



Neutral Citation Number: [2021] EWHC 192 (Ch)

Case No: CR-2020-002675

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**INSOLVENCY AND COMPANIES LIST**

The Royal Courts of Justice  
Rolls Building  
London, EC4A 1NL

Date: 03/02/2021

**Before :**

**INSOLVENCY AND COMPANIES COURT JUDGE BURTON**

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**Between :**

**CRAYMANOR LIMITED** **Applicant**  
**- and -**  
**LS POWER AND DATA LIMITED** **Respondent**

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**Christopher Canning** (counsel instructed by **Hadfield & Co**) for the **Applicant**  
**Andrew Petchey** (chartered legal executive of **Howell Jones LLP**) for the **Respondent**

Hearing dates: 24 October 2020  
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**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**INSOLVENCY AND COMPANIES COURT JUDGE BURTON**

## **Insolvency and Companies Court Judge Burton :**

1. Following receipt of a statutory demand dated 7 May 2020, the Applicant applied on 4 June 2020 to restrain the Respondent from presenting a winding-up petition.

### **Background**

2. The Respondent supplies and installs electrical parts to the Applicant, a residential development company. A dispute arose regarding several items claimed in five invoices, but an agreement was reached for an undisputed sum of £8,284.50 to be paid in relation to invoices totalling £11,291.50 and for there to be a discussion regarding the balance. It is the Respondent's intention to present a petition based on the Applicant's failure to pay £8,284.50 (the "Debt").
3. The Applicant's case is that it paid the Debt to an account, details of which it received in an email from the Respondent and that having done so, it is not obliged to pay the same amount again. The Respondent claims that the email did not come from its office and that the payment must have been diverted as part of what has become known as a "push payment fraud". It claims that two members of the Respondent's staff informed a member of the Applicant's staff, before the payment was made, that they knew nothing about the email and that the Applicant should direct its payment to the account to which all other payments were usually made, details of which were set out on its invoices.
4. It is against this background that Mr Canning submitted that the Applicant disputes, on substantial grounds, that it has an outstanding liability to pay the Debt. He submits that there is a substantial dispute of fact regarding the discussions which took place between each party's staff in the period immediately leading up to the payment and that the Debt is either no longer outstanding or that it is extinguished by cross-claims.
5. The Application is supported by two witness statements of the Applicant's director, David Phillips dated 4 June 2020 and 15 September 2020. The Respondent's evidence is set out in a witness statement of the Respondent's director, Tony Lawrence also dated 15 September 2020.

### **Applicable law**

6. The applicable principles were not in dispute. The court will grant an injunction to prevent the presentation of a winding-up petition where it considers that the petition would be an abuse of process or bound to fail. In *Coilcolor Ltd v Camtrex Ltd* [2015] EWHC 3202 (Ch) Hildyard J summarised the key principles:

“[32] The Court will restrain a company from presenting a winding-up petition if the company disputes, on substantial grounds, the existence of the debt on which the petition is based. In such circumstances, the would-be petitioner's claim to be, and standing as, a creditor is in issue. The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the Court's settled practice to dismiss the petition. That practice is the consequence of both the fact that there is in such circumstances a threshold issue as to standing, and the nature of the Companies Court's procedure on such petitions, which involves no

pleadings or disclosure, where no oral evidence is ordinarily permitted, and which is ill-equipped to deal with the resolution of disputes of fact.

[33] The Court will also restrain a company from presenting a winding-up petition in circumstances where there is a genuine and substantial cross-claim such that the petition is bound to fail and is an abuse of process: see e.g. *Re Pan Interiors* [2005] EWHC 3241 (Ch) at [34] – [37]. If the cross-claim amounts to a set-off, the same issue as to the standing of the would-be petitioner arises as in the case where liability is entirely denied. Even if not qualifying as a set-off, a genuine and substantial cross-claim exceeding the would-be petitioner's claim will also result in the petition being dismissed in accordance with the same settled practice, save in exceptional circumstances (as a discretionary matter). That is also because, if the cross-claim is established, the would-be petitioner will have no sufficient interest either in itself having a winding up ordered, or to invoke the class remedy which such an order represents.

[34] Further, it is an abuse of process to present a winding-up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as to whether that money is owed: *Re a Company* (No 0012209 of 1991) [1992] BCLC 865.

[35] However, the practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will suffice to warrant the matter proceeding by way of ordinary litigation. The Court must be persuaded that there is substance in the dispute and in the Company's refusal to pay: a “cloud of objections” contrived to justify factual inquiry and suggest that in all fairness cross-examination is necessary will not do.

[36] As stated by Chadwick J (as he then was) in *Re a Company* (No 6685 of 1996) [1997] BCC 830 at 838:

“I accept that any court, and particularly the Companies Court, should not seek to resolve issues of fact without cross-examination where there is credible affidavit evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in circumstances in which, on a full understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible.”

7. The principles were summarised by Norris J in *Angel Group Ltd v British Gas Trading Ltd* [2012] EWHC 2702 (Ch) where, at paragraph 22 he said:

22. The principles to be applied in the exercise of this jurisdiction are familiar and may be summarised as follows:-

a) A creditor's petition can only be presented by a creditor, and until a prospective petitioner is established as a creditor he is not entitled to present the petition and has no standing in the Companies Court: *Mann v Goldstein* [1968] 1WLR 1091.

- b) The company may challenge the petitioner's standing as a creditor by advancing in good faith a substantial dispute as to the entirety of the petition debt (or at least so much as will bring the indisputable part below £750):
  - c) A dispute will not be “substantial” if it has really no rational prospect of success: in *Re A Company No.0012209* [1992] 1WLR 351 at 354B.
  - d) A dispute will not be put forward in good faith if the company is merely seeking to take for itself credit which it is not allowed under the contract: *ibid.* at 354F.
  - e) There is thus no rule of practice that the petition will be struck out merely because the company alleges that the debt is disputed. The true rule is that it is not the practice of the Companies Court to allow a winding up petition to be used for the purpose of deciding a substantial dispute raised on bona fide grounds, because the effect of presenting a winding up petition and advertising that petition is to put upon the company a pressure to pay (rather than to litigate) which is quite different in nature from the effect of an ordinary action: in *Re A Company No.006685* [1997] BCC 830 at 832F.
  - f) But the court will not allow this rule of practice itself to work injustice and will be alert to the risk that an unwilling debtor is raising a cloud of objections on affidavit in order to claim that a dispute exists which cannot be determined without cross-examination.
  - g) The court will therefore be prepared to consider the evidence in detail even if, in performing that task, the court may be engaged in much the same exercise as would be required of a court facing an application for summary judgment
8. The threshold for establishing that a debt is disputed on substantial grounds in the context of a winding-up petition is not a high one. Etherton LJ noted at paragraph 22 of his judgment in *Tallington Lakes Ltd v South Kesteven District Council* [2012] EWCA Civ 443 that it may be reached even in circumstances where the defence could be regarded as “shadowy”.

## **Decision**

9. There is, in my judgment, a substantial dispute between the parties concerning the nature of the Applicant’s obligation to pay the Debt and whether it has been breached. The dispute is substantial because it goes to the heart of whether the Respondent is a creditor, and as such, entitled to present a winding-up petition against the Applicant. The court will need to determine whether, as contended for by the Applicant, the agreement reached between the parties during the telephone calls on 19 and 20 April 2020, gave rise to an obligation on the Applicant to pay the Debt only on confirmation that the sum was agreed and whether, construed objectively, the Applicant was entitled to treat the 15.24 email as such confirmation with details of the account to which the payment should be made (the “Email Bank Account”).

10. In my judgment the Applicant's argument is advanced in good faith. On its face, the 15.24 email appeared to have been sent by the Respondent, with instructions, with which the Applicant complied, to pay the Debt to the Email Bank Account.
11. The Respondent's director states not only that he did not send the email but also that he informed the Applicant's employee not to send the money to the Email Bank Account. There is, consequently, a substantial dispute of fact whether the Applicant paid the Debt pursuant to or in breach of the Respondent's directions.
12. The Applicant's case has a real prospect of success and, in my judgment, is raised on bona fide grounds.
13. The issues in dispute can only properly be determined by Part 7 proceedings where the judge will have the benefit of examining documents disclosed by each party (possibly including data from the Respondent's email provider and any data attached to the 15.24 email) and hearing cross-examination of the makers of witness statements.
14. Having determined the application for the reasons set out in paragraphs 8 to 12, it is not necessary for me to consider:
  - i) the Applicant's alternative argument that the Respondent is in breach of an implied contractual term by failing to provide a secure means of digital communication;
  - ii) the Applicant's cross claim pursuant to section 13 of the Data Protection Act; or
  - iii) its proposed defence, relying on the doctrine of apparent authority and/or estoppel (that the Respondent's negligence caused it to represent that the party sending the 15.24 email was the Respondent's director, Mr Lawrence and it would be inequitable to allow the Respondent to take advantage of the representation, by requiring the Applicant to make the payment again).
15. If the Respondent intends further to pursue its claim, the proceedings should be commenced in the county court.
16. It is an abuse of the process of the court to present a winding-up petition based on a claim which is disputed in good faith and on substantial grounds. Having found that the Respondent's claim is subject to such a dispute, it shall be restrained from presenting a winding-up petition against the Applicant in respect of the Debt.
17. I shall hear submissions on costs, unless agreed, when handing down this judgment. Counsel should please provide a draft order.