[2011]JRC016A

ROYAL COURT
(Samedi Division)

19th January 2011

Before : M.C. St. J. Birt, Esq., Bailiff, sitting alone.

Between	**Leeds United Association Football Club Limited**	**First Plaintiff**
	Leeds United Football Club Limited (formerly Leeds United 2007 Limited)	**Second Plaintiff**
And	**The Phone-in-Trading-Post Limited (t/a Admatch)**	**Defendant**

Advocate P. C. Sinel for the Plaintiffs.

Mr R Weston as Director of the Defendant.

JUDGMENT

THE BAILIFF:

1. This is an application by the plaintiffs to strike out the answer of the defendant and seek judgment against the defendant on the grounds that the defendant's continued actions and inactions in these proceedings amount to an abuse of the court's process.

Background

2. There have been numerous interlocutory judgments in these proceedings in which the factual background has been described. For present purposes it can be summarised as follows.

3. The first plaintiff is an English company which once owned and operated Leeds United Football Club. The defendant, which trades under the name of Admatch, is a Jersey company owned and controlled by Mr Robert Weston. In August 2004, the first plaintiff and the defendant entered into an agreement for the defendant to act as agent to the first plaintiff for the purpose of selling match

and season tickets by credit card. There is no dispute that the defendant owes the first plaintiff £190,400 under that agreement.

4. In the course of 2005, control of the first plaintiff was acquired by interests associated with Mr Ken Bates. The present proceedings were issued by the first plaintiff in December 2005 seeking payment from the defendant of the sum of £190,400. On 4th May 2007 the first plaintiff went into administration, with net debts reported to be about £40 million. By an agreement of that date, the administrators transferred the assets of the first plaintiff (including the claim against the defendant) to the second plaintiff, and the shares in the second plaintiff were sold to a consortium led by Mr Bates. Subsequently, the first plaintiff went into liquidation. On 26th July 2007, the second plaintiff was joined to the action. Amended particulars of claim (to take account of the addition of the second plaintiff) were filed on 31st July 2007 and an amended answer was filed on 23rd August 2007.

5. As already mentioned, the debt in the sum of £190,400 is admitted. However the defendant contends that the agreement contained at clause 9(f) a set-off clause which entitled the defendant to set-off from any monies it owed to the first plaintiff any sum owed by the first plaintiff (or by any parent, associate or subsidiary company of the first plaintiff) to the defendant (or to any parent, associate or subsidiary company of the defendant). The defendant alleges in its answer that the sum of £1,439,734 is owed by the first plaintiff and/or an associated company of the first plaintiff to Cope Industrial Holdings Limited ("Cope"), which is a company in which Mr Weston has a controlling interest and is said therefore to be an associated company of the defendant.

6. The proceedings have been bedevilled by interlocutory jousting between the parties. It is not necessary to refer to the history in detail. For today's purposes the relevant events would appear to be as follows.

7. In the original pleadings, the plaintiffs admitted the existence of the set-off provision at clause 9(f) of the agreement but denied that it was relevant on the grounds that the debt of £1,439,734 was owed to Mr Levi (an associate of Mr Weston's and a fellow shareholder in Cope) rather than to Cope, that the debtor company was not an associate of the first plaintiff and that Cope was not an associate of Admatch.

8. On 24th April 2007 the Master made an unless order against the defendant in respect of the provision of discovery. That order was not complied with but the matter became entangled with an application by the defendant for a stay of the proceedings pending the hearing of an application for security for costs. On 21st August the Master refused a stay but extended the time for compliance with the unless order.

9. On 4th February 2008 the Master made an order requiring the defendant to give certain discovery and to file further and better particulars of its amended answer. Following a failure by the defendant to comply with that order, the Master made an 'unless' order on 18th March to the effect that the amended answer would be struck out if the defendant did not comply with the order of 4th February 2008 within 28 days. That period expired at midnight on 15th April. The defendant sent an e-mail minutes thereafter providing a draft affidavit of discovery but the further and better particulars were not provided at that stage. The Master refused to grant a retrospective extension of time for compliance with the unless order but, for the reasons set out in a judgment dated 30th May 2008, I subsequently allowed an appeal against that decision and granted the required extension of time.

10. A trial date had been fixed for 2nd December 2008 but this was vacated by order of 28th October 2008. On 1st December 2008 the second plaintiff filed an amended reply to the defendant's amended answer which had been filed on 23rd August 2007. For the first time the second plaintiff now conceded that Cope was an associated company of Admatch and that the debtor company in respect of the £1,439,734 was an associated company of the first plaintiff. The sole dispute at that stage therefore appeared to be whether that sum was owed to Cope (as the defendant contended) - in which event it could be set off against the £190,400 - or to Mr Levi (as the second plaintiff contended) – in which event it could not.

11. However, matters changed shortly thereafter. On 29th January 2009, the defendant filed a re-amended answer which alleged that the assignment by the first plaintiff to the second plaintiff of the benefit of the claim to £190,400 was invalid under Jersey law. On 16th February 2009, the second plaintiff filed a re-amended reply joining issue in relation to the issue of the assignment.

12. The proceedings now became side-tracked by an issue as to security for costs. On 21st August 2008 and 4th December 2008, I had made orders requiring the second plaintiff to provide security for costs up to and including trial. On 19th May 2009, the Court of Appeal allowed the second plaintiff's appeal against those orders. On 17th December 2009 the plaintiffs applied for leave to further amend the claim so as to allege that, contrary to what they had admitted previously, the agreement did not in fact contain the set-off provision in clause 9(f). After a contested hearing I granted leave for the plaintiffs to re-amend the particulars of claim and ordered that the defendant file a re-amended answer to the re-amended claim by 1st February 2010, such amendments being limited to those consequential upon the amendments made by the plaintiffs. Various other orders were made including that both parties should file revised affidavits of discovery, including in particular documents relied upon arising out of proceedings for libel in the English High Court between Mr Levi and Mr Bates.

13. When allowing the appeal in respect of security for costs, the Court of Appeal had made an order for standard costs against the defendant. These were subsequently taxed and the Greffier certified total costs in the sum of £63,529.79 on 19th January 2010. The plaintiffs' advocates wrote to Mr Weston on 20th January 2010 requesting payment of the costs within seven days. On 29th January the matter was placed in the hands of the Viscount's Department for enforcement but no recovery has been possible. On 4th February, Mrs Weston sent an e-mail to the plaintiffs' advocates stating that the re-amended answer would be filed as soon as Mr Weston was well enough to do so. However, she went on to say that, in view of the fact that the enforcement of the taxed costs had been put in the hands of the Viscount, the intention of the defendant to file the re-amended answer had to be conditional upon the company being permitted to remain in existence (in order to continue defending the action). She said that the situation would be resolved more quickly and more certainly if the plaintiffs were to withdraw the instructions to the Viscount's Department to enforce the claim for costs until after completion of the proceedings as a whole.

14. The plaintiffs filed the present summons on 12th February 2010 referring in particular to the defendant's failure to pay the taxed costs, the failure to file the answer to the re-amended particulars of claim by 1st February (as ordered on 17th December 2009), defending a claim when the defendant had no funds to honour any award and for other unspecified repetitive breaches of court orders and timetables.

15. The hearing of the summons was listed for 8th April 2010. On 1st April, after the plaintiffs had served and filed their bundle for the hearing, Mrs Weston wrote back stating that the defendant would not be able to attend the Royal Court because of illness on the part of Mr Weston. She supplied a redacted medical certificate dated 15th March. On 8th April, having heard from Mrs Weston on behalf of the defendant and Advocate Sinel on behalf of the plaintiffs and having seen a brief medical report from Mr Weston's doctor, I adjourned the summons.

16. The matter was re-listed for 10th June and on that occasion the defendant again applied for an adjournment. On that occasion I was provided with a medical report from Mr Weston's specialist and, for the reasons set out in a judgment of that date, I agreed to adjourn the matter until the first available date after 1st October 2010. I made it clear that it was highly unlikely that any further adjournment would be granted and that, if Mr Weston remained unable through illness to represent the defendant, the company would have to make alternative arrangements for representation. The first plaintiff sought leave to appeal against my decision to grant an adjournment but this application was refused on the papers by the Deputy Bailiff as single judge and subsequently by Pleming JA after oral argument. It was in those circumstances that the summons came to be heard on 26th October.

The plaintiffs' submissions

17. On behalf of the plaintiffs, Advocate Sinel submits that the defendant's conduct in relation to the claim amounts to an abuse of process such that it should be debarred from defending the case. He relies on a number of matters.

18. First, he refers to the fact that the defendant has not paid the sum of £63,529 in respect of taxed costs which, pursuant to RCR12/3(2), are payable forthwith. He points out that in response to the demand for payment, Mrs Weston sent an e-mail dated 27th January 2010 stating that the defendant intended to appeal the decision of the taxing officer, that the defendant had not received any income for the past five years, that it had no funds available to meet the requested payment of costs, and that a decision would have to be taken by the defendant's shareholders as to whether or not to put the company into liquidation as they were not willing to provide additional funding to enable payment of the costs. Further information about the financial position of the defendant is to be found in the affidavit dated 12th February 2010 sworn by Mr Weston. In that affidavit he said that the defendant had not traded since 1999, apart from the short period in 2004 when it acted pursuant to the agreement with the first plaintiff. It had no assets. It had only one bank account which was overdrawn to the extent of some £9,700. It had other creditors, namely Mr Weston and companies wholly or partially owned by him. These other debts amounted to many times the value of the claim by the plaintiffs but none of these creditors had been pressing for payment. Mr Weston had personally guaranteed the overdraft with the bank and had agreed to pay off the overdraft pursuant to that guarantee.

19. Advocate Sinel pointed out that the sum of £190,400 had been disbursed by the defendant to other companies owned by Mr Weston notwithstanding that the agreement provided that the sum in question remained the property of the first plaintiff. In the circumstances, it was an abuse of process for the defendant to continue to defend the claim when it had not paid the order for costs.

20. Secondly, Advocate Sinel argued that it was an abuse of process for the defendant to continue to defend the claim when it had no funds with which to settle any liability ultimately found against it and when Mr Weston had made it clear that he would not be putting in funds to pay the claim.

21. Thirdly, he referred to the fact that the defendant was in continued breach of the order of the court dated 17th December 2009 in two respects, namely it had failed to file a re-amended answer to the re-amended particulars of claim by 1st February 2010 and it had failed to file a revised affidavit of discovery by 15th February 2010.

22. Fourthly, he referred to repeated breaches of court orders and timetables. For example, the defendant had repeatedly sought to delay the hearing of this particular summons, it having originally been fixed for hearing on 8th April 2010 and had also delayed the taxation of the costs awarded by the Court of Appeal for a considerable period. The defendant had also sought to delay the hearing of the appeal against my decision to adjourn the hearing of the summons on 10th June 2010; the defendant had failed to comply with two unless orders, namely those of 24th April 2007 and 18th March 2008 (as described above); and had also repeatedly been late in complying with orders, for example the Act of 16th April 2009 requiring a memorandum of understanding to be produced by 30th April 2009 and delays leading up to the hearing of 22nd January 2009 in relation to the issue of segregated funds.

23. In short, argued Advocate Sinel, the defendant was doing all it could to avoid the matter ever coming to trial. The defendant, said Advocate Sinel, knew that it would lose when the case eventually came to trial and was therefore simply delaying matters indefinitely in the hope that the plaintiffs would give up because the costs would become out of all proportion to the sum at stake. In support of his assertion, Advocate Sinel referred to the chronology attached to his skeleton argument and the affidavit sworn by Mr Hiren Mistry, an employee of Advocate Sinel, in support of the summons. I have carefully considered those documents.

The defendant's submissions

24. In response, Mr Weston argued on behalf of the defendant that there had not been any abuse of process. The defendant was insolvent on an asset basis but had not been insolvent on a cash flow basis until the plaintiffs had demanded payment of the taxed costs. The defendant did not have any monies with which to pay the costs. An impecunious defendant was entitled to defend a claim and should not be barred from doing so because of an inability to pay a costs order or to pay any sum ultimately found to be due. There was an additional reason for permitting the defendant to defend the claim in this case. The plaintiffs had made it clear that, if, following a successful outcome of their claim against the defendant, they were unable to recover from the defendant, they would pursue Mr Weston and/or one or more of his companies. If the defendant was debarred from defending the claim, this would severely prejudice Mr Weston and/or his other companies as they would not be able to dispute the liability of the defendant in the course of the subsequent proceedings against them. This would be grossly unfair when there was a valid defence to the claim.

25. Mr Weston submitted that, far from the defendant not wishing to allow the matter to come to trial, it was the plaintiffs who did not wish the matter to come to trial as they knew they would lose. Mr Bates was seeking to browbeat the defendant into submission without a hearing. This was particularly so following the decision of the Court of Appeal in relation to security for costs,

because the comments of the Court of Appeal suggested that the defendant, being a company represented by its director, would not be able to recover any costs even where costs were awarded in its favour. Thus the plaintiffs could safely run up costs without any risk of having to pay costs to the defendant. As to the merits, Mr Weston referred to the libel action in the High Court in London where the judge had found the evidence of Mr Levi and Mr Weston himself to be credible and reliable, whereas he had found the evidence of both Mr Bates and his solicitor Mr Taylor (who would be key witnesses in the present case) to be unreliable and, in Mr Bates' case, undermined by documents. Mr Bates wished to try and win the case without going to trial by swamping the defendant with collateral issues so that it missed deadlines imposed by the Court. Mr Weston admitted that the £190,400 had been disbursed amongst various of his other companies but this was only done following exercise of the right of set off, at which point the monies concerned became the property of the defendant.

26. He accepted that the defendant had failed to file the re-amended answer by 1st February 2010 or to file an affidavit of discovery by 15th February but the failure to do so had been due to his ill health and to the fact that, since then, the plaintiffs had forced the defendant to spend time in litigating the present summons and the plaintiffs' various unsuccessful appeals to the Court of Appeal. This meant that he was unable to attend to the outstanding matters. He concluded that, even in normal circumstances, it took him up to ten times as long as a small team of lawyers with secretarial resources would take to carry out the same task. During the course of 2010, he had been even more limited because of his illness. The plaintiffs were continuing their tactic of overwhelming the defendant with paperwork and numerous hearings in order to make things impossible for the defendant. The filing of the answer and the affidavit of discovery were the only outstanding matters and these could be dealt with by an order giving new deadlines for compliance.

27. As to the alleged repetitive breaches, he accepted that the defendant had on occasions been late but this was due to the problems of not having a lawyer and the breaches had all been rectified. The plaintiffs had been guilty of far greater delays and indeed had been responsible for loss of most of the trial dates which had been fixed.

28. In short, there had been no abuse of process and there was no reason why the court should not give directions now to bring the matter to trial. When pressed as to how long he would require to produce the re-amended answer and affidavit of discovery, Mr Weston stated that the amendment by the plaintiffs in December 2009 of its case concerning whether the set-off provision was contained in the agreement would involve a substantial revision of the pleadings. Furthermore, there had been a delay in the defendant receiving the documents from the libel proceedings in England and this had been caused by the failure of the plaintiffs to grant consent.

These documents would need to be reviewed. He thought he would require five weeks in order to comply with the two outstanding matters.

The law

29. I was referred to a number of cases, but it seems to me that the applicable principles are to be found in those referred to below.

30. In Alhamrani v Alhamrani and others [2008] JRC 051, the Royal Court was faced with a defendant, Sheik Abdullah, who had repeatedly failed to comply with orders of the Court or to take an appropriate part in the proceedings. Having summarised at paragraph 34 of the judgment the nature of the inherent jurisdiction of the Court following Mayo v Cantrade [1998] JLR 173, Page Commissioner said this at paragraph 37:-

> ***"It is axiomatic that one area in which considerations of necessity may demand the exercise of the court's inherent jurisdiction is when someone who has been properly made a party to the litigation takes it upon himself to flout or ignore the court's orders or persistently to conduct himself in a way that evinces an unwillingness to engage in the litigation process on an equal footing with the other parties, as here. And, while striking out or threatening to strike out a defendant's pleading, or otherwise barring him from defending proceedings, is a strong thing to do – more so, perhaps, than striking out a plaintiff – the ability to do so in an appropriate case must be, on any view, a necessary part of the court's armoury."***

31. Despite the fact that the conduct of Sheik Abdullah as summarised in the judgment was, in my judgment, worse than that of the defendant in this case, the court in Alhamrani gave Sheik Abdullah a final chance to put his house in order. It made clear, however, that any further breach of court orders would be likely to lead to the summary striking out of his answer.

32. Although, initially, Sheik Abdullah complied with the order, he failed to participate in the proceedings at a later stage as a result of which his answer was struck out. On appeal [2008] JCA 187A, the Court of Appeal confirmed at paras 65 – 67 of the judgment the jurisdiction of the Royal Court to strike out a defence because of defaults on the part of a defendant in complying with orders of the Court. Nevertheless, the Court of Appeal emphasised the drastic consequences of such an order and, despite Sheik Abdullah's conduct, allowed the appeal and permitted Sheik Abdullah to continue to defend the case provided that he paid into the hands of the Greffier a substantial sum by way of security for costs of the other parties.

33. Further assistance as to the circumstances in which striking out may be appropriate is to be found in the comment of Chadwick LJ in Arrow Nominees Inc v Blackledge [2000] 2 BCLC 167 at para 54:-

> ***"I adopt, as a general principle, the observations of Millett J in Logicrose v Southend United FC Limited (The Times 5 March 1988) that the object of the rules as to discovery is to secure the fair trial of the action in accordance with the due process of the Court; and that , accordingly, a party is not to be deprived of its right to a proper trial as a penalty for disobedience of those rules- even if such disobedience amounts to contempt for or defiance of the Court – if that object is ultimately secured by (for example) the late production of a document which has been withheld. But where a litigant's conduct puts the fairness of the trial in jeopardy, where it is such that any judgment in favour of the litigant would have to be regarded as unsafe, or where it amounts to such an abuse of the process of the Court as to render further proceedings unsatisfactory and to prevent the Court from doing justice, the Court is entitled – indeed I would hold bound – to refuse to allow that litigant to take further part in the proceedings and (where appropriate) to determine the proceedings against him. The reason, as it seems to me, is that it is no part of the Court's function to proceed to trial if to do so would give rise to substantial risk of injustice. The function of the Court is to do justice between the parties, not to allow its process to be used as a means of achieving injustice. A litigant who has demonstrated that he is determined to pursue proceedings with the object of preventing a fair trial has forfeited his right to take part in a trial. His object is inimical to the process which he purports to invoke." (Emphasis added)***

34. The above passage was quoted with approval by Bean J in Madarassy v Nomura International plc [2006] All ER (D) 75 and he went on to say at para 30(iii):-

> ***"Striking out is a draconian remedy: it must be a proportionate response to the misconduct involved, and there must be a compelling reason for the Court or tribunal to take such a step."***

35. I draw from the above authorities the conclusion that it is a strong thing to strike out a defence and there must be an abuse of process such as to render further proceedings unsatisfactory or prevent the court from doing justice or, to quote Page Commissioner, a party must have flouted or ignored the Court's orders or persistently conducted himself in a way that evinces an unwillingness to engage in the litigation process on an equal footing with the other parties.

36. I should add that this is not a case where the defendant is, at present, in breach of an 'unless' order. The plaintiffs have not sought an unless order in respect of the two failures by the defendant to comply with the order of 17th December 2009. Where there is a breach of an unless order, different considerations are likely to apply; see the observations of Ward LJ in Hytec Information Systems Limited v Coventry City Council [1997] 1WLR 1666 at 1674 – 1675, quoted with approval by the Court of Appeal in Alhamrani at paras 84 and 85.

37. I turn next to consider the authorities in relation to a failure to pay a sum ordered by the Court, such as an order for costs. There is clear authority for the proposition that such a failure may lead to a party being struck out provided that the failure is not due to an inability to pay. Although the case involved very different issues, the observations of Millett LJ in Abraham v Thompson [1997] 4 All ER 362 at 377 are relevant:-

> ***"It is not an abuse of the process of the court for an impecunious plaintiff to bring proceedings for a proper purpose and in good faith while being unable to pay the defendant's costs if the proceedings fail. If the plaintiff is an individual the court has no jurisdiction to order him to provide security for the defendant's costs and to stay the proceedings if he does not do so. It may be unjust to a successful defendant to be left with unrecovered costs, but the plaintiff's freedom of access to the courts has priority. The risk of an adverse order for costs and consequent bankruptcy has always been regarded as a sufficient deterrent to the bringing of proceedings which are likely to fail. Where there is no risk of personal bankruptcy as in the case of a plaintiff which is a limited company, the court has a statutory jurisdiction to award security for costs; but even in this case it will frequently not do so if this will have the effect of stifling bona fide proceedings. It is preferable that a successful defendant should suffer the injustice of irrecoverable costs than that a plaintiff with a genuine claim should be prevented from pursuing it."***

These observations are, a fortiori, applicable in the case of an impecunious defendant who finds himself brought before a court at the instance of a plaintiff.

38. Nevertheless, the general principle is that, in the absence of an inability to pay, a party should pay an order for costs as it falls due and if the party does not do so, he may be struck out. Thus in Crystal Decisions (UK) Limited v Vedatech [2006] EWHC 3500 (Ch), having observed that there was no suggestion that the defendants could not in that case pay the costs of an interlocutory hearing which they had been ordered to pay, Patten J said as follows at para 16:-

"In any event I take the view that the orders of the Court, even in relation to interim costs, require to be complied with and that, unless there is some overwhelming consideration falling within Article 6 [of the ECHR] that compels the Court to take a different view, the normal consequence of a failure to comply with such an order is that the Court, in order to protect its own procedure, should make compliance with that order a condition of the party in question being able to continue with the litigation."

39. In the case of a company with no assets which is being supported by its shareholder or directors, the Court may look to the reality of the situation. In PDM Holdings (Jersey) Limited v Rockwood Investments Limited [2010] JRC 010, the plaintiff was a company with no assets and which had been used specifically to pursue the claim in question. An order for costs had been made against the plaintiff in respect of an unsuccessful interlocutory application and these had subsequently been taxed. The Royal Court upheld the decision of the Master to order that the claim would be struck out unless the plaintiff paid the sum due by way of taxed costs. The Royal Court observed that the directors of the plaintiff would have to fund the liability for costs if they wished the action to continue.

40. In Jakobsson v Offshore Nautical Sales Limited [2003] JLR 71, the plaintiff obtained judgment for £125,000 against the defendant company in respect of the sale of a yacht. After the events forming the basis of the plaintiff's claim, but prior to the commencement of the proceedings, the defendant transferred its business to another company within the same group. It therefore had a substantial balance sheet deficit and, but for the financial support of its parent company, would have been insolvent. The defendant's substantial legal costs and all other debts had been met by the parent company. The defendant sought to appeal the judgment of the Royal Court. The plaintiffs sought an order that the appeal be stayed until the defendant had provided security for the payment of the judgment debt and the plaintiff's costs before the Royal Court.

41. The Court of Appeal held that it had an inherent jurisdiction to enforce its rules of practice and to suppress any abuse or attempted thwarting of its process or that of the Royal Court. It held that an abuse of process had occurred. The actions of the defendant and the parent group i.e. the failure to comply with the Royal Court's order, the payment of the defendant's legal costs and other debts by the parent group, and the transfer of the franchise to another company within the group, was evidence of a clear intention, if the defendant's appeal were unsuccessful, to use the defendant's impecuniosity to force the plaintiff to undertake the long and expensive task of pursuing companies and individuals in the parent group for payment of the judgment debt. The defendant and the parent group were therefore attempting to use the courts to further their own interest, while refusing to comply with the Court's existing order. In the circumstances the appeal

was stayed until sufficient funds to meet the judgment debt and the plaintiff's costs were paid into Court or secured by bank guarantee.

Decision

42. I take first the non payment of the outstanding costs of £63,529. The starting position is that orders of the Court are to be obeyed and if a party refuses to pay an award of costs made against it, it is at risk of having its claim or defence, as the case may be, struck out. However, if the reason for non-payment is an inability to pay, questions of access to the Court under Article 6 ECHR will arise and may militate against an order striking out that party.

43. Nevertheless, as appears from PDM and Jakobsson, the Court may, in appropriate circumstances, order an impecunious company to pay sums due where this would otherwise give rise to an abuse of process. In my judgment, there would be such an abuse in this case if the defendant were allowed to continue to defend the case without paying the outstanding costs. I say this for the following reasons:-

(i) It is clear that the defendant has no real interest of its own in defending the action. It has no assets which could be taken in the event of a judgment against it. It is a dormant company. The sole interest in defending the case lies with Mr Weston and one or more of his other companies because, in the event of success against the defendant, it is clear that the plaintiffs intend to seek to recover the sum due from Mr Weston personally and/or from some of his companies. As Mr Weston rightly conceded, the position of himself and his companies would be prejudiced considerably in the event of judgment being obtained against the defendant because its defence had been struck out. They would lose the ability to argue that the sum of £190,400 is not owed and therefore they cannot be liable for it. In circumstances where the real interest in defending lies with Mr Weston and/or his companies, I do not consider it unreasonable to require that he or his companies fund the defendant so that it can pay the outstanding costs order as a condition for being allowed to continue to defend.

(ii) It is strongly arguable that the defendant should have retained the £190,000 pending resolution of the dispute. If it had done so, there would have been monies from which the outstanding costs order might have been paid, although it would clearly have been argued by the plaintiffs that these were proprietary funds and could not therefore be used for such a purpose. It was Mr Weston's decision, as director and shareholder of the defendant, to allow these monies to be transferred to one or more of his other companies, so that they have had the benefit of it. In the circumstances, it would in my judgment be an abuse for

the defendant to be allowed to continue to defend notwithstanding a failure to pay an outstanding costs order, when the monies in question were paid away to Mr Weston and/or his other companies.

(iii) On the basis of the evidence before me, I conclude that there should be no difficulty in Mr Weston and/or his companies funding the defendant to the extent of £63,529. In the first place, in an e-mail dated 24th October 2008 to the plaintiff's previous advocates, Mr Weston, on the topic of whether the defendant would be able to satisfy any judgment against it for the £190,400, said *"If it makes the plaintiff feel more comfortable, you may be assured that if there were to be any shortfall in the defendant's funds, I could personally afford to make up the shortfall if I choose to do so".* Secondly, at paragraph 57 of his affidavit, Mr Mistry lists various other hotels and properties which he says are owned by companies owned by Mr Weston and these have a very substantial gross value. I accept, as Mr Weston asserted during the course of argument, that there are borrowings which are not referred to in these figures and that the valuations may be inaccurate. Nevertheless, it is clear that, through his various companies, Mr Weston has very substantial property and hotel interests and, in the absence of any evidence from Mr Weston to the contrary, I consider it highly unlikely that he or one of his companies will not be able to come up with the necessary sum. Thus no question of stifling the defendant's defence arises.

44. However, even allowing for the other failures of the defendant as summarised in the remainder of this judgment, I consider that it would be completely inappropriate to strike out the defence at this stage without giving the defendant a final opportunity to pay the outstanding amount of costs. As all the cases make clear, to strike out a party for non-compliance with a court order is a draconian step which should only be done where it is necessary and proportionate. In my judgment, it is not necessary or proportionate to strike out the defence at this stage. If, following the making of an unless order, the costs are paid, the plaintiffs will be in the position that they should have been and the matter can therefore proceed to trial. Accordingly, I consider the right course in this case is to make an order that, unless the defendant pays the outstanding costs by a certain date, its defence will be automatically struck out. This will give the defendant and Mr Weston a final opportunity to consider how they wish to proceed in knowledge of the consequences should the decision be not to fund the defendant to the necessary extent.

45. Advocate Sinel argued that it was also an abuse of process for a company with no assets to defend a claim in circumstances where it was clear that the shareholder would not provide any funds to meet the claim in the event of the defendant company being found liable. I do not agree. As Millett LJ made clear in the passage cited at para 37 above, it is not an abuse for an impecunious plaintiff, whether a company or not, to pursue a claim in circumstances where it will not be able to meet any adverse costs order. This must be even more true in the case of an

impecunious defendant because at least a plaintiff has a choice as to whether to proceed or not whereas a defendant is brought before the Court by the actions of a plaintiff. The fact that a defendant has insufficient finds to meet a claim does not make it an abuse of process to defend a claim which it believes to be ill founded. I therefore reject this ground of the plaintiff's application.

46. I turn next to the remaining matters relied upon by Advocate Sinel, namely repeated failures to comply with court orders. In so far as Advocate Sinel relied upon the conduct of the defendant during the course of 2010 in relation to this summons and the various appeals to the Court of Appeal, I do not consider this relevant. This Court accepted that there were valid grounds for the two adjournments of the hearing of this summons on the basis of Mr Weston's ill health and that decision was upheld by the Court of Appeal. I cannot see therefore that any grounds for criticism of the defendant in seeking to adjourn the hearing of the summons. In so far as it is said by Advocate Sinel that the defendant sought to delay the hearing of the various appeals, the fact remains that these were heard on schedule and that any attempts at delay were therefore unsuccessful. I cannot see that such conduct even begins to give grounds for the draconian remedy of striking out. It is of note, in any event, that the summons to strike out was filed before any of these events.

47. I accept that the defendant has a history of being late in complying with orders of this Court, although the plaintiffs are not without fault in this area either. Furthermore, the defendant has twice failed to comply with unless orders as set out at paragraphs 8 and 9 above. However, its failures have in the end been remedied and there are only two respects in which the defendant is in default at present. They both arise out of the order of this Court dated 17th December 2009. In the first place the defendant has failed to file its re-amended answer to the re-amended particulars of claim. That should have been filed by 1st February 2010 but was deliberately not filed, as was made clear by Mrs Weston in her e-mail of 4th February. In the second place it has failed to file its revised affidavit of discovery, which should have been done by 15th February 2010. Again it is to be noted that the plaintiffs' summons to strike out was filed before the expiry of the date for filing the affidavit of discovery.

48. I do not consider that the two failures, even when taken together with the other failures referred to at paras 17 - 23 above, justify the draconian remedy of striking out. There is no reason why this case cannot be tried properly and fairly if the defendant now files the two outstanding documents. It is true that they are long overdue but the plaintiffs have contributed to this. They have expended enormous time and costs in issuing this summons within days of the expiry of the time for filing one of the documents (and before the expiry of the time for filing the other) and then pursuing hopeless appeals to the Court of Appeal. If they had taken the more obvious and appropriate step of seeking an unless order shortly after the expiry of the time for filing the

documents, this matter would have been resolved one way or the other a long time ago and at much less cost.

49. In the circumstances, I consider that the proportionate and fair way to deal with this matter is now to make an unless order in respect of the filing of the two outstanding documents. Mr Weston indicated that he would need five weeks for this purpose, although he qualified that by saying that he might need more if he was having to work on the appeal against my costs decision of 10th June 2010, which was due to be heard by the Court of Appeal in November. That has now occurred and the appeal has been dismissed. That is therefore no longer relevant. Mr Weston has had the time available since then to work on the outstanding matters. In these circumstances, I propose to order that, unless the defendant files its re-amended answer to the re-amended particulars of claim (as described in paragraph 2 of the Act of 17th December 2009) and the revised affidavit of discovery (as described in paragraph 5 of the said Act) on or before 23rd February 2011, (being 5 weeks from the date that this judgment is formally delivered), the answer of the defendant shall be struck out without further order and the plaintiffs will be entitled to judgment. I consider that a similar period is appropriate for the payment of the costs and I therefore order that, unless the defendant pays to the plaintiffs the outstanding costs in the sum of £63,529.79 by the same date, the defendant's answer shall be struck out and the plaintiffs shall be entitled to judgment.

50. By way of conclusion I would add this. The Court made it clear in its judgment of 10th June 2010 that it would grant no further adjournments on the grounds of the ill health of Mr Weston. The defendant is the company and it is up to the company to ensure that it is adequately represented in this case, whether this is by Mr Weston, by Mrs Weston if she feels up to it, by another director or by a lawyer. The same principle will apply going forward. The defendant must appreciate that the orders of the court must be complied with. If it does not comply with the unless orders, I find it hard to imagine any circumstances in which further time would be granted. Assuming that it complies with those orders, there is no reason why the Court should not fix a timetable to bring this matter to trial in early course. Further failures to comply with timetables are likely to result in stringent unless orders, with the likelihood of the defendant being struck out in the event of failure to comply with those orders. So far as the plaintiffs are concerned, they should stop litigating collateral issues (which enables Mr Weston to argue that this is a deliberate tactic to overwhelm him) and concentrate on bringing the matter to trial as soon as possible.

Authorities

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