

Insolvency principles re-affirmed in *Cosmur v St. Lewis* decision

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The fundamental principle of insolvency litigation - that individual and corporate petitions will not be heard in respect of disputed claims - was re-affirmed in the recent English High Court decision of *Cosmur Construction (London) Ltd v. St Lewis Design Ltd*.

By way of background Cosmur engaged St. Lewis Design (SLD) as a sub-contractor to carry works at a site in east London which commenced in January 2015. On 8th March 2016 SLD sent an interim payment application (as is the procedure in construction contracts) followed by a final account on 28th June 2016. Following an invoice on 1st July 2016 (which Cosmur say they did not receive) SLD served Cosmur with a statutory demand for payment.

Cosmur responded by sending a pay less notice, albeit out of time, and applied for an injunction to prevent SLD from presenting a winding-up petition against it. Cosmur claimed that the works completed by SLD had been overvalued and claimed for liquidated damages of £18,000 arising out of delay. They also asserted a right of set-off arising from another project.

The Court noted that an injunction would be granted where:

- a) The debt was genuinely disputed on substantial grounds, or
- b) The debtor company had a serious and genuine cross claim which exceeded the debt.

Previous case law had established that where there was an immediately enforceable debt (such as a valid application for payment or an adjudication decision), an injunction would still be granted where there was a serious and genuine cross claim.

The Court held that there was a substantial dispute as to whether SLD had complied with a condition precedent to serving the final account as set out in the terms and conditions. The fact that Cosmur had sought to agree the draft final account with SLD did not amount to acceptance that the amounts were already due to SLD.

There was further a genuine and substantial dispute as to whether SLD had been entitled to serve the application for payment after a certain date. Ultimately the Court decided that this issue was not something that could be determined on this application.

The first test having been satisfied anyway the Court further concluded that the set-off claim was genuine and substantial, noting that the evidence, although thin, was not 'plucked out of thin air' in response to a statutory demand. Cosmur therefore satisfied both of the Court's tests where one would have been sufficient. It is already established that the responding party need not prove their case on the balance of probabilities but merely establish that there is a triable issue, which is a relatively low test to meet and something that companies should be advised of when deciding to issue a statutory demand for payment.

The impact of the decision brings the issue of set-off and counterclaim to the fore, re-affirming that even where a genuine debt exists (though this was not the case here) a serious and genuine cross claim which matches or exceeds the debt will be sufficient for injunctive proceedings to succeed.

The decision protects the position that the insolvency court is not to be abused by a claimant seeking to put a company under financial constraint by presenting a Winding-Up Petition. Given the burdens the presentation and advertising of a petition places on a company – likely freezing of accounts, alerting of other parties – it would be an abuse of process for such a petition to be presented, and any dispute as to existence and value of a claim ought be resolved and the position clarified prior to issue of proceedings.

Lest there be any doubt the Insolvency (NI) Order 1989 makes specific reference that the company must have “neglected” to pay a sum claimed, a description that can hardly apply where there is a genuine dispute and/or counterclaim.

Whilst the decision simply reinforces old maxims of insolvency the judgment is of most significance to construction disputes as it offers guidance on how the principle applies in respect of non-payment under construction contracts. Failure to submit a pay less notice is not of itself evidence of an immediately payable debt, but even if the debt itself is agreed but a genuine cross claim exists, the issue needs resolving elsewhere before it can be enforced by way of statutory demand.

The insolvency courts have always stated that theirs is not the forum for construction disputes. Having said that contractors quite often find their efforts to secure payment by statutory demand suppressed by a previously unheard of issue with the contract or another contract between the parties. In this situation there is little the claimant can do however where notice of an issue has been raised, attempting to force the issue by presenting a statutory demand is at best risky, and at worst an abuse of process.

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