

JUDGMENT : HIS HONOUR JUDGE RICHARD SEYMOUR QC : TCC : 24th November 2000

- 1 There is before the Court an application for summary judgment on behalf of the Claimant, Harwood Construction Limited against the Defendant Lantrode Limited.
- 2 The amount for which judgment is sought is £208,390.17.
- 3 That amount, so the Claimant contends, is due from the Defendant under the terms of an adjudicator's decision dated 13 October 2000 by Mr J Riches FRICS.
- 4 The grounds under which payment is resisted are eventually three.
- 5 The first is that this action by which the Claimant seeks to enforce payment is an abuse of the process of the Court because there are already pending in the King's Lynn District Registry of the High Court proceedings in which the Defendant challenges the legal and factual foundation for the award in favour of the Claimant.
- 6 The second ground on which it is sought to resist payment is set-off. It is submitted on behalf of the Defendant that the provisions of the HGCRA 1996, in particular Section 111, do not exclude the right of equitable set-off and that in the King's Lynn proceedings there are cross-claims on behalf of the present Defendant the asserted value of which exceeds the amount of the award.
- 7 The third ground is that the Claimant is or may be insolvent and in the event that it was found to be insolvent the effect of the decision in **Bouygues v Dahl-Jensen** on 31 July 2000 is that it is not appropriate to permit enforcement by an action in which summary judgment is sought by an insolvent company because the provisions of the Insolvency Act and the Regulations under it amount to a code for the determination between themselves of the rights of insolvent parties and their debtors and creditors.
- 8 The first ground seems to me to be unsustainable. It is in the nature of the way in which adjudication operates that it is intended to determine on an interim and temporary basis who should hold a sum of money while the question is resolved in other proceedings by litigation or arbitration. So the fact that there are other proceedings does not mean the application amounts to abuse.
- 9 There has been consideration in a number of previous decisions of the question whether S111 excludes equitable rights of set-off. I do not take a view different to that of others in these courts which is that if a set-off was not excluded by S111 it is difficult to see how the scheme has any practical value. The argument to the contrary is extremely weak.
- 10 There is more substance regarding the question of the current financial state of the Claimant. The Claimant is not in liquidation. A petition has been presented and the hearing date is 6 December 2000, i.e. less than two weeks time. Mr Lettman has drawn to my attention the effect of Section 29 of the Insolvency Act which is that if a winding up order is made, the liquidation will be deemed to have commenced at the date of presentation of the petition.
- 11 On the other hand there is the statement of Mr Callaghan in which he explains the Claimant's perception of the likely outcome of the petition which is that it will fail.
- 12 Mr Coplin said that if there were any substance in Mr Lettman's submissions, nothing would be easier than to present a petition and say that the mere existence of the petition prevents the Court from enforcing, or should influence against enforcement of, an adjudication award.
- 13 If the Defendant had presented the petition, the submission may have had some force. But it is clear from Mr Callaghan's evidence that it was a third party who presented the petition. That party has been paid but the petition has not been dismissed because the present Defendants have given notice to support it.
- 14 So on 6 December a winding up order may be made but may not. If it is, the liquidation will be deemed to have commenced prior to today.
- 15 The evidence is insufficient to enable me to be confident that the petition will succeed or fail.
- 16 But subject to what happens on 6 December there is no reason why the Claimants should not recover summary judgment.
- 17 The real issue is whether I should make an order for payment straightaway or stay the order. It seems to me that there should be a stay.

- 18 There will be judgment for the Claimants for £209,665.29 with execution stayed until the hearing of the petition for winding up, that stay to be continued thereafter if a winding up order is made but otherwise to cease on dismissal of the winding up petition.
- 19 I anticipate that the winding up petition will be dealt with on 6 December. It may not be. As against the possibility that disposal of the petition may be excessively delayed, I give permission to either party to apply in relation to the stay after 6 December.
- 20 Judgment for £209,665.29 plus the Claimants' costs assessed at £4,917.50, payment of costs also subject to the stay.