

JERSEY / JUDGMENT

Milner v Milner Laboratories

[2000] JRC 145A (24 July 2000)

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JUDGMENT

THE BAILIFF: 1. On 20th June 2000, the Court granted an application, made ex parte by Mrs. Ellen Milner, the representor, for interim injunctions against Milner Laboratories Limited ("the company"), Kevin Ronald Leech ("Mr. Leech") Richard John Smith ("Mr. Smith") and Stuart William Sim ("Mr. Sim") to whom we shall refer collectively as "the respondents", in the following terms: 1. That each of the Respondents, namely the Company, Mr. Leech, Mr. Smith and Mr. Sim, be restrained whether by themselves, servants or agents or otherwise howsoever from causing, procuring or permitting the Company to do all or any of the following things, save with the prior written consent of the Representor's advocate: A. making any loans to any person or entity whatsoever (other than the loans referred to in Paragraph 2.6 of the said representation); B. entering into or giving any guarantees to any person or entity in respect of the liabilities of any nature whatsoever; C. entering into any form of charge, mortgage, guarantee, pledge, security interest or any other form of agreement or arrangement under the terms or as a result of which the assets of the Company cease to be in any way immediately freely available to the unsecured creditors of the Company; D. compromising or releasing in any way the ability, rights and powers of the Company to obtain the timely and full recovery and satisfaction of all sums or assets due to it under the terms of any loan or other agreement whatsoever; E. without prejudice to the generality of D above, accepting the transfer or assignment or any shares or any other assets (other than cash) in satisfaction of any part of the Company's loan portfolio; F. entering into any transaction of any nature whatsoever with Mr. Leech, Mr. Sim or Mr. Smith or any person or entity associated with any of them; G. otherwise transferring or disposing of any of its assets save up to a value of £5000 per calendar month and provided (1) expended in the ordinary course of business and (2) all or any such expenditure and the basis for it is notified to the representor's advocate within five working days after the end of each calendar month; and H. applying any part of the Company's assets towards the legal fees, costs or expenses in these proceedings of Mr. Leech, Mr. Sim or Mr. Smith in any way. 2. That Mr. Leech, Mr. Smith and Mr. Sim shall, within 10 working days of the date hereof, make and file an affidavit disclosing, so far as lies within their knowledge, understanding or belief, the use to which all monies advanced by the Company to Glen Investments Limited or entities associated with any of them and all monies so advanced by third parties, but secured by assets of the Company or guaranteed by the Company have been

put, the whereabouts of all assets so acquired and the nature, extent and whereabouts of any profits so generated." 2. The Court also ordered service of the representation upon the respondents. According to the representation, the principal asset of the company is a 54.74% holding in ML Laboratories plc which is said to be worth about £135 million. The representor owns 32% of the company, and Mr. Leech owns or controls 68%. The principal objects of the company are to carry on the business of marketing pharmaceutical, medical and allied products. The company was established by Mr. Leech and the late Jeremiah Milner, husband of the representor, for the purpose of exploiting the intellectual property of Mr. Milner. ML Laboratories plc was incorporated as a subsidiary of the company in 1987. Later that year, it was floated on the London Stock Exchange. 3. Mr. Leech, Mr. Smith and Mr. Sim are all directors of the company. The representor is not a director. 4. The representor alleges breaches of fiduciary duty by each of the individual respondents in their capacity as directors of the company. In particular, it is alleged that Mr. Leech has wrongfully misapplied the company's assets for his own benefit. The representor also complains that the company's accounts have not been prepared in proper time and that no consistent or reasonable dividend policy has been followed. 5. In short, the representor alleges that the company's affairs have been conducted in a manner unfairly prejudicial to her interests as a shareholder. She seeks as a remedy an order from the Court directing Mr. Leech to purchase her shares at a price to be determined by the Court. 6. That was the background, in brief, to the order made by the Court on 20th June, 2000. Subsequently, the injunctive disclosure order has been stayed, by consent, pending a determination of the respondents' current application. That application is to vary or discharge the injunctions and, in the event that any part of the injunctions should be continued, to impose a condition that the representor gives the usual undertaking in damages. 7. Mr. Le Cocq's first submission was that the representation should not have been made nor determined ex parte. It was a fundamental principle of natural justice that an order should not generally be made without giving the other party the opportunity to be heard. He referred the Court to a decision of Hoffmann J in *Re First Express Limited* (10th October 1991) "The Times". That was a case where a company had gone into voluntary liquidation on 15th January 1991. On 29th January 1991, receivers were appointed by one of the secured creditors. On 25th February 1991, the receivers applied ex parte to the registrar and obtained an order under the Insolvency Act 1986 requiring the liquidator to transfer the books and records of the company and all moneys held by him on behalf of the company. The affidavit in support of the receivers' application was misleading and incomplete. Hoffmann J stated:- "I am firmly of the view that it was wrong for the application to be made ex parte. It is a basic principle of justice that an order should not be made against a party without giving him an opportunity to be heard. The only exception is when two conditions are satisfied. First, that giving him such an opportunity appears likely to cause injustice to the applicant, by reason either of the delay involved or the action which it appears likely that the respondent or others would take before the order can be made. Secondly, when the court is satisfied that any damage which the respondent may suffer through having to comply with the order is compensatable under the cross-undertaking or that the risk of uncompensatable loss is clearly outweighed by the risk of injustice to the applicant if the order is not made. There is, I think, a tendency among applicants to think that a calculation of the balance of advantage and

disadvantage in accordance with the second condition is sufficient to justify an ex parte order. In my view, this attitude should be discouraged. One does not reach any balancing of advantage and disadvantage unless the first condition has been satisfied. The principle audi alteram partem does not yield to a mere utilitarian calculation. It can be displaced only by invoking the overriding principle of justice which enables the court to act at once when it appears likely that otherwise injustice will be caused. There was in this case no suggestion that Mr. Kravetz, if notified of the application, would have been likely to dispose of the company's records or funds, or any evidence of urgency which precluded the possibility of an inter partes hearing. The leisurely pace at which the applicants acted is shown by the fact that it was not until 13th March that they wrote to Mr. Kravetz to tell him that an order had been made. It lay for a month in the registry before being drawn up and was served, indorsed with penal notice, on 2nd April." 8. Mr. Le Cocq submitted that neither condition specified by Hoffman J for dispensing with an inter partes hearing was satisfied. As to the first condition, the representor's affidavit expressed concerns that Mr. Leech had built up his wealth by improper use of the company's funds, that she had never seen audited accounts and that her investment had been placed in a highly precarious position. She had expressed a fear that the directors would continue to disregard their duties to the company and to her. There was nothing, however, in the affidavit to justify ex parte injunctive relief. Furthermore, the chronology of events demonstrated a lack of urgency, and, therefore, an absence of any legitimate fear that the respondents might act to her detriment. A letter before action had been sent by the representor's advocates on 3rd April, 2000, warning that, in the absence of satisfactory proposals from Mr. Leech to purchase her shares "proceedings will be issued with a view to ensuring that her interests are fully protected pending the final determination of all matters." A reply to that letter was sent on 15th May 2000 but the application for the injunctions was not made until 20th June, 2000, that is some eleven weeks after the letter before action. The letter itself contained a clear indication that injunctive relief might be sought, which again demonstrated an absence of serious concern that the company's assets might be dissipated in the meantime. 9. As to the second condition specified by Hoffmann J, no cross-undertaking in damages had been offered. 10. Miss Lacey, for the representor, conceded that the Court's attention had not been drawn to the case of Re First Express Limited and that the principles laid down by Hoffmann J constituted the appropriate test as to whether ex parte relief should be granted. She submitted that urgency was only one reason why an inter partes hearing was unnecessary. She contended that the respondents were not on notice about prospective injunctive relief, and that Mr. Leech had a propensity to act swiftly in his business dealings. She illustrated that argument by referring to the transfer of allegedly volatile internet stock into the name of the company in partial satisfaction of loans made by the company to Glen Investments Limited, a company wholly owned by Mr. Leech. The representor had complained about these loans to Mr. Leech towards the end of 1999. She submitted that there was a serious risk that the respondents might, if given notice of the representation, have acted to frustrate the injunctions. 11. In our judgment, the concerns expressed by the representor fall a long way short of solid evidence that there was a serious risk that the respondents might dissipate the company's assets if given notice of the application for injunctions. No allegation of dishonesty or fraud has been made. The only allegation is one of breach of fiduciary duty. Furthermore, Mr. Leech has been

resident in the jurisdiction for over eighteen years and is apparently well settled here. We understand the suspicions which have been generated in the representor's mind as to the motives of Mr. Leech; we make no finding, of course, as to whether those suspicions are well founded. That is a matter for another day. But the conduct of Mr. Leech and that of his co-defendants did not justify the extreme measure of depriving them of the right to be heard before the injunctions were imposed. We do not believe that the Court, if its attention had been drawn to the relevant principles of law, would have decided to hear the application *ex parte*. 12. That conclusion is sufficient to justify the setting aside of the injunctions. We should, however, record that Mr. Le Cocq submitted that the injunctions should also be discharged on the ground of material non-disclosure. The alleged non-disclosure related to the interests of the representor and members of her family in a company called Milner Neocal Limited. It is unnecessary, in our judgment, in view of our earlier conclusions, to recite the opposing arguments. Suffice it to say that we were not satisfied that any failure to disclose aspects of the family's interests in Milner Neocal Limited was material. 13. We accordingly set aside the injunctions and proceed to consider afresh whether they ought, in the light of all the submissions at this hearing, to be re-imposed. Both counsel were agreed that the appropriate test was that laid down in *American Cyanamid Co. v. Ethicon Ltd* .

[1975] 1 All ER 504 and adopted by this Court on many occasions. The principles were usefully summarized in *Alpha Print v. Alphagraphics*

[1989] JLR 152 at 157. "1. Has the plaintiff shown on the evidence before the court that there is a serious question to be tried? If not, then no injunction is granted. 2. If there is a serious question to be tried, then the court considers whether the damages awarded at the trial would be an adequate remedy for the plaintiff. If so, then no injunction is granted. 3. If damages would not be an adequate remedy for the plaintiff, the court then goes on to consider if damages would be an adequate remedy for the defendant: if so, then normally an injunction will be granted. 4. If damages would not be an adequate remedy for the defendant, the court goes on to consider the factors affecting the balance of convenience, i.e. which party will suffer more uncompensatable damage from the grant or refusal of the injunction. 5. If the balance of convenience is fairly even, then it is prudent for the court to seek to preserve the status quo. 6. Finally, where there is approximately equal uncompensatable damage to both parties, it is proper to look at the relative strength of the parties' substantive cases. Where one is disproportionately stronger than the other, this may swing the balance." 14. Both counsel were again in agreement that there was a serious question to be tried. On that basis, Mr. Le Cocq, on behalf of the respondents, offered to consent to the injunctions contained in paragraphs F and H of the interim order. During argument, Mr. Le Cocq enlarged that concession so as to consent to amended injunctions in paragraphs A and B. The defendants would therefore consent to being restrained from:- A. making any loans to Mr. Leech, Mr. Sim or Mr. Smith or any person or entity associated with any of them; B. entering into or giving any guarantees to Mr. Leech, Mr. Sim or Mr. Smith or any person or entity associated with any of them in respect of the liabilities of any nature whatsoever; F. entering into any transaction of any nature whatsoever with Mr.

Leech, Mr. Sim or Mr. Smith or any person or entity associated with any of them; H. applying any part of the Company's assets towards the legal fees, costs or expenses in these proceedings of Mr. Leech, Mr. Sim or Mr. Smith in any way. Mr. Le Cocq submitted that the other injunctions sought by the representor amounted to an unreasonable restriction on the legitimate business activities of the company. 15. Adopting the approach suggested by Lord Diplock in the *American Cyanamid* case, we ask ourselves whether damages awarded at the trial would be an adequate remedy for the representor. Mr. Le Cocq argued that plainly the answer was in the affirmative. The representor was seeking an order that Mr. Leech should buy her shares. The price for those shares could reflect any secret profit wrongly made by Mr. Leech with the company's assets. He submitted that the burden was on the representor to show that damages would not be an adequate remedy. There was no evidence before the Court, in his view, and certainly nothing in the affidavit of the representor, to show that Mr. Leech would not be able to meet any award of damages or financial order which the Court might make. 16. Miss Lacey submitted that the value of the representor's interest in the company was in the region of £100M, and that there was a significant risk that Mr. Leech would not be in a position to pay a sum of that magnitude. Miss Lacey drew the Court's attention to a note in the draft interim accounts of the company to 30th June 2000 appended to the affidavit of Mr. Smith. The note disclosed:- "The investment in ML Laboratories plc consists of 76,492,995 ordinary 1p shares Of the shares held, 61,560,190 shares were held as security by HSBC Bank plc and Citibank NA in respect of borrowings by companies controlled by Mr. Kevin R. Leech as at 30th June 2000." 17. Counsel told us that this revelation had come as a shock to the representor. These arrangements to use 80% of the company's holding in ML Laboratories plc for Mr. Leech's own purposes had been put in hand between April and June 1999 and had not been disclosed to the representor. The balance sheet as at 30th June 2000 disclosed that commercial lenders required security from Mr. Leech notwithstanding his claim to be a billionaire. 18. We have considered these submissions very carefully. It appears from the submissions of the representor that 65% of the company's assets are subject to security of one form or another. Put another way, 35% of the company's assets are free of any form of charge. The injunctions which would be consented to by the representors would prevent any further charging of the company's assets to secure borrowing by Mr. Leech or any of his companies or associates. In our judgment that is sufficient protection for the interests of the representor. Recalling that the burden of proof is on the representor, we are not satisfied that there is a serious risk that Mr. Leech could not meet an award of damages made to her. 19. We turn to the question of disclosure and paragraph 2 of the injunctions contained in the order of 20th June 2000. Miss Lacey submitted that the disclosure order had two purposes - (1) it ensured that the Mareva-type injunctions could be policed, and (2) it would identify what had become of the company's money which had been loaned to companies controlled by Mr. Leech. The argument underpinning the first submission was that disclosure would provide a snap-shot of the company's affairs against which the duty to account could be assessed at trial. That submission appears to us to have been undermined by the production by the respondents of the draft accounts of the company to

30th June 2000 which provide that very snap-shot. The respondents also offered, through counsel, to notify the representor on a monthly basis of any material transactions which might affect the balance sheet. So far as the second submission is concerned, it is clear that most if not all the material which is sought will become available during the ordinary process of discovery. Absent any allegation of fraud or dishonesty, we can see no basis for requiring the respondents to give the very wide advance disclosure which is sought at this stage of the proceedings. 20. There only remains to consider the question of the usual cross-undertaking in damages. During oral argument, this was volunteered by counsel for the representor. We can see no good reason why the cross-undertaking should not be given and we accordingly order that it be a condition of the re-imposition of the injunctions which we have set out in paragraph 14 of this judgment and which, subject thereto, we re-impose. Authorities. A. C. Mauger-v-Victor Hugo Management, Ltd (25 th September, 1990) Jersey Unreported. Bankers Trust -v-Shapiro [1980] 3 All ER 353 C. A. Re Tecnion Investments, Ltd [1985] BCLC CA. P-v-T Ltd. [1997] 1 WLR 1309. American Cyanamid Company-v-Ethicon Ltd

[1975] AC 396 HL. 1900 Trustee Company Ltd-v-Nurnberg Co., Ltd. (1998) JLR N.13; (28 th May, 1998) Jersey Unreported. Bank Mellat-v-Nikpour [1985] FSR 87. In re First Express Ltd (10 th October, 1991) "The Times". The "P" [1992] 1 Ll. LR 470. Gee on Mareva Injunctions: pp.115,127-143,372-374. Taylor & Ors-v-SFO & Ors

[1998] 4 All ER 801 . Polypeck-v-International Plc & Nadir (11 th November, 1991) "The Times". Rolled Steel Products (Holdings) Ltd-v-British Steel Corporation & Ors (1985) 3 All ER CA. Re Zaki, Ltd (1987-88) JLR 244. Alphaprint-v-Alphagraphics

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