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THE EFFECT OF DISPUTED DEBTS, SET-OFFS AND COUNTERCLAIMS ON WINDING-UP AND BANKRUPTCY PETITIONS

by

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THE EFFECT OF DISPUTED DEBTS, SET-OFFS AND COUNTERCLAIMS ON WINDING-UP AND BANKRUPTCY PETITIONS

1. LIQUIDATION

There are three prerequisites of the making of a winding-up order. First, the Court must be satisfied that one of the grounds for winding-up set out in S217, Companies Act 1955 has been satisfied. For the purpose of this paper, the relevant ground is that contained in sub-section (e), namely that "the company is unable to pay its debts".

Secondly, the petitioner must have locus standi to present a petition under S219, the most common type of petitioner being a "creditor" of the company.

Finally, the Court must exercise the discretion conferred on it by S220 to make the winding-up order.

Disputed debts can affect any one of the three pre-requisites referred to above, whilst set-offs and counterclaims can affect the final one.

A. DISPUTED DEBTS

I GROUNDS FOR WINDING-UP: INSOLVENCY

The petitioner must prove that the company is unable to pay its debts within the meaning of S217(e). S218 sets out three ways in which the petitioner can prove the company's insolvency.

1. S218(a) - STATUTORY DEMAND

S218(a) provides that a company shall be deemed to be unable to pay its debts:

"(a) If a creditor, by assignment or otherwise, to whom the company is indebted in a sum exceeding $100 then due, has served on the company, by leaving it at the registered office of the company, a demand under his hand (or under the hand of his agent thereunto lawfully authorised) requiring the company to pay the sum so due, and the company has for 3 weeks thereafter neglected to pay the sum or to secure or compound for it to the reasonable satisfaction of the creditor;".

If S218(a) has been satisfied, the company is irrebuttably deemed to be insolvent, although evidence of the company's actual solvency may be relevant to the exercise of the Court's discretion under S220.[1] Accordingly, the notice must comply in all respects with S218(a), and any discrepancy will result in the company not being deemed insolvent.[2]

From the time of the earliest Companies legislation, the Courts have refused to deem companies insolvent under S218(a) where the debt demanded has been bona fide disputed on substantial grounds.[3] The dispute may be one of three types, namely :

(a) a dispute as to the existence of the debt;

(b) a dispute as to the time for payment of the debt; or

(c) a dispute as to the amount of the debt.

(a) Existence of the Debt

If a statutory demand is made for a debt, the existence of which is disputed by the company,[4] the petitioner has not proved himself to be a "creditor" to whom the company is indebted in a sum "then due", and the company has not "neglected to pay" that sum. Accordingly, the company is not deemed to be insolvent under S218(a).[5]

(b) Time for Payment of the Debt

The company may alternatively admit the debt for which the demand was made, but deny that it is presently payable (i.e. the debt may be future or contingent). In such a case, the debt will not have been "due" when the demand was served and the company will not be deemed to be insolvent under S218(a).[6]

(c) Amount of the Debt

In principle, if the statutory demand is for an amount in excess of the sum due from the company, the creditor has not served a demand "requiring the company to pay the sum so due", and the company has not "neglected to pay" such sum because it is under no obligation to do so. It is only under an obligation to pay a smaller sum, which has not specifically been demanded. Accordingly, an over demand by a creditor should render the demand ineffective, so that the company is not deemed to be insolvent.

In Re Brighton Club and Norfolk Hotel Co. Ltd.,[7] the petitioner served a statutory demand under S.80, Companies Act 1862[8] for the sum of L4,358. which he claimed was due under a building contract with the company. The company

bona fide disputed the debt, but admitted that more than the L50 limit was due to the petitioner. Sir John Romilly M.R. dismissed the petition, holding that the dispute as to the amount of the debt must be resolved by action, not in the winding-up proceedings.

Similarly, in Re London and Paris Banking Corporation[9] the petitioner supplied furniture and fittings to the company, apparently under a contract under which no price was fixed. Accordingly, the price to be paid was a reasonable price.[10] The petitioner charged L267.14s for the goods, but the company refused to pay this amount and offered, in good faith, to pay L155. The petitioner served a statutory demand on the company in the sum of L267.14s and the company resisted the petition on the ground that the amount of the debt was disputed. Sir George Jessel M.R. dismissed the petition, referring to the wording of S80, Companies Act 1862 and commenting[11]:

> "It is very obvious, on reading that enactment, that the word "neglected" is not necessarily equivalent to the word "omitted". Negligence is a term which is well known to the law. Negligence in paying a debt on demand, as I understand it, is omitting to pay without reasonable excuse. Mere omission by itself does not amount to negligence. Therefore I should hold, upon the words of the statute, that where a debt is bona fide disputed by the debtor, and the debtor alleges, for example, that the demand for goods sold and delivered is excessive, and says that he, the debtor, is willing to pay such sum as he is either advised by competent valuers to pay, or as he himself considers a fair sum for the goods, then in that case he has not neglected to pay, and is not within the wording of the statute."

Although the learned judge's equating of "neglect with "negligence" is unconvincing[12], it is submitted that

the decision is correct as a matter of statutory interpretation. The petitioner had not served on the company a demand for "the sum so due", and, accordingly, the provisions of S80 had not been complied with and the company was not deemed to be insolvent.[13]

Unfortunately, there are certain decisions which conflict with this approach. In Cardiff Preserved Coal and Coke Co. v. Norton[14], Lord Chelmsford L.C. said:

> "It was contended that the winding-up order was bad because Mr. Hill had demanded a sum of L628, and it appeared that he was entitled only to L411.7s.9d; and the 67th and 68th sections of the Act make a company liable to be wound up only when a demand is made of a certain sum, and the company neglect to pay such sum, which in this case they were not bound to pay. But the liability of a company to be wound up under these provisions arises when a creditor, to whom the company is indebted above L50, serves a demand requiring the company to pay the sum so due, and the company for a certain time neglect to pay such sum. In this case there was a debt of more than L50 due to Mr. Hill. He made, it is true, a demand upon the company for payment of more than was due, but of course the amount due was known to the company, and was included in the demand, and the company neglected to pay "such sum", which means not the sum demanded, but the sum due, which they might have paid, and so have prevented the order being made. The construction contended for would make every winding-up order bad where the creditor had demanded the smallest sum above what was actually due to him."

It is submitted that the Lord Chancellor misconstrued the section. Although "such sum"[15] does mean the sum due

rather than the sum demanded, the petitioner had not served on the company a demand for the sum "so due", but for a larger amount. Accordingly, he had not complied with the statutory provisions and the company should not have been deemed to be insolvent.

In England, it has been Re London and Paris Banking Corp. which has consistently been followed, Norton's case being relegated to almost total obscurity. Norton's case was, however, resurrected, only to be interred again, in Queensland in 1964.

In Thiess Peabody Mitsui Coal Pty. Ltd. v. A.E. Goodwin Ltd.,[16] the petitioner served a statutory demand on the company for L181,011. The company admitted that L66,220 was owing to the petitioner, but disputed the balance of L114,791 . and claimed that the petitioner owed it L68,000. The Queensland Full Court[17] granted the company an injunction restraining a winding-up petition. Stanley J. referred to the passage from Norton's case cited above, but nevertheless concluded that a dispute as to the amount of the debt was sufficient to prevent the petitioner relying on the Australian equivalent of S218(a). He said[18]:

> "At first sight it seems improper that such a remedy can flow from a total demand for payment of a lump sum - representing in fact (although not stated in the demand) A plus B, when A represents a true indebtedness and B a field of uncertain and disputed obligation. It seems unjust that a debtor owing A must pay or secure or compound for A plus B, when in fact it might not owe one penny of B."

It is submitted that the reasoning on Norton's case is inconsistent with the express words of S218(a) and with the reasoning in prior and subsequent English authorities, and that it should not be followed.

In Bateman Television Ltd. v. Coleridge Finance Co. Ltd.[19], winding-up orders were made against two companies where there was some dispute by the companies as to the amount of the debts owing to the petitioner. However, although statutory demands were served on them, the companies were found to be insolvent under S218(c) and reliance on S218(a) was therefore unnecessary.[20] In addition, the disputes were found not have been based on substantial grounds.[21] Accordingly, statements by Turner J.[22] and McCarthy J.[23] that a dispute as to amount does not render a statutory demand invalid are obiter. Indeed, the authority cited by both judges [24] is not authority for the proposition.

A number of recent Australian cases indicate that a dispute as to amount is not sufficient to render a statutory demand invalid if the Court can establish that a sum certain is owed to the petitioner in excess of the statutory minimum.[25] It is submitted that such authorities are wrong in principle and should not be followed.

In conclusion, a statutory demand for a sum in excess of that due will render the demand invalid and mean that the company is not deemed to be insolvent. The petitioner has two alternatives. He may either serve a correct demand on the company, or rely on S218(b) or (c) to prove that the company is insolvent.

2. S218(b) and (c) - OTHER PROOF OF INSOLVENCY.

A petitioner whose debt is bona fide disputed by the company on substantial grounds is unable to prove the company's insolvency under S218(a). He is, however, still able to rely on S218(b) or (c), which provide that a company shall be deemed to be unable to pay its debts :

"(b) If execution or other process issued on a judgment, decree, or order of any Court in favour of a creditor of the company is returned unsatisfied in whole or in part; or

(c) If it is proved to the satisfaction of the Court that the company is unable to pay its debts, and, in determining whether a company is unable to pay its debts, the Court shall take into account the contingent and prospective liabilities of the company."

S218(b) does not call for comment,[26] but S218(c) is worthy of mention. It incorporates two tests of insolvency. A company is insolvent under S218(c) if either:

(a) it is unable to pay its debts as they fall due,[27] or

(b) its total present future and contingent liabilities exceed its total assets (on the assumption that the company ceases trading and realises its assets in an orderly manner).[28]

If the petitioner is unable to satisfy either of subsections (b) or (c) the petition will fail in limine.

II LOCUS STANDI: A CREDITOR

The second prerequisite of a winding-up order is that the petitioner has locus standi to petition. S219(1) provides:

> "(1) An application to the Court for the winding up of a company shall be by petition, presented, subject to the provisions of this section... by any creditor or creditors (including any contingent or prospective creditor or creditors)...
> Provided that -....
> (c) The Court shall not give a hearing to a winding-up petition presented by a contingent or prospective creditor until such security for costs has been given as the Court thinks reasonable and until a prima facie case for winding up has been established to the satisfaction of the Court; ...."

1. Types of Creditor

(a) Present Creditor

If the company owes the petitioner a debt which is presently payable, the petitioner has locus standi under S219.

(b) Future (or Prospective) Creditor

If the company is under an existing obligation to the petitioner which must become payable in the future,[29] the petitioner also has locus standi to petition. In Stonegate Securities Ltd. v. Gregory,[30] Buckley L.J. indicated that a "prospective creditor" within the meaning of S219(1)(c) means a "future creditor".[31] Accordingly, a future creditor must satisfy the additional requirements of S219(1)(c) in order to be entitled to petition.

(c) Contingent Creditor

A contingent liability is an existing obligation, payment of which depends on the happening of some uncertain future event.[32] A contingent creditor has locus standi to petition, but must also satisfy the additional requirements of S219(1)(c).

2. The Effect of Disputes

Is a person whose debt is bona fide disputed on substantial grounds a "creditor" of the company? It is submitted that the answer depends on the nature of the dispute which, for this purpose, may be one of four types, namely:

(a) a dispute as to the existence of the obligation on which the debt is based; or
(b) a dispute as to the existence of the debt, but not as to the obligation on which it is based; or
(c) a dispute as to the amount of the debt; or
(d) a dispute as to the time for payment of the debt.

(a) Existence of the Obligation

The company may dispute the existence of the obligation on which the debt is based. In such a case, the petitioner is not even a "contingent" creditor of the company because he has not proved that the company is under an existing obligation to him. Accordingly, the petition will fail in limine.

In Mann v. Goldstein,[33] petitions were presented to wind up two companies, J. Ltd. and C. Ltd., both of which were insolvent.[34] The petition against J. Ltd. was based on an alleged debt for directors fees, which the company contended had already been drawn by the petitioner. The petition against C. Ltd. was based on an alleged debt for goods supplied, which the company disputed on the ground that the goods had been supplied to another company trading from the same premises.

Ungoed-Thomas J. found that the company disputed the debts in good faith on substantial grounds and granted the company injunctions restraining the petitioners from prosecuting their petitions. His Lordship held that the fact that the companies were insolvent was irrelevant, saying:(35)

> "Of course, a person not named in S.224(36) as a person entitled to present a winding up petition, does not become so named because the company is insolvent. Therefore, so far as material to our case, if the defendants are not creditors they are not entitled to present or advertise their petitions or apply for a winding up order: they have no locus standi, and their petitions are bound to fail even though the company be insolvent."

(b) Existence of the Debt

The company may alternatively dispute that any moneys are, or will become, payable to the petitioner, but admit the obligation on which the purported debt is based. In such a case, the petitioner can petition as a contingent creditor because the company is under an existing obligation payment of which is uncertain.

In Re Community Development Pty. Ltd.,(37) a petition was presented against the company in respect of payments which the petitioner claimed were due from the company under a building contract. The company disputed that any sums were, or would become, payable under the contract. Matthews J. nevertheless made a winding-up order. There was evidence that the company was insolvent under the equivalent of S218(c), and, accordingly, the petitioner did not have to rely on a statutory demand. The petitioner also had locus standi as a contingent creditor since, although the company disputed the debt, it did not dispute the existence of the building contract, and accordingly, admitted that it was under an existing obligation which may or may not mature in the future.

Similary, in Stonegate Securities Ltd. v. Gregory,[38] the petitioner served a statutory demand on the company for L33,000. The company admitted the contract on which the claim was based, but denied that any moneys were presently payable under it and contended that it was uncertain whether any moneys would become so payable. In this case, however, there was no evidence that the company was insolvent. The Court of Appeal granted the company an injunction preventing a petition on the statutory demand, but held that the petitioner was entitled to present a petition as a contingent creditor.[39]

In Re Laceward Ltd.,[40] Slade J. dismissed a petition by a solicitor based on a claim for unpaid costs, because the costs had not been taxed, and it was uncertain whether any moneys would become payable to him. His Lordship held that the solicitor had no locus standi. Stonegate Securities v. Gregory was not cited. It is submitted that the solicitor did have locus standi to petition as a contingent creditor, and that the decision is incorrect on this point in principle and on authority.

(c) Amount of the Debt

A third possibility is that the company may admit that a debt is owing to the petitioner, but dispute the amount. In such a case the petitioner is clearly a creditor of the company, either actual (if the amount owing is ascertained) or future or contingent (if the amount owing has to be ascertained).

(d) Time for Payment of the Debt

Finally, the company may admit the debt, but claim that it is not yet payable. In such case, the petitioner is a future (or "prospective") creditor of the company and has locus standi to petition.

In Holt Southey Ltd. v. Catnic Components Ltd.,[41] the petitioner served a statutory demand on the company for

L39,000. The company disputed L19,000 of that sum, and claimed that the balance of L20,000 was not presently payable. There was no evidence that the company was insolvent. The company applied for an injunction to prevent the presentation of a winding-up petition, but Goulding J. refused to make the order, holding that the petitioner was entitled to petition as a prospective creditor. When the petition came on for hearing the petitioner would have to prove that the company was unable to pay its debts under the English equivalent of S218(c).(42)

III THE COURT'S DISCRETION

If the company disputes the existence of any obligation,[43] the petitioner will have no locus standi and his petition will fail in limine. If, on the other hand, the company admits the obligation but disputes that all or any of the moneys claimed by the petitioner are or will become payable, the petitioner has locus standi to petition as a contingent or prospective creditor.[44] In such a case, the petitioner can not prove the company's insolvency under S218(a), but can rely on S218(b) or (c).[45] Once the petitioner has satisfied the first two prerequisites, is the Court likely to exercise its discretion to refuse a winding-up order on the ground that the debt petitioned on is disputed? S220(1) provides :

> "Subject to the provisions of this section, on a winding-up petition the Court may dismiss it, or adjourn the hearing conditionally or unconditionally, or make any interim order, or any other order that it thinks fit..."

It is generally considered that a creditor has a right ex debito justitiae to an order to wind up an insolvent company.[46] Thus, although the Court has a statutory discretion to refuse an order, it will not generally do so, especially where the creditor is unable to obtain payment in any other way. Should a dispute as to the debt result in the petition being dismissed?

If the whole debt depends on a contingency which is unlikely to happen, it is arguable that the Court might exercise its discretion to dismiss the petition. On the other hand, if the petitioner is a creditor of the company (albeit contingent) and the company is insolvent it would not be an abuse of process to make the order. The purpose of the statutory provisions is to prevent insolvent companies from continuing trading. To

refuse an order because of a dispute as to the debt might prejudice existing and prospective creditors of the company.

The reported decisions support the proposition that the company should generally be wound up notwithstanding the dispute.[47]

In Re Tweeds Garages Ltd.,[48] a creditor of the company presented a winding-up petition in respect of an alleged debt of L20,000. The company disputed the amount of the debt, but admitted that the petitioner was a creditor of the company for part of that sum. Plowman J. found that the company was insolvent under the English equivalent of S218(c) and ordered it to be wound up. His Lordship distinguished cases such as Re London and Paris Banking Corporation[49] in which a dispute as to the amount of the debt rendered the statutory demand invalid. In this case, the Company had been proved to be insolvent aliunde and, since only the amount of the debt was disputed, the first two prerequisites of a winding up order had been established. Accordingly, the matter was one of discretion and "it would in many cases be quite unjust to refuse a winding up order to a petitioner who is admittedly owed moneys which have not been paid merely because there is a dispute as to the precise amount owing."[50]

The Courts are likely to follow this approach even where the debt is wholly contingent (at least where the contingency is reasonably likely to occur). In Re Community Development Pty. Ltd.[51] a contingent creditor petitioned to wind up a company which disputed that the debt would become payable. Matthews J. found that the company was insolvent under the equivalent of S218(c), and that the outcome of the dispute was likely to result in the petitioner being an actual creditor of the company. In those circumstances, His Honour made a winding-up order.

In conclusion, where the petitioner has locus standi to petition and the company is found to be insolvent under S218(b) or (c), the Court is likely to exercise its discretion in favour of making a winding-up order even though the debt is disputed. The only type of case in which it may not do so is where the debt is wholly contingent, and the contingency is unlikely to occur. Even in such a case, the best course may be to wind up the insolvent company.

B. SET-OFFS AND COUNTERCLAIMS

The company may admit that it owes a debt to the petitioner, but contend that it should not be wound up because it has a bona fide set-off or counterclaim based on substantial grounds which equals or exceeds the debt petitioned on.(52) In order to decide whether such a contention will succeed, it is necessary to consider, in turn, the possible effect of a set-off or counterclaim on each of the three prerequisites of a winding-up order.

I GROUNDS FOR WINDING-UP: INSOLVENCY

1. S218(a): Statutory Demand

In principle, the existence of a counterclaim should not affect the validity of a statutory demand. If the petitioner makes demand for a sum which is due from the company, and the company neglects to pay that sum for three weeks, the company is deemed to be insolvent under S218(a) notwithstanding that it has a counterclaim against the petitioner.

It has, however, been contended that the company has not "neglected to pay" the debt within the meaning of S218(a) if it has a bona fide counterclaim based on substantial grounds which equals or exceeds the debt petitioned on. This possibility was adverted to, but not decided by O'Bryan J. in Re K.L. Tractors Ltd.(53) In Clem Jones Pty. Ltd. v. International Resources Planning and Development Pty. Ltd.(54) Wanstall J. held that a set-off "would raise a bona fide dispute as to the existence of the petitioning creditor's debt and, that being so, that failure to pay the latter would not constitute neglect to pay in answer to a statutory demand." In Re Jeff Reid Pty. Ltd.,(55) McLelland J. extended this concept to include counterclaims which are not set-offs:

> "The existence of a counter-claim based on substantial grounds for an amount equal to or exceeding the debt will generally provide reasonable cause for omitting to pay the debt in accordance with a demand and thus prevent the statutory presumption arising, regardless of any question of set-off."

It is submitted that such an approach is wrong. The section refers to the company having "neglected to pay" the debt, not to its having done so "for reasonable cause".(56) The approach of the recent Australian cases referred to above is inconsistent with the express words of the Section and should not be followed.

2. S218(b) and (c): Other Proof of Insolvency

Since the existence of a set-off or counterclaim does not affect a statutory demand, it will normally be unnecessary for the petitioner to rely on S218(b) or (c).

II LOCUS STANDI: A CREDITOR

The existence of a counterclaim by the company against the petitioner does not affect the petitioner's status as a "creditor".[57] In Re Glenbawn Park Pty. Ltd.,[58] Yeldham J. considered that the existence of a set-off which equalled or exceeded the debt petitioned on meant that the petitioner was not a "creditor" of the company.[59] It is, however, submitted that, even where the company has a set-off, the petitioner is still a "creditor" of the company because the set-off does not discharge the debt petitioned on pro tanto until judgment.[60] In the words of O'Bryan J. in Re K.L. Tractors Ltd.[61]:

> "Set-off is a creature of statute. It is part of the law of procedure which enables a debtor in an action brought against him by his creditor to raise as a defence a cross-debt or liquidated demand. But a set-off is not a denial of the debt - it is a plea against its enforcement. It is in substance a plea in bar. It differs in substance from a plea of payment or accord and satisfaction which in effect alleges that the claim no longer exists. A plea of set-off, on the other hand, in effect admits the existence of the debt, but sets up a cross-claim as being a ground on which the person against whom the claim is brought is excused from payment and entitled to judgment on the plaintiff's claim. Until judgment in favour of the defendant on the ground of set-off has been given, the plaintiff's claim is not extinguished... It follows that, even if the company has a right of set-off against the Commonwealth's debt, the Commonwealth's debt is not extinguished, although it could be met in an action to enforce it by a special plea of set-off. Hence set-off or no set-off, the Commonwealth is a creditor who may present this petition."

III THE COURT'S DISCRETION

Since the existence of a counterclaim does not affect either of the first two prerequisites of a winding-up order, it can only be taken into account when the Court exercise its discretion to make the order.[62] There are three possible ways in which a Court can approach this problem:

(a) It can dismiss the petition because the company has a counterclaim which equals or exceeds the debt petitioned on; or

(b) It can decide that counterclaims are not relevant and make the winding-up order accordingly; or

(c) It can decide that a counterclaim shall only result in the petition being dismissed if there are other factors which indicate the same result.

(a) The First Approach

Some cases indicate that the Court's discretion should be exercised against a winding-up order simply because the company has a counterclaim which equals or exceeds the judgment debt.

In Re Glenbawn Park Pty. Ltd.,[63] the petitioner had commenced an action against the company for the price of goods sold and delivered. The company had a counterclaim against the petitioner for breaches of condition and warranty which equalled the amount of the petitioner's claim. The petitioner subsequently issued a statutory demand and petitioned to wind up the company. The company admitted that it was insolvent but applied for the petition to be dismissed so that it could re-finance its borrowing and trade out of its difficulties. The petitioner opposed the application, but did not require that the company immediately be wound-up, simply wanting to prevent the company giving security for the re-financing.

Yeldham J. held that the counterclaim was based on substantial grounds and, accordingly, that the petition should be dismissed, either because the petitioner was not a "creditor", or because, in its discretion, the Court would normally refuse to make a winding-up order where the counterclaim equalled or exceeded the debt petitioned on. It has already been suggested that the first ground for the decision is incorrect, and it is submitted that the second ground is also open to criticism. His Honour appears to have held that the existence of a counterclaim means that the debt is disputed, and, therefore, that the petition should generally be dismissed. Such an approach is unfortunate because disputes as to the debt itself can affect the first two prerequisites of a winding-up order as well as the third, whereas a counterclaim can only affect the Court's discretion and can not make a petition fail in limine. Accordingly, it is submitted that the existence of a counterclaim exceeding the debt petitioned on should not automatically (or even normally) result in the petition being dismissed, but, rather, should be one matter which the Court should take into account in exercising its discretion.

In Re Portman Provincial Cinemas Ltd.,(64) the Court of Appeal took a similar position, indicating that the petition should be dismissed where the counterclaim equals or exceeds the debt petitioned on. It is submitted that this approach is unfortunate.

(b) The Second Approach

The opposite approach is for the Court to indicate that the existence of a counterclaim should have no effect on the exercise of its discretion.

In Re Douglas (Griggs) Engineering, Ltd.,(65) a judgment creditor in a sum of L380 petitioned to wind up the company. The company was found to be insolvent under the equivalent of S218(c), but the company resisted the petition on the ground that it had a claim against the petitioner for a sum of L2,500

which was due to be heard in five weeks. Pennycuick J. refused to exercise his discretion against the making of the order, saying[66]:

> "It seems to me that this prima facie right of the petitioning creditor to a winding-up order is not displaced merely by showing that the company has a disputed claim against the petitioning creditor which is the subject of litigation in other proceedings."

It is submitted that the second approach is also wrong and that the Court should not disregard the counterclaim when exercising its discretion. Indeed, Pennycuick J's statement does imply that the existence of a counterclaim may be a relevant factor if added to other considerations, but that it is not sufficient on its own to displace an unpaid creditor's right ex debito justitiae to a winding-up order.

(c) The Third Approach

The final approach which the Court can adopt is that the existence of a bona fide counterclaim based on substantial grounds which equals or exceeds the judgment debt is a factor to be taken into account in exercising its discretion to make a winding-up order. Whether or not the Court exercises its discretion against an order will depend on the facts of each case.

In Re L.H.F. Wools, Ltd.,[67] a Belgian Bank obtained judgment for L24,000 against an English company on a bill of exchange, and petitioned to wind-up the company. The company commenced a counterclaim for L120,000 damages against the petitioner in the Belgian Courts. The action was likely to take a long time to come on for trial. The company had no assets and had ceased trading. It had four other creditors whose debts totalled L25,000 and who neither supported nor opposed the petition. At first instance,

Plowman J. made a winding-up order, but the Court of Appeal allowed an appeal by the company and stood over the petition to await the outcome of the action in Belgium. On the very unusual facts of the case, it considered that the existence of the counterclaim was a sufficient reason why it should exercise its discretion against a winding-up.

The following are some of the factors which might be taken into account in deciding whether the existence of the counterclaim should result in the Court refusing to make a winding-up order :

(i) Insolvency

If the company is clearly insolvent under S218(c), it should probably "be put out of its existence because it [is] really doing no good to anybody".(68) On the other hand, if the company is only technically insolvent under S218(a), the Court might be more inclined to refuse an order if the company can prove that it is, in fact, solvent, or will be solvent if the counterclaim is successful.

(ii) Delay

A Court is more likely to make an order if the creditor is owed a present debt and the counterclaim will take some time to be decided. This is especially so if the petitioner is a judgment creditor who has exhausted all other execution remedies. On the other hand, if the counterclaim will quickly be heard, or the creditor is only a prospective or contingent creditor, the existence of a counterclaim may mean that an order will be refused.(69)

(iii) Nature of the Counterclaim

If the counterclaim arises out of the same transaction or series of transactions as the debt petitioned on,(70) the Court is more likely to dismiss the petition.(71) The likelihood of success of the counterclaim is a factor which may also be taken into account.(71)

(d) The Correct Approach?

It is submitted that, notwithstanding the uncertainty which it may cause, the third approach is that which should be followed, because it is the approach which is consistent with the discretionary wording of S220. The existence of a set-off or counterclaim is a factor to be taken into account in deciding whether or not the Court should exercise its discretion in favour of winding-up. Whether or not it is sufficient to enable the Court to refuse an order to a creditor will depend on the facts of each individual case. If the company is, in fact, insolvent, an order should normally be made. If, however, the company is technically insolvent under S218(a), but in fact solvent, the Court may refuse to make an order if it considers that the existence of the counterclaim gives the company a good reason not to pay the debt. This will depend on such factors as the nature of the counterclaim, and the time it will take to be resolved.

C. "BONA FIDE ON SUBSTANTIAL GROUNDS"

The earliest cases indicated that the dispute, set-off or counterclaim must be made by the company in good faith.[72] Later cases indicated that the dispute must also be "reasonable",[73] but the test which has subsequently been established is that the company must bona fide dispute the debt on substantial grounds, or have a bona fide set-off or counterclaim on substantial grounds, as the case may be.[74] It is for the company to put forward evidence to show that the dispute is based on substantial grounds.[75] Once the company has done so, the Court will normally dismiss the petition, or adjourn it until the dispute can be tried by action,[76] since it would be inconvenient and an abuse of process for the dispute to be decided in winding-up proceedings.[77] If, on an examination of the evidence, the Court decides that there is no substantial dispute, it will make the order in the usual way.

There is, however, a third possibility. In exceptional circumstances, the Court may conclude that there is a substantial dispute but nevertheless decide that the hearing of the petition is a suitable forum to resolve the dispute. It may do so if the facts which generate the dispute are simple and have fully been put in evidence on the petition,[78] or if the facts are more complicated but full discovery has been made before the hearing of the petition and it would be contrary to the interests of justice to embark on new and lengthy proceedings,[79] or if the dispute is one of law which the Court can resolve.[80]

The problem is summarised by Needham J. in Re Horizon Pacific Ltd.[81]:

> "The rule is not necessarily applicable in all cases. For example, it is open to the court hearing the winding up petition to resolve the dispute if it is satisfied that it has before it all the evidence which could be brought before it in proceedings to establish the debt... As Gibbs J. said in Re QBS Pty Ltd. ..."Of course a debt is not bona fide

> disputed simply because the respondent company says that it is disputed. The court hearing the petition can go into evidence to consider whether or not the dispute is bona fide, i.e. whether the claim is disputed on some substantial ground."... It seems to me that in every case it becomes necessary for the court to exercise its discretion as to how far it will allow the question whether or not the dispute is bona fide to be explored. In some cases it may be very easy to decide this question on the petition and affidavits in reply. In other cases however it may be difficult to determine whether or not the dispute is bona fide without determining the merits of the dispute itself. In some such cases convenience may require that the court decide the question whether or not a debt exists, but in other such cases it may appear better to allow that question to be determined in other proceedings before the petition for winding up is heard."

Nevertheless, in most cases in which it is established that there is a substantial dispute, it will be more convenient to dismiss or adjourn the petition and allow the dispute to be tried by action.

D. APPEALS FROM JUDGMENT

A judgment creditor has a right ex debito justitiae to wind up an insolvent company.[82] As in bankruptcy, however, an order will not be made if the company can prove that the judgment was obtained by fraud or if there was no consideration for the judgment (e.g. if it was based on a void debt).[83]

If the judgment has been reversed by the time the petition is heard, the petition will be dismissed, even if the creditor is appealing against the reversal of the judgment.[84] If, however, the petition comes on for hearing at a time when the company is still in the process of appealing against the judgment, the Court may still make a winding-up order based on the judgment debt. The proper course is for the company to apply to the Court which gave judgment for a stay of execution pending determination of the appeal. This should prevent the judgment creditor from petitioning to wind-up the company[85]. Where the stay of execution is applied for and given after a petition has been presented by the judgment creditor, the Court may adjourn the petition to await the outcome of the appeal rather than dismiss it outright.[86]

E. THE FORM OF THE ORDER

In the early cases on disputed debts, the practice was for the petition to be stood over pending determination of the dispute by action.[87] In subsequent cases, however, the practice changed, and the petition was normally dismissed.[88] It is submitted that the latter approach is generally the correct one. If the petitioner does not have locus standi to petition, or has not proved that the company is insolvent, his petition is an abuse of process,[89] and he should accordingly pay the costs of its dismissal. If he succeeds in his substantive action, he can then petition again.

Different considerations apply where the Court, in its discretion, takes account of a set-off or counterclaim. In such a case the petitioner is not abusing the process of the Court if he has locus standi to petition and he has proved that the company is insolvent. Accordingly, it may be proper in such a case to stand over the petition to await the outcome of the counterclaim.[90]

F. INJUNCTIONS

If the petition comes on for hearing, the Court will deal with the matter in accordance with the foregoing principles. The company may alternatively apply for an injunction to prevent the presentation of a petition[91] or the advertisement or further action on a petition which has already been presented.[92] The New Zealand Courts have inherent jurisdiction to prevent the presentation of or dismiss a petition which is an abuse of process.[93] In what circumstances will the Courts exercise that jurisdiction?

1. Disputed Debts

(a) Locus Standi

The Courts will prevent the presentation of, or further action on a petition if the petitioner has no locus standi to petition.[94] Thus, in Mann v. Goldstein,[95] an injunction was granted to restrain the prosecution of winding-up petitions where the company disputed the existence of the obligations on which the debts petitioned on were based. The petitioner was not a "creditor" of the company and accordingly had no locus standi to petition even though the company was insolvent. In the words of Ungoed-Thomas J.[96]:

> "For my part, I would prefer to rest the jurisdiction directly on the comparatively simple propositions that a creditor's petition can only be presented by a creditor, that the winding-up jurisdiction is not for the purpose of deciding a disputed debt (that is, disputed on substantial and not insubstantial grounds) since, until a creditor is established as a creditor he is not entitled to present the petition and has no locus standi in the companies court: and that, therefore, to invoke the winding-up jurisdiction when the debt is disputed (that is, on substantial grounds) or after it has become clear that it is so disputed is

an abuse of the process of the court. This seems to me to be in accordance with the statement of Kekewich, J.[97] which I have quoted, even though it be borne in mind that the company in that case was solvent: and the references to irreparable damage in the other cases which I have mentioned, where the petitioners were contributories or creditors petitioning against solvent companies, do not exclude an injunction being granted to prevent an abuse of the process of the court. Indeed, the prevention of the abuse of the process of the court is the very essence of the whole of the court's jurisdiction to restrain the presentation of a winding-up petition".[98]

(b) Insolvency

If a petitioner has locus standi, he is entitled to present a petition, and, at the hearing, attempt to prove the company's insolvency. Any dispute as to the debt petitioned on will render a statutory demand nugatory,[99] and the petitioner will accordingly have to rely on S218(b) or (c) in order to prove the company's insolvency. If he fails to do so, the petition will, of course, be dismissed with costs, and the petitioner may also be liable for the tort of malicious prosecution.[100]

If the petitioner has served a statutory demand in respect of a disputed debt but is nevertheless a contingent or prospective creditor, the company can obtain an injunction to prevent a petition being presented or advertised on any other basis than that the petitioner is a contingent or prospective creditor.[101] Taken with the safeguards mentioned in the preceding paragraph, this should normally be sufficient to protect the company.

There are, however, authorities for the proposition that the Courts have jurisdiction to prevent the presentation of or further action on a petition where the petitioner has

locus standi but the debt is disputed and the company can prove that it is solvent. An injunction will be granted in such a case because the petition must fail (there being no ground on which to wind up the company), and the company could be irreparably damaged by the publicity consequent on a petition.

In Cadiz Waterworks Company v. Barnett,[102] a contractor entered into a contract with the company for the execution of certain works. He received certain moneys from the company but claimed to be entitled to a further sum. The company disputed the claim. The contractor served a statutory demand on the company, which applied for an injunction to restrain the presentation of a petition, adducing evidence that it was solvent. The contractor argued that the Court had no power to prevent the petition being presented, and that the company's only remedy was to recover the costs of the hearing if the petition failed. Malins V-C granted an injunction, on the grounds that the debt was disputed and that he was satisfied that the company was solvent. The presentation of a petition, and the resultant publicity could irreparably damage the company.[103]

Although certain cases contain statements which suggest that it is for the petitioner to put forward evidence of the company's insolvency,[104] it would seem that the proper course is for the company, when applying for the injunction, to aver its solvency and to adduce evidence thereof. If the Court is not satisfied that the company is solvent, it will allow the petition to continue to hearing.[105]

In Stonegate Securities Ltd. v. Gregory,[106] there are certain statements by the members of the Court of Appeal which indicate that the Courts should not prevent a petition by a contingent or prospective creditor, but should only enjoin him from petitioning otherwise than as a contingent or prospective creditor.[107] It is submitted that these statements are obiter because the company had not proved that it was solvent and, accordingly, was not entitled to an injunction preventing

any petition by the petitioner. Moreover, the company did not ask for such an injunction, only requiring an injunction to restrain a petition based on an invalid statutory demand. Any such approach would be inconsistent with the line of cases which has followed Cadiz Waterworks Co. v. Barnett.(108)

In conclusion, if the petitioner has served a statutory demand on the company in respect of a disputed debt, but nevertheless has locus standi to petition as a contingent or prospective creditor, the company has the choice of alternative procedures:

(i) If the company can prove that it is solvent, it is entitled to an injunction restraining the presentation of, or further action on a petition which must fail, there being no ground on which to wind up the company.

(ii) If the company can not (or does not wish to) prove its solvency, it is still entitled to an injunction restraining the presentation of, or further action on, a petition on any basis other than that the petitioner is a contingent or prospective creditor. The onus will then be on the petitioner to prove that the company is insolvent at the hearing.

2. Set-offs and Counterclaims

The existence of set-offs and counterclaims does not affect the locus standi of the petitioner, nor the effect of a statutory demand, and is simply a factor to be taken into account when the Court exercises its discretion to wind up the company.(109) It might, accordingly, be assumed that the company can not obtain an injunction to prevent a creditor presenting or pursuing a petition simply because of the existence of a set-off or counterclaim. Since the matter is one of discretion, it is for the Court hearing the petition to decide whether or not to wind up the company.

Certain recent Australasian authorities, however, indicate that an injunction can be granted to prevent the presentation or prosecution of a petition in such a case. The reason for these decisions is that it would be an abuse of process to present a petition where there is a more suitable alternative remedy (i.e. action and counterclaim). This approach is best expressed by McGarvie J. in Fortuna Holdings Pty. Ltd. v. Deputy Federal Commissioner of Taxation,(110) who distinguished two lines of authority :

> "The authorities which have been discussed illustrate the distinction between the application of the first and second branches of the principle.
>
> The first branch applies to cases where the petition is incapable of success as a matter of law or through absence of supporting evidence. Where the petitioner is not entitled to present a petition or where the ground alleged is not a ground which can found a winding up order the petition is incapable of success as a matter of law. If there is no sufficient evidence to establish an otherwise sufficient ground, the petition is incapable of success for that reason. Thus the first branch applies where the proposed petition cannot succeed.
>
> The second branch applies to cases where there is more suitable alternative means of resolving the dispute involved in a disputed claim against the company. They are not necessarily cases in which as a matter of law or through absence of evidence, there is an inherent incapacity of success. They may be cases where the petitioner is entitled to present the petition, the ground is sufficient in law and there is evidence to support the ground. They are cases, though, where due to the availability of the more suitable alternative remedy, the court hearing the petition would in the circumstances, in the exercise of its discretion, decline to make a winding up order,

at least while the circumstances remain as they are at the time of the application for an injunction. Thus the second branch applies where, because of the availability of a suitable alternative procedure, the petition is unlikely to succeed in the circumstances existing at the time."

In Universal Chemicals Ltd. v. Hayter,[111] Barker J. granted a company an injunction to prevent a petition being presented because the company had a counterclaim against the petitioner. It is submitted that this decision is unfortunate because His Honour followed Re Glenbawn Park Pty. Ltd.[112] and assumed that the petition would be dismissed simply because a bona fide counterclaim on substantial grounds exceeded the debt petitioned on. Such an approach has already been criticised. The case may, nevertheless, be taken as authority for the proposition that an injunction can be granted to prevent the presentation of a winding-up petition if the petition is likely to be dismissed because of the existence of a counterclaim.

In principle, it is for the Court which hears the petition to decide whether or not to wind up the company. If the petitioner has locus standi and has proved that the company is (albeit technically) insolvent, the Court which hears the injunction proceedings should not normally usurp that discretion. On the other hand, it is arguable that the Court should have jurisdiction to grant an injunction where the company can prove that it is, in fact, solvent and has not paid the debt because of the existence of the counterclaim. Advertisement of the petition could irreparably damage a solvent company, and it may not necessarily be an answer to reply that the company has the choice of paying the debt.

If the Courts are to assume such a jurisdiction it is submitted that an injunction should only be available where:

(i) the balance of convenience is in favour of the injunction being made[113] (e.g. because advertisement

of the petition will irretrievably damage a solvent company); and

(ii) it is likely that, on the hearing of the petition, the Court would have exercised its discretion to refuse the order.

The Court which hears the injunction proceedings must accordingly be apprised of all the information which would have been available on a hearing of the petition. The company must put forward evidence of its solvency and of the reasons why an order should not be made. The Court which hears the injunction will, in effect, be exercising the discretion which would normally be exercised on the hearing of the petition, the justification for such an approach being the irretrievable damage which would be caused to a solvent company were the petition to be advertised.

The considerations for and against such injunctions are nicely balanced, and recent authority, such as it is, is in favour of them. If an injunction is granted, it should be made on terms that the counterclaim be prosecuted with all due diligence.(114)

II BANKRUPTCY

The provisions of the Insolvency Act 1967 are substantially different from those of the Companies Act 1955, and disputed debts, set-offs and counterclaims do not play as large a part in the bankruptcy cases as they do in the liquidation cases. Their effect on the three stages of a bankruptcy petition can therefore briefly be considered.

A. GROUNDS: THE ACTS OF BANKRUPTCY

A creditor may only file a bankruptcy petition if the debtor has committed an act of bankruptcy within the three months before the filing of the petition.(115) S19, Insolvency Act 1967 lists the acts of bankruptcy. In practice, the most important act of bankruptcy is that contained in S19(1)(d), which provides that a debtor commits an act of bankruptcy:

> "If a creditor has obtained a final judgment or final order against the debtor for any amount, and, execution thereon not having been stayed, the debtor has served on him in New Zealand, or, by leave of the Court, elsewhere, a bankruptcy notice under this Act, and he does not, within fourteen days after the service of the notice in a case where the service is effected in New Zealand, and in a case where the service is effected elsewhere then within the time limited in that behalf by the order giving leave to effect the service, either comply with the requirements of the notice or satisfy the Court that he has a counterclaim, set-off, or cross demand which equals or exceeds the amount of the judgment debt or sum ordered to be paid, and which he could not set up in the action in which the judgment was obtained, or the proceedings in which the order was obtained."

Unlike a statutory demand under S218(a), Companies Act 1955, a bankruptcy notice can only be served on a debtor against whom a final judgment or final order has been obtained.(116) Accordingly, most disputes, set-offs or counterclaims will have been resolved by the judgment. There are, however, two ways in which such matters can affect bankruptcy notices.

(a) Counterclaims, Set-Offs and Cross Demands

S19(1)(d) provides that the debtor need not comply with the bankruptcy notice if he has "a counterclaim, set-off or cross demand which equals or exceeds the amount of the judgment debt... and which he could not set up in the action in which the judgment was obtained..."(117)

(b) Disputes as to the Amount of the Debt

S20 provides that the bankruptcy notice must "require the debtor to pay so much of the judgment debt...in accordance with the terms of the judgment...as remains unpaid..."

The creditor must strictly comply with these provisions, and an understatement of the unpaid amount of the judgment debt will render the notice invalid.(118) Paradoxically, an overstatement of the unpaid amount of the judgment debt will not necessarily render the notice invalid because of the provisions of S20 proviso(b), which states that a bankruptcy notice :

> "Shall not be invalidated by reason only that the sum specified in the notice as the amount due exceeds the amount actually due, unless the debtor within the time allowed for payment gives notice to the creditor that he disputes the validity of the notice on the ground of that misstatement; but if the debtor does not give any such notice he shall be deemed to have complied with the bankruptcy notice if within the time allowed he takes such steps as would have constituted a compliance with the notice had the actual amount due been correctly specified therein."

A creditor can, of course, rely on any of the other acts of bankruptcy set out in S19, none of which are affected by disputed debts or counterclaims.

B. LOCUS STANDI

S23, Insolvency Act 1967 provides :

"A creditor may file a bankruptcy petition against a debtor, if -

(a) The debt owing from the debtor to the petitioning creditor, or, if two or more creditors join in the petition, the aggregate amount of debts owing to the several petitioning creditors, amounts to a sum not less than two hundred dollars; and

(b) The debtor, whether before or after incurring the debt, has committed an act of bankruptcy within three months before the filing of the petition; and

(c) The debt is a liquidated sum payable either immediately or at some certain future time."

As in the case of the grounds of bankruptcy, the provisions of S23, Insolvency Act 1967 are stricter than those of S219, Companies Act 1955. A contingent creditor who is owed an unascertained sum has locus standi to petition to wind up a company, whereas only a creditor who is owed a liquidated present or future debt is entitled to petition in bankruptcy.(119) Accordingly, although a dispute as to the time for payment of the debt will not affect the creditor's locus standi if the debt must become payable at a certain future time, a dispute as to the existence of the debt will prevent the petitioner being a present or future creditor, and a dispute as to the amount of the debt will prevent it being a liquidated sum. As in the case of liquidation, a set-off or counterclaim will not affect the petitioner's locus standi.

C. THE COURT'S DISCRETION

1. Disputed Debts

S26(1) gives the Court a discretion to adjudge the debtor bankrupt. Since a dispute as to anything except the time for payment of the debt will deprive the petitioner of locus standi, the Court will not normally have to consider the effect of a disputed debt on its discretion. However, S26(5) gives the Court power to stay the proceedings pending trial of the dispute if the debt is disputed. S26(5) provides:

> "Where the debtor appears on the petition and denies that he is indebted to the petitioner or that he is indebted to such an amount as would justify the petitioner in presenting a petition against him, the Court, on such security (if any) being given as it requires for payment to the petitioner of any debt which may be established against the debtor and of the costs of establishing the debt, may, instead of dismissing the petition, stay all proceedings on the petition for such time as is required for the trial of the question relating to the debt."

In order to give effect to S26(5) it is necessary that it should override S23(c) and be applicable even though the petitioner does not have locus standi under S23(c).

In winding-up proceedings, the current practice is to dismiss rather than adjourn the petition if the debt is disputed. It is to be hoped that the Court will follow this practice in bankruptcy proceedings, and that it will rarely exercise its power to stay proceedings under S26(5).

The Court also has power to go behind a judgment debt and refuse to make an order of adjudication if the

judgment was obtained by fraud, or if there was no consideration for the judgment.[120]

2. Set-offs and Counterclaims

There is very little authority on the effect of set-offs or counterclaims on the Court's discretion to make an order of adjudication. It appears that the existence of a set-off or counterclaim which exceeds the amount of the debt petitioned on is a factor to be taken into account in exercising the Court's discretion,[121] but only if the set-off or counterclaim is based on substantial grounds.[122]

FOOTNOTES

1. Re Willes Trading Pty Ltd. (1978) 3 ACLR 582 (N.S.W.S.C.); Re G. Stonehenge Constructions Pty.Ltd. (1978) 3 ACLR 941 (N.S.W.S.C.); and see Re Imperial Hydropathic Hotel Co., Blackpool, Ltd. (1882) 49 LT 147 (CA) per Cotton L.J. at p.150. Compare the tortuous construction adopted by Gibbs J. in Re Q.B.S. Pty.Ltd. [1967] Qd.R.218 (Qd.S.C.) For cases where evidence of solvency may be relevant to the exercise of the Court's discretion, see Part B III infra.

2. Re Willes Trading Pty. Ltd. (supra), in which Needham J. said, at p.583: "The deeming effect of the notice, in my opinion, arises only if the notice is in full compliance with the conditions set out in the Section itself."

3. One of the earliest cases in which an order was refused where the debt was disputed is Ex p. Rhydydefed Colliery Co., Glamorganshire, Ltd. (1858) 3 De G. & J. 80; 44 ER 1199 (LJJ).

4. And the dispute is made in good faith on substantial grounds (see Part C infra).

5. Re Lympne Investments Ltd. [1972] 2 All ER 385 (Ch.D); F.J. Reddacliffe & Associates Pty. Ltd. v. A.R.C. Engineering Pty. Ltd. (1978) 3 ACLR 426 (N.S.W.S.C.); a fortiori if the company disputes the existence of the obligation on which the debt is based.

6. Detroit Finance Corporation Ltd. v. Camillo (1979) 4 ACLR 509 (N.S.W.S.C.); Re Bryant Investment Co. Ltd. [1974] 2 All ER 683 (Ch.D); New Travellers' Chambers Ltd. v. Cheese & Green (1894) 70 LT 271 (Ch.D)

7. (1865) 35 Beav.204; 55 ER 873 (MR). See also Ex.p. Rhydydefed Colliery Co. (supra - note (3)).

8. Equivalent, in all material respects, to S218(a).

9. (1874) LR 19 Eq.444 (MR).

10. See now S10(2), Sale of Goods Act 1908.

11. At p.446.

12. The Shorter Oxford Dictionary does include as one of the meanings of "neglect": "to omit through carelessness", but this definition seems unduly narrow, and inconsistent with the other meanings given: "to disregard";"to fail to perform, render or discharge a duty".

13. The same approach is taken in certain Australian decisions: Re Alderney Dairy Co. Ltd. (1885) 9 VLR 628 (Victoria S.C.); Metal Protectives Co. Pty. Ltd. v. Site Welders Pty. Ltd. [1968] N.S.W.L.R. 106 (N.S.W.S.C.); Club Marconi of Bossley Park Social Recreation Sporting Centre Ltd. v. Rennat Constructions Pty. Ltd. (1980) 4 A.C.L.R. 883 (N.S.W.S.C.).

14. (1867) 2 Ch. App. 405,410(LC)

15. "the sum" in S218(a).

16. [1966] Qd.R.1 (Qd. Full Court).

17. Stanley, Jeffriess and Hanger JJ.

18. [1966] Qd.R.1,5.

19. [1969] N.Z.L.R. 794 (CA); affd. [1971] N.Z.L.R.929 (PC).

20. [1971] N.Z.L.R. 929, 931.

21. In order to be effective, the dispute must be made in good faith and on substantial grounds (see Part C infra).

22. [1969] N.Z.L.R. 794, 816.

23. [1969] N.Z.L.R. 794, 819-820.

24. Re Tweeds Garages Ltd. [1962] 1 All ER 121 (Ch.D) (infra)

25. Re Nickel Mines Ltd. (1978) 3 A.C.L.R.686(N.S.W.S.C.); Mutual Home Loan Fund of Australia Ltd. v. Smith (1978) 3 A.C.L.R.589 (N.S.W.S.C.); Re Convere Pty.Ltd.[1976] VR 345 (Victoria S.C.). In the last case, Kaye J. relied on Re Tweeds Garages (note (24) supra), which is not authority for the proposition.

26. Except that it appears to apply to writs of sale and distress warrants but not to charging orders or garnishee proceedings.

27. See S2(3), Sale of Goods Act 1908.

28. Re European Life Assurance Society (1869) L.R.9 Eq.122 (V-C); Re Capital Annuities Ltd.[1978] 3 All ER 704 (Ch.D)

29. i.e. debitum in praesenti, solvendum in futuro.

30. [1980] 1 All ER 241 (CA).

31. [1980] 1 All ER 241, 243: "a prospective creditor is a creditor in respect of a debt which will certainly become due in the future, either on some date which has been already determined or on some date determinable by reference to future events."

32. Stonegate Securities v. Gregory [1980] 1 All ER 241, 243; Re William Hockley Ltd. [1962] 2 All ER 111 (Ch.D); Community Development Pty. Ltd. v. Engwirda Construction Co. (1969) 120 CLR 455 (H.Ct.Au.). The liability may be unliquidated.

33. [1968] 2 All ER 769 (Ch.D). There is, however, authority for the proposition that an unregistered over-sea company can be wound up even if the existence of the

obligation is disputed, if the petitioner would otherwise be without a remedy: Re Russian and English Bank [1932] 1 Ch.663 (Ch.D); Re Russian Bank for Foreign Trade [1933] 1 Ch. 745 (Ch.D); Re Tovarishestvo Manufactur Liudvig - Rabenek [1944] 1 Ch.404 (Ch.D).

34. Accordingly, it was unnecessary to rely on S218(a).

35. [1968] 2 All ER 769, 771.

36. S219 in New Zealand.

37. [1968] Qd.R. 548 (Qd.S.C.);affd. [1969] Qd.R.1 (Qd.Full Court), affd (1969) 120 CLR 455 (H.Ct.Au.)

38. [1980] 1 All ER 241 (CA).

39. For the form of the order see [1980] 1 All ER 241, 245-6.

40. [1981] 1 All ER 254 (Ch.D). The case was also decided on other grounds.

41. [1978] 2 All ER 276 (Ch.D).

42 In Stonegate Securities Ltd. v. Gregory [1980] 1 All ER 241 (supra), CA disapproved of certain statements made by Goulding J. in Holt Southey, holding that in a case where the petitioner was only a contingent or prospective creditor but had nevertheless served a statutory demand, the company was entitled to an injunction restraining the presentation of a petition otherwise than as a contingent or prospective creditor (See Part F.infra).

43. And the dispute is based on substantial graounds (see Part C infra).

44. Part II supra.

45. Part I supra.

46. Bowes v. Hope Life Assurance Society (1865) 11 HLC 389; 11 ER 1383 (HL) per Lord Cranworth at p.402; IOC Australia Pty.Ltd. v. Mobil Oil Australia Ltd. (1975) 2 ACLR 122 (High Court of Australia).

47. In Niger Merchants Company v. Capper (1877) 18 Ch.D.557n (MR), Sir George Jessel M.R. said: "Where a company is insolvent, no doubt it is reasonable to wind up the company, even when the debt is disputed".

48. 1962] 1 All ER 121 (Ch.D).

49. (1875) LR 19 Eq.444 (MR): Part I supra.

50. [1962] 1 All ER 121, 124. Re Tweeds Garages has sometimes been taken as authority for the proposition that a dispute as to the amount of the debt does not render a statutory demand invalid: see, e.g. Bateman Television v. Coleridge Finance [1969] N.Z.L.R. 794, 816, 819-820; Re Convere Pty. [1976] VR 345. It is not authority for that proposition since the company was proved to be insolvent aliunde. See Part I supra.

51. [1968] Qd.R.548 (Qd.S.C.), [1969] Qd.R.1 (Qd.Full Court); affd. (1969) 120 C.L.R. 455 (H.Ct.Au.); see also Re a Private Company [1935] N.Z.L.R. 120 (SC).

52. For these purposes there is normally no need to distinguish between a set-off and a counterclaim: Fortuna Holdings Pty. Ltd. v. Deputy Federal Commissioner of Taxation (1976) 2 A.C.L.R. 349 (Victoria S.C.); Re Glenbawn Park Pty.Ltd. (1977) 2 ACLR 228 (N.S.W.S.C.). Unless the context otherwise requires, the expression "counterclaim" shall include "set-off" throughout this paper.

53. [1954] VLR 505; [1954] ALR 917 (Victoria S.C.); and see the Fortuna Holdings case - supra; note (52).

54. [1970] Qd.R. 37, 43 (Qd.S.C.).

55. (1980) 5 ACLR 28, 31 (N.S.W.S.C.); Re Glenbawn Park Pty. Ltd. (1977) 2 ACLR 228 (N.S.W.S.C.).

56. To "neglect" is simply to fail to perform a duty (see note (12) supra). The misconception stems from a passage in the judgment of Jessel M.R. in Re London and Paris Banking Corporation, cited in Part AI supra.

57. Re Jeff Reid Pty. Ltd. (supra: note (55)).

58. (1977) 2 ACLR 228 (N.S.W.S.C.).

59. Compare Re Jeff Reid Pty. Ltd. (supra: Note (55)).

60. Re Hiram Maxim Lamp Company [1903] 1 Ch.70 (Ch.D).

61. [1954] VLR 505, 507.

62. In Re Glenbawn Park Pty.Ltd. (supra: note (58)), Yeldham J. appeared to consider that it did not matter which prerequisite was affected. It is, however, submitted that it is most important to appreciate that a set-off or counterclaim (unlike a disputed debt) is only a matter to be considered when the Court exercises its discretion and does not mean that the petition fails in limine. For its relevance in practice, see Part F infra.

63. (1977) 2 ACLR 228 (N.S.W.S.C.); see also Clem Jones Pty. Ltd. v. International Resources Planning and Development Pty.Ltd. [1970] Qd.R.37 (Qd.S.C.); Universal Chemicals Ltd. v. Hayter [1980] NZ Recent Law 194 (SC).

64. (1964) 108 Sol.Jo.581 (CA), discussed and criticised in Re L.H.F. Wools, Ltd. [1969] 3 All ER 882 (CA) at pp 886, 889, 891.

65. [1962] 1 All ER 498 (Ch.D).

66. [1962] 1 All ER 498, 500.

67. [1969] 3 All ER 882 (CA); and see the approaches of O'Bryan J. in Re K.L. Tractors Ltd. [1954] VLR 505 (Victoria S.C.) and of McGarvie J. in Fortuna Holdings Pty. Ltd. v. Deputy Federal Commissioner of Taxation (1976) 2 ACLR 349 (Victoria S.C.).

68. [1969] 3 All ER 882, 885 per Harman L.J. in a slightly different context.

69. Re Douglas (Griggs) Engineering Ltd. [1962] 1 All ER 498 (Ch.D); Cf.Re L.H.F. Wools, Ltd. [1969] 3 All ER 882 (CA).

70. Even if it can not technically be pleaded as an equitable set-off; see Re Glenbawn Park Pty. Ltd. (1977) 2 ACLR 228 (N.S.W.S.C.).

71. Re L.H.F. Wools, Ltd. [1969] 3 All ER 882, 891-2. Another factor taken into account in that case included the fact that the company had ceased trading. The Court also considered whether the directors or a liquidator would be best suited to pursue the counterclaim.

72. Re Catholic Publishing and Bookselling Company Limited (1864) 2 De GJ & S.116; 46 ER 319 (LJJ).

73. Re Brighton Club and Norfolk Hotel Co. (Ltd) (1865) 35 Beav. 204; 55 ER 873 (MR).

74. The test is the same whether the debt is disputed,or the company has a set-off or counterclaim: Re K.L. Tractors [1954] V.L.R.505 (Victoria S.C.).
Some of the expressions used in the cases are:
(a) is there "so much doubt and question about the liability to pay the debt that the Court see that, there is a question to be decided" - Re General Exchange Bank (Ltd) (1866) 14 LT 582 (MR) per Lord Romilly MR;

(b) "the dispute must be one in which the Court feels that there is substance, so that it cannot be decided on an interlocutory application" - Re Imperial Silver Quarries Company Ltd. (1868) 16 WR 1220 (V-C), per Malins V-C.

(c) "They must bring forward a prima facie case which satisfies the Court that there is something which ought to be tried..." - Re Great Britain Mutual Life Assurance Society (1880) 16 Ch.D 246 (CA) per Jessel M.R.

(d) "It is not because a man says "I dispute the debt" that that makes it a disputed debt. He must give some reasonable ground, and if he writes a series of nonsensical propositions, it appears to me the creditor is entitled to say: "You are merely amusing yourself by trying to put me off with vague and frivolous excuses - you do not see any ground to dispute it in law." - Re Imperial Hydropathic Hotel Company, Blackpool, Ltd. (1882) 49 LT 147 (CA), per Jessel M.R.

(e) See, also, Re Welsh Brick Industries Ltd. [1946] 2 All ER 197 (CA); Re Q.B.S. Pty. Ltd. [1967] Qd.R.218 (Qd.S.C.); Re Mittagong RSL Club Ltd. (1980) 4 ACLR 897 (N.S.W.S.C.): Dina Plastics Ltd. v. Neill Cropper & Company Ltd. (High Court, Auckland; 22nd May 1981; A.422/81; Chilwell J.)

75. cf Needham J. in Medi Services International Pty. Ltd. v. Jarson Pty. Ltd. (1978) 3 ACLR 518 (N.S.W.S.C.) who indicated that it was for the petitioner to show, "on a balance of probability, that there is no substance in the alleged dispute." This dictum is inconsistent with the other authorities, such as those cited in note (74) supra.

76. For the form of the Order, see Part E infra.

77. Re Catholic Publishing and Bookselling Company Limited - supra, note (72), Re Lympne Investments Ltd. [1972] 2 All ER 385 (Ch.D).

78. Re Turf Enterprises Pty. Ltd. (1975) 1 ACLR 197 (Qd.S.C.).

79. Bateman Television Ltd. v. Coleridge Finance Company Ltd. [1969] NZLR 794 (CA) per North P. at p.810.

80. Re Imperial Silver Quarries Company Ltd. (1868) 16 WR 1220 (V-C); but not if the dispute is complex: Re Horizon Pacific Ltd. (1977) 2 ACLR 495 (N.S.W.S.C.).

81. (1977) 2 ACLR 495, 498 (N.S.W.S.C.).

82. See note (46) supra.

83. Re United Stock Exchange Company [1884] WN 251 (Ch.D) Pearson J. did not refer the bankruptcy cases, but the principle would appear to be the same.
The bankruptcy cases include: Re Onslow, ex p. Kibble (1875) 10 Ch.App.373 (LJJ); Re Lennox (1885) 16 QBD 315 (CA); Re Hawkins, ex p. Troup [1895] 1 QB 404 (CA).
The right to go behind a judgment debt other than in bankruptcy or liquidation is restricted to cases where the judgment was obtained by fraud (in the common law sense) - The Ampthill Peerage Case [1976] 2 All ER 411 (HL).

84. Re Anglo-Bavarian Steel Ball Co. [1899] WN80 (Ch.D).

85. Re Amalgamated Properties of Rhodesia (1913) Ltd. [1917] 2 Ch.115 (Ch.D.and CA).

86. Re Mosbert Finance (Australia) Pty. Ltd. (1976) 2 ACLR 5 (W.A.S.C.) - where the petition was adjourned on terms.

87. e.g. Ex.p. Rhydydefed Colliery Company, Glamorganshire, Ltd. (1858) 3 De.G. & J. 80; 44 ER 1199 (LJJ).

88. e.g. Re Brighton Club and Norfolk Hotel Company (Ltd) (1865) 35 Beav.204; 55 ER 873 (MR); Re London Wharfing and Warehousing Company (Ltd) (1865) 35 Beav.37; 55 ER 808 (MR).

89. see, e.g. the remarks of Megarry J. in Re Lympne Investments, Ltd. [1972] 2 All ER 385, 389.

90. Re L.H.F. Wools Ltd. [1969] 3 All ER 882 (CA); Re Jeff Reid Pty. Ltd. (1980) 5 ACLR 28 (N.S.W.S.C.). The problem with such an approach is that the period of relation back under S222 may be extended for a very long period.

91. Cadiz Waterworks Company v. Barnett (1874) LR 19 Eq.182(V-C)

92. Re Gold Hill Mines (1883) 23 Ch.D.210 (CA).

93. Tench v. Tench Bros. Ltd. [1930] NZLR 403 (CA); Associated Theatre Services Ltd. v. N.Z. Express Transport Ltd. [1980] N.Z.Recent Law 194 (SC).

94. Re a Company [1894] 2 Ch.349 (Ch.D).

95. [1968] 2 All ER 769 (Ch.D) - discussed in Part A II supra.

96. [1968] 2 All ER 769,775.

97. New Travellers' Chambers Ltd. v. Cheese and Green (1894) 70 LT 271, 272.

98. A petitioner does not lose his locus standi simply because the debt is disputed, but only if the obligation on which the debt is based is disputed. Community Development Pty. Ltd. v. Engwirda Construction Co.(1969) 120 CLR 455 (discussed in Part A II supra).

99. See Part A I supra.

100. Quartz Hill Consolidated Gold Mining Company v. Eyre (1883) 11 QBD 674 (CA).

101. Stonegate Securities Ltd. v. Gregory [1980] 1 All ER 241 (CA). See Part A II supra; Detroit Finance Corporation Ltd. v. Camillo (1979) 4 ACLR 509 (N.S.W.S.C.).

102. (1874) LR 19 Eq. 182 (V-C).

103. At the time, a contingent creditor could not petition, and accordingly the case could have been decided on the basis of lack of locus standi. It was, however, decided on a different ground and has consistently been followed: John Brown & Co. v. Keeble [1879] WN 173 (V-C); Niger Merchants Company v. Capper (1877) 18 Ch.D.557n (MR); Cercle Restaurant Castiglione Company v. Lavery (1881) 18 Ch.D.555 (MR); Re Gold Hill Mines (1883) 23 Ch.D 210 (CA): Re Compagnie Generale des Asphaltes de Paris [1883] WN 17 (V-C); Charles Forte Investments Ltd. v. Amanda [1963] 2 All ER 940 (CA); Metal Protectives Co. Pty.Ltd. v. Site Welders Pty. Ltd. [1968] 1 N.S.W.L.R.106 (N.S.W.S.C.); Mutual Home Loan Fund of Australia Ltd. v. Smith (1978) 3 ACLR 589 (N.S.W.S.C.).

104. e.g. Re Gold Hill Mines (1883) 23 Ch.D 210 (CA).

105. Community Development Pty. Ltd. v. Engwirda Construction Company [1968] Qd.R.541 (Qd.S.C.).

106. [1980] 1 All ER 241 (CA).

107. [1980] 1 All ER 241; per Buckley LJ at p.247; per Goff LJ at p.249; per Sir David Cairns at p.251.

108. See notes (102) and (103) supra.

109. See Part B supra.

110. (1976) 2 ACLR 349, 359 (Victoria S.C.). In Clem Jones Pty. Ltd. v. International Resources Planning and Development Pty. Ltd. [1970] Qd.R. 37 (Qd.S.C.) and Re Glenbawn Park Pty. Ltd. (1977) 2 ACLR 228 (N.S.W.S.C.), injunctions were granted on the grounds either that the petitioner was not a "creditor" of the company, or that the statutory demand was invalid. This reasoning has been deprecated in Part B, supra.

111. [1980] NZ Recent Law 194 (S.C.); and see Dina Plastics Ltd. v. Neill Cropper & Company Ltd. (High Court, Auckland; 22nd May 1981; A.422/81; Chilwell J.) cf the approach taken in Stonegate Securities Ltd. v. Gregory [1980] 1 All ER 241 (CA).

112. (1977) 2 ACLR 228 (N.S.W.S.C.).

113. See American Cyanamid Co. v. Ethicon Ltd. [1975] 1 All ER 504 (HL).

114. See Universal Chemicals Ltd. v. Hayter - supra note (111).

115. S23(b) Insolvency Act 1967).

116. For the meaning of "final" in this context, see Bozson v. Altrincham U.D.C. [1903] 1 KB 547 (CA).

117. For the meaning of "counterclaim, set-off or cross demand" see Re G.E.B. [1903] 2 KB 340 (CA); Re a Bankruptcy Notice (No. 171 of 1934) [1934] 1 Ch.431 (CA); Re a Debtor (No.80 of 1957) [1957] 2 All ER 551 (CA).

118. Re H.B. [1904] 1 KB 94 (CA); Re a Debtor (No.478 of 1908) [1908] 2 KB 684 (CA); Re Eva [1927] NZLR 652 (N.Z.S.C.).

119. For a useful discussion of the meaning of "liquidated sum" see Alexander v. Ajax Insurance Co. [1956] VLR 436 (Victoria S.C.).

120. See note (83) supra.

121. Re Burke (1886) NZLR 4 SC 303 (SC); Re Slater (1889) 8 NZLR 224 (SC).

122. This appears to be the reason why Connolly J. distinguished Re Burke in Re Humphreys (1890) 8 NZLR 421 (SC).