Neutral Citation Number: [2020] EWHC 3159 (Ch)

Case No: CR-2017-000140

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)

(Remote hearing via Microsoft Teams)

Rolls Building
7 Rolls Buildings
Fetter Lane
London
EC4A 1NL

Date of judgment: 6/11/2020

Before:

THE HON. MR JUSTICE FANCOURT

Between:

MIDDLESBROUGH FOOTBALL & ATHLETIC COMPANY (1986) LIMITED	Applicant
- and -	
MR PAUL MILLINDER	Respondent

- -
- -

Mr Dov Ohrenstein (counsel instructed by Womble Bond Dickinson LLP) appeared on behalf of the **Applicant**

Mr Paul Millinder, the Respondent, appeared in person

Hearing date: 6 November 2020
- -

Approved Judgment

MR JUSTICE FANCOURT:

1. I have before me three applications. The first is an application by the Applicant, Middlesbrough Football & Athletic Company (1986) Limited, which I will call "the Club" for convenience, issued on 22 October 2020 for an injunction restraining the Respondent, Mr Paul Millinder, from presenting a petition to wind up the club and also for a new Extended Civil Restraint Order ("ECRO") to be made against Mr Millinder. The second is an application issued on 23 October 2020 by the Club for a new ECRO to be made.

2. The third application was issued by Mr Millinder himself on 29 October 2020. It is an application to set aside the order made by Mann J on 23 October 2020, on the ground that it was obtained by fraudulent non-disclosure, and to set aside the orders of 9 January 2017 and 16 January 2017 on the basis that he had an indisputable debt. The application also seeks to strike out the Club's application for an ECRO, on the basis that their cause is said to be illegal. Mr Millinder requested in his application a trial of those issues over a period of seven days, lasting 21 hours in total.

3. In a helpful continuation sheet attached to his application, he set out the basis on which he seeks to have the ex parte order made by Mann J and the orders of 2017 that I have referred to set aside. Those are essentially grounds that he has previously advanced as to why (he says) there was serious non-disclosure of various matters to Arnold J on 9 January 2017 and to Norris J on 16 January 2017. He also submits, and I will come to this in a while, that there were important matters that were not disclosed to Mann J himself on 23 October when dealing with the Club's ex parte application for injunctive relief.

4. Mann J made an order for injunctive relief in the terms asked for over until the end of today, being the return date of that application, and he adjourned the application for a renewed Civil Restraint Order to be heard today too.

5. I have heard submissions by Mr Dov Ohrenstein on behalf of the Club, and Mr Millinder in person. Mr Millinder, albeit restricted in the amount of time available by virtue of the nature of this interim application hearing in the applications court, nevertheless made his *points* before me *clearly and* I understand the nature of his complaints. This is not the first time that his complaints have been ventilated in the court.

6. The first issue that I have to decide is whether the injunction granted by Mann J on 23 October should be continued. As I have said, that is an injunction to restrain presentation of a petition to wind up the Club based on a statutory demand dated 5 October 2020. The amount claimed in the statutory demand is well over £1,000,000. The origin of the amount, which Mr Millinder confirmed in the hearing today, are sums of £200,000 and £330,000 arising from a dispute between the Club and Mr Millinder's company Empowering Wind MFC Limited ("Empowering Wind") back in 2015.

7. The dispute was about whether Empowering Wind had failed to make payments due to the Club and whether the Club was entitled to terminate a lease of a wind turbine site next to the Club's stadium and a power supply agreement that it had entered into with Empowering Wind. The Club, at that time in August 2015, purported to terminate the supply agreement and forfeit the lease, and it has always been Empowering Wind's and Mr Millinder's case that it was not then entitled to do so.

8. On that basis, Empowering Wind first and now Mr Millinder claim that they are entitled to a repayment of £200,000, which was the premium originally paid for the lease, together with £330,000 said to be consequential damages resulting from the termination of the lease and the electricity supply contract and, in addition to that, substantial sums for costs incurred at the time, and interest since then, which all go to make up the sum of over £1,000,000 in the statutory demand.

9. The dispute between the Club and, initially, Empowering Wind, was ventilated in 2017 in court, when a claimed assignee of Empowering Wind's rights, Earth Energy LLC, itself presented a statutory demand to the Club, and the Club, at that time, sought similar injunctive relief restraining presentation of a winding up petition. That was granted by Arnold J on 9 January 2017 on the basis that the underlying claim as to liability between the Club and Empowering Wind was known to be disputed and the validity of the assignment by Empowering Wind to Earth Energy was also disputed on genuine grounds.

10. Allegations of non-disclosure of various matters to Arnold J have since been raised by Mr Millinder.

11. There was then a further hearing, on 16 January 2017, when the injunction previously granted was continued by consent by an order of Norris J.

12. About a year later, Earth Energy applied to set aside that Consent Order on the basis of alleged non-disclosure of material information. Nugee J, on 5 February 2018, rejected the application to set aside the Consent Order.

13. Notwithstanding that, there was then a further application by Earth Energy on 1 March 2018 to seek to set aside the Consent Order and, indeed, Nugee J's order too. By that time there had been a petition to wind up Earth Energy, and a proof of debt by the Club in the liquidation of Empowering Wind was admitted by the Companies Court in March 2018, at which time Earth Energy was itself wound up.

14. On 7 June 2018, HHJ Pelling QC dismissed the application of 1 March 2018 to set aside the Consent Order and Nugee J's order, and shortly after that Judge Pelling made an Extended Civil Restraint Order against Mr Millinder.

15. Notwithstanding the Extended Civil Restraint Order, an application was heard by the Chancellor, Sir Geoffrey Vos, in 2019, reviewing all of the previous history that I have just recited but in more detail and, ultimately, addressing the validity of the Extended Civil Restraint Order made against Mr Millinder. The Chancellor also reviewed the merits of the underlying arguments as to whether or not Empowering Wind was indebted to the Club or the Club was liable to Empowering Wind.

16. In a lengthy and detailed judgment, he held that it was simply too late for Mr Millinder to seek to challenge the validity of orders that had previously been made. The Chancellor also held that the Club was clearly entitled to the injunction that Arnold J had granted, on the basis that at the very least the underlying liability alleged by Mr Millinder was a matter of genuine dispute, and therefore seeking to recover alleged debts by presentation of winding up petitions was an abuse of the process of the Court.

17. Notwithstanding the Chancellor's decision, Mr Millinder has continued to make various applications during the two year period of his Civil Restraint Order to seek to reopen various matters. These attempts were comprehensively rejected by Nugee J in an order made on 18 June 2019. One of the attempts made and rejected was an attempt by Mr Millinder to bring, in his own right, a claim for the debt or damages that were said to be owed by the Club. Nugee J held that the allegations that Mr Millinder sought to rely upon could not at that stage be pursued.

18. The position as it is before me today is in principle very simple because the statutory demand on which Mr Millinder relies is based upon the same underlying claimed debt or damages that Empowering Wind originally asserted and Earth Energy sought to rely upon in its statutory demand in 2017.

19. The question I must decide is a straightforward one. It is whether the amount claimed in the new statutory demand served by Mr Millinder in his own name is bona fide disputed on substantial grounds. The Court considering whether or not to restrain presentation of a bankruptcy petition or a winding up petition does not decide the merits of the underlying dispute. It only seeks to ascertain whether or not there is a genuine dispute. If there is, a petition is inappropriate as a means of resolving the dispute.

20. Mr Ohrenstein, on behalf of the Club, submits that at three levels there is very clearly a genuine dispute, and at two of those levels the courts have previously held that there is a genuine dispute. The first level is the validity of the forfeiture of the lease and the termination of the electricity supply agreement and who, as a result of that, was liable to whom. Then, second, there is the validity of the assignment by Empowering Wind to Earth Energy. And the third level, which is new, is the validity of an assignment, on which Mr Millinder relies, from Earth Energy to himself.

21. What is now alleged is that there was an assignment on 18 March 2018 of the rights that Earth Energy had, which it derived from an assignment by Empowering Wind. A deed purporting to show such an assignment has been produced in evidence, and at face value it appears to be an assignment by Earth Energy acting by Mr Millinder to himself personally. The amount of the claim assigned by the deed was the same claim in relation to which Earth Energy had previously served its own statutory demand.

22. However, the problem at that level for Mr Millinder is that the assignment by deed, if indeed it is such an assignment, was made after the date of the presentation of the petition to wind up Earth Energy. The petition was presented on 12 February 2018, and the deed of assigned is dated 18 March 2018, so any such assignment, if it was made on that date, became void under Section 127 of the Insolvency Act 1986 upon the making of a winding up order against Earth Energy on that petition, which is what happened in due course.

23. It seems to me, therefore, that on any view there is a real dispute and a very real difficulty for Mr Millinder in having himself, personally, any valid claim based on Earth Energy's rights. Nugee J, in considering the validity of an intended new claim by Mr Millinder, considered that it had no reasonable prospects of success.

24. I emphasise that it is not necessary for me to decide the merits of these issues. All I need to decide is whether there is a genuine dispute on substantial grounds. It seems to me to be impossible to escape the conclusion that there is a genuine dispute, whatever the right answer is. There is a genuine dispute at all three of the levels that I have identified, and the dispute at levels 1 and 2 was well known to Mr Millinder, even if he personally considered that he and his companies had always been in the right on the underlying claim and on the assignment from Empowering Wind to Earth Energy. As a matter of law, to present a winding up petition to seek to recover a genuinely disputed debt is an abuse of the process of the Court (see a decision called *Re a Company (No: 0012209 of 1991)* [1992] 1 WLR 351, decided by Hoffmann J as he then was, and many, many decisions of this Court since then).

25. For Mr Millinder to present a petition based on his statutory demand of 5 October 2020 or based on any statutory demand that relies on the original claims of Empowering Wind or Earth Energy against the Club, would therefore in my judgment be an abuse of process. I am satisfied that Mr Millinder intends, if he can, to present such a petition unless he is restrained from doing so. The Club, therefore, in my judgment is entitled to an injunction in the terms sought and in the terms that Mann J granted on an interim basis, save that if no petition has in fact by now been presented to the Court, then paragraph (d), the fourth limb of the injunction sought, is unnecessary and should be excluded.

26. I turn then to Mr Millinder's own application to set aside the order of Mann J. As will be apparent, it matters not ultimately whether Mann J's order is now set aside, because I am satisfied that the Club is entitled to an injunction going forward from today to restrain an abuse of the court's process. But Mr Millinder argues that the position was materially non-disclosed or misrepresented by the Club when it appeared before Mann J. I asked him to summarise his five headline points on non-disclosure, as a way of trying to identify the nature of the complaints that he is making.

27. The complaints, as Mr Millinder explained to me, were first that the Club did not properly explain to Mann J that Mr Millinder contended that he was owed substantial money by the Club and that he did not owe the Club any money at all, and that there had been an unlawful forfeiture of Empowering Wind's lease and unlawful termination of the electricity supply agreement; second, that the Club lied about the nature of the assignment by Empowering Wind and did not show to the judge the counterpart assignment; third, that there was withheld from the judge a report prepared by Mr Millinder himself dated 2 June 2018 showing a fraud or a series of frauds allegedly perpetrated by the Club and various other persons in the course of the insolvency proceedings; fourth, that he pointed out to the Club's counsel after the order of Mann J was made and served that there had been a failure to draw this report to Mann J's attention but still nothing was done to remedy the matter, and fifth that orders of Nugee J previously made and a transcript of a hearing before Judge Barber were not shown

to Mann J, which would have demonstrated that the Court had previously been misled by the Club.

28. In my judgment, there is nothing in any of these allegations, so far as I can see. It was squarely put before Mann J in Mr Ohrenstein's skeleton argument that Mr Millinder disputed the position as between Empowering Wind and the Club so far as forfeiture of the lease and termination of the electricity supply agreement were concerned. Of course, in the witness statement in support of the application, the Club's own position was set out in its evidence, but I am quite satisfied that Mann J would have understood there was a dispute and that Mr Millinder considered that he was entitled to the monies claimed. Indeed, the whole basis on which Mann J considered it appropriate to grant an injunction was that there was a genuine dispute about such matters. He did not decide the issue one way or the other. He did not have to decide who was right about it.

29. As to Mr Millinder's contention that the Club did not show Mann J various documents, it is accepted that a counterpart assignment was not shown to him, but again the disputed issue about the validity of the original assignment by Empowering Wind was sufficiently identified. The Club was not trying to persuade Mann J that it was right on the issue and concealing contrary arguments. It was simply attempting to show Mann J that there was a genuine dispute. There was therefore no reason for it to conceal these matters and showing Mann J the document would have added nothing to the explanation that the Club disputed that there was a valid assignment (and indeed the Club could have said that the assignment had previously been held to have been of doubtful validity).

30. It is true that Mr Millinder's report of 2 June 2018 was not shown to Mann J either before or after he made his order and that the transcript of Judge Barber's hearing was not referred to him and that the orders of Nugee J were not specifically referred to him, but, in my judgment, these matters were not sufficiently material to the narrow issue that Mann J had to decide. Mann J was not deciding the rights and wrongs of the underlying dispute or even whether the Court had been misled on an earlier occasion. He was only concerned with the question of whether there was a genuine dispute about the amount of the debt claimed in the statutory demand.

31. In those circumstances, I consider that there was no improper misleading of the Court nor was there material non-disclosure to the Court.

32. Insofar as Mr Millinder's application seeks to set aside the orders of 9 January 2017 and 16 January 2017, this is, for all the reasons given by the Chancellor in his lengthy judgment, far too late - indeed even later now than it was in 2019 before the Chancellor - to seek to reopen those orders previously made. Mr Millinder has attempted to do that before and failed. He cannot seek to have yet another go in an interim application of this nature, and probably not at all, though I do not have to decide that point. I therefore dismiss Mr Millinder's application.

33. I have not dealt with the part of the Club's application to make a new or extended Civil Restraint Order. I should say in full frankness to Mr Millinder that I can see considerable force in the application that is being made, given the long history of applications being made totally without merit and the previous ECRO that has recently expired. However, it would be wrong today, given the shortness of time, to make such

an order without giving Mr Millinder the opportunity to address submissions on it. He has so far only taken the time that was available to him to address the injunction and the setting aside application. He has not yet addressed the Civil Restraint Order matter. I am willing to arrange at an early date for a resumed hearing of that matter so that, if he wishes, he can make submissions in that regard.

(proceedings continue)

34. I refuse the application for permission to appeal. Mr Millinder appears to be mistakenly under the impression that my responsibility is to conduct an inquiry into everything that has happened in this case and to decide the substantive merits of the underlying dispute. That is simply not right. I am hearing these applications as urgent interim applications in the applications court. The only matters that were before me are those that were raised in the applications which I have disposed of. In my judgment, there are no grounds of appeal on which there is any reasonable prospect of succeeding on an appeal.
