



Neutral Citation Number: [2023] EWCA Civ 262

Case No: CA/2022/001145

**IN THE COURT OF APPEAL (CIVIL DIVISION)**  
**ON APPEAL FROM THE HIGH COURT OF JUSTICE**  
**QUEEN'S BENCH DIVISION**  
**(Mr Justice Martin Spencer)**

The Royal Courts of Justice  
Strand, London, WC2A 2LL

Friday, 10 February 2023

**Before:**

**LORD JUSTICE UNDERHILL**

**Between:**

**(1) CREDICO MARKETING LIMITED**  
**(2) PERDM TRADING LIMITED**

**Claimants/  
Respondents**

**- and -**

**(1) BENJAMIN GREGORY LAMBERT**  
**(2) S5 MARKETING LIMITED**

**Defendants/  
Appellants**

Transcript of Epiq Europe Ltd, Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE  
Tel No: 020 7404 1400 Email: [civil@epiqglobal.co.uk](mailto:civil@epiqglobal.co.uk) (Official Shorthand Writers to the Court)

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**MR I SHIPLEY** (instructed by Brandsmiths) appeared on behalf of the **Appellants**

**MR J MEHRZAD KC** (instructed by Addleshaw Goddard) appeared on behalf of the **Respondents**

**Judgment**  
**(Approved)**  
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**LORD JUSTICE UNDERHILL:**

1. This is an application for permission to appeal together with an application for permission to rely on fresh evidence. I propose to refuse both, for the reasons which follow. The proceedings arise out of the relationship between the first respondent and claimant, Credico Marketing Limited, and the first appellant and defendant, Mr Lambert, under which Mr Lambert, through the services of the second appellant, supplied the services of his company, “independent sales advisers” to Credico to work on direct marketing campaigns for its clients. I will refer to the parties as “the claimants” and “the defendants”. I will not, save where necessary, distinguish between the two defendants and I will refer to the claimants simply as Credico, since the second claimant is for all practical purposes out of the picture. The defendants were one of a large number of so-called marketing companies ("MCs") supplying a similar service to Credico. The relationship between Credico and the MCs was governed by Trading Agreements in similar but not necessarily identical terms to that between Credico and the defendants. They included restrictive covenants restraining the MCs, among other things, from providing to others similar services to those supplied to Credico, both during the contract (that is clause 21.1 in the defendants' contract) and following its termination (that is clause 21.2). In late 2020, the relationship between Credico and the defendants broke down. Credico began proceedings against the defendants, seeking damages and an injunction arising out of breaches of the restrictive covenants in both clause 21.1 and clause 21.2.
2. There was a speedy trial on the issue of liability which led to a decision of Cavanagh J in June 2021 in which he found the defendants liable and upheld the enforceability of both covenants. That decision was the subject of an appeal to this court, which overturned his decision to the extent of finding the post-termination restraints in clause 21.2 of the Trading Agreement to be unenforceable. More details can be found in the judgment of this court handed down on 26 June 2022 ([2022] EWCA Civ 864).
3. In the meantime, Credico decided to advance a much wider claim against the defendants, the essence of which is that they pursued an unlawful scheme to disrupt and/or take over part of Credico's network of MCs, which constituted the torts both of

conspiracy by unlawful means and of unlawful interference with business. The matters relied on in relation to both ways of putting the claim included that MCs were induced to breach the restrictive covenants in the Trading Agreements both during the currency of those agreements and following their termination – in effect, clause 21.1 and clause 21.2, though I should make the caveat that the terms of those covenants may not have been entirely identical to those in the defendants’ own contract. Permission to amend to plead such a claim was given by Cavanagh J on 6 July 2021. That, rather than the original claim, is now the focus of the proceedings, and damages of almost £2 million are claimed.

4. I should emphasise that that is a brief summary by way of introduction only and is not intended to be fully comprehensive.
5. The defendants had solicitors acting for them, Messrs Brandsmiths, both in the original proceedings before Cavanagh J and on the appeal to this court, and initially also in relation to the economic tort claims. However they came off the record on 2 November 2021, not long after the defendants had served their Amended Defence.
6. On 26 November 2021, HHJ Coe, sitting as a High Court Judge, held a case management hearing at which Mr Lambert represented the defendants in person. Among other things she ordered the defendants to answer a request for further information in relation to the Amended Defence and also ordered them to pay the costs of two interim applications totalling together some £14,400. Neither order was to be enforceable until after the hearing of (not, NB, the decision in) the pending appeal to this court against the decision of Cavanagh J in the original claim. That hearing took place over 15 and 16 March 2022. The defendants' time for responding to the further information ran from 14 days after that date, but the costs order of Judge Coe became enforceable on 17 March. On 30 March, the defendants applied for an extension in relation to the requests for further information until after the handing down of the judgment of this court. There was no such application in relation to the costs order, and they were not paid.

7. On 7 April 2022 Credico applied for an order that the Amended Defence be struck out unless the further information was provided and the outstanding costs paid within seven days, with consequent costs orders.
8. On 11 April 2022 Martin Spencer J made an unless order as sought by the claimants, save that the orders had to be complied with by 22 April. He also made a further costs order in the sum of approximately £8,000. His order was unfortunately not issued forthwith; but for that reason time for compliance was subsequently extended to 4 May.
9. On 29 April 2022 Brandsmiths came back on the record. On 3 May they sought an extension of the time allowed by the unless order to 2 June. That application came before Martin Spencer J on 19 May. Credico was represented by Mr John Mehrzad KC and the defendant by Mr Iain Shipley of counsel, both of whom appear before me today. The application was dismissed, with the result that the Amended Defence stood struck out in accordance with the earlier unless order. Giving effect to that, the judge's order provided at paragraph 2 that:

"There be judgment on liability for the claimants against the first and second defendants on the claims for unlawful means conspiracy and unlawful interference."

10. The application for permission to appeal relates to that order. On 17 October 2022 I directed an oral hearing for reasons which I gave in that order and to which I will return. There has unfortunately been some delay in the hearing coming on.
11. Martin Spencer J made it clear that he was refusing the application for an extension because no good reason had been advanced for why the defendants could not pay the costs ordered by Judge Coe. He did not do so on the basis of the failure to supply the further information; if the latter had been the only issue, he said he would have been prepared to grant an extension. We are thus only concerned with the issue of non-payment. As to that, the defendants' case before the judge was that they had not paid because they were impecunious. That was in practice accepted by Credico as regards the second defendant, but not as regards Mr Lambert.

12. No evidence of Mr Lambert's impecuniosity was adduced before Martin Spencer J beyond a bare assertion in the witness statement of his solicitor, Mr Seligman. The judge did not regard that as adequate, referring in particular to paragraph 29(4) of the judgment of Sir Richard Field in *Michael Wilson v Sinclair* [2017] EWHC 2424 (Comm) which reads:

"A submission by the party in default that he lacks the means to pay and that therefore a debarring order would be a denial of justice and/or in breach of Article 6 of ECHR should be supported by detailed, cogent and proper evidence which gives full and frank disclosure of the witness's financial position including his or her prospects of raising the necessary funds where his or her cash resources are insufficient to meet the liability."

13. Martin Spencer J acknowledged, correctly, that this was not a case where the applicant was seeking relief from sanctions following a default, but he took the view that the situation was substantially similar, in view of the fact that what was being sought was an extension to an unless order. He also referred to the history of the litigation generally. The relevance of this went beyond the simple fact of prolonged non-payment. It included the fact that Mr Lambert had apparently found funds to instruct solicitors in the appeal to the Court of Appeal, which had by then been heard, and indeed for security for costs, but not to pay the (by comparison) fairly small sums which had been ordered to be paid to Credico. The judge also referred to an Instagram post by Mr Lambert in which he appeared to be crowing over the costs which he had caused Credico to incur for no result. He said at paragraph 61 of his judgment:

"The defendants have, in my judgment, been playing fast and loose with both the claimants and the courts in relation to these matters and in the process have been causing the claimants to incur more and more costs in reasonably resisting applications which have been made by the defendants. We thus have the costs of meeting the application of 30 March, the costs of meeting the application of 3 May and the costs of today's application. In my judgment, it is simply inappropriate for the defendants to conduct litigation in this way and that, as Mr Mehrzad submitted, enough is enough and the time has come to put an end to this."

14. The defendants' grounds of appeal, developed in a clear and helpful skeleton argument from Mr Shipley, largely focus on an application now to adduce evidence of Mr Lambert's impecuniosity in the form of a witness statement from him dated 15 June 2022. I believe that that application must be refused for essentially two reasons.
  
15. First, the witness statement contains no explanation of why it, or a statement to the same effect, was not put before the judge at the hearing on 19 May. It should have been perfectly apparent that such evidence was essential if the judge was going to be persuaded to grant further time following the making of the unless order. That is not simply a result of the general law as expressed in the judgment of Sir Richard Field which I have quoted. It should also have been particularly evident to the defendants because of observations which had already been made in this Court. On 30 January 2022 Master Bancroft-Rimmer made an order for security for costs in the sum of £10,000 in relation to the pending appeal (which, as I have already noted, the claimant found the funds to pay) and in that context made some strong observations about the inadequacy of Mr Lambert's disclosure about his means. Shortly afterwards, in connection with an application to this Court for a stay of payment of the costs which the defendants were ordered to pay in relation to that security for costs application, I noted that the Master had found that Mr Lambert had been less than fully frank in his disclosure and said:

"It is unsatisfactory that the appellant's assertion that he is unable to pay the amount due is not made in a witness statement or supported by documentary evidence."

The importance of that observation is not lessened by the fact that for particular reasons I was prepared to order the stay sought.

16. Mr Lambert had in fact already produced a witness statement claiming that he was impecunious: that was in July 2021 in connection with an application to this court as part of his first appeal. That statement would have been rather out of date if relied on before Martin Spencer J; but it could at least have formed the basis of a witness statement for the purpose of the hearing before him, as indeed it does in the statement now sought to be adduced.

17. As regards the absence of any such evidence before the Judge Mr Shipley pointed out that the defendants had until fairly recently been unrepresented. However, Brandsmiths were instructed for the purpose of the hearing and had been on the record for at least three weeks. They were apparently acting at that stage on a no charge basis, but that does not affect the fact that they were now acting for the defendants and in a position to advise on what was required. Mr Shipley submitted, and I accept, that the *Ladd v Marshall* factors can be applied rather less strictly in an interlocutory context. Nevertheless, the fact that the defendants could, and plainly should, have adduced this evidence before the judge must weigh heavily in the balance against its being admitted now.
  
18. Second, while the witness statement and the 2021 witness statement to which it refers do indeed give some basic information about Mr Lambert's financial situation, they do not satisfactorily establish that he could not have paid the £14,000-odd that became payable in March 2022 and was the subject of the unless order. They are very short both on detail and on documentary support for the statements made. A number of obvious deficiencies are helpfully identified in paragraph 5 of the paragraph 19 representations filed by Credico. I need not set them out here, not only in the interests of brevity but also because Mr Shipley sensibly did not attempt to deal with them one by one. Rather, his position was that, while there were no doubt deficiencies in the evidence, they were not such as to undermine the basic picture which it painted of a defendant who was indeed impecunious. However, even if the broad picture painted is that the defendant is short of funds, the statements offer no satisfactory explanation of why, if he was able to find the funds for his own legal representation in the Court of Appeal and for security for costs there, and indeed in relation to the drafting of his Amended Defence, he was not able to find the comparatively modest amounts with which we are concerned here.
  
19. Taking those two points together, I do not think it would be right for me to take the exceptional course of allowing the defendants to adduce for the first time on this appeal evidence that could and should have been made available before the judge.



20. The refusal of that application disposes of most of grounds 1–3 of the defendants' grounds of appeal, since they all depend principally on the submission that the judge should have proceeded on the basis that they were unable to pay the costs ordered, and that it would accordingly be wrong in principle, and indeed in breach of their article 6 rights, to prevent them from defending the claim.
21. Mr Shipley submitted that even without detailed evidence of Mr Lambert's means there were obvious indications before the court that he was in truth impecunious, most obviously that he had been acting for some time in person and that Brandsmiths were at the time, as he told the judge, acting without charge; and that that was sufficient to support otherwise bare assertion in Mr Seligman's witness statement. I cannot accept that submission. I do not believe that there is a real prospect that if this appeal were to proceed this Court would find that the judge had been wrong on the material before him, including the view which he took about Mr Lambert's attitude to the litigation, to refuse a further extension. The same goes for Mr Shipley's submission that the judge should at least have given the defendants a short further period to submit proper evidence of impecuniosity (although he in fact acknowledged that that was not a course which he had invited him to take).
22. Ground 4 of the grounds of appeal contends that the judge should have granted an extension in relation to the provision of the further information. In fact, as I have said, Martin Spencer J made clear that, but for the failure to pay the outstanding costs, he would have granted such an extension. Mr Shipley told us that ground 4 was only included in order to make sure that all points were covered if he were successful on grounds 1–3. Since for the reasons I have given that is not the case, I need say nothing more about it.
23. The issues which I have so far covered would, in the ordinary course, have been capable of being determined without a hearing. The reason why I directed a hearing was that I was concerned about the effect of the unless order, and specifically the entry of judgment on liability on the economic tort claims, in the light of the defendants' subsequent success in this court on the issue of the enforceability of clause 21.2 of the Trading Agreement – that is, the post-termination constraint. I was concerned that, if

the enforceability of clause 21.2 was a necessary element in Credico's cause of action, it would be wrong in principle that it could obtain damages for a wrong which the decision of this court meant had never occurred. Our decision was not of course known at the time of Martin Spencer J's order, and it is at least arguable that he would not have thought it right to make an order that had that effect. Unless that concern were allayed, I might have been prepared to allow the defendants to amend their grounds of appeal to take this point; and it is fair to say that it is in fact to some extent foreshadowed in Mr Shipley's skeleton argument, albeit in a different context.

24. Both parties filed helpful written submissions on this point and also addressed me orally. I am now persuaded that the issue does not arise. The relevant principles are helpfully summarised at paragraphs 26–29 in the judgment of Ward LJ in *Pugh v Cantor Fitzgerald International* [2001] EWCA Civ 307. Credico's pleading of the economic tort claims is somewhat dense, but Mr Mehrzad demonstrated that none of the bases of liability pleaded depended only on clause 21.2 or therefore on its being enforceable. It followed that there was no necessary inconsistency between the decision of this court on the earlier appeal and the default decision on liability following the order of Martin Spencer J. It followed in turn from that that the defendants are entitled, on any issue going to causation or quantum of damages, to seek to rely on the earlier decision of this court that clause 21.2 was unenforceable. (In that connection, I should record that Mr Mehrzad made it clear that Credico did not necessarily accept that that finding was applicable to the equivalent covenants in the contracts of the targeted MCs, for the reasons acknowledged in principle by Sir Patrick Elias at paragraphs 34–35 of his judgment.)
25. Mr Mehrzad in fact suggested that the order of Martin Spencer J could be varied to include a paragraph in the following terms:

"The defendants may, as so advised, argue on the issues of causation and/or damages at the assessment of damages under paragraph 8 above, that clause 21.2 only of the targeted Trading Agreements is not enforceable following the Court of Appeal judgment of 23 June 2022, subject to any arguments from the claimants that the Court of Appeal judgment does not apply to the targeted Trading Agreements."

That is to the same effect, I hope, as the reasoning which I have just expressed, but I do not think it is necessary to vary the order. It is sufficient that I have recorded Mr Mehrzad's formulation here as a formal statement of Credico's position, with which I agree.

26. Finally, I should note that Mr Shipley made it clear that it was the defendants' position that the unenforceability of clause 21.2 made a huge difference to the value of Credico's claim, whether by reference to causation or any other elements of quantification. I should express no view on that either way. I would, however, encourage both parties to take a realistic view about what they can achieve by this litigation. Quite apart from the question of what any eventual award may be, the further costs necessary to reach that point are likely to be substantial and Credico will no doubt consider carefully their prospects of recovery.

**Order: Application to adduce fresh evidence and permission to appeal refused. Order for costs summarily assessed in the sum of £15,000 payable within 14 days.**

**Epiq Europe Ltd** hereby certify that the above is an accurate and complete record of the proceedings or part thereof.

Unit 1 Blenheim Court, Beaufort Business Park, Bristol BS32 4NE  
Tel No: 020 7404 1400  
Email: [civil@epiqglobal.co.uk](mailto:civil@epiqglobal.co.uk)