[CHANCERY DIVISION]

*In re A COMPANY (No. 0012209 of 1991)

1991 Nov. 5 — Hoffmann J.

Insolvency—Winding up—Petition—Company failing to pay on statutory demand—Company not alleged to be insolvent—Liability disputed—Whether presentation of petition abuse of process—Whether injunction restraining presentation to be granted

Winding up petitions ought not to be used as an alternative to an application for summary judgment under R.S.C., Ord. 14, and it is an abuse of the process of the Companies Court for a creditor to present a petition for the winding up of a company which is solvent and which has raised a bona fida triable defence to the creditor's claim (post, p. 354C–H).

Where, therefore, a creditor served on a solvent company a statutory demand in respect of a disputed contractual debt and the company applied for an injunction to restrain the creditor from presenting a petition for the winding up of the company:—

Held, that the injunction would be granted and the creditor would be ordered to pay the company's costs of the application on an indemnity basis (post, p. 354G–H).

Cornhill Insurance Plc. v. Improvement Services Ltd. [1986] 1 W.L.R. 114 distinguished.

The following case is referred to in the judgment:

Cornhill Insurance Plc. v. Improvement Services Ltd. [1986] 1 W.L.R. 114

The following additional cases were cited in argument:

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

Modern Engineering (Bristol) Ltd. v. Gilbert-Ash (Northern) Ltd. [1974] A.C. 689; [1973] 3 W.L.R. 421; [1973] 3 All E.R. 195, H.L.(E.)

Mondel v. Steel (1841) 8 M. & W. 858

Pillings (C.M.) & Co. Ltd. v. Kent Investments Ltd. (1985) 30 B.L.R. 84, C.A.

ORIGINATING MOTION

By an originating motion dated 25 October 1991, the applicant company sought an order that the respondent company be restrained from presenting whether by itself, its servants or agents or otherwise howsoever any petition for the winding up of the applicant company under the provisions of the Insolvency Act 1986, pursuant to a statutory demand dated 10 October 1991 or based on an alleged debt of £665,826·50 (or any part thereof) described therein. The grounds of the application were that (1) the alleged debt was, as was known to the respondent company to be, bona fide in dispute on substantial grounds and/or (2) the applicant company was a solvent company.

The facts are stated in the judgment.

Nigel Pleming for the applicant.

Howard Palmer for the respondent company.

HOFFMANN J. This is an application to restrain the presentation of a winding up petition. The applicant company is part of a larger property

group. Its own accounts for the year to 31 December 1990 show that it has net assets of about £100m. and the group resources are a good deal larger. It is accepted to be solvent and capable of paying the alleged debt on which the petition is proposed to be founded. The respondent company has served a statutory demand, claiming £665,826·50 as being due under the terms of a building contract by which the respondent company was engaged to refurbish an office building in the City of London.

The parties acted on the assumption that they had entered into the J.C.T. standard form of building contract with contractors' design, although by the time the applicant company purported to terminate the contract in October no contractual document had actually been signed. Clause 30 of this standard form provided for interim payments upon the making of applications by the contractor supported by valuations. Valuations in accordance with the standard form of the contract were to be submitted at monthly intervals, but the parties in April 1991 agreed to specific dates separated at approximately monthly intervals for five of those valuations, namely from May to September inclusive. Each valuation included the whole of the value of the work to date, giving credit for the amounts paid under earlier valuations. Payment was to be made within 14 days of the issue of an application for interim payment. By clause 33.4, if the employer considered that the valuation was excessive he was required to issue the contractor with a notice to that effect and to pay whatever amount he considered to be properly due. The clause said that such notice was to be given forthwith, but in practice the parties appear to have treated that as meaning within the 14-day period provided for payment. The contract contained an arbitration clause which allowed disputes over interim payments to be submitted to arbitration while the work was still proceeding.

For the period up to 13 August 1991 the respondent company submitted 14 valuations. In each case the applicant's project managers, A.Y.H. Partnership ("A.Y.H."), certified to their clients that a lesser sum was due. The applicant gave notice of that certificate to the respondent company and paid only the sum certified. There was no request for arbitration. There has been a dispute as to what happened during August. The applicant says that in order to accommodate the respondent company's cash flow problems, which seemed to be having the effect of slowing down the progress of the work, it was agreed at meetings on 12 and 19 August that the respondent company could submit its next valuation on 20 August, that is to say well within the one month period provided by the contract and before the 6 September date which had been agreed in the April letter. It was also agreed that in order to provide the respondent company with an incentive to speed up the work the applicant would make a £150,000 payment in two instalments—£75,000 on 20 August and another £75,000 at the end of the month—if certain work had been completed by that date. On 20 August 1991 A.Y.H. issued a certificate valuing work completed up to that date and added the first instalment of the incentive payment.

The applicant's case is that the payment on 20 August was agreed to be treated as in response to an application for payment on that date, and brought forward what would otherwise have been not payable until 6 September. The respondent company, on the other hand, said that it was not a new accelerated valuation under the contract, nor an application for payment on their part, but a revision of the 13 August valuation and represented an acknowledgment by A.Y.H. that their

A original valuation had been too low. That is a dispute which in my view cannot be resolved on the affidavits. On 6 September, which was the date fixed in accordance with the original timetable, the respondent company presented a new valuation and application for interim payment, and that is the valuation upon which the statutory demand is based. Mr. Lovett of A.Y.H. says that a few days later he telephoned Mr. Baker of the respondent company and told him that the valuation and application B would not be accepted because they were premature. In the applicant's view the effect of the agreement to have another valuation on 20 August invalidated the original time table agreed in April which had clearly been constructed on the basis that the dates there agreed were at monthly intervals. Now that there had been introduced an additional valuation on 20 August it followed according to the applicant company C that there would not be another one until 20 September. Mr. Baker, on the other hand, says that when he gave the application to Mr. Lovett on site, Mr. Lovett said nothing to indicate that it was premature. On the contrary, in his usual way he went around the building looking to see how far the work had progressed. He also denies that Mr. Lovett said anything to that effect on the telephone. That again is not a matter on which I can come to a conclusion about one way or the other on D affidavits.

Mr. Baker then went on holiday, and meanwhile A.Y.H. prepared a new valuation as at 20 September, which they said was the right date, and which showed that in their view so far from anything being owing to the respondent company, over £17,000 was due to the applicant. The matter was taken up again by the respondent company who wrote on E 19 September to A.Y.H. asking why it had not received a certificate in respect of their 6 September valuation and requesting that it be issued as a matter of urgency. On 23 September the project managers wrote back, saying in terms that the 6 September valuation was premature and outside the contractual framework.

On 2 October the applicant purported to terminate the contract, and the respondent company was dismissed from the site. The letter of F termination, which was handed to the respondent company on that date, is not very revealing about the grounds upon which that company was alleged to be in repudiatory breach, and the evidence which has been sworn on behalf of the applicant takes the matter little further. The contractual completion date was 31 May, and from other parts of the evidence one is left to infer that delay would be the principal ground G relied upon as constituting repudiation. The result is that the applicant claims that it now has an unquantified claim for damages arising out of the need to engage new contractors to finish the work.

The respondent company says that it has an unanswerable claim to the amount due under the 6 September application. The machinery of the contract provides that the amount due under a valuation has to be paid within 14 days unless the employer has invoked the machinery of H clause 33.4 by issuing a notice stating the amount which in his opinion is due and paying that amount. In this case the applicant or A.Y.H. issued no such certificate in response to the 6 September valuation, and accordingly the respondent company says that that valuation stands. Whether it does or not seems to me entirely to depend upon the effect of the agreement arrived at orally between the parties at those meetings on 12 and 19 August. The applicant says that the effect of that meeting was to revise the original calendar for the presentation of applications

for interim payment and to introduce an accelerated application on 20 August. The consequence of that in its contention was to invalidate the 6 September date and postpone the date for any subsequent valuation until the contractual period of a month from 20 August had expired.

In order to say that the respondent company is entitled to present a winding up petition I must come to the conclusion that that argument is either not put forward in good faith or that it has really no rational prospect of success. In my view it is not possible on the affidavit evidence to come to that conclusion. There is in my judgment a triable issue on that question, and if that is right then the whole question of whether the application for interim payment, which forms the basis of the statutory demand, was in accordance with the contract is something which is disputed and would have to be tried.

In addition to that the applicant says that it has a cross-claim for damages arising out of the repudiation of the contract. It is, I think, fair to say that the grounds upon which it claims to have repudiated the contract are not stated with any degree of particularity in the evidence, and I do not think it is necessary for me to say what view I would have taken if that had been the sole ground relied upon. For present purposes, however, it is sufficient to say that there seems to me to be a bona fide dispute on substantial grounds in relation to the validity of the 6 September application.

It does seem to me that a tendency has developed, possibly since the decision in *Cornhill Insurance Plc. v. Improvement Services Ltd.* [1986] 1 W.L.R. 114, to present petitions against solvent companies as a way of putting pressure upon them to make payments of money which is bona fide disputed rather than to invoke the procedures which the rules provide for summary judgment. I do not for a moment wish to detract from anything which was said in the *Cornhill* case, which indeed followed earlier authority, to the effect that a refusal to pay an indisputable debt is evidence from which the inference may be drawn that the debtor is unable to pay. It was, however, a somewhat unusual case in which it was quite clear that the company in question had no grounds at all for its refusal. Equally it seems to me that if the court comes to the conclusion that a solvent company is not putting forward any defence in good faith and is merely seeking to take for itself credit which it is not allowed under the contract, then the court would not be inclined to restrain presentation of the petition. But if, as in this case, it appears that the defence has a prospect of success and the company is solvent, then I think that the court should give the company the benefit of the doubt and not do anything which would encourage the use of the Companies Court as an alternative to the R.S.C., Ord. 14 procedure.

For those reasons the injunction will go. The basis upon which the injunction is granted is that presentation of the petition is an abuse of the process of the court. I think that it should be made clear that abuse of the petition procedure in these circumstances is a high risk strategy, and consequently I think the appropriate order is that the petitioner should pay the company's costs on an indemnity basis.

Order accordingly.

Solicitors: Waltons & Morse; Theodore Goddard.

T. C. C. B.