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Neutral Citation Number: [2012] EWCA Civ 1743
IN THE SUPREME COURT OF JUDICATURE
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT
CHANCERY DIVISION
(MR JUSTICE PETER SMITH)

Royal Courts of Justice
Strand
London, WC2
Thursday, 20 December 2012

B E F O R E:
LORD JUSTICE TOMLINSON
LORD JUSTICE LEWISON
LORD JUSTICE McCOMBE

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SIR MARTIN BROUGHTON

Respondent/Claimant

-v-

(1) KOP FOOTBALL (CAYMAN) LIMITED
(2)THOMAS O HICKS
(3)GEORGE N GILLETT
(4) UKSV HOLDINGS COMPANY LIMITED
(5)NESVI LLC (d/b/a/ FENWAY SPORTS GROUP)
(6) KOP FOOTBALL LIMITED
(7) KOP FOOTBALL (HOLDINGS) LIMITED

Applicants/Defendants

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ROYAL BANK OF SCOTLAND

Respondent/Claimant

-v-

(1)THOMAS O HICKS
(2)GEORGE N GILLETT
(3) KOP FOOTBALL (CAYMAN) LIMITED
(4) KOP FOOTBALL (HOLDINGS) LIMITED
(5) KOP FOOTBALL LIMITED

Applicants/Defendants

MR ALI MALEK QC and **MR RICHARD HILL QC** (instructed by Clyde & Co) Appeared on behalf of the the Applicants
MR PAUL HARRIS QC and **MR OWAIN DRAPER** (instructed by Couchmans LLP) appeared on behalf of Sir Martin Broughton
MR RICHARD SNOWDEN QC and **MR JAMES POTTS** (instructed by Freshfields Bruckhaus Deringer LLP) appeared on behalf of the Royal Bank of Scotland

1. LORD JUSTICE LEWISON: This is an application for permission to appeal with the appeal to follow if permission is granted against case management orders made by Peter Smith J in the course of bitterly fought and very expensive proceedings.

2. The extraordinary volume of paper, the extravagantly long skeleton arguments, which more resemble the Michelin Man than skeletons, and the inordinate citation of authority are quite inappropriate for an application dealing principally with case management decisions.

3. I emphasise that the appeal is against the judge's orders and not an appeal against remarks which he made during the course of the hearings. In paragraph 7.2 of Jackson LJ's report on costs in civil proceedings, he put forward the view that he regarded it as vital that the Court of Appeal supports first instance judges who make robust but fair case management decisions. This principle has been affirmed on a number of occasions in this court, see for example Deripaska v Cherney [2012] EWCA Civ 1235 and Stokors SA v IG Markets Limited [2012] All ER(D) 31 (Nov).

4. In the present case, the judge's case management decisions were certainly robust. Were they fair? In order to put those decisions in context, it is necessary to go some way into the background.

5. Until about two years ago, Liverpool Football Club was operated by the Liverpool Football Club and Athletic Grounds Limited ("LFC"), whose shares were owned by Kop Football Limited ("KFL"). KFL was in turn owned by other companies whose ultimate parent was Kop Football Holdings Limited ("KFH"). This network of companies was owned by two residents in and citizens of the United States, Messrs Hicks and Gillett. The companies were in part funded by the Royal Bank of Scotland ("RBS"), together with another lender.

6. Because of these companies' financial difficulties, RBS put pressure on Messrs Hicks and Gillett to sell the club. By April 2010, RBS wanted them to give up control of the sale process and to give control of that to the board of KFH. In consequence, a number of agreements came into existence dealing with corporate governance. Under the terms of those agreements, the board of KFH was to consist of a new independent chairman, the two executive directors of that company, Messrs Purslow and Ayre, and Messrs Hicks and Gillett. In April 2010, under the terms of the agreement, Sir Martin Broughton was engaged as the independent chairman of the board in order to lead the process of selling or transferring control of LFC to meet the indebtedness to RBS. The sale process was conducted between April and October 2010.

7. On 6 October 2010, against the wishes of Messrs Hicks and Gillett, a subcommittee of the board decided to accept an offered made by UKSV Holdings Ltd. KFL then concluded a conditional agreement for the sale of the entire share capital of LFC to UKSV.

8. On 13 October, Messrs Hicks and Gillett and their companies (whom I will collectively refer to as "the Kop defendants") filed a petition with the district court in Dallas County, Texas, seeking a temporary restraining order to stop the sale. They alleged that

the sale was "an epic swindle at the hands of rogue corporate directors and their co-conspirators", naming Sir Martin and Messrs Purslow and Ayre (who I will collectively refer to as "the English directors"). They alleged that the sale price was "hundreds of millions of dollars below true market value" and that the English directors were in blatant disregard of their fiduciary duties. The English directors were said to be pawns of RBS and to have enriched themselves at the club's expense. RBS and the English directors were alleged to have entered into a conspiracy to promote the breaches of fiduciary duty. The petition contained more along the same lines.

9. It was a matter of particular concern that the Texan lawyers representing the Kop defendants had untruthfully told the Dallas court that they had been unable to obtain relief in England because the courts were closed. The truth was that, immediately before the petition had been filed in the Dallas court, the Kop defendants had applied to the Chancery Division for an injunction which Floyd J had refused. The Dallas court was not told of this.

10. Messrs Hicks and Gillett have never been able to provide a satisfactory explanation either to Floyd J or to Peter Smith J how it came about that the Dallas court was so seriously misinformed.

11. As October moved on, Messrs Hicks and Gillett made statements to similar effect as those contained in the petition to national media, but there has been no repetition of those statements since.

12. Meanwhile, both RBS and the English directors had issued proceedings in England. Their initial purpose was to allow the sale to go through, but that has now been achieved. The proceedings have been substantially amended and in effect now seek negative declarations validating their conduct of the sale.

13. On 24 June 2011, the Kop defendants served a defence and counterclaim. They pleaded an agreement by RBS to extend the dates for repayment of the various credit facilities and alleged that the agreement contained implied terms which RBS had broken.

14. On 28 October 2011, RBS issued an application for summary judgment on the pleaded counterclaim. In March 2012, in the course of the first part of the hearing of the application for summary judgment, the Kop defendants, at the suggestion of the judge, made a number of applications for disclosure. The judge granted those applications. The reason behind the applications was to see whether the Kop defendants, with the aid of disclosure, would be able to plead a case alleging serious breaches of various obligations. Normally, of course, disclosure follows rather than precedes the pleaded case.

15. But the orders at first imposed a confidentiality requirement that meant that the disclosed documents were available only to the Kop defendants' English legal team. This had the effect that the legal team could not show the documents to Messrs Hicks or Gillett or to their US lawyers. Underpinning the rationale for this order was first the concern about the misinformation that had been given to the Dallas court and a fear that

disclosed documents might find their way into the public domain; and second an appreciation that, if the case did not go beyond the summary judgment stage, the documents would not have been disclosable and the Kop defendants would have had no right to see them at all.

16. In April, Peter Smith J varied the earlier orders. In the course of his ruling, he said that RBS and the English directors were entitled to be fearful that the Kop defendants would break the rules when it suited them and that to enforce the rules in the USA would be time consuming and costly. The revised confidentiality regime allowed Mr Hicks and/or Mr Gillett personally to attend at their English solicitors' offices or counsels' chambers in order to view disclosed documents, accompanied by representatives of their US lawyers, but no documents were to be copied or removed.

17. An alternative regime was put in place to allow them to attend a meeting by video or telephone conference. That regime was still in place when the resumed hearing of the application for summary judgment took place.

18. That first came before Peter Smith J on 8 March 2012; and, following the applications for disclosure which I have mentioned, he adjourned it to be heard in May together with an application by the Kop defendants to amend the counterclaim. The proposed amendments put before the judge raised serious allegations of deliberate bad faith on the part of the English directors and various derelictions of duty and breaches of obligation on the part of RBS.

19. The adjourned hearing took place on 16 and 17 May. On 22 August 2012, the judge's clerk circulated the judge's draft judgment with a view to handing it down on 24 August. That did not, however, happen and judgment was in fact formally handed down on 22 October. It is the order made on that day which is the principal focus of this appeal.

20. In a supplemental skeleton argument, prepared shortly before the hearing, the Kop defendants complained that progress of the case had been delayed for a year. They continued:

> "The case needs to be put in order and case managed closely to a trial."

21. While discussing the question of summary judgment with Mr Snowden QC, appearing then, as now, for RBS, the judge indicated on 17 May that he might exercise the court's residual power to allow the case to go to trial, but he added:

> "If anything survives to go to trial, the timetable will lead to a trial early next year. It will go to a strict timetable, to a trial early next year, on this basis with your clients protected as to the costs of that exercise."

Towards the end of the hearing, the judge raised with Mr Malek QC, appearing then, as now, for the Kop defendants, the question of refusing summary judgment against them on condition that they paid a substantial amount of money into court. Mr Malek said that he accepted the principle, subject to reasonableness, staged payments and working out what the figure would be. When the judge mentioned a figure of £1 million plus,

Mr Malek agreed as long as payments were staged.

22. The judge took up the point in his draft judgment, which, as I have said, was circulated on 22 August. He referred to the court's power to make a conditional order and continued in paragraph 132:

> "I raised this with Mr Malek QC and, on instructions, he said that he would not oppose such a conditional order. Clearly the amount and the regularity of such payments will have to be subject to agreement or orders of the court. However, I will only grant them permission to amend the defence and counterclaim on the basis that an order is made in terms that they provide security for RBS's costs of taking this matter to trial."

On the question of confidentiality of documents, the judge said in paragraph 133:

> "At the moment the documentation is confidential and my rulings are confidential. I do not believe that, as the action is proceeding, the confidentiality ought to be maintained. I will hear submissions on that. In that, context of course, if it is established at a later date that the former owners break their obligations in respect of disclosed documents, RBS will have substantial protection as regards the sums deposited with their solicitors as envisaged by this judgment and will be able to apply for sanctions against them.
>
> I do not see that any of the material referred to in the amended defence and counter claim is of such confidence that it needs to be protected. Of course I appreciate that a significant amount of other documentation was provided which has not been disclosed to me. If there are confidentiality issues as regards those, I would hope that the parties' lawyers can agree a method of preserving any such confidentiality. If not, the matter will have to be brought back to the court."

At the conclusion of his judgment, the judge said in paragraph 134:

> "The matter should be brought to a speedy conclusion. I would wish directions to be agreed, if possible, with a view to this action, together with the Broughton action, being heard early in 2013. I would appreciate the parties' representations in that regard."

23. Thus all parties knew that, on the day when judgment would be formally handed down, the matters to be considered would include the amount and timing of payments into court and the case management directions needed to bring the case to a speedy conclusion. Indeed, as I have said, the judge had made his view clear at the hearing on 17 May some three months earlier.

24. Some discussion of a possible timetable took place in correspondence. On 9 October 2012, Freshfields for RBS sent Clyde & Co for the Kop defendants a draft order. That draft contained an order that the trial of liability should take place "on an expedited

basis" and that the trial of liability should take place on the first available date after 9 April 2013.

25. In a letter of 12 October 2012, Clyde & Co proposed a timetable leading to a six to eight week trial starting on the first available date after 10 June 2013. There was no objection in principle to expedition.

26. Freshfields objected that that the timetable proposed by Clyde & Co carried the risk that the trial would be part heard over the long vacation and that RBS should not have to wait until the Autumn. They commented:

> "The parties have adequate legal resource to manage a swift timetable and in the circumstances there is no reason why disclosure and witness evidence cannot be completed more expeditiously than your timetable allows."

27. Counsel for the Kop defendants prepared a skeleton argument for the hand down hearing. It was signed by Mr Malek QC, Mr Mitchell QC and Mr Christopher Harris of counsel. The Kop defendants offered a million pounds as a first stage payment for security for RBS's costs, but said that that sum could not be raised before 30 November. They asked for the application for further security to be adjourned. They proposed payment in stages: up to the end of disclosure; up to the exchange of witness evidence; up to the beginning of the trial and up to the end of the trial. They offered further security in respect of the some of the English directors' costs, also to be paid in stages. Again they said that the first stage payment (an additional £425,000) could not be raised until 30 November. So far as the trial directions were concerned, they adhered to a timetable leading to a trial on the first available date after 10 June 2013.

28. So far as the confidentiality regime was concerned, they supported the judge's view that it no longer needed to be maintained in its current form. They asked for it to be lifted entirely. They were two principal reasons given: first, Messrs Hicks and Gillett needed to be able to discuss the case with their US lawyers and, second, they needed to discuss the case with bankers, business colleagues and others in order to be able to fund it. Critically, however, there was no suggestion that they would be unable to fund the first tranche of the offered security without the lifting of the confidentiality regime.

29. The hand down hearing began on 22 October. Mr Snowden QC for RBS raised the question of the confidentiality regime early in the hearing. The judge said:

> "Do you want my view on that, subject to persuasion? Do you want my view? My view is that I accept that the current regime inhibits the defendants in properly defending the case. Balanced against that, I believe the claimants have a legitimate concern that documents, if handed over to the defendants, and even more so if handed over to other non-parties, quite easily could be misused and put in the public domain in some slanted way in the United States and not afford them any effective sanction of the breach. The effective sanction which I envisage being applicable is in effect, as I said in my judgment, that there ought to be

conditionalities as regards payment."

30. Mr Malek told the judge that he did not wish to go behind the judgment, but he invited the judge to make a distinction between documents actually referred to in the pleadings and documents which were merely disclosed. He asked that his client should be free to show the former class of documents. The judge replied that he no objection to the Kop defendants having "full access to the confidential documents once there is protection in place". He was also content for them to be shown to US lawyers who had signed a confidentiality undertaking. Mr Snowden then urged on him that the confidentiality regime should not be relaxed until there was some money in court.

31. Among the applications that Mr Malek made on behalf of the Kop defendants was an application for permission to appeal. In the course of making that application, he said to the judge:

> "We give an undertaking that, in the event that permission is refused, we will draw it to the Court of Appeal's attention that this case is being dealt with on an expedited basis."

A few minutes later, Mr Harris QC, appearing then, as now, for the English directors, referred to Mr Malek's statement that the case was being dealt with on an expedited basis and continued:

> "I think all parties see it that way as we stand here today."

But he went on to caution against "proceeding pell mell" into an expedited trial until the pleadings had been finalised. Nevertheless, at a subsequent stage, Mr Harris put forward a proposal for the whole case to be tried starting in April 2013. The judge's reaction was that, if the trial were to encompass more than liability, it would have to be put off until after October, but that that was against his instincts. He added:

> "I would like to start it earlier, but I would have thought that, if you want to start it next summer, you should start it on liability only."

There was then a further discussion in which Mr Harris tried to persuade the judge that it was practicable to have a trial of the whole case which concluded before the beginning of the long vacation in 2013. The judge was unmoved.

32. Mr Snowden QC for RBS supported the idea of a split trial. His suggestion was that the trial should begin at the beginning of the term following Easter. After some discussion, the judge was moving towards fixing a trial date in April or May on the basis of a trial on liability only. He then asked for Mr Malek's observations. Mr Malek said that the trial should start in October. He pointed out that the case had not, until then, been conducted on an expedited basis and that it did not need to be tried immediately, and he reminded the judge that there had been a substantial delay in giving judgment following the hearing in May. If the case came on in the normal course, it would not be heard until 2014. Thus to start in October would itself be some form of expedition.

33. Mr Malek then said that he personally had professional commitments which would prevent him from conducting the trial if it were to continue into June. The partner instructing him at Clyde & Co would be in a similar position. This must have come as something as a bolt from the blue because it was flatly contradictory of the timetable that Clyde & Co had themselves proposed only ten days earlier which envisaged that the trial would start in June. Mr Malek summarised his position thus:

> "So it comes down to this. It is a matter for your Lordship. Your Lordship is aware of my commitments and my instructing solicitor, who is on the other side of the case. This case has never been conducted on the basis that it is necessary for expedition in terms of a case that has to be tried immediately. Your Lordship was looking for a trial at the beginning of next year. None of the parties have suggested that that is possible. I have difficulties and in my submission an October start is fair. No party suffers any prejudice if this case starts in October rather than starting whenever it is in April or May. It is a matter for your Lordship."

The judge then asked whether Mr Malek's difficulties could be overcome by starting in March. His reply was that the case would be "quite tough to prepare" and that his clients were restricted by confidentiality orders from showing documents to anyone other than the English defence team. The judge made it clear that he was reluctant to fix a date that would require a party to abandon his chosen counsel. It was, he said, not a matter of counsels' convenience; it was the client's convenience.

34. Mr Malek was resistant to the judge's suggestion that the trial date be brought forward to March on the basis that there was too much still to be done. The discussion between Mr Malek and the judge at that stage concluded thus:

> "MR JUSTICE PETER SMITH: Well, unless I bounce you out of the case, that kills any prospect of the trial starting around April, does it not?
>
> MR MALEK: Correct.
>
> MR JUSTICE PETER SMITH: And then we have two alternatives: we can either telescope it to start before then or we push it back to 1 October."

Mr Snowden then told the judge that both he and his junior had professional commitments in October and said that, until Mr Malek had suggested a start in October, everyone had been working on the basis that the trial would start either in April or in June. He maintained a preference for an April start date. If the trial did not start in April, it could not be heard in 2013. He also pointed out to the judge that Mr Malek was one of two leading counsel that the Kop defendants had retained so that the loss of his services would not deprive them of leading counsel of their choice. The judge then remarked that he could not accede to Mr Malek's suggestion to defer the trial because of his professional commitments without also deferring it because of Mr Snowden's commitments and that that would put it off until at least November. He again floated the idea of a start in March. Mr Malek replied:

> "My Lord, I have real concerns as to whether, if we start in March, that we can do, that any of us are going to be ready, certainly on our side. If that means it goes back and I'm going to be knocked out as a result, it is better for me to be knocked out than do a trial in the middle of March which is going to be impossible to make. I'm' prepared to do that."

After further discussion, Mr Malek said:

> "I am happy for your Lordship to go for May, whether it is, and I will drop out."

35. The judge then suggested that the parties might be able to agree a timetable for the trial finishing no later than 15 July and Mr Harris pointed out that Mr Malek "had generously stated that there is a way of dealing with this trial in April that he is content with". Mr Harris repeated at least three times in the course of addressing the judge that Mr Malek had accepted that the trial could start in April.

36. At the end of Mr Harris' submissions, the judge asked whether anybody else had anything to say on the question of trial date. Nobody did, so Mr Harris' characterisation of Mr Malek's stance was not contradicted by Mr Malek. The judge then ruled as follows:

> "With all these competing strands, I have reluctantly come to the conclusion that we should start this trial in April, I'm afraid, Mr Malek. I am sorry. I would like you still to be in the case, but I can't see how I cannot take into account the position of all the other counsel and you have magnanimously accepted that you have grave doubts whether your clients' can be justly covered by a start in March. You have realistically therefore agreed that your impediment, as you are willing to be called for this purposes, is such that the trial date should be then. That is my decision."

37. The order that the judge made fixed the trial date to begin on 22 April 2013.

38. The next item on the agenda was the question of stage payments of the sums that the judge was to order as a condition of permission to defend and counterclaim and as security for costs. In the course of the discussion, Mr Malek raised the question of the confidentiality regime. The judge said that he was content that disclosed documents be disclosed to Messrs Hicks and Gillett and also to their US lawyers. Mr Malek said:

> "That is all I need."

However, what remained to be clarified was when this would happen. The judge went on to say that what he had described was the regime that would apply after the Kop defendants posted the security. As he put it:

> "You get nothing until you provide the security."

39. The judge went on to explain at slightly greater length that he viewed the posting of the security as a sanction against the possibility that the Kop defendants might break the implied undertaking not to use disclosed documents for a collateral purpose. In expressing that view, he had in mind particularly the misinformation that had been given on behalf of the Kop defendants to the District Court in Dallas during the petition for the temporary restraining order for which no good explanation had ever been given. Mr Malek did not press the point that the confidentiality regime was hampering the financing of proceedings and certainly did not say that it would hamper the posting of the first tranche of the required security.

40. The judge had indicated at an early stage that he accepted the principle of staged payments which the Kop defendants had themselves put forward and which had been opposed by Mr Snowden. He had expressly referred to, though without citing, the decision of the House of Lords in MV Yorke Motors v Edwards [1982] 1 WLR 444 in which the House had accepted the submission that, if a sum ordered to be paid as a condition of granting leave to defend was one that the defendant would never be able to pay, then that would be a wrongful exercise of discretion. The House in that case also accepted the submission that, where a defendant seeks to avoid or limit a financial condition by reason of his own impecuniosity, the onus is upon him to put sufficient and proper evidence before the court. He should make full and frank disclosure. He cannot complain because a financial condition is difficult for him to fulfil. He can complain only when a financial condition is imposed which it is impossible for him to fulfil and that impossibility was known or should have been known to the court by reason of the evidence placed before it.

41. Mr Malek said that what the judge should decide was what the first tranche should be. He repeated to the judge that the first payment could not be raised until 30 November. The judge again accepted the principle that he should not make an order with which the Kop defendants could not comply, but he pointed out that they had had since May to make preparations. He said that he was prepared to give them until 15 November to make the first payment.

42. One difficulty in the path of the Kop defendants was that, as the judge pointed out, and Mr Malek accepted, there was no evidence before him of any difficulties that the Kop defendants, or more specifically Messrs Hicks and Gillett, had had in raising the money. Having regard to the earlier debate about the need to get the case on for trial, the judge was not prepared to allow the full period until 30 November which he thought would undo much of what had already been discussed and decided. He ruled as follows:

> "I will give your clients 14 days and they have got liberty to apply, because, as I have said, it is not right as a matter of principle to make an order that you can't comply with. But, if they want to extend time, they can do so, but to do that they have to come clean: assets, liabilities, friends with supportable evidence. That can be given confidentiality if required, but you are not going to move that 14 days without credible testimony that shows that 14 days is an illusion because your clients cannot comply."

43. Mr Snowden tried to persuade the judge to order more than a million pounds to be paid as the first tranche because RBS had already incurred costs of that amount, but the judge recognised that the order he had in mind would itself be a big test for the Kop defendants and he therefore refused. Towards the end of the day's hearing, the judge said that the order should include liberty to apply to him on any matter arising out of the order on two business days' notice.

44. The essential parts of the order against which the Kop defendants seek permission to appeal are first of all that the order fixed the trial date for 22 April 2013; second that the confidentiality regime be lifted with effect from receipt by RBS and the English directors' solicitors of the first tranche of the sums ordered to be paid by way of security; third, the stage payments of the tranches themselves; fourth, the liberty given to the Kop defendants to apply to the judge in the event that they cannot meet those payments in full on the due dates supported by detailed evidence about the defendant's resources.

45. On 28 October 2012, Clyde & Co wrote to the judge. In their letter they said:

> "Our clients are unable to fund this litigation on the basis of an expedited trial commencing in April 2013. They accept that RBS and the English directors should not be exposed to the risk of non-payment of their fees and so are not seeking to challenge the conditional order. They ask you to vary the order so that payment by way of security for costs can be made on an extended basis. This necessarily involves that a trial would not take place in April 2013 but in late 2013 or early 2014."

46. They asked for a hearing to take place in private, for the evidence in support to be shown only to one QC and one solicitor for each party, and they said that the evidence would be ready for 1 November.

47. The judge heard Mr Mitchell QC on behalf of the Kop defendants on 29 October. Mr Mitchell made it clear to the judge that there was as yet no evidence and that the application to vary the judge's order not then been formally made. Although the first instalment of security was due to be paid by 5 November, Mr Mitchell also made it clear that he was not applying for a stay of the order.

48. The judge gave a short judgment at the end of that hearing in which he accepted that it was open to the Kop defendants to make an application for a variation of the order. He also reiterated the principle that the court should not make an order which the defendants established they cannot comply with. He noted that the consequence of non-compliance with the order for the payment of the first tranche of security would not be the automatic dismissal of the counter claim and he noted that it would be open for the Kop defendants to apply for relief against sanctions. But, as a condition of the application, he said that they had to make an on account payment of £712,500, half of what they had offered to pay by 30 November, but by 5 November, in default of which the application for a variation would be dismissed. That amount has, as I understand it, been paid.

49. The judge's order made on that occasion also stated, first, that, if any party wanted the hearing of the application to vary the timetable for payment to be heard in private, the question should first be ventilated between the party's solicitors and then, in the event of dispute, Peter Smith J would decide. Second, that the evidence served in support of the application might be used by the other parties to the two actions solely for the purpose of responding to the proposed application to vary the timetable but that they could show that evidence or information contained within is it to third parties solely for the purpose of responding to the proposed application.

50. The Kop defendants, as I have said, seek permission to appeal against those parts of the judge's order of 22 October and also those on 29 October I have just mentioned.

51. Case management decisions are discretionary decisions. They often involve an attempt to find the least worst solution where parties have diametrically opposed interests. The discretion involved is entrusted to the first instance judge. An appellate court does not exercise the discretion for itself. It can interfere with the exercise of the discretion by a first instance judge where he has misdirected himself in law, has failed to take relevant factors into account, has taken into account irrelevant factors or has come to a decision that is plainly wrong in the sense of being outside the generous ambit where reasonable decision makers may disagree. So the question is not whether we would have made the same decisions as the judge. The question is whether the judge's decision was wrong in the sense that I have explained.

52. In addition, in Allen v Bloomsbury Publishing Limited [2011] EWCA Civ 943, Lloyd LJ said that it was unfair to criticise the exercise of a discretion by a judge on the basis that he had failed to consider matters which were never raised before him where each party had had plenty of time in which to put the matters which they considered relevant before the judge. As Lloyd LJ said:

> "In our adversarial system of litigation, in a case where each party was professionally represented, with plenty of opportunity to formulate and put to the court all points considered to be relevant on a particular point, it seems to me questionable for a judge to be criticised for having failed to take into account a factor which, if relevant, was known or available to all parties and which no party invited him to consider as part of the process of exercising his discretion."

Rix and Sullivan LJJ agreed.

53. In the present case, the hand down hearing took place some two months after the judgment had been circulated in draft. All parties were represented by leading counsel. There had been ample time for all of them to consider what they wanted to submit to the judge.

54. The first point that the Kop defendants take is that the judge was wrong in principle to regard the case as one fit for expedition because there was no objective reason for expedition. They refer in particular in this connection to the decision of Lloyd J in

Daltel Europe Limited v Makki [2004] EWHC 1631 (Ch) and that of Warren J in CPC Group v Qatari DR Real Estate Investment Company [2009] EWHC 3204 (Ch).

55. However, as is clear from a lengthy recitation of the hearing which I have set out, this is not the way that the case was put to the judge. Neither the cases themselves, nor the principle for which they stand, formed any part of the argument before the judge. The contest before the judge was whether, as Clyde & Co had suggested, the trial should start in June or whether, as Freshfields had suggested, it should start in April. The parties' positions fluctuated during the course of the hearing, not least because Mr Malek dropped the bombshell that neither he nor his instructing solicitor could conduct the trial in June. But it was never suggested to the judge that the indication that he gave in his draft judgment back in August that he wished to see a trial early in 2013 was wrong in principle.

56. The suggestion now canvassed in the Kop defendants' skeleton argument that the trial should not begin until 2014 is later than any of the dates canvassed before the judge. Given the way that the rival cases were presented to the judge, I consider that he was realistic in deciding that the choice before him was between April and October 2013. In my judgment, it was a proper exercise of his discretion in the circumstances in which he found himself to choose April. There was no evidence before him that an April date would cause hardship to the Kop defendants. Mr Malek appears to me to have accepted that an April start date was possible. That was certainly how Mr Harris and the judge interpreted what he had said and they were not contradicted. The judge balanced the factors that were put to him as relevant to the exercise of his discretion. It came to what he plainly regarded as the least worst solution. I would refuse permission to appeal on this ground.

57. Once the trial date had been fixed, that served as the reference point for the orders dealing with the position until trial. It was not suggested to the judge, on 22 October, that there would be any particular difficulty in raising the sums that he was minded to order. Nor was there any evidence before him about the resources available to the Kop defendants either from their own assets, liquid or illiquid, or from what resources third parties might make available to them. The judge must have had in mind the principles accepted in the MV Yorke Motors case which he had already referred to himself. That it is that it is incumbent on a party to demonstrate not only that he himself has inadequate resources, but also that he cannot raise the resources from backers and that he must do so in evidence that can be placed clearly before the court.

58. The judge was rightly concerned, as the Kop defendants recognised, that neither RBS nor the English directors should be exposed to the risk of non-recovery of their costs. Accordingly, in my judgment, he was fully entitled to exercise his discretion so as to ensure that appropriate amounts were paid as the case moved along to trial. It must also not be forgotten the judge was mindful of the principle that the court should not make an order for payment of security that the payer cannot comply with. But he was also right to say that, in order to establish an inability to pay, evidence in support of the assertion must be provided. He thus left it open to the Kop defendants to apply to him to vary the timetable. Other judges might have laid down a different timetable or have been less prescriptive about the evidence that would be needed in support of the

application, but I am not persuaded that the judge exceeded the generous ambit within which reasonable disagreement is possible. I would refuse permission to appeal on this ground too.

59. So far as the confidentiality regime is concerned, the first point to make is that, as the judge recognised, in the absence of proceedings, the Kop defendants have no right to these documents at all, let alone the right to show them to anyone else. The judge was narrowly persuaded not to give summary judgment against the Kop defendants because of the possibility of an order for the payment of security. Mr Malek says that the judge had decided that the case was fit for trial. That is not what he decided. He decided that the case could go to trial if the Kop defendants paid the security. If the judge's order for the payment of security is not complied with, the action will not proceed and that will bring to an end any right for the Kop defendants to have any access to the disclosed documents.

60. The judge's order requiring payment of the first tranche of security was due to be complied with by 5 November, only a couple of weeks after the hearing on 22 October. Unless, therefore, it could plausibly be said that the confidentiality regime meant that it would not be possible to raise the first tranche of security, particularly bearing in mind that the Kop defendants had already offered £1.425 million by way of security, I do not consider that the judge's exercise of discretion can be faulted. It was not suggested to him that the Kop defendants would be unable raise the first tranche of security and indeed it is not suggested even now. There is no concrete evidence of any approach that has been made to an outside funder nor any evidence of a refusal of funds on the ground of lack of information. Half the first tranche has in any event now been paid. On top of all that, a hearing has now taken place by which the judge has discharged parts of his earlier orders imposing a confidentiality regime. I would refuse permission to appeal on this ground too.

61. I would therefore refuse permission to appeal against the case management parts of the judge's order of 22 October.

62. In the course of the hearing, the judge wryly observed that he would ban transcripts of the Court of Appeal where they could be very dangerous weapons. However, in the present case, it is only by a close reading of the transcript that it is possible to see why the judge was justified in the decisions that he made.

63. That leaves the judge's order of 29 October. At the hearing on the 22nd, the judge indicated that evidence in support of an application to vary the timetable could be given confidentiality if required. In response to Mr Malek, he said:

> "If you have material which you do not wish to disclose, for example, to the other parties to these actions, then, if you can make that case, you can say to them lawyers only."

64. The real complaint made about the judge's order on 29 October was that, in effect, he decided that question against the Kop defendants without waiting to see what the evidence was. He did not, for example, rule that evidence could be provisionally be

provided on a more confidential basis until the court had the opportunity to consider what the membership of any confidentiality club should be. Indeed, at the time when the judge made his order, the Kop defendants had not actually made an application for a variation of the timetable. This meant that there was no evidence for the judge to consider before making his ruling, nor was there an explanation why it would, or at least might, cause irreparable harm to Messrs Hicks and Gillett to provide the evidence that the judge expected them to provide without stringent restrictions on the persons to whom it could be shown.

65. In light of the judge's observations on 26 October, there was in my judgment no particular reason for the Kop defendants to have anticipated that, on the 29th, the judge would give an immediate ruling on the possible dissemination of the evidence. Thus there was no reason for them to adduce the evidence they have now put before the court.

66. It is true that the judge did order that the evidence and information could be used only for the purpose of resisting the proposed application as opposed to use in connection with the action itself. That may not have been sufficient in the circumstances. In that respect, and in that respect only, in my judgment the judge erred in principle. In effect he jumped the gun, but the question still remains: should permission to appeal be given? The judge has repeatedly given the parties liberty to apply in order that any difficulties in procedural orders should be dealt with quickly and efficiently. Moreover, on 15 November 2012, the solicitors for both RBS and the English directors proposed that any evidence that the Kop defendants wished to adduce should initially be served on a lawyers only basis, subject to confidentiality undertakings, with a private hearing to take place in order to determine what, if any, confidentiality restrictions should apply to the proposed application at a subsequent hearing. The judge has repeatedly encouraged the parties to agree relevant procedural questions and that is what they have done in this case.

67. In my judgment, whatever problem there might have been with the order of 29 October, it has now gone away. Since we have not seen the evidence that the Kop defendants wish to adduce, we could not decide who could be admitted to any confidentiality club or on what terms. In short, we could not do more than RBS and the English directors have offered to do. There seems to me, therefore, to be no useful purpose in granting permission to appeal or in setting aside the judge's order. I would refuse permission to appeal against this order too.

68. In his judgment of 22 October, the judge ruled against the Kop defendants on the question of implied terms. The agreements in relation to which they sought to imply the terms were compendiously referred to in the draft pleading. But the argument in this court focused more closely on two agreements referred to as the transaction co-operation letters. By those letters, RBS extended the time for repayment of facilities and the Kop defendants undertook to use all reasonable endeavours to achieve a refinancing of the facilities in full before the repayment date.

69. The implied terms are formulated as follows: (1) that RBS would not take any step or fail to take any step which would frustrate, impede or delay a refinancing of the

facilities; (2) that RBS would co-operate with all reasonable requests from the defendants in relation to a refinancing; and (3) that each of the parties to the extension agreement would use their best endeavours to ensure that the sale process of Liverpool Football Club will be conducted in such a way as to sell LFC for its maximum value and would not take any step or fail to take any step which would impair the attainment of the maximum value for LFC. The first two of these terms are referred to in the pleading as "the refinancing implied terms" and the third as the "sale value implied terms".

70. The argument on implied terms faces formidable difficulties. The first point to make is that to which the judge alluded in paragraphs 112 and 113 of his judgment. For centuries the law has regulated the powers and duties of a mortgagee through the intervention of equity and not by the implication of terms into contracts of loan. This means that in general a mortgagee owns no common law duty of care to the mortgagor and there are no implied terms. This was stated by Robert Walker LJ in Yorkshire Bank v Hall [1999] 1 WLR 1713 at 1728H and again by Lloyd LJ in the Socimer International and Standard Bank [2008] 1 Lloyd's Rep 558.

71. Mr Malek says that this is a bespoke contractual obligation and therefore the ordinary rules relating to implied terms apply. But in my judgment anyone trying to understand what the financing documents meant would know that they had been entered into against the background of this long legal history. As the judge rightly said, if the borrowers had wished to redeem the mortgages by coming up with the money, RBS could not have stopped them.

72. The Kop defendants say that the judge did not apply the legal test laid down in Attorney General of Belize v Belize Telecom, which they say altered the legal test. I do not think that it did. Lord Hoffmann said that a term would be implied because that is the "only meaning" consistent with the other provisions of the instrument and the relevant background and that the implied meaning is what the instrument "must mean". It follows that necessity is still the test. I accept that necessity is to be judged by reference to the reasonable expectations of the parties but that does not alter the test. That view is supported by the decision of this court in Mediterranean Salvage and Towage Ltd v Sea Mar Trading and Commerce Limited [2009] EWCA Civ 351; [2009] 1 Lloyd's Rep 639.

73. The judge referred to the criteria in BP Refinery (Westernport) Pty Ltd v the Shire of Hastings [1978] 52 ALR 20 and concluded that the suggested terms were neither necessary nor obvious. That, in my judgment, was a perfectly permissible approach. It cannot in my judgment be plausibly suggested that the judge applied the wrong legal test.

74. In the present case, RBS decided not to exercise their powers of enforcement as mortgagee. Against that background, it would be very surprising if it undertook obligations as onerous, let alone more onerous, than that which would have applied to it in equity if it had decided to exercise its powers of enforcement.

75. Moreover, in our case, the agreements into which the Kop defendants say that the terms are to be implied are, on the face of them, agreements which impose no positive obligation on RBS at all. The only consideration that RBS gave was the forbearance to enforce its existing rights and remedies under the mortgage. It is an ambitious undertaking to impose positive obligations on RBS by way of implication in such an agreement.

76. This leads on to the next point. Given that RBS had rights and remedies under the mortgage, it is inconceivable that the finance documents which simply postponed the repayments date would have been understood to have imposed upon RBS any obligation more onerous than those which equity would have imposed on it in its capacity as mortgagee.

77. The duties that equity imposes on a mortgagee in relation to a realisation of the secured property is a duty to take reasonable care to achieve the best price. That duty does not oblige him to improve the property or to wait for improvements in the market. It is inconceivable that, against that background, the reasonable reader would have understood RBS to be accepting the more onerous sale value implied term, particularly in circumstances in which RBS was not in fact exercising its power of sale.

78. So far as the refinancing implied terms are concerned, the Kop defendants rely on decisions to its effect that, where a contract requires the co-operation of all parties to a contract, there is an implied term that co-operation will be forthcoming. But that is dependent on the express terms of the contract. Since RBS undertook no express obligation to do anything, I do not see what necessity there is to imply any term about co-operation. If the borrowers came up with the money, RBS would have been obliged to accept the tender and release the security. That is the obligation imposed by equity and in my judgment it is enough.

79. The last of the implied terms is that RBS would not take any step, or fail to take any step, which would frustrate, impede or delay a refinancing of the facilities. By refinancing, the Kop defendants obviously mean repayment of the RBS loan. But, plainly, if RBS were to exercise its power as mortgagee, for example by appointing a receiver or by exercising its power of sale, that would impede or delay a refinancing. So the suggested implied term is inconsistent with RBS's existing rights and obligation, which is another reason why this term cannot be implied.

80. In addition, as the judge observed, things have moved on since these agreements were made. Although refinancing was still an option, the main focus was on achieving a sale of the club and, as I have said, the implied term was pleaded in relation to all documents without differentiation. The judge was therefore entitled, as he did, to look at the documents in the round and to say that efforts made to advance the contractually agreed objective of a sale of the club could not have been understood to amount to a breach of any previous agreement, even though those agreements were said to remain in full force and effect. would therefore refuse permission to appeal on this question too, with the result that I would dismiss this application.

81. LORD JUSTICE McCOMBE: I agree.

82. LORD JUSTICE TOMLINSON: I too agree.

83. I would reiterate and underline the observation of my Lord at the outset of his judgment that we have resolved applications for permission to appeal against the orders made by the judge. Our judgments go no further than is necessary to dispose of those applications.

84. When he adjourned the applications for oral argument on notice, Sir Robin Jacob imposed a stay on such parts of the order as required action by the Kop defendants in order to avoid various consequences. We will now hear argument on the terms upon which that stay should be lifted.

(The hearing continued)