Neutral Citation Number: [2019] EWHC 999 (Ch)

Case No: BL-2018-001559

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND & WALES
BUSINESS LIST (ChD)

Royal Courts of Justice
Rolls Building
Fetter Lane
London
EC4A 1NL

Date: 17 April 2019

Before:

MR JUSTICE SNOWDEN

- -

Between:

(1) WH HOLDING LIMITED

(2) WEST HAM UNITED FOOTBALL CLUB LIMITED

Claimants

- and -

E20 STADIUM LLP

Defendant

- -

Paul Downes QC (instructed by **Gateley PLC**) for the **Claimants**
Thomas Plewman QC (instructed by **Gowling WLG**) for the **Defendant**

Hearing date: 16 April 2019

- -

Approved Judgment

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

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MR JUSTICE SNOWDEN

MR JUSTICE SNOWDEN :

1. I am required to determine the issue of costs of an application by the claimants ("West Ham") for injunctive relief against the defendant ("E20"), together with the costs of the Part 8 Claim which was then issued by West Ham.

Background

2. The claimants operate the well-known Premier League football club and E20 is the leasehold owner of the former Olympic Stadium in East London ("the Stadium") where West Ham plays its home games. West Ham's use of the Stadium is governed by a concession agreement with E20 dated 22 March 2013 ("the Concession Agreement"). Under the Concession Agreement, E20 has (broadly speaking) the responsibility for providing stewarding, safety, staff, and security personnel for each home match at the Stadium in accordance with various contractual and regulatory standards. In practice, the operation of the Stadium on match days is carried out by an agent appointed by E20, namely LS185 Limited ("LS185").

3. There have been a significant number of disputes over the last couple of years between the parties arising out of the use of the Stadium. The particular matter with which this dispute is concerned arose from crowd disturbances, including a number of pitch incursions, at a match at the Stadium between West Ham and Burnley FC on 10 March 2018.

4. As might be expected, after the Burnley game, there was correspondence between solicitors acting for West Ham and E20 as to the adequacy of the stewarding and security arrangements at the game. West Ham immediately asserted that the stewarding arrangements were inadequate and warned that there might be sanctions imposed on West Ham by the relevant governing bodies, including in particular the Football Association ("FA"), for which West Ham would hold E20 accountable. E20 denied West Ham's allegations as regards the inadequacy of stewarding and attributed the disorder to the behaviour of West Ham's fans.

5. Although E20 was not prepared to accept that it had failed in its contractual responsibilities for stewarding and security at the Burnley game, it did, over the weeks that followed, provide information and cooperation to West Ham. That included the provision of a report into the incidents from LS185, and the implementation of changes to stewarding and Stadium operations for subsequent home games. West Ham makes no complaint about any lack of co-operation from E20 at this time.

6. On Wednesday 27 June 2018, West Ham received a letter from the FA charging it with misconduct in respect of the match against Burnley ("the FA Charge"). The allegation was that West Ham had failed to ensure that its spectators conducted themselves in an orderly fashion and/or that no spectators or unauthorised persons were permitted to encroach onto the pitch area. The FA required a response from West Ham by Thursday 5 July 2018.

7. After 5 pm on Friday 29 June 2018, West Ham's solicitors sent a letter by email to E20's solicitors, informing them of the FA Charge. The letter was misdated 28 June 2018, but I shall nonetheless refer to it as the letter of 28 June 2018. The letter stated that West Ham held E20 responsible for the failure to control the crowd at the Burnley match and indicated that West Ham was considering whether to admit the FA Charge or contest it. The letter concluded,

> "If your client has any views as to the course of action or has any suggested representations to be made to the FA in defence of the stewarding of the match please let us know together with an outline of any points suggested. Please note that our client will require adequate time to consider the same prior to responding to the charge formally on 5 July 2018. Accordingly, please write to us in this regard by close of business on 2 July.
>
> We would add that our client has requested some further time from the FA in order to respond and if it is provided we will revert to you.
>
> As you are aware both the independent report and the attached FA report points to a number of recommendations for improvements that need to be made to the match day operation. We would be grateful if you could please confirm that those changes have either already been implemented by your client/its agent, or where they have yet to be implemented that they will be in operation from next season so that our client can confirm to the FA that these issues are all in hand.
>
> If your client does not wish to make any representations please advise in order that our client can proceed accordingly."

8. On 2 July 2018 West Ham's solicitors notified E20's solicitors that the FA had given West Ham an additional seven days in which to respond. West Ham asked for a response to its letter of 28 June 2018 by close of business on Thursday 5 July 2018.

9. E20 did respond through its solicitors in a letter of 5 July 2018. E20 declined the opportunity to comment upon the FA's Charge and explained the reasons why. E20's letter did, however, correct two factual inaccuracies in the FA report. In addition, E20 indicated that it would be writing to West Ham separately concerning the changes to be made at the Stadium in light of the post-match report from LS185 and the independent report referred to in West Ham's letter of 28 June 2018.

The injunction application

10. Up to this point there had been no refusal by E20 to respond to the letter of 28 June 2018 in the terms in which it was written, or to provide any information requested by West Ham. However, at 2.23 pm the next afternoon, Friday 6 July 2018, West Ham's solicitors sent another letter by email to E20's solicitors. That letter thanked E20 for the letter of 5 July 2018 but stated,

> "West Ham do need the information we have requested to meet the FA's Charge".

The letter gave no further details of what information had been requested and not provided.

11. The letter of 6 July 2018 then continued,

> "Please also confirm that you will cooperate in [the FA] process including providing all reasonable information in relation to the [FA Charge], identifying the natural persons who would be appropriate to address the points regarding decision-making in relation to the stewarding and procuring, insofar as E20 is able to do so, their assistance and cooperation including, if necessary, their attendance at a regulatory hearing to assist the FA."

12. The letter then referred to two provisions of the Concession Agreement and asserted,

> "Given your client's obligations under the concession agreement your client has a contractual duty under the concession agreement to provide reasonable cooperation in this situation.
>
> Alternatively, such a contractual duty under the concession agreement to provide reasonable cooperation in this situation would be implied in any event.
>
> If, on the other hand, you believe that your client has no contractual duty under the concession agreement to provide reasonable cooperation in this situation please set out the basis for this denial."

13. The letter then demanded that E20 provide "these details and confirmation" by 6 pm that same day – i.e. a mere 3 ½ hours after the letter had been sent. West Ham stated that if such details and confirmation were not given, an immediate application would be made to the interim applications court early the following week.

14. No response was forthcoming from E20's solicitors that afternoon. The evidence is that the individuals concerned were out of the office. Mr. Downes QC submitted that it is telling that the evidence from E20 does not say that its solicitors did not see the email that afternoon, and he invited me to conclude that a deliberate decision was taken by E20 and its solicitors to ignore the email. For reasons that I will explain, I do not think that I have to resolve that question to decide the issues before me, and I am in any event not prepared to draw that inference on the very limited information that I have. I would also observe that in light of what is now said to have been the urgency of the matter, it is notable that no attempt to check that the email was being attended to, or to chase up a response to it, was made by West Ham's solicitors, either by further email or telephone.

15. On Sunday 8 July 2018, West Ham's solicitors sent a draft order to E20's solicitors by email, indicating that they had been instructed to issue an urgent application which they would seek to have heard the following morning. The substantive provisions of the draft order essentially fell into two parts. The first was clearly based upon the letter of 28 June 2018. It required E20 to provide "a full response" and "answers" to the letter of 28 June 2018 "giving the fullest and best particulars that [E20] is able to provide". The draft order did not, however identify in any way what questions in that letter had not been answered or which details were required.

16. The second part of the draft order was based upon the letter of 6 July 2018 and required E20 (a) to name the person or persons who would be best placed to provide information to the FA in connection with the FA Charge; (b) to identify and provide copies of the relevant contracts for provision of services at the Stadium; (c) to provide confirmation that E20 was able to procure the cooperation of the person(s) that they had identified under (a); or (d) confirmation that E20 was prepared to compel cooperation from such persons using any relevant contractual arrangements between itself and other organisations.

17. The draft order made no reference to the need for any information concerning the changes to be made to the Stadium in light of the post-match report from LS185 and the independent report into the Burnley game: nor did it require any confirmation or otherwise of the existence and scope of any general duty to co-operate in relation to an FA disciplinary charge under the Concession Agreement.

18. E20's solicitors responded to the letter of 6 July 2018 at 10.22 on the Monday morning, 9 July 2018. The email objected to the shortness of time which had been given to E20 and made the point that the relevant lawyers at E20's solicitors had not been in the office on the Friday afternoon when the email had arrived. The email also made the point that there was nothing which had been requested in the letter of 28 June 2018 to which E20 had failed to respond; it denied that West Ham was entitled to any relief given the lack of any prior request; and it asserted that the application was inappropriate and premature and reserved its rights to make submissions on costs accordingly. E20 nonetheless indicated that it would abide by any order the Court might make but that it would not be able to attend the hearing due to timing and logistical difficulties.

19. The relevant part of the email setting out E20's position concluded,

> "E20 has not yet addressed West Ham's case as to the meaning and effect of the Concession Agreement - again, and as West Ham is well aware from the other disputes that are referenced in its counsel's skeleton argument, E20 will disagree; and again E20 accordingly reserves its position on that"

20. The hearing of West Ham's application took place before Mr. Justice Fancourt on Monday, 9 July 2018 and was attended by Mr. Downes QC for West Ham. During the hearing, a revised draft order was produced to Fancourt J. The first part of that revised draft order still sought an order that E20 should provide a "full response" and "answers" to the letter of 28 June 2018, but added five specific matters which were "in particular" to be addressed by E20. Those matters were as follows,

> "(a) Its views on the charges brought by the FA by letter dated 27 June 2018.
>
> (b) Any representations or defence that may be advanced under FA Rule E21.
>
> (c) Any further representations that should be made in relation to the allegations relating to stewarding at the match against Burnley FC on 10 March 2018.
>
> (d) Whether the recommendations of the Watson report and the FA report have now been implemented and stating the measures that have been taken.
>
> (e) To the extent that the recommendations have not been implemented confirmation that these will be implemented before the start of the 2018 2019 football season."

The second part of the revised draft order followed the earlier draft provided to E20's solicitors.

21. The basis for the application appears to have been an acceptance by West Ham that there had been no failure by E20 to co-operate until the afternoon of Friday 6 July 2018. That appears most clearly from the following submission by Mr. Downes QC in discharge of his duty of full and frank disclosure,

> "Importantly … I accept that we did change our position in the sense that the letter of 28 June wasn't really a demand for cooperation; it was giving them the opportunity to cooperate. So I don't criticise E20 or Gowlings for that initial response, and I accept that this is only really come on since Friday and, but for the fact we have a deadline of this Thursday, there would be no case really coming to court with this urgency. The only reason we are here with this urgency is because of the very short deadlines that the FA impose in these situations, and I've emphasised to you that I'm not suggesting that before at least last Friday there was any failure to cooperate at all. It's just now we are faced with the matter. We've got to deal with it, and we really do need E20's help."

22. Mr. Downes QC did, however, place reliance upon the assertion that there was a general duty upon E20 to co-operate with West Ham under the Concession Agreement. As Fancourt J summarised in his ex tempore judgment,

> "Only last [Friday] did the applicant's correspondence move from the territory of requesting assistance in the provision of information and answering the FA charge to an alleged

> requirement or duty on the part of the respondent to do so. The basis on which the application before me is now put is that, as a matter of interpretation the concession agreement or alternatively by implication of a term, the respondent is obliged to provide information and assistance to the club in relation to matters of stewarding when reasonably requested by the club and/or in relation to dealing with the charge of the kind that the FA has now brought against the club."

23. Fancourt J made the order requested with the exception of paragraph (a) set out in paragraph 20 above, but included a provision that the substantive paragraphs of the revised order would not take effect if E20 stated that it wished to have the order reconsidered at a hearing at which it could be represented. E20 took that opportunity, and the matter returned to Court the following day, Tuesday 10 July 2018.

24. Before the hearing commenced, leading counsel for the parties communicated. The result was that shortly before the hearing commenced, Mr. Downes QC handed Mr. Plewman QC an incomplete list of specific questions relating to the FA Charge to which it was said that West Ham wished to have answers. That list was then placed before Fancourt J and Mr. Downes QC argued that E20 was, by reason of an obligation to provide West Ham with reasonable cooperation under the Concession Agreement, required to provide answers to those questions.

25. For E20, Mr. Plewman QC drew attention both to the shortness of time and to the fact that the order which had been made the previous day was in materially different form to the draft which had been supplied to E20 over the weekend. He also traced the history of co-operation between E20 and West Ham prior to Friday 6 July 2018. Mr. Plewman QC then addressed the issue of the obligations of E20 under the Concession Agreement as follows,

> "…we do not say for the purposes of today that there is not a serious issue to be tried, that there might be an implied obligation, we say there is no express obligation, but that there might be an implied obligation upon E20 as the grantor of a concession, to respond to reasonable requests for information in regard to stewarding following an incident of this kind.
>
> It is obvious, my Lord, that the exact articulation of such an implied term is a matter that would have to be debated and therefore that should not be taken to be a concession as to the fact that such a term does or does not exist. It is only for that reason the concession that there is a serious issue to be tried in that regard….
>
> The question as to what representations have to be made to the football Association is at the outset and in the final analysis necessarily a question for West Ham and it must be a question for West Ham. West Ham may, in making those representations, reasonably require information from E20 and, if it is reasonably requested, that information would then have to be provided."

26. Mr. Plewman QC went on to submit that the order as drafted by West Ham was inappropriate because it did not identify the specific information required. However, he made clear (as he had suggested earlier that morning to Mr. Downes QC) that if West Ham provided a list of questions identifying the specific information which it required to make representations to the FA, that information would be provided.

27. However, Mr. Plewman QC submitted that E20 should not have to answer questions which required an "evaluative" response from E20. An example was question 5 on the draft list before the Court which read,

> "Please state whether E20s position is that the strategy adopted by E20 to prevent or deter a pitch incursion was appropriate."

28. An argument then ensued between counsel on this point, and Fancourt J delivered a short judgment in favour of West Ham. The essence of his reasoning was,

> "I consider that a question of that nature is a question to which the applicants reasonably need to have an answer in order to decide how to deal with the charge that has been made against them. The answer to that question depends on an assessment of matters that are in part solely within the knowledge of the respondent and not within the knowledge of the applicants."

29. After the hearing, West Ham produced a further version of the order to reflect the Judge's ruling, the terms of which were then agreed between counsel. As made, the final order no longer referred to the letter of 28 June 2018 at all. Instead, it referred to a Schedule containing an expanded list of 27 very detailed questions seeking information and answers, the vast majority of which had not been intimated or identified prior to the production of the shorter list that had been provided to E20 just before the hearing on 10 July. A significant number of the questions were "evaluative" in nature. They also included, at the very end, the questions about the implementation of the recommendations of the independent report and LS185's report following the Burnley game.

30. As matters transpired, the FA gave a further extension to West Ham to respond to the FA Charge, and E20 duly provided the answers to the questions in the Schedule to the order of 10 July 2018.

<u>The Part 8 Claim</u>

31. One of the undertakings given by West Ham to the Court on both 9 and 10 July 2018 was an undertaking to issue a claim form within three working days, "which includes a claim for substantially the same relief as that provided in this order".

32. On Thursday 12 July 2018 West Ham issued a claim form under CPR Part 8. The Claim Form identified, in effect, a single question which the Court was asked to decide which was whether on the true construction of the Concession Agreement, or alternatively as an implied term thereof,

> "the defendant is obliged to cooperate with the claimants in the event that they face a charge relating to the stewarding provision at a home match at the Stadium. This obligation includes an obligation to provide the claimants with information they reasonably require in order to respond to the charge and present their case, and to take reasonable steps to assist them in obtaining such information from third parties."

The claim form additionally sought a mandatory injunction requiring E20 to comply with the obligations alleged to exist.

33. As is apparent from the use of the Part 8 procedure, the claim raised a pure question of construction of the Concession Agreement, and it stated that West Ham did not anticipate any substantial issues of fact arising. The Part 8 Claim Form contained no reference whatever to any breach of contract by E20, or to any obligation specifically arising from the incidents at the Burnley game. Nor, in spite of the terms of the undertakings given to the Court, did it in fact seek the relief which had been granted to West Ham on 9 or 10 July 2018.

34. E20's response to West Ham's Part 8 claim was contained in a letter dated 25 July 2018. That response was that the claim went beyond what had been in issue in the injunction proceedings, that it was premature, and that the matter raised should never have been brought to Court without proper engagement with E20.

35. The letter asserted that the first time West Ham had requested that E20 cooperate with them was in the letter dated 6 July 2018, and even then it was not until the following week in the orders of 9 and 10 July 2018 that West Ham had properly specified the nature and extent of the cooperation said to be required.

36. So far as the particular issue raised by the Claim Form was concerned, E20 contended that this question had never been put to E20, and that it was not a real dispute, in the sense that if West Ham had taken the time to inquire of E20, it would have become clear that there was very little, if anything between the parties. In its letter, E20 then set out its position, which was that it accepted that the Concession Agreement required E20 to provide to West Ham reasonable cooperation in the event that West Ham faced an FA charge relating to the stewarding provision at a home match at the Stadium. As had been foreseen by Mr. Plewman QC on 10 July 2018, the letter made a number of further observations in relation to the precise formulation of the obligation alleged to exist by West Ham.

37. After a further exchange of evidence in the Part 8 claim, a consent order was entered into between the parties on 5 December 2018 under which Deputy Master Rhys made an order declaring that on the true construction of the Concession Agreement, E20 is obliged reasonably to cooperate with West Ham in the event that they face an FA charge relating to the stewarding provision at a home match at the Stadium; and that this obligation includes an obligation to provide West Ham with information they reasonably require in order to respond to the FA charge and present their case, and to take reasonable steps to assist them in obtaining such information as is reasonably required from third parties. The consent order also contained a further declaration that West Ham is obliged reasonably to cooperate with E20 in relation to an FA

charge and to provide information to E20 which it reasonably requires in order to cooperate with West Ham.

The costs issues

38. Fancourt J and Deputy Master Rhys reserved the question of the costs of the injunction proceedings and the Part 8 Claim respectively. That is the exercise upon which I am now engaged.

39. Broadly speaking, the costs claimed by West Ham total £132,000, broken down as to £57,500 in relation to the injunction, £34,500 in relation to the Part 8 Claim and a little short of £40,000 in relation to this hearing for costs. For its part, E20 contends that its costs total about £55,000 which comprises about £21,000 in relation to the injunction, a little under £13,000 in relation to the Part 8 Claim and about £22,000 in relation to this costs hearing.

The contentions of the parties

40. Without intending any disrespect to the extensive written and oral submissions which I received, the contentions of the parties can be broadly summarised as follows.

41. West Ham contends that it was the successful party in the Part 8 Claim because the final relief which was granted by consent was substantially in the form of the declarations that it sought. It also contends that its application for interlocutory relief succeeded and was necessitated by reasonable fears, that turned out to be justified given the lack of a positive response to the letter of 6 July 2018, that E20 would be obstructive in providing the information required to enable West Ham to meet the urgent deadline for a response to the FA Charge on 12 July 2018. West Ham also placed reliance on the fact that E20 resisted, and lost, the argument on the "evaluative" provisions in the final order made by Fancourt J on 10 July 2018.

42. Consistent with its letter of 25 July 2018 to which I have referred, E20 contends that there was never was a real dispute, still less an urgent one as to the interpretation or implied terms to be read into the Concession Agreement. It contends that the Part 8 Claim was wholly unnecessary and West Ham cannot sensibly claim to have succeeded in that matter.

43. So far as the injunction proceedings are concerned, E20 contends that it had cooperated with West Ham up to the afternoon of 6 July 2018, that the demands in the letter of that date were new and were attached to an unreasonably short timetable. E20 contends that there was no basis for any concern that it would not co-operate if asked to provide specific information to enable West Ham to respond to the FA Charge arising out of the Burnley game. E20 contends that such specific information was only identified on the morning of the hearing on 10 July 2018, and when properly identified, it was provided. E20 therefore contends that West Ham was not justified in making its application for urgent relief, and the fact that West Ham was forced to amend the order which it sought several times in response to criticisms made by E20 means that it cannot be regarded as having been successful. In so far as West Ham won the argument on the "evaluative" provisions in the eventual order on 10 July 2018, E20 points out that this issue only arose out of the draft list of questions produced that morning, at a hearing which was necessitated by the inappropriate order

that West Ham had obtained the previous day, and that it occupied very little court time and incurred no material extra expense.

The approach to costs

44. The provisions of CPR 44 in relation to costs are well known. The court has a discretion under CPR 44 to make an order about costs, and although the general rule is that the unsuccessful party will be ordered to pay the costs of the successful party, the court may make a different order.

45. In deciding what, if any, order to make about costs the court will have regard to all the circumstances, including the conduct of the parties. The conduct of the parties includes the conduct before as well as during the proceedings, whether it was reasonable for a party to raise, pursue or contest a particular allegation or issue, and the manner in which a party pursued or defended its case or a particular allegation or issue.

The injunction proceedings

46. So far as the injunction proceedings are concerned, I first put aside the fact that West Ham has not in fact issued a Claim Form seeking the relief that it was granted (as to which, in the absence of the point being taken by E20 I shall say no more).

47. However, I do consider that E20 is correct to say that West Ham commenced its application for an injunction at a time at which E20 had not failed in any material respect to comply with any request for co-operation, and that West Ham's reliance on a supposed failure by E20 to answer questions in the letter of 28 June 2018 was misconceived. There was no such failure, as Mr. Downes QC in effect conceded at the hearing on 9 July 2018 whilst nonetheless still seeking an order which referred in terms to that letter.

48. I also consider that the conceptual basis upon which West Ham put forward its application for an injunction on 9 July 2018 was unjustified. Although it had not had a response to its pre-emptory demand in the letter of Friday 6 July 2018 that E20 accept that it had a general obligation to provide reasonable co-operation to West Ham, resolution of that point of principle could not, of itself, warrant an urgent application for injunctive relief in the absence of any identification of specific respects in which such co-operation had been requested and had not been provided. For reasons that I have just explained, there was no such identification.

49. Moreover, it is apparent that when E20 did take up the opportunity to object to the order of 9 July 2018, West Ham abandoned reference to the letter of 28 June 2018 and adopted, in substance, the approach suggested by E20 of providing specific questions identifying the particular information which it required in order to meet the FA Charge. When that was done, E20 provided the necessary answers.

50. In my judgment, therefore, West Ham was not justified in making its application for urgent injunctive relief, the relief which it eventually obtained conformed to E20's arguments as to how the matter should proceed, and there was no basis for a conclusion that E20 was unwilling to provide co-operation when the nature of that cooperation was specifically and properly identified.

51. In closing his submissions, Mr. Downes QC posed the question of whether this was a case of West Ham having to deal robustly with "a difficult landlord", which it reasonably anticipated would be "bloody-minded"; or whether it was West Ham being "trigger-happy" in circumstances in which E20 would have co-operated if asked. If asked to choose between those two narratives, I unhesitatingly choose the latter. In my view, whilst understandably anxious about the impending FA Charge, West Ham did jump the gun with an unfocussed application for injunctive relief which it was then forced to amend very substantially to adopt the process reasonably suggested by E20.

52. My overall view of the merits of the injunction proceedings is not altered by the fact that the letter of 28 June 2018 requested confirmation of the steps taken by E20 to implement the reports produced after the Burnley game; or that the letter of 6 July 2018 requested information as to the names of persons who might assist West Ham in meeting the FA Charge; and that provisions to such effect appeared in the orders made by Fancourt J. These provisions were never the real focus of West Ham's application; the former had been addressed in E20's response of 5 July 2018 and no particular issue had been taken with that response; and the latter appeared only for the first time in the letter of 6 July 2018 and was never, so far as I can tell, the subject of any resistance by E20.

53. Nor do I consider that the fact that E20 resisted and lost the argument before Fancourt J on 10 July 2018 as to the "evaluative" questions should make any difference. As E20 submitted, that was a question which Mr. Plewman QC was forced, by the production of Mr. Downes QC's draft questions, to deal with "on-the-hoof" on 10 July 2018. Although important, it also occupied little time and accounted for no material extra costs of a hearing that was already necessitated by E20's justifiable objections to the form of the order that had been made on 9 July 2018.

54. Accordingly, in my judgment, the appropriate order in relation to the injunction applications is that West Ham should pay E20's costs of and occasioned by those applications, such costs to be assessed on the standard basis if not agreed. I will, if asked, summarily assess those costs.

<u>The Part 8 Claim</u>

55. The position in relation to the costs of the Part 8 Claim is somewhat different. Although E20 contends that the Part 8 Claim was unnecessary, the fact is that the issue of E20's obligations under the Concession Agreement was raised in the letter of 6 July 2018, and in E20's solicitors email response on the morning of 9 July 2018, an indication was given that "E20 will disagree … and reserves its position on that".

56. The following morning, Mr. Plewman QC very sensibly (and properly given the immediate context) restricted his submissions before Fancourt J to accepting that there was a serious issue to be tried on the meaning of the Concession Agreement (or as to an implied term). He also quite properly observed that the determination of this issue might depend upon the precise drafting of such a term – which had been alluded to, but not actually set out in the letter of 6 July 2018.

57. Against that background, it cannot be said that there was no live issue between the parties as to the meaning of the Concession Agreement when the Part 8 Claim came

to be issued. However, it is equally clear that it was not until that Claim Form was settled that West Ham actually set out the meaning of the Concession Agreement or the implied term for which it actually contended. Further, when the matter eventually came to be compromised in the consent order of 5 December 2018, it was on a basis which adopted suggestions made by E20 as to the precise formulation of the meaning of the Concession Agreement.

58. I therefore consider that West Ham was justified in issuing the Part 8 Claim because of E20's equivocal stance. However, West Ham had not clearly defined the dispute, and missed an obvious opportunity for the precise term of the meaning of the Concession Agreement to be put to E20. When the dispute was crystallised in the Part 8 Claim Form, E20 took the first reasonable opportunity which it had to respond with comments which were then incorporated into the final terms of compromise.

59. In these circumstances, I do not think that either party can be said to have been the successful party in the litigation, and having regard to the manner in which the dispute came about and was resolved, I consider that the just order is that there should be no order as to the costs of the Part 8 Claim.

This costs application

60. I will hear submissions from counsel as to the costs of this costs application in light of my rulings above.