

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

CAUSE NO. FSD 30 OF 2020 (MRHJ)

**IN THE MATTER OF SECTION 93 COMPANIES LAW (2020 REVISION)
AND IN THE MATTER OF ORDER 29 OF THE GRAND COURT RULES**

BETWEEN:

KRISENERGY (GULF OF THAILAND) LTD

APPLICANT

AND

RUBICON VANTAGE INTERNATIONAL PTE LTD

RESPONDENT

OPEN COURT

Appearances:

**Ms Shelley White and Mr. Jonathan Turner of Walkers for the
Applicant**

**Mr. Nick Hoffman and Ms Anya Park of Harney Westwood &
Riegels for the Respondent**

Before:

Mme Justice Margaret Ramsay-Hale

Heard:

16 April 2020

Draft Judgment

Circulated

9 June 2020

Judgment Delivered:

12 June 2020



HEADNOTE

Insolvency - Application to restrain presentation of petition - Principles to be applied

RULING

1. The Respondent, Rubicon Vantage International PTE Ltd. ("Rubicon") seeks to present a petition for the winding up of the Applicant, KrisEnergy (Gulf of Thailand) Ltd. ("KEGOT") in the capacity of a creditor under section 94(1)(b) of the *Companies Law (2020 Revision)* following the service

of a statutory demand (“the Statutory Demand”) dated the 10 February 2020 on KEGOT with which KEGOT refuses to comply.

2. KEGOT is a Cayman Islands exempt company focused on the development and production of oil and gas in Southeast Asia. It is wholly owned by KrisEnergy Ltd., (“KrisEnergy”) which is also a Cayman Islands exempt company. Rubicon is a Singaporean company which owns a floating storage and offloading vessel called the Rubicon Vantage (the “FSO”).
3. In this application, KEGOT seeks to restrain the presentation of a winding up petition. The application is supported by extensive affidavit evidence from a senior executive of KEGOT, Mr. Brian Helyer, Vice President of KrisEnergy, with 40 years’ experience in the oil and gas industry and Ms Sui Keng Ang, Interim Chief Financial Officer and Group Treasurer for KrisEnergy.

Background

4. By way of a bareboat charter dated 13 October 2014, Rubicon chartered the Rubicon Vantage to KEGOT for a term of five years (the “Charter”) from 24 July 2015 to 17 August 2020.
5. The FSO is a storage vessel used in offshore oil projects to store oil extracted from an oil field before offloading it periodically (in procedures called “offtakes”) to oil tankers for onward transportation ultimately to an oil refinery. Rubicon chartered the FSO to KEGOT for use in Block G10/48 in the Gulf of Thailand, known as the Wassana Field (the “Field”), which is in Thai territorial waters.
6. The Charter provided that Rubicon was to carry out certain works to the FSO prior to delivery referred to as the “*Life Extension Work*” which was the work necessary to extend the operating life of the FSO and make it able to maintain Class for a period of 10 years at the Field, without the need for drydocking. The Life Extension Work would be done at the shipyard of Unithai Shipyard and Engineering Limited in Thailand.
7. The Life Extension Work included a requirement for Rubicon to transport and install a metering skid (the “Skid Works”). A metering skid (the “Skid”) is a large flow meter used in the oil extraction industry to measure crude oil quantities for the purposes of calculating tax. Its installation on the FSO was required by Thai law as a precondition to the FSO operating at the Field.



8. The requirement for Rubicon to carry out the Life Extension Work and the Skid Works is set out in the Charter as follows:

“1.1 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.”

“2.1 The Owner shall carry out the Life Extension Work...so that the FSO shall at the Arrival Date comply with [the Specifications and rules of regulatory bodies]. The cost and expense of the Life Extension Work shall be borne and paid for by the Owner.”

“Exhibit A – SCOPE OF WORK

Owner shall be responsible for: ...

1. *Yard works comprising: FSO Refurbishment, dry-docking, Life Extension works in accordance with Classification Society specification, codes and standards – prior to the delivery of the FSO.*

...

3. *Supply, installation and integration of the FSO Custody Metering Skid.*

...

7. *FSO Scope:*

- *Supply FSO Custody Metering Skid that meets DMF requirements.*
- *Install Intake Hose Connections at Bow.*
- *[Further particulars then follow].”¹*

9. The Charter provided for compensation for the use of the FSO and the works done by Rubicon as follows:

“12.1 ...unless otherwise stated in this Charter, [KEGOT] shall pay hire for the use of the FSO at the rate of [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 [Rubicon’s] costs.

12.2 In addition [KEGOT] shall pay to [Rubicon]

(..)

(ii) ... those costs and expenses identified in Exhibit B as payable by [KEGOT] to [Rubicon] on a reimbursable basis.”²

¹ See page 219 of exhibit BH-1 [HB/13].





"Exhibit B – SCHEDULE OF COMPENSATION (...)

3.3.5 FSO Custody Metering Skid – Integration

[KEGOT] shall reimburse [Rubicon] for the costs incurred for the transportation, installation and integration of the fiscal meter unit onboard the FSO, including steelworks, piping modifications, electrical and instrumental works etc. These variable costs will be dealt with on an open book basis shall be reimbursed by [KEGOT] as per section 3.3.7 below.

The metering skid shall be a prover loop type and acceptable by DMF (Thailand Department of Mineral Fuels). (...)

3.3.7 Direct Cost Mark-up

[KEGOT] 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 for 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."

10. Mr. Alistair Maclean, Engineering Director of a related company, Rubicon International Pte Ltd, who was responsible for the engineering aspects of preparing the Rubicon Vantage for re-deployment in the Gulf of Thailand from 13 October 2014 to the startup of the FSO on 14 August 2015 gave evidence on behalf of Rubicon.
11. In his evidence, he stated that the Life Extension Work included the purchase of the Skid as well as the works necessary to transport and install the Skid on the FSO. The Life Extension Work and the Skid Works were a fundamental aspect of the Charter and within the original scope of work. Rubicon duly performed, or procured the performance of, the Life Extension Work, including the Skid Works.
12. The Skid was purchased from suppliers in Singapore, transported to Thailand, lifted on to the FSO and installed. Pursuant to the Charter, the Skid Works were carried out by approved sub-contractors at a reputable shipyard, Unithai, in Thailand, for which Rubicon paid as provided for by clause 2.1.

13. On 27 March 2015, a Sailaway Certificate was presented to KEGOT by Rubicon and accepted by KEGOT. Mr. Maclean explains that the Sailaway Certificate is a certificate stating that the FSO was at the time of issue classed by an approved classification society and fit for purpose. On 24 July 2015, the FSO arrived at the Field and the vessel has remained at the Field from 15 August 2015, when it was hooked up, until the present day.
14. Rubicon issued four invoices to KEGOT, one in respect in respect of the Skid Works and the other three in respect of costs arising from the Life Extension Work.
15. Invoice 7, in the amount of US\$1,523,107.94, was for the Skid Works. Rubicon's case is that the costs for the Skid Works was to be reimbursed to Rubicon plus 10% which was the agreed markup on Rubicon's direct costs as per clause 12.2 and Exhibit B clauses 3.3.5 and 3.3.7.
16. The other invoices were for modifications to the forecastle and hang off in the amount of US\$147,9274.20 (Invoice 9); for changes to the forecastle hang off in the amount of \$49,465.90 (Invoice 11) and \$107,353.40 for a change of the FSO's classification society (Invoice 13).
17. Mr. Maclean explains that:

"In undertaking work in a large and complex project, which the Life Extension Work certainly was, work items cannot be viewed in isolation. Delay in dealing with one item can cause delay in another item of work. Time was not a luxury Rubicon could afford and it was imperative to keep to the work time line in order to meet the project schedule.

The work covered by the ... Invoices was essential in order for the FSO to obtain approval from her classification society (i.e. regulatory approval), sail away from the yard, pass the performance tests and to achieve delivery...."

18. KEGOT refused to pay the Invoices. According to Mr. Maclean, there have been numerous attempts to resolve the impasse. In April 2018, representatives of both companies had a meeting at which, according to Mr. Maclean, KEGOT accepted that the Skid Works had been done and that Rubicon should be compensated but KEGOT was of the view that the costs for the works should have been in the region of \$700,000 - \$800,000. Mr. Maclean says that matters were left with KEGOT stating it would report to the parent company whose CEO would revert to Rubicon with the amount it was prepared to pay. Nothing further was heard.



19. Rubicon thereafter pursued its rights under the parent company guarantee provided by KrisEnergy (the “Guarantee”) and was successful in obtaining judgment against KrisEnergy in proceedings in the English High Court (the “English Proceedings”). KrisEnergy refused to pay and successfully petitioned in the Singapore Court to obtain a moratorium pending a proposed restructuring as a consequence of which it was insulated from all legal proceedings.
20. In a final attempt to recover the sums it alleges are owed to it under the invoices, Rubicon served on KEGOT a statutory demand in the amount of US\$2,839,306.85 (principal of US\$1,827,901.44 and interest of US\$1,911,405.41) (“the Debt”) on 10 February 2020.

This Application

21. In this application KEGOT seeks:
- (i) A declaration that there is a genuine and substantial dispute concerning the Debt claimed by Rubicon to be owing to it by KEGOT in the Statutory Demand dated 10 February for the principal sum of US\$1,827,902.44 together with interest of US \$1,011,405.41.
 - (ii) Further or alternatively, a declaration that KEGOT has a genuine cross-claim on substantial grounds against Rubicon for an amount exceeding the sums claimed in the Statutory Demand.
 - (iii) An order that the Statutory Demand be set aside.
 - (iv) A final injunction against Rubicon that it be and is hereby restrained from presenting any petition to wind up the Plaintiff based on the Statutory Demand.
 - (v) Further or alternatively, an order that Rubicon be restrained from issuing any petition to wind up KEGOT based on the sums claimed in the Statutory Demand until such time as the dispute is finally and conclusively determined in a court of competent jurisdiction, or agreement of the parties.

Disputed debt

KEGOT’s Position



22. KEGOT's position is that it is not liable to pay any of the sums invoiced because KEGOT's liability to pay was governed by the specific payment approval procedure in the Charter dealing with Variations set out in clause 4 with which Rubicon failed to comply.
23. Clause 4.3 of the Variation scheme on which KEGOT relies in disputing their liability, provides that if KEGOT made a request, or an event occurred, which Rubicon considered would constitute a variation, Rubicon was to inform KEGOT and, on request, provide specified "detailed" information, including as to cost.
24. Clause 4.4 provides, *inter alia*, that on receipt of a variation proposal from Rubicon, KEGOT may accept or reject it. If KEGOT accepts the variation proposal, it shall issue written instructions to Rubicon to proceed (a Variation Order). If a dispute arises as to whether a variation has occurred, or the terms of such variation, either party may refer the dispute to an expert.
25. Clause 4.5 provides that compensation for any Variation Order shall be made in one of three ways and provides at (c) that Rubicon shall be compensated on the basis of actual documented costs plus the mark up as provided in Exhibit B, which in turn provides as set out above, that KEGOT approved 3rd party costs only in respect of variations in accordance with the terms of the Charter [sic] be reimbursed on a cost plus basis with a 10% mark-up on its demonstrated direct cost.
26. Pursuant to Clause 4.6, Rubicon was not to commence implementation of any variation unless both parties had signed a Variation Order or KEGOT had issued written instructions that Rubicon should proceed without a Variation Order.
27. Under Clause 4.7, Rubicon was not entitled to invoice, and KEGOT was not obliged to pay, any compensation in respect of any variation which had not been authorised under Clause 4.6.
28. With respect to Invoice 7 which relates to the Skid Works, which KEGOT identifies as a **variation order proposal** numbered "VO-01" Mr. Helyer says this:

"42. By way of summary, the Applicant's main arguments for rejecting Invoice 7 are that:

(a) the applicable procedure for claiming a variation under clause 4 of the Bareboat Charter: "Variations." was not followed,



- (b) *the Applicant never approved the sums claimed in respect of the VO-001 works pursuant to clause 4.6 of the Bareboat Charter;*
- (c) *the Respondent did not obtain advanced approval in respect of the VO-001 works pursuant to section 3.3.5 and 3.3.7 of Exhibit B of the Bareboat Charter;*
- (d) *the Respondent failed to substantiate the sums claimed in accordance with the Bareboat Charter; and*
- (e) *the documents that the Respondent did provide demonstrated that the sums claimed were obviously inflated such that the invoices were invalid and their rejection was justified.*

43. *The Applicant's position is that each of these grounds constitutes an independent and sufficient basis to reject all of the claims in their entirety.*

44. *Notably, clause 13.2 of the Bareboat Charter provides as follows:*

"In case 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.

...

46. *As the Respondent has persistently maintained a claim for an inflated sum in relation to the VO-001 works, whilst failing to provide adequate documentation, no settlement amount was ever agreed in relation to the VO-001 works. The entire purpose of the Bareboat Charter's variation order and/or works approval and substantiation provisions in conjunction with the disputed invoice provisions, was to prevent the Respondent from unilaterally claiming to be a creditor of the Applicant. The Applicant has rightly withheld payment, notwithstanding the fact that the metering skid works were done. Such withholding is entirely in accordance with the clear provisions of the Bareboat Charter."*

29. More particularly, with respect to the assertions at 42 (b) and (c) above, Mr. Helyer says that the parties were still negotiating on Unithai's bid for the Skid Works and had not arrived at any consensus as to the costs when Rubicon issued the formal purchase order to Unithai for the Skid Works on 22 December 2014. This, he says, was not consistent with Clause 4.6 of the Charter *"which explicitly stated that the Respondent should not commence work without a signed VO or*



with Exhibit B Clause 3.3.7 which refers to “Charterer approved 3rd party costs only in respect of variations in accordance with the terms of the Charter...”³

30. KEGOT’s primary position, then, is that the Invoice for the Skid Works was a variation order proposal, subject to the variation order scheme. Rubicon did not comply with the scheme by getting approval before commissioning the Skid Works, hence Rubicon was not entitled to invoice for the Works and KEGOT was not obliged to pay.
31. The assertion that the Skid Works were subject to the variation scheme appears to be grounded on the fact that Rubicon submitted a variation order proposal to KEGOT and sought KEGOT’s approval of Unithai’s bid before it commenced the Skid Works. Ms. White submits that Rubicon by its conduct plainly accepted that the Skid Works, even if not a variation in the strict sense, were subject to the variation scheme in the Charter and that the costs of the Works had to be approved before they became payable.
32. Alternatively, KEGOT contends that Exhibit B, clauses 3.3.5 and 3.3.7, which govern approval for the Skid Works, required the third-party costs to be approved by KEGOT in advance. They were not approved and they are, therefore, not payable.
33. Finally, as the invoices are disputed in good faith, KEGOT is entitled under clause 13.2 to withhold payment subject to the matter being resolved under the dispute resolution provisions in the Charter.
34. Mr. Helyer refutes the suggestion made by Mr. Maclean that KEGOT at any time accepted that Rubicon should be compensated for the Skid Works, and says that his reference to the sum of \$700,000 to \$800,000 was his estimate of what the Skid Works should cost. KEGOT maintains that Unithai’s bid for the Skid Works was overpriced and not properly substantiated, but its position remains that the sums are not due and owing because they were not approved in advance.
35. In a lengthy disquisition in his affidavit, Mr. Helyer sets out the various shortcomings in the Unithai bid which made it impossible for KEGOT to assess whether the costs claimed by Rubicon in the invoice for the Skid Works were justified, including the design and engineering costs

³ First Affidavit of Brian Helyer at paragraph 89.



which Mr. Helyer asserted were excessive and not properly substantiated, the costs for lifting the Skid from the quay to the deck of the FSO, which were likewise excessive and not properly substantiated, and the costs for work done by other third-parties, which he considered to be outside the scope of the Skid Works and costs which did not appear to be properly allocated between the Skid Works and the Life Extension Work.

36. With respect to the remaining invoices which appear to be variations properly so called, Mr. Helyer's evidence can be summarised as follows:
37. With respect to Invoice 9, relating to variation order proposal "VO-06," for the work done to the forecastle of the FSO including modifications that were required because the intake and offtake hoses were to be hung off the sides rather than off the front, Mr. Helyer says KEGOT did not sign or approve the variation order and further, that KEGOT was of the view that the work was not a variation at all but fell within Rubicon's original scope of work and were, therefore, for Rubicon's account.
38. In his evidence, Mr. Helyer suggests that KEGOT sought to agree the Invoice ⁴ but Rubicon failed to provide further "write up" on traceability as well as to produce purchase orders and other supporting documents for the invoiced work, as requested.
39. In sum, VO-06 was not approved and not properly substantiated and/or was not a variation but within the scope of work for which Rubicon was financially responsible and KEGOT, therefore, had no liability to pay.
40. With respect to Invoice 10, which relates to variation order proposal "VO-11," Mr. Helyer accepts that this was an actual variation to the original work scope. It originated from the discovery that the capacity of a marine breakaway coupling, designed to close off the floating hoses and prevent oil spills from an open-ended hose break in the event the FSO broke away from the CALM buoy⁵ to which it was attached, had to be revised upward. KEGOT's position is that Rubicon commenced the work without approval and before KEGOT had issued the revised

⁴ Correspondence between Mr. Tan of KEGOT and Mike English of Rubicon refers

⁵ CALM is an acronym for Catenary Anchor Leg Mooring, which is part of a floating mooring system which facilitates the inter-connection of hoses and umbilicals between the FSO, the reservoir and the Mobile Offshore Production Unit (MOPU).



breakaway load, with the result that some of the works which had already been started, had to be re-engineered and re-worked.

41. Mr. Helyer said further that Rubicon did not provide any explanation or documentation which demonstrated whether and to what extent the materials claimed were required as a consequence of the revised load or whether they would have been required in any event.
42. In summary, as VO-11 was not approved and not properly substantiated by Rubicon, KEGOT had no liability to pay.
43. Invoice 13, relating to variation order "VO-08", deals with the costs incurred by Rubicon in changing the classification society of the FSO. The change became necessary as KEGOT had classified the CALM buoy, to which the FSO would be attached, with the classification society, Bureau Veritas ("BV"). The classification society that Rubicon had selected - ABS - refused to classify the FSO unless they also classified the CALM buoy. In the result, Rubicon had to classify the FSO with BV and thus incurred additional costs which it sought to recover from KEGOT.
44. KEGOT disputes its liability to pay these costs as Rubicon was responsible for obtaining classification of the FSO at its own cost. Mr. Helyer asserts that KEGOT could not be held responsible for any of Rubicon's costs of classifying the CALM buoy with Bureau Veritas ("BV") as KEGOT was not contractually obliged to classify the buoy with any particular classification society and was unaware, in any event, until after the CALM buoy was classified, that its decision to classify the CALM buoy with BV would necessitate a change to the classification society for the FSO. Accordingly, KEGOT was not responsible for the costs occasioned by the change and Rubicon was not entitled to issue a Variation Order to charge for such costs.

Rubicon's Response

45. Mr. Hoffman's submissions were confined to the Invoice for the Skid Works. He says, simply, that the Skid Works were required to make the FSO functional, the Skid Works were completed to KEGOT's satisfaction and the Skid has been used by KEGOT for the last 4 ½ years to successfully extract over 8 million barrels of oil. Under the Charter, the Skid Works were to be paid for by Rubicon and reimbursed by KEGOT and something is due to be paid to Rubicon, irrespective of whether there are extant disputes relating to the facts as presented or as to the



legal construction of the terms of the Charter or how those disputes are to be resolved under the Charter.

46. Mr. Hoffman invites the Court to find on the evidence that KEGOT has on numerous occasions admitted that some sum of money is payable for the Skid Works and submits that as recently as his Second Affidavit, Mr. Helyer confirmed that the issue is one of quantum and not underlying liability:

*"[KEGOT's] position was (and remains) that: (a) it would have paid had the variation procedure been followed; or (b) it will pay costs that become properly due and payable under the [Charter] once appropriate substantiation of reasonable claims is provided and agreed invoices are issued."*⁶

47. Referring to the English proceedings and Mr. Helyer's evidence that he expected the Skid Works to cost between \$700,000 and \$800,000, Mr. Hoffman submits that the evidence amounts to an admission or an acknowledgment that monies are payable to Rubicon for the Skid Works and invites the Court to find that on any view, Rubicon is owed a sum which exceeds the statutory minimum and that Rubicon is a creditor with standing to present the petition.
48. Mr. Hoffman submits that KEGOT's present position, that the costs of the Skid Works would be dealt with as a variation under the Charter, was first raised by KEGOT in the course of the English proceedings to enforce the Guarantee against the parent, KrisEnergy, to recover the sums owed to it by KEGOT. He invites the Court to dismiss as unsupported, KEGOT's assertion that these costs were to be treated as a variation or that the Charter required the costs to be pre-approved before the Skid Works were undertaken. Mr. Hoffman says that KEGOT's position does not accord with the contemporaneous documents, is inconsistent with Mr. Helyer's witness statements in the English proceedings and was mentioned for the first time in passing in cross-examination.
49. It was agreed that the Skid Works were to be dealt with on a "*reimbursable basis*," as the bulk of those works was to be carried out by third party sub-contractors and the costs were not readily ascertainable at the time the Charter was signed. For that reason, they are referred to as "*variable costs*" in Clause 3.3.5.

⁶ Paragraph 22 of the second affidavit of Mr Helyer.



50. In his affidavit, Mr. Maclean points out that the terms of payment for the Skid Works, specifically agreed on a reimbursable basis to accommodate the variable nature of the costs, were expressly discussed prior to the signing of the Charter by way of an email exchange of 4 July 2014. Mr Munday, a representative of Rubicon, suggested that the cost of the Skid could be dealt with as an increase to Hire but *“with the engineering, mobe, installation, integration etc. as reimbursables (considering how variable that may all end up being)”* to which Mr. Helyer responded, *“yeah that could work.”*⁷
51. Mr. Maclean observes that Clause 12.2 confirms that there was a specific compensation arrangement for items identified in Exhibit B as repayable on a reimbursable basis and that the only works that were identified as payable on a reimbursable basis were the Skid Works, as set out in Clause 3.3.5.
52. Mr. Hoffman submits that contracts which contain such compensation mechanisms, as the Charter, are referred to as *“cost reimbursable contracts”*. As such, the contractor’s entitlement to payment depends upon the costs actually incurred by the contractor in executing the work plus some uplift, which under the Charter is 10%. In such contracts, the paying party, in this case KEGOT, assumes the risk.
53. He refers to *Keating on Construction Contracts* (Sweet & Maxwell, 10th Ed) at paragraph 4-029 where such contracts are referred to as *“Cost plus Percentage Contracts”* and the author’s note that contractors are not disentitled from the reimbursement of their actual costs incurred because the costs exceed the amount that was anticipated.
54. With respect to the three remaining invoices, Mr. Maclean says there is no dispute that the work covered by the Invoices was done to the requisite standard required for the issuance of the Sailaway Certificate and the subsequent acceptances after start up, and no dispute that Rubicon paid the sub-contractors for the work. He explains that in a large and complex project such as the Life Extension Work, work items cannot be viewed in isolation. Delay in dealing with one item can cause a delay in another item and that time was not a luxury Rubicon could afford as it was imperative to keep to the work timeline in order to the project schedule.

⁷ Affidavit of Mr Maclean at paragraph 37



55. Mr. Maclean makes the point that the work covered by these invoices was essential for the FSO to obtain approval from the classification society, sail away from the yard, pass the performance tests and achieve delivery and that he cannot see any basis on which they can be disputed.

Discussion

56. The test for determining whether a court will accede to an application to restrain the presentation of a winding up petition is set out in *Coulson Sanderson & Ward Ltd v Ward* [1985] 1 WLUK 105:

"[T]he court should not on an interlocutory motion restrain what would otherwise be the legitimate presentation of a winding-up petition by someone qualified to present it, unless the company establishes on the evidence a prima facie case for holding that the petition would constitute an abuse of process."

57. In *Mann v Goldstein* [1968] 1 W.L.R. 1091, at 1092-1093, Unged-Thomas J said:

"...this court has jurisdiction to restrain the presentation or advertising of a winding-up petition and restrain all further proceedings on it. That jurisdiction is a facet of the court's inherent jurisdiction to prevent an abuse of the process of the court. It will be exercised where a winding-up application is presented or prosecuted otherwise than in accordance with the legitimate purpose of such process..."

And later at 1099:

"...the prevention of the abuse of the process of the court is the very essence of the whole of this court's jurisdiction to restrain the presentation of a winding-up petition."

58. It is a well-established principle that winding up proceedings should not be commenced where the petition debt is genuinely disputed on substantial grounds and that it is an abuse of process to seek to use the winding up court as a debt collection agency or to use the process to put pressure on a company to pay.
59. In *Re Company (No.006685 of 1996)* [1997] BCC 830, Chadwick J explained the rule of practice that the court will not allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on *bona fide* grounds at 832:

"It will not do so, as a matter of practice, because the effect of presenting a winding-up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an



ordinary writ action. The pressure arises from the fact that once the existence of the petition is known amongst those having dealings with the company, they are likely to withdraw credit or refuse to continue to trade with the company on the ground that, if the company is wound up on the petition, their dealings with it will be subject to the provisions in s. 127 of the Insolvency Act 1986. In those circumstances it may well be commercially necessary for the company to pay a debt which is disputed on substantial grounds rather than to run the risk that the whole of the company's business will be destroyed."

60. To restrain the presentation of a winding up petition, KEGOT would need to establish a dispute in relation to the entirety of the debt as a creditor is entitled to present a winding up petition where the prospective petitioner is indisputably a creditor in an amount exceeding the statutory minimum.
61. In *Angel v British Gas Trading Ltd* [2012] EWHC 2702 (Ch) Mr. Justice Norris set out the principles to be applied in exercise of the Court's jurisdiction to restrain the presentation of a petition:

"22. The principles to be applied ...are familiar and may be summarised as follows:

(a) A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court: Mann v Goldstein [1968] 1WLR 1091.

(b) The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750)

...

...

"29 On this application the question is whether or not there is an indisputable debt owed by Angel to BG sufficient to support a winding up petition. There may be uncertainty about the precise sum: but the court at this stage is not concerned to determine what could be proved in a winding up. It is concerned to see that the petitioner is indisputably a creditor in a sum exceeding the statutory minimum and so entitled to present a winding-up petition.... In Re A Company No. 2340 (2001) Mr Justice Blackburne held:

'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.”

62. In the instant case, KEGOT accepts that some amount of money will become due and payable for the Skid Works when Rubicon complies with the Charter but asserts that they have no present liability.
63. As the case has been put by KEGOT, the mechanism in the Charter for agreeing what is reimbursable to Rubicon is the same as the mechanism for agreeing variations and that the costs for the Skid Works, not being pre-approved by KEGOT following the variation procedure in Clause 4, nothing is due and payable to Rubicon for those Works. Alternatively, because KEGOT did not approve Unithai’s bid for the Works in advance, as required by clause 3.3.7, nothing is due or payable by KEGOT for those Works. Further, the costs Rubicon says it has incurred have not been properly substantiated as required under the Charter and are, for that reason, not payable.
64. I take on board Mr. Heyler’s concern that without a control mechanism in the contract, there would be no incentive on Rubicon to control its sub-contractors’ costs. His concern received full expression in the English proceedings where KEGOT’s Counsel suggested that if the provisions in the Charter left it to Rubicon’s discretion to organise the work as they think appropriate for the installation, transportation and integration of the Skid, at such a price it chose to agree with the sub-contractor, and that KEGOT would reimburse the costs plus 10% without being able to exert any control over the costs, that would be a commercially unsound interpretation.
65. That said, KEGOT’s argument that that the control mechanism was the requirement for approval as set out in the scheme for Variations at Clause 4 of the Charter is untenable. Clause 4 only applies where a Variation in the Works or the scope of the equipment provided is required. The Skid Works were part of the original scope of Works and its character is not affected by the fact that Rubicon submitted its invoice for the Skid Works as a variation proposal.



66. KEGOT's alternative submission, to much the same effect, that the control mechanism as set out in Clauses 3.3.5 and 3.3.7 of Exhibit B required the costs of the Skid Works to be pre- approved by KEGOT before any liability to reimburse Rubicon could arise, is also untenable.
67. If that were right, then KEGOT would never have any liability to pay for the Skid Works for which they promised to reimburse Rubicon because Unithai's costs were not, in fact, approved by them *before* Rubicon issued the purchase order to Unithai to commence the Skid Works. On such an interpretation of Clause 3.3.7, KEGOT would have had the Skid Works done for free, as Mr. Hoffman submitted. That would be a distinctly uncommercial interpretation which is not, in my judgment, borne out by the language of Clause 3.3.5 and Clause 3.3.7 when looked at in the context of Clause 12.2 (ii).
68. In my view, the latter required KEGOT to pay to Rubicon the costs and expenses identified in Exhibit B as reimbursable costs. Clause 3.3.5 of Exhibit B identifies the reimbursable costs as the costs of the Skid Works. These were to be dealt with on an open book basis, meaning that only Rubicon's direct costs were to be reimbursed. Clause 3.3.7 provides that direct costs were to be reimbursed with a mark up of 10%.
69. It is not a matter I have to decide, but it appears to me that, as Rubicon paid Unithai and submitted the relevant documentation to KEGOT to substantiate what it had paid to Unithai, then, the Works being completed to the requisite standard and accepted by KEGOT, Clause 3.3.7 required KEGOT to reimburse Rubicon for Unithai's costs - i.e. Rubicon's direct costs - with a 10% uplift.
70. I consider 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,"* on which KEGOT relies, to be a reference to those variations which the parties agreed should be compensated pursuant to Clause 4.5 (c). With respect to those costs, Clause 3.3.7 makes it clear that they are to be reimbursed with a 10% mark up on demonstrated direct costs.
71. To put it another way, Clause 12.2 (ii) and Clause 3.3.5 already state that the Skid Works are reimbursable costs. There would be no need for this to be set out again in 3.3.7. Clause 4.5 (c) does not state in terms that the costs are reimbursable. That is set out in the opening paragraph of clause of 3.3.7.



72. The only relevant reference in Clause 3.3.7 to the Skid Works is to the mark up to be added to Rubicon's reimbursable costs.
73. It is plainly not right for KEGOT to say that on such an interpretation there would be no cost control mechanism. The provision for the work to be reimbursed on an "open book" basis was the mechanism. Because Rubicon was to be reimbursed for its actual costs, it was required to give KEGOT complete access to the relevant underlying information and invoicing to satisfy KEGOT that it had actually incurred those costs.
74. Having examined such documents as were available, supporting Unithai's lump sum bid, and having a figure of \$700,000 to \$800,000 already in mind, as Mr. Helyer said in the English proceedings, KEGOT formed the view that Unithai's costs were too high and refused to pay. It appears to me, however, that as Unithai was the approved third party contractor and that Rubicon had paid Unithai and submitted the relevant documentation to KEGOT to substantiate what it had paid to Unithai, then Clauses 3.3.5 and 3.3.7 required KEGOT to reimburse Rubicon for those costs with a 10% uplift.
75. It is clear from the evidence that Rubicon sought to get approval for the costs of the Skid Works before commencing work. While it would have been commercially prudent to obtain approval in advance to avoid any later dispute as to costs, as has happened here, it is not evidence that Rubicon was obliged to get approval before it directed Unithai to commence the Skid Works, as Ms. White suggested.
76. The evidence shows that Rubicon took on board KEGOT's concerns about the cost but, having obtained a revised invoice from Unithai which substantially reduced the costs, it delivered the purchase order to Unithai. Rubicon no doubt had in mind the possibility that further delay in commencing the Skid Works would affect its ability to meet the target arrival date of 15 March 2015. In my view, Rubicon was not constrained by Clause 3.3.7 to wait on such approval as KEGOT was, I have said, obliged to reimburse its costs on an open book basis, which meant that KEGOT could satisfy itself at any point whether the costs had been properly incurred.



77. KEGOT has consistently protested the lack of documentary substantiation of Unithai's costs but, as Rubicon advised KEGOT, it was a lump sum contract and the specific list of documents requested by KEGOT were not available.⁸
78. On any view of the evidence, KEGOT's real complaint is that Unithai did not properly substantiate its costs but nothing in the Charter can be read as requiring *Rubicon* to contract the Skid Works with *Unithai* on an open book basis, thus giving KEGOT access to the sort of documentation from Unithai that Mr. Helyer says they asked for and should have received. It could have been agreed that all third-party costs were to be on an open book basis, but that would have been a different Charter.
79. Under this Charter, Rubicon was not required to contract with third parties on an open book basis and UniThai was not required to open its books and substantiate its costs under its agreement with Rubicon. It was entitled to provide estimates to justify its lump sum proposals and its prices would reflect its risks.
80. Mr. Helyer seeks to demonstrate, by reference to specific areas of the bid, that some of the costs were, *inter alia*, not properly allocated between the Skid Works and the Life Extension Works, were inflated and included charges for work which was outside the scope, work which was not necessary and work which was not done.
81. Even if KEGOT were entitled to dispute Rubicon's demonstrated direct costs on the ground that Unithai's bid was too high and all the costs Mr. Helyer says were too high or otherwise unjustifiable, were revised or removed, it is indisputable that some sum would still be owed to Rubicon for the Skid Works. Given the size and scope of the Skid Works, and Mr. Helyer's own estimate that the Skid Works should have cost somewhere between \$700,000 and \$800,000, that sum would easily exceed the statutory minimum for presentation of a petition. That is sufficient to establish that Rubicon is a creditor with standing to present a petition to wind up KEGOT.
82. With respect to KEGOT's assertion that under the provisions in Clause 13.2, they are entitled to withhold payment as the sum is disputed, I accept Mr. Hoffman's submission that Clause 13.2 is not engaged.

⁸ See Helyer 1 at para 93



83. As set out above, Clause 13.2 provides that *“where an item billed is disputed in good faith, [KEGOT] will promptly notify [Rubicon] 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”* which gives exclusive jurisdiction to the English Courts. If KEGOT were disputing costs in good faith, then Clause 13.2 required them to make a good faith effort seek to agree a sum with Rubicon that it was willing to pay and the rest would be dealt with by the dispute resolution mechanism set out therein. KEGOT has refused to propose a sum which it might be willing to pay for the Skid Works and instead has asserted that it has no liability to pay for those works at all.
84. For the reasons I have given, I am satisfied that the entirety of the debt in the Statutory Demand is not genuinely disputed on substantial grounds and the exclusive jurisdiction clause is, therefore, irrelevant: see Jones J in *Re Duet Real Estate Partner 1LP* FSD 77 of 2011 (Unrep) and Bannister J in *Alexander Jacobus De Wet v Vascon Trading Limited* BVIHCV (COM) 2011/0129.
85. Even if I were wrong on the matter of construction, I would still hold that, as the Skid Works were undertaken at KEGOT’s request and done to the requisite standard, Rubicon is entitled to be reimbursed in some amount greater than \$100.
86. I do not go on to consider the other invoices which are set out in the Statutory Demand, as the resolution of the question whether there is a substantial dispute about the entirety of the Debt being answered with respect to the Skid Works in the negative, nothing turns on whether the other invoices are *bona fide* disputed on substantial grounds.
87. As Nugee J observed in *Ensygnia Ltd v David Rickard* [2014] EWHC 1184 (Ch) (not cited by the parties) at paragraphs 9 and 10:

‘...unless the alleged debtor can show that the entirety of the sums claimed are in dispute, or at any rate can show that there is a sufficient dispute to reduce the undisputed sums below £750, the creditor is entitled to present a petition and no injunction should be granted.

“To put this point the other way round, it is enough for the creditor to point to at least one debt, or debts, exceeding £750, as to which there is no substantial dispute, in order to succeed. Where, as here, there are numerous invoices relied on, this places a high hurdle in the way of the applicant, who must successfully challenge all the invoices, or at any rate enough of them to bring the undisputed sum below £750.”



KEGOT's Solvency

88. There is no evidence before me that KEGOT is insolvent other than its failure to comply with a statutory demand for a debt which it has repeatedly said it does not owe because Rubicon has not complied with the provisions in the Charter for the approval and payment of invoices and has failed to substantiate the sums claimed.
89. Over the course of the Charter, KEGOT has paid US\$80.5 million to Rubicon and continues to pay Rubicon US\$30,650 a day for the Hire of the FSO. The financial records which were disclosed, though for the year ending 2018, support a finding that KEGOT is solvent.
90. Ms. Ang in her affidavit asserts that the Company is solvent and says further that, if the petition is presented, then even if it is later dismissed by the Court, it will have serious repercussions on KEGOT which will cause it irreparable harm. She also states that presenting a petition against KEGOT will put KrisEnergy in jeopardy and that by seeking to put KEGOT in liquidation, Rubicon is putting at risk the recovery of its claim which it has already established under the Guarantee.
91. I am not satisfied that, if the presentation of the petition were restrained and Rubicon required to prove the debt in an action, that KEGOT would be unable to pay, despite Rubicon's assertions to the contrary. That said, the authorities suggest that solvency is not a shield to a petition for winding up and that if part of the debt is, on the facts, indisputably owed, the prospective petitioner is entitled to present a petition to wind up the Company.
92. The position was set out by Murray J in *Foxholes* [2013] EWHC 3712 at paragraph 47 of his judgment:

"...even if there is other evidence that appears to confirm the solvency of the debtor. In other words, the failure by a debtor to pay an undisputed debt is sufficient evidence of insolvency under section 123(1)(e) notwithstanding evidence that otherwise appears to confirm the solvency of the debtor: see Cornhill Insurance plc v Improvement Services Ltd [1986] 1 WLR 114 at 118B-C (quoting with approval from the judgment of Mr Justice Ungood-Thomas in Mann v Goldstein [1968] 1 WLR 1091 at 1096C-D and at 118G-H, which considered this issue in relation to section 518(1)(e) of the Companies Act 1985, the equivalent of section 123(1)(e) of the Insolvency Act 1986 in force at the relevant time."

93. In *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114 to which Murray J referred, Harman J said this,



"In my view the correct test in approaching these matters is exemplified first by Ungood-Thomas J, who was a great master of equity (and I, it must be remembered, am being asked to exercise the ordinary equitable remedies, not the Companies Court remedies), where he in Mann v Goldstein , [1968] 1 WLR 1091, 1096 where he said:

'When the creditor's debt is clearly established it seems to me to follow that this court would not, in general at any rate, interfere even though the company would appear to be solvent, for the creditor would, as such, be entitled to present a petition and the debtor would have its own remedy in paying the undisputed debt which it should pay. So, to persist in non-payment of the debt in such circumstances would itself either suggest inability to pay or that the application was an application that the court should give the debtor relief which it itself could provide, but would not provide, by paying the debt.'

"That appears to me to be sound reasoning and sound law. I reinforce it by a reference to In Re a Company (1950) 94 S. J 369, where Vaisey J. in a matter in which counsel of the utmost distinction in Chancery, at that time, both leading and junior, appeared, said that where a company was well known and wealthy it was the more likely that delay in settlement of its obligations would create some suspicion of financial embarrassment. 'Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them'. In my view those words apply to this case also. This is a case of a rich company which could pay an undoubted debt and has chosen, I think I must use that word, not to do so from 12 June to today. In my view in such circumstances the creditor was entitled to (a) threaten to and (b) in fact, if it chooses, present a winding-up petition, and I was wrong to make the ex parte order which I made on 12 July and I should not accede to this motion to continue that order today."

The Cross-Claim

94. The authorities establish that a creditor is not entitled to present a winding up petition against a company where the company has a genuine and serious cross-claim for an amount equal to or exceeding the debt owing to the creditor. As with a disputed debt petition, a cross-claim petition may be restrained as an abuse of process.
95. The principles on which the Court should exercise its jurisdiction to restrain presentation of a winding up petition where the company has a cross-claim against the threatened petitioner, were examined by David Stone sitting as a deputy judge of the High Court, in *LDX International Group LLP v Misra Ventures Limited* [2018] EWHC 275 (Ch) who summarised them at paragraph 22 as follows:

"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."*

96. Ms. White submits that KEGOT has a cross-claim in misrepresentation and breach of the Charter for an amount in excess of the sums claimed in the Statutory Demand. She relies on a generally

endorsed Claim Form filed in the English High Court two days before the hearing of KEGOT's application, to demonstrate that the cross-claim is genuine and serious.

97. Details of the cross-claim are set out by Mr. Helyer in his First Affidavit. His evidence is that under Clause 6 of the Charter, Rubicon warranted that the FSO would conform to the Specification in Exhibit C at sailaway and on arrival on location in the Field. Exhibit C specified that the FSO has a capacity of 581,429 barrels of crude oil, with two slop tanks providing an additional 15,776 barrels of storage. These figures, he says, were consistent with the representations which Rubicon had made to KEGOT before the Charter was signed in an email exchange between KEGOT's engineer, Mr. Tan and Mr. Munday, Rubicon's commercial director on 21 May 2014.
98. Mr. Helyer asserts that KEGOT received information from the FSO's Master in December 2015 that the FSO's actual storage capacity was only 484,472 barrels. The Master subsequently informed KEGOT that this had been the operating limit during the FSO's previous charter and this was also confirmed by the previous charterer.
99. KEGOT set this out in a letter to Rubicon dated 8 April 2016 and asked for an explanation in relation to the capacity shortfall. In that letter, Mr. Helyer noted that the limited capacity of the FSO affected the 4th offtake on 22 March 2016, when Rubicon required KEGOT to restrict production and off-loading of oil, causing KEGOT a direct loss of 25,000 barrels of production and associated revenue.
100. Mr. Helyer then advised that the evidence indicated that there had been a misrepresentation of the FSO's capacity which Rubicon knew was substantially more limited than stated. As an aside, I note that in an echo of its position with respect to the Skid Works, Mr. Helyer suggested in correspondence that KEGOT was not obliged to pay Hire for the FSO because the FSO did not have the capacity as stated in Exhibit C.
101. Rubicon in its response, denied the assertion that there had been any misrepresentation and suggested that there had been a fundamental failure by KEGOT to appreciate the difference between 'capacity,' 'volume' and 'weight'. There followed an explanation that the capacity of the vessel was as described but the volume of oil the FSO could hold was affected by the maximum weight the vehicle can load to, which in turn is determined by its stability, the stress



on the steel structure and/or hydrostatic curves. The amount that could be stored would, therefore, be affected, *inter alia*, by the specific gravity of the oil. It was explained further that the vessel cannot load below her load line draught which had been increased by International Convention in 1988 and further reduced the volume of oil the FSO could hold.

102. Rubicon protested, *inter alia*, that KEGOT made no statement and gave no notice to Rubicon that it was of importance that the cargo storage capacity of the FSO be a warranted minimum for her commercial use by KEGOT and that the FSO and her drawings were inspected by KEGOT which took the FSO “*as is where is.*” Rubicon also noted that proper scheduling of shuttle tankers will prevent the need to reduce the Field’s production due to reaching tank tops on the FSO. From the evidence, it appears that there were no other instances where KEGOT had to cut back production because the FSO had reached its limit.
103. The correspondence, to borrow Ms White’s phrase, crystallised the issues between the parties, but there was no resolution and nothing further was done by KEGOT with respect to the alleged misrepresentation.
104. In explaining the delay in pursuing its claim for damages based on the alleged misrepresentation, Mr. Helyer said that KEGOT took a commercial decision not to litigate the claim thus far because it appears that Rubicon would be an impecunious defendant in light of the financial position detailed in its publicly available accounts.
105. Ms. Ang states in her evidence seeks to substantiate KEGOT’s concern by reference to Rubicon’s financial statement. She suggests that the vessel impairment loss of over \$5 million recorded in Rubicon’s 2018 financial statement is indicative of financial problems and she relies as well Note 22 as establishing that its finances were not robust.
106. Note 22 states:

“In the event that [Rubicon] is unable to generate sufficient cash from its operations, and/or the continued support from the immediate holding corporation is not forthcoming resulting in the (Respondent) being unable to meet its obligations as and when they fall due and to continue as a going concern for the foreseeable future, adjustments would be required to reflect the situation that assets may need to be realised other than in the normal course of business and at amounts



which could differ significantly from the amounts stated in the balance sheet. In addition, [Rubicon] may have to provide for further liabilities which may arise, and to re-classify non-current assets as current assets. No such adjustments have been made to the financial statements...”

107. Ms. Ang says that the Note makes it plain that if the Rubicon’s parent is unable to inject enough capital to rescue its operations and/or to settle its liabilities, Rubicon’s assets may need to be sold and the amount raised may not be sufficient to cover its liabilities.
108. Her evidence conveniently ignores that the accountants verified that Rubicon is sufficiently funded for all of its existing operations and that its total assets exceed its total liabilities.
109. In paragraph 4 of the Claim Form filed on 14 April 2020, KEGOT asserts that it was a term or alternatively, a condition of the Charter that the FSO would have the capacity to store 597.206 barrels of crude oil and the breach of which had caused KEGOT to suffer loss and damage.
110. At paragraph 5(a) KEGOT claims that the representations as to the capacity of the FSO caused it to pay a rate of hire that was excessive.
111. Mr. Helyer states that KEGOT had had no knowledge of the limited cargo capacity of the FSO prior to signing the Charter and would have insisted on a lower hire rate if it had known, as the cargo capacity of the FSO was a matter of importance to KEGOT as it had a specific reason for requiring an FSO with a cargo handling capacity of 600,000 barrels. He explained that PTT Public Company Limited (the national oil company of Thailand, and KEGOT’s only off-taker) has a policy of accepting cargoes of only 300,000 barrels. KEGOT, therefore, needed 100% redundancy to mitigate against the possible effect of FSO equipment breakdowns which would cause production to stop or decrease and the possibility of bad weather that could prevent an offload tanker from being able to moor during the monsoon period. A larger cargo capacity, he says, would minimise the risk of production being affected in such circumstances. He asserts that due to the limits on capacity of the FSO, the risk is now much higher.
112. The claim and the assertion of potential loss because the FSO lacked 100% redundancy is supported by the report prepared by Angus Davis, a shipping and marine expert, of ACD



Shipping Pte Ltd. who KEGOT instructed on 20 February 2020, after service of the Statutory Demand, who makes the same observations.

113. With respect to the rate of hire, Mr. Davis's opinion is that a reduced rate of hire should have been paid for the FSO by reason of its lower than contracted for cargo carrying capacity of the FSO when compared with that stated in the tank capacity plan in the Specifications. Mr Davis states, by reference to rates of trading tankers, that for every 1% reduction in capacity, a reduction of .41% occurs on a time charter rate. He observes in paragraph 13 that, on the basis of those charter rates, generally reduced capacity equals reduced charter rates. Translating that to the Charter, he concludes that taking into account the lower capacity, the rate of Hire for the FSO would be reduced at least 8.2%. This equates to the sum of US\$3,504,000 over the course of four years of hire.
114. At paragraph 5(b) a claim is asserted for loss and damage caused by the *"reduced volume of hydrocarbons that could be sold in or about February 2016"*. This allegation is not readily understood against the backdrop of the correspondence and Mr. Helyer's statement that on 22 March 2016, the lack of capacity required KEGOT to cut back production and caused KEGOT to suffer a direct loss of 25,000 barrels of production and hence revenue.
115. This apparent inconsistency - or, indeed, any other aspect of the claim form - was not addressed by Counsel for KEGOT who simply relied on the fact of the claim in seeking to persuade the Court that KEGOT had a cross claim which it should be permitted to litigate.

Rubicon's response

116. Rubicon submits that KEGOT's cross-claim is not genuine and is wholly unmeritorious.
117. In support of his submission that the cross-claim is not genuine, Mr. Hoffman points to the fact that although KEGOT first raised the issue of the FSO's capacity in 2016 it did nothing to advance its claim then or in 2019 when it raised the issue for the second time in the English Proceedings, but now files a claim, two days before the hearing of this application, in the form of a generally endorsed Writ which he characterises as hurried, inconsistent with the correspondence between the parties, timed to allow KEGOT to rely on it in opposition to



Rubicon's petition and attached as an exhibit to an otherwise unrelated affidavit, all emblematic, he says, of what Lord Denning referred to as a "*put up*" job.⁹

118. With respect to the explanation advanced by KEGOT for not instituting proceedings earlier which relies on an allegation of Rubicon's doubtful solvency, Mr. Maclean says that whilst Rubicon's current liabilities may have exceeded the current assets, total assets exceeded total liabilities in both 2017 and 2018 and the opinions of the accountants were unqualified. He adds that the fact that Rubicon's shareholders support it, so that all debts are met as they become due and payable means that Rubicon is clearly solvent.
119. Mr. Hoffman submits that the timing of the cross claim is an indicator that it is not genuine and the Court should dismiss it. He relies in support of that submission on the decision of the Court in *LDX (supra)* which he says establishes that in applying the test set out in *Re Bayoil (supra)* - is the cross-claim a genuine and serious and one which the company has not been able to litigate - the Court should consider three things:
- (i) when the claim could be and was commenced,
 - (ii) how it was commenced and thirdly, and
 - (iii) what explanation was provided for the delay.
120. Counsel submits that the claim could have been commenced at the earliest in 2015 or 2016, following the exchange of correspondence, it was commenced by way of a hastily drawn up and generally endorsed Claim Form which raised issues not previously raised in correspondence and without the usual pre-action protocol. The explanation that was given for the delay in instituting the proceedings does not bear scrutiny.
121. In a further assault on the purported genuineness of the claim, Mr. Hoffman points out that the allegation at paragraph 4, that "*it was a term, alternatively, a condition,*" of the Charter that the FSO could store 597,206 of crude oil with a specific gravity of 0.87 t/m, was not made by its attorneys in the detailed letter addressed to Rubicon's attorneys on the 21 February 2020 following the service of the Statutory Demand. He invites the Court to find that the constantly evolving claim demonstrates that the claim is only advanced for strategic reasons.

⁹ In *Re Claybridge Shipping Co SA* [1997] 1 BCLC 572.



122. As to the merits of the claim, Mr. Hoffman submits that insofar as KEGOT relies on a pre-contractual misrepresentation in the circumstances where there is an Entire Agreement clause that provides that the Charter supersedes and replaces any oral or written communications made before the Charter was signed, the claim stands little chance of success. He reminds the Court that the parties are sophisticated commercial parties who negotiated this Charter over some period of time and that the Court should be sceptical about the assertion that KEGOT relied on any representation as to capacity in deciding to enter into the Charter. In any event, Rubicon denies there was any misrepresentation.
123. Counsel also asks the Court to note that the assertion now made by KEGOT, that the capacity of the FSO was important because KEGOT needed 100% redundancy to mitigate, *inter alia*, against the possible effect of FSO equipment breakdowns causing production to stop or decrease, was a matter raised only after the Statutory Demand was served.
124. Mr. Hoffman suggests that this belated assertion was likely based on the expert's discussion of the possible ramifications of selecting an FSO with insufficient capacity ¹⁰ and highlights the insincerity of KEGOT's claim.
125. In any event, no such circumstances arose and there is no evidence that the cargo carrying capacity of the FSO has prevented KEGOT on any occasion from offloading the desired amount of crude oil as shown in the table of offtakes performed during the currency of the Charter up to January of this year which Mr. Maclean exhibited. KEGOT cannot identify any loss it has suffered.
126. In response to KEGOT's claim that it paid an excessive rate of hire because the capacity of the FSO was not as set out in the Charter, Mr. Hoffman relies on Rubicon's expert, Mr. Andrew Bray of Braemar ACM Shipbroking, experienced in shipbroking and the management of large fleets of tankers, FSOs and FPSOs. By way of establishing his credentials, Mr. Bray asserts that Braemar is one of the largest shipbroking companies in the world.
127. Mr. Bray states that the analysis in the ACD Report is flawed as it elides charter rates for trading tankers with those of FSOs which are two completely separate sectors. He explains that, unlike oil tankers, FSOs are specialised vessels, with only some 100 in the world, whereas there are

¹⁰ Paragraph 8 of the ACD Report



7,500 tankers. Unlike tankers which are typically leased on standard charter party forms, FSO contracts are bespoke and the contractual negotiations for their charter are typically lengthy and complex. Because of their bespoke nature and the relatively few contracts that have been signed, FSO contracts are not transparent, unlike the pricing contracts for tankers which are subject to several publicly traded indices, so it is not possible to say that an FSO of a particular size would have a particular charter rate.

128. He asserts that capacity is not a major factor, except for determining whether a vessel is suitable at all. He said that KEGOT required an FSO with a capacity of 500,000 to 600,000 barrels and the FSO met that criteria. The real drivers of price are the amount of capital the owner would have to commit, as for example to carrying out the Life Extension Works in this case, and the length of time for which the FSO will be chartered and there on the field.
129. He said further that there were no disadvantages as set out the ACD report as the FSO was not in a remote location. Singapore, which is 2 or 3 days away, is a major hub for waiting tankers, the weather and conditions are benign and unlikely to cause delay and the monthly production has never been higher than 11,000 barrels a day and is currently 4,500 barrels per day which allows nearly a month to produce sufficient oil for a parcel of 300,000 barrels and more than adequate time to plan an offtake, secure a suitable tanker and avoid a risk of shutdown.

Discussion

130. That KEGOT failed to prosecute its alleged claim for misrepresentation in either 2015 when it was first advised of the actual storage capacity for the crude from the Field, or in 2016 following the correspondence with Rubicon or in 2019 when it raised it again in the English proceedings, is a clear indication that the claim is not a serious one. The reason advanced for not pursuing the claim is not readily understood. The fact that current liabilities exceed current assets is no reason for forming a preliminary view of a company's insolvency, particularly in circumstances where its total assets exceed total liability and the accountants have given their unqualified opinion that Rubicon is solvent. In the case of Rubicon, any capital or cash crunch will be met by its shareholders and KEGOT has, as Mr. Maclean pointed out, been provided with a continuing parent guarantee.



131. It seems to me 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 is 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 its failure to advance its claim of misrepresentation for the last 4 years, that the cross claim was neither genuine or serious, but calculated to stave off the presentation of the petition.
132. I concur with Mr. Hoffman's view that the claim is hastily put together and makes allegations not previously made both of which fortify my conclusion that the claim is not genuine.
133. Further, KEGOT has not, in any of the evidence before the Court, demonstrated that it suffered any loss as a result of the actual storage capacity of the FSO in the Field. Rather, it has been able to meet all its demands for crude oil over the years of the Charter according to the offtake table exhibited. It is unsurprising that no actual loss is pleaded in the claim.
134. But that is perhaps because KEGOT hangs its hat on the allegation that it overpaid a sum of US\$4 million for Hire in order to raise a cross claim in an amount which is larger than the Debt in the Statutory Demand. KEGOT has failed to show, however, that this claim is a genuine and serious claim for the reason that it had 4 ½ years to flesh out a claim for a rate of Hire based on comparative rates for FSOs and yet had no evidence at all to substantiate it until they instructed Mr. Davis after service of the Statutory Demand. His analysis of tanker rates on which KEGOT seeks to rely does not, in my judgment, raise a credible challenge to the rate of Hire of the FSO and he is unable to point to any charter rates for FSOs to support his conclusions.
135. I consider the cross claim for these reasons to be not genuine and serious and that Rubicon should not be restrained from presenting a petition as to do so would not amount to an abuse of process.

Summary

136. KEGOT's argument that it has a genuine and substantial dispute with respect to the entirety of the Debt in the Statutory Demand on the ground that the Skid Works were to be treated as a variation, and the costs not having been approved in accordance with the Variations scheme in the Charter were not payable, is inarguable, as the Skid Works were part of the original scope of works.



137. Its alternative position, that it has no liability to pay for the Skid Works as the costs had not been approved in advance as required by Clause 3.3.7 of Exhibit B of the Charter, appears to me to have no rational prospect of success as the wording in the Clause upon which they rely in my judgment relates to compensation for Variations which the parties agreed pursuant to Clause 4.5 should be dealt with on the basis of actual documented costs
138. In my judgment, on a proper analysis of the Charter, KEGOT is required by Clause 12.2(ii) to reimburse Rubicon for the costs for the Skid Works on an open book basis pursuant to Clause 3.3.5 - i.e. for its direct costs - with a direct cost mark up of 10% as set out in Clause 3.3.7.
139. The Skid Works were completed by a third party who was contracted by Rubicon on a lump sum or fixed costs basis and their invoices have been settled by Rubicon. Those are direct costs for which KEGOT is required to reimburse Rubicon under Clauses 12.2 and 3.3.5.
140. Having considered the evidence in the round, and the evidence of Mr. Helyer in particular, it appears to me that KEGOT's true objection to reimbursing Rubicon for the third party costs it incurred is, *inter alia*, that some of the third party costs were excessive and/or did not relate to the scope of the works which is an issue of quantum and not liability. Given the size and scope of the works, and Mr. Helyer's own estimate of the costs of such works, even if some of the costs were properly disputed, a sum well in excess of the statutory minimum would still be due and payable.
141. KEGOT's cross claim rests chiefly on the allegation that it overpaid on the Hire for the FSO as the capacity of the FSO was overstated. The issue was first raised in 2015, but no action was taken to litigate the claim until proceedings were filed in the English High Court two days prior to the hearing with no notice to Rubicon, as KEGOT eschewed the pre-action protocol. The claim is supported by evidence that the price of oil tanker charters is determined by size but that is not evidence, without more, that the cost to charter a specialised vessel such as an FSO is also determined by size. Given the timing of the action instituted against Rubicon, the lack of any reasonable explanation for the delay and the lack of substance in the claim, the Court is of the view that the cross claim is not one of a genuine and serious nature.
142. The presentation of a petition by Rubicon would not be an abuse of process as Rubicon is indisputably a creditor in a sum which exceeds the statutory limit and is entitled to present a



petition to wind up KEGOT on that ground. KEGOT's application is dismissed. I will hear Counsel on costs.

The Hon. Mme Justice Margaret Ramsay-Hale
Judge of the Grand Court