IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

[2010] EWHC 2579 (Ch)

Case No.HQ10C03206

Royal Courts of Justice

Thursday, 14th October 2010

Before:

MR. JUSTICE FLOYD

B E T W E E N :

ROYAL BANK OF SCOTLAND PLC — Claimant

- and -

(1) THOMAS OLLIS HICKS
(2) GEORGE NIELD GILLETT
(3) KOP FOOTBALL (CAYMAN) LIMITED
(4) KOP FOOTBALL (HOLDINGS) LIMITED
(5) KOP FOOTBALL LIMITED — Defendants

Transcribed by ***BEVERLEY F NUNNERY & CO***
Official Shorthand Writers and Tape Transcribers
Quality House, Quality Court, Chancery Lane, London WC2A 1HP
Tel: 020 7831 5627 Fax: 020 7831 7737
info@beverleynunnery.com

J U D G M E N T

(As approved by the Judge)

APPEARANCES

MR. R. SNOWDEN QC, MR. J. POTTS and MR. B. SHAW (instructed by Freshfields Bruickhaus Deringer) appeared on behalf of the Claimant.

LORD GRABINER QC and MR. J. GOLDSMITH (instructed by Slaughter and May) appeared on behalf of Football and Holdings.

MR. P. MARSHALL QC and MR. P. HARRIS (instructed by Crouchmans) appeared on behalf of the Mr. Broughton, Mr. Purslow and Mr. Ayre.

MR. D. CHIVERS QC (instructed by Shearman & Sterling) appeared on behalf of NESV.

MR. JUSTICE FLOYD:

1 This is an application made by RBS and other parties in these proceedings for an anti-suit injunction. Yesterday, after prolonged argument on Tuesday, I gave judgment on two applications. As I explained, the first application was for a mandatory injunction to restore the composition of the boards of KFL and KFHL into the condition that they were required to be pursuant to a contract between the Owners and others and RBS. I granted that application.

2 The second application was an application made by the Owners, the target of which was to prevent the completion of a sale of KFL to NESV. I refused that application. It was an application made by the Owners as an interim injunction. I considered that it was not appropriate to grant that injunction. The decision whether to go ahead with that offer was a matter for the properly constituted boards of the companies.

3 When I gave judgment, the Owners indicated that they would require time in order to sign the necessary unanimous consents to give effect to the mandatory part of my judgment; and they also sought permission to appeal my judgment to the Court of Appeal, which I refused. No steps of which I am aware have been taken to seek to obtain permission to appeal my judgment from the Court of Appeal. I gave the owners until 8 pm London time yesterday to sign the consents.

4 In accordance with my order, at around 5.39 pm London time yesterday, solicitors for RBS received the signed unanimous shareholder consents signed by Mr. Hicks on behalf of KFL and KFHL.

5 Fifteen minutes later, proceedings which I shall call the Texas proceedings were commenced. I shall come back to explain what the Texas proceedings contain. They are proceedings begun by the Owners, but also by KFL and by KFHL. It is quite clear that no decision of the board of KFL or KFHL was held in order to authorise those proceedings. That is the case because Mr. Broughton is the chairman of the board of both companies, whether as now constituted or as constituted under the purported alterations made by the Owners. He is not aware of any decision taken by the boards of those companies to commence those proceedings.

6 To continue the story on this side of the Atlantic, at 9.35 London time last night solicitors for RBS received a letter from attorneys in Dallas purporting to acting on behalf of Cayman, KFHL and KFL, and also LLC, which is another company within the chain of holdings underneath Mr. Hicks and Mr. Gillett. The letter enclosed the petition and a Temporary Restraining Order (TRO) granted by the court in Dallas. The TRO was signed at 8.25 pm London time.

7 The position so far as the proceedings in front of me are concerned is that no mention was made at any stage of the Owners' intention to commence proceedings in Texas. The inference which I draw is that it was the Owners' intention to commence the proceedings if they were unsuccessful in the various applications before me. Having reviewed the documents which were sent to RBS's solicitors, consisting of the Texas petition and order, it is plain that they had been in preparation for some very considerable time.

8 The Texas proceedings are brought by LLC, Cayman, KFHL and KFL. As I have said, I cannot see what basis there can be for KFL and KFHL to have commenced those proceedings in the light of the history of the constitution of their boards.

9 The petition, even allowing for the differences between legal cultures in the United States and this country, makes serious allegations against the defendants to the petition, who are Mr. Broughton, Mr. Purslow, Mr. Ayre, RBS, NESV and Mr. Philip Nash, who is the Chief Financial Officer and Company Secretary of KFHL, KFL and the Club.

10 The gravamen of the petition is that the defendants have conspired together to sell KFL to NESV at a price which is many millions of dollars less than the value of the company.

11 The claim to jurisdiction over the matter, although not at the heart of this application, is set out in paras.12 and 13 of the petition, which say this:

> "12 Jurisdiction is proper in this Court because the amount in controversy exceeds the minimum jurisdictional limits of this Court, and all parties are subject to personal jurisdiction in Texas based on their continuous and systemic contact with Texas, the intentional tortious conduct that they have directed at this State, and/or other conduct and contacts with this State as alleged herein.
>
> 13 Venue is proper in Dallas County because all or a substantial part of the events or omissions giving rise to Plaintiffs' claim occurred in Dallas County …"

as one of the alternative bases for asserting the jurisdiction of that court.

12 I will not attempt to summarise the allegations which are made except to say this: that in para.47 it is said that RBS has been complicit in a scheme with the Director Defendants. It is said:

> "In furtherance of this grand conspiracy, on information and belief, RBS has improperly used its influence as the club's creditor and as a worldwide

banking leader to prevent any transaction that would permit Messrs. Hicks and Gillett to recover any of their investment in the club, much less share in the substantial appreciation in value of Liverpool FC that their investments have created."

13 Given that the petition and the application for the TRO which was subsequently granted were being made after my judgment yesterday, it is right that I should refer to the summary of the English proceedings, which is given in para.53 of the petition, which says this:

> "On October 8, 2010, RBS sued Mr. Hicks, Mr. Gillett, Cayman, [KFHL] and [KFL] in a British court. Tacitly recognizing that actions of the rogue board could not have been effective, RBS sought, among other things, a mandatory injunction that would require Mr. Hicks, Mr. Gillett, Cayman, [KFHL] and [KFL] to place Messrs. Ayre and Purslow back on the Board. On October 13, 2010, the British court entered an order requiring Messrs. Ayre, Purslow and Broughton to be restored to the Boards of [KFL] and [KFHL]. *Consistent with the Director Defendants' prior and ongoing breaches of fiduciary duty, the Director Defendants will then, presumably, ratify the collusive and improper deal with NESV in a subsequent vote at a board meeting that is scheduled for 8:30 p.m. London time today, despite the existence of better offers.*"

14 That paragraph is a rather impoverished description of the proceedings before me. It fails to mention, except by the words "among other things", the fact that Mr. Hicks and Mr. Gillett, the Owners, had commenced their own proceedings and sought and been refused an injunction which would prevent the completion of the NESV deal. It does not mention that the appointees of the Owners, Messrs Hicks junior and McCutcheon were to be removed from the Board. It wrongly suggests that Mr Broughton had been removed from the Board, when he had been Chairman throughout.

15 The causes of action identified at the end of the petition seek declarations that, for example, Mr. Ayre and Mr. Purslow were removed, and presumably validly removed, as directors, and that all acts purportedly approved by the boards of the companies were *ultra vires* or void, including but not limited to the approval of the sale of Liverpool to any other party. It is right to point out that the causes of action are used to found claims for damages as a result of the tortious activities complained of.

16 The petition also included a claim for the TRO, which the judge in Dallas has granted. That order runs to six pages and contains recitations of the allegations and findings of the court based on those allegations. The judge has amended that

document in manuscript, so, for example, where the draft, no doubt provided by the attorneys, said this:

> "Based on the allegations in the Verified Petition and the arguments of counsel, the Court that it has personal jurisdiction over the parties and jurisdiction is proper in this Court."

he has inserted the word "solely" as the second word, so as to make it clear that he was operating entirely on the basis of the allegations in the petition. That word has been inserted some 17 times in the course of the document.

17 The order that he made restrains the defendants from:

> "a. Completing, closing or otherwise consummating a purported sale of Liverpool FC to Defendant NESV or any related entities as provided in the October 6, 2010 Share Purchase Agreement or on similar terms;
>
> b. Without Plaintiffs' consent, taking any action to modify, pledge, sell, transfer, seize, foreclose on or dispose of Plaintiffs' ownership interest in Liverpool FC …"

A third injunction sought, identified as c. was:

> "Taking any action in any other court to affect or impede this lawsuit."

but the learned judge has deleted that paragraph in the order and initialled it. That injunction, if granted, would have prevented the applicants before me today from making this application, but the judge did not grant it. It appears that the judge may have anticipated that such an application might be made and wisely took steps to ensure that his order did not impede it.

18 It is worth pausing for a moment over para.a. That, in substance, represents an interim injunction to the same effect as that which was sought and refused by me yesterday. Paragraph b, directed as it as against RBS, would prevent RBS from taking steps to enforce its security.

19 Those injunctions do not sit happily with what I was told on Tuesday by counsel acting on behalf of the Owners. All the counsel before me today have made it clear that they make no suggestion that counsel on this occasion was doing anything other than relaying instructions from the Owners that he believes he had, and no suggestion of impropriety whatsoever is directed at him personally. It is nevertheless worth recording what was said on the Owners' behalf and no doubt on their instructions:

> "Secondly, and importantly, this is not about the Owners simply trying to put a spanner in the works, as I think has been suggested, of whatever Mr. Broughton, Mr. Ayre and Mr. Purslow were trying to do to effect a sale of the Club … the owners have made no secret, and your Lordship will have seen some evidence to that effect, that they were opposed to an outright sale but they accept that it now seems inevitable that some sort of sale is going to have to occur, whether or not that had been their preference. So the owners are not simply intent on stopping the sale and they are not intent on stopping the sale to NESV in circumstances where there is not an alternative in place, as your Lordship might have been encouraged to think on Friday."

Later, and most importantly, he said this:

> "The bank has always been in a position to serve demand and enforce its security long before the events with which your Lordship is concerned. There is no issue that events of default have occurred entitling the bank to do so, quite independently of the matters with which your Lordship is concerned. And therefore Mr. Snowden I think says this to your Lordship, he is now, and at all times between now and Friday, insofar as that is relevant, is in a position to step in and assert his rights. And from Friday unarguably will be able to do so. Nothing done and nothing in fact that your Lordship, or whoever it may be, is going to have to decide eventually in this case, affects any of that."

20 It seems to me to be tolerably clear that the injunction which the Owners have sought and been granted in Texas would have the effect of preventing RBS from taking the steps that were referred to in the course of that discussion.

21 There is clear authority that the court has a jurisdiction and a discretion in appropriate cases to grant anti-suit relief. It is a jurisdiction which is to be exercised very cautiously. It is more readily exercised where the parties themselves have submitted to the exclusive jurisdiction of the English court. In cases such as that the court is doing no more than enforcing the bargain which the parties themselves have agreed to. Mr. Snowden points out that the CGSL contains clauses which refer to jurisdiction, but even if that were right, the disputes between the parties extend more widely than disputes over that particular contract.

22 The most concise summary of the law in relation to such injunctions, to which I have been referred, is the judgment of Lord Hobhouse in *Turner v. Grovit* [2002] 1 WLR 107. At para.25 he pointed out the distinction to which I have already referred between a contractual jurisdiction clause and other cases. At 118A he says:

> "By contrast there are cases where the only unconscionable conduct alleged is the fact that the party sought to be restrained has commenced proceedings in inappropriate forum. This is a weak complaint and is easily overridden by other factors."

Lord Hobhouse makes the point which has been made repeatedly in the authorities that an anti-suit injunction is not directed at the foreign court, but is an injunction against the respondent personally to prevent him from continuing or commencing activities which are abusive. It is not, and should not be used so as to interfere with the procedures of a foreign court directly, although as everyone must accept, that can be an indirect effect.

23 In para.29 Lord Hobhouse's summary reads as follows:

> "… the essential features which made it proper, under English law, for the Court of Appeal to exercise its power to make the order in the present case are –
>
> (a) The applicant is a party to existing legal proceedings in this country;
>
> (b) The defendants have in bad faith commenced and propose to prosecute proceedings against the applicant in another jurisdiction for the purpose of frustrating or obstructing the proceedings in this country;
>
> (c) The court considers that it is necessary in order to protect the legitimate interest of the applicant in the English proceedings to grant the applicant a restraining order against the defendants.
>
> The order applies only to the defendants before the English court. It does not require the English court to make any finding as to the jurisdiction of the foreign court."

24 There is no doubt that the relief sought in the Texas proceedings has very substantial overlaps with the issues which will be determined in proceedings in the English court. For example, both sets of proceedings will require the court to grant a declaration that Messrs. Ayre and Purslow were removed as directors validly or invalidly. Of course, the Texas proceedings go further in some respects in that they seek monetary compensation for the tortious conduct alleged. No claim for damages has yet been made by the Owners in their proceedings in this country.

25 RBS say that this is a strong case for an anti-suit injunction. They say that the Texas proceedings are an attempt to obtain by another route relief which the Owners have been expressly refused by the English court. They say that those proceedings are brought in bad faith and are vexatious and oppressive. They say

the Texas proceedings have no connection with that jurisdiction. In so doing, their submission is not a formal one as to the requirements of jurisdiction in the Texas court. That, of course, is a matter for the Texas court alone. But they say that Liverpool is an English football club, the contract is an English law contract, the duties to KFL and KFHL are the duties that the directors of an English company owe to that company, and that the only real connection of these proceedings with Texas is that Mr Hicks, one of the Owners is resident there.

26 They assert also that the Texas proceedings are a further breach of the CGSL. In particular, they rely on the clauses of the CGSL relied on by the Owners themselves, namely that the sale process is a sale process to be conducted by the board of KFHL and not by anybody else. Furthermore, they point to the very significant differences between the allegations made in the Texas proceedings and those made here.

27 It is also worth pointing out, as they do, that the TRO granted by the Texas court was supported only by a Bond for US$15,000. One of the grounds on which I refused the injunction yesterday was the absence of any security for the very considerable losses which would be likely to be incurred if I had granted that injunction.

28 The Owners have been given only informal notice of this application. What I have been told is that their counsel has indicated that he is without instructions and the solicitors instructed in this jurisdiction on the Owners' behalf are in the same position.

29 I think that RBS are right that this case has no real connection with Texas, and I think they are also right that the commencement and prosecution of the Texas action is an attempt by the Owners to deprive them of the fruits of their success so far in the English litigation. It seems to me to be a deliberate omission from the document presented to the United States judge that there is no mention of the fact that injunctive relief was asked for and refused to the Owners yesterday. It is, of course, the case that the existence of parallel sets of proceedings with common issues is not itself enough to cause the court to interfere. But the material before me goes much further than that, and establishes what I regard as unconscionable conduct on the part of Mr. Hicks and Mr. Gillett In bringing those proceedings.

30 In the absence of any explanation, it appears to me that the applicants are able to get over each of the hurdles identified in the paragraph of Lord Hobhouse's judgment and which they need to cross. It is obviously quite unsatisfactory for the court in one country to make an order, the purpose of which was to permit the board to control its own affairs, only to be met with subsequent and exactly parallel set of proceedings directed to a different result in which a wholly inadequate description is given of the existing proceedings.

31 There is this further development which is material to whether I should grant the relief now or allow the Owners an opportunity of putting in evidence and resisting the injunction. Firstly, as I have indicated in my judgment yesterday, there is a degree of urgency in allowing the board to continue to control its own affairs., A meeting was held last night at which the NESV deal was considered in parallel with other potential deals, and a decision was taken by a majority (Mr. Hicks and Mr. Gillett voting against) to allow that deal to go ahead. The urgency with which I was concerned yesterday seems to me to persist today.

32 Secondly, I was told in the course of Mr. Snowden's address to me that proceedings had been commenced in Texas based on the Texas injunction to commit Mr. Broughton and others to prison for breach of the Texas injunction. Again, it seems to me that the sooner that proceedings there are held up the better.

33 For those brief reasons, I propose to grant in principle the injunctive relief sought.

34 One peripheral point is this: LLC (that is to say the holding company of Cayman) is not yet a party to the action. An application has been made to join them as a party on the basis that they are a necessary and proper party to the action. My attention has been drawn to the fact that they, themselves, have given an undertaking that they would not do anything to frustrate decisions made by the boards of directors of KFL and KFHL. It seems to me that that is a closely related issue to the issues which will have to be decided in this action, and that it is obviously just and convenient that that issue be decided as well. I, therefore, propose to give permission that they be added as a defendant and permission to serve out of the jurisdiction, if necessary, on them.

35 One similar matter is that NESV are defendants to the Texas proceedings but not yet parties to any of the proceedings in this country. I raised that question in the course of the submissions before me on Tuesday, and I was told by counsel for the Owners that it was their intention to join NESV. That has not been done. In those circumstances, Mr. Chivers has applied for his clients NESV ,to be joined as a defendant and I am prepared to make an order joining NESV as a defendant now.

_____