IN THE HIGH COURT OF JUSTICE

IN THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES

COMMERCIAL COURT (QUEENS BENCH DIVISION) CL-2020-000396

BEFORE MRS JUSTICE MOULDER

Date: 17 March 2021

BETWEEN:

MANCHESTER CITY FOOTBALL CLUB LIMITED

Claimant

- and –

(1)THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED

(2)PHILIP HAVERS QC

(3)JOHN MACHELL QC

(4)DANIEL ALEXANDER QC

Defendants

ORDER

UPON the Claimant's arbitration claim for an order under sections 24, 67, and 68 of the Arbitration Act 1996 by claim form dated 26 June 2020 (the "Arbitration Claim")

AND UPON the arbitral order of the Second to Fourth Defendants dated 2 November 2020 requiring the Claimant to provide certain documents and information to the First Defendant and to make certain requests of third parties by no later than seven days after the date of the Court's judgment in these proceedings ("the Arbitral Order")

AND UPON HEARING Leading Counsel for the Claimant and Leading Counsel for the First Defendant on 1 and 2 March 2021

AND UPON the judgment handed down on 17 March 2021 ("the Judgment")

AND UPON considering (by agreement of the parties without a hearing) the parties' written submissions as to the matters arising from the Judgment including the application for permission to appeal and the issue of whether the Judgment should be published other than to the parties.

IT IS ORDERED THAT:

1. The Arbitration Claim be dismissed.

2. Permission to appeal to the Court of Appeal is refused.

3. Until further order, the Judgment and this Order shall be confidential and released only to the parties.

4. The Claimant shall pay the First Defendant's costs on the standard basis, such costs to be the subject of detailed assessment if not agreed.

5. The Claimant shall make a payment on account of costs to the First Defendant in the sum of £314,275.92 within 14 days of the date of this Order.

Reasons:

Costs

CPR 44.2 (8) provides that the court will order payment of *"a reasonable sum on account of costs, unless there is good reason not to do so"*.

It is not submitted that the court should not make an order for a payment on account of costs but rather the amount so to be ordered is disputed.

I note the approach set out by Christopher Clark LJ in Excalibur Ventures LLC v Texas Keystone Inc [2015] EWHC 566 (Comm) at [22] -[24]:

> *"22. …It may be that in any given case the only amount that it is reasonable to award is the irreducible minimum. I do not, however, accept that that means that "irreducible minimum" is the test… "*
> *23. What is a reasonable amount will depend on the circumstances, the chief of which is that there will, by definition, have been no detailed assessment and thus an element of uncertainty, the extent of which may differ widely from case to case as to what will be allowed on detailed assessment. Any sum will have to be an estimate. A reasonable sum would often be one that was an estimate of the likely level of recovery subject, as the costs claimants accept, to an appropriate margin to allow for error in the estimation. This can be done by taking the lowest figure in a likely range or making a deduction from a single estimated figure or perhaps from the lowest figure in the range if the range itself is not very broad.*
> *24. In determining whether to order any payment and its amount, account needs to be taken of all relevant factors including the likelihood (if it can be assessed) of the claimants being awarded the costs that they seek or a lesser and if so what proportion of them; the difficulty, if any, that may be faced in recovering those costs; the likelihood of a successful appeal; the means of the parties; the imminence of any assessment; any relevant delay and whether the paying party*
> *will have any difficulty in recovery in the case of any overpayment."*

The question is what is a reasonable amount to be paid on account of costs. The question is not whether the total amount claimed is reasonable – in this case £448,965.60. If a detailed assessment is undertaken the issue will be whether or not the amount claimed is reasonable and proportionate having regard to the factors in CPR 44.4. I note that that includes the complexity of the matter and wider factors which are in play in these proceedings.

I accept the submission for the PL that the rates for the solicitors are lower than rates often charged by solicitors instructed by clients in the commercial court. I take into account the fact that two leading counsel appeared on the one matter although there was a clear division in the way they presented the case (although that does not appear to be reflected in the way that the matter has been charged in the Costs Summary now before the court).
I also note that several fee earners have claimed for attendance at the hearing which in my view is unlikely to be allowed on a detailed assessment. As to the division of work between different grades of solicitors which is challenged by the claimant in its written submissions that can be reviewed in detailed on the detailed assessment.

Having regard to all these matters, it seems to me that a discount of 30% will cover any likely reduction on a detailed assessment and even if I were wrong on that this is not a matter where it would be difficult for the claimant to recover any overpayment.

For those reasons I order the amount to be paid on account as 70% of the amount claimed.

Permission to appeal

In my view the appeal does not have a real prospect of success nor is there “some other compelling reason for the appeal to be heard”.

The construction issue has been decided on the basis of the application of the principles of construction to a written contract set out in Wood v Capita Insurance Services Ltd [2017] UKSC 24.
The court did engage with the claimant’s argument in relation to rule X.3.1 but did not accept it given the wording of X.3. The court considered the arguments now largely repeated in the submissions as to the consequences of the interpretation for which the claimant contends and reached a conclusion as to the meaning of the arbitration provisions balancing the language used against the context and the consequences.

There is no other compelling reason for the appeal to be heard: the implications for other clubs is limited given that the clubs are the members of the PL with (collectively) power to change the Rules. The reasoning concerning the application of the principle of construction of lex specialis is specific to the drafting of the Rules and does not detract from the general principle.

The issue of apparent bias has been decided applying the test (of general application) approved, and having regard to the features of arbitration identified, by the Supreme Court in Halliburton Company v Chubb Bermuda Insurance Ltd [2020] UKSC 48.

Although the Court held that it was not necessary to decide waiver or the date of assessment, in order to succeed on an appeal the claimant would have to show not only that the court was wrong on the issue of substantive bias but also that the court was wrong on the issue of waiver and the date of assessment.

There is no real prospect that an appeal would succeed and accordingly permission to appeal is refused.

Stay

Having refused permission to appeal, section 68(4) applies and there is no question of a stay pending an appeal or application for permission to appeal.