

JUDGMENT : HIS HONOUR JUDGE WEEKS QC, (sitting as a High Court Judge). Bristol District Registry. 13th July 2006

- 1 This is a dispute between two companies engaged in the construction industry over a number of invoices raised by the respondent, SCC Construction Limited, as sub-contractor, against the head contractor, or what it thought was the head contractor, Medlock Projects Limited. Those invoices were not paid and on 23rd May 2006, SCC Construction Limited presented a petition to this court to wind up Medlock Projects Limited.
- 2 Medlock Projects Limited has issued the present application which has come before me (*after a directions hearing before His Honour Judge Havelock-Allan*) seeking either restraint of advertisement or the striking out of the petition.
- 3 The petition alleges that the company is indebted to the petitioner in the sum of £51,642 being the sum outstanding in respect of goods and services supplied to the company by the petitioning creditor during the period March 2005 to March 2006. In fact the petitioning creditor has accepted that £5,803 is improperly included as a debt owed by Medlock Projects Limited and has reduced the debt on which the petition is based to £46,559.
- 4 The invoices on which the debt was based are dated 20th April 2006 and headed: "**Final Account**". One is in respect of work at Congleton and the other two in respect of work at Catterick and on phone masts at ConvaTec, Deeside. The Congleton debt is said to be £27,375 and the Catterick and phone masts ConvaTec debt is said to be £24,267, making up the amount of the debt mentioned in the petition. Those invoices were served after a withholding notice had been served by the main contractor on the sub-contractor in respect of the Congleton contract.
- 5 After that, at the end of March, the parties met to discuss the various contracts between them. The agenda is in evidence, and the result of their discussion was two documents, both headed: "*Agreement between Medlock Projects Limited (called 'Medlock') and SCC Construction Limited (called 'SCC')*." Both were signed by or on behalf of the two contracting parties.
- 6 One says: "*Agreement to voluntarily terminate contract at Congleton Leisure Centre. This agreement hereby witnesses the agreement between the above parties to terminate the above contract on the following terms. SCC will cease operations on the site on March 31st ... and remove all of their plant and labour. Medlock Project Developments Limited ...*", which was a subsidiary of Medlock Projects Limited, "*...to pay in full and fixed settlement the sum of £75,000 to discharge all their liabilities and monies owed to SCC under this contract in two stages. Stage one is for Medlock to pay SCC the sum of £50,000 no later than 13th April. Stage two is for Medlock to pay the sum of £25,000 by no later than 28th April. There shall on the signing of this agreement be no liability for SCC to complete or remedy any defect either apparent or latent by way of unfinished work or any liability under any clauses of the sub-contract document*".
- 7 There are other clauses which I need not read. The other document is similar and says: "*Contract Congleton Leisure Centre. This agreement hereby witnesses the agreement between the above parties for the above contract that they hereby agree to a mutual termination of the contract on the following terms. SCC will cease operations on the site on March 31st ... and remove all their plant and labour. Medlock Projects Developments agree to pay in full and fixed settlement the sum of £75,000 to discharge all their liabilities and monies owed to SCC under this contract. There shall on the signing of this agreement be no liability for SCC to correct or remedy any defect either apparent or latent by way of unfinished work or any liability under any clauses of the sub-contract document*".
- 8 Several things are plain from those two documents. The first is the contract was made between Medlock Projects Limited and SCC Construction Limited, although payment was to be made by a company associated with Medlock Projects Limited.
- 9 The second is that these agreements related to terminating the Congleton contract and were in full discharge of the Congleton contract, because there was going to be no liability for SCC to remedy any defect or liability for any unfinished work; or any liability under any other clauses of the sub-contract document. So there was a clean break for the Congleton contract.
- 10 The other point clear from those written agreements is that they did not apply to the other contracts between the parties. Under normal practice the main contractor, who had already served a withholding notice in respect of the Congleton contract, would be free, if he was dissatisfied with any of the work done on the other contracts, to serve a withholding notice under those other contracts; but that was not done.
- 11 The first payment of £50,000 was made by 13th April, and invoices were then sent in by way of final account on 20th April claiming the sum of £51,642 made up of £24,267 in respect of the other contracts and £27,375 to include VAT in respect of the Congleton contract. No response was made to those documents on 20th April and the final payment due under the Congleton contract on 28th April was not made.
- 12 So, very naturally, SCC consulted solicitors in Bristol who wrote to Medlock Projects Limited on 3rd May setting out the sum due of £51,642, including the unpaid amount on the Congleton contract, and saying they were writing on behalf of SCC in relation to sums due from Medlock Projects Limited for works carried out in relation to the listed contract.
- 13 That letter prompted a response from the main contractor's solicitors who asked for time to reply, and eventually it was agreed that the winding-up petition would not be issued until 10 am on 22nd May 2006 to allow those solicitors to take instructions. They did not meet that deadline and the winding-up petition was issued before they

actually responded. They responded on 23rd May, taking no point that the claim was made against the wrong company, but dealing in detail with the various contracts and making, in effect, claims to withhold monies under the various contracts for poor work and saying: *"The quantified losses of our clients greatly outweigh those at present claimed in your letter. There are significant unquantified losses at present coupled with significant information required from your client which may increase the amounts owed yet further. Winding-up proceedings are inappropriate. We await your response to this letter"*.

- 14 By that time, however, the winding-up petition was issued and it was served in due course. When it was served the solicitors for the recipient reserved their position as to whether or not the right company was the company which the petitioning creditor was seeking to wind up.
- 15 Medlock Projects Limited then applied to restrain advertisement, and advertisement was deferred until the matter has come before me.
- 16 Mr Redpath for the company Medlock Projects Limited takes three points. The first is that the petitioning creditor, SCC Construction Limited, is seeking to wind up the wrong company. The company which entered into the contracts and owes the money is not Medlock Projects Limited, which is a holding company, but is a wholly owned subsidiary called Medlock Developments Limited which trades as Medlock Projects; and it was Medlock Developments which entered into all the material contracts. I do not accept that submission. The only reference one can find in the written documents to Developments is the reference that I have read from the two agreements made at the end of March where it was quite clear that Developments was not the contracting party but merely the paying party; and Projects was to secure that a company in the same group would actually make the payment, and of course if the payment was not made, then Projects has to pay. No point was taken when the invoices were sent to Projects. No point was taken when the solicitors wrote to Projects. No point was taken on this when the solicitors on behalf of Projects first wrote back to SCC's solicitors. In my judgment there is no substance in the submission that the wrong company is the subject matter of this winding-up petition.
- 17 The next two points are similar. Mr Redpath contends that the debts are bona fide disputed on substantial grounds; or alternatively that there are cross-claims which his client has not yet been able to litigate and that those exceed the amount of the petition debt.
- 18 The principle which I have to follow is fairly clear on the authorities which have followed *Bayoil v Sea-wind* in relation to cross-claims [1998] BCC 908 or in relation to disputed claims *Re A Company* 685 of 1996 reported at [1997] BCC 830. The dispute has to be a genuine one on substantial grounds and the cross-claim has to be one which is a bona fide cross-claim which has a genuine prospect of success.
- 19 In my judgment neither the dispute as to the claim nor the cross-claims have any genuine prospect of success, and it seems to me plain that the parties were settling all disputes in relation to the Congleton contract in their written agreement on 30th March this year.
- 20 Mr Redpath suggests that what was left out was an agreement that SCC should construct a drain and the managing director of the company refers to a possibility that there may be a claim for rectification. It is notorious that rectification has to be proved by a high standard of evidence. The claim is entirely denied by SCC Construction Limited, and I see very little prospect of a rectification claim succeeding in the face of the agenda for the meeting and the clear written terms of the meeting itself.
- 21 The other claims are really claims in respect of poor work either on the Congleton contract, which it seems to me was settled as at the meeting, or in relation to the other contracts. The short answer to that is that these were all, in my judgment, written contracts within the terms of the Housing Grants, Construction and Regeneration Act 1996 Part II because they incorporated the written terms of Medlock Projects' standard terms of contract. In passing I note that the standard terms were standard terms issued by Medlock Projects Limited and not by Developments. The incorporation of those written terms made them written contracts for the purposes of Part II. That introduces the requirements of a withholding notice under Section 111. Medlock was well aware of that practice because they had served one in relation to Congleton, but no notice was ever served under any of the other contracts and in my judgment the time for doing so has long since expired.
- 22 I thought at one stage that the absence of notice might be a special circumstance within Bay oil for refusing an order restraining advertisement. On reflection I think that is not correct because Bay oil itself was a freight case, which has a certain resemblance by way of analogy to the procedure under withholding notices. I rely on the absence of any withholding notice therefore to support my conclusion that the cross-claims are not substantial and serious claims which Medlock had in mind irrespective of the present winding-up proceedings. It seems to me that they have been thought of as a last resort and not advanced until the threat of winding-up proceedings was already very much to the fore. In my judgment this is one of those cases where a main contractor is trying to take every possible point and throw up a lot of dust to conceal the fact that it has failed to pay what was clearly agreed in writing in respect of the Congleton contract and what seems to me to be effectively undisputed in relation to the other contracts of the total debt of £46,559. There is, in my judgment, insufficient evidence on which I could reach the conclusion that these proceedings ought to be struck out or to prevent them from going further by way of advertisement. I will therefore dismiss the present application.

(There followed discussion as to the form of order and costs)

Mr Redpath appeared on behalf of the Claimant.
Mr Briggs appeared on behalf of the Defendant.