGOT needed 100% redundancy to mitigate against events that could cause production to cease or decrease.

28. Mr Helyer also states in his first affidavit that the delay in bringing proceedings for misrepresentation and breach of contract was due to the fact such proceedings would not be worthwhile because it was evident from Rubicon's audited accounts for 2018 that it was of doubtful solvency since current liabilities exceeded current assets in both 2017 and 2018; and, to meet its liabilities as they fell due, Rubicon required the assistance of its parent.

29. Responding to this evidence, Mr MacLean deposed that Rubicon was solvent, pointing out that in both 2017 and 2018 total assets exceeded total liabilities and that the audited accounts for

those years were signed off by the auditors, PriceWaterhouseCoopers, with unqualified audit opinions and no reference was made to any issues regarding Rubicon's solvency.

30. Mr MacLean also deposed by reference to a chart exhibited to his affidavit that there was no evidence that the cargo capacity of the FSO had prevented KEGOT from offloading the quantity of crude oil requested. The chart showed that during the life of the Charter to date, there had been 32 offtakes and the quantity of crude oil produced, loaded onto, stored and discharged to 6 March 2020 was 8,146,544 barrels, the average minimum offtake quantity requested by KEGOT being 248,844 barrels and the average offtake quantity achieved being 254,580 barrels.

31. In reply, in his second affidavit Mr Helyer stated that, with the prevailing rates of production at the relevant time, there was going be a problem come the offtake due on 21 March 2016 because the FSO would hit tank tops well before that date which necessitated a throttle-back on production with the FSO Master imposing a loading limit of 461,272 barrels rather than 480,000 barrels, which effectively caused a reduction of production of 23,000 barrels which equated to lost revenue of US$667,000 based on a sale price of US$29/bbl.

32. KEGOT relied on an expert report provided by Mr Angus Davis of ACD Shipping Pte Limited ("ACD") dated 18 February 2020. ACD provides strategic advisory, support and consultancy services in the Marine/Shipping sector in which sector Mr Davis has more than 25 years' experience. In his report, Mr Davis opines that KEGOT should pay a reduced rate of hire for the FSO by reason of the actual reduction in production capacity of 19.6% to 22.9% from the represented capacity (i.e. 600,000 barrels less 460,000 to 480,000 barrels). In Mr Davis' view, it was appropriate to have regard to the charter rates of trading tankers where there was sufficient liquidity in data that showed the 20-year average of 1 year Time Charter rates between the capacity of the assets and corresponding percentage differences on charter rates versus capacity reduction. These data showed that for every 1% reduction in capacity there is a reduction of 0.41% in Time Charter rate and thus it followed that a capacity reduction of 19.6% to 22.9% would equate to 8.04% to 9.939% reduction in the Time Charter rate. On this basis the reduction in charter hire for the FSO of 8.04% over the time of the Charter to date would be US$4,191,706 and for the reduction of 9.939% in the charter hire for the like period it would be US$4,895,546.

33. Mr Davis' approach was challenged by the expert instructed by Rubicon, Mr Andrew Bray of Braemar ACM Shipbroking Pte Ltd ("Braemar"), which is one of the world's largest shipbroking companies offering broking in a wide range of vessels including tankers and FSOs. Mr Bray is a maritime professional with over 30 years' in senior marine management roles at Director and Board level. In Mr Bray's opinion, it is not meaningful to compare charter rates of trading tankers with those of FSOs and nor can such comparison be distilled down to vessel cargo capacity as the key issue driving pricing for each type of vessel. In short, the markets for trading tankers and FSOs are distinct and very different, FSOs being specialized vessels with only some 100 in operation worldwide, whereas there are approximately 7,500 tankers in the world market. In addition, given the bespoke nature of FSOs and the relatively few contracts for FSOs that have been signed, the pricing of FSO contracts is not transparent, unlike the pricing of tankers which is reflected in publicly traded indices/futures contracts. The real drivers of contract terms for FSOs include the amount of capital the vessel owner is being asked to commit (i.e. existing capital invested and spending on refurbishment and upgrades), the

length of the contract's term and the amount and quality of the contract security that the charterer is willing and/or able to provide to the owner.

34. Mr Bray further observes that the significance of the capacity of an FSO to a charterer is much affected by the availability of offtake tankers in the area of the FSO's proposed location. The Wassana Field, where KEGOT was using the FSO, is only 2-3 days steaming from Singapore which is an available hub for waiting tankers and the weather and environmental conditions are relatively benign such that they are most unlikely to cause delays in conducting offtakes over a prolonged period. Since oil production by KEGOT was never more than around 11,000 bbls/day, and was currently 4,500 bbls/day, this gave many days to produce sufficient oil for a monthly parcel of 300,000 bbls (which was the maximum allowed for offtakes from the FSO).

35. Mr Bray also points out that the FSO has been receiving significant quantities of water, as well as oil, which has had to be separated from the oil before the crude oil is ready for offtake.

36. In his reply report, Mr Davis stoutly maintains the position that a reduction in capacity would generally correspond to a reduction in the rate of hire.

37. KEGOT also relied on a report from Mr Stuart Guy dated 16 March 2020. Mr Guy is a naval architect with more than 30 years' experience in all marine and structural aspects of the oil and gas industry. In Mr Guy's view, the FSO never had 600,000 barrels of usable crude capacity and the volumetric crude capacity could never have been used anyway when loading crude oil because of the deadweight limitation. The specification was therefore misleading in its presentation of volumetric capacity.

38. KEGOT also pleads a claim in the Claim Form that the supply of the Skid was on a lump sum basis and its transportation, installation and integration were to be undertaken in accordance with the Charter which provided for the approval of the costs thereof by KEGOT prior to such works being commenced, with Rubicon having to provide full substantiation of the costs after the work had been completed. This aspect of the cross-claim, however, was not relied on by KEGOT in its case that the cross-claim was a good ground for restraining Rubicon's winding-up petition.

The judgment below

39. Citing *Coulon Sanderson & Ward Ltd v Ward* [1985] 1 WLUK 105 and *Mann v Goldstein* [1968] 1 W.L.R. 1091, at 1092-1093, the judge observed that the jurisdiction to restrain the presentation of a winding-up petition was a facet of the court's inherent jurisdiction to prevent an abuse of the process of the court.

40. The judge also cited with approval the decision in *Angel v British Gas Trading Ltd* [2012] EWHC 2702(Ch) 2702, where Norris J adopted the approach taken by Blackburne J in *In Re A Company No. 2340 (2001)*:

> "*At the end of the day the question is whether or not there is a debt owed by [the Debtor] to [the Creditor] over and above £750, sufficient therefore in amount to support a winding up petition,* ***which is not bona fide disputed on substantial grounds.*** *In my judgment, there clearly is. Even making allowance for the various points which [Counsel] has raised, on any view, further*

> *substantial sums are owing. In my judgment therefore, it cannot be said that if [the Creditor] were now to present a petition to wind up [the Debtor] it would be an abuse of process.* ***True it is that there is a dispute as to the precise amount of the sum to which [the Creditor] is entitled but, on the evidence I have seen, I am satisfied that there is no genuine dispute… as to the existence of an indebtedness on the part of [the Debtor] to [the Creditor] amply sufficient in amount to support a winding up petition****."*
>
> [Emphasis supplied]

41. The judge held that the Skid Works were not a variation but were part of the original Scope of Work and the character of those works was not affected by the fact that Rubicon submitted invoice No 7 as a variation proposal. She also held that payment for the Skid Works was not controlled by the first part of Clause 3.3.7 of Exhibit B for otherwise, despite KEGOT having agreed to reimburse Rubicon for these works in Clause 12.2 (ii) of the Charter and Clause 3.3.5 of Exhibit B, KEGOT would escape this liability for all time on the basis that it had not pre-approved the costs. Instead, under Clause 12.2 (ii) KEGOT was contractually obliged to pay Rubicon the costs and expenses identified in Exhibit B as reimbursable costs which, by Clauses 3.3.5 and Clause 3.3.7 of Exhibit B, were to be assessed on an open book basis and paid with a mark-up of 10%. The reference to "*Charterer approved third party costs only in respect of variations in accordance with the terms of the Charter … to be reimbursed at cost plus basis*" in the first sentence of Clause 3.3.7 was a reference to those variations which the parties agreed should be compensated pursuant to Clause 4.5 (c).

42. The judge further held that, even if KEGOT were entitled to dispute Rubicon's demonstrated direct costs on the ground that they were too high, it was indisputable that some sum would still be owed to Rubicon for the Skid Works and, given the size and scope of the works in question and Mr Helyer's own estimate that the cost was between US$700,000 and US$800,000, that sum would easily exceed the statutory CI$100 minimum for the presentation of a winding-up petition.

43. The judge then dealt with the third limb of KEGOT's case founded on Clause 13.2 of the Charter. She held that the clause required KEGOT to make a good faith effort to seek to agree a sum with Rubicon that it was willing to pay and the disputed balance would then be dealt with in accordance with the dispute resolution mechanism set out in the clause. However, KEGOT had refused to propose a sum it might be willing to pay for the Skid Works and instead insisted that it had no liability to pay for these works at all. The judge held that she was satisfied that the entirety of the debt was not genuinely disputed on substantial grounds and accordingly "*the exclusive jurisdiction clause*" was irrelevant. She added that, even if she were wrong on the matter of construction, she would still hold that as the Skid Works were undertaken at KEGOT's request and were done to the requisite standard, Rubicon is entitled to be reimbursed in some amount greater than $100.

44. The judge next addressed KEGOT's cross-claim. She began by adopting the applicable principles distilled from a number of well-known authorities by Mr David Stone sitting as a Deputy High Court Judge in *LDX International Group LLP v Misra Ventures Limited* [2018] EWHC 275 (Ch). Paragraph 22 of the Deputy Judge's judgment reads:

> "*It seems to me that a number of uncontroversial propositions can be drawn from these cases. Given the clarity of the language of the Court of Appeal and*

judges of this court, it is appropriate, where possible, for me simply and respectfully to repeat their remarks:

a. *In the absence of special circumstances, it will be appropriate to issue an injunction to prevent the presentation and advertisement of a winding up order where there is a genuine and serious cross-claim in an amount exceeding the petitioner's debt. The cross-claim must be genuine and serious, or, in other words, one of substance: In re Bayoil [[1999] 1 WLR 147], at page 155.*

b. *If there is a genuine and serious cross-claim, the company should be allowed to establish its cross-claim in ordinary civil proceedings: the Companies Court is not the right court in which to engage in a detailed examination of claim and counterclaim: Dennis Rye [Ltd v Bolsover DC [2009] EWCA Civ 372], at paragraph 19.*

c. *It is incumbent on the recipient of the statutory demand to demonstrate, with evidence, that the cross-claim is genuine and serious: Orion Media Marketing Ltd v Media Brook Ltd [2001] 10 WLUK 638, at paragraph 31. Bare assertions will not suffice: there is a minimum evidential threshold: Re a Company [[2016] EWHC 3811 (Ch)], at paragraph 33.*

d. *But it is not practical or appropriate to conduct a long and elaborate hearing, examining in minute detail the case made on each side. A lengthy hearing is likely to result in a wasteful duplication of court time: Tallington Lakes [Ltd v Ancasta International Boat Sales Ltd [2012] EWCA Civ 1712], at paragraph 41.*

e. *If there is any doubt about the claim or the cross-claim, then the court should proceed cautiously. This is because a winding up order is a draconian order, which, if wrongly made, gives the company little commercial prospect of reviving itself: In re Bayoil, at page 156.*

f. *Petitioning creditors must take a realistic view of whether the company is likely to establish a genuine and substantial dispute: Tallington Lakes, at paragraph 41.*

g. *A company is not prevented from raising a cross-claim simply because it could have raised or litigated the claim earlier, or because it has delayed in bringing proceedings on the cross-claim. However, the court is entitled to take any delay into account in its assessment of whether the cross-claim is genuine and serious: Dennis Rye, at paragraph 19.*"

45. Having recorded the parties' competing submissions on whether the cross-claim was genuine and serious, the judge observed that KEGOT's failure to prosecute such a claim in 2015 (when told by the FSO's Captain that the actual crude oil capacity limit was 484,472 barrels), or in April 2016 following the correspondence on capacity that passed between the parties, or in 2019 when the capacity issue was raised in the parent guarantee proceedings, was a clear indication that the claim was not a serious one. The fact that Rubicon's current liabilities exceeded current assets was no reason for forming a preliminary view of a company's insolvency, particularly where: (a) total assets exceeded total liability; (b) the accountants had

given their unqualified opinion that Rubicon was solvent; and (c) any capital or cash crunch affecting Rubicon would be met by its shareholders and the company had a continuing parent guarantee.

46. The judge held that the only reasonable inference to be drawn from the fact that the claim was issued on the eve of KEGOT's application to restrain the petition was that it was filed in order to permit Counsel to rely on it in an effort to avoid the near inevitable conclusion, to be drawn from KEGOT's failure to advance its claim of misrepresentation for the last four years, that the cross-claim was neither genuine or serious, but calculated to stave off the presentation of the petition.

47. The judge was also of the view that the claim was hastily put together and made allegations not previously made and these matters fortified her conclusion that the claim was not genuine. She further observed that there was no evidence that demonstrated that KEGOT had suffered any loss as a result of the actual storage capacity of the FSO in the Field. On the contrary, KEGOT had been able to meet all its demands for crude oil over the years of the Charter according to the offtake table that had been exhibited (by Mr MacLean). In her view, this was perhaps why KEGOT had hung its hat on the allegation that it had overpaid a sum of US$4 million for hire to raise a cross claim for an amount which was larger than the debt in the statutory demand. But KEGOT had not shown that this claim was a genuine and serious claim because KEGOT had had four and a half years to flesh out a claim for a rate of hire based on comparative rates for FSOs and yet had had no evidence to substantiate it until they instructed Mr Davis after service of the statutory demand. And Mr Davis' analysis of tanker rates did not raise a credible challenge to the rate of hire for the FSO and he was unable to point to charter rates for FSOs for his conclusions.

Discussion of KEGOT's case on appeal.

The judge's finding that the Skid Works was not a variation on the true construction of the Charter.

48. One of KEGOT's grounds of appeal was that the judge erred in fact and law on the construction of Clause 4 and Exhibit A of the Charter and should have held in the light of Clause 3.3.7 of Exhibit B that the Skid Works were a variation within the meaning of that expression in the Charter. This ground, however, was not in the end pursued before us, Leading Counsel for KEGOT, Mr Robert Levy QC, accepting that he had difficulty in arguing that the Skid Works were not part of the original work specified in Exhibit A but were a variation involving work distinct and separate from "*Work*" as defined within the Charter, which definition expressly referred to Exhibit A.

49. For the avoidance of doubt, if Mr Levy had pursued this ground of appeal, I would have upheld the judge's conclusion on this issue for the reasons she gave for it.

The judge's failure to deal with the evidence that Mr Helyer and Mr Vogel explicitly agreed to employ the variation procedure to the Skid Works.

50. It was Mr Levy's case that the judge had erred in wholly ignoring Mr Helyer's evidence in his second affidavit that there was an "*explicit agreement*" between himself on behalf of KEGOT and a Mr Vogel on behalf of Rubicon "*to employ the variation procedure*" in respect of the

Skid Works. In Mr Levy's submission, this alleged agreement was borne out by the parties' subsequent actions and correspondence.

51. Mr Levy accepted that Mr Helyer's second affidavit was served in reply to the evidence served by Rubicon, so that formally the evidence for KEGOT's injunction application was closed after service of KEGOT's reply evidence, but he sought to set store by the absence of any evidence from Rubicon challenging the alleged Helyer/Vogel agreement, submitting that there had been ample time for Rubicon to put in an affidavit challenging Mr Helyer's evidence before the hearing of KEGOT's application.

52. Mr Levy is correct that the judge did not deal with Mr Helyer's evidence that there was an agreement with Mr Vogel to employ the variation procedure. However, as Mr Weisselberg QC for Rubicon observed, the alleged Helyer/Vogel agreement was not raised in argument by KEGOT below and so far as I can see from the skeleton arguments relied on below and the transcripts of the Grand Court proceedings, Mr Weisselberg was correct about that. This shows, in my opinion, that KEGOT plainly set very little store by this part of Mr Helyer's evidence and it is hardly surprising that the judge did not deal with the alleged agreement, faced as she was with a great deal of other affidavit evidence to which her attention was drawn. In these circumstances, I do not think KEGOT can complain that the judge did not deal with the alleged Helyer/Vogel agreement.

53. If, contrary to the view expressed in the above paragraph, KEGOT is entitled to criticize the judge for not addressing the alleged Helyer/Vogel agreement, it is for this Court to consider whether this evidence should have led to KEGOT's application succeeding below. In my judgment, for the reasons that follow, the failure of the judge to address this evidence affords no basis for setting aside the judge's decision to dismiss KEGOT's application. First, Mr Helyer's evidence is shadowy and vague in that it conspicuously lacks such important particulars as when and where the agreement was made and who else was present at the time. Second, Mr Helyer produces no contemporaneous documents that refer to, or otherwise evidence, the making of this "*explicit*" agreement. Third, it would very surprising for Mr Vogel to have agreed that the whole panoply of the Charter's provisions dealing with variations was to apply to the Skid Works given that Rubicon chose to instruct Unithai on 26 October 2014 to proceed with the works without first having obtained KEGOT's approval of the costs Unithai was proposing to charge. Fourth, the alleged agreement is thrown into doubt by the fact that it is not pleaded in that part of the Claim Form issued in the Commercial Court in London which alleges that the transportation, installation and integration of the Skid were to be undertaken in accordance with the Charter which provided for the approval of the costs thereof by KEGOT prior to such works being commenced. Fifth, the alleged agreement is inconsistent with the entire agreement provision found in Clause 39 of the Charter and/or with Clause 42 which provides that none of the provisions of the Charter will be considered waived unless an express waiver is given in writing.

KEGOT's conventional estoppel case.

54. Mr Levy sought leave to argue on appeal that Rubicon was conventionally estopped from denying that the variation provisions were to apply in full to the Skid Works. Mr Weisselberg QC for Rubicon did not object to Mr Levy advancing this argument and the Court did not stop him from doing so. Mr Levy drew the Court's attention to *Blindley Health Investments Ltd and*

another v Bass and others [2017] Ch 389 and contended that the conventional estoppel arose from: (a) the parties having at all times operated and conducted themselves on the basis and understanding that the variation provisions in the Charter applied and accordingly KEGOT's prior approval to all Skid Works was required; and (b) this understanding was clearly communicated by the parties inter se.

55. Responding to KEGOT's estoppel case, Mr Weisselberg submitted that KEGOT had not made out any of the following requisite ingredients for establishing a conventional estoppel that are identified in *Snell's Equity*, 34th Ed, at 12-011-12-14):

(1) There must be an agreement or convention by which the parties regulated their dealings and which "*crossed the line*".

(2) The expression of the common assumption by the party alleged to be estopped (Rubicon) must be such that they may properly be said to have assumed some element of responsibility for it, in the sense of conveying to the other party (KEGOT) an understanding that they expected the other party (KEGOT) to rely on it.

(3) KEGOT must show that it was induced to act in reliance on the shared convention so that it would be unjust to permit Rubicon to depart from that convention and rely on the terms of the Charter.

(4) KEGOT must be able to point to some detriment that would result from its reliance on the assumption if Rubicon was free to depart from the convention or some benefit that would accrue to Rubicon sufficient to make it unjust or unconscionable for Rubicon to assert the true legal position.

56. Mr Weisselberg's submissions as to why these conditions were not met were as follows:

(1) The fact that the Skid Works invoice was issued on a variation order form does not make it a variation and does not give rise to any estoppel. Rubicon, taking a commercially prudent approach, kept KEGOT informed of the Skid Works costs and sought approval before the works were completed. However, there was no obligation on it to do so.

(2) There is no evidential basis for the alleged convention. It is entirely unclear how it is said that KEGOT was induced to rely (and then did rely) on the alleged convention (whether to its detriment or at all). It cannot be said to be unjust to require KEGOT to pay for the Skid Works, notwithstanding the absence of any approval of the costs of those works.

(3) Rubicon did not act as if the variation regime applied. Thus, it would have been obvious to KEGOT, by at least 28 October 2014, that Rubicon had instructed Unithai to proceed with the works, notwithstanding that KEGOT had not approved that costs. Further, on 17 March 2015, in response to an email from KEGOT asking for supporting documentation to justify the overall cost, Rubicon replied: "*The supporting documentation for the VOs are Unithai and 3rd party engineering quotations the contract refers to reimbursement of actual costs, signing of the VO is not the actual costs it is an estimate of costs it is not a claim for payment. ROI will invoice KE with actual invoices in support of the claim for reimbursement*."[5]

(4) KEGOT's concerns, following the issue of invoice No 7, involved an alleged lack of justification for the costs incurred and were not based on an alleged convention (understanding) that the variation regime should have been followed.

[5] HB5/25/413

57. I accept Mr Weisselberg's submissions and find that KEGOT's conventional estoppel case has no real prospect of success and affords no ground for setting aside the judge's dismissal of KEGOT's injunction application.

The judge's rejection of KEGOT's case that by virtue of Clause 3.3.7 of Exhibit B it had no liability to pay for the Skid Works until it had approved Unithai's costs for carrying out the work.

58. Mr Levy contended that the judge had misconstrued the relevant provisions in the Charter and had been wrong to find that the opening sentence of Clause 3.3.7 of Exhibit B was not applicable to the costs of the Skid Works.

59. Mr Levy submitted: (i) it was plain that the costs of the Skid Works were "*variable costs*" within Clause 3.3.5 of Exhibit B and accordingly the manner in which KEGOT was to reimburse Rubicon in respect of those costs was governed by that clause (to be "*dealt with on an open book basis*") and by Clause 3.3.7; (ii) Clause 3.3.7 applied as a whole to the reimbursement of the variable costs referred to Clause 3.3.5; (iii) there was no warrant for separating out the second sentence "*Direct cost mark-up : 10%*" in Clause 3.3.7 as having a separate application to situations that did not fall to be governed by the first sentence ("*Charterer approved 3rd party costs only in respect of variations in accordance with the terms of the Charter, and excluding insurance, to be reimbursed at cost plus basis shall be subject to the following mark up of demonstrated direct cost*"); (iv) proposition (iii) is supported by: (a) the reference to "*an open book basis*" in Clause 3.3.5 which chimes with the first sentence of Clause 3.3.7; (b) the heading to Clause 3.3.7 ("*Direct Cost Mark-up*"); and (c) although Clause 1.8 of the Charter provides that headings to Clauses and Exhibits are for convenience only and do not affect the interpretation of the Charter, on the basis of the authorities[6] cited in paragraph 5.13 of *Lewison on The Interpretation of Contracts* 6th ed, the Court can have regard to the headings to tell the reader at a glance what the clause is about; (v) it follows that the opening sentence of Clause 3.3.7 was applicable to the costs of the Skid Works and on its true construction KEGOT was not liable to reimburse those costs unless and until it approved them.

60. I do not accept Mr Levy's submissions. Clause 3.3.7 applies not only to the costs of the Skid Works but also, by virtue of Clause 4.5 (c), to a situation where there has been a variation in accordance with Clauses 4.1 to 4.4 and the parties have agreed on the basis of actual costs plus the mark up as provided in Exhibit B. As I have held above, the Skid Works were part of the original work to be undertaken by Rubicon in accordance with Exhibit A and therefore they were not subject to the variation procedures provided for in Clauses 4.1 to 4.4. It follows that Clause 3.3.7 of Exhibit B must have been intended to apply both to: (a) the costs of the Skid Works that were not contemplated as being subject to the variation regime; and (b) where the parties had agreed a Variation Order on the basis of actual documented costs plus the mark-up in Exhibit B. It follows therefore that it must have been intended that the first sentence of Clause 3.3.7 would apply where the parties had agreed a variation within Clause 4.5 (c) and the second sentence "*Direct cost mark-up : 10%"* was to apply where there was an obligation on the Charterer under Clause 12.2 (ii) to reimburse expenses identified in Exhibit B. It therefore further follows that, since the Skid Works were not a variation but part of the original work,

[6] *SBJ Stephenson Ltd v Mandy* [2000] EWHC 277 (QB); *Doughty Hanson & Co Ltd v Roe* [2009] BCC 126; *Citicorp International Ltd v Castex Technologies Ltd* [2016] EWHC 349 (Comm).

KEGOT's obligation to pay the costs thereof is not covered by the first sentence of Clause 3.3.7 but by the second sentence "*Direct cost mark-up: 10%".*

61. The reasoning expressed in the above paragraph was essentially the reasoning deployed by the judge who also took the view that KEGOT's postulated meaning of Clause 3.3.7 cannot have been the meaning intended by the parties because if that were the meaning, KEGOT could indefinitely escape liability to pay for work that had undoubtedly been done for its benefit.

The judge erred in holding that, even if she was wrong on her construction of the Charter, since the Skid Works were undertaken at KEGOT's request and done to the requisite standard, Rubicon was entitled to a sum in excess of $100.

62. It was submitted in KEGOT's outline written submissions that in so holding the judge erred because there was no room for a restitutionary remedy in the face of the terms of the Charter. In my judgment, there is nothing in this ground of appeal because the judge was correct in her construction of the Charter.

The judge erred in not applying the judicial observations in: (a) *Tallington Lakes Limited v South Kesteven District* Council [2012] EWCA Civ 443 and *Mullalley and Co Ltd v Regent Building Society* [2017] 2962 (Ch) that the threshold for establishing that a debt is disputed on substantial grounds is not a high one and the threshold for granting an injunction restraining the presentation of a petition is low; and (b) *Re A Company* [2016] EWHC 1046 (Ch) that once it was established there was a clash of evidence, it is generally inevitable that the matter would be left to ordinary court process.

63. In my judgment this ground of appeal fails. The steepness of the threshold where a debt is disputed is implicit in the principle that a winding-up petition will be restrained where the debt is disputed in good faith and there is substance in the dispute.[7] The judge applied this principle and the contention that her decision is vitiated by the adoption of too high a threshold is not susceptible of reasonable argument.

64. As to the observation of Mr Gabriel Moss QC sitting as a Deputy High Court Judge in the cited *Re A Debtor* case -- "*Whilst the court is not to be fobbed off by raising unmeritorious defences, once there is a serious clash of evidence then it is usually inevitable that the matter will be left to the ordinary court processes*" --- the words "*serious*" and "*usually*" are very important. There was no serious clash of evidence so far as KEGOT's disputed debt case was concerned and when dealing with the cross-claim the judge was entitled on the evidence to form the negative view she came to on KEGOT's case that it had suffered loss in excess of the statutory demand debt by reason of the alleged breach of warranty as to the capacity of the FSO.

KEGOT's submission that the judge misconstrued Clause 13.2.

65. In contending that the judge had misconstrued Clause 13.2 and should have held that that provision entitled KEGOT to withhold the whole of the invoice No 7 sum, Mr Levy advanced two distinct arguments, neither of which was advanced below. First, focusing on the words, "*an item billed"*, he submitted that invoice No 7, specifying as it does an unparticularised single sum due, was "*an item billed*", so that on the wording of the rest of the clause the whole of the

[7] "*So the hurdle is a low one. Winding up proceedings should not be pursued on the basis of a debt which is disputed in good faith and where that dispute is of sufficient substance to warrant determination in the usual way*." per Mr David Stone, sitting as a Deputy High Court Judge in *Mullaley and Co*, per para 44.

invoiced sum could be withheld notwithstanding that KEGOT accepted it would eventually have to pay between US$700,000 to US$800,000.

66. Secondly, Mr Levy submitted that a party subject to a condition that he act in good faith could only be in breach of that condition if he acted in bad faith in terms of his subjective intention and it was not open to the Court to find on the evidence that KEGOT had acted in bad faith in maintaining that it was not under a present liability to pay the sum specified in invoice No 7. In support of this submission, Mr Levy cited the judgment of Butcher J in *Teeside Gas Transportation Ltd v CATS North Sea Limited* [2019] EWHC 1220 (Comm), a case concerning an agreement requiring one of the parties to pay for gas transported through the counterparty's pipe line subject to a right in clause 7.17 (a) to dispute in good faith any amount specified in an invoice. Butcher J adopted the view of Langley J in earlier judgments in proceedings between the parties that the clause imported a subjective test which involved enquiring whether the party withholding payment knew it had no grounds for disputing liability.

67. Mr Levy also cited *CPC Group Ltd v Qatari Diar Real Estate Investment Company* [2010] EWHC 1535 (Ch) where one of the issues for decision by Vos J was the meaning and effect of clause 7.1 in a Sale and Purchase Agreement ("the SPA") relating to an interest in a company that owned a site in London that was to be developed depending on planning applications being made by the parties, and granted by the relevant planning authority. Clause 7.1 provided, inter alia, that the SPA parties "*shall both act in the utmost good faith towards each other in relation to the matters set out in this Deed and in Schedule 4*". One of the three cases Vos J thought provided assistance on the meaning and effect of clause 7.1 was *Manifest Shipping Co v. Uni-Polaris Shipping Co* [2003] 1 AC 469, where the House of Lords considered the obligation of utmost good faith in the context of section 17 of the Marine Insurance Act 1906. When considering this authority, Vos J referred to Lord Hobhouse's approval of counsel's agreement that utmost good faith is a principle of fair dealing and to Lord Scott's dictum, in relation to the specific context of that case: "*Unless the assured has acted in bad faith, he cannot, in my opinion, be in breach of a duty of good faith, utmost or otherwise*".

68. In paragraph 246 of his judgment, Vos J concluded:

> *"... that the content of the obligation of utmost good faith in the SPA was to adhere to the spirit of the contract, which was to seek to obtain planning consent for the maximum Developable Area in the shortest possible time, and to observe reasonable commercial standards of fair dealing, and to be faithful to the agreed common purpose, and to act consistently with the justified expectations of the parties. I do not need, it seems to me, to decide whether this obligation could only be broken if QD or CPC acted in bad faith, but it might be hard to understand, as Lord Scott said in Manifest Shipping how, without bad faith, there can be a breach of a "duty of good faith, utmost or otherwise*".

69. Mr Weisselberg drew to our attention the judgment of Teare J in *Emirates Trading Agency LLC v Prime Mineral Exports Private Limited* [2014] EWHC 2104 (Comm). Here, the issue to be determined was whether a clause that required the parties first to seek to resolve a dispute by "*friendly discussion*" before having the dispute determined by arbitration was enforceable. Teare J expressed the view that an obligation to seek to resolve disputes by friendly discussions must import an obligation to do so in good faith and in paragraph 53 of his judgment said:

> "*Good faith connotes an honest and genuine approach to settling a dispute as Alsopp P. said in United Group Rail Services v Rail Corporation New South Wales. In his Lecture on Contract Law: fulfilling the reasonable expectations of honest men (1997) LQR 433, Lord Steyn said that good faith connoted both honesty and the observance of reasonable commercial standards of fair dealing. Where a party clearly fails to honour such standards of conduct judges and commercial arbitrators will have no particular difficulty in recognising and identifying such failures."*

70. Mr Weisselberg submitted that this meaning of good faith was to be preferred both to that adopted by Langley and Butcher JJ and to the view that a party subject to a duty to act in good faith cannot be in breach of that duty unless he has acted in bad faith by disputing a liability when he knew that he had no grounds for adopting that position.

71. In my judgment, the words "*in good faith*" in Clause 13.2 must be construed having regard to the wording and purpose of Clause 13.2 as a whole. So construed, I find that these words do not mean that the Charterer will only be failing to act in good faith if it knew it had no grounds for disputing liability. Instead, in line with the view taken by Teare J in *Emirates Trading Agency*, I find that there will be a lack of good faith for the purposes of Clause 13.2 not only where it is known there are no grounds to dispute an invoice but also where the stance taken by the Charterer is not in accordance with reasonable commercial standards of fair dealing, even if the Charterer honestly believes that the grounds relied on are in accordance with fair dealing.

72. I am also of the view that on the language of Clause 13.2, "*the item billed*" is not "*disputed in good faith*" where part of the sum to which the item billed refers is accepted as having to be paid. In this situation it is only that part of the bill which is disputed in good faith that will be determined in proceedings in the English High Court if the Charterer so elects.

73. Applying this approach, in my judgment, in refusing to offer to pay what on any reasonable view approximated to a sum that was not capable of being disputed, KEGOT was not acting in good faith in relation to the whole of invoice No 7 (the "*item billed*") because the stance it took was otherwise than in accordance with reasonable commercial standards of fair dealing. I accordingly agree with the judge's conclusion that Clause 13.2 afforded KEGOT no justification for refusing to pay at least the sum that was indisputable, which was plainly many times in excess of the $100 specified in section 93 (a) of the *Companies Law*.

74. I would add that, even if Rubicon had to show that KEGOT knew it had no grounds for contesting a large part of invoice No 7, I would still conclude that Clause 13.2 afforded KEGOT no justification for withholding the whole of the sum specified in invoice No 7. I say this because the contentions advanced by KEGOT that it had a legal entitlement to withhold the whole of the invoiced sum – the Skid Works were subject to the variation regime; there was no prior approval in accordance with the first sentence of Clause 3.3.7; Clause 13.2 provided KEGOT with a safe harbour -- have all been correctly rejected by the judge, so that following her judgment and what I apprehend will be the judgment of this Court, KEGOT knows that the only ground of dispute it can rely on is that the costs Rubicon is seeking to pass on to it were not honestly and properly expended or the work was not carried out with reasonable economy so that the cost charged is in excess of what would be reasonable to recover.[8]

[8] See Keating On Construction Contracts, 10th ed, para 4-029

The judge erred in concluding that the cross-claim was not a genuine and serious cross-claim.

75. Mr Levy argued that the judge's analysis of the cross-claim was thin to the point of exiguous. He submitted that the judge should have analysed the provisions in the Charter dealing with the tank size, deadweight and cargo storage capacity etc and, had she done so, she would have been inevitably forced to the conclusion that there was a good arguable case for breach of warranty. It was further submitted that the judge was over-influenced by the delay in bringing the claim and had not complied with the guidance in *LDX International Group LLP v Misra Ventures Ltd* [2018] EWHC 275 (Ch) and other cases such as *Quarry Products Limited v Austin International Incorporated* [2000] CILR 265 and *Re Bayoil SA* [1999] 1 WLR 147 that the court should proceed cautiously if there is any doubt about a cross-claim because a winding-up order is draconian and in practice irreversible.

76. Complaint is also made of the judge's criticism of Mr Davis' evidence that he was unable to point to any charter rates for FSOs and also of her conclusion that KEGOT had suffered no loss as a result of the actual storage capacity of the FSO when Mr Helyer had deposed that KEGOT had paid excessive hire of between 8.04% to 9.39% over the life of the Charter.

77. In my judgment, KEGOT has shown no good ground for overturning the judge's finding that the cross-claim was not genuine and serious. The judge's finding was the result of an evaluative exercise and it has been said many times that an appellate court should be very cautious in differing from the evaluation of the judge at first instance.[9]

78. The judge summarised the claim as it was pleaded in the Claim Form (that being the only pleading available) and the reasons she gave for reaching her conclusion were cogent and provided a sound basis for her finding. In particular, she was entitled to place the reliance she did on the extraordinary delay in the period December 2015 to 14 April 2020 in bringing the cross-claim and there was a solid basis for her scepticism as to the losses KEGOT claimed to have suffered due to the alleged breach of warranty given: (a) Mr Davis' justly criticised reasoning for his conclusion that KEGOT had over paid hire in the sums of US$4,191,706 or US$4,895,546.10 over the period of the Charter; (b) the speculative nature of the claim that in respect of the 22 March 2016 offloading KEGOT suffered a reduction of production of 23,000 barrels which was alleged to be equated to lost revenue of US$667,000; (c) Mr MacLean's unchallenged chart exhibited to his affidavit that showed there was no evidence that the cargo capacity of the FSO had prevented KEGOT from offloading the quantity of crude oil requested; and (d) Mr Bray's evidence that: (i) given the location of the FSO and that oil production by KEGOT was never more than around 11,000 bbls/day, KEGOT had many days to produce sufficient oil for a monthly parcel of 300,000 bbls (which was the maximum allowed for offtakes from the FSO); and (ii) the FSO has been receiving significant quantities of water, as well as oil, which had to be separated from the oil before the crude oil was ready for offtake.

79. Mr Levy also submitted that the judge ought to have had a doubt about the cross-claim and therefore should have adopted a cautious approach in accordance with Deputy High Court Judge Stone's proposition (e) in *LDX International Group.* I reject this submission. The burden was on KEGOT to establish that it had a serious and genuine cross-claim and as I have already

[9] See for example *Biogen Inc v Medeava plc* [1997] RPC 1, per Lord Hoffmann at p. 45.

held, the judge was entitled to hold on the evidence before the Court that KEGOT's claim was not serious or genuine.

Conclusion

80. For the reasons given above, I would dismiss KEGOT's appeal against the decision of the judge refusing to grant any of the relief sought in its application for an injunction and other relief dated 21 February 2020.

81. Since Rubicon is undoubtedly the successful party in this appeal, I propose that KEGOT should be ordered to pay Rubicon's costs of the appeal to be taxed on the standard basis, if not agreed.

Sir Alan Moses, JA

82. I agree.

Sir John Goldring, President

83. I also agree.

ANNEX

The Definitions

Life Extension Work:	Means the shipyard of Unithai Shipyard and Engineering Limited in Thailand whose address is Laem Chabang Port Industrial Estate Tungsukhla, Sriracha, Chonburi 20230, Thailand.
Work:	The Life Extension Work and the transportation and delivery of the FSO to be carried out by the Owner pursuant to this Charter as defined in Exhibit A.

Clauses 2.1 and 2.2

2.1 **The Owner shall carry out the Life Extension Work at the Life Extension Yard so that the FSO shall at the Arrival Date comply with (i) the Specifications and (ii) the rules of the Classification Society and the other regulatory bodies set out in Exhibits A, F and G with whose rules the FSO is require to comply. The cost and expense of the Life Extension Work shall be borne and paid for by the Owner.**

2.2 The Life Extension Work will be sufficient to enable the FSO to maintain Class with appropriate notations on the assumption that the FSO will remain at the FSO Site for a period of ten (10) years before dry-docking or work in a repair yard is required.

Clause 4 Variations

4.1 In the event a variation in the Work or the scope of equipment provided is required, such a variation shall only be made in accordance with the provisions of this Clause 4. Without limitation to the foregoing and for illustrative purposes only, instructions issued by Charterer which would result in a change to the Specifications as detailed in Exhibit C shall be regarded as a variation …

4.2 Charterer may at its sole discretion at any time from time to time, request a variation to the Work and Owner shall (subject to the provisions of this Clause) implement said variation in accordance with the procedure set forth in this Clause. Such variation shall not in any way be construed as invalidating this Charter or any ancillary document but shall form part of the Work. The Charterer shall not however be entitled to require the Owner to perform variations to the Work that would adversely affect the performance or value of the FSO.

4.3 If Owner receives any document, request or instruction from Charterer, or an event occurs, either of which Owner considers would constitute a variation to the Work, it shall as soon as is reasonably practical, and in any event within twenty eight (28) days of becoming aware that the document, request, instruction or event, may constitute a variation, advise Charterer as to the circumstances or occurrence which it considers constitute a variation. Upon Charterer request, Owner will issue a variation proposal to Charterer providing: (a) detailed technical narrative/description of that which Owner considers constitutes the variation with a full and precise list of impacts/interfaces; (b) a detailed calculation as to increase or decrease in compensation required for performing the proposed variation; (c) a detailed calculation as to any anticipated impact upon the Target Arrival Date and/or the Project Programme due to the proposed variation (together, when relevant, with any previously uncalculated cumulative impact of earlier variations) and/or a calculation of the time period required to implement the proposed variation.

4.4 On receipt of a variation proposal from Owner, Charterer may accept or reject it. If Charterer accepts the variation proposal, it shall issue written instructions to Owner to proceed ("a

Variation Order") for signature by both Parties incorporating the terms of the variation proposal. A Variation Order when so signed shall be binding on both Parties. Owner shall execute the variation as provided by it, and the subject matter of the Variation Order shall become part of the Work, subject to the provisions of this Charter. Any disputes as to whether a variation has occurred or the terms of such variation, may be referred by either Party for resolution in accordance with Clause 36.3 …

4.5 Compensation for any Variation Order shall be made in accordance with any of the following, as the Parties may agree:

(a) by payment of an agreed lump sum amount; and/ or

(b) where the Variation is completed prior to Arrival Date by an adjustment to the Hire calculated using the Roll Up Rate, and following the Arrival Date by such change to the Hire as the Parties shall agree; and/ or

(c) on the basis of actual documented costs plus the mark-up as provided in Exhibit B, together with additional compensation, if any, to be agreed in respect of any anticipated impact on the Target Arrival Date and/or the Project Programme. In the event the Parties are unable to reach agreement, the compensation for any Variation Order shall be made in accordance with Clause 4.5(c).

4.6 Owner shall not commence implementation of a variation in the Work until the applicable Variation Order has been signed by both Parties or upon receipt of a written instruction signed by the Charterer Representative authorising Owner to proceed in respect of such variation in the Work without a Variation Order. In the event there is any dispute as to the amount of compensation payable to the Owner, or the extent of any extension to the Target Arrival Date and/or the Project Programme, pursuant to any Variation Order, either Party shall be entitled to refer such dispute for resolution in accordance with Clause 36.3.

4.7 Owner shall not invoice and Charterer will not be obliged to pay any compensation in respect of any variation in the Work (i) which has not been authorised by Charterer pursuant to Clause 4.6; (ii) which the Owner has not notified to the Charterer in accordance with Clause 4.3; or (iii) which has not been claimed by the Owner within ninety (90) days of the completion of the variation work.

Clause 12 COMPENSATION

12.1 As and from the Arrival Date, unless otherwise stated in this Charter, the Charterer shall pay hire for the use of the FSO at the rate of United States Dollars Thirty Thousand Six Hundred and Fifty (US$30,650.00) per day throughout the Charter Term in accordance with Exhibit B ("Hire") - Unless otherwise stated in this Charter, the Hire and stated charges are inclusive of all Owner's costs.

12.2 In addition Charterer shall pay to Owner:

(i) The Mobilisation Fee; and

(ii) Subject to Clause 18.3, those costs and expenses identified in Exhibit B as payable by Charterer to Owner on a reimbursable basis.

12.3 The Hire payable under this Charter shall be adjusted in accordance with paragraph 3.4.1 of Exhibit B. Such adjustment shall be the sole and exclusive remedy available to Charterer under this Charter and under the O&M Agreement, in the event of any deficiency in the performance of, or breakdown of the FSO, or

any machinery or equipment thereon.

12.4 Save as set out in Clause 12.3, all payments under this Clause 12 shall be made without any discount, set-off, deduction or withholding whatsoever save to the extent required by law…

EXHIBIT A
SCOPE OF WORK

Owner shall be responsible for
(1) …
(2) …
(3) Supply, installation and integration of the FSO Custody Metering Skid.
(4) …
(5) …
(6) …

The intended yard works are summarised as per the following list.

7. FSO SCOPE
- Supply Custody Metering Skid
- …

EXHIBIT B

SCHEDULE OF COMPENSATION

3 Remuneration

3.3.5 FSO Custody Metering Skid - Integration.

Charterer shall reimburse Owner for the costs incurred for the transportation, installation and integration of the fiscal meter unit on board the FSO, including steelworks, piping modifications, electrical and instrumentation works etc. These variable costs will be dealt with on an open book basis shall be reimbursed by Charterer as per section 3.3.7 below.…

3.3.7 Direct Cost Mark-up

Charter approved 3rd party costs only in respect of variations in accordance with the terms of the Charter, and excluding insurance, to be reimbursed at cost plus basis shall be subject to the following mark-up of demonstrated direct cost.

Direct cost mark-up: 10% (ten percent)

The cost of Owner's in-house management, procurement and administration services are priced into the Charter rates and prices shall not be a reimbursable cost under the Charter.