Neutral Citation Number: [2020] EWHC 1171 (Ch)

Case No: BL - 2020 - 000527

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 a Deputy Judge of the Chancery Division)

- -

Between :

AXIS FOOTBALL INVESTMENTS LIMITED **Claimant**

- and -

(1) LEE POWER
(2) SWINTON REDS 20 LIMITED
(3) SEEBECK 87 LIMITED **Defendants**

- -
- -

RICHARD SLADE QC (instructed by **Peregrine Law Limited**) for the **Claimant**
TOM ASQUITH (instructed by **Terrells LLP**) for the **Defendants**

Hearing date: 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. This is an application by the Claimant, Axis Football Investments Limited (**Axis**) for an interim injunction against the three Defendants, Mr Lee Power (**Mr Power**), Swinton Reds 20 Limited (**Swinton**) and Seebeck 87 Limited (**Seebeck**).

2. I heard this application on 6 May 2020 together with an application in related proceedings: Standing v Power PT-2019-000964 (the **Standing proceedings**). The reason they are related is that both proceedings 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 the Standing proceedings, Mr Power is applying for fortification of the Claimant's (**Mr Standing**) 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 the assets of the Club or the shares in its holding companies without his consent; Mr Standing claims that he beneficially owns 50% of the shares in those holdings companies but this is denied by Mr Power;

    (2) In these proceedings (the **Axis proceedings)**, Axis's application dated 21 April 2020 seeks a similar injunction to that of Mr Standing so as to protect Axis' claimed (and admitted) 15% interest in the Club, through the holding companies' shares.

3. 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. This is my judgment in the Axis proceedings; my judgment in the Standing proceedings has neutral citation number [2020] EWHC 1173 (Ch) and is being handed down at the same time.

4. Until the day of the hearing there had been no response by the Defendants to Axis' application. On 6 May 2020, at about 9.15am, I received a skeleton argument from Mr Tom Asquith on behalf of the Defendants in which he set out the bases for the Defendants' opposition to the relief sought in the application. Just after the hearing started, a short witness statement dated 6 May 2020 from the Defendants' solicitor, Mr Roger Terrell of Terrells LLP, was sent to me. This merely exhibited three documents, which were relied upon by the Defendants in both proceedings, but did not provide any substantive answer to Axis' application.

Background

Corporate Structure

5. Axis is an English company that was incorporated on 5 December 2017 by Mr Clemente Morfuni, its sole shareholder and director. Mr Morfuni incorporated Axis as a special purpose vehicle to acquire an interest in the Club. Mr Morfuni lives in Australia and is the Chief Executive Officer and Executive Chairman of the Axis Services Group which provides construction, maintenance and consultancy services in Australia, New Zealand, Thailand, the USA and the UK. He made a witness statement on 21 April 2020 in support of this application.

6. Mr Morfuni first became involved in the Club in 2015, having been introduced to Mr Power, and the Axis Services Group became a shirt sponsor of the Club. Mr Morfuni was interested in owning or part owning a football club and discussions began in 2017 between him and Mr Power as to the acquisition of a stake in the Club.

7. The assets and business of the Club are owned by a company called Swindon Town Football Company Limited (**STFC**). STFC is wholly owned by Seebeck which is in turn wholly owned by Swinton. Mr Power is the legal owner of all the shares in Swinton following an acquisition of the Club in 2013. In the Standing proceedings, Mr Standing is claiming that Mr Power holds 50% of the shares in Swinton on trust for Mr Standing by virtue of an agreement between him and Mr Power at the time of the acquisition in 2013. Mr Power admits that there was an agreement in 2013 in relation to the acquisition with an investor, but he says that it was not with Mr Standing, but with Mr Gareth Barry, the well-known England international footballer, who is a good friend of Mr Standing. Mr Power denies that either Mr Standing or Mr Barry is the beneficial owner of 50% of the shares in Swinton but he accepts that Mr Barry is entitled to 50% of the proceeds of a sale of the Club and any other "*surpluses*" arising.

The Share Sale Agreement

8. It is not dated, but it is common ground that a Share Sale Agreement was signed in early June 2018 (the **SSA**). The SSA was between Mr Power as the "*Seller*", Axis as the "*Buyer*" and Swinton and Seebeck as further parties. By the SSA, Axis acquired the "*Nominated Shares*" for a total consideration of £1.1 million.

9. There was some confusion during the hearing as to the exact percentage of the Club that was being acquired by Axis. The "*Nominated Shares*" were defined in the SSA as:

> "(i) Fifteen (15) £1 ordinary Share [sic] in [Swinton];
>
> (ii) Fifteen (15) £1 ordinary Shares in [Seebeck]."

Both Swinton and Seebeck have an issued share capital of £100 divided into 100 ordinary shares of £1 each. Therefore, under the SSA, Axis was acquiring 15% of each of Swinton and Seebeck. That would mean that Axis would own 27.75% of the Club (15% of 85% plus 15%) rather than the 15% that appears to have been intended. As will be seen, while a claim to 15% of both Swinton and Seebeck is made in the Particulars of Claim, it is fairly clear that both parties were proceeding on the basis that Axis had acquired only 15% of the Club.

10. In both the Recitals to the SSA and in clause 6, Mr Power warranted that he was the beneficial owner of all the shares in Swinton. There was no mention of Mr Standing or Mr Barry or any interest they might have in the ownership of Swinton. It is, of course, Mr Power's case that he is the beneficial owner of all those shares.

11. Payment for the Nominated Shares was to be in instalments as set out in clause 4 of the SSA. Axis had already paid some instalment payments to Mr Power in contemplation of the SSA being executed and these counted towards the overall consideration of £1.1 million. In sub-clause 2(5) of the SSA the following is provided for:

> "(5) Upon payment of the final instalment of payments referred to in clause 4, the Nominated Shares will be transferred to [Axis] by [Mr Power] by way of delivery of a Share Transfer Form duly executed by him in registrable form for both Seebeck and [Swinton] to [Axis].

This was repeated in sub-clause 4(4):

> "(4) Upon receipt of the final monthly instalment referred to in subclauses 4(2) [Mr Power] will provide [Axis] with an executed Share Transfer in registrable form to effect the transfer and registration of the Nominated Shares from [Mr Power] to [Axis]."

This was repeated again in sub-clauses 5(4) and (5):

> "(4) On receipt of the final instalment due under the terms of this Agreement, [Mr Power] will do all things necessary to ensure that the title to the Nominated Shares in [sic] transferred to an registered to [Axis].
>
> (5) Immediately upon payment of the final instalment for the Nominated Shares, [Mr Power] will provide [Axis] with an executed Share Transfer Form in registrable form for the Nominated Shares."

12. There is no dispute that by the end of December 2018, the full consideration of £1.1 million had been provided by Axis in accordance with the SSA. The SSA could not be clearer on Mr Power's obligation to transfer the Nominated Shares to Axis and for Axis to be registered as a member, yet this has still not happened. Unsurprisingly, this is the main relief sought in the Axis proceedings.

13. It is pertinent to point out, because of one of Mr Asquith's arguments, that the SSA provides for certain things to happen upon Axis being registered as a member of Swinton and Seebeck. Sub-clause 4(5) states as follows:

> "(5) Upon registration of the Share Transfer form referred to in sub clause 4(4) of this Agreement:
>
> a. [Axis] will acquire fifteen per cent (15%) of the issued shares in [Swinton] and fifteen per cent (15%) in [Seebeck];
>
> b. [Mr Power] is released from any and all obligations under the Guarantee and Indemnity in clause 13 of this Agreement"

And sub-clause 5(3) provides:

"(3) Upon

a. The payment of the final instalment,

b. Payment of the Consideration and

c. Registration of the Nominated Shares by [Axis][1]

The agency of [Mr Power] referred to in sub clause (2) above ceases."

14. In clause 6 of the SSA there were various warranties from Mr Power, Swinton and Seebeck to Axis. In sub-clause (viii), the following was one of the warranties:

"(viii) None of the provisions of this Agreement nor the indemnities, warranties or covenants will merge on Completion but will continue afterwards for the benefit of [Axis] for so long as may be necessary for the purpose of giving effect to the terms of this Agreement."

15. Clause 7 of the SSA obliged Mr Power to ensure that Swinton, Seebeck and STFC refrained from certain conduct without the prior written consent of all "*Shareholders*". This included matters such as ceasing to be a private company, amending their articles of association and altering rights attaching to shares. Two relevant matters for the purposes of the injunction application are the following:

"(d) sell or otherwise dispose of the whole or any part of undertaking, property, assets, or any interest therein or contract to do so whether or not for valuable consideration;…

(g) do, permit or suffer to be done any act or thing whereby the Company may be wound-up, or enter into any compromise or arrangement under the Insolvency Act 1986."

16. Clause 8 contained a covenant by Axis:

"8. **TRANSFER OF SHARES**

[Axis] shall not sell, transfer, assign, pledge, charge or otherwise dispose of any share or any interest in any share in the Companies [without] the prior written consent of [Mr Power]."

17. Finally, clause 13 which was referred to in sub-clause 4(5) was as follows:

"13. **TERMINATION BY FRUSTRATION**

The parties acknowledge and agree that, after payment of the Consideration in full, if the Nominated Shares cannot be transferred to [Axis] for any reason beyond the control of the parties within 3 months of making the final monthly instalment (or such further time as may be agreed between the parties in writing), then the

[1] This must be a mistake for Mr Power

> Agreement will terminate and [Mr Power] will, upon written notice from [Axis], repay [Axis] the total amount of Consideration within 30 days of the written notice."

Restructuring of and attempts to complete the SSA

18. In early 2019, Mr Power explained to Mr Morfuni that he had a personal tax problem in relation to the consideration agreed in the SSA. He had been advised that he potentially faced having to pay substantial capital gains tax on a sale for value of the shares in Swinton. At a meeting on 4 February 2019, Mr Power asked for the consideration under the SSA to be changed to £1 and that the balance of the instalments paid by Axis be treated as loans to STFC. Axis had already started lending money to STFC pursuant to an oral agreement that Axis would contribute 15% of the Club's ongoing working capital requirements.

19. Later in February 2019, Axis' solicitors at the time, Glovers, prepared a revised share sale agreement for discussion purposes with £1 as the stated consideration for the shares. Glovers also drafted a loan facility agreement for £1.1 million to be entered into between Axis and STFC. These documents were only ever drafts and were subject to contract. Axis took its own professional tax advice and certain issues were highlighted. As a result, the two draft agreements were never entered into by Axis and its case is that the SSA remains in full force and effect.

20. In June 2019, Mr Morfuni received approval from the English Football League that he was a "*fit and proper person*" to be a football club owner. He asked Mr Power to notify the English Football League that Axis owned 15% of the Club as a result of the share purchase.

21. Mr Power responded by asking Mr Morfuni, in an email of 27 June 2019, to sign the "*new share agreement we all agreed*". There was then a testy exchange of texts between the two of them in which Mr Power was insisting that the new agreement with £1 as the consideration for the shares should be signed and Mr Morfuni responding to say that the *"£1.1 million is for 15% shareholding and not investment*".

22. On 9 July 2019, Glovers, on behalf of Axis, sent a letter to Mr Power denying that there had been any restructuring of the SSA. The letter did, rather strangely, go on to refer to clause 13 of the SSA (see above) and said that Axis would give Mr Power "*the benefit of the doubt*" that the clause applied and that therefore the consideration of £1.1 million would be repayable by Mr Power. They demanded such repayment within 30 days.

23. On 5 August 2019, Mr Power's solicitors, Terrells LLP, responded to that letter by effectively rejecting the claim to repayment under clause 13 and asserting that the share transfer should proceed. In the letter, Terrells stated:

> "Our client will issue a Share Certificate in respect of the payment made by your client but there needs to be further discussion regarding the consideration to make the transaction tax efficient for both parties."

24. On 10 August 2019, Glovers emailed Terrells following a meeting that had taken place the day before to confirm that it had been agreed that Mr Power "*would arrange for the appropriate shares to be transferred to ensure that [Axis] acquired 15% of the shares in [STFC] by next Friday, 16 August 2019*." However, on or about 15 August 2019, Mr Power only managed to procure that a Form CS01 Confirmation Statement was filed at Companies House stating that Axis held 15% of the shares in Swinton. He did not provide a duly executed Stock Transfer Form to transfer legal title to the shares to Axis.

25. Following some chasing by Glovers for the necessary documentation to effect the transfer of the shares, Mr Power messaged Mr Morfuni on 23 September 2019 to say that Mr Terrell was away at the moment but that "*ur shares have been registered and confirmed the lawyers need 2 agree tax position as well*".

26. On 3 October 2019, Terrells sent by post and emailed Glovers a copy of a Stock Transfer Form purporting to be signed by Mr Power and transferring 15 ordinary shares in Swinton to "*Axis Sports Investments Ltd*" for a consideration of £1. This was the wrong transferee and, so far as Axis was concerned, the wrong consideration. Glovers have said that they never received the original of Terrells' letter and so the original signed stock transfer form has not been seen.

27. Clearly this was inadequate for Axis to be registered as a member of Swinton and to date there has been no proper registrable Stock Transfer Form provided by Mr Power and no Share Certificate issued in respect of Axis' admitted 15% shareholding in Swinton.

Mr Power's attempts to sell the Club

28. On 21 September 2019, Mr Morfuni had discovered from an article in the local newspaper, the Swindon Advertiser, that a US company, Able Company Swindon LLC (**Able**), had made an offer to buy the Club from Mr Power. Mr Morfuni was very concerned about this because Mr Power had not mentioned anything to him about being in any negotiations to sell the Club. Furthermore, he considered that under sub-clause 7(d) of the SSA, Axis' written consent would be needed for any such sale.

29. Mr Morfuni texted Mr Power about this and Mr Power responded by saying he had had no offer for the Club "*nor have I put club on market*". However, Mr Morfuni obtained a copy of the Letter of Intent from Able dated 11 September 2019 from the Swindon Advertiser. The Letter of Intent features large in the Standing proceedings, to which reference should be made. Able was offering to purchase the assets of the Club for £7.5 million. Extraordinarily, Mr Power denied in his Defence in the Standing proceedings that he had seen the Letter of Intent at the time and that it was only during the course of the proceedings that he had seen a copy of it.

30. Mr Morfuni was concerned about this turn of events and the failure to have got Axis' shares registered. He decided to change solicitors to Peregrine Law and he instructed them to write a letter before action to Mr Power on 23 September 2019. That letter sought immediate delivery up of a duly executed Stock Transfer Form, a Share Certificate and a copy of the amended Register of Members of Swinton.

The Statutory Demands

31. Having still not received the documentation transferring the shares, Axis changed tack again and on 22 October 2019 demanded from STFC the total amount paid by it to STFC which was £1,367,500. On 30 October 2019, Peregrine Law on behalf of Axis issued statutory demands in that amount to STFC.

32. Mr Richard Slade QC on behalf of Axis acknowledges that this was a strange step to have taken and it was not correct. It was done because of Mr Power's insistence that the consideration for the shares was £1 and on the premise that the rest of the monies provided by Axis were therefore loans to STFC. Nevertheless, it led to an application by STFC to prevent the presentation of a winding up petition against it and in the course of that application Mr Power made a witness statement dated 14 November 2019 in which he stated in para. 24:

> "…So that the court has a clear picture, the £1,255,000 which was paid to my solicitors can be split into two different types of payment: £1.1million relates to the payment for the shares and the remaining £155,000 relates to payments towards Swindon Town's losses."

33. Axis has since withdrawn the statutory demand in relation to the £1.1 million paid as consideration for the shares, as Mr Power admitted in the statement. Mr Morfuni recognised in his witness statement in these proceedings that the statutory demand in respect of the share consideration was "*misconceived*" and he has apologised for some inaccurate statements that he made in the course of dealing with STFC's application. While that is unfortunate, it has helped to clarify Mr Power's position: namely that he accepts that £1.1 million was paid for the shares in Swinton.

The issue of these proceedings and the application

34. On 22 January 2020, Peregrine Law sent a Letter before Action to Terrells claiming that Axis was entitled to be registered as a member of Swinton as to 15% and demanding that Mr Power provide a duly signed Stock Transfer Form, Share Certificate, copy of the Register of Members and an undertaking to comply with the terms of the SSA. Despite the terms of the SSA, Peregrine Law were only asserting that Axis was entitled to 15% of Swinton and there was no reference to the 15% of Seebeck that it was entitled to under the SSA. There was no response at all to the Letter before Action.

35. In the middle of February 2020, Peregrine Law was told by the solicitors of Mr Standing that Mr Terrell had told them that Mr Power was still pursuing his interest in selling the Club to Able even though that had apparently stalled at the end of 2019, probably as a result of the injunction obtained by Mr Standing. Mr Morfuni had known of Mr Standing's claim to a 50% interest in the Club from around August 2019. Mr Morfuni met Mr Standing and a Mr Zavier Austin on or around 19 February 2020 and he was told that Mr Power was also apparently having other discussions regarding the sale of the Club with third parties unconnected to Able. Mr Morfuni had also heard from others at the Club that a consortium from the Middle East had been in discussions with Mr Power in relation to the sale of the Club.

36. At the end of February 2020, Mr Ben Walmsley of Peregrine Law spoke with Mr Standing's solicitors and they told him that Mr Terrell had said that a sale to Able or another third party may proceed with some urgency and could be completed by April

2020. Mr Power apparently considered that Axis' 15% shareholding was no obstacle to any such sale and that he would "*take care*" of any interest Axis had.

37. The potential imminence of a sale was of serious concern to Mr Morfuni, despite Mr Power's insistence to him that he had not been pursuing a sale of the Club. Furthermore, I imagine that the refusal of Mr Power to register Axis' 15% shareholding in Swinton was looking like it was deliberately done in order to facilitate a potential sale and to avoid having to involve Axis.

38. On 18 March 2020, Axis issued the Claim Form with Particulars of Claim attached. The Defendants acknowledged service and sought an extension of time for the Defence, which has since been granted to 19 May 2020.

39. On 23 March 2020, Peregrine Law sent a letter on behalf of Axis to the Defendants seeking undertakings in the form of the injunction now sought by the application before me because of their concerns about Mr Power's continuing attempts to sell the Club or its assets without involving or seeking the consent of Axis. No such undertakings were forthcoming; indeed, there was no response at all to this letter. Accordingly, the application was issued on 21 April 2020.

Issues on the Application

40. Basing its application on the *American Cyanamid* principles, Axis says that there is clearly a serious issue to be tried as to whether the Nominated Shares should have been transferred to it and for it to have been registered as a shareholder of Swinton (and possibly Seebeck too). On the balance of convenience, Axis says that unless the relief is granted, it is likely to be cheated of its existing and future contractual rights under the SSA. Despite Mr Power's acceptance that Axis owns 15% of Swinton he has refused to complete the transfer of those shares and to have Axis registered as a shareholder. It appears that Mr Power is intent on using his own failure to perfect Axis' title to the shares to avoid engaging Axis in any potential sale of the Club and thereby ride roughshod over Axis' contractual rights to give or withhold consent to such a sale.

41. Mr Asquith on behalf of the Defendants submitted in his skeleton argument and orally that there were six points of contention which should be taken into account in considering the application. They were as follows:

    (1) Whether the SSA or the Articles of Association should regulate the relationship between the parties;
    (2) Whether damages would be an adequate remedy;
    (3) Whether Axis actually needs an injunction;
    (4) Whether the delay in applying for the injunction should debar Axis;
    (5) Whether Axis should have an injunction given its changing case; and
    (6) Whether Axis has offered an adequate cross-undertaking.

I will take each in turn.

(1) <u>SSA or the Articles of Association</u>

42. Mr Asquith accepted that Axis has a serious issue to be tried on the substantive claim, namely that it should be provided with a duly executed Stock Transfer Form, Share Certificate and to be registered as a shareholder in Swinton. However, he did not accept that there is a serious issue to be tried in relation to whether Axis should have an injunction to protect its contractual rights. His argument was, I think, that the SSA has effectively come to an end and that the only contractual rights that Axis now has are under Swinton's articles of association. (These were exhibited to Mr Terrell's witness statement filed during the hearing.) He said that at the injunction stage the Court should assume that that is correct.

43. While I can see that there is some slightly strange wording in the SSA, I find it difficult to understand Mr Asquith's point for the following reasons:

    (a) Sub-clauses 4(5), 5(3), 6(viii) and 8 of the SSA, all quoted above, clearly contemplate there being continuing obligations under the SSA after the shares have been transferred to Axis;

    (b) Clause 7, containing the relevant sub-clauses (d) and (g), requires Mr Power to obtain the "*prior written consent of all Shareholders*"; "*Shareholders*" is not a defined term but as Mr Power and Axis are the only shareholders of Swinton contemplated by the SSA, this must be a reference effectively to a requirement to obtain the consent of Axis;

    (c) There is nothing in the SSA to suggest that clause 7 expires on the transfer of the shares to Axis;

    (d) Until Axis is registered in the Register of Members, it is not a member of Swinton (see s.112 of the Companies Act 2006); the articles are only binding on and between the company and members (see s.33 of the Companies Act 2006); therefore, at present Axis is not able to rely on the articles;

    (e) Mr Asquith said that the pre-emption provisions in regulations 23.7 and 23.8 of the articles regulate the parties' rights in the context of a potential sale of Swinton's shares; I do not see why, even if Axis was able to rely on the articles, there could not also be a binding shareholders' agreement that any sale requires the prior written consent of Axis;

    (f) Mr Power seems to want it both ways: on the one hand he denies Axis its contractual right to be registered as a shareholder; and on the other hand he says Axis should be regarded as a shareholder for the purposes of articles and so as to bring to an end the SSA.

44. In short and certainly at this stage for the purposes of considering Axis' application for an injunction, I consider that it has a good arguable case that the SSA continues to apply to the relationship between the parties and that it requires the Defendants to obtain Axis' prior consent to any sale of the Club. Even though sub-clause 7(d) does not refer to a share sale, the shares in Seebeck are assets of Swinton, and the shares in STFC are assets of Seebeck.

(2) <u>Damages an adequate remedy</u>

45. Mr Asquith simply submitted that there was nothing in Axis' evidence or skeleton argument that suggested that damages would not be an adequate remedy.

46. Mr Slade QC nevertheless submitted that the nature of the potential sale is very obscure indeed, in particular whether it is an asset or share sale. The Defendants' conduct has been shown to be extremely evasive over both complying with their obligations under the SSA and registering Axis as a shareholder and also in terms of engaging Axis in any negotiations for a sale and seeking its consent. Accordingly, so Mr Slade QC submitted, it would be difficult to compute the damage suffered by Axis from Mr Power's failure to seek its consent. He also submitted that both Mr Power and Swinton and Seebeck may not be good for the money on any damages claim, given that Mr Power has said that he cannot continue funding the Club's losses.

47. Mr Asquith responded by saying that there is no reason for thinking that the Defendants would not be good for the money and that would be particularly so if a sale of the Club did actually go through. He also submitted that the Court frequently has to assess difficult damages claims but that did not mean that damages were an inadequate remedy.

48. In my view this is an aspect of the balance of convenience. Normally it is considered in the context of whether damages would be an adequate remedy for the claimant at trial, not whether damages in lieu of an injunction would be an adequate interim remedy. It is fairly obvious that a claim to shares in the ultimate holding company of a football club is of a such a special nature that damages for failure to have those shares transferred could not be a suitable remedy. Axis does not seek damages, only that the share transfer be perfected by registration. Therefore, damages are not an adequate remedy in this situation.

49. Insofar as it is relevant to consider whether damages are an adequate alternative to an injunction that seeks to protect Axis' contractual rights, I consider that it would be extremely difficult to calculate the loss suffered by Axis from Mr Power's failure to seek its consent to a sale. If Mr Power purported to sell the Club's assets without Axis' consent, Axis will be a shareholder in a very different company and it is not obvious how its loss could be assessed. I therefore reject this argument.

(3) The need for an injunction

50. Mr Asquith submitted that there is no need for an injunction because of three matters:

(a) Mr Power and his solicitors, Terrells LLP, are well aware that they are obliged under the articles to inform Axis of any potential sale of the shares;

(b) that any potential purchaser can see from the Confirmation Statement filed at Companies House that Axis owns 15% of the shares in Swinton;

(c) there is already an injunction in place in favour of Mr Standing in the Standing proceedings preventing any sale of the Club or its assets and Axis could be informed if there is any danger of that injunction being discharged.

51. Mr Slade QC submitted that there was every chance that Mr Power would proceed with some form of sale of the Club or its assets. Mr Terrell had exhibited a letter from Able[2] dated 5 May 2020 which was headed "SUBJECT TO CONTRACT" and 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."

While there is no indication of price or the terms of any such transaction, it shows that there is still the possibility of doing some sort of deal with Able. Furthermore, the Covid-19 pandemic will be having a serious impact on football clubs, particularly those in the lower leagues, and that may well make owners more desperate to sell their clubs and to sell at deflated prices.

52. Mr Slade QC submitted that the way Mr Power has behaved towards Axis (and indeed Mr Standing) shows that he would be likely just to press ahead with a sale without reference to it and then present a done deal as a *fait accompli*, thus depriving Axis of its right to be properly informed as to the transaction and to be in a position of being able to decide whether to consent to the deal or not.

53. From the evidence I have seen, I agree with Mr Slade QC. I would have no confidence that, absent an injunction requiring him to do so, Mr Power would actually keep Axis informed as to any proposed deal and would seek its consent. It would not be right to expect that the injunction in the Standing proceedings would adequately protect Axis, as Mr Power only needs to get the consent of Mr Standing under that injunction and it could be discharged at short notice without Axis knowing anything about it. The fact that any purchaser could see an indication of Axis' shareholding from records filed with Companies House would not prevent Mr Power from telling such purchaser that he has full power and authority to deal with 100% of the shares in Swinton. There would be no guarantee that any such purchaser would seek to engage directly with Axis in such circumstances.

54. I therefore consider that Axis has demonstrated a real need for an injunction.

(4) Delay

55. Mr Asquith submitted that Mr Morfuni believed that there was an impending sale to Able in September 2019 yet he did not seek an injunction for over 6 months.

56. While it is right to say that Mr Morfuni did find out about a potential sale in September 2019, he was assured at that time by Mr Power that there were no such discussions going on. Mr Morfuni was clearly focused on getting Axis' 15% shareholding properly registered and enforceable and very shortly thereafter Axis went down the route, presumably on advice, of issuing the statutory demands. When they got things back on

[2] In fact it was from a company called AC Sports, LLC, but it was signed by the same person who signed the Letter of Intent dated 11 September 2019, Mr Keravuori.

track in January 2020, a letter before action was issued and Mr Morfuni found out in mid-February 2020 that a sale of the Club was still very much on Mr Power's agenda. The proceedings were issued in March 2020 together with a request for undertakings and following no response whatsoever from Mr Power or Terrells, the application was issued.

57. There may have been a sense on Axis' part that it was partly protected by the injunction that Mr Standing had obtained. It is also unfortunate that it took a wrong turn by pursuing the statutory demand course. Nevertheless, I do not consider that in the circumstances there has been material delay in making the application and I understand how the new information concerning the continuing threat of a potential sale while Axis' 15% shareholding had not been registered would have been alarming to Axis.

58. I therefore reject the argument on delay.

(5) Axis' changing case

59. As explained above, Mr Morfuni has recognised that it was a mistake to have pursued the statutory demands but to a certain extent this was induced by Mr Power's constantly changing case. He signed the SSA, then wanted to change the consideration for the shares to £1; in response to a claim under clause 13 of the SSA, Mr Power said he wanted to transfer the shares to Axis; and in response to the statutory demands, he said in his witness statement that £1.1 million had been paid as consideration for the shares. There has been shifting sands on both sides and I do not think it sits well for the Defendants to be submitting that a changing case should deprive Axis of an injunction if it is otherwise entitled to one.

(6) Adequacy of the cross-undertaking

60. In the Standing proceedings, I have dismissed Mr Power's application for fortification largely on the basis that there is insufficient evidence of a real likelihood that a sale of the Club to Able at a price of £7.5 million would have gone through absent the injunction. Furthermore, the injunction, like the one sought by Axis, does not prevent a sale; it only requires the consent of Mr Standing or Axis to such a sale.

61. In this case, as submitted by Mr Slade QC, there are now no circumstances under which Axis will not obtain its 15% shareholding as this has been admitted by the Defendants. It is only a matter of time. I might add that a way of avoiding the injunction might be by the Defendants agreeing to the relief sought in the claim and registering Axis' 15% shareholding in Swinton. But for whatever reason, Mr Power is refusing to do this and therefore it is necessary in my view for Axis' position to be secured in the meantime. Given the terms of the injunction sought and the inevitability of Axis being registered as a shareholder, it is difficult to conceive of any situation under which the Defendants would be able to enforce the cross-undertaking. The only "*intelligent estimate of the likely amount of any loss*" that could be suffered by the Defendants at this stage would be nil.

62. As Mr Slade QC also pointed out, if for some reason Axis does not get registered as a shareholder, the £1.1 million will be repayable by the Defendants and this would amount to some degree of security for Axis' cross-undertaking. He also submitted that the Axis Services Group is a very substantial group of companies worth over £200

million, with some £3 million of assets in the UK. However, I do not take that into account as there is no evidence of that before me and Axis itself was a special purpose vehicle with no other assets than the shares, or right to be registered as a shareholder of Swinton.

63. In the circumstances, I do not consider that there is inadequate fortification of Axis' cross undertaking.

Terms of Order

64. For the reasons set out above, I am satisfied that there is a serious issue to be tried and that the balance of convenience lies in favour of granting an injunction to Axis preventing a sale of the shares or assets of the Club without Axis' prior written consent. Accordingly, I grant that injunction.

65. Turning to the draft Terms of Order attached to the application notice, Mr Asquith objected to paragraph (2) which requires notification to any potential purchaser of the shares or assets of the Club of Axis' 15% interest. He submitted that Axis' interest is clear from any search at Companies House where the Confirmation Statement had been filed. Whether that would be clear or not, I do not consider that Axis would be adequately protected by that, particularly bearing in mind Mr Power's suspicious failure to register the shareholding and to engage Axis in any of the discussions concerning a potential sale of the Club. Accordingly, I will make the Order set out in paragraph (2) of the draft Terms of Order.

66. Mr Slade QC, in his skeleton argument, suggested a new paragraph (3) to the draft Terms of Order in the following terms:

> "(3) Until trial or further Order, without the prior written consent of Axis none of Mr Power, [Swinton] nor Seebeck shall do, permit or suffer to be done any act whereby [Swinton], Seebeck or [STFC] may be wound up, or enter into any compromise or arrangement under the Insolvency Act 1986."

This mirrors the wording in sub-clause 7(g) of the SSA and is to prevent Mr Power carrying through with his threat to put the Club into administration if the deal with Able is unable to go ahead.

67. Mr Asquith submitted that this wording is too broad and it could potentially be a breach of such order for Mr Power not to oppose a creditor's winding up petition even where there are no good grounds for doing so. I agree with Mr Asquith that the wording needs to be tightened up, as I think Mr Slade QC accepted, so as only to cover positive steps being taken by the Defendants to put those companies into some form of insolvency procedure. In short, I am prepared to make that Order but in a more limited form of restricting the Defendants from taking active steps to put Swinton, Seebeck and/or STFC into an insolvency procedure.

68. There is no dispute that the costs of this application should be reserved to the trial judge.

69. Accordingly, I make the Order in the amended form set out above. Mr Asquith suggested that there should be a return date at which the Defendants could apply to discharge the injunction. However, this was an *inter partes* hearing and it is appropriate to make the injunction "*until trial or further order in the meantime*".

70. This judgment will be handed down remotely under the Covid-19 Protocol and it should be unnecessary for there to be a further hearing. I would hope that the parties can agree a form of Order in the light of what I have said above. If for any reason that is not possible then a hearing to deal with any consequential matters can be arranged through the usual channels.