Disputed winding-up petitions—bare assertion will not suffice (Fenton Whelan Ltd v Swan Campden Hill Ltd)

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Restructuring & Insolvency analysis: This case concerned a debt claimed in winding up proceedings that was allegedly disputed. Several counterclaims were also advanced. After a contested hearing the court rejected all grounds of opposition and concluded that the winding-up petition should proceed. The case provides a good example of the court taking a robust approach to disputes/counterclaims advanced in respect of a winding-up petition and requiring such disputes to be properly supported and substantiated with evidence. The case provides a timely reminder that although the bar for establishing a substantial dispute or counterclaim is reasonably low, bare assertion is not enough. Written by Rowena Page, barrister at Maitland Chambers and counsel for the successful petitioner.

Fenton Whelan Ltd v Swan Campden Hill Ltd [2021] EWHC 2470 (Ch)

What are the practical implications of this case?

This case is a salutary reminder of the importance of ensuring that allegations and assertions made in response to winding up proceedings are properly and fully evidenced and are carefully thought through.

In dismissing the company's grounds of opposition to the claim, Insolvency and Companies Court Judge Burton reiterated three general principles:

- first, that where grounds of opposition are advanced in respect of a petition, the onus of showing that those grounds are serious and substantial lies on the company: *Orion Media Marketing Ltd v Media Brook Ltd* [2002] 1 BCLC 184, [2003] BPIR 474. It is up to the company to meet that evidential burden: *Re a Company* [2016] EWHC 3811 (Ch) (not available in Lexis®Library)
- second, that (just as in other proceedings) allegations of fraud made in opposition to winding up proceedings must be fully and clearly particularlised. A failure to do so may lead to those allegations being treated with considerable care by the court, and
- third, that when framing grounds of opposition, care must be taken to differentiate between a disputed debt on the one hand, and a counterclaim/set off on the other. It is not acceptable to frame an issue as a dispute in evidence and, at trial, to seek to re-frame that dispute as a counterclaim

What was the background?

The petitioner had formerly acted as a development manager for the redevelopment of a property in Kensington.

The relationship between the company and the petitioner was governed by a development manager agreement (DMA) under which the petitioner agreed to provide management services.

Instalment payments due to the petitioner under the DMA were not paid and the petitioner presented a winding-up petition in respect of those sums.

The company opposed the petition on the following grounds:

- it asserted the petition was disputed on the basis that the petitioner had failed to carry out its obligations under the DMA with due care and skill
- it asserted that it had cross claims that equaled or exceeded the petition debt, namely: (i) a cross claim for fraudulent misrepresentation regarding the prospects of achieving renewed planning permission on development of the property; (ii) a cross claim arising from the petitioner's receipt of allegedly improper payments or 'secret profits'; and (iii) a cross claim arising from an alleged whistleblower, who alleged that the petitioner may have been complicit in overcharging on the project

An attempt was also made at the hearing to re-frame the ground of dispute as a counterclaim for negligence in the alternative.

The parties agreed early in the proceedings that the coronavirus (COVID-19) test set down by the Corporate Insolvency and Governance Act 2020 was satisfied, with the result that the case proceeded as a traditional disputed debt petition.

What did the court decide?

The court rejected all grounds of opposition.

As regards the dispute, the court held that:

- the DMA was a 'construction contract' within the meaning of the Housing Grants, Construction and Regeneration Act 1996 (HGCRA 1996)
- under the provisions of both the DMA and the HGCRA 1996, if the company had wished to dispute a debt raised under the contract it was required to do so within a set period of time by the service of a 'pay less' notice. It had failed to do so
- as a result, it was no longer open to the company to raise a dispute in respect of the debt (applying *R&S Fire and Security Services Ltd v Fire Defence plc* [2013] EWHC 4222 (Ch), [2013] BPIR 1085)

As regards the alleged counterclaims, the court held that:

- the company's allegations of fraudulent misrepresentation had not been fully or clearly particularised and, in any event, the relevant assertions were not actionable misrepresentations but were statements of opinion. On the evidence before the court, it could not be said that those statements of opinion were not honestly held: the company bore the burden of establishing a serious cross claim and had failed to satisfy that burden
- there was no basis on which the court should read fiduciary duties into the parties' contractual relationship such as to give rise to a claim in respect of the alleged 'secret profits'. Indeed, the DMA expressly held that the arrangement between the parties would not constitute a partnership or a joint venture, and provided that the petitioner was not the company's agent
- there was no sworn evidence before the court from the alleged whistleblower and no evidence at all to suggest that there had indeed been overcharging on the project (or that the petitioner had been involved in such practices if they had gone on). The concerns expressed by the director of the company arising from the allegations were no more than that—concerns and apprehensions. They did not give rise to a genuine and serious cross claim

As regards the counterclaim for negligent planning services, it was not acceptable for the company to seek, in oral submissions at trial, to re-frame grounds of dispute as a counterclaim. In any event, the assertions amounted to little more than unsubstantiated statements of belief and failed to meet the minimum evidential threshold to demonstrate that the counterclaim was genuine and serious.

Case details

- Court: Business and Property Courts of England and Wales, Insolvency and Companies List (ChD)
- Judge: Insolvency and Companies Court Judge Burton
- Date of judgment: 9 September 2021

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