judge below was perfectly right, and that this trial should proceed upon the basis that it is for the defendant to establish that which he asserts, namely, that he received the two sums of money from the plaintiff by way of gift.

I would, therefore, dismiss this appeal.

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Appeal dismissed with costs.

Solicitors: *Oswald Hickson, Collier & Co. for Desmond Pye, Clacton-on-Sea; Thompson, Smith & Puxon, Colchester.*

M. G.

[CHANCERY DIVISION]

* MANN AND ANOTHER *v.* GOLDSTEIN AND ANOTHER

1967
Nov. 1, 3, 7, 15

[1967 M. No. 4455]

UNGOED-THOMAS J.

Company—Winding up—Petition—"Creditor"—Debt disputed on substantial grounds—Whether prosecution of petitions abuse of process of court—Companies Act, 1948 (11 & 12 *Geo.* 6, *c.* 38), *s.* 224.

The plaintiffs and the first defendant and his wife were equal shareholders in two companies, J. Co. Ltd. and C. Co. Ltd. The first plaintiff managed J. Co. and the first defendant C. Co. Proposals were made to buy each other out but no agreement could be reached. The first defendant presented a creditors' petition to wind up J. Co., alleging a debt of £1,869 for director's fees. The second defendant presented a petition to wind up C. Co. as a creditor for goods sold and delivered to that company.

The plaintiffs sought an injunction to restrain the defendants from advertising or taking any further steps in the prosecution of their respective petitions on the grounds that the defendants were not creditors at all, or, alternatively, that their debts were disputed on substantial grounds, that the petitions were not bona fide but an abuse of the process of the court and that the companies were solvent:—

Held, granting the injunctions, (1) that a creditors' winding-up petition could only be presented by a creditor and since the debts upon which both the defendants founded their petitions were substantially disputed, neither of the petitioners were established as "creditors" of either of the two companies; and that, accordingly, neither was entitled to present a petition as neither had any locus standi in the Companies Court.

(2) That even though it appeared from the evidence that the companies were insolvent, as the debts were substantially disputed the defendants ought to be restrained from proceedings on their petitions.

In re Welsh Brick Industries [1946] 2 All E.R. 197, C.A. applied.

[Reported by MRS. ROSALIE LONG, Barrister-at-Law.]

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Niger Merchants Co. v. *Capper* (1877) 18 Ch.D. 557, distinguished. A

(3) That to invoke the winding-up jurisdiction when a debt was disputed on substantial grounds after it had become clear that it was so disputed was an abuse of the process of the court.

New Travellers' Chambers Ltd. v. *Cheese and Green* (1894) 70 L.T. 271, applied.

B

MOTION.

The plaintiffs, Peter Mann and his wife Anita Mann, and the defendant, Sidney Bernard Goldstein and his wife were equal shareholders in two companies carrying on hairdressing businesses, Joanita Ltd. and Charmaine Coiffeur d'Art Ltd.

C

The first plaintiff managed Joanita and the first defendant Charmaine. Differences arose between them and proposals were made to buy each other out but no agreement was reached.

On October 12, 1967, the first defendant filed a petition to wind up Joanita ". . . for loans made to or monies left in the company, the present amount of such indebtedness being £1,869 16s. 3d." He alleged that the sum represented director's fees. It was not disputed that this sum had been voted by Joanita in 1959–60 and that no fees had been voted since. The plaintiff alleged that from October, 1965, to June 12, 1967, the first defendant had drawn £15 per week from Joanita which, when grossed up at the appropriate rate of tax, amounted to a sum in excess of £1,869. The first defendant denied that the drawings were fees but even if so treated the weekly sums drawn were only £7 per week thus leaving a substantial amount owing.

D

E

The second defendants, Wallands Laboratories Ltd., presented a petition on October 12, 1967, to wind up Charmaine Coiffeur d'Art Ltd. on the ground that the company was indebted to the petitioner in the sum of £340 16s. 6d. in respect of goods sold and delivered. The second defendants' main dealings were with a subsidiary of Charmaine, Charmaine Marguerite Ltd., which originally carried on its business at the same premises. The plaintiffs alleged that the debt was owed by Charmaine Marguerite Ltd.

F

G

On a motion the plaintiffs sought injunctions to restrain the defendants until trial or further order from advertising or taking further steps in the prosecution of their winding-up petitions.

H

P. S. A. Rossdale for the plaintiffs.

G. M. Godfrey for the first defendant.

P. J. Millett for the second defendant.

The cases cited in argument are referred to in the judgment.

Cur. adv. vult.

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November 15. UNGOED-THOMAS J. read the following judgment. This is an action by Mr. Peter Mann and his wife against Mr. Sidney Bernard Goldstein and Wallands Laboratories Ltd. The notice of motion asks that the first defendant, Mr. Goldstein, might be restrained until trial of the action or further order from advertising or taking any further steps in the prosecution of a winding-up petition against Joanita Ltd. And it also asks for an injunction in similar terms against the second defendant in respect of a petition against Charmaine Coiffeur d'Art Ltd. Leave was given to amend so as to join those two companies as defendants and enable the plaintiffs to sue, in a representative capacity, for shareholders in those companies, other than the defendant, Mr. Goldstein.

Each of the companies carries on a hairdressing business and the shares in each company are held equally between Mr. Mann on the one hand and Mr. Goldstein on the other hand, or between Mr. and Mrs. Mann on the one hand and Mr. and Mrs. Goldstein on the other hand. Mr. Mann managed the Joanita business in Pinner and Mr. Goldstein the Charmaine business in Haverstock Hill. Since July, there have been strained relations between Mr. Mann and Mr. Goldstein, apparently, partly because Mr. Mann thought that he did not have a fair deal over the sale of a subsidiary company of Charmaine called Charmaine Marguerite Ltd., which was sold to Mr. Goldstein. It was also partly due to friction over Marguerite's business continuing to be conducted from the Charmaine premises at Haverstock Hill after that sale.

Proposals for one side to buy out the other in Charmaine and Joanita were made, but no agreement was reached, and in these circumstances Mr. Goldstein presented a creditor's winding-up petition to wind up Joanita—and I quote from the petition—". . . for loans made to or monies left in the company, the present amount of such indebtedness being £1,869 16s. 3d." And the defendant company, Wallands, presented a petition to wind up Charmaine as creditor for £340 for goods sold and delivered to Charmaine.

The hostility between Mr. Mann and Mr. Goldstein has become acute and there is, apparently, a deadlock between them over the conduct of the two companies, Joanita and Charmaine. But Mr. Goldstein's petition is not based upon deadlock; nor has deadlock been relied upon by either side in the submissions made to me. The plaintiffs claim that they are entitled to the injunctions mentioned in the notice of motion, on the grounds that (1) the defendants are not creditors at all of these companies; or, alternatively, (2) that their debts are disputed on substantial grounds; (3) that the petitions are not bona fide petitions but are an abuse of the process of the court; and (4) that the companies are solvent. Each of these grounds involves questions of fact and of law and it will be convenient to deal first with the law.

It is well established that this court has jurisdiction to restrain

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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. (See, for example, *In re A Company.*[1])

The presentation of a petition is governed by statutory provision. Section 224 of the Companies Act, 1948, provides that an application to wind up a company shall be by petition presented, so far as material for present purposes ". . . by any creditor or creditors. . . ." The section seems to me plainly, on the face of it, exhaustive, so that a person not within its ambit cannot petition. This conclusion is in accordance with the note in Buckley on the Companies Act (13th ed. (1957), p. 462), based on the observation of Wynn-Parry J. in *In re H. L. Bolton Engineering Co. Ltd.*[2] Of course, a person not named in section 224 as a person entitled to present a winding-up petition, does not become so named because the company is insolvent. Therefore, so far as material to our case, if the defendants are not creditors they are not entitled to present or advertise their petitions or apply for a winding-up order; they have no locus standi, and their petitions are bound to fail even though the company be insolvent. So if a creditor's petition is not restrained by such an application as is now before me and comes before the Companies Court, that court will, in limine, before proceeding further, consider the petitioner's claim to be a creditor. As stated in Buckley on the Companies Act, 13th ed. (1957) p. 451, in a passage quoted with approval by Lord Greene M.R., in *In re Welsh Brick Industries* [3]:

> "Some years ago petitions founded on disputed debt were directed to stand over till the debt was established by action. If, however, there was no reason to believe that the debt, if established, would not be paid, the petition was dismissed."

And then it goes on:

> "The modern practice has been to dismiss such petitions. But, of course, if the debt is not disputed on some substantial ground, the court may decide it on the petition and make the order."

What the Companies Court will not do is to proceed any further at all on a petition founded on a debt which is not thus shown in limine to exist, for in such a case there is not, of course, the necessary creditor required by section 224 to apply for a winding-up order.

The defendants, however, relied on the observation of Sir George Jessel M.R. in *Niger Merchants Co.* v. *Capper*,[4] that "Where a company is insolvent no doubt it is reasonable to wind

[1] [1894] 2 Ch. 349.
[2] [1956] Ch. 577, 583; [1956] 2 W.L.R. 844; [1956] 1 All E.R. 799.
[3] [1946] 2 All E.R. 197, 198, C.A.
[4] 18 Ch.D. 557, 559.

A up the company, even where the debt is disputed." But this statement is tentatively phrased in an apparently unreserved judgment unreported at the time in the early period of the development of the jurisdiction, and, so far as I know, stands alone. Of course, judges, with due regard to the facts of the particular cases before them, have, naturally, referred to the company's solvency or in-
B solvency, as the case may be, as emphasising the desirability of their dismissal of an application to restrain winding-up proceedings or of granting an injunction to restrain such proceedings, as the case might be. But there is no authority, so far as I have been able to ascertain, to support the suggestion that a company might be wound up on a creditor's petition where the company is insol-
C vent though the debt upon which the petition is founded is disputed. It seems to me to be neither in accordance with the requirements of the Companies Act nor the practice recognised by Lord Greene M.R. and I do not consider it justifiable to treat Sir George Jessel's observation as other than the incidental and tentative observation which it appears to me to be.

D To enable the Companies Court to make the winding-up order itself, not only must the petitioner have been shown to be entitled to present the petition, but one of the grounds specified in section 222 of the Companies Act must be established: and the only such ground relied on in the petition and before me was that the company is unable to pay its debts. This requirement is additional to
E the pre-condition of presenting the petition, that the petitioner must be a creditor, and is not alternative to it. But the insolvency requirement, unlike the creditor requirement, is only a prerequisite of the order and not a prerequisite of the presentation of the petition. So if a person is entitled to present a petition, then the company's inability to pay its debts is the very matter which it is
F appropriate for the Companies Court to enquire into and decide in the exercise of its jurisdiction to make a winding-up order.

I come now to the allegation of lack of bona fides and to abuse of process. It seems to me that to pursue a substantial claim in accordance with the procedure provided and in the normal manner, even though with personal hostility or even venom, and from
G some ulterior motive, such as the hope of compromise or some indirect advantage, is not an abuse of the process of the court or acting mala fide but acting bona fide in accordance with the process. And certainly no authority suggesting otherwise has been brought to my attention. In *In re Welsh Brick Industries*,[5] Lord Greene M.R. treated a bona fide claim as being a claim based on
H some substantial ground when he referred to [6] " considering whether or not the dispute is a bona fide dispute, or, putting it in another way, whether or not there is some substantial ground for defending the action." And, so far as is material here, the winding-up process provides that the petition shall be presented by a creditor and that the winding-up order shall be on the ground that the company is

[5] [1946] 2 All E.R. 197. [6] Ibid. 198.

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unable to pay its debts. As Malins V.-C. said in *Cadiz Waterworks Co.* v. *Barnett*,[7] if the court "sees a petition to wind up presented, not for a bona fide purpose of winding up the company, but for some collateral and sinister object, on that ground it will be dismissed with costs." There the purpose of winding up the company is treated as a bona fide purpose in contrast with some purpose other than the winding up of the company.

What then is the course for this court to take (1) when the creditor's debt is clearly established; (2) when it is clearly established that there is no debt; and (3) when the debt is disputed on substantial grounds?

(1) 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 his own remedy in paying the undisputed debt which he 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. Further, the winding-up order on the ground of inability to pay debts would be the very matter which it would be for the Companies Court to decide after presentation of the petition: and validly to present a creditor's petition which the company inexplicably would not pay could hardly, in general at any rate, be an abuse of the process of the court.

(2) When it is clearly established that there is no debt, it seems to me similarly to follow that there is no creditor, that the person claiming to be such has no locus standi and that his petition is bound to fail. Once that becomes clear, pursuit of the petition would be an abuse of process, and this court would restrain its presentation or advertisement. Indeed, I understood counsel for the second defendant to concede this proposition.

(3) When the debt is disputed by the company on some substantial ground (and not just on some ground which is frivolous or without substance and which the court should, therefore, ignore) and the company is solvent, the court will restrain the prosecution of a petition to wind up the company. As Malins V.-C. said in *Cadiz Waterworks Co.* v. *Barnett*,[8] of a winding-up application:

> "It is not a remedy intended by the legislature, or that ought ever to be applied, to enforce payment of a debt where these circumstances exist—solvency and a disputed debt."

As Sir George Jessel M.R. said in the judgment from which I have already quoted[9]: "When a company is solvent, the right course is to bring an action for the debt." So, to pursue a winding-up petition in such circumstances is an abuse of the process of the court.

[7] (1874) L.R. 19 Eq. 182, 196.
[8] Ibid. 194.
[9] 18 Ch.D. 557, 559.

A But what if the debt is disputed by the company on some substantial ground but it appears that the company is unable to pay its debts? Researches have not produced any decision covering this point. Words interpreted out of context are amply available to support the plaintiff's claim that this court should, in such circumstances, grant the injunction. Thus, for example, in *In re* B *Imperial Guardian Life Assurance Society*,[10] Sir William James V.-C. said: "A winding-up petition is not to be used as machinery for trying a common law action." But in that case voluntary liquidators had in fact offered to be personally liable and set aside assets to meet the disputed claim if proved and that was the only claim against or debt due from the company.

C In *In re Gold Hill Mines*,[11] Bacon V.-C. said:

> "The Act of Parliament . . ."—that is, the Companies Act— ". . . has given a creditor who cannot get paid a right to present his petition against a company which not only refuses to pay him, but is in a state of insolvency. That is all the Act does. It does not countenance applications to wind up as a means of enforcing the payment of debts which the D company dispute."

And Lindley L.J. said[12]:

> "Now it ought to be understood that winding-up proceedings are not to be had recourse to for the purpose of recovering a disputed debt, especially when, as here, the company appears to be solvent." E

But in that case Lindley L.J. added, "In fact we have no evidence of insolvency."

In *Niger Merchants Co.* v. *Capper*,[13] Sir George Jessel M.R. said that Malins V.-C. in *Cadiz Waterworks Co.* v. *Barnett*[14] granted an injunction to restrain winding-up proceedings[15] "on F the ground that it is the object of the court to restrain the assertion of doubtful rights in a manner productive of irreparable damage." And Willmer L.J., in *Charles Forte Investments Ltd.* v. *Amanda*,[16] quoted this passage of Sir George Jessel with approval. But in *Niger Merchants Co.* v. *Capper*[17] and *Cadiz Waterworks Co.* v. *Barnett*,[18] where the debt was disputed and the injunction was G granted, the company was solvent. And in *Charles Forte Investments Ltd.* v. *Amanda*,[19] the petition was not a creditor's petition but a contributory's petition, where an injunction was granted on the ground that the petition was bound to fail and an abuse of the process of the court and is in line with the early leading H case *In re A Company*,[20] which I have already mentioned.

The strongest statement which I have seen in favour of the

[10] (1869) L.R. 9 Eq. 447, 450.
[11] (1883) 23 Ch.D. 210, 211, C.A.
[12] Ibid. 215.
[13] 18 Ch.D. 557.
[14] L.R. 19 Eq. 182.
[15] 18 Ch.D. 557, 558.
[16] [1964] Ch. 240, 241; [1963] 3 W.L.R. 662; [1963] 2 All E.R. 940, C.A.
[17] 18 Ch.D. 557.
[18] L.R. 19 Eq. 182.
[19] [1964] Ch. 240.
[20] [1894] 2 Ch. 349.

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plaintiff's contention is that of Kekewich J. in *New Travellers' Chambers Ltd.* v. *Cheese and Green*[21]: A

> "Of course the question whether this is a debt or not may possibly be tried by a winding-up petition; but it has been said over and over again, that the presentation of a winding-up petition is not a convenient, and often not a proper method of trying a disputed debt. If there is any reasonable ground for disputing the existence of the debt—if the question is not a mere question of quantum, but whether there is in fact a debt or not—a petition ought not to be presented, and therefore the court ought to restrain the presentation of the petition." B

No reference was expressly made here to irreparable damage to the company, but, again, it appears, from the end of the argument as reported, that the company was in fact solvent, and it could then well go without saying that the presentation of the petition which was restrained would cause irreparable damage to the solvent company. C

If the company is unable to pay its debts as they fall due it seems to me that the presentation or advertisement of the petition might or might not cause it damage. It might prevent its pulling through a period of financial difficulty and becoming solvent, or it might result in worse insolvency. In the case of Charmaine the evidence is that its profits are improving, and in the case of both companies that a winding-up petition would injure goodwill. D

It might be suggested that this court should, where the company is insolvent, intervene on the ground that it would be to the detriment of future possible creditors to countenance the continuation of a company unable to pay its debts as they fall due. But the Companies Court, in accordance with the practice which I have mentioned, does dismiss a petition founded on a substantially disputed debt whose validity it cannot conveniently decide even though the company be insolvent. And, as I have indicated, this, in my view, is in accordance with the requirements of section 224 of the Act. And this court is certainly no less conveniently placed than the Companies Court to decide a disputed claim. Of course, if a creditor's petition turns out before the Companies Court to be based on a substantially disputed debt, there is the opportunity, under the Companies (Winding Up) Rules 1949, rule 37, for substituting another petitioner in place of the one whose debts are disputed. But such other petitioner could in any event present such a petition—as indeed could Mr. Mann, in this case, on the ground of deadlock. E F G H

These considerations appear to me to be complicated and inconclusive and afford no satisfactory basis for the exercise of the court's jurisdiction. For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the

[21] 70 L.T. 271, 272.

winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds), since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the Companies Court; and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is an abuse of the process of the court. This seems to me to be in accordance with the statement of Kekewich J.[22] which I have quoted, even though it be borne in mind that the company in that case was solvent: and the references to irreparable damage in the other cases which I have mentioned, where the petitioners were contributories or creditors petitioning against solvent companies, do not exclude an injunction being granted to prevent an abuse of the process of the court. Indeed, 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.

So I return to what was mentioned earlier in this judgment, that it is an abuse of the process of the court to prosecute a winding-up application otherwise than in accordance with the legitimate purpose of such a process. The legitimate purpose of such a process is to wind up a company on a ground specified in the Companies Act, which, so far as material to this case, is the ground that it is unable to pay its debts. It is not its legitimate purpose to decide whether a petitioner claiming to be a creditor is a creditor, because section 224 makes it a prerequisite that he should be a creditor before he is even entitled to present a petition at all and before any consideration of the company's insolvency can become relevant. So, in my view, when a petitioning creditor's debt is disputed on some such substantial ground this court should restrain the prosecution of the petition as an abuse of the process of the court even though it should appear to the court that the company is insolvent.

So I come to examine the debts which the defendants allege to be due to them from the company in this case.

The defendant Mr. Goldstein alleges a debt of £1,869 for directors' fees and its payment was demanded before presentation of his petition. It is not now disputed that fees to this amount were duly voted by Joanita in the years 1959/60 to 1964/65; and none has been voted since. Mr. Mann's evidence is that since October 1965, until June 12, 1967, £33 a week was drawn by Mr. Goldstein from both companies, of which £15 was drawn from Joanita and the remainder from Charmaine, without deduction for P.A.Y.E., which Mr. Goldstein should bear. It is submitted for the plaintiffs that Joanita is liable to pay tax on the £15 so drawn, that Mr. Goldstein is ultimately liable to bear that tax, that the sums drawn are, therefore, net sums, and that those

[22] 70 L.T. 271, 272.

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sums grossed up, if I may use that useful phrase, at the appropriate rate of tax, are the sums, in effect, drawn by Mr. Goldstein from Joanita and that such sums exceed the £1,869. Mr. Goldstein has not contested this submission except by submitting that the £15 drawings must be treated as not being in respect of the fees voted amounting to £1,869 and that even if so treated the evidence establishes that the £15 figure should be £7, thus leaving a substantial part of the £1,869 still owing to Mr. Goldstein. There is no authority whatsoever for the drawings other than the voting of the £1,869 and I have no hesitation in concluding that the drawings were or are to be treated as being in payment of the £1,869.

With regard to the contention that the drawings from Joanita were £7 and not £15 a week, if part of the £1,869 was still owing to Mr. Goldstein, then, in accordance with Kekewich J.'s observations [23] which I have quoted and the decision in *In re Tweeds Garages Ltd.*,[24] there would be sufficient debt to entitle the petitioner to qualify as a creditor for the purpose of presenting the petition. Mr. Mann's affidavit stated:

> "Since October, 1965, and until July 12, 1967, Mr. Goldstein and I were each drawing £33 per week from both companies—as to £15 from Joanita and the remainder from Charmaine."

Mr. Goldstein observed on this that "It is quite untrue . . . that he and I were drawing £33 each from Charmaine prior to July 12, 1967," though, I may interject, Mr. Mann never in fact said that the £33 was drawn from Charmaine. Mr. Goldstein produced Charmaine's "Salary Book" to show that

> ". . . throughout the period covered by the entries therein both Mr. Mann and I were drawing a gross salary of £26 per week from that company."

The book does show from its commencement such entries of £26 gross each for the last 15 weeks of one year and the first 20 weeks of the following year, making a total of 35 weeks. I am then invited to deduct the £26 gross mentioned by Mr. Goldstein from the £33 drawings mentioned by Mr. Mann as drawn from both companies to produce the figure of £7 which I have mentioned, and, further, to infer that Mr. Goldstein's drawings from Joanita were limited to that £7 not only during the 35 weeks which I have mentioned, but throughout the much longer period since October, 1965, mentioned by Mr. Mann. Mr. Mann, although he stated that £33 was drawn from both companies, also stated, perfectly clearly, that he and Mr. Goldstein drew £15 per week from Joanita. Mr. Goldstein has had ample opportunity to deal with that statement about Joanita. Nevertheless, his quoted observations appear to be directed entirely to drawings from Charmaine and not expressly, at any rate, to drawings from Joanita at all. I feel quite unable to conclude, on the material before me, that Mr. Goldstein's

[23] 70 L.T. 271, 272.

[24] [1962] Ch. 406; [1962] 2 W.L.R. 38; [1962] 1 All E.R. 121.

drawings from Joanita were limited to £7 a week. I am not satisfied that Mr. Goldstein is a creditor of Joanita for any part of the debt on which his petition is founded, although it is possible that if full investigation of Mr. Goldstein's claim to the debt were made, with full discovery and cross-examination, that some substantial part of the alleged debt at any rate would be established. But there is, in my view, a substantial defence to the whole of Mr. Goldstein's claim and, as I have indicated, the Companies Court is not the proper court to decide the issue that thus arises.

So I come to the debt on which the Wallands company's petition against Charmaine is based and the payment of this debt appears to have been duly demanded.

Wallands is a company incorporated in the course of this year to take over the business of a Mr. and Mrs. Muller and it claimed to be the creditor of Charmaine in respect of wigs and similar goods supplied on its own account and as assignee of debts in respect of such goods supplied to Charmaine by Mr. and Mrs. Muller. The Mullers had business dealings with Charmaine Marguerite Ltd., which, as I have said, was a subsidiary of Charmaine and to which the Mullers supplied such goods. The businesses of both Charmaine and Marguerite were carried on by Mr. Goldstein at the same premises and Mr. Goldstein ordered goods from the Mullers for both Marguerite and Charmaine. The Mullers' dealings with Marguerite were far bigger than any dealings which they had with Charmaine. It amounted to £1,000 to £1,500 a week, whereas the debts claimed against Charmaine for wigs, and so on, spreading over the nine months January to September, 1967, amounted only to £347, according to Mr. Muller's evidence; and it is on these alleged debts that the Wallands petition is founded.

Mr. Muller seeks to establish it by a list " . . . in which . . ." he says " . . . there is itemised all goods sold to Charmaine between January 13, 1967 and the end of September, 1967," amounting, in total, to £347. He then says, " All goods shown thereon were despatched to Charmaine's premises. . . . " But Charmaine's premises were the same as Marguerite's premises. And he adds, " . . . and to the best of my knowledge were ordered by Mr. Goldstein for Charmaine and were despatched to that company." Mr. Goldstein says, " To the best of my recollection all the items shown therein . . ."—that is, in Mr. Muller's list—" . . . were ordered by me on behalf of Charmaine, were delivered to Charmaine and subsequently sold to Charmaine's customers." Statements so phrased themselves invite doubt whether the goods were sold to Charmaine at all.

Mr. Muller, in his affidavit, said that Charmaine paid, in May, 1967, £87 6s. 0d. in respect of debts due from it up to December 31, 1966. The £87 6s. 0d. was certainly paid by a cheque of Charmaine Coiffeur d'Art Ltd. But it seems clear from the evidence of Mr. Shelley, a chartered accountant, who gave evidence

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for the plaintiffs, that, of the six invoices for this debt, only one was invoiced in 1966, namely on December 27, 1966, for £17, and that the rest were in 1967; that four invoices were to "Marguerite," that one was to "Charmaine Marguerite" and only one to "Charmaine"—without the addition of "Marguerite" or "Coiffeur d'Art"—and that not one was invoiced to Charmaine Coiffeur d'Art. It seems that here not only was Mr. Muller confused in respect of the debts, but he was treating goods invoiced to Marguerite as goods supplied to Charmaine and that, insofar as any sum is owing in respect of debts now relied on by Wallands, it is the plaintiffs' contention here that the goods were supplied to Marguerite and not to Charmaine at all. Further, Mr. Muller said, as I have mentioned, that his list itemised all goods sold between January, 1967, and the end of September, 1967, to Charmaine; but as the £87 6s. 0d. was in payment of a number of invoices for goods sold between those dates it is clear that this statement is not accurate if, as Mr. Muller said, the £87 6s. 0d. was for payment of goods sold to Charmaine, or even if the one invoice addressed to "Charmaine" were to "Charmaine Coiffeur d'Art."

However, on July 20, Marguerite ceased to carry on business at Charmaine's premises, and from about the middle of September Mr. Goldstein ceased to attend there regularly and Mr. Mann conducted Charmaine's business. The only invoice forthcoming for goods within Wallands' claim is an unreceipted invoice addressed to "Charmaine London, N.W.3." showing an amount of £7 charged for goods supplied, date of September 28, 1967, and invoice number corresponding to those in the last item in Mr. Muller's list of invoices in respect of the debt claimed. But this invoice is produced by Mr. Goldstein without any explanation how he obtained it, though he did say elsewhere in his evidence that he visited Charmaine's premises intermittently since he ceased to conduct this business. He adds that two names appearing on the invoice, opposite the two items of goods there mentioned as supplied, were those of a hairdresser and customer of Charmaine. Mr. Mann says that he is informed by Charmaine's receptionist/cashier that for the past four or five months all deliveries from Mr. Muller or his company have been for cash-on-delivery and that she understood that this had been the arrangement since about the beginning of this year.

I find this evidence and much of the evidence on both sides very unsatisfactory. The evidence with regard to the claim for the £7 for goods supplied in September is stronger than with regard to the rest of the claim, but I do not consider even the claim for this sum satisfactorily established having regard to all the circumstances of this case. All that is perfectly clear is that there is considerable confusion of goods ordered for Charmaine and goods ordered for Marguerite and that the evidence before me has to be approached with considerable care. There is here a

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defence to Wallands' claim that requires thorough investigation, with full discovery and opportunity for cross-examination. As in Mr. Goldstein's alleged debt against Joanita, I am not satisfied that any of the debt on which Wallands founds its petition is owing, though the debt may, of course, be established in proper proceedings for the purpose. As I have indicated, winding-up proceedings are not proper proceedings for that purpose.

There remain two matters which I can quite quickly dispose of. The first is the plaintiffs' allegation of the lack of bona fides in the defendants in presenting their petitions. I have already dealt with the meaning of bona fides in presenting a petition. It is clear, if I am correct in my conclusion so far, that, as the debts are disputed on substantial grounds, to pursue the petitions would be an abuse of the process of the court. That is all I need say on bona fides or that it is advisable that I would say on it at this stage of the conflict between the parties.

The second matter to mention is the company's insolvency. Insolvency in connection with a winding-up petition means inability to pay debts as they fall due and not a deficiency of assets as compared with liabilities. Indeed, insolvency in that sense, of inability to pay debts as they fall due, clearly appears from Mr. Mann's own affidavits. The evidence of such insolvency of both companies is altogether so conclusive to my mind that I do not propose to analyse or particularise it, especially as I do not rely on it for my conclusion but come to my conclusion despite it.

My conclusion, therefore, is, in the case of each company, for the reasons which I have given at length, that the plaintiffs are entitled to the injunctions which they claim, until trial or further order, unless, of course, the parties, by chance, consent to agree to treat this motion itself as the trial of the action.

Orders accordingly.

Solicitors: *Martins; Lewis Cutner & Co.*

[COURT OF APPEAL]

* CARBERRY (*formerly an infant but now of full age*) *v.* DAVIES AND ANOTHER

C. A.

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HARMAN, DIPLOCK and FENTON ATKINSON L.JJ.

[1965 C. No. 119]

Vicarious Liability—Agency—Negligence—Motor car—Driven by employee and nephew of owner in evenings—Used to take owner's son on social jaunts—Accident—Negligence of driver—Responsibility of owner—Test of.