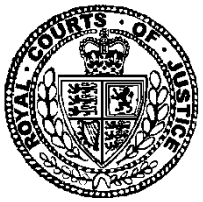

Neutral Citation Number: [2022] EWHC 3522 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
OF ENGLAND AND WALES
COMMERCIAL COURT
MANCHESTER DISTRICT REGISTRY

No. CC-2022-MAN-000057

Manchester Civil Justice Centre
1 Bridge Street West
Manchester
M60 9DJ

Friday 22 July 2022

Before:

HIS HONOUR JUDGE HALLIWELL

B E T W E E N :

SPORTFIVE UK LIMITED

Claimant/Applicant

- and -

NOTTINGHAM FOREST FOOTBALL CLUB LIMITED

Defendant/Respondent

MR J. COHEN QC and MR A. CUKIER (instructed by DWF LLP) appeared on behalf of the Claimant/Applicant.

MR A. ZELLICK QC and MR C. LANGLEY (instructed Centrefield LLP) appeared on behalf of the Defendant/Respondent.

A P P R O V E D J U D G M E N T

(v i a M i c r o s o f t T e a m s)

JUDGE HALLIWELL:

1 The Claimant, Sportfive UK Limited, applies for interim injunctive relief under a contract with the Defendant, Nottingham Forest Football Club Limited, relating to the sale of advertising space at its stadium known as the City Ground, West Bridgford in Nottingham.

2 Before me, Mr Jonathan Cohen QC and Mr Ashley Cukier appear on behalf of the Claimant, and Mr Adam Zellick QC and Mr Christopher Longley appear on behalf of the Defendant.

3 In support of its application, the Claimant relies on the witness statement dated 14 July 2022 of Mr Carl Robert Woodman, together with supporting exhibits. The Defendant Club has elected not to file evidence in response.

4 The factual background can be stated shortly.

5 The Claimant is a sports marketing company which provides services in connection with perimeter advertising at professional football grounds in the UK. The Defendant is a well-known professional football club based in Nottingham. It has recently been promoted from the Championship to the Premier League.

6 The Claimant has been contracted to the Defendant as its exclusive sales agent for perimeter advertising since 3 June 2009. Most recently, the parties renewed their contractual relationship on 31 August 2021 when they entered into an agreement made up of a contractual documents denoted as an Exclusive Perimeter Sales Agency Agreement, the Claimant's Standard Terms and Conditions; a Glossary of Terms and Annexes 1 and 2. The Agency Agreement was signed by representatives of each party and incorporated by reference, the other documents.

7 The Agency Agreement was for a term commencing on 15 July 2021 and expiring on 31 May 2024 subject to provisions for renewal and earlier termination. By Clause 1.1, it was provided that the Defendant appointed Claimant as its exclusive sales agent in respect of the advertising sites - as defined - and granted the Claimant the exclusive right throughout the world to sell advertising space on the advertising sites in accordance with the terms of the Agency Agreement. By Clause 14.1 of the Agency Agreement, it was provided that the Club would make the advertising boards - as defined and if applicable - and the LED display available at the Stadium in each season of the term in accordance with a series of specific contractual provisions. By Clause 14.1.5, these imported an obligation to ensure that the Advertisements were displayed on the LED display at each match and, by Clause 14.1.6, an obligation to ensure that they were displayed on the Advertising Boards as defined.

8 By Clause 1.1 of the Standard Terms and Conditions, it was provided, again in terms, that "the Club shall not, without Sportfive's prior written consent, at any time during the Term use, sell, license, let or otherwise dispose of any advertising space on the Advertising Sites (or permit any third-party to do any of the same) save in the exercise of the rights permitted under this Agreement in respect of Club Retained Inventory".

9 By Clause 2.2.1, it was provided that the Club "shall not directly or indirectly negotiate, enter into discussions with, correspond, or release any information to or with any third-party with respect to the appointment of such third-party as the Club's sales agent in respect of the advertising sites or in respect of the sale of advertising space on the advertising sites to such a third-party."

10 The Claimant contends that at a meeting on 15 June 2022, attended by representatives of the Club and Claimant itself, including the Defendant Club's majority owner, Mr Marinakis, his co-owner Mr Kominakis, and at least two directors, Mr Murphy and Mr Dourekas, Mr Marinakis advised the Claimant that the Defendant intended to cease work with the

Claimant with immediate effect and had no intention of honouring its obligations under the contract. He also advised them that the Defendant would not engage in any further conversations with them. Although Mr Marinakis is not recorded as a director, it is alleged his advice was implicitly endorsed by the other Club representatives, including Mr Murphy and Mr Dourekas.

11 Correspondence ensued culminating in an exchange of letters between DWF LLP, on behalf of the Claimant, and Centrefield LLP, on behalf of the Defendant, with a letter of claim dated 29 June 2022 from DWF seeking confirmation the Club intended to honour the contract and Centrefield's written response dated 30 June 2022 to the effect that DWF's threat to commence legal proceedings somehow amounted to a refusal to comply with the dispute resolution provisions in the contract and an anticipatory breach which the Defendant had elected to accept so as to terminate the contract itself.

12 In support of its application for interim relief, the Claimant has submitted a draft order. The draft order was revised shortly before the hearing so as to include an injunction on the use, sale, or disposal of advertising space and an injunction on change to the specification, location, and applicability of the advertising boards and LED display. At least this part of the order is negative in nature. However, the draft also includes provisions of a positive nature requiring the Club to make the advertising boards and LED display available for the upload of advertising media and to display the advertising media in accordance with Clause 14.1.5 and 14.1.6, of the Agency Agreement.

13 *American Cyanamid* principles apply. There is thus a threshold question in relation to the viability of the claim. If that question is answered in Sportfive's favour, I must then address the balance of convenience.

14 To the extent that, in substance the relief sought is negative, the threshold test is simple. It is whether there is a serious question to be tried. To the extent that the relief is positive, the test is more nuanced. In *Shepherd Homes Ltd v Sandham* [1971] CH 340, Megarry J observed that, to obtain interim relief on a mandatory basis, the court must have "a high degree of assurance" that the applicant will establish its rights to relief at trial. Consistently with this approach, in *Leisure Data v Bell* [1988] FSR 367, Dillon LJ said that "the case must be unusually strong and clear before a mandatory injunction will be granted even if it is sought in order to enforce a contractual obligation".

15 However, Mr Cohen QC took me to *Nottingham Building Society v Eurodynamics Systems plc* [1993] FSR 468 in which Chadwick J explained, at p.143, the jurisprudential basis for the principle. This is as follows. Where relief is sought which requires the respondent to take a particular step, this may well give rise to a great risk of injustice if it turns out to be wrongly made and a greater risk than an order which merely prohibits action and thus preserves a status quo. However, "even when the court is unable to feel any high degree of assurance that the plaintiff will establish his right, there may still be circumstances in which it is appropriate to grant a mandatory injunction at an interlocutory stage". He said that this will be the case "where the risk of injustice, if the injunction is refused, sufficiently outweighs the risk of injustice if granted".

16 Logically, the risk of injustice and how it is to be reflected pertains more closely to the balance of convenience than the threshold question of whether there is a serious question to be tried. Be that as it may, Mr Cohen QC submits that, if I apply Chadwick J's guidance to the mandatory relief sought by the Claimant in the present case, the risk of injustice to the Claimant if I decline to grant mandatory relief is greater than the risk of injustice to the Defendant if I grant such relief. This is on the basis that the Claimant only seeks an order providing for the Defendant to make the advertising boards and the LED Display available

for the upload of advertising and to display the advertising media pending trial. He does not seek an order requiring the Club to take a once and for all step which would pre-empt the outcome of the proceedings as a whole, for example, an order requiring it to demolish a wall, or other structure, or assign an agreement.

17 Viewed in this way, Mr Cohen QC submitted that for me to direct that the Club continue, as it has done before, to make available the Advertising Boards and the LED display for the upload of advertising and, indeed, to allow the advertising media to be displayed, would be precisely the converse of a pre-emptive order. He submits that making the order will be tantamount to holding the ring pending trial. If I decline to make the order, he submits that the Claimant will cease to be entitled to exercise its right and, once the Defendant has itself granted third-party rights in relation to advertising, there is every chance the Claimant will have no realistic chance of re-establishing them.

18 In my judgment, this point is well taken. I am satisfied that, in applying the threshold test, the primary question is whether Sportfive has demonstrated there is a serious question to be tried.

19 So is there a serious question to be tried?

20 On the Club's behalf, Mr Zellick QC has generally taken a realistic view on this aspect of the case. Within the sense envisaged by the House of Lords in *American Cyanamid*, he accepts there is a serious question to be tried as to whether the Club has successfully terminated the contract. On this basis, there is also a serious question to be tried as to whether the Club is in breach or has evinced an intention to commit breaches of the contract whether on the basis that it has repudiated or purport to repudiate Sportfive's rights as exclusive sales agent, or at least exposed itself to a claim for *quia timet* relief.

21 On the issues of termination, breach, and intention to commit breaches of contract, the threshold question is satisfied in the Claimant's favour.

22 However, Mr Zellick QC submits that the Claimant's claim for interim relief is incidental to its substantive claim for a decree of specific performance and the claim for such a remedy is destined to fail since enforcement will require supervision and ongoing cooperation. Since this is historically a bar to a decree of specific performance, Mr Zellick QC submits that it would be wrong in principle for me to grant interim relief to the Claimant in support of such a remedy.

23 This part of the case was skilfully presented in the Skeleton Argument of Mr Zellick QC and Mr Langley of counsel. It was also developed by Mr Zellick QC in his submissions before me. As Mr Zellick QC himself observed, their arguments on the point may have prompted the Claimant to refine the relief in the draft order emailed to the court shortly before the hearing.

24 However, to succeed on this part of his case, Mr Zellick QC must persuade me that the Claimant's prospects of obtaining a decree of specific performance are so poor that there is not a serious question to be tried. Viewed in this way, Mr Zellick QC's case on the point is ambitious and, in my judgment, it fails.

25 The proposition in heading (4) of the Defendant's Skeleton Argument, on page 8, was that, based on the requirement for supervision and ongoing cooperation, the whole agreement was unsuitable for specific performance. In Paragraph 18 of their Skeleton Argument, Mr Zellick QC and Mr Langley then explained that "the order sought was for interim specific performance of the entire contract, not a discrete and separable element".

26 It is certainly true that, as formulated, the claim for specific performance is in wide terms. It requires the Defendant to comply generally with its contractual obligations. There is, of

course, nothing unusual in a claim for specific performance being presented in this way. However, in its application before me, the Claimant's case was tailored to the specific prohibitions on the sale of advertising space to third parties in Clause 1.1 of the Standard Terms and the obligations to make available advertising boards in Clause 14 of the Agency Agreement, supported by the obligations of the Defendant Club to ensure the advertisements are displayed on the LED display at each match. These provisions are not to be construed in isolation and the overall context is relevant, together with the parties' commercial objects. However, in considering whether a specific contractual provision requires constant cooperation and supervision, I should focus on the provision itself and the way in which it operates.

27 On this basis, Clause 1.1 of the Standard Terms does not require constant cooperation or supervision. It merely imposes a prohibition on the disposal of advertising space to a third-party. The prohibition is imposed in support of the appointment of Sportfive as an exclusive sales agent under the provisions of Clause 1.1 of the Agency Agreement and it has been imposed for good commercial reason. It is a classic negative stipulation which the courts can generally be expected to enforce in accordance with the principle in *Doherty v Allman*.

28 The Claimant also seeks to prohibit the Club from changing the specification, location, and operability of the advertising boards. This is not the subject matter of an express prohibition but the Claimant seeks such relief so as to enforce the Defendant Club's contractual obligations in Clauses 14.1, 14.5 and 14.6 of the Agency Agreement. Again, the prohibition sought is simply a restriction on disposal and on the use of the Advertising Boards. It does not require supervision or cooperation. It is clear from the prohibition itself what the Club must refrain from doing. If an order were to be made in those terms and the Defendant were to commit a breach, its directors would potentially be exposed to committal proceedings.

However, the order does not require constant supervision or cooperation between the parties.

29 The mandatory relief in Paragraphs 6.1 and 6.2 of the order provides for the Club "to make the Advertising Boards (if applicable) and the LED display available for the upload of advertising media by or on behalf of the Claimant at the Stadium" and to "display the advertising media in accordance with Clause 14.15 and cl.14.16 of the Agency Agreement.

30 Whilst this requires a measure of cooperation between Sportfive and the Club, it can be seen from Mr Woodman's witness statement that, following the installation of the advertising equipment, the Club's role in connection with the provision of advertising is minimal. He says this:

> "After finalising the multi-club portfolio which we offer to customers, Sportfive will, before the season commences, generally agree the allocation of advertising inventory to brands and produce, curate and finalise a digital advertising product for the entire season, apart from the live televised cup games which, if applicable at all, only require minimal operational input from NFC [that is the Club] which is then provided to each applicable club's appointed third-party LED system operator at the start of the season. Once the digital adverts are provided to, in this case, the club's appointed LED system operator, there is likely to be little ongoing operational interaction as the adverts' content usually remains the same throughout the season and it is simply uploaded digitally by the LED system operator to the LED advertising hoardings for display on match days unless the advertisers choose to change their advert content/animation during the season, in which case new electronic files will simply be supplied by us to the relevant LED system operator. In short, the delivery of the perimeter advertising is

managed between Sportfive and the LED system operator with minimal interaction between Sportfive and the Club."

31 With minor amendments, it would be possible to formulate the claims for final and interim relief so they will not require the Defendant Club's obligations to be subject to supervision and ongoing cooperation in any substantial sense.

32 I am persuaded that there is a serious question to be tried on all issues of liability - that is to the extent that there are any such issues - and on the Claimant rights to final relief, including its right to a decree of specific performance.

33 I shall now return to the balance of convenience.

34 In his witness statement, Mr Woodman goes to some length to explain the Claimant's business model and the nature of the services it provides in connection with the sale of perimeter advertising at professional football clubs. It has obtained exclusive rights for the display of perimeter advertising at a range of football clubs. This includes ten football clubs currently in the Premier League and thirty-five clubs in the Championship, League One and League Two. Based on such rights, it is able to deliver an aggregated advertising product for clubs in its portfolio on a scale which attracts major international and national brands, maximising, as he puts it, "inventory utilisation for the clubs" and generating significant revenue for the clubs themselves.

35 The Claimant contends that the balance of convenience weighs in its favour on the basis that it has already sold packages of advertising at the City Ground to its clients for the new Premier League season and, with the season due to commence shortly, the Claimant will suffer severe reputational damage if, having sold such packages, it is unable to exercise its rights under the relevant agreements and provide the services to its clients which it is contractually obliged to perform. It will also be exposed to substantial contractual claims.

36 The Defendant contends that damages will be an adequate remedy. In support of its case on this issue, it advances an array of arguments, set out in its Skeleton Argument and ably developed before me by Mr Zellick QC in his oral submissions.

37 It is submitted that, whilst the Claimant apparently provides its customers with a portfolio of advertising rights across a range of football clubs, it ought to be possible to quantify its losses by comparing its earnings next season with earnings for previous seasons based on an adjusted number of clubs. In support of this submission, Mr Zellick QC observes that the Claimant "may well have sales from previous seasons which show previous differentials depending on the number of Premier League clubs in the overall product". It is certainly true that the Claimant should be able to compare its returns next season with its returns in previous years and draw inferences as to its attendant losses owing to the absence of the Defendant Club. It may also be possible to make a calculation in respect of the value in its portfolio of advertising. This is the advertising in respect of the Club. However, based on this data, it is unlikely it will be possible for it to do more than make an educated guess about the loss of goodwill attributable to any reputational damage that will accrue if it has to withdraw from its commitments to provide advertising in respect of the Club.

38 Mr Zellick QC also makes the point that, notwithstanding at least two requests, the Claimant has failed to produce copies of any of its commercial agreements with its own customers to enable the Club, through its advisors, to assess its overall exposure. In response, Mr Cohen QC submits that it has withheld such documents with good reason since the information is confidential to his client and if and when such documentation is disclosed, the Club will be able to utilise that information to approach his client's customers and solicit their business. He submits this is significant because the Club has intimated that, if and once free of its commitments to Sportfive, it intends to market its advertising rights directly to customers. This submission does not meet Mr Zellick QC's point fully since the opportunity has not

been taken to disclose redacted copies of its commercial agreements. However, the Claimant's solicitors have at least gone some way to address the issue by letter dated 28 July, in which they provide some information at least about the Claimant's potential liabilities to eight unnamed clients.

39 Mr Zellick QC submits that it would be easy to assess the losses associated with existing customers by calculating the loss of profit associated with lawful termination and reduction in price as a result of a product which has been reduced in scope. Again, it is certainly true that, if and to the extent customers were to terminate their agreements owing to the withdrawal of the Club from the portfolio, the immediate and attendant losses should be easily calculable. If a customer withdraws entirely, that might be translated into a loss of goodwill which could then be assessed. However, goodwill is a nebulous concept. In a case such as this, the loss of goodwill is not simply the function of a straightforward arithmetical calculation.

40 Mr Zellick QC submits that Mr Woodman is guilty of exaggeration and over statement in his observations about the Claimant's potential losses. This submission is not without foundation. However, I am satisfied he has done enough to suggest that the Claimant might sustain substantial losses for which it will not be properly compensated in damages in the event that injunctive relief is withheld. It is submitted that, if and when the issue is referred to the court, the court will do its best to assess Sportfive's losses on the available evidence and no doubt that is true. However, it is axiomatic that at least in relation to prospective losses and loss of goodwill, the court will be able to do no more than make an assessment based on inferences from the evidence adduced before it.

41 Notwithstanding the skill with which the Defendant's case has been presented, I am satisfied damages are not an entirely adequate remedy for the Claimant, certainly at this interim stage when assessing whether I should grant interim relief.

42 Conversely, Mr Cohen QC submits, with reason, that if injunction relief is granted and the Claimant fails at trial, the Club's losses should be comparatively easy to calculate. The Defendant has elected not to file evidence in relation to the losses it might sustain and there is thus no evidence that it has done anything to market advertising space but there is nothing to suggest it has any accumulated goodwill in relation to perimeter advertising. If the Claimant's case fails and, at that stage, the Defendant seeks an enquiry as to damages under the Claimant's cross-undertaking, a clear picture is likely to emerge about the revenue available to the Club through advertising by the time that the enquiry is heard.

43 I am satisfied that, subject to Mr Zellick QC's submissions about the Claimant's cross-undertaking in damages, the balance of convenience favours the Claimant and it has established its right to interim relief.

44 This takes me to the cross-undertaking in damages. Mr Zellick QC submits that, if I grant the Claimant interim relief, I should require it to make a cross-undertaking in damages. He also submits that the cross-undertaking should be fortified by a payment into court of at least £1.5 million.

45 It is axiomatic that the Claimnat must make a cross-undertaking in damages and Mr Cohen QC does not suggest otherwise.

46 However, I am not persuaded that the Claimant should be required to fortify the cross-undertaking. Evidence has not been admitted from which I can make a meaningful assessment of the Club's prospective losses. However, I have been referred to Sportfive's audited accounts for the year ending on 31 December 2021 approved by the board on 28 March. They show that in the year ending 31 December 2021, it made an operating profit of £7,260,490 and a net profit after tax of £5,837,402. On the balance sheet, Sportfive is shown to have net assets of £24,981,123 after accounting for current liabilities of

£21,425,521. On that basis, some £40,088,667 was projected for payment within one year and, in addition, the company was entitled to cash or a cash equivalence of £4,832,028.

47 It appears from the notes to the accounts that upwards of £25 million - that is £25,468,188 - is due to the company from group undertakings but it is not suggested that there is an issue about this.

48 I am satisfied the Claimant is entitled to injunctive relief without requiring it to fortify its cross-undertaking in damages.

49 I shall make an order in the terms of Paragraph 5 of the draft order.

50 I am currently minded also to make an order based on a refined form of Paragraph 6 so as to provide that the Defendant shall permit the Claimant to use the advertising boards and the LED display, and the Defendant shall not obstruct or otherwise interfere with Claimant in the use of the advertising boards and the LED display.

JUDGE HALLIWELL: I do not know whether, Mr Cohen, your junior has made a sufficient note of the order because you will need to draw up a copy at the end of the hearing. Would you like me to repeat it?

MR COHEN: If you could just repeat it once, I would be very grateful.

JUDGE HALLIWELL: Yes. Paragraphs 5.1 and 5.2, essentially, are as they are. Then there is Paragraph 6. Subject to submissions from either of you, it will require the Club to permit Sportfive to use the advertising boards and the LED display. There will also be an injunction restraining the Club from obstructing or otherwise interfering with Sportfive in the use of the advertising boards and the LED display. This substantially meets the points about supervision and continuous cooperation.

51 So that brings me on to the issue of whether to direct an expedited trial. Mr Cohen QC initially invited me to make directions for an expedited trial but, following Mr Zellick QC's submissions, he suggested that the pragmatic solution would be for me to certify that the case is fit for an expedited trial and list it for a CCMC. This would be on the basis that the parties would then have the opportunity to enter into further discussions.

52 I am currently minded to list it for a CCMC on the first available date on or after 30 August but I will hear what you have to say about that. Consideration can then be given as to whether it is fit to be listed as an expedited trial. It would be open to me to do so now but I will hear generally from you both on this issue before dealing with any other issues you might wish to raise.

_____

CERTIFICATE

Opus 2 International Limited hereby certifies that the above is an accurate and complete record of the Judgment or part thereof.

Transcribed by ***Opus 2 International Limited***
Official Court Reporters and Audio Transcribers
5 New Street Square, London, EC4A 3BF
Tel: 020 7831 5627 Fax: 020 7831 7737
civil@opus2.digital

**** This transcript is approved ****