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permit the use of a statutory demand. If, of course, there exists a counterclaim which equals or exceeds the debt this may be considered by the court in the context of the winding up petition. In this respect reference to the case of *Re A Company* (No 1299 of 2001)CCL demonstrates that even without a withholding notice a valid cross claim or counter claim which a party has not had the opportunity to pursue will be sufficient to bring about a stay or strike out of a Statutory Demand.

A number of cases, however, have looked at the status of a counterclaim as a defence to a winding up petition with some caution. It is clear that, the counterclaim or set off pleaded as a defence to the petition should be of a value commensurate to the adjudicators award and the party raising the defence had not had a chance to pursue that claim in any event prior to the time it was raised as a defence.

Take, for example, *Absolute Rentals v Gencor*, Gencor argued that there should be a stay on the enforcement of the adjudicators decision against them whilst they prepared and pursued their case against Absolute on the basis of the alleged impecuniosities of the Claimant. The TCC refused to grant a stay indicating that an adjudicators award should, under normal circumstances, be enforced irrespective of ancillary matters.

In *George Parke v Fenton Greton*, Fenton Greton sought to enforce an adjudicators decision in their favour by way of a statutory demand. The courts held that an adjudicators decision could form the basis of a statutory demand but, as was the case here, if there was a valid cross claim which would eradicate any value from the adjudicator's decision and would in turn prevent the insolvency of the debtor the statutory demand could be stayed pending the progression of the matter. In that case it was of note that the Debtor, George Parke had already commenced proceedings in the TTC for the value of the cross claim at the time he raised it as a defence to the winding up petition. Contrast this to the circumstances of the case of *Guardi v Datum* in which Datum obtained an adjudicators decision which was not paid. Datum issued a Winding Up Petition which was met by an argument by Guardi that they had a legitimate cross claim/counterclaim which would extinguish and exceed the value of the adjudicators award and, as such the injunction on the

winding up petition should be extended. The court declined to impose the injunction on the basis that Guardi had failed to issue a Notice of Intention to Withhold and that he had the opportunity to litigate or adjudicate the cross claim well before the need for the Winding Up Petition or related matters.

Of course a company that is already in liquidation or administration cannot have proceedings commenced against it without the express permission of the court. This includes the commencement of any adjudication proceedings. This is not so if the company in liquidation wants to commence an adjudication against another party albeit they should be aware that in the event there is an assertion of a counter or cross claim it may be that the courts will agree a stay of execution on the enforcement of the adjudicators decision pending the outcome of any other proceedings.

A stay of execution on the statutory declaration or petition is frequently requested by a party when they consider that the proceedings they have commenced either in an adjudication or in the TCC will substantially overturn or exceed the value of the adjudication decision the parties are seeking to enforce. Such a request will usually be met with serious consideration by the court unless it is clear that the party requesting the stay could have progressed the matters upon which they rely more effectively at any point prior to the request for the stay.

With the breadth of case law in this area it would be easy to assume that the procedure and exceptions are fairly well established. However, this is not the case. In the current economic climate it seems clear that there will continue to be developing case law as more companies seek to quickly enforce payment of their debts. Whilst preparing this article the case of *Mead General Building Limited v Dartmoor Properties Limited* (2009) EWCH 200 was dealt with in the TCC in which it was decided that Mead's Creditors Voluntary Liquidation would not prevent a judgment enforcing an adjudication decision in favour of Mead but it was relevant to the question of a stay in respect of that judgment. The TCC made it clear that of significant relevance was whether the weakness of a parties trading position was, in fact a direct result of the failure of the debtor to make payment of the adjudicators award against them.

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A brief review of commercial issues relevant to the construction, engineering and energy industries.

By Lewis Ayers, Senior Consultant Stapleton International Limited

Economic Duress

"I'm writing this under duress." What does that mean? The dictionary tells us that "duress" means pressure, force, coercion or compulsion. What does English law have to say about the concept of duress? Well there can be Personal Duress, which often involves some threat of physical violence to the person involved, there can be Duress to Goods, which will usually involve some threat to seize goods or to dispose of goods or to damage goods or property, and there can be Economic Duress.

Our understanding of what Economic Duress may entail could be assisted by consideration of what Personal Duress or Duress to Goods may involve. If I enter into an agreement to purchase something under threat of physical violence in the event of my refusal to enter into that contract, it is unlikely that the English Courts would hold me to that contract. Similarly, HH Judge Kerr stated in the case of *The Sibeon and The Sibotre* [Occidental Worldwide Investment Corp. v. Skibs A/S Avanti 1976] that "if I should be compelled to sign a lease or some other contract for a nominal but legally sufficient consideration under an imminent threat of having my house burnt down or a valuable picture slashed through without any threat of physical violence to anyone, I do not think that the law would uphold the agreement ..." and he went on to say that the true test (which is applicable to most such cases) is, whether or not the agreement being sought to be enforced or being sought to be set aside "is to be regarded as having

been concluded voluntarily".

It is interesting to note how these considerations are applied in the arena of engineering and construction projects and similar commercial contracting arrangements. Economic duress may apply to the formation of the contract in the first place or subsequent variations of the contract, and it can be difficult to prove.

The main principle that will be applied under English law is that, firstly, commercial pressure (even though very heavy) is not usually enough to prove duress; it must be demonstrated that the consent of one party was so overwhelmed by compulsion as to deprive him of his freedom to voluntarily consent. The main tests that will be applied to measure the extent of compulsion will be, a) did the victim protest at the time, b) did he have an alternative course open to him, c) was he independently advised, and d) did the victim regard the transaction as closed or did he take steps to escape from

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If you have any comments on the issues raised in this edition or there are any subjects you would like to see addressed in future issues of this newsletter please contact Suzanne Green.

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the new agreement?

In the case of *North Ocean Shipping v Hyundai Construction (The Atlantic Baron)* ["The Atlantic Baron" 1979] the builders of a ship demanded a 10% increase on the contract price from the owners largely because the value of the US dollar fell by 10%, and threatened not to complete the ship if the increased price was not agreed to by the customer. The owners felt commercially compelled to pay since, at the time of the threat, they were negotiating a very lucrative contract for the charter of the ship, so they paid the increased price demanded from them, although they protested that there was no legal basis on which the demand could be made. The Court found that this did constitute economic duress because of the illegitimate pressure exerted by the shipbuilding company in their threat to break the construction contract. Where a threat to break a contract had led to a further agreement, that agreement, even though it was made for good consideration, could be set aside for reasons of economic duress.

But in the case of *Pas On v. Lau Yin Long* [1980] one party had threatened not to proceed with a contract unless the other side agreed to a renegotiation of certain separate arrangements. The victim was aware that they could use the Courts to enforce the primary contract but wanted to avoid litigation so agreed to the demands. When the victim later tried to avoid compliance with the separate arrangements on the basis that they had been entered into only under economic duress their argument failed in Court because it was found that they had not really been coerced but had weighed up the alternatives and elected to enter into the additional contracts in preference to using the Courts to enforce the original agreement. There had been commercial pressure, but no coercion. The Court clarified that commercial pressure alone is not enough grounds to succeed in a claim of economic duress - there must be an additional factor which could be seen to be coercion of a party's will and invalidate its consent.

In the case of *Universe Tankships v. ITWF* ["The Universe Sentinel" 1982], a trade union threatened to prevent a ship leaving port unless the owners paid a large sum of money, partly to the union welfare fund. Because of the potentially disastrous financial consequences the owners paid but it was later held by the Court that they

could recover the money. Lord Scarman said that, "duress, if proved, not only renders voidable a transaction into which a person has entered under its compulsion but is actionable as a tort, if it causes damage or loss".

Many of our readers will already be aware of the case of *DSND Subsea v. Petroleum Geo-Services ASA* [2000]. DSND was a subcontractor to PGS in connection with the development of an FPSO vessel. The parties had entered into a supplementary agreement which PGS later alleged had been forced on them by DSDN's threats to refuse to perform vital work on the project unless several concessions were made in their favour including the introduction of payment on a reimbursable basis. The Court decided that even though DSDN's suspension of work was a breach of contract, PGS had not entered into the new agreement under duress. Important to the Court's finding was that there had been no protestation from PGS at the time of making the agreement. In fact, at the time the agreement had been made the representatives of the 2 companies went out to dinner together. The Judge, HH Judge Dyson also remarked that even if there had been duress at the time the agreement had been formed, because PGS had performed in compliance with the agreement and done nothing to avoid it or set it aside within a reasonable time, the agreement had been affirmed. He said that once a party becomes aware of his right to avoid the contract due to economic duress, he is obliged to act promptly if he wishes to avoid the contract on that basis.

A short time later the same judge considered the case of *Carillion Construction Limited v. Felix (UK) Ltd.* [TCC December 2000] Carillion was the main contractor for the construction of an office building in London, and employed Felix as a subcontractor for the cladding for the building. The cladding work should originally have been completed by 17 January 2000. Despite not having finished the work, at the end of February 2000 Felix presented its final account which was almost £600,000 more than Carillion's valuation. The status of the cladding work was delaying the whole of the project, and Felix wrote to Carillion stating that unless their final account price was agreed, they could not "predict when the project will be complete". Although Carillion believed that Felix had over-valued the work Carillion agreed to a figure substantially in

excess of Carillion's own assessment. After the settlement was reached the deliveries of cladding to site resumed. In this case Judge Dyson held that threats by Felix not to complete the work unless a settlement was reached did constitute economic duress and he held the settlement agreement to be avoidable by the employer. As a benchmark for assessment, the Judge referred to the same criteria he had set out in the *DSDN* case, but the facts here were starkly different. Felix had made specific threats to obtain something (in this case, additional payment, and agreement to a final valuation and early payments before they were due) that they were not entitled to under the contract, and had no contractual right to suspend deliveries as they had done, and Carillion had little practical choice than to agree because all alternatives would have taken more time and delayed completion of the entire project.

A 2007 case reconfirmed the application of this principle. A company named *Mitras Automotive (UK)* worked with Opel to produce vans, some of which were assembled in Luton. Mitras was the sole supplier of some components for the vans and they were delivered to Luton daily on a "just in time" basis. It was a long-term agreement for a large volume of parts with pre-agreed prices. In 2006 and following a small change in design, Opel decided to purchase the components from an alternative supplier and gave Mitras 6-months notice of termination of the agreement. Mitras replied that it had calculated its prices and had spread its set-up costs over a larger number of units than were now to actually be sold, and therefore required a compensation payment of over half a million Pounds. Most significantly, Mitras informed Opel that Mitras reserved the right to suspend deliveries if agreement on this claim was not reached. Opel replied that it was of the opinion that the claim was excessive because the original set up costs had in fact been substantially recovered from the previous sales, but Mitras effectively repeated an ultimatum that in the absence of agreement to new prices there would be a cessation of deliveries.

Opel had no stocks of the components, could not quickly arrange an alternative supplier, and could not tolerate a stoppage of production of the vans, and therefore agreed to Mitras's demands. Opel agreed to pay a sum of approximately £450,000 in return for Mitras' agreement to continue

the supplies. Later, when Opel's new supplier was in place and able to deliver, Opel demanded repayment of the sum paid to Mitras. This claim was made on the basis that the compromise agreement was unenforceable due to having been made under duress. The Court concluded that Mitras could have waited until the end of the supply agreement and then negotiated a settlement based on the numbers of parts actually supplied, and that Mitras' alternative strategy of demanding an earlier settlement figure under the threat of interruption of vital deliveries was not legitimate, and that for these reasons Opel was entitled to receive a declaration that the agreement to pay monies to Mitras was voidable. Opel was also entitled to recover the money paid to Mitras under that agreement. *Adam Opel GmbH and Renault S.A. v Mitras Automotive (UK) Limited* [QBD 18 December 2007]

So how does that affect us in day-to-day activities in our industry? Any agreement that we make may be set aside by the court if it can be shown that it was obtained by illegitimate pressure and where the victim had no realistic practical alternative but to submit to the pressure. This illegitimate pressure must be much more than what HH Judge Dyson described as "the rough and tumble" of normal commercial bargaining

One Party's refusal to perform its contractual obligations unless its demands are met is not in itself enough to prove duress, because there are other alternative remedies such as accepting such action as being a repudiatory breach and seeking appropriate damages. But where the time required for such action is not available or would have disastrous commercial consequences, so that the victim of the illegitimate pressure has no real alternative other than to agree, and makes the discomfort, disapproval and protest known at the time of making the agreement, the agreement entered into may be able to be set aside and avoided. And if you one day find yourself to be in an unusually strong bargaining position you should be careful to avoid making demands that are unjustifiable or threats not to perform an existing contract. If you are either side of that negotiating table remember the value of good advice and where to obtain it.

All references are to the position under the Laws of England and Wales.

Insolvency and Adjudication

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In the current economic climate it is almost inevitable that we have seen a rise in the use of ADR to attempt to recover monies in dispute. In fact, a commensurate rise in the use of litigation and the Winding Up Petition or statutory demand has been witnessed, perhaps because it is seen as a more formal and final way to recover a debt.

But how far could an adjudication be relied on as a way to recover monies in the event that the debtor is ultimately found to be insolvent? We will take a view on this below.

The Housing Grants, Construction and Regeneration Act 1996 makes limited reference to insolvency. S. 114 refers to the availability of the argument "pay when paid" if the payer or any party in the contractual chain is insolvent. This argument, in Act compliant construction contracts, is normally curtailed. Additionally the standard form construction contracts often make provision for determination in the event of contractor insolvency.

If a company has a "dispute" concerning unpaid money under a construction contract the usual method of enforcement would be to commence adjudication proceedings. Increasingly, in order to expedite the process companies are issuing Winding Up Petitions and statutory demands for the debt as an alternative. This is only available if there is no "dispute" as to the debt. If a contract has been administered correctly through the process of application and certification and subsequent deductions have been made through a Notice of Intention to Withhold it is likely that a "dispute" will be deemed to have materialised and a Winding Up Petition or statutory demand would be inappropriate under such circumstances.

However, it is a matter for debate as to whether, in the absence of a certificate/payment notice this is clear evidence of an inability to pay and would

