Neutral Citation Number: [2020] EWHC 1173 (Ch)

Case No: PT - 2019 - 00964

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

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

Date: 15/05/2020

Before :

MR MICHAEL GREEN QC

(sitting as Deputy Judge of the Chancery Division

- -

Between :

MICHAEL STANDING	**Claimant**
- and -	
LEE POWER	**Defendant**

- -
- -

COLIN WEST QC (instructed by **Hanover Bond Law**) for the **Claimant**
TOM ASQUITH (instructed by **Terrells LLP**) for the **Defendant**

Hearing dates: 6 May 2020

- -

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.

Covid-19 Protocol: This judgment was handed down remotely by circulation to the parties' representatives by email, release to BAILII and other websites. The date and time for hand-down is deemed to be 10.30am on 15 May 2020.

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MR MICHAEL GREEN QC

MR MICHAEL GREEN QC:

1. I heard an application in these proceedings together with an application in related proceedings, because both are concerned with claimed interests in Swindon Town Football Club (the **Club**) which is currently in League 2 of the English Football League (the fourth tier of English professional football). The two applications are as follows:

    (1) In these proceedings (the **Standing proceedings**), the application dated 18 March 2020 is by the Defendant, Mr Lee Power (**Mr Power**), for fortification of the Claimant's cross-undertaking in damages in respect of an injunction he obtained without notice on 22 November 2019 and continued on 6 December 2019 which prevents any dealings in 50% of the shares in the Club's ultimate holding company or any dealings in the Club's assets other than in the ordinary course of business without the consent of the Claimant (**Mr Standing**); Mr Standing claims that he beneficially owns 50% of the shares in that holding company but this is denied by Mr Power;

    (2) In the other proceedings, which have title and case no: Axis Football Investments Limited v Power BL-2020-000527 (the **Axis proceedings**), the application dated 21 April 2020 is by the Claimant, Axis Football Investments Limited (**Axis**), which seeks a similar injunction to that of Mr Standing so as to protect Axis's claimed (and admitted) 15% interest in the Club, through the holding companies' shares.

2. On Monday 4 May 2020 I directed that both applications be heard together and that the evidence in each should be shared with the parties in the other proceedings. The applications were then adjourned for hearing on 6 May 2020. This is my judgment in the Standing proceedings; my judgment in the Axis proceedings has neutral citation number [2020] EWHC 1171 (Ch) and is being handed down at the same time.

Background

Acquisition of the Club

3. The assets and business of the Club are owned by a company called Swindon Town Football Company Limited (**STFC**). Prior to the acquisition in 2013 described below, STFC was wholly owned by a company called Seebeck 87 Limited (**Seebeck**). Following the acquisition, Seebeck became wholly owned by a company called Swinton Reds 20 Limited (**Swinton**).[1] Swinton was incorporated by Mr Power to acquire Seebeck and therefore the Club. Swinton and Seebeck are Defendants in the Axis proceedings.

4. At all material times, Mr Power has been the legal owner of 100% of the shares in Swinton. He is also currently the sole director of Swinton, Seebeck and STFC.

5. The Club was acquired by Mr Power in 2013. The main dispute between the parties in the Standing proceedings concerns the terms of his acquisition of the Club and whether he holds 50% of the shares in Swinton on trust for Mr Standing. Mr Power does not

[1] In fact, it appears that Swinton might have owned 99% of Seebeck but nothing turns on this.

deny that there was another person involved in the acquisition but extraordinarily he says that it was not Mr Standing, but his, Mr Standing's, very good friend, the well-known England international footballer, Mr Gareth Barry. Mr Power disputes that Mr Standing and/or Mr Barry have a 50% interest in the Club but he does accept that Mr Barry has certain contractual rights.

6. The rival contentions are as follows:

(1) Mr Standing says that there was an oral agreement on or around 20 March 2013 between him and Mr Power whereby they would purchase the Club on a 50/50 basis on these terms:

(a) Mr Standing would provide the initial £800,000 of the funding required for the acquisition. This was understood to be made up as to £300,000 for the cost of the shares in the Club to be acquired from the former owners and as to £500,000 for working capital by way of a loan to the Club.

(b) Mr Power would be the legal owner of all the shares in Swinton, the ultimate holding company of the Club, but 50% of such shares would be held on trust for Mr Standing.

(c) Mr Power would be a director of the Club and would run it on a day to day basis. However all important decisions including in particular in relation to any possible sale of the Club would be discussed with Mr Standing and would require his consent. On any sale of the Club, the proceeds would be split 50/50 between Mr Standing and Mr Power in accordance with the beneficial interests in the shares in Swinton.

(d) The Club's working capital requirements from time to time would be met 50/50 by Mr Standing and Mr Power. Likewise, any "*surpluses*" arising from time to time would be shared 50/50 between Mr Standing and Mr Power and would go to repaying any outstanding loans they had made.

(e) Mr Standing's beneficial interest in the Club would be kept confidential.

(2) Mr Power says that there was a meeting in March 2013 at Mr Barry's house attended by him and Mr Standing. At that meeting, Mr Power says he reached an oral agreement with Mr Barry in the following terms:

(a) Mr Barry would be allowed to invest in the acquisition of the Club and to that end Mr Barry, through a corporate vehicle, would provide the initial £800,000 required with the same split of £300,000 for the shares and £500,000 as working capital.

(b) Mr Barry would not own any shares in the Club whether directly or indirectly but he would be entitled to 50% of the profits arising from any increase in value of the Club, including 50% of net profits arising from sales of certain players.

(c) Mr Barry and Mr Power would fund 50/50 any ongoing working capital requirements of the Club. They would also have equal responsibility for

discharging a debenture over the Club's assets held by Mr Andrew Black, a former owner of the Club, in the sum of £2 million in the event of a sale of the Club.

7. Even though the terms are similar the crucial term that is not is in relation to whether the investor, whether that is Mr Standing or Mr Barry, owns beneficially 50% of the shares in Swinton. The reason why there had to be confidentiality about the beneficial interest, if there was one, or the fact of Mr Standing's or Mr Barry's involvement, was because of the Football Association's rules concerning the ownership of football clubs. Mr Standing has an interest in a company called First Touch Professional Management Ltd (**FTPM**) which is involved in the football agency business. Its main client is Mr Barry. The FA's regulations are now contained in the FA Regulations on Working with Intermediaries and they prohibit football intermediaries/agents from owning or having interests in football clubs. Mr Barry remains as a professional footballer, currently playing for West Bromwich Albion FC, and he too was unable to hold shares in any football club.

8. Mr Standing says that he did not think it necessary to put the agreement into writing as he had trust and confidence at the time in Mr Power. There is substantial evidence of the performance of the agreement and it is not disputed by Mr Power that £800,000 was put up initially by whoever the other investor was and that, until September 2019, both parties have been making equal contributions towards the Club's working capital requirements. Mr Power says that he thought Mr Standing was at all times acting on behalf of Mr Barry.

9. Following the acquisition, Mr Standing's accountant, Mr Stephen Crouch, was appointed as a director of Swinton. He kept Mr Standing informed of all relevant financial matters relating to the Club. Furthermore, Mr Standing was given the Club's online banking log-in details so he could monitor the Club's bank statements. However, in 2019, this access was removed as was Mr Crouch as a director.

The Andrew Black Incident

10. Mr Matt Richie is a Scottish international footballer and played for the Club until he was sold in January 2013 (before the acquisition) to AFC Bournemouth. He was then sold on in July 2016 to Newcastle United FC and this triggered a payment to the Club of £1.85 million under the terms upon which he had been sold to AFC Bournemouth. On Mr Standing's version of the agreement, the £1.85 million was "*surplus*" funds and should have been split equally between him and Mr Power.

11. However, Mr Standing says that he was told by Mr Power that the former owner, Mr Black, who had the debenture covering his £2 million loan to the Club, was seeking repayment of the loan from the monies received in respect of the transfer of Mr Richie. This was a surprise to Mr Standing as he thought that Mr Black would only be repaid on a sale of the Club. Nevertheless, he accepted Mr Power's explanation and he even provided a further £75,000 in order to clear completely, as he was led to believe, Mr Black's loan (that was half the difference between £2m and £1.85m). That meant that rather than receiving c.£925,000 from the on-sale of Mr Richie, he paid £75,000 more to the Club to repay Mr Black's loan.

12. In mid-2019 however, Mr Standing discovered that Mr Black had not been repaid his loan and the debenture still existed. This was confirmed by Mr Black's accountant and does not appear to be disputed by Mr Power. No explanation has been provided by Mr Power as to why he said one thing and did another and the strong suspicion is that those monies were paid to Mr Power not the Club. That would be consistent with what Mr Power says in paragraph 48 of his Defence that he:

> "…agreed a compromise under which he offered to give credit to Gareth Barry for half of the 'sell-on' fee in respect of Matt Richie when it came to discharging the debenture with Black/Arbib[2] which Gareth Barry [sic] against the amount for which Gareth Barry would otherwise have been liable as set out in paragraph 11(ii) above."

13. The discovery that Mr Power had not paid Mr Black out of the proceeds of the on-sale of Mr Richie was of serious concern to Mr Standing.

The sale of 15% of the Club to Axis

14. Mr Standing says that he found out, on or around 7 June 2019, that Mr Power had sold a 15% stake in the Club to Axis. From the Axis proceedings, it is now known that Mr Power, on behalf of himself and Swinton and Seebeck, signed a Share Sale Agreement with Axis a year earlier in June 2018 but Mr Standing knew nothing about it then. There was also an article about this in a local newspaper in June 2019 that Mr Standing saw and so he asked Mr Power about it. Mr Clemente Morfuni owns Axis and Mr Power explained to Mr Standing that Mr Morfuni had become involved in the Club because of certain property development works that the Club was considering doing. Mr Power said that Mr Morfuni/Axis had not paid any money for the shares. Axis had in fact paid £1.1 million for the shares and Mr Standing discovered this in November 2019, shortly before he applied for the injunction. Mr Standing's view is that since Mr Power did not seek his consent to the sale of the 15% or account to him for any part of the consideration, the 15% must have come from Mr Power's 50% share in the Club. If so, Mr Standing would not have been entitled to share in the proceeds. It was nevertheless also of concern to Mr Standing that it appeared that Mr Power had not told him the truth about the terms of the transaction with Axis and he had only found out about it a year after it happened.

The potential sale to Able Company Swindon LLC (**Able**)

15. In August 2019, Mr Power informed Mr Standing that an American-based company, Able, was interested in purchasing the Club. Subsequently, Mr Standing came into possession of a Letter of Intent dated 11 September 2019 by which Able was offering to buy the assets of the Club for £7.5 million plus an earn out provision in relation to a player called Mr Jayden Bogle. Much reliance was placed at the hearing by Mr Tom Asquith on behalf of Mr Power as to the £7.5 million as being a figure that shows that the Club was worth that amount and that this should be the relevant figure for the purposes of fortification. I will come on to deal with those arguments but it is another curious feature of this application that the Letter of Intent is the only document with that figure in and yet it is now 8 months old and not apparently countersigned. It is also most odd that, given Mr Power's reliance on the Letter of Intent, he says in his Defence

[2] Sir Martin Arbib who was a party to the debenture and a previous owner of the Club.

that he only saw the Letter of Intent for the first time in the course of these proceedings. If this was truly a deal that was and is reasonably likely to progress at that figure, then it must be for Mr Power to prove that but he does not appear to have even seen, let alone signed the Letter of Intent.

16. The Letter of Intent said as follows:

(1) The "*Acquiring Party*" was a US company called Able Company Swindon, LLC. The "*Selling Party*" was said to be Mr Power.

(2) The Purchase Price was £7.5 million.

(3) The "*Assets to be Acquired*" were "*all of the assets (inclusive of cash, accounts receivable, cash equivalents, marketable securities and other current assets) and businesses of the Team…*". It is odd that Mr Power is the selling party of the Club's assets; presumably if this had gone ahead the Club would have had to be a party.

(4) There was a "*Due Diligence Period*" of 60 days from the acceptance of this offer for Able to investigate and review; after the Due Diligence Period, there was a further period of 60 days for "*a mutually agreeable Acquisition Agreement…to be executed*";

(5) The offer in the Letter of Intent expired after 7 days; it had to be countersigned by the Club within that time to proceed on that basis;

(6) It was signed by a Mr William Keravuori of Able; there is no countersignature by Mr Power or anyone else on the copy I have seen.

17. Mr Standing had significant concerns about the potential sale to Able. Clearly on his version of the agreement, Mr Power would have no right to sell the Club or the shares in companies that own the Club without his consent. Mr Power did not seem to have any intention of seeking that consent or of involving Mr Standing in any of the negotiations in relation to such a sale. Mr Standing was also extremely concerned that Mr Power would not properly account for his share of the proceeds of any such sale.

18. It is also relevant to point out that (as already referred to in paragraph 9 above) in August 2019, Mr Power took steps to prevent Mr Standing from having access to financial information concerning the Club. The online banking log-in details were changed and Mr Standing was not given the new details. And Mr Crouch was removed as a director of Swinton, thus depriving Mr Standing of the ability to monitor performance. As a result, Mr Standing refused to provide any more funds by way of working capital. Since the acquisition, Mr Standing had provided over £6 million in loans to the Club and after some repayments the current amount outstanding to him is over £3.7 million. Despite that huge investment in the Club, some of it borrowed from Mr Barry, Mr Standing now had no access to any financial information and Mr Power appeared to be trying to sell the Club without letting him know or giving any transparency as to the terms of any sale so that he could secure his position.

19. On 22 October 2019, Mr Standing's solicitors wrote to Mr Power asking him to supply them with stock transfer forms executed in blank in relation to 50% of the shares in Swinton so that he could transfer them to a new nominee. They also asked for an

undertaking not to dispose of or deal with those shares save upon Mr Standing's instructions. No substantive response to this letter was received.

The Injunction

20. On 22 November 2020, the Standing proceedings were issued and on the same day Mr Standing applied without notice to Morgan J for an interim injunction against Mr Power preventing him from selling any shares in the companies which own the Club without his written consent. The injunction granted by Morgan J was in the following material terms:

> "1. Until heard 6 December 2019, the Defendant must not, save with the express written consent of the Claimant:
>
> (i) Sell or otherwise dispose of or deal with shares registered in his name in the company [Swinton], or exercise any rights attached to such shares, if any such sale, disposal, dealing or exercise would have the effect of reducing the Defendant's shareholding in such company below a 50% shareholding.
>
> (ii) Cause [Swinton] to take any steps which would have the effect of reducing the shareholding of [Swinton] in the capital of [Seebeck] below its current level.
>
> (iii) Cause [Seebeck] to take any steps which would have the effect of reducing the shareholding of [Seebeck] in the capital of [STFC] below its current level.
>
> (iv) Take any steps which would have the effect of transferring any of the assets and business of [STFC] to a third party, save in the ordinary course of business."

Mr Standing gave a cross-undertaking in damages that was not limited to losses that may be suffered by Mr Power and was in the following terms:

> "AND UPON the Claimant undertaking that, in the event that the Court finds that this Order has caused loss to any person, he will comply with any order the Court may make"

21. In his witness statement in support of the application for the injunction, Mr Standing gave details of his assets to support the cross-undertaking which were stated to be as follows:

(1) His residential property which he owned jointly with his wife and was said to have a net value at that time of £900,000;

(2) His 23% shareholding in FTPM; he gave the following details of turnover, profit before tax and net assets on the balance sheet, but did not give a valuation of his shareholding:

	Turnover	Profit before tax	Balance Sheet
To 31/3/16	£891,873	£452,032	£1.852m
To 31/3/17	£792,000	£96,000	£1.780m
To 31/3/18	£1.369m	£480,575	£2.038m

(3) Cash of £50,000;

(4) His 50% shareholding in Swinton.

22. At the return date on 6 December 2019, Mr Andrew Hochhauser QC, sitting as a deputy High Court Judge, continued the injunction "*until trial or further Order*" upon the same cross-undertaking given by Mr Standing. Mr Power's solicitor, Mr Roger Terrell had appeared at the hearing and asked for time to make an application to set aside the injunction and for it to be discharged pending such application. The learned deputy Judge allowed Mr Power until 10 January 2020 to serve any evidence relied upon in support of an application to discharge but refused to discharge the injunction in the meantime. Any such application was to be listed on the first available date convenient to the parties after 1 February 2020. The order also provided a timetable for the service of pleadings.

23. After service of the Particulars of Claim on 20 December 2019, there has been slippage to the timetable. The Defence was due on 17 January 2020 but it was not filed until 24 February 2020. The Defence was served along with a witness statement of Mr Power dated 26 February 2020 in which he set out his substantive defence to the proceedings. It was unclear whether this witness statement was in support of an application to discharge the injunction (it would have been seriously out of time if it was). It was subsequently confirmed, however, that Mr Power was not pursuing an application to discharge and has since focussed on his application for fortification which was issued on 18 March 2020.

24. Before he issued the application for fortification, there was some correspondence and telephone discussions between the parties' solicitors: Mr Edward Parladorio of Hanover Bond Law for Mr Standing; and Mr Terrell of Terrells LLP for Mr Power. Of note are the following:

(1) On 3 January 2020, Mr Terrell wrote two letters: one enclosing a Request for Further Information (these were provided on 23 January 2020); and the other requesting fortification of the cross-undertaking on the basis that the offer from Able at £7.5 million was still ongoing and that therefore there was a shortfall in the assets securing the cross-undertaking.

(2) On 9 and 14 January 2020, Mr Terrell and Mr Parladorio spoke about timetabling issues and Mr Terrell also confirmed on each occasion that there were ongoing discussions with Able about its potential purchase of the Club.

(3) On 15 January 2020, when they spoke again, Mr Terrell said that realistically there would be no deal with Able until at least April 2020. Able had done some due diligence but had not issued any formal documentation for review or negotiation.

(4) On 16 January 2020, both apparently agreed that it would be sensible for the Able deal to be explored by both sides. There was recognition by Mr Terrell that the terms of the injunction required the consent of Mr Standing to any such deal going through and that it would therefore be sensible for Mr Power to be open and transparent about the deal so that Mr Standing could be in a position properly to assess and consider it.

(5) On 24 January 2020, Mr Parladorio emphasised that he had instructions from Mr Standing that he would keep an open mind at all times on any proposals to sell the Club and would consider them so long as he had full details of the transaction. When it was suggested to Mr Terrell that Mr Standing may have other third party potential purchasers, he responded that his client would certainly consider any such proposals.

(6) On 25 January 2020, Mr Terrell wrote to Mr Parladorio in which he said:

> "There was a subsequent discussion between Mr Terrell and Mr Parladorio on 16th January and it was agreed in principle that the sale to Able could proceed subject to full transparency and approval of documentation on behalf of your client and for the injunction to be released / varied to enable this transaction to take place…
>
> On reflection, now we have agreed subject to contract to proceed with the Able sale. The need to go to the time, trouble and expenses of filing and serving a statement, defence and applying for fortification should be avoided. Do you agree? Perhaps the present proceedings could be adjourned generally?"

(7) On 28 January 2020, Mr Parladorio responded to the letter by email in which he said:

> "Separately, you were going to arrange for full transparency for us in relation to all ongoing discussions with Able so that we are able to see the product of those discussions and you of course already know that, unless you manage to discharge the injunction, the sale of our client's 50% shares cannot take place without our client first agreeing to that. I think the easiest way to achieve this will be to have me copied in to any email communications in that regard. Let me know when this can be initiated.
>
> We have also agreed that if any better sale opportunity becomes available then both our clients will be content in principle to explore that."

(8) On 5 February 2020, Mr Parladorio emailed Mr Terrell following discussions about timetabling and in which he said:

> "2. The above is part of a process where our client is given online access to the bank accounts so that an element of visibility is restored while (3) below is pursued.
>
> 3. We also agreed to continue to discuss and explore matters to see if a sensible and agreed mechanism can be found to pause the litigation generally while the parties pursue the potential sale to ABLE or any third party on the basis that upon such sale our client will receive 50% of the proceeds assuming that, per the existing injunction order, he has agreed to the sale in writing (something which he can of course only sensibly consider at his absolute discretion when the terms of such sale have been presented to him – in this latter regards we look forward to being copied in on communications with ABLE or their lawyers as previously discussed and agreed)."

(9) In a discussion on 21 February 2020, Mr Terrell confirmed that the Able deal was going ahead but that the likely date for any conclusion was now the end of April 2020. Mr Terrell said that some documentation had been prepared by Able and that it contemplated an asset rather than share sale but that he was still taking instructions on whether the documentation could be provided to Mr Standing.

(10) In a further discussion before 28 February 2020, Mr Terrell indicated that he had a draft Share Sale Agreement (contrary to what he had said on 21 February about it being an asset sale) from Able's lawyers which ran to some 120 pages. Mr Terrell was encouraging Mr Parladorio to pursue other third party purchasers, which Mr Parladorio took as an indication that there was not much confidence in the Able deal progressing. Mr Parladorio said that his client was open minded and would give serious consideration to the Able deal if he was provided with the documentation.

(11) On 28 February 2020, Mr Terrell wrote a sharply contrasting letter to Mr Parladorio in the following terms:

> "We refer to our letter date 03 January a copy of which is enclosed and to which we have received no reply of acknowledgment.
>
> As a result, our client has no alternative due to imminent loss of the Sale of Able [sic] due to the injunction remaining in place to issue the application for fortification for costs. Please confirm by return whether or not your client will lift the injunction to enable the sale to proceed and avoid the application for fortification."

25. I can well understand why Mr Parladorio says in his second witness statement dated 24 April 2020 that he found this letter "*astonishing given all the discussions and communications that [he] had with Mr Terrell*." It was perfectly apparent that Mr Standing would have been prepared to consent to any such sale to Able if he had been given full details of the transaction and was able to secure his interest in the proceeds of any such sale. Mr Terrell appeared to accept that and yet he suddenly changed tack,

ignored all that had happened during January and February 2020 and decided to proceed with a fortification application.

The Fortification Application

26. As stated above, Mr Power's fortification application was issued on 18 March 2020. The application seeks fortification "*up to the value of £5,800,064*". It is supported by Mr Power's second witness statement dated 18 March 2020. In that witness statement Mr Power says that if the injunction remains in place the sale to Able may be lost. He further says that if it is lost, it is likely that the Club would have to be put into administration as he would not be able to fund its ongoing losses. In paras. 16 to 19 he said as follows:

> "16. Since Able's Letter of Intent, which was produced by the Claimant, the proposed sale to Able has progressed. Able has carried out their due diligence and on 6 February 2020 they issued a Share Sale Agreement to my solicitors, Terrells LLP.
>
> 17. Able's offer to buy the Club is in the sum of £7.5m, as referred to in the Letter of Intent exhibited by the Claimant.
>
> 18. At present, due to the Order dated 6 December 2019, I am unable to sell my shares in [Swinton] to Able and believe there is a real and serious risk that unless matters are resolved quickly, Able may withdraw and the transaction will fall through.
>
> 19. If Able does withdraw, there is a very strong possibility that I will not be able to continue funding the ongoing losses the Club is incurring as set out in paragraph 28 of my first witness statement."

27. Mr Power calculated in this witness statement that the likely loss that he would suffer if the Able sale did not go through was £6.3 million. This was on the following basis: the sale at £7.5 million less the Club's net asset value which was approx. £88,000; 85% (to take account of Axis's 15%) of that figure of £7.42 million is £6.3 million; he valued Mr Standing's available net assets at £500,000 (ie he excluded any interest in FTPM and Swinton); and was therefore left with an alleged shortfall of £5.8 million.

28. In response to the application Mr Standing served two witness statements: Mr Parladorio's second; and a first witness statement from Mr Barry. Mr Barry says categorically that he was not the investor and did not agree anything with Mr Power. He says that he did lend Mr Standing some of the money needed to fund the acquisition and for ongoing working capital contributions but that he did so as a good friend of Mr Standing and he himself has no rights or interests in the Club. He also said that, for the purpose of making it clear that Mr Power had no defence that Mr Barry was the investor, he would assign any alleged interest in the Club or the joint venture by which Mr Power acquired the Club, to Mr Standing for £1.

29. Mr Standing's main answer to the fortification application is that the injunction does not prevent a sale to Able as it can be done in accordance with the injunction with his

written consent. Through Mr Parladorio's communications with Mr Terrell in January and February 2020 it was clear that Mr Standing had an open mind about any such sale but that he would require transparency as to the terms and conditions of any such sale before he could give his written consent. Mr Standing says that it is for Mr Power to prove that the deal with Able would have been likely to go through at the price of £7.5 million were it not for the injunction being in place and yet the only document that evidences the sale is the Letter of Intent, which cannot stand as evidence of the current position.

30. Mr Standing also challenged the calculation of Mr Power's alleged losses, saying that he should have taken account of the 50% share of the proceeds that would go to the investor (which Mr Power admitted would be due to Mr Barry) and that Axis's 15% share had to come out of Mr Power's 50% interest and not Mr Standing's. In other words, Mr Power's true loss, if any, should be reduced to 35% of the net proceeds of sale that would be lost. He also said that there needed to be further deducted the £1.925 million to repay the debenture to Mr Black. All of which reduced the alleged loss to some £670,000 which is only marginally more than the £500,000 of liquid assets available to Mr Power on his calculation. In fact, Mr Standing asserted that his shares in FTPM were not valueless; nor were his 50% of the shares in Swinton. Mr Standing contested Mr Power's statement that the Club would have to go into administration if the deal with Able could not proceed. Either another purchaser would be found or Mr Standing would be prepared to continue to fund the Club's working capital requirements so long as he was provided with proper financial information concerning the Club.

31. Mr Asquith's skeleton argument dated 29 April 2020 for this hearing continued to assert that Mr Standing's cross-undertaking should be fortified to the full extent claimed, namely £5.8 million. However, as a "*fallback*" and accepting that half of the net proceeds of the "*increase in value*", being £7.5 million less £800,000 paid for the Club on acquisition, should go to Mr Barry, he submitted that fortification in the sum of "*£2-£2.5 million*" should be provided. He rejected the points about the Black debenture.

32. Having seen what was said in Mr Asquith's skeleton argument, Mr Standing filed three further short witness statements: one from himself making it clear that he would consent to a sale at £7.5 million so long as this was on normal commercial terms; one from Mr Crouch with a valuation of Mr Standing's 23% interest in FTPM; and another from Mr Barry in which he reiterated that he had no interest in the Club and that he had actually assigned whatever interest or contractual rights Mr Power says he has to Mr Standing. Mr Asquith objected to my receiving Mr Crouch's evidence in particular as it was too late and Mr Power did not have a proper opportunity to respond to it.

33. On the day of the hearing on 6 May 2020 with a start time of 10am, at about 9.15am, Mr Asquith filed a supplemental skeleton argument, as well as his skeleton argument for the Axis proceedings. The supplemental skeleton argument disclosed a radical change of position. Mr Power had now reduced his claim for fortification to just £1 million. For the purposes of the hearing, Mr Power conceded the points on the 50% of the net proceeds of sale and on the Black debenture. That left two points of contention for the hearing, and these were developed by Mr Asquith in his oral submissions:

(1) Whether the liability to Mr Barry was for 50% of the total proceeds of sale of £7.5 million or whether it was of the "*increase in value*" from the £800,000 acquisition cost, that is £6.7 million (the **£800,000 point**)

(2) Whether account should be taken of Mr Barry's alleged failure to contribute to the Club's working capital needs from 1 September 2019 onwards; in that time, Mr Asquith asserted, that Mr Power had contributed £1.035 million (of which there was some evidence in relation to £735,000 but the balance was merely asserted on instructions) and Mr Barry should have contributed half of that in accordance with the alleged contract between them (the **working capital point**).

34. I will deal with those points below together with the other submissions made at the hearing. Suffice it to say at this stage that this was quite a *volte face* by Mr Power in the time between the two hearings on 4 and 6 May 2020.

Legal Principles

35. There was no dispute between the parties as to the applicable legal principles on an application for fortification. The three linked requirements on such an application were clearly explained by Mr Michael Briggs QC (as he then was), sitting as a deputy High Court Judge in *Harley Street Capital Ltd v Tchigirinski and ors* [2005] EWHC 2471 (Ch):

> "17. …The first is that where fortification is sought, then although the loss itself, and certainly the quantification of the loss will lie in the future, the court is nonetheless required to make an intelligent estimate of the likely amount of the loss…
>
> 18. Secondly, it is for the applicant for fortification to show a sufficient level of risk of loss to require fortification…
>
> 19. The Third principle is that loss will not qualify for compensation under the cross-undertaking unless it has been caused by the grant of the injunction. Though normally that is an issue decided on an enquiry as to damages at the end of the day, the causation issue must also be examined in forming an intelligent estimate of likely loss at the fortification stage."

36. This was endorsed by the Court of Appeal in *Energy Venture Partners Ltd v Malabu Oil and Gas Ltd* [2015] 1 WLR 2309 in paragraph 53 of Tomlinson LJ's judgment where after referring to another case of Briggs J (as he then was) in *Jirehouse Capital v Beller* [2008] EWHC 725 (Ch) (this set out the same three requirements) he said:

> "The three requirements are of course inextricably linked. The principles could equally be summarised, as Hamblen J did at para 31 of his judgment, as a requirement that the applicant for fortification show a good arguable case for it. In this interlocutory context, showing a sufficient level of risk of loss to require

> fortification is synonymous with showing a good arguable case to that effect. In some cases the assessment of loss may at the interlocutory stage be difficult. It is in such cases that an intelligent estimate is required. An intelligent estimate will be informed and realistic although it may not be entirely scientific."

37. Mr Asquith submitted that the test is satisfied if he shows that there is a real risk of any loss being suffered by Mr Power and there is no basis for applying the loss of a chance principles in this area. If there is a real risk of the sale being lost as a result of the injunction, then an intelligent estimate of the likely loss has to be made. I think he must be right on this and that is the approach I will take.

38. It furthermore seems to me that I have to be so satisfied as at the date of the hearing that the evidence shows that there is a real risk of a loss being suffered from a sale falling through in the future. If the evidence indicates that the sale has already fallen through, then that has happened while there was no added fortification to the cross-undertaking and was a risk that the applicant took in delaying his application. I do not think that fortification should be ordered for losses already incurred by the time the application is heard.

The loss of a sale to Able

39. I was somewhat surprised at the hearing for there to have been no reference in any of the written material, both witness statements and skeleton arguments, as to the effect of the Covid-19 pandemic on the prospects of a sale to Able, or any other third party, proceeding at a price of £7.5 million. (There is a passing reference in Mr Power's second witness statement to the expected losses arising from the initial cancellation of games by the English Football League until 4 April 2020, since postponed further.) It seems to me that if I am to make an "*intelligent estimate*" of the amount of loss likely to be suffered, it is necessary to know the up-to-date position as to the potential deal with Able and that must take into account the effect of the pandemic.

40. Mr Asquith submitted that I did not need to be concerned about that because it was effectively common ground that the Club was worth £7.5 million. Mr Power had said this in his second witness statement based on the alleged offer from Able and Mr Asquith said that Mr Standing should be taken as having accepted this by relying on the Letter of Intent to get the injunction in the first place and not putting in any evidence to show that the loss of the sale to Able would be any lesser figure than £7.5 million. Furthermore, the fact that Axis was prepared to pay £1.1 million for a 15% stake in 2018 shows that the Club was worth something in that region.

41. At the start of the hearing, I received a short witness statement dated 6 May 2020 of Mr Terrell to which he exhibited a letter dated 5 May 2020 from Mr Keravuori, who had signed the Letter of Intent, but this time on behalf of a different company called AC Sports, LLC. The letter was headed "SUBJECT TO CONTRACT" and was written to Mr Power. It said:

> "We refer to our recent communications regarding our continued interest in purchasing your football club.

> As you know the worldwide pandemic has had an impact on transacting business. However, we remain determined to conclude negotiated terms with you to purchase the club as soon as conditions allow it.
>
> We look forward to continuing discussions with you on this purchase."

Whilst there is recognition of the impact of the pandemic, there is no mention of an existing agreement or the figure of £7.5 million. The letter really says nothing at all to indicate that the sale has got anywhere and I got the impression from it that, if anything, they would be biding their time until they could negotiate further and in particular to pick up the Club as cheaply as possible in the difficult circumstances of the pandemic affecting the value of football clubs.

42. Mr Colin West QC on behalf of Mr Standing submitted that it was for Mr Power to prove that there was a potential sale to Able on the table at a price of £7.5 million and he cannot rely on the Letter of Intent, which was not signed or apparently even seen by Mr Power at the time, and was now 8 months old. Mr Standing had relied upon the Letter of Intent when applying for the injunction in November 2019 because it was relatively contemporaneous evidence then as to Mr Power's intent on selling the Club without involving Mr Standing or providing any details. Furthermore, it appears from a text message exhibited to Mr Morfuni's witness statement in the Axis proceedings that when Mr Morfuni asked Mr Power about the potential sale to Able in September 2019, that is around the time of the Letter of Intent, Mr Power responded as follows:

> "Clem, don't know why every1 is getting involved in this…it's finished had no offer nor have I put club on market…no need for any1 to get involved it feels like it's a set up. Mate…like people r trying 2 create something…I asked 2 see document b4 and they said they not allowed to send it."

So Mr Power himself was denying that there were discussions going on with Able in September 2019 after the Letter of Intent had been issued.

43. Mr West QC also referred to the fact that Mr Power had specifically referred to a draft "*Share Sale Agreement*" that had been issued to his solicitors on 6 February 2020 but they had refused to disclose it under CPR 31.14. Instead, in an email on 29 April 2019, Terrells stated:

> "5. Copy of the Share Sale Agreement
>
> You have requested this information in your RFI. The solicitors for the potential purchasers have informed us that they intend to supply the following:-
> (1) An option agreement;
> (2) A warranty deed;
> (3) A deed of guarantee; and
> (4) A SPA.
>
> Only document (4) has been provided to date. The Claimant is not a shareholder and in any event the Defendant is subject to the terms of a Non-Disclosure Agreement and not able to disclose the documents or copies."

This was the first time that there had been mention that the documentation was subject to a non-disclosure agreement and that such documentation included an option, warranty deed and a guarantee. Mr Terrell had not said this in any of his communications with Mr Parladorio during February 2020. It should also be pointed out that the Letter of Intent contemplated an asset sale whereas these documents suggest that it was then a share sale. I have no idea if the sale is at a price of £7.5 million and Mr Asquith was unable to tell me if that was so. None of the above documents have been disclosed.

44. From this evidence, or lack thereof, I am unable to conclude what the current state of the negotiations are, if anything, with Able. While it appears that Mr Power is keen to sell the Club, he is not prevented from doing so by the terms of the injunction, as he only needs to involve Mr Standing in the process and get his written consent. Because of the total lack of transparency, Mr Standing is not in a position to consider any possible deal or to give his consent to it. While I understand that a deal at £7.5 million in the current circumstances would be very attractive to both Mr Power and Mr Standing, there is simply no evidence before me that there is any likelihood of that happening.

45. I also have my doubts about Mr Power's evidence that if the deal with Able falls through the Club would be likely to have to go into administration because of his inability to fund its ongoing losses. His evidence stated that the Club would "*require in the region of £700,000 to £750,000 between May 2020 and August 2020 in order to continue operating*" and that he was unable to provide this. He said that this is exacerbated further by the present pandemic and the loss of the rest of the home game receipts for this season.

46. However, there is no evidential support for these figures and it is mere assertion by Mr Power. No up-to-date accounts or any financial information for the Club have been provided. It seems to me that it would be much more likely that either a sale of the Club to another purchaser would be pursued or that the money would be found to fund the ongoing losses than for the Club to go into some form of insolvency. Mr Standing has always said that, if he had been provided with full current financial information in relation to the Club, then he would resume funding his half share of the Club's working capital requirements. He has also said that he does not accept that Mr Power is himself unable to fund these. It would not be in either of their interests to allow the Club to go into administration and I do not consider that Mr Power has proved that this is a likely outcome from the loss of the sale to Able.

47. For the reasons set out above, I do not consider that any of the three requirements of an application for fortification have been met:

    (1) If there is no real likelihood on the evidence before me that a sale to Able at a price of £7.5 million is possible, then I do not see that I can make an "*intelligent estimate of the likely amount of the loss*".

    (2) Mr Power has not proved that he has an arguable case of a sufficient risk of loss, whether that is from the loss of the sale to Able or from a possible insolvency, such that there must be an order for fortification; and

(3) In any event, because of the possibility of obtaining Mr Standing's consent to any such sale and of the lack of evidence as to the real possibility of insolvency if the deal does not go ahead, I do not consider that Mr Power has established the requisite causative link to the injunction. Of relevance to causation is also the necessary involvement and consent of Axis to any sale of the Club, and Mr Power's failure to provide financial information to and seek the consent of Axis which could also break the chain of causation from the injunction.

48. In all the circumstances, I will have to dismiss the application and it is not necessary to consider the adequacy of Mr Standing's assets to support the cross-undertaking.

49. I will, however, consider the remaining arguments on quantum, being the two points raised by Mr Asquith, namely the £800,000 point and the working capital point, as well as the valuation of FTPM.

The £800,000 point

50. Mr Asquith argued that on Mr Power's case as to the terms of the agreement with Mr Barry, he only had to share the proceeds of an increase in value of the Club from the £800,000 acquisition cost to the sale price of £7.5 million. On this scenario Mr Barry would be entitled to £3.35 million, being 50% of £6.7 million.

51. However, as Mr West QC pointed out, there is an inconsistency in the terms of the alleged agreement with Mr Barry on Mr Power's evidence. In paragraph 11(iii) of the Defence (which was not settled by Mr Asquith) one of the terms of the alleged agreement was (underlining added):

> "Gareth Barry would provide funds, through Lindene Ltd or FTPM (each being a "corporate vehicle"), none of which would be repayable by the Club <u>until the Defendant sold his shares</u> of which:
>
> (a) £800,000 of such funding would be provided through Lindene Ltd;
>
> (b) £300,000 would be used to pay the existing owners of the Club and £500,000 would be used to fund the Club which was loss making;"

In paragraph 11(iii) of Mr Power's first witness statement dated 26 February 2020 (the same time as the Defence had a statement of truth signed by Mr Terrell) he said exactly the same except the underlined words were omitted.

52. If the term was as in the Defence, then Mr Barry would be entitled to be repaid the £800,000 on a sale of the Club by Mr Power; whereas arguably he may not be so entitled if the term was as in Mr Power's witness statement.

53. Mr West QC also pointed out that, on Mr Power's case, Mr Barry was only entitled to 50% of the profits arising from an increase in value of the Club, but the actual value of the shares in the Club was £300,000 as was accepted in the Defence.

54. Of course, Mr Standing says that he is entitled to 50% of the proceeds because he is a 50% shareholder. But in the scenario where Mr Power has managed to prove his case

that the agreement was with Mr Barry, which most likely would be the case if the cross-undertaking were being enforced, I would be bound to conclude that Mr Power had not proved that the £800,000 would not be repaid to Mr Barry on a sale of the Club. In other words, in making an "*intelligent estimate of the likely amount of the loss*", because of the inconsistencies in Mr Power's case, I would have concluded that the £800,000 would have to be accounted for from the proceeds of sale. If the £800,000 had to be repaid to Mr Barry on a sale of the Club, it would mean that Mr Power's alleged loss would have to be reduced by that amount.

The working capital point

55. This was first raised as a point in Mr Asquith's supplemental skeleton argument. In paragraph 20 of Mr Power's second witness statement he said that he had "*invested £735,000 into the Club from 1 September 2019 to 31 January 2020*" but that Mr Barry had refused to provide any such funding contrary to their agreement. He went on to say that the Club needed approx. £200,000 a month to survive. In paragraph 8 of Mr Asquith's supplemental skeleton argument he said: "*Since that statement, the author is instructed that D has put in a further £300,000, making a total of £1,035,000*." No actual evidence supporting that figure has been provided.

56. Mr Asquith submitted that half of that amount of £1.035 million should have been provided by Mr Barry and therefore £517,500 should be taken off the amount that would otherwise have gone to Mr Barry from the proceeds of sale.

57. As Mr West QC pointed out however there has been no disclosure of financial records evidencing the amounts said to have been contributed by Mr Power. Mr Standing has never disputed his liability to provide 50% of the working capital to the Club but he has been unable to do so since Mr Power removed Mr Crouch as a director and deprived Mr Standing of any access to any financial information in relation to the Club. Up to September 2019, Mr Standing had provided over £6 million to the Club by way of loans. Mr West QC submitted that his obligation to provide loans to the Club was conditional on the provision of financial information and as the condition had not been fulfilled Mr Standing was not under any such obligation.

58. Nevertheless, Mr Power may possibly have a point here but I am totally unable to come to any conclusion on quantum because of the complete lack of supporting evidence adduced by Mr Power. Accordingly, I would not have been able to take it into account in making my "*intelligent estimate*".

Valuation of FTPM

59. Mr Crouch, who is Mr Standing's and FTPM's accountant, performed a rather rough and ready valuation of FTPM in his second witness statement. From FTPM's last annual accounts for the year ended 31 March 2019, he calculated a figure for EBITDA (earnings before interest, tax, depreciation and amortisation) and applied what he said would be a typical multiplier for UK professional football agencies, which he said would be in the range of 6 to 8. He calculated that FTPM was worth £4.4 million with

a 23% interest being valued at £1.012 million. He then applied a minority shareholding discount and concluded that the value of Mr Standing's interest in FTPM would be between £455,000 and £506,000.

60. I have some sympathy with the position adopted by Mr Asquith in relation to this evidence. It was certainly late and it was fairly clear from Mr Power's application and his second witness statement that he was placing no value on the shareholding in FTPM. This evidence could have been adduced much earlier. The content of the evidence is also not particularly helpful as there is no explanation as to where the multiplier figures come from and whether in the current climate they have any real credibility. Also the EBITDA figure is based on accounts that are over a year old and there is no evidence as to FTPM's current financial position. I imagine that the pandemic may well be affecting its value.

61. So, were it relevant, I would not have paid much attention to this evidence. Having said that, the inclusion of the substantial balance sheet and profit figures in Mr Standing's first witness statement (see para. [20] above), indicate a company that does have some value and that could have been the only reason for putting those figures forward at the time. I do not think that I would have concluded that the shareholding in FTPM was worth nothing.

62. I should add that Mr Standing also relied on his shareholding in Swinton. While it is unlikely that he would have succeeded in establishing such shareholding if the cross-undertaking was being enforced, nevertheless some value would have been attributable to this in the light of my finding that the Club would not have been likely to go into administration if the deal with Able did not go ahead.

Conclusion

63. For the reasons set out above, I dismiss Mr Power's application for fortification. He has not been able to satisfy me that there is a sufficient level of risk of loss such as to require fortification. Even if I had found that he was entitled to fortification, I would have been unlikely to conclude, based on the only remaining contentious issues before me, that there is any material shortfall between Mr Standing's available assets and an intelligent estimate of the likely amount of the losses that would be suffered by Mr Power as a result of the injunction.

64. This judgment will be handed down remotely in accordance with the Covid-19 Protocol. Mr Standing is entitled to his costs of defending the application. His solicitors filed a Statement of Costs before the hearing. I do not believe Mr Terrell filed a Statement of Costs. I did not receive submissions in relation to costs but I would be prepared to make a summary assessment of Mr Standing's costs. If the parties are unable to agree this, we can either have a further remote hearing to sort out this and any other consequential matters, or the parties can file short written submissions and I will decide it without an oral hearing.