Neutral Citation Number: [2007] EWHC 1761 (Ch)

Case No: 575 of 2007

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
LEEDS DISTRICT REGISTRY
COMPANIES COURT

IN THE MATTER OF LEEDS UNITED ASSOCIATION FOOTBALL CLUB LIMITED (THE) (in administration) ("the Company")

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 25/07/2007

Before :

THE HONOURABLE MR JUSTICE PUMFREY

Between :

(1) RICHARD DIXON FLEMING
(2) MARK GRANVILLE FIRMAN
(3) HOWARD SMITH
The Administrators of the Company
("the Administrators") — **Claimants**

- and -

(1) DAVID HEALY
(2) JONATHAN DOUGLAS
(3) KEVIN NICHOLLS
(4) JERMAINE BECKFORD — **Defendants**

William Trower QC and **Hilary Stonefrost** (instructed by **Walker Morris**) for the **Administrators**

Hearing date: 18th May 2007

Approved Judgment

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

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THE HONOURABLE MR JUSTICE PUMFREY

Mr Justice Pumfrey :

1. On 18th May 2007 the administrators of Leeds United Association Football Club Limited, Richard Dixon Fleming, Mark Granville Firman and Howard Smith ("the Administrators"), applied pursuant to an order which I made permitting short service of the application on the Respondents for a declaration that any liabilities for damages for wrongful dismissal to footballers employed by the Company were not payable as expenses of the administration, were not payable by reason of the provisions of paragraphs 99(4)-(6) of Schedule B1 of the Insolvency Act 1986 (contracts of employment adopted by an administrator before his discharge) and were not necessary disbursements within the meaning of Rule 2.67(1)(f) of the Insolvency Rules 1986 (as amended). The Administrators were appointed on 4th May 2007 by a holder of a qualifying floating charge. The notice of appointment was filed in the Leeds District Registry and I transferred the administration proceedings to the High Court in London on 17th May 2007. I made the order sought at the hearing, since the day on which I heard the application was the last day from which time did not run for the purpose of deciding whether the players' contracts had been adopted. The following are my reasons for making the order.

Background

2. The respondents to the application are all footballers employed by the Company ("the Club") who had not, as of the date of the application, entered into an agreement with the Club, having the effect of varying the terms of their contracts of employment so that all or part of the remuneration due to them is deferred until either the Administrators can be confident that they can pay all or part of the deferred remuneration, either as an expense in the administration or under the Transfer of Undertakings Regulations which apply on a sale of the Club's business to another company. The other players employed by the Club had entered into such a variation, by way of what is called a "Deed of Deferral". I was told that the Club's potential liabilities under the unexpired portions of the players' contracts was about £2.2m. Obviously, if the Administrators did not adopt the contracts, the Club would lose its most valuable assets: if the contracts were adopted, the Club might subsequently incur substantial liabilities if the players are not paid.

3. As I understand the witness statement of David Warwick Hinchliffe, the Administrators' solicitor, the Administrators wish to be in the position of being able to continue to pay the players, for which funding will be available, until a transfer of the whole undertaking takes place. The Administrators do not wish to terminate the players' contracts of employment with the Club, since the effect of such a move would be that the players would become "free agents", able to move to another club which would have no obligation to pay the Club any compensation or transfer fee under the rules of the Football Association. Accordingly, the Administrators are anxious to know whether or not the compensation for any future wrongful dismissal is payable as an expense of the administration. The effect of the declaration which I made is that liability in respect of a wrongful dismissal subsequent to adoption of the contract of employment would not rank as an expense in the administration to be paid in accordance with the provisions of paragraph 99(3). So far as material, the provisions of paragraph 99 of Schedule B1 of the 1986 Act are as follows:

" (3) The former administrator's remuneration and expenses shall be –

(a) charged on and payable out of property of which he had custody or control immediately before cessation; and

(b) payable in priority to any security to which paragraph 70 applies [paragraph 70 relates to property the subject of a floating charge].

(4) A sum payable in respect of a debt or liability arising out of a contract entered into by the former administrator or any predecessor before cessation shall be –

(a) charged on and payable out of property of which the former administrator had custody or control immediately before cessation; and

(b) payable in priority to any charge arising under sub-paragraph (3).

(5) Sub-paragraph (4) shall apply to a liability arising under a contract of employment which was adopted by the former administrator or a predecessor before cessation; and for that purpose –

(a) action taken within the period of 14 days after an administrator's appointment shall not be taken to amount or contribute to the adoption of a contract,

(b) no account shall be taken of the liability which arises, or in so far as it arises, by reference to anything which is done or which occurs before the adoption of the contract of employment; and

(c) no account shall be taken of a liability to make a payment other than wages or salary.

(6) In sub-paragraph (5)(c) "wages or salary" includes –

(a) a sum payable in respect of a period of holiday (for which purpose the sum shall be treated as relating to the period by reference to which the entitlement to holiday accrued),

(b) a sum payable in respect of a period of absence through illness or other good cause,

(c) a sum payable in lieu of holiday,

(d) in respect of a period, a sum which would be treated as earnings for that period for the purposes of an enactment about social security, and

(e) a contribution to an occupational pension scheme."

4. The question is thus whether, in addition to the matters specified in paragraph 99(6) above, "wages or salary" includes also sums payable in respect of damages for wrongful dismissal. If it does so, subject to paragraph 99(5)(b), then these sums will be paid in priority to all other expenses of the administration and the administrators' own remuneration. It follows also that these sums would be payable in priority to the unsecured creditors.

5. I did not hear any representation made on behalf of the players. Mr Hinchliffe's evidence was that the First and Third Respondents' representatives, registered FIFA agents of their respective clients, were fully aware of the nature of the application and that the Second Respondent had spoken to the First Respondent's FIFA agent. The Third Respondent, whose registered FIFA agent also discussed the application with Mr Hinchliffe, was served personally with the application, together with the order abridging time, late on the night before the hearing. In order to allow as much time as possible, I did not start hearing the application until 2.00pm on 18th May. Mr Trower QC, who appeared with Ms Stonefrost on behalf of the Administrators, drew my attention to all the relevant considerations of which he was aware: and this (in part) accounts for the question raised by Rule 2.67 of the Insolvency Rules 1986.

6. So far as paragraph 99 is concerned, the argument proceeds as follows: in order to qualify under paragraph 99(5) to be paid in priority under paragraph 99(4), the sum payable must be in respect of "a debt or liability arising out of a contract" entered into or adopted by the administrator, and such a liability must be in respect of "wages or salary", a phrase which is plainly employed in sub-paragraph (5)(c) to limit the otherwise general opening words of sub-paragraph (5): "a liability arising under a contract of employment".

7. Sub-paragraph (6) is in no sense a definition of "wages or salary". None of the matters listed in (a)-(e) are payments in respect of any period during which the contract no longer subsists. In *Delaney v. Staples* [1992] 1 AC 687 the House of Lords considered the meaning of the word "wages" in s.7 of the Wages Act 1986, in a case in which the issue was whether the industrial tribunal had jurisdiction to entertain a claim in respect of non-payment of money in lieu of notice. The speech of Lord Browne-Wilkinson, with whom the remainder of the House agreed, includes a short passage on the meaning of the word "wages" in its normal sense, divorced from the special definition contained in s.7 of the Wages Act. The passage is a short one:

> "I agree with the Court of Appeal that the essential characteristic of wages is that they are consideration for work done or to be done under a contract of employment. If a payment is not referable to an obligation on the employee under a subsisting contract of employment to render his services, it does not in my judgment fall within the ordinary meaning of

> the word "wages". It follows that if an employer terminates the employment (whether lawfully or not), any payment in respect of the period after the date of such termination is not a payment of wages (in the ordinary meaning of that word) since the employee is not under an obligation to render services during that period."

8. The structure of paragraphs 99(5)-(6) of Schedule B1 to the 1986 Act seems to me to be as follows. While the opening words of sub-paragraph (5) are wide, applying sub-paragraph (4) to any liability arising under a contract of employment, the effect of sub-sub-paragraph (5)(c) is to reduce the width of the provision to payments of "wages or salary" alone, that term being broadened to include the matters itemised under sub-paragraph (6). In my judgment, this structure strongly suggests that the words "wages or salary" are being used in their normal meaning, that identified by Lord Browne-Wilkinson in the passage that I have quoted above.

9. The actual question in *Delaney's* case was whether payment in lieu of notice was to be regarded as wages for the purposes of the Wages Act. Four types of wages in lieu of notice are identified by Lord Browne-Wilkinson, one of which is concerned with payments made in breach of contract. Lord Browne-Wilkinson describes this class of payment in these words:

> "Without the agreement of the employee, the employer summarily dismisses the employee and tenders a payment in lieu of proper notice."

In such a case, the payment is a payment by the employer on account of the employee's claim for damages for breach of contract, and Lord Browne-Wilkinson approved the statement by Lord Donaldson of Lymington MR in *Gothard v. Mirror Group Newspapers Limited* [1988] ICR 729, 733:

> "If a man is dismissed without notice, but with money in lieu, what he receives is, as a matter of law, payment which falls to be set against, and will usually be designed by the employer to extinguish, any claim for damages for breach of contract, i.e. wrongful dismissal. During the period to which the money in lieu relates he is not employed by his employer."

Evidently the damages payable to the employee are not wages, and so it follows that if the Administrators were to adopt the players' contracts only subsequently to dismiss the players, the position is no different.

10. Finally, it should be noted that the Court of Appeal has held that the meaning of the word "wages" in paragraph 99 of Schedule B1 of the 1986 Act is the meaning given to the word by *Delaney* – see *Re Huddersfield Fine Worsted Limited* [2005] 4 All ER 886. In that case, the Court of Appeal describes the priority given in respect of "wages or salary" as a "super-priority" and its significance in the context of the "rescue culture" said to be encouraged by the modern administration regime. This case, which is binding upon me, holds that payments falling within Lord Browne-Wilkinson's fourth class of payments in lieu are not entitled to super-priority, and it

seems to me that in relation to payments in the present case, the reasoning is precisely the same.

11. Informing this conclusion, I have come to the same conclusion as that reached by Lawrence Collins J, as he then was, in *Re Allders Department Stores Limited* [2005] 2 All ER 122.

Rule 2.67 of the Insolvency Rules 1986

12. While not entitled to super-priority by virtue of paragraph 99 of Schedule B1 to the 1986 Act, Mr Trower QC suggested that another approach to the question could be advanced by the players, viz. the contention (rejected by Lawrence Collins J in respect of the statutory liabilities for redundancy payments or unfair dismissal claims) that liabilities for wrongful dismissal would count as necessary disbursements for the purpose of Rule 2.67(1)(f) of the Insolvency Rules 1986. In the event that such liabilities were to rank as necessary disbursements by the Administrator in the course of the administration, they would, by virtue of paragraph 99(3) of Schedule B1, not have super-priority but rank in priority to the ordinary creditors. In my judgment, I should follow the decision of Lawrence Collins J, with whom David Richards J agreed in *Exeter City Council v. Bairstow* [2007] EWHC 400, [77].

13. Accordingly, I granted the declaration sought by the Club.