Neutral Citation Number: [2022] EWHC 733 (Ch)

Case No: BR-2021-000191

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

Rolls Building
Royal Courts of Justice

7 Rolls Buildings
London EC4A 1NL

Date: 13 April 2022

Before: DICCJ Greenwood

DEPUTY INSOLVENCY AND COMPANIES COURT JUDGE GREENWOOD

- -

IN THE MATTER OF HASSAN ALI MAKKI

AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Between:

HASSAN ALI MAKKI

Applicant

- and -

BANK OF BEIRUT S.A.L.

Respondent

- -

Dr Riz Mokal (instructed by Mishcon de Reya LLP) for the Applicant

Mr Alexander Heylin (instructed by Howard Kennedy LLP) for the Respondent

Hearing date: 3 March 2022

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Approved Judgment

This judgment was handed down by the Judge remotely by circulation to the parties' representatives by email and released to the National Archives. The date and time for hand down is deemed to be 13 April 2022 at 10.30am.

DEPUTY ICC JUDGE GREENWOOD:

Introduction

1. This is an Application dated 8 July 2021 and made under Rule 10.4 of the Insolvency (England and Wales) Rules 2016 ("**the Rules**") by Mr Hassan Ali Makki ("**Mr Makki**") for an order setting aside a statutory demand dated 10 June 2021 ("**the Demand**") and served on him by the Respondent, the Bank of Beirut S.A.L. ("**the Bank**"). Before me, Mr Makki was represented by Dr Riz Mokal of Counsel, and the Bank by Mr Alexander Heylin of Counsel.

2. According to the Demand, Mr Makki owes the Bank £209,616.34 pursuant to an order for costs (in the sum of £205,606) made against him in the Southwark Crown Court on 5 March 2021, under s.19 of the Prosecution of Offences Act 1985, in the context of a private prosecution which he began against the Bank in July 2020 under the Fraud Act 2006, but which he subsequently discontinued ("**the Private Prosecution**"). Mr Makki does not deny his liability for that debt ("**the Makki Debt**"). Instead, his case is that he has a counterclaim, set-off, or cross demand against the Bank in the sum of US$ 1,115,580 (equivalent to more than £832,000) plus interest ("**the Makki Claim**"), which is to say, for a sum about four times as much as the Makki Debt. In respect of the Makki Claim, proceedings were commenced by Mr Makki against the Bank in Lebanon in March 2021 ("**the Lebanese Proceedings**"). Those Proceedings, actively contested by the Bank, are continuing.

3. Before me, there were essentially 4 issues.

a. On what date was the Demand served on Mr Makki? Was it 14 or 17 June 2021, as submitted by the Bank, or was it 21 June 2021, as submitted by Mr Makki?

b. If it was served on 14 or 17 June 2021, it follows that the Application was not made within 18 days of service, under Rule 10.4(2) of the Rules. In that case, is there before me an application to extend time (as denied by the Bank) and if so, should time be extended (opposed by the Bank)? In any event, even in the absence of an application, should the Court set aside the Demand?

c. Is it necessary, for a claim to comprise a "*counterclaim, set-off or cross demand*" for the purposes of Rule 10.5(5)(a), that there be mutuality between Mr Makki and the Bank in respect of their contending rights or claims (as submitted by the Bank) and if so, is there mutuality (as denied by the Bank)?

d. In any event, is there a "*genuine triable issue*" in respect of the Makki Claim currently being pursued in Lebanon, or do those Proceedings – as the Bank would have me hold – stand no reasonable prospect of success? Does it make a difference that the Makki Debt is owed pursuant to a court order for costs?

4. There were, in addition, various issues concerning the admissibility of parts of the evidence before me, which I shall deal with in due course, but which concerned, in particular: (a) the content of Lebanese law, and thus the merits of the Lebanese Proceedings; and (b) Mr Makki's committal to prison in 2005 for contempt of court (an order that was both made, and subsequently in 2014, discharged by Mr Justice David Richards) said by the Bank to be relevant to an assessment of Mr Makki's evidence that the Demand did not come to his attention until 21 June 2021.

5. The Application first came before the Court on 9 August 2021, when directions for further evidence and for this hearing were made by Chief ICCJ Briggs. Neither party sought permission to adduce expert evidence of Lebanese law, and therefore none was given. As at that stage, the evidence comprised:

a. the 1st witness statement of Mr Makki, made on 8 July 2021;

b. the 1st witness statement of Ms Shruti Chandhok of Cadwalader, Wickersham and Taft, Mr Makki's solicitors at that time, made on 12 July 2021;

c. the 1st witness statement of Ms Rachel Brown of Howard Kennedy LLP, the Bank's solicitors.

6. Subsequently, the parties both adduced further evidence:

a. on behalf of Mr Makki, the 1st witness statement of Mr Ibrahim Najjar made on 30 August 2021. Mr Najjar is, according to his statement, an attorney with 58 years of experience, and is the founding partner of Ibrahim Najjar law firm. He is an emeritus professor of law at Saint Joseph University, and a former Justice Minister in Lebanon. His firm represents Mr Makki in the Lebanese Proceedings, and he has conduct of those Proceedings.

b. on behalf of the Bank, the 1st witness statement of Mr Charles Airut, made on 27 September 2021. Mr Airut is a Lebanese attorney who qualified in 1978. He is one of the founding partners of Airut Law Office. According to his statement, he has extensive experience of more than 40 years advising Lebanese banks, as well as foreign and local investors in respect of corporate banking, bankruptcy, enforcement procedures, construction and real estate. He has been an advisor to the Bank since 1999, and represents it in the Lebanese proceedings. On Mr Makki's behalf it was submitted that substantial parts of his evidence were inadmissible expert evidence of foreign law.

c. finally, on behalf of Mr Makki, the 1st witness statement of Mr David Leibowitz of Mishcon de Reya, Mr Makki's current solicitors, made on 15 February 2022 (and for which, as was accepted by Mr Makki, there was no permission, and which the Bank argues ought to be excluded because it was served too late and because in any event it is inadmissible).

7. The hearing before me took about 2 hours and 30 minutes, and none of the witnesses were cross-examined. Neither party sought, for any reason, or at any point, an adjournment.

<u>The First & Second Issues: Service of the Demand, and the Extension of Time</u>

8. These issues are connected, and I shall take them together. I do not consider them to be decisive of this Application.

9. Rule 10.2 of the Rules requires a creditor seeking to serve a statutory demand to "*do all that is reasonable to bring the statutory demand to the debtor's attention and, if practicable in the particular circumstances,* [to] *serve the demand personally*." The requirement to do "*all that is reasonable*" was described as a "*high test*" by Nourse LJ

in *Regional Collection Services v Heald* [2000] BPIR 661 (CA), 664-5. Given its consequences for the debtor, that observation is unsurprising.

10. Paragraph 11.2 of the Insolvency Practice Direction [2020] BCC 698 provides that if personal service is not practicable in the particular circumstances, the steps the creditor must take in order to comply with Rule 10.2 might include those set out at paragraph 12.7 of the Practice Direction which would justify the court making an order for service of a bankruptcy petition other than by personal service, and provides that such steps may also include any other form of physical or electronic communication which will bring the demand to the debtor's attention. Paragraph 12.7.1 of the Practice Direction sets out various steps that will suffice in most cases. Having said that, I accept Mr Heylin's submission that the issue is one to be decided on a "*case by case*" basis.

11. Rule 10.3(5) of the Rules provides that if the demand has been served other than personally and there is no acknowledgement of service, the certificate of service required by Rule 10.3(1) must be authenticated by a person or persons having direct personal knowledge of the means adopted for serving the demand and must contain the following information: (a) the steps taken to serve the demand, and (b) the date by which to the best of the knowledge, information and belief of that person, the demand will have come to the debtor's attention. Where paragraph (5) of Rule 10.3 applies, the demand is deemed to have been served on the debtor on the date referred to in paragraph 5(b), unless the court determines otherwise.

12. If it is necessary to consider whether to extend time to make the Application (and if such an application is before me) it was common ground both that the court has jurisdiction to extend time (under s.376 of the Insolvency Act 1986) and that as a matter of authority, the relevant test is currently set out in the decision of Deputy ICCJ Kyriakides in *Rankin v Dissington Lending Co Ltd* [2021] EWHC 172, according to which the court must consider all the circumstances, including balancing the following factors:

a. the purpose of the prescribed time limit;
b. the merits of the set aside application;
c. the reasons for not filing the application in time;

d. any prejudice that might be caused to the debtor if time was not extended; and

e. any prejudice that might be caused to the creditor if time was extended.

13. Although Dr Mokal suggested that (certainly in this case) particular weight should be attached to the merits of the application, I take the law to be as it was stated in *Rankin*, and that all the circumstances must be considered. Of course, different factors may be more or less significant in different cases, depending on the particular facts and circumstances.

14. The evidence regarding service of the Demand was as follows.

15. On each of 10 and 13 June 2021, an attempt was made by the Bank's process server, Mr Luigi Cobelli, to serve the Demand personally at Mr Makki's London address, Box Tree House, Lensbury Avenue, London SW6 2PT. Those attempts were unsuccessful, and Mr Makki says that he was in Lebanon at the time.

16. On 14 June 2021:

a. The Bank sent an email to Mr Makki's Gmail address enclosing a cover letter and the Demand. The cover letter, dated 14 June 2021, asserted that the Demand "*has been sent to you by a number of methods to ensure it is brought to your attention*", and stated that if Mr Makki failed to pay the Makki Debt "*within 21 days*" in other words, by 5 July 2021, the Bank would commence bankruptcy proceedings. Mr Makki's evidence is that he was still in Lebanon and was hampered by the difficult conditions in that country, including in particular power outages, from engaging "*regularly*" with his email correspondence. He says that for this reason, the email and its attachments "*did not come to his attention*" until (as described below) 5 July 2021.

b. The Bank also sent an email to Ms Chandhok, an associate at Mr Makki's solicitors, which enclosed a cover letter and the Demand. The email was sent to Ms Chandhok's address and copied to a general email address for the firm. Mr Kevin Roberts, the partner at Cadwalader who, to the Bank's knowledge, had dealt with the Private Prosecution on Mr Makki's behalf, was not copied. In circumstances explained by Ms Chandhok in her witness statement, this

email did not come to the attention of Mr Makki's solicitors until after 5 July 2021.

17. On 17 June 2021, the Demand was delivered by hand at Mr Makki's London address by posting it through his mailbox. Again, Mr Makki's evidence is that he was still in Lebanon, and so again, the Demand did not come to his attention.

18. On 21 June 2021:

a. the Bank's solicitors sent the Demand by first class post to Mr Makki's London address and to another London address.

b. the Bank's solicitors also sent another email to Mr Makki's Gmail address. This enclosed another cover letter, this time dated 21 June 2021, which again stated that if payment were not made "*within 21 days*", the Bank would commence bankruptcy proceedings. The period of 21 days from 21 June 2021 expired on 12 July 2021, in other words, a week after the period referred to in the cover letter of 14 June 2021.

c. the Bank's 21 June 2021 letter made no specific reference to previous attempts to serve the 14 June 2021 letter, and did not say that the 21-day period for payment had started to run on 14 June (or any earlier or other date). It did not, in terms, draw to Mr Makki's attention the Bank's position that the Demand had been served on any earlier date.

19. The Bank's email of 21 June 2021 came to Mr Makki's attention on the day it was sent, and on the same day, he notified his solicitors and instructed them to address it.

20. On 30 June 2021, Mr Makki's solicitors wrote to the Bank's solicitors, describing the Demand as "*a flagrant abuse of process*" and inviting the Bank to withdraw it. In their response of 5 July 2021, the Bank's solicitors asserted that Mr Makki was now out of time for making a set aside application on the basis that "*the Demand was served on your client by email on 14 June 2021 (a copy was also sent to your firm by email)*."

21. Ms Chandhok's evidence is that this brought the 14 June emails to Cadwalader's attention, and that as a result they investigated their own emails, and asked Mr Makki to do likewise.

22. The Bank not having agreed to withdraw its Demand, Mr Makki made his Application on 8 July 2021, the 17th clear day after 21 June 2021.

23. On the Bank's behalf it was submitted:

a. that it had done "*all that was reasonable*" to serve the Demand by 14 June 2021.
b. that there is no independent or documentary evidence to support Mr Makki's various assertions that he did *not* see the Demand until 21 June 2021. For example, there is no documentary evidence to support his claim to have been in Lebanon, or that there were power outages in Lebanon at that time, or that the email of 14 June was not opened until after 21 June 2021. Nor has Mr Makki waived privilege in respect of his communications with his former solicitors to show when he became aware of the emailed demand.
c. that in any event it is common ground that the Demand was successfully sent by email on 14 June 2021, whether or not it was read.
d. that in assessing Mr Makki's evidence, I should take into account the fact of his conviction for contempt of court in 2005, that he is said only to have avoided imprisonment by residing in Lebanon and not returning to the UK until some years later, and that it was his failure to reveal his earlier contempt that brought about the discontinuation of his Private Prosecution against the Bank in the Southwark Crown Court that gave rise to the Makki Debt.
e. that in the circumstances, I should find that the Demand was in fact or should be treated as having been served on 14 June 2021 (the Bank having by then done "*all that was reasonable*") and that the Application was therefore made out of time.

24. Against that, on Mr Makki's behalf it was submitted:

a. that the Bank took the risk of the Demand not coming to Mr Makki's attention until 21 June 2021 - and had not done all that was reasonable to serve it by 14 June 2021 - because it had failed to email the Demand to Mr Roberts, the partner at Cadwalader whom the Bank knew had previously had conduct of the prosecution on Mr Makki's behalf, and did not seek through Mr Roberts to arrange an appointment with Mr Makki, as envisaged by the Insolvency Practice Direction;

b. that in any event, as a matter of fact, I should find that the Demand did not come to Mr Makki's attention until 21 June 2021, regardless of having been sent earlier. In that regard, Dr Mokal submitted that Ms Brown's evidence concerning Mr Makki's conviction in 2005 for contempt of court should be disregarded as irrelevant and inadmissible.

25. I have not had the benefit of oral evidence or cross-examination. But by reference to the parties' written statements:

a. I accept Ms Chandhok's evidence that the Demand did not in fact come to her conscious attention, or to that of Mr Roberts or of any other relevant person at Cadwalader, until 21 June 2021. I accept her evidence that it was also on that date that she received an email from Mr Makki forwarding Howard Kennedy's email to him of the same day. Not only is there no reason to disbelieve Ms Chandhok (who accepts that her failure to notice properly or attend to Howard Kennedy's communication on 14 June 2021 was "*human error on* [her] *part*") but it is plain from Cadwalader's letter to Howard Kennedy on 30 June 2021, which refers (only) to Howard Kennedy's letter of 21 June 2021 and acknowledges service of the Demand on Mr Makki's behalf, that as at that date, Cadwalader were proceeding on the assumption that the date of service was 21 June 2021. Ms Chandhok's evidence is that once instructed, she "*began to prepare an application to set aside the Demand*" … and "*assumed that* [it] *would need to be submitted … by 9 July 2021*". There is no basis upon which not to accept that evidence.

b. It follows that Mr Makki wrote to Cadwalader on 21 June 2021, but not on 14 June, or otherwise before 21 June. Given his prompt reaction to Howard Kennedy's email on 21 June, and given the absence of any real reason to find that he would not have reacted in precisely the same way had he read or paid conscious attention to their email of 14 June, it seems inherently likely, and I find on the balance of probabilities, that although an email was sent to him

on that day and successfully received into his account, he did not see or read or at least consciously appreciate its content, and did not in fact do so until subsequently, after Howard Kennedy's letter of 5 July 2021, which referred specifically to their earlier communications.

c. I accept as a fact (having been shown the Judgments of Mr David Richards) that Mr Makki was found guilty of contempt in 2005, and was sentenced to a period of imprisonment, which in fact he did not serve. However, those events took place some years ago, in a quite different context. The mere fact of a person having been dishonest on one occasion is no necessary reason to find that he will always be dishonest, or is being dishonest on a different occasion. In the current case, as I have said, I can see no real reason to find that Mr Makki is not telling the truth regarding his receipt of the Demand. After all, had he told Cadwalader about the email of 14 June when he wrote to them on 21 June, he would still have been in time to make an application, even on the Bank's case. Had he known about it, he would have had no reason not to tell them about it. Accordingly, in the absence of cross-examination, I am not willing to disbelieve Mr Makki's evidence.

26. Those findings raise the question of whether the Demand "*came to Mr Makki's attention*" on 14 June 2021, if it was received but unread as at that date. Mr Heylin submitted (albeit without reference to authority) that the failure of Mr Makki and his solicitor to read Howard Kennedy's emails of 14 June was "*immaterial*". Against that, Dr Mokal simply submitted that the Demand "*did not come to Mr Makki's attention until 21 June 2021*".

27. It would seem to me that for a demand to "*come to a debtor's attention*" for the purposes of Rule 10.3(5)(b) and therefore Rule 10.3(6), not having been served on him personally, it must in fact have come to his attention as a statutory demand for payment, on the day in question. If for some reason (however unusual) it does not, then the court is entitled to "*determine otherwise*" under Rule 10.3(6). I therefore accept Dr Mokal's submission that the Demand "*did not come to Mr Makki's attention until 21 June 2021*". In the circumstances, it is not material to determine whether or not as at 14 June 2021 or 17 June, the Bank had done all that was reasonable to bring the Demand to Mr Makki's attention – the deeming provision at Rule 10.3(5) is subject to a determination of the facts under Rule 10.3(6).

28. In any event, even if I am not right about that, I would and do extend the time in which to apply. In my judgment, the case for an extension, if required, is overwhelming.

a. Even on the Bank's case, the required extension is very short, it being said that the 18-day period ended on Friday 2 July 2021, and the Application having been made on Thursday 8 July 2021. Having received Cadwalader's letter of 30 June 2021 referring only to the communications of 21 June, acknowledging service and giving notice that Mr Makki intended to apply to set aside the Demand, it was not until Monday 5 July 2021 that Howard Kennedy replied, saying that the period in which to do so had expired on the Friday of the preceding week. Even then, it was said that no petition would be presented until after 8 July 2021, assuming Mr Makki's failure to pay in the meantime. Having explicitly given Mr Makki until 8 July 2021 in which to pay before presentation of a petition, the Bank now complains that in that time – having previously stated his intention to do so – he instead applied to set aside the Demand.

b. In the event, the Application was made only 3 days later (3 days after the Bank's argument regarding date of service had been brought to Mr Makki's attention) and before any attempt at presentation of a petition.

c. As set out above, Howard Kennedy's emails of 21 June 2021 stated that if payment were not made "*within 21 days*", the Bank would commence bankruptcy proceedings. The period of 21 days from 21 June 2021 expired on 12 July 2021. Moreover, that letter made no specific reference to previous attempts to serve the 14 June 2021 letter, and did not say that the 21-day period for payment had started to run on 14 June (or any earlier or other date). It did not, in terms, draw to Mr Makki's attention the Bank's position that the Demand had been served on any earlier date. As I have said, it is and was from their correspondence at the time, perfectly plain that Cadwalader took the date of service to be 21 June 2021. I have already described the circumstances in which they and Mr Makki came to hold that view, which Howard Kennedy made no attempt to contradict until 5 July, by which time it was said to be too late. Mr Makki's failure to apply within a period beginning on 14 June was not deliberate. At worst, it was careless.

d. Moreover, as I will explain below, the merits of the Application favour Mr Makki. If I were to refuse to extend time, the Bank would face the same argument on the hearing of its petition, which would therefore stand to be dismissed.

e. In the circumstances, whilst there is or appears to be little prejudice to the Bank in extending time (none that was specifically suggested at any rate) there would be significant prejudice to Mr Makki in refusing to do so.

29. In respect of extension however, Mr Heylin had a more fundamental point – he submitted that there was no application before me at all, and that therefore, regardless of what might have been its merits, no extension could be granted. He rightly pointed out that the Application itself did not seek an extension, and neither has a discrete application been issued subsequently. I regard this point as somewhat arid.

30. In his statement of 8 July 2021, at paragraph 14, Mr Makki said, "... *I do not think it would be fair to treat me as having obtained notice of the Demand until 21 June 2021, and I respectfully request the Court not to do so. However, if the Court takes the view that the period within which I should have applied for the setting aside of the Demand started on 14 June 2021, then I respectfully ask the Court to extend that time so as to permit me to make the present application*." Furthermore, in Dr Mokal's Skeleton Argument of 4 August 2021 for the hearing before Chief ICCJ Briggs, at paragraph 26, he said, "... *if necessary, the Applicant asks the Court to make the Application out of time*". In his Skeleton Argument for the hearing before me, he said that Mr Makki, if necessary, "*renews that application*".

31. Whilst I accept, as Mr Heylin points out, that the Insolvency Practice Direction states at paragraph 11.4.2, that a "*debtor who wishes to apply to set aside a statutory demand after the expiration of 18 days ... must apply for an extension of time within which to apply to set aside the statutory demand*" supported by evidence, I do not accept that such an application cannot be made orally. In any event, as I have said, an extension was requested in (and supported by) Mr Makki's evidence, and was raised at the first hearing. It comes as no surprise to the Bank. The Court would have jurisdiction if necessary to allow the Application to be amended, or to accept an undertaking to issue a discrete application. Beyond the fact that if successful, it would deprive the Bank of a decisive victory scored without the inconvenience of having to meet Mr Makki's case on its merits, Mr Heylin did not suggest to me that the Bank would suffer any prejudice were I to allow the application for an extension to be

advanced. It remained open to the Bank to oppose it, which it did, albeit unsuccessfully.

32. In the circumstances, I do not accept that it was not open to Mr Makki to seek an extension of time. If and to the extent necessary, as I have said, I accede to that application. For the sake of completeness, I should add that Dr Mokal also submitted that even if the Application were out of time, and not properly before the Court, the Demand should be set aside because it is incapable of founding a petition. In support, he cited the decision of Sir Donald Nicholls VC in *In re a Debtor* [1995] Ch 66, at 71B-D, where he said:

> "*In the present case … it is apparent that a bankruptcy petition cannot properly be presented on the basis of the existing statutory demand. It cannot properly be presented, because the only debt the debtor appears unable to pay is a debt which is less than the bankruptcy level. In those circumstances it would not be sensible or just to leave the statutory demand extant. The only purpose in doing so would be for this demand to form the foundation for a bankruptcy petition. Here such a petition would be bound to fail. That being so, the very presentation of a petition would be oppressive and an abuse of process. It could be struck out summarily. Accordingly, at the earlier stage of the statutory demand the court should intervene. When able to foresee the inevitable the court will always intervene summarily to anticipate it. The court does not countenance parties proceeding to a blank wall. Hence in the case now under consideration the court ought not to permit the statutory demand to stand*."

33. I was not persuaded by that broad submission, which if correct would seem to mean that a debtor need never apply under Rule 10.4. In the case cited, the debt sought by the demand was less than the prescribed limit. It was therefore a demand that could be dealt with summarily, as failing to meet the statutory requirements. The same cannot be said for the Bank's Demand which is for an admitted, liquidated debt of over £200,000, presently due. It cannot be set aside other than by reference to Mr Makki's Application, and his supporting evidence. In any event, it is not necessary to decide the case on that basis, and I do not do so.

The Third Issue: Mutuality

34. Mr Heylin submitted that for the purposes of Rule 10.5(5)(a), it is necessary for a debtor to establish mutuality between his claim or demand, and that of his creditor, and that the Makki Claim does not satisfy this requirement. I disagree with both limbs of his argument.

35. The nature of a counterclaim, set-off, and cross demand for the purposes of Rule 10.5(5)(a) was explained by Peter Gibson LJ in *Hurst v Bennett* [2001] BPIR 287 (CA), [52]-[53] (and quoted with apparent approval by Jonathan Parker LJ in *Popely v Popely* [2004] BPIR 778 (CA), [75]):

> "*Despite the generality of the language used, it is clear that limits must be implied. Thus, in the case of set-off the claims must exist between the same parties and, subject to immaterial exceptions, in the same right … The set-off directly reduces the amount of the debt claimed by the creditor. But it was obviously thought that to limit claims to liquidated sums due between the parties at the time of the hearing of the application to set aside was unfair to the debtor and that other claims yet to be proved should be allowed to be taken into account. Hence, a counterclaim or cross-demand may be relevant. A counterclaim may be permitted procedurally even if the claim and counterclaim are not between the same parties in the same right. However, as Rimer J said in Re a Debtor (No 87 of 1999) …when the claim and counterclaim are heard, the court will not be compelled to set the claim and counterclaim off against each other and merely give judgment to one party for the balance, as in many cases that might produce gross injustice.*
>
> *The reference in r 6.5(4)(a) to 'cross-demand' must be interpreted more widely than 'counterclaim' or 'set-off' … But I not aware of any case where a cross-demand has been held relevant despite an absence of mutuality between the debtor and creditor in their rival claims …*"

36. For the purposes of Rule 10.5(5)(a) therefore, I agree with Dr Mokal that:

a. a set-off depends on establishing that the claims in question are between the same parties and in the same right;
b. a counterclaim may exist even if the claim and counterclaim are *not* between the same parties in the same right; and,
c. a cross-demand appears to be wider than either a set-off or a counterclaim (even if generally it has been found to exist where there is mutuality between the debtor and creditor in their respective claims).

37. In my judgment therefore, there is no requirement of mutuality. As to whether (if I am wrong about that) there is mutuality in the present case, Mr Heylin submitted that Mr Makki is comparing "*apples and oranges*". He said:

a. that Mr Makki's discontinuance of the Private Prosecution in the Crown Court was in "*a totally different venue and jurisdiction to the proceedings in Lebanon*"; a criminal action, he said, is not a debt recovery exercise;
b. that the existence of a disputed debt claim (the Makki Claim) between the same parties does not "*have the effect of discharging Mr Makki's liability*" under the costs order (the Makki Debt);
c. that a liquidated sum is due under the costs order in England, but that no liquidated sum is due in the Lebanese proceedings, even if successful.

38. None of those submissions in my judgment affect the relevance of the Makki Claim to the Application, in the context of which Mr Makki must establish that he has (or that there is a genuinely triable issue in respect of) a "c*ounterclaim, set-off or cross demand*".

a. First, whether or not required, there <u>is</u> mutuality between the parties' rival rights and claims - in both cases, the parties act or acted in the same right and capacity. The fact of different venues and jurisdictions is immaterial.
b. Second, it is not necessary for the Makki Claim to "*have the effect of discharging Mr Makki's liability*", and it is not necessary for the Makki Claim to be for a liquidated sum – although in fact, as I understand it, and explain below, it *is* a claim for a liquidated sum (advanced in respect of various dishonored cheques).

39. I therefore reject the Bank's argument that the Application should fail for want of mutuality between the parties' claims: there is no such requirement, and even if there is, it is satisfied.

The Fourth Issue: Is there a "*genuine triable issue*" in respect of the Makki Claim?

The Legal Principles

40. It was common ground that in order to succeed, Mr Makki must establish a "*genuine triable issue*" in respect of his claim against the Bank.

41. In *Ashworth v Newnote Ltd* [2007] BPIR 1012 (CA), [30], [31], and [33], Lawrence Collins LJ held that on an application pursuant to (what is now) Rule 10.5(5)(a), "*the court will normally set aside the statutory demand if, in its opinion, on the evidence there is a genuine triable issue*", and that this is the same test as whether there is a real prospect of success on an application for summary judgment, which is to say that there is "*a realistic as opposed to fanciful prospect of success, carrying some degree of conviction (and not merely arguable)*".

42. Moreover, it makes no difference that the Makki Debt arises pursuant to a costs order. To the extent that Mr Heylin submitted otherwise, I reject that submission. In *Popely v Popely* [2004] BPIR 778 (CA), [113]-[114], Jonathan Parker LJ held that a statutory demand based on a debt arising pursuant to an English costs order could be set aside under this Rule:

> "*Either the underlying claim is a 'cross-demand' within the meaning of the rule, or it is not; and whether it is or not cannot in my judgment depend on the nature of the debt which is the subject of the statutory demand. In contrast to the words 'counterclaim' and 'set-off', the word 'cross' in the expression 'cross-demand' does not imply any kind of procedural or juridical relationship to the debt which is the subject of the statutory demand: all it means, in my judgment, is that the 'demand'*

is one which goes the other way, ie that it is a 'demand' by the debtor on the creditor.

In my judgment, therefore, as a matter of construction of the rule, just as the underlying claim would be a 'cross-demand' in the context of a statutory demand based on a judgment (including a default judgment: see para 12.3 of the 1999 Practice Direction), so is it a 'cross-demand' in the context of a statutory demand based on the debtor's liability under a costs order; and the deputy judge was right so to conclude. In my judgment, the meaning of the expression 'cross-demand' in r 6.5(4)(a) of the Rules cannot change according to whether the judgment or order on which the statutory demand is based was obtained in the same proceedings as those in which the claim relied on as a 'cross-demand' is being advanced."

43. At [117], in considering the exercise of the Court's discretion, Jonathan Parker LJ also rejected the submission that to permit a statutory demand based on a costs order to be set aside on the basis of a set-off, counterclaim, or cross-demand would "*subvert*" the costs order:

"*(1) The setting aside of the statutory demand does not render the costs order either invalid or unenforceable. Notwithstanding the setting aside of the statutory demand the costs order remains valid and enforceable in the same way as any other judgment or order of the court providing for the immediate payment of money. The available methods of enforcing such a judgment or order are set out in CPR Part 70.*

(2) Bankruptcy is no more a form of execution than companies winding up (see the observations of Ward LJ in Bayoil *quoted in para [58] above). This is illustrated by the fact that s 268(1)(b) of the 1986 Act enables a creditor who has made an unsuccessful attempt to enforce a judgment or order to rely on that fact as proof of the debtor's inability to pay his debts – ie as a ground for presenting a bankruptcy petition. An unsatisfied execution does not entitle the creditor as of right to a bankruptcy order on the hearing of the petition.*

(3) Paragraph 12.4 of the 1999 Practice Direction expressly provides that a statutory demand based on a judgment or order 'will normally', that is to say in the absence of special circumstances (cf Bayoil), be set aside where there is a cross-demand (sc a genuine cross-demand) which exceeds the debt. In the course of argument, the example was taken of a not uncommon type of case in which the claimant sues on a dishonoured cheque; the defendant advances a genuine counterclaim for damages for defective goods supplied by the claimant; the claimant obtains summary judgment on the cheque and serves a statutory demand based on the judgment; and the defendant applies to set aside the statutory demand, relying on his counterclaim. In such circumstances, as para 12.4 provides, the statutory demand will 'normally' be set aside, notwithstanding the absence of any stay of the judgment. In that example, there is no question of the judgment thereby being 'subverted'. The judgment remains valid and enforceable.

(4) In addition to the procedures available to a receiving party to enforce an interlocutory costs order under CPR Part 70, the court has power under s 49(3) of the Supreme Court Act 1981, either of its own motion or on the application of the receiving party, to stay the action until the costs are paid. (No such application was made in the instant case.)

(5) In the light of para 12.4 of the 1999 Practice Direction, and of the Bayoil approach in the context of companies winding up, there is in my judgment no basis in principle for treating the fact that the debt on which the statutory demand is based happens to arise under an interlocutory costs order, rather than (for example) an interlocutory judgment, as a 'special circumstance' taking the case out the general rule. ..."

A Summary of the Background to the Makki Claim

44. Broadly, the factual background to the Makki Claim, and the steps so far taken in the Lebanese Proceedings, were not in dispute. Whilst I take that background (set out below) from Dr Mokal's Skeleton Argument (and so from the evidence adduced on behalf of Mr Makki) I do so in order to summarise the context of the Lebanese Proceedings and the genesis of the Makki Claim, whilst acknowledging that it may not capture all the facts and circumstances relied on by the Bank in its defence of the

Lebanese Proceedings, and that there may be important disputed issues of fact; I do so without having heard evidence or having tried the Makki Claim, and therefore without making (or being in any position to make) findings of fact.

45. Mr Makki lives in both Lebanon and the UK. In August 2013, he opened a bank account with the Bank ("**the Bobsal Account**"). In June 2018, he opened an account at Barclays Bank in London. He says he chose Barclays because it is one of the Bank's correspondent banks.

46. In November 2019, Mr Makki had about US$800,000 held on fixed term deposit with the Bank. He wanted to move these and other funds to the UK with a view to buying property in this country and to financing his children's education. Accordingly, on 14 November 2019, he wrote to the Bank's manager in Lebanon to instruct him that when the deposit matured, the funds should be deposited in the Bobsal Account as a prelude to being transferred to London.

47. Mr Makki visited the Bank's branch in Lebanon on 23 November 2019, where he usually conducted his in-person banking. He says that the Bank's staff informed him that there were instructions "*from the top*" within the Bank — applicable to all account holders and not merely to Mr Makki — not to permit international transfers of funds. Instead, he was offered banker's cheques.

48. Mr Makki subsequently told the Bank's staff that he would take the cheques, and so on 25 November 2019, three such cheques (the first three of the "**Bobsal Cheques**") were issued in the sums of US$250,000, 250,000, and 300,000, respectively. Each Cheque is drawn on the Bank's account with the Central Bank of Lebanon ("**the CBL**"). A deduction of US$800,000 was made on the same day from the Bobsal Account.

49. On 27 November 2019, Mr Makki travelled to London, and the next day, he deposited the three Bobsal Cheques at Barclays. On 3 January 2020, he logged on to his Barclays account and discovered that the Cheques had not been honoured. On 13

January 2020, he received formal letters to this effect from Barclays, which stated that each Cheque had "*been unpaid by the bank on which it was drawn for the reason Unable to Obtain Payment*".

50. Between 28 December 2019 and 20 July 2020 (inclusive), five more Bobsal Cheques were issued to Mr Makki, for a total sum (in addition to the US$800,000 value of the first three Cheques) of US$315,580. None of these Cheques has been honoured, and in June 2021, Barclays informed Mr Makki that they "*can no longer accept cheques from Lebanon*".

51. In the event, Mr Makki claims that the Bank owes him US$1,115,580 plus interest. This is the Makki Claim. It is a claim to a debt presently due and outstanding, and in significant excess of the admitted Makki Debt.

52. With a view to recovering the sums claimed to be due to him, Mr Makki started two sets of proceedings, one each in England and Lebanon.

a. In July 2020, Mr Makki brought the Private Prosecution against the Bank pursuant to the Fraud Act 2006 in the Southwark Crown Court. As described above, its discontinuation gave rise to the costs order comprising the Makki Debt.

b. In March 2021, the Lebanese Proceedings were commenced against the Bank in Lebanon. The Bank is actively contesting those proceedings, which are continuing. Mr Makki's submission was that the Bank's defence is "*untenable*". The Bank's on the other hand, was that Mr Makki's claim in Lebanon has "*no reasonable prospects of success*", but that due to the absence of a summary procedure process in Lebanon, it is "*locked in litigation which will take several years to resolve*" but which it expects will "*result in another adverse costs order against*" Mr Makki. It is only if I can find in favour of the Bank on this point (involving both issues of fact and Lebanese law) that its Demand ought not to

be set aside. Given the nature and constraints of the hearing before me, the difficulties of doing so are obvious.

The Lebanese Proceedings

53. As to the current state and content of the Lebanese Proceedings, Mr Makki relied on the witness statement of Mr Najjar made on 30 August 2021. In his statement, he set out - as a "*high level summary of the filings made in the Lebanese Proceedings*" - the following steps, accepted by the Bank, in its own evidence, to which I shall come in due course, to be "*broadly accurate*".

a. On 1 March 2021, the Bank was served with a "*legal warning*" which required it to transfer the sum of US$1,101,580, the amount for which cheques had been issued (the difference with the figure in paragraph 51 above, being accounted for by exchange rate fluctuations). The warning required the Bank to act within a period of 48 hours from the date of notification to avoid prosecution and seizure.

b. Upon the expiration of the time period included in the warning, on 4 March 2021, Mr Makki petitioned the Execution Department of the Lebanese Court in Beirut for "*precautionary seizure*" (effectively, so I am told by Dr Mokal, a freezing order) of the Bank's property in Lebanon in the sum of US$1,101,580.

c. On 9 March, the Bank replied to the warning notice of 1 March, stating that it could not facilitate the requested transfer because the cheques could not be paid outside Beirut and in any event no international transfers could be made. It relied on what it said to be the effect on the parties' legal rights and obligations of, in particular, a press release issued by the Association of Banks in Lebanon on 17 November 2019 ("**the ABL Press Release**").

d. On 24 March 2021, the judge presiding over the seizure application acceded and granted a sequestration order against the Bank in the sum of

US$800,000, plus US$80,000 in costs in Mr Makki's favour. According to Mr Najjar, a further application in respect of the other sums said to be outstanding was submitted to the judge of urgent matters.

e. On the same day, a claim was filed before the Civil Court of First Instance of Beirut in support of the sequestration order. On 23 April 2021, the Bank was served with the sequestration order.

f. On 27 April 2021, the Bank challenged the sequestration order on the basis of the ABL Press Release, and that the cheques should not have been presented abroad as they are only valid in Lebanon. The Judgment of Judge Anani on 30 November 2021, dismissing that challenge, is exhibited to the statement of Mr Leibowitz. Whilst disputed by the Bank (and subject to appeal) I observe that the Judge's reasoning and conclusions comprise some 15 pages of text, and that on the face of the Judgment, the Judge appears to have considered and dealt in substance with the application of numerous points of Lebanese law.

g. According to Mr Leibowitz, on 22 December 2021, the Bank filed an appeal against Judge Anani's decision, and on 12 January 2022 Mr Makki's Lebanese counsel filed a response. Both documents were exhibited to Mr Leibowitz's statement, and together, they comprise some 60 pages of text stating the parties' detailed arguments of (Lebanese) law and fact. I observe that since Mr Najjar's statement of 30 August 2021, the Lebanese courts appear at least to some extent to be functioning (and possibly - I was not told - to their full extent).

h. On 24 June 2021, Mr Najjar says that he prepared a summary application for submission to the urgency court, requesting the court to order a transfer of US$351,580 to Mr Makki's account in London. Mr Airut's evidence is that this was not notified to the Bank until 14 September 2021. As at the date of Mr Najjar's statement, that application had not been heard as a result of the "*current situation in Lebanon*" - a reference, as I understand it, to both the strike and "*the overall difficult situation in* Lebanon". Mr Leibowitz, in his

statement, said that this claim had been listed to be heard on 4 March 2022, although I was not told the outcome of that hearing, if indeed it took place.

54. Against this background it is clear to me that the Lebanese Proceedings are substantial, and that they are being genuinely prosecuted with reasonable expedition within the constraints of the Lebanese legal system, albeit from time to time subject to the situation in Lebanon more generally. No criticism was levelled at Mr Najjar (an evidently experienced Lebanese attorney) or at his or indeed Mr Makki's conduct of the Lebanese Proceedings.

The Evidence of Mr Najjar, Mr Airut and Mr Leibowitz

55. In setting out the progress and essential content of the Lebanese Proceedings, I have already referred to the statements of Mr Najjar, Mr Airut and Mr Leibowitz. There were, however, various issues as to the admissibility of those statements, or parts of them. As to these issues, I begin by reminding myself that: (a) there is no permission for expert evidence of Lebanese law (and neither party sought any such permission – indeed, the Bank's solicitors in correspondence said that it was "*unnecessary and inappropriate for an application of this nature*"); and (b) that Chief ICCJ Briggs gave directions for evidence on 9 August 2021, that any further evidence of Mr Makki was to be served by no later than 4pm on 1 September 2021. It is of course accepted that the statement of Mr Leibowitz, made on 15 February 2022, was not served within that time.

56. Dr Mokal submitted that substantial parts of Mr Airut's evidence are inadmissible, in the absence of permission to adduce expert evidence. In particular he referred to the following, which comprised, he suggested, an attempt to adduce opinion evidence on various aspects of Lebanese law and on the effect on the parties' legal rights and obligations of the ABL Press Release and a statement of the Governor of the Central Bank:

a. Paragraphs 12, 13, and 37 which state the effect of the ABL Press Release on the Bank's legal obligations to Mr Makki;

b. Paragraphs 13, 20, 23 (except first sentence), 24, 25, 26, 27, 28, 29, 32, 33, 34, 35, 36, and 45 which state the law governing various aspects of banking transactions, including the effect of the writing of certain cheques;

c. Paragraphs 36 and 40 which state his view about the proper construction of contractual terms governed by Lebanese law;

d. Paragraphs 38 and 39 which characterise the effect on the Bank's legal obligations of a statement by the Governor of the CBL;

e. Paragraph 41 which states the effect of Law 193 of 22 October 2020;

f. Paragraphs 42 and 43 which characterise certain alleged emerging trends in Lebanese jurisprudence;

g. Paragraph 44 which asserts that Mr Makki may not rely on a Lebanese court decision since that decision is under appeal;

h. Paragraphs 22, 48, and 49 in which he assesses the likelihood of Mr Makki's success in the Lebanese Proceedings.

57. In my judgment, the evidence of Mr Airut is admissible (as is that of Mr Najjar and Mr Leibowitz, in respect of Mr Makki's case) to the extent that it contains (given by the Bank's Lebanese legal representative) a factual description of the Bank's position and its case in the Lebanese Proceedings, and in respect of the Makki Claim. It is also admissible to the extent that it records the various stages and progress of those

proceedings, and states the fact of various opinions held by Mr Airut (whether justifiably or not). It is however inadmissible as evidence of the meaning or effect of Lebanese law and in particular, as evidence of its application to the facts of the current dispute, and as an assessment of the merits of that dispute and of the Bank's defence.

58. The evidence of Mr Leibowitz was served late. Nonetheless, to the extent that it contains (as recorded above) a more recent description of the progress of the Lebanese Proceedings, it was relevant and not disputed, and I admit it. In addition, Mr Leibowitz exhibited, without explanation of their meaning, 3 Lebanese judgments, unrelated to the Lebanese Proceedings. I derived no assistance from those judgments, which were not in any event explained to me, and which in the absence of expert evidence about their meaning, did not advance my understanding or assessment of the merits of the Makki Claim. They were irrelevant to my decision.

The Bank's Submissions

59. The Bank resists Mr Makki's claim in the Lebanese Proceedings on two bases.

60. First - and "*primarily*" according to Mr Airut's statement - the Bank asserts that it is no longer indebted to Mr Makki. This argument is advanced on the basis that the effect of having written the Bobsal Cheques against the Bank's account with the CBL and/or of having handed them to Mr Makki (who accepted them), taken together with the effect of the ABL Press Release, was to:

a. debit Mr Makki's accounts with the Bank for the relevant sums;
b. credit the Bank's account with the CBL with those sums; and,
a. earmark and "*block*" those sums for the payment of the Bobsal Cheques;
b. such that the Bank holds those sums for Mr Makki's benefit, and Mr Makki is therefore to be treated as having already been paid.

61. As explained by Mr Airut (whose evidence I accept, as explained, as evidence of the fact of the defence advanced by the Bank):

> "*The Bank's primary position in the Lebanese Proceedings is that the requested transfer cannot be performed because the requested sums have already been duly paid to Mr Makki and are now held in its bank accounts held by the CBL. …*
>
> *In the case at hand, Mr Makki received, without any reservation, banker's cheques drawn on the CBL for amounts covering nearly the entire balance of his credit personal and joint accounts with the Bank. The value of such cheques was registered on Mr Makki's accounts and debited from their balances on the cheques' issuance dates… The drawn funds have been credited to the Bank's account at the CBL and thereafter have been blocked to the benefit of the bearer of the cheques, i.e. Mr Makki. The Bank is not able to request the drawn funds back from the account at the CBL or cancel the banker's cheques. The only way for Mr Makki to access the funds is to present the cheques at a qualifying bank (i.e. a bank in Lebanon) so that the CBL releases the funds. Once the cheques are submitted for payment by Mr Makki at a qualifying bank, the blocked funds will be transferred to his account at a depositing bank of his choosing.*"

62. Second, in reliance on the alleged effect of the ABL Press Release, the Bank contends that the sum claimed by Mr Makki is only payable in Lebanon (and therefore not in England). If that is right, submitted Dr Mokal, then in any event, Mr Makki has a claim against the Bank falling within Rule 10.5(5)(a).

63. In support of the Bank's position, Mr Heylin submitted that the "*summary procedure*" before Judge Anani, did not "*really delve into the merits and should be approached with extreme caution*", and is "*essentially meaningless*" because the matter will ultimately be determined on appeal, by the Lebanese Court of Cassation.

64. In support of that submission, he referred both to the evidence of Mr Airut, and to the recent decision of Mr Justice Foxton in *Khalifeh v Blom Bank SAL* [2021] EWHC

3399, which he said "*was essentially on the same factual matrix as that now put forward*" by Mr Makki and in which (having had the benefit of expert evidence on Lebanese law) the Judge rejected - following an 11 day trial - a claim brought by a Lebanese citizen against a Lebanese bank alleging that it had wrongfully refused to pay him the balance of his US dollar account in the manner in which he was entitled to payment. Specifically, Mr Heylin referred me to the Judge's findings (on expert evidence) that in almost all such similar cases, banks have appealed the decisions of judges of summary procedure, and sought stays of execution, and have been successful in doing so, on the "*likely to be overturned*" ground. He referred to the Judge's ultimate conclusion, at paragraph 214 of his Judgment, that "*a Lebanese court would hold that the tender of the BdL Cheques by the Bank was a valid tender which, coupled with the subsequent crediting of those cheques to the account of the notary public, discharged the debt under Lebanese law*". On this basis, he suggested, I should conclude that there is "*no genuine set off or cross demand*", this being essentially the Bank's primary position in the Lebanese Proceedings.

65. Against that, as to English authority, Dr Mokal referred in his Skeleton Argument to an order made by Mr Justice Picken on 28 February 2022 (this time following an expedited 9-day trial) in *Vatche Manoukian v Societe Generale De Banque Au Liban S.A.L. and Bank Audi S.A.L.* (Claim No. QB-2020-003992) also in respect of a claim about the failure or refusal of 2 Lebanese banks to transfer to certain accounts in Geneva the sums held by the banks to Mr Manoukian's credit in his Lebanese accounts. Mr Manoukian's case succeeded, and the Judge ordered the two banks to make transfers of the sums held by him in accounts with those banks in Lebanon to the client account of his English solicitors. The order indicated that a written judgment was to follow.

66. In the event, I was sent a copy of that judgment after the hearing of Mr Makki's Application on 3 March 2022, and after completing a draft of this Judgment, but before handing it down in final form. In those circumstances, I invited the parties to make further written submissions if they wished to argue that Mr Justice Picken's judgment would make a difference to my own conclusions. On behalf of Mr Makki, no submissions were made. On behalf of the Bank, dated 4 April 2022, Mr Heylin lodged written submissions (although - and albeit nothing turns on this - they appear not to have been received by Mr Makki's advisors until 11 April 2022 for "technical reasons").

67. In summary, in his submissions, Mr Heylin said that the fact that Mr Manoukian succeeded in his claim, on the individual facts of his own case, has a limited impact on whether or not Mr Makki has a genuinely arguable claim against the Bank in the Lebanese proceedings. What is more relevant, said Mr Heylin, is that the burden is on Mr Makki to establish that there is genuine triable issue, and that no one will know the answer to that question until the Lebanese Court of Cassation makes a final determination, which will not be for a number of years. Mr Heylin submitted that the decision of Mr Justice Picken takes Mr Makki no closer to satisfying that burden.

Conclusions

68. Against that background, my conclusions are as follows.

a. As I have said, the Lebanese Proceedings are substantial, and they are being genuinely prosecuted with reasonable expedition on behalf of Mr Makki by experienced representatives. His claim is not inherently incredible, and is for a sum considerably in excess of the admitted Makki Debt. Even by reference to the limited evidence adduced on this Application, it is apparent that the Lebanese Proceedings raise numerous important and keenly disputed issues.

b. In the course of the Lebanese Proceedings, Mr Makki has thus far succeeded to the extent of the summary procedure before Judge Anani, whose "*summary*" decision is subject to an extant appeal. The parties' dispute will ultimately be decided by the Court of Cassation. Whilst that is so, I cannot and do not simply discount Judge Anani's decision - I have no proper (or any) basis upon which simply to dismiss it as "*essentially meaningless*", or manifestly wrong; it appears, at least on its face, to have involved a considered approach to the dispute, following argument.

c. There was before me no expert evidence of Lebanese law. Whilst I therefore understand as a matter of fact (and have to some extent recorded) the rival contentions advanced by the parties in Lebanon, I have no evidential basis upon which to reach a final assessment of their merits. In any event, I

have no basis upon which to make whatever findings of fact might be required to conduct that assessment – it is far from clear to me that no such issues will arise, for example, in respect of the circumstances surrounding Mr Makki's receipt of the Bobsal Cheques, or the effect of circumstances in Lebanon on the parties' rights and obligations.

d. I have, as explained, now been shown 2 recent English decisions (*Khalifeh* and *Manoukian*) concerned with apparently similar disputes, albeit with different banks. In both cases, involving trials of 9 and 11 days, the Judges had the benefit of expert evidence Lebanese law. In one case, the claimant customer succeeded, and in the other, he failed. However, no submissions were addressed to me to enable me to distinguish those cases either from one another, or from the current case, or with any degree of comfort to apply their conclusions to the current case. If anything, they would seem to underline the submission that the Makki Claim is arguable both ways.

69. In all the circumstances therefore, I am satisfied that the Makki Claim raises a genuine triable issue, that it falls within the scope of Rule 10.5(5)(a) (as a "*counterclaim, set-off or cross demand*"), that it exceeds in amount the Makki Debt, and that in the circumstances, the Demand must be set aside. Finally, for the sake of completeness, I should add that Mr Makki relied also on Rule 10.5(5)(d) but that: (a) it is not necessary in the circumstances to determine that argument, and (b) in any event, it seemed simply to restate the argument under Rule 10.5(5)(a), being to the effect that "*it would be unjust for the Bank to be allowed to proceed towards Mr Makki's bankruptcy on the basis of a debt which results, in significant part, from the Bank's own refusal or failure to meet its own liabilities to Mr Makki*" and therefore in terms depending on establishing "*liabilities to Mr Makki*".

70. Mr Makki's Application succeeds, and I shall order accordingly.

Dated 13 April 2022