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

No. CR-2017-000140

Rolls Building
Fetter Lane
London EC4A 1NL

Monday, 9 January 2017

Before:

MR JUSTICE ARNOLD

B E T W E E N :

MIDDLESBROUGH FOOTBALL
AND ATHLETIC COMPANY (1986) LTD

Claimant

- and -

EARTH ENERGY INVESTMENTS LLP

Defendant

MR U. STAUNTON appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

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(Transcript prepared from poor quality audio)

MR JUSTICE ARNOLD: Mr Staunton, do you want your application heard in private?

A MR STAUNTON: No, my Lord.

MR JUSTICE ARNOLD: All right.

MR STAUNTON: My Lord, have you had an opportunity to read my skeleton and the evidence?

MR JUSTICE ARNOLD: I have.

B MR STAUNTON: I am obliged. I do not propose to be long. All I intend to take you to is the exhibit to Mr Bloom's witness statement and then address you on the application. Can I take you to tab 4, which is the exhibit. Do you have that, my Lord? Tab 4----

MR JUSTICE ARNOLD: Just a second. I am still getting myself in order. Yes. Thank you.

C MR STAUNTON: The pagination in the bottom right-hand corner. Page 16. My Lord, you will see the lease was granted to Empowering Wind, not the respondent. Do you see that, my Lord?

MR JUSTICE ARNOLD: Yes, I do.

MR STAUNTON: Page 18, penultimate entry, there is the premium of 200,000----

D MR JUSTICE ARNOLD: Yes.

MR STAUNTON: -- and can I also take you to p.27 under the clause, "Demise"?

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: You will see that the premium was to be paid on the grant of the lease.

MR JUSTICE ARNOLD: Yes.

E MR STAUNTON: If you would also look at the penultimate line of cl.2, and the final line, you see there is further rent payable.

MR JUSTICE ARNOLD: Yes.

F MR STAUNTON: If I take you to p.32, cl.1.1, covenant to pay that further rent as set out in Schedule 7. Page 48, cl.1.4.1, there is the further rent of 50,000 a year----

MR JUSTICE ARNOLD: Yes.

G MR STAUNTON: -- and if you turn over the page, my Lord, 1.7 and 1.8, that is to be paid on the usual quarter days. So there is the obligation. It is the obligation of Empowering Wind, and you know from the evidence it fails to pay that additional rent, hence the lease is forfeit, which gives rise to this claim.

The respondent argues constantly about *force majeure*. Can you turn back to p.22, please?

H There is a definition clause for *force majeure*. The very curious thing is, although it is part of

the definition clause of the lease, there is no further mention in the lease of *force majeure*, what happens should circumstances of *force majeure* arise. It is very curious.

A

MR JUSTICE ARNOLD: Right. Yes, that is odd.

MR STAUNTON: So it does not appear on the face of this document that any event of *force majeure* excuses Empowering Wind from paying the rent. Where you do find *force majeure* is, if you turn on to the energy supply agreement, p.51, it has an effective *force majeure* clause. So p.51. This is the energy supply agreement.

B

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: If you turn on to p.54, you will see the *force majeure* definition about two-thirds of the way down the page. It is slightly different to the definition of *force majeure* in the lease, but that's neither here nor there in my submission, but this does have effect because if you turn on to p.57----

C

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: -- cl.3.1.2, there is an obligation to pay sums, and p.60, cl.6, does have an effective *force majeure* clause. Now, I do not have, in the evidence, any answers to why there is an effective *force majeure* in the energy supply agreement but not in the lease, but that is the evidence before you.

D

MR JUSTICE ARNOLD: Okay.

MR STAUNTON: Now, the rent was not paid and there was a demand, forfeiture. Can you turn to p.66? There is the invoice for the rents. Page 67 is the invoice itself and p.73----

E

MR JUSTICE ARNOLD: Yes?

MR STAUNTON: -- the step before forfeiture and Mr Bloom's evidence is that it was then forfeited in, I believe, August, he says.

F

Now, before the events of December 2016 and this month, it was quite clear to all the parties that there was a dispute as to whether Empowering Claim have a claim arising from the forfeiture. If you look at p.77----

MR JUSTICE ARNOLD: Yes.

G

MR STAUNTON: -- there is a letter of September 2015 from Empowering Wind, and, of course, what is material to note, and I will take you to it in due course, is the allegation is that the claim was assigned in June 2015, wholly inconsistent with the documentation because here we are in September 2015 and the claim had been advanced by Empowering Wind. It is an extremely convoluted claim, difficult to actually fathom, but you will see here on p.77, the first paragraph:

H

“Following my conversation with Tracey Flanagan I write as suggested to set out the reasons we have had to resort to legal action to recover our losses in the wind turbine project.”

A

So it is clearly a claim by Empowering Wind. Para numbered “(1)”, the first paragraph, last sentence:

“I submitted an application to Middlesbrough Borough Council in September 2013 with background as to why the planning condition is not necessary, is unreasonable and is also *ultra vires*.”

B

If you look at the final paragraph on that page, the second sentence:

“The condition was not removed until ... December 2014.”

C

If you turn over the page, third paragraph:

“Payment of rent and the energy supply would have therefore commenced 12 months after the date the *Force Majeure* issue was finally resolved ...”

D

The next paragraph:

“My company has taken comprehensive legal advice around this position ...”

E

So, again, it is Empowering Wind’s claim. He then refers to an email from Mr Bloom of 13 March 2015 and, just basically, he says, Mr Bloom says that the claim is disputed. Finally, if we turn over the page, p.79, the penultimate paragraph:

“We eventually agreed ...”

F

Do you see that, my Lord?

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: We eventually agreed to actually pay a deposit of £240,000. So it seems there, on the face of it, to be an acceptance that there is some merit in the dispute, but also merit in the defence and hence you have the payment of a deposit.

G

Now, what is clear is that this, in September 2015, seems a claim by Empowering Wind, not the respondent. I have already referred you to various passages in that letter showing that.

H

Can I just take you on to p.88? We are now into December 2016. Look at the top, my Lord.

It is from Mr Millinder on 15 December 2016. Attachments: "EW Statement of Case". Do you see that, my Lord?

A

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: I will take you to that in a moment. If you then move on to the third paragraph:

B

"I have established the correct legal position around *Force Majeure* and I, as majority creditor of Empowering Wind ... have right to progress the claim that I shall assign to its parent company. I attached (redacted) particulars of claim which I am quite happy, at this stage to lay on the table."

And then if you go down to the third paragraph from the bottom:

C

"MFC attempted----"

Do you have that, my Lord?

MR JUSTICE ARNOLD: Mm hmm.

MR STAUNTON:

D

"... however this does not prevent us from assigning rights to recover costs and taking legal action resulting from forfeiture of the Lease as Parent Company of Empowering MFC."

So, as of 15 December---- My Lord, sorry, if you turn on to p.19, that is the attachment----

E

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: -- that he calls the particulars of claim, it does not look like it, but it is quite clear again it is a claim by Empowering Wind, 15 December 2016.

MR JUSTICE ARNOLD: Yes.

F

MR STAUNTON: And then if you turn on to p.99, an email from Mr Millinder of 22 December, including a link to a web page that he created, and if you turn on, over the page, there is the web page itself.

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: And you will see there, about a quarter of the way down:

G

"Empowering exposes the truth and the outcome of its investment in the project."

H

Now, he says roughly the same thing on his web page as he does on the letters of claim in September 2015 and the redacted particulars of claim, so, by 22 December, it is still Empowering's claim.

Now, he asserts that the claim was assigned in June 2015. If you turn on to the statutory demand itself, p.173----

A

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: -- you will see that the statutory demand was from Earth Energy, and if you turn on to p.176, the assertion is that it was assigned on 29 June 2015. Do you see that, my Lord?

B

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: Part B. And, in my submission, that is wholly implausible in view of the correspondence of September 2015 and December 2016. And we know that Empowering had been wound up---- Can I take you to the winding up order at p.86?

C

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: You see the owner winding up or restoring Empowering Wind to the register first and then winding it up, and that is 19 September 2016. At the top, it is based on a petition presented on 2 June 2016.

D

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: So, thereafter, clearly Empowering Wind, through Mr Millinder, could not assign the cause of action----

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: -- and, in my submission, the evidence shows that it had not been assigned in June 2015 as Mr Millinder claims in the statutory demand.

E

Now, in my submission, it is clear that what Mr Millinder is doing is threatening this wind up petition so as to prejudice the interests of the applicant, and one of the things he says is that if he presents the petition, all the bank accounts will be frozen.

F

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: All he wants to do is cause trouble. If you turn on to p.170----

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: -- there is an email string. The one two, a third of the way down, Mr Bloom-- -- This is sent at 9.17 on Friday morning. I am sorry the date does not appear on it as we sent it, but Mr Bloom gives evidence that that is when it was received.

G

“As you have indicated you do not intend to pay----”

H

MR JUSTICE ARNOLD: It does have the date on it. I can see it, just above----

MR STAUNTON: Oh, sorry. Yes. You do much better than me. Indeed.

MR JUSTICE ARNOLD: Okay.

MR STAUNTON: So 9.17 on Friday morning.

“As you have indicated you do not intend to pay your debt despite my requests and in light of the Demand you believe is an abuse of process. I will now issue the Winding Up Petition with it and will advertise the petition within 7 working days from date of service. You have full particulars and we will have our QC at court if the case is sent for directions.”

And then if you look at the final paragraph:

“You may note, if the petition get advertised, your bank accounts may be frozen and the other creditors will become aware.”

You know from Mr Bloom’s evidence that Mr Millinder has behaved somewhat erratically and seems to adopt a fairly abusive approach to Mr Bloom. He moves from December 2016, “Here are the particulars of claim”, to 5 January serving a statutory demand; Mr Bloom responds then with the claim is disputed, then the morning of the 6th, he then moves to, “Fine, I will just present the petition”, and his estimate as to when he will present the petition, if you look, please, at page---- Yes, so he says he is going to present the petition at some point, and then if you look at Mr Gill’s evidence, at tab 5----

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: -- it moves from, “I am going to present it on Tuesday if I do not hear from you on Monday” to, Sunday afternoon, he says he is actually coming down to London to present it.

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: So there is great concern that if we notify Mr Millinder of the application, before it can be heard after three clear days’ notice, he will simply come to court and present the petition, and we know from the evidence of Mr Bloom that he says that the mere presentation and existence of the petition can cause real risk of jeopardy to the financial position of the applicant, both in relation to its bankers, existing sponsors, future sponsors, other football clubs with whom it is negotiations, during this window----

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: -- and also in relation to the fact if it cannot deal in players, there is an increased risk of relegation, with a significant loss.

So, for all those reasons, we invite you to make an order. Now, the draft is at tab 2. We would suggest a fairly short return date, Monday of next week. Tab---- Sorry, page, the second page, the paragraph numbered “(1)”, I have left blank the return date.

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: My Lord, we would intend to serve this today, so we could have a return date of Friday, but my difficulty is that I am presently involved----

MR JUSTICE ARNOLD: Seven days is normal in these circumstances.

MR STAUNTON: Indeed. Indeed. Paragraph 2, because it is made without notice, he can apply to vary and rescind.

MR JUSTICE ARNOLD: Yes.

MR STAUNTON: Costs reserved.

MR JUSTICE ARNOLD: Yes. **This does not include a cross-undertaking in damages.**

Presumably, you accept that it should do?

MR STAUNTON: Indeed, I will do that.

MR JUSTICE ARNOLD: Very good. All right.

MR STAUNTON: Now----

MR JUSTICE ARNOLD: I need not trouble you any further on that basis.

MR STAUNTON: Yes. Well, my Lord, save for this: that the evidence is that the applicant is not in good health but its parent company is, and the parent company is quite content to be joined.

MR JUSTICE ARNOLD: Very good. So if you can give me a cross-undertaking in damages from the parent company. I am obliged that you pointed that out.

MR STAUNTON: Thank you, my Lord.

MR JUSTICE ARNOLD: Very good.

(See separate transcript for judgment)

MR JUSTICE ARNOLD: So, Mr Staunton, if you could send my clerk a revised draft of the order which, first of all, specifies the return date as a week today and, secondly, includes the cross-undertaking.

MR STAUNTON: Okay. And the parent company is The Gibson O’Neill Company Limited. P&L for June 2015, 18 million, and balance sheet, 176 million.

MR JUSTICE ARNOLD: Very good. Thank you very much.

A

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B

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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
INSOLVENCY AND COMPANIES LIST (ChD)
[2017] EWHC 3914 (Ch)



No. CR-2017-000140

Rolls Building
Fetter Lane
London EC4A 1NL
Monday, 9 January 2017

Before:

MR JUSTICE ARNOLD

B E T W E E N :

MIDDLESBROUGH FOOTBALL
AND ATHLETIC COMPANY (1986) LIMITED

Claimant

- and -

EARTH ENERGY INVESTMENTS LLP

Defendant

MR U. STAUNTON appeared on behalf of the Claimant.

THE DEFENDANT did not appear and was not represented.

J U D G M E N T

MR JUSTICE ARNOLD:

- 1 This is an application without notice by Middlesbrough Football & Athletic Company (1986) Limited for an interim injunction to restrain Earth Energy Investments LLP from presenting or advertising a winding up petition based on a statutory demand dated 6 January 2017 until a return date in seven days' time.
- 2 The basis for the application, shortly stated, is that the claim made by the respondent in the statutory demand is disputed, and on substantial grounds, those being twofold: first, that, if there is a claim, the claim is that of Empowering Wind MFC Limited, a company in liquidation, and not of the respondent; secondly, and in any event, the claim, whichever be the correct party, has been disputed by the applicant for some time.
- 3 The background to the matter, in summary, is as follows. On 17 June 2013 the applicant granted Empowering Wind a lease on payment of a premium of £200,000 under which Empowering Wind was liable to pay rent of £550,000 per annum. There was a planning aspect to the matter which I do not propose to go into in any detail, but the upshot was that it was not until December 2014 that Empowering Wind obtained planning permission from the local planning authority. Empowering Wind paid the rents due under the lease up to June 2015, but thereafter failed to pay the rent. On 19 August 2015 the applicant forfeited the lease.
- 4 It is apparently Empowering Wind's assertion, and now the respondent's assertion, that the delay which was encountered between September 2013 and December 2014 in obtaining planning permission from the local planning authority was an event of *force majeure* under the lease. Be that as it may, it is at least arguable on the evidence before the court that Empowering Wind and the respondent have known for a very considerable period of time that the claim was disputed.
- 5 On 22 September 2015 Mr Paul Millinder, who appears to be the moving spirit behind both Empowering Wind and the respondent, wrote to the applicant advancing a claim, as it appears, on behalf of Empowering Wind.
- 6 On 30 September 2015 the applicant's general counsel, Robin Bloom, replied to that letter, making it plain that the claim was disputed. There has been subsequent correspondence, but it is not necessary for present purposes for me to go all the way through it. Suffice it to say that, until comparatively recently, the claim apparently being made was one on behalf of Empowering Wind. Only in the statutory demand did the respondent emerge as the claimant.
- 7 In the statutory demand, the basis for the claim being made by the respondent rather than Empowering Wind is stated to be an assignment dated 29 June 2015. The applicant's evidence, however, gives rise to a real doubt as to whether there can possibly have been an assignment of the relevant cause of action as of that date. Even if it turns out that there was an assignment of the cause of action, the evidence presently before the court indicates that there is a well arguable case that the claim is and has been in dispute for over a year. Indeed, Mr Millinder himself appears, even in his letter of claim of 22 September 2015, to have recognised that there was a dispute, since he uses that very word.

- 8 Accordingly, on the basis of the present evidence, I am satisfied that it is well arguable that the presentation by the respondent of a winding up petition would constitute an abuse of process and therefore should be restrained.
- 9 It remains for me to deal with two matters. Firstly, the justification for this application having been made without notice. It is the applicant's evidence that Mr Millinder has been behaving in what has been described as an "erratic" fashion and that the applicant is concerned that, if he is given notice of the application, he will seek to frustrate it by presenting the petition before he can be restrained from doing so. In my judgment, the evidence justifies concern on the part of the applicant so far as that is concerned. In particular, there are two aspects of the evidence which seem to me to justify that concern. The first is that Mr Millinder's recent communications evidence an intention to pressurise the applicant by presentation of the proposed winding up petition. Secondly, he has brought forward in time his threatened issuing of the petition, and yesterday afternoon stated that he was on his way to London to issue it, apparently today.
- 10 The second matter I should address is that, although all I am being asked to make is an interim order for a period of seven days, which of course carries with it the entitlement of the respondent to apply to vary or discharge the order in the meantime, given that it is an interim order rather than a final order, it is right that the respondent should be protected by a cross-undertaking in damages. That is very properly accepted on behalf of the applicant. The applicant is not in a good financial position, which is precisely why it is concerned about the potential effects of the presentation of a winding up petition. However the applicant's parent company is, I am informed, in a financially healthy position and therefore offers to join in the cross-undertaking in damages. On that basis, I will make an order substantially as sought, subject to the two amendments discussed with counsel for the applicant.
-

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