

Middlesbrough Football & Athletic Company (1986) Limited ("MFC")







NOTE OF HEARING OF APPLICATION BEFORE MR JUSTICE ARNOLD IN COURT 10, THE ROLLS BUILDING AT 10:30AM ON 9 JANUARY 2017

In attendance:

Mr Justice Arnold ("J")

Mr Ulick Saunton of Radcliffe Chambers, Counsel for MFC ("US")

Harriet Ainsworth, Paralegal, of Bond Dickinson LLP, solicitors for MFC

HEARING	
J	Do you require this to be heard in private?
US	No.
	<p>I will begin by referring to tab 4 of the bundle – page 16. This is the lease granted to Empowering Wind MFC Limited ("EWML"). This is not the Respondent.</p> <p>Reference to tab 4, page 18. Sets out the parties to the lease. These are listed as MFC and EWML.</p> <p>Reference to tab 4, page 27. Clause 2 refers to the premium paid of £200,000.</p> <p>Reference to tab 4, page 32. Clause 1.1 references the rent due from EWML.</p> <p>Reference to tab 4, page 48. Clause 1.4.1 states that there was rent due of £50,000 per annum.</p> <p>Reference to tab 4, page 49. Clauses 1.7 and 1.8 confirm that the rent is to be paid quarterly from the date of the lease.</p>
1	EWML was obligated under the lease to pay rent. 
2	There is a definition of Force Majeure in the lease. There is no other reference to Force Majeure in the lease. 
3	There is reference to Force Majeure in the Energy Supply Agreement between MFC and EWML. Reference tab 4, page 51. Force Majeure is defined at page 54. For the purpose of this Agreement, it does have effect. 
4	Reference to tab 4, page 57. Clause 3.1.2 confirms the obligation to pay sums where the Actual Consumption in any given year is less than the Agreed Output. 
5	Reference to tab 4, page 60. Clause 6 – Force Majeure – Neither party shall be in breach of the Agreement, or otherwise liable to the other, by reason of any delay in performance, or non-performance of any of its obligations due to an event of Force Majeure.
6	The rent was not paid. 
7	Reference to tab 4, page 66. Letter from MFC to EWML enclosing invoices for rent. 
8	Reference to tab 4, page 73. Letter from MFC to EWML providing notice of non-payment. Robin Bloom's evidence states that the lease was forfeited. Prior to December 2016 EWML was aware that the claim was disputed.

9	<p>Reference to tab 4, pages 77-79. Letter dated 22 September 2015 from EWML to MFC. In this letter EWML confirmed their offer to pay £240,000 into an escrow account in respect of the dispute over the lease.</p>
10	<p>Therefore, as at September 5 EWML was the claimant and not the Respondent.</p>
11	<p>Reference to tab 4, page 88. Email dated 15 December 2016 from Paul Millinder to Robin Bloom and Mark Ellis sent on behalf of EWML. Therefore as at 15 December 2016 the claimant was EWML.</p>
12	<p>Reference to tab 4, page 99. Email dated 22 December 2016 from Paul Millinder to Robin Bloom and Mark Ellis providing a link to a webpage for EWML and demanding payment. Therefore as at 22 December 2016 the claimant was EWML.</p>
13	<p>The Statutory Demand was issued by Earth Energy Investments LLP ("EEIL").</p>
14	<p>Reference to tab 4, page 176. Email dated 8 January 2017 from Paul Millinder to Julian Gill.</p>
15	<p>It is my submission that the this is wholly implausible given the correspondence of September 2015 and December 2016 which references EWML.</p> <p>A Winding Up Order was made on 19 September 2016 in respect of EWML.</p> <p>Paul Millinder has threatened to issue a Winding Up Petition against MFC. I believe this is to prejudice my client and cause trouble.</p> <p>Paul Millinder sent an email to my client on Friday [06/01/2017] at 09:17 confirming that he had issued a Winding Up Petition.</p> <p>Julian Gill's evidence states that Paul Millinder then emailed on Sunday afternoon [08/01/2017] saying that he was on his way to London to issue the Petition.</p> <p>Our concern is that if Paul Millinder was given notice of this application to restrain, he may present a Petition in the interim period before the hearing. This may have serious financial consequences for the Applicant.</p> <p>I therefore invite you to make the Order with a short return date. I suggest Monday 16 January 2017.</p> <p>We intend to serve the papers on the Respondent today.</p>
J	<p>Seven days is normal. List for 16 January 2017.</p> <p>I am concerned that the Order does not make reference to a cross-undertaking for damages.</p>
UC	<p>I accept that an undertaking will have to be given.</p> <p>The most recent filed accounts of MFC did not show a healthy position but its parent is willing to join in the undertaking and its most recent accounts showed £18,791,042 on the profit and loss and £176,549,398 on the balance sheet.</p>
J	<p>This is an Application without notice to restrain EEIL presenting a Winding Up Petition. It is based on the Statutory Demand dated 6 January 2017.</p> <p>The claim made by the Respondent is disputed on substantial grounds:</p> <ol style="list-style-type: none"> 1. The claim is by EWML (in Liquidation) and not the Respondent; and 2. The underlying claim is disputed by the Applicant. <p>The background to the Application is that a lease was signed on 17 June 2013. The rent payable was £50,000 per annum. I understand that there was a planning aspect. The upshot</p>

was that the work was not completed until December 2014 when EWML obtained planning permission.

EWML paid the rent due under the lease until June 2015. In August 2015 the Applicant forfeited the lease.

It is the Respondent's assertion that the delay from September 2013 to December 2014 was an event of Force Majeure.

It is arguable that EWML and the Respondent have known for a considerable period that the claim was disputed.

Refer to letter of 22 September 2015 where Paul Millinder wrote to the Applicant advising of the claim. On 30 September 2015 the Applicant (Robin Bloom) replied confirming that the claim was disputed. There was then subsequent correspondence.

Until recently the claim has been made by EWML only. It is only in the Statutory Demand that the Respondent has emerged as the Claimant.

The Respondent states that the claim was assigned on 29 June 2015. The Applicant's evidence gives real doubt to that date. Even if there was an assignment, it is arguable that the claim is/has been in dispute for over a year. Paul Millinder recognised the dispute in September 2015.

On the basis of the evidence presented, the presentation of a Winding Up Petition would constitute an abuse of process and therefore the Respondent should be restrained.

I accept the Applicant's justification for making the application without notice. Paul Millinder has been known to behave in an erratic fashion. By providing notice there was a possibility that the Petition would be issued before the Application is heard. The evidence in support of this is:

1. Paul Millinder's recent communication; and
2. Paul Millinder's intention to bring forward the issuing of the Petition – informing the Applicant that he was on his way to London yesterday afternoon.

I will make an Interim Order (7 days). The Respondent can make an Application to vary/discharge.

The Respondent should be protected by a cross-undertaking for damages. I understand that the Applicant's parent company has a healthy financial status.

I will make the Order subject to two amends:

1. Return date of 16 January 2017 to be added; and
2. Reference to be made to the cross-undertaking.