

JERSEY / JUDGMENT

Nautech Services Ltd -v- CSS Ltd and Others [2014] JRC 102E (02 May 2014)

[2014] JRC 102E

Source: bailii.org · Research copy typeset by Esheria. Not court-issued or certified.

judgment

the deputy bailiff: 1. This is part of the continuing dispute between the parties. I refer to the judgment of this Court at Nautech v CSS Ltd

[2013] JRC 089 and Nautech-v-CSS Ltd

[2013] JRC 153 , which I have reviewed. I do not repeat all that has been said previously but I have regard to it. 2. I sat on th April, 2014, to receive two applications - the first was for directions to be given in relation to a representation issued by the plaintiff in which it is alleged that the first to fourth defendants are in breach of the interlocutory injunctions contained at paragraph 3 of the Act of Court of 7 th May, 2013, and the second an application by the first to fifth defendants against the plaintiff for an unless order in relation to the compliance by the plaintiff with the order contained at paragraph 4 of the same Act of Court dated 7 th May, 2013. For convenience I will deal with the second matter first. 3. By way of a response to the summons issued by the first to fifth defendants, the plaintiff has adduced the fourth affidavit of Adrien Merhet. In this affidavit, an explanation is given for what the second defendant regarded as evidence of a breach by the plaintiff of paragraph 4 of the Court's order of 7 th May, 2013, in relation to what was asserted to be a hacking into the Facebook account of the second defendant. Mr Merhet gave an explanation for the circumstances which gave rise to the second defendant's suspicion, and which would, if correct, show that such suspicions were not at all justified. This technical explanation is one which the first to fifth defendants would clearly have to consider with the benefit of expert advice, as yet unavailable. The first to fifth defendants also asserted that it was surprising that the plaintiff had not volunteered a confirmation by way of affidavit that the terms of the order had been complied with. At the hearing I asked Advocate Santos-Costa if the plaintiff was prepared to give such an undertaking on affidavit. I understood from him in response that the plaintiff was prepared to depose, through Mr Harrison the beneficial owner, that the plaintiff has complied with the order of 7 th May, 2013, and has not breached it. The affidavit would go on to qualify that statement - to the extent it is a qualification - by the addition of language which made it plain that the documents already before the Court have not been destroyed, and that the

plaintiff did not regard the non-destruction of those documents as being in breach of the order. 4. In those circumstances, the first to fifth defendants agreed that their application might be regarded as premature, and by agreement this matter was then left over. The first to fifth defendants will have to take some action if it is to be resurrected. The Plaintiff's Application 5. This application was brought by representation, and Nautech Services Limited is described in much of the documentation accordingly as the Representor. For ensuring no confusion of terms, I will refer to Nautech Services Limited as the plaintiff. The company is so described in the main action and is seeking to enforce the interlocutory injunctions ordered against the first to fourth defendants in that action by these proceedings. 6. The application was presented to the Court on 4 th April, 2014, when orders for service were made. I understand the application has been served on the first to fourth defendants

- possibly also the fifth defendant - but has not been served upon the sixth, seventh, eighth and ninth defendants who are described as parties cited in the application. This may be more than just a technical point. Advocate Santos-Costa asserted that the parties cited could seek leave to join the proceedings if they wished, but he had not served them because no allegation for contempt was made against them. The accusation was made against those who had physically accessed the data of the plaintiff, and used it contrary to the terms of the Court's injunction. 7. The allegations made by the plaintiff are not new in these continuing proceedings. They are that the first to fourth defendants have stolen the database of the plaintiff and have used the information on that database for the purposes of setting up a business in competition with the business of the plaintiff. It is said that there is an absolute need for an urgent hearing to call the defendants before the Court to require them to answer for their contempt, as the plaintiff is suffering a loss of business from the abuse of the database, and that damages would not be an adequate remedy. Indeed it is said that if damages were an adequate remedy there would have been no need for an injunction in the first place and the mere existence of the injunction shows that damages are not an answer to the particular problem which has arisen. 8. Advocate Santos-Costa had ascertained from the Bailiff's Judicial Secretary that five days might be available before me from 1 st September, 2014, in order that this argument could be heard. The plaintiff would have liked the matter dealt with earlier. Indeed, if necessary, he thought that it would have been preferable for a Commissioner to be appointed to enable the Court to deal with the argument at an earlier date. The relevant injunctions in these terms. The defendants are prohibited:- "From infringing the Plaintiff's copyright in any of the Plaintiff's confidential information and/or trade secrets or any part thereof for any purpose including, without prejudice to the generality of the foregoing, the exploitation of that information for the purposes of offering any situations vacant to engineers, officers or crew." In order to understand the injunction properly, one must have regard to the context in which it was made, namely the judgment of this Court at

[2013] JRC 089 , which was not appealed. 9. In its representation the plaintiff asserts that notwithstanding the terms of the injunction, the first to fourth respondents have copied and misused the plaintiff's information to offer situations vacant to engineers, officers and crew, and details of those allegations are then particularised under these headings:- (i) Between 1 st January and 28 th February, 2014, to offer situations vacant on behalf of the first respondent to 11 contractors. (ii) Between 29 th January and 4 th March, 2014, to offer "better rates" than those of the plaintiff seeking to procure three existing contractors to terminate their existing contracts with the plaintiff and, by implication, instead make themselves available to the first defendant. (iii) On a date after 7 th May, 2013, the exact details of which are not known, to have copied the plaintiff's LinkedIn contacts and to change the password to the LinkedIn account of the plaintiff so that the plaintiff was denied access to it, and only the respondents would have access to it. (iv) Between 9 th May, 2013, and 29 th January, 2014, it is said that the defendants used the plaintiff's trade secrets and confidential information in order to offer contracts to a further 17 contractors. (v) Between 7 th May, 2013, and 21 st June, 2013, it is said that the plaintiff's copyright and confidential information was used by the defendants to offer situations vacant to two clients. (vi) On or about 22 nd January, 2014, it is said that the plaintiff's copyright and confidential information was used by the defendants to enquire as to the availability of a further set of engineers, officers and/or crew through an organisation called Seafactor. 10. Details of these alleged breaches of the injunction were provided by letter to the defendants' lawyer Advocate Hanson on 7 th March, 2014, and the allegations were summarily rejected. The representation seeks orders against the first, second, third, fourth and fifth defendants as the Court considers appropriate in relation to the contempt of Court which has been alleged, further orders to relinquish password control over all LinkedIn accounts under their control so that, other than the plaintiff's LinkedIn contacts, they might be deleted; the appointment of a third party to filter emails sent to and from the first defendant's domain, the appointment of an independent third party adjudicator to receive and consider email alerts, and sundry other orders to monitor the use of the first defendant's server hosting its domain. 11. Advocate Santos-Costa said that really the Court at the hearing of the contempt representation would need to consider two principal activities:- (i) Was the data which had been used to make the offers of employment the plaintiff's data? (ii) Had it been improperly accessed? 12. If the answers to those questions were in the affirmative, then it would follow that the factual basis for the allegation of contempt would likely have been established. Indeed Advocate Santos-Costa submitted that if his clients were successful in establishing the contempt application, most of the defences in the main action would fall away - the technical issue as to what data belonged to the plaintiff would have been determined as a necessary part of determining the contempt allegation, and would bind those in the main action as well. Accordingly, there was no question of any duplication of cost. 13. It was urgent that this matter was dealt with in his view. The first to fifth defendants had asserted that they were not in contempt of Court, and indeed a letter from their English lawyers Messrs Ashfords had been posted on their website, making it plain that they would continue to follow the course that they were

currently following. In the meantime, daily damage was being done to the plaintiff's business. 14. In the circumstances, Advocate Santos-Costa suggested that the following directions should be made:- (i) There should be a "confidentiality club" comprising nominated representatives of Messrs Collas Crill on behalf of the plaintiff and of Hanson Renouf on behalf of the first to fifth defendants. The confidentiality club should include nominated English counsel on either side but not English solicitors. There should be included in the club one expert from each side. (ii) The confidentiality club members would have access to and use of the copy images and material lodged with the Judicial Greffier pursuant to the Acts of Court of 7 th and 13 th May, 2013. (iii) The defendants should file and serve their answer to the contempt representation and any affidavits in support by 4pm on th May, 2014. (iv) The plaintiff should file and serve any further affidavit evidence to be relied on by 4pm on 28 th May, 2014. (v) Skeleton arguments and bundles be filed and served by 4pm on 4 th June, 2014. (vi) The contempt representation be listed for hearing for the first open date with a hearing time of one week. 15. In response, Advocate Hanson said his clients (the first to fifth defendants for the purposes of this application) denied contempt and any breach of the injunction. He said that this was a campaign against the directors personally, and that the costs which had been incurred so far were in aggregate on both sides of the dispute some £250,000. He asserted that his clients were desperately trying to focus on the main issue, and that costs would probably eclipse any likely damages even if the plaintiff succeeded. In his view this was an application for an accelerated trial of some of the issues in the main action, and amounted to a resurrection of the Anton Pillar application and the springboard injunction application. He pointed out that some of the relief claimed was very similar to that which had been sought in the springboard injunction application which was rejected in June 2013 and which is the subject of the judgment of this Court at

[2013] JRC 153 . 16. It was asserted that the alleged contempt had been known about since February 2014, and the plaintiff had now sought to raise the issue when the Court sat to hear the English defendant's application for leave to appeal their joinder to the proceedings. He referred to some copy emails sent in January by Mr Harrison on behalf of the plaintiff, presumably to persons who were or had been the plaintiff's clients, seeking information as to whether the defendants were in breach of the interim orders. Advocate Hanson submitted that there could not be a binding conclusion arising out of the contempt proceedings as the parties in the main action were different. There would be no issue estoppel and it would be expensive to have to litigate the same issues more than once. He was anxious to contain costs. 17. In his submission, there were difficult questions of principle which arose out of his suggestion that there should be a confidentiality club, not least because clients should not be cut out from information which their lawyers might have. I was told there is some guidance from the Bar counsel in this respect, although I was not shown it. There was a particular difficulty for Advocate Hanson that the proposed confidentiality club excluded access by his instructing solicitors to the relevant material. He was concerned that the proposal for a confidentiality club had been made

simply for the purposes of the appeal on the joinder of the English defendants, which was a collateral purpose quite unconnected with the present contempt proceedings. 18. As to contempt, he thought that there might well be clients who appeared on the database of both the plaintiff and the first defendant. That did not prove anything. He relied on the procedural history to date which he said showed a campaign against the defendants brought in order to strangle the new business at birth, and that this was simply the springboard application brought again in another guise. 19. I asked Advocate Hanson whether his clients had any information technology experts. I was informed they have not retained such an expert at present but he agreed that they would need one. He asked me not to fix a date with a hearing at this stage. He thought it would take two to three months for an expert to be retained and that was a timetable I could use for the purposes of any directions to be given immediately, with liberty of course to the parties to apply.

Discussion 20. I would certainly be anxious about any pre-trial hearing of issues that will be live issues at trial, if the result would simply be a duplication of costs, upon the basis that the pre-trial resolution might not be binding at trial. It is true that the English defendants are not parties to the contempt proceedings and although they are described as parties cited, they have not been served. As they are appealing their joinder to the proceedings in any event, they may not wish to participate. Nonetheless I have noted that they are represented in the objections to their joinder by Advocate Hanson, and there appears to be no separate interest at present, although one cannot tell whether a different interest may be identified in the future. I do proceed on the basis now that there is at least the possibility that there would be no issue estoppel operating against the English defendants as a result of a finding of fact on the contempt application, and indeed I can hardly do otherwise given that the English defendants are not party to the present application. 21. On the other hand, I accept the contention that the Court must actively deal with any alleged breach of its injunctions. This is an important matter of principle. I also accept the proposition that the Court must proceed on the assumption that the injunctions having been granted, the Court has already accepted that damages would not be an adequate remedy in respect of the subject matter of those injunctions. That suggests that the policing of the injunctions must take place now and not at the end of the litigation. Furthermore I can see that the appeal by the English defendants against the order for their joinder, which appeal I understand will not be heard before September, means that for practical purposes it will be at least the latter part of 2015 before this case is ready for trial. 22. In principle therefore I think that the contempt representation needs to be brought on for hearing as soon as reasonably possible. Because I am anxious that the parties are already committing large sums of money by way of legal fees in this litigation, I think it is useful however both in terms of what is practical and also as a matter of principle to identify the purpose of the injunctions, and to be clear that this is recognised in the context of the enquiry which the Court will now make. This principle is emphasised in *AG -v- Punch Limited* [2013] 1 AC 1046. 23. I also note that many of the cases which have been put before me there has been a plain and obvious contempt. This is not at present such a case. There is obvious potential force in the argument that merely ascertaining

whether particular persons, who might once have been employed by the plaintiff, are available to the first defendant to work on a contract for them, or whether the first defendant has offered employment to such persons, does not necessarily imply that there has been a breach. 24. The injunction which was varied by paragraph 96(iii) of the Court's judgment of 13 th May, 2013, made it plain that the injunction which was substituted prohibited the defendants from infringing the plaintiff's copyright in any of the plaintiff's confidential information and/or trade secrets for any purpose, including the purposes of offering situations vacant to engineers, officers or crew. The injunction does not prohibit the defendants from offering situations vacant to engineers, officers or crew. It prohibits them from infringing the plaintiff's copyright, and the mere offering of situations vacant would not of itself be enough. In this context, I consider that the contents of paragraphs 92 and 93 of the Court's judgment of 13 th May, 2013, are of particular relevance - as also are the contents of paragraph 12 of the Court's judgment of 31 st July, 2013, refusing the application for a springboard injunction. I add that although it will be a matter for evidence at the time of the contempt hearing, the suggestion that the plaintiff's LinkedIn contacts have been used in breach of the orders is one which currently comes as something of a surprise given my understanding of the way in which the LinkedIn business network operates. 25. The defendants deny that they have acted in contempt of the Court's orders. It is clear from Advocate Santos-Costa's submissions that the plaintiff considers that it has expert evidence which show that the defendants have so acted. I consider that to be very relevant material for the purposes of determining where the truth lies in relation to the contempt allegations that have been made. 26. The plaintiff asserts that particular employees or clients of the plaintiff have been approached and offered situations vacant. The first to fifth defendants must know whether such persons have been approached, and must know how the approach came about. That emphasises the need for a pleading in response to the representation. It is possible that one or more of those actually approached or retained by the first to fifth defendants, if there are any approached or retained, will be called to give evidence. The veracity of all who do give evidence will no doubt be tested against such expert evidence as is produced. The Court has already expressed some views as to what is or is not the plaintiff's "data" for the purposes of the injunctions and that will no doubt inform the parties approach to the contempt application. 27. As Advocate Hanson said, a contempt application is a serious application and at least potentially leaves a party found guilty of contempt at risk of a custodial penalty. It follows that there must be full disclosure of relevant material as it would be wholly contrary to principle that a person should be potentially subject to such a penalty without having the opportunity of seeing the material upon which it was based. While I recognise that the disclosure of such material will be a matter about which the plaintiff is not sanguine, I do not see any realistic way around that particular issue. The proposed confidentiality club does not satisfy me as a mechanism therefore for dealing with any disclosure issues of this nature. 28. In relation to the contempt proceedings therefore, I make the following directions:- (i) The defendants must file an answer to the contempt representation within 16 days. They have known of the detail of the allegations

for some time, and I see no reason why they should not be in a position, in terms of having access to the factual information necessary, to formulate the response speedily. I have allowed two extra days because there are two bank holidays. (ii) The plaintiff may file a reply, if so advised, within 15 days of receipt of the answer filed by the defendants. I have allowed an extra day for the bank holiday. (iii) For the purposes of discovery, a list of documents verified by affidavit must be provided by each of the parties within seven days of the date of delivery of the plaintiff's reply, or within seven days of the date of the expiry of the time allowed to the plaintiff for filing a reply, whichever be the earlier. The list should be accompanied by copies of the documents so discovered. (iv) The plaintiff should provide within seven days of today a copy any expert report on which it relies. The report may be supplemented by an addendum provided that such addendum is filed no later than the date of filing of the plaintiff's reply, or the date upon which the time for filing a reply has expired, whichever be the later. If the defendants wish to reply on expert evidence, such expert report must be provided to the plaintiff within seven days of the plaintiff's reply or the expiry of time for filing the plaintiff's reply, whichever is the later. (v) The parties should seek to agree, but in any event the plaintiff should file a trial bundle by close of business on Friday th June, 2014. Skeleton arguments are to be exchanged by close of business on Wednesday th June, 2014. (vi) The hearing of the contempt representation is listed for 10am on 23 rd June, 2014. Five days have been set aside in the Court diary for the hearing although I do not presently anticipate that the matter should take anything like that time. (vii) There is liberty to apply. 29. This is a very tight timetable but allegations of contempt are serious. If the allegations are not proved, the Court may well take the view that this application is nothing but a continuation of the approach that would see the first defendant's business strangled at birth and mark its displeasure in that event by an appropriate costs order. If the allegations are proved, the consequences for a flagrant breach of the Court's order may well be serious. 30. In giving these directions I would to emphasise that I see the contempt application as currently falling within quite a narrow compass. The real question is whether the plaintiff is able to establish that the solicitation of these named clients by one or more of the defendants results from the misuse of the plaintiff's confidential data and/or copyright. As at present advised, I see this issue as separate from the issues which will be determined at trial but I am also conscious that a speedy resolution of this allegation may assist, one way or another, in a mediated settlement. 31. Finally I turn to the proposed direction for the establishment of a confidentiality club in relation to the release of the images and material lodged with the greffier pursuant to the Acts of Court of 7 th and 13 th May, 2013. I have already indicated that I am not inclined to the view that in contempt proceedings a confidentiality club of any kind is appropriate. However in relation to the material held at the Judicial Greffe, I consider that, as indicated in the earlier judgments, that material has been taken from the first to fifth defendants and copied. The material copied may include both material from the plaintiff and material from the first to fifth defendants. The first to fifth defendants have or should have received back their hardware and software. That will similarly have had on it both their own material and, if the plaintiff is correct, some of the plaintiff's

material. They have been ordered to destroy the plaintiff's material. 32. I do not see any reason for releasing the material held at the Judicial Greffe. To the extent that it contains copies of the first to fifth defendants' material, the plaintiff is not entitled to it. To the extent that it contains the plaintiff's material, the plaintiff already has it, because, to the extent that it does, it was copied from the plaintiff's material anyway. I was not addressed at any length, if at all, on the need for this order at present, but I am certainly not prepared to make the direction on the information currently available to me. Authorities
Nautech v CSS Ltd

[2013] JRC 089 . Nautech-v-CSS Ltd

[2013] JRC 153 . AG -v- Punch Limited [2013] 1 AC 1046. Page Last Updated: 24 Jul 2017 BAILII:
Copyright Policy | Disclaimers | Privacy Policy | Feedback | Donate to BAILII

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bailii.org/je/cases/UR/2014/>

CASE PAGE <https://chat.esheria.ai/case-law/jersey/nautech-services-ltd-v-css-ltd-and-others-2014-jrc-102e-02-may-2014>

Prepared on 22 October 2026 · Esheria