Case No: 5970 of 2015

Neutral Citation Number: [2015] EWHC 3202 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT

IN THE MATTER OF COILCOLOUR LIMITED (No 02695346)
AND IN THE MATTER OF THE INSOLVENCY ACT 1986

Royal Courts of Justice
Rolls Building, Fetter Lane,
London, EC4A 1NL

Date: 6 November 2015

Before :

THE HONOURABLE MR JUSTICE HILDYARD

- -

Between :

COILCOLOR LIMTED	**Applicant**
- and -	
CAMTREX LIMITED	**Respondent**

- -
- -

David Alexander QC and **Matthew Abraham** (instructed by **Temple Bright LLP**) for the **Applicant**
Lance Ashworth QC and **Steven Reed** (instructed by **Gateley Plc**) for the **Respondent**

Hearing date: 27 October 2015

- -

Judgment

Mr Justice Hildyard :

1. This is an application by Coilcolor Limited ("the Company") to restrain the presentation of a winding-up petition against it by Camtrex Limited ("Camtrex").

2. The basis of the application is that the alleged debt to Camtrex is bona fide disputed on substantial grounds and/or that there is a genuine and substantial cross-claim that exceeds the amount said to be due to Camtrex.

3. Camtrex contends, to the contrary, that the debt to Camtrex is due, that there is no genuine dispute founded on substantial grounds in that regard, and that there is thus no basis for any restraint on its right as a creditor to present a winding-up petition against the Company based on the Company's failure to pay long outstanding invoices.

4. Although the issue is not an unfamiliar one, the hearing of the application occupied the best part of a day, and ranged over issues of some factual and legal detail, as well as well-known cases as to the approach and practice of the Companies Court in dealing with applications of this kind. I reserved judgment to enable me to review the documentation carefully, but also because I considered the debate as to the use and abuse of a winding-up petition to be worthy of reflection.

5. I have had the benefit of submissions, oral and in writing, from Mr David Alexander QC and Mr Matthew Abraham of Counsel for the Applicants and Mr Lance Ashworth QC and Mr Steven Reed of Counsel for the Respondents.

Parties

6. The Company supplies high quality pre-finished steel, including coating, profiling and slitting a wide variety of substrates.

7. The Company purchases steel coils and processes them to supply to its customers for use in a variety of applications. As its name implies, the Company typically provides painted coils. The quality of the steel coils is essential. Furthermore, at least some (but Camtrex says not all) purchase orders sent by the Company state that the coils *"must be suitable for coating by reverse roller method"*. As I understand it, the stated requirement is intended to ensure a good paint finish. It is of some potential importance (for reasons which will appear later) that any defect in the coils may well not emerge until the Company's own processes are completed.

8. The Company primarily sources its materials from companies based in China and Western Europe. However, due to lead times that arise in relation to orders from abroad, the Company sometimes spot buys from stockholders in the UK, such as Camtrex, to make up any supply shortfall.

9. The Respondent, Camtrex, is a Class 1 steel supplier and sells 65,000 tons of steel per annum to the automotive, white goods and construction industries.

10. Camtrex does not manufacture steel; it merely buys from a producer and sells to a consumer.

Trading relationship

11. It is not in dispute that Camtrex first began supplying steel coils to the Company in 2004 and they have traded with each other intermittently since that time.

12. Between 2004 and 2014 inclusive, 78 invoices were raised in respect of supplies of steel by Camtrex to the Company.

13. There has been a significant amount of trading between the Company and Camtrex in 2015, in the course of which 37 invoices were raised in respect of orders placed by the Company.

14. Over the years the Company has occasionally raised issues with the quality of the materials which Camtrex has provided. However, until now, all such issues have always been resolved amicably, with Camtrex removing defective materials supplied by Camtrex and giving credit for those defective materials.

The present dispute

15. The matters relied on by the Company as giving rise to the present dispute between the parties can be summarised as follows:

    (1) From April 2015 onwards, the Company's quality control identified an increasing number of what it regards as defective steel coils supplied by Camtrex.

    (2) Following the identification of alleged defects in the materials supplied, there was correspondence between the parties which resulted in some non-conformity reports ("NCRs") being raised by the Company. Some of these NCRs were resolved, but others remain unresolved.

    (3) Following an email on 2 July 2015 from the Company informing Camtrex that there were numerous outstanding issues, the parties attended a meeting which took place on 9 July 2015 to discuss the ongoing problems.

    (4) Following the meeting some of the defects were accepted and others were disputed or remained to be verified;

    (5) On 18 August 2015, in a conference call, it was agreed that, rather than continuing to raise NCRs, the Company would review all stock provided by Camtrex and put together a schedule showing all allegedly defective stock supplied.

    (6) However, it also appears from correspondence that certain coils provided by Camtrex have different Galv Weights from those expected and specified in Camtrex's description: the Company claims compensation for these defects also.

16. The Company contends that it is entitled to set-off or cross-claim in respect of goods supplied unfit for purpose; and that this is all it has been seeking to do. The Company maintains that its set-off or cross-claims plainly have real substance, and can only

fairly be adjudicated at a trial. It makes the further point that Camtrex has not taken the trouble to assess the defects on the ground; it has simply dismissed the claims.

17. Nevertheless, Camtrex continues to maintain that the complaints raised by the Company are for the most part contrived some time after the event and with a view to avoiding or delaying payment. Its position is that having initially engaged with the Company to resolve issues that the Company claimed to have, it became clear to Camtrex that many of the issues being raised had no foundation in fact, even disregarding the terms of trading between the parties. For example, the Company raised a complaint about steel coils which Camtrex had not supplied, but rather had been supplied by Tata.

18. Further and in any event, Camtrex maintains that the complaints relied on by the Company are precluded by the terms of trading between the parties (see later). Camtrex relies on what I understand to be its standard terms and conditions, which it contends were incorporated in each and every of its contracts with the Company.

19. Indeed, during the hearing, Mr Ashworth did not shrink from the proposition that Camtrex's case at this stage really is focused on the terms and conditions and its contention that these preclude any set-off and even any cross-claim, with the result that no factual inquiry can be justified.

20. As to the incorporation of these terms, Camtrex's case is that there can be no substantial doubt that dealings between the parties were governed by terms and conditions printed on the reverse of all acknowledgments of orders and all invoices and also on all delivery notes. Camtrex contends that:

    (1) It is common ground that the parties have traded with each other intermittently for in excess of 10 years.

    (2) To place an order the Company would email or telephone Camtrex to enquire whether Camtrex had certain coils of steel available. Once the availability of coils had been confirmed, the Company would raise a purchase order and send it by email to Camtrex. The purchase orders contain no reference to any terms and conditions.

    (3) It is Camtrex's standard procedure that when an order is received an Acknowledgment is sent by post to the customer along with Camtrex's standard terms and conditions (paragraph 13 of Ms Thomas's 2nd witness statement). The Acknowledgment states on its front: "Our terms and conditions attached apply".

    (4) Upon delivery of each order Camtrex provided a delivery note to the Company. The delivery notes had Camtrex's standard terms and conditions on the reverse.

    (5) Once the order had been processed, invoices were raised in respect of each purchase order. Camtrex's terms and conditions are printed on the reverse of all invoices and a larger two-page version is sent with each invoice.

21. Camtrex contends that there can be no substantial doubt that in light of the supply process set out above and the long course of dealing between the Company and Camtrex, it is clear that those terms have been incorporated into the contracts for supply (each of which, it insisted, are separate from any other). Indeed, Mr Ashworth submitted, it would be "simply incredible" for the Company to assert that Camtrex's terms and conditions do not govern each contract for the steel supplied: insofar as the Company was to or does assert that the terms are not incorporated, such an assertion flies in the face of the contemporaneous documents and evidence and cannot be accepted even in the absence of cross-examination.

22. The Company, however, does not admit that these terms and conditions ever became incorporated into its contractual relations with Camtrex, and it maintains that some at least are clearly inapposite to the nature of the goods supplied. It contends that the terms and conditions on which Camtrex relies were not signed or expressly acknowledged by the Company to be applicable; and in such circumstances whether (and the extent to which) they were incorporated by a course of conduct is a question of fact and degree which can only fairly be adjudicated by a proper inquiry at trial.

23. Turning more specifically to the terms and conditions on which Camtrex has come to place increasing reliance the Company contends that:

    (1) in any event, on their true construction such terms and conditions did not validly exclude cross-claims, even if made after 7 days (see below);

    (2) the Company might also seek to rely on the Unfair Contract Terms Act: but that was a matter for trial.

24. I do not think it necessary or apposite to quote the provisions of the terms and conditions endorsed on invoices and delivery notes, which Camtrex contends were expressly notified to the Company, and on which it seeks to rely. They are however appended to this Judgment, and Camtrex relies especially on clauses 3.4, 8.1, 8.4, 10.3, 13.2, 13.3, 13.4, 13.9, 13.14 and 15.2.

25. With this armour, Camtrex submits that:

    (1) Even if the Company were to be able to prove for the purpose of this hearing that there is a genuine dispute in relation to the quality of the steel supplied, clause 8.4 renders any such dispute fundamentally flawed and otiose. The sums due and owing cannot, on any reasonable construction of clause 8.4, be withheld by virtue of any set-off, deduction, counterclaim or otherwise. Therefore, there can be no genuine and substantial dispute in relation to payment of the outstanding sums.

    (2) It being accepted by the Company that it did not notify Camtrex of every defect on which it now seeks to rely within seven days and therefore, pursuant to clause 13.3 the express terms, Camtrex has no liability in respect of this steel supplied and there can be no genuine or substantial dispute.

    (3) The Company's suggestion that the seven day period for notification of defects has not been adopted and has been waived or varied is defeated by clause 15.2

26. Further, Camtrex submits that any liability in respect of such part of the Company's cross-claim (some £27,230.06) as relates to the cost of applying paint to allegedly defective coils is expressly excluded under clause 13.9 of the terms and conditions.

27. As to the Company's attempt to surmount the no set-off and no liability clauses by asserting that, because Camtrex accepted notification after seven days on a number of occasions since the start of the relationship and/or raised credit notes in the Company's favour, Camtrex has thereby waived the no set-off provision and/or the seven day notification provision, Camtrex rejects such an approach as being fundamentally flawed in light of clause 15.2. Furthermore, it contends that in the context of individual supply agreements, each a separate contract, where the no set-off, seven day notification and no waiver clauses are each time restated, it cannot be said that those clauses have been waived by a course of dealing. To assert otherwise would render the no waiver clause otiose when it expressly contemplates a waiver by Camtrex of a breach by the Company.

28. Accordingly, and as indicated previously, Camtrex submits that it is not necessary to get into the details of the Company's cross-claims: they are for present purposes irrelevant.

29. Thus it is that the real issue between the parties at this stage has become, not so much the factual question as to the extent and nature of the defects asserted by the Company, but the question of mixed fact and law as to the application, meaning and effect of the terms and conditions relied upon by Camtrex.

The proceedings thus far

30. The course of proceedings thus far can be summarised as follows:

    (1) On 21 August 2015 the Company was served with a statutory demand relating to invoices for May 2015 amounting to £179,501.11.

    (2) Following service of the statutory demand a letter was sent by the Company's solicitors, Temple Bright, dated 28 August 2015 requesting an undertaking from Camtrex that no petition would be presented in relation to the statutory demand and any subsequent invoices.

    (3) Since then, Camtrex has added the invoices for June 2015 and has demanded payment of £344,304.64.

    (4) On 10 September 2015 the Company's solicitors informed Camtrex's solicitors, Gateley Plc, that the Company would pay the sum of £243,671.52 to Camtrex but that the balance of £100,633.12 was disputed.

    (5) On 11 September 2015 the Company issued its application for an injunction restraining presentation of the petition. Upon an undertaking to pay the sum of £243,671.52 to Camtrex, the Court granted the Company an injunction restraining presentation of a petition against it and adjourned the application to 18 September 2015.

    (6) The Company duly paid the sum of £243,671.52 to Camtrex.

(7) On 18 September 2015, upon an undertaking from Camtrex not to present a winding-up petition in the meantime, the Court adjourned the application to a day to be fixed in a five day window commencing on 26 October 2015 with a time estimate of one day. That is the hearing which has resulted in this judgment.

Legal principles

31. The court will grant an injunction to prevent presentation of a winding-up petition where it considers that the petition would be an abuse of process and/or that the petition is bound to fail (to the extent they are different): *Mann v Goldstein* [1968] 1 WLR 1091. See also Buckley LJ in *Bryanston Finance Ltd. v De Vries (No. 2)* [1976] Ch. 63 at p77:

> "If it could now be said that, on the available evidence, the presentation by the defendant of such a petition as is described in the injunction would prima facie be an abuse of process, the plaintiff company might claim to have established a right to seek interlocutory relief. Otherwise I do not think it can. If it were demonstrated that such a petition would be bound to fail, it could be said that to present it, or after presentation to seek to prosecute it, would constitute an abuse*: Charles Forte Investments Ltd. v. Amanda* [1964] Ch. 240."

32. The Court will restrain a company from presenting a winding-up petition if the company disputes, on substantial grounds, the existence of the debt on which the petition is based. In such circumstances, the would-be petitioner's claim to be, and standing as, a creditor is in issue. The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the Court's settled practice to dismiss the petition. That practice is the consequence of both the fact that there is in such circumstances a threshold issue as to standing, and the nature of the Companies Court's procedure on such petitions, which involves no pleadings or disclosure, where no oral evidence is ordinarily permitted, and which is ill-equipped to deal with the resolution of disputes of fact.

33. The Court will also restrain a company from presenting a winding-up petition in circumstances where there is a genuine and substantial cross-claim such that the petition is bound to fail and is an abuse of process: see e.g. *Re Pan Interiors* [2005] EWHC 3241 (Ch) at [34] – [37]. If the cross-claim amounts to a set-off, the same issue as to the standing of the would-be petitioner arises as in the case where liability is entirely denied. Even if not qualifying as a set-off, a genuine and substantial cross-claim exceeding the would-be petitioner's claim will also result in the petition being dismissed in accordance with the same settled practice, save in exceptional circumstances (as a discretionary matter). That is also because, if the cross-claim is established, the would-be petitioner will have no sufficient interest either in itself having a winding up ordered, or to invoke the class remedy which such an order represents.

34. Further, it is an abuse of process to present a winding-up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as

to whether that money is owed: *Re a Company (No 0012209 of 1991)* [1992] BCLC 865.

35. However, the practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will suffice to warrant the matter proceeding by way of ordinary litigation. The Court must be persuaded that there is substance in the dispute and in the Company's refusal to pay: a "cloud of objections" contrived to justify factual inquiry and suggest that in all fairness cross-examination is necessary will not do.

36. As stated by Chadwick J (as he then was) in *Re a Company (No 6685 of 1996)* [1997] BCC 830 at 838:

> "I accept that any court, and particularly the Companies Court, should not seek to resolve issues of fact without cross-examination where there is credible affidavit evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in circumstances in which, on a full understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible."

37. There was some disagreement between the parties before me as to the relevance of proof of the relevant company's solvency. The question has not infrequently been considered, primarily because the ground for winding up is not a company's continued indebtedness but that company's insolvency: it is the inference that may be drawn from its failure to discharge undisputed or substantially indisputable indebtedness which is the true basis of the petition.

38. Mr Ashworth on behalf of Camtrex relied especially (and repeatedly) in that regard on the Court of Appeal's decision in *Re Taylor's Industrial Flooring Ltd* [1990] BCC 44, where it was emphasised that (a) "if a debt is due and an invoice is sent and the debt is not disputed, then the failure of the debtor company to pay the debt is itself evidence of inability to pay"; (b) that inference is permissible even in the case of a company which is known to be in a strong financial position (see *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114), lest otherwise solvent companies be insulated from the process and encouraged to spin out the time for payment; and (c) to displace the inference, the reason for non-payment must be substantial: "It is not enough if a thoroughly bad reason is put forward honestly".

39. Mr Alexander, for the Company, submitted that the Court should take into account all the circumstances, including whether (a) the alleged debt was entirely undisputed, or had been the subject of a stated objection and (b) the subject company appeared otherwise to be in good financial state, if so minimising any justification for a winding up (especially since a petition is a class remedy (being a remedy brought by a creditor for the protection not of himself but, whether appreciated or not, all other creditors)). Mr Alexander particularly relied on the judgment of Hoffmann J (as he then was) in *Re a Company no. 0012209 of 1991* [1992] 1 WLR 351, in which he stated:

> "I do not for a moment wish to detract from anything which was said in the *Cornhill Insurance* case, which indeed followed earlier authority, to the effect that a refusal to pay an indisputable debt is evidence from which the inference may be drawn that the debtor is unable to pay. It was, however, a somewhat unusual case in which it was quite clear that the company in question had no grounds at all for its refusal. Equally it seems to me that if the court comes to the conclusion that a solvent company is not putting forward any defence in good faith and is merely seeking to take for itself credit which is not allowed under the contract, then the court would not be inclined to restrain presentation of the petition. But, if, as in this case, it appears that the defence has a prospect of success and the company is solvent, then I think that the court should give the company the benefit of the doubt and not do anything which would encourage the use of the Companies Court as an alternative to the RSC Ord 14 procedure."

40. There is a measure of policy in all this. In the *Cornhill Insurance* case, the Court's approach was to deprecate and discourage large companies standing on their size and treating and flaunting their obvious solvency as a shield or insulation against petitions even when based on undisputed debts. So too in *Taylor's Industrial Flooring*, the judge had found, and the Court of Appeal proceeded on the basis, that there was no substantial ground of defence; the principal purpose of the Court of Appeal's judgments was to make clear that the fact of solvency was not itself an answer to a petition based on an undisputed or indisputable debt.

41. But the point made by Hoffmann J, which I respectfully adopt, is that a company opposing a petition on the basis that it is not insolvent and the debt asserted is disputed on grounds on which it has at least a prospect of success, is not using solvency as a shield or insulation, but as part of a composite answer as to why the Companies Court is not the appropriate forum, and is thus being abused. In such a context, the Court can usually be expected to give the company the benefit of the doubt and not do anything to encourage the use of the Companies Court as an alternative to ordinary court processes, even if the case is one of sufficient strength in the perception of the petitioner that it would be proper to resort to an application for summary judgment under *CPR Part 24*.

42. In short, in my judgment, although solvency is not a defence to a petition based on an undisputed claim, and the Court will always consider whether any dispute has real substance such as to make the Companies Court an inappropriate forum for its resolution, the Court will also wish to be satisfied that the remedy is not being invoked as a means of putting pressure on a company of which the solvency is not in real doubt, and where there is a dispute as to indebtedness. Further, in my view, the remedy is ultimately discretionary; and the more obvious it is that the remedy is being threatened or pursued as a threat or to exert inappropriate pressure, the more likely the Court is to give the company the benefit of any reasonable doubt, both at the interlocutory stage of an injunction and subsequently, in determining whether its defences or cross-claims give rise to a sufficiently substantial dispute to make the Companies Court process inappropriate.

Application of these principles in this case

43. What, then, should be the approach of the Court in this case? The Company does not appear to be insolvent (even if its latest management accounts do show deterioration in its cash at bank, as Mr Ashworth pointed out). However, there are signs that it has sought out defects as a defence, and to build a case in damages to sustain a cross-claim sufficient to over-top Camtrex's claim (so as to bring it within the remit of the judgment of Nourse LJ in *Re Bayoil SA* [1988] BCC*)*. The Company has also been inconsistent and evasive on the presently central point as to whether or not Camtrex's terms and conditions have been incorporated. It may be that when more fully investigated and argued it is revealed that the dispute lacks sufficient substance even to avoid summary judgment.

44. But would the Companies Court be the proper forum? Is there any real and sufficient doubt as to whether the Company is indebted to Camtrex (taking into account any admissible cross-claims)? Should the Company be given the benefit of any such doubt?

45. The first and, as I indicated previously, the central issue, at least at this stage, is whether (a) there are any substantial grounds on which the Company can dispute Camtrex's assertion that the terms and conditions on which Camtrex relies came to be incorporated into the contracts between the Company and Camtrex for each supply of goods; and (b) if they were, whether there is any substantial dispute which cannot or should not now be adjudicated as to their true meaning and effect. The prime importance of this point is that, if those terms and conditions were so incorporated, and are to be given the meaning and effect contended for by Camtrex, any dispute as to whether in fact the goods supplied were defective may not avail the Company. I turn to address these issues as to (a) incorporation of Camtrex's terms and conditions and (b) their interpretation; there may also arise a further issue (c) whether any of the terms and conditions, if incorporated, were varied or waived.

46. As to (a), (the issue of incorporation), the approach of the Court is apparent from the decision of the House of Lords, in *Henry Kendall & Sons v William Lillico & Sons* [1969] 2 AC 31. As explained (*per* Lord Pearce):

> "The court's task is to decide what each party to an alleged contract would reasonably conclude from the utterances, writings or conduct of the other. The question, therefore, is not what [the buyers] themselves thought or knew about the matter, but what they should be taken as representing to [the sellers] about it or leading [the sellers] to believe. The only reasonable inference from the regular course of dealing over so long a period is that [the buyers] were evincing an acceptance of, and a readiness to be bound by, the printed conditions of whose existence they were well aware although they had not troubled to read them. "

47. The Company's evidence is surprisingly equivocal, and sufficiently thin to encourage suspicion that either there is no real answer or that the issue has not fully been thought through. It does not, thus far at least, condescend to detail as to whether and if so on what basis the Company contends that the terms and conditions did not form part of

the contracts between the parties (the strongest that it was put in the Company's evidence being that "it has not been admitted" and "is a legal and factual issue that should not be addressed in the context of a winding up petition"). Further, parts of the Company's skeleton argument appeared to accept the premise that they applied, especially in the context of contending that they had been varied or waived.

48. Mr Ashworth, on behalf of Camtrex, was quick to point out these weaknesses, though to my mind he went too far in his oral presentation in suggesting that it was clear that the Company accepted that the terms and conditions had indeed been incorporated. In any event, Mr Ashworth submitted that the uncontradicted evidence as to the supply process described in paragraph [20] above and the long course of dealings between the parties also there referred to, coupled with what is not suggested to be anything other than an invariable expectation that some terms and conditions will be applicable, made any assertion that the terms and conditions were not incorporated incredible.

49. These are powerful points. It does seem to me that, on the evidence as it stands, Camtrex has a strong case that the terms and conditions on which it relies were incorporated into and did form part of and regulate the transactions between the parties: the fact of a course of dealings, the expectation that such dealings would be subject to some terms and conditions, their communication and acceptance and the inference of knowledge that some were endorsed, and the apparent absence of any comment, query or objection by the Company plainly and strongly support that inference. Even though actual findings of such facts would be necessary, the factual inquiry would be reasonably limited. It is immaterial whether or not anyone on behalf of the Company actually read the terms and conditions. If the only issue was as to whether the terms and conditions were incorporated, then, with some reluctance, since in my view it is not really the business of the Companies Court to engage in such factual inquiries and findings as to the detailed nature and basis of the dealings between the parties, I might not be disposed to injunct further use of the Companies Court process on that ground alone.

50. However, it is not the only issue: for even if the facts give rise to the inference that the parties agreed that, so far as appropriately applicable, the terms and conditions should be treated as incorporated, questions arise both as to terms that do not appear to be appropriate having regard to the communicated purposes for which the goods were to be supplied, and as to the meaning and effect of such terms and conditions in their factual context.

51. An example of a term or condition which it is difficult to accept that Camtrex can have thought to be acceptable to and accepted by the Company is one of the clauses on which Camtrex places greatest reliance: clause 13.3, which purports to exclude any liability (which is extremely broadly defined in clause 1) for any defects "unless the event is notified to the Company within 7 days". Although there is a dispute as to whether the Company invariably made clear in every Order Form that this was so, it seems clear that in at least some documented instances it expressly stated that the coils to be supplied "must be suitable for coating by reverse roller method and roll forming into profiled sheets". That might well (indeed perhaps typically) only emerge more than seven days after delivery, when the Company applied its own processes. It seems difficult to justify an inference that the Company accepted that it should not have recourse in such circumstances. Similar considerations may apply to

clause 13, and possibly also to clause 8.4 (since it seems to me that it must be arguable that the Company would have expected to withhold payment in respect of goods supplied which were not fit for the express purpose for which they were ordered). Of course, the same arguments might be deployed in the context of the further issue as to interpretation: but that simply extends the inquiry required.

52. As to (b) in paragraph [45] above and that issue of interpretation, it seems to me that a number of difficult questions arise. These may include questions as to (i) whether the provisions of clause 13.3 are really to be interpreted as excluding all liability, or (for example) only liability in respect of defects not amounting to unfitness for purpose, and (to take another example) whether "the event" requiring to be notified is the event which results in disclosure of the defect, or simply the seventh day after delivery; (ii) what, as a matter this time of interpretation, might be the limits of the purported exclusion in clause 8.4 of any right to withhold payment in the case of goods not fit for purpose; and (iii) what might be the limits on the purported exclusion by clause 13.14 of all warranties, terms and conditions and duties implied by law, especially having regard to the Unfair Contract Terms Act (on which, albeit belatedly, the Company indicated it would seek to rely). As I say, these are the clauses on which Camtrex has placed special reliance.

53. Then as to (c) in paragraph [45] above, the issue of waiver or variation may be an alternative way of restricting the application of these generic terms and conditions, some of them arguably inappropriate and not in fact observed in the course of dealings, in the particular and specific context. That needs little elaboration: it requires factual analysis of the way in which the individual contracts were in fact performed, and the practices that developed as a matter of course between the parties. Clause 15.2 does not address waiver in the very same transaction; it does not expressly apply to variation or estoppel by convention; and in any event, it invites consideration as to its true scope and effect.

54. In my view, none of these inquiries of fact and context, and none of these difficult questions of contractual interpretation and statutory control, would be appropriate to be undertaken by the Companies Court in the context of a winding-up petition. They are far better dealt with by ordinary process and in the orderly way for which it provides, rather than under the threat and difficulties (including immediate freezing of bank accounts) that even the presentation of a petition poses and triggers.

55. In short, unless there is nothing worthy of further inquiry and analysis in the Company's factual case on defects, I do not consider a petition for winding up to be a suitable or even proper way to proceed.

The Company's factual defences and cross-claims based on defects

56. I turn, then, to the Company's factual defences and cross-claims based on its case that Camtrex supplied, with increasing regularity recently, goods which were not fit for purpose, or alternatively, defective.

57. In this context, it was Camtrex's case that was slim. Mr Ashworth sought to extrapolate from the fact (which was admitted by the Company) that at one point it sought to claim in respect of coils which were not in fact supplied by Camtrex (they were supplied by Tata) the proposition (as advanced in Camtrex's skeleton argument)

that “this demonstrates the lack of substance to [the Company’s] claims”. But it appears tolerably clear that the error was just that, made whilst an individual who would have known better was on holiday; and it is impossible, in my view, to extract from that sort of error the broad proposition for which Mr Ashworth contends.

58. Mr Ashworth also sought to ring-fence one of the Company’s cross-claims, for the cost of applying paint to allegedly defective coils, as a claim (in the amount of some £27,230.06) which is “expressly excluded under clause 13.9 of the terms and conditions”; but that begs the questions of application, interpretation and variation to which I have referred; and it is wholly inapposite, in my view, to deal with it separately, and leave all other issues to be fought out in a more appropriate process.

Miscellaneous

59. I need not lengthen an already long judgment by addressing other miscellaneous points that were raised, as to the recoverability (or not) of VAT erroneously paid to Camtrex, as to whether the Company had claims in restitution or only in damages, and the like.

60. All these are matters, which if pursued, are best adjudicated in the ordinary process and not in the context of a petition.

Conclusion

61. Standing back from the details, and as I put to Counsel at the hearing, it is quite apparent that what Camtrex really seeks is not a winding up of the Company, but leverage whereby to require the Company to make payment now and argue later. It seeks to justify that course on the basis of the terms and conditions, and especially the exclusion of set-off, and contends that unless allowed to proceed it will be deprived of that aspect of its contract. But that is all in issue, for reasons I have explained; and the issues are sufficiently arguable to make them unsuitable for adjudication under the threat of winding up and in the Companies Court.

62. That is not of course because judges sitting in the Companies Court are in some way less able to deal with the points: there is in any event no longer any demarcation and all judges of the Chancery Division sit from time to time in the Companies Court. It is because the process is not apt for the adjudication of such issues, and the inference of inability to pay upon which the remedy is based is unjustified; the threat of winding up should not loom over those whose disputes are in such circumstances more appropriately resolved elsewhere, even if potentially by summary process. Put another way, in my view, a winding-up petition should not be resorted to in such circumstances by those whose objective is not in truth the class remedy which a successful winding-up petition provides but to put pressure upon a company to pay lest the provisions for the protection of the class which are triggered by the mere presentation of a petition undermine its standing and its business. The circumstances, exemplified by the *Cornnhill Insurance* case, of a company using its prestige and solvency as if it clothed it with immunity from the process of a petition, despite delaying payment of an undisputed debt without condescending to any defence, are both exceptional and distinguishable.

63. In all the circumstances, I have reached the firm conclusion that the claims, defences and cross-claims which I have sought to describe in the present case should be adjudicated in the context of an ordinary action. They should not be pursued in a winding-up petition. That would, in my view, be an abuse.

64. It follows that I shall, unless suitable undertakings are offered in lieu, and subject to the next following paragraph [65], make an injunction restraining presentation of a petition as sought by the Company.

65. My only uncertainty has been prompted by my acceptance that, though not suitable for the Companies Court, there are some signs that the Company has been (if I may put it that way) scratching around for a defence, and exacerbated by the doubts raised towards the end of the hearing as to the financial position of the Company in what may be difficult trading conditions. It is whether (by analogy with *CPR Part 24* and leave to defend on a conditional basis), I should require some payment in by the Company pending resolution of all the issues. I shall hear the parties further on that point, and the question of costs, after formally handing down judgment.

APPENDIX

Camtrex Limited’s Conditions of Business

CAMTREX LIMITED – CONDITIONS OF BUSINESS

1. DEFINITIONS

In these conditions the following words have the following meanings unless the context requires otherwise.

"Company" means Camtrex Limited (Company No. 01251841) whose registered office is at Speedwell Road, Hay Mills, Birmingham B25 8ET;

"Contract" means any contract between the Company and the Customer incorporating these conditions of business for the sale of Products;

"Customer" means the person whose Order for Products is accepted by the Company;

"Liability" means actions, awards, costs, claims, damages, losses (including without limitation any direct or indirect consequential losses), demands, expenses, loss of profits, loss of reputation, judgments, penalties and proceedings and any other losses and/or liabilities;

"Force Majeure Event" means any occurrence which hinders, delays or prevents the Company performing any of its obligations under this Contract which is beyond the reasonable control of the Company including but not limited to war, civil war, act of God, fires, flood, epidemic, utility disruption, subsidence, strikes, lock-outs, insurrection or riots, embargoes, unavailability of raw materials, products and or services, sub-contractor and/or supplier delays and/or default, delays in transportation, and/or changes in requirements or regulations of any governmental authority;

"Order" means an order placed by the Customer with the Company for the supply of Products;

"Products" means any products and/or goods ordered from the Company by the Customer or to be supplied by the Company to the Customer;

"Specification" means the quantity, quality and/or description of the Products to be supplied by the Company to the Customer [as attached to the Order]; and

"Working Day" means any day from 9.00 am until 5.00 pm which is not a Saturday, Sunday or bank or public holiday in England.

BASIS OF CONTRACT

2.1 This Contract together with an Order contains the whole agreement between the parties and it supersedes any prior written or oral agreement between them and is not affected by any other promise, representation, warranty, usage, custom or course of dealing. The parties confirm that they have not entered into this Contract on the basis of any representation that is not expressly incorporated into this Contract. Nothing in this Contract shall exclude liability for any fraudulent statement or act made prior to the date of this Contract.

2.2 Orders placed by the Customer leading to a contract which are not expressed to be subject to these conditions shall still be subject to them.

2.3 No purported variation to this Contract shall take effect unless made in writing and signed by an authorised representative of the Company.

3. ORDERS AND CONTRACT

3.1 "Quotations" are not binding or capable of acceptance and are estimates only.

3.2 The Company shall have the right to refuse to accept any Orders placed for Products.

3.3 The Customer shall be responsible for the accuracy of an Order and for giving the Company any information necessary for the Company to perform the Contract.

3.4 The Contract between the Company and the Customer shall come into effect on the Company's acceptance of the Customer's Order. No Order for Products shall be deemed accepted by the Company until confirmed in writing by the Company's authorised representative.

4. SAMPLES

4.1 The production of any samples or test work for the Customer shall, unless otherwise agreed in writing with the Company, be carried out at the cost of the Customer.

In addition to clause 10.2, if the Customer approves any sample produced or test work performed by the Company then the Customer shall have no claim in respect of, nor any right to reject, any Products, where:

4.2.1 the Products in question are of the same and/or similar Specification and fitness for purpose, as the sample and/or test work as appropriate; and/or

4.2.2 any difference(s) from the Specification do not have a material adverse effect on the quality and/or performance of the Products.

5. DELIVERY

5.1 Dates for delivery and/or performance are estimates only and are not guaranteed. Time is not of the essence in relation to such dates. They are also subject to any matter beyond the Company's reasonable control. The Company will use its reasonable commercial endeavours to ensure delivery and/or performance on the dates specified.

5.2 Where Products are to be delivered in instalments, each delivery shall constitute a separate and distinct contract and failure by the Company to deliver, or any claim by the Customer in respect of, any instalment shall not entitle the Customer to repudiate and/or terminate this Contract as a whole.

5.3 Subject to clause 14.3, the Customer shall have no right to reject Products and shall have no right to rescind for late delivery and/or performance unless the due date for delivery and/or performance has passed and the Customer has served on the Company a written notice requiring the Contract to be performed and giving the Company not less than 14 Working Days in which to do so and the notice has not been complied with.

5.4 The Company shall not be required to fulfil Orders for Products in the sequence in which they are placed.

5.5 The Customer shall procure during normal working hours that the Company has free right of access to the address for delivery for the purpose of delivering the Products. The Customer shall be responsible at its own cost for all arrangements to unload the Products when delivered.

5.6 If the parties agree that the Products are to be collected from the Company's premises then the Customer shall collect the Products within 3 Working Days of being notified that the Products are ready for collection. If the Products are not collected by the Customer within the specified period the Company may despatch the Products to the Customer at the Customer's expense and risk and/or store the Products at the Customer's expense and risk until despatch and/or collection.

6. POSTPONEMENT OF DELIVERIES

6.1 The Company may comply with reasonable requests by the Customer for postponement of delivery of the Products for up to 14 Working Days from the original delivery date but shall be under no obligation to do so.

6.2 Where delivery of the Products is postponed at the Customer's request or because the Customer refuses to take delivery of the Products, then the Customer shall pay all costs and expenses of the Company incurred as a result, including reasonable charges for storage, transportation and insurance. In addition the Customer shall be obliged to pay for the Products as if delivery and/or performance had not been postponed.

7. PRICE

7.1 The price of the Products shall be as quoted to the Customer at the date of the acceptance of the Order.

7.2 The Company may increase its prices in relation to the Products which the Company has agreed to supply where the increase is to take account of increases in costs, expenses and/or materials suffered by the Company. The Customer will be informed in writing by the Company of any increases in prices for the Products at least 30 days before such increase takes effect.

7.3 The Customer may cancel without Liability any Contract in relation to which the price is to be increased provided that the notice of cancellation is received by the Company 14 Working Days before the scheduled date for delivery of the Products.

7.4 If the Customer does not cancel the Contract for the provision of the Products within the specified time period then the price increase shall take effect for the Products ordered by the Customer.

7.5 The Company's prices are exclusive of any VAT for which the Customer shall additionally be liable.

8. PAYMENT

8.1 Unless otherwise agreed in writing with the Company, the Company's terms of payment are net cash within 60 days from the end month in which delivery is made. Time for payment shall be of the essence.

8.2 If the Customer fails to make any payment in full on the due date the Company may charge the Customer any reasonable additional administration costs and/or interest (both before and after judgment) on the amount unpaid at the rate of 4% above the base rate from time to time of the Company's bank. Such interest shall be compounded with monthly rests.

8.3 Any monies received by the Company from the Customer may be applied by the Company at its option against any additional administrative costs and/or interest charged prior to application against any principal sums due from the Customer against which it may be applied in any Order.

8.4 The Customer shall pay all sums due to the Company under this Contract without any set-off, deduction, counterclaim and/or any other withholding of monies.

8.5 Payment shall not be deemed to be made until the Company has received either cash or cleared funds in respect of the full amount outstanding.

8.6 Subject to clause 6.2 the Company shall be entitled to render an invoice to the Customer any time on or after delivery of the Products. The Company shall be entitled to invoice each delivery of Products separately.

8.7 If payment in full is not made to the Company when due then the Company may withhold or suspend future or current deliveries of the Products and delivery under this and/or any other agreement with the Customer.

9. CREDIT LIMIT

9.1 The Company may set a reasonable credit limit for the Customer. Changes in the Customer's credit limit will be notified to the Customer from time to time.

9.2 The Company reserves the right to refuse to accept Orders for Products and/or to suspend or withhold delivery of Products if such Products would result in the Customer exceeding its credit limit, the credit limit is already exceeded and/or the Company's credit insurers withdraw the insurance in respect of that Customer.

10. CANCELLATION AND SPECIFICATION

10.1 Subject to clause 7.3:

10.1.1 the Customer shall not be entitled to cancel and/or refuse to accept delivery of the Products where the Customer's Order has been accepted by the Company in accordance with clause 3.4;

10.1.2 if the Customer purports to cancel this Contract and/or refuses to accept delivery of ordered Products, the Customer agrees to indemnify and keep indemnified the Company against any and all Liabilities and increased administration and professional and legal costs on a full indemnity basis suffered by the Company whether or not such losses were foreseeable or foreseen at the date of this Contract.

10.2 In addition to clause 4.2 any Specification supplied by the Company to the Customer shall only be approximate unless stated on the Company's quotation or agreed in writing.

10.3 The Specification for the Products shall be that set out in the Company's quotation and/or order acknowledgement (if agreed by the Customer) or the Customer's Order (if agreed by the Company) unless otherwise agreed in writing by the parties.

10.4 The Customer is responsible for checking the quotation and/or order acknowledgement and satisfying itself that any Specification given is accurate and adequate for the Products.

10.5 Subject to clause 10.7, if there is an error in the Specification made by the Company for the Customer, then, where that error is material and it has been relied upon by the Customer, the Customer may cancel that part of this Contract which is affected by the error without any Liability due to the cancellation.

10.6 The Company shall have no Liability for errors in any Specification or details supplied by the Customer and the Customer is solely responsible for their accuracy.

10.7 The Customer agrees to indemnify and keep indemnified the Company against any and all Liabilities and increased administration and professional and legal costs on a full indemnity basis suffered by the Company arising out of the Company's use of Specifications, details and/or drawings supplied by the Customer.

10.8 The Company reserves the right to make changes to the Specification as required from time to time by law, applicable safety requirements or manufacturing requirements provided that they do not have a material adverse effect on the quality and/or performance of the Products.

10.9 The Company may satisfy any Order for Products by delivery of a weight of Products which is within 10% of the amount ordered and the price shall not be adjusted as a result.

11. OWNERSHIP AND RISK

11.1 Risk in the Products shall pass to the Customer at the time of delivery. Delivery shall be deemed to occur:

11.1.1 at the time when the Products arrive at the place of delivery if the Company delivers the Products by its own transport or it arranges transport in accordance with a specific Order;

11.1.2 when the Products leave the Company's premises; or

11.1.3 after the expiration of 3 Working Days after the Customer has been notified that the Products are available for collection from the Company in accordance with clause 5.2.

11.2 Despite delivery in accordance with clause 11.1 and the, ownership of the Products shall not pass to the Customer until the Company has received payment in full in cash or cleared funds for the Products and/or all other goods and services agreed to be provided by the Company to the Customer under this Contract and any other agreement between the Company and the Customer.

11.3 Until ownership of Products passes to the Customer, the Customer shall hold the Products and each of them on a fiduciary basis as bailee for the Company. The Customer shall store the Products (at no cost to the Company) separately from all other goods in its possession and marked in such a way that they are clearly identified as the Company's property. The Customer agrees that the Company's employees and/or agents shall be entitled to enter upon any premises owned occupied or controlled by the Customer (or premises of third parties with their consent) where the Products are situated to check compliance with this clause.

11.4 Despite the Products remaining the property of the Company, the Customer may sell or use the Products in the ordinary course of its business at full market value for the account of the Company. Any such sale or dealing shall be a sale or use of the Company's property by the Customer on the Customer's own behalf and the Customer shall deal as principal when making such sales or dealings. Until ownership in the Products passes from the Company, the proceeds of sale or otherwise of the Products equivalent to the sum total of the Customer's debt to the Company shall be held in trust for the Company and shall not be mixed with other money or paid into any overdrawn bank account and shall be at all material times identified as the Company's money.

11.5 Until ownership of the Products passes to the Customer, the Customer shall upon request deliver up such of the Products as have not ceased to be in existence or been resold. If the Customer fails to do so, the Company's employees and/or agents may enter upon any premises owned occupied or controlled by the Customer where the Products are situated and repossess the Products.

11.6 The Customer shall not pledge or in any way charge by way of security any of the Products which are the property of the Company.

11.7 The Customer shall insure and keep insured the Products to the full market value against all insurable risks and shall procure that Company's interest is noted on such policy of insurance until ownership in the Products passes to the Customer. The Customer shall whenever requested produce a copy of the policy of insurance to the Company. The Customer shall hold any proceeds of such policy of insurance in relation to the Products on trust for the Company upon receipt of the same plus interest accrued in accordance with clause 8.2.

12. TERMINATION ON DEFAULT OR INSOLVENCY

12.1 If the Customer:

12.1.1 fails to make any payment to the Company when due;

12.1.2 breaches the terms of this Contract (and if remediable the breach has not been remedied within 14 days of receiving notice requiring it to be remedied);

12.1.3 persistently breaches any one or more terms of this Contract;

12.1.4 pledges or charges any Products which remain the property of the Company;

12.1.5 ceases or threatens to cease to carry on business; and/or

is declared or becomes insolvent or bankrupt, has a moratorium declared in respect of any of its indebtedness, enters into administration, receivership, administrative receivership or liquidation or threatens to do any of these things, takes or suffers any similar action in any jurisdiction or any step is taken (including, without limitation, the making of an application or the giving of any notice) by it or by any other person in respect of any of these circumstances; then the Company shall have the right, without prejudice to any other remedies, to exercise any or all of the rights set out in clause 12.2 below.

12.2 If any of the events set out in clause 12.1 above occurs in relation to the Customer then:-

12.2.1 the Company may enter, without prior notice, any premises of the Customer (or premises of third parties with their consent) where Products may be and repossess and dispose of or sell any Products so as to discharge any sums due to the Company under this Contract or any other agreement with the Customer;

12.2.2 the Customer is automatically no longer permitted to re-sell, use and/or part with the possession of any Products owned by the Company until it has paid in full all sums due to the Company under this Contract or any other agreement with the Customer;

12.2.3 the Company may withhold delivery of any undelivered Products and stop any Products in transit;

12.2.4 the Company may cancel, terminate and/or suspend without Liability to the Customer any contract with the Customer; and/or

12.2.5 all monies owed by the Customer to the Company under this Contract or any other agreement with the Customer shall forthwith become due and payable.

12.3 The Company shall have a lien over all property or Products belonging to the Customer which may be in the Company's possession in respect of all sums due (including interest accrued in accordance with clause 8.2) from the Customer to the Company. Upon the termination of the Contract for any reason if any monies due to the Company from the Customer have not been paid within 14 days of the due date the Company may sell any property or Products over which it has a lien (and the Customer agrees that the Company may give good title for such property and/or Products) and shall apply the proceeds of sale firstly in discharging any costs or expenses of sale, secondly in repaying any interest owed by the Customer to the Company, thirdly in payment of any principal sums owed to the Company and fourthly the Company shall account to the Customer for the remainder (if any).

13. LIMITATIONS ON LIABILITY

13.1 The Company shall have no Liability for defective Products where the defect has been caused or contributed to by the Customer to the extent so contributed.

13.2 The Company shall have no Liability to the Customer if the price for the Products has not been paid in full by the due date for payment.

13.3 The Company shall have no Liability to the Customer for defective Products, Products not despatched or Products damaged or lost in transit unless the event is notified to the Company within 7 days.

13.4 The Company shall have no Liability for additional damage, loss, liability, claims, costs or expenses caused or contributed to by the Customer's continued use of defective Products after a defect has become apparent or suspected or should reasonably have become apparent to the Customer.

13.5 The Customer shall give the Company a reasonable opportunity to remedy any matter for which the Company is liable before the Customer incurs any costs and/or expenses in remedying the matter itself. If the Customer does not do so the Company shall have no Liability to the Customer.

13.6 The Customer shall produce to the Company written evidence of any claims for which it is alleged that the Company is liable together with written details of how the loss was caused by the Company and the steps the Customer has taken to mitigate the loss before the Company shall have any Liability.

13.7 The Company shall have no Liability to the Customer to the extent that the Customer is covered by any policy of insurance and the Customer shall ensure that the Customer's insurers waive any and all rights of subrogation they may have against the Company. The Customer shall be under a duty to mitigate any loss, damage, costs or expenses that it may suffer (including by maintaining an adequate stock of Products).

13.8 The Company shall have no Liability for any matters which are outside its reasonable control.

13.9 The Company shall have no Liability to the Customer for any:

13.9.1 loss of profits and/or damage to goodwill;

13.9.2 pure economic and/or other similar losses;

13.9.3 special damages;

13.9.4 aggravated, punitive and/or exemplary damages;

13.9.5 consequential losses and/or indirect losses; and/or

13.9.6 business interruption, loss of business, loss of contracts, loss of opportunity and/or production.

13.10 The Customer shall be under a duty to mitigate any loss, damage, costs or expenses that it may suffer (including by maintaining an adequate stock of Products).

13.11 The Company's total Liability to the Customer shall not exceed [£2,500,000]. To the extent that any Liability of the Company to the Customer would be met by any insurance of the Company then the Liability of the Company shall be extended to the extent that such Liability is met by such insurance.

13.12 Each of the limitations and/or exclusions in this Contract shall be deemed to be repeated and apply as a separate provision for each of:

13.12.1 Liability in contract (including fundamental breach);

13.12.2 Liability in tort (including negligence);

13.12.3 Liability for breach of statutory duty; and

13.12.4 Liability for breach of Common Law and/or under any other legal basis; except clause 13.11 above which shall apply once only in respect of all of the said types of Liability.

13.13 Nothing in this Contract shall exclude or limit the Company's Liability for death or personal injury due to its negligence or any Liability which is due to its fraud or any other liability which it is not permitted to exclude or limit as a matter of law.

13.14 All warranties, terms, conditions and duties implied by law relating to fitness, quali, adequacy are excluded to the fullest extent permitted by law.

14. FORCE MAJEURE

14.1 The Company shall not have any Liability for delay or failure to deliver and/or perform all or any part of its obligations under this Contact as a result of a Force Majeure Event including but not limited to a reduction in the amount of Product supplied.

14.2 The Company's performance under this Contract will be suspended for the period that the Force Majeure Event continues and the Company will have an extension of time for performance which is reasonable and in any event equal to the period of delay or stoppage.

14.3 The Company may, if the delay or stoppage continues for more than [30] continuous Working Days, terminate this Contract with immediate effect on giving written notice to the Customer. The Company shall have no Liability for such termination.

15. GENERAL

15.1 The Customer agrees to indemnify and keep indemnified the Company against any and all Liability and legal costs on a full indemnity basis suffered and/or incurred by the Company and arising from or due to any breach of contract, any tortuous act and/or omission and/or any breach of statutory duty by Customer.

15.2 No waiver by the Company of any breach of this Contract shall be considered as a waiver of any subsequent breach of the same provision or any other provision.

15.3 The invalidity, illegality or unenforceability of any of the provisions of this Contract shall not affect the validity, legality or enforceability of the remaining provisions of this Contract.

15.4 The Customer shall not assign its interest in this Contract (or any part) without the written consent of the Company. The Company can assign its interest in this Contract (or any part) without the Customer's consent.

15.5 None of the terms and conditions of this Contract shall be enforceable by any person who is not a party to it.

15.6 The remedies under this Contract shall be cumulative and are not exclusive. Election of one remedy shall not preclude pursuit of other remedies. In arbitration a Party may seek any remedy generally available under the governing law.

15.7 This Contact is governed by and interpreted in accordance with English law and the parties agree to submit to the non-exclusive jurisdiction of the English courts.