IN THE HIGH COURT OF JUSTICE

CHANCERY DIVISION

[2010] EWHC 2568 (Ch)

Case No.HQ10C03206/3212

Royal Courts of Justice

Wednesday, 13th 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

AND B E T W E E N :

(1) THOMAS OLLIS HICKS
(2) GEORGE NIELD GILLETT — Claimants

- and -

(1) KOP FOOTBALL (HOLDINGS) LIMITED
(2) KOP FOOTBALL LIMITED
(3) MARTIN FAULKENER BROUGHTON
(4) CHRISTIAN MARK CECIL PURSLOW
(5) IAN AYRE
(6) ROYAL BANK OF SCOTLAND PLC — Defendants

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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.

MR. P. GIROLAMI QC, MR. A. HAYDON and MS. R. STUBBS (instructed by Peters & Peters) appeared on behalf of Mr. Hicks and Mr. Gillett.

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 and Sterling) appeared on behalf of NESV.

MR. JUSTICE FLOYD:

1 I have before me two application notices in two sets of proceedings, which concern the commercial affairs of Liverpool Football Club, which is an English Premier League Football Club (the "Club"). These are, firstly, an application by Royal Bank of Scotland ("RBS") in proceedings commenced by them (the "RBS proceedings") against Mr. Hicks and Mr. Gillett (the "Owners") and companies controlled by the Owners for mandatory injunctions to restore the constitution of and the composition of the boards of two companies, Kop Football Limited ("KFL") and Kop Football (Holdings) Limited ("KFHL"), to the position in which they were before certain purported alterations to their structure on about 5th October 2010; and secondly, an application by the Owners in Part 8 proceedings begun by them (the "Owners proceedings") for (a) relief restraining KFL and KFHL and others from proceeding with an arrangement for the sale of the shares of KFHL to a company called New England Sports Ventures ("NESV"). I shall refer to that agreement as the SPA. That injunction is sought pending determination of the Owners proceedings which seek declaratory relief in relation to the SPA; and (b) disclosure of documents.

2 In addition to the RBS proceedings and the Owners proceedings a third set of proceedings has been commenced by KFL and KFHL seeking declaratory relief as well. Nothing much turns for present purposes on those proceedings.

3 Mr. Snowden QC appeared for the Royal Bank of Scotland, Lord Grabiner appeared for KFL and KFHL on the basis of their pre-existing constitutions, Mr. Marshall QC for the Chairman and non-owner directors of KFHL and KFL, Mr. Girolami QC appeared for the Owners, Mr. Chivers QC appeared for NESV, who are proposed to be added as defendants in the Owners' proceedings. They appeared with juniors, to whom I intend no discourtesy by not mentioning.

4 On Friday of last week I granted without notice to the Owners a short interim injunction until yesterday in negative form to restrain the Owners from taking further steps in relation to KFL and KFHL in reliance on the purported alterations to the structure. I continued that injunction after the hearing yesterday over until today.

5 There is no dispute any more about negative relief of that kind pending trial. The relief sought by RBS in this application goes further by seeking mandatory interim orders to place the companies back in the position they were in before the alterations to their Articles of Association were affected by the Owners. Such orders are, of course, unusual, but there is no dispute that there is jurisdiction to grant them in appropriate circumstances.

6 KFL owns the Club. KFHL owns KFL, which in turn is owned by Kop Football (Cayman) Limited, a Cayman Islands company, indirectly owned by the Owners as to 50 per cent each ("Cayman").

7 RBS provided finance for the acquisition of the Club by the Owners in 2007. Facilities were afforded by RBS to a company called the Liverpool Football and Athletic Grounds Limited, which is a subsidiary of KFL, and KFL itself, in an aggregate amount of £297 million. The lenders are RBS as to 75 per cent participation and Wells Fargo Bank NA as to 25 per cent participation. RBS hold fixed and floating charges over the assets of KFHL, KFL and the Club. Each of the Owners has provided a guarantee which is now unsecured following release of the cash collateral. They are creditors of KFHL.

8 The principal facility, namely that in favour of KFL, is due to be repaid on Friday of this week, and has been accelerated so that it is already repayable on demand. No demand has yet been made for repayment, but the sum will become due in any event on Friday. In that event, the Bank will be free to place the Club into administration or take any other steps which it considers desirable in order to enforce its security. An event of this kind will result in the Club having nine points deducted in the League Table. There is no doubt that such an event would have a very serious effect on the value of the Club.

9 Attempts have been on foot for some considerable time to sell the Club. In April 2010 RBS made it clear that they were only prepared to extend the credit facilities for a further six months – that is until Friday of this week – on the basis that an agreement was entered into providing for a sale to take place in an orderly fashion under the chairmanship of Martin Broughton. Mr. Broughton currently holds, or has held, the positions of Chairman of British Airways, President of the Confederation of British Industry, President of the British Horseracing Board and Chairman and Chief Executive of British American Tobacco. It was explained to him when he accepted the position that it was essential that he lead the sale process independently.

10 The Owners agreed that corporate governance structures should be put in place and built into the constitution of KFHL and KFL. These arrangements included the fact that the boards of directors of KFHL and KFL would be reconstituted and comprise Mr. Broughton, the two Owners and two others to be determined by the chairman. The Owners were expressly provided to have no right to appoint additional representatives to the boards of KFHL or KFL.

11 The Corporate Governance Side Letter ("CGSL", which forms part of the finance arrangements entered into between RBS, the companies and the Owners, gave effect to the new constitutional arrangements. By clause 1(c)(iii) and (d) it was provided that:

"(c) You agree that: ...

(iii) there will be no Owner representatives appointed to the boards of the Company and its subsidiaries other than the Owners ...

(d) You agree not to exercise any of your rights as direct or indirect shareholders in the Company and its subsidiaries in a manner that would be contrary to the corporate governance arrangements contemplated by this letter, the RBS Side Letter and the Corporate Governance Documentation delivered to us pursuant to the Ninth Repayment Date Amendment Letter. No changes will be made to the Corporate Governance Documentation without our prior written consent."

12 It was in these circumstances that Mr. Broughton became Chairman of the Board and Mr. Ayre and Mr. Purslow were appointed as two additional non-Owner directors. Under these new arrangements the sale of the Club was to be subject to the control of the Board of KFHL. That is provided for by clauses 2(a) and 2(b) of the CGSL:

"(a) You have informed us (and we hereby confirm) that with effect from 15th April 2010 all responsibility for conducting an Exit has been transferred to the board of directors of the Company ..."

that is to say KFHL –

"(b) You agree that with effect from 15th April 2010 all discussions and correspondence with Interested Parties in respect of an Exit will be conducted exclusively by the board of the Company and its advisers (including for the avoidance of doubt any directors or employees of the Group designated by the board of the Company) and all agreements relating to that process will be entered into by the Company provided that the Company shall have the right to agree to a structure in respect of an Exit relating to one of its holding companies."

13 Extensive efforts were made during the six month period to find a buyer for the Club, to which I will refer later in this judgment. On 5th October 2010 a board meeting of KFL was convened to consider the proposals. Shortly before the meeting was to start Mr. Broughton received a letter from the Cayman and Kop Investment LLC, signed by Mr. Hicks. That letter read as follows:

"We are writing this letter in our capacity as the ultimate shareholder of 100% of the direct and indirect equity capital in and the direct and indirect sole members of [KFHL] and [KFHL] (the "Companies") and the

Liverpool Football Club and Athletic Grounds Limited, and their subsidiaries.

Attached please find copies of Special Resolutions of the sole member of each of the Companies signed on 4th October 2010 and delivered to (and received by) the Companies on 5th October 2010 amending each company's Articles of Association, together with Ordinary Resolutions electing Mack Hardy Hicks and Lori Kay McCutcheon as Directors of each Company.

Also attached is a Removal of Directors made in writing by an Investor Director (as defined in each Company's amended Articles of Association) of each of the Companies whereby the Investor Director has removed Christian Mark Cecil Purslow and Ian Ayre from the Board of Directors of each of the Companies, in accordance with each Company's amended Articles of Association.

We have taken this action in response to the purported sale of the Club to Meriton Limited ("Meriton"), which we believe is a sale of LFC at an undervalue and would constitute a gross breach of fiduciary duties owed to the companies. We understand that neither of Messrs. Hicks and Gillett, who also sit as Directors of the Companies, has been provided with adequate information and detail about the offer from Meriton, include that no copies of the purchase documentation that we are led to believe has been substantially negotiated with Meriton, were provided until this morning. We also note that an offer has been purportedly made by [NESV]. that is on terms and conditions that are substantially less than the terms of the offer from Meriton.

Following this reconstitution of the Boards of the Companies we will be in a position to properly and fairly consider the above offers, or any other offers made for LFC."

The letter is signed by Mr. Hicks on behalf of Kop Investments LLC and Cayman).

14 The Resolutions attached to the letter of 5th October purported to do as the letter sets out. It is not accepted by RBS or the non-Owner Directors of KFL or KFHL that they are valid.

15 The basis for the claim for the mandatory injunction which RBS seeks is that if the resolutions are valid, as the Owners contend they are, then this is the plainest possible breach of the CGSL. The whole purpose of the arrangements put in place in April was that the sale process would be conducted under the chairmanship of Mr. Broughton and a board of the composition provided for. That was an essential part of the bargain pursuant to which RBS extended the credit facilities yet further.

16 When the board meeting of Football of 5th October commenced Mr. Gillett and Mr. Hicks attended by telephone from the United States. They contended that the resolutions were valid and that Messrs. Ayes and Purslow were no longer directors. They proposed an adjournment for a week. Mr. Broughton agreed to an adjournment of an hour. In the interim, in addition to taking preliminary advice on the validity of the resolutions, Mr. Broughton spoke to Mr. Hicks and Mr. Gillett who said they refused to attend the adjourned meeting. When the meeting was reconvened, the Owners were, therefore, not present, although Mr. Gillett's legal representative, Mr. Toth, attended the meeting by telephone as an observer. According to Mr. Broughton, the Board of KFL then resolved to form a committee consisting of Mr. Broughton, Mr. Purslow and Mr. Ayre to continue negotiations with the two viable bidders. Mr. Broughton says that there were further negotiations with both remaining bidders and the committee resolved to accept the bid of NESV. Accordingly, in the early hours of 6th October, KFL entered into an agreement with NESV. That agreement is to complete on 15th October. It has the support of RBS and in the event that it goes forward the Club will be protected from the consequences of further steps being taken by RBS to enforce their security.

17 The SPA contains the following terms. Under the heading "Court Proceedings" Clause 8.1.6 provides that:

> "The Seller undertakes to commence appropriate legal proceedings and use all other reasonable endeavours to obtain a declaratory judgment confirming its ability to enter into this Agreement and consummate the transactions described herein."

Clause 12.1(d) provides that:

> "This Agreement may be terminated and the Transaction abandoned at any time prior to Completion by either the Seller or the Purchaser if a declaratory judgment confirming the ability of the Seller to enter into this Agreement ... has not been obtained by 5.30 pm London time on the day immediately before the Long-Stop date..."

which is defined by Clause 8.1 as 1st November 2010 or such later date as the parties may agree. The Seller is KFL.

> "... or such later date as the parties may agree."

18 The obtaining of a declaratory judgment on the ability of the Company to enter into the agreement is therefore not essential to enable the SPA to go forward, but if KFHL and KFL fail to get that declaratory judgment then the SPA is at risk of

termination. There therefore remains an urgency in achieving certainty in a short time over the Company's ability to conclude the contract with NESV.

19 The Owners say that the SPA was not validly entered into, because no notice of the business to be transacted at the meeting was given to Mr. Gillett and Mr. Hicks.

20 In relation to the CGSL, Mr. Hicks' account in his witness statement is as follows. He says that he discovered in the course of 4th October an email that was not intended to be sent to him which referred to someone called Philip Nash referring to a "Home Team". Mr. Hicks extrapolates from this that there were communications going on between members of a so-called "Home Team" to which he and Mr. Gillett were not parties, and that he raised this with Mr. Broughton on the telephone. He then goes on:

> "As a result of this last conversation, Mr. Gillett and I became seriously concerned at the attitude of the other directors, and that they were not prepared to consider all available deals fairly and openly or that they were not prepared to include us in their deliberations as directors of [KFHL] and [KFL].
>
> They seemed to be proceeding secretly in discussions with purchasers to the exclusion of alternative proposals which we wished them to consider and without involving us in the discussions by which the boards of [KFHL] and [KFL] appeared to be coming to pursue a sale either to Meriton or NESV. Having been effectively kept in the dark, we were opposed to any sale to Meriton or NESV when it seemed to us that there were other offers which wee being excluded.
>
> Having received the 'home team' email, we knew that it was likely that the other directors were gearing up to force through a sale come what may, without involving us and without the position being properly or fairly considered. As a result, I, my son, Tom Hicks, Jr, and Mr. Gillett, reluctantly concluded that we had no alternative but to take action. Because of the way that events were developing, we had agreed a few days before that it might become necessary to take drastic action to stop the English directors of [KFL] from acting without reference to Mr. Gillett and me by reconstituting the boards of those companies."

21 At paras.33 and 34 he says this:

> "Since that conversation ..."

which I interpolate is a conversation at 4.30 pm on 5th October –

> "... neither Mr. Gillett nor I have been kept informed of anything which has happened, been invited to attend any board meetings of [KFL] or [KFHL] (beyond the notification received at 3.38 pm BST today) or given any notice of any business that has been carried on by Mr. Broughton and the English directors purportedly on [KFL] or [KFHL]. Indeed, we have never had sight of any board minutes or any documents recording business conducted at meetings since before 20 September 2010. What happened after 4.30 pm BST on 5 October 2010 we do not know. But the events seem extremely strange. No details have been provided as to what happened. Even if (which I do not accept) our reconstitution of the board was invalid, I do not accept that a valid decision can have been made by Messrs. Broughton, Purslow and Ayre acting alone to enter into the NESV deal. (I should make clear that I know nothing of the existence of any 'sub-committee' or any meetings held by it.)
>
> I say that in particular because by the evening of 5 October 2010 it seems that the Meriton deal was the bid preferred by the English directors. I have seen the letter dated 10 October 2010 from the Hong Kong solicitors acting for Meriton in that connection which appears to make that clear. Indeed, it seems clear from the announcement made by the Club itself on the evening of 5 October 2010 that no decision as between Meriton and NESV had been made. At some point after that – it seems on 6 October 2010 – some decision was made to enter into the NESV deal instead. Why and on what basis that decision was made we have never been told."

Paragraph 36 says this:

> "The events which I have described briefly at paragraphs 33 to 35 above reinforce us in our judgment that it was necessary in order to ensure that the matter would be properly dealt with for us to reconstitute the board as we sought to do on 5 October 2010. In having done so we acknowledge that that was contrary to the Corporate Governance Side Letter. But our intention was in no way to prejudice the interests of RBS. We do not believe that what we did did or could prejudice their interests. There was already default as I have mentioned above and what we did did not make the position as between the Club and RBS any worse. If RBS wanted to and wants to assert its rights as secured lender it always could and can do so. And I believe it could so without the need for any administration or otherwise affecting the position of the Club vis-à-vis the English Premier League."

22 I consider first the application for the mandatory injunction. Mr. Snowden QC for RBS submits that there is no arguable answer to the claim of RBS for mandatory relief restoring the composition of the Board. There was a plain breach of the

CGSL, which was, in turn, a valuable part of the consideration for extending the credit facility. If that was so, there is no point in delaying the grant of relief. The damage caused to the value of the underlying asset, the Club, by continuing uncertainty over the governance of KFL and KFHL was significant and should be stopped now rather than at trial. Moreover, the Owners should not be allowed to take any benefit from their wrongdoing, such as continuing to jeopardise the deal with NESV, of which they disapprove. He relied on *Luganda v. Service Hotels Limited* [1969] 2 Ch. 209. That was a case where a man had been wrongly excluded by management from his occupation of a room which was protected by the Rent Acts. At p.220A, Lord Denning MR said this:

> "Mr. Luganda is *prima facie* entitled by statute to security of tenure of this room. It was unlawful for the management to lock him out of it (see s.30 of the Act of 1965). They were wrong to take the law into their own hands. If the management had not changed the lock and Mr. Luganda was still in occupation, I am sure that the court would have granted an injunction to prevent the management from locking him out. They should not be in a better position by wrongfully locking him out.
>
> As Lord Uthwatt said in *Winter Garden Theatre (London) Limited v. Millennium Productions Limited*, 'In a court of equity wrongful acts are no passport to favour'. We must see that the law is observed. To do this we should, I think, order that Mr. Luganda should be restored to his room."

Lord Justice Edmund Davies also referred to *Winter Garden Theatre* and added this:

> "I do not think that this court should assist those who have shown *prima facie* to have trodden roughshod over the plaintiff's rights. I would accordingly concur in dismissing this interlocutory appeal."

23 So, say Mr. Snowden and Lord Grabiner, having wrongfully reconstituted the board in order to frustrate the deal with NESV, the Owners should not be allowed to take advantage of that flagrant breach of contract by insisting that the wrongfully created *status quo* be preserved until trial and thereby continue to frustrate the deal.

24 Mr. Girolami QC for the Owners submits that there is an arguable defence to the contract claim. He says that the CGSL is a mutual document and the obligations of KFL, KFHL and RBS under that document have been breached as well. For example, he says that it is provided that it is to be the board of KFHL and not KFL which must conduct the sale process, and in particular not a sub-committee of the board of KFL, and not selected members of the board to the exclusion of the Owners. Moreover, he says it is the duty of the board to consider all bids, not to proceed single-mindedly in favour of that from NESV.

25 He goes further and submits that there has been an attempt here by the English directors to exclude the Owners from their right to be consulted in relation to the rival bids. Moreover, he says that it is clear that RBS were involved in the breaches of the CGSL. This, he said, entitled Mr. Hicks and Mr. Gillett to treat the CGSL as at an end and take the action which they did in relation to the composition of the boards. The court should not in any event grant what amounts to specific performance of an agreement where the party seeking the relief was, itself, not respecting the terms of the agreement.

26 It is common ground that considerations of the balance of convenience do not arise where a party has a case to which no arguable defence can be mounted. This is entirely in conformity with the principles set out by the House of Lords in *American Cyanamid v. Ethicon* [1975] AC 396. There is simply no serious issue to be tried. The court is not concerned in such a case about whether its decision to grant or refuse an injunction might turn out later to be wrong. In that context, there is no need for the balancing exercise which is otherwise necessary to determine which course carries the least risk of injustice. In such a case there should not, therefore, be a two stage approach withholding relief from a party until a second hearing at which there is no prospect of a different result being achieved. Mr. Snowden put his case for the mandatory relief on this principle, without abandoning the alternative case based on the balance of convenience.

27 I have come to the conclusion that there is no seriously arguable defence to RBS's claim for breach of contract. Everything depends on the suggestion that the Owners will be able to establish that the conduct of RBS was such as to entitle the Owners to treat their obligations to them under the CGSL as at an end or otherwise such as to disentitle them to relief in a court of equity.

28 I do not consider that the evidence even begins to establish a case of repudiation sufficient to discharge the Owners from their obligations under the CGSL to RBS, or that it is realistic to suppose that the Owners would be able to establish such a case at trial.

29 I deal first with the suggestion that Mr. Hicks and Mr. Gillett have been wrongly excluded from board discussions, because I consider that to be the high point of Mr. Girolami's case. Prior to the events of 5th October the sale process was continuing as provided for in the arrangements put in place in April under Mr. Broughton's supervision and with advice from Barclays Capital. The board meeting of 5th October was convened for the specific purpose of considering the rival bids. Mr. Hicks and Mr. Gillett would have been able to take part in and vote on those bids. It was their own actions in seeking to destroy the legality of that meeting by altering the constitution of the companies which prevented that discussion from taking place. When it was clear that the company did not accept

the validity of the resolutions which they had passed, they ceased of their own volition to take any further part. Given that is what occurred on 5th October, I fail to see how anything which occurred earlier can be the subject of substantial complaint by the Owners.

30 Secondly, Mr. Girolami relied on the bids of Meriton and Mill which he submitted were better than NESV's and in support of the suggestion that NESV was being favoured. I do not see how this advances a case of repudiation given the course which Mr. Hicks and Mr. Gillett have taken in relation to the 5th October meeting. In any case, it is clear that the board considered the Meriton bid and it was open to the Owners to put the Mill bid before the board.

31 The meeting was quite clearly at the end of an exhaustive period of investigation of bids detailed in the evidence of Mr. Broughton. He says this:

> "Barclays Capital commenced the sales process by contacting approximately 130 potentially interested parties based on its existing contacts and on discussions with the boards of directors of the companies and RBS. The announcement of the sales process on 16 April 2010 also led interested parties to contact Barclays Capital directly and it encouraged such parties to make written conditional proposals. Around 27 parties expressed an interest and Barclays Capital sent an information memorandum to approximately 13 interested parties which had signed a Non-Disclosure Agreement. In addition to the interested parties who came forward as a result of Barclays Capital's engagement there were a number of 'legacy' parties from the sales process which had been conducted before my appointment."

He goes on to say:

> "Throughout the sales process Barclays Capital provided regular updates to the directors of the companies and we met with various interested parties to try to progress a sale. The boards of directors met on 4, 13, 20 and 27 August 2010, and on 28 September 2010 in order to discuss, amongst other matters, the state of the sale process.
>
> By the beginning of October 2010 only five interested parties remained active in the sale process, including NESV which had not yet made a firm bid.
>
> On 3 October I sent an email to Mr. Hicks and Mr. Gillett telling them that I expected at least one firm bid to materialise, and I was calling board meetings of both KFHL and KFL to be held simultaneously by the same people on Tuesday, 5 October at 3.30.

> Later that day I forwarded them a firm bid I had received from NESV and informed them that I expected one further bid. On 4 October I forwarded that second bid from a business whose identity remains confidential. Those two bids were viable bids and amounted to the only firm offers from parties who indicated that they would be able to complete by 15 October 2010."

32 Thirdly, I do not think that the fact that it may be established that it was KFL and not KFHL which may have taken the relevant steps assists the Owners either. The evidence that this was so is subsequent to the Owners' decision to alter the composition of the boards and so it can only go the equitable relief limb of Mr. Girolami's argument. It cannot be the case that RBS loses the benefit of the constitutional arrangements put in place for their benefit because of a breach, if it be a breach, of the CGSL of this kind.

33 Lastly and importantly, it is relevant in all this to ask what it is that RBS has done to amount to a repudiation. The suggestion that by approving the sale to NESV that they have somehow committed or "connived in", to use Mr. Girolami's language, a repudiatory breach of the CGSL so as to discharge the Owners from further performance of their side of the bargain vis-à-vis RBS is, in my judgment, not a realistic one.

34 The true position is that in order to secure additional loan facilities, the Owners have released absolute control of the sale process which they are now seeking to regain. When it appeared that a sale was going forward on a basis which they considered unfavourable to them they sought to renege on that agreement and in effect a veto which the CGSL was designed expressly to prevent. There is no basis for suggesting that what they did was justified because of any conduct of RBS or the companies prior to the meeting of 5th October.

35 There is equally no basis for their suggestion that either before or afterwards their conduct is conduct of a kind which would prevent the court from ordering equitable relief to RBS under normal principles.

36 It follows that I am prepared to grant the mandatory element of the relief sought. It should be backed up by an order that if the Owners fail to execute the relevant documents by the time limit Mr. Broughton will be appointed by the court pursuant to s.39 of the Senior Courts Act 1981 to execute the documents instead.

37 I turn to the cross-application by the Owners for relief. The draft interim order reads as follows:

> "Until judgment on the substantive determination of the Claimants' claim or sooner order [KFL, KFHL, Messrs. Broughton, Purslow and Ayre, and RBS] must not:
>
> (a) further negotiate the terms of the SPA ...;
>
> (b) waive any condition to which the SPA is subject; or
>
> (c) take any step pursuant to the SPA; or
>
> (d) ratify the SPA."

38 The order sought by way of final relief in the Owners' proceedings in the action is for an injunction in the same terms but containing an important further final sentence:

> "Until a properly constituted board meeting to which Hicks and Gillett have been invited has taken place at which a discussion has been had as to whether or not Football should ratify the decision purportedly made on its behalf of, or enter into the SPA."

39 The claim is therefore focused on stopping the SPA from going ahead. Three things should be noticed: (1) it is based on the invalidity of the steps taken in agreeing the SPA. The Owners hope to obtain a declaration that it was not validly entered into so as to render it terminable; (2) the order sought in the action simply seeks to enforce the Owners' rights to be present at a meeting of a properly constituted board, something which could already have happened but for their now unsuccessful attempt to reconstitute it; (3) unusually, the interim order seeks to go further than that sought at trial and stop steps being taken, whether by a properly constituted board or not.

40 Mr. Girolami submits that the injunction is necessary to hold the ring pending the determination of the issues. He says that if the injunction is granted there is little chance that the agreement will be terminated or RBS will enforce its security. As to the former, there is the long-stop of 1st November; and as to the latter, RBS has been in a position to, but has not enforced the security for some time.

41 Mr. Girolami accepts, indeed he contends, that the companies and RBS may well be right that his clients have no cause of action in damages if the SPA goes ahead. Indeed, the Owners' proceedings contain no claim for damages. He says that bolsters rather than destroys his case for an injunction, because as creditors of the company the Owners have an interest in stopping a sale at an undervalue. If the sale goes ahead and the Owners lose money as a result they will go uncompensated.

42 Lord Grabiner did not seriously resist an injunction in the terms of that sought in the Part 8 claim form. What he resisted was an injunction in the interim form. That is because the latter did not include words which would allow the companies to act under the control of a properly constituted board. Once it is accepted, as I have decided, that the board must be reconstituted to the form provided for by the CGSL then it seems to me that the further conduct of the sale is a matter for the board so constituted.

43 It is obviously appropriate for there to be a further meeting of the board to consider what steps to take in the light of my judgment and Mr. Hicks and Mr. Gillett are entitled to be present at that meeting as directors if they choose to make themselves available.

44 I was told that a board meeting had been planned for yesterday evening, but did not, in fact, take place because my judgment was not by then available. Given that it is accepted that that further step must take place, and take place promptly, which I do not understand to be disputed, I can see no justification for the court to interfere any further in the running of the companies. These are matters for the board of the companies as reconstituted. This judgment is not the place to set out the duties which the directors owe and with which they will need to comply.

45 I am not prepared to grant any relief the direct effect of which would be to stop or risk stopping the SPA from going ahead, even for a short period. There is no doubt that the current position of the Club is highly unsatisfactory. The uncertainty to its future ownership is damaging to it, and hence damaging to the underlying value of the assets which the companies are trying to sell and which provide security for RBS. If I were to grant an injunction in the terms sought in the application notice the potential damage to the Club, and in consequence to RBS, could be substantial. Moreover, as Mr. Chivers QC, for NESV, submitted, the damage to his clients could be significant as well.

46 Whilst Mr. Hicks offers a cross-undertaking in damages there is no evidence that he or Mr. Gillett would be good for it, and indeed a little evidence that he would not. Quite apart from that, the damage in question would be enormously difficult to quantify even if turned out that the Owners were good for some sum. How does one quantify, for example, the effect of the continuing uncertainty on the fortunes of the Club on the value of the asset?

47 On the other hand, Mr. Girolami has told me that, reluctantly, the Owners have now accepted that a sale, at least to someone, is inevitable. They are not trying, as Lord Grabiner puts it, to preserve a unique asset but to seek to minimise their financial losses.

48 It has to be recorded that the scope of the relief which the Owners are seeking in the Owners' action amounts in substance to a right to be present at a board meeting where decisions are taken in relation to the SPA. They do not have an absolute right to veto a sale and the relief given should therefore not risk giving them that right. In those circumstances, and particularly in view of the harm that an injunction would cause in the terms sought, it would be entirely wrong, in my judgment, to grant the Owners the injunctive relief sought in their application notice.

49 Next there is the question of the Owners' disclosure application. The order sought is that KFHL and KFL do provide copies of the following, and there are then set out three categories of documents: firstly, documents recording or evidencing the events at the meeting or meetings at which the decision was made to enter into the SPA; secondly, documents evidencing the so-called "Home Team"; thirdly, all correspondence between the First and/or Second Defendant and/or persons acting or purporting to act on behalf of the First or Second Defendant and UKSV or NESV, and all persons acting on behalf of or representing them.

50 There was no dispute of substance or principle here. The order is at the moment framed as an order to produce documents, whereas it should, in my judgment, be an order in relation to documents within the First and Second Defendants' possession, custody or power, and be subject in the usual way to claims of privilege which in the absence of agreement may need to be determined by the court. Disclosure should take place by the close of business on Thursday.

51 Lord Grabiner submitted that para.2 should not be ordered as he has given an adequate explanation of the "Home Team", and I might add that that issue is perhaps less relevant in the light of my judgment, but I consider that overall it should be ordered, not least because it is probably encompassed in para.1 in any event.

52 Paragraph 3 should limited to documents relevant to the purchase of Liverpool Football Club.

53 Lastly, I turn to directions for any trial that now needs to take place. It may be that events at any further meeting will render that trial unnecessary, but I cannot assume that is so, particularly in view of the clause in the SPA which requires efforts to be made to obtain a declaratory judgment in relation to the SPA. It should be clear that I have not granted any such declaratory judgment.

54 The main dispute is the trial date which everyone agrees should be well before 1st November. On the other hand, I think it would not give enough time if the trial were to commence on Friday of this week as suggested by RBS, nor is it desirable for the parties to rush headlong into a further hearing without time for reflection.

I will order the expedited trial of any remaining issues to take place commencing on Thursday, 21st October. I will hear counsel as to any further directions.

55 In summary, I grant the application for mandatory relief. I refuse the Owners' application for an interim injunction and I will order the disclosure which was sought in the Owners' application notice. I will fix the expedited trial for 21st October 2010.

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