

# CROSS CLAIMS AND WINDING UP PETITIONS:

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## Further Clarification.

*Victory House General Partner Ltd v RGB P&C Ltd [2018] EWHC 1143:*

- ▶ Confirms that a winding-up petition based on a failure to pay is likely to be stopped where a genuine cross-claim exists;
- ▶ Follows the TCC's decision in *Grove v S&T* that an employer can bring a second adjudication to determine the true value of the works and may be entitled to repayment if the Contractor has been overpaid.

## What's it about?

RGB was appointed as contractor under a JCT Design and Build 2011 contract in relation to an office development in Leicester Square. The Employer (Victory House) failed to give a pay-less notice in response an application for interim payment made by RGB and following an adjudication, RGB was awarded the amount claimed in the interim application (£680,000). Victory House failed to pay and Part 8 enforcement proceedings were commenced in the Technology & Construction Court (TCC). The court entered judgment in favour of RGB for the amount awarded by the adjudicator.

A second adjudication commenced by Victory House determined that the true value of the works at that point in time was £7m. RGB had been paid £8.5m, meaning an overpayment by Victory House of £1.5m. On that basis, the adjudicator determined that the amount due to RGB was nil.

RGB submitted a winding-up petition in relation to Victory House's failure to pay the judgment debt. Victory House argued that it had a cross-claim and if it had paid the judgment debt, it would have been immediately entitled to repayment under the law of restitution.

## Why does it matter?

In reaching its decision, the court agreed that Victory House had a genuine cross-claim, based on the decision reached in the second adjudication. Mr Justice Morgan placed much emphasis on Coulson J's decision in *Grove Developments Ltd v S&T (UK) Ltd [2018] EWHC 123 (TCC)*, 177 ConLR 30, which stated that:

- ▶ an employer could bring a second adjudication to determine the true value of the works; and
- ▶ if the second adjudication confirmed that the contractor had in fact been over paid, the employer would be entitled to repayment.

Citing the general test in *Re Bayoil SA; Seawind Tankers Corp v Bayoil SA - [1999] 1 All ER 374*, Mr Justice Morgan considered that in the absence of special circumstances (there weren't any on the facts of this case), a winding-up petition should be dismissed if there is a bona fide cross-claim put forward for an amount which exceeds the judgment debt.

## Now what?

Though not a ground breaking decision, the judgement in this case serves to reinforce Coulson J's decision in *Grove* which departed from the previous position that, where an employer had failed to serve a payment notice or pay less notice, it could not adjudicate on the true value of that payment.

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