

JERSEY / JUDGMENT

# Bates -v- Weston [2017]

## JRC 111 (18 July 2017)

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in the name of Leeds, between 2005 and 2015, to have been in the region of £5 million pounds. This continued until sometime in 2015 when Mr Cellino, according to paragraph 32 of Mr Weston's second affidavit, declined on behalf of Leeds to continue paying legal fees on behalf of Mr Bates. As to evidence of Mr Bates' involvement with the litigation after he had ceased to have any financial interest in Leeds in December 2012, Mr Weston relied on the JEP article and Radio Yorkshire interviews referred to at paragraph 23 of my previous judgment. Mr Weston's application 4. The documents sought by Mr Weston were as follows:- (i) The sale agreement made in late 2012 involving the sale of Leeds to GFH Capital Bank of Bahrain ("GFH"); (ii) Any other related agreement permitting or facilitating Mr Bates, after his sale of Leeds to GFH, to manage or to continue to manage or to run or continue to run any litigation involving Leeds; (iii) A schedule detailing all costs incurred by Mr Bates in the English libel proceedings, that Mr Weston brought against Mr Bates and Leeds, and a similar schedule in relation to costs incurred by Leeds insofar as this information was available to Mr Bates; (iv) Similar information in relation to costs incurred and damages paid in relation to the libel and harassment actions brought by Mr Levi against Mr Bates referred at paragraph 35 of my previous judgment; and (v) A copy of any contract between Leeds and its English solicitors, Carter-Ruck, signed by Leeds on the instruction or with the consent of Mr Bates; and (vi) Specific details of what was said to Sir Michael Tugendhat by counsel at the hearing on 11 th November, 2015. 5. Mr Weston argued that the documents he was asking for would make clear what the arrangements between Mr Bates and Leeds in relation to the payment of Carter - Ruck's legal fees. 6. It would also support his argument that Sir Michael Tugendhat was misled. Until sometime in 2015 Carter-Ruck were acting for both Mr Bates and Leeds. The position should therefore be made clear. The overriding objective required him to be put on an equal footing. 7. Advocate Hoy argued that this was a fishing expedition because there was no evidence of any arrangement existed of the kind required for Mr Weston to succeed. 8. This submission was based on paragraphs 36 to 38 of my previous judgment which bear repetition and which state as follows:- "36. However the difficulty with Mr Weston's application is that he is facing a judgment of the English High Court where all rights of appeal have been exhausted (save that Mr Weston intimated a possible appeal to the European Court which has not been made to date), and where he has not been granted permission to appeal against the costs order. Ordinarily there would be no ability to challenge registration of a costs order following on from a judgment where there is no further right of

appeal. 37. Furthermore, Mr Weston has to go further than simply to show the existence of an indemnity in order to resist enforcement of the judgment. An indemnity by Leeds in favour of Mr Bates does not mean that Mr Bates is not legally liable to his solicitors and also does not mean that Mr Bates does not have the legal right to recover costs. All an indemnity usually means is a right to reimbursement or that, if such costs have in fact previously been paid by Leeds, Mr Bates would have to account for any monies recoverable by him to Leeds, unless Leeds chose not to rely on any such right. This is a matter however between Mr Bates and Leeds and does not therefore assist Mr Weston. 38. Something more, therefore, is needed than an indemnity to show that Mr Bates is not legally liable to pay the costs of the lawyers who appeared for him in the English libel proceedings and that Mr Bates had effectively abandoned or given up any right to recover such costs. While such an agreement is possible it is much more than an agreement to indemnify. It also requires Leeds to have agreed with the lawyers who appeared for Mr Bates that only Leeds would have any responsibility to meet their costs. In other words Mr Weston would have to show there was no contract between Mr Bates and the lawyers who appeared for him in the English libel proceedings. This would not be a normal arrangement. Furthermore, in England as in Jersey, where costs are claimed a lawyer is required to certify that the costs claimed do not exceed the costs which the party entitled to them is required to pay for the legal adviser concerned (see precedent F of Practice Direction 47 of the Civil Procedure Rules). The lawyers who appeared for Mr Bates if in fact they were only retained by Leeds, would therefore be misleading the English Court by claiming costs said to be due from Mr Bates. Yet the affidavit of Mr Pepper sworn in support of the application to register the English judgment describes Mr Bates as his client. Mr Pepper also deposes at paragraph 16 that there are no features which might reasonably weigh against granting registration of the English judgment. An agreement that he was only retained by Leeds would be such a feature." 9. Advocate Hoy argued that there was no evidence of any such arrangement. 10. In support of this and without waiving privilege, he produced an email (dated 15 th June, 2017, at 09:03) from Mr Alasdair Pepper a partner in Carter-Ruck. Mr Pepper was the deponent of the affidavit sworn on 2 nd December, 2016, and filed on behalf of Mr Bates in support of the application to register the judgment. Mr Pepper had been sent a copy of my previous judgment and the email was his reply. 11. The email states as follows:- "Thanks but my understanding is that your firm is now taking instructions direct from Mr Bates, and I am only to become involved if necessary. Please refer to Mr Bates for your instructions, including whether he wishes you to contact me. I can confirm that the costs claimed and awarded by the UK court (which Mr Bates is seeking to recover in Jersey) are the liability of Mr Bates only to this firm in relation to the defamation proceedings brought by Mr Weston. They were incurred after LUFC had ceased to instruct this firm and on the sole instruction of Mr Bates. They also post-date Mr Bates sale of LUFC and, therefore, cannot fall under the sale agreement. If you require more information please let me know once you have Mr Bates instructions." 12. On the basis of this email, Advocate Hoy argued that no discovery should be produced because there was no issue to be determined. By reference to the statement from Mr Pepper who was an English solicitor, the costs awarded were the liability of Mr Bates only and were incurred after Leeds ceased to instruct Carter-Ruck. 13. Advocate Hoy also argued that to order discovery would be disproportionate as well as leading to sensitive information being produced. What Mr Weston

wanted to do was re-open the English libel proceedings. It was also clear that Mr Bates was not covered by Sir Michael Birt's order September 2014. 14. Granting discovery would be an indulgence to Mr Weston and would lead to unnecessary and disproportionate costs being incurred. 15. Mr Weston in reply pointed out that he did not understand why Mr Pepper was now saying in the first paragraph of his email of 15 th June that Mr Bates was now instructing Messrs. Voisin & Co. direct when Mr Pepper had previously sworn the affidavit in support of registration of the English

### judgment.

16. Secondly, the email stated that the costs were the liability of Mr Bates which had been incurred only after Leeds had ceased to instruct Carter-Ruck. This did not make the position clear. The email further implied that Mr Bates had not paid those costs. This meant there was a lack of transparency on the part of Mr Bates and there was no affidavit from him explaining the position. 17. Mr Weston did not know the amount of costs being claimed by Mr Bates. What Mr Weston wanted to do, as he had made clear on the previous occasion, was to net this sum off as part of the netting off exercise between Mr Weston and Leeds. Decision 18. The starting point for my decision is the nature of the application brought by Mr Weston. In my judgment, this is an application for discovery. However, the proceedings brought by Mr Bates are to register a judgment which Mr Weston seeks to set aside on the grounds I have summarised above, which are quite specific. This is therefore a case where it is appropriate, because of the amount claimed, to limit discovery (if it is to be ordered) to that necessary to produce in order to resolve issues between the parties and where it would not be onerous to produce such documents. The approach I have therefore taken is one which is analogous to an application for specific discovery. This approach was summarised in *Vilsmeier v A1 International Ltd* and *P1 Power International Ltd*

[2014] (1) JLR note 26. The first paragraph of the note states:- "On an application for specific discovery, an applicant is required to show (a) a prima facie case that the defendant has, or has had, documents that have not been disclosed; (b) that the documents in question are relevant to matters in issue in the case-relevance is determined, primarily, by reference to the issues pleaded; and (c) that an order for specific discovery is necessary for disposing fairly of the case (*Victor Hanby Associates Ltd. v. Oliver*, 1990 JLR 337 , applied; *Trustcorp Ltd. v. Barclays Private Bank & Trust Ltd.*, 2007 JLR N [24], applied). Specific discovery should not be ordered where it is sought solely for cross-examination as to credit (*Thorpe v. Greater Manchester Police (Chief Const.)*, [1989] 1 W. L. R. 665, applied)." 19. In relation to the request for a copy of the sale agreement of GFH, I am satisfied that Mr Weston, by reference to his affidavit, has shown a prima facie case that such a document exists and is relevant. He has been told by the owner of Leeds subsequent to Mr Bates' interest in Leeds that Mr Bates would have day to day control over litigation involving Leeds which covered the English libel proceedings but that Leeds would continue to pay for it. The statements in the JEP and on Radio Yorkshire provide some support for this view and, as noted in my previous judgment, it is difficult to understand

why Mr Bates continued to make comments on behalf of Leeds' position in 2016 relating to the dispute with Admatch and Mr Weston if, as Mr Weston argues, Mr Bates' interest in Leeds ceased in 2012. 20. Furthermore, Mr Pepper's email also raises questions. While Mr Pepper filed the affidavit in support of the application to register the English judgment, Mr Pepper no longer appears to be involved and instead Advocate Hoy is taking instructions directly from Mr Bates. Yet there is no evidence from Mr Pepper or Mr Bates to explain this change of position. 21. Furthermore, while Mr Pepper states that the costs claimed are the liability of Mr Bates only and were incurred after Leeds ceased to instruct Carter-Ruck, it is not clear when this happened or what had occurred previously. The English libel proceedings started in 2010. At least according to Mr Cellino, Leeds only ceased to meet Mr Bates' costs at some point in 2015. 22. Yet, the position was that Carter-Ruck were on the record for both Mr Bates and Leeds from 2010 to 2015. Where a lawyer is acting for two parties, who is responsible for costs and how costs will be allocated between them should be made clear to both parties. It is also not clear who Carter-Ruck's point of contact was and whether it was Mr Bates, both in his own capacity, or for Leeds, or both. The position is also not clear in respect of what happened when bills were sent. Were separate bills sent to Mr Bates and Leeds? Did communications explain how costs had been split between Mr Bates and Leeds? 23. In my judgment, Mr Weston is entitled to test what the position was between Mr Bates, Leeds and Carter-Ruck. He has raised a relevant issue and seeks documentation concerning that issue. 24. Furthermore, Mr Pepper's response is only by email. He could have filed an affidavit setting out exactly the position but chose not to do so. While he is an English Solicitor and can be held to account for any statements made by him, by an English Court, he is not an officer of this Court. I do not therefore accept that I should regard the email from Mr Pepper as if it had been made on oath. 25. Accordingly, I ordered discovery of the following:- (i) Mr Bates shall disclose the relevant parts of the agreement for the sale of Leeds to GFH insofar as it contained any provision permitting Mr Bates to manage or continue to run any litigation relating to Leeds concerning Mr Weston or Admatch, including the English libel proceedings and including any provision relating to who should bear the costs of such litigation. I am satisfied that these documents are directly relevant to the issues raised by Mr Weston. However, Mr Weston is only entitled to see the relevant parts of any such agreement and not the entirety of the agreement. Mr Bates is therefore entitled to redact any other provisions not relevant, provided that the sense of what is disclosed can be understood. (ii) For the same reason Mr Bates shall disclose any other related agreement allowing him to manage or run litigation relating to Leeds, Mr Weston, and Admatch including the English libel proceedings. (iii) Mr Bates should further set out all costs incurred by him in the English libel proceedings identifying the periods for which these costs were incurred and in particular identifying costs incurred before and after the sale of GFH. (iv) Insofar as is within Mr Bates' possession, custody or power, he should also disclose the costs position of Leeds in relation to the costs of the English libel proceedings. This information is likely to be in the possession of Carter-Ruck. If Carter-Ruck were acting for Mr Bates and Leeds, as I have set out above, Carter-Ruck should have explained to Mr Bates how costs were

being split between Mr Bates and Leeds. Mr Bates may also possess this information as a representative of Leeds. Either way it is information I would expect him to have received. (v) Likewise Mr Bates should disclose any contractual documents showing the arrangements between him and Carter-Ruck, and Leeds and Carter-Ruck, insofar as this is within the possession, custody or power of Mr Bates. In particular, if Mr Bates retained Carter-Ruck both on his own behalf and behalf of Leeds he should have received letters of engagement setting out the position and explaining how costs were to be split between Mr Bates and Leeds. (vi) In relation to the hearing before Sir Michael Tugendhat of 11 th November, 2015, both parties should produce notes of any barristers or solicitors who attended on their behalf. However, I am not prepared to order production of any transcript that would both delay the hearing of Mr Weston's challenge to the registration of the English judgment. In addition, in light of the over-riding objective, it would be disproportionate to produce such a transcript. If it already exists, however, it should be produced. 26. In relation to the documents to be produced, in this case, I directed that the affidavit of discovery should be produced by Mr Bates personally because, given the history of his involvement, he is the person best placed to produce and identify relevant documents. This is because of the length of time disputes have gone on, involving Mr Bates on the one hand through Leeds and Mr Weston on the other either in person or through Admatch. Secondly, Mr Bates is in the best position to describe what arrangements he had reached with Leeds and Carter-Ruck and to respond to the evidence of Mr Cellino as recorded in Mr Weston's affidavit. 27. Furthermore, to the extent that documents do not exist then the affidavit should expressly say so. As required by Practice Direction RC17/07, any affidavit should furthermore be endorsed by Advocate Hoy, as the advocate given responsibility for the case, that he is satisfied that his client's discovery obligations have been met. 28. In my judgment the discovery I have ordered will make it clear what the arrangement was between Mr Bates and Leeds in relation to the costs of the English libel proceedings. While costs will be incurred in relation to producing such discovery, if such discovery is as conclusive as Advocate Hoy argued and makes it clear that the costs claimed are the liability of Mr Bates only, as Mr Pepper sets out in his email, then this should cut down significantly any issues the Royal Court has to decide and would leave only a very discrete issue of whether or not there should be netting off by reference to Sir Michael Birt's order in September 2014. I do not express any further views on this issue beyond those set out at paragraph 41 of my previous judgment where I was not persuaded that any netting off should incur costs to be paid by Mr Weston. 29. As I consider the documents I want to be produced are likely, or should be determinative of, whether Mr Weston is liable to pay the costs now claimed by Mr Bates, I refused to order discovery of information about who had paid costs of the libel and harassment proceedings involving Mr Levi. At best, such evidence would only be similar fact evidence supporting of Mr Weston's argument. If however, in fact, Mr Bates was liable to pay his English solicitors, as distinct from Leeds, in the English libel proceedings, the position in other proceedings would not be relevant even if Leeds had met those costs. I also regarded it as disproportionate to require this additional information to be produced when it is not

central to the argument raised by Mr Weston. 30. In terms of the timing of discovery, I allowed Mr Bates until 15 th August, 2017, to produce this information given I was told by Advocate Hoy that Mr Bates was unavailable for July. 31. I further gave directions for the filing of substantive affidavit evidence if Mr Bates wished to do so in response to that filed by Mr Weston. Authorities Bates-v-Weston

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[2014] (1) JLR note 26. Page Last Updated: 25 Jul 2017 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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