no direct financial interest in keeping this bankruptcy on foot. His real concern is to ensure that Mr. Kenny remains bankrupt and therefore incompetent to conduct the litigation relating to the Forum site. I do not suggest that Mr. Taylor had no locus standi to be heard on the application. But it seems to me relevant to take into account the fact that he is motivated not by any legitimate financial interest likely to be satisfied in the distribution of Mr. Kenny's estate in the Bankruptcy Court, but by extraneous advantages that he would achieve by ensuring that the disability of the bankruptcy continued to affect Mr. Kenny. I do not think the Bankruptcy Court should be used as a means of stopping litigation alleged to be vexatious. There are other and better ways of stopping vexatious litigants.

I therefore consider that, in weighing the facts relevant to the exercise of the discretionary powers to order cross-examination or to grant an annulment, it is proper to take into account the fact that the person asking for cross-examination and opposing the annulment desires to achieve from the bankruptcy personal advantages which the law of bankruptcy was not designed to provide for him. I should add that I am expressing no view, one way or the other, as to the merits of Mr. Kenny's claim relating to the Forum site, of which we know nothing.

Appeal dismissed with costs.

Solicitors: *W. R. Hodge & Halsall, Southport; Brett, Ackerley & Cooke, Manchester; Treasury Solicitor.*

[Reported by PAUL NIEKIRK ESQ., Barrister-at-Law]

[COURT OF APPEAL]

STONEGATE SECURITIES LTD. *v.* GREGORY

[1979 S. No. 053]

1979 Oct. 4, 5

Buckley and Goff L.JJ. and Sir David Cairns

Company—Winding up—Petition—Creditor—Debt disputed on substantial grounds—Whether prospective creditor to be restrained from presenting petition—Form of injunction—Jurisdiction of Companies Court—Companies Act 1948 (11 & 12 *Geo.* 6, *c.* 38), *ss.* 223, 224 (1) (*c*)

Prior to the presentation of a petition to wind up the plaintiff company, the defendant, in accordance with section 223 (*a*) of the Companies Act 1948, served a notice on the company demanding the payment of a debt of £33,000 within

21 days. The company, while accepting that there was a contingent or prospective liability to the defendant, denied that the debt was presently due. It issued a writ and sought interlocutory relief restraining the defendant from presenting a petition. Blackett-Ord V.-C. found that there was a bona fide dispute whether the defendant was a creditor for a sum presently due and granted an injunction restraining the defendant from presenting a petition in respect of the alleged debt provided that, within three weeks, the directors of the plaintiff company made a declaration of solvency of the company.

On appeal by the company:—

Held, allowing the appeal, that the Companies Court was not the forum for resolving the question whether the plaintiff company's debt to the defendant was due, prospective or contingent and, since there was a bona fide dispute, as the defendant now conceded, whether the debt was presently due, the plaintiff company was entitled to an unconditional injunction restraining the defendant from presenting a petition based on a failure of the plaintiff company to pay within 21 days of the receipt of the statutory demand for payment of a debt presently due (post, pp. 579F—580C, 583B–E, 586C–G, 587B–E, 588E—589D, G); that further, such an onerous condition should not have been imposed on the directors of the plaintiff company because the defendant was entitled, if he chose, to present a petition for the winding up of the company on the basis of a contingent debt and, in those circumstances, the burden of proof as to the solvency of the company was on the defendant and not on the plaintiff company or its directors (post, p. 584D–G).

Mann v. *Goldstein* [1968] 1 W.L.R. 1091 applied.

Dictum of Goulding J. in *Holt Southey Ltd.* v. *Catnic Components Ltd.* [1978] 1 W.L.R. 630, 634 disapproved.

Order of Blackett-Ord V.-C. varied.

The following cases are referred to in the judgments:

Bryanston Finance Ltd. v. *de Vries* (*No. 2*) [1976] Ch. 63; [1976] 2 W.L.R. 41; [1976] 1 All E.R. 25, C.A.

Holt Southey Ltd. v. *Catnic Components Ltd.* [1978] 1 W.L.R. 630; [1978] 2 All E.R. 276.

Mann v. *Goldstein* [1968] 1 W.L.R. 1091; [1968] 2 All E.R. 769.

The following additional cases were cited in argument:

Atlantic Star, The [1974] A.C. 436; [1973] 2 W.L.R. 795; [1973] 2 All E.R. 175, H.L.(E.).

J.N. 2 Ltd., In re [1978] 1 W.L.R. 183; [1977] 3 All E.R. 1104.

APPEAL from Blackett-Ord V.-C. sitting as an additional judge in the Chancery Division.

By an agreement made in July 1972, the plaintiff company, Stonegate Securities Ltd., agreed to buy shares from the defendant, Philip Howard Gregory, 12, Park Place, Leeds, which he held in a property company, Trinette Ltd., for the sum of £67,000. The shares were to be transferred following the grant of outline planning permission and on completion the sum of £35,000 was to become payable and the balance of £32,000

payable on the acquisition by Trinette Ltd. of detailed planning permission. In May 1973, the defendant, on payment of £17,500, transferred his shares to the company and various other payments were paid by the company to the defendant on account during the next three years. The agreement was also modified by a reduction of £5,000 in the purchase price.

On January 25, 1979, the defendant served a notice on the plaintiff company, under section 223 (*a*) of the Companies Act 1948, to pay within 21 days the sum of £33,000 which the defendant alleged was due and owing to him by the company. On February 5, 1979, the company issued a writ and by notice of motion claimed interlocutory relief in the form of an injunction, restraining the defendant from presenting a petition to wind up the company until the trial of the action and, in the alternative, an injunction restraining the advertisement of such petition.

Blackett-Ord V.-C. granted an injunction restraining the presentation of a petition subject to a condition that the plaintiff's directors made a declaration of the company's solvency within three weeks.

By a notice of appeal dated April 9, 1979, the company appealed from so much of the order as made the injunction conditional on the grounds that the judge erred in law (1) in refusing to grant to the company an unconditional injunction restraining the defendant (until trial of the action or further order) from presenting any winding up petition other than on the basis that he was merely a contingent creditor of the company in respect of the £33,000; (2) that the order which was actually made, although it restrained the defendant from presenting a petition on the basis of his being a contingent creditor, was in effect conditional upon all the directors of the company making (within the period specified) a declaration of solvency of the company as at March 21, 1979; that the imposition of that condition was erroneous in that it had the effect of reversing the burden of establishing a prima facie case for winding up which section 224 (1) (*c*) imposed upon every contingent creditor who presented a petition for the winding up of a company and was inconsistent with and/or repugnant to proviso (*c*); (3) alternatively if the judge had a discretion whether to grant to the company an unconditional injunction restraining the defendant (until trial of the action or further order) from presenting a winding up petition other than on the basis that he was merely a contingent creditor of the company in respect of £33,000, then having regard to the evidence before the judge and in all the circumstances of the case, the judge exercised his discretion wrongly in refusing to grant such an unconditional injunction.

The facts are stated in the judgment of Buckley L.J.

W. F. Stubbs Q.C. and *Leonard Porter* for the plaintiff company.
J. F. Parker Q.C. and *J. H. Allen* for the defendant.

The main submissions of counsel are indicated in the judgments (post, pp. 583B, 584C–D, 585B–C, 589G).

BUCKLEY L.J. This is an appeal from an order of Blackett-Ord V.-C. sitting as an additional judge of the Chancery Division in Leeds on March 20, 1979, whereby he granted an injunction in terms which I shall have to explain later, restraining the defendant from presenting a petition for the winding up of the plaintiff company; he made his injunction subject to a condition which also I shall have to explain in due course.

The relevant statutory provisions are contained in sections 222, 223 and 224 of the Companies Act 1948. Section 222, as is very familiar, provides that a company may be wound up by the court if "(*e*) the company is unable to pay its debts." Section 223 provides that a company shall be deemed to be unable to pay its debts if, among other things, a creditor to whom the company is indebted in a sum exceeding £50 then due—and I emphasise those last two words—has served a statutory demand upon the company and the company has failed for three weeks to comply with it. That provision has no application to a case in which the creditor is a creditor in respect of a sum which is not presently due. Section 224 (1) indicates who may present a winding up petition, and it provides that an application for the winding up of a company shall be by petition presented either by the company or by any creditor or contributory of the company. Then there are provisos, and proviso (*c*) is in the following terms:

> "The court shall not give a hearing to a winding up petition presented by a contingent or prospective creditor until such security for costs has been given as the court thinks reasonable and until a prima facie case for winding up has been established to the satisfaction of the court."

In that context, in my opinion, the expression "contingent creditor" means a creditor in respect of a debt which will only become due in an event which may or may not occur; and a "prospective creditor" is a creditor in respect of a debt which will certainly become due in the future, either on some date which has been already determined or on some date determinable by reference to future events.

Where a creditor petitions for the winding up of a company, the proceedings will take one of two courses, depending upon whether the petitioner is a creditor whose debt is presently due, or one whose debt is contingent or prospective by reason of the proviso in paragraph (*c*) of section 224 (1). If the creditor petitions in respect of a debt which he claims to be presently due, and that claim is undisputed, the petition proceeds to hearing and adjudication in the normal way; but if the company in good faith and on substantial grounds disputes any liability in respect of the alleged debt, the petition will be dismissed or, if the matter is brought before a court before the petition is issued, its presentation will in normal circumstances be restrained. That is because a winding up petition is not a legitimate means of seeking to enforce payment of a debt which is bona fide disputed.

Ungoed-Thomas J. put the matter thus in *Mann* v. *Goldstein* [1968] 1 W.L.R. 1091, 1098–1099:

> "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 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."

I gratefully adopt the whole of that statement, although I think it could equally well have ended at the reference to want of locus standi. In my opinion a petition founded on a debt which is disputed in good faith and on substantial grounds is demurrable for the reason that the petitioner is not a creditor of the company within the meaning of section 224 (1) at all, and the question whether he is or is not a creditor of the company is not appropriate for adjudication in winding up proceedings.

The circumstances may, however, be such that the company adopts an intermediate position, denying that the debt is presently due but not denying that it will or may become due in the future—in other words, accepting it as a contingent or prospective debt. The present case is of the last-mentioned kind and the present appeal involves consideration of what is proper in such a case.

On January 25, 1979, the defendant served upon the company a notice in the following terms:

> "Take notice that you are required to pay Philip Howard Gregory" —and an address is given—"within 21 days from the date of this notice the sum of £33,000 which sum is due and owing by you to Philip Howard Gregory. Take notice that this notice is served in accordance with the provisions of section 223 (*a*) of the Companies Act 1948."

That is clearly a notice which affirms that the whole of the sum of £33,000 was presently due and owing from the company to the defendant; indeed, it was only upon that basis that such a statutory demand could have been served.

The debt of £33,000 relied upon is said to have arisen out of a transaction relating to certain shares in a company called Trinette Ltd., which were sold by the defendant to the company. In February 1972 it appears that the defendant was the holder of 24 shares out of the total issued share capital of 100 shares of Trinette Ltd., and he agreed to sell those 24 shares to the company for £80,000. That agreement was later modified by mutual agreement between the parties so that the sale was restricted to 14 only of the shares and the purchase price was reduced from £80,000 to £67,000. Trinette Ltd. was a company engaged in a speculative development of certain land and had the benefit of a contract connected with that project, but no planning permission had at that time been obtained. By the agreement that was entered into in July 1972

modifying the original sale agreement, it was provided that completion of the transfer of the 14 shares which were then to be sold should take place following the grant of outline planning permission in respect of the development; and it was further provided that £35,000, part of the £67,000 purchase price, would be payable on completion and that the balance of the consideration, £32,000, would become payable upon the acquisition by Trinette Ltd. of the whole of the proposed site or such part of it as would enable Trinette Ltd. to proceed with, and complete, the re-development in accordance with the outline planning consent.

In 1973 the company paid the defendant £17,500, part of the purchase price payable under the agreement—that is to say, half of the £35,000—and in May of that year the 14 shares were transferred to the plaintiff company. It was then agreed that the balance of £17,500, the other half of the £35,000, should be paid only on obtaining detailed planning consent for the development, so that was a further modification of the sale agreement and, as the judge pointed out in his judgment, nobody could foresee whether the £17,500 which was to be paid on detailed planning permission being obtained would become payable before the £32,000, or whether the £32,000 would become payable before the £17,500. There were various payments made to the defendant on account during 1974 and 1975, and in 1976 there was a further agreement between the parties that the purchase price should be reduced by the sum of £5,500. Allowing for that, the judge said that there was left outstanding under the sale agreement a sum of £33,000, of which it was suggested that at least £1,000 must be payable forthwith. The company now admits that the defendant is a contingent creditor at any rate in a sum of £33,000, but not that any part of that sum is immediately due. The defendant alleges that at least some part of the £33,000 is immediately due, but Blackett-Ord V.-C. held that this was not established on the evidence, and the defendant now accepts that there is a bona fide dispute as to whether any part of the £33,000 is now due, and he further admits that in so far as the debt is contingent, the relevant contingency may never happen. So the situation is such that the defendant cannot petition to wind the company up on the basis that he is a debtor for a sum which is presently due, because that position is disputed in good faith and on substantial grounds; but he is competent to petition as a contingent creditor. As a petitioner in that capacity, however, he would have to comply with the requirements of proviso (*c*) of section 224 (1), under which the burden rests upon him of establishing a prima facie case for winding up the company.

Consequent upon the service of the statutory demand, the company issued its writ in the action in which the present appeal arises, on February 5, 1979. On the same day it served notice of motion for interlocutory relief in the following terms: the notice of motion asks for an order:

> " restraining the defendant whether by himself or by his servants or agents or any of them or otherwise howsoever until the trial of this action or further or other order from presenting a petition for

the winding up of the plaintiff company based upon an alleged debt of £33,000 referred to in a notice dated January 25, 1979, purported to be served upon the plaintiff company under section 223 (*a*) of the Companies Act 1948,"

and then it asks in the alternative for an injunction restraining advertisement of any such petition.

Blackett-Ord V.-C. in effect granted relief in accordance with paragraph 1 of the notice of motion, but he made such relief conditional; I will read the form of his order. After the formal parts it provides:

"This court doth order that the defendant be restrained for a period of three weeks from March 20, 1979 (if during the said period of three weeks, all the directors of the plaintiff company make a declaration of solvency of the plaintiff company as at March 21, 1979) and thereafter until the trial of this action or further order from presenting whether by himself or by his agents or servants or otherwise howsoever any petition under the Companies Act 1948 for the winding up of Stonegate Securities Ltd. in respect of an alleged debt of £33,000 referred to in a notice dated January 25, 1979, and purported to be served upon the plaintiff company under section 223 (*a*) of the Companies Act 1948."

Then provision was made for the order to be suspended in the event of any appeal being made against the order, such appeal being prosecuted with due diligence.

That order is certainly ineptly drafted in one respect; the words in parenthesis, "(if during the said period of three weeks, all the directors of the plaintiff company make a declaration of solvency of the plaintiff company as at March 21, 1979)," have, I think, quite clearly got in in the wrong place; they should follow the words "and thereafter." It is also, I think, not crystal clear whether the injunction was one intended to restrain the presentation of any petition founded upon a debt of £33,000, or whether it was only intended to restrain the presentation of a petition founded upon an allegation that that sum was presently due to the petitioner. We are however told by counsel that it was made clear in the court below that the company was not seeking an injunction which would restrain a petition based on the debt of £33,000 as a contingent debt, and from the terms of Blackett-Ord V.-C.'s judgment I think it was certainly his intention that the injunction should restrain, and restrain only, the presentation of a petition founded upon the statutory demand, or possibly founded upon an averment that the £33,000 was presently due to the defendant.

The company appeals, in effect, against so much of the order as makes the injunction conditional. By its notice of motion the company seeks to have the order discharged in whole, and in lieu thereof an order in the following form, which I read from the notice of motion, interpolating certain additional words which, it seems to me, are necessary to give it satisfactory form. The notice asks for:

"An order that (upon the plaintiff by its counsel giving the normal cross-undertaking as to damages)... the defendant be restrained

A until judgment in this action or further order from presenting whether by himself or by his servants or agents or otherwise howsoever any petition for the winding up of the plaintiff company under the Companies Act 1948, (a) on the basis that a sum of £33,000 is allegedly due from, and/or immediately payable by, the plaintiff to the defendant; or (b) on any basis other than that the defendant must be treated for the purposes of the petition as a contingent B creditor of the plaintiff in a sum of £33,000."

There is no cross-appeal. Mr. Parker, appearing for the defendant, contends that the judge was entitled in his discretion to grant the injunction which he did grant in its conditional form.

The legal position appears to me to be this: (1) the defendant could not properly petition as a creditor who had an established or undisputed C debt immediately due; (2) the defendant was, and is, entitled to petition as a contingent creditor; (3) when the injunction was granted the company had sound reasons for supposing that the defendant proposed to present a petition based upon his statutory demand—that is, upon the basis of a debt of £33,000 immediately due. Such a petition would not on its face have fallen within the terms of proviso (*c*) of section D 224 (1); it would have been a petition upon which the defendant could not have proceeded, at any rate without amendment, on account of the fact that immediate liability to pay was bona fide disputed; it would in effect have been demurrable and, unless amended to recognise the debt as being for the purposes of the petition (although not for any other purposes) a contingent one, it would have been bound to be dismissed. (4) In these circumstances in my judgment the company was entitled E to an injunction restraining the presentation of a petition which did not restrict the alleged indebtedness in that way; that is to say, which did not proceed upon the footing that for the purposes of the petition the petitioner was content to be treated merely as a contingent creditor.

There remains the question of whether Blackett-Ord V.-C. was justified in making the injunction conditional in the way he did. He F stated his reasons for doing so as " I think therefore that the defendant should not be allowed to base a petition on the notice of January 25, 1979,"—I pause there to say that from that I think it is reasonably clear that Blackett-Ord V.-C. did not think that he was restraining the presentation of any petition except one that was based upon the statutory notice or, possibly, one which in terms alleged that the G £33,000 was presently due and owing to the petitioner. I continue to read the transcript of the judgment:

> "... but I also consider that he is entitled to know if Stonegate Securities Ltd. has any assets. It apparently has not filed an annual return since 1976"—again I pause to interpolate that that position has now been rectified; an annual return has been filed down to H September 30, 1977—". . . and such assets as it is said to have consist, or consisted at that date of inter-group credits. Nothing, if I may say, that one could really get one's teeth into. I propose, therefore, to grant an injunction in accordance with paragraph 1

of the notice of motion, and the injunction will take effect forthwith, but it will be subject to the plaintiff company, all the directors of the plaintiff company joining in making a statutory declaration of the solvency of that company in the form which would be applicable in the case of a members' voluntary winding up except that instead of a reference to the date of the commencement of the winding up, the reference should be today's date. It will, of course, schedule the assets and liabilities in the usual way, and that must be supplied to Mr. Gregory within 21 days. If it is not, the injunction will cease. If this term is complied with the defendant, Mr. Gregory, must pay the costs of the motion, and if not, the plaintiff will pay the costs."

As Mr. Stubbs has pointed out, the preparation of a declaration of solvency is an onerous business, and may be a very difficult one. It involves, or may involve, making estimates of the value of assets (such, for instance, as contracts and book debts) which may be speculative and very difficult to value. It also involves putting a value on future or contingent liabilities, which also may be very difficult to assess. It is not a declaration as to the commercial solvency of the company—that is to say, as to its ability to pay its debts as they fall due—but of its ability to discharge all its debts, whatever their character, within 12 months. Realisation of the company's assets within that period might well be an improvident act; directors might well feel difficulty about making such a declaration under the sanctions of the Perjury Act 1911 notwithstanding that the company might be fully commercially solvent. If the only established footing upon which the defendant can petition to wind up the company is as a contingent or prospective creditor, the burden rests on him to show prima facie that there is a case for winding up the company. If the ground for seeking a winding up order is that the company is unable to pay its debts—and no other ground is suggested here—it would be incumbent on the defendant to establish a prima facie case that this was so. The condition of Blackett-Ord V.-C.'s order seems to me to reverse this burden of proof, for if the condition is not complied with it would be open to the defendant as a petitioner to rely upon that fact as some evidence of the company's inability to pay its debts; and moreover, having regard to the nature of the declaration of solvency which I have mentioned, the condition imposes upon the company, through its directors, a heavier burden of proof than the burden of establishing merely that the company is not commercially solvent; it imposes the burden of proof of establishing that the company will ultimately be solvent on the basis of a prospective liquidation within 12 months. It seems to me that such a condition cannot be supported in principle.

In the first place, Blackett-Ord V.-C. was, I think, with deference to him, mistaken in saying that the defendant—that is, the prospective petitioner in the present case—was entitled to know if Stonegate Securities Ltd. had any assets. Of course, a creditor is entitled to have access to the published public documents of the company; he is entitled

A to see the annual returns which are filed in the registry. But he is not entitled to have access to the company's books and he is not entitled to demand to have any information with regard to the company's financial position. In any event, for the reasons which I have adumbrated, it seems to me that this is placing upon the company a quite unreasonable burden and one which cannot be justified in principle.

B Mr. Parker concedes that if upon its true construction and effect the injunction should be treated as restricted to restraining the presentation of a petition, either founded upon the statutory declaration or founded upon an averment that the £33,000 is presently due to the defendant, he could not justify any effort to uphold the correctness of the condition. But he has contended that upon its true interpretation Blackett-Ord V.-C.'s order is appropriate to restrain the presentation of a petition C founded upon the debt of £33,000, whether immediately due or contingent, and he says that in those circumstances it was open to the judge, in his discretion, to append the condition to the injunction. In my judgment that is not a proposition which can stand up to investigation. If the injunction, upon its true construction, forbids the presentation of a petition based upon the debt of £33,000, whether immediately due or only contingently due, then in my judgment it was the wrong injunction D to grant and the appeal should succeed upon the ground that the injunction was too wide and not justified by the circumstances of the case.

If, on the other hand, upon its true construction it does no more than restrain the presentation of a petition founded upon an assertion that the £33,000 was immediately due, or based upon a statutory E declaration which embraces the same assertion, then there is no justification for adding any condition to the injunction, for that is an injunction to which in my judgment the plaintiff company was clearly entitled. So it seems to me that for those reasons this appeal must succeed, upon the basis that the conditional character of the injunction is not one which can be upheld on principle.

F The way in which the order is framed does not, in my opinion, express with happy clarity what I think was the true intention of Blackett-Ord V.-C. I would allow the appeal and substitute for the injunction as framed in the order an injunction in the terms which I have read out, taken from the notice of appeal with the minor amendments which I incorporated in my reading of the notice of appeal.

G In the course of the argument we were referred to the decision of Goulding J. in *Holt Southey Ltd.* v. *Catnic Components Ltd.* [1978] 1 W.L.R. 630; indeed, that was a case which was referred to by Blackett-Ord V.-C. in his judgment under appeal. In that case a statutory demand had been served in respect of an alleged debt of £39,000-odd said to be due from the company, Holt Southey Ltd., to the proposed petitioner. That debt appears to have been disputed, though exactly what the full H nature of the dispute was does not clearly emerge from the report. As regards £20,000, part of the £39,000, the dispute was as to whether that part of the debt was immediately payable or whether it was only payable in the future; there seems to have been no dispute about the fact that it

was at any rate payable at some time. What the position was with regard to the balance of the £39,000 does not clearly appear, but I think it must have been the case that there was a bona fide dispute with regard to that part of the liability.

Goulding J. held that, although the circumstances and the evidence showed that there was a substantial dispute, the presentation of the petition could not be restrained, since the prospective petitioner was at any rate a prospective creditor in respect of the £20,000, and as a prospective creditor the proposed petitioner was qualified to petition to wind up the company. Goulding J. considered that in these circumstances he should leave it to the Companies Court to weigh up and decide by its own process the allegations which might be made in the petition, and accordingly he declined to restrain the presentation of the petition. In the course of his judgment he referred to Ungoed-Thomas J.'s decision in *Mann* v. *Goldstein* [1968] 1 W.L.R. 1091 and to the decision of this court in *Bryanston Finance Ltd.* v. *de Vries* (*No. 2*) [1976] Ch. 63, and towards the end of his judgment, Goulding J. said, at p. 634:

> "Then Mr. Cohen makes an alternative submission, assuming I get to the point (at which I have in fact arrived) of holding that there is a substantial dispute regarding the debt alleged in the statutory demand, but at the same time thinking that I ought not to ignore the defendant's locus standi as a prospective creditor for a sum admitted in that respect. Mr. Cohen suggests that I ought, none the less, to restrain the defendant until further order from presenting a winding up petition otherwise than as a prospective creditor. He asks me also to restrain the advertisement of a petition presented on that footing until prior notice has been given to the plaintiff. I have hesitated over that application, but it seems to me that I ought not to accede to it. As I have said, I am very loath to extend this type of proceeding. As I have also said more than once, I think the basis of *Mann* v. *Goldstein* is that it is an abuse for a person who is not qualified as a petitioner under the terms of the Companies Act 1948 to present a petition. If he is qualified, it seems to me that the only satisfactory course is to leave the Companies Court itself to weigh up and decide by its own process all the allegations that may be made in the petition. It was said by Sir William James V.-C. in *In re Imperial Guardian Life Assurance Society* (1869) L.R. 9 Eq. 447, 450, quoted in the report of *Mann v. Goldstein* [1968] 1 W.L.R. 1091, 1097, that 'A winding up petition is not to be used as machinery for trying a common law action,' and that of course is the whole basis of the application before me. But that does not mean that the Companies Court may not have to decide on the validity or terms of an alleged liability once the petitioner has established his locus standi to petition before that court."

If when a matter is brought before a court a prospective petitioner has not yet made clear in what form, or on what basis, he proposes to petition, whether as a creditor in respect of a debt presently due or in respect of a contingent or prospective debt, an application to restrain

A presentation of the petition might well be premature if the only dispute as to liability was as to whether it was immediate or prospective. But if the prospective petitioner has made it clear that he proposes to petition upon the footing of a debt alleged to be presently due, and there is a bona fide dispute on substantial grounds as to its being presently due, it seems to me that on principle, and in accordance with the principles that I have been discussing earlier in this judgment, the court ought to B restrain the presentation of a petition otherwise than in terms which make it plain that for the purposes of the petition the petitioner is content to be treated as being no more than a prospective or contingent creditor. If Goulding J. in the passage which I have read meant that in a case in which there was such a dispute it would be right to allow the petition to be presented in a way which claimed the debt to be C presently due, and sought to obtain winding up on that basis, and if he intended to say that in such circumstances the Companies Court should decide whether or not, upon the true view of the facts, the debt was in fact presently due then, with all deference to Goulding J. I think the judge went too far. The whole of the doctrine of this part of the law is based upon the view that winding up proceedings are not suitable proceedings in which to determine a genuine dispute about whether the D company does or does not owe the sum in question; and equally I think it must be true that winding up proceedings are not suitable proceedings in which to determine whether that liability is an immediate liability or only a prospective or contingent liability. It might be that in some cases the point was so simple and straightforward that the winding up court might be able to deal with it, but I feel certain that it cannot be right E to say that, in a case where there is a dispute of that nature, the only course which the court to which application is made to restrain presentation of the petition can follow is to leave it to the Companies Court to resolve all the issues between the parties. Accordingly, I do not think that the observations of Goulding J. in the paragraph that I have read can be regarded as satisfactory.

F Goff L.J. Some confusion has been imported into this case by reason of the fact that the defendant and his advisers took the view that the injunction would restrain the defendant from presenting a petition to the court even on the footing that the defendant conceded, for the purposes of the petition but for such purposes only, that he was no more than he is admitted to be, namely, a contingent creditor. If that were G the true construction of the order, then in my judgment it was plainly too wide and such an injunction ought not to have been granted. Moreover, I cannot see that the vice of ordering too wide an injunction could be cured by making it subject to a condition which, with all respect to Blackett-Ord V.-C., was too onerous and also calculated to place the defendant in a better position vis-à-vis the debtor than that in H which under section 224 (1), proviso (*c*) of the Companies Act 1948 he ought to stand.

However, it is clear that the company never asked for so wide an injunction; all it sought was an injunction to restrain the defendant

from presenting a petition on any other basis than as a contingent creditor. Moreover, I think it is clear that Blackett-Ord V.C. did not intend to do more than that, and although I agree that the wording of the order (which is in fact taken from the notice of motion) is not happily phrased, in my judgment that is its true construction.

Once one reaches that conclusion, it seems beyond doubt that the injunction ought to stand, but to be discharged from the condition, and I would agree, as Buckley L.J. has proposed, that it should be worded in the form of the notice of appeal, with certain minor amendments which have been indicated.

The defendant, by serving a statutory notice under section 223 (*a*), threatened and intended to present a petition based upon the contention that the debt was immediately payable and based upon default in compliance with the notice as evidence of inability on the part of the company to pay its debts. It has never effectively resiled from that position, at all events until the appeal came to be heard.

I agree, therefore, that the appeal should be allowed, and that the order should be in the form proposed by Buckley L.J.

I would, however, wish to add some observations on the decision of Goulding J. in *Holt Southey Ltd* v. *Catnic Components Ltd.* [1978] 1 W.L.R. 630. He said, at p. 634:

> "Thus it seems to me that the point taken by Mr. Potts is a good one and that at least I ought not to prevent the presentation of a petition based on a prospective debt."

So far I find nothing to quarrel with in that conclusion. [His Lordship then cited the passage from Goulding J.'s judgment, at p. 634, already read by Buckley L.J. (see ante, p. 586C–G and continued:] Goulding J. there appears to me to be saying that even where the court is satisfied that there is a bona fide dispute whether the debt is presently payable, but it is established or conceded that the would-be petitioner is at least a contingent or prospective creditor, then he should be allowed to present a petition based on his claim that he is a creditor presently entitled, with or without an alternative claim as a contingent or prospective creditor, leaving the Companies Court to resolve the dispute; that is, to determine the rights of the parties, not merely the issue whether there is a bona fide dispute.

I say that because, in the opening part of the passage I have cited the judge said, at p. 634:

> "... assuming I get to the point (at which I have in fact arrived) of holding that there is a substantial dispute regarding the debt alleged in the statutory demand, but at the same time thinking that I ought not to ignore the defendant's locus standi as a prospective creditor for a sum admitted in that respect."

and because he then went on at the end of the passage to say that the quotation from *Mann* v. *Goldstein* [1968] 1 W.L.R. 1091 did not mean that the Companies Court might not have to decide on the validity or terms of an alleged liability once the petitioner has established his locus

A standi to petition. So he was proceeding on the basis that he had already satisfied himself that there was a bona fide dispute, and therefore all that could be left to the Companies Court, if anything was to be left to it at all, would be to resolve that dispute. If that be what the judge meant, then in my judgment, with all respect to him, that is wrong.

Once the court is satisfied that there is a bona fide dispute as to the right of an alleged creditor to claim as one to whom a debt is presently B due then, unless he elects for the purposes of the petition, to proceed on the basis, if that be not also disputed, that he is only a contingent or prospective creditor, then he ought to be restrained. If, however, the judge meant no more than that it should be left to the Companies Court to decide whether or not there was a bona fide dispute, then, with all respect, I find that rather surprising in view of his own conclusion that C there was. It may well be right if the court which is asked to grant an injunction is not satisfied on the question whether there is a bona fide dispute or whether it is insubstantial or trumped up, to leave the creditor to present his petition on his own claim, with or without an alternative claim as a contingent or prospective creditor, and to leave the Companies Court to decide for itself whether there is a bona fide dispute or not; but given the premise that there is a bona fide dispute, D it seems to me that the company is entitled as of right to an injunction to restrain a petition which it is threatened shall be brought upon the basis, in effect, that there is no such dispute.

Accordingly, I agree with the order proposed.

E SIR DAVID CAIRNS. I agree that this appeal should be allowed. At the time of the hearing before Blackett-Ord V.-C. it was clear that there was a bona fide dispute as to whether any debt was presently due from the company to the defendant. The defendant was nevertheless threatening to present a petition on the basis that there was a debt of £33,000 presently due. The company was therefore entitled, as of right, to an injunction to restrain the presentation of such a petition.

F In my opinion, the language used by Blackett-Ord V.-C. in his judgment shows that it was only an injunction to that effect that he intended to grant. If that is so, I do not consider that it was open to him to impose any such condition as he did impose on the grant or continuance of the injunction.

It was contended by Mr. Parker, who appeared for the defendant in G this court, that the order as drawn up restrained the defendant from presenting any petition in his capacity as a creditor for £33,000, even on the basis of its being a contingent debt. I would not so construe the order as drawn up, although I agree that it would be desirable to amend the language as proposed in the notice of appeal with the further slight amendments mentioned by Buckley L.J. to make it clearer.

H If, however, the defendant had been enjoined from petitioning even as a contingent creditor, I consider that such an injunction would not have been one which could, as a matter of discretion, be granted conditionally, but one which ought not to have been granted at all.

However, for the reasons I have already given, and for those which have been given more fully by Buckley and Goff L.JJ., I agree that the right course for this court to take is to delete the condition and to make the amendments necessary to make quite plain what the defendant is restrained from doing.

Appeal allowed.
Order of Blackett-Ord V.-C. discharged.
Injunction in terms of notice of appeal with amendments as indicated in judgment of Buckley L.J. substituted.
Plaintiff's costs of motion before Blackett-Ord V.-C. and of appeal, to be taxed in favour of defendant.

Solicitors: *Halliwell Landau & Co., Manchester; Willey, Hargrave & Co., Leeds.*

L. G. S.

[COURT OF APPEAL]

MIDLAND BANK TRUST CO. LTD. AND ANOTHER *v.* GREEN AND ANOTHER

[1970 G. No. 334]

1977 Oct. 17, 18, 19, 20, 21 — Oliver J.

1979 March 12, 13, 14: April 11 — Lord Denning M.R., Eveleigh L.J. and Sir Stanley Rees

Land Charge—Charges registrable—Estate contract—Unregistered option to purchase farm—Farm conveyed to grantor's wife at gross undervalue—Whether court can inquire into adequacy of consideration—Whether wife "purchaser . . . for money or money's worth"—Whether option void against wife—Whether fraud—Land Charges Act 1925 (15 & 16 *Geo.* 5, *c.* 22), *s.* 13 (2)

In 1961 a father granted to his son a 10-year option to purchase the farm which the son farmed as a tenant. The option was not registered under the Land Charges Act 1925, and in 1967 the father, wishing to deprive the son of his option, conveyed the farm, then worth about £40,000, to the mother for £500. When the son found out about the conveyance he sought to register the option and give notice exercising it. In proceedings commenced, after the mother's death, by the son (and carried on after his death by his executors, the present plaintiffs), against, inter alia, the mother's estate for, inter alia,