Re a Company No. 007356/98 (ITC Infotech Ltd).

Chancery Division.
Hart J.
Judgment delivered 12 January 1999.

Winding up – Statutory demand – Debt based on disputed invoices – Application to restrain advertisement of winding-up petition – Hearing – Further evidence established solvency of debtor and reasons for disputing debts – Adjournment – Respondent gave undertaking not to present petition – Costs – Whether applicant could claim costs of application as reasonably brought – Whether additional costs of adjournment and further evidence should be ordered.

This was an application for costs where, in an application to restrain the advertisement of a winding-up petition based on a disputed statutory demand, the applicant provided further evidence of the debtor company's solvency and proper reasons for disputing the debt and the respondent was then prepared to give an undertaking not to present a petition on the basis of the statutory demand or to serve a fresh statutory demand.

The respondent had provided a training course and computer software to the applicant which provided post-dated cheques in relation to the training course, but these were stopped before they could be credited to the respondent's bank account. The parties were in correspondence about the disputed debt for some time but the respondent's solicitors decided to serve a statutory demand for about £158,454 on the applicant based on the disputed debt rather than seek to resolve the matters in dispute by action. The applicant applied to restrain the advertisement of a petition based on the statutory demand. Before matters got under way at the hearing of the application the applicant served on the respondent further detailed evidence as to the applicant's undoubted solvency and why the applicant had refused to make payment. The hearing had to be adjourned for a day and on the following day by the time it came back for hearing the respondent was content to give an undertaking not to present a winding-up petition based on the disputed statutory demand.

The applicant applied for its costs of the application on the basis that it had in effect succeeded. The respondent resisted the application for costs on the basis that until the service of the additional evidence it had been reasonable for the respondent to proceed as the applicant would have been unable to satisfy the court that the debt was bona fide disputed.

Held, **making no special order as to costs, which should be taxed as properly and reasonably incurred:**

1. A person who claimed to be a creditor and who elected to pursue his claim by the machinery of a petition for the winding-up of the alleged debtor company rather than by writ proceedings ran the risk that in the course of that process the alleged debtor would be able to prove in a manner sufficient for the court that the procedure adopted was inappropriate because of the existence of a bona fide dispute as to the debt.

2. This was a case where however reasonably the respondent's advisers had calculated the risks of that eventuality, the risk had eventuated in the sense that on the evidence the respondent no longer wished to put the question as to the disputed debt to the test and had offered the undertaking not to present a petition. Having embarked on the course of serving a statutory demand they ran the risk of finding themselves in a position where they wished to halt a train which they had themselves put in motion. They could only do so on the basis of giving the undertaking and submitting to an order that they paid the costs incurred as a result of the applicant having had to make the application to stop them. The risk would include costs incurred as a result of the adjournment since the respondent could have opposed the admission of the new evidence or sought an adjournment in which to deal with it.

Daniel Lightman (instructed by Bolitho Way, Portsmouth) for the applicant.

Malcolm Sheehan (instructed by Charsley Harrison, Datchett) for the respondent.

A JUDGMENT

Hart J: By a statutory demand dated 9 December 1998, Supernova UK Ltd, the respondent, served notice on ITC Infotech Ltd, the applicant, in respect of a total sum of £158,454-odd pursuant to two invoices which it had rendered to the applicant.

First, an invoice dated 30 January 1998, which was in respect of a training course provided by the respondent for the applicant's employees and in respect of which a sum B of £15,000 remained outstanding. Although this is not expressly referred to in the statutory demand, that sum of £15,000 had in fact been initially provided to the respondent in late April 1998 by two cheques post-dated to June and July 1998 respectively, which cheques were subsequently, in the circumstances outlined in correspondence which is now before me, stopped by the applicant. The second invoice was in relation to a sum of £143,000-odd and that had been rendered partly (and as to C the bulk of it) pursuant to an alleged claim by the respondent against the applicant under certain heads of agreement dated 31 March 1998, and as to the balance in respect of certain computer software products, maintenance and support provided to the applicant by the respondents.

The parties had earlier in 1998 been in correspondence with each other in relation to these alleged claims and by the end of 1998 at least the matter was, as appears from the statutory demand, in the hands of the respondent's solicitors, who decided to proceed by D serving a statutory demand rather than by seeking to resolve the matters in dispute between the parties by action. The statutory demand was met by an application dated 21 December to restrain the presentation of a petition based upon it. That application was supported by an affidavit sworn by Mr Stephen James Wood, a solicitor in the employ of the applicant's solicitors, Bolitho Way, which purported to set out the grounds on which the applicant disputed liability to pay any sums under either of the invoices. E Perhaps significantly in the light of subsequent events, that affidavit, first of all, did not deal specifically with the circumstances in which and the basis upon which the two post-dated cheques were countermanded, nor did it deal, except in the most general way, with questions of possible liability by the respondent to the applicant under the heads of agreement. It appears from a 'without prejudice save as to costs' letter written by the respondent's solicitors to the applicant's solicitors, dated 22 December 1998, that in the light of what had passed between those two firms the view taken on behalf of the F respondent was that there would be no possibility of the applicant succeeding in showing that there was a bona fide dispute as to the sum of £15,000 due in respect of the dishonoured cheques. But in that 'without prejudice save as to costs' letter an indication was given of acceptance of the position that there might be a dispute as to the balance of the sums claimed by the statutory demand.

Thus matters stood essentially until the matter came on before me for first hearing on G Monday, 11 January 1999, when, shortly after the court had sat, but before an occasion had arisen for the substantive hearing of the applicant's application, the applicant served on the respondent further evidence of a detailed nature, first as to the solvency of the applicant (and I should say at once that that evidence establishes beyond any doubt at all that the applicant is a substantial and solvent company) and, secondly, a detailed affidavit as to the circumstances in which, as alleged by the applicant, the claims made by the respondent came to be made and the reasons why the applicant had refused to H make the payments.

For reasons which did not have any direct or necessary connection with the service of that evidence, the application was not heard until this afternoon, on 12 January, by which time the respondent and its advisers had taken the view that on the basis of the new evidence provided by the applicant they were content to give an undertaking not to present a petition on the basis of the statutory demand, or to serve any fresh statutory

demand on the basis of the two invoices to which I have referred. However, they wished to resist an application then made on behalf of the applicant for its costs of the application and to do so essentially on the basis that until service of that additional evidence it had been reasonable for them to proceed on the basis that the applicant would find itself unable, on the substantive hearing of its application, to satisfy the court that there was a bona fide dispute, at least as to the £15,000 the subject of the two dishonoured cheques.

That, I am bound to say, seems to me to have been an understandable attitude at least for the respondent's lawyers to have taken on the basis of the information they then apparently had. However, I am not persuaded that that means that I should treat the result of this application as having been in the event anything less than a victory for the applicant with the usual consequences as to costs. It has been said on many occasions that a person who claims to be a creditor and who elects to pursue his claim by the machinery of a petition for the winding-up of the alleged debtor rather than by writ proceedings runs the risk that in the course of that process the alleged debtor will be able to prove in a manner sufficient for the court that the procedure adopted is inappropriate because of the existence of a bona fide dispute as to the debt. It seems to me that this is a case where however reasonably, from its own point of view, those advising the respondent may have calculated the risks of that eventuality, the fact of the matter remains that the risk has in this case eventuated in the sense that on the evidence as it now stands while the respondents do not concede that there is a bona fide dispute as to the whole of the claim which they make, they do not wish to put that question to the test and have therefore, on that evidence, been willing to offer the undertakings which I have mentioned. It seems to me that if the respondents wished to succeed in a submission that there was no bona fide dispute as to the whole of this alleged debt, that they cannot do so by offering an undertaking which can only be justified on the basis that there is, and seeking to test the matter in argument on costs. Having embarked on the course of serving a statutory demand and refusing initially to offer any undertaking not to present a petition based on it, they have run the risk of finding themselves in a position where they wish to halt a train which they have themselves put in motion and in my judgment they can only do so on the basis of giving the undertaking and submitting to an order that they pay the costs incurred as a result of the applicant having had to make the application to stop them.

Mr Sheehan, on behalf of the respondent, has said that even if I order his client to pay some part of the costs, that should not include the costs incurred as a result of the adjournment of the case from yesterday until today, or the costs incurred by the applicant in putting together evidence as to its solvency.

So far as the adjournment from yesterday until today is concerned, the way in which the business of this court is organised is such that there is always a risk that a motion listed for the Monday will not in fact be heard on the Monday but will be heard later in the week and in those circumstances there is an attendant risk that a plaintiff may seek, before the substantive hearing of the motion, to improve his evidence by filing further evidence. If that causes injustice or risks causing injustice, the remedy for a respondent is either to oppose the admission of that evidence or to seek an adjournment in which to deal with it. I am not therefore persuaded that I should make any special order in relation to the costs of and occasioned by the adjournment from yesterday until today; nor am I persuaded that I should make any special order in relation to the costs incurred by the applicant in putting together the evidence of the company's solvency. The extent to which costs have been properly and reasonably incurred will be a matter for taxation.

(*Order accordingly*)