Claim No. 9578 of 2012

IN THE HIGH COURT OF JUSTICE
COMPANIES COURT

7 Rolls Building
Fetter Lane
London, EC4A 1NL

Wednesday, 19th December 2012

Before:

THE HONOURABLE MR JUSTICE NORRIS

Between:

HENRY CONSTRUCTION PROJECTS LIMITED

Applicant

and

LINTON FUEL OILS LIMITED

Respondent

MR M WHEATER (instructed by Jeffrey Green Russell, Waverly House, 7-12 Noel Street, London, W1F 8GQ) appeared on behalf of the Applicant.

MR M WATSON-GANDY (instructed by Moorhead James LLP) appeared on behalf of the Respondent.

PROCEEDINGS
(excluding Judgment)

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MR WHEATER: My Lord, I am Mr Wheater and I appear in this application on behalf of the Company, my learned friend Mr Watson-Gandy appears for the Respondent. This is my application for an injunction restraining presentation of a winding-up petition, on two bases: either the debt is disputed in good faith on substantial grounds; or alternatively, there is a genuine and substantial cross-claim.

My Lord, the background to this matter is very simple. Essentially it is a dispute relating to the supply of red diesel commercial fuel by the Respondent to the Company. My Lord, the Respondent alleges that it has invoices due in the sum of about £26,282-odd. The Company disputes that on the basis that it has been overcharged, and accordingly the Company's case is the amounts claimed are themselves overstated, but more importantly, historic overcharging for the past two years results in sums due to the Company that overtop any sums that may be due to the Respondent.

MR JUSTICE NORRIS: You are presumably not saying that the overcharging is of the order of £25,000 on the fuel you have received.

MR WHEATER: My Lord, no. I think on the fuel that we have received we say it is about £550 plus VAT on each invoice, and there are about eight invoices.

MR JUSTICE NORRIS: So you have still got a debt above the statutory minimum of £750 in respect of the fuel that has been delivered.

MR WHEATER: My Lord, yes, subject to the fact that we say the overcharging is both a cross-claim but would also give us an equitable defence of set-off. So we would say that does allow us to dispute the debt itself. But I think my learned friend and I differ very little on the law, and whether this is a disputed debt petition or a cross-claim petition, the background facts relate to the overcharging, so it is much of a muchness.

MR JUSTICE NORRIS: Right.

MR WHEATER: My Lord, just at this point before we go into the evidence, there have been some updates to the bundle and I just want to make sure that your Lordship has everything. Your Lordship should have skeleton arguments from my learned friend and I.

MR JUSTICE NORRIS: Yes.

MR WHEATER: Your Lordship should also have one bundle which is probably in a grey file, containing the Company's witness statements

MR JUSTICE NORRIS: Yes.

MR WHEATER: Your Lordship may also have received loose two witness statements, one from Mr Stephen Panten and one from Mr Jeffrey Harbour, for the Respondent.

MR JUSTICE NORRIS: Yes.

MR WHEATER: And this morning your Lordship should have received two further statements, one from Mr John Noone - these will be loose - and a second statement from Mr William Henry.

MR JUSTICE NORRIS: No.

MR WHEATER: My Lord, those should have been delivered this morning, if I may hand copies up.

MR JUSTICE NORRIS: Wait a minute, there is an e-mail - yes, I got them by e-mail.

MR WHEATER: I am grateful, my Lord.

MR JUSTICE NORRIS: Right.

MR WHEATER: My Lord, perhaps the place to start is in Mr William Henry's first statement, which your Lordship will find behind tab 5 of the paginated bundle. Essentially, my Lord, Mr Henry is a director of the Company, and if I can take your Lordship to paragraphs 4 and 5, if your Lordship considers those paragraphs.

MR JUSTICE NORRIS: Yes.

MR WHEATER: Mr Henry says that he had a longstanding relationship with the Respondent, who I think accepts in its own evidence that it had a longstanding relationship with the predecessor company, Lancsville, but the Respondent does not comment on the nature of that relationship. Mr Henry states that the arrangement that Lancsville had with the Respondent was that it would buy red diesel at the lowest available daily rate. Mr Henry's evidence is that is how Lancsville traded with the Respondent for about twenty years.

My Lord, at paragraph 5 Mr Henry goes on to say that in October 2010 he had a discussion with Mr Stephen Panten of the Respondent, and agreed with him that the Respondent would carry on dealing with the Company on the same basis as it had previously dealt with the Lancsville Group. My Lord, I should say that that allegation is denied by the Respondent, who says no such agreement was reached, and Mr Henry has seen the Respondent's evidence and in his second statement he is adamant that his version of events is correct.

MR JUSTICE NORRIS: Where is his second statement?

MR WHEATER: His second statement is one of the loose statements that your Lordship had earlier. My Lord, in particular at paragraph 3. (Pause)

MR JUSTICE NORRIS: Yes.

MR WHEATER: My Lord, the parties traded with each other for some time, since October 2010. Then if I can take your Lordship to the statement of Mark Henry, which your Lordship will find behind tab 4 in the bundle - Mark Henry is another director of the Company - and in particular if I could take your Lordship to paragraph 6 at the bottom of page 61.

MR JUSTICE NORRIS: Yes.

MR WHEATER: My Lord, at paragraph 5 of that statement Mr Mark Henry reiterates the nature of the agreement that his father describes, and at paragraph 6 he talks about how the overcharging was discovered. My Lord, in this case that is an important point because my learned friend will invite the court to infer, from the timing of this dispute, that it is not genuine. However, my Lord, in the circumstances of this case, where the agreement is for the supply of fuel oil at the lowest daily rate, unless the Company knows that fuel oil is in fact being supplied at a lower rate, how is it to know? Mr Mark Henry in his witness statement states that he only discovered that other local competitors and other local contractors were being supplied with red diesel at a much lower rate on 14th November.

My Lord, turning over the page to page 62, Mr Henry did not take action against the Respondent immediately because he wanted to take the perfectly reasonable step of investigating matters further, and he sets out some details of those investigations at paragraph 7. My Lord, Mr Henry made further enquiries of the company called Modebest, who he already refers to in paragraph 6, together with two other local contractors, J&J Transport and Flannery Construction. Mr Henry discovered that all three were being supplied with diesel at a lower rate than the Company.

My Lord, if I can take you to tab 3, page 11, your Lordship should have there a letter dated 7th December 2012 from the Company to the Respondent. My Lord, I should emphasise that at this time there had been no threat of insolvency proceedings, and your Lordship will also note that the second paragraph of that letter raises a substantial dispute and raises the idea that the Company has been overcharged to the extent of at least £50,000.

MR JUSTICE NORRIS: Yes. Was the credit limit nil at this stage? £20,000? £42,000? What was the credit limit?

MR WHEATER: My Lord, there is a dispute about the credit limit.

MR JUSTICE NORRIS: What was the credit limit at this stage, on 7th December? Was it cash only at that date?

MR WHEATER: My Lord, by that date my understanding is that the Respondent had ceased providing fuel to the Company, so, my Lord, I do not think there had been any further -----

MR JUSTICE NORRIS: When you say they had ceased providing, does that mean that you had asked them to provide it and they said no, or you said: "We are fed up with you and we are going elsewhere"?

MR WHEATER: My Lord, I believe the answer is probably found in the correspondence from the Respondent, in the chain of e-mails exhibited to the statement of Mr Harbour, with the Respondent's continual refusal to supply any more diesel.

MR JUSTICE NORRIS: Right, they will not supply you.

MR WATSON-GANDY: My Lord, if it may assist, there is an e-mail at page 25 of the exhibit to the witness statement of Mr Harbour, and it intimates that unless payment is made by 4th December the credit limit would be reduced to nil.

MR JUSTICE NORRIS: Yes.

MR WHEATER: So, my Lord, by 7th December there was a clear issue raised as to overcharging and at least the sum of £50,000. For reasons that I will come on to explain, the sum of £50,000 relates to figures provided by Modebest, the first company contacted by the Company. Later figures supplied by J&J Transport suggest an even higher degree of overcharging. My Lord, over the page at tab 3, page 12, your Lordship will see a second letter dated 11th December 2012 from the Company. Again your Lordship will see in the final paragraph the allegation is the overcharging is £57,000.

My Lord, on the same day (and we believe this was sent by post and had probably crossed with the Company's letter, if I can take your Lordship to page 8, this is the initial threat to present a winding up petition. Over the page at page 9 is a letter from the Company's solicitors, which attaches again the letters of 7th and 11th December, explains that the debt is disputed and seeks an undertaking not to present. My Lord, I think it is common ground that undertaking has not been given. My learned friend rightly points out there was a short undertaking given until 20th.

My Lord, if I could take your Lordship to page 16, this is another letter from the Company dated 13th December which attaches a schedule which runs to some three pages. The schedule sets out the prices per invoice that had been charged to the Company, and then compares that with the price per litre supplied to Modebest and the price per litre supplied to J&J Transport, and there are also columns showing what the total discrepancy is on the basis of those figures. My Lord, at the bottom of the columns on page 19 your Lordship will see that in comparison to the prices of fuel supplied to Modebest the disparity is that

Modebest had been charged some £57,000 less than the Company, and that J&J Transport had been supplied over £72,000 less than the Company.

Pausing there, my Lord, in circumstances where it is the Company's case that the agreement was to supply red diesel at the lowest available daily rate, there is clearly a dispute as to whether or not that was ever done.

I also pause here, my Lord, because the Respondent has produced a letter which appears at page 31 of the exhibit to Mr Harbour's witness statement, in which it is alleged that J&J Transport did not provide that information. My learned friend relies on this to suggest that the case being advanced by the Company is something of a sham. Whereas if I can take your Lordship to page 13 of the exhibit to Mr Henry's second statement, your Lordship will see an e-mail from J&J Transport to the Company enclosing invoices for red diesel, which would have disclosed the rates that they were charged in respect of red diesel .....

MR JUSTICE NORRIS: There does not appear to be an attachment to that e-mail.

MR WHEATER: My Lord, I think that may be an error in the preparation of the bundle. The invoices in fact precede the e-mail for some reason, they are pages 11, 10, 9, 8 and 7. Your Lordship will see that these are invoices from the Respondent to J&J Transport.

MR JUSTICE NORRIS: Yes, but they do not appear as attachments to the e-mail. The e-mail should have as its head an indication that there is an attachment to it.

MR WHEATER: My Lord, it is because, if your Lordship looks at page 12, your Lordship will see that this is part of an e-mail chain and that this is where the e-mail was printed off, but the e-mails were attached to the invoice of 11th December, which is on page 13, which was sent to Mr Hopkins of the Company, who forwarded it to his solicitor, who forwarded that to be printed, and the scanned images in the attachment section at the top of page 12 are the invoices.

MR JUSTICE NORRIS: So that shows that the scanned images were not attached to the e-mail that was received from Amanda and sent to Mr Hopkins.

MR WHEATER: My Lord, it does not. This is a print out of an e-mail -----

MR JUSTICE NORRIS: Because otherwise you would simply forward that e-mail with attachments.

MR WHEATER: My Lord, that is exactly what has happened, this is the print out of an e-mail chain, and all of the attachments that are in that e-mail chain are represented at the top of page 12. When you print out an entire chain of e-mails the attachments are not shown under every single e-mail, my Lord.

MR JUSTICE NORRIS: They should only be shown under the e-mail that included them in the first place.

MR WHEATER: My Lord, in this case they are included under the e-mail where they were printed out. But either way, my Lord - it may be that we are veering into unnecessary territory, because either way we do have copies of the invoices between the Respondent and J&J Transport setting out the rates for red diesel.

MR JUSTICE NORRIS: No, you have got four invoices but the schedule was a lot more than four, was it not? Am I right?

MR WHEATER: My Lord, indeed.

MR JUSTICE NORRIS: Yes. You have apparently got the J&J invoices complete from 7th October 2010 to 8th November 2012.

MR WHEATER: My Lord, that is what the schedule represents certainly.

MR JUSTICE NORRIS: Yes. So where are they?

MR WHEATER: My Lord, let me take instructions.

MR JUSTICE NORRIS: There is four printed invoices there: one in April, two in October and one in December.

MR WHEATER: My Lord, quite right. My Lord, the second statement of Mr Henry and the statement of Mr Noone were put together at short notice yesterday afternoon in response to the evidence which was only received yesterday afternoon from Mr Panten and Mr Harbour. Mr Mark Henry's evidence is that the information was provided by J&J, the schedule sets out the rates from J&J. The suggestion was made in rather robust terms in the statement of Mr Harbour that J&J simply had never provided us with the information. The e-mail of 11th December with those invoices attached is illustration of the fact they were providing us with information, but the complete log, as it were, of the investigations is not before your Lordship. But the product of those investigations, which is the schedule setting out the prices for Modebest and J&J, is in evidence before your Lordship, which sets out the disparity in the figures.

So, my Lord, in this case there is a clear dispute as to the terms upon which the Company agreed to purchase the red diesel, and there is a clear dispute as to whether the Company has been overcharged. My Lord, this is not a dispute that, as Mark Henry puts it in his witness statement, has just been dreamt up for the purposes of this case. Indeed, it is Mr Henry's evidence - and your Lordship will find that at paragraph 9 of Mark Henry's statement behind tab 4, and at paragraph 9 Mr Henry refers to the fact that he had instructed his solicitors to start preparing to issue proceedings in relation to the overcharging before the winding up had been threatened.

My Lord, this is clearly a substantial dispute that cannot be resolved in insolvency proceedings. The Respondent, however, takes issue with that, but the way they take issue with that makes clear that there is in fact a substantial dispute. The way they take issue with it is, first of all, Mr Panten in his evidence denies that there was ever an oral agreement with William Henry. My Lord, that is a disputed issue of fact that requires cross-examination and live evidence.

The Respondent also contends that all of its transactions were governed by its terms and conditions. However, if I can take your Lordship to those terms and conditions, which were exhibited to Mr Panten's statement, if your Lordship has the terms and conditions and turns to the second page, your Lordship may be able to make out, at the bottom of page 2, underneath the last terms, that these terms and conditions were reviewed in December 2011. My Lord, the Company's case is that the agreement in relation to the supply of red diesel was reached in October 2010. Indeed, the schedule to which I referred your Lordship earlier setting out the disparity in pricing, goes back as far as 7th October 2010. My Lord, terms and conditions that did not come into existence until December 2011 could have no relevance or no bearing on an agreement made with Mr Henry in October 2010. My Lord, in his second witness statement at paragraph 5.3 Mr Henry, as well as pointing out that fact, says that he has never seen these terms and conditions before.

My Lord, the Respondent also says in its evidence that its procedure for taking orders is that orders were placed by telephone and that a price is agreed for each order. If I can take your Lordship briefly to tab 3, page 23, your Lordship will see that this is a schedule of all the invoices upon which the Respondent relies in this case. Your Lordship will also see that the reference on almost every invoice is John Noone or John. If I may take your Lordship to the statement of Mr Noone - this is one of the loose statements that should have reached your Lordship today - Mr Noone is the purchasing manager at the Company, he is the man who is responsible for placing the orders for the diesel. If I can refer your Lordship to paragraphs 4, 5 and 6 ..... (pause) ..... your Lordship will see that Mr Noone states that he in fact never agreed prices on the phone with the Respondent's employees and that he never felt that he had to because he understood that there as an overarching arrangement as to the price. My Lord, that is entirely consistent with an overarching agreement having been reached that the price should be the lowest available daily rate.

My Lord, the Respondent says that the Company simply has not challenged the prices that were agreed on a daily basis. For the reasons that I have just explained, that is not true. It is Mr Noone's evidence that no prices were agreed on a daily basis, but in addition the schedule of 14th December to which I have taken your Lordship already contains a breakdown of overcharging in relation to each individual invoice. It also contains a breakdown of overcharging in relation to each invoice relied upon by the Respondent. As I indicated to your Lordship at the beginning, that schedule suggests that each invoice has been overcharged by the sum of about £550-570 plus VAT. That is

without taking account of any of the historic overcharging. But further and rather more generally, given that it has been the Company's case throughout and certainly the Company's case disclosed in its correspondence from early December that it has been overcharged generally in sums exceeding £50,000, it would be somewhat disingenuous to suggest that the Company has not disputed the sums claimed.

The next point taken by the Respondents is they say it is simply unbelievable that the Respondent would have agreed a special rate with the Applicant, particularly because of the history of the previous company.

MR JUSTICE NORRIS: The failure of the previous company.

MR WHEATER: Indeed, my Lord. Now, again, whether or not it is simply unbelievable is a hotly disputed factual issue, but very briefly, Mr Harbour's evidence is that because the Lancsville Group went into administration he was particularly cautious about the Company's position. He also gives evidence, which your Lordship will have seen, that any variations whatsoever to the terms upon which the Respondent does business would have been evidenced in writing.

MR JUSTICE NORRIS: Yes.

MR WHEATER: I want your Lordship to bear those two things in mind. Let's go through this. The Henrys have been dealing, in one corporate guise or another, with the Respondent for over twenty years. It is neither surprising nor unbelievable that the Respondent would agree to continuing business with them on the same basis as it had before, particularly in the construction industry where companies going in and out of various states of insolvency is in fact common. But also the alleged cautious approach is simply inconsistent with how the account was ever actually operated. Your Lordship has already picked upon the section in Mr Henry's second statement where he says that for periods of time the Company was trading at £30,000 credit, the Company was trading at £42,000 credit and indeed there are statements of credit from the Respondent, which are attached to Mr Henry's second statement, showing .....

MR JUSTICE NORRIS: (Inaudible).

MR WHEATER: My Lord, if your Lordship refers to the exhibits to Mr Henry's second statement, the first few pages are examples of the Company running at considerable excess of the alleged £20,000 credit limit. My Lord, we have seen nothing from the Respondent challenging that; in fact the Respondent's evidence -----

MR JUSTICE NORRIS: Hang on. When did they get it? When did they get the statement of 18th December?

MR WHEATER: It came through yesterday, but we have heard nothing today challenging it. Yesterday evening, my Lord.

MR JUSTICE NORRIS: Okay. They got it yesterday evening. Nothing to challenge this.

MR WHEATER: But not only is there nothing there, but it is simply inconsistent with Mr Harbour's account, which is: "Gradually we allowed them to have a credit limit of £20,000 but we were watching it extremely carefully because we were worried about their credit position."

MR JUSTICE NORRIS: So do you say that at the time when there was £30,000 outstanding Linton were perfectly happy for that and were not sending e-mails saying: "Please will you pay us"?

MR WHEATER: My Lord, my instructions are that Linton have been happy to allow us to trade well over £20,000 throughout, until the end of this relationship.

MR JUSTICE NORRIS: Okay. With no credit limit. Just whatever you wanted.

MR WHEATER: My Lord, there must have been a credit limit, because in his letter of 7th December Mr Henry refers to the Respondent unjustifiably trying to close its account or suspend its account whilst the Company was under its credit limit, so the Company believed in December, when the -----

MR JUSTICE NORRIS: What did it think its credit limit was?

MR WHEATER: My Lord, that is not set out in the statement. I can take some instructions on that.

MR JUSTICE NORRIS: Thank you. (Pause)

MR WHEATER: I am afraid I cannot assist your Lordship with that.

MR JUSTICE NORRIS: Right.

MR WHEATER: My Lord, not only is allowing the Company to run considerably in excess of credit inconsistent with Mr Harbour's position, furthermore the Respondent in setting out its case has adduced none of the documents that one would expect to see if Mr Harbour's account is correct. There is no written record, for example, of the alleged agreement, according to Mr Harbour, that all orders would be paid cheque on delivery, that is referred to both in Mr Harbour's evidence and in my learned friend's skeleton argument. Indeed, on the Respondent's own case deviations from its standard terms, if it could produce the right ones, should have been recorded in writing. But there is no such record of that deviation. There is no record, aside from the chasing e-mails in October/November 2012, of any agreement in relation to the credit limit. Your Lordship has seen Mr Henry's evidence that the Company traded with much

higher credit - indeed his letter of 11th December complains about the audacity of the Respondent trying to put the account on hold at the level that it was at in October and November. Your Lordship has seen no account opening forms or credit references, which is inconsistent with Mr Harbour's position that he was taking a cautious approach as to the creditworthiness of the Company.

Taken in the round, there are clear disputes as to the terms of the agreement and the level of charging. That dispute is substantial and the court cannot simply dismiss it out of hand.

My Lord, as I said at the outset, the debt is disputed either on the basis that the overcharging amounts to a set-off, or that it amounts to a genuine and substantial cross-claim. There is little between my learned friend and I on the law. The court requires a dispute to be substantial, but a substantial dispute is not a high hurdle. In this case the dispute is clearly substantial; it is not a shadowy dispute, it is not one that has been pulled out of the ether. This is a case where in order to resolve the factual differences, which are not only an alleged conversation between William Henry and Mr Panten, but also an alleged agreement between Mr Harbour, who sets out a disputed version of how the account was opened, and Mr Henry, and also the evidence of Mr Noone as to how the account was operated. These are all matters that would require cross-examination.

Furthermore, in relation to the quantum of the overcharging, at the moment the Company has put its position together, the best it can, on the basis of the investigations that Mark Henry has been able to make of local competitors. However, in proceedings there would be disclosure, and there would be disclosure of the Respondent's daily rates and of the Respondent's pricing. At that point, my Lord, the full extent of the overcharging could be crystallised. Insolvency is not the appropriate regime in order to determine those disputes: there is no live evidence, there is no disclosure, there is no pleadings. So for those reasons, my Lord, this is not an appropriate forum. This is a disputed debt, or there is a genuine cross-claim.

The last thing I would say, my Lord, is a word, a very brief word, on the Company's solvency. The Respondent -----

MR JUSTICE NORRIS: Yes, take me to the accounts.

MR WHEATER: My Lord, the accounts begin at page 45, behind tab 3.

MR JUSTICE NORRIS: Thank you.

MR WHEATER: Your Lordship will see at page 52 that turnover in the 11/12 year has increased from £1 million to £10 million, and the profit for the financial year has increased from £100,000 to £174,000. Your Lordship will also see on page 53 the Company is balance sheet solvent. My Lord, if I can take you out of the accounts to page 5 of the exhibits, to Mr Henry's second statement, your

Lordship will also see an excerpt from the bank account showing that as of 5th November, at or around the time when my learned friend alleges that there was non-payment due to insolvency, the Company had cash in the bank of £143,000-odd.

MR JUSTICE NORRIS: It is a slightly odd statement. Just the one entry in the middle of the page, and no banking transactions in a business from 19th October to 5th November. Is that a complete page?

MR WHEATER: My Lord, I rather imagine that there are other transactions with other parties that are not shown on that, and I am just going to take some instructions.

MR JUSTICE NORRIS: So the following day there might have been a cheque to the Revenue for £145,000.

MR WHEATER: My Lord, the statement of Mr Mark Henry, which your Lordship will find behind tab 4 .....

MR JUSTICE NORRIS: Yes, that might tell me a bit more.

MR WHEATER: I am sorry, my Lord, it is in the solicitor's statement of Mr McCallum behind tab 2. My Lord, tab 2, page 4, paragraph 7 is a statement from Mr McCallum, the Company's solicitor, stating that he has instructions from the Company's chartered accountant that as at -----

MR JUSTICE NORRIS: Yes. That is where you would expect to see a bank statement showing that.

MR WHEATER: My Lord, that is the only bank statement we have. There is also attached to the exhibit, in addition to the accounts which show a profit, there is also the Equifax report which shows that the Company has a positive credit rating.

MR JUSTICE NORRIS: Yes.

MR WHEATER: So, my Lord, in the circumstances it is simply not right to say that the Company is a company in trouble. The reason that the invoices were not paid is because there is a genuine dispute as to whether or not they are due at all, because of the level of overcharging.

MR JUSTICE NORRIS: Yes. That presumably does not apply to the first of the invoices which is set out on that schedule, does it?

MR WHEATER: I am sorry, my Lord?

MR JUSTICE NORRIS: You took me to a letter which set out a schedule of invoices in respect of which the claim is being made.

MR WHEATER: That is at tab 3, page 23.

MR JUSTICE NORRIS: Yes, that is right. The earliest invoice there is 18th October.

MR WHEATER: It is 18th October 2012.

MR JUSTICE NORRIS: Yes.

MR WHEATER: Whereas the historic overcharging goes back to 7th October 2010.

MR JUSTICE NORRIS: I have got that point. But the first invoice is 18th October 2012. You are saying the reason the invoice of 18th October 2012 has not been paid is because there is this dispute about overcharging. But this dispute about overcharging did not happen until 14th November.

MR WHEATER: No, my Lord, the invoice of 18th October, even on 28 day payment terms, would not fall due until mid-November.

MR JUSTICE NORRIS: Where do we get the 28 day payment terms from?

MR WHEATER: My Lord, it is common ground. It is common ground the invoices provided for 28 day payment terms. In fact in Mr Henry's letter of 7th December he states that he has always made payment within the 28 day payment terms, save for these invoices.

MR JUSTICE NORRIS: Right.

MR WHEATER: If your Lordship takes 18th October and applies 28 day payment terms, and considers the fact that Mark Henry discovers the overcharging on 14th November 2012 .....

MR JUSTICE NORRIS: Yes.

MR WHEATER: ..... then your Lordship has it.

MR JUSTICE NORRIS: And then immediately decides not to pay any invoices.

MR WHEATER: My Lord, once the overcharging had been discovered -----

MR JUSTICE NORRIS: That is the case, is it?

MR WHEATER: ..... no more payments were pending the investigation, and that is precisely what the letter of 7th December says.

MR JUSTICE NORRIS: Yes, but the letter of 7th December comes two months after payments are stopped.

MR WHEATER: One month, my Lord. Payments were stopped -----

MR JUSTICE NORRIS: 18th October.

MR WHEATER: Fell due 18th November. So it comes 23 days after the discovery of the overcharging. My Lord, in that time enquiries were made of other local contractors. The scale of the overcharging by 7th December had been shown to be around £50,000; it is now believed to be between £57,000 and £72,000 -----

MR JUSTICE NORRIS: Yes, I have got all those points. Okay. Thank you.

MR WHEATER: My Lord, that is why these invoices have not been paid -----

MR JUSTICE NORRIS: Thank you very much. I will hear from Mr Watson-Gandy now. Yes.

MR WATSON-GANDY: My Lord, dealing with insolvency very quickly first of all. We say the test is nothing to do with the Company's position in June, it is the position now. Indeed, if you look at the JH1, page 5, the bank statement, we say this is a document which is somewhat tantalisingly redacted, shows one day only - if your Lordship looks closely, it is in 2010. My Lord .....

MR JUSTICE NORRIS: Sorry, page what?

MR WATSON-GANDY: It is the extract from the bank statement.

MR JUSTICE NORRIS: Yes, I am trying to find it, which page it was.

MR WATSON-GANDY: It is attached to the second witness statement of Mr Henry.

MR JUSTICE NORRIS: Mr Henry's second witness statement, okay.

MR WATSON-GANDY: And it is page 5 of that. We get the date - if you look at the very top, in very, very small -----

MR JUSTICE NORRIS: "Issued on 5th November 2010."

MR WATSON-GANDY: My Lord, yes. My Lord, even my bank account is in credit occasionally. What we say as regards insolvency is that there is an inability to pay debts as they fall due. What we basically put our case in respect of that is Mr Harbour's witness statement, and your Lordship will see a course of conduct and e-mails which basically set out the chasing and the presentation of various invoices, and what we see is a consistent over-reaching of the credit limit and a failure to pay debts due. This is not a claim on a single invoice, it is numerous invoices, each representing a separate contract of purchase.

MR JUSTICE NORRIS: Yes.

MR WATSON-GANDY: My Lord, I did not think I would need to take your Lordship through this, but as regards exceeding credit limit, your Lordship will find in JH1, the exhibit to Mr Harbour's witness statement, a number of e-mails, first of all at page 1 on 17th September 2012:

> "Your account has exceeded the credit limit of £20,000. In order to release the orders I need £4,000. Any further orders, you will have to pay before I can release it."

Again the same on page 2, again the same on page 3, same on page 4. We see, as regards the first invoice, 18th October 2012, we do not even see a full payment on that, we see a part payment. There is that sort of indicator of a company in difficulties.

If there is truth in the matter, the thing that is striking is that there is no squeak of complaint whilst credit is being allowed, no angry phone calls that you might expect to hear, and instead, as Mr Harbour describes and indeed is found in the e-mails, you get instead a sort of - you see the e-mails at pages 22, 23 and 24 - a situation which might give the impression that the Company was rather avoiding calls, because there is references to calls being unanswered, and "I am disappointed you have not called me, nor replied to my e-mail." What we say is significant is the e-mail at page 24, 28th November, where the credit is reduced to nil as of 4th December 2012. We say it is striking that the letter raising this complaint comes in on 7th, a few days later.

What we accept is that of course if Henry Construction can raise a dispute on substantial grounds, then of course that would be a defence to the petition. But you are entitled to test that evidence with an uncritical eye - bald assertions of course are not enough. They have the burden of establishing that there is a defence.

Obviously of course it would not work - what they are putting forward is that there would seem to have been some bargain struck on 5th October 2010 between Mr William Henry and Mr Panten, whose authority was basically distribution in my client's company, and there was some sort of bargain struck to sell at the lowest market rate. My Lord, the position that is being advanced by my learned friend has a number of hurdles that it needs to circumvent. Obviously it cannot work as a misrepresentation because it is a representation as to future facts, so the question then is whether you can incorporate it into some sort of contract.

The first hurdle of course is in respect of the contractual terms. Of course each invoice, your Lordship will see at the very bottom of the page, says: "Terms and conditions of sale available on request", and whether or not Mr William Henry read it or not, what would have been perfectly clear on every invoice in respect of every contract entered into is that there were terms and conditions which applied to the offers of our oil being made to Henry Construction Ltd. The significance of that is that those contracts provided that

they were under an entire agreement clause. Your Lordship will find the clause exhibited to the witness statement of Mr Stephen Panten, and the clause appears at paragraph 17: "These terms are the entire terms and agreement governing the supply and subject matter hereof."

MR JUSTICE NORRIS: Of course I do not know whether that formed part of the terms and conditions when the agreement started, do I?

MR WATSON-GANDY: My Lord, what we are suing on is in respect of contracts which were entered into after the date of those standard terms, and they are of course separate contracts, because in respect of different consignments of oil what is common ground between the parties is of course different prices would relate to each consignment of oil being provided.

Also, of course, they need to establish a degree of precision as to the terms of that agreement and a meeting of minds. What is clear is that there has been a certain lack of meeting of minds. My learned friend puts it in terms of a dispute between the parties. My Lord, what we say is that what one can see from that is that there are misunderstandings as to a conversation only a week ago, and you can see that from paragraph 7 of Mr Panten's witness statement. What this defence appears to be about is a reputed conversation between the same parties some time in 2010. Mr Panten is fairly clear that he would not have agreed this. Mr Harbour's case is that Henry Construction were coming in as beggars rather than choosers, and both of them are fairly clear that any variation in the agreement would have been in writing. What my learned friend needs to have shown is that both Henry Construction and my client agreed to those terms, rather than something that their client would have wanted to have as terms between them.

Taking their case a step further, where does it get them? In essence, what they are asserting is at best what might be analogous to the Asda promise: we will match or beat our competitor supermarket deals. Of course, as we all know, all supermarkets, Tesco and Sainsburys, promise to do exactly the same thing. What we say is that in terms of contract law this is no more than sales puff, and about as contractually enforceable. There is, as you have heard from the evidence of Mr Harbour - does your Lordship need to be drawn to the paragraphs?

MR JUSTICE NORRIS: Just tell me: the evidence of Mr Harbour says .....

MR WATSON-GANDY: Mr Harbour says that we negotiated a deal, we deal with it on a deal by deal basis in terms of price.

MR JUSTICE NORRIS: Yes.

MR WATSON-GANDY: There is not a sort of market rate. But the problem with that is that, given that there is no retail benchmark in his area, there is no way in

which our clients could effectively have quantified what was the lowest market rate.

The next question that leads to is that even if that could constitute a term, even if that was precise enough, does Linton Fuels live up to effectively the Asda promise? We would say we effectively offered a competitive market rate and offer the best price for the client order, because we are of course conscious that a client would go elsewhere. But what Mr Harbour makes clear is that what is a competitive rate will depend on a number of factors, such as the risk the client represents, the volumes being ordered, the market rate on a day. It is common ground - Mr Henry at paragraph 5 - that the market rate of oil changed on a day to day basis.

So the issue then arises: is the other side able to demonstrate beyond mere say-so that there is a breach of the agreement? What would probably be sufficient, I suppose, for today is to be able to point to two invoices and say: "Compare and contrast. This is an invoice, for example, from J&J Transport and this is an invoice for something we were charged which shows on the same day different prices were being charged for the same volume of product." Instead what they produce is five invoices from J&J Transport, none of which coincide with a day in which our invoices relate - and the significance of course of that is that the price fluctuates daily - but in each case the order in respect of J&J Transport is for more than double the volume. So of course there may well have been a different price adjusted for a different volume.

My Lord, just to summarise, where we stand is: we say that these are contracts which were not disputed at the time; they ordered disclosed volumes; the prices would have been clear because they would have been invoiced the same day; they kept on entering into contracts until the credit ran out; they did not go elsewhere if they suspected overcharging, and instead at this point of time they raise some sort of implied term which could at best be a mere puff, which was apparently oral when there is an entire agreement clause and a practice of dealing with things in writing; there is no evidence of a meeting of minds in respect of it; there is no proof of breach, there is just say-so; and there is no discernable best market rate. My Lord, this is not a case where the defence is shadowy, it is a case where the defence just simply does not have legs. My Lord, unless I can assist your Lordship.

MR JUSTICE NORRIS: Okay. Yes?

MR WHEATER: My Lord, very briefly, to take a point my learned friend made in turn, first of all he says the timing of this is coincidental with the credit control e-mails. Of course that is to ignore the fact that it was only on 14th November 2012 that the company discovered the overcharging in the first place; it then acted promptly and raised its complaint just over three weeks later. So, my Lord, the complaint that we should have acted earlier simply has no legs. This is not a case where there is a bald assertion of facts -----

MR JUSTICE NORRIS: If you felt you were being overcharged, it might have been thought you would have gone to a cheaper supplier.

MR WHEATER: My Lord, if we knew we were being overcharged, perhaps we would -----

MR JUSTICE NORRIS: On 14th November you did.

MR WHEATER: ..... but we only discovered the overcharging on 14th November.

MR JUSTICE NORRIS: Yes, you did.

MR WHEATER: Indeed. My Lord, this is not a case where there is a simple bald assertion of fact. You have got three witness statements, all attested with statements of truth. You have evidence that the investigations have been carried out, you have evidence of the product of those investigations. You have the fact that letters were being sent to the Respondent prior to the threat of winding-up proceedings. You have evidence that the Company had contacted its solicitors in order to begin preparing proceedings to recover the overpayment. This is not merely a bald assertion.

In relation to the terms and conditions, first of all we do not know what any of the terms and conditions at the relevant time said, and the question of whether or not these contracts or a contract for the supply of fuel is governed by an umbrella contract that was agreed between the Company and the Respondent, or individual contracts agreed on a day to day basis, is a matter that is in dispute and would require to be determined by evidence at trial. Furthermore, we have already heard that the only evidence of the terms and conditions being supplied is by a disclaimer at the bottom of an invoice.

MR JUSTICE NORRIS: No, not a disclaimer.

MR WHEATER: My Lord, traditionally invoices tend to follow the contract. The invoice is a request for payment.

MR JUSTICE NORRIS: Yes.

MR WHEATER: They have not provided any delivery notes with this on, they have not provided any evidence at the time of each contract that we had been notified.

MR JUSTICE NORRIS: So you may be in difficulties with the first contract, but forever after you know, the second, third, fourth, fifth, you know that they are the terms and conditions of the company.

MR WHEATER: My Lord, if they are separate contracts, because of course it is the Company's case that there was an overarching agreement. If there was an agreement and if Mr Henry's evidence is believed at trial that there as an agreement that they would continue in the same way as they always had with

Lancsville, if that evidence is believed at trial then what status sending an invoice that says: "Oh, and we have got some terms and conditions as well." Unless my learned friend is going to argue there was a variation by necessary conduct, if the Company is believed that there was an agreement on 5th October '10, then the terms and conditions are of no relevance. Your Lordship does not know what the terms and conditions say, because the only terms and conditions throughout the relevant period we have got are December 2011.

My Lord, my learned friend has raised a number of concepts. He says at best the Company's case tends to suggest a lack of a meeting of minds. That is a concept the Chancery Division has to deal with quite a lot, and there is no way for this court to assess whether there was a meeting of minds unless the evidence is tested as to what was in the minds of the parties at the time, tested by cross-examination, work out what was said, what the objective, reasonable man would believe it to mean, and whether in fact the parties were ad idem. At trial evidence would be produced from the history of Lancsville, which is not to hand at the moment due to its administration but could be sought if we had the time in proceedings, evidence could be sought as to the relationship leading up to that meeting of minds, and that all needs to be tested by evidence.

My learned friend said this is all about a misunderstanding in a conversation between Mr Henry and Mr Panten. In fact he says your Lordship should look at the conversation that took place a week ago and look at the fact that the parties disagree even about that conversation. My Lord, this court is not the place to determine whether there has been a misunderstanding, and in fact my learned friend's example is a halcyon example of the point. The court would need to understand what was said, by whom, and when, in order to work out whether there was an understanding. My learned friend bases his case on the fact he says: there was clearly a misunderstanding because Mr Panten said the conversation never happened, and in fact Mr Harbour agrees that the conversation was with him. Mr Henry has seen both of those statements and he is adamant that his version of events is correct, and that needs to be tried and tested by evidence.

My learned friend says that even if Mr Henry is right that there was an agreement or that there was a comment made that the Respondent would provide red diesel at its lowest daily rate, he says this is an Asda price promise and it is a mere marketing puff. Again your Lordship will know that your Lordship would have to test what was said, by whom, in what context, in order to assess whether it was intended to have contractual effect and whether it was a marketing puff. Again, another of the points raised by my learned friend would require to be tested in evidence at trial. It is not for this court today to say whether or not a promise by an oil supplier to supply red diesel at its lowest available daily rate is a marketing puff.

My learned friend says I have got to prove all of that today. I do not. I have to prove that there is a substantial dispute today, and, my Lord, there is.

My learned friend says the last thing the court has got to do is consider what the term is. He says there is no market rate. My Lord, the only evidence you have got on that is not from a market expert, it is from Mr Harbour. But in any event, before the court has to determine what the term means and what the interpretation of the term is, the court has to determine what the agreement was. If the court finds as a fact at trial that Mr Henry and the Respondent entered into an agreement for the lowest available daily rate, the court would see if it could give effect to that agreement. My Lord, it may be that there is a market rate. It may be that lowest available daily rate would refer to the Respondent's lowest available daily rate. But the matter of the interpretation of that agreement is a matter for the court.

Lastly, my learned friend says that I have to prove that there has been a breach of the agreement. Again, I would beg to differ. My Lord, I need to raise a substantial case that there has been a breach of the agreement. Your Lordship has seen the product of Mark Henry's investigations, setting out a history of overcharging spanning over two years.

So, my Lord, unless I can assist your Lordship any further.

MR JUSTICE NORRIS: No. Thank you.

(Mr Justice Norris then gave judgment - please see separate transcript)

MR WHEATER: My Lord, the first thing that I request is: can we have a two week extension on 4th January because of the Christmas period and the fact that certainly, whilst the court does not make orders for counsel's convenience, certainly I am not going to be here for two weeks until 7th.

MR JUSTICE NORRIS: I will extend it till 11th.

MR WHEATER: I am grateful, my Lord. The next issue is the question of costs. Your Lordship will hopefully have received costs schedules.

MR JUSTICE NORRIS: Yes. I am proposing to make an order that the costs shall be costs in the action.

MR WHEATER: My Lord, we oppose that in principle. The application is a short application listed for a day, and the issues that will arise in the action are very different, my Lord, from the issues that arise today. This is an application to restrain presentation of a winding up petition.

MR JUSTICE NORRIS: Yes. On the grounds that you have got a bona fide substantial set-off claim.

MR WHEATER: My Lord, yes.

MR JUSTICE NORRIS: You have just convinced me of that, but I think it is a bit shadowy.

MR WHEATER: And your Lordship has built into the injunction a clause whereby the injunction lapses if we do not issue our proceedings.

MR JUSTICE NORRIS: Absolutely.

MR WHEATER: Which we have absolutely every intention of doing.

MR JUSTICE NORRIS: So there will be an action, at which all of these issues will be determined.

MR WHEATER: My Lord, save that once the claim form and particulars of claim are issued of course that deals with your Lordship's proviso. The simple fact of the matter is the letters of 7th, 11th and 13th December raised, as your Lordship has found, albeit with certain reservations, a case which is on the face of it bona fide, genuine and substantial. In those circumstances it would have been an abuse of the process of the court for the Respondent to present a winding up petition in those circumstances. It was requested to give an undertaking not to .....

MR JUSTICE NORRIS: Yes.

MR WHEATER: ..... and we were forced to make this application.

MR JUSTICE NORRIS: It put in some pretty powerful evidence in opposition, which you have managed to plug by serving evidence yesterday.

MR WHEATER: My Lord, some of the evidence in opposition could not have been foreshadowed. For example, prior to yesterday - and bear in mind, my Lord, whilst, yes, some of our evidence was late yesterday afternoon, we ourselves were only served with the Respondent's evidence at two o'clock, so, my Lord, we could not have responded to the issues that were raised before then. The simple fact is that the lion's share of the evidence that your Lordship has referred to, particularly the statements of both Messrs Henry, the investigations and the correspondence, were already in evidence in our first round of evidence. My Lord, in the circumstances this application should never have been necessary because an undertaking should have been given not to present the petition. In those circumstances, my Lord, I would seek the usual order that costs follow the event and that the Company be granted its costs of this application.

MR JUSTICE NORRIS: Yes. Right. Mr Watson-Gandy, what do you want to say?

MR WATSON-GANDY: My Lord, unless your Lordship needs me, I would not seek to dissuade you from the course you are seeking to adopt. I think there is a certain judgment of Solomon-esque quality to it.

MR WHEATER: My Lord, I am instructed to draw to your attention the fact that prior to this hearing today an offer was made for the parties to attend a mediation. My Lord, this application may not have been necessary at all had the Respondents taken a prudent course and granted the undertaking, but it made no effort whatsoever to engage in any productive dialogue with the Company prior to today. Indeed -----

MR JUSTICE NORRIS: Tell me about the mediation.

MR WHEATER: My Lord, there was a proposal made by way of a letter dated 12th December 2012. My Lord, it obviously does not appear in your Lordship's bundle given that it is WP, but I can hand a copy up.

MR JUSTICE NORRIS: Is it completely without prejudice or without prejudice save as top costs?

MR WHEATER: Save as to costs.

MR JUSTICE NORRIS: Right, I will look at it. (Pause) Ninety days? Mediation in ninety days.

MR WHEATER: My Lord, to take account of the Christmas period. (Pause)

MR JUSTICE NORRIS: Right. That makes the difference. Mr Watson-Gandy, so you know what I have got in mind, I am minded to order that your clients shall pay the costs of this application from noon on 14th December, but that prior to that the costs will be costs in the action.

MR WATSON-GANDY: My Lord, perhaps I could draw your attention to an attendance note which indicates our response.

MR JUSTICE NORRIS: Right. Let's have a look at that then.

MR WATSON-GANDY: My Lord, in essence it deals with the - my instructing solicitor tried to phone reference NF at Jeffrey Russell:

> "RBK,"

which is my instructing solicitor,

> "has just received a fax and is surprised they want to proceed with the issue of the petition given that we have said we will wait until next week,"

I think that is the application.

MR JUSTICE NORRIS: Yes.

MR WATSON-GANDY: "He said that his client is not prepared to wait with the threat of petition hanging over them. He has instructed Wendy Parker of Hardwick,"

at which point he hung up on my instructing solicitor. That was the sum of the negotiations.

MR JUSTICE NORRIS: Sorry, I missed - take me through it again. He tried to ring.

MR WATSON-GANDY: We rang in response to the letter you have just been shown.

MR JUSTICE NORRIS: Right.

MR WATSON-GANDY: My instructing solicitor indicates - it reads as follows:

> "RBK has just received his fax and is surprised that they want to proceed with the issue of a petition given that we have said we will wait until next week. He said that his client is not prepared to wait with the threat of petition hanging over him. He has instructed Wendy Parker of Hardwick. He then hung up."

MR JUSTICE NORRIS: There must be a mistake in that somewhere.

MR WATSON-GANDY: My Lord, the mistake is to the reference to the petition, it is this application for an injunction.

MR JUSTICE NORRIS: That is where I lost it. Yes, I see.

MR WATSON-GANDY: In essence when my instructing solicitor -----

MR JUSTICE NORRIS: Your solicitor said: "I am surprised you are going ahead with the application," is that right?

MR WATSON-GANDY: Yes, my Lord.

MR JUSTICE NORRIS: And they said: "We are not prepared to wait forever, and we have instructed somebody."

MR WATSON-GANDY: Yes.

MR JUSTICE NORRIS: What was the date of that?

MR WATSON-GANDY: The date of that is 14th December 2012.

MR JUSTICE NORRIS: So they did not wait until noon on 14th December, as indicated in their letter, is that right? Or they did wait. No, they did not wait until noon on 14th December, is that it?

MR WATSON-GANDY: That is 11.50, my Lord.

MR JUSTICE NORRIS: 11.50.

MR WATSON-GANDY: My Lord, as regards willingness to engage in constructive dialogue, slamming the phone down on my instructing solicitor is probably not the best way of starting it.

MR JUSTICE NORRIS: Right. Have you got an attendance note to deal with this event?

MR WHEATER: My Lord, we do not. My instructions are that this is a call that took place between the Respondent's solicitors and my instructing solicitor whilst he was travelling to and from court - it was a call placed on a mobile telephone. My instructions are that it related not to the offer of mediation but to the issue as to the undertaking which had been requested by those who instruct me on 13th December, and whether the undertaking would be given.

There are a number of puzzling aspects about this. First of all - and Miss Parker, as far as I am aware, has never been instructed on this case and all (inaudible) it. There is no mention of the mediation. It does not seem to refer to this letter at all. As to whether or not we waited until twelve o'clock on 14th, my understanding is that this was an outgoing phone call from the Respondent's solicitors - they called Jeffrey Green Russell at 11.50, so ten minutes before the deadline - to say that they were surprised that the hearing was going ahead. There was an offer mediation; they did not accept it. In fact that attendance note does not refer to the issue at all. My Lord, my instructions are that certainly the Company's solicitor did not merely hang up. Now, it may have been because ----

MR JUSTICE NORRIS: Well, I am not going to -----

MR WHEATER: ..... there was a mobile telephone call while they were on a train, they may have lost connection, but my instructions are certainly that that sort of thing just did not happen.

MR JUSTICE NORRIS: There we are. I cannot possibly resolve that sort of dispute.

The order I am going to make is that the Respondents will pay the Applicant's costs of the application as from noon on 14th December 2012, and the remainder of the costs shall be treated as costs in the action. Right. Those costs will be subject to detailed assessment.

MR WHEATER: My Lord, at the very great risk of imposing on your Lordship's patience for too long, given that the application was issued on 14th December, perhaps your Lordship would consider an interim payment on account pending detailed assessment.

MR JUSTICE NORRIS: No, I do not think so. I think the sooner the issues are identified in a formal court document, the better. Then whether you mediate it or litigate it or what you do with it, I do not know, but a dispute like this should be nailed down at as early a time as possible. So that is the way I will dispose of the application. I will hand back your various papers. Thank you both very much.

MR WHEATER: My Lord, before your Lordship goes, I am instructed to seek leave to appeal the decision not to grant an interim costs order. The Respondent is a solvent company. There will be an assessment of costs in due course. There are costs of today. Certainly your Lordship has two costs schedules; one of them is a supplemental schedule dealing only with costs incurred in the last two days. Some, if not all, of the costs from the costs schedule dated - in relation to the application that was submitted yesterday would relate to costs after 14th. In my submission your Lordship has ample evidence with which to assess an interim payment. In the circumstances, given the Respondent's means, your Lordship ought to have decided that an interim payment was appropriate.

MR JUSTICE NORRIS: We had also to take into account that this application has taken far longer than your time estimate, that it is now five past five, and I do not intend to entertain argument on appeal at this stage. I will refuse you permission to appeal and you can seek it elsewhere. So there we are. Thank you.

(The Court adjourned)
