Neutral Citation Number: [2015] EWCA Civ 1030

Case No: A2/2014/2542

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE,
CHANCERY DIVISION
HIS HONOUR JUDGE HODGE QC
3113 of 2014

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 13/10/2015

Before :

LORD JUSTICE McCOMBE
LADY JUSTICE GLOSTER
and
SIR COLIN RIMER

- -

Between :

WILSON AND SHARP INVESTMENTS LTD	**Appellant**
- and -	
HARBOUR VIEW DEVELOPMENTS LTD	**Respondent**

- -
- -

Ms Krista Lee (instructed by **BPL Solicitors Ltd**) for the **Appellant**
Mr Clifford Darton (instructed by **Watkins Ryder Solicitors Ltd**) for the **Respondent**

Hearing dates : Thursday 16 July 2015.

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Approved Judgment

Lady Justice Gloster :

Introduction

1. This is an appeal against the dismissal by His Honour Judge Hodge QC ("the judge") of an application by Wilson and Sharp Investments Ltd ("the appellant") for an injunction to restrain Harbour view Developments Ltd ("the respondent") from presenting a winding up petition against the appellant based on an alleged debt of £902,506. The debt is the balance alleged to be due under four interim certificates issued on 1 August and 5 September 2013 under two building contracts by which the respondent carried out building works at the appellant's sites in Bournemouth. The appellant also appeals against the judge's order that it pays the respondent's costs of the application summarily assessed at £28,196.98.

2. Miss Krista Lee appeared as counsel on behalf of the appellant; Mr Clifford Darton appeared as counsel on behalf of the respondent.

Issues arising on the appeal

3. In summary the issues on the appeal are:

   i) Issue 1: whether the proposed petition debt is disputed on substantial grounds.

      The appellant contends that the sums set out in the interim payment certificates were no longer payable after the respondent entered Creditor's Voluntary Liquidation ("CVL") on 25 July 2014; this argument is based upon clauses in the contracts that state:

      > "As from the date the Contractor becomes insolvent … the Employer need not pay any sum that has already become due."

      The appellant contends that the judge wrongly rejected its construction of the contract and failed to apply the correct test of whether the debt was disputed in good faith and on substantial grounds.

   ii) Issue 2: whether, in accordance with what is said to be the established practice of the Technology and Construction Court ("TCC") not to enforce interim payment obligations in favour of insolvent contractors, the respondent should not be permitted to enforce an interim payment obligation by way of a winding up petition, given that it is insolvent and in CVL.

      The appellant contends that the judge, in permitting the respondent to present a petition, acted inconsistently with the established practice of the TCC which, it is said, recognises the provisional nature of interim payment obligations and that enforcement should not be ordered where there is no prospect of recovering payment if those payment obligations are subsequently varied.

   iii) Issue 3: whether the appellant has serious and genuine cross claims which exceed the sums alleged to be outstanding under the interim payment certificates.

> The appellant contends that the respondent's works were overvalued in the interim payment certificates and further that it has substantial claims for damages based upon the respondent's repudiatory breach of contract and defective and late works. It contends that the judge was wrong to reject such arguments and to refuse to exercise his discretion in favour of the appellant.

Factual background

4. The appellant is a property developer, whose directors are Mr Sam Wilson and Mr Craig Sharp. The respondent was at the material time a building contractor, whose main director was Mr Paul Clapcott. The appellant and the respondent entered into two contracts ("the contracts") for the development of student accommodation on Christchurch Road, Bournemouth. The first contract was in respect of 4 Christchurch Road ("Union House") and is dated 15 August 2012. The second contract was in respect of 6 Christchurch Road ("Hurn House") and was entered into in the first half of 2013. Both contracts were subject to the JCT[1] ICD[2] Conditions ("the Conditions").

5. Mr Tom Green of Greenward Associates Ltd ("GA") was the architect/contract administrator and quantity surveyor (as defined) appointed in respect of the contracts. By clause 3.4.1 of the contracts the appellant was given the power to replace Mr Green , but by clause 3.4.2 it was provided that any such replacement could not:

> "…disregard or overrule any certificate, opinion, decision or instruction given by any predecessor in that post, save to the extent that the predecessor if still in post would then have had the power under this Contract to do so."

6. Pursuant to sections 110 to 111 of the Housing Grants Construction Grants and Regeneration Act 1996 ("the HGCRA"), the Conditions included provisions for the making of monthly interim payments. These provisions allowed for:

   i) the contractor (i.e. the respondent) to make an application for payment not less than 7 days before the due date (clause 4.10.1);

   ii) the architect/contract administrator to issue an interim certificate stating the sum due not later than 5 days after the due date (clause 4.7.2);

   iii) a final date for payment of an interim payment 14 days after the due date (clause 4.11.1);

   iv) the sum to be paid to be as stated in the interim certificate, save and to the extent that the employer (i.e. the appellant) issued a Pay Less Notice (as defined) not later than 5 days before the final date for payment (clause 4.11.5).

7. The amount due in respect of each interim certificate was the total value of the work properly executed by the contractor, site materials provided and any listed items (clause 4.8.1). Clause 4.14 provided for a final assessment of the Contract Sum in the Final Certificate (both as defined), which could result in adjustment of any of the valuations in the earlier interim certificates.

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[1] "The Joint Contracts Tribunal Ltd."
[2] Intermediate Building Contracts with Contractors Design (2011) Edition.

8. Clause 8.5 of the Conditions dealt with the insolvency of the contractor. The relevant provisions will be set out in full below. It is the appellant's contention that the effect of clauses 8.1.3, 8.5.3, 8.5.3.1 and 8.7.3 was that, as from the date that the contractor passed a resolution for voluntary winding-up without a declaration of solvency, the employer was no longer under any obligation to pay any sum that had already become due and payable under any interim payment certificate.

9. The contract dated 15 August 2012 in respect of Union House provided for the respondent to take possession of the site on 3 September 2012 and for a completion date of 31 August 2013**.** Under the contract the appellant was entitled to recover liquidated damages of £10,000 per week in the event of delay but only after the Contract Administrator had certified non-completion in accordance with clause 2.22.

10. The contracts provided for a rectification period of 6 months and by clause 2.30 obliged the respondent to return to site and remedy any defects of which it was given notice by the Contract Administrator.

11. By an undated deed ("the Guarantee") the appellant's directors, Mr Sharp and Mr Wilson, personally guaranteed payment of certain sums which had to be paid in accordance with the Works. There was subsequently a dispute as to the extent of the sums in respect of which Mr Sharp and Mr Wilson had given their guarantees.

12. The respondent obtained possession of the site at Union House in December 2012 and Hurn House in April of the following year, being sometime after the dates provided in the contracts. Following possession the respondent proceeded with the Works (as defined) and various variations to the Works under the supervision of the Contracts Administrator, Mr Green.

13. In August and September 2013 the following interim certificates were issued by GA:

    i) Union House Contract:

Issue Date	Interim Certificate	Gross Valuation	Amount Due
01/08/2013	14	£1,878,622.22	£339,712.41
05/09/2013	15	£2,197,163.12	£318,540.90

    ii) Hurn House Contract

Issue Date	Interim Certificate	Gross Valuation	Amount Due
01/08/2013	7	£2,819,324.56	£530,962.76
05/09/2013	8	£3,270,635.43	£451,310.87

    It is the appellant's case that the above interim certificates substantially overvalued the respondent's works. This is disputed by the respondent.

14. The appellant did not issue any Pay Less Notices and accordingly the appellant did not dispute that, according to the terms of the Conditions, the sums certified became

payable and that the final dates for payment were 14 August 2013 and 14 September 2013 respectively. In their witness statements sworn in support of the application for the injunction, the directors of the appellant gave two reasons for not issuing Pay Less Notices at the time: first, it is said that the directors were not aware of the need to issue Pay Less Notices and GA did not advise them to do so; secondly, it is said that both the respondent and GA were refusing to disclose project documentation to the appellant and accordingly the appellant was not in a position to check GA's/the respondent's valuation and/or quantify the suspected overvaluation for the purposes of providing an adequately detailed Pay Less Notice.

15. Interim Certificate 14 was paid in full. The appellant does not dispute that, as at 12 November 2013, the amount unpaid was £1,202,506.55 in respect of the three remaining certificates.

16. The history of the dispute between the parties was set out in the witness statements that were before the lower court and in relation to which there was no cross-examination. According to the appellant's evidence, from August 2013, it was concerned that the projects were running over budget and were in substantial delay; the appellant was losing confidence in both the respondent and GA; the appellant believed that there was (and continued to be) a strong commercial relationship between the respondent and GA and that GA was no longer acting in the appellant's best interests. According to the respondent's evidence, on 9 September 2013 and 2 October 2013 the respondent suspended its services in respect of both contracts in accordance with clause 4.13 on the grounds that it had not been paid the sums due under the interim certificates.

17. On 20 September 2013, the respondent issued statutory demands against the directors of the appellant (Mr Sharp and Mr Wilson), in respect of the unpaid sums under the three interim certificates, pursuant, or purportedly pursuant, to the Guarantee, which the respondent claimed covered the debts due by the appellant under the interim certificates. Mr Sharp and Mr Wilson applied to set aside the statutory demands on two grounds: first, that the alleged debts were due from the appellant and not from the directors; and secondly, that the Guarantee did not apply to the alleged debts in respect of the interim certificates but only as security for payments due by the respondent to one of its suppliers, Metsec, for the supply and fix of a steel frame. Mr Sharp and Mr Wilson did not seek to raise any cross-claim by the appellant in respect of any alleged overpayments or defective works by the respondent, even though they would have been entitled to raise such a set off as a defence to any claim against them under the Guarantee. However, neither of them admitted that the alleged debt was owed by the appellant; they merely said:

> "I do not admit the debt because the debt relates to monies owing by [the appellant] in connection with two building contracts between [the respondent] and [the appellant] and not myself."

In their evidence on the application, Mr Sharp and Mr Wilson explained that, on the basis of the advice which they had received, they were confident that the grounds which they had raised as a defence to the statutory demands would succeed, and therefore there was no need to raise any other ground.

18. There then followed negotiations between the appellant, the respondent and their respective directors. These resulted in an agreement dated 12 November 2013 ("the November Agreement") between the appellant and the respondent. This provided for a revised payment schedule for the sums due under the interim certificates and for the payment of further sums payable under the contracts. It also included an acknowledgement by the appellant that the balance of the sums outstanding under the interim certificates was due for payment. The material terms for present purposes were as follows:

> "2 Completion of the Works
>
> (a) [The respondent] agrees to remobilise and re-commence the Works on the Commencement Date.
>
> …
>
> 3 Payment
>
> (a) **The parties acknowledge that the balance of the Payment interim certificates in the sum of £1,202,506.55 excluding VAT is due for payment.** In consideration of this agreement [the respondent] agree[s] to waive any claim for interest and damages for late payment accrued as at the date of this agreement.
>
> (b) [the appellant] will pay [the respondent] the sums due for payment exclusive of VAT under the Payment interim certificates in instalments on the respective due dates for payment. The parties acknowledge that the due dates otherwise determined by the Contracts and/or the Act [the HGCRA] are agreed as follows:
>
> (i) On condition that the Contract Administrator has issued further payment certificates (where required) the following sums are due for payment on the following due dates:
>
> (a) £200,000 on the Commencement Date[3];
>
> (b) … [and subsequent payments of £97,000 each week thereafter up to practical completion]
>
> (ii) …
>
> (c) In the event the payment at paragraph 3(b)(i)(a) is not made this agreement has no effect."

19. In addition clause 5(a) of the November Agreement suspended enforcement of the statutory demands which had been served on Mr Wilson and Mr Sharp for so long as the terms of the November Agreement were honoured by the appellant.

[3] This was seven days after the date of the November Agreement subject to satisfaction of certain conditions by the respondent.

20. The appellant made the initial payment of £200,000, but not until after the Commencement Date and in various tranches up until 13 December 2013. Nor did it make payment of any of the later instalments set out in clause 3(b)(i) of the November Agreement. Accordingly, it was common ground that clause 3(c) was triggered and that the November Agreement had no effect. There has been no further performance of the November Agreement by either party. In particular the respondent did not re-commence the Works.

21. On 11 December 2013, the appellant terminated, or purported to terminate, GA's appointment as contract administrator and quantity surveyor in respect of the two building contracts and subsequently appointed Mr Peter Dacey ("Mr Dacey") of Peter Gunning and Partners LLP in his place. Mr Dacey was also instructed by the appellant to value the respondent's Works.

22. On 21 January 2014 the respondent's solicitors wrote to the appellant's solicitors giving notice of the respondent's intention to terminate the contracts. The first paragraph of the letter read as follows:

> "Notice of Intention to terminate contracts
>
> I am instructed on behalf of [the respondent] to give notice of intention to terminate for non-payment of interim certificates in respect of the above sites effective from the date of this letter. Full details of those certificates are of course known to yourself and your client. Formal termination notice, in the absence of payment will be given on 4 February, clause 8. 9. 3.
>
> [The letter went on to complain that the respondent was entitled to possession of the sites and had wrongly been denied access]."

23. It does not appear however that any such formal termination notice was served on 4 February 2014.

24. On 22 January 2014, the appellant's solicitors replied to the respondent's solicitors terminating or purporting to terminate the respondent's employment under the contracts in the following terms:

> "Your client has not been refused access. There are security arrangements in place but access is not been denied.
>
> A letter will be coming out to you later this morning to confirm this email that your client's repudiation of contract is accepted; the repudiation primarily relates to your client's complete failure to comply with its statutory obligations with regard to the CDM regulations and the hoarding licence (the current CAs recent emails on these subjects refer). Your client has refused to respond to the current EA's attempts to engage with your client with regard to both the serious issues and the EA and our client to reach the conclusion (quite legitimately) your client has no intention whatsoever to engage or comply with its

> obligations. The contracts relating to 4 and 6 Christchurch Road are therefore determined.
>
> I am also instructed that significant damage has been caused to the property in your client's taken no steps whatsoever to protect the building from further damage."

25. The fact that the contracts had been terminated was not in issue before us. It was not necessary for the court below to determine how and when, or by whom, the contracts had been terminated, or the grounds of such termination, and it did not do so. It is the appellant's case that the respondent was in repudiatory breach of contract, which the appellant accepted on 22 January 2014, thereby terminating the contracts. That is disputed by the respondent.

26. Mr Wilson and Mr Sharp then proceeded with their applications to set aside the statutory demands made by the respondent against them. The applications were listed for hearing on 3 February 2014 but were adjourned on that date until the first open date after 3 March 2014 with permission to the respondent to adduce further evidence. Those proceedings were ultimately settled under the terms of an agreement dated 6 February 2014 ("the February Agreement") between the appellant, the respondent, Mr Sharp and Mr Wilson. Under the terms of the February Agreement:

    i) by paragraph 1, the appellant agreed to pay the respondent £100,000 by 10 February 2014;

    ii) in consideration of such payment, the respondent agreed not to present a winding up petition or any proceedings of any kind against the appellant for a period of 60 days from 6 February 2014; and

    iii) in consideration of a payment by Mr Sharp and Mr Wilson of £1 each to the respondent, it was agreed that the statutory demand proceedings were to be discontinued by way of Tomlin Order with no order as to costs and that "the statutory demands and [the Guarantee] which are the subject of the above proceedings are revoked and of no legal effect … PROVIDING that [the appellant] makes payment in accordance with paragraph 1 above."

27. The appellant duly paid the sum of £100,000 by 10 February 2014 under the terms of the February Agreement.

28. On 6 February 2014, Mr Dacey produced an interim valuation of the respondent's Works, which purportedly showed that the interim certificates had overvalued the respondent's works to such an extent that none of the unpaid sums were due.

29. On 27 February 2014, the respondent notified the appellant that it would present a winding up petition if the interim certificates were not paid prior to 7 April 2014.

30. On 3 April 2014, the appellant's solicitors wrote to the respondent setting out the detail of its cross claims, as then valued. The letter stated that, in Mr Dacey's view:

    i) the previous Contracts Administrator, Mr Green, had overvalued the Works by £452,524.20 in respect of Union House;

ii) £230,000 of this alleged overvaluation related to the construction of student accommodation on the top floor of Union House for which planning consent had yet to be obtained;

iii) the previous Contracts Administrator had overvalued the works at Hurn House by £717,238.75.

The letter concluded by stating that the interim certificates had overvalued the Works by £1,169,762.96 (i.e. in excess of the amounts outstanding under the certificates) and that there were other claims for damages. Attached to this letter were 8 pages of schedules setting out the basis of Mr Dacey's valuation which showed that £268,782.59 had been deducted for works for which planning permission had yet to be obtained.

31. On 17 April 2014, the respondent notified the appellant that it would present a petition for the winding up of the appellant on 25 April 2014. Accordingly on 24 April 2014 the appellant issued its application for an injunction to restrain such action. The application was supported by a statement from the appellant's solicitor, Mr Reeves. In that statement Mr Reeves stated that he hoped that Mr Dacey's final valuation would be available at the hearing of the application and that he had instructions to proceed to adjudication on the basis of that valuation. However no notice of such a referral has ever been served on the respondent.

32. The application came on for hearing before Hildyard J on 24 April 2014 when it was adjourned on undertakings to the first available date after 22 May 2014.

33. Between the start of these proceedings and the hearing on 10 July 2014 the following events occurred:

i) On 16 May 2014, the appellant obtained a planning appeal decision that affected the valuation of the respondent's works.

ii) On 21 May 2014, the respondent obtained a moratorium to enable it to put forward to its creditors proposals for a company voluntary arrangement ("CVA"). The proposals showed that the respondent was insolvent in an estimated amount of £137,749, even if it recovered in full the sums alleged to be due from the appellant. That moratorium stayed in place until 30 June 2014, when the proposals for a CVA were rejected by the respondent's creditors[4].

iii) On 30 June 2014, Mr Dacey issued updated valuations of the respondent's works to take account of the planning appeal decision and other matters. His conclusion was that the respondent had been overpaid by £240,550.36 across both of the contracts and that, accordingly, no sums were due to the respondent.

iv) On 2 July 2014, after rejection by its creditors of the directors' proposals for a "CVA", the respondent gave notice under section 98 of the Insolvency Act

[4] The creditors who voted against the CVA did not include the appellant because of the fact that the nominee for the purposes of the CVA adopted the respondent's position that the appellant owed the sums stated in the interim certificates.

> 1986 ("the 1986 Act") that a meeting of creditors was to be held on 11 July 2014 for the purposes of appointing a liquidator for the purpose of winding up the respondent's affairs and distributing its assets.

34. On 25 July 2014, after the hearing on 10 July 2014 had taken place, the respondent passed a special resolution that it be wound up voluntarily. There was no dispute that this court was entitled to receive that fact into evidence.

The legal background to the contracts

35. It was common ground that the statutory background to the case was Part II of the HGCRA, which applies to construction contracts such as the contracts in this case, and that one of the aims of the HGCRA was to improve cash flow within the construction industry. Part II included two major reforms:

    i) First, parties to a construction contract were entitled to payment by instalments: section 109. Every construction contract was to provide a mechanism for determining what payments become due, and when, and a final date for payment in relation to any sum, which became due: section 110. By section 111 (as originally enacted), a party could not withhold payment beyond the final date for payment, unless it had served a valid withholding notice.

    ii) Second, a party to a construction contract was given a statutory right to refer any dispute to adjudication at any time: section 108. That is a speedy form of dispute resolution, where the standard time for a decision is apparently 28 days. The adjudicator's decision is binding until the dispute is finally determined by legal proceedings, arbitration or by agreement.

36. Likewise it was common ground that these reforms reflected a "pay now litigate later" philosophy and that the general approach of the TCC was summarily to enforce adjudicators' decisions (without hearing any argument as to whether the adjudicator got it wrong and/or whether the paying party had a right of set off or other valid counterclaim), save where the adjudicator had acted outside his jurisdiction or was in breach of natural justice: see, for example, *Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd* [2000] BLR 522 at paragraph 29 per Chadwick LJ:

> "The second question raised by the appeal is whether the judge was right to give summary judgment to Dahl-Jensen for the amount which the adjudicator had decided Bouygues should pay. In the ordinary case I have little doubt that an adjudicator's determination under section 108 of the 1996 Act, or under contractual provisions incorporated by that section, ought to be enforced by summary judgment. The purpose of the Act is to provide a basis upon which payment of an amount found by the adjudicator to be due from one party to the other (albeit that the determination is capable of being re-opened) can be enforced summarily….".

See also The Technology and Construction Court Guide, 2nd ed. (30/4/2014) Section 9. It was also common ground that the courts have allowed the enforcement of

payment obligations under construction contracts to be the subject of statutory demands and winding up petitions: see e.g. *In Re a Company (No 1299 of 2001)* [2001] CILL 1745.

37. However the HGCRA did not expressly set out what was to occur on the insolvency of a party to a construction contract. Accordingly the interrelation between the HGCRA and insolvency law has to date largely been a matter of case law. Thus, for example, this court took the view in *Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd* that in circumstances where there were latent claims and cross-claims between parties, one of which was in liquidation at the date of the adjudication, there might well be a compelling reason to refuse summary judgment on a claim arising out of an adjudication which was, necessarily, provisional. Chadwick LJ explained the reasons for this in paragraphs 29 to 36 of his judgment in *Bouygues (UK) Ltd v Dahl Jensen (UK) Ltd*[5] as follows:

> "29……But this is not an ordinary case. At the date of the application for summary judgment - indeed at the date of the reference to adjudication - Dahl-Jensen was in liquidation.
>
> 30. In those circumstances rule 4.90 of the Insolvency Rules 1986 has effect. The rule is in these terms, so far as material:
>
> "(1) This rule applies where, before the company goes into liquidation there have been mutual credits, mutual debts or other mutual dealings between the company and any creditor of the company proving or claiming to prove for a debt in the liquidation.
>
> (2) An account shall be taken of what is due from each party to the other in respect of the mutual dealings and the sums due from one party shall be set off against the sums due from the other.
>
> (3) ...
>
> (4) Only the balance (if any) of the account is provable in the liquidation. Alternatively (as the case may be) the amount shall be paid to the liquidator as part of the assets."
>
> 31. That rule is made under section 411 of the Insolvency Act 1986. Subsection (2) of that section - and Schedule 8, paragraph 12 - provide that the Lord Chancellor may make provision by rules or regulations as to the debts that may be proved in the winding up. There is no doubt that the rule has statutory force. It applies wherever there have been mutual dealings, giving rise to mutual obligations and mutual credits, between a company which subsequently goes into liquidation and another party.

[5] With which both Peter Gibson and Buxton LJ J agreed.

32. The effect of the rule was explained by Lord Hoffman[n] in his speech in the House of Lords in Stein v Blake [1996] 1 AC 243……. [which Chadwick LJ went on to cite]

33. The importance of the rule is illustrated by the circumstances in the present case. If Bouygues is obliged to pay to Dahl-Jensen the amount awarded by the adjudicator, those monies, when received by the liquidator of Dahl-Jensen, will form part of the fund applicable for distribution amongst Dahl-Jensen's creditors. If Bouygues itself has a claim under the construction contract, as it currently asserts, and is required to prove for that claim in the liquidation of Dahl-Jensen, it will receive only a dividend pro rata to the amount of its claim. It will be deprived of the benefit of treating Dahl-Jensen's claim under the adjudicator's determination as security for its own cross-claim.

34. Lord Hoffman[n] pointed out, at page 252 in Stein v Blake that the bankruptcy set-off requires an account to be taken of liabilities which at the time of the bankruptcy may be due but not yet payable, or which may be unascertained in amount or subject to contingency. Nevertheless, the insolvency code requires that the account shall be deemed to have been taken, and the sums due from one party shall be set off against the other, as at the date of insolvency order. Lord Hoffman pointed out also that it was an incident of the rule that claims and cross-claims merge and are extinguished; so that, as between the insolvent and the other party, there is only a single claim - represented by the balance of the account between them. In those circumstances it is difficult to see how a summary judgment can be of any advantage to either party where, as the 1996 Act and paragraph 31 of the Model Adjudication Procedure make clear, the account can be reopened at some stage; and has to be reopened in the insolvency of Dahl-Jensen.

35. Part 24, rule 2 of the Civil Procedure Rules enables the court to give summary judgment on the whole of a claim, or on a particular issue, if it considers that the defendant has no real prospect of successfully defending the claim and there is no other reason why the case or issue should be disposed of at a trial. In circumstances such as the present, where there are latent claims and cross-claims between parties, one of which is in liquidation, it seems to me that there is a compelling reason to refuse summary judgment on a claim arising out of an adjudication which is, necessarily, provisional. All claims and cross-claims should be resolved in the liquidation, in which full account can be taken and a balance struck. That is what rule 4.90 of the Insolvency Rules 1986 requires.

> 36. It seems to me that those matters ought to have been considered on the application for summary judgment. But the point was not taken before the judge and his attention was not, it seems, drawn to the provisions of the Insolvency Rules 1986. Nor was the point taken in the notice of appeal. Nor was it embraced by counsel for the appellant with any enthusiasm when it was drawn to his attention by this Court. In those circumstances - and in the circumstances that the effect of the summary judgment is substantially negated by the stay of execution which this court will impose - I do not think it right to set aside an order made by the judge in the exercise of his discretion. I too would dismiss this appeal."

38. The case law prior to the coming into force of the Local Democracy, Economic Development and Construction Act 2009 ("the 2009 Act") also established that, notwithstanding the provisions of Part II of the HGCRA, parties to a building contract might validly agree that, if after the final date for payment the payee became insolvent, interim payments, in respect of which the date for serving a withholding notice had passed, were no longer payable: see *Melville Dundas Ltd v George Wimpey Ltd* (HL(Sc)) [2007] UKHL 18, [2007] 1 WLR 1136 at 1142-3 per Lord Hoffmann[6] at paragraphs 17-20, 22.

39. The 2009 Act came into force on 1 October 2011. This amended some of the provisions of Part II of the HGCRA as to payment; thus "Withholding Notices" were replaced with "Pay Less Notices" and the effect of *Melville Dundas* was confirmed by an amended section 111(10) of the HGCRA. The amended section 111 was in the following form:

> "111**Requirement to pay notified sum**
>
> (1)Subject as follows, where a payment is provided for by a construction contract, the payer must pay the notified sum (to the extent not already paid) on or before the final date for payment.
>
> (2)For the purposes of this section, the "notified sum" in relation to any payment provided for by a construction contract means—
>
> (a)in a case where a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;
>
> (b)in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with a requirement of the contract, the amount specified in that notice;

[6] With whom Lords Hope and Walker, agreed, but with Lord Mance and Lord Neuburger dissenting.

(c)in a case where a notice complying with section 110A(3) has been given pursuant to and in accordance with section 110B(2), the amount specified in that notice.

(3)The payer or a specified person may in accordance with this section give to the payee a notice of the payer's intention to pay less than the notified sum.

(4)A notice under subsection (3) must specify—

(a)the sum that the payer considers to be due on the date the notice is served, and

(b)the basis on which that sum is calculated.

It is immaterial for the purposes of this subsection that the sum referred to in paragraph (a) or (b) may be zero.

(5)A notice under subsection (3)—

(a)must be given not later than the prescribed period before the final date for payment, and

(b)in a case referred to in subsection (2)(b) or (c), may not be given before the notice by reference to which the notified sum is determined.

(6)Where a notice is given under subsection (3), subsection (1) applies only in respect of the sum specified pursuant to subsection (4)(a).

(7)In subsection (5), "prescribed period" means—

(a)such period as the parties may agree, or

(b)in the absence of such agreement, the period provided by the Scheme for Construction Contracts.

(8)Subsection (9) applies where in respect of a payment—

(a)a notice complying with section 110A(2) has been given pursuant to and in accordance with a requirement of the contract (and no notice under subsection (3) is given), or

(b)a notice under subsection (3) is given in accordance with this section,

but on the matter being referred to adjudication the adjudicator decides that more than the sum specified in the notice should be paid.

> (9)In a case where this subsection applies, the decision of the adjudicator referred to in subsection (8) shall be construed as requiring payment of the additional amount not later than—
>
> (a)seven days from the date of the decision, or
>
> (b)the date which apart from the notice would have been the final date for payment,
>
> whichever is the later.
>
> (10)Subsection (1) does not apply in relation to a payment provided for by a construction contract where—
>
> (a)the contract provides that, if the payee becomes insolvent the payer need not pay any sum due in respect of the payment, and
>
> (b)the payee has become insolvent after the prescribed period referred to in subsection (5)(a).
>
> (11)Subsections (2) to (5) of section 113 apply for the purposes of subsection (10) of this section as they apply for the purposes of that section."

The relevant provisions of the contracts

40. The relevant provisions of the contracts so far as the issues on this appeal are concerned are as follows:

> "**Contractor's right of suspension**
>
> 4.13
>
> 1 Without affecting the Contractor's other rights and remedies, if the Employer fails to pay the Contractor the sum payable in accordance with clause 4.11 (together with any VAT properly chargeable in respect of such payment) by the final date for payment and the failure continues for 7 days after the Contractor has given notice to the Employer …. of his intention to suspend the performance of his obligations under this Contract and the ground or grounds on which it is intended to suspend performance, the Contractor may suspend performance of any or all of those obligations until payment is made in full.
>
> …
>
> **General**
>
> **Meaning of insolvency**
>
> 8.1 For the purposes of these Conditions:

1. a Party which is a company becomes insolvent:

.1 when it enters administration within the meaning of Schedule B1 to the Insolvency Act 1986;

.2 on the appointment of an administrative receiver or of a receiver or manager of its property under Chapter I of Part III of that Act, or the appointment of a receiver under Chapter II of that Part;

.3 on the passing of a resolution for voluntary winding-up without a declaration of solvency under section 89 of that Act; or

.4 on the making of a winding-up order under Part IV or V of that Act.

…….

4. a Party also becomes Insolvent if:

.1 he enters into an arrangement, compromise or composition in satisfaction of his debts (excluding a scheme of arrangement as a solvent company for the purposes of amalgamation or reconstruction);…..

…

Other rights, reinstatement

8.3.1 The provisions of clauses 8.4 to 8.7 are without prejudice to any other rights and remedies of the Employer. The provisions of clauses 8.9 and 8.10 and (in the case of termination under either of those clauses) the provisions of clause 8.12 without prejudice to any other rights and remedies of the Contractor.

…

Insolvency of Contractor

8.5

.1 If the Contractor is Insolvent, the Employer may at any time by notice to the Contractor terminate the Contractor's employment under this Contract.

> .2 The Contractor shall immediately notify the Employer if he makes any proposal, gives notice of any meeting or becomes the subject of any proceedings or appointment relating to any of the matters referred to in clause 8.1.
>
> .3 As from the date the Contractor becomes insolvent, whether or not the Employer has given notice of termination:
>
> .1 clauses 8.7.3 and 8.7.5 and (if relevant) clause 8.8 shall apply as if such notice had been given;
>
> .2 the Contractor's obligations under Article 1 and these Conditions to carry out and complete the Works shall be suspended; and
>
> .3 the Employer may take reasonable measures to ensure that the site, the Works and site materials are adequately protected and that such Site Materials are retained on site; the Contractor shall allow and shall not hinder or delay the taking of those measures.
>
> …
>
> 8.7 If the Contractor's employment is terminated under clause 8.4, 8.5 or 8.6:
>
> .1...
>
> .2…
>
> .3 no further sum shall become due to the Contractor under this Contract other than any amount that may become due to him under clause 8.7.5[7] or 8.8.2 and the Employer need not pay any sum that has already become due either:
>
> .1 insofar as the Employer has given a Pay Less Notice under clause 4.11.5; or
>
> .2 if the Contractor, after the last date upon which such notice could have been given by the Employer in respect of that sum, has become insolvent within the meaning of clauses 8.1.1 to 8.1.3.
>
> ……."

41. Clause 8.9 dealt with termination by the contractor and provided at clause 8.9.3 that the contractor might terminate after any period of suspension had expired. On such

[7] On an account following the completion of the Works.

termination by the contractor or on termination by either party (in accordance with clause 8.11) clause 8.12 provided that:

> "If the Contractor's employment is terminated under any of clauses 8.9 to 8.11, under clauses 6.11.2.2[8] or under paragraph C.4.4 of schedule 1[9]:
>
> .1 no further sums shall become due to the Contractor otherwise than in accordance with this clause 8.12".

The first issue - discussion and determination

42. As I have already explained, the first issue which arises for determination on this appeal is whether the proposed petition debt is disputed on substantial grounds. Miss Lee correctly accepted that the fact that the appellant now contends that the respondent and/or GA overvalued the work for the purposes of the interim certificates, and intends to dispute liability for the sums stated in the certificates at a later stage, did not in itself (in the absence of any Pay Less Notice served at the relevant time) provide any basis for contending that the debt itself was disputed. That concession is in line with cases such as *In Re a Company (No 1299 of 2001)* supra; *Rupert Morgan Building Services (LLC) Ltd v. Jervis (2004) 1 WLR 1867* at 1872 (per Jacob L.J); and *R & S Fire and Security Services Ltd v. Fire Defence Plc (2013) EWHC 4222* at paragraphs 7 – 12 (per Newey J).

43. The basis of the appellant's argument that the proposed petition debt, based on the sums set out in the interim payment certificates, was genuinely disputed is that, given the provisions of clause 8.7.3 set out above, such sums were no longer *payable* after the respondent entered CVL on 25 July 2014.

44. The principles on which a court will strike out a petition, or restrain presentation of the petition by injunction, in circumstances where the proposed petition debt is disputed, are well established. They were recently summarised by David Richards J in this court in *Tallington Lakes Ltd and another v Ancasta International Boat Sales Ltd* [2012] EWCA Civ 1712 at paragraphs 4-5:

> "4. There was no dispute before the Judge, nor has there been in this court, on the applicable legal principle. It can be shortly stated. If the company can demonstrate that the alleged debt on which the petition is founded is genuinely disputed on substantial grounds, the court will strike out the petition. There are rare exceptions to this principle, none of which is relevant to this case.
>
> 5. This principle is essentially a statement of general practice. A petitioner must establish its standing to present a winding-up petition. Those with standing are defined for present purposes by section 124 of the Insolvency Act 1986 and include any creditor or creditors. Where the company disputes any liability

[8] Non availability of terrorism cover
[9] Material loss and damage to existing structures.

> to a person petitioning as a creditor, it is taking issue with the petitioner's standing to present the petition. It would in theory be open to the court dealing with the winding-up petition to try that issue itself, as in effect a preliminary issue. For at least three sound reasons, that is not the practice of the court. First, it is not the function of the Companies Court to try disputed debt claims. Its function, so far as winding-up petitions are concerned, is to decide whether the case is suitable for the class remedy of a winding-up order and, if so, to administer, principally through the Official Receiver or liquidator, the winding up. The determination of debt claims is a proper function of the county courts or, in appropriate cases, an action in the High Court. Secondly, the threat of winding-up proceedings could otherwise be used as improper pressure on a company to pay a disputed debt. Thirdly, the inevitable delay in determining the issue is unacceptably damaging to the company, whose freedom to carry on business may be severely curtailed by the existence of a pending winding-up petition. It is for this reason that the earlier practice of staying a winding-up petition while the issue of liability was determined in separate proceedings was abandoned in favour of striking it out."

45. At the hearing before the judge, as before us, Miss Lee, on behalf of the appellant, submitted that on a proper construction of the relevant clauses of the contracts, if a contractor entered into a CVL after the last date on which a Pay Less Notice could have been given, an employer was not obliged to pay any sum that had already become due under any interim certificate; this it was said resulted automatically from the CVL, irrespective of whether the employer gave a notice of termination; moreover the relevant clauses were all capable of operation as at the date of the respondent's CVL on 25 July 2014, notwithstanding the fact that the contracts had been already terminated in January 2014.

46. The judge rejected these submissions. He accepted Mr Darton's submission that, when construed in context, clause 8.7.3 was "looking to the position only where a contract is still on foot" and that accordingly the clauses had no operation if the relevant contract had already been terminated prior to the insolvency of the contractor. At paragraphs 42-43 of the judgment he said as follows:

> "42. Mr Darton submits that that conclusion is wrong. He says that when one looks at condition 8-7-3 in its context, it is looking to the position only where a contract is still on foot. He submits that s.111 (10) of the 1996 (as substituted) and the contractual provisions in the JCT standard conditions, were introduced to address the issues raised by the speech of Lord Hoffman in the case of *Melville Dundas Ltd v George Wimpy UK Ltd* [2007] UKHL 18, reported at paragraphs 11 through to 13. Mr Darton submits that that was a case where a contract was terminated by the contractor's insolvency. Those observations, he says, have no application to a case where the

> contract has, prior to the insolvency, already been terminated. There are issues in the present case as to who lawfully terminated these two building contracts; but it is common ground that terminated those building contracts had been by a date earlier this year. Mr Darton submits that the provisions of condition 8-5 and 8-7 are predicated on the basis that the contract is still on foot at the date of the contractor's insolvency.
>
> 43. I accept that submission. It seems to me that where the contract has already been terminated before a relevant insolvency event, condition 8-7-3 is not engaged. I acknowledge the force of Miss Lee's point that condition 1-4-1 the conditions provides that, unless the context otherwise requires, the headings in the conditions are included for convenience only, and are not to reflect interpretation of the contract. Nevertheless, it seems to me quite clear that, looking at conditions 8-5 and 8-7 in context, they are not engaged where the contract has already been terminated in advance of the onset of the contractor's insolvency. Thus I do not consider that even if the respondent company enters into creditors' voluntary liquidation tomorrow or thereafter, that of itself will render it incompetent to present a winding up petition against the applicant."

47. In this court Mr Darton amplified his submissions as follows:

i) Clauses 8.5 and 8.7 were, he said, clearly predicated on the basis that the contracts were determined by the respondent's insolvency as shown by the fact that clauses 8.5.3.2 and 8.5.3.3 stated that (i) such insolvency would determine the respondent's obligations to complete the Works; and (ii) allow the appellant to secure the site. That determination might take effect by the appellant giving notice under clause 8.5.1 or automatically under clause 8.5.3, but in both cases the provisions were concerned with the determination of the contracts as a consequence of the respondent's insolvency.

ii) Clause 8.5 did not in itself determine the appellant's obligation to pay its existing liabilities as that provision was set out at clauses 8.7.3. Under the heading: "Consequences of termination under clauses 8.4 to 8.6" clause 8.7.3 was preceded by clause 8.7 which stated: "If the Contractor's employment is terminated under clauses 8.4, 8.5 or 8.6." It was therefore clear that the appellant's liabilities were only extinguished under clause 8.7.3 if the contracts were determined by the respondent's insolvency and not otherwise.

iii) That construction of clauses 8.5 and 8.7 not only accorded with the ordinary and natural meaning of the words used in these clauses but it was also consistent with the other provisions of the contracts which:

a) excluded CVAs from the extinguishing provisions of clause 8.7.3.2;

b) provided that the respondent's termination of the contracts under clause 8.9 only terminated the appellant's liability for "further sums".

iv) That interpretation did not offend subsection 111(10) of the HGCRA and did not give rise to the "injustice" that was considered in *Melville Dundas*.

v) The need to preserve a contractor's "cash flow" which underpinned section 111 of the HGCRA was preserved, because, in such circumstances, the contractor's insolvency was likely to have been caused (as here) by the employer's failure to make interim payments (in accordance with subsection 111(1)) and to have led to the contractor terminating the contract. To find otherwise would be to encourage employers to withhold payment on interim certificates in the hope that this would lead to a contractor's insolvency and its release from liability, contrary to the whole purpose of section 111 of the HGCRA.

48. It was common ground that, in approaching the construction of the contracts, the court is required to determine the objective, natural and ordinary meaning of the relevant provisions against the background knowledge which would have been reasonably available to both parties and which may have affected the language used: see e.g. per Lord Hoffmann in *Investors Compensation Scheme v West Bromwich BS* [1998] 1 WLR 896 at 912H-913F. Adopting this approach, I have no doubt that, on the true construction of the contracts, the judge was wrong to conclude that clauses 8.5.3 and 8.7.3 could have no application if the contracts had already been terminated prior to the insolvency. My reasons may be summarised as follows.

49. First, it is clear that the provisions of clause 8.7.3 are intended to operate *after* termination of the contract. Indeed the entire scheme of clauses 8.7 and 8.8 are directed at setting out the respective rights and obligations of both parties *after* the contractor's employment under the contract has been terminated by the employer and necessarily the contract has come to an end: see the opening words of clause 8.7 – "if the Contractor's employment is terminated under clause 8.4, 8.5 or 8.6". To similar effect is clause 8.12 which addresses the consequences of termination by the contractor under clause 8.9 or by either party under clause 8.11 upon the happening of certain specified events. There is no wording in clause 8 which in any way suggests that the consequential provisions are not to apply *after* termination, or are not to apply after a termination by the contractor (pursuant to the saving provisions of clause 8.3.1) on the grounds of repudiatory breach (as opposed to pursuant to the express termination provisions contained in 8.4, 8.5 or 8.6).

50. Second, clause 8.5 ("Insolvency of Contractor") has a wider ambit than simply conferring a right of termination on the employer in the event of the contractor's insolvency. Thus clause 8.5.2 imposes an obligation on the contractor immediately to notify the employer if the contractor makes any proposal, gives notice of any meeting, or becomes the subject of any proceedings or appointment relating to insolvency, to enable the employer to decide on its options. And, most importantly, clause 8.5.3 *expressly* states that clause 8.7.3 applies as from the date when the contractor becomes insolvent "whether or not the Employer has given such notice of termination" – i.e. a termination notice under clause 8.5 based on the contractor's insolvency. Contrary to the judge's view, therefore, I see no necessity, or basis, for the implication of what would have to be an implied term that clauses 8.5.3 and 8.7.3

have no operation in circumstances where the employer has already terminated the contractor's employment, as it is entitled to do (pursuant to the saving provisions of clause 8.3.1), on the grounds of repudiatory breach (as opposed to pursuant to the express termination provisions contained in 8.4, 8.5 or 8.6), but do apply in circumstances where either:

i) the employer has not served any notice of termination; or

ii) the employer has already served a notice of termination under clauses 8.4, 8.5 or 8.6.

In other words, given that clause 8.7.3 necessarily applies *after* termination in circumstances where the contractor's employment has already been terminated under clause 8.4 or 8.6, and can apply *irrespective* of whether the contract has already been terminated on the grounds of the contractor's insolvency under clause 8.5, I see no logical basis for the implication of a term that clauses 8.5.3 and 8.7.3 are not operative in circumstances where the contract has already been terminated by the employer on the grounds of repudiatory breach on the part of the contractor.

51. Third, the provisions of section 111(10) of the HGCRA do not restrict the non-application of section 111 (1) to the situation where the contract has in fact been terminated by reason of the contractor's insolvency or where the contract is still capable of termination pursuant to its provisions. Thus in my judgment there is no factual matrix justification to construe the contractual provisions of the contracts in a narrow fashion in order to reflect the provisions of the HGCRA.

52. Fourth, as Miss Lee submitted, Lord Hoffmann's reasoning in *Melville Dundas Ltd* (albeit a case where the contract had been determined following the appointment of an administrative receiver) for upholding the contractual clause which permitted the employer to withhold any further payment following the insolvency event was based upon: (1) general principles of freedom of contract; (2) the nature of the provisional obligation to make payment; and (3) the alteration of the rights between the parties that arises on the insolvency of the contractor by reason of the rules of insolvency set-off. There is nothing in Lord Hoffmann's line of reasoning, which would suggest that the provisions of the contracts should be construed narrowly to restrict their application to situations when the contract is still in full operation or could still be terminated by reason of the insolvency of the contractor. Lord Hoffmann stated:

> "8 Apart from the requirements of sections 109(1) and 110(1) , the Act does not purport to interfere with the freedom of the parties to make their own terms about interim payments. Section 109(2) says: "The parties are free to agree the amounts of the payments and the intervals at which, or circumstances in which, they become due."
>
> 9 The references to "circumstances" shows that Parliament did not require that stage payments should become inexorably due at fixed intervals but that liability to pay them could be subject to contingency. … I can think of no reason why Parliament should have left the parties free to agree the circumstances on which instalment payments should fall due but then insisted that nothing should be capable of discharging that liability. Mr Howie suggested that it was in the interests of certainty. But certainty does not require

> unalterability if the grounds of alteration are sufficiently certain. There can be no uncertainty about whether administrative receivers have been appointed and the contract therefore provides an "adequate mechanism" for determining whether a payment is due.
>
> …
>
> "11. … Instalments payments are in their nature provisional liabilities. As has been frequently said, they are to provide the cash flow for the contractor or subcontractor to enable him to perform his duties under the contract. But when the contractor's employment has been determined in consequence of the appointment of a receiver, two consequences follow. First, the contractor no longer has any duties to perform. Secondly, the liability to make an interim payment is no longer provisional. While the employer retains the money, he can set it off against his cross-claim for non-completion against the contractor. In practice, where the contractor has become insolvent, the employer will have a cross-claim for damages which exceeds the contractor's claim for unpaid work. On the other hand, once the employer has paid the money, it is gone. It is swept up by the bank's floating charge and the employer will have to prove in the liquidation for his cross-claim. Upon insolvency, liability to make an interim payment therefore becomes a matter which relates not to cash flow but to the substantive rights of the employer on the one hand and the contractor's secured or unsecured creditors on the other.
>
> …
>
> 13. A provision such as clause 27.6.5.1, which gives the employer a limited right to retain funds by way of security for his cross-claims, seems to me a reasonable compromise between discouraging employers from retaining interim payments against the possibility that a contractor who is performing the contract might become insolvent at some future date (which may well be self-fulfilling) and allowing the interim payment system to be used for a purpose for which it was never intended, namely to improve the position of an insolvent contractor's secured or unsecured creditors against the employer. Mr Howie said that to allow the employer any security in the form of an unpaid instalment payment would be to allow him to profit from his own wrong. But the security arises, not from the terms of the contract but from the law of bankruptcy set-off. As Chadwick LJ pointed out in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* [2000] BLR 522, any creditor who owes a debt to an insolvent company, no matter how long overdue, may set off that debt in full against his own claim in the liquidation. It is in any case artificial to speak of the employer profiting from his own wrong when the contractor has no further interest in the matter and the issue is one of priority between the employer and the contractor's other creditors."

53. Fifth, contrary to the submissions of Mr Darton, the obligation to pay under an interim certificate is a *payment* obligation. The fact that an employer is not obliged, in the event of the contractor's insolvency, to make an instalment payment does not mean that the employer is *discharged* from all *liability* to make such payments as may be due upon the taking of the final account. All that clause 8.7.3, as applied by 8.5.3.1, does is to excuse the contractor from its interim *payment* obligations under the terms

of clause 4.7 and 4.8. The contractor nonetheless remains liable to pay the sums which may be due under clauses 8.7.4 to 8.7.5 and 8.8, if any, once an account has been taken. As Lord Hoffmann explained in *Melville Dundas*, instalment payments are "in their nature provisional liabilities". Nor am I persuaded by Mr Darton's submission that preservation of a contractor's cash flow, or the potential for an employer to drag out payment under interim certificates, thereby potentially pushing a contractor into insolvency, requires a construction of the clauses of the contracts that is contrary to the words actually used. As the TCC Guide makes clear[10], the TCC has moulded a rapid procedure for enforcing an adjudication decision that has not been honoured which enables a contractor to obtain speedy payment. Moreover, there is nothing in section 111 that requires such a conclusion, as that for which Mr Darton contends.

54. Accordingly, as at the date of the hearing before the judge on 10 July 2014, the reality was that, after the prior rejection on 2 July 2014 by the respondent's creditors of the directors' proposals for a CVA, the meeting of creditors which was to be held on 11 July 2014 was almost inevitably going to result in the respondent being subject to a CVL and the appointment of a liquidator - in other words of the respondent becoming "Insolvent" for the purposes of clauses 8.5.3 and 8.7.3. That was something that the judge clearly was obliged to take into account in the exercise of his discretion as to whether to grant an injunction to restrain presentation of the petition as against the appellant. That was because, as from 11 July 2014, the appellant would clearly have been entitled to say that, pursuant to clauses 8.5.3 and 8.7.3 of the contracts, it had a bona fide dispute on substantial grounds that it was not obliged to pay sums due under the interim certificates but was entitled to delay payment until the taking of the final account under clause 8.7.4 and 8.7.5. In my judgment that was a contractual right which the appellant had in circumstances where it did not accept the finality of the interim certificates, irrespective of any consideration by the court of the substantive merits of the appellant's counterclaim. That meant that, as from that date, the appellant was entitled to say that the respondent, as petitioner under the proposed winding up petition, was unable to establish the *locus standi* necessary to present a petition under section 124 (1) of the 1986 Act: see *Re Bayoil SA* [1999] 1 WLR 147 at 150 D-H per Nourse LJ.

55. Given his incorrect approach to the construction of the contracts, the judge came to the wrong conclusion as to whether payment of the debts due under the interim certificates was disputed in good faith and on substantial grounds. In my judgment, given the realities of the situation on 10 July 2014, and the almost inevitable defence open to the appellant in the event that a resolution was passed for the CVL of the respondent, the only course available to the judge was either to adjourn the application to await the outcome of the meeting on 11 July 2014 or to restrain presentation of the petition pending the outcome of such meeting, with liberty to apply in the event that no resolution was passed for the winding up of the respondent.

56. Accordingly I would allow the appeal on this ground. Given that the respondent did in fact go into voluntary liquidation after the hearing on 10 July, I would re-exercise the discretion by granting a permanent injunction restraining presentation of a petition against the appellant based on the interim certificates.

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[10] See paragraphs 9.1.3 and 9.2.8 of the Guide.

The second issue - discussion and determination

57. The second issue is whether, even on the assumption that there was no contractual entitlement under the terms of the contracts themselves to refuse payment of interim certificates, the judge should nonetheless have restrained presentation of the petition based on the interim certificates in accordance with what Miss Lee submitted was the established practice of the TCC not to enforce interim payment obligations in favour of insolvent contractors. She submitted that the judge, in permitting the respondent to present a petition, acted inconsistently with the established practice of the TCC, which recognised the provisional nature of interim payment obligations, and that enforcement should not be ordered where there was no prospect of recovering payment if those payment obligations were subsequently varied. In this context she referred to: *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* at pages 527-529, paragraphs 29 to 36; *Hart v Fidler* [2006] EWHC 2857 (TCC) at paragraphs 69-73; and *Galliford Try Building Ltd v Estura Ltd* [2015] EWHC 412 (TCC) at paragraph 22.

58. Those cases indeed establish (as, for example, the above citation from paragraphs 29 to 36 of the judgment of Chadwick LJ in *Bouygues (UK) Ltd v Dahl-Jensen (UK) Ltd* demonstrates) that, in appropriate circumstances, including where the contractor is insolvent, the provisional nature of an employer's obligation to make payment of an interim payment will lead to the court refusing summary judgment on an adjudication in favour of the contractor.

59. But, in my judgment, it is clear from the facts of, and discussion in, those cases that it is not an *absolute* rule that summary judgment on an adjudication will be refused simply because the employer is able to show by evidence that the contractor is insolvent. What is clear is that, in deciding whether to refuse summary judgment in such cases, the court looks at *all the circumstances* including whether the employer's counterclaim has sufficient merit to justify such a course and/or has sufficient mutuality to lead to compulsory set off in an insolvency.

60. Thus, in my judgment, in the absence of a contractual right entitling the employer to refuse payment under interim certificates in the event of the insolvency of the contractor (such as I have held existed under the contracts in the present case), there is no absolute rule that the TCC will necessarily decline to give summary judgment or restrain presentation of a winding up petition based on an adjudication, merely because the contractor is insolvent. Whether or not the court will adopt such a course will be dependent on the facts of the particular case. Accordingly, I would dismiss the appeal on this ground.

The third issue - discussion and determination

61. The third issue is whether the appellant has serious and genuine cross claims which exceed the sums alleged to be outstanding under the interim payment certificates, such as to justify an injunction restraining presentation of a winding up petition against the appellant.

62. There was no dispute before us that, in order to resist presentation of a winding up petition, the appellant had to establish that it had a serious and genuine cross-claim, and that, absent special circumstances, if such a claim was established on the evidence before the court, as a matter of principle, presentation of a winding up order should be

restrained by injunction: see, for example, *Re Bayoil SA* supra per Nourse LJ at pages 154-155 and per Ward LJ at pages 156-157.

63. The judge's view was that he was not satisfied that the appellant had raised a serious and genuine cross-claim in an amount exceeding the debt under the interim certificates of £902,506 odd. It is clear from paragraphs 45, 46 and 48 of the judgment that the principal reason given by the judge for rejecting the appellant's cross-claim and refusing to exercise his discretion was that the appellant had acknowledged that the sums set out in the interim certificates were due and payable in the November Agreement and that the directors had not raised the points by way of defence to the statutory demands in the set-aside proceedings in the local County court. He expressed the view that the history of the matter led him to the conclusion that the counterclaims were not genuine and serious but were, effectively, a "put-up job designed to prevent enforcement through winding up proceedings of the amount which had been acknowledged to be due and owing as long ago as last November." [11]

64. I cannot agree with the judge's approach which in my view placed far too much emphasis on the fact that earlier in the chronology there had been no dispute by the appellant that payments under the interim certificates were due.

65. First, it is established law that the fact that the proposed petition debt is not disputed (or as in this case acknowledged) does not prevent the debtor raising a cross-claim in defence of a winding up petition: see e.g. *In re Bayoil SA* supra at 150.

66. Second, the fact that an employer was obliged to make an interim payment did not preclude him from challenging disputed items at a later stage: see *Rupert Morgan Building Services (LLC) Ltd v Jervis* supra, where Jacob LJ said:

> "If [the client]'s has overpaid on the interim certificate the matter can be put right in subsequent certificates. Otherwise he can raise the matter by way of adjudication with necessary arbitration or legal proceedings".

Similarly, the fact that an employer accepts that interim payments have become due, because of a failure to serve a Pay Less Notice, is not prejudiced by such acceptance when it seeks to raise a serious and genuine cross claim: see per Newey J in *R & S Fire and Security Services Ltd v Fire Defence plc* supra, in which he held that the fact that interim payments had fallen due under the HGCRA, by reason of a failure to issue a Pay Less Notice, did not preclude the employer from challenging the valuation at a later date or raising a cross-claim in response to a winding up petition.

67. Third, the appellant's acknowledgment that the interim payment certificates gave rise to interim payment obligations under the terms of the contracts and the HGCRA, prior to the respondent's insolvency, was a statement of law which was indisputable. There was no reason to penalise the appellant for such acceptance.

68. Fourth, both parties agreed that the November Agreement was of no effect, by reason of the appellant's late payment of the first instalment and the operation of clause 3(c)

[11] See paragraph 46 of the judgment.

of that agreement. The November Agreement was dated 12 November 2013 and by 19 November 2013 was of no effect.

69. Fifth, the judge placed undue weight on the fact that the appellant's directors had not raised the cross-claims in their applications to set aside the statutory demands. But the appellant was not a party to these proceedings and, as the evidence made clear, the appellant's directors considered that they had valid reasons for not relying upon the appellant's cross-claims. They had been advised that, in any event, they could not be held personally liable for the appellant's debts to the respondent under the interim certificates and that accordingly the Guarantee which was the basis of the statutory demands did not apply to the sums due under the interim certificates. This was later accepted by the respondent in the February Agreement.

70. Moreover the evidence clearly demonstrated the following features which suggested that the appellant's cross-claims were reasonably arguable and were sufficiently strong to be tested in court proceedings or in the context of a determination in the course of the respondent's winding up:

i) the appellant's unchallenged evidence that from August 2013 (the same month as the first two interim certificates) the respondent and the Contract Administrator, GA, had been refusing to disclose project documentation to the appellant that would have enabled it to carry out an independent review of the valuations;

ii) the prejudice which this caused the appellant in preparing its cross-claims and its new contract administrator, Mr Peter Dacey, in preparing independent valuations;

iii) the appellant's evidence that it did not know about the need to send Pay Less Notices and that its then contract administrator/architect (GA) had failed to advise it of the need for such notices;

iv) the fact that the appellant had claims for repudiatory breach of contract and defects against the respondent which could not be finally determined until completion of the project, which had still not occurred;

v) the fact that the appellant's cross-claims had been put forward in correspondence as early as January 2014 and substantiated in correspondence from April 2014; and that such cross-claims were supported by independent valuations carried out by the quantity surveyor, and new contract administrator, Mr Dacey that supported WS' cross-claim;

vi) the fact that the rejection by the judge of Mr Dacey's evidence was based simply upon assertions made by a director of the respondent, Mr Clapcott, with no detailed consideration of the points made, their impact upon Mr Dacey's valuations or the appellant's responses to Mr Clapcott's points;

vii) the fact that the appellant's reasons for not issuing any proceedings against the respondent at an earlier stage included: the lack of disclosure of relevant information by the respondent; the fact that the project was incomplete; a desire to focus on completion of the project; the CVA moratorium from 21

May 2014 to 30 June 2014; and the insolvency of the respondent; and were not therefore consistent with a lack of confidence or belief on the appellant's part in its claims.

71. This, in my judgment, was a classic case where, based on the evidence before the court, which necessarily had not been tested by cross-examination or any kind of exploration of the evidence in depth, the judge, in accordance was well established principles applying to these type of cases, should have concluded that there were substantial disputes between the parties which could not be appropriately determined in winding-up proceedings. Accordingly he should have granted the injunction sought restraining the issue of a winding up petition.

72. Accordingly, in my judgment the judge erred in principle in his approach to his consideration of the appellant's cross-claims; he took into account matters that he should not have taken into account and left out of account relevant matters. On any analysis his decision was wrong because he failed to balance the various factors fairly in the scale. I would therefore allow the appeal on this third ground also and, on a re-exercise of the discretion, grant the injunction sought by restraining presentation of the petition.

Sir Colin Rimer:

73. I agree.

Lord Justice McCombe:

74. I also agree.