Neutral Citation Number: [2008] EWHC 3442 (Comm)

Case No: 2006 FOLIO 26

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 27/10/2008

Before :

THE HONOURABLE MR JUSTICE FLAUX

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Between :

AUTOMOTIVE LATCH SYSTEMS LIMITED	**Claimant**
- and -	
HONEYWELL INTERNATIONAL INC	**Defendant**

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For applicant (Honeywell): Ewan McQuater QC, David Head and James MacDonald (instructed by Wilmer Hale)
For respondent (ALS): Daniel Toledano (as Director of ALS)
For interested parties (solicitors) Victoria Butler-Cole (instructed by O'Mahoney St. John)

Hearing date: 27th October 2008

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Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version may be treated as authentic.

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THE HONOURABLE MR JUSTICE FLAUX

MR JUSTICE FLAUX:

1. In my judgment of 30 September 2008 I dismissed this claim by ALS and I ordered that ALS should pay the costs of the defendant, Honeywell. Some of those costs I ordered to be paid on an indemnity basis. The claim varied in its immensity from at one stage in excess of £3 billion to, by the time of the trial, a minimum of £300 million but as I found in my judgment, the claim was one which failed on every score. No appeal is being pursued against my judgment. In defending the claim in this substantial litigation, where the trial lasted for some 12 weeks and where, as I said in my judgment, it seemed to me that ALS was prepared to run every point and didn't demonstrate any inclination to abandon the point.
Honeywell has incurred very substantial costs. I am told that those costs are in excess of US$17 million, and even allowing for changes in the exchange rate, on any view the costs incurred are very substantial indeed. The present application is one by Honeywell in support of what it contemplates is a future application under section 51 of the Supreme Court Act 1981, that is to say an application such as is contemplated by that section and specifically by subsection (3) of section 51 which gives the court full power to determine by whom and to what extent the costs are to be paid. What is contemplated is a possible application or applications against those individuals or entities who are said by Honeywell to have funded litigation on behalf of ALS.

2. The jurisdiction that is provided by section 51 is supported by Part 48(2) of the CPR, which provides, under the rubric "Costs orders in favour of or against non-parties" as follows:

> "Where the court is considering whether to exercise its power under section 51 of the Supreme Court Act (costs are in the discretion of the court) to make a costs order in favour of or against a person who is not a party to the proceedings, (a) that person must be added as a party to the proceedings for the purposes of the costs only and (b) he must be given a reasonable opportunity to attend a hearing at which the court will consider the matter further."

3. At present none of the relevant potential non-parties is before the court and nothing that I say today either does or is intended to pre-empt any consideration I may have to give at a later date as to the appropriateness or otherwise of making any order under section 51. What Honeywell seeks today is an order against ALS that by a particular date ALS shall serve on Honeywell a witness statement signed by one of its directors setting out:

> (i) The identity of all individuals, companies or other entities that have provided funding to the Claimant since January 2004.
> (ii) The amount of such funding in each case.
> (iii) The terms on which such funding was provided.
> (iv) The extent of each such party's involvement in the conduct of this action.
> (v) The nature and extent of that party's interest (financial or otherwise) in the outcome of the action.

4. Before dealing briefly with the material that is relevant to this application, I should say that although ALS has been represented throughout by solicitors and counsel, on the present application it has been represented by one of its directors, Mr Toledano. I allowed

permission for this at the outset of the hearing, although when I first learned that this was what was proposed during the course of last week, I was, as I said, troubled about it, particularly in circumstances where Mr Toledano has served a witness statement dealing with the issue of funding, some of which Honeywell challenges or at least takes issue with. Furthermore, given that Mr Toledano must, on any view, be one of the non-party targets for a section 51 application and that he may very well have to give evidence hereafter and be cross-examined, I still regard the fact that he is the person who has represented the company on this application as deeply unsatisfactory.

5. Having said that, I have been greatly assisted by the skeleton argument which was prepared by counsel or former counsel for ALS, Mr Stephen Auld QC and Mr Marcus Dracos, apparently on a pro bono basis. Although they did not attend this hearing, their care and attention in providing this document clearly involved both of them doing a great deal of work, for which I am extremely grateful. They showed the highest standard of professional integrity which one would expect from members of the English bar.

6. I have also been assisted by submissions by Ms Butler-Cole, who appeared on behalf of O'Mahoney St John, who until 30 September this year were ALS's solicitors. She appeared here essentially in opposition to paragraph 2 of the draft Order which seeks orders against the firm of O'Mahoney St John and the firm of Edwin Coe, who provided litigation support throughout the proceedings, that they should respectively provide a witness statement confirming, so far as they are aware, the accuracy of the witness statements served by ALS, pursuant to paragraph 1 of the draft Order. Miss Butler-Cole also made submissions as to the scope of the ancillary powers which the court undoubtedly has at this stage.

7. Turning to those matters which are material to the present application, following the termination of the joint collaboration agreement, ALS set up a subsidiary company, VSS, through which the business of developing and promoting the ULS latch has been conducted. So far as ALS itself is concerned, the abbreviated accounts of the company to 31 March of 2006, which are exhibited to the eighth witness statement of Miss Miles, demonstrate that at least by 31 March 2005, if not before, this company was balance sheet insolvent. Its net liabilities over those two annual periods increased from £682,000 in 2005 to £842,000 in 2006 with corresponding negative shareholders' funds. The 2007 accounts, which Miss Miles also exhibits, show a worsening position with a total net liability position and corresponding negative shareholders' funds of £1,170,172. That balance sheet also shows long-term liabilities of the company having gone up from £1.8 million-odd in 2006 to £4.5 million in 2007. They are described as amounts falling due within ten years. It is not said from where those sums derive, but from the subsequent draft accounts, to which I will refer in a moment, it seems to me likely has those were shareholders' loans.

8. Mr Toledano, as I have said, produced a witness statement, to which he exhibited the draft accounts of both ALS and VSS for the annual period to 31 March 2008. So far as the balance sheet for that period in those draft accounts for ALS was concerned, it showed that the long-term liabilities of the company, amounts falling due within ten years, had increased from £4.5 million to £8.054 million. It appears from those draft accounts and specifically note 10 that those long-term liabilities relate to loans provided to the company by its shareholders and are repayable no earlier than March 2009. It also appears from Mr Toledano's evidence and from the draft accounts of VSS that of that sum of just over £8

million, some £3.86 million has been lent by ALS to VSS. It is that company which has carried on, as I have said, the latch business.

9. Although in his submissions to me Mr Toledano sought to say that expenses had been incurred such as rent, research and development, patent payments and salaries of employees, it is quite clear from a comparison of the two detailed trading and profit and loss accounts of the two companies at pages 9 and 17 of the exhibits to the witness statement, that it is VSS and not ALS that has incurred all that expenditure. So far as ALS is concerned, by far and away the preponderance of the expenditure incurred by that company, that is to say of a total of £2.38 million, was legal costs- £2,337,000 of that £2,380,000 figure is attributable to legal costs.

10. Accordingly, on the face of the accounting documents, it seems to me that Honeywell shows a prima facie case that the balance of the shareholder loans, some £4.2 million, had gone to pay the costs incurred by ALS in this litigation, which on ALS's own admission are between £3.5 and £4 million. Indeed it is an obvious question: if these shareholder loans are not the source of the monies which paid for the costs, then what is? What is said by Mr Toledano is that the investors were investors in the latch business. They didn't like the litigation and some of them were reluctant to invest. Nonetheless that does seem to have been what their loans were used to pay for, at least in substantial part. In parallel with those loans it is clear that ALS was trying to raise some professional funding through a consultancy called GGW in 2005. A draft business plan is exhibited to Miss Miles' witness statement, in which the following is said, and I quote two passages, first of all from page 30 of her exhibit as follows under the heading "Funding requirement":

> "We will require sufficient monies to fund all costs associated with claims against Honeywell for breach of contract. In addition, funding may be required as security for other side's costs. "£4 million to fund the claim against Honeywell for breach of contact. Repayment will be from the costs awarded against Honeywell or from insurance proceeds that we have funded in case (unthinkably) the decision is found against us."

11. Then from page 13 of that exhibit it says this:

> "The company is now seeking to raise sufficient monies to fund the court case against Honeywell for their breach of contract. Existing investors, including the management team, have invested £2 million to date in the company with the balance of £400,000 being injected by new investors later in 2005."

12. Mr Toledano told me in his submissions that the company sought to raise funds in this way for some 18 months and although it received some offers they, which I took to be a reference to himself and Mr Chevalier, did not like the conditions which were being offered, and in those circumstances did not take up any of those offers. In addition to that material, Miss Miles has already produced from the records at Companies House details of the current shareholders of the company, some of whom clearly are in the case of Mr Toledano and Mr Chevalier and in fact, Mr O'Mahoney of O'Mahoney St John, and some of whom may also be investors in the company, and, therefore, those individuals or entities who have provided shareholder loans to the company. Amongst the shareholders of the company listed at Companies House are included a number of corporate entries, one of which, Cape Gold Limited, I was told by Mr Toledano was effectively an investment vehicle in which some 60

shareholders had invested no doubt relatively small amounts each in the company, and Mr Toledano also told me that two other corporate entities, AVL Nominees Limited, a Scottish company, and GSD Management Limited, a Bermudian company, were similar corporate vehicles through whom individual investors had invested in the company. Against that background it seems to me that Honeywell has at least a prima facie case against those individuals and entities who invested in ALS, that they have funded the litigation, so that Honeywell has the basis for commencing section 51 proceedings, although, as I have indicated, I am not in any sense pre-judging whether any application under that section would succeed. The notes to the civil procedure in the White Book at paragraph 48.2.2 provide as follows:

> "The court necessarily has the ancillary power to order a party to proceedings or the solicitors who have been on the record for that party to disclose to the other party the names of those who have financed the litigation. Where a power exists to grant a remedy, there must be, inherent in that power, the power to make ancillary orders to make the remedy effective. (See Abraham v Thompson [1997], 4 All E.R. 362, Court of Appeal, and Raiffeisen Zentralbank Osterreich AG v Cross-Seas Shipping Limited, [2003], EWHC 1381 (Comm) a decision of Mr Justice Morison)."

13. The issue before me today is essentially the narrow one: is the jurisdiction which the court undoubtedly has ancillary to section 51 of the Supreme Court Act to order disclosure of the names of funders limited to that and no more, or does jurisdiction extend to whatever ancillary orders will make the section 51 remedy effective, so that in an appropriate case the court may exercise a discretion to order more against the party who has been funded than simply the disclosure of the names of those individuals who have funded the litigation. Both ALS, principally in its helpful skeleton, and Miss Butler-Cole on behalf of Mr O'Mahoney submit at this stage the jurisdiction is limited to ordering the disclosure of the names. In support of that submission it is said that none of the cases goes beyond the disclosure of names. That may be correct, although in truth it is sometimes difficult to discern what has been ordered in any particular case. Equally, the fact that other cases have not gone further does not of itself mean that in an appropriate case the court may not make a wider order against the losing party. In its skeleton argument, ALS relies on a passage from the judgment of Lord Justice Ackner in Bekhor v Bilton [1981] QB, 923 at page 942. That was, of course, the case upon which Lord Justice Potter relied in Abraham v Thompson in support of the existence of ancillary powers, Bekhor v Bilton itself being the foundation of the jurisdiction to grant disclosure orders in support of Mareva injunctions, now known as freezing injunctions.

14. However, I agree with Mr McQuater QC for Honeywell that the passage cited is not in fact in the context of the jurisdiction under what is now section 37 of the Supreme Court Act to make ancillary orders in support of the statutory power to grant injunctions. Rather the passage referred to is in the somewhat different context of an alleged inherent jurisdiction. I agree with Mr McQuater that that passage is nothing to the point for present purposes, where the power I am being invited to exercise is ancillary or incidental to section 51 rather than pursuant to some inherent jurisdiction. In this regard I consider that a passage in the judgment of Mr Justice Morison in the Raiffeisen Zentralbank case to which I have referred is both instructive and of some assistance. In paragraph 7 of his judgment, having set out section 51 and specifically subsection (3) to which I have referred, the learned judge goes on to say:

"In a number of reported and unreported decisions it has been held that the court necessarily has an ancillary power to order a party to proceedings, or solicitors who have been on the record for that party, to disclose to the opposing party the name or names of those who financed the litigation for the benefit of that party. See, for example ..."

15. He then cites a number of authorities. He goes on to say this:

"None of these authorities is entirely satisfactory for a variety of reasons, but the reasoning of Lord Justice Potter in the Abraham case is directly applicable, namely 'where the power exists to grant the remedy, there must also be inherent in that power the power to make ancillary orders to make that power effective'. Therefore since section 51 empowers the court to make an order for costs against a person who is not a party to the action, the power would be ineffective unless there was an inherent power to discover who such persons might be. It does not follow, of course, that once the identities are revealed the court will go on to make an order against anyone who has been identified. That is a matter for the discretion of the court at the second stage."

16. It seems to me implicit in the sentence which I have just read, "the power under section 51 would be ineffective unless there was an inherent power to discover who such persons might be", that where, in a case such as the present, the court is faced with a number of individuals or entities having funded the company, and it is said by ALS through its directors that that funding was for other purposes in the litigation but, as also seems to me to be the prima facie the position, that assertion on behalf of ALS is questionable, then it seems to me that the process of discovering who the persons are who may have funded the litigation can only be achieved by more information being made available by ALS than just the listing of the names of the investors. Then it is said, principally by Miss Butler-Cole, that I should not make an order, the effect of which would be to duplicate what may happen hereafter, namely that having joined individuals or entities, Honeywell may apply for disclosure against them. Of course there may be an element of duplication, but it does not seem to me that that is an answer to the question of whether or not the court has the relevant jurisdiction. That goes only to discretion. Unless it could be said that the court was pre-empting whether it would, in due course, exercise its jurisdiction under section 51 against a particular investor, which is clearly not the case where all that is sought is an order against ALS, then I can see nothing objectionable, in an appropriate case, in making an order requiring a party in the position of ALS to disclose more than just the names of the investors. I also see considerable force in Mr McQuater's submission that the relevant jurisdiction is a flexible one, capable of adaptation to changing circumstances. He referred me by analogy to the development of the Norwich Pharmacal jurisdiction, once thought to be limited to identifying wrongdoers, but now clearly of much wider scope. Accordingly, I am satisfied that the court has jurisdiction to make the order sought.

17. Having determined that question, there only remains the question of whether I should exercise the relevant discretion to make the order. I have no doubt that I should, in brief, for the following reasons, which to some extent overlap with what I have already said.

18. Firstly, as I have already indicated, with the present somewhat conflicting information before the court, it is clearly unsatisfactory that the matter should proceed without more than the mere disclosure of names. A clear statement by a director of ALS of the nature which is

sought by the order would clarify against which, if any, of the investors or shareholders a section 51 order might, in due course, be properly made.

19. Secondly, the submission that Honeywell should be left to the expense of joinder and obtaining orders for disclosure with the consequence of the incurring of additional, potentially irrecoverable costs by Honeywell and also the potential for Honeywell being liable for third party costs should it transpire that no section 51 order could be made against those individuals, was a submission which was marginally less attractive coming from counsel for Mr O'Mahoney than it would have been from ALS itself. However, the history of this litigation is such that I do not consider that, in circumstances where what is sought is, after all, an order against ALS, not against any further party, Honeywell should be put to the trouble and expense that it is suggested they should in circumstances where, as I say, the order that is sought is against ALS. In all the circumstances I do propose to make the order sought in paragraph 1 of the draft. I cannot see that ALS will be in any sense prejudiced by this. They will have to be full and frank in this regard with both Honeywell and the court in circumstances where, as I reflected in my lengthy judgment, there has been a distinct lack of frankness and truthfulness, at least on the part of Mr Chevalier, in the past. It seems to me that this may be a salutary exercise for ALS.

20. As I have already said, paragraph 2 of the draft order sought orders from the two solicitors who acted for ALS, essentially confirming what was said or what will be said in the witness statement to be provided by the director. So far as Mr O'Mahoney is concerned, in the witness statement which he produced or he has produced for the purposes of these proceedings at paragraph 4 he says:

> "I can confirm, however, that apart from the Commerzbank guarantee organised to meet ALS's obligations under the agreed security for costs orders and the accompanying insurance which insured the guarantee, I am not aware of any third party funding provided to ALS for the purpose of conducting this litigation."

21. Mr Franklin of Edwin Coe who, as I have said, were responsible for litigation support, says in paragraph 13 this:

> "At no point was my firm ever involved in any aspect of the claimant's funding of the litigation."

22. I see no reason to disbelieve either of them and accordingly in the circumstances I do not propose to require them to confirm what is said by ALS. It does not seem to me that any conceivable purpose could be served by making such an order against the solicitors.