JUDGMENT : MR JUSTICE WARREN: Chancery Division. 1st November 2007

1. This is an application by Moorside Investments Limited (which I will call "the Company") to restrain the presentation of a winding up petition based on a statutory demand dated 27th September 2007 sent by post to the Company on behalf of the Respondent, DAG Construction Limited in administration (which I will call "DAG").

2. The background to this application briefly is that the dispute arises out of a construction contract, partly oral, partly in writing, made in part on 11th October 2006 and in relation to other parts after that date. The main contract is for ground work on the Company's site in Colchester, the work to be carried out by DAG as a preliminary to a construction project which the Company was carrying out on the site.

3. DAG started work on 16th October 2006. There was no date expressly agreed for completion of the works. It appears that negotiations were conducted between the Company and DAG in the period leading up to 11th October. On that date there was an exchange of letters or faxes, the first from DAG to the Company, preceded by a fax which is not in the bundle of evidence and without which it is not on the face of the letters possible to determine precisely what was to happen but the sense is clear enough.

4. The first communication from DAG to a company called Managing Partners Limited, associated with the Company but not the Company itself, came from Mr Hockey who carried out communications and negotiations on behalf of DAG. It referred to three items of work under paragraphs (a), (b) and (c). (a), one can divine, is the clearance of the main building and (c) is drainage. (b) I understand related to a staircase removal. The price for (a) was £12,500 plus VAT. The price for (b) was £7,2000 plus VAT, and the price for (c) was £66,700 plus VAT. On the same date a fax or letter from the Company to Mr Hockey at DAG said this:

   "Further to my letter of yesterday and our telephone conversation this morning, I confirm acceptance of your quotation as follows,"

   and he accepts the quotation for items (a) and (c) but says nothing about (b) save that,

   "It would be appreciated if you would forward a separate quotation for the removal of the staircase in the front building."

   So it is apparent that there had been negotiations which resulted in that correspondence.

5. It is accepted by the Company that there was no contract prior to those letters but it says that there was one immediately after. It is said that the letters do not contain all the terms of the contract. That is clearly correct in the sense that if all that was expressly agreed was to be found in those two letters it would be necessary to imply a number of terms, for instance about the time of completion. Whether there were terms expressly agreed which form part of the contract which do not appear from those two letters is another matter about which I will say more in a moment.

6. The Company's position is set out in paragraph 4 and following of a witness statement from Mr Sullivan in support of the application. So far as is material he says:

   "Colin" - who was his cousin who was conducting discussions with Mr Hockey - *"tells me that DAG had been awarded the ground work contract on the basis that it seemed a large and reputable company who had the resources to manage the work properly and complete the contract within a suitable time frame. I understand from Colin that DAG were advised by him that the works would need to be carried out in short order and understood and agreed to this requirement. From Colin's experience of the construction industry the ground work should have been completed within about four weeks of commencement, although it would be reasonable to allow a three week extension to allow for delay to the works following discovery of asbestos in a small internal office which limited progress of works to the remainder of the building for three weeks. A reasonable period to complete the works was therefore seven weeks which would mean that the contract should have been completed by the beginning of December 2006."*

7. In relation to that Mr Hockey says that it is common ground that there was no written agreement in place between DAG and Moorside in respect of the works which were subject of this dispute. That is not strictly true in the sense that the two letters I have referred to at least are part of or evidence a contract.

8. He says the contrary to what I have just read out from Mr Sullivan's witness statement but he says there was no oral agreement between DAG and Moorside as to the timescale in which the works and the additional works were to be performed. He says that, given that the service pipes and ducts were to be supplied by the company, the date of the completion of the works was not within DAG's control. He says it was never contemplated by DAG or agreed with the Company that the works would be completed within seven weeks and it would not have been possible to do so. Further, they were later complicated through no fault of DAG by the discovery of asbestos, which I have already mentioned, as a result of which the completion of the works and additional work was unavoidably delayed by five weeks. He refers to a statutory notice period of 14 days before asbestos removal works can begin, and the asbestos removal took three weeks during which no other work could take place due to statutory regulations regarding the handling and disposal of asbestos containing materials. I understand that there is likely to be a dispute about that.

9. Mr Sullivan says that DAG made a good start on clearing part of the site but the ground works in the main factory building proceeded very slowly. Nonetheless, an application for payment of 85 percent of the £12,500 was made on 20th October 2006 and that amount was paid. It was an application which was addressed to Moorside Developments Limited, another company associated with the Company but not the correct addressee of the application. Curiously, it, like all the subsequent applications for payment which I will mention, refers to an

instruction to carry out the works dated 5th July, whereas one can see that there was no obligation in the contract until 11th October at the earliest, and this is not explained in the evidence.

10. It seems that as well as the two items of work in the letters there were other items of work which DAG and the Company agreed to carry out. These included the removal of a staircase which I have mentioned and certain service installations. There is no written agreement concerning those works and no written record of such an agreement. There is nothing in the evidence before me to explain how such additional works were agreed, nor whether the price which DAG now claims in respect of such works was agreed or was simply an amount which it considers reasonable, or perhaps unreasonable.

11. On 24th November 2006 there was a second application for payment. This again was addressed to Managing Partners Limited and refers to the instruction dated 5th July 2006. It related to five items of work, demolition works to unit D, removal of staircase, drainage installation, service installation and additional works, which was blank on that particular application. The amount due was then shown at £43,063 odd after credit of the £10,625 which had been previously paid.

12. Mr Sullivan says in his witness statement that in late November Mr Denham, the site agent for the Company, advised DAG verbally that insufficient work had been completed and no payment was due to them at that stage.

13. Returning to the progress of the works, the Company's case is that a site meeting took place on 11th December attended by Mr Denham and by Mr Hockey. It is common ground that there was a meeting but it is not common ground about what happened at it. According to Mr Sullivan, those attending agreed a programme of works at that meeting that would have accelerated the outstanding works and enabled the contract to be completed by 21 st December. Notwithstanding that agreed period to complete the works, this did not mean that the Company acknowledged any good reason for the delay by DAG. He goes on to say that unfortunately DAG did not achieve completion by 21st December and the works were not in fact complete until 9th February.

14. He says that, although additional works were instructed, there was no reason why they should not have been completed in a week in any event and there is no reason why they could not have been completed by the deadline of 21st December.

15. He asserts that the ground works for the project should have taken seven weeks but in fact took 17 weeks and says expressly that the financing cost to the project was ten weeks at £3,600 per week, that is to say £36,000. More detail of that is given subsequently in correspondence and is in evidence.

16. I should read paragraph 6: *"DAG's delays in carrying out the work has caused delay to the entire project. Given that the project has been carried out with the assistance of loan finance from Royal Bank of Scotland, this delay has resulted in the project incurring additional funding costs. The loan from the Bank was provided in two tranches, £1,687,500 and £700 respectively, on which interest is payable at base rate plus 2 percent. The effective rate of interest has been 7.25 percent, resulting in an annual charge of £187,594 or approximately £3,600 a week."*

17. Mr Hockey tells a different story in relation to the December meeting. He says that meeting was arranged on the instigation of DAG to discuss payments of DAG's application for payment number 2 dated 24th November. He says that at the meeting Colin Sullivan stated that the Company was unhappy with progress and was therefore withholding payment. This was the first indication that DAG had had that the Company considered the works to be delayed. DAG did not at any stage consider the works or the additional work to be delayed or accept the Company's contention that they were delayed. There is, of course, a dispute about what was said at the meeting and when DAG first knew of the complaints.

18. In spite of what Mr Hockey says, it seems quite possible that the meeting would have been arranged to discuss progress and to address the Company's concerns and, as will be seen in the correspondence in February 2007 which I will come to, Mr Sullivan's account at least cannot be said to be something which had been newly created for the purposes of this application. There are, in any event, notes of the meeting prepared by Mr Hockey and these were faxed to the Company on the same day. The first page refers as follows:
"Please find attached programme as discussed today and certain quotations."

    The programme shows the dates for completion of the works, all of which show, with one exception, which is the main pumping connection, completion dates before 21st December 2006, the other one being described as having a completion date after Christmas.

19. The Company does not suggest that these are contractual dates and accepts that they are target dates, although it does say that there was a contractual term that the work would be done within a reasonable time, an implied term which had indeed already expired on their submissions by 11th December and certainly by 21st December.

20. The significance of these dates is that Mr Hockey puts them forward as targets and, unless he was being totally disingenuous at best or dishonest at worst, he must have believed them to be obtainable. It must cast doubt on what he now says in paragraph 8 of his witness statement when he says,
    "It is simply untenable either as a matter of contractual arrangement between DAG and the Company or as a matter of engineering practicality that the works, with or without the additional works, could or should have been completed within seven weeks. The works as originally contemplated could reasonably have been expected to take 12 weeks. The discovery of asbestos introduced unavoidable delays by five weeks. The additional work could reasonably have been expected to take four weeks. This gives a total of 21 weeks. The fact that DAG completed its work in 17 weeks shows how hard DAG worked to mitigate the effects of circumstances for which it was not at fault."

That, of course, assumes that work should be done in series rather than in parallel and, without, of course, making any determinations of fact in this application, it seems to me that there is on that issue at least a genuine bona fide dispute.

21. The next event was the application for payment dated 22nd December 2006, the third application (I must be careful because it is the first application headed "*Application number 3*" - I will come to the later one in due course) again, addressed to Managing Partners Limited instead of the Company, and again referring to the instruction of 5th July. It shows a total amount due of £25,318.

22. The copy in my bundle has a handwritten note on the bottom of it. I know nothing about when that note was written at the bottom of the page but what it says is, *"Discuss at meeting on site*," and then a word I cannot read, *"4th January 2007*." As to that application number 3, Mr Sullivan says that the figure was disputed by the Company and consequently a meeting occurred on site on Thursday, 4th January 2007, attended by himself, Colin Sullivan and Paul Denham for the Company and Andy Hockey for DAG. He says that it was agreed at the meeting and accepted by DAG that the company would settle both applications 2 and 3 by paying DAG the sum of £30,000 plus VAT. It appears that the £30,000 was paid but there is a dispute whether that was in full satisfaction of applications 2 and 3 or simply a payment on account to avoid adverse consequences, such as a site walk-out.

23. Then on 31st January came the second application number 3. It shows a large amount. It is in similar form. It contains five items similar to the ones I have read before, except under *"Additional works*" are specified four items, demolition of brick panels, external trench from B16 to C31, internal trench from B16 to A1 beyond excavation of meter room, the total of those four being about £15,000.

24. Curiously, according to Mr Sullivan, and I do not understand this to be contested, DAG then left the site on 9th February.

25. On 23rd February the Company wrote to DAG quite a long letter. Mr Sullivan says that he wrote thinking, in the light of the way matters were turning out with DAG having left site, that he should record the Company's position in writing.

    By the time of the letter, according to Mr Sullivan, DAG had been off site for two weeks and had refused to return, despite a number of problems alleged to have been discovered with their work.

26. The letter itself begins as follows: *"We refer to the works carried out at the above site and the application for payment number 3 submitted by yourselves on 31st January 2007. As you are aware, these works have not progressed smoothly and, given that they have largely been completed, we feel that it is now an appropriate time to agree the final sums to be paid for the work."*

27. It summarises how, in Mr Sullivan's view, matters had reached the stage that they had. I am not going to read the second and third paragraphs of that letter into the judgment but they will be well known to the parties and form an important part of the background.

28. He then sets out his complaints in relation to the works that have and have not been done. I am not going to go through these complaints because they are repeated and updated in a later letter and it is by reference to that that I will deal with them. I only mention that, at this stage on the basis of what the Company then considered to be the position, its calculation was that a sum of £8,325 remained due and unpaid.

29. The letter ends by saying: *"We are sure you will find it difficult to agree with the significant reduction of payment we are proposing to make so might we suggest a meeting within the next week or so to discuss how best to resolve this matter."*

30. I should mention that that sum of £8,000 odd is arrived at after deducting the sum of £36,000 that I have previously mentioned.

31. On 6th March Roberts Pierce & Associates (RPA), who are commercial and contract consulting quantity surveyors who acted for and still act I understand for DAG, so both before and after the administration commenced, wrote to the Company. Mr Howarth, who signed the letter, referred the company to the Housing Grants Construction and Regeneration Act 1996 (which I will call "the 1996 Act") and the Scheme for Construction Contracts SI649 1998 which he referred to as "*the Scheme*" and I shall use that use that terminology. Under the 1996 Act and the Scheme he says:

    "Following receipt of the company's applications for payment you are required to give the Company written notice stating the amount you consider to be due and the basis of assessment."

32. There is dispute about whether the 1996 Act applies at all to this contract. Miss Williamson, who appears for the Company, submits that it does not apply at all because this contract is not a contract in writing as defined in the Act. She is clearly right in that in relation to all aspects of the contract, save possibly for items (a) and (c) which I have already mentioned. I do not propose and do not need in this judgment to determine whether she is right in her submissions about (a) and (c). The fact is that the parties appear to have proceeded on the basis that the Act did apply but it is not suggested that that course of conduct has led in any way to a situation where the Company is now prevented from asserting what the true meaning and effect of the Act is.

33. I should, however, mention the provisions of the Act very briefly. I will mention only two sections I think, section 107 which says that: *"The provisions of this part apply only where the construction contract is in writing and any other grievance between the parties as to any matter is effective for the purposes of this part only if in writing."*

    And we are told then in subsection (2) what an agreement in writing is. Essentially it is where the agreement is made in writing, where it is made by exchange of communications in writing or it is evidenced in writing. Case law indicates that all the terms of the agreement must be signed in whichever bit of the writing is being relied on under subsection (2) and it is that requirement that has given rise to the dispute about whether the contract in relation to items (a) and (c) is in fact in writing or not.

34. Section 111 is also important because it provides for notice of intention to withhold payment. On receipt of an application for payment under the Act the payer can serve the notice. If he does not do so, one has effectively a *"pay now litigate later"* regime. Ultimately the question of whether there is a contract in writing or not in relation to items (a) and (c) will itself depend on the facts as they eventually turn out. Although I was testing Miss Williamson hard in her submissions in relation to that, I think it is at least possible on the evidence as it turns out that it will transpire that not all the terms of the contract which the parties sought to operate are to be found in the written contract, in the writing or by way of implied term, although whether the agreed terms are to be found before or after 11th October 2006 may be a matter for debate when the evidence is out in full.

35. On 8th March there was a further letter from the Company to DAG. It commences in this way: *"We refer to our letter of 23rd February and subsequent telephone conversations and site visits. We understand from our site agent, John Kluss, that during these visits it has been made clear that DAG had no intention to return to site to either complete the outstanding work or carry out rectification of previous substandard work."*

36. He gives details of the financing costs again, which I have already mentioned when referring to Mr Sullivan's evidence. I will read the paragraph in the middle of the letter that reads as follows: *"The detailed terms of the two loan agreements are included in quite lengthy documents which we can have copied at a later date if you so require. We have to date received nothing in writing from Mr Hockey regarding responsibility for the delays and note that we are still open to consider anything he cares to put before us."*

37. That reflects the second paragraph of the letter where it is said that DAG agreed that, if the company provided details to substantiate the interest costs suffered on the project, which it did later in the letter, Andy Hockey would provide evidence, including contemporaneous meeting notes, showing that DAG was not responsible for all of the delay that occurred.

38. Then at the end of the letter: *"As stated in our letter of 23rd February, DAG was given this contract because we believed it was a large and reputable company. Given the catalogue of errors revealed at our site we are at a loss to explain why we have not received the quality of service we expected. As noted previously, we are prepared to meet to discuss a mutually satisfactory resolution to the situation. However, might we suggest that Mr Hockey first provide the evidence regarding the responsibility for delay in accordance with the telephone conversations of 26th February. If he can provide this information by Friday, 16th March, we will make ourselves available for a meeting the following week."*

39. So that it is reasonably to infer from that letter that there were indeed conversations and meetings between 23rd February and 8th March 2007, and that indeed is what Mr Sullivan expressly says in paragraph 10 of his witness statement.

40. Mr Hockey says this: *"Mr Sullivan refers in his paragraph 10 to a letter of his dated 23rd February and to a conversation he says he had with me on 26th February to discuss that letter. His recollection is incorrect. The letter he refers to was received after the administration of DAG on 7th March 2007 and having not seen it I could not and did not discuss it with him on 26th February."*

    I pause to mention that the letter, if it was sent on 23rd February, would have arrived, if it arrived in the ordinary course of the post, rather before 7th March. Mr Hockey goes on:

    "There was a telephone conversation between us on 26th February. The subject matter of the conversation that I was chasing for payment of sums due which remained outstanding. In fact, as can be seen from the Company's letter of 23rd February, though it claimed to be entitled to make a large deduction which it was not entitled to make, even Moorside acknowledged that £8,325 was due and payable."

41. There is clearly a disputed fact here since there is no reason to think that the letter would not have been received before the administration. I do not prejudge that. It may be established on the facts, but at least there is a genuine dispute there. As I pointed out, the letter sets out the costs which are as in accordance with the agreement which was alleged on the phone with no response from Mr Hockey to suggest that that was not what was agreed on the phone at the time. DAG has never provided the material which the Company says that Mr Hockey agreed to provide to show that DAG was not responsible for the delay.

42. On 16th March DAG wrote again to the Company. They say this in the third paragraph:

    "I note your references to delayed completion by the Company (that is DAG). However, from the exchange of correspondence which forms the contract there are no completion dates mentioned, nor was any such date or dates agreed and incorporated as a contractual obligation of the Company. As such it is impossible for you to aver that the Company was in delay or that it caused the additional costs mentioned in your letter."

43. That is a rather curious assertion because it logically entails that if no completion date is stated then completion can be delayed as long as anyone cares to delay it. Quite clearly the law implies that completion must be within a reasonable time and the issue of fact is whether a reasonable time has or has not passed.

44. The fourth paragraph is as follows: *"I note your comments regarding the section of drainage pipe allegedly broken by the Company. I am not aware of any prior notification of this alleged damage, particularly at a time when the damage might have been inspected. As you have now excavated and removed the allegedly broken section and back along the trench, it is impossible to verify the events you allege. The other defects you allege are also unevidenced and unsubstantiated."*

45. That is actually incorrect. The Company offered Mr Hockey the opportunity to inspect. Indeed, an operative did attend the site. If that is not accepted there is at least good evidence of it, which would be a matter for resolution at trial, and it is set out in the subsequent letter of 13th March from the Company to Robert Pierce Associates.

46. That records as follows: *"You should be aware that our site agent, John Kluss, spoke to Andy Hockey by telephone on several occasions in the two week period commencing Monday, 5th February. He notified Mr Hockey of the damage to the drainage pipes and requested Mr Hockey to attend site to inspect the excavated trenches. However, Mr Hockey failed to attend the site as agreed and instead sent his foreman who we only know as Steve. Steve attended site at 9.30 on Wednesday 21 st February and was shown all the damaged areas. He will no doubt be able to confirm to you that it was recent damage caused by DAG's works. If for some reason Steve is unable to assist DAG in this matter we confirm that we can still provide you with photographs of the damage and part of the damaged pipe itself,"*

an opportunity that I do not think has been taken up by DAG. That at least is the Company's case.

47. That letter of 30th March also takes the point: *"We are not aware of any application for payment to this Company and as evidence of this we attach copies of the application payment number and other applications for payments. You will note that the first is addressed to Management Partners Limited and the second is addressed to Moorside Developments Limited. This may seem an unmeritorious and technical point, but it is a point directed at what the Company sees as a wholly unmeritorious claim, ignoring discussions and agreements said to have taken place and made with Mr Hockey.*

48. Further, it is recorded in that letter: *"In your letter of 6th March you purported to give notice to suspend the performance of DAG's obligations under the contract. In fact, DAG had left the site on 9th February and have made it clear that they do not intend to return."*

49. I find this correspondence of some significance. It shows that the Company was expressly concerned about delay and inadequate work many months ago and long before the statutory demand was posted. It is not possible for DAG sensibly to argue that the complaints have been trumped up in order to resist a statutory demand and the natural consequences of a winding up that follows from a statutory demand, namely, the presentation of a petition. It appears that an application number 4 may have been sent on 28th February but the Company says it has not received that. It was addressed to Moorside Developments again. It was resent under cover of a letter of 25th April from RPC with a manuscript amendment to correct the name of the recipient. A protective notice under the 1996 Act was served in relation to that by the Company in case, contrary to its submissions, the Act does apply.

50. The Company wrote two letters on 4th May, one to Robert Piece Associates and one to DAG Construction. In relation to the letter sent to DAG, they requested information about how the first copy of the fourth application was sent. The letter ends: *"We should point out that we still believe a meeting will be the quickest way to resolve any outstanding issues and suggest you can contact us to make an appointment."*

51. That received a rather unhelpful response: *"We would be happy to meet you to discuss the matter but only after you remove the spurious £36,000 additional interest charge and pay the interim balance of £33,370(?) excluding VAT.*

52. On 4th May, as I have said, there was also a long letter written by the Company to DAG itself. The first page of it replicates almost verbatim I think the first page of the letter of 23rd February but it then sets out the details of the complaints in relation to each item of work.

53. I will go through them in a minute, mentioning the submissions of each side in relation to the complaint, but before doing so I should mention that Mr Sullivan exhibits to his witness statement a number of invoices which he says relate to the remedial work which has been done in relation to the main work.

54. He says this in his witness statement, after exhibiting the invoices: *"These are all sums that the Company has been obliged to pay to outside contractors to complete unfinished works and to rectify faults of DAG's work and support the figure summarised in the last page of the letter of 4th May."*

55. It is not easy to relate all of the invoices precisely to the separate items of complaint in the letter, but the picture is clear enough, that the Company asserts that it has spent the amount shown in these invoices on repairing and completing defective works.

56. The first item is demolition works, unit D, the sum of £12,500. That is not agreed, *"as there was a significant amount of work to be carried out clearing away the debris and rubble which was used to create a ramp at the rear of unit D and we estimate the cost of clearance to be £1,500."*

57. It is said there is nothing to prove this item. Of course one is not in this application dealing with the detail of the evidence that will appear at any trial of liability or damages but the invoices at page 58 of the bundle onwards do seem to relate at least in part to that work.

"As to the room with the staircase, this sum is not agreed as you failed to take away all of the supporting steels, cabling, ducting and pipe work. To tidy this area up has cost us £1,000 and this will be deducted from the sum claimed."

The same observations apply but the invoices taken as a whole show costs incurred in relation to that item.

"Crainage installation, £52,682, not agreed. It has been necessary to employ contractors to finish and repair the groundwork within the factory at a cost of £8,275."

That at least is an item which is clearly shown in one of the invoices.

"In addition, interest costs have been incurred by the project as a direct result of the delay in completing these works."

We will come back to the £36,000 I have mentioned.

58. The service installations at £6,220 are agreed. The demolition of the brick panels at £2,600 is agreed. The external trenching, in relation to that it is not agreed and there is a dispute about the charge per meter of trenching that could properly be charged. There is nothing in the papers before me or in the evidence of the witnesses to suggest that a rate per metre of trenching had been expressly agreed. It is complained by DAG that the Company has put in no evidence to show that its figure of £125 per metre is wrong and too high and that the Company's figure of £90 is fairer. There is no evidence either way, there is simply a dispute about what the proper rate is. I do not think that there is any reason for saying that there is not a genuine dispute about that element.

59. Then it says: *"In carrying out this element of the work you have damaged the existing outside drains. Repair of this has cost £2,650 so far with a further repair cost of £5,000 expected. When these sums are deducted from your claim you are liable to pay us £4,680."*

The damage, as I have already stated, is open to inspection and photographs, CCTV footage and broken pipe are available for inspection. It is quite clear there is some evidence of damage here and I see no reason to think that the estimate is other than a genuine one. It is a matter for the trial judge to decide at the end of the day what the right figure is.

60. Again an internal trench, the rate is not agreed and I make the same observation. The item BO and excavation of meter rooms, 100 percent of £5,161, not agreed. *"Having physically examined the site and seen the amount of work carried out we are unable to understand how it could possibly be so expensive but we propose to agree a figure of approximately half of that claimed."*

61. Now this is another figure that is not, at least on the evidence before me, expressly agreed for the particular extra work that was done. There appears to be a perfectly genuine dispute with neither side having justified its position. And the final item is again a dispute about the rate of trenching, the cost of trenching.

62. Summarising those deductions, as it were, the claimed amount in total is £98,361. The admitted amount is £73,995. Payments of £10,625 and £30,000 have been made, leaving a significant balance owing by the Company to DAG. However, the Company seeks to set off its additional financing charge of £36,000 which reduces the claim to nil, and indeed gives a balance owing in the other direction of £2,630.

63. As I have said, in spite of opportunities to do so, Mr Hockey has never dealt with the complaints of delays or defective works. Even after inspection by his operative he did nothing. Of course, DAG's case may be that there was no delay and there were no defects and thus he did not need to respond, but clearly this gives rise to a huge area of dispute which I cannot begin to resolve in this application. I cannot do otherwise than conclude that both sides had claims which cannot be ruled out as frivolous. I conclude that each and every one of the claims reductions is a bona fide claim of a substantial nature. I also conclude that the £36,000 claim is a genuine and substantial cross-claim. It is accepted for the purpose of this application at least that if there is delay and if there is additional finance charging, which there inevitably would be, that prima facie the measure of damage would be the additional cost. At the very least I consider that there is a genuine and substantial issue in relation to both delay and therefore the financing charge so that the £36,000 cross claim is a bona fide, genuine, to use the English word, and substantial claim. That phrase, of course, I use deliberately to reflect the test which one finds in ***Bay Oil (Bayoil SA, Re (1999) 1 WLR 147***) in relation to the practice of this Court in relation to cross claims.

64. More specifically I conclude that the Company's case on delay is properly arguable and that the delay for which they contend of ten weeks is not one which can be ruled out as a possibility. I am quite satisfied that there is no reason to doubt the finance charges which are asserted. DAG complains that there is no evidence about that but that is not right. I have already referred to Mr Sullivan's witness statement and the contents of the correspondence. In particular one must remember that Mr Hockey and DAG were offered sight of the financing documents if they wished to but they have not taken up that offer.

65. What follows from all this for the purposes of this application? It was at one stage submitted by DAG that there was no threat to issue a petition. I find that an extraordinary proposition. One does not go round serving statutory demands save to tee up the case for a petition. In any event, I asked Counsel whether, if the statutory demand could not be relied on, her clients would seek to wind up on the basis that the Company was unable to pay its

debts, relying on its status as a creditor by reference to the debts which form the basis of the statutory demand. The answer, after taking instructions, was yes. Accordingly, it is clear that the petition would very probably be presented unless restrained by injunction. I comment here that the statutory demand itself does not appear to be good at present in any event because it has not been served in accordance with section 123(1)(a) of the Insolvency Act 1986 by service by delivery at the Company's registered office but has only been served by post. For the purposes of the present application the 1996 Act seems to me to be a red herring. Even if we do have a contract in writing the position is that the underlying dispute can still be litigated. The Act simply requires payments of sums claimed in respect of which no counter- notice is served. Thus, although the sums claimed may be due, the Company can still assert a breach of contract which, if established, would entitle it to recover some of the amounts which it had paid. The sort of "*pay now litigate later*" situation is precisely analogous to that found in Bay Oil itself where there was a contractual rather than a statutory duty to pay with litigation to follow.

66. The decisions of Mr David Donaldson QC and Hart J in the two cases which I have been referred to refers to, ***Re A Company 1299 2001*** and the second ***Re Environmental Services Limited on 14th November 2001,*** established that proposition beyond any doubt. Accordingly, the Company has in respect of its delay and defect claims and in respect of its cross claim to finance costs, in my judgment, demonstrated disputes giving rise to genuine and substantial cross claims or, where the 1996 Act does not in fact apply, bona fide defences. If it succeeds in those disputes nothing will be owing.

67. The practice is well established (as to which see ***Bay Oil*** itself) that the existence of a genuine and substantial cross claim, just as much as a defence will, ordinarily entitle a company to injunctive relief to prevent advertisement of the petition and will justify the dismissal of the petition which has in fact been advertised. It is, of course, not a rule of law, it is a practice, and exceptional circumstances will produce a different result but there is nothing in the present case which would amount to a special circumstance. Similarly, a company would be entitled to prevent the presentation of a petition even though that prevents someone coming to the seat of justice. Where the debt on which it would be based is subject to a bona fide dispute on substantial grounds, as I explained in my own judgment in ***In the Matter of Pan Interiors Limited*** [2005] EWHC 3241 (Ch):

"The Court has power to do so provided that the proceedings sought to be restrained would be an abuse of process. Abuse of process, it is to be noted, is precisely the foundation on which the modern practice of dismissing petitions rests where there is a genuine and substantial cross claim. The same principles which lead to dismissal and grant of an injunction to restrain advertisement of the petition leads also to the granting of an injunction to restrain presentation of a petition."

68. Accordingly, the Company succeeds in this application.

MISS WILLIAMSON appeared on behalf of the Claimant.
MS A MARKHAM appeared on behalf of the Defendant.