

# International Corporate Rescue



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## Using a Cross-Claim to Injunct a Winding-up Petition: The Position Considered and Restated in *LDX International Group LLP v Misra Ventures Limited*

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### Synopsis

*LDX International Group LLP v Misra Ventures Limited* is an excellent summary of when a debtor can use a cross-claim to restrain a winding-up petition. It follows *In re Bayoil* and holds that a debtor's cross-claim must be genuine and serious, or, in other words, one of substance. Although the Companies Court is not the right court for a detailed examination of the counterclaim, the debtor has the burden of proof and there is a minimum evidential threshold. Equally, given the draconian nature of a winding up order and serious consequences if wrongly granted, the court will proceed cautiously before allowing a petition to proceed.

### Introduction

Some cases are noteworthy as they break new ground, others because they are an excellent summary of the relevant law – the recent case of *LDX International Group LLP v Misra Ventures Limited* [2018] EWHC 275 (Ch) is the latter. In his judgment, David Stone (sitting as a Deputy High Court Judge) considered when an asserted cross-claim can justify an injunction to restrain a winding-up petition. David Stone considered the various relevant cases and provided a helpfully concise summary of the key principles.

### The facts

In October 2016, Misra Ventures Limited ('Misra') lent LDX International Group LLP ('LDX') £200,000, to be repaid on 31 October 2017. Misra and LDX also had a number of other business relationships which are discussed below in the context of the cross-claim.

In May 2017 and then July 2017, Misra served and subsequently withdrew two statutory demands on LDX. Misra argued that, due to a default, the loan had been accelerated and was payable before 31 October. LDX disputed the default, though it was accepted that the loan fell due on 31 October 2017.

In July 2017 in response to Misra's second statutory demand, LDX asserted a cross-claim against Misra and its principal Mr Hirander Misra. LDX claimed damages of £300,000 and sought an injunction restraining Misra from presenting a winding up petition. Misra subsequently withdrew its second statutory demand and, as a result, LDX withdrew its first injunction application, with costs awarded against Misra.

On 11 October, LDX sent Misra a preliminary notice setting out allegations against Misra and four other defendants. LDX refined and expanded its claims against Misra and damages were now alleged to be £2.87 million. On 15 November, LDX subsequently notified Misra by email that it was preparing a cross-claim against Misra for breach of contract and misrepresentation.

Misra served a third statutory demand on LDX on 6 December 2017 for approximately £177,000 (the judgment does not record why this was less than the original £200,000 loan). In response, on 22 December, LDX applied for a second time to injunct Misra from bringing a winding-up petition. Further, on 15 January 2018, LDX sent a letter of claim to Misra, noting Misra's failure to respond to the preliminary notice of 11 October and setting out LDX's position.

So in summary, there was (i) an overdue £200,000 loan owed by LDX to Misra, with (ii) LDX asserting various sizeable (as yet unproved and unissued) cross-claims against Misra.

### The competing arguments

LDX did not dispute that the loan repayment amount in the statutory demand was due and payable. However, LDX argued that it was entitled to an injunction because its cross-claim against Misra exceeded the value of the debt in the statutory demand. LDX's cross-claim comprised (i) a costs order obtained in relation to Misra's second (withdrawn) statutory demand and LDX's related first injunction application, and (ii) the litigation matters set out in LDX's letter of claim.

In seeking its injunction, LDX submitted that, when considering the cross-claim, the court need only

consider whether the cross-claim was genuine and serious. Provided there were no special circumstances, the court should grant the injunction. Separately, LDX also argued that Misra was bringing the petition to gain a collateral advantage, rather than using the winding up proceedings for their correct purpose. LDX argued that Misra wanted to inflict damage on LDX and cause its liquidation to stop LDX's cross-claim.

Unsurprisingly, in defending the injunction, Misra sought to argue that a rigorous assessment of the cross-claim was required, and that it was necessary to 'get into the weeds' of the cross-claim. Misra's Counsel asserted that LDX's letter of claim was 'totally unparticularised' and Misra submitted that a detailed analysis of the cross-claim would demonstrate that it was neither genuine nor serious.

## The law

In considering whether a debtor's cross-claim should prevent the bringing of a winding-up petition, the judge helpfully drew out a number of 'uncontroversial principles' drawn from relevant authorities:

- an injunction may be issued to prevent the bringing and advertising of a winding-up order where there is a *genuine and serious cross-claim* that exceeds in value the petitioner's debt, unless there are special circumstances justifying the bringing of the petition. The cross-claim must be serious, or, in other words, one of substance: *In re Bayoil SA* [1999] 1 WLR 147 (page 155);
- if a debtor's cross-claim is genuine and serious, the debtor should be allowed to establish its cross-claim in ordinary civil proceedings: *Dennis Rye Limited v Bolsover District Council* [2009] EWCA Civ 372 (para. 19);
- the recipient of a statutory demand must demonstrate, supported by evidence, that the cross-claim is genuine and serious: *Orion Media Marketing Limited v Media Brook Limited* [2002] 1 BCLC 184 (para. 31). There is a minimum evidential threshold that the debtor must satisfy: *Re a Company* [2016] EWHC 3811 (Ch) (para. 133);
- at the same time, it is not practical or appropriate to conduct a lengthy and detailed hearing into both sides' case: *Tallington Lakes Limited v Ancasta International Boat Sales Limited* [2012] EWCA Civ 1712 (para. 41);
- as the effect of a winding-up order is extreme, the court should exercise caution if there is any doubt or uncertainty about the claim or cross-claim: *In re Bayoil* (page 156);
- petitioning creditors must take a realistic view of whether the debtor is likely to establish a genuine and substantial dispute: *Tallington Lakes* (para. 41); and
- a debtor is not prevented from raising a cross-claim because it could have raised or litigated its claim earlier, or because it has delayed in bringing proceedings. The court, may, however take any delay into account in its assessment of the claim: *Dennis Rye* (para. 19).

Further consideration was given to the meaning of 'genuine and serious'. As the party seeking an injunction, LDX submitted that the threshold was a low one: 'more than merely arguable' and having some substance to it. The court was not persuaded by this approach and confirmed that the 'genuine and serious' test established in *In re Bayoil* was the applicable threshold.

The judge further confirmed that the debtor's solvency was not a relevant factor in assessing whether or not the debtor had a genuine and serious cross-claim.

With respect to LDX's argument that Misra was seeking to bring a petition for a reason other than its correct purpose, the judge referred to *Re Majorcy* [1955] Ch 600 (page 623). The judge accepted LDX's argument that a petition brought to secure some collateral or ancillary advantage, and not for the primary purpose for which the proceeding was designed, would be an abuse of process and therefore liable to be defeated. However, David Stone held on the facts there was no collateral purpose.

## LDX's cross-claim

In addition to the costs claim referred to above, LDX's cross-claim related to advisory services and strategic business advice provided by Misra to LDX. LDX had provided details of these in its previous injunction application, its preliminary notice and its letter of claim.

The services were set out in several agreements and included standard contractual terms, such as an obligation on Misra to provide services with due care, skill and diligence, and to maintain business information in confidence. These services were largely provided through Mr Misra who was also a founder member and the majority shareholder in LDX.

LDX alleged that Mr Misra failed to provide the services to the standard required, particularising eight failures. As a result, LDX claimed numerous heads of losses, including a contingent liability valued at £1 million, loss of clients, investment opportunities and reputational damage, plus interests and costs. Perhaps more importantly, LDX set out for the court with asserted documentary evidence three examples (asserted by LDX to be 'concrete examples') of alleged breaches by Mr Misra:

- (a) Mr Misra's alleged diversion of approximately £250,000 from a LDX subsidiary to a company

controlled by Mr Misra when the LDX subsidiary owed £532,000 plus interest to LDX;

- (b) Mr Misra's alleged use of LDX's confidential information for his own benefit, which LDX alleged was 'plainly improper'; and
- (c) Mr Misra's alleged misrepresentation of the value of a transaction, resulting in a considerable loss to LDX.

In its defence, Misra noted that LDX had taken 18 months to formulate its cross-claim after a firm of solicitors had undertaken an investigation into Mr Misra's conduct. (This was one of three professional reports that LDX had conducted into its allegations against Misra.) While this 18 month delay would not itself justify rejecting LDX's injunction application, Misra submitted it should be taken into account by the court when assessing the claim.

In response, LDX submitted that its delay in presenting the cross-claim was caused by:

- (a) dealing with the three statutory demands issued by Misra;
- (b) formulating LDX's cross-claim against Misra, which was complex; and
- (c) following due process and not rushing into litigation with Misra.

The judge further noted that LDX had first brought its cross-claim to Misra's attention in July 2017,

mitigating the argument that LDX had unnecessarily delayed the bringing of its claim. On these bases, the judge concluded that LDX's cross-claim could not be considered 'so lacking in prosecution as not to be genuine and serious'.

Based on the three examples set out by LDX and despite the asserted 18 month delay, the court held that LDX's cross-claim was sufficiently genuine and serious. Therefore, LDX should have the opportunity to properly particularise and bring its claim in the proper forum for such disputes, so the injunction was granted.

## Commentary

As mentioned, in this case, David Stone succinctly sets out the factors for a debtor's cross-claim preventing the bringing of a winding-up petition. The judgment serves as a very useful restatement of the relevant authorities – in particular that, as in the seminal case of *In re Bayoil*, a debtor's cross-claim must be genuine and serious, or, in other words, one of substance.

Practitioners seeking to injunct a threatened winding up petition need to balance (i) demonstrating that a debtor's cross-claim is sufficiently genuine and serious, while (ii) ensuring that the hearing is not too lengthy and expensive. LDX's strategy seems a good one to follow – namely, to identify a few specific examples of the breach/loss and, importantly, also to provide evidence in support.

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