

JUDGMENT : Mr Justice Ferris : Chancery Division, Companies Court : 28th October 2002.

1. This is an application by a company, Guardi Shoes UK Limited, for an order restraining another company named Datum Contracts International Limited from advertising a petition for the winding-up of Guardi which was presented by Datum on the 4th September this year. The petition alleges that at the date of the petition Guardi was indebted to Datum in the sum of some £78,000.
2. The indebtedness arises out of a contract entered into on the 10th September 2001 between Guardi and Datum under which Datum was to do work for Guardi on the refurbishment and fitting out of a shop which Guardi intended to open. The work was completed in about mid October 2001. There were however, as is not unusual, some snagging items which remained to be done. Guardi accepted responsibility for the snagging items and was prepared to return and attend to them at its own expense, but Guardi took the view that the defects were substantial and that it had lost confidence in Datum and was not prepared to have Datum doing any more work. It does not appear whether Guardi has had the work done by any other contractor. The suggestion is that it has not.
3. On the 26th October last year Guardi's solicitors wrote to Datum informing Datum that Guardi would not be making any further payments under the contract until the problems between the two companies had been resolved. There was then architect's report and Datum referred its claim for payment under the contract to adjudication in accordance with the terms of the contract.
4. The contract contained machinery under which the employer, such as Guardi, which asserts that it has a cross-claim against the contractor may, as it were, put its obligation to make payments under the contract in suspense by serving an appropriate notice of its claim. Guardi has served no such notice. Accordingly, when the matter went to adjudication there could be no doubt that Datum was entitled to be paid the balance of what was due to it under the contract and the adjudicator made a decision which reflects this.
5. The position was taken a stage further on the 1st March 2002 when Guardi having made no further payment to Datum, Datum took proceedings against Guardi in the Construction Court which came before his Honour Judge Havery, who by consent gave judgment in favour of Datum for the sum of £108,000 odd, that being the sum which was then undoubtedly due under the contract from Guardi to Datum on the assumption that there was no set-off for defects.
6. During the summer Guardi offered to make payments to Datum at the rate of £4,500 a month and some payments were duly made. Guardi sought to excuse its incomplete performance in respect of payment by referring to short-term financial difficulties and to a fire in its warehouse resulting in loss which its insurers refused to cover.
7. Eventually, on the 23rd July, Datum served on Guardi a statutory demand for some £78,000 odd, that being the balance remaining unpaid of what was due to Datum in respect of the judgment and interest and costs. Guardi, through its solicitors, was throughout this period making murmuring noises about its claim in respect of defects and, at the end of August it, through its solicitors, obtained Datum's agreement that the dispute between them about defects should be dealt with by litigation rather than by arbitration as the contract required. But no effective steps were taken at that time to bring the matter to any form of adjudication.
8. On the 4th September the winding-up petition was presented. Matters then woke up somewhat and, by 9th October, Guardi's solicitors had furnished draft particulars of claim and certain supporting documents but the patience of Datum was exhausted and it was made clear that the petition would be advertised.
9. On the 28th October Guardi made a without notice application to Mr Justice Park who granted it an order restraining advertisement until after today.
10. The matter now comes before the Court on the basis that Guardi seeks a continuation of injunction granted by Mr Justice Park and that is opposed by Datum.
11. So far as the petition debt is concerned there is no dispute about the figures. There is no dispute that £78,877 odd was due from Guardi to Datum at the date of the statutory demand. Since that time, I think at a date earlier this month, a payment of £9,000 has been made representing the instalments of

£4,500 for August and September . No payment has been made for any instalments for October. There is no doubt that there is due to Datum a sum of £69,877.

12. Guardi now says that it has a cross-claim in respect of the defects for a sum of which approximately equals, or exceeds the amount due to Datum. It arrives at that figure by starting with the figure of £64,000 which is his calculation of the cost of remedial work and consequential loss to put right the defects. It accepts that £64,000 is less than £69,000 but is says that there are other matters such as interest to be taken into account and that when that is done the cross-claim of Guardi will come up to something like £69,000 odd which is due from Guardi to Datum. I have to say that I am not in the least convinced that that will be the case, but I can see that Guardi has a cross-claim which is not obviously without substance and which may, and I emphasise may, be made good in respect of a substantial sum.
13. The fact remains however that Datum is a judgment creditor for about £69,000. The principles which should be applied on an application of this kind I think are well-established. The advertisement of a petition will not be restrained unless the Court is satisfied that the presentation of the petition represents an abuse on the part of the petitioner because the debt asserted is disputed to the knowledge of the petitioner on substantial grounds and in good faith.
14. The alternative basis on which it would be possible to restrain advertisement would be if the Court could see now, with certainly that the petition, if it was heard, is bound to be dismissed.
15. It seems to me that neither of those conditions is satisfied in this case. I have already dealt with the amount of the cross-claim. The fact of the matter is that it comes forward very late, and after other excuses not connected with the supposed defects, have been offered for failure to satisfy the judgment. The whole situation is very unconvincing and to my mind smacks of an attempt to drag together sufficient grounds to get the advertisement of the petition restrained.
16. The most important factor is this. The principles applicable to a case of this kind were stated by the Court of Appeal in the case of **Bayoil**. One of those conditions indicated in **Bayoil** was that the cross-claimant must have been unable to litigate the amount of the cross-claim previously. Once the decision in **Bayoil** the extent of that condition has been considered in this division in two cases, the first being a decision of Mr Justice Rime in a case called **A Debtor -v- Johnson** and the other a decision of Mr Justice Park in **Re Wanda Modes Limited**. I have been shown a report of transcript of both decisions. In each of them the Judge declined to create inability to litigate as a condition precedent to obtaining an injunction. Accordingly in Mr Justice Park's case, the presentation of a petition was restrained and in Mr Justice Rimer's case, a statutory demand was set aside.
17. However it seems to me that the circumstances surrounding the supposed inability to litigate are of crucial importance. In both cases I have referred to the cross-claim arose independently from the transaction which have rise to the debt.
18. Here the two are closely connected. Moreover in this case it seems to be common ground that there was a contractual provision designed specifically to cover what has happened. In other words, the contractor has the right to be paid under the contract on the dates provided by the contract, unless the employer serves an appropriate counter notice specifying his complaint, in which case payment is in effect put into suspense until both claim and counter claim are adjudicated upon.
19. Here, as I mentioned earlier, Guardi had the opportunity to serve an appropriate counter notice but it didn't take it. Guardi comes before the Court saying, in effect, that although it hasn't operated the machinery under which its obligation to pay would be put into suspense, Datum should be left in the same practical position as if Guardi had operated that machinery. Datum has proceeded to judgment. It has now taken the next step, which is quite usual for an unsatisfied judgement creditor, in presenting a petition.
20. In all the circumstances of this case it seems to me that Guardi has only itself to blame. Its position, as it seems to me, is weak. It cannot say that the presentation of a petition in the circumstances of this case was an abuse. It certainly cannot say, in my view, that the petition is bound to be dismissed if it proceeds.

21. In those circumstances I see no proper basis for continuing the injunction originally granted by Mr Justice Park and I refuse this application.

MR STANSFIELD: *My Lord that leaves the question of costs.*

MR JUSTICE FERRIS: *Yes*

MR STANSFIELD: *May I ask for my costs? There has been a cross schedule prepared but I'm not sure whether your Lordship---*

MR JUSTICE FERRIS: *Yes I have seen it. So far as liability of course is concerned you cant resist that can you Mr Marshall?*

MR MARSHALL: *(inaudible)*

MR STANSFIELD *My Lord I think the schedule is self-explanatory.*

MR JUSTICE FERRIS: *Yes.*

MR STANSFIELD: *In fact the attendance of the hearing is an underestimate of the event, page 2. Furthermore the partner is in fact here.*

MR JUSTICE FERRIS: *Yes. On the other hand, I would have thought your own fees are somewhat handsome, or at any rate more than is usual to allow upon this sort of application. Yes. What do you say about this cost schedule?*

MR MARSHALL: *My Lordship, I advocate what your Lordship has must made, and also I say that the amount of partner's time at a very high rate is excessive, particularly for the attendance of the partner at this hearing.*

MR JUSTICE FERRIS: *Yes. Well he doesn't put anything for his attendance at the hearing. He has got quite long hours documentation.*

MR MARSHALL: *It's a very high large amount of input from someone charging his rate for a case like this.*

MR JUSTICE FERRIS: *On the other hand it has dragged on for a period of time, has it not? He has had to produce a fairly elaborate witness statement and sort out quite a lot of documentation to be annexed.*

MR MARSHALL: *My Lord certainly there had to be a witness statement and documents and I am simply questioning how much of that had to be done by the partner.*

MR JUSTICE FERRIS: *Yes. Well I think some of these figures are a bit high. I think I have in mind particulars of the total of counsel. I think there is quite a lot of partner's attendance on documents. There is very nearly five hours from the partner, two hours for the assistant and trainee. On the other hand these things do cost a significant amount of money. I shall assess the costs in the sum of £5,000.*

MR D MARSHALL appeared on behalf of the applicant

MR STANSFIELD appeared on behalf of the respondent