



Case No.: BR-2020-000343

Neutral Citation Number: [2020] EWHC 1505 (Ch)

IN THE HIGH COURT OF JUSTICE

BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

INSOLVENCY AND COMPANIES LIST (ChD)

The Rolls Building
7 Rolls Buildings
Fetter Lane
London EC4A 1NL

Wednesday, 13 May 2020

Before:

THE HON. MR JUSTICE FANCOURT

Between:

MEDIA & SPORT MANAGEMENT LIMITED

Applicant

- and -

DARIO OVIDIO SCHETTINI

Respondent

Mr Timothy Lau (instructed by **Brown Rudnick LLP**) appeared on behalf of the **Applicant**

The Respondent did not attend and was not represented

Hearing date: 13 May 2020

Approved Judgment

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MR JUSTICE FAN COURT:

1. This is an application by Media & Sport Management Limited ("MSM"), an English company, to restrain the presentation of a winding-up petition by the respondent, Mr Schettini, following the service of a statutory demand on MSM in a sum of just under £1 million on 9 April 2020. The statutory demand relates to a claim - advanced by Mr Schettini for the first time in a letter of 9 March 2020 - for payment of what is essentially commission, in a sum of €1,010,000, arising out of contractual arrangements between MSM and Mr Schettini first put in place in 2010. The letter of 9 March required payment of the sum within 14 days.
2. The letter provoked a response written by MSM's Italian lawyers on 23 March 2020, in which it was pointed out that Mr Schettini had signed in 2014 a letter acknowledging the invalidation of the previous contractual agreement reached in 2010; further, that a sum of €490,000 was paid by MSM to Mr Schettini as a settlement in respect of services that he might have provided or did provide in the years 2014 to 2016.
3. That letter of 23 March provoked a response on 9 April 2020 from Mr Tarantino, who is a lawyer in Mr Schettini's office in Rome, who said that the contents of the email of 23 March were contested "word for word" and alleged that the wording of the letter on which MSM relied for invalidating the previous contractual agreement had been fraudulently tampered with. Mr Tarantino reserved the right to take action for the sums that were due. That action materialised a little later the same day, when Mr Tarantino emailed to MSM a statutory demand for £967,397.31. That statutory demand was therefore served without waiting for any response to the letter of 9 April. The statutory demand is taken to have been formally served on 14 April, when a copy arrived at MSM's offices by post.
4. A very detailed response to the allegations in Mr Tarantino's letter was sent by MSM's lawyers, Brown Rudnick, on 22 April 2020. They said that the debt claimed by Mr Schettini was entirely disputed and explained why the use of the statutory demand was inappropriate and illegitimate. They said that the original agreement made in 2010 had been terminated by the release letter signed by Mr Schettini in 2014 and any outstanding entitlement was resolved by a termination payment of just over €500,000 that was agreed at that time. The letter denied the allegations of fraud and itself raised (to put it at its lowest) suspicions about the validity of certain letters on which Mr Tarantino had relied to seek to establish Mr Schettini's entitlement to further money. There was therefore, spelt out in Brown Rudnick's letter a real, substantial and serious dispute about the history of the commercial relations between MSM and Mr Schettini, and in particular concerning the validity of various documents relied upon by each side. Brown Rudnick's letter invited Mr Tarantino, on the strength of the genuine dispute described, to withdraw the statutory demand by 24 April 2020 and to give an undertaking not to start any winding-up proceedings without giving 15 days' prior notice to MSM.
5. There was no response to that letter by the deadline imposed. As a result, a solicitor on behalf of MSM telephoned Mr Tarantino on 27 April 2020 to ascertain Mr Schettini's intentions. The content of that telephone call was noted in a letter of the same date written to

Mr Tarantino. In the conversation, Mr Tarantino had stated that the statutory demand would not be withdrawn and that he would proceed to rely upon it. The letter of 27 April explained that MSM would proceed to seek injunctive relief unless a satisfactory response was urgently received and pointed out that if MSM had to do so, its costs would be sought on an indemnity basis.

6. On 28 April Brown Rudnick sent a final warning letter to Mr Tarantino seeking confirmation by close of business that day. Although a response was received, it gave no comfort in relation to the statutory demand and any winding-up proceedings. Accordingly, an application for injunctive relief was issued on 30 April 2020 and served on that day. Only after service of the application was a response received from Mr Tarantino in which he purported to withdraw the statutory demand.
7. Brown Rudnick sought clarification of Mr Schettini's intentions by a letter of 1 May 2020 and expressly required an undertaking to be given as had been requested in the letter of 22 April. An undertaking in those terms was given in response on 1 May 2020, and at that stage, therefore, an application did not need to be pursued by MSM. MSM's lawyers sought to place before the court a consent order signed by both parties, providing for them to attempt to agree the question of costs and for the matter to be relisted in due course, if necessary, to resolve that question. That draft consent order was sent on Saturday, 2 May 2020. Mr Tarantino did engage in further correspondence with Brown Rudnick on Sunday, 3 May 2020, but did not deal with the consent order.
8. Accordingly, MSM appeared before me in the applications court on Monday, 4 May 2020, seeking an order for the question of costs to be adjourned and dealt with at a future time. I made that order, adjourning the matter to be heard today. It was only after I had made the order that a signed consent order was then received from Mr Tarantino. It was only sent at 12.27 pm on 4 May 2020. No explanation was given as to why it was sent after the time scheduled for the start of the hearing. It was therefore, in my judgment, necessary for MSM to incur the costs of coming before me on 4 May to ask for the hearing to be adjourned in the absence of any consent order signed on behalf of Mr Schettini.
9. Following that hearing, on 7 May 2020, Brown Rudnick made a proposal as to the costs that Mr Schettini should pay in the sum of just over £25,000. No response was received to that proposal until Monday of this week (11 May 2020) when Mr Tarantino responded, saying that the costs were disproportionate and that any liability for costs should only relate to the period from 24 April to 30 April.
10. In this application, MSM does not seek its costs before and up to the date on which Brown Rudnick's detailed letter was sent on 22 April. It therefore is only seeking its costs from 23 April but it seeks payment of all its costs up to and including today. I can see no justification for starting the costs for which Mr Schettini is liable on 24 April (as he proposes) rather than 23 April. In view of the history that I have briefly recited, I can see no justification for stopping it on 30 April. It could have been stopped on 30 April if Mr Tarantino had dealt promptly with the requests for an undertaking and then signed a consent order, but that was not done and MSM had to incur the further costs that they have done.

11. Again, at a very late stage, I have had placed in front of me a letter from Mr Tarantino of today's date, which was received by email shortly after the hearing started. In that letter Mr Tarantino says that the costs ought to await the outcome of the trial since there are serious fraud allegations to be determined. He also suggests again that the amount of costs is disproportionate and should be limited to the period of 24 April to 30 April.
12. In my judgment, MSM is entitled to its costs at this stage. The basis on which it is so entitled is that threatening to pursue a petition for winding-up of the company (which was the effect of serving a statutory demand) and then not providing an undertaking not to seek to wind up the company is an abuse of process (see *Re a Company (No. 0012209 of 1991)* [1992] 1 WLR 351). It is an abuse of process because it is known that the debt claimed is disputed on bona fide and substantial grounds and therefore the intended petitioner cannot yet say that it is a creditor of the company. For that reason, it is not appropriate or necessary to await the outcome of the trial to decide that MSM is entitled to its costs of this application. It is entitled to its costs because Mr Schettini was abusing the process of the court by threatening to wind up the company on the basis of the statutory demand that had been served.
13. As to the period of time in respect of which the costs are payable, as I have explained, it should start on 23 April and, in my judgment, it should include all the costs that have been incurred up to and including today's hearing. It was reasonable for the company, MSM, to continue to work on the matter and appear before me on 4 May and, in the absence of any offer to settle the costs and any agreement on costs, it was reasonable for it to appear before me today on notice to pursue its entitlement.
14. Accordingly, I will therefore award MSM its costs of this application from and including 23 April 2020, to be assessed in detail if not agreed, on the indemnity basis.

(After further submissions)

15. I have cast an eye over the amounts of time spent on all the matters and nothing strikes me immediately as being the sort of time that it was unreasonable to spend on any of those matters. I am satisfied in relation to the amount of work that was done by the fee earners. Counsel's fees seem to me to be perfectly reasonable for the work that was done and the two hearings, and the attendance figures also seem relatively modest and appropriate, as far as I can see, so I have no reduction to make on that account.
16. The only issue as far as I am concerned is the hourly rates that are being billed. I accept that an increase over the guideline rates is appropriate, given the nature of the work and the urgency, but I am not going to accept the rates that are there stated. They seem to me to be very much at the upper end and very substantially in excess of what remains the guideline, even though it has not been updated for some time.
17. Accordingly, what I will do is direct that the quantum of costs for phase 2 and phase 3 be recalculated on the basis of hourly rates of £550 an hour for the Grade A fee earner and £300 an hour for the Grade C fee earner. As to any other reduction for the phase 2 costs, it seems to me that what was offered in correspondence was an offer that was made with a view to trying to settle the amount of costs, and MSM should not be limited by reason of any offer that it has previously made. Having looked at the costs that have been incurred on phase 2, I

do not see any reason to make any further adjustment other than to the hourly rates, as I have already indicated. Subject to recalculation of the hourly rates, I allow the costs for phases 2 and 3 on the basis of the schedule that has been provided to me, and I allow all the disbursements on page 3.

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