

JERSEY / JUDGMENT

Leeds -v- Admatch [2013]

JRC 134 (04 July 2013)

[2013] JRC 134

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judgment

the bailiff: 1. This judgment is supplemental to the judgment dated 14 th March, 2013, ([2013] JRC 058) and is to be read with it. That judgment ("the March judgment") concluded that Admatch (which has now apparently been dissolved) and Mr and Mrs Weston (as directors of Admatch) were in contempt of court by failing to comply in certain respects with an order of the court made on 15 th August, 2011. The Court indicated at the conclusion of the March judgment that it would hear the parties on what penalty, if any, should be imposed on Mr and Mrs Weston and would also hear the parties in relation to costs. 2. The Court sat on 2 nd May to hear counsel on these matters and we now give our decision.

Background

3. The background is set out fully in the March judgment and the reader is referred to that judgment for a description of the proceedings and the reasons for the court's findings as to contempt. Suffice it to say for present purposes that, after long running litigation by the Representor ("Leeds") as second plaintiff, and Leeds United Association Football Club Limited as first plaintiff, against Admatch, judgment was given on 19 th May, 2011, against Admatch in favour of Leeds in the sum of £190,400 together with interest. 4. There was no dispute that at some stage in the past, that sum had been in the possession of Admatch, and it was under a duty to account for it to the first plaintiff subject to any available defences. There was also no dispute that Admatch was no longer in possession of the sum and that it had been dispersed elsewhere amongst one or more of Mr Weston and his companies. 5. In these circumstances, Leeds obtained from this Court on 15th August, 2011, an order that a director of Admatch should file and serve, within three months, an affidavit in respect of the financial position of Admatch for the period 1st January, 2004, to the date of the order and that affidavit should exhibit, at least, the following documents:- (i) all of its accounts and financial statements; (ii) all statements and records in respect of its bank accounts; (iii) all accounting ledger information including invoices, receipts and vouchers; and (iv) all related correspondence. 6. On 22 nd November, 2011, (some seven days late), Mrs Weston, as a director of Admatch, served an affidavit ("the November affidavit") in purported compliance

with the August order. She said that Admatch had no annual accounts or financial statements and no accounting ledgers other than those annexed to the affidavit. She exhibited the required bank statements but they had been redacted so as to hide the identity of the payer or recipient of a particular payment where that payer or recipient was Mr Weston or one of his companies. 7. By letter dated 5 th December, 2011, to Admatch, Sinels stated that Mrs Weston's affidavit did not comply with the August order and indicated that all rights were reserved should the matter not be remedied by return. On 7 th December, 2011, Mr Weston sent an email stating that he and his wife were confident that the affidavit fully complied with the court's order, but asking for clarification of any particular problem which was alleged. He indicated that if they had made a mistake or missed something, they would naturally endeavour to remedy the error or omission. 8. On 9 th December, Sinels replied pointing out that the affidavit should have exhibited "all related correspondence", that it was late and that the bank statements had been redacted. The letter went on to state that Sinels were instructed to issue contempt proceedings against Admatch and against Mr and Mrs Weston. That representation was duly issued a few days later on 15 th December. 9. Subsequently, Mr and Mrs Weston belatedly sought legal advice and instructed Baker & Partners to act for them personally, although Admatch remained without legal representation. 10. On 28 th March, 2012, Mr and Mrs Weston filed further affidavits ("the March affidavits"). The contents are described in the March judgment but for our purposes it is sufficient to say that some of the redactions of the bank statements had been removed (insofar as they now identified payments to or from Mr Weston) but redactions remained where the payee or payer was one of Mr Weston's companies. Furthermore, and for the first time, some correspondence was produced. 11. The contempt allegation had been due to be heard on 29 th March, 2012, but was adjourned in view of the late production of the March affidavits. At the hearing on 29 th March, the court was asked to rule on certain matters. In particular, the court ruled that it was not open to the respondents to redact any of the bank statements and that all correspondence which related to the financial position of Admatch had to be disclosed. The court directed the swearing of a further affidavit exhibiting all the un-redacted bank statements and dealing with various other matters by 22 nd May. 12. Mr and Mrs Weston produced the exhibits (such as the unredacted bank statements) by that date but did not in fact serve the relevant affidavits until 7 th June. 13. On 31 st July, 2012, Sinels wrote indicating certain respects in which they believed that the June affidavits still did not comply with the August order, but this was rejected by Baker & Partners by letter dated 29 th August. 14. On 3 rd September, Leeds issued a summons to bring the matter back to court for the court to consider the question of contempt. On 5 th September Advocate Redgrave referred to what the court had said in February about specifying the respects in which a respondent is said not to have complied with a court order and asked for details. Sinels replied on 11 th September giving six broad headings of alleged contempt. On 21 st September, Advocate Redgrave wrote pointing out that there appeared to be no complaints of continuing contempt. Nothing further was heard from Sinels until 29 th November when they said they would be producing particulars of the contempt; this they did on 3 rd December, demanding a response from the respondents by 6 th December. The March

Judgment 15. Leeds alleged that Mr and Mrs Weston had breached the court order in the following respects:- (i) Non-compliance with court imposed deadlines. On this, the court found that the affidavits had been late as described in paragraphs 40-41 of the judgment. (ii) Failure to produce accounts and financial statements. Leeds contended that there had been a failure to comply with the August order in this respect. The court found that there were no such accounts and financial statements and there was accordingly no breach. (iii) Failure to produce bank statements. The court held that they had all been produced but that there had been a breach of the order by the redactions in both the November and March affidavits. The contempt had been purged by the filing of the June affidavits. (iv) Failure to produce accounting ledger information. Leeds alleged that there had been a failure to produce such information. The court found that there was no such information which had not been produced, other than in the very minor respect of cheque stubs, which the court ordered should be produced. (v) Failure to produce all related correspondence. The court found there had been a failure to comply with this part of the order in the November and March affidavits, but that this had been remedied by the June affidavits. (vi) Continuing breaches. Leeds alleged that there were continuing breaches in six respects described in paragraph 55 of the March judgment. The court found against Leeds on each of these issues. 16. In summary therefore, as set out in paragraph 56 of the March judgment, the court found that Mr and Mrs Weston had been in contempt of court by redacting the bank statements and failing to disclose related correspondence, but that that contempt was purged by production of the June affidavits. They were also late in filing their affidavits. Following the filing of the June affidavits, there was no continuing breach of the order save in the very minor respect of the failure to produce the cheque stubs. These have since been provided. 17. We turn therefore to consider the question of costs and whether any penalty should be imposed. Costs are of course a matter for the Bailiff alone, although the judgment will, for convenience, continue to refer to the first person plural. Costs

- (i) Up to 30 th June 2012 18. The Court has found that the respondents did not comply with the August order until the filing of the June affidavits. They were therefore in contempt of court until then. Advocate Redgrave accepted during the course of the hearing that the respondents would have to pay some of the costs for this period. However he contended that they should not have to pay all the costs. He suggested that Leeds leapt into contempt proceedings too quickly. They had not made it clear (other than in relation to redactions) in exactly what respects the November affidavit failed to comply with the order and indeed had to be ordered by the court in February to produce particulars of the alleged breaches. Leeds should, he said, simply have written to Mr and Mrs Weston and subsequently Bakers, specifying the respects in which the affidavit was deficient and inviting the respondents to make the deficiencies good. If the respondents had failed to do so, there could have been a short hearing seeking a ruling from the court as to whether the order had been complied with or not. This in fact was what had happened at the March hearing when the court ruled on the redactions of the bank statements and the production of correspondence (see para 11 above). 19. We accept that there is deep hostility between Mr Bates - who was the driving

force behind Leeds at the time - and Mr Weston. We accept therefore that Leeds may well have been motivated by a desire to punish Mr Weston as well as by the wish to ensure compliance with the order. But the fact remains that, following the judgment of 19 th May, 2011, Leeds was a judgment creditor of Admatch for £190,400. The position had completely changed at that point because previously, Admatch had been able to say that it did not owe Leeds any money by reason of set off. Leeds is now entitled to try and recover the sum lawfully due to it. In its August 2011 judgment, the court made it clear that information had to be provided in order to show what had happened to the £190,400, with a view to Leeds then being able to take such steps as it thought fit to enforce its

judgment.

Mr and Mrs Weston have accepted that the reason they redacted the bank statements was to try and prevent Leeds from instituting action against any of the Weston companies to recover the £190,400. 20. Whilst we can envisage other plaintiffs taking a more measured approach to seeking compliance with the August order following production of the November affidavit, we do not think that, given the background, Leeds can be criticised for moving swiftly to institute proceedings for contempt in order to procure production of the required information at the earliest opportunity. After all, the May judgment itself had come about as a result of a failure by Admatch to comply with an 'unless' order and there had been a number of previous occasions where Admatch (then represented by Mr Weston as director) had failed to comply with orders in a timely manner. Most importantly, Admatch was now a judgment debtor. Leeds was entitled to find out where the money had gone and to be suspicious of any delay in producing the missing information. 21. In the Court's judgment, the costs incurred in connection with the representation of 15 th December, 2011, were incurred because of the contempt of court by Mr and Mrs Weston and they must be jointly and severally responsible for the costs until 30 th June, 2012. We take that date as being sufficient to allow Leeds and its advocates time to review the June affidavits in order to satisfy themselves that there had been compliance. 22. The question then arises as to whether such costs should be on the standard basis or the indemnity basis. In the Court's judgment they should be on the indemnity basis. We would summarise the reasons for so concluding as follows:- (i) The principle of when indemnity costs should be ordered is conveniently summarised in the decision of the Court of Appeal in C-v-P-S

[2010] JLR 645 para 11 where Beloff JA said this:- "We do not accept that it is appropriate to impose such a restrictive approach on the discretion of the court to make an award of costs on the indemnity basis. The question will always be - is there something in the conduct of the action by one of the parties or the circumstances of the case which takes the case out of the norm in a way which justifies an order for indemnity costs, recognising that there will usually be some degree of unreasonableness?" (ii) The court has often made an award of indemnity costs in cases of contempt of court (eg Play Limited-v-Legato Assets Limited

[2006] JLR N30; Caversham Trustees Limited-v-Patel

[2007] JLR N60). (iii) There is good reason for this. Contempt proceedings are a form of collateral litigation which arise only because of a party's failure to comply with a court order. Whilst it is accepted that, in the absence of special or unusual features, the ordinary costs of successfully pursuing or defending a claim will result in the award only of standard costs (thereby leaving a successful party out of pocket to a degree), it is hard to see why that should also be the case in circumstances where the proceedings are not an ordinary and natural part of pursuing or defending a claim, but have arisen purely because of the failure by a party to comply with an order of the court. That is above and beyond the ordinary course of litigation and it seems reasonable in those circumstances that a party should normally not be left out of pocket in respect of costs which have occurred only by reason of the other party's breach of a court order. That can properly be said to be a special and unusual feature which justifies an award of indemnity costs. (iv) That is the situation here. Leeds has only been put to the cost of instituting and conducting the representation up to 30th June, 2012, because Mr and Mrs Weston failed to comply with the August order as they should have done. Furthermore, as already stated, this was an order aimed at assisting a judgment creditor in establishing where assets which had previously been in the possession of the judgment debtor had gone. (v) In all the circumstances, the Court is satisfied that Mr and Mrs Weston should bear full responsibility for this part of the costs and therefore orders that they should jointly and severally pay the costs of and in connection with the representation up until 30th June, 2012, on the indemnity basis. (ii) Costs from 1 st July 2012 23. It seems to the Court that the position changes from that date. On the court's finding, the respondents had purged their contempt upon the filing of the June affidavits (other than in respect of the cheque stubs which had been referred to by Mrs Weston in her affidavit and could therefore have been specifically requested by Leeds). 24. Leeds did not accept that the respondents had complied with the August order by filing the June affidavits. They insisted that there were more documents to come and that Mr and Mrs Weston remained in contempt. They persisted in this approach despite the affidavits and despite Advocate Redgrave pointing out that there was no continuing contempt and that all available documents had been produced. Leeds insisted on pursuing the matter and in due course lost on these issues before the court. 25. Advocate Sinel submitted that, although the court had found against Leeds on the question of any continuing contempt, it had been reasonable for Leeds not to accept the affidavits. For example, it was unacceptable that Admatch had not kept financial statements in accordance with the Companies (Jersey) Law 1990 . 26. But whether it was reasonable or not is not the point. It is often reasonable for a party to institute litigation but the normal consequence of losing is that that party has to pay the other side's costs. The Court sees no reason why the normal consequence should not follow in this case. Subject to what we are about to say, Leeds should therefore be responsible for the costs incurred after 30th June, 2012, because it insisted upon continuing with the contempt proceedings alleging continuing contempt even when the contempt had been purged and in circumstances where it was essentially unsuccessful at the hearing. 27. The Court proposes however to make a slight reduction in the costs for

the following reasons. As will appear shortly, we think the contempt by Mr and Mrs Weston is such that a penalty should be imposed. Thus, even if Leeds had accepted - as in the Court's judgment it should have - that the contempt had been purged by the filing of the June affidavits, it would have been reasonable for Leeds to have taken the matter back to court for a short hearing on the question of costs up to 30 th June and whether a penalty should be imposed for the contempt prior to the filing of the June affidavits. Furthermore, it is the case that, although Advocate Redgrave conceded during the course of the hearing the contempt which we have found proved, there had been no formal admission of contempt by Mrs and Mrs Weston prior to the hearing. However, these aspects required very little time at the hearing. There was no dispute about the late filing of the affidavits and the court had already ruled at the hearing on 29 th March, 2012, that the August order required production of unredacted bank accounts and all related correspondence. It was obvious therefore that the failure to comply with these two aspects was a breach of the order and was therefore a contempt of court. The substantial proportion of the hearing was taken up by Advocate Sinel's unsuccessful attempts to show that the respondents were in contempt by producing false or misleading information and in the various other respects described in the March judgment. Taking the matters in the round, the Court concludes that a reduction of 10% would be reasonable. 28. The next issue is whether such costs should be on the standard or indemnity basis. Advocate Redgrave submitted that it should be the latter. He took us through the correspondence and emphasised that it had been made clear to Sinels in that correspondence that there was no continuing contempt. He also queried whether there had been a collateral purpose to the continuation of the contempt proceedings and pointed out that many of Advocate Sinel's questions in cross-examination appeared to be directed more towards obtaining information which would be useful for the continuing English proceedings than to establishing whether or not there was a contempt of court. 29. The Court has carefully considered Advocate Redgrave's submissions and accepts that the court did have to intervene on a number of occasions to restrict the width of Advocate Sinel's questions. Nevertheless it does not consider that Leeds' conduct in continuing the proceedings should be categorised as unreasonable to the extent that it justifies an order for indemnity costs. The fact is that the directors of Admatch had failed to keep the financial and accounting records which the law requires and, particularly in the context of a post-judgment disclosure order, it is not entirely surprising that Leeds remained suspicious as to whether the affidavits had indeed disclosed everything which was available. Accordingly, whilst the Court has no doubt that Leeds must pay 90% of the costs because it was unsuccessful, the Court concludes that such costs should be on the standard basis. The Court therefore orders Leeds to pay 90% of the costs incurred in connection with the representation between 1 st July, 2012, and 31 st March, 2013, on the standard basis. (iii) Penalty 30. Finally, we must consider whether it is necessary to impose a penalty for the contempt of court which we have found. Mr and Mrs Weston will undoubtedly already be paying a substantial price as a result of their breach of the August order. Firstly, they will have to pay Leeds' costs on the indemnity basis up to 30 th June as well as bearing their own costs for that period. Secondly, they will

have to bear 10% of their own costs thereafter; and thirdly they will have to bear the difference between the costs which they have incurred and the standard costs recovered in respect of the remaining 90% of the costs for the period after 30 th June. 31. Despite this, we think that some penalty must be imposed. We so conclude for the following reasons:- (i) The context of the contempt has to be borne in mind. This was an order intended to assist a judgment creditor in recovering what was due to it. It was a post judgment order. The Court should take a strong line when a judgment debtor fails to comply with an order intended to assist a judgment creditor in recovering what is due to him. (ii) The reason given by Mr and Mrs Weston for redacting the bank statements is completely unacceptable. They said that they redacted the statements in order to hide the identity of the companies so as to avoid Leeds taking action against any of those companies in respect of the £190, 400. This went against one of the very reasons for the August order, as appears from the judgment of that date. (iii) In the event that they really were in doubt as to whether they could redact the bank statements, the correct course would have been to seek guidance from the court before filing the affidavit; instead Mr and Mrs Weston simply redacted the statements unilaterally. (iv) Their failure to comply with the order has to be read in the context of their many previous failures to comply timeously with orders of the court. This is not a "first offence", albeit that it was the first time that proceedings had been brought against them for contempt of court. 32. Advocate Redgrave pointed out that the plaintiffs also had a poor record (particularly earlier in the proceedings) of complying with court orders but they had not been punished for contempt. This may be so, but we do not think that this justifies what the respondents did following the August order. 33. In all the circumstances, we think that Mr Weston must pay a fine. We say Mr Weston because he accepted in evidence that it was his idea that the bank statements be redacted and Mrs Weston essentially went along with his suggestion. In all the circumstances, we think that the correct sanction, to emphasise the need to comply with orders for disclosure fully and in good time, is a fine of £5,000. This must be paid within two months from the formal issue of this judgment and we impose a sentence of 1 month's imprisonment in default. Authorities Companies (Jersey) Law 1990. Leeds-v-Admatch

[2013] JRC 058 . C-v-P-S

[2010] JLR 645 . Play Limited-v-Legato Assets Limited

[2006] JLR N30. Caversham Trustees Limited-v-Patel

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