

(1986)

[CHANCERY DIVISION]

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## \*CORNHILL INSURANCE PLC. v. IMPROVEMENT SERVICES LTD. AND OTHERS

[1985 C. No. 3585]

1985 July 22

Harman J.

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*Company—Winding up—Petition—Insurance company failing to pay debt due—Improbability of company's insolvency—Whether prosecution of petition abuse of process of court—Whether petitioner able properly to swear to belief in company's insolvency—Companies Act 1985 (c. 6), s. 158(1)(e)<sup>1</sup>*

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The plaintiff, a well known insurance company with a substantial business, had paid to the defendants the greater part of their claim under the terms of an insurance policy. On 12 June 1985 the parties orally agreed to settle the outstanding part of the claim for £1,154. On 14 June the defendants made a written request for payment and upon receiving no reply wrote to the plaintiff on 26 June pursuant to section 518(1)(a) of the Companies Act 1985 giving notice that unless the sum was received within 21 days they would present a petition to wind up the company on the ground that it was unable to pay its debts. On 12 July, just before the expiry of the 21 days, the plaintiff obtained an ex parte injunction restraining the defendants from presenting or threatening to present a petition to wind up the company. On the plaintiff's application for a continuation of the injunction on the ground that the presentation of such a petition would be an abuse of process since the defendants, knowing the standing of the plaintiff, could not truthfully swear that they believed the plaintiff to be insolvent:—

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*Held*, refusing the application, that where a company was under an undisputed obligation to pay a specific sum and failed to do so, it could be inferred that it was unable to do so; that, accordingly, the defendants could properly swear to their belief in the plaintiff company's insolvency and present a petition for its winding up (post, pp. 115F–G, 117F–H, 118B–D, G–H).

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*In re Globe New Patent Iron and Steel Co.* (1875) L.R. 20 Eq. 337 and *Mann v. Goldstein* [1968] 1 W.L.R. 1091 applied.

The following cases are referred to in the judgment:

*Company, In re A* (1950) 94 S.J. 369

*Globe New Patent Iron and Steel Co., In re* (1875) L.R. 20 Eq. 337

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

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No additional cases were cited in argument.

## MOTION

The plaintiff, Cornhill Insurance Plc., owed the defendants, Improvement Services Ltd. and Patrick Bennett and Peter David East (trading together as Bennett East & Partners), the sum of £1,154. When

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<sup>1</sup> Companies Act 1985, s. 518: "(1) A company is deemed unable to pay its debts—(a) if a creditor . . . to whom the company is indebted in a sum exceeding £750 then due has served on the company, by leaving it at the company's registered office, a written demand requiring the company to pay the sum so due and the company has for three weeks thereafter neglected to pay the sum . . . or (e) if it is proved to the satisfaction of the court that the company is unable to pay its debts . . ."

1 W.L.R.            **Cornhill Insurance v. Improvement Services (Ch.D.)**

A the plaintiff failed to pay the sum due the defendants threatened that if the sum were not paid within three weeks they would present a petition for the winding up of the plaintiff. On 12 July 1985, just before the expiry of the three weeks, the plaintiff applied *ex parte* for an injunction to restrain the defendants, whether by themselves or by their directors, officers, servants or agents or otherwise howsoever from presenting or threatening to present a petition to wind up the plaintiff under the provisions of section 517(1)(e) and (f) of the Companies Act 1985, or publishing any such threat and an injunction was granted in those terms. Pursuant to the conditions of the injunction the plaintiff, having issued a writ on 15 July, applied by notice of motion on 22 July for the injunction to be continued.

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C     The hearing was *in camera* but judgment was given in open court.  
      The facts are stated in the judgment.

*Arthur Stevenson* for the plaintiff.

*Terence Etherton* for the defendants.

D     HARMAN J. I have before me a motion on behalf of the plaintiff, the well known insurance company Cornhill Insurance Plc. to restrain presentation of a winding up petition against it. I have heard the matter *in camera* upon the application of Mr. Stevenson for the plaintiff on the ground that such an application, if heard in open court, will be misunderstood and may give rise to quite unwarranted fears and cause great damage to the plaintiff, wrongly. I acceded to that application, it not being opposed, although I now wonder whether I should have.

E     The matter arises, quite astonishingly, out of the sum of approximately £1,154. The defendants to the action were assureds of the plaintiff and are a company, Improvement Services Ltd., and two individuals trading as Bennett East & Partners. The claim is for fire damage. The damage occurred I think last October, certainly some time last autumn. The plaintiff has been negotiating through loss adjusters and it has paid something of the order of £65,000 under the fire policy in respect of the loss. Given the standing of the plaintiff and the sums already paid it was a matter of wonder that it has ended up with an application to the Chancery Division to restrain a winding up petition over £1,154, which seems a small sum in this context.

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G     The application arises in this way. On 12 June 1985 the solicitors acting for the claimants, the defendants here, spoke to the loss adjusters acting for the plaintiff and agreed on the telephone that two specific items, some damage to plaster and damage to an injection machine lance, should be agreed at specific sums. They total, as I say, £1,154. On 14 June the solicitors wrote a civil and proper letter and said, "May we have a cheque to settle these two items?" Thereafter, sadly, there is silence on the correspondence. There was a long history set out in the affidavit by the defendants' solicitor who has been conducting the matter which, it is claimed, shows that the plaintiff has unreasonably dragged its feet, delayed payment and behaved in a manner unfitting an insurance company of high repute. I am not going to decide anything about that. I shall neither find that those allegations are justified nor find that they are unjustified. It is not in my view material to this motion. But it is plain that a long period of time passed and, rightly or wrongly, the solicitors became impatient.

I think it unfortunate that they became impatient, because at an earlier stage, on 10 June, the solicitors had succeeded, by speaking to head office, in obtaining promises from head office to ring back upon looking into the matter. That promise was complied with and a further promise made, when it had been looked into, to "send a cheque off tomorrow," which was also fulfilled. It shows that kindness sometimes pays. But nonetheless the solicitors were entitled, and their clients were entitled, to stand upon their strict rights, and they did so. They wrote their letter of 14 June. No answer followed, and on 26 June they sent to the plaintiff a document which said:

"We give you notice, pursuant to the Companies Act, that unless the sum is received within 21 days of receipt a petition to liquidate the Cornhill will be issued without further notice."

It is not quite a normal form of statutory demand under section 223 of the Companies Act 1948, and further the sum claimed by it, £1,581.83, is not broken down into any separate parts. It will be seen at once that that is more than the £1,154 which was agreed and admitted by the conversation of 12 June.

There followed a meeting on 8 July at which, according to the defendants' solicitors' attendance note, the loss adjusters acting for the plaintiff treated it as perfectly extraordinary that payment for the £1,154 had not been made. There followed on 10 July a letter from Mr. Stevenson's instructing solicitors, who were brought into the matter solely and only in connection with this matter of the demand and the winding up threat. They wrote a letter which set out the matter at length and asserted that total payments of £65,000 had been made to date and alleged that the matters were still in dispute, or rather under negotiation regarding quantum. The letter then referred to the meeting of 8 July, the attendance note of which I have already mentioned.

There followed a series of miscarriages of telexes, owing to the fact that some ingenious new scheme called Telecom Gold worked less well than Gold should work. In the result the telexes were not a speedy means of communication but, like so much modern paraphernalia, far less efficient than the old-fashioned written message delivered by hand. Be that as it may, there followed a letter from the plaintiff's solicitors on 12 July saying they were going to take steps to obtain an injunction, and there followed an ex parte application to me at about 3 p.m. on Friday, 12 July. The significance of that time is that the 21 days time limit imposed by the letter of 24 June expired on Monday, 15 July. It followed that a winding up petition was technically able to be presented upon the section 223 ground on the morning of Monday 15 July, which might be before any application to the court could be made on that Monday. Thus, Mr. Stevenson submitted to me, the Friday afternoon was appropriate.

The application, as I say, is based upon the proposition that it would be an abuse of process to present a winding up petition against the plaintiff. I was on Friday, 12 July, clear that that was indeed the case, and I was for a long time this morning convinced that it was the case, not on the usual ground for restraining presentation of winding up petitions, that the debt is disputed on substantial grounds, but upon the ground that the fundamental allegation of insolvency, which is the basis upon which a winding up order is made, could not be properly put forward in any petition against the plaintiff. My reasoning was that the

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A plaintiff, I think it can be properly said, is a public company known (sufficiently widely to allow judicial notice to be taken) to be carrying on insurance business in a very large way indeed. Given the requirements imposed by statute for the solvency of insurance companies, it seemed impossible to believe that there could be any inadequacy of assets. There were in fact produced to me in evidence this morning accounts down to December 1984 which show huge assets and plainly, as I thought, a sum of £1,154 could not conceivably be either here or there in the solvency of the plaintiff.

B The question arises: what should the court do with a threat to present a petition against a company which the court instinctively considers must be solvent, and as to which there is now evidence before the court that it was solvent to a major degree on 31 December 1984?

C The point as to possible abuse of process which particularly concerned me was that every winding up petition must contain an averment that the company is insolvent and is unable to pay its debts, and the affidavit in support, sworn either by the petitioner or by his solicitor under the winding up rules, must aver that the statements in the petition are true. Thus it would have been necessary for someone to go on oath that he genuinely believed the plaintiff to be insolvent, and I for a considerable time was much concerned that that was an impossible allegation for anyone conscientiously to make. It seems to me that it could well be an abuse of process to make an impossible allegation.

D I have been convinced in argument that that approach is wrong. In my view the statutory demand itself is something of a red herring. It is, maybe, an unfortunate red herring because it demands £1,581.83 without quantifying how that figure is arrived at, but that figure is not, it is put forward, an undisputed amount due—£1,154 is the undisputed amount—and the form of the statutory notice is less than normal to satisfy what is now section 518(1)(a) of the new Companies Act 1985. As I have said, I believe that the reference to section 518(1)(a) in the statutory demand is a red herring, because, as it was put to me, in my view rightly, there is equally appositely, 518(1)(e), “If it is proved to the satisfaction of a court that a company is unable to pay its debts.”

E In that connection I was referred to an observation of Sir George Jessel M.R. in *In re Globe New Patent Iron and Steel Co.* (1875) L.R. 20 Eq. 337, 338, where he ruled that the company could be wound up whenever it was proved to the satisfaction of the court that the company was unable to pay its debts. Upon the facts there he had evidence that the company had not paid its debts and therefore was satisfied that it was unable so to do. He ignored any question of statutory demand—rightly in my respectful view—and said that that is merely another way of establishing the case.

F Here we have then, on 12 July when the matter first came before me and today £1,154 which is quite undoubtedly due and which has not been paid—which has not been paid, I may add, since first 12 June when it was orally agreed to be paid, second 14 June when it was demanded in clear, courteous and specific terms in writing, third since 26 June when there was a statutory demand for a greater sum which should have concentrated minds on what was possibly due, and fourth today, when no tender of that amount has been made although there have been telexes offering what are described as payments on account of £2,000. In my view an offer of a payment on account in a round sum such as £2,000 in a context of three listed claims, two of them being

£1,154 and the third being a quite different claim for loss of profits in a several thousand pound figure, is not an adequate figure, let alone a tender of payment of the £1,154. Had a cheque been offered for those sums the position might be different; but, as one can say, this is a question of offers, offers and no performance. A

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

“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.” C D

That appears to me to be sound reasoning and sound law. I reinforce it by a reference to *In re A Company* (1950) 94 S.J. 369 where Vaisey J., in a matter in which counsel of the utmost distinction in Chancery at that time, both leading and junior, appeared, said that where a company was well known and wealthy it was the more likely that delay in settlement of its obligations would create some suspicion of financial embarrassment: E

“Rich men and rich companies who did not pay their debts had only themselves to blame if it were thought that they could not pay them.”

In my view those words apply to this case also. This is a case of a rich company which could pay an undoubted debt and has chosen—I think I must use that word—not to do so from 12 June to today. In my view in such circumstances the creditor was entitled to (a) threaten to and (b) in fact if it chose to present a winding up petition, and I was wrong to make the *ex parte* order which I made on 12 July and I should not accede to this motion to continue that order today. F

I concede that the matter is sad and unfortunate because it may be there were other and out of court remedies which might effectively have got the money before now. Nonetheless it is my business to give people their rights, according to their proper entitlement in the law and not to force them into other courses, and in my judgment each defendant was entitled to say: “I am undoubtedly owed £1,154. If you don’t pay me I must suspect you can’t. Therefore I can properly swear that you are insolvent and I can properly present a winding up petition to the Companies Court.” I so hold and therefore refuse to make any order on this motion in favour of the plaintiff. G H

*Application dismissed.*

*Solicitors: Stanleys & Simpson North; William Stockler & Co.*

[Reported by SARAH WADHAM, Barrister-at-Law.]