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IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
CHANCERY DIVISION
[2020] EWHC 2825 (CH)

No. BL-2020-00158

Rolls Building
Fetter Lane
London, EC4A 1NL

Tuesday, 6 October 2020

Before:

THE HONOURABLE MR JUSTICE MARCUS SMITH

B E T W E E N :

WATSON'S DAIRIES — Applicant

- and -

A G LAMBERT & PARTNERS & ORS — Respondents

MR C. WEST QC (instructed by Burges Salmon) appeared on behalf of the Applicant.

MR A. LEGG (instructed by Clarke Willmott LLP) appeared on behalf of the Respondents.

J U D G M E N T

(R e m o t e v i a S k y p e)

(Please note this transcript has been prepared from poor quality recording)

MR JUSTICE MARCUS SMITH:

1 This is the return date for an injunction that was granted by Mr Mellor, QC sitting as a Deputy High Court Judge on 30 September 2020. The injunction has a timed expiry, which is at 4:00pm, today, 6 October 2020. So it is a slightly unusual return date, in that the injunction has an explicit sunset provision. The question that is before me today is the question of whether the injunction ordered by Mr Mellor should continue until trial or further order.

2 The hearing before Mr Mellor, which took place on 30 September 2020, was *ex parte* on notice. The Respondents, whom I will describe in due course, were represented on that occasion, because short notice of the hearing was given, but did not have time to adduce evidence in their own right. They had the opportunity – which they took – to make limited, but they were very limited, submissions. The Applicant therefore assumed the burden, entirely rightly, of the full and frank disclosure that normally goes with *an ex parte* application, and that was the way in which the hearing was conducted. Mr Mellor granted the injunction, as I have said.

3 The parties to this application are, on the one side, the Applicant, Watson's Dairies Limited. Watson's Dairies Limited are part of a larger group, the Medina group of companies. The Applicant is a processor of milk, that is to say it buys milk from and takes delivery of milk from third-party producers, from dairy farmers like the Respondents. That milk is then processed, and the processed products sold on to third parties such as supermarkets.

4 The Applicant, as I shall call Watson's Dairies Limited, has the benefit of a contract between itself and the various members of a cooperative association, whose members, for the most part, comprise the Respondents to this application. The cooperative is, as I understand it, called the Meadow Milk Cooperative and they have concluded, in the past, longer-term contracts with the Applicant for the supply of milk. I shall refer to these contracts as the Milk Purchase Agreements.

5 As is unsurprising between a milk processor and dairy farmers, there is tension between the Applicant and the Respondents as to the price at which the milk produced by the Respondents is purchased by the Applicant, which tension has been articulated in conversations crossing the line between the Applicant and the Respondents. The tensions that these price negotiations gave rise to culminated in notices being served by the Respondents on the Applicant purportedly terminating the Milk Purchase Agreements that have subsisted between them. Those notices were served in the course of and towards the end of June 2020. They appear, on their face, to be effective from 1 July 2020, and give three months' notice of termination. That notice period expires on 30 September 2020.

6 The substance of the application by the Applicant before Mr Mellor was to obtain an injunction restraining the Respondents from selling their milk elsewhere. There was a helpful, and helpfully short, debate between counsel for the Applicant, Mr West QC, and counsel for the Respondents, Mr Legg, as to whether this injunction ought properly to be labelled a mandatory or prohibitory one. It seems to me that, in this case, the injunction is more appropriately described, to the extent that it matters, as a mandatory injunction. In effect, the Respondents are, if the injunction is continued, and for the last week have been,

tied into a contract which they wanted to get out of and which they say they are entitled to get out of.

7 The effect of the order is to maintain what one might say is the *status quo*. The *status quo* is, itself, a dangerous and somewhat loaded term in this context because, of course, on the one side the Applicant contends that the *status quo* involves the continuation of the Agreement that subsists between the Applicant and the Respondents, whereas the Respondents say their notice to terminate is appropriately given and that, effectively, the *status quo* involves them continuing to do what they have been doing over the summer, which is to negotiate new contracts of supply with other milk processors in place of the Agreement.

8 With that broad introduction, I turn to the substance of the dispute before me which is whether, according to the well-established principles of *American Cyanamid Co (No 1) v. Ethicon Ltd* [1975] AC 396, the injunction on an interim basis should be granted until trial or further order. The *American Cyanamid* test is well understood by practitioners, and I will not go through its finer points in this ruling. I will analyse the matter in the following stages:

(1) **Stage 1.** I will first consider the question of whether there is a good arguable case and/or a serious issue to be tried, which is the first stage in Lord Diplock's analysis. I will, in the course of this assessment, consider whether (in this case, given the nature of the injunction sought) that is the proper test or whether, in this case, I need a higher degree of assurance on the merits (as was contended by the Respondents). Unless Stage 1 is passed, there is no need to consider the later stages.

(2) **Stage 2.** My second and third stages of analysis have to do with the question of the adequacy of damages. I will first consider, at Stage 2, the question of whether damages are <u>not</u> an adequate remedy for the Applicant, such that an injunction ought to be granted. It is well established that unless this second stage can be passed, I do not need to proceed to the third stage.

(3) **Stage 3.** This stage, which I get to if I am satisfied as to Stage 2, involves assessing whether the undertaking in damages, which is the price of any injunction, is such as to be sufficient for the court to be assured that the granting of an injunction will not adversely or sufficiently adversely affect the Respondents because, given the undertaking, they will be properly compensated for in damages.

There is a final stage in the *American Cyanamid* assessment, which involves taking into account the balance of convenience, as one calls it. For reasons which I will come to, it will not be necessary for me to consider that fourth stage and I mention it for completeness only.

9 I turn then to the question at Stage 1, which is whether there is a serious issue to be tried or a good arguable case. The problem with this case is that the evidence before me in terms of the operation of the Milk Purchasing Agreements between the parties is such that there is a high degree of confusion as to its terms. I say this making no criticism whatsoever of either side. The fact is that contractual terms evolve and, in this case, there was a suggestion that the critical term that was introduced into the Agreements between the Applicant and the Respondents was one that was introduced with a degree of unilateralness and with a degree of coercion, if I may take the words of Mr Legg.

10 That provision confers on the Applicant an ability to vary the price that it pays for the milk it purchases from the Respondents. The Respondents had, or thought they had, the protection of a "reference price", that reference price being calculated by reference to a basket of prices offered to competing milk providers. If the price set by the Applicant fell below that

reference price, the Respondents were entitled to terminate the Milk Purchasing Agreements on three months' notice, rather than the usual twelve.

11 The problem that I face is that the amendments that introduce this term are, first of all, in themselves vague; and, secondly, the documents by which the amendments were introduced are controversial between the parties. Even the "baseline" contracts – that is, the Milk Purchase Agreement originally subsisting as between the Applicant and the various Respondents – which the amendments purported to vary were controversial as between the parties.

12 So, in terms of construing matters, it is actually quite difficult to work out precisely which original agreement (or, rather, agreements) one is construing, and what the effect of the amendments to them are. However, it was, if not quite common ground then at least for the purposes of this application, accepted by Mr Legg on behalf of his clients that the letter introducing the variation to the pricing system between the parties was one that was at least acquiesced in by his various clients.

13 With a fair degree of hesitation, I consider that the Applicant has shown a good arguable case and/or a serious issue to be tried. If a higher requirement needs to be satisfied – i.e., if, because of the effects of the mandatory nature of the injunction, I need to be satisfied on the merits to a high degree of assurance – then it may be that the Applicant just about succeeds on this test also. I do not propose to engage in the detailed analysis that I have had from the parties on the question of whether Stage 1 has or has not been satisfied for the simple reason that I consider that the critical question in lies in the adequacy of damages in the case, and I have reached a very firm conclusion as to that question.

14 To cut to the chase, and to anticipate the outcome of this application, I consider that in this case, the second stage of the *American Cyanamid* test is not met. There is no prospect of an injunction being granted (or, more accurately, the injunction made by Mr Meade being continued) because I consider damages to be an adequate remedy to the Applicant in this case. So, for that reason, I am going to give the Applicant the benefit of the doubt, and say that Stage 1 is passed. But I only do so because I consider that Stage 2 is so clearly <u>not</u> met.

15 I proceed, then, to my reasons for concluding as to why this is the case. Moving, then, on to Stage 2, it is important, I think, to begin with the Particulars of Claim that were pleaded by the Applicant pursuant to the order of Mr Mellor. Paragraph 34 of the Particulars of Claim provides:

> "In the premises as set out above, the Claimant hereby asks this honourable Court to determine and declare that the Purported Notices to Terminate were not valid or effective to begin a three-month notice period at the end of which the [the Milk Purchase Agreements between the Applicant and the Respondents] (as amended) would terminate in accordance with their terms."

So the primary remedy sought by the Applicant is a declaration.

16 One then moves on to other remedies sought, and I read from paragraphs 35 and 36 of the Particulars of Claim:

> "*(ii) Damages*
>
> 35. On 29 September 2020 the Claimant applied for an interim injunction to prevent the Defendants from ceasing to supply it with milk until such time as

the Court can finally determine the validity/effectiveness of the Purported Notices to Terminate. On 30 September 2020 the Court granted such an injunction until the return date. In the event that the said injunction is continued at the return date (and assuming it remains the Defendants' position that the MPAs terminated by notice on 30 September 2020), the Claimant intends to put in place alternative supply contracts prior to trial in this matter. If the Claimant is successful in securing such alternative arrangements, it ought to suffer no or only minimal losses by reason of the Defendants' position concerning the Purported Notices to Terminate, even if such is ultimately found to be wrong on the true construction of the MPAs (as amended). In the premises, the Claimant does not hereby seek an award of damages, although it reserves the right to introduce such a claim later should it become appropriate.

(iii) Specific performance / injunction

36. For the same reason, by the time of trial the Claimant does not anticipate that it will require specific performance or injunctive relief by way of final order, and the Claimant does not seek such relief hereby at present. Again, however, it reserves the right to do so in future should it become necessary."

17 I consider these to be important paragraphs outlining the nature of the Applicant's claim. The fact is that this injunction, as is explicit from the paragraphs I have just quoted, seeks to hold the ring for only a limited period of time. There is no suggestion that the supply of milk on which, so it is said, the Applicant presently depends on the Respondents to supply is irretrievably lost if the Milk Purchase Agreements are lost. To the contrary, it is said that in the time it will take to bring this matter to trial, the Applicant will be able to put in place arrangements that will not only render an injunction unnecessary, but which will also render damages minimal. To my mind, that represents a very difficult starting point for the Applicant to contend that an injunction until trial is required.

18 The Applicant contends is that, unless an injunction is granted until trial or further order, the Applicant will effectively no longer be able to sustain its business and will go out of business because it is so dependent at present upon the milk supplies from the Respondents. For reasons that I shall give, I consider that even if that is right, as to which I have some doubt, but even if that is right, I do not consider it is a relevant consideration in the circumstances of this case.

19 I was taken to the decision of Phillips LJ in *VTB Commodities Trading DAC v JSC Antipinsky Refinery*, [2020] 1 WLR 1235. In that case, Phillips LJ, sitting in the Commercial Court, considered the circumstances in which an order for specific performance for fungible goods might or might not be granted. What he said in the course of discussion, culminating in [77]-[78], was as follows:

"77. In my judgment the rationale for refusing specific performance of contracts for the sale of future unascertained goods goes beyond the fact that damages will usually be an adequate remedy, although that is an important aspect of the rule. The granting of such a remedy effectively turns a contractual claim into a quasi-proprietary right in respect of goods which have not been allocated to the contract and which may have been sold to a third party. That gives rise to both conceptual difficulties as referred by Atkin LJ in *Re Wait* and to practical difficulties as identified by Stanley Burnton LJ in *SSL*.

> 78. There is, in my judgment, a strong presumption that specific performance will be limited to cases of specific or ascertained goods, a presumption to be gleaned from s.52 and from the judgment of Atkin LJ and recognised in *Sky Petroleum*, the one case where the rule has been overridden."

20 Equating, as I think is right, the remedies of specific performance, final injunction, and interim injunction, it is to my mind clear that a court should be extraordinarily wary – I never say never, but extraordinarily wary – in granting an interim injunction to preserve the supply of fungible goods that can otherwise be obtained in the market. It seems to me that that is the *prima facie* position in this case: damages are and will be an adequate remedy. The Applicant can, provided it pay the price, obtain milk from other sources, in order to carry on its processing business. In circumstances where the market is operating properly, even if the cost of procuring the fungible goods is higher than under the present Milk Purchase Agreements, the general remedy of the Applicant, assuming it succeeds at trial, is one of damages.

21 In my judgment, that is the case, even where the cost of procuring the additional goods is liable to cause the company seeking the injunction to go under. It seems to me that that is a proper reflection of the way in which markets operate and contracts for the supply of goods operate: that is, damages are the *prima facie* remedy, and a court should, as I say, be extraordinarily cautious in departing from this *prima facie* position where the markets for fungible goods are operating properly.

22 In this case, I am satisfied that the market in milk supplies is operating properly. I have had evidence before me, notably from a market consultant adduced by the Respondents and from a representative from the NFU, also adduced by the Respondents, which show that there is a spot market in milk, albeit that I accept that in these autumn times, it may well be that the price of milk is higher than it ordinarily might be because of a tightness in the market supply. The fact is, I am entirely satisfied that the Applicant can, as of today, go out into the market and obtain the milk that it needs. Of course, I accept that that will cost more; but that is precisely what the remedy of damages exists to compensate for.

23 In the circumstances, essentially for that reason, I find that an injunction ought not to lie in this case. In this case, however, there are two other factors which I pray in aid to support that conclusion. These additional factors are as follow.

24 First of all, this has been a dispute which has been rumbling on for some time. The notices purporting to terminate the Milk Purchase Agreements, as I said earlier in this ruling, were submitted by the Respondents to the Applicant towards the end of June of this year, and they declared in unequivocal terms that the Respondents were purporting to end contractual relations as at 30 September 2020. I entirely accept that there were negotiations going on as between the Applicant and the Respondents with a view to negotiating a mutually agreeable solution. In some cases, particularly in the case of two (now former) Respondents, agreements have been reached which have resulted in, as I understand it, better terms being agreed as between these two parties and the Applicant. In particular, the "price basket", which represents the safeguard against low prices for these parties, has been reintroduced on terms that these parties find acceptable. I have not seen, and do not need to refer to, but I have been told that that is the case. So the effect of negotiations over the summer as regards these two milk producers has resulted in an amelioration of the terms of the contract or, put in another way, an improvement.

25 So far as the remaining Respondents are concerned, they have been absolutely clear that they have the right, disputed by the Applicant, to end the Agreements between them and the Applicant. That has been the position in terms of open correspondence right up until the application before Mr Mellor. In these circumstances, the Applicant had a choice:

(1) It could choose to play a game of brinksmanship and permit the negotiations to carry on until 30 September 2020 and do nothing more.

(2) It could, in addition to this, accelerate this dispute, and could have sought an injunction in sufficient time to enable the court to consider matters in advance of a cessation of supply, instead of at that point in time when the Respondents were not merely threatening to cease supplies in the future, but were actually threatening to cease supplies imminently, which was the position at the end of September.

(3) It could, additionally or alternatively have put in place alternative arrangements for the supply of milk after the end of September 2020.

26 These were options all open, with variants, to the Applicant. It seems to me that it lies ill in the mouth of the Applicant to say that it risks insolvency or an inability to procure to itself the supply of milk necessary to supply its own customers simply because it has failed, over a period of three months, to take steps to protect its position.

27 Secondly, I refer to the so-called "nightmare scenario" that was advanced by Mr Hussain, a director of the Applicant. Mr Hussain gave evidence for the Applicant in two witness statements. He suggested that the financial parameters within which the Applicant operated were such that unless the injunction was granted, it would not be given the funding that it needed by the Medina group (of which it is a part) to carry on in business. In short, there was an unwillingness on the part of the group to fund the Applicant to go into the spot market or to go into the market as it existed in the last three months, and hedge, effectively, against the inability to conclude satisfactory milk supply agreements with the Respondents. This was a commercial decision on the part of the group and it seems to me that, even if the nightmare scenario that Mr Hussein has described is likely to occur, this is part of the operation of market forces, and not something in which the court should intervene. If the group wishes the Applicant to court insolvency, rather than fund it through these difficulties, obtaining damages at the end of the court process for the additional costs the Applicant will incur, then so be it.

28 So, I consider that for those two reasons, the general rule that in the case of fungible products damages are an adequate remedy is supported and buttressed. For all those reasons, I conclude that the second stage of the *American Cyanamide* test has not been met.

29 There are a couple up of other sweep up points that I should make. The question of whether damages would be an adequate remedy includes not merely damages as a theoretically adequate remedy, but a practically adequate remedy. In other words, if one assumes that the Applicant successfully pursues the Respondents to judgment, will that judgment to be fulfilled? I am satisfied that, in this case, damages would be a practically adequate remedy, as well as a theoretically adequate one. Whilst I appreciate that the Respondents may well not be cash rich in immediate cash flow terms, they nevertheless are sitting on assets of considerable value, albeit perhaps capital assets rather than income. If the Applicant's claim succeeded, these assets could be realised to pay any damages awarded. I fully accept that such enforcement processes would likely be terminal to the Respondents' business, but that

is something which I regard as an irrelevant factor. The fact is that the money is there and damages will be paid if the Respondents are successfully pursued to judgment.

30 So I conclude, for all those reasons, that the second stage of the *American Cyanamid* test is not satisfied and it therefore follows that I do not really have to consider the question of the adequacy of the cross-undertaking in damages provided by the Applicant as the price of the injunction. However, given that the point was argued and given that the matter has assumed some importance before me, I will say a few words on this point.

31 I do not take account of the fact that the undertaking was not fortified. It does seem to me that it is quite difficult, in this context, to work out precisely what level of fortification might be required given that it is rather hard to assess what losses the Respondents would suffer were the injunction to have been granted. So that is a factor that I do not take into account in considering the adequacy of the cross-undertaking offered by the Applicant. I assume, for the purposes of this part of my ruling, that had the injunction been granted and were it to be established at trial that the injunction had been wrongly granted, the Applicant would be able to hold the Respondents harmless in respect of such monetary losses as they might be able to prove.

32 It is clear that some of the losses that the Respondents would have sustained, had an injunction been granted, would be quantifiable in damages. Let me explain the context. What has been happening over the three months after the issuing of the notices to terminate the Milk Purchase Agreements is that various of the Respondents have been engaged in seeking new contractual relations with other milk processors. For the most part, and I will not go into any detail, but for the most part, the Respondents have successfully reached contractual arrangements or nearly concluded contractual arrangements with third-party milk processors. In all cases where such arrangements have been reached, the supply of milk that the Respondents are obliged to deliver under these arrangements imminent. In other words, the injunction, if granted, would actually restrain the Respondents from fulfilling their legal obligations.

33 That has two effects. First of all, I am told, and I accept, that the contracts that have been reached between the Respondents and the third-party milk processors are on more favourable terms than those with subsist or subsisted as between the Applicant and the Respondents. By that I mean the Respondents are going to get more per litre for milk that they sell under the new arrangements. That is obviously an advantage which they would be deprived of in terms of profits to them were the injunction to run. However, that is something which I consider is easily compensatable for in damages and is a matter that I leave out of account for the purposes of this assessment.

34 Much more significant, however, is the fact that these contractual opportunities which the Respondents have negotiated will, in my judgment, likely be lost if the injunction were to be granted. It is quite clear that these agreements with other milk processors do not, if I may be colloquial, "grow on trees". They are commercial arrangements which require careful commercial negotiation and, in some cases, and I take the case of the Tenth Respondent as an example, in some cases they require an opportunity to present itself to participate in an association which involves, again in the case of the Tenth Respondent, the expenditure of significant amounts of money to participate in the association that the Tenth Respondent has successfully availed itself of, but only on the payment of significant monies.

35 The cost of fracturing these carefully negotiated agreements seems to me to be something which it is impossible to assess in terms of the compensation or in terms of the harm that

will be suffered by the Respondents. It follows that even if a fully adequate undertaking in damages were given, the quantification of that loss would be extremely hard, if not impossible, to assess. The risk of under-compensation to the Respondents, were the injunction to have been (wrongly) granted, is considerable. I do not consider damages to be an adequate remedy in this regard.

36 The other point that I bear in mind is that the effect of the injunction, were it to be granted, would be to tie the Respondents into a contractual arrangement which they no longer wish to continue. It may be that they are in breach of contract by refusing to supply milk to the Applicant because the notices to terminate are, as the Applicant maintains, invalid. However, the fact is that that is a matter for trial. The effect of the injunction would be to tie the Respondents into a disputed contract. Mr Legg, for the Respondents, contended that the relationship of trust and confidence between the Applicant and the Respondents had broken down, and that in such circumstances the Respondents should not continue to be tied to the Applicant. I am not sure that the importation of such fiduciary questions actually helps in the context of what is really very commercial litigation. What we are talking about here is essentially the price on which milk is bought. There are other terms but price is the driver of the dispute here.

37 It seems to me that Mr Legg's point is better put in the following way. What we have here, and what one has been seen over the course of the summer, is a process of negotiation between the Applicant and the Respondents. That process of negotiation has, in some cases, with some Respondents (now former Respondents), succeeded and a deal has been reached. These (former) Respondents have concluded revised or varied agreements with the Applicant. They are, I understand, on significantly on better terms than the pre-existing Agreements. The effect of the injunction would be to tie the Respondents into a more disadvantageous commercial relationship than others have been able to negotiate. Mr West, in his admirable submissions, sought to ameliorate this point by saying that his client was quite prepared to introduce, as a term of the injunction, into the continuing contractual relationship, which, of course, one side says does not exist any longer, the favourable terms that have been negotiated by the former Respondents. To my mind, that simply underlines the pernicious nature of granting an injunction in this case. If granted, the injunction would have the effect of subverting the free market in which the Applicant and the Respondents operate.

38 For these reasons, I decline to continue the injunction and for the remaining 22 minutes of its life, I discharge it now.

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Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

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