

Before Lord MacLean , Lord Osborne, Lord Johnston Extra Division, Inner House Court of Session.  
Petitioners for suspension of a charge for payment of money and suspension ad interim : 23<sup>rd</sup> January 2004

**OPINION OF THE COURT delivered by LORD JOHNSTON**

- [1] This is a reclaiming motion against an interlocutor of Lord Carloway sitting as vacation judge refusing a motion on behalf of the petitioners to suspend *ad interim* a charge in respect of a demand for money from the respondents, The Construction Centre Group Limited (in receivership). We refer to the latter as respondents notwithstanding the fact that they have not formally entered the process and have not lodged answers. They were however represented at the hearing before the vacation judge.
- [2] The background to the matter relates to a series of disputes between the parties with regard to a building contract awarded by the petitioners to the respondents which was ultimately terminated by the petitioners.
- [3] In relation to that dispute an adjudicator made an award in favour of the respondents in the sum of £245,469.24 on 28 June 2002. The respondents went into receivership on 26 November of the same year. Subsequent litigation ensued in relation to the enforcement of that award which resulted in the Inner House on 11 April 2003 refusing a reclaiming motion against the decision of the Lord Ordinary. Accordingly the respondents have a decree in their favour for the sum in question.
- [4] On 15 May 2003 the petitioners commenced adjudication proceedings themselves in respect of a claim for liquidated damages consequent upon the delay on the part of the respondents in the execution of the works. On 4 July 2003 the adjudicator issued an award in favour of the petitioners in the sum of £360,305.76 against an original claim made to him by the petitioners of £638,400. The adjudicator's award was the balance between the gross amount of the liquidated damages found due and the original award made in favour of the respondents together with certain other sums owed to them by the petitioners.
- [5] On 7 July 2003 the petitioners raised an action in the commercial court seeking enforcement of the adjudicator's decision in respect of this latter award. This action is currently sisted with defences lodged.
- [6] Having obtained their decree in relation to the initial award in their favour the respondents thereafter extracted same and executed a charge. The present petition is brought seeking a suspension of that charge.
- [7] The matter called before the vacation court, where Lord Carloway, having heard the matter, refused to grant interim suspension. The matter is thereafter appealed to this court.
- [8] The petitioners originally lodged enumerated grounds of appeal all of which related to the substance of the issue with regard to the decree being enforced, with particular regard to the existence of the contra debt. However, before the matter proceeded to a hearing before us in that respect the petitioners sought to lodge an additional ground of appeal against the background of a minute of amendment which essentially raised a new issue in favour of suspension on the basis of balancing of accounts in bankruptcy having regard to the existence of a contra debt now constituted in the second award and the declared insolvency of the respondents. The amendment and related ground of appeal were opposed by the respondents but we allowed the amendment to be made and the additional ground of appeal, to be lodged.
- [9] For reasons which need not be gone into at this stage having regard to the fact that this is an interim hearing, we consider that the issue to be determined by us turns only upon this fresh ground of appeal having regard to the fact, that there is in existence an extract decree which on the face of it precludes argument as to its validity. Be that as it may, we consider the only point at this stage is the issue focused in the new ground of appeal.
- [10] Whether viewed as compensation or retention, the right to balance debts in a bankruptcy situation has been recognised for a long time and is based on an equitable consideration to prevent hardship to a debtor who is also a creditor and is being forced to pay in full while he only receives a dividend for his debt (*Goudy on Bankruptcy* 4<sup>th</sup> Ed, page 551 and *Gloag on Contract* 2<sup>nd</sup> Ed, at page 662 (See also *Ross*

v *Ross* 1895 22R 461 per Lord Maclaren at pp. 465 - 6.) It is recognised that the issue is one of equitable relief and arises where a bankrupt or at least insolvent creditor is seeking to enforce a debt against the debtor holding a contra balance debt against an insolvent or bankrupt. In effect this is the position in this case having regard to the existence of the two adjudication awards in favour of each party. Mr McKenzie's position was that the new ground of appeal did not disclose a *prima facie* case since, in effect, once his clients had an extract decree in respect of an adjudication, the respondents were entitled to enforce it and there was no way that that could be prevented. In any event he submitted that the matter of bankruptcy was being raised too late. He referred to the fact that the receiver had been appointed some time before the second adjudication had taken place, although Mr Cullen said that it was only considerably later that it was discovered that the company was probably practically insolvent.

- [11] This is, however, an interim application in respect of an equitable remedy to preserve the *status quo* pending resolution of this particular dispute. We therefore offer no view on the substance of the argument presented by Mr McKenzie as to whether or not suspension is appropriate or indeed competent at this stage. What is clear to us is that on the authorities there is an arguable case that compensation or retention in bankruptcy by way of balancing of accounts is open at any stage of process even in relation to an extracted decree because it is an equitable remedy. In this case the matter raised is extrinsic to the substance of the decree being enforced and in our view equity is plainly in favour of a suspension at this stage in order to preserve the *status quo*. There is no risk to the respondents since, by agreement, the disputed amount has been lodged on a deposit receipt in joint names. However, if the interim suspension is not granted, there is a serious risk that the petitioners may have to pay twice if ultimate insolvency emerges, and in any event may face unknown consequences when it comes to enforcement of the decree albeit there is currently an agreement to withhold such action until the matter is resolved.
- [12] In these circumstances we are persuaded that a *prima facie* case has been made out to justify at this stage an interim suspension of the relevant charge. We should point out that we do so on the basis of an argument that was not presented to the vacation judge.
- [13] In these circumstances we shall allow the reclaiming motion, order suspension *ad interim* of the charge and remit the matter back to the Lord Ordinary to proceed as accords. Urgent consideration should be given to the lodging by the Respondents of Answers if the matter is to proceed.

Act: Cullen Q. C., Dundas & Wilson :

Alt: MacKenzie, Solicitor Advocate, Masons