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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURT
OF ENGLAND & WALES



No. CR-2017-000140

Rolls Building
Fetter Lane
London EC4A 1NL

Thursday, 7 June 2018

Before:

HIS HONOUR JUDGE PELLING QC
(Sitting as a judge of the High Court)

BETWEEN :

EARTH ENERGY INVESTMENTS LTD

Applicant

- and -

MIDDLESBROUGH FOOTBALL & ATHLETIC CO (1986) LTD

Respondent

The Applicant appeared In Person by Mr Millinder.

MR STAUNTON (instructed by Womble Bond Dickinson (UK) LLP) appeared on behalf of the
Respondent.

JUDGMENT

JUDGE PELLING :

- 1 There are two main applications before me today. The first is an application in the name of Earth Energy Investments LLP (“EEI”) for an order discharging what is ostensibly a consent order made on 16 January 2017 by which EEI was ordered to pay £25,000 by way of a costs’ contribution to Middlesbrough Football & Athletic Company (1986) Ltd (“Club”) and to set aside an order made by Nugee J on 5 February 2018 by which he had dismissed what the Club maintains was a materially identical application to that now made before me in relation to the 16 January consent order. The second main application before me is an application to rescind an order made on 28 March 2018 directing that EEI be wound up. Since the winding up order depends upon EEI being liable to the Club for £25,000 under the 16 January consent order, it was submitted by the Club that I should determine the application to set aside that order first. Mr Millinder who is or claims to be interested in EEI and to be entitled to act on its behalf in these proceedings does not oppose that course.
- 2 Ordinarily, it would be necessary for me to set out at some length the background facts relevant to the application. Happily, I do not have to in the circumstances of this case simply because I am able to adopt what Nugee J said in para.3 to 4 of his judgment dismissing EEI’s earlier application to discharge the order of 16 January.
- 3 As Nugee J said at para.2 of his judgment, the principle application before him was an application to “*set aside an order made on 16 January by Norris J.*” The relevant background was set out by Nugee J in para.3 to 4 of his judgment in these terms.

“In essence a company called Empowering Wind MFC Ltd, which was a special purpose vehicle and was, I believe, a subsidiary of EEI, negotiated with the applicant, who has appeared by Mr Staunton, that is Middlesbrough Football &

Athletic Company (1986) Ltd, which I will call Middlesbrough, for a suite of agreements under which it would in effect erect a wind turbine on a car park next to Middlesbrough Stadium, the benefit to Middlesbrough being not only in the shape of an annual rent but also the delivery of free electricity and the benefit to Empowering Wind (or EW as I will call it) being to be able to generate more electricity which it could feed into the national grid and receive a tariff for.

“In the event, the project did not succeed. I heard some explanation from Mr Millinder as to why the project did not succeed, his contention being that it was in effect all Middlesbrough’s fault for failing to enter into an agreement called the Connection Agreement. The upshot of that was that EW was unable to generate any money. That meant it was neither able to pay rent under the lease nor to pay what were quite substantial charges ostensibly payable under something called the Energy Supply Agreement under which, if it was not supplying energy to Middlesbrough, it had to pay Middlesbrough a figure based on 8p for each kilowatt of hour of energy which Middlesbrough consumed.”

“On the basis of these matters, Middlesbrough demanded payment of money from EW, terminated the lease for non-payment of rent and subsequently appeared as a supporting creditor in support of a petition to wind up EW brought by HMRC. In January 2017 Middlesbrough received a statutory demand, not from EW (which was by then in liquidation) but by EEI claiming over half a million pounds in respect of what could be briefly described as aborted costs, namely £200,000 which had been paid by EW for the premium for the lease and a further £330,000 said to be for costs which had been incurred on the project. This led to an application initially without notice before Arnold J by Middlesbrough and a

without notice order was made on 9 January and subsequently to the order of 16 January made by Norris J which, on its face, is recited to have been made as a consent order. Arnold J on 9 January restrained the presentation of a winding up petition and Norris J on 16 January restrained the presentation of a petition or any further proceedings on any petition and ordered the respondent, that is EEI, to pay Middlesbrough £25,000 in respect of the applicant's costs."

- 4 It is necessary that I set out in more detail the steps leading to the order made by Norris J. That can best be done by reference to the correspondence that passed between the Club's solicitors, Bond Dickinson, and the solicitors acting for EEI at that time, Pennington Manches.
- 5 Following the grant by Arnold J of the injunction on 9 January 2017 it became apparent that there had been what EEI and its solicitors regarded as a serious non-disclosure. On 11 January 2017 Penningtons wrote to Bond Dickinson in these terms:

"We have been instructed to represent EEI in relation to the injunction obtained by your client restraining the presentation of a winding up petition and in relation to the return date. We have seen the three witness statements and exhibits in support of the without notice injunction made on 9 January 2016 and are concerned that material information was not put before the court ..."

There are then set out eleven separate categories of material which it is said had been omitted including most of the documents which are said to constitute the relevant agreements, some board minutes and some email correspondence. The letter then continued as follows:

“Please explain why this material was not put before the court. In any event, going forward our client agrees that the injunction should continue in the same terms as the interim order obtained by your client and until further order of the court or agreement of the parties. However, given the failure by your clients to provide full disclosure to the court, the appropriate order as to costs is that each party bears its own. If this cannot be agreed by four pm on 12 January 2016 we have instructions to attend the hearing on Monday for the purposes only of arguing that your client should not be entitled to its costs.”

The focus of the application before me is on the issue concerning costs. Mr Millinder maintains that he was the person giving instructions to Penningtons and that the final paragraph of the letter set out above reflects his instructions which he says never changed.

- 6 Following a response by Bond Dickinson to the letter quoted above, Penningtons wrote again on 12 January 2017 in these terms insofar as is material:

“We refer to our previous correspondence in your letter of today. In order to dispose of the hearing on Monday and so as to avoid any further costs, we confirm our client will agree to a continuation of the interim injunction as set out in our letter of yesterday and agrees to pay your client’s costs to be assessed on the standard basis if not agreed. Please let us have a draft order to dispose of this matter for our agreement.”

Mr Millinder maintains that that letter and all the others to which I refer below were written without his instructions.

7 Following some further email and letter correspondence concerning settlement that I need not take up time setting out, on 12 January at 1945 Mr David Niven, the partner at Penningtons acting for EEI on the instructions of Mr Millinder, emailed Bond Dickinson as follows.

“I have instructions from my client to agree to pay £25,000 within 21 days in respect of your client’s costs as earlier requested. Please confirm by return settlement on this basis.”

This was followed by an email from Mr Stewart of Bond Dickinson at 2112 on 12 January which was in these terms:

“I confirm that my client will agree to accept a payment of £25,000 within 21 days. We will forward a revised consent order in the morning for signature.”

A consent order was produced and it was apparently signed on behalf of EEI by Penningtons and was approved and sealed without any formal hearing taking place. The consent order contained at para.1 a provision in the terms summarised by Nugee J in the judgment quoted from earlier and then at para.2 provided as follows:

“The respondent shall by four pm on 3 February 2017 pay the applicant £25,000 in respect of the applicant’s costs of this application.”

It is common ground that that sum was never paid.

- 8 I can now move forward to 30 January 2018 because on that date EEI acting now by Mr Millinder in person issued the application that was ultimately heard and determined by Nugee J by his judgment delivered on 5 February 2018. The relief sought on that application was “*to set aside the order of 16 January 2017 due to significant material non-disclosure of the application hearing of 9 January 2017 ...*” That application was supported by a lengthy witness statement from Mr Millinder also dated 30 January 2018 that sets out the background but which I do not need to summarise at this stage having regard to the summary set out earlier in this judgment. Broadly, Mr Millinder sought an order setting aside the consent order on the basis of the non-disclosure that took place when the application for the order made by Arnold J was heard. The non-disclosure relied upon was that summarised in the letter from EEI’s former solicitors quoted above and which led ultimately to the consent order. Further, or alternatively, Mr Millender maintained that EEI had a cross-claim to recover sums paid by EW to the Club by way of advance rent, being the sum of £200,000 referred to by Nugee J in his summary set out above, and the further £330,000 which it is alleged constituted wasted costs incurred in attempting to perform the agreement.
- 9 It was common ground before me, as it was before Nugee J, that this claim can only be advanced by EEI if the right to claim those sums has been assigned by EW to EEI . Before me, all the arguments advanced by Mr Millinder before Nugee J were relied on again with the only material difference as far as I can see being that before me Mr Millender has placed much greater emphasis on his assertion that the £25,000 was not due to the club because Mr Millinder had never agreed to pay it and had not instructed his solicitors to agree to pay it.
- 10 The hearing before Nugee J lasted approximately one hour and 40 minutes - see the cover page of the transcription of the hearing. Mr Millinder addressed Nugee J at length both

himself and by Ms Elizabeth Jones QC appearing under the CLIP scheme on behalf of the applicant. At the conclusion of the hearing, Nugee J delivered a judgment dismissing the application in essence because (i) he was not satisfied that there had been a material non-disclosure, (ii) any entitlement to rely upon the non-disclosure could not survive the making of para.1 of the consent order and the agreement which had been reached leading to it; and (iii) he was not satisfied that the evidence demonstrated any effective assignment of EW's causes of action to EEI.

- 11 Mr Millinder has relied before Nugee J on a board minute as constituting the relevant assignment. He relies on the same document before me. The minute purported to record a meeting between Mr Millinder and his father. It purported to be a meeting of EW or at any rate is recorded on EW letterhead. Insofar as is material, the minute was to the following effect:

“We agreed to tidy up loose ends on some of the fees and the £200,000 that we paid from other accounts so that EEI as parent of EW is assigned those investments representing what we put into project. We agreed to separate out what went in as investments to the project so that there were two causes of action, with the parent recovering funds invested and empowering MFC recovering consequential loss including the feed in tariff revenue. We agreed this would mitigate loss in litigation to an extent. We discussed how we will quantify the claim and agreed to base this on the base tariff secured in 2013 to December 2014 when the turbine would have been constructed along with the GH reports verifying energy output. We discussed legal action and the risks involved. We agreed to discuss with various solicitors and get another legal opinion on the case. We agreed we cannot keep investing money into the project when it appears that they have killed it by preventing connection. PM is

to write to them to set the position in clear terms, let them know we are contemplating legals. PM agreed he will try to curb his feelings in particular towards Robin Bloom. We agreed to get further legal advice and come up with a plan to recover the losses.”

The document is then signed by Mr Millinder, who is appearing before me, and his father, Mr Alan John Millinder.

- 12 Nugee J was considering the alleged assignment in the context of an assertion that the failure to disclose the document was a material non-disclosure by the club when applying for the without notice order made by Arnold J. Nugee J rejected this material as constituting an assignment at para.12 of his judgment in these terms:

“It does not seem to me that disclosure of the material other than the board minute would have caused any change to Arnold J’s view on that question, the two being quite separate questions, and I do not agree that the disclosure of the board minutes, although it would have explained the basis upon which it was said that the assignment had taken place on 29 June, would have been likely to have persuaded Arnold J that the position as to assignment was so clear as to give rise to no *bone fide* and substantial dispute because of the material that was before him by Mr Bloom. Even taking the board minutes on their face, they discuss doing various things but end up with the decision to discuss matters with various solicitors and get another legal opinion and I think it is likely that had that been before Arnold J, the conclusion that one would have drawn from all the material is that it was still unclear whether the assignment had taken place on 29 June 2015 or whether it was something that was being discussed as a way forward. In those circumstances, it

does seem to me to be likely that the material that was withheld or not disclosed would not in the end be likely to have made a difference to the decision on 9 January which was simply to grant a short injunction until a return date on 16 January to enable the matter in the usual way to be reconsidered on an on notice hearing. The on notice hearing on 16 January did not in fact take place because, as I have said, the matter was disposed of by consent.”

- 13 Before me, counsel for the Club relies on those conclusions as giving rise to an estoppel or in any event submits that I should reach the same conclusions for the same reasons. He further submits that the conclusion that the minute records only an agreement to assign is fortified by two further documents. The first, and perhaps potentially the most significant, is a letter from Prospect Law dated 27 February 2017 disclosed by Mr Millinder in these proceedings. At para.3 the letter of advice, which itself runs to some 116 paragraphs over 26 pages, states as follows:

“We are advised that the claim will need to be assigned as a result of the winding up of the SPV. We have not yet considered the papers in the insolvency proceedings though we may need to do and we have not considered the issue of an assignment. Both these matters lay outside the scope of this initial advice.”

The advice being sought concerned “*a potential claim against Middlesbrough Football Club for its failure to cooperate in order to allow the successful completion of a renewable energy project at its stadium.*” The advice letter then proceeds to advise in some detail. Para.16 the letter of advice ended in this way:

“In conclusion, we believe that there is a *prima facie* case against MFC for frustrating the project that had a reasonable prospect of success. The logical next steps will be to analyse the quantum and the further evidence, including expert evidence, that would be required to substantiate such a claim. First, however, it would be necessary for PM to secure a valid legal assignment of any claims that EW MFC has against MFC.”

In addition, the Club also rely on the evidence of Mr Jeremy Robin Bloom contained in his witness statement of 8 January 2017 at para.22.2 where he says this:

“In his email of 15 December 2016 referred to above ... Mr Millinder stated that as the majority creditor of EW he had the ‘right to progress the claim that I shall assign to its parent company’ ...”

The relevant email is exhibited and it is perhaps unnecessary for me to quote from it at any length other than to say that in the third paragraph of the relevant email there is a statement to the effect summarised in the evidence quoted above.

- 14 The point made by the Club is that this material is manifestly inconsistent with there being an assignment in place at the date of the minute, thereby providing further support for Nugee J’s conclusion as to the effect of the minute. Mr Millinder submitted that there were in effect two assignments that were relevant, one relating to the costs’ claims that he relies upon in these proceedings before me and one relating to a damages’ claim that he does not seek to rely on and to which the legal advice is focused.
- 15 I am not persuaded that that distinction is made out. I do not accept that the rent repayment element of the claim is anything other than a consequential loss claim since the claim would

be to recover by way of damages or compensation for unjust enrichment the advance rental payment that had been paid over unconditionally. I am not satisfied that the £200,000 referred to in the minute is a reference to the advance rental payment. Had that been what was intended, it would have been easy to say so. On the face of the minute, it is true to say that there is a reference to two causes of action, one concerning the sums invested and one concerning consequential losses, but what is relied upon here appears to be a consequential loss claim which was to remain with EW and which had not been assigned by the time the advice letter referred to above same to be written. The real point remains, however, that the minute is not an assignment of anything for the reasons identified by Nugee J and there is no reference to any assignment of any sort having been made in the legal advice which is relied upon by the Club. In those circumstances, as it seems to me, the position is no different or possibly even stronger than it was when Nugee J came to address that issue.

16 It is next necessary to consider the position relating to para. 2 of the consent order. As I have explained, Mr Millinder asserts that he did not give instructions to Penningtons to consent to an order in the terms that in fact were made and which is described on its face as a consent order and on its face to have been signed by Penningtons. At the hearing before Nugee J, Mr Millinder had asserted that the £25,000 element of the order was made without his agreement - see the transcript of the proceedings at p.53 of 88, 54 of 88, 55 of 88 and p.56 of 88).

17 Nugee J ruled on these issues at para.13 to 16 of his judgment in these terms. Having said what I have quoted above from para.13, he then continued as follows:

“I have had less full information on how the consent order came about than one would have expected although it is fair to say, I think, that it was not until very

recently that it only became apparent that Mr Millinder was contending that he did not entirely agree to the consent order that had been made. I wrote down what he said to me and he said, 'I agreed for the order to continue but for each party to bear its own costs,' and then he said, 'Middlesbrough's solicitors, Bond Dickinson, were trying to charge £47,000. Penningtons agreed the consent order but I never agreed to the £25,000.'

"As I say, the evidence before me is not as full as one would have expected to explain how it came about that a consent order was in fact signed and what I was told by Mr Millinder was that he subsequently complained about Penningtons' conduct which led to the consent order being made but I think it very unlikely that Norris J would have made a consent order without there being before him some *prima facie* material that either the representative or the solicitor for the parties had signed a form of consent. I was told that there was no hearing on 16 January and the matter was dealt with on paper. My experience is that the court will not do that unless it is a signed copy of the order. In those circumstances and in the circumstances where Penningtons had taken the point in a letter of 11 January almost immediately that there had been non-disclosure, it does seem to me that Mr Staunton is right that even assuming that the non-disclosure on 9 January was material, matters had moved on by 16 January. EEI had a choice to make which was either to rely on the non-disclosure to try and set aside the original order or, as Mr Millinder appears to have done, to accept that there was a dispute as to the debt which meant that it was appropriate for the order to continue.

"As I understand it, Mr Millinder does not really object to the continuation of the injunction on 16 January and it was just the question of the costs of the £25,000. In

those circumstances, it seems to me that I cannot conclude that the order of 16 January should be set aside. I have not got material which would adequately explain that there was an order, which on its face was made by consent, was not truly made by consent and on the basis that it was made by consent it does not seem to me that the non-disclosure on 9 January which Penningtons were aware of and drew attention to in their letter of 11 January was responsible for the order being made on 16 January. What was the cause of the order being made on 16 January was the decision of EEI no longer to contest the substantive relief and in those circumstances I propose not to set aside the order of 16 January.”

- 18 In my view, Mr Millinder’s case on this point must be rejected for the following additional reasons; first, there is no evidence that any mistake was made by anybody. Had an apparently competent solicitor made a mistake of the sort alleged, it would have been fully and frankly admitted and either an application made to rectify the error using the residual discretion conferred on the court by the Civil Procedure Rules or at least the mistake would have been acknowledged and the client advised to seek independent advice elsewhere.
- 19 Secondly, if and to the extent the absence of such evidence before Nugee J could be explained, it cannot in relation to this application which is being heard some three months later and after Nugee J had drawn attention to the absence of evidence in the judgment, the relevant parts of which are set out above. The evidence before me is no different in any material respect to that which was deployed before Nugee J other than that the correspondence leading to the consent order was not before him as it is before me.
- 20 Against that background and in those circumstances I now turn to the application to set aside the consent order and Nugee J’s order. It is conceded that the court has jurisdiction to vary

a consent order - see para.33 of Mr Staunton's skeleton submissions. However, I am entirely satisfied that I should not set aside the consent order made on 16 January 2017. I reach that conclusion for the following reasons. First, the application set aside the consent order made on 16 January 2017 is a collateral challenge to Nugee J's judgment and order that is entirely unwarranted unless the application to set aside Nugee J's order succeeds. There is no proper basis for me to discharge Nugee J's order because CPR 3.17 is an exceptional provision and one that is simply not engaged on the facts of this case given the scope of that provision as it has been construed in the case law concerning it.

- 21 Secondly, all the facts and matters that have been relied on before me as justifying the setting aside of the consent order of 16 January were gone into in significant detail before Nugee J. There was nothing not considered by him at that hearing that is before me apart, possibly, from a greater emphasis being given to an alleged absence of agreement by Mr Millinder to the costs' order. However, I am not able to act on that on the basis of his assertion given the inherent improbability of what is asserted for the reasons I have identified in detail already. Mr Millinder claimed to have evidence to make good his assertion that he had not agreed the costs order based, I think, on the dispute which he maintains he has with Penningtons. If that is so, then it is surprising that that material has not been produced and it all the more surprising given that Nugee J had expressly referred to the absence of evidence relevant to this point. Reliance on alleged non-consent to the costs' order is unarguable in addition because there is no evidence of any sort that shows the Club or its advisers knew or even could or ought to have known of the alleged mistake. It is difficult in those circumstances to see how the alleged absence of consent could vitiate the agreement to settle in the terms of the consent order or engage the exceptional jurisdiction to vary a consent order.

- 22 If and to the extent that reliance was placed on non-disclosure, the reasons why the application failed before Nugee J apply with equal force to the application before me. There is no answer to the point made concerning the effect of para.1 of the consent order vitiating the effect of any non-disclosure and the non-disclosure was not material for all the reasons identified by Nugee J.
- 23 In those circumstances, this application to discharge the consent order and the order of Nugee J must fail and is dismissed.
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CERTIFICATE

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This transcript has been approved by the Judge (subject to Judge's approval)