

SPORTS LAW

RBS v HICKS & GILLETT ~ THE SALE OF LIVERPOOL FC

ROYAL BANK OF SCOTLAND v HICKS & OTHERS [2010] EWHC 2568 (CH)

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Last month Floyd J gave two judgments regarding the sale of Liverpool FC. Both judgments were covered extensively in the media. The outcome is well known, but the details of the litigation are less so.

FACTUAL BACKGROUND

In 2007 RBS lent approximately £300m to Kop Football Limited (KFL), a company controlled by Hicks and Gillett, to enable KFL to purchase Liverpool FC. As condition of the loan, RBS and Hicks and Gillett entered into a corporate governance agreement limiting Hicks and Gillett to two representatives on the board of KFL (Hicks and Gillett themselves), alongside the chairman Martin Broughton and two other directors, Ayre and Purslow.

RBS's loan to KFL was due for repayment on Friday 15th October 2010. If the loan was not repaid, RBS would be entitled to place the club into administration, which would mean a 9-point deduction in the Premier League, in turn devaluing the club. To avoid this, KFL had been making efforts for some time to sell the club, to raise money to repay the loan on 15 October.

Hicks and Gillett became suspicious that the other directors of KFL intended to sell the club for less than Hicks and Gillett thought it was worth. On 5 October, before a scheduled board meeting, Hicks and Gillett in their capacity as shareholders in KFL passed special resolutions dismissing Ayre and Purslow and appointing two new directors of their choice.

Acting on advice, Broughton, Ayre and Purslow refused to accept the validity of the resolutions, and together as directors of KFL decided to enter into an agreement (with the support of RBS) to sell the club to New England Sports Ventures (NESV).

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THE FIRST JUDGMENT – WEDNESDAY 13 OCTOBER

In order to ensure the validity of the sale to NESV, RBS applied for a mandatory injunction to restore the constitution of KFL to its position before the disputed changes on 5 October. At the same time Hicks and Gillett sought an injunction restraining the sale to NESV.

RBS contended that Hicks and Gillett were in breach of the provision in the corporate governance agreement regulating the board membership of KFL (as well as other provisions). Hicks and Gillett argued that there had been various repudiatory breaches by KFL and RBS too, entitling Hicks and Gillett to treat the agreement as at an end and take the action they had taken.

In deciding to grant the injunction sought by RBS, Floyd J applied the first test laid down by the House of Lords in *American Cyanamid v Ethicon* [1975] AC 396 – whether there was a serious issue to be tried. Reviewing the arguments, Floyd J concluded that there was no seriously arguable defence to RBS's claim for breach of the corporate governance agreement; the evidence did not “*even [begin] to establish a case of repudiation sufficient to discharge [Hicks and Gillett] from their obligations under the [agreement]*”¹.

Accordingly Floyd J ordered the board of KFL to be reconstituted in its old form, and held that the further conduct of the sale was a matter for that board. Given that the parties were planning a new board meeting further to consider the sale, at which Hicks and Gillett could be present, Floyd J declined to make any order affecting the conduct of the sale, and thus declined to order the injunction sought by Hicks and Gillett².

THE SECOND JUDGMENT – THURSDAY 14 OCTOBER

The evening after the judgment, at around 5.30pm, RBS received the necessary shareholder consents to reconstitute the KFL board.

Fifteen minutes later, Hicks and Gillett commenced proceedings in Texas, alleging that Broughton, Ayre, Purslow, RBS and NESV (amongst others) had conspired to sell the club at far below its value. The Texan court accepted jurisdiction and, at 8.25pm London time, issued a temporary restraining order preventing KFL and its board members from completing the

¹ [2010] EWHC 2568 (Ch) at paragraphs 26-28

² [2010] EWHC 2568 (Ch) at paragraphs 42-45

sale to NESV and preventing RBS from enforcing the terms of its loan.

The same evening Hicks and Gillett attended the new board meeting of KFL (by telephone), and that meeting proceeded to consider the sale, on advice that the temporary restraining order did not prevent it from so doing. The meeting decided by a majority (Hicks and Gillett voting against) to seek a further ruling from the English Court so as to allow the sale to NESV to go ahead.

The following morning RBS applied again to Floyd J, this time for a rare 'anti-suit' injunction. The courts can issue 'anti-suit' injunctions when a defendant issues proceedings in another jurisdiction for the purpose of frustrating English proceedings. The injunction serves to prevent the defendant from commencing or continuing the "*abusiv e activities*". Importantly, it does not require the English court to make any findings regarding the *jurisdiction* of the foreign court³.

Floyd J held that the material before him established unconscionable conduct on the part of Hicks and Gillett in bringing the Texan proceedings. Those proceedings were a deliberate attempt to deprive RBS of the fruits of the injunction it had obtained from Floyd J just minutes earlier and to obtain the relief that the English Court had just denied to them. It also appeared that Hicks and Gillett had given an inadequate description to the Texan judge of the English proceedings⁴.

Floyd J also referred to the urgency in allowing the KFL board to control its own affairs (and arrange the sale in time to meet the liability to RBS), and noted that proceedings had begun in Texas to commit Broughton, Ayre and Purslow to prison for breach of the Texan court's order. It followed that "the sooner proceedings there are held up the better"; accordingly Floyd J made the anti-suit order⁵.

Floyd J's order enabled the sale of the club to NESV to go ahead. The sale was finalised on Friday 15 October, in time to meet the liability to RBS.

³ [2010] EWHC 2568 (Ch) at paragraph 23

⁴ [2010] EWHC 2568 (Ch) at paragraph 29

⁵ [2010] EWHC 2568 (Ch) at paragraphs 31-33

Paul Harris of Monckton Chambers acted throughout for the English directors, Messrs. Broughton, Purslow and Ayre and continues to act in the on-going litigation that follows these interim injunctions.

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