Neutral Citation Number: [2013] EWHC 1070 (Ch)

Case No: 3 MA 30087

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

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

Date: 29th April 2013

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

Between:

HENNING BERG	**Claimant**
- and -	
BLACKBURN ROVERS FOOTBALL CLUB & ATHLETIC PLC	**Defendants**

- - - - - - - - - - - - - - - - - - - -

Mr. Paul Gilroy QC (instructed by **Slater & Gordon (UK) LLP**) for the **Claimant**
Mr. Neil Berragan (instructed by **IPS Law LLP**) for the **Defendant**

Hearing dates: 26th April 2013

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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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HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC

Introduction

1. This is the hearing of an application by the Defendant ("Blackburn") made pursuant to CPR r.14.1 (5) for permission to withdraw an Admission dated 1st March 2013 by which it has admitted liability to pay £2.25 million claimed by the Claimant ("Mr. Berg") to be due to him under the terms of his contract of employment with Blackburn by which he was employed as Blackburn's club manager ("the Service Agreement"). Mr. Berg opposes the application on the basis that the defences that Blackburn seeks to rely on are not realistically arguable, but on the contrary are fanciful, and in any event that the application should be refused in all the circumstances and having regard to Blackburn's conduct in relation to this application in particular but also the litigation generally. The application was argued over a hearing that finished after 4.30 on Friday and I decided to give judgment this morning given the time at which the argument concluded and the importance of the issue to the parties.

Background

2. Blackburn is a Plc. Its dominant member is a company that controls 99.9% of its issued shares. That company in turn is controlled by three individuals being Mrs Desai, Mr Balaji Rao and Mr. Venkatesh Rao ("Messrs. Rao"). These individuals are described in various documents and hereafter collectively as the "Owners". Mr. Singh, who describes himself as being the owners' "Global Adviser", represents Mrs Desai and Messrs. Rao in relation to the club.

3. Blackburn is governed by Articles of Association that were passed at a General Meeting held on 22nd December 2010. By Article 5.1 the directors are responsible for the management of Blackburn's business but by Article 7.1 they may delegate any of the powers conferred on them to such person, and to such extent, as they consider appropriate.

4. At all times material to these proceedings, Blackburn's statutory directors were Mr. Paul Agnew, Mr. Reddy Ghandi Babu, Mrs Karen Silk, who it is common ground was and is Blackburn's Financial Director, and Mr. Derek Shaw ("Mr. Shaw") who it is common ground was and is Blackburn's Managing Director.

5. Mr. Shaw is said to have been, and to be, employed in that capacity under an undated and unsigned service agreement, a copy of which has been produced by Blackburn. Mr. Shaw's contract defines his duties in Part 4 as being (Clause 4.1.1) to faithfully and diligently perform the duties and exercise the powers which the Owners (that is Mrs Desai and Messrs. Rao) assign to or vest in him and (Clause 4.1.2) in the absence of any specific instructions from the Owners, but subject to the Articles of Association, to be responsible for the general control and management of Blackburn's business. Mr. Shaw is required (Clause 2.2) to report to the Board of Directors and the Owners. No board resolutions have been produced that deal with the issue of delegation of powers.

6. In the autumn of 2012, it became necessary for Blackburn to employ a club manager to replace Mr. Steve Kean, whose contract of employment in that role

had been terminated by Blackburn. Once it became known that a new manager was required Mr Berg made contact with Blackburn and offered his services. Initial contact was made by Mr Berg with Mr. Shaw a few days prior to the 25th or 26th October 2012. No one suggests that anything of consequence was said in the course of that conversation. On either the 25th or 26th October, Mr. Berg received a phone call from Mr. Singh in which Mr. Singh requested Mr. Berg to travel to the UK for further discussion on the following Monday – that is 29th October 2012.

7. The initial meeting was in Manchester on 29th October. Mr Berg, Mr. Shaw, Mr. Agnew and Mr. Singh attended it. Although Mr. Shaw says in Paragraph 12 of his first statement that "*... I can confirm that I would have made it clear that the owners' approval was necessary, when speaking with ...",* Mr. Shaw does not state when that is said to have occurred (or even if he actually recalls saying what he maintains that he would have said). Although a second statement from Mr Shaw was produced by Blackburn on the day of the hearing, it does not further expand on this point. There is no statement from Mr Singh or any explanation as to why there is no such statement. Mr. Shaw says Mr. Agnew was present at the meeting on 29th October. Mr. Agnew has filed a witness statement. He does not say that he was present at that meeting. There is thus no evidence that suggests the statement Mr. Shaw considers he would have made was made at this meeting.

8. A phone call took place between Mr. Berg and either Mr. Singh or Mr. Shaw on 30th October 2012. Mr. Berg says that he was informed that Blackburn wished to appoint him as its club manager. Mr. Shaw says that this contact with Mr Berg was by Mr Singh. I proceed on that basis. It is not suggested that Mr. Singh suggested in this call that the appointment or the terms of appointment would be subject to approval by the Owners once negotiated. The one thing that is clear from the internal communications both before and after the contract was made between Blackburn and Mr Berg is that Mr. Shaw was authorised to carry on the negotiations on behalf of Blackburn and conclude a contract with him. The contrary is not suggested by Blackburn. Its case is that Mr. Shaw did not have actual authority to conclude the contract in fact concluded.

9. Mr. Berg says that on 31st October a meeting took place at a hotel in Blackburn at which Mr. Berg, assisted by his agent Mr Hauge, negotiated the terms of his appointment with Mr. Shaw and Mr. Agnew. Mr. Shaw maintains that the meeting was a "*meet and greet*" meeting. Mr. Berg disputes that. Mr. Shaw does not assert that it was at this meeting that he informed Mr. Berg that the owner's approval would be necessary and Mr Agnew in his statement does not suggest that any such comment was made although he accepts that he was at this meeting.

10. On 31st October Blackburn drew up an offer letter to Mr. Berg setting out what in effect were the broad outlines of an offer to employ Mr. Berg. Although the letter does not say in terms that it has been written subject to contract it makes clear that a formal Service Agreement was to follow as is apparent from the list underneath the signatures on the second page of the letter. Mr Shaw and Mr. Berg signed that document on 1st November 2012. The letter contains no reservations of the sort Mr. Shaw maintains he would have articulated to Mr Berg.

11. In Paragraph 11 of his third statement, Mr. Berg asserts that in the course of the meeting on 31st October, the length of the Service Agreement was agreed as was the principle that Mr. Berg would receive compensation based on the unexpired part of the fixed term if Blackburn terminated the agreement before the end of the fixed term. Both Mr. Shaw and Mr. Agnew deny that was so and both maintain as I have said that this meeting was little more than a "*meet and greet*" meeting. The letter of 31st October certainly contains a provision to the effect that the contract would be for a fixed period ending on 30th June 2015. Mrs Silk says in her statement that she was instructed by Mr. Shaw to draw up the offer letter "*one evening after office hours ...*" and that Mr Shaw passed to her a note (which is exhibited) that he told her contained the terms he wanted included. Inferentially this can only have been the evening of the 31st October since Mr. Shaw and Mr. Berg signed the 31st October letter during working hours on 1st November.

12. The note that Mrs Silk says she was handed by Mr. Shaw when he asked her to draw up the offer letter of 31st October is consistent with what Mr Berg says was agreed at the meeting on the 31st October. There is a reference to 30th June 2015 in Mr. Shaw's handwriting and a reference to there being "*… no 12 months notice ...*" in Mrs Silk's handwriting, that she says records a clarification given to her by Mr. Shaw. Whilst I cannot resolve at a hearing of this sort what was said at the meeting on 31st October, the material available appears to provide significant support for Mr. Berg's case on this point. It is difficult to see why Mr. Shaw would instruct Mrs Silk in the manner she says he did unless that reflected the effect of what had been discussed and agreed between Mr Berg and Mr. Shaw and Mr Agnew at the meeting between them on 31st October. It is to be noted that Mrs Silk's statement was filed and served on behalf of Blackburn.

13. Mr. Berg instructed Mr Nick White, a member of Couchmans LLP, a law firm that specialises in sports industry law, to act on his behalf in relation to the formalisation of the arrangements. On 2nd November Mrs Silk had sent a draft agreement to Mr. Hauge. It is now common ground that this was the first draft sent to Mr. Berg or anyone acting on his behalf. It is not in dispute that this draft was sent attached to an email from Mrs Silk that said:

> "… Please see attached Service Agreement as discussed for your review. Please let either me or Derek Shaw know if you have any queries. Otherwise I will bring printed copies to the match with me tomorrow for signature
>
> Regards
>
> Karen"

It was not suggested that the document was sent subject to the qualification that it was required to be approved by the Owners or that the Owners had not approved it or that any signature of it was conditional upon the terms set out in the document being approved by the Owners. It is now common ground that Clause 15.3 of the contract that was eventually signed, and under which Mr Berg makes his claim, is in similar terms to Clause 15.3 of the initial draft sent by Mrs Silk to Mr. Hauge on 2nd November, although there was a negotiating issue concerning the rate to be inserted into the clause for use in calculating compensation. It was this draft that

was sent on to Mr White and it was by reference to this draft that all the further negotiations that followed took place.

14. Thereafter there was a significant negotiating debate between the parties concerning the rate at which compensation for the unexpired part of the contract would be calculated in the event that Blackburn decided to terminate the contract earlier than the fixed date but the principle that compensation would be payable to be calculated by reference to the unexpired term remaining at the date of termination never altered. Mr. White and Mr. Hauge carried on the negotiations on behalf of Mr. Berg with Blackburn acting by Mr. Shaw, Mrs Silk and Brabners Chaffe Street, the solicitors instructed on behalf of Blackburn. At no stage was it suggested in the course of these discussions that approval would have to be sought before the contract could be signed or that if signed the contract could not take effect until such approval had been obtained.

15. The Service Agreement was finally signed on 16th November 2012. Mr. Shaw signed it on behalf of Blackburn. There was a space for signature by another director but in fact no other director signed the document. It is accepted by Mr. Berragan that if Mr. Shaw had either actual or ostensible or usual authority to sign the agreement, the absence of a second signature does not invalidate the agreement.

16. By Clause 3.1 of the Service Agreement it was agreed that it would continue until 30th June 2015 and the period between the commencement date and 30th June 2015 was defined as being "*the Fixed Period*". By Clause 15.3 of the Service Agreement, it was agreed that:

> "In the event that the Club shall at any time wish to terminate this Agreement with immediate effect it shall be entitled to do so upon written notice to the Manager and provided that it shall pay to the Manager a compensation payment by way of liquidated damages in a sum equal to the Manager's gross basic salary for the unexpired balance of the Fixed Period assuming an annual salary of £900,000 …"

17. On 27th December 2012, Blackburn terminated its agreement with Mr. Berg. It is common ground that if clause 15.3 of the Service Agreement takes effect in accordance with its terms, Mr. Berg is entitled to £2.25 million. Payment was claimed but was not forthcoming.

Procedural History

18. On 14th February 2013 these proceedings were commenced by the issue of a Claim Form. Mr. Berg claimed that the sum of £2.25 million was due to him under Clause 15.3 of the Service Agreement, following early termination of the Service Agreement and that the failure to pay was a breach of contract.

19. On 1st March 2013, Brabners Chaffe Street filed a formal Admission in Form N9C on behalf of Blackburn. In so far as is material the Admission was to the following effect:

> "**Part A Response to claim**
>
> …
>
> I admit liability for the claim and offer to pay £2,250,000 in satisfaction of the claim
>
> **Part B How are you going to pay the amount you have admitted?**
>
> …
>
> Please see the attached continuation sheet which sets out the reasons why the Defendant cannot pay immediately.
>
> **AND**
>
> I offer to pay by instalments of £562,500 per month starting on 26th February 2013 …"

It does not now appear to be in serious dispute that Mr. Shaw gave the instruction to Brabners Chaffe Street ("Brabners") to file and serve the Admission. It would appear from Brabners' attendance note of 1st March 2013, that Brabners were aware that at least Mrs Desai objected to paying what was claimed but self evidently that firm did not perceive there to be any difficulty in acting on the instructions of Mr Shaw recorded in that attendance note to file the Admission.

20. The sum of £562,500 had been paid by Blackburn to Mr. Berg on 26th February 2013. Although not material for present purposes, the reason given for not being able to pay the whole sum immediately was because of cash flow difficulties caused by the relegation of Blackburn from the Premier League to the Championship at the end of the 2011/2012 season, which it was proposed should be rectified by seeking accelerated payment of the "*parachute*" payment due to Blackburn from the Premier League as a result of its relegation.

21. On 1st March 2013, Mr. Berg's solicitors issued an application for summary judgment on the claim. In light of the fact that an Admission had been filed this was procedurally wrong. An application for judgment in Form N255A should have been issued. This point was taken by the solicitors currently acting for Blackburn, who, by this stage, had taken over from Brabners.

22. By an Order made by me by consent on 22nd March 2013, Mr. Berg was directed to file a form N255A, if advised to do so, by 26th March 2013. Mr. Berg complied with this direction. Blackburn was directed to file any evidence in support of its claim for an Order permitting payment by instalments by 4th April 2013. No such evidence was filed. Various other directions were given on the assumption that Blackburn would comply with this direction that never took effect because of that omission. I directed a hearing before me on then first available date after 9th April 2013 to determine what was then the only issue namely whether Blackburn should be given time to pay. That hearing was listed for 16th April 2013.

23. Blackburn's case is that is that by no later than 8th April 2013, it considered that the Service Agreement had been entered into by Mr. Shaw on its behalf in breach of express instructions given to him by Mrs Desai or on her behalf by which she had directed that any agreement with Mr. Berg should be subject to a 12 months notice period with any compensation for early determination being limited to 12 months salary. I say that because it is Blackburn's case that by a letter of that date it had given notice to Mr. Shaw of disciplinary proceedings against him arising out of the signing of the Service Agreement which it maintains arises from this alleged failure to comply with Mrs Desai's instructions. This was however contradicted by a press statement placed on Blackburn's web site on 9th April 2013 which was in these terms:

> "Following recent and misleading media speculation Blackburn Rovers FC would like to offer clarification on the situation concerning former manager Henning Berg.
>
> The owners wish to make it clear that the club's lawyers are actively seeking agreement with Mr. Berg on the settlement of his contract. They also wish it to be known that a £500,000 instalment has already been paid to Mr. Berg.
>
> Additionally the owners would like to state that there is no investigation into this matter with regard to managing director Derek Shaw who continues to have their complete backing and support.
>
> Mr. Shaw, operations director Paul Agnew and Gary Bowyer are currently in India for meetings with the owners."

It is Blackburn's case that in effect Mr Shaw is operating the affairs of Blackburn outside the control of the Owners. It is said that an aspect of this conduct was the posting of the press announcement referred to above, which it is contended was posted on the direction of Mr. Shaw without the permission of the Owners or any of them, and was not removed thereafter (and in the event not until the late afternoon of 24th April 2013) because Mr Shaw failed and refused to instruct Blackburn staff to do so.

24. The letter of 8th April is unusual in a number of respects, not the least of which is that it does not itself specify or refer to or attach any document that specifies what it is alleged that Mr. Shaw has done to warrant the proceedings to which the letter ostensibly refers. The meeting to which that letter refers did not take place. Mr. Berragan told me that this was because Mr Singh was unable to obtain a visa in time. There is no evidence that supports this assertion. There is no explanation as to why there is not. Even if Mr. Singh is unable to get a visa, that would not prevent him signing and returning by email or fax a signed witness statement.

25. After ordinary business hours on 15th April 2013, Blackburn's solicitors sent to Mr Berg's solicitors a draft unissued application for permission to withdraw the admission that had been filed by Brabners. Some hours later, a draft witness statement that purportedly supported that application was sent to Mr. Berg's

solicitors. A signed statement that contained material variations from the earlier draft statement it replaced was served on the morning of the hearing.

26. The hearing that had been fixed to determine Blackburn's application for an order that it be permitted to pay the admitted sum by instalments was listed before me on 16th April 2013. Mr. Berragan appeared for Blackburn then as now. He has displayed throughout both courtesy and candour whilst advancing his client's case with skill and as well as it can be advanced. I record my gratitude to him. He informed me that his client no longer sought time to pay but instead to withdraw the Admission previously filed on its behalf so as to be able to argue two defences to the claim being (a) that Mr Shaw did not have authority to enter into the Service Agreement on behalf of Blackburn and (b) Clause 15.3 of the Service Agreement was an unenforceable penalty.

27. No explanation was offered as to why these points had not been identified to Mr. Berg's solicitors at a much earlier stage given the terms of the 8th April letter to Mr. Shaw and the ostensible reason for it, other than an assertion, unsupported then or now by any evidence, by Mr. Berragan on instructions that this was the result of the need to obtain instructions from the Owners. I do not accept that as a satisfactory explanation – modern communications enable almost instant communication to take place between individuals anywhere in the world using video link, Skype, FaceTime, phones, email and fax. The result of the failure to notify Mr. Berg's solicitors of the new stance being adopted by Blackburn is that the hearing on the 16th April was for all practical purposes a waste of both the parties' time and money and of court resources. It reflects a serious failure to give effect to the Overriding Objective. It ignored the requirements of CPR Part 23 in relation to the filing and service of Application Notices and evidence in support.

28. On the basis of the material then available I considered both of Blackburn's asserted defences to be barely arguable but I directed a full hearing of the application subject to the compliance by Blackburn with various conditions that included a requirement that Blackburn pay into an escrow account in the joint names of the parties solicitors the whole of the net sum remaining due assuming that Clause 15.3 of the Service Agreement took effect according to its terms. That was then estimated to be £843,750. This direction and the others that I gave were complied with. An application by Mr. Berragan at the start of the hearing to adduce a further statement from Mr Shaw was conceded by Mr Gilroy QC, who appears for Mr Berg.

The Principles Applicable To This Application

29. CPR r.14.1.(5) is augmented by Paragraph 7.2 of Part 14 Practice Direction - Admissions. It provides:

> "In deciding whether to give permission for an admission to be withdrawn, the court will have regard to all the circumstances of the case, including –
>
> (a) the grounds upon which the applicant seeks to withdraw the admission including whether or not new evidence has

> come to light which was not available at the time the admission was made;
>
> (b) the conduct of the parties, including any conduct which led the party making the admission to do so;
>
> (c) the prejudice that may be caused to any person if the admission is withdrawn;
>
> (d) the prejudice that may be caused to any person if the application is refused;
>
> (e) the stage in the proceedings at which the application to withdraw is made, in particular in relation to the date or period fixed for trial;
>
> (f) the prospects of success (if the admission is withdrawn) of the claim or part of the claim in relation to which the offer was made; and
>
> (g) the interests of the administration of justice."

In exercising the discretion conferred by CPR r 14.1(5) the Court of Appeal in Sowerby v. Charlton [2005] EWCA Civ 1610 approved the approach identified by Sumner J in Braybrook v. Basildon & Thurrock University NHS Trust [2004] EWHC 3352 (QB) which requires that the Court should consider all the circumstances of the case and seek to give effect to the overriding objective. Amongst the matters to be considered are:

i) The reasons and justification for the application, which must be made in good faith;

ii) The balance of prejudice to the parties;

iii) Whether any party has been the author of any prejudice they may suffer;

iv) The prospects of success of any issue arising from the withdrawal of the admission;

v) The public interest in avoiding where possible satellite litigation, disproportionate use of court resources and the impact of strategic manoeuvring;

vi) The proximity of the application to a final hearing.

On 1st April 2013, the Overriding Objective was radically amended. It now places emphasis not merely on the need to deal with cases justly but to do so at proportionate cost, expeditiously, to enforce compliance with the Rules and orders and to allot to each case an appropriate share of the Court's resources. This amendment of the overriding objective is likely to have a significant impact on the approach to be adopted to applications of this kind, which will now be approached by courts much more rigorously than perhaps has been the practice in the past,

particularly where formal admissions are made on behalf of parties represented by experienced and specialist professional advisors.

30. In relation to the underlying merits of Blackburn's asserted defences, I suggested in the course of the argument that the appropriate starting point is the realistic arguability test applied to summary judgment applications. Mr Berragan accepted this approach as correct and Mr Gilroy did not express any disagreement with that approach. It necessarily follows from that, and in any event from the nature of these proceedings, that I cannot resolve disputes of fact that are material but by the same token, just as is the position in relation to summary judgment applications, there is no obligation on the Court to accept without question any factual assertion made by the party asserting that it has an arguable defence available to it – see National Westminster Bank Plc v. Daniel [1993] 1 WLR 1453 and the post CPR cases noted in the notes to Part 24 in Volume I of the White Book at Paragraph 24.2.5, which show that this practice has continued to be applied *post* the coming into effect of the CPR.

31. In my judgment the correct way of approaching an application of this sort is to start by asking whether the Defendant has demonstrated that if permitted to withdraw its admission it would have a realistically arguable defence. If it has it will be necessary to consider the other factors. If it has not then clearly it will not be necessary to consider the other factors because a summary judgment application would be bound to succeed if permission to withdraw the Admission was granted and thus no useful purpose would be served by giving the permission sought.

The Defences That Blackburn Rely Upon

32. *Penalty*

Mr. Berragan submits that Clause 15.3 is at least realistically arguably a penalty and as such is unenforceable beyond the sum that represents Mr. Berg's actual loss. In the course of the argument I asked Mr. Berragan whether there is any contested factual issue that is material to the construction of Clause 15.3. He assured me there was not. His submissions centre on the effect of the Clause and are coupled with a submission that the contract must be read as a whole.

33. In my judgment the contention that Clause 15.3 of the Service Agreement is a penalty is not realistically arguable for the following reasons. A sum of money payable under a contract on the occurrence of an event other than a breach of a contractual duty owed by the paying to the receiving party is not a penalty – see Campbell Discount Company Limited v. Bridge [1961] 1 QB 445 where a hirer under a hire purchase agreement could terminate the hiring during the course of the term whereupon the hirer was required to pay a sum by way of agreed compensation. The appeal to the House of Lords proceeded on the basis that the hirer was in breach and thus is irrelevant to the issue I am now considering. The approach adopted by the Court of Appeal in Campbell Discount (ante) was also adopted by the House of Lords in Export Credits Guarantee Department v. Universal Oil Products Company [1983] 1 WLR 391. The facts of that case are complex and immaterial for present purposes. As Lord Roskill succinctly observed at 402H:

> "The clause was not a penalty clause because it provided for payment of money upon the happening of a specified event other than a breach of contractual duty by the contemplated payer to the contemplated payee …"

As he added at 403E

> "…the main purpose of the law relating to penalty clauses is to prevent a plaintiff recovering a sum in respect of a breach of contract committed by a defendant which bears little or no relationship to the loss actually suffered by the plaintiff as a result of the breach by the defendant. But it is not and never has been for the courts to relieve a party from the consequences of what may in the event prove to be an onerous or possibly even a commercially imprudent bargain.

Finally and by reference to an unreported case he expressed agreement with the view that it was wrong to "… *extend the law by relieving against an obligation in a contract entered into between two parties which does not fall within the well defined limits in which the court has in the past shown itself willing to interfere.*"

34. I now turn to the terms of the Service Agreement. Clause 3.1 creates the fixed term element in these terms: *"The manager's employment shall commence on the commencement date and shall continue subject to the remaining terms of this Agreement until 30th June 2015 ..."* [Emphasis supplied]. Clause 3.1 is thus expressly made subject to Clause 15.3. Clause 15.3 is premised on a future wish of Blackburn to "*... terminate this Agreement with immediate effect ...*'. In that event then the clause provides expressly that Blackburn "*... shall be entitled to do so ...*". Thus termination of Mr. Berg's employment prior to the expiry of the Fixed term did not constitute a breach of contract – to the contrary early termination by Blackburn was permitted as of right – whereupon a sum of money became payable by Blackburn to Mr. Berg. This is not a payment for a breach of contract. It is a payment that becomes due on the occurrence of an event other than a breach of contract. That being so the law relating to penalty clauses is not engaged and the contention by Blackburn to contrary effect is not arguable. Mr. Berragan submitted that the clause should be construed as being a disguised or hidden penalty clause. I do not accept that to be arguable given the effect of the express terms to which I have referred. In a fixed term contract a party is either entitled to terminate before expiry of the fixed term or it is not. Here it is. Once that is understood the law relating to penalty clauses is entirely immaterial.

35. *Authority*

I am prepared to accept that Blackburn has an arguable case that Mr. Shaw did not have actual authority to enter into a contract with Mr. Berg other than on the basis that it was terminable on 12 months notice and compensation for early termination was capped at 12 months salary. That issue is material however only to a claim as between Blackburn and Mr. Shaw or to a claim as between Mr Berg and Mr. Shaw. It is entirely immaterial to a claim on the Service Agreement by Mr Berg against Blackburn where the sole issue is whether Mr. Shaw had usual authority to

enter into the Service Agreement on behalf of Blackburn by reason of his appointment as Managing Director of Blackburn. If Blackburn is unable to demonstrate a realistically arguable case that Mr. Shaw did not have such authority then it has no defence to the claim.

36. It is common ground that Mr. Shaw was and is a statutory director of Blackburn and was and is its managing director. It is also common ground that Mr. Shaw was actually authorised to negotiate and conclude a contract with Mr. Berg. This much is apparent from the evidence of Mr Farnell (Blackburn's current solicitor) who says at Paragraph 8 of his witness statement "*... the owners instructed Mr Shaw to enter into a contract with Mr. Berg ...*". There is no evidence from either Mr. Singh or any of the Owners that contradicts this. Paragraph 5 of Mrs Silk's statement supports the proposition that Mr. Shaw had been authorised to negotiate a contract of employment with Mr Berg. Mr. Shaw says in Paragraph 5 of his first witness statement that the Owners "*... directed me to negotiate a contract for the Claimant's services ...*".

37. There is no evidence that suggests that Mr. Berg or his advisors were ever aware that Mr. Shaw's authority was restricted in the manner suggested – that is that he was authorised to negotiate and conclude a contract with Mr. Berg only on the basis that the contract entitled Blackburn to terminate it without cause on one year's notice and/or that compensation for early termination was to be limited to one year's salary. Mr. Shaw assertion in Paragraph 12 of his first statement that "*… I would have made it plain that the owner's approval was necessary ...*" does not assist Blackburn. The statement is devoid of evidential worth because (i) Mr. Shaw does not say that he actually recalls making such a statement; (ii) all of the meetings with Mr. Berg that Mr. Shaw attended were attended by other Blackburn representatives and none of those who attended those meetings give evidence of Mr. Shaw having made such a statement and (iii) none of the correspondence passing to Mr. Berg from Blackburn or those acting for Blackburn suggested that the contract he was being asked to sign was in any sense conditional on final approval by the Owners. In any event, the assertion is immaterial for the reasons given in Paragraph 42 below.

38. The legal principles that apply in this area are well established. By appointing Mr. Shaw to be the Managing Director of Blackburn, he has been held out as having the usual authority of someone holding that office. It has for many years been the case that the managing director of a company has an implied or usual authority to make decisions for the company in the ordinary course of its business – see by way of example Hely-Hutchinson v. Brayhead Limited [1968] 1 QB 549. All acts falling within such authority are binding on the company concerned as between the company concerned and a party dealing with the company concerned in good faith.

39. In my judgment it is unarguable to suggest that the Managing Director of Blackburn does not have implied or usual authority to sign employment contracts on its behalf. As I have said it is common ground that Mr. Shaw had been actually authorised to negotiate and conclude an employment contract with Mr. Berg. The only qualification on that was it is asserted was that the contract was to be terminable on 12 months notice and no more than 12 months salary was to be

payable by way of compensation for early termination. It is not suggested by anyone that Mr. Berg or his advisers were ever informed of that qualification to Mr. Shaw's authority.

40. In relation to signing contracts on behalf of Blackburn, Mr. Shaw says in Paragraph 11 of his first statement (filed on behalf of Blackburn) "*I am the usual signature for footballing matters like this and also signed Michael Appleton's contract"*. He expanded upon this in his second statement in Paragraph 3 where he said: *"I did not mean that I am authorised to sign contracts on my own. I am one of the authorised or usual signatures. I now refer to the executed contracts for Steve Keen and for Mike Appleton … Both were drawn up as deeds. Mr. Keen's contract was signed by two of the then directors of the club. Mr. Appleton's was signed by myself as director and Mr. Sylvester as company secretary.*" That qualification does not lead to the conclusion that Mr. Shaw does not and did not have usual or implied authority to sign such contracts on his own. At best it implies that he did not have actual authority to sign contracts on his own. That is not the issue that arises.

41. In any event, none of Blackburn's directors or its Company Secretary has given evidence that Mr. Shaw was not authorised to sign contracts on behalf of Blackburn. Mrs Silk has given a lengthy statement. She deals with the signature of the Service Agreement at Paragraph 11 of her statement. She says merely that Mr. Shaw took it to get it signed by Mr. Berg. She does not there or anywhere else suggest that Mr. Shaw was not authorised to sign such contracts on behalf of Blackburn. Mr. Agnew is a director of Blackburn. He has provided a statement. He does not suggest that Mr. Shaw did not have authority to sign contracts on behalf of Blackburn. Mr. Silvester is the Company Secretary of Blackburn. He says that as far as he is aware a meeting of the Board of Directors did not approve the Service Agreement. Critically however, what he does not say is that Mr. Shaw was not authorised to sign contracts on behalf of Blackburn. Finally there is nothing within the Articles of Association that could lead even arguably to the conclusion that Mr. Shaw did not have such a power. To the contrary, Article 7.1 shows very clearly that he could have had such a power. It is noticeable that it has not been asserted by Blackburn that there had been no relevant delegation of contract making powers to Mr. Shaw.

42. Blackburn rely on Paragraph 7 of Mr. Farnell's statement as supporting the proposition that the managing director of a Plc carrying on the business of a professional football club does not have usual authority to sign a contract by which the club manager is employed. Paragraph 7 of Mr. Farnell's witness states that "*… I would expect that … Mr. Berg (and Mr. Berg's advisers) would have been well aware that Mr. Berg's contract would have to be authorised by the owners …*" In my judgment this takes the issue I am now considering no further. The issue I am concerned with is not whether the contract would have to be authorised by the owners but whether Mr. Berg was entitled to assume that it had been by reason of it being signed by Blackburn's Managing Director. Mr. Farnell does not assert that there is a practice in professional football by which the managing directors of companies carrying on such business do not have the usual authority that the managing directors of other trading companies have. It is that

issue that Mr. White (Mr Berg's solicitor in relation to the transaction) addresses in Paragraph 14 of his witness statement where it is stated:

> "I would regard it as extraordinary to suggest that a professional football manager proposing to enter the employment of a professional football club or any agent or legal advisor acting on behalf of that manager, having negotiated in good faith with the Finance Director of that club and with the involvement knowledge and approval of the Managing Director throughout … should conduct some form of due diligence on that club or make enquiries of the club's owners to ensure that the officers of the club having conduct of the negotiations actually had the authority to commit the club to a concluded agreement."

Mr. White's expertise that qualifies him to give this evidence is well established by Paragraph 1 of his witness statement. Of even more significance in this context is the statement of Mr. Olaf Dixon, the Deputy Chief Executive of the League Managers Association. As he puts it at Paragraphs 11 and 12 of his statement:

> "…I can confirm that in my over 30 years of experience in relation to the appointment of football managers to professional football clubs, it is perfectly normal to assume that if a managing director and/or a finance director of a football club are negotiating the terms of a contract utilising for example the facilities of that club and engaging for example the club's solicitors to advise in connection with the proposed appointment, then they have authority to do so.
>
> In my experience it would be unheard of for a manager to investigate the authority of a managing director or finance director in these circumstances. Within the football industry, my experience suggests that it is perfectly normal and proper for a manager to accept that a managing director or finance director, but especially a managing director, has the authority to offer the terms they are offering to the manager on behalf of the club."

43. In those circumstances and for those reasons I consider Blackburn's case that Mr. Shaw did not have implied or usual authority to sign the Service Agreement is unarguable. If permission were to be given to withdraw the Admission, an application for summary judgment would be bound to succeed for the reasons that I have identified.

Discretion

44. Given my conclusions concerning Blackburn's asserted defences to Mr. Berg's claim, strictly it is unnecessary that I consider further the exercise of the discretion to give permission to withdraw the Admission. Whilst I have considered whether to set out my conclusions on this issue on the hypothesis that I am wrong in the

conclusions that I have reached concerning the arguability of Blackburn's asserted defences, on balance I consider that it would be wrong to attempt to do so because the exercise would be essentially an academic one.

Disposal

45. Neither of Blackburn's asserted defences are realistically arguable. On that basis no useful purpose would be served by permitting the Admission to be withdrawn. It follows that the application for permission to withdraw the admission is dismissed.