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Case No: CR-2018-011228

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST

Rolls Building
Strand, London, WC2A 2LL

Date: 3 September 2019

Before :

INSOLVENCY AND COMPANIES COURT JUDGE BURTON

- -

Between :

SELL YOUR CAR WITH US LIMITED	**Applicant**
- and -	
ANIL SAREEN	**Respondent**

- -

Guy Sims for the **Applicant**
Faith Julian for the **Respondent**

Hearing dates: 17 June 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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INSOLVENCY AND COMPANIES COURT JUDGE BURTON

Insolvency and Companies Court Judge Burton:

1. This is the hearing of an application by Sell Your Car With Us Limited (the "**Company**") made on 22 November 2018, for an injunction to restrain the Respondent, Mr Sareen from presenting a winding-up petition against the Company.

Background

2. On or around 25 July 2018, the Company agreed, subject to the terms of a "sale or return" contract, to sell the Respondent's Maserati Levante for a fixed fee of £995 + VAT. The Company sold the car on 4 September 2018 and pursuant to the terms of the contract, was obliged to pay the Respondent £51,800.

3. It appears that a third party ("**TP**") fraudulently intercepted the email exchanges between the Company and the Respondent and, purporting to be the Respondent, directed the Company to send £30,000 of the sale price to an account which was presumably under TP's control. In any event, the Respondent states that he did not receive the money and on 1 November 2018 served a statutory demand on the Company. The 21-day time period for the demand has expired but the Respondent has undertaken not to present a petition until the outcome of this injunction application.

Grounds for restraining the Respondent from presenting a winding-up petition

4. The Company contends that a winding-up petition should be restrained as there is a genuine and substantial dispute between the parties regarding which party is responsible for the fraud. Mr Sims' skeleton states that the Company has not agreed that the Respondent was not involved in the fraud but for the purposes of this application, does not assert that he was. On behalf of the Company, he asserts a counterclaim in an amount equal to the debt claimed by the Respondent based upon:

    i) an implied term of the contract that the Respondent would take reasonable care over the security of his email communications. Mr Sims' skeleton states: "*The likelihood is that [the Respondent] failed to take reasonable care*". He appeared to be accessing his G-Mail account from his mobile telephone and "*someone getting access to his phone is an inherently more likely proposition than that someone gained access to the Applicant's corporate server"*. "*It is not necessary that someone obtained the Respondent's password, or the account hacked by other means, for the fraud to have been committed – a few moments with an unlocked phone or laptop would have been sufficient for the email trail to have been forwarded to another account".*

    The Company stated that in order for the truth to be ascertained, an IT security expert will need to investigate the exchanges between the parties and if such expert were to establish, for example, that the rogue emails came from approximately the same physical location as the Respondent, then the likelihood is that his security had been compromised; and

    ii) an implied representation by the Respondent that he had reasonable control over the security of such communications. The Company says that if he did

not have such control, there is a negligent misrepresentation "*possibly under s2(1) of the Misrepresentation Act 1967, depending on the timing"*.

5. The Company states that the likelihood is that the Respondent accessed his email account whilst travelling via his phone and that "*Someone getting access to his phone is an inherently more likely proposition than that someone gained access to the Applicant's corporate server*".

6. Finally, the Company states that it has adequate assets to pay the £30,000 if necessary and that the threat of insolvency proceedings should not be used as a method of debt collection. Consequently, the Respondent should withdraw the threat of winding-up proceedings and proceed with an ordinary Part 7 claim to determine which party is responsible for the fraud (seeking summary judgment if he considers his claim to be strong enough to do so).

The Respondent's response

7. The Respondent denies that the Company has a genuine and serious cross claim based on breach of contract and/or misrepresentation.

8. Relying on ***Ali Petroleum Company of Trinidad and Tobago*** [2017] UKPC 2, Ms Julian submitted on behalf of the Respondent that the court should only imply a term into a contract if it is necessary to make the contract work which it may be if:

> "it is necessary to make the contract work, and this it may be if (i) it is so obvious that it goes without saying (and the parties, although they did not, *ex hypothesi*, apply their minds to the point, would have rounded on the notional officious bystander to say, and with one voice, 'Oh, of course') and/or (ii) it is necessary to give the contract business efficacy. Usually the outcome of either approach will be the same. The concept of necessity must not be watered down. Necessity is not established by showing that the contract would be improved by the addition. The fairness or equity of a suggested implied term is an essential but not a sufficient pre-condition for inclusion. And if there is an express term in the contract which is inconsistent with the proposed implied term, the latter cannot, by definition, meet these tests, since the parties have demonstrated that it is not their agreement.'

She submitted that such a term would be unusual in a contract such as this and that it cannot reasonably be said, using the words from ***Ali Petroleum***, that it is "*so obvious that it goes without saying*", nor that it was required to give the contract business efficacy.

9. Ms Julian submitted that to establish a cross-claim based on misrepresentation, the Company would need to show first that the Respondent impliedly represented that he would take reasonable care over the security of his email and that:

   i) there is no basis upon which the court should imply such a representation: the terms of the Company's request for the Respondent's consent to communicate by electronic communication made no reference to a requirement to maintain adequate security; and

ii) even if the court were willing to imply such a representation, it amounts to nothing more than a statement of intent which cannot amount to a misrepresentation of fact unless at the time the statement was made, the person making it did not intend to do what he said or knew that he would not have the ability to do it. The Company neither alleges nor provides evidence to show that the Respondent did not intend to do what he said nor that he did not have the ability to put the intention into effect.

iii) Furthermore, the Company would need to show that the alleged representation was untrue and there is no evidence of this, whereas there is evidence that the Company's email account had been recently hacked; and finally

iv) the Company would need to show that it was induced to enter into the contract with the Respondent on the basis of the alleged representation, for which the Company has failed to advance any evidence.

10. Her skeleton argument summarises the Respondent's position: "*The reality is that the Applicant was careless. It neither noticed that the Third Party was using a different email address from the Respondent, nor did it think it suspicious that it had received three sets of bank account details (two of which detailed a name bearing no relation to that of the Respondent). The Respondent ought not to be punished for the Applicant's failures.*"

Relevant legal test

11. The court will restrain the presentation of a winding-up petition where it is satisfied that the company would succeed in establishing that the proceedings constitute an abuse of process. A petition founded on a debt that is disputed on genuine and substantial grounds would constitute an abuse of process. The Companies Court practice was clearly set out by Hildyard J in ***Coilcolor v Camtrex*** [2015] EWHC 3202 (Ch)**:**

> "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".

12. The learned judge continued at paragraphs 34 and 35:

> "[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".

13. Consequently, if the court decides that there is a substantial ground for the dispute, it will usually prevent a winding-up petition from being presented and will usually take the same approach where there is a genuine and substantial cross claim or set-off.

The contract and sale

14. The contract was dated 25 July 2019 and described as a "Sale or return agreement". The Company used "DocuSign", a third-party electronic signature system. The Company's terms and conditions provided:

> "From time to time, Sell Your Car with Us (we, us or Company) may be required by law to provide to you certain written notices or disclosures. Described below are the terms and conditions for providing to you such notices and disclosures electronically through the DocuSign, Inc (DocuSign) electronic signing system".

15. Included within those terms and conditions were the following provisions regarding electronic notices:

> "Unless you tell us otherwise in accordance with the procedures described herein, we will provide electronically to you through the DocuSign system all required notices, disclosures, authorizations, acknowledgments and other documents that are required to be provided or made available to you during the course of our relationship with you. To reduce the chance of you inadvertently not receiving any notice or disclosure, we prefer to provide all of the required notices and disclosures to you by the same method and to the same address that you have given us. … If you do not agree with this process, please let us know as described below."

16. Under the heading "How to contact Sell Your Car With Us", the contract provided:

> "You may contact us to let us know of your changes as to how we may contact you electronically, to request paper copies of certain information from us, and to withdraw your prior consent to receive notices and disclosures electronically as follows:

> "**To advise Sell Your Car With Us of your new e-mail address**
>
> To let us know of any change in your e-mail address where we should send notices and disclosures electronically to you, you must send an email message to us at brad@sellyourcarwithus.co.uk and in the body of such request you must state: your previous e-mail address, your new e-mail address. We do not require any other information from you to change your email address. In addition, you must notify DocuSign, Inc. to arrange for your new email address to be reflected in your DocuSign account by following the process for changing e-mail in the DocuSign system."

17. A table in the body of the terms and conditions sets out minimum requirements for customers' hardware and software and under a heading "Acknowledging your access and consent to receive materials electronically" the following:

> "To confirm to us that you can access this information electronically, which will be similar to other electronic notices and disclaimers that we will provide to you, please verify that you were able to read this electronic disclosure and that you also were able to print on paper or electronically … Further, if you consent to receiving notices and disclosures exclusively in electronic format on the terms and conditions described above, please let us know by clicking the "I agree" button below. By checking the "I agree" box, I confirm that:
>
> - I can access and read this Electronic … document; and
> - I can print on paper the disclosure …; and
> - Until or unless I notify Sell Your Car With Us as described above, I consent to receive from exclusively through electronic means all notices, disclosures, authorizations, acknowledgements, and other documents that are required to be provided or made available to me by Sell Your Car With Us during the course of my relationship with you."

18. The terms and conditions provided under the heading "Payment":

> "All payments shall be made to the Seller as indicated on the form of acceptance or invoice issued by the Seller. Vehicles will not be released without written confirmation of receipt of funds. Once in receipt of funds we will release to the owner".

19. The sale or return agreement recorded the Respondent's name and address, his email address ending in "1@gmail.com" and his mobile telephone number ending in "864". It recorded his DocuSign signature having been adopted from a pre-selected style using an IP Address ending in "189" and noted it was "signed using mobile".

20. On 7 September 2018 the Respondent wrote by email to Mr Dowling, described as a Sales Specialist at the Company asking whether he had finalised the sale of the Maserati. Mr Dowling replied saying:

> "All going as planned. I will need your bank details shortly, would you kindly send them to me via email? I will forward them to accounts and you will receive a docusign".

21. The Respondent replied on 7 September at 11.36 providing details for a bank account with Santander, the account number ending in "012". I pause here to state that whilst I shall set out the times at which each email states it was sent, they can appear, chronologically to be out of order. This could be explained by time differences between countries (particularly as the Respondent stated he was travelling overseas) or any number of other factors. I shall simply identify the email by the time sent, albeit that on that basis, some replies appear to have been sent before the email to which they were responding.

22. In the email sent on 7 September at 11.36, the Respondent also informed Mr Dowling that he had received a call and a message from the Company but was in meetings all day: "was it regarding these bank details or about something else, please advise …". Mr Dowling replied to say that he thought the calls were from one of his colleagues regarding another car and asked the Respondent to return the colleague's call "when you have 5 minutes". The Respondent replied: "Thanks. Can you ask Graham to email me what he needs to know? Thanks". Mr Dowling replied: "I think he would like to discuss the marketing with you. Not something that can be emailed really. Give him a call at your leisure."

23. The next item in the exchanges of emails exhibited to the Respondent's witness statement, was a copy email without address or time information, apparently from the Respondent to Mr Dowling saying:

> "Hi Chris, What is happening with the payment for the Maserati Levante Sale? Please update me ASAP".

24. There is also an email dated 13 September 2018, sent at 8:10 from the Respondent again asking what was happening with payment for the Maserati "as I haven't received it yet, I am out of the country at moment, so please advise by email Thanks".

25. The Respondent's witness statement then exhibits a DocuSign generated email dated 17 September and sent at 6.21pm from Steven Prosser of the Company stating that all parties had completed. There is nothing further in the Respondent's documents until an email from him sent on 26 September at 15.14 chasing payment.

26. However, the next email received by the Company included in the bundle exhibited to the witness statement filed by Mr Ewings on behalf of the Company is dated 17 September 2018 13:19. It was from an email address bearing the Respondent's name but instead of the suffix "1@gmail.com" it was from "01@gmail.com". Unlike earlier emails, which bore in the subject heading the prefix "Re" (which tends to denote that the sender is replying to an earlier email) it bore the prefix "Fwd" followed by the same heading as appeared on all earlier emails: a description of the car and its registration number. All earlier emails had been sent by the Respondent to Mr Dowling, but this one was sent to Mr Prosser. The email stated:

> "Hi Steve/Graham

RESENDING

> I've waited long enough. I need to receive my payment today at the latest, I'll appreciate it if you can take care of this immediately and let me know. Thanks."

The email signature featured the Respondent's name and the same wording which appeared under his signature in all emails up to that point (although did not appear in some of his later emails) with one difference: the words "Sent from my wireless device from an unknown location in our Solar System" appeared on just two lines, whereas it was usually spread closer to the left hand margin and across three lines. The chain of emails that had been forwarded appears to have included the email referred to at paragraph 19 above, in which the Respondent provided his bank account details, but now, the forwarded version of that email included different account information, albeit still under headers for an email sent at 11.36 on 7 September. The sort code and account number were different and now, provided in addition, was an account name "T soyanov" an IBAN (International Bank Account Number) and BIC (Business Identifier Code, used to identify banks internationally). This appears to be the first email from the unknown TP.

27. Mr Prosser replied, though it is impossible to see from the copy email, the address to which it was sent (i.e whether it was sent to 1@gmail.com or 01@gmail.com) as it appears on the exhibited copy in the "To" line merely as "'Anil K Sareen'". Mr Prosser said:

> "Good Morning Mr Sareen, I have tried to call you on the number given ([number] please confirm this) but it says the number is not recognised. I received the docusign purchase agreement, thank you. I now need you bank details. Would you please email back the relevant sort code, account number and account name. I will then ring you to confirm these details as there are lot of fraudulent scams at the moments. What we then do is pay you one pound to make sure that the money hits the right account so that we can complete the payment. Sorry for the long-winded way but we want to be double sure of the details."

28. The TP replied on 21 September 2018 at 18:29 expressing disappointment with the service he had received, saying he had resent his bank details a few times and that "In addition, I already mentioned long time ago that I'm traveling so won't be able to receive calls. My bank details to receive my funds is as below, I don't have any problems with receiving funds so nothing to worry about here!" The email then included the T stoyanov bank details.

29. Mr Prosser replied on 22 September at 13.17 apologising that the recipient of the email was disappointed but pointing out that the bank details had changed: "this is why we need to speak with you to confirm the correct details." The reply from 01@gmail.com was timed 11.33. TP said that the bank details were the same as sent about a week ago and asked Mr Prosser to process the payment.

30. Mr Prosser did not send the payment, but replied instead saying:

> "we have two emails, supposedly from you that give different bank details. The first was to Chris on 7th September at 11.36 giving different details to the one you sent on 21st at 18.29.

> We were hacked last week twice so, I know you are traveling but I really need to get verbal confirmation of which bank is correct".

31. TP replied on 24 September at 15.07: "I understand your concerns so in that case I will have my accounts person call you to sort all this out. Is this the number where you can be reached? [number]". On this occasion, and for all subsequent emails from TP, the signature was not followed by the Respondent's usual signature statement that it had been sent from a wireless device.

32. Mr Prosser replied at 17.29 saying "Thank you for your understanding Anil. Yes that is my direct line".

33. The following day on 25 September TP wrote in an email timed at 12.30:

> "Hi Steve, Could you let me know when you've sent the 1pound".

Mr Prosser replied at 15.22:

> "Anil it was sent at 11.30".

At 17.21, TP wrote

> "Hi Steve, Use this details and calling now to explain why".

He then provided details of a Barclays Bank account in the name of a Mr O'byrne (sic). That was followed by a further email, confusingly timed at 16.06:

> "Hi Steve,
>
> Matt called you back like you asked but you were not available so he spoke to Graham instead. The 1pound couldn't go through possibly because of online pending transactions in the Santander so to avoid anymore delays that's why I sent you the Barclays details in the previous mail.
>
> Will call you in the morning for confirmation."

34. The following day, 26 September 2018, at 12.08 Mr Prosser emailed saying:

> "Good morning Anil, the £1.00 is still showing as left our account and has not returned so I assume the account details are correct."

35. TP replied (with time stated to be 10.18) saying

> "The 1pound isn't received yet and not sure when it will be so please minus that from my total amount and send the actual funds to the details as provided yesterday."

36. In an email dated 26 September 2018 bearing a time stamp of 10.14 TP sent a screen shot of the Barclays Bank account. Mr Ewing's witness statement recites that on 26 September the Company sent £1 to the account and received a telephone call confirming receipt. The Company then sent £30,000 to the Barclays account.

37. The Respondent's witness statement exhibits an email also dated 26 September, time stamped 15.14 in which he wrote to Mr Prosser at: "brad@sellyourcarwithus.co.uk" which was the last address in the chain of correspondence received by him when Mr Prosser wrote via DocuSign to confirm that "All parties have completed" chasing payment for the car:

> "I spoke to one of you office colleagues earlier, and have been chasing Chris on a number of occasions. I've been waiting for payment for a while now, I've even received the DVLA transfer of vehicle a while back.
>
> It really shouldn't take this long to get my payment."

The Respondent's email signature on this occasion did not include the usual note that it was sent from his wireless device, but simply provided under his name, his mobile telephone number.

38. The Company reported the matter to Barclays Bank's Scam Investigation Team and subsequently also to the police.

A genuine and substantial cross-claim

39. Does the Company have a genuine and substantial cross-claim based on the Respondent's breach of an implied term or misrepresentation which resulted in him, albeit unintentionally, permitting the fraud to be perpetrated?

40. The threshold for the court to determine that a cross-claim is genuine and substantial is low. In ***Re Bayoil SA; Seawind Tankers Corp v Bayoil SA***, [1999] 1 All ER 374, Ward LJ, sitting in the Court of Appeal stated:

> "a winding-up order is a draconian order. If wrongly made, the company has little commercial prospect of reviving itself and recovering its former position. If there is any doubt about the claim or the cross-claim, that seems to me to require that the court should proceed cautiously".

41. In ***Tallington Lakes Ltd v South Kesteven District Council*** [2012] EWCA Civ 443, Etherton LJ stated:

> "I have to emphasise, however, in this context that it is well established that the threshold for establishing that a debt is disputed on substantial grounds in the context of a winding-up petition is not a high one for restraining the presentation of the winding-up petition, and may be reached even if, on an application for summary judgment, the defence could be regarded 'shadowy'".

Implied term of the contract

42. I have sympathy for the position in which the Company now finds itself but in my judgment, even applying an appropriately low threshold, the Company's alleged cross-claim based on the Respondent having breached an implied term of the contract cannot be considered to be either genuine or substantial. There is no need for the court to imply into the contract, in order for it to have business efficacy, a term that the Respondent would take reasonable care over the security of his email account. Whilst the contract might have been improved by the addition of such a term, that, as

explained by Lord Hughes in ***Ali Petroleum***, is not the relevant test. Moreover, to have any meaningful effect, such a term would have needed to have specified what was meant by "reasonable", for example, whether the account must be password protected and perhaps also the degree of complexity required for such a password. The contract between the Company and the Respondent could function without such a term being implied. Without any email security at all, both parties would have been exposed to a higher risk of fraud but there are ways that could be combatted, for example by the use of telephone calls or other verification procedures.

43. Although the threshold for establishing that a cross-claim is genuine and substantial is not a high one, in my judgment, the Company's claim based on the Respondent's breach of an implied term of the contract fails to meet that threshold.

Implied representation

44. The Company claims that having agreed to communicate by email, the Respondent represented that he would take reasonable care over the security of his email account and that if it can be shown that he did not have that security, then there has been a negligent misrepresentation.

45. The representation in this matter is therefore to be implied. To be of any value or relevance, it would have needed to have referred to future conduct. As such, I concur with Ms Julian, that it should be characterised as an implied statement of intent. There is a fine line between a statement of intent and a term of a contract, but concentrating on the Respondent's implied statement, if it is found that the intention was not in fact held at the time the statement was impliedly given, then the statement may amount to a misrepresentation. Such a misrepresentation would be actionable if it can be shown that it induced the Company to enter into the contract.

46. Once again applying the relatively low threshold test, I do not consider that the Company's claim based on the Respondent's implied representation gives rise to a genuine and serious cross-claim. When the Respondent provided his email address, in my judgment, he was representing no more than that he was contactable at that address. The Company proposed that communication would be via email and DocuSign. When asking the Respondent to consent to electronic communication, the Company did not refer to basic security requirements or warn those customers who agreed to such communications that they were thereby impliedly representing that they operate reasonable security controls over their email account. The Company did, however, set out other terms regarding the use of email communication and basic operating systems in its contractual provisions. I have seen no evidence that the Company relied upon such a representation when deciding whether to accept the Respondent as a customer. The fact that it had prudently introduced various steps in its transactions with clients to try to combat the risk of email fraud suggests that it was alert to such risks and the possibility that some may have been caused by its customers' careless use of their email accounts. I have also not been provided with any evidence that such a statement of intent was falsely given by the Respondent. The Respondent's evidence is that his email account was password protected and that he accessed it via either his mobile telephone, which requires facial recognition, or a six-digit passcode, or via his laptop computer which can only be accessed by entering a password. That evidence is unchallenged.

47. The sad truth is that cyber criminals are able, via both unsophisticated hacking attempts, as well as by refined email interception techniques to intercept emails and, as now frequently seen by solicitors engaged in conveyancing transactions, to give instructions directing payments away from legitimate contracting parties.

48. The Company erred in accepting instructions from TP purporting to be the Respondent. The Company was alert to the risk of fraud and included in its terms and conditions, a procedure which customers were required to follow to change their email contact details. However, the Company did not spot the change. The email address used by TP was very similar to the Respondent's. In his second witness statement, Mr Ewings stated:

> "At that time, we had no reason to believe that the emails were not from Mr Sareen"

I do not agree. The Company had good reason not to believe it: the emails were from a different address.

49. The Company questioned the change of bank account details and attempted to deploy its own security procedure, telephoning the Respondent on the number he provided, in order to verify the bank details. However, having on one occasion been unable to contact the Respondent on his mobile telephone number, the Company then failed to try it again and instead provided the Company employee's direct dial telephone number, so that TP could call him.

50. The third and final check included in the Company's procedure was similarly overlooked: having sent £1 to the T stoyanov account at Santander, the Company again failed to call the Respondent on his mobile telephone number to confirm that he had received the £1 payment into his account. Instead it continued to receive emails from TP (and possibly also a telephone call from TP) but when the £1 had apparently not been returned from the T stoyanov account, the Company still agreed to divert the payment to the Barclays account.

51. In my judgment, the Company was alone responsible for sending money to an unauthorised account on instructions received from an unknown third party. The cross-claim which it asserts, has no prospect of success and falls below the threshold required for me to consider it to be serious, genuine or substantial.

52. Whilst winding-up proceedings are a class remedy and it is an abuse of the process of the court to present a winding-up petition based on a claim in respect of which there is a triable issue, an unpaid creditor of even a substantial and prosperous company, whose debt is not disputed, is entitled to petition for its winding up. I do not therefore accept the Applicant's contention that insolvency proceedings should not be used as a method of debt collection.

53. Whilst the courts have historically looked dimly on the use of such proceedings for debt collection, there is a long line of authority leading up to and following *Cornhill Insurance plc v Improvement Services Ltd* [1986] 1 WLR 114 which confirms the right of a creditor owed an undisputed debt to petition the court for winding-up. This is because a failure by a company to pay even one, relatively small debt, is evidence that the company is unable to pay its debts as they fall due. The position is helpfully

summarised in *Goode on Principles of Corporate Insolvency Law* where, on page 195 of the Fifth Edition the author states:

> 'Admittedly, it has been said on more than one occasion that the winding-up procedure in the Companies Court cannot properly be used for the purpose of debt collection. In *Re A Company (No.001573 of* 1983), for example, Harman J stated:
>
> > "… it is trite law that the Companies Court is not, and should not be used as (despite the methods in fact often adopted) a debt-collecting court. The proper remedy for debt collecting is execution upon a judgment, a distress, a garnishee order, or some such procedure."
>
> However, if this statement means that it is somehow improper for a creditor to resort to winding-up instead of execution in the hope of inducing the company to pay the debt, then it undoubtedly goes too far. Very often that is precisely the reason why the petition is launched, and the courts have emphasised that a petition presented in order to bring pressure on a company to pay a debt which is indisputably due is perfectly proper, even where other proceedings are in train for recovery of the debt and even if the winding-up proceedings are being pursued "with personal hostility or even venom".'

54. It does not, therefore follow, that simply because the Applicant disputed which party was responsible for the fraud, the proposed presentation of a petition by the Respondent amounted to an abuse of process. In light of my finding that the alleged cross-claim has no prospect of success, I am satisfied that the debt is not subject to a substantial dispute and it is open to the Respondent, should it so wish, to seek to recover payment of the debt via winding-up proceedings.

55. I find that the Company is indebted to the Respondent for the sum claimed in the statutory demand and, in the event it remains unpaid, that there are no grounds upon which this court should restrain his entitlement to pursue a class remedy by the presentation of a winding-up petition based upon that debt.

56.