**Approved Judgment**

**Neutral Citation Number [2023] EWHC 1779 (Ch)**

**CR 2023 001036**

**IN THE HIGH COURT OF JUSTICE**
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**
**INSOLVENCY AND COMPANIES LIST**

**IN THE MATTER OF A COMPANY (INJUNCTION TO RESTRAIN PRESENTATION OF A PETITION)**
**AND IN THE MATTER OF THE INSOLVENCY ACT 1986**

Royal Courts of Justice
7 The Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 21/07/2023

**Before** :

**ICC JUDGE BARBER**

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**Between :**

**A COMPANY**

**Applicant**

**- and –**

**THE RESPONDENT**

**Respondent**

- - - - - - - - - - - - - - - - - - - - -

**Katherine Hallett** (instructed by **Fenwick Elliott LLP)** for the Applicant
**James Barnard** (instructed on a Public Access basis) for the Respondent

Hearing date: 2 May 2023

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# Approved Judgment

This judgment was handed down remotely by email and MS Teams. It will also be sent to The National Archives for publication. The date and time for hand-down is 9.30 a.m. on 21 July 2023

## ICC Judge Barber

1. This is an application to restrain the Respondent from presenting a winding up petition against the Applicant based on sums claimed in a statutory demand dated 30 January 2023 served on the Applicant on 2 February 2023. Interim relief was granted by order of Mr Justice Trower dated 23 February 2023 and continued by consent by Order of ICC Judge Burton dated 9 March 2023 pending the final hearing. On 2 May 2023 I granted a final injunction, with written reasons to follow. This judgment sets out my reasons for that decision. As the hearing was in private to protect the interests of the Applicant, this judgment has been anonymised.

### Evidence

2. I have read the following witness statements and their respective exhibits:

   (1) first witness statement of Edward Farren, litigation executive employed by the solicitors for the Applicant, dated 23 February 2023;

   (2) second witness statement of Edward Farren dated 6 March 2023;

   (3) first witness statement of R, managing director of the Respondent, dated 10 March 2023;

   (4) first witness statement of MD, managing director of the Applicant, dated 6 April 2023;

   (5) second witness statement of R dated 23 April 2023.

   I have also read the other documents contained in a bundle agreed for use at the hearing, to which reference will be made where appropriate.

### Background

3. The Applicant provides electrical services on building projects to a MEPH sub-contractor (who is employed by the main contractor). The Respondent is an agency which sources and supplies vetted labourers.

4. The Applicant and the Respondent worked together on two projects from March to September 2022 (the ‘London Project’ and the ‘Birmingham Project’). These were both projects in which WEL was the MEPH sub-contractor.

5. The Applicant was able to provide a number of electrically qualified operatives itself but required more for these projects than it had within its own ranks. The Respondent agreed to provide the remaining operatives required.

6. There is a dispute as to the terms on which it did so. The Applicant’s case is that (among other things) the Respondent agreed to:

   (1) source labour from their database of electrically qualified persons;

   (2) provide defined categories of operative with specific minimum qualifications for each category; and

(3) verify and validate qualifications held by each operative put forward.

7. The projects did not run smoothly for the Applicant. WEL issued 'Payless' notices to the Applicant in July, August and October 2022.

8. By October 2022, a dispute had arisen between the Applicant and the Respondent. By email dated 6 October 2022, the Respondent demanded payment of certain invoiced sums by 4pm on 7 October 2022 and threatened service of a statutory demand in the event of non-payment.

9. The Applicant responded by letter dated 6 October 2022, which provided as follows:

> 'Further to our recent discussions, and a meeting I attended with the Group Commercial Director of [WEL] on Tuesday afternoon, it has become apparent that there is a dispute on hours which your labour has claimed on the [London Project].
>
> Attached has just been received from our client, WEL, confirming the position put forward in said meeting.
>
> It appears that WEL have conducted an exercise to determine labour attendances and works undertaken on site for the duration of project and continue to investigate these matters as detailed.
>
> WEL have identified that there is a conflict between the hours that have been claimed by your operatives and the site information based against the WEL facial scanner, WEL labour sheets and Main contractors signing in sheet.
>
> As such our account is being reviewed and valued considerably less at this stage than expected due to the operatives not fulfilling their obligations.
>
> It is of grave concern that we read comments such as "misrepresentation" from our Client, a position which leaves us with no other option than to embark on our investigation as to what has gone on with the hours presented by labour on the Project, of which [the Respondent] provided a large amount.
>
> Having commenced this immediately after the meeting, which is still very much work in progress, we have already discovered discrepancies in the hours put forward in invoices for which your recent letter and statement relate.
>
> As such and without prejudice to our rights on this matter, we confirmed that the invoices as amended in your statement are in dispute.
>
> Whilst we will be working through this expediently, focusing on the current invoices as listed in your statement, we are sure you can appreciate this exercise will also be extended to

> retrospective invoices and payments to ensure no overpayments have occurred in the past.
>
> With regards to timescales we intend to complete our audit of hours and invoices on your statement by 21 October 2022 and will issue these to you at that point for the Parties to meet to discuss.
>
> Our review and timescales of matters will be distinct and separate to those WEL have set out, however, clearly the two may need to merge at a point as we move towards a resolution.
>
> For clarity and good order we confirmed that [the Applicant] remains committed to releasing sums for payment as they fall due should they move out of the disputed status they are currently in a set out above…'

10. Enclosed with the Applicant's letter to the Respondent dated 6 October 2022 was a letter dated 6 October 2022 from WEL to the Applicant, which provided as follows:

> 'Further to our meeting on Tuesday, 4 October 2022 at the offices of [the Applicant's solicitors]… we write as follows:
>
> As set out in the meeting … WEL have undertaken and continue to do so, an audit of site sign-in records on the [London] Project.
>
> As demonstrated in our meeting such exercise up to the 1 June 2022 presents a position where it is clear hours that you have put forward for the labour deployed are not representative of the actual hours spent on site and/or the works undertaken …'

11. WEL's letter of 6 October 2022 then summarised discrepancies and adjustments totalling £289,026.75, including adjustments required in respect of 180 man days of snagging works. The letter continued:

> 'Given the magnitude of these discrepancies I am sure you can appreciate that your account on [the London Project] will now be under my review, during which time, and considering the paid to date against the above sums, it is unlikely that any further payments will be due to [the Applicant] for works undertaken now, in the past or future until such time as we have collectively resolved what has happened with this misrepresentation.'

12. The Respondent was unmoved by the Applicant's letter of 6 October 2022 and its enclosure. By subsequent email the Respondent observed:

> 'You will appreciate that all our invoices are supported with detailed timesheets, these invoices were created on the back of the timesheets you sent to us stating what you had approved for

> the week and accordingly there is no reason that those that are now due and owing should not be paid'.

13. By letter dated 10 October 2022, the Applicant responded as follows:

> 'To be clear, we confirm your timesheets at the time of issue each week were approved based on information we are party to at the time. We did not have [sight] of the weeks signing in sheet from Red [the main contractor] or [WEL] at [the London Project]. As previously advised, it is each individual's responsibility and obligation to sign in and out each day....
>
> Both Red construction and [WEL] have now agreed to issue us full copies of both contractors attendance sheets which we are collecting this week. These were not available before but we have insisted these are transferred to us to justify the claims of shortfall in payments on our account. At this time [WEL] have shown us samples on the [London] site given several of your operatives not complying with these rules based simply on the internal sheets which has resulted in a suspension of payments on our account until detailed reviews can be completed. We have disputed the claims and the amounts being identified across the project (£201k) but at this time do not have the information to review ourselves to conduct an accurate review….
>
> If you do pursue your submission of a statutory demand, we will instruct our solicitors to submit to the court an injunction against [the Respondent] in the matter, as we have identified the monies to be in dispute given the difference in value of our accounts directly which may be considered fraudulent. We note and identify that due to the values being deducted from our account being a direct relation to the personnel provided by [the Respondent] we will be suspending any payments owed to [the Respondent] until this matter can be resolved and a true value of the account be identified.'

14. The Respondent did not reply to the letter of 10 October 2022. On 7 November 2022, the Applicant chased for a response. No response was received.

**The Statutory Demand**

15. By January 2023, the parties had not resolved their differences. The Respondent made one attempt to serve a statutory demand in January 2023, but that demand was abandoned due to technical defects. The second statutory demand was served shortly thereafter, on 2 February 2023.

16. By letter dated 3 February 2023, the Applicant made clear that the sums claimed were disputed, stating:

> 'The entire sum listed (plus additional sums that may be due back to [the Applicant]) has been in dispute between the Parties for more than six months, with no resolution to the same in either a settlement or enforceable decision from a Third Party.'

17. The letter warned that if the Respondent sought to act on the statutory demand, the Applicant would have no option but to seek an injunction restraining presentation. The letter required confirmation within seven days that the Respondent would not act on the statutory demand and that it would be withdrawn.

18. The Respondent did not reply to the letter of 3 February 2023.

19. The Applicant then sent a further letter, dated 7 February 2023. This letter, which ran to 9 pages, set out in considerable detail the Applicant's position in relation to the invoices on which the statutory demand was based. In addition to addressing material discrepancies in hours claimed, the letter also addressed concerns regarding the qualifications of the operatives supplied by the Respondent and the scale of defective works which the Applicant was having to put right. Paragraphs 71 and 76-81 of the letter provided as follows:

> '[71] As detailed above, [the Respondents] have consistently failed to provide the confirmation that any of the electricians provided were qualified as they put them forward as being.
>
> …..
>
> [76] [The Applicants] consider that the large amount of defective works they have, and continue, to put right on the projects, notably [the London Project], is due to labour not being the qualified and experienced operatives [the Respondents] were to provide, which in part is due to the failure of [the Respondents] to undertake the services in full [which the Applicants contend included vetting and verifying the qualifications of operatives supplied] as agreed.
>
> [77] Such defective works, as a result of the breach, is compensable back to [the Applicant] from [the Respondent] in respect of losses incurred by [the Applicant].
>
> [78] At present these continue to be assessed and understood by [the Applicant] as they continue to a) be putting works right undertaken by [Respondent] provided labour, and b) receive costs from their Employers on the Projects.
>
> [79] Notwithstanding future claims against [the Respondent] from [the Applicant] it is clear that due [to] the breaches on the part of [the Respondent], [the Applicants] are entitled to recover losses incurred by way of one or more of the following:
>
> a. Common law set off or abatement …

> b. Equitable set off…
>
> [80] [The Applicants] expressly reserve their rights to issue to [the Respondent] [a] fully detailed claim in due course, as and when matters have become sufficiently clear. Such sums shall be subject to costs and interest under common law.
>
> [81] Whilst the assessment of these loss[es] incurred by [the Applicants] have not been quantified within this correspondence, it is clear that whatever sum is found to be owed by [the Respondent] to [the Applicants] for such matters, these will simply compound the negative balance owed by [the Applicants] to [the Respondent] as set out in para 67 above [which related to overcharging], adding to the sums owed back [to] [the Applicants] by [the Respondent]'.

20. The Respondent failed to reply to the letter dated 7 February 2023.

21. The Applicant wrote again, by letter dated 20 February 2023, pressing for urgent confirmation within 24 hours that the statutory demand would be withdrawn and warning that in the absence of such confirmation, an application for an injunction restraining presentation would be made.

22. By a further letter dated 22 February 2023, this time from the Applicant's solicitors to the Respondent, the Respondent was given another opportunity to offer an undertaking. The letter of 22 February explained that the presentation of a winding up petition in relation to a debt that is the subject of a bona fide dispute was an abuse of process.

23. The Respondent failed to answer these letters. Two attempts by the Applicant to reach the director of the Respondent by telephone in the immediate run-up to the hearing on 24 February 2023 were also rebuffed.

**Interim Injunction: 24 February 2023**

24. By order of Mr Justice Trower dated 24 February 2023, the Respondent was restrained from presenting a winding up petition against the Applicant in respect of the debts claimed in the statutory demand until further order. The matter was listed for further hearing before an ICC Judge on 10 March 2023.

**Consent Order**

25. By a consent order approved by ICC Judge Burton on 9 March 2023, the hearing of 10 March 2023 was vacated and the matter relisted for a half-day hearing on 2 May 2023, with injunctive relief continued in the interim. The consent order also provided for the Respondent to file evidence in answer by 10 March 2023 and for the Applicant to file evidence in reply by 7 April 2023.

**R's first statement dated 10 March 2023**

26. At the time of R's first witness statement, the Respondent's position was that the disputes raised by the Applicant (which as summarised in Counsel's skeleton

argument before Trower J, and Farren (1) and (2), had focused on substantial overcharging) were 'completely groundless' with 'no prospects of success'. R relied on various matters, including weekly timesheets signed off as approved by the Applicant prior to invoicing. The Applicant's position on the timesheets (in summary) was they were signed off under time pressure and without access to full data. R also relied upon the Respondent's standard terms of business, which the Applicant maintained that it had not agreed.

27. R's first witness statement had as its third exhibit records of the qualifications held by all operatives supplied by the Respondent to the Applicant on the London and Birmingham projects. The Applicant had asked for these on a number of occasions. This was the first time that they had been supplied.

**MD's witness statement dated 6 April 2023 in reply**

28. By the time of MD's witness statement in reply, MD had undertaken a review of the turnstile and biometric data for each operative and compared that data to the timesheets provided. This exercise demonstrated, MD maintained, that the operatives were not on site, let alone working, for 40% of the total hours charged by the Respondent.

29. In addition, following the details of the operatives' qualifications provided in the third exhibit to R's statement, MD ascertained that approximately 40% of the operatives provided by the Respondent did not have the qualifications that the Respondent had represented them to have.

30. Taking into account the corrected hours and rates for each operative across the two projects, MD calculated a corrected variant of -£82,457.81.

31. In total, the Respondent had invoiced the Applicant £246,577.46 net of VAT. Taking into account the corrected variant, MD calculated the revised total of the Respondent's work, net of VAT, as £164,119.65. The amounts already paid by the Applicant to the Respondent totalled £147,230.40, leaving an unpaid balance, on MD's calculations, of (at most) £16,889.25.

32. MD also maintained by his witness statement that the Applicant had a cross-claim against the Respondent 'for the losses and damages associated with the [Respondent] operatives' under-qualification'. He calculated this cross-claim as £186,165.98, a sum based on certain of the items set out in the WEL October Payless Notice.

33. Netting off the sum of £16,889.25 against the sum of £186,165.98 gave rise to a balance in favour of the Applicant, on the Applicant's case, of £169,276.73.

**R's second witness statement dated 25 April 2023**

34. By the time of filing R's second witness statement, the Respondent's position had changed. Whilst continuing to dispute the Applicant's allegations of overcharging (based on time and rates), the Respondent accepted that the Applicant had demonstrated substantial grounds for disputing the bulk of the debt claimed by the statutory demand. The Respondent maintained, however, that even if everything

which MD had said in his witness statement about overcharging was true, even on his own calculations, the Applicant still owed the Respondent the sum of £16,889.25.

35. The cross-claim referred to in MD's witness statement was flatly rejected. By R's second witness statement, the Respondent offered an undertaking not to present, conditional upon payment of the sum of £16,889.25.

36. On 25 April 2023, the Applicant made an open offer to accept an undertaking from the Respondent and £24,000 towards its costs.

37. By the time of the hearing before me on 2 May 2023, therefore, attentions were focused on the cross-claim.

**Legal Principles**

38. The legal principles applicable to the application were largely uncontroversial.

39. Both parties referred me to Coilcolour v Camtrex [2015] EWHC 3202, in which Hildyard J summarised the relevant principles as follows:

> '31. The court will grant an injunction to restrain presentation of a winding up petition where it considers that the petition would be an abuse of process and/or that the petition is bound to fail (to the extent they are different): Mann v Goldstein [1968] 1 WLR 1091. See also Buckley LJ in Bryanston Finance Ltd v De Vries (No. 2) [1976] Ch 63 at p.77:
>
> "If it could now be said that, on the available evidence, the presentation by the defendant of such a petition as is described in the injunction would prima facie be an abuse of process, the plaintiff company might claim to have established a right to seek interlocutory relief. Otherwise I do not think it can. If it were demonstrated that such a petition would be bound to fail, it could be said that to present it, or after presentation to seek to prosecuted, would constitute an abuse: Charles Forte Investments Ltd v Amanda [1964] Ch 240."
>
> 32. The court will restrain a company from presenting a winding up petition if the company disputes, on substantial grounds, the existence of the debts on which the petition is based. In such circumstances, the would-be petitioner's claim to be, and standing as, a creditor is in issue. The Companies Court has repeatedly made clear that where the standing of the petitioner, and thus its right to invoke what is a class remedy on behalf of all creditors, is in doubt, it is the court's settled practice to dismiss the petition. That practice is the consequence of both the fact that there is in such circumstances a threshold issue as to standing, and the nature of the Companies Court's procedure on such petitions, which involves no pleadings or disclosure, where no oral evidence is ordinarily

> permitted, and which is ill-equipped to deal with the resolution of disputes of fact.
>
> 33. The court will also restrain a company from presenting a winding up petition in circumstances where there is a genuine and substantial cross-claim such that the petition is bound to fail and is an abuse of process: see e.g. Re Pan Interiors [2005] EWHC 3241 (Ch) at [34]-[37]. If the cross-claim amounts to a set-off, the same issue as to the standing of the would-be petitioner arises as in the case where liability is entirely denied. Even if not qualifying as a set off, a genuine and substantial cross-claim exceeding the would-be petitioner's claim will also result in the petition being dismissed in accordance with the same settled practice, save in exceptional circumstances (as a discretionary matter). That is also because, if the cross-claim is established, the would-be petitioner will have no sufficient interest either in itself having a winding up ordered, or to invoke the class remedy which such an order represents.
>
> 34. Further, it is an abuse of process to present a winding up petition against a company as a means of putting pressure on it to pay a debt where there is a bona fide dispute as to whether that money is owed: Re a Company (No 0012209 of 1991) [1992] BCLC 865.
>
> 35. However, the practice that the Companies Court will not usually permit a petition to proceed if it relates to a disputed debt does not mean that the mere assertion in good faith of a dispute or cross-claim in excess of any undisputed amount will suffice to warrant the matter proceeding by way of ordinary litigation. The court must be persuaded that there is substance in the dispute and in the Company's refusal to pay: a "cloud of objections" contrived to justify factual enquiry and suggest that in all fairness cross examination is necessary will not do.
>
> 36. As stated by Chadwick J (as he then was) in Re a Company (No 6685 of 1996) [1997] BCC 830 at 838:
>
> "I accept that any court, and particularly the Companies Court, should not seek to resolve issues of fact without cross-examination where there is credible affidavit evidence on each side. But I do not accept that the court is bound to hold that there is a need for a trial in circumstances in which, on a full understanding of the documents, the evidence asserted in the affidavits on one side is simply incredible."'

40. Ms Hallett referred me to Tallington Lakes v South Kesteven District Council [2012] EWCA Civ 443, in which Etherton LJ (albeit on an obiter basis) considered the threshold that an applicant must cross in an application to restrain presentation. At paragraph 22 of his judgment, he observed as follows:

> 'it is well established that the threshold for establishing that a debt is disputed on substantial grounds in the context of a winding up petition is not a high one for restraining the presentation of the winding up petition, and may be reached even if, on an application for summary judgment, the defence could be regarded as "shadowy"'.

41. Ms Hallett also referred me to the cases of Mulalley v Regent Building Services [2017] EWHC 2962 (at [44]) and Integral Law v Jason [2020] EWHC 3698 at [14], which take a similar approach.

42. Mr Barnard took me to the case of Ashworth v Newnote [2007] EWCA Civ 793 at [29-34] in which Lawrence Collins LJ held (in the context of an application to set aside a statutory demand) that:

(1) the test to be applied equates to the "real prospects of success" test applied in summary judgment applications;

(2) a "genuinely triable issue" means a realistic as opposed to fanciful prospect of success, carrying some degree of conviction (and not merely arguable);

(3) in each case it is open to the court to reject evidence because of its inherent implausibility or because it is contradicted by or not supported by the documents.

43. In LDX International Group LLP v Misra Ventures Ltd [2018] EWHC 275 (Ch) David Stone (sitting as a Judge of the High Court) set out certain propositions which could be drawn from the authorities, including (at 22(c)) that:

> 'It is incumbent on the recipient of the statutory demand to demonstrate, with evidence, that the cross-claim is genuine and serious … Bare assertions will not suffice: there is a minimum evidential threshold: Re a Company, at paragraph 33'.

44. Mr Barnard also referred me to Poperly v Poperly [2004] EWCA Civ 463 at [66] per Jonathan Parker LJ (citing Re Bayoil [1999] 1 WLR 147) in support of the proposition that:

> 'Delay in putting forward a cross-claim may lead to an inference that it is not put forward in good faith, but only as a pretext in order to stave off bankruptcy.'

**Respondent's Submissions**

45. Mr Barnard noted that even taking the Applicant's calculations on overcharging at face value for current purposes, a stubborn core of £16,889.25 remained. He submitted that the cross-claim raised in MD's witness statement was a new case and that the statement was not evidence in reply. He invited the court to reject the new case, observing that it was not mentioned in Farren (1) or in Counsel's skeleton argument for the hearing before Trower J. Nor was it mentioned in Farren (2); whilst a point was raised that the operatives may not have had given qualifications, this had

only been raised in the context of a potential dispute about the rate at which they should have been charged out.

46. Mr Barnard referred me to Poperly in support of the proposition that delay in putting forward a cross-claim may lead to an inference that it is not put forward in good faith. He argued that the cross-claim in this case had been introduced simply as a means of getting around the balance of £16,889.25 due on the Applicant's own calculations, with a view to avoiding winding up proceedings.

47. Mr Barnard observed that the Applicant sought to base its alleged loss on WEL's Pay Less Notices. These, however, had been received in July, August and October. Had MD genuinely considered that the Respondent should be liable for deficiencies of such magnitude, Mr Barnard argued, he would have notified the Respondent at the time of receipt of such notices. Instead, the Applicant had by MD continued to approve and sign weekly time sheets, each of which bore the words 'The standard of work was satisfactory'.

48. Mr Barnard invited the court to note that MD did not state anywhere in his witness statement that he ever notified or complained to the Respondent about deficient workmanship during the time that the operatives supplied by the Respondent were working on site. He did not state that the photographs which he refers to in paragraph 48 of his witness statement were ever sent to the Respondent prior to service of that statement. He did not state that the Respondent was ever made aware of any of WEL's Payless Notices and schedules. At its highest, MD had stated simply (at para 64) that 'following the identification of poor workmanship by [Respondent] operatives, I sought to obtain from [the Respondent] proof that the labour provided by them was indeed qualified as they claimed'.

49. R had by his second witness statement confirmed that none of the alleged deficiencies were ever brought to the attention of the Respondent at the time, despite the fact that the operatives were on site until October 2022. The Applicant had not provided the October Payless notice or any attendant documentation to the Respondent until service of MD's first witness statement, 6 months after the event.

50. Mr Barnard noted the Applicant had not given the Respondent an opportunity to investigate the alleged deficiencies at the time or establish for itself that they were caused by poor workmanship by operatives supplied by the Respondent. No Pre-Action Protocol Procedure for Construction and Engineering Disputes had ever been initiated on behalf of the Applicant.

51. Mr Barnard accepted that there was, as he put it, a 'vague reference' to the Applicant having a possible counterclaim for defective works in paragraphs 76-81 of MD's letter to the Respondent dated 7 February 2023, but argued that no details of the counterclaim were provided at that stage, simply a reservation of rights, when the Applicant had, long before February 2023, all the information that it needed if it really wished to assert a cross-claim.

52. Mr Barnard went on to submit that the facts and matters now relied upon by the Applicant in support of its cross-claim did not meet the minimum evidential threshold in any event.

53. He submitted that none of the documentation exhibited to MD's witness statement referred to or supported the contention that it was the operatives supplied by the Respondent who were the cause of the defective workmanship complained about by WEL. Whilst MD had asserted at paragraphs 46-53 of his witness statement that the deficient work was undertaken by operatives supplied by the Respondent, the correspondence from WEL exhibited to MD's witness statement did not identify the operatives in question.

54. Mr Barnard also observed that MD had not stated anywhere what the outcome of the service of the WEL's Payless Notices had been and whether the Applicant actually ended up suffering any loss as a result.

55. In all the circumstances, Mr. Barnard submitted that the evidence contained in MD's witness statement was not sufficient to meet the necessary evidential threshold to demonstrate that the Applicant had a counterclaim with real prospects of success. He also referred me to other cases in which the courts have found that the debtor's evidence did not meet the necessary minimum evidential threshold in cross-claim cases, including Pan Interiors Limited [2005] EWHC 3241 at [51-53], Micom v HTS Limited [2014] EWHC 4455 (Ch) at [3-10], [25]; and Fenton Whelan Ltd v Swan Campden Hill Limited [2021] EWHC 2470.

**Applicant's submissions**

56. On behalf of the Applicant, Ms Hallett submitted that the cross-claim was not new; MD had intimated such a claim by his letter of 7 February 2023.

57. Ms Hallett argued that it was clear from the letter of 7 February and MD's witness statement that the Applicant had suspected throughout that the defects identified were explained by the Respondent's workers being underqualified. It was only by R's first statement, however, served on 10 March 2023, that the Respondent finally provided the evidence of qualifications which the Applicant had been seeking. This evidence established that (or at the very least established a strongly arguable case that) 40% of the workers provided by the Respondent were indeed underqualified and, importantly, that they did not have the qualifications that the Respondent had represented them to have on placing them with the Applicant.

58. This evidence was an essential piece of the jigsaw which was missing until March 2023. Whilst there had been ample evidence of defective works, defective works of themselves would not be sufficient to establish a cross claim in breach of contract or misrepresentation against the Respondent. The timing of R's first witness statement, Ms Hallett submitted, explained the timing of MD's assertion of the cross-claim in the context of this application.

59. On the issue of causation, Ms Hallett relied upon MD's witness statement, including his evidence that it was the workers supplied by the Respondent who had worked in the rooms in which defective works were discovered.

60. On the issue of loss, Ms Hallett submitted that MD's witness statement, the correspondence from WEL to the Applicant concerning defective works and the Payless Notices together evidenced a strongly arguable case of loss to the Applicant as a result of the defective works, the loss comprising substantial deductions to sums

which would otherwise have been payable to the Applicant for its work on the projects.

61. Ms Hallett submitted that all such issues were triable and that, whilst full disclosure would be required, along with cross examination of MD and his on-site managers, the evidence adduced by the Applicant was sufficient to show a strongly arguable, genuine and substantial cross-claim equalling or exceeding £16,889.25.

**Discussion and conclusions**

**(1) reply evidence**

62. In my judgment the Applicant should be permitted for the purposes of this application to rely on MD's witness statement notwithstanding that it goes beyond what may properly be described as evidence in reply. In reaching this decision I take into account the overriding objective, the circumstances outlined in paragraphs 66 to 71 below and the matters addressed in paragraph 63 to 64 below. In the exercise of my case management powers I grant permission for such purposes.

63. The Respondent had an opportunity to file further evidence in response and did so, by R's second witness statement.

64. Mr Barnard was also asked at the hearing whether he wished to seek an adjournment to allow further time in which to deal with the cross claim raised in MD's witness statement and confirmed that the Respondent wished to 'crack on'.

**(2) impact of delay in raising cross claim**

65. In my judgment, it would not be legitimate to infer from the timing of the introduction of evidence on the cross claim in this case that the cross-claim was put forward in bad faith, as a pretext to stave off winding up proceedings.

66. Whilst initially, the evidence in support of the application to restrain presentation focused on the issue of overcharging, it cannot be said that the first time that any cross-claim was intimated was by MD's reply evidence. The letter of 7 February 2023 speaks for itself. The Applicant had plainly signalled such a cross claim at Paragraphs 76 to 81, and 86(i) and (j) of that letter.

67. In context and reading the evidence as a whole, it is in my judgment clear why the Applicant initially focussed on overcharging in its evidence in support of this application. First, evidence on overcharging was more readily to hand and at one point was expected arithmetically to result either in a nil balance or a negative balance in favour of the Applicant in its own right, thereby obviating the need to run up further costs preparing evidence and arguments on a cross-claim for the purposes of the application to restrain. Second, the Applicant was missing a crucial piece of the jigsaw for its cross-claim based on breach of contract or misrepresentation, namely, evidence establishing that (or more accurately establishing a strongly arguable case that) a significant proportion of the workers provided by the Respondent were materially underqualified and did not have the qualifications that the Respondent had represented them to have on placing them with the Applicant.

68. Mr Barnard contended that no explanation had been given in the evidence for the late reliance of a cross claim in support of the application. Whilst I accept that there is no express explanation given in the evidence, it is in my judgment plain from context and the evidence read as a whole why the cross claim was introduced at the time that it was. It was in direct response to receipt in March 2023 of the evidence of qualifications contained in the third exhibit to R's first witness statement.

69. MD made clear in his witness statement (at paras 64 and 65) that following the identification of poor workmanship, the Applicant had made repeated requests to the Respondent for proof of the qualifications held by the operatives supplied by the Respondent, but that the Respondent had failed to comply with such requests. (Reference is also made to the Respondent's failure to comply with such requests in the letter of 7 February 2023 at paragraphs 59 and 71). In context it is readily apparent why the requests were made; as confirmed in R's own witness statements, the Respondent was not a sub-contractor, but simply an employment business engaged to provide vetted operatives with specific, validated levels of qualifications and experience for the Applicant's use at the two sites: absent evidence that the operatives provided by the Respondent were materially underqualified and/or did not have the qualifications that the Respondent had represented them to have, the Applicant would have no obvious cause of action against the Respondent in respect of any poor workmanship on the part of the operatives which it had supplied.

70. It was only on the filing and service of R's first witness statement in March 2023 that the requested evidence of the qualifications held by Respondent operatives was provided. This evidence established that (or at the very least established a strongly arguable case that) 40% of the workers provided by the Respondent were indeed underqualified and, importantly, that they did not have the qualifications that the Respondent had represented them to have on placing them with the Applicant. It was at that point that the Applicant was able to articulate and evidence to the required threshold standard the elements of its proposed cross claim based on breach of contract/misrepresentation.

71. I pause here to note that the matters addressed at paragraphs 69 and 70 above also serve to explain why the Applicant did not raise the cross-claim in correspondence with the Respondent following receipt of the Payless Notices in July, August and October 2022.

**(3) is the minimum evidential threshold met?**

72. In my judgment, the facts and matters now relied upon by the Applicant in support of its cross-claim do clear the minimum evidential threshold. The Applicant has demonstrated on the evidence before this court a genuine, strongly arguable cross-claim in contract/misrepresentation which comfortably exceeds £16,889.25 and has real prospects of success.

73. The evidence before the court establishes a strongly arguable case that approximately 40% of the operatives supplied by the Respondent to the Applicant were materially underqualified and did not have the qualifications that the Respondent had represented them to have when placing them with the Applicant. The Applicant's evidence also, for the purposes of its cross claim in misrepresentation, raises a strongly arguable case that it relied on such representations.

74. It was plain from the evidence before the court that the electrical works undertaken in the London and Birmingham Projects over the period March to October 2022 were peppered with defects which then had to be corrected. In addition to the written testimony of MD on this issue, the evidence included (i) contemporaneous correspondence from third parties such as WEL; and (ii) photographic evidence.

75. Contemporaneous third-party correspondence on this issue includes WEL's letter to the Applicant dated 10 July 2022, which states (with emphasis added):

> 'You have recently commenced widescale testing and commissioning of your installation … having commenced this phase of your works *it is alarming the extent of non-compliant installations that your own engineers are discovering* with your works.
>
> The extent of the problems are not yet known, save as to say that of the areas testing and commissioning has taken place on, the vast majority of the same have either failed in part or whole, requiring your remediation of your own works previously handed over as complete for the purpose of follow-on finishing trades.
>
> We will continue to monitor and assess the extent of these nonconformance is, however, wish to confirm for clarity that we will not be paying for any time spent by you correcting your own failings, which will require us to assess the time spent putting your own works right in upcoming payment notices and ultimately the final account.'

76. It will be noted that as at July 2022, the full extent of the defects remained unknown.

77. The nature of the defects discovered is in my judgment also significant. In many cases, the defects were the result of rudimentary errors. MD describes a number of such errors at paragraph 47 of his statement, as follows:

> 47. … when the works progressed to the testing phase at the end of June 2022 (running through to October 2022) … we uncovered severe deficiencies in the works undertaken by [Respondent] provided staff. In many instances it was inexplicable for a qualified electrician to have undertaken works in such a poor manner, for example:
>
> 47.1 Cables within the back of a double socket were not secured correctly, to the point where they came out during testing, which could have caused a short-circuit.
>
> 47.2 Incorrectly terminated cables crossed live and neutral cores and crossed supply and load cables. Essentially, each wire within the cable is coloured differently and meant to correspond with cores that are labelled "live", "neutral" or "earth". The [Respondent] operatives had connected these

> cables to the wrong core, despite the clear colour coding and labelling, meaning the unit would remain live at all times, causing risk of shock to the user if they presume the switch is off and risk of damage to connected equipment.
>
> 47.3 Incorrectly terminated cables leading an inordinate amount of exposed copper within a metal enclosure, again risking shock to the user or short-circuit.

78. MD's testimony as to the nature of the defects discovered is supported by photographs exhibited to his witness statement. These photographs include obvious examples of rudimentary errors and shoddy workmanship.

79. MD's evidence is that it was the Respondent's operatives who were working in the rooms in which these defects were discovered. At paragraphs 49 and 50 of his witness statement, he states:

> '49. I am able to identify that it was [Respondent] staff that performed these works as the First Project was executed on a room by room basis as we worked through the levels of the hotel. By discussion with my Managers on site and through our records I am aware of which of my labourers were working in each room in a given period. The works for which [the Applicant] has been criticised were exclusively performed by operatives from [the Respondent].
>
> 50. In my experience, there is no way qualified electricians would have carried out such basic elements of electrical work, such as simply terminating cables, so poorly and in such an unsafe manner….'

80. Mr Barnard argued that the Applicant had adduced no evidence to support the contention that the Respondent's operatives were responsible for the electrical defects discovered at the projects. He argued that the Applicant's case on this comprised simply the 'bare assertions' of MD. He pointed out that MD had failed to exhibit to his witness statement copies of any of the 'records' to which he referred in paragraph 49 of his statement. He reminded me that it is open to the court to reject witness evidence untested by cross-examination not only where such evidence is inherently implausible or contradicted by documents, but also where such evidence is 'not supported' by the documents: Ashworth v Newnote at [29-34].

81. I accept that the 'records' referred to in paragraph 49 of MD's witness statement are not exhibited to it. I also acknowledge that MD's failure to exhibit the 'records' relied upon, and his failure to explain why they were not included in his evidence, are relevant factors to take into account. These factors are however only two of many to consider.

82. MD's written testimony is not manifestly incredible or inherently implausible; far from it. Nor is it contradicted by any documents in evidence.

83. I also take into account the nature of the defects discovered, as evidenced not only by MD's written testimony but also by the photographic evidence exhibited to his statement. In this regard I refer to paragraphs 77 to 78 above. A review of the photographs in evidence reveals such rudimentary errors and shoddy workmanship that it is difficult to conceive of a qualified electrician (such as a permanent member of the Applicant's own team of electricians) being capable of the same.

84. I also take into account the Respondent's long-standing reluctance to disclose evidence of the qualifications held by the operatives supplied by it to the Applicant, notwithstanding repeated requests. Such conduct strongly suggests that the Respondent was aware that these qualifications mattered, in context.

85. On quantum, MD's evidence was that he had been able to link the contra charges for each defective element of work to a room in which a Respondent operative was responsible. He maintained that these defective works would not have occurred if the operatives had been qualified to perform the works, as represented by the Respondent to the Applicant both over the phone and in the client placement confirmation emails sent by the Respondent to the Applicant when placing an operative. As put at paragraph 80 of his statement, 'The extremely poor level of workmanship is a direct consequence of [the Respondent's] misrepresentation and these operatives' lack of qualification and training'. He confirmed that the Applicant intends to pursue a claim against the Respondent in respect of these sums, based on breach of contract/ misrepresentation.

86. Ms Hallett referred me to the most recent Payless Notice dated 12 October 2022 served by WEL on the Applicant. Items 2, 3, 4 and 7 represented deductions made from sums which would otherwise be payable by WEL to the Applicant. The deductions in question totalled £186,000 odd and were described as follows:

    [2]: -£85,686.48: 'contra charges to [the Applicant] for BWIC required to remedy defective works';

    [3]: -£46,800.00: 'adjustment for costs associated with [the Applicant] putting right their own defective works';

    [4]: -£28,679.50: 'contra charges for consequential damage to adjacent finish surfaces damage during the reopening up of finished walls and ceilings and [the Applicant's] remedial works; and

    [7]: -£25,000.00: 'contra charges for WEL costs [the provision of a manager] related to item 2'.

87. This cross claim, Ms Hallett contended, exceeded the sum of £16,889.25 by some £169,000 odd.

88. On the evidence as a whole, in my judgment the Applicant has demonstrated cogent grounds in support of its contention that the defects which gave rise to items 2, 3, 4 and 7 in the October Payless Notice were caused by underqualified operatives supplied by the Respondent.

89. Mr Barnard argued that MD had not in his evidence addressed what the outcome of the October Payless Notice had been. He suggested that the Applicant might have been able to negotiate a reduced level of deductions. It is however implicit in MD's written evidence taken as a whole that no material reductions in the sums deducted under items 2,3, 4 and 7 of the October Payless Notice have been achieved by the Applicant in negotiations with WEL. I was taken to no evidence controverting MD's written testimony on this issue. I also consider inherent plausibilities: any negotiations between the Applicant and WEL would have had to have been extraordinarily successful on the part of the Applicant to bring items 2, 3, 4 and 7 of the October Payless Notice down to a sum so low that the Applicant's cross claim against the Respondent did not equal or exceed £16,889.25.

90. Mr Barnard also argued that the October 2022 Payless Notice was available in October, yet the February 2023 letter stated that the Applicant was not able to quantify. In my judgment this point is a red herring, for reasons explored in paragraphs 69-70 and 89 above.

## Conclusions

91. On the evidence before me I conclude that

(1) all but £16,889.25 of the sum claimed by the statutory demand is the subject of a bona fide dispute on substantial grounds; and

(2) the Applicant has demonstrated a genuine, strongly arguable cross-claim in contract/misrepresentation comfortably exceeding £16,889.25 with real prospects of success.

92. In light of my conclusions, I shall grant an order restraining the Respondent from presenting a winding up petition against the Applicant based on any of the sums claimed in the statutory demand.

93. I shall hear submissions on costs on the handing down of this judgment.

**ICC Judge Barber**