Case No. 2012/7925

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
2014 EWHC 1223 (Ch)

7, Rolls Building,
Fetter Lane,
London, EC4A 1NL.

Wednesday 26th February, 2014

B e f o r e :

MR JUSTICE HENDERSON

LAKEHOUSE CONTRACTS LIMITED

Applicant

- and -

UPR SERVICES LIMITED

Respondent and Petitioning Creditor

MR WILLIAM WEBB (instructed by Birketts LLP, 24-26 Museum Street, Ipswich, Suffolk IP1 1HZ) appeared on behalf of the Applicant, Lakehouse Contracts Ltd.

MR HUGH MIALL (instructed by Jeffery Green Russell Ltd (Waverley House, 7-12 Noel Street, London W1F 8GQ) appeared on behalf of the Respondent and Petitioning Creditor, UPR Services Ltd.

Transcribed by :
JOHN LARKING VERBATIM REPORTERS
Suite 91 Temple Chambers
3 - 7 Temple Avenue
London EC4Y OHP
Telephone : 020 7404 7464

J U D G M E N T
(Approved)

4,908 words / 68 folios

MR JUSTICE HENDERSON:

1. This is an unfortunate dispute about costs. Like many such disputes, it is by no means easy to resolve. There is the added unfortunate feature that everything else in dispute has either been dealt with or is not before me today, so that the court is, in effect, having to deal on a summary basis with the costs of proceedings which have otherwise been, at least for present purposes, resolved. It is clear from a number of authorities, including paragraph 11.11 of the Chancery Guide, January 2013 edition, that in this kind of case the court will often consider it appropriate not to investigate the matter in any great detail but, rather, will adopt a relatively broad brush approach, making an order against one party or the other only if it is clear, without spending too much time on it, that such an order would be appropriate, and otherwise making no order as to the costs.

2. The general background to the matter is that the applicant, Lakehouse Contracts Limited ("the Company"), carries on business as a building contractor. The respondent (and petitioning creditor) is a company called UPR Services Limited ("the Petitioner"). It provides scaffolding services. The dispute, and the alleged debt upon which the petition was based, stems from a contract for the provision of scaffolding services which was entered into in or around June/July 2012. As is common in such contracts, payments were made during the course of the works in accordance with the procedure laid down in the Housing Grants (Construction and Regeneration) Act 1996 and the contractual provisions agreed between the parties.

3. The story begins, for present purposes, with an application made by the Petitioner for payment on 31st March 2013, when it valued the total works it had carried out to date at £64,779.70. The Company made clear immediately that it disagreed with that figure and, on 4th April 2013, a Mr Jackson on behalf of the Petitioner replied, saying that he would speak with Mr John Hobson of the Petitioner on his return, but that meanwhile the Company was asked to ignore the valuation until further correspondence took place.

4. Somewhat later, two "pay less" notices were served by the Company pursuant to the procedure set out in s.111(3), (4) and (5) of the 1996 Act which, although containing little in the way of detail, did at least make it clear that three valuations (in the case of the first notice) and a further two valuations (in the case of the second notice) were disputed - it being contended that nothing was owing in respect of any of them because: "Contracted works deemed inclusive". That laconic description did at least make it clear, to my mind, that the general nature of the dispute was that the alleged works claimed by way of variation were said by the Company to be included in the underlying contract price. The amount which the Company admitted, after deduction of the amounts set out in the two pay less notices, came to £40,738.50. The Company then made some small additional payments, to bring the total amount paid during the project up to that sum.

5. There matters appear to have rested, until further discussions took place between the parties in October 2013, which led to an email sent by Mr Gordon Booth of the Company to Mr John Hobson of the Petitioner. Mr Booth said that he had looked into the paperwork which had been produced by his predecessor, Mr Brendon Flannagan. He referred to the two pay less notices, and attached evidence that payment of the undisputed amount had been duly

made. He attached further copies of the two pay less notices for the Petitioner's information, and also referred to the original order which stated that:

> "Additional hire, stacks and alterations are deemed included. The only item agreed was the alteration to allow fitting of windows which we have paid you for."

6. Mr Hopson replied on 16th October by email, making it plain that he did not accept that version of events. He said that the governing terms and conditions of the contract were those of the Petitioner, not those of the Company. He said that a meeting with Mr Flannagan and Mr David Wood had taken place, at which a revised contract specification had been agreed, as confirmed by an email dated 4th September 2012, and that a revised subcontract was expected to have been forthcoming on that basis, although it was never received. He said that the Petitioner would continue to carry out the contract in accordance with the terms of the Petitioner's quotation and, therefore, a demand was made for the amount outstanding from the March valuation in the sum of £34,000 odd. This was then followed up on 4th November by a letter from solicitors instructed on behalf of the Petitioner, Jeffrey Green Russell Limited, demanding what I take to be the same sum, in the total amount of £28,849.44 plus VAT. The letter then said that unless that amount was paid by noon on Friday, 8th November they were instructed to initiate proceedings against the Company without further notice. No indication was given of the form that such proceedings might take.

7. There matters rested until, on 13th November 2013, a winding up petition was presented by the Petitioner, alleging that the Company was unable to pay its debts and that it owed the Petitioner the amount withheld from the March valuation. That, in short, is the background to the present application. I will have to come back to the history of the dispute between the date of presentation of the petition and the hearing which took place before Peter Smith J on 3rd December. It is enough at this stage to say that, when the matter came before the judge on that date in the Applications Court, there was, as I understand it, insufficient time for the issue of costs (which was by then the only outstanding issue) to be dealt with.

8. The order made by Peter Smith J on that date recorded that the Company had refused to attempt to resolve the issue of the costs associated with the petition, which the Company contended was an abuse of process, either by mediation or by some other form of alternative dispute resolution, notwithstanding that the Company had agreed to mediate the underlying dispute. Against that background, it was ordered that the petition be struck out and consequently be dismissed, but without prejudice to the issue of costs and without prejudice to the Petitioner's contention that the petition had been properly presented. It was then ordered that the issue of costs be dealt with as an application by order, with a time estimate of half a day, and that the parties should lodge skeleton arguments, bundles and authorities not less than two clear days before the date fixed for the hearing. I pause to note that no provision was made for the filing of any additional evidence on either side. It appears clear to me that what was envisaged was a hearing dealing with the issue of costs, but on the basis of the evidence as it then was before Peter Smith J, and upon which he would, indeed, have ruled had there been sufficient time to allow the matter to be dealt with. That is not to say that further evidence could not in any circumstances be admitted, but a good case would have to be made out for doing so.

9. That is the application which is now before me today. In the meantime, the mediation referred to in the order did, indeed, take place, but unfortunately it was unsuccessful. It was

conducted on entirely without prejudice terms, so I have been told nothing about it and I think it would be wrong for me to speculate about what occurred at it.

10. This is how it comes about that I find myself in the unfortunate position of having to deal with the question of costs when nothing else is left in dispute in this court. It appears to me that, in order to deal with this question, I first need to form a view, albeit on a summary basis, on the fundamental question of whether the presentation of the petition was an abuse of the process of the court. It is well established that the winding up court is not to be used where a debt is genuinely disputed on substantial grounds. In those circumstances, the correct way to resolve a dispute is by taking proceedings, usually in the County Court, sometimes in the High Court, or, in a case where there is a building contract, by means of the special procedure laid down in the 1996 Act for adjudication of disputes on a relatively rough and ready but cheap and speedy basis.

11. I refer in this connection to the decision of the Court of Appeal in Tallington Lakes Limited and another v. Ancasta International Boat Sales Limited [2012] EWCA Civ 1712, where the judgment of the court was delivered by David Richards J, sitting with Thorpe LJ and Patten LJ. In paragraph 5 of his judgment, he said that there are at least three sound reasons why it is not the practice of the winding up court to itself decide the merits of a bona fide disputed claim. Firstly, it is not the function of the Companies Court to try disputed debt claims; its function is, rather, to decide whether the case is suitable for the class remedy of a winding up order. By contrast, the determination of debt claims, as I have said, is a proper function of the County Courts or, in appropriate cases, the High Court. Secondly, the threat of winding up proceedings may otherwise be used to put improper pressure on a company to pay a disputed debt; and, thirdly, the inevitable delay in determining the issue is unacceptably damaging for the company, whose freedom in carrying on business may be severely curtailed by the existence of a pending winding up petition. It is for that reason, said David Richards J, that the earlier practice of staying a winding up petition while the issue of liability was determined in separate proceedings was abandoned in favour of striking it out. Consistently with that approach, the order for costs which is normally made where a winding up petition is struck out on that basis is that the petitioner pay the costs of the company, and that it do so on the indemnity basis if the petitioner presented the petition at a time when it knew that the debt was genuinely disputed on substantial grounds.

12. From the little which I have already set out about the history of this matter, it seems to me that there is at least a prima facie case that this was, indeed, a genuinely disputed debt. The procedure in the 1996 Act for the service of pay less notices was employed, the notices themselves gave a brief indication of the nature of the dispute and, as I have already explained, on the next day after the original payment request was made, a representative of the Petitioner had effectively invited the Company to pay no attention to the request until further investigations and correspondence had taken place. It is fair to say that nothing further in the way of chapter and verse to explain the precise nature of the dispute was provided, but it does seem to me, on the basis of that material, that it would be difficult for this court to conclude on a summary basis that there was in fact no genuine dispute in relation to the entirety of the petition debt.

13. Possibly in recognition of that likely outcome, at a very late stage indeed an attempt has been made by the Petitioner to argue that, at the very lowest, there was an undisputed debt of £4,800 due and owing and, because that sum is well in excess of the minimum level of £750 which in practice is required to found a petition, its presentation was therefore not an abuse of

process, even if it be assumed that there is a genuine dispute in relation to the remainder of the petition debt. This argument was raised for the first time in a witness statement of Mr Hopson dated 20th February (Thursday of last week), which was not served until the evening of that day. Read in isolation, it is fair to say that this evidence puts forward what may on investigation turn out to be a persuasive case that there was, indeed, an agreed variation in relation to the provision of scaffolding for chimney stacks, giving rise to a debt of £4,800, which is comprised in part of the balance which the Company refused to pay. I do not propose to go into the details, however, because it seems to me that this evidence really was too little and too late if it was seriously sought to persuade the court today that the petition was not an abuse of process.

14. From what I have been taken to by both parties in the contractual documentation, it appears to me that the true position may well be difficult to ascertain, and there may well have been variations (agreed or not agreed) in the course of negotiations, in circumstances where without a full hearing one could not hope to come to a fair decision one way or the other. If the position in relation to the chimney stacks is really as clear as Mr Hopson now seeks to make out, I am left wondering why the point was not raised in correspondence last year, and why it has only surfaced at such a very late date. That is quite apart from the fact, as I have already mentioned, that no permission was granted by Peter Smith J for further evidence to be adduced. The focus of today's hearing, as it seems to me, should be on the position as it was before him in December, and he never intended to allow a further free-ranging inquiry into the merits or otherwise of the underlying debt. Bearing in mind the summary approach that it is appropriate to adopt on hearings of this nature, I think it is enough for me to say that, although I take note of the new evidence, it does not suffice to persuade me that there was a clear undisputed debt. I therefore proceed on the footing that, albeit by a relatively narrow margin, this is a case where a genuine dispute is established as to the existence of the whole of the petition debt.

15. On that footing, it follows that the presentation of the petition was an abuse of the process of the court and, in the normal way, costs would follow the event. At this stage, however, it is necessary for me to look in more detail at what happened after the presentation of the petition and before the hearing in December to see whether and, if so, to what extent that prima facie position should be displaced.

16. I have read and considered the whole of the correspondence, which extends to at least a hundred pages in the exhibits. I have also been taken through the very careful and helpful skeleton arguments of both parties and I have had the benefit of excellent submissions from counsel on both sides. I do not, therefore, propose to spend a great deal of time going through the correspondence, but will rather pick up the points which appear to me of particular significance.

17. The Company instructed solicitors, Birketts LLP, who first came on the scene on 20th November, when they wrote a letter addressed to the Petitioner's solicitors, explaining why in their view the petition debt was disputed and seeking an undertaking that the petition would not be advertised, in default of which they said they were instructed to seek an injunction restraining advertisement without further notice. That letter prompted an immediate reply on the following day from Jeffrey Green Russell, undertaking not to advertise the petition without giving 14 clear days' notice of the Petitioner's intention to do so. That, therefore, lifted the immediate threat hanging over the Company because, in the normal way, it is only after advertisement that the seriously adverse effects of a winding up petition are felt,

including, in particular, the usual consequence of a company's bank accounts being frozen. However, the Company was not content with that, and the line which it thereafter consistently adopted was that it required the petition itself to be withdrawn and its own costs to be paid in full, the amount of which was set out from time to time in the correspondence, increasing with predictable but, nevertheless, depressing regularity as each fresh letter was sent.

18. From one point of view, this was a reasonable position for the Company to adopt, because, if a petition is an abuse of process, it follows that it must in due course be dismissed, with an order for costs which will normally follow the event in the way I have explained. On the other hand, there is a further complication to bear in mind. Except in very clear cases, it is often not possible for the court to come to an immediate view on whether the petition debt is, indeed, genuinely disputed on substantial grounds. In the normal way, an issue of that kind can only be resolved after evidence has been put in on both sides and the court has heard submissions from each party at a contested hearing. It will then decide one way or the other, and, if the decision goes in the company's favour, it will at that stage become clear that the presentation of the petition was, indeed, an abuse of process and an appropriate order for costs will be made. However, the Company, it seems to me, was really seeking to preempt that process by insisting from the very beginning that the petition be withdrawn and its costs be paid. Furthermore, it was insisting upon those conditions being performed before it would agree to mediation, which was, at a very early stage, suggested by the Petitioner. That offer was made in a letter headed "Without prejudice save as to costs" dated 22nd November 2013, so only a few days after service of the petition on 19th November. The letter said that the amounts involved in the petition were not great, that the writer was very conscious that the costs of a contested petition could easily amount to much more than the petition debt within a short period of time, and that this was the type of case that the writer had many times settled at mediations. It seems to me that those points were well taken, and it is, indeed, now the case that the costs incurred on each side amount to considerably more than the petition debt.

19. The writer, Mr Frost, went on to suggest a suitable mediator who would be free to deal with the matter the following Friday, 29th November, and he also offered free accommodation at his firm's offices on that day. The costs of the mediation would have been £500 plus VAT, payable by each party. However, the offer was rejected by the Company, whose solicitors maintained the stance which I have already referred to. They said in a letter dated 22nd November that it was simply unacceptable for the Petitioner to maintain the petition and that, if it was unwilling to withdraw it, immediate steps would be taken to apply to the court for an injunction. That reference to an injunction must, I think, be read as intended to refer to an application to strike out the petition because, as I have said, the undertaking relating to advertisement meant that no injunction was necessary for that particular purpose.

20. In reply, Jeffrey Green Russell wrote an open letter on 22nd November saying that, if the Company wished to continue to assert that the petition was bona fide disputed on substantial grounds, they suggested directions for the resolution of that issue. Those directions, in short, were that the undertaking not to advertise the petition would continue until completion of the final hearing of an application to strike it out; the Company should file evidence in opposition by 6th December; the Petitioner should file evidence in response by 30th December; and the matter be listed for hearing, with an estimated time of one hour's reading and a two hour hearing.

21. In my judgment this was an eminently sensible offer, which the Company would have been well advised to accept. The Company's position would have been protected by the continuing undertaking, and, as I have explained, the issue of the existence or not of a bona fide dispute on substantial grounds can normally only be resolved on evidence in the kind of way which the letter suggested. It is, therefore, in my view unfortunate that the Company's solicitors maintained their intransigent stance that they were unwilling to countenance any kind of timetable of that nature unless immediate steps were taken for the Petition to be withdrawn. Similarly, although they made it clear that they were in principle prepared to mediate in relation to the underlying dispute, they emphasised that they were not prepared to embark upon mediation while the winding up petition remained outstanding and while the Company's costs remained unpaid.

22. That, in essence, was the stance which the two parties continued to adopt until the matter came before Peter Smith J on 3rd December. By that stage evidence had been put in on both sides fleshing out some of the background of the dispute and exhibiting the correspondence, including correspondence which was said to be without prejudice save as to costs. Although the chronology is not entirely clear to me, it seems that by the date of the hearing, if not immediately before, the Petitioner was content for the petition to be either struck out or withdrawn. Indeed, it was only on that basis that the parties could properly have exhibited the without prejudice correspondence. However, as I have said, Peter Smith J did not have time to deal with the matter fully, and the way matters were left is reflected in the order which he made.

23. This brings me on to another aspect of the matter which is, in my view, unfortunate, and that is the refusal of the Company, either at the hearing or shortly thereafter, to agree to what seems to me the obviously sensible proposition that the mediation should embrace not only the underlying dispute between the parties but also the question of the costs of the petition. In my view an experienced mediator could perfectly well distinguish between the two issues and, even though it may be said that the Petitioner was trying to lump them together, the Company could have made it very clear that they were separate issues which needed to be looked at independently - the important point being that, even if there were ultimately a degree of give and take or compromise relating to the underlying dispute, that would not in itself answer the question whether there was a genuine dispute on substantial grounds at the time when the petition was presented, with the consequence that it still might have been an abuse of process to go down that route.

24. The desirability of dealing with all the outstanding issues at mediation was frankly and sensibly recognised by Mr Webb in both his written and his oral submissions, and I think really the highest he can put it is to say that Yes, it would have been sensible for the mediation to deal with all matters, but his clients were also anxious to have a return date when the question of costs could be gone into by this court if the mediation failed to achieve a satisfactory outcome. There is also a suggestion in some of the submissions and correspondence that there might have been a chilling effect on the mediation, or indeed the subsequent costs hearing, if a "rolled up" mediation had taken place. However, I do not find that a convincing suggestion. It seems to me that, with professional representation on each side, the issues were quite capable of being separately dealt with and considered, and there was everything to be said for all matters in dispute between the parties being brought before a single mediator on a single occasion. Furthermore, although the order on 3rd December may have been negotiated in circumstances of considerable urgency, without perhaps all the consequences being fully thought through, there was nothing to prevent the Company from

reconsidering its position in the interval between that hearing and the mediation. However, there is no suggestion of any such reconsideration having occurred.

25. Standing back and looking at the history, it seems to me that this is a case where there has been unreasonable behaviour at various times on both sides. The Petitioner was wrong to invoke the jurisdiction of the Companies Court in the first place, and the petition was, in my view, an abuse of process. On the other hand, the Company's position became too entrenched too early, as a result of which they failed to agree a sensible timetable for evidence put forward on 22nd November, they maintained their requirement for total surrender on the part of the Petitioner up to and including the hearing on 3rd December, and at that stage they insisted on the mediation dealing only with the underlying dispute and not with the costs of the petition proceedings. It is impossible to know what would have happened at the mediation had it dealt with all outstanding issues, but in my judgment there is a real chance that it would have resolved this matter once and for all and avoided the hearing which has taken place before me today, with considerable extra expenditure on both sides, not to mention the time of the court which it has taken up.

26. How then should I reflect these considerations in the order for costs which I make? My starting position is that, because the petition was an abuse of process when presented, the Company should have its costs of the petition, at least down to a date when its conduct made it unreasonable for it to continue to have its costs paid by the Petitioner. In my view, a time came when that was, indeed, the position and I would identify the beginning of that period as 25th November (that is to say, the date when the letter of 22nd November would in the normal course have been received). It seems to me that from then onwards the position adopted by the Company has been in some respects unreasonable. However, I emphasize that it is only in some respects that their position has been unreasonable. I must not lose sight of the fact that the petition was an abuse of process, and it was, of course, the Petitioner which initiated the whole set of proceedings which is now coming to its conclusion today. In those circumstances, I think the appropriate order is that the Petitioner should pay the Company's costs on the indemnity basis down to 25th November, but from then onwards there should be no order as to costs. This would reflect the general nature of my conclusion that there has been unreasonable behaviour on both sides. From that cut-off point in November, I consider that justice will be done, albeit on the relatively broad brush approach which the court has to adopt at hearings of this nature, if each side is left to bear its own costs.

27. I also note that on 10th February (that is to say some two weeks ago) the Petitioner's solicitors did in fact make an offer to agree to an order that there should be no order as to costs throughout. That is not quite the order which I have made, because I have ordered the Petitioner to pay costs on the indemnity basis down to 25th November; but from then onwards it appears to me that this was a sensible offer, which again the Company would have been well advised to accept. In any event, the matter was not resolved before today, and I have now explained what order I think it is appropriate to make.
