HC01C04744

IN THE HIGH COURT OF JUSTICE
IN THE (CHANCERY DIVISION)

The Royal Courts of Justice
Strand
London
WC2A 2LL

Monday 17th December, 2001

B e f o r e:

MR JUSTICE STANLEY BURNTON

- - - - - - -

BRACKEN PARTNERS LIMITED

Plaintiff

- v -

GRAHAM MARTIN GUTTERIDGE AND OTHERS

Defendants

- - - - - - - - -

Transcript by Smith Bernal Reporting Limited
190 Fleet Street, London EC4A 2AG
(Official Shorthand Writers to the Court)

MR ROBERT MILES and MR GREGORY DENTON-COX appeared on behalf of the Plaintiff
MISS CATHERINE ROBERTS appeared on behalf of the Defendants

J U D G M E N T
(As Approved by the Court)

Introduction

On 2 November 2001, Mitting J granted a freezing injunction in standard terms against the Defendants restraining them from dealing with their assets up to the amount of £1.25m. The injunction was granted until 16 November 2001 or further order. It was subsequently extended over the hearing of the Claimant's application before me.

I have before me:

(a) an application on behalf of the Claimant, acting in a representative capacity on behalf of itself and all other shareholders in Eye Group Ltd (Eye) except the First Defendant, for the continuation of that injunction until trial or further order;

(b) an application on behalf of the Defendant for the discharge of the injunction.

The parties

Eye Group Ltd ("Eye or "the company)is a private limited company incorporated in England and Wales. It is involved in the business of exploiting commercial rights for sports, in its case what are referred to a secondary and even tertiary

sports, such as ice hockey and squash. Eye is nominally a defendant in these proceedings, but it is alleged by the claimant to be the victim of the wrongs alleged in the Particulars of Claim committed by the other defendants rather than their perpetrator. When below I refer to the defendants it is to the defendants other than Eye.

Bracken Partners Ltd is a venture capital company. It invested £250,000 in acquiring 500,000 ordinary shares of Eye on a private placing on 26 September 2000, about 3% of the issued equity. According to the First Defendant, they also brought in about an additional £1m by way of investments by clients: see the affidavit of Ms Bryan at paragraph 57. The total raised in that private placing was about £2 million.

The First Defendant is the chairman and majority shareholder of Eye. He owns 62% of its issued ordinary share capital. The Articles of Eye give him power to appoint additional directors, and he has done so since the commencement of these proceedings, appointing 5 additional directors, giving him and his nominees a majority on the board.

The Second Defendant is his wife. She is not an officer or employee of Eye.

Third Defendant is a company inc. in E&W of which the First Defendant is the sole shareholder and director. The Second

Defendant is its company secretary. It is not in issue for the purposes of this application that the Third Defendant, referred to as GMG, is controlled by First Defendant.

These proceedings re derivative proceedings, brought by Claimant on behalf of all the shareholders of Eye to recover its assets and moneys which, it is alleged, have been lost as a result of beaches by Gutteridge of is fiduciary and other duties to the Company. It is not suggested that these proceedings are incompetent or improperly constituted.

Its assets and money, which, It is alleged, have been lost as a result of breaches by Mr Gutteridge of his fiduciary and other duties to the company, hence the formal proceedings. It is not suggested that these proceedings are incompetent or improperly constituted.

The other directors of Eye are listed in the Particulars of Claim at paragraphs 10 and 11. They were Mr Ireland, Mr Smith, Mr Fiaz Rehman and Mr Lindsay Charlton.

Paragraph 22 of the Particulars of Claim states that since the issue of proceedings Mr Raymond has resigned as director of Eye. Mr Jonathan Stobart has been appointed finance director. Mr Charlton has resigned as director of Eye, and as I mentioned above, Mr Gutteridge has purported to exercise

his powers as majority shareholder to appoint five additional shareholders.

Fiaz Rehman was finance director of Eye and Non League Media Plc, referred to NLM. Cheques on Eye's bank account could, until August 2001, be signed by the First Defendant and Mr Rehman. From August, any one of them and Mr Stobart, the now finance director, may sign cheques.

Other companies concerned

NLM is a public company listed on the Alternative Investment Market since the summer of 2000. Its principal business is the publication of a newspaper, magazine, Internet web site and directory relating to non-league football.

Mr Gutteridge was, until after the commencement of these proceedings, the chairman of NLM and he is a substantial shareholder in the company. Mr Ireland and Mr Rehman were also directors of NLM. Mr Gutteridge was removed as a director and as chairman of that company on 9th November of this year.

Fablon Investments Limited is a company incorporated in Gibraltar, owned beneficially and managed by Mr Gutteridge. Mr Gutteridge is the beneficial owner of all the shares in that

company. Fablon Investments (UK) Limited is a company incorporated in England and Wales and is its wholly owned subsidiary. Mr Gutteridge and Mr Carl Oliver are the directors of Fablon Investments (UK) Limited.

Newcastle Jesters Limited is a subsidiary of Fablon and therefore ultimately owned by Mr Gutteridge, the claimant's claim against the defendants.

The Claimant's claims against the Defendant

The claimant alleges that Mr Gutteridge has dishonestly taken monies from Eye for his and his wife's benefit without the knowledge or agreement of the board of directors of the company or its shareholders, other than himself and Mr Rehman, that he has treated the company's monies as a source of monies for himself and his wife without regard to the interests of the company.

It seeks orders for the repayment by Mr Gutteridge of monies taken from Eye, an account by him of all monies wrongfully taken from the company and it asserts that the company has a proprietary claim to the property at 52 Chatsworth Gardens, London W3, to which I shall refer as "the property", the home of Mr Gutteridge and the Second Defendant,

vested in the Second Defendant and acquired in part with monies of the company in the circumstances referred to below.

The Claimant contends that the total liability of Mr Gutteridge to the company, with interest and costs taken into account, exceeds the sum protected by the freezing order.

The First Defendant accepts that the affairs of Eye have not been conducted as they should have been. His counsel's skeleton admits, in paragraph 38, that, "The running of EGL has fallen short of the standards that are expected from directors of limited companies". However, Mr Gutteridge claims that such irregularities as there have been were the fault of Mr Rehman and Miss Deller, his personal assistant, on whom he relied for the administration of his and the company's financial affairs. He also claims that, to the extent that he is responsible for the irregularities in the company's affairs, that the claimant has unfairly blamed him alone for irregularities in the administration of the company, and that they are also the responsibility of the other directors.

So far as the primary facts are concerned, by which I mean the payments of money from Eye's bank account to accounts controlled by or connected with Mr Gutteridge, there is much that is not in issue and indeed cannot be. Substantial sums of money have been taken from the company and have been placed

for the benefit of the defendants. Mr Gutteridge accepts that he has a substantial liability to the company. The principal issue is whether these monies were paid in circumstances involving dishonesty or want of probity by Mr Gutteridge.

His case is that his role in the company has been greatly exaggerated and that the allegations of dishonesty on his part are unfounded. There are issues as to the remedies to which the company is entitled, in particular, whether it has a propriety claim to the property and as to the amounts for which the defendants are liable, and as to whether certain payments were properly paid to meet liabilities of the company. However, Miss Roberts accepted that the claims pleaded against the defendants are arguable claims. The real issues on these applications are:

(a) Are the claims sufficiently strong to merit protection by a freezing order?

(b) Is there sufficient evidence to justify the claimant's allegations of want of probity on the part of the defendants so as to justify the inference that if the injunction is not continued there is a real risk that any judgment obtained in these proceedings against the defendants will go unsatisfied? (see Ketchum Plc v Group Public Relations Limited [1997] 1 WLR 4 at 13 (A) to (D)).

(c) Was the granting of the injunction and would its continuance be oppressive or disproportionate, having regard

to the restrictions that it imposes on the Defendants, the risk of harm to Mr Gutteridge's business reputation and the costs involved?

(d) If the Court would otherwise continue in injunction should it refuse to do so by reason of the alleged weakness of the cross-undertaking in damages given by the claimant's parent company?

There is also the question of the discharge of the injunction on the grounds of non-disclosure or misrepresentation on the application without notice, to which I shall refer below.

In a case such as the present, issues (a) and (b) are linked and I do not propose to consider them separately.

The nature of the Court's decision on issue (b) on these applications.

On an interlocutory application such as this, when the material before the Court is entirely written and the relevant witnesses are not given an opportunity to give their evidence orally and they are not cross-examined, it is only in the rarest cases that the Court can or should make a finding of dishonesty against the defendant who professes his honesty and puts forward explanations for the case against him.

I shall not make any finding as to the honesty or dishonesty of Mr Gutteridge, as to his probity or lack of it. It is not for me to say whether his evidence, insofar as it is disputed, is true or false. The question for the Court on these applications, apart from the question of the sufficiency of the causes of action, is whether the evidence establishes a sufficiently strong case of want of probity to justify the continuation of the injunction. In addressing that question I shall have regard in particular to the documentary evidence before me to see whether it justifies the inference of want of probity on the part of Mr Gutteridge. If Mr Gutteridge's explanation of his conduct is well-founded, he will establish at trial that that inference is mistaken. Pending trial, however, the inference must be treated as a possibly well founded one. In particular, where there are documents signed by Mr Gutteridge, the Claimant and the Court are entitled to infer that he was aware of its contents when he signed it.

His case is that he was unaware of the contents of a number of important documents when he signed them. I do not propose to mention that fact when I come to individual documents, but I take it into account throughout. Mr Gutteridge may conceivably, at trial, be able to establish that this is so, although if it is so it says little for the standard of his care. At this stage, and for the purpose of this application, it is sufficient to say that the normal and, indeed, strong

inference is that he knew what the contents were of the documents he signed.

That inference is even stronger where the effect of the document or of the transaction effected by it was to benefit the Defendants.

I do not propose to consider every allegation made by the Claimant. I shall deal with the sufficient to determine whether there is sufficient evidence of their case of a serious want of probity on the part of Mr Gutteridge to justify the continuation of the injunction.

Sums paid to the defendants.

The Defendants admit having received substantial sums from the company. The Claimant alleges that the sum outstanding is about £400,000. The Defendants admit to being liable to repay the sum of £358,000. It is not suggested that I can resolve this difference on these applications.

Mr. Rehman has provided a witness statement to the effect that he arranged payments by Eye as well NLM to and for the benefit of Mr Gutteridge in accordance with his instructions. For the present purposes I shall treat his evidence as unreliable. His evidence may be given and it may be tested at trial. In my judgment the documentary material before me is sufficient to enable me to determine the present applications.

The payments alleged by the Claimant are listed in Schedule 1 to the Particulars of Claim. There are a number of large payments, the largest being a payment of £272,000. It is not disputed that that sum was used for the purchase of the property. It appears from Mr Gutteridge's affidavit of 9th November 2001, at C2, tab 10, that additional sums were transferred out of Eye to pay for building works at the property. Naturally, the first question that arises is the nature of the transaction under which that sum of £272,000 was paid. Given that it was a transaction between the company and its chairman, one would expect it to be properly documented. If it were a loan between the company and the Second Defendant, leaving aside the question of its legality for the moment, one would expect a loan agreement with a provision for the payment of interest and possibly the grant of security for the loan. One would have expected the agreement to have been considered and approved by the board of directors as being in the interests of the company, if not, indeed, by the members of the company, and a minute of the board's decision would have come into existence. One would expect to find evidence of the payments of interest.

A loan by the company to Mr Gutteridge himself would be illegal (see section 330 of the Companies Act 1985). If a loan had been entered into between the company and Mr Gutteridge in innocent ignorance of that prohibition, one would

nonetheless expect to find proper documentation of the agreement and the features of it to which I referred above.

Much the same falls to be said about the payments for the building works, but one would also expect Mr Gutteridge to have kept or to have caused to be kept an accurate written account of the monies received by the defendants so that he and the company could ascertain the state of the account between them at any time. The company must, of course, keep such a record (see section 221 of the Companies Act).

None of these requirements is satisfied. The payments were not properly documented. As to the sum of £272,000, it is unclear on the Defendants' own case who is primarily liable to the company to repay that sum. There is no relevant written agreement for payment or repayment. It is not suggested that there was any agreement for payment of interest or any actual payment of interest. The company's interest was unsecured. No explanation has been given as to how the substantial payments with no provision for interest could have been in the interests of the company. It is not suggested by the Defendants that they were considered by the board of directors at any meeting.

It is alleged that in addition to Mr Rehman, Mr Ireland knew of the transaction, although when Mr Ireland learned of it is not stated. As far as I can see, Mr Gutteridge does not allege that the payments made for the building work were known

to or approved by Mr Ireland. The payments were not the subject of any formal or indeed informal board approval. They were not put to the members of the company for their consideration.

The sum of £272,000 originated with NLM, as had an earlier payment of £120,000 on 17th July 2000, of which the Claimant also complains. The sum of £272,000 was paid by NLM to Eye on 25th August 2000, and the transaction documented by NLM as a loan to Eye. According to the books of Eye it was immediately paid on to GMG. GMG then transferred the sum of £272,000 to the solicitors acting on the purchase of the property. The receipt of this sum from NLM increased the indebtedness of Eye to NLM to over £450,000. I have seen nothing to indicate that these loans by NLM to Eye, if such they were, were approved by the board of NLM, or their purpose, that is ultimately the benefit of the Defendants, known to the board of that company.

The purchase price of the property was £449,500, for which only £7,500 was provided from the defendants' own resources, the balance being provided by a mortgage from Woolwich Plc.

The Defendants' account of the acquisition of the property has varied. It was not included as an asset of Mr Gutteridge in his affidavit of 9th November 2001 at C2/12.

The Second Defendant, in her affidavit of 9th November 2001, stated that she is the owner of the property, as indeed she nominally is. She discloses that, in addition to the first charge in favour of Woolwich Plc for originally £220,000,

there was a second charge in favour of Allied Irish Bank for guarantees in favour of Mr Gutteridge, Eye and NLM for a total of £350,000.

The Defendants' solicitor's letter of 29th November 2001 deals with the property as if it were the First Defendant's alone. The Defendants' solicitor's affidavit of 29th November 2001, at paragraph 67, gives a reason for the property being held in Mr Gutteridge's wife's name, rather than their joint names, that is unconvincing. Miss Bryan states, in the last sentence of paragraph 67, that the Second Defendant is responsible for certain matters, such as organising the payment of bills and, "any property that had been owned by them is usually held in her name, on the basis that as she has a regular income, it is easier and more appropriate for mortgages to be obtained in her name". It is commonplace for couples to take a property in joint names, although only one has the income to support the mortgage loan.

Paragraphs 92 and following of the Defendants' solicitor's affidavit refer to the acquisition of the property as if Mr Gutteridge had contracted to purchase it, in which case one would expect him to be the legal owner. On the other hand, the Defendants' solicitor's letter of 9th November 2001 refers to "their" having exchanged contracts. In the Defendants' solicitor's letter of 11th December 2001, at page 141 of bundle C3, the Defendants denied that Mr Gutteridge has any beneficial interest in the property. In that letter it was asserted that

there had been a loan of £272,000 by the company to the Second Defendant.

Most recently, Miss Roberts told me during the course of the hearing that the Defendants' case now is that the money was a loan by the company to Mr Gutteridge.

These uncertainties are understandable or forgivable in a domestic context. They are not understandable, forgivable where one is dealing with substantial monies taken from a company in which Mr Gutteridge has a majority interest for the benefit of himself and/or his wife.

There are further aspects of this transaction that arouse concern. Eye did not have the cash to make a loan of £272,000. It had to be obtained from NLM, which had previously raised some £2m from the public. One would expect that Mr Gutteridge, as chairman of NLM and of Eye, would have been aware of this. The instruction to Allied Irish Bank for the transfer from the account of NLM to that of Eye, of the sum of £272,000, bears his signature. That transfer would have been unnecessary if Eye had sufficient funds itself.

Mr Gutteridge disputes that signature: see his solicitor's letter of 12th December 2001, saying he "has no recollection" of signing the document. I find that a surprisingly equivocal denial. In addition, it is odd and not obviously explicable that someone else should have forged his signature to a document effecting a transfer of £272,000 which ultimately went for his benefit.

Miss Roberts referred me to the guarantee given by the Second Defendant of the liabilities of Eye to Allied Irish Bank as evidence of the Defendants' good faith. The reference to that document had the opposite effect from that intended. A written agreement, dated 3rd October 2001, was executed between Eye and the Second Defendant relating to that guarantee. It shows that the liabilities of Eye to the Second Defendant were formally and clearly documented, in contrast to the liabilities of the First Defendant and the Second Defendant and GMG to Eye. It shows that the company required £100,000 as working capital, that being recital A to the agreement.

The company only needed that sum because of the sums that had been paid out to the benefit of the Defendants: indeed, the sums that had been invested in the property. The Second Defendant, if she was the beneficial owner of the property, had received that money, apparently with no liability for interest, and certainly she had paid none. Yet the agreement rewarded the second defendant by way of an arrangement fee and a share option which, if exercised, would enable to Second Defendant to buy shares in Eye at a price only one-fifth of that paid by the Claimant. Given the reason for Eye's lack of funds, I have great difficulty in seeing how the agreement of 3rd October 2001 could have been entered into bona fide in the interests of the company.

Mr Gutteridge seeks to justify the loan by Eye, if loan it was, for the purchase of the property on the basis that his

shortage of funds arose from his investment in shares in NLM that enabled it to be listed in the AIM. That seems to me to ignore the benefit he obtained from that listing, the realisability of his existing investment in that company. It also ignores the fact that NLM and Eye are separate companies with their own shareholders and creditors, whose interests must be separately considered by their directors.

I regret that a different inference may be drawn, namely that Mr Gutteridge treated the assets of each company as available to be transferred to him for his benefit or that of his wife.

I do not propose to refer to the other payments made by Eye to GMG. The schedule exhibited in Mr Gutteridge's first affidavit of 9th November 2001 shows that most of them were applied for the Defendants' benefit. It is not suggested that the Claimant does not have a good arguable case for the sums claimed under this head. The balance outstanding is disputed by a relatively small sum and it is not a dispute I can resolve in this application. As I mentioned above, the Defendants' accountants have concluded that the balance outstanding is £358,000, ignoring interest and any propriety claims.

In the present connection there is another matter of concern, in addition to possible breaches of section 330 of the Companies Act. The private placing(?) memorandum of September 2000 that led to the Claimant investing in Eye stated that there were no outstanding loans or guarantees that had

been granted or provided the company to or for the benefit of any of the directors. At page 21 of the document there were listed directors' loans, meaning loans made by directors to the company. The memorandum stated, "The following directors have loaned money to the company: Fiaz Reman, £14,000; Graham Gutteridge, £9,139.

Mr Gutteridge, as a director of the company, was responsible for the correctness of that information. I cannot reconcile it with the evidence now before me except on the basis that the payments made by the company for the benefit of Mr Gutteridge were not repayable by him. If they were regarded by him as not repayable, his conduct was more reprehensible, not less. If they were loans the investors were misled, and he must, at the very least, have been negligent. No explanation has been given for the statements in the placing memorandum to which I have referred.

Other Falsities

The honesty of Mr Gutteridge is also put in doubt by other false statements for which he had responsibility. The announced interim results of NLM misrepresented the cash balances of that company at 31st December 2000. The cash balances were specifically referred to by Mr Gutteridge in his chairman's statement at page 26, tab 18, of C2. The chairman's statement included the following: "The Group ended the period with cash balances of £904,000 and cash burn is approximately

£40,000 per month. There is a reasonably strong case that Mr Gutteridge was aware of the true state of affairs and therefore that that statement was a deliberate lie.

On 13th June 2001, there was a presentation to the Claimant of the affairs of Eye. A document was provided by Eye, a copy of which is at page 262, at tab 6 of bundle C1. It included a consolidated balance sheet of the company and its subsidiaries as at 30th June 2001. That showed cash at bank of £633,000 out of net current assets of £754,000. According to the Claimant's accountants' report the true figure for cash at bank was either £98,000 or minus £3,000, depending on whether the company's overdraft was taken into account or separately disclosed.

Of course, at the date of the presentation the figures for the end of the month could not have been known accurately. However, according to the Claimant's note of the meeting at which the presentation was made they were told that the cash at bank was £653,000, which is consistent with the balance sheet figure. The discrepancy between written presentation and fact is enormous and has not been justified. Mr Gutteridge blames Mr Rehman for it. At this stage it is sufficient for me to comment that it is not easy to see how Mr Gutteridge, who was at the presentation, could have thought that the company had some £600,000 in the bank at the time, given the sums that had been paid out for his benefit, and in any event his responsibilities as chairman of the company.

As is obvious, the discrepancy is accounted for to a substantial extent, if not totally, by the monies removed from Eye for the benefits of Mr Gutteridge and his companies.

I also refer to the false board minutes, which are at page 280 and following in tab 6 of bundle C1. It is, as I understand it, not disputed by the Defendants that they evidenced fictitious board meetings. They were signed by Mr Gutteridge. Deliberately to sign such a document is a serious breach by a director of his duties to his company and is likely to be a criminal offence.

Mr Gutteridge's case is that the minutes were prepared by others and signed by him in ignorance of the fact that they evidenced formal board meetings, but he says that they do evidence agreements made by the directors informally. That explanation is at paragraphs 114 and 115 of the defendants' solicitor's affidavit. It is unnecessary for me to make any finding other than that there is clearly a reasonable case to go to trial that Mr Gutteridge deliberately signed, and therefore brought into existence, these misleading documents.

In the case of the board minute at page 284, the explanation given by Miss Bryan at paragraphs 114 and 115 is insufficient. The explanation at paragraphs 114 and 115 is as follows:

> "The First Defendant utterly rejects any suggestion that he has consistently or ever produced false Board minutes. The First Defendant himself has never actually produced any Board minutes. They have at all times been produced by Graham Urquhart the Company Secretary. Thus, neither the First Defendant nor Mr Rehman are the authors of any Board minutes. It will be apparent from the pages

exhibited at pages 280 to 302 of "SLG1",from the fax references across the top of the pages that they were sent from Woodside Secretarial Services when providing secretarial services to EGL.

As set out earlier above, the business of EGL was run from premises in Wembley, whereas the First Defendant was at all times based in premises in South Audley Street. The position was that he would be presented by Mr Rehman with Board minutes that had been prepared by Mr Urquhart for his signature which reflected agreements reached as between the Directors, even if there had been no formal meeting with all parties present in the same room. The First Defendant had assumed at all times that he was simply being asked, as Chairman, to sign off in relation to those agreements."

At paragraph 104 of her affidavit the Defendants' solicitor states as follows:

"It should be noted at this stage that in or about July 2001 as the first defendant was aware that EGL needed further financing, he instructed Mr Rehman to arrange for the sale of some of his personal shareholding in EGL in order to raise funds that he might inject into EGL. He agreed with Mr Maurice Healey and Mr Matthew Hooper, close business contacts of his, that they would invest in EGL by way of the purchase from him of 460,000 shares (namely 200,000 to Mr Healy and 260,000 to Mr Hooper) at a price of 50p, thereby raising funds for the First Defendant of £230,000 which money was to be injected into EGL. It was not until the transaction had been completed that the First Defendant discovered that, contrary to his instructions and for reasons which he cannot fathom, Mr Rehman mistakenly issued 460,000 new shares for which Messrs Hooper and Healey subscribed. In the event, whilst crucial additional funding for EGL was raised, it was not in the way in which the First Defendant had instructed Mr Rehman to do the transaction and thus did not operate to balance the position between the First Defendant and EGL as had been intended. The First Defendant immediately instructed Mr Rehman to try unravel his mistake but it appears that he has not done so."

The mistaken issue of new shares referred to in that paragraph would have had to be authorised by the board. There are board minutes giving that authorisation. They are among

those which Mr Gutteridge said he signed unaware that they were evidencing in board meetings. If what is said at paragraph 104 is correct, he signed the minutes at pages 204 and 205 in the Claimant's first bundle of documents without having read their contents or understanding what was in them.

Miss Roberts referred to this issue of new shares as showing that Mr Gutteridge was concerned to further the interests of Eye. Regrettably, in my judgment, the documentation casts additional doubt as to the probity of Mr Gutteridge.

Payments to Fablon

The Claimant alleges that sums totalling some £406,000 were wrongfully paid by Eye to discharge the liabilities of Fablon, that such payments were not made bona fide in the interests of Eye, and that Mr Gutteridge is liable to account to the company for those payments. The agreements that are in evidence do not justify these payments. If they were paid at the instigation of Mr Gutteridge without commercial or legal justification he is liable to account to Eye for them. I would add that the suggestion made by Mr Gutteridge that the payments were made by Eye rather than Fablon because Fablon did not have a bank account begs the question why it did not open one, as to which no explanation is volunteered.

Miss Roberts accepted that she could not submit that there was no good arguable claim under this head of claim and in view

of my conclusions in other matters I need not consider it further for the purposes of the present application.

Newcastle Jesters

The issues under this head are similar to the issues in respect of Fablon. Newcastle Jesters owns an ice hockey team of that name. Schedule 3 to the Particulars of Claim, lists payments totalling over £380,000 alleged to have been made by Eye in discharge of liabilities of Newcastle Jesters and payments to it. Some of the payments are described as payments of players' fees. The first three payments listed in schedule 3 of the Particulars of Claim are said to be the sums paid for the acquisition of the team by Newcastle Jesters.

The Claimant's case is that these payments were made in the interests of Mr Gutteridge, Fablon and Newcastle Jesters and were not made in the interests of Eye, that Mr Gutteridge caused these payments to be made, that he knew that he was using Eye's monies for the benefit of himself or his companies, that the payments were not authorised by the board of Eye and were paid out in breach of Mr Gutteridge's fiduciary duties.

An agreement between Eye and Newcastle Jesters was disclosed at the placing memorandum to which I have referred above. Contrary to the assertion in Ms Bryan's affidavit at paragraph 110, that agreement would not justify the payments complained of by the Claimant.

The Defendants' accountants, in paragraph 4.06 of their report, at D414, state that they have been informed by Mr Gutteridge of an agreement in different terms relating to the financing of Newcastle Jesters. The information in that paragraph is vague, the agreement being unspecified and the contribution to the costs of the club referred to unquantified. The alleged agreement is wholly undocumented so far as the evidence before me is concerned. No written agreement has been produced that would justify these payments. I do not think it is suggested that there is no arguable claim for the sums paid to or for the benefit of Newcastle Jesters. In any event, I am clear there is a good arguable claim against Mr Gutteridge for these monies.

Summary on claims

In my judgment the Claimant has established that it has at the very least good arguable claims against the Defendants, which, after taking into account Mr Gutteridge's claims against Eye, but also taking into account the claims for interest on sums allegedly due from the Defendants, and the costs of these proceedings significantly exceed the sum of £1.25m protected by the injunction. The claims against the Defendants are strong enough to justify protection by freezing injunction. In these circumstances the offer of the defendants to provide security by way of a charge on the property alone is insufficient.

The position of other directors of Eye

Miss Roberts submitted that a mistaken impression had been given that Eye was a one-man company in which all relevant decisions were taken by Mr Gutteridge and in which the other directors played no significant part, and that if there were defects in its administration all the directors, not solely Mr Gutteridge, are responsible for them.

It is unnecessary for me to reach a conclusion on these points. The documents put before me, and the fact that the payments complained of by the Claimant were paid to or for the benefit of the Defendants and companies controlled by them, are sufficient to establish a reasonably strong case against the Defendants. There is no evidence of payment to or for the benefit of other directors of Eye.

If others were also liable for payments made otherwise than bona fide in the interests of Eye, assuming that they were, they may be joined in the proceedings by Mr Gutteridge in a claim for contribution. Their alleged liability does not diminish the liability of Mr Gutteridge or affect the claim for injunctive relief.

The need for protection by asset freezing injunction

It will be apparent from the foregoing that I have concluded that there is a strong case of serious want of probity on the part of Mr Gutteridge. It is evident that he is a

financially sophisticated businessman and, if the Claimant's allegations are well founded, able and willing to transfer monies for his or his wife's personal benefit, dishonestly and without proper regard for the interests of the companies of which he is an officer. I am entirely satisfied that if the injunction is not continued there is a real risk that a judgment obtained in these proceedings against the Defendants will go unsatisfied.

Oppression and risk of loss to the defendants

Freezing injunctions are liable to lead the parties to incur substantial legal costs. They are capable of operating and being operated oppressively. The Court must be vigilant to prevent such oppression. In addition, in the case of a businessman such as Mr Gutteridge the Court must be concerned as to the restrictions on his affairs imposed by a freezing injunction and the damage to his business reputation that it may cause.

So far as the risk of loss due to the restrictions placed on the Defendants' financial dealings are concerned, their solicitor's letter of 29th November 2001 made mention of no specific transaction that has been prevented or may be prevented if the injunction is continued, other than the sale of the property. If the Defendants wish to sell the property they may apply for the injunction to be varied to enable them to do so, although I should expect there to be conditions

protecting the net proceeds of sale pending trial in that event. Incidentally, that letter also reserves the Defendants' position in relation to seeking further security. There is no evidence of any specific loss to the Defendants, and in my judgment no evidence that the injunction has been used oppressively.

Having regard to my conclusions on the case of dishonesty or want of probity on the part of Mr Gutteridge, I reject the submission that the application without notice for a freezing injunction in this case was unnecessary or a disproportionate response to the information available to the Claimants. I recognise that the business reputation of Mr Gutteridge will suffer damage if the injunction is continued and I have taken that into account. I regret that I have concluded that the case against him is sufficiently strong for it to be appropriate to continue the injunction notwithstanding that damage.

The application to discharge

Miss Roberts sought to apply to discharge the order of Mr Justice Mitting on the ground of material non-disclosure or misrepresentation by the Claimant or its legal representatives on the application made without notice. The non-disclosure or misrepresentation suggested relates to the worth of the parent company of the Claimant and the strength or otherwise of its

undertaking to meet any loss suffered by the defendants if it should prove that the injunction should not have been granted.

Claimants and their lawyers have a serious responsibility to the Court on any application made without notice to put all material facts and issues before the Court. That responsibility is the more onerous when the injunction sought and obtained is an asset freezing injunction.

Correspondingly, an allegation that a Claimant or his lawyers have failed in that duty is a serious allegation involving misconduct or default on the part of the Claimant or his lawyers. If it is to be made, adequate and clear notice of it must be given and full details provided of the non-disclosure or misrepresentation alleged. No such notice was given in this case by the Defendants in their application notice. The application to discharge on this ground was not foreshadowed in correspondence. In their letter of 29th November 2001, the defendants' solicitors stated that it was not particularly necessary for Mr Gutteridge to issue his application for the discharge of the injunction. They could not have so stated if they proposed to apply for discharge on the grounds of non-disclosure or misrepresentation.

The application was not signalled in the defendants' evidence. It was not, in my judgment, clearly signalled in the Defendants' skeleton argument in the hearing before me, and in any event that document is dated 12th December for a hearing that began on 13th December.

The Claimant's delay in providing a note of the hearing before Mr Justice Mitting, which was provided on 14th November 2001, a month ago, does not justify the failure to give notice of the allegation.

In these circumstances it would be quite wrong for the Court to entertain an application on this ground.

I have, however, taken into account the submissions made on behalf of the Defendants in considering whether the cross undertaking should be fortified by the provision of security. The defendants are unable or unwilling to give any details of the losses they may suffer if the injunction is continued.

Against that, the audited balance sheet of the parent company of the Claimant, as at 31st March 2001, and the more recent management accounts, show net assets of about £3m. I have no reason to believe that these accounts are materially misstated. Of course, further information could have been provided both at the without notice application and at this stage, but what was provided was, in my judgment, sufficient then and the information before me is similarly adequate. On the evidence before me the undertaking of the parent company is sufficient.

Nothing in this judgment, however, should be taken to prevent the defendants from applying for security to be given for the cross undertaking of the claimant if the defendants have evidence of the risk of specific loss justifying greater protection.

Conclusion

For the reasons set out above, the injunction will be continued until trial or further order. It will be varied as agreed so as to remove the cap on the Defendants' legal costs.

Affidavits by solicitors

In this case both parties' evidence has been in the form of affidavits sworn by their solicitors, setting out facts on the basis of information provided by others. Where affidavit evidence is required urgently the provision of evidence in this way may be necessary for practical reasons.

Where the evidence given by affidavit takes the form of the exhibiting of documents and comment on them, or where the facts are uncontentious, there is no possible objection to a solicitor's affidavit. Where, however, on an application for the grant or continuation or the discharge of a freezing injunction the facts are contentious, and evidence is to be given on the matters that are within the personal knowledge of a party to the proceedings, he or she should swear the affidavit.

The affidavit sworn by the Defendants' solicitor in this case is, in my judgment, the paradigm of an affidavit that should have been sworn by a party personally. It is largely an affidavit of facts deposed to on the instructions of Mr

Gutteridge, setting out his case and his recollection. Much of it is highly contentious.

I do not make these comments by way of criticism of the Defendants' solicitors or counsel. I am aware that it is common practice for solicitors to make the affidavits in cases such as the present. My decision in this case is unaffected by the fact that Mr Gutteridge did not swear the affidavit personally. However, in circumstances such as those of the present case, the correct practice is for the affidavit to be sworn by the defendant personally and not by his solicitor. In other cases the Court may take into account the unexplained reluctance of a party to swear such an affidavit.

Other matters

To the extent that I have referred above to triable issues or to a trial, I should not be taken to mean that if an application were made for judgment on the Part 24 of the CPR it would necessarily fail. That is a matter I have not had to consider.

(Discussion as to costs)
