

JERSEY / JUDGMENT

Leeds Utd -v- Admatch [2009]

JRC 023 (13 February 2009)

[2009] JRC 023

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judgment

the deputy bailiff: 1. The Court is considering a summons issued by the second plaintiff in the following terms:- "1. That the defendant provide to the second plaintiff within seven days of order an affidavit sworn by an officer of the defendant company setting out full and detailed information as to: (a) what the defendant has done with and what has become of the 'Processed Monies' (as defined by Clause 8 of the Draft Agreement dated 10 August 2004) in dispute in these proceedings; and (b) if the defendant has paid away the said Processed Monies: (i) to whom it has made those payments; (ii) on what dates; and (iii) in respect of what or (sic) goods, services or other value in return such payments have been made. 2. That the defendant cause to be exhibited to the said affidavit copies of all relevant documents, including bank statements, that evidence the matters required to be disclosed by paragraph 1 above....." 2. The second plaintiff's application is made pursuant to the well-known Norwich Pharmacal principle (Norwich Pharmacal Co-v-Customs and Excise Commissioners

[1974] AC 133). During the course of his oral submissions, Mr Journeaux confined his application at this stage to a request for disclosure of certain bank statements of the defendant ("Admatch").

Background

3. In August 2004, the first plaintiff and Admatch entered into an agreement for Admatch to act as agent of the first plaintiff for the purpose of selling season tickets, other tickets and other goods and services relating to Leeds United Football Club. Although the draft agreement was never signed the parties agree that it was broadly put into effect and there is no dispute that Admatch owes the first plaintiff £190,400 under that agreement. 4. Proceedings were issued by the first plaintiff in December 2005, seeking payment of the above sum. Subsequently, the first plaintiff was placed in administration and, by an agreement dated 4 th May, 2007, the administrators transferred its rights against Admatch to the second plaintiff. On 26 th July, 2007, pursuant to an order of the Master, the second plaintiff was joined to the action. 5. As already mentioned, the debt in the sum of £190,400 is admitted. However, the agreement contained at Clause 9(f) a set-off clause which entitled Admatch to set off against any monies

it owed to the first plaintiff any sum owed for whatever reason by the first plaintiff (or by any parent, associate or subsidiary company of the first plaintiff) to Admatch (or to any parent, associate or subsidiary company of Admatch). 6. Admatch alleges in its answer that the sum of £1,439,734 is owed by the first plaintiff and/or Adulant Force Limited and/or Romans Heavies Limited (each of the latter two companies being said by Admatch to be a parent or associate of the first plaintiff) to Cope Industrial Holdings Limited ("Cope") which is said by Admatch to be an associate of Admatch; and that accordingly this sum may be set off against what is owed by Admatch to the first plaintiff. 7. Until recently it appeared that the trial would therefore turn on whether:- (i) Any of the first plaintiff, Adulant Force or Romans Heavies is indeed indebted to Cope as alleged; (ii) The relevant debtor company is a parent, associate or subsidiary of the first plaintiff; and (iii) Cope is an associate of Admatch. 8. However, on 1 st December, 2008, (approximately one year after it should have) the second plaintiff filed an amended reply in which it admitted that Cope was an associate of Admatch and that from 22 nd September, 2005, Adulant was an associate of the first plaintiff. It is not clear to me whether this date is significant but I am told that the trial is now likely to turn on the first issue, namely whether the debt of £1,439,734 was owed to Cope or whether it was owed to a Mr Levi. The grounds for this application 9. Clause 8 of the agreement states as follows:- "The Monies so received and processed in accordance with the preceding clauses (hereinafter 'the Processed Monies') will be automatically transferred by the MSC into a bank account operated and controlled by Admatch but will, save for the authorised deductions referred to in the next following Clause, remain the property of LUFC ." (Emphasis added) 10. Clause 9 goes on to set out six cases of where authorised deductions may be made from the Processed Monies but the relevant one for our purposes is Clause 9(f) which reads:- "Admatch shall be entitled and is hereby authorised to deduct from the Processed Monies:- (f) by way of set-off, any sum owed at any time and for whatever reason by LUFC (or by any parent company, associate company or subsidiary company of LUFC) to Admatch (or to any parent company, associate company or subsidiary company of Admatch)." 11. As Mr Journeaux conceded during the hearing, the cause of action relied upon in both the original and the amended particulars of the claim is simply one of debt pursuant to the contract. It is alleged that Admatch owes £190,400 pursuant to the terms of the agreement. There is no proprietary claim. 12. However, on 16 th September, 2008, Carey Olsen e-mailed Mr Weston seeking confirmation that the Processed Monies had been kept in a separate bank account and asking for details of the account with a view to showing that the monies were still there. 13. Mr Weston replied the next day stating that there was no obligation on Admatch to maintain a separate account. 14. A further five weeks then elapsed before Carey Olsen replied on 23 rd October, and it was on this occasion that, for the first time, there was an unambiguous reference to the suggestion that the first plaintiff had a proprietary interest in the Processed Monies subject only to the set-off allowed under Clause 9. It was pointed out that, if the second plaintiff was successful (i.e. the set-off was disallowed) the proprietary title to the funds would stand and there would then be the possibility of a breach of trust on the part of the directors of Admatch and a claim against them or any other person receiving the money with the requisite degree of

knowledge. The e-mail went on to ask for an explanation of how the Processed Monies came to be where they were now located, to request an undertaking from the relevant account holders that the funds would not be moved further, and to demand the provision of all relevant documentation to show how the Processed Monies had been dealt with to date. 15. Mr Weston again replied by e-mail the next day explaining the position as he saw it and declining to give the information requested. 16. There were various further exchanges and eventually on 12 th December, 2008, Admatch supplied what it called its 'response to the second plaintiff's request for disclosure'. This was quite a lengthy document. Amongst other matters it asserted that, in the light of the refusal of the directors of the first plaintiff to guarantee the terms of the agreement as stipulated under Clause 22 of the draft agreement, the agreement contained in the draft had been varied so that Admatch was authorised to use the Processed Monies in such manner as it should think fit, subject only to its obligation to account to the first plaintiff for the various instalments within the timescale envisaged in the agreement. The response also stated that Admatch and the group of companies with which it was associated consistently operated their business with the benefit of bank overdraft and loan facilities and that accordingly all funds received by Admatch or its associated companies were almost invariably utilised to reduce group borrowing from banks. The funds were then re-drawn as necessary. This was elaborated by Mr Weston during the course of the hearing when he made it clear that, as instalments of the Processed Monies came in, they were utilised for the general benefit of Mr Weston's group of companies, with monies being transferred back to Admatch as and when an instalment had to be paid to the first plaintiff pursuant to the agreement. 17. Following that response, the second plaintiff elected to proceed with its summons. The application 18. Mr Journeaux submitted that the second plaintiff clearly had an arguable proprietary claim to the Processed Monies. If the set-off claimed by Admatch was not permitted and if the alleged variation of Clause 8 of the agreement referred to by Mr Weston had not in fact occurred (so that Clause 8 remained in its original form) the second plaintiff would have a proprietary interest in the Processed Monies. Where there was an arguable proprietary claim, the Court would often grant interim relief (whether by way of a freezing injunction or disclosure) in order to ascertain its whereabouts and so as to ensure that equity did not act in vain and that the trust fund was available in the event of a plaintiff succeeding at trial. 19. He accepted that there had been a considerable delay on the part of the first and second plaintiffs in raising this point and that this was a factor which the Court could take into account when considering how to exercise its discretion. However delay did not mean that the Court could not grant the relief sought. When it was pointed out to him that insisting upon the degree and level of information sought in the summons at this stage ran the risk of derailing the timetable for the proceedings and the loss of the trial date on 5 th May, he said that he would confine his request for the time being to production of Admatch's bank statements for the period from 24 th May, 2004, until the first date upon which the account went into overdraft following receipt of the last instalment of Processed Monies in February 2005. He said that this was a simple task which should not take more than an hour or two. 20. He submitted that the interests of justice required that the second plaintiff should receive this information. The

second plaintiff did not want to find that it had achieved an empty judgment. Assuming that the Processed Monies were no longer in the possession of Admatch, he wished to place any recipient of any part of the Processed Monies on notice of a possible claim so that any disposal thereafter of any part of the funds by any recipient would be made with the requisite knowledge on the part of the recipient that it was dealing with trust monies. There would therefore be a claim against the recipient for any monies subsequently paid away. He accepted that, if Admatch's account had fallen into overdraft after receipt of the last instalment of the Processed Monies, tracing through the account would thereafter not be permitted, but he wished to establish the identity of any recipients prior to that time. He accepted that, following receipt of the bank statements, the second plaintiff might seek further relief against any recipients and that this could distract the parties from the main litigation but he argued that the Court could exercise its discretion at that stage not to grant relief if it felt that this would derail the timetable for the main proceedings. 21. Mr Weston argued that the application was far too late and was part of the tactics of the plaintiffs to swamp him with procedural and interlocutory matters so that he could not prepare properly for trial. He said that, according to his calculations, there had been some twenty four interlocutory hearings, most of which had gone against the plaintiffs. There was a comparably short time until the trial began on 5 th May, and it was essential that, as effectively litigants in person, he and his wife were able to spend the necessary time on preparation for trial. He said that this was already being put at risk by the second plaintiff's decision to appeal against the order for security for costs, having originally decided not to do so. This matter was due to come before the Court of Appeal in March and the necessary time to be spent on preparing for and arguing that matter would already affect Admatch's preparation for trial. 22. He asserted that the Processed Monies were not held by Admatch, which was now substantially dormant and had a small overdraft. The monies had been used for general group purposes with the Processed Monies being passed almost immediately after their receipt back and forth between various companies in the group as dictated by the requirement to keep interest charges on overdrafts to a minimum. He said that, even if it could be done, it would be an enormously time-consuming exercise to try and work out exactly where the Processed Monies had gone and whether they could now be traced because of the frequent inter-company movements. He fully accepted that, if Admatch lost at trial, he or one of his companies would have to put funds into Admatch so that it could pay the second plaintiff. He accepted that, if Admatch did not pay, the second plaintiff would no doubt renew the application which had now been brought and would seek personal relief against him, amongst others, as a director of Admatch. It would therefore be in his interests to ensure that Admatch paid up. He said that granting the order would cause considerable prejudice to Admatch whereas not granting the order would not cause any prejudice to the second plaintiff. The second plaintiff had been content to proceed without such an order for many years now and it would make no difference to the second plaintiff's position if that situation were to continue for the remaining three months to trial. He accepted that the simple production of Admatch's bank statements for the relevant period would not be a complex or time-consuming matter but said that this was bound to be the precursor for

further applications either against Admatch or against other companies in the group, which would mean that he would be unable to prepare properly for trial. Decision 23. Clause 8 of the draft agreement provides that the first plaintiff retained ownership of the Processed Monies(subject to any permitted set-off) and it will be a matter for resolution at trial whether, as Admatch alleges, Clause 8 was varied in the final agreement reached between the parties. I accept therefore that the second plaintiff has an arguable claim that it has a proprietary interest in the Processed Monies. There is therefore jurisdiction for me to grant the relief sought in accordance with the Norwich Pharmacal Principle (as described in this jurisdiction in *Macdoel Investments Limited v The Federal Republic of Brazil*

[2007] JLR 201). 24. Thus, it becomes a matter of discretion as to whether, on the facts of this particular case, I should exercise that jurisdiction so as to grant relief. As a matter of discretion, I conclude that it would not be right to do so. I would summarise my reasons for so concluding as follows:- (i) As I indicated in my Judgment of 12 th December, 2008, ([2008] JRC214] on the topic of security for costs, the time spent by both parties on this matter is out of all proportion to what is at stake and this has been caused by all the interlocutory battles which have been fought on almost anything which can be fought over. I am reluctant to see any further time and money spent on collateral matters unless they are essential. (ii) The proceedings began as long ago as December 2005. After initially being fixed for June 2008, the trial date was then fixed for early December 2008, but that had to be vacated on the ground that all the time spent on interlocutory matters had led to the defendant having difficulties in being ready for trial. The trial has now been fixed for four days beginning on 5 th May, 2009. I am determined to do all that I can to ensure that this date is not lost. These proceedings need to be brought to a conclusion so that it is determined once and for all whether Admatch owes the sum of £190,400 or whether it has a right of set-off as a result of a debt between associated companies. I am satisfied that in view of the security for costs appeal and the other matters which still have to be dealt with before trial, there is already considerable pressure on Mr and Mrs Weston in ensuring that Admatch is ready for trial. I accept of course that similar work has to be undertaken by Carey Olsen but they are in a position to commit additional resources to the matter if necessary and can approach matters with the benefit of their legal experience which means that their use of time is likely to be more productive. (iii) Mr Journeaux has now confined his request to the bank statements of Admatch for the relevant period. I accept that the provision of these documents alone would not be time-consuming and could be undertaken without risk of losing the trial date. However I think it inevitable that, following receipt of the statements, the second plaintiff will either seek further relief against Admatch (e.g. explanation of the bank statements such as identity of recipients etc) or seek further information from any identified recipients of the Processed Monies. It seems probable that most of these recipients will be other companies in Mr Weston's group and that he would have to deal with any such enquiries. Mr Journeaux argues that, if I am worried that such further steps may lead to the loss of the trial date, it would be open to me at that stage to exercise my discretion to refuse any further relief but that I

should not do so at this stage. However, in my judgment, the further preparation and argument for such hearing(s) would of themselves take time and run the risk of derailing the progress of the main trial. All in all, I consider that, if I order the production of the bank statements at this stage, there is a substantial risk that further collateral litigation will ensue which will divert both parties from timely completion of the preparations for trial. There would be a real risk that the trial date would be lost. (iv) I consider that the second plaintiff has delayed too long and that the interests of justice do not require that it be provided with the information at this late stage. As Mr Weston pointed out, there was no mention by anyone of the need for a separate bank account or the existence of a proprietary claim until Mr Journeaux's e-mail on 16 th September, 2008. Thus, the first plaintiff never raised the point during the currency of the agreement; neither the first plaintiff nor its lawyers ever sought any information on the subject in the period from the commencement of the proceedings in December 2005, until the joining of the second plaintiff in July 2007; neither the second plaintiff nor its lawyers thought it necessary to seek any such information from July 2007, until 16 th September, 2008; and even then, after Mr Weston had replied to the initial query on 16 th September, Carey Olsen did not think it necessary to respond for a further five weeks. The claim set out in the original and amended particulars of claim is not a proprietary claim and it was only some 2¾ years after the commencement of the proceedings that the second plaintiff for the first time raised the issue of seeking the whereabouts of the Processed Monies by means of the e-mail of 16 th September, and even then, after an immediate response by Mr Weston, a further five weeks elapsed before the matter was taken any further. This is hardly consistent with what is now said to be the vital importance of obtaining this information. (v) In short, the plaintiffs have been content to proceed with the action without taking steps to establish the whereabouts of the Processed Monies until now. What has now changed? The answer, it seems to me, is nothing. I consider that the risk of any additional prejudice being caused to the second plaintiff between now and the trial date by refusal of this application is minimal. Assuming that the second plaintiff is ultimately successful in establishing a proprietary interest in the Processed Monies, any rights against Admatch or its directors will remain. If the Processed Monies were paid out to companies within Mr Weston's group of which Mr Weston is also a director, such companies will presumably be fixed with Mr Weston's knowledge concerning the existence of a trust fund. Thus, again, nothing will change in the next three months. If the monies have been paid out to third party recipients, then, given the time which has elapsed, it seems to me that the likelihood of the second plaintiff obtaining additional protection by informing the recipient of the existence of a possible trust fund at such a late stage is minimal. (vi) Clearly matters will change if the second plaintiff is successful at trial in establishing that the Processed Monies constituted trust property in the hands of Admatch. If Admatch does not pay what is owed at that time, I would certainly be prepared to consider afresh any application aimed at establishing the whereabouts of and securing trust property. 25. In summary, bearing in mind the extreme lateness of the application, the risk of collateral litigation, the need to avoid risking the loss of the trial date in May and the minimal additional

prejudice that I consider the second plaintiff to be at risk of suffering by reason of a refusal, I exercise my discretion to refuse this application. Authorities Norwich Pharmacal Co-v-Customs and Excise Commissioners

[1974] AC 133 . Macdoel Investments Limited v The Federal Republic of Brazil

[2007] JLR 201 . Leeds United-v-Admatch

[2008] JRC 214 . Page Last Updated: 29 Jul 2016 BAILII: Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

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