Neutral Citation Number: [2018] EWHC 1663 (Ch)

Case No: BL-2018-000281

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

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

Date: 29/06/2018

Before :

THE HONOURABLE MR. JUSTICE FANCOURT

- -

Between :

UTB, LLC	**Claimant**
- and -	
Sheffield United Limited	**Defendant**

- -
- -

Andreas Gledhill QC and Tom Mountford (instructed by **Jones Day**) for the **Claimant**
Paul Downes QC and Emily Saunderson (instructed by **Shepherd and Wedderburn LLP**) for the **Defendant**

Hearing dates: 20-21 June 2018

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Approved Judgment

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

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THE HONOURABLE MR. JUSTICE FANCOURT

Mr. Justice Fancourt:

1. This is my judgment on an application for interim injunctive relief made by Sheffield United Ltd ("Sheffield") against UTB LLC ("UTB"). Sheffield and UTB each own (or, in the case of UTB, own or control) 50% of the shares in Blades Leisure Ltd ("Blades"). Blades owns all the shares in The Sheffield United Football Club Ltd ("FC"), which in turn runs the football club of that name.

2. Sheffield is a subsidiary company in the Scarborough Group of Companies, owned and controlled by Kevin McCabe and his family. Sheffield owns the football ground at Bramall Lane and the football club's academy ("the Properties"). Mr McCabe has long been associated with the football club and invested much money in it.

3. On 30 August 2013, Mr McCabe and his companies reached agreement with Prince Abdullah Bin Mosaad Bin Abdulaziz Al Saud ("Prince Abdullah") for him, through UTB, to invest £10 million in the football club, by subscribing for 50% of the shares in Blades at that premium.

4. The agreement is in the form of an Investment and Shareholders' Agreement ("the ISA"). Voting and board control of Blades and its subsidiary, FC, is evenly shared between the two shareholders. Neither has a casting vote. Clause 10 of the ISA specifically provides for what happens if, on any important business matter, there is deadlock in the affairs of Blades. Failing reasonable attempts in good faith by the principals to resolve the matter, either shareholder may serve notice on the other offering to buy out the other's shareholding at a specified price. The offeree may either accept and sell or serve a counternotice to buy the offeror's shareholding at the same price, in which case the offeror is bound to sell.

5. Clause 6.1 of the ISA recognises that Blades may require further finance to fund its and FC's projected cash requirements. The shareholders are given the right, once in any six-month period, to subscribe for extra shares at a premium calculated on a basis that effectively valued Blades at about £20 million. That right is subject to pre-emption provisions giving the other shareholder the right to subscribe for an equal number of new shares.

6. By clause 9 of the ISA, Blades undertook to each of its shareholders, and the shareholders agreed so far as they could, to procure that Blades did certain things. These included, at clause 9.1.5 that Blades and its subsidiaries should be properly managed and comply with the law and the regulations of the Football Association and the Football League, and at clause 9.1.10 that none of the matters listed in schedule 4 to the ISA should occur without the consent of a majority (in some cases a super majority) of shareholder votes. These included the making of any loan and the borrowing of any money in excess of £25,000 in aggregate.

7. Clause 9.1.12 of the ISA provides that if any shareholder acquires more than 75% of the entire issued share capital of Blades, FC is obliged to exercise its property call options ("the FC Options"). The important one of these entitles FC to purchase from Sheffield the Properties at their market value with vacant possession. The Properties are in fact let to FC on long leases at a reduced rent, so exercise of the options would confer a very substantial financial benefit on Sheffield.

8. Clause 11 of the ISA gives each shareholder the right, during specified option periods, to make an offer for the other shareholder's shares, in similar terms and with the same consequences as under the clause 10 provisions.

9. In recent years, the fortunes of the football club have improved, after some bad years previously. It was promoted last season to the Championship Division of the Football League

and finished its first season there in a creditable 10th place. It has ambitions to regain its place in the Premier League, which – it goes without saying – would make an enormous difference to its profitability. As it stands, FC is consistently loss making and depends for its survival on financial subsidy from Blades. Blades in turn depends on large contributions from its shareholders.

10. By the end of 2017, relations between Prince Abdullah and Mr McCabe had deteriorated to the point that Mr McCabe wanted to put an end to the joint venture basis on which Blades operated and was even willing to give up his involvement in the football club. Sheffield therefore served notice on UTB on 29 December 2017 pursuant to clause 11 of the ISA, offering to buy UTB's shares for £5m. Mr McCabe knew that that was a low price. He expected UTB to serve a counternotice to buy Sheffield's shareholding at the same price. The low price for its own shares would be compensated, Mr McCabe believed, by the fact that UTB and Sheffield would thereupon become bound to cause FC to exercise the FC Options, thereby realising the full market value of the Properties (estimated to be about £20 million) for Sheffield.

11. As Mr McCabe expected, UTB did indeed serve a counternotice, but before it did so it transferred 80% of its own shareholding to another corporate vehicle, UTB 2018, LLP. As a result, when the counternotice was served, UTB claimed that it did not then own more than 75% of Blades' shares and so the FC Options did not have to be exercised. Indeed, UTB took steps to ensure that FC did not purport to exercise them. If effective, this manoeuvre would mean that UTB was entitled to purchase all Sheffield's shares at a low price and retain the benefit of the underrented long leases of the Properties, with Sheffield not being able to realise their full value.

12. This unsurprisingly caused consternation and considerable upset for the McCabes and Sheffield. They felt that they had been tricked out of their entitlement. The parties fell out badly.

13. UTB issued proceedings claiming specific performance of the share sale at £5m and a declaration that the FC Options were not exercisable. Sheffield defended that claim and counterclaimed a declaration that UTB was obliged to cause FC to exercise the FC options. Sheffield also brought an additional claim against UTB, Prince Abdullah and others for damages for lawful or unlawful means conspiracy. These would represent the loss of value of the Properties in the event that UTB's claim for its relief succeeded. More recently, Sheffield has issued a petition under section 994 of the Companies Act 2006, seeking relief against UTB, UTB 2018, Prince Abdullah and others for unfairly prejudicial conduct. The specific relief sought is an order that the option notice and the counternotice are to be treated as void and an order that UTB (and UTB 2018) sell their shares to Sheffield at a fair price.

14. Sheffield's stance in the litigation viewed as a whole was clarified by Mr Downes QC at the hearing. He confirmed that Sheffield seeks to defeat UTB's claim to its shares, and seeks to acquire UTB's shares, with the result that Sheffield either remains a 50% shareholder or takes full control of Blades. As a fall-back position, if UTB's claim for specific performance succeeds and the section 994 petition fails, Sheffield seeks to enforce the FC Options. As a final fall-back position it claims damages.

15. All the proceedings are hotly contested. It is therefore impossible to say, until trial of the various claims, whether UTB or Sheffield will emerge as the person in control of Blades and so in control of the football club, if either does. In the meantime, FC has a need for continuing financial support. The professional business managers of the football club (who are accepted to be independent of both sides in the litigation) have produced a cash flow that, on certain

assumptions about what may happen this summer, indicates that up to £10 million is needed by the club between 1 July 2018 and January 2019 to keep it afloat. That £10 million however includes a substantial amount, over £7 million, to fund activity in the current transfer window (i.e. the purchase of new players and the additional wage costs resulting from it). It allows only £600,000 as income from player sales. Both sides accept that there is one player sale that is likely to happen that could itself fund the cash requirement for the forthcoming season if a significant part of the fee is paid up front rather than deferred.

16. There is disagreement as to whether such expenditure on new players is necessary or discretionary. Sheffield says that in real and practical terms it is necessary, to maintain and improve the standards of the football club and its prospects of further promotion and to honour an assurance previously given to the club's manager that an additional £2 million would be available in the transfer window to improve the squad. UTB says that in purely financial terms it is not necessary and that in any event the cash flow properly analysed does not show that the injection of further capital is needed to fund such expenditure.

17. Against that background, Sheffield's application is (as now effectively amended and pursued before me) for an order that UTB lend Blades £1.25m interest free (to be matched by an identical loan from Sheffield), such loans not to be repaid without court order. What is contemplated is that the trial judge, depending on decisions on the underlying disputes, will have jurisdiction to order repayment of either side's loan, as appropriate in the light of those decisions, by adjusting the sum representing the sale price of the shares. When an order for an expedited hearing was applied for the application was for Sheffield to lend up to £10 million to Blades to fund FC; that repayment of that loan would be subject to Court order if Sheffield lost its 50% shareholding in Blades; that UTB would procure and cooperate in the appointment of a further director of Blades to represent Sheffield; or for such other relief as the Court deemed fit to guarantee Blades' solvency for the period up to 30 June 2019. But now Sheffield now seeks to deal with only the initial requirement for a further £2.5m capital injection by 1 July 2018. It was recognised that further substantial sums may flow into FC as a result of the sale of existing players during the transfer window, and it may be that the result of this is that no further capital is required during the 2018-19 season. But these matters are uncertain.

18. The application is an unusual one, in that it seeks to compel a shareholder of a company to lend money to the company on an interim basis, when it is acknowledged that the shareholder has no obligation to do so. Despite that, the fact that the application is contested by UTB is more than a little strange, for these reasons. First, it is accepted that each of the parties can afford to make the loan. Second, each of the parties professes to wish to acquire the other's shares in Blades (at substantial cost) and thereby obtain control of the football club. An even-handed injection of further monies, in accordance with the pre-existing 50/50 shares and subject to later adjustment in favour of the losing party at trial, might be thought to be a relatively simple and harmless way of funding the club on a temporary basis, pending the outcome of the trial. Third, and most remarkably, UTB has made an open offer to fund a further £1.25 million now, on the basis that each party gives that sum to Blades on a non-recoverable basis. A potentially recoverable loan of £1.25m is, on the face of it, more advantageous to UTB than an outright donation of that sum, yet UTB is not willing to agree such a loan. The practical difference is of course that, on UTB's proposal, the winner in the litigation does better, since the loser will have contributed another £1.25m that it cannot recover.

19. When asked why UTB was willing to make a donation of £1.25m, matched by Sheffield, but was not willing to make a loan of £1.25m, matched by Sheffield, Mr Gledhill QC drew

my attention to a letter from Jones Day on behalf of UTB to Shepherd & Wedderburn LLP on behalf of Sheffield dated 25 May 2018, which states:

> "The benefits of this approach are that:
>
> 1. It is straightforward – it does not require any subsequent supervision or other interference by the Court in the affairs of the club;
>
> 2. It does not encumber the club (or Blades) with debt or otherwise adversely impact on the club's (or Blades') financial position;
>
> 3. It is neutral in its approach – it applies equally to both sides; and
>
> 4. It is consistent with previous practice in terms of investments in the club."

When pressed as to why a loan arrangement was unacceptable to UTB, as opposed to being less attractive to Blades than an outright gift, Mr Gledhill could not add to what was said in this letter, save to say that it was possible that UTB took a more positive view about the likely outcome of the litigation than Sheffield did. It is fair to UTB to record that it also, quite recently, made a further proposal to Sheffield that Sheffield was not willing to accept, namely that Sheffield should make a repayable interest-free loan of the whole of the £2.5 million.

20. I asked Mr Downes why Sheffield was willing to lend Blades £1.25 million interest free, matched by a loan from UTB, but not to donate £1.25 million in the way that UTB proposed. He said, frankly, that Sheffield recognised that there was a real prospect (in the sense of the summary judgment test) that Sheffield would lose the litigation and that it was not willing to invest further money in Blades, on a non-recourse basis, until the outcome was known.

21. I am driven to the conclusion that this litigation is being used, by both parties to an extent, to seek to apply commercial pressure to the other, and not simply to resolve the issues that are raised in it. Each side can comfortably afford to provide the necessary funding to keep Blades and FC afloat, pending the trial, yet neither is willing to give ground. Despite its protestations, there is no possible detriment to UTB in agreeing to lend Blades money rather than donate money, but it declines to do so in order to maintain pressure on Sheffield, presumably hoping that it will either give ground in the litigation or agree to put a further £1.25m of its money at risk, for the potential benefit of UTB. UTB did express concern that Sheffield's application threatened to become the thin end of the wedge, by establishing a precedent for further such applications if it succeeded. If that were so, it could have avoided any precedent by agreeing particular terms for lending money, but now it is risking a precedent being established by contesting the application. Both sides are risking further reputational or financial damage by exposing the financial weakness of FC to the public gaze.

22. Despite the regrettable appearance of game-playing or pointless obduracy on one or both sides, I am required to consider whether or not it is appropriate to grant the relief sought.

23. In substance, Sheffield is seeking an order that each shareholder lend money to Blades on commercially unattractive terms, where neither is under an obligation to do so and where the lending is (unless agreed) contrary to the terms of the shareholder agreement contained in the ISA. It might be added that the borrower is in a dubious financial position and that there is no security as such for repayment. Clearly, there is no basis on which any such relief could or would be awarded to Sheffield at trial: the articles of association of Blades and the ISA define UTB's obligations as shareholder. So this is not a case in which the injunction sought is relief that will be pursued at trial. None of the relief sought by Sheffield at trial could justify an order that UTB lend money to Blades interest-free.

24. The purpose of the loans is to give Blades the best chance of prospering (by being able to advance money to satisfy the needs of its subsidiary, FC) and to avoid the risk of it or FC becoming insolvent before trial. In normal circumstances, where both shareholders wish to save and develop the business of their company, they might be expected to make such loans, but these are not normal circumstances. The question that I have to consider is whether one of the shareholders can and should be compelled to make such a loan, on an interim basis, against its wishes, if it is necessary to do so in order to ensure that the assets of Blades (and hence the value of its shares) are not damaged before the trial.

25. Three main objections are taken by UTB to the order that Sheffield seeks.

26. First, it contends that the Court has no jurisdiction to grant an injunction in these circumstances. It says that UTB is not threatening to infringe (nor has it infringed) any right of Sheffield that could justify an injunction of this kind, nor is this a case in which interim relief can be granted to preserve relevant property within the meaning of CPR Part 25.1(1)(c). UTB also denies that it is acting in a way that is unconscionable and which might justify the Court in granting interim relief.

27. Second, it disputes that there is any urgent need for £2.5m of finance to be injected into Blades.

28. Third, it contends that even if the Court has jurisdiction to grant such an injunction the circumstances of this case do not warrant it, given the nature of the mandatory relief sought and on application of the well-known *Amercian Cyanamid* principles. If necessary, the injunction should be refused in the Court's discretion.

29. I will deal with each of these arguments in turn.

Jurisdiction

30. As Lord Scott of Foscote explained in Fourie v Le Roux [2007] UKHL 1; [2007] 1 WLR 320, the term "jurisdiction" is often used to mean different things in this context. In the true sense, the Court has jurisdiction to grant an injunction against UTB because UTB is a party to substantive proceedings before it.

31. Section 37(1) of the Senior Courts Act 1981 provides:

> "The High Court may by order (whether interlocutory or final) grant an injunction or appoint a receiver in all cases in which it appears to the court to be just and convenient to do so."

This confirms but does not create the power of the High Court, which derives from the practice of the Court of Chancery prior to 1873. The power to grant an injunction therefore

exists and is unlimited (subject to there being jurisdiction over the defendant), but the settled practice of the Court has over time evolved to govern the way in which that power will and will not be exercised. The power is only exercised on a principled basis. The evolution has continued apace in the last 30 years in particular (since the days of the earliest 'Mareva' injunctions) and still continues, as shown by the extension to the Norwich Pharmacal line of authority recently considered by the Court of Appeal and the Supreme Court in Cartier International AG v British Sky Broadcasting Ltd [2016] EWCA Civ 658 and [2018] UKSC 28.

32. The true question is whether it is proper for the Court, in the circumstances before it, to make an order of the kind sought. This, as Lord Scott explained, involves an examination of the restrictions and limitations that have been placed by a combination of judicial precedent and rules of court on the circumstances in which injunctive relief can properly be granted. Reference to precedent does not, however, require an applicant to bring himself four square within an established category of case in which relief has previously been granted. As Lord Nicholls of Birkenhead said in Mercedes Benz AG v Leiduck [1996] 1 AC 284 at 308, after referring to previous dicta in cases in the Privy Council:

> "These are highly persuasive voices that the jurisdiction to grant an injunction, unfettered by statute, should not be rigidly confined to exclusive categories by judicial decision. The court may grant an injunction against a party properly before it where this is required to avoid injustice, just as the statute provides and just as the Court of Chancery did before 1875. The court habitually grants injunctions in respect of certain types of conduct. But that does not mean that the situations in which injunctions may be granted are now set in stone for all time. The grant of Mareva injunctions itself gives the lie to this. As circumstances in the world change, so must the situations in which the courts must properly exercise their jurisdiction to grant injunctions. The exercise of the jurisdiction must be principled, but the criterion is injustice. Injustice is to be viewed and decided in the light of today's conditions and standards, not those of yester-year."

33. The wrongs about which Sheffield complains in the current proceedings relate to the way in which UTB and others exploited an opportunity to defeat the apparent rights of Sheffield under the terms of the ISA. The matters of complaint in the s.994 petition are the same matters, making misleading statements in relation to those matters at the time, a failure to act in good faith towards the McCabe family and Sheffield, abuse of power in relation to the appointment and payment of company employees, and breaches of fiduciary duty in relation to a loan transaction with Charwell Investments Limited. But no relief is sought relating to a failure to finance Blades in accordance with any agreement or understanding previously reached. There is therefore no past or threatened wrong by UTB that might justify the grant of interim relief of the kind sought on the basis that substantive allegations may lead to such relief being granted at trial. Mr Downes argued that the Court's ability under s.996 of the Companies Act to grant appropriate relief being very wide, it is possible that relief of the kind now sought could be granted at trial. I do not consider that argument to be at all realistic, given the terms of the petition and the claims for relief that have been made by Sheffield and the terms of the ISA and the articles of association of Blades. Further, I do not consider that

a fanciful possibility of such relief being granted is sufficient at this stage to make it proper for the court to grant interim relief of that kind.

34. In what seemed to be an attempt to plug that hole, Mr Downes argued that one of the cases in which the court could grant interim relief was where a party to proceedings has acted or was threatening to act unconscionably: see per Lord Brandon of Oakbrook in South Carolina Insurance Co v Assurantie Maatschappij "De Zeven Provincien" NV [1987] AC 24, 40. In general terms that is no doubt an accurate statement of a class of cases in which the Court will often act, but these are cases in which the unconscionable behaviour would give rise to some private right, or public harm, if not restrained. A prohibitory injunction might well be granted to prevent a party from acting inconsistently with assurances previously made, on which a claimant had arguably relied to its detriment, but a mandatory order requiring UTB to lend money to Blades does not obviously fall into that category, absent an agreement to do so.

35. Mr Downes's argument is that UTB and Prince Abdullah, by endorsing an extension to the football club manager's contract, agreeing to his having a budget for new players that he wanted, and then sanctioning a joint press release announcing the extended contract, will have misled the manager and FC, thereby causing significant potential harm to the club's interests unless the assurance is made good. The argument is that if UTB does not make its assurance good it will be acting unconscionably.

36. This interpretation of the facts is strongly challenged by UTB. It contends that while comfort was given about money being made available to the manager for player purchases, no assurance was given to the effect that UTB would inject further capital (or lend money) to Blades. I cannot make any decision about the facts in this regard, save to observe that there is at least an arguable case that an assurance was made that £2 million of 'new money' would be introduced, to add to the funds that would be released from any sales of existing players.

37. However, even if this was the understanding reached between Prince Abdullah and Mr Giansiracusa on behalf of UTB and employees of FC and Sheffield, it does not give rise to any enforceable right on the part of FC or Sheffield, nor in my judgment does it justify making an interim order that UTB lend Blades money now. The management of FC is not interested in how the necessary funds are made available, only that they are there when needed, and for reasons that I will develop shortly it is not clear that the funds will not be available when needed. It is also material that UTB is not refusing to introduce new funds: it is willing to agree to inject £1.25m if the other 50% shareholder, Sheffield, does the same. There was no assurance or promise made by UTB that it would enter into a loan agreement as sought by Sheffield and I cannot therefore see that its present conduct in declining to do so at this time can be characterised as unconscionable.

38. Accordingly, in my judgment, the only properly arguable basis on which the injunction is sought is that it is necessary, at this stage, to seek to preserve Blades (and its subsidiary) as a going concern, and therefore to maintain the value of the shares in dispute until trial, and that it would be unjust to allow Blades to fail in the meantime when a relatively modest injection of further funds would keep it afloat. That type of relief is ancillary to the relief sought at trial, in the same way that a freezing injunction seeks to protect the value of a judgment that may be obtained at trial. If Sheffield succeeds in fighting off UTB's claim for specific performance and obtains the buy-out order that it seeks in relation to UTB's shares, Sheffield will have control of Blades and FC. If it does not succeed in its s.994 petition but

nevertheless defeats the specific performance claim, it will remain a 50% shareholder of Blades. Either way, it has a legitimate interest in protecting its shareholding, that is to say the value of the shares in Blades. The shares themselves will not disappear if no injunction is granted, but (according to Sheffield) the shares may become worthless, or much less valuable, unless the relief sought is granted now.

39. In considering whether or not to grant such relief, the exact character of the relief sought, the degree of interference with the rights of UTB and the degree of risk to UTB of granting the relief would all be material. But, apart from those matters, which all go to how the Court's discretion should be exercised, UTB submits that there is no principled basis here on which such relief can be granted at all. Alternatively, it submits that there is no need for such relief and so it should not be granted.

40. The argument on whether an injunction of this kind can properly be granted at all is based on the wording of Rule 25.1(1) of the Civil Procedure Rules. This provides, so far as material, that:

> "The court may grant the following interim remedies-
>
> …..
>
> (c) an order –
>
> (i) for the detention, custody or preservation of relevant property;
>
> (ii) for the inspection of relevant property;
>
> (iii) for the taking of a sample of relevant property;
>
> (iv) for the carrying out of an experiment on or with relevant property;
>
> (v) for the sale of relevant property which is of a perishable nature or which for any other good reason it is desirable to sell quickly; and
>
> (vi) for the payment of income from relevant property until a claim is decided."

"Relevant property" is defined by rule 25.1(2) as "property (including land) which is the subject of a claim or as to which any question may arise on a claim".

41. UTB submits that the order sought by Sheffield is not an order for the detention, custody or preservation of "relevant property", on the basis that shares in a company are intangible property (a collection of rights and obligations) that is not capable of being "relevant property" within the meaning of the rule. Such property can be neither detained, inspected, sampled, nor experimented on, nor is it of a perishable nature. They rely on Sports Network Ltd v Calzaghe [2008] EWHC 2566 (QB), in which Coulson J expressed the (obiter) view that money received or to be received by the claimant and to which the defendant claimed a partial entitlement was not "relevant property", though it could be a specified fund that could be ordered to be paid into court under Rule 25.1(1)(l). The judge considered that the notes to the then edition of Blackstone's Civil Practice were correct in suggesting that 'relevant

property' had to be something physical that can be inspected, preserved and experimented upon.

42. Although that would doubtless be the paradigm case, the rule does not require to be interpreted so as to exclude other types of property. "Relevant property" is property which is the subject of a claim or as to which any question may arise on a claim. For the avoidance of doubt the rule provides that it includes land. But there is no exclusion of other types of property. It may well be that intangible property, such as shares or some intellectual property, cannot be detained, inspected, sampled or experimented on, but that does not mean that it cannot be "relevant property". Those types of property can be preserved, or sold if there is good reason to sell them quickly, or income from them can be paid to an applicant until trial. It cannot be said that if there is a dispute over ownership of a portfolio of investments, the court would not have power under this rule to order the sale of certain shares, or order the payment of income from the portfolio pending trial. The argument that the use of the word "assets" in rule 25.1(1)(g) in contradistinction to "relevant property" suggests that the latter has a limited meaning is not convincing: the reason for the use of the word "assets" in paragraph (g) is simply to distinguish assets over which a freezing order may be made from the relevant property that is the subject of the claim or as to which any question may arise on the claim.

43. In any event, even if that is wrong and intangible property is not within rule 25.1(1)(c), the rule does not limit the power of the court to grant an interim injunction or cut down the broad equitable power to grant appropriate injunctive relief pending trial. It confirms or confers power to make orders of the kind falling within the rule; it does not exclude or limit the court's general power. Rule 25.1(3) itself provides that "the fact that a particular kind of interim remedy is not listed in paragraph (1) does not affect any power that the court may have to grant that remedy".

44. UTB argued that the order sought by Sheffield was not an order for the "preservation" of property within the meaning of rule 25.1(1)(c)(i), on the basis that it was far more invasive than any order that simply had the effect of keeping the property as it was until trial. It was contended that no case has required a respondent to spend substantial money to protect property where it had no obligation to do so, and that what Sheffield is seeking is an order that has the effect of enhancing the value of the shares in Blades.

45. I am not persuaded on either of these matters. First, there are inevitably cases where an interim order necessitates the respondent spending money. Strelley v Pearson (1880) 15 ChD 113 appears to me to be such a case. The defendant would have been ordered to carry on pumping out the mine until trial because the balance of convenience favoured that: it could be done at relatively little cost and it was what the defendant had been doing previously, when it was performing its obligation to work the mine. Failure to make such an order would have resulted in irreparable damage to the mine. Where ownership of real property is disputed, an order may be made to keep it secure, or wind- and water-tight, pending trial, even though compliance with the order may cost money. In my judgment, these factors – the mandatory nature of the relief; the question of whether there is any relevant obligation on the respondent; the cost of complying and the risk to the respondent – all go to the exercise of discretion, not the power of the court to make such an order where it is appropriate.

Necessity

46. The next point relied upon by UTB is that the evidence does not establish any urgent need for the injection of £2.5 million.

47. Originally, when it sought expedition of the hearing of this application, Sheffield sought an order in respect of the total £10 million of investors' funds referred to in the cash flow forecast, which was produced independently by the professional management of FC on 18 May 2018. This shows that, assuming an additional £2 million would be spent on 5 new players, wages would increase in 2018-19 by £4.9 million and that only £600,000 would be received from sales of players. It shows that £2.5 million extra would be needed by July 2018 to fund expenditure of £2 million on the new players that month, and a further £7.5 million between October 2018 and January 2019 to keep the cash flow in the black. Analysis of the cash flow shows that if the £2.5 million is not injected and new players are bought, the cash flow is in the red by over £2 million in July and by £4.3 million in October. If no new players are bought and no funds are injected, the finances will be in the red in October, by just over £700,000.

48. In his first witness statement dated 12 June 2018, Mr Tutton says that being assured of a transfer budget was a key reason why the club's manager extended his contract. Although spending on players was in one sense discretionary (in that there was no obligation on FC to buy), in practical terms it was essential, in order to avoid unsettling the manager, the risk that he might decide to leave (whether in breach of contract or not), word leaking to other clubs that FC is in financial difficulty and the club's playing staff not being strengthened. This in turn would tend to de-motivate the club and its supporters, thereby causing further financial problems in the future. Mr Downes summarised this by stressing the importance generally of confidence among the players and all those associated with a football club. It is somewhat ironic, in view of these arguments, that Sheffield has chosen to pursue this application, which will no doubt attract publicity, rather than submit to one or other of the funding alternatives that UTB offered.

49. UTB argued that the allegation of urgent financial need is overstated. It emphasised that spending on new players and consequent increase in wages is discretionary, not mandatory, and pointed out the absence of any direct evidence from anyone who negotiated the contract extension with the club's manager that he regards the new cash injection and transfer budget as something that must be delivered come what may. Further, UTB noted that player receipts of £600,000 is very low, not least because it was common ground that there is a strong likelihood of the sale of a player for somewhere between £11m and £15m. Were it to happen, UTB said, the financial position of FC would of course be significantly changed in the short term – though not all of any transfer monies would expect to become payable immediately. Although UTB did not question the integrity of the current cash flow, it pointed to a change in the figure for player receipts from £3 million in the previous version of the cash flow dated 26 April 2018 to £600,000 in the later version to show how sensitive such cash flows are to the inputs, which are only estimates from time to time. Further, UTB says that the evidence suggests that not all the £2 million to be spent on new players is likely to have to be spent in July 2018: it is common for payment to be deferred or made in instalments.

50. Overnight after the first day of the hearing, Mr Tutton made a second witness statement seeking to clarify certain matters about the cash flow forecast. He explained that the £600,000 for player sales does not in fact cover any future sales of players, only instalments from past sales; he confirmed that an offer had been received to pay £11 million for one player, though only £4 million of that would be payable during the 2018/19 season. He also confirmed that it is usual for paying clubs to spread the price over a period of 18 months in 3 instalments.

On that basis, it seems unlikely that FC will indeed have to spend the full £2m on new players in July 2018.

51. In my judgment, it is wrong for UTB to characterise the spending on new players as something that is unnecessary. I accept Sheffield's evidence that in practical terms, in order to sustain morale at the club and to avoid a collapse in confidence, it is important to invest in new players to strengthen the squad. That is obviously so if one of the club's best players is about to be sold. However, I do not consider the evidence, as it currently stands, to be strong that £2.5m is needed immediately in order to keep FC afloat. It appears to be very likely that any purchases in the transfer market can be funded (to the extent that payment is not deferred) by receipts from likely player sales. It is however evident that Blades's finances would be more comfortable, and FC freer to move swiftly and effectively in the market, if the funds were immediately available. It is therefore desirable that further monies be injected, though as things stand not essential.

52. I would have reached these conclusions on the cash flow regardless of the news, of which I was informed only yesterday, that a sale of one of the club's players has now been agreed in principle at £11.5 million, with £4 million of that price being payable on 1 July 2018. The agreement is subject to the following matters: formal board approval of FC and the buying club, formal contract, a medical at the buying club, and the player confirming agreement of personal terms with that club. The sale is therefore still not definite, but now very likely to occur shortly. If it does happen, the immediate cash flow potential crisis will have been relieved. If the sale does not proceed for whatever reason, the pressing need for further money to be introduced in the short term would remain.

Discretion

53. Against that background, I come to consider whether I should exercise the power that the court has to grant the relief that Sheffield seeks. It is common ground that I should apply an American Cyanamid approach to the exercise of discretion.

54. I am satisfied that Sheffield has an arguable case that it is entitled to retain its 50% shareholding or alternatively that it has an arguable claim to discretionary relief by way of a share buy out order. The fact that I have reached those conclusions is of course not to be taken as any indication of the strength of those cases beyond the conclusion that I cannot dismiss either of them as having only fanciful (or no) prospects of success. If it does succeed, Sheffield will either own Blades or retain its 50% share of Blades and as such has a legitimate interest in the survival of that company.

55. If an order is not made, Blades will be at greater risk of insolvency than if an order is made. The making of the order that Sheffield seeks will not guarantee Blades's solvency; neither will refusing the order mean that Blades will shortly become insolvent. What refusing to make the order does is leave Blades in a financial position where it is more exposed and at greater risk. But I bear in mind that there are two shareholders each of which is claiming 100% ownership of Blades and so neither wishes to see Blades become insolvent. There is a power struggle at present in which each of the shareholders is seeking to gain some advantage, or create difficulties for and impose its will on the other, but I do not consider that either of them wishes to damage the interests of Blades and FC. Although, UTB did not address the point, UTB's conduct in relation to the repayment of the Charwell loan on 30 April 2018 was in my judgment reckless, and so there is a risk nevertheless that Blades may become insolvent.

56. If it did happen that Blades became insolvent as a result of further capital of £2.5 million not being introduced in July 2018 and Sheffield then established its interest in Blades at trial, damages would not be an adequate remedy for Sheffield. Sheffield would have no claim for damages, since UTB is not obliged to fund Blades, nor in my judgment is there any enforceable understanding arising from the assurances given to the club's manager in May 2018. There might not even be a trial in those circumstances, were they to happen.

57. On the other hand, if UTB were ordered to lend Blades £1.25m, with repayment being a matter for the trial judge to determine in the light of the outcome of the litigation, UTB could expect to be repaid, in the event that it lost at trial, by an adjustment to the price for the acquisition of its shares. Sheffield is in effect submitting to that power of the Court by making the application on the terms that it does. That assumes, however, that Blades remains solvent and that the trial proceeds. If it does not, and UTB lost its £1.25 million as a result, it would be dependent on the enforcement of Sheffield's undertaking in damages to obtain compensation. In those circumstances, UTB would prima facie have a strong argument that Sheffield should compensate it for its loss regardless of the merits of the underlying claims. That is because the Court, at Sheffield's instigation, ordered UTB to lend money on an unsecured basis to a company that was at risk of insolvency. However, there is no certainty that UTB would be adequately compensated by that means. Sheffield indicated, rather belatedly, that it would be willing to give such an undertaking if the Court considered that UTB might suffer loss from being ordered to lend money. Sheffield has substantial assets in the form of the Properties at least, and UTB did not argue that its undertaking in damages would be inadequate.

58. UTB sought to argue that it would suffer prejudice that could not be compensated by damages in that its cash flow would be interfered with, which might cause it problems in its specific performance claim in meeting any defence that it was not ready willing and able to pay £5 million for its shares. That argument cannot be accepted in circumstances in which UTB has indicated openly that it is willing to donate £1.25m to Blades if Sheffield does the same.

59. Accordingly, it appears to me that UTB probably will be able to be compensated by a monetary payment at a later time in the event that it turns out at trial that Sheffield should itself have been funding Blades or Blades becomes insolvent before trial. That is a factor in favour of the grant of the relief that Sheffield seeks though not conclusive.

60. The factors that I need to weigh, in considering the balance of convenience, seem to me to be the following:

a. The fact that the grant of relief is only justified if it is necessary in order to preserve Blades as a solvent company pending the trial;

b. The exceptional nature of the mandatory relief being sought;

c. My finding that the finances of FC are such that it is not yet absolutely necessary but nevertheless desirable that further funding be introduced, and the existence of a risk of insolvency if it is not introduced;

d. The fact that UTB would be ordered to do something, against its will, which it has no obligation to do and which is contrary to the terms of the ISA (though the parties did act in the same way previously);

e. The fact that UTB is willing to gift £1.25 million to Blades if Sheffield does the same;

f. The fact that the ISA provides a remedy for the parties in the event of deadlock, which is for one party to buy out the other, not for the court to decide on another way of breaking the deadlock;

g. The conduct of the parties.

61. As far as the willingness of UTB to make a gift is concerned, Mr Downes argued that since UTB was willing to gift £1.25 million there could be no possible prejudice to UTB in lending the same amount of money, and so the Court should order it to make the loan. In my judgment, that is not the right comparison to make on the question of whether the balance of convenience favours the grant or refusal of relief. UTB made it clear that it was only willing to make a gift of £1.25 million on terms that Sheffield made a similar gift. But Sheffield is unwilling to do so. Accordingly, the relevant comparison is between ordering a loan to be made as sought by Sheffield and refusing relief. Comparison of what Sheffield seeks with what UTB is willing to do is relevant to the question of prejudice caused by making an order and may be relevant on costs, but it is not in itself an answer to where the balance of convenience lies.

62. In my judgment, the relief sought is of an invasive character, as Mr Gledhill described it, given the rights that UTB has as a result of its prior agreements with Sheffield. I should therefore only grant the relief if satisfied that it is really necessary to prevent a substantial risk of serious damage to the value of the shares in Blades. I have already given my reasons for finding that it is not necessary on the basis of the evidence that is before me. It is, in my judgment, no answer to say that granting the relief is better for UTB than something that it is conditionally willing to do, or that there is no prejudice caused to UTB in any event. Those are factors that are relevant but they do not of themselves justify granting the mandatory order sought. It is for Sheffield to justify the grant of such unusual relief in the circumstances of the case.

63. For the reasons that I have given, I will not make the order sought by Sheffield.