Neutral Citation Number: [2016] EWCA Civ 717

Case No: A3 2016 0125

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MRS JUSTICE ROSE DBE
[2015] EWHC 3895 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 12/07/2016

Before:

LORD JUSTICE PATTEN
LORD JUSTICE FLOYD
and
MR JUSTICE BAKER

- -

Between:

JONATHAN FERSTER	**Petitioner/ Respondent**
- and -	
(1)STUART FERSTER **(2)WARREN FERSTER** **(3)INTERACTIVE TECHNOLOGY COMPANY LIMITED**	**Respondents/ Appellants**

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Charles Hollander QC (instructed by **DAC Beachcroft LLP**) for the **Appellants**
Christopher Butcher QC and **Sushma Ananda** (instructed by **Herbert Smith Freehills LLP**) for the **Respondent**

Hearing date: 15 June 2016

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Approved Judgment

Lord Justice Floyd:

1. This is an appeal from the decision of Mrs Justice Rose of 21 December 2015, allowing an application by the respondent, Jonathan Ferster, to amend his petition under section 994 of the Companies Act 2006 (the unfair prejudice provision) so as to refer to the contents of an email dated 29 April 2015 ("the email"). The email was sent in the context of a mediation, and thus would normally be the subject of mediation/without prejudice privilege. The judge held, however, that the contents of the email showed that it fell within the "unambiguous impropriety" exception to that privilege, and thus was available for use in the petition. The respondents to the petition (first and second appellants in this court), Stuart Ferster and Warren Ferster, are dissatisfied with the judge's ruling on this point and appeal to this court with the permission of Briggs LJ given after an oral hearing. For convenience, I will refer to the first and second appellants as Stuart and Warren, and to the respondent as Jonathan.

2. The appeal arises against the background of two sets of hotly contested proceedings. In the first set of proceedings Interactive Technology Corporation Ltd ("the company" or "ITC") at the instigation of Stuart and Warren, sues a number of defendants including Jonathan for, amongst other things, breach of fiduciary duty in the management of the company. I will call these proceedings "the company's action". In the course of the company's action an order had been made requiring Jonathan to make disclosure of his assets. The second set of proceedings, and that of immediate relevance, is the petition under section 994 of the Companies Act 2006 brought by Jonathan. Section 994 provides that the court can grant relief in favour of a member of a company where there is unfair prejudice, in that the manner in which the affairs of the company are being conducted is unfairly prejudicial to the interests of the members or some of them, including the petitioner. It is alleged in Jonathan's petition that Stuart and Warren have procured ITC to pursue the company's action for an improper purpose, namely to pressurise Jonathan into buying their shares in ITC at an inflated price. I will call these proceedings "the unfair prejudice petition".

3. The mediation took place on 20 January 2015. At the mediation, Stuart and Warren had offered to sell their shares in the company to Jonathan for a specified sum. No agreement was reached at the mediation, but the mediator continued to stay in touch with the parties. The email was sent by the mediator herself passing on messages from Stuart and Warren. The full text of the email is set out below:

> "Dear Catherine,
>
> Thank you for returning the call. I am setting out below the 11 points of communication that I have discussed with you following written and telephone communications with DAC. The messages from the claimant are as follows:
>
> 1. We withdraw our existing offer to sell the shares of Warren and Stuart for the sum of [**redacted**].
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> 2. We make a revised offer to sell the shares of Warren and Stuart to Jonathan for the aggregate sum of [**redacted**]. The revised offer is made subject to contract and without prejudice

as part of a global compromise incorporating all the parties to the proceedings and the petition. The sale price is to be settled on completion in cash and also by the transfer to Warren and Stuart by Jonathan at market value of his share in any assets which the three brothers on jointly. Any settlements will contain amongst other provisions, confidentiality provisions.

3. We have increased our offer because we have become aware of further wrongdoings by Jonathan. Jonathan knows the extent of his wrongdoings and our client believes that Jonathan is in very serious trouble which will also have serious implications for Jonathan's partner (Jonathan Seeds) by reason of Jonathan's actions.

4. It is for Jonathan to assess the reasonableness of the offer we are making. Jonathan ought to realise that the offer is beneficial to him and Jonathan Seeds and HSF should take is instructions.

5. The claimant has information that Jonathan does not only hold bank accounts in England (as per his affirmation) and various additional offshore accounts are held by him or on his behalf (and/or now Jonathan Seeds).

6. It is clearly in everyone's (and particularly Jonathan's) interest to wrap this up speedily and quietly. If it is not settled within 48 hours there is a real risk that such a settlement may no longer be possible – the concern being that others will become aware of it.

7. Mr Watts is expected to take his client's instructions as a matter of urgency as a settlement will obviate the need of further steps such as committal proceedings being issued.

8. If this offer is not accepted the company also proposes to accept third party funding. The amount of the company's claim will be amended and the amount required by Warren and Stuart for the purchase of their shares will be considerably higher than [**redacted]** (by at least another £3m) in light of the third party funder's share of sums recovered. Jonathan will also face the repercussions detailed below.

9. If Jonathan has misled HSF and sworn false evidence Alan Watts will be aware that Jonathan will face charges of perjury, perverting the course of justice and contempt of court and is likely to be imprisoned. If Jonathan Seeds is implicated he will likewise be investigated and/or charged.

10. In the above circumstances, Jonathan's credibility and reputation will be destroyed barring him out of the online gaming business in the future. He will also have no prospect of succeeding in this case.

> 11. Furthermore and hypothetically, if a substantial judgment is entered against Jonathan and it is not satisfied by assets in Jonathan's own name, we will pursue third parties, such as Jonathan Seeds, as regards claims against them where Jonathan has sought to put assets out of the reach of his creditors.
>
> If you wish me to convey any message back once you have talked to Alan and taken your client's instructions I am happy to assist. I do however have a very busy 48 hours coming up so we do have limited time."

4. Mr Watts was the partner at Herbert Smith Freehills ("HSF" in the email) dealing with the matter on behalf of Jonathan.

5. The proposed amendment to the petition alleges that in April 2015 Stuart and Warren sought to extort a ransom price from Jonathan for their shares in ITC by making improper and unwarranted threats to cause the company to commit him for contempt and cause criminal proceedings to be brought against him unless he agreed to purchase their shares at an inflated price. The particulars of the allegation then refer to the offer made in the mediation on 20 January 2015 by Stuart and Warren to sell their shares, and alleges that the email contained an unambiguous threat that the company would bring committal proceedings against Jonathan unless he paid the brothers a higher sum.

6. Following the sending of the email, Mr Watts wrote to DAC Beachcroft, the solicitors for Stuart and Warren, asking for full details of the allegations of non-disclosure and contempt that had been made in the email. DAC Beachcroft did not choose to give further details, but said:

> "Contrary to your emails of yesterday, our client neither sought nor intended that committal proceedings would be issued or allegations of perjury made if the offer was not accepted. Contrary to the suggestion in your email, our client did not know, and to be clear does not make, any threats as to what will happen if the parties do not reach a settlement agreement. Their position as to possible future procedural steps in the event that a settlement is not achieved is, however, reserved."

7. The application to amend was supported by a witness statement of Catherine Emanuel of HSF. Stuart and Warren were afforded an opportunity to put in evidence but chose not to do so.

8. In *Unilever plc v The Procter & Gamble Co.* [2000] 1 WLR 2436 the issue before the court was whether it was open to a party to rely on allegedly unjustified threats of patent infringement proceedings made in the context of a without prejudice meeting. In the course of his judgment, Walker LJ at page 2444 identified a number of discrete exceptions to the without prejudice rule. One was:

> "… One party may be allowed to give evidence of what the other said or wrote in without prejudice negotiations if the exclusion of the evidence would act as a cloak for perjury,

> blackmail or other "unambiguous impropriety" (the expression used by Hoffman LJ in *Forster v Friedland* (unreported) 10 November 1992… But this court has, in *Forster v Friedland* and *Fazil-Alizadeh v Nikbin* (unreported), 25 February 1993… warned that the exception should be applied only in the clearest cases of abuse of a privileged occasion."

9. Later at page 2449 he said:

> "Lord Griffiths in the *Rush and Tompkins* case [reported at [1989] AC 1280] noted, at page 1300C, and more recent decisions illustrate, that even in situations to which the without prejudice rule undoubtedly applies, the veil imposed by public policy may have to be pulled aside, even so as to disclose admissions, in cases where the protection afforded by the rule has been unequivocally abused."

10. In *Savings & Investment Bank Ltd v Fincken* [2004] 1 WLR 667; [2003] EWCA Civ 1630 the defendant had admitted at a without prejudice meeting that he owned shares in a company which he had not disclosed in his affidavit of means. The claimant applied to amend its pleading to include the admission on the ground that it showed the defendant had lied in his affidavit of means, and that this amounted to unambiguous impropriety. The defendant did not give any evidence in rebuttal. This court (Rix LJ with whom Carnwarth LJ agreed) held that the admission did not fall within the exception. At paragraphs 56 to 57, Rix LJ distinguished between an unequivocal admission and an unambiguous impropriety. He declined to treat the unequivocal nature of the admission as a factor which took the case outside the philosophy of the jurisprudence. That jurisprudence was:

> "… antagonistic to treating an admission in without prejudice negotiations as tantamount to an impropriety unless the privilege is itself abused. That, it seems to me, is what Robert Walker LJ meant in the *Unilever* case when he repeatedly spoke in terms of the abuse of a privileged occasion, or the abuse of the protection of the rule of privilege … That is why Hoffmann LJ in *Forster v Friedland* 10 November 1992 emphasised that it was the use of the privileged occasion to make a threat in the nature of blackmail that was, if unequivocally proved, unacceptable under the label of unambiguous impropriety…It is not the mere inconsistency between an admission and a pleaded case or a stated position, with the mere possibility that such a case or position, if persisted in, may lead to perjury, that loses the admitting party the protection of the privilege … It is the fact that the privilege itself that is abused that does so. It is not an abuse of privilege to tell the truth, even where the truth is contrary to one's case. That, after all, is what the without prejudice rule is all about, to encourage parties to speak frankly to one another in aid of reaching a settlement: and the public interest in that rule is very great and not to be sacrificed save in truly exceptional and needy circumstances."

11. As that passage shows, the critical question is whether the privileged occasion is itself abused. Although the test remains that of unambiguous impropriety, it may be easier to show that there is unambiguous impropriety where there is an improper threat than where there is simply an unambiguous admission of the truth. In either case, as Hoffman LJ pointed out in *Forster v Friedland* (unrep) 10 November 1992:

> "The rule is designed to encourage parties to express themselves freely and without inhibition. I think it is quite wrong for the tape-recorded words of a layman, who has used colourful or even exaggerated language, to be picked over in order to support an argument that he intends to raise defences which he does not really believe to be true."

12. In her judgment, the judge referred to these and other authorities before concluding at paragraph 17 onwards:

> "17. I am in no doubt that this was an attempt at blackmail which falls firmly within the exception and that the email is admissible. The applicant is not trying to bring into evidence any discussions that genuinely took place in the mediation. Indeed, they have redacted the figures being discussed from the email. The impropriety consists, in my judgment, in threatening to pursue contempt proceedings, including a committal to prison, unless Jonathan pays the brothers a much higher price for the two-thirds share, an extra 25%, I am told, on the price previously considered. It is on the basis of the supposed discovery of wrongdoing by Jonathan and also threatens not only him but his partner, Mr Seeds.
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> 18. Here there is no lack of clarity in what is being said. This is not an instance where a party is trying to pick up exaggerated or colourful verbal statements made during a long, heated meeting between lay clients. This email appears to have been drafted by lawyers and is forwarded to Herbert Smith by the mediator. There is no ambiguity in the purpose of the threat, namely to pressure Jonathan to pay more for their shares. So it is quite clear that the increase in price is nothing to do with any increase in the value of the shares or of the company's business, but rather is the price being exacted for the brothers who are now in control of the company, not causing the company to take action to deal with the supposed wrongdoing which they claim to have uncovered. That wrongdoing is that Jonathan is alleged to have withheld information when complying with the freezing order directions granted to the company that Jonathan disclose his assets.
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> 22. ... there is no disguising, in my judgment, what was going on here, namely that the brothers were using the threat of causing ITC to instigate committal proceedings in the other litigation (brought by the company against Jonathan for breach of fiduciary duty) in order to make a personal gain for

> themselves by increasing the payment for their shares. If, in fact, they have real evidence that Jonathan's assets which would be available for satisfying a judgment obtained by the company ultimately in the company's litigation, I do not consider that this provides any excuse for this email. On the contrary, if they had a genuine belief what they appear to be saying here is that they will cause the company to refrain from pursuing those matters if Jonathan pays them personally more money for their shareholdings. I do not agree that the assets of the company are automatically reflected in the value of the shares in the hands of the shareholders so that they are just claiming their share of the monies that the company might win in its claim. The company may have creditors and may want to use the money from any judgment against Jonathan for expanding its business rather than paying out to the shareholders."

13. The judge reached those conclusions without regard to whether or not Stuart and Warren had a genuine belief in the substance of the allegations of wrongdoing which they made against Jonathan, even though they had made no attempt to show that they had. She also rejected the suggestion that the involvement of solicitors and the mediator in the sending of the email was a factor indicating that there was nothing improper about it. The judge also rejected the suggestion that DAC Beachcroft's email following the email from the mediator (set out at paragraph 6 above) was a "clarification" of the content of the email, as Stuart and Warren had contended. She concluded that DAC Beachcroft had recognised the impropriety of what had been said in the email and were trying to repair the damage.

14. Mr Hollander QC, who appeared for Stuart and Warren, submitted that the judge had been wrong to treat the action of Stuart and Warren as improper because of the separate identity of the company. The three brothers were the three equal shareholders in ITC. Thus a greater claim by the company would simply involve the two thirds share of Stuart and Warren increasing proportionately in value. Accordingly, the discovery that the company's action might in practical terms be worth more because of the discovery of the additional account would have a proportionate impact on the value of their shares. What was contemplated by way of settlement was that Jonathan would buy Stuart and Warren's shares. Jonathan would then be in complete control of the company and could discontinue the company's action. It was not in any way improper for Stuart and Warren to indicate, that by accepting their offer for shares, the result would be that Jonathan could cause the company to refrain from pursuing those monies.

15. I cannot accept this submission. The impropriety in the threat identified by the judge was not concerned with what would happen if Jonathan accepted the increased offer: it was concerned with what would happen if he did not. Paragraph 22 of the judgment has to be read as a whole. What the judge understandably regarded as improper was the use of the threat of committal proceedings in the company's action to place increased pressure on Jonathan to pay Stuart and Warren personally more for the shares. Stuart and Warren were making it clear that, if the offer was not accepted, they would use their control of ITC to take the steps identified in the email. Whilst

those steps might be steps which it might be proper for ITC to take if it had a genuine belief in some basis for them, it was wrong for them to be used as a lever to enable Warren and Stuart to get more for their shares.

16. Mr Hollander also submitted that the judge was wrong to state that the increase in price in the proposed offer had nothing to do with any increase in the value of the shares or of the company's business. If Jonathan had misled the court in his disclosure affirmation, it was not a matter of surprise that the settlement value of the litigation would be increased. This was for three reasons: (i) the undisclosed bank account had the potential to increase the value of the company's claim thereby increasing the value of the shares of Stuart and Warren; (ii) an undisclosed bank account would adversely affect Jonathan's credibility and therefore make it more likely that the company would succeed on its claim; (iii) the settlement value was increased by what a party regards as the risks to himself of going to court, and what he perceives as the risk of the other party of going to court. The potential damage to Jonathan's reputation and issues of perjury and contempt if he proceeded with the litigation would make Jonathan more willing to settle.

17. Mr Hollander distinguishes between demanding more money than the claim is worth and demanding an increased sum which yet remains a discount compared to what the claim is worth. In the former case it might be justified to hold that the claim was self-evidently unwarranted. However, in the latter case whether the claim was unwarranted depended on the evidence. He submits that the present case was a case in the latter category, whereas the judge had treated it as one in the former category.

18. Again, I find myself unable to accept these submissions. It would have been entirely possible for Stuart and Warren or their advisors to make an increased offer for the sale of their shares by reference to what they regarded as their increased value (once the contents of the undisclosed bank account, and the interests of the company and its creditors had been allowed for), or because of what they perceived as the consequences for them personally as a result of increased prospects of the company succeeding in the company's action. That is, however, not the offer which they chose to make. Instead, a fair reading of the email is that they wanted more for their shares because they had learned of their ability to cause the company to take the steps identified. Thus the offer was increased "*because we have become aware of further wrongdoings by Jonathan"* and because "*Jonathan is in very serious trouble*". The "*very serious trouble"* would also "*have implications for*" Jonathan's family "*by reason of Jonathan's actions*." For that reason the offer would be "*beneficial to [Jonathan] and [his partner]*". The email went on to make a thinly-veiled threat that, if the offer was not accepted within 48 hours, the allegations being made would be made public. Acceptance of the offer would obviate "*the need of further steps such as committal proceedings*". The email goes on to draw attention to the criminal consequences of giving false evidence, including perjury, perverting the course of justice and likely imprisonment. Jonathan's *"credibility and reputation will be destroyed barring him out of the online gaming business in the future*".

19. It is quite unrealistic in my judgment to read this email as being based on an appreciation of an increased value of the company in the light of the undisclosed bank account. To put it bluntly, Stuart and Warren believed that they had alighted on a way of frightening Jonathan into paying more for their shares. That is what the judge meant, as I understand her judgment, when she said that it was clear that the increase

in price had nothing to do with any increase in the value of the shares. Mr Hollander's attempted rationalisation is beside the point.

20. I agree that the distinction which Mr Hollander draws between an offer which unambiguously exceeds the claim, and one which merely makes an upward adjustment within that value, is a valid one. In the former case one might infer more readily that improper factors are being deployed. However, in the present case we are not concerned with inference: the terms of the offer, and the improper factors which are sought to be deployed are apparent on the face of the email itself.

21. Next, Mr Hollander drew attention to the fact that the judge refers in her judgment to the percentage by which the price is increased. He submitted that this showed that, contrary to what the judge said in paragraph 17 of her judgment, the admission of the email would inevitably bring into evidence discussions which took place in the mediation. It would not be possible to excise the email from what took place in the mediation. I do not think that this is a problem which arises here. The impropriety arises from the fact that the increase in price is tied, and tied only, to the threats affecting Jonathan's liberty, family and reputation. The impropriety does not depend on the quantum of the price increase. The redaction of the amount involved is an adequate means of protecting details of the negotiations. This is not a case of the type referred to by Hoffmann LJ, where there is a need to pick through many hours of recorded negotiations in order to make out a case of impropriety. The impropriety is apparent from the email itself, a single and carefully formulated document.

22. Mr Hollander also submitted that the judge should have taken account of the fact that the email was sent by a distinguished mediator, albeit that he does not challenge that she had the authority of Stuart and Warren to do so. It might also be said, as Baker J pointed out in the course of argument, that that fact might also lend authority to the threats which they might not otherwise possess. To my mind the involvement of the mediator is not a factor to which much weight should be attached either way. We have no idea, as the judge pointed out, whether the mediator merely cut-and-pasted the demands, or gave them careful consideration before sending them on. It is all speculation.

23. In the end, as Mr Hollander accepted, what is involved here is an evaluation of whether the threats unambiguously exceeded what was "permissible in settlement of hard fought commercial litigation" (*Boreh v Republic of Djibouti* [2015] EQHC 769 (Comm) at [132] per Flaux J). In the absence of any error of principle by the judge I should be extremely cautious before coming to the conclusion that the judge's evaluation was wrong. However, I agree with the judge that the threats here did unambiguously exceed what was proper, essentially for the reasons she gave. Firstly, the threats went far beyond what was reasonable in pursuit of civil proceedings, by making the threat of criminal action, (not limited to civil contempt proceedings). Secondly, the threats were said to have serious implications for Jonathan's family because of Jonathan's wrongdoings. Thirdly, the threats were of immediate publicity being given to the allegations. It is nothing to the point in this connection that Warren and Stuart may have believed the allegations to be true. The threat to publicise allegations of extreme severity against Jonathan and his partner, and within such a short timescale, placed quite improper pressure on Jonathan. Fourthly, the purpose of the threats was to obtain for the brothers an immediate financial advantage arising out of circumstances which should accrue, if they had basis in fact, to the benefit of the

company. Finally, there was no attempt to make any connection between the alleged wrong and the increased demand.

24. It is not necessary for the threats to fall within any formal definition of blackmail for them to be regarded as unambiguously improper. However, we also heard some argument concerned with the statutory definition of blackmail, in consequence of a suggestion made by Briggs LJ at the oral hearing when permission to appeal was granted. As Briggs LJ pointed out, section 21 of the Theft Act 1968 defines blackmail in the following way:

> "A person is guilty of blackmail if, with a view to gain to himself or another or with intent to cause loss to another, he makes any unwarranted demand with menaces; and for this purpose a demand with menaces is unwarranted unless the person making it does so in the belief-
>
> (a) that he has reasonable grounds for making the demand; and
>
> (b) that the use of the menaces is a proper means of reinforcing the demand."

25. There is thus, in the definition of the criminal offence, a presumption that a demand is unwarranted unless there is some evidence of a belief in reasonable grounds for making the demand and that the use of the menaces is a proper means of reinforcing it. Given the absence of any explanation for the demands by way of evidence from Stuart and Warren, the argument would run that it should be assumed against them that the threats were blackmail.

26. I have not found it necessary to explore this argument further, as I have been able to reach a conclusion on the issue of unambiguous impropriety without reliance on it. In other words I have concluded, without reliance on this presumption and on the language of sub-paragraph (b) of section 21, that the means used were not a proper means of reinforcing the demands. I can, however, see real problems with the routine application of the presumption in cases of this kind, not least because there may be very good reasons why a party would not wish to be drawn in to justification of his demands. To allow reliance on this presumption would run the risk of making considerable inroads into the without prejudice protection, which the decisions I have referred to make clear should be conscientiously avoided.

27. The judge decided the case on the basis that Stuart and Warren had some basis for their threats. She declined an invitation from counsel for Jonathan to come to a view that in fact they had no basis, relying on the fact that no threat was subsequently carried out, and the fact that Jonathan had unequivocally stated that no such bank accounts existed. Although we were pressed by Mr Butcher QC for Jonathan to revisit this issue on the basis of a respondent's notice, I have not found it necessary to do so. As the judge said, the impropriety arises from the nature of the threats themselves.

28. It is for these reasons that, when we had heard the oral argument, I joined in the decision to dismiss the appeal.

Mr Justice Baker

29. I agree.

Lord Justice Patten

30. I also agree.