Neutral Citation Number: [2021] EWHC 628 (Comm)

Case No: CL-2020-00396

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
COMMERCIAL COURT (QBD)
IN AN ARBITRATION CLAIM

The Rolls Building, Fetter Lane, London, EC4A 1NL

Date: 17/03/2021

Before :

MRS JUSTICE MOULDER

- -

Between :

MANCHESTER CITY FOOTBALL CLUB LIMITED	**Claimant**
- and -	
THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED	**Defendants**
PHILIP HAVERS QC	
JOHN MACHELL QC	
DANIEL ALEXANDER QC	

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LORD PANNICK QC, PAUL HARRIS QC and DAVID GREGORY (instructed by **CLIFFORD CHANCE LLP**) for the **Claimant**
ADAM LEWIS QC and ANDREW HUNTER QC (instructed by **BIRD & BIRD LLP**) for the **First Defendant**

Hearing dates: 1 and 2 March 2021

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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.

Covid-19 Protocol: This judgment was handed down by the judge remotely by circulation to the parties' representatives by email. The date and time for hand-down is deemed to be 10:30am on 17 March 2021.

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Mrs Justice Moulder :

1. This is the court's judgment on the application by Manchester City Football Club Limited (the "Club") to set aside the award of the arbitral tribunal dated 2 June 2020 (the "Award") under Section 67 and/or Section 68 of the Arbitration Act 1996 (the "Act"). The Club also seeks the removal of the arbitrators under Section 24 of the Act.

2. The defendants to the application are The Football Association Premier League Limited (the "PL") and the three arbitrators, Mr Philip Havers QC, Mr John Machell QC and Mr Daniel Alexander QC.

3. The three arbitrators did not participate in the hearing of the application.

Evidence

4. In support of the application, the Club has served a witness statement dated 26 June 2020 of Mr Christopher Yates, a partner of Clifford Chance LLP ("Clifford Chance") , the lawyers acting for the Club, and a second witness statement of Mr Yates dated 16 October 2020.

5. In response the PL has served a witness statement of Mr Maxwell Duthie, a partner of Bird & Bird LLP, the lawyers acting for the PL, dated 18 September 2020.

6. The court also had the benefit of the evidence of Mr Jamie Herbert, Head of Legal-Football and Regulatory Services at the PL which was before the tribunal as to the process for appointment to the Panel and the involvement of the clubs. His evidence was not challenged in cross examination before the tribunal.

Hearing

7. In the light of the current pandemic the hearing was held remotely. The court had the benefit of both written and oral submissions from leading counsel for the Club and for the PL.

8. The hearing was held in private pursuant to CPR 62.10.

Background

9. The PL is a company and each of the clubs that play in the Premier League competition in a particular season is a shareholder in the company. The relationship between the PL and the clubs is governed by articles of association and the rules of the PL (the "Rules").

10. In December 2018 the PL wrote to the Club requesting information and documents in relation to a number of potential breaches of the Rules. This initial request was made pursuant to the PL's powers of inquiry under Rule W.1.

11. The circumstances in which the request for information arose are not relevant to the issues which this court is to decide. The request for the production of documents and information was said to be made pursuant to Rules B.19 and W.1.

12. A Commission was appointed pursuant to W.21 but its composition and the disciplinary system under Rule W and Rule X was challenged by the Club as not being sufficiently independent or impartial (letter of 9 September 2019 from Clifford Chance).

13. The PL proposed an ad hoc procedure for the appointment of a new Commission but this was rejected by the Club as being "outside the Rules" and failing to remedy the alleged deficiencies in the disciplinary and dispute resolution processes (letter of 30 September 2019 from Clifford Chance).

14. The PL then commenced an arbitration against the Club pursuant to Rule X of the Rules, by request dated 22 October 2019, in respect of the Club's alleged failures to comply with its contractual obligations under the Rules to provide documents and information and the disciplinary proceedings under Rule W were "suspended".

15. By the request for arbitration the PL sought a declaration and/or determination that the Club was obliged to provide the PL with certain requested documents and information and an order for specific performance compelling the Club to deliver up to the PL the withheld documents and information (the "Information Claim").

16. In accordance with Rule X.8 the PL provided a list of individuals who were members of the panel from which the arbitrators were to be appointed (the "Panel"). The Club appointed from the Panel John Machell QC. The PL appointed Daniel Alexander QC and in accordance with the Rules, the two arbitrators then appointed a chairman, Philip Havers QC.

17. It was submitted by the Club before the arbitral tribunal that on a proper construction of the Rules, the PL had no power to institute a Section X arbitration in respect of the Information Claim. It was thus submitted that the tribunal lacked substantive jurisdiction and the arbitration could not proceed. It was also submitted by the Club before the tribunal that the tribunal did not have the appearance of impartiality. By its Award the tribunal rejected these submissions and found that the PL was entitled to pursue the Information Claim by arbitration under Section X.

18. On 6 February 2020 the Rules relating to the disciplinary and dispute resolution procedures were amended at a meeting of the shareholders.

The application

19. In summary by its application the Club seeks the following primary relief:

    i) an order under Section 67 of the Act on the basis that the tribunal erred in concluding that it had jurisdiction to hear the arbitration;

    ii) an order under Section 68 of the Act on the basis that there was apparent bias on the part of the tribunal and under Section 24 of the Act removing the tribunal members.

Grounds of challenge

20. The Club raises two challenges to the tribunal's jurisdiction which can be summarised as follows (paragraph 3 of Club's skeleton):

i) that on a proper construction of the Rules, the PL had no power to institute arbitral proceedings under Rule X (the "Construction Objection"). This challenge to the jurisdiction of the tribunal under Section 67 of the Act is thus one of the construction of the relevant contract, that is the Rules.

ii) that the disciplinary and dispute resolution proceedings are unfair and in breach of the principles of impartiality and independence due to the process for appointment and reappointment of potential arbitrators to the PL's Panel. This challenge is thus one of apparent bias under Section 68 of the Act (paragraph 26 of the Club's skeleton).

Section 67 challenge

Relevant legislative framework

21. Section 67 of the Act provides:

> "67.— Challenging the award: substantive jurisdiction.
>
> (1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court—
>
> (a) challenging any award of the arbitral tribunal as to its substantive jurisdiction; or
>
> (b) for an order declaring an award made by the tribunal on the merits to be of no effect, in whole or in part, because the tribunal did not have substantive jurisdiction.
>
> A party may lose the right to object (see section 73) and the right to apply is subject to the restrictions in section 70(2) and (3).
>
> …
>
> (3) On an application under this section challenging an award of the arbitral tribunal as to its substantive jurisdiction, the court may by order—
>
> (a) confirm the award,
>
> (b) vary the award, or
>
> (c) set aside the award in whole or in part.

Nature of hearing

22. It was common ground that a challenge under Section 67 proceeds by way of a de novo rehearing: *Dallah Co v Ministry of Religious Affairs of Pakistan* [2011] 1AC 763.

23. However the PL stressed that whilst:

> "…[t]he award of the arbitrators has no automatic legal or evidential weight. Nevertheless, and given that the arbitral tribunal has considered the same issues, the Court will examine the award with care and interest. If and to the extent that the reasoning is persuasive, then there is no reason why the Court should not be persuaded by it." (*Korea v Dayyani* [2019] EWHC 3580 (Comm).)

Relevant Rules (as in force prior to the amendments in February 2020)

24. The material provisions of the Rules, so far as the Construction Objection is concerned, are as follows:

> "Section W: Disciplinary
>
> Power of Inquiry
>
> *W.1. The Board shall have power to inquire into any suspected or alleged breach of these Rules and for that purpose may require:*
>
> *W.1.1. any Manager, Match Official, Official or Player to appear before it to answer questions and/or provide information; and*
>
> *W.1.2. any such Person or any Club to produce documents.*
>
> *W.2. …*
>
> Board's disciplinary powers
>
> *W.3. The Board shall have power to deal with any suspected or alleged breach of these Rules by either:*
>
> *W.3.1. issuing a reprimand;*
>
> *W.3.2. imposing a fixed penalty or other sanction where such provision is made in these Rules;*
>
> *W.3.3. exercising its summary jurisdiction;*
>
> *W.3.4. referring the matter to a Commission appointed under Rule W.21;*
>
> *W.3.5. referring the matter to The Football Association for determination under The Football Association Rules; or*
>
> *W.3.6. concluding an agreement in writing with that Person in which it accepts a sanction (which may include any of the sanctions referred to at Rule W.55) proposed by the Board.*
>
> *W.4…*

…

Appointing a Commission

W.21. A Commission shall be appointed by the Board and shall comprise three members of the Panel of whom one, who shall be legally qualified, shall sit as chairman of the Commission.

…

Commission's Powers

W.54. …

W.55. Having heard and considered such mitigating factors (if any) the Commission may:

W.55.1.reprimand the Respondent;

W.55.2. impose upon the Respondent a fine unlimited in amount and suspend any part thereof;

W.55.3.in the case of a Respondent who is a Manager, Match Official, Official or Player, suspend him from operating as such for such period as it shall think fit;

W.55.4. in the case of a Respondent which is a Club:

W.55.4.1. suspend it from playing in League Matches or any matches in competitions which form part of the Games Programmes or Professional Development Leagues (as those terms are defined in the Youth Development Rules) for such period as it thinks fit;

W.55.4.2. deduct points scored or to be scored in League Matches or such other matches as are referred to in Rule W.55.4.1;

W.55.4.3. recommend that the Board orders that a League Match or such other match as is referred to in Rule W.55.4.1 be replayed;

W.55.4.4. recommend that the League expels the Respondent from membership in accordance with the provisions of Rule B.7;

W.55.5. order the Respondent to pay compensation unlimited in amount to any Person or to any Club (or club);

W.55.6. cancel or refuse the registration of a Player registered or attempted to be registered in contravention of these Rules;

W.55.7. impose upon the Respondent any combination of the foregoing or such other penalty as it shall think fit;

W.55.8. order the Respondent to pay such sum by way of costs as it shall think fit which may include the fees and expenses of members of the Commission paid or payable under Rule W.53; and

W.55.9. make such other order as it thinks fit

…

Appeal Board's Powers

W.79…

W.80 Subject to the provisions of Section X of these Rules (Arbitration), the decision of an Appeal Board shall be final.

Section X: Arbitration

X.1. …

Agreement to Arbitrate

X.2 Membership of the League shall constitute an agreement in writing between the League and Clubs and between each Club for the purposes of section 5 of the Act in the following terms:

X.2.1. to submit all disputes which arise between them (including in the case of a Relegated Club any dispute between it and a Club or the League, the cause of action of which arose while the Relegated Club was a member of the League), whether arising out of these Rules or otherwise, to final and binding arbitration in accordance with the provisions of the Act and this Section of these Rules;

…

X.3 Disputes under these Rules will be deemed to fall into one of three categories, being:

X.3.1. disputes arising from decisions of Commissions or Appeal Boards made pursuant to Rules W.1 to W.83 (Disciplinary) of these Rules ("Disciplinary Disputes");

X.3.2. disputes arising from the exercise of the Board's discretion ("Board Disputes"); and

X.3.3. other disputes arising from these Rules or otherwise.

> *X.4 In the case of a Disciplinary Dispute, the only grounds for review of a decision of a Commission or Appeal Board by way of arbitration under this Section X shall be that the decision was:*
>
> *X.4.1. reached outside of the jurisdiction of the body that made the decision;*
>
> *X.4.2. reached as a result of fraud, malice or bad faith;*
>
> *X.4.3. reached as a result of procedural errors so great that the rights of the applicant have been clearly and substantially prejudiced;*
>
> *X.4.4. reached as a result of a perverse interpretation of the law; or*
>
> *X.4.5. one which could not reasonably have been reached by any Commission or Appeal Board which had applied its mind properly to the facts of the case.*
>
> *…*
>
> Remedies
>
> *X.27. The tribunal shall have power to:*
>
> *X.27.1. determine any question of law or fact arising in the course of the arbitration;*
>
> *X.27.2. determine any question as to its own jurisdiction;*
>
> *X.27.3. make a declaration as to any matter to be determined in the proceedings;*
>
> *X.27.4. order the payment of a sum of money;*
>
> *X.27.5. award simple or compound interest;*
>
> *X.27.6. order a party to do or refrain from doing anything;*
>
> *X.27.7. order specific performance of a contract (other than a contract relating to land); and*
>
> *X.27.8.order the rectification, setting aside or cancellation of a deed or other document…"* [emphasis added]

Submissions

25. It was submitted for the Club (in summary) that:

    i) on a proper construction of the Rules, the PL had no power to institute arbitral proceedings under Rule X as the Rules properly construed required the dispute

to be resolved through Rule W and not by a Rule X arbitration (although a Rule X arbitration may occur at the end of the Rule W process) (paragraph 15 of the Club's skeleton).

ii) the dispute relates to a disciplinary matter expressly within the scope of Rule W; the PL is enquiring into a suspected or alleged breach of the rules (paragraph 16 (a) of the Club's skeleton); Rule W applies in the circumstances of the dispute and that implicitly excludes the application of Rule X.

iii) Rule X concerns arbitration and the PL has sought impermissibly to use Rule X as an additional procedure (paragraph 16 (c) of the Club's skeleton).

iv) there are safeguards in Rule W inter alia, a right of appeal from a Commission to an Appeal Board and the chairman of the Appeal Board must have held judicial office; Rule W.80 recognises arbitration as the final stage in the disciplinary process (paragraph 16 (d) of the Club's skeleton).

v) Rule X recognises that disciplinary disputes are one category of dispute in respect of which a Rule X arbitration may be commenced and Rule X.4 specifies that in such a case, the powers of an arbitral tribunal are confined to a review of the decision on limited and specified grounds (paragraph 16 (e) of the Club's skeleton).

vi) the arrangements within Rule W constitute the agreement to be followed when disciplinary matters arise (paragraph 16 (f) of the Club's skeleton).

26. It was submitted for the PL (in summary) that (paragraph 7 of its skeleton):

i) Section X expressly includes at X.27.7 claims for specific performance.

ii) there is no express term in Section X or any other Rule excluding PL from bringing such a claim for specific performance (and thus the Club is forced to contend that such exclusion is "implicit").

iii) there is no basis for the implicit exclusion of Section X - it does not satisfy the test in *Marks and Spencer plc v BNP Paribas Securities Services Trust Co (Jersey) Ltd and another* [2015] UKSC 72 at [18] that it must be "*necessary to give business efficacy to the contract*" and so obvious that '*it goes without saying'*.

iv) there is good reason why the PL might want to pursue contractual remedies instead of or alongside disciplinary action, for example a club leaving the Premier League.

v) the implied exclusion would exclude the PL from ever seeking specific performance and would be contrary to the principle in *Gilbert Ash (Northern) Ltd. v Modern Engineering (Bristol) Ltd*. [1974] A.C. 689.

vi) there is express power to grant the relief sought which is not restricted to clubs.

Discussion

27. Although in the oral submissions before this court, only passing reference was made to the decision of the Supreme Court in *Wood v Capita Insurance Services Ltd* [2017] UKSC 24, the approach to be taken to contractual construction of a contract is set out in the judgment of Lord Hodge in that case and, in line with the approach taken by the arbitrators (paragraphs 41 and 42 of the Award), I approach the exercise of construction by applying the principles set out by Lord Hodge. It is in my view important in considering the submissions of the parties, to bear in mind the following passages from the judgment of Lord Hodge:

> "[10] The court's task is to ascertain the objective meaning of the language which the parties have chosen to express their agreement. It has long been accepted that this is not a literalist exercise focused solely on a parsing of the wording of the particular clause but that the court must consider the contract as a whole and, depending on the nature, formality and quality of drafting of the contract, give more or less weight to elements of the wider context in reaching its view as to that objective meaning…
>
> 11. Lord Clarke elegantly summarised the approach to construction in *Rainy Sky* at para 21f. In Arnold all of the judgments confirmed the approach in *Rainy Sky* (Lord Neuberger paras 13-14; Lord Hodge para 76; and Lord Carnwath para 108). Interpretation is, as Lord Clarke stated in *Rainy Sky* (para 21), a unitary exercise; where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause (*Rainy Sky* para 26, citing Mance LJ in *Gan Insurance Co Ltd v Tai Ping Insurance Co Ltd (No 2)* [2001] 2 All ER (Comm) 299 paras 13 and 16); and it must also be alive to the possibility that one side may have agreed to something which with hindsight did not serve his interest: Arnold (paras 20 and 77). Similarly, the court must not lose sight of the possibility that a provision may be a negotiated compromise or that the negotiators were not able to agree more precise terms.
>
> 12. This unitary exercise involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated: Arnold para 77 citing *In re Sigma Finance Corpn* [2010] 1 All ER 571 , para 10 per Lord Mance. To my mind once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a

> close examination of the relevant language in the contract, so long as the court balances the indications given by each.
>
> 13. Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements. Some agreements may be successfully interpreted principally by textual analysis, for example because of their sophistication and complexity and because they have been negotiated and prepared with the assistance of skilled professionals. The correct interpretation of other contracts may be achieved by a greater emphasis on the factual matrix, for example because of their informality, brevity or the absence of skilled professional assistance. But negotiators of complex formal contracts may often not achieve a logical and coherent text because of, for example, the conflicting aims of the parties, failures of communication, differing drafting practices, or deadlines which require the parties to compromise in order to reach agreement…" [emphasis added]

The language of the clause

28. The Club bases its construction argument on the "*express terms*" of the Rules and in particular Rules W.3, W.80, X.3.1 and X.4.

29. However in my view the PL is correct in its submission (paragraph 37 of its skeleton) that the starting point for any challenge based on the scope of an arbitration agreement is to consider the express terms of the arbitration agreement itself that is Section X.

30. In my view the starting point is Rule X.2.1 which states:

> "X.2 Membership of the League shall constitute an agreement in writing between the League and Clubs and between each Club … in the following terms:
>
> X.2.1. to submit all disputes which arise between them (including in the case of a Relegated Club any dispute between it and a Club or the League, the cause of action of which arose while the Relegated Club was a member of the League), whether arising out of these Rules or otherwise, to final and binding arbitration… " [emphasis added]

31. The Club's submissions focused on the overall approach within the Rules and the division for which it contended between "*disciplinary*" disputes which it submitted was governed by Section W and arbitration which is dealt with in Section X.

32. However one cannot ignore the language of Section X and in particular the wording of Section X.2.1 which, as set out above, expressly provides for the submission of "*all disputes which arise between [the Club and PL]*" to arbitration [emphasis added].

33. In my view the Club's case on construction is dependent on the argument that notwithstanding the clear language of Section X.2.1, the words "all disputes" are to be construed as limited by other provisions of the Rules in particular Section X.3.1 and X.4 and Section W.3 and W.80.

34. It was submitted for the PL that this argument was in effect an argument for an implied term and that it did not satisfy the test for implied terms in *Marks and Spencer*.

35. It was submitted for the Club that it was not concerned with implied terms but was relying on express terms and that this approach was entirely orthodox: counsel relied on the underlined passages (below) of the judgment of Lord Neuberger at [27] and [28] in *Marks and Spencer*:

> "[27] Of course, it is fair to say that the factors to be taken into account on an issue of construction, namely the words used in the contract, the surrounding circumstances known to both parties at the time of the contract, commercial common sense, and the reasonable reader or reasonable parties, are also taken into account on an issue of implication. However, that does not mean that the exercise of implication should be properly classified as part of the exercise of interpretation, let alone that it should be carried out at the same time as interpretation. When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed; and to speak of construing the contract as a whole, including the implied terms, is not helpful, not least because it begs the question as to what construction actually means in this context.
>
> 28 In most, possibly all, disputes about whether a term should be implied into a contract, it is only after the process of construing the express words is complete that the issue of an implied term falls to be considered. Until one has decided what the parties have expressly agreed, it is difficult to see how one can set about deciding whether a term should be implied and if so what term…"

36. In this regard I note the words in [27] above:

> "When one is implying a term or a phrase, one is not construing words, as the words to be implied are ex hypothesi not there to be construed"

37. I also note the observation of Lord Neuberger in the preceding paragraph of the judgment:

> "[26] I accept that both (i) construing the words which the parties have used in their contract and (ii) implying terms into the contract, involve determining the scope and meaning of the contract. However, Lord Hoffmann's analysis in the Belize Telecom case could obscure the fact that construing the words used and implying additional words are different processes governed by different rules." [emphasis added]

38. Applying these principles, I turn to consider the provisions relied upon by the Club as providing context for the interpretation of the arbitration provisions in Section X.

The relevant parts of the contract that provide the context

39. The Club relied on Rules X.3.1 and X.4.

40. X.3 provides:

> "X.3 Disputes under these Rules will be deemed to fall into one of three categories, being:
>
> X.3.1. disputes arising from decisions of Commissions or Appeal Boards made pursuant to Rules W.1 to W.83 (Disciplinary) of these Rules ("Disciplinary Disputes");
>
> X.3.2. disputes arising from the exercise of the Board's discretion ("Board Disputes"); and
>
> X.3.3. other disputes arising from these Rules or otherwise."

41. X.4 (set out above) limits the grounds for review of a decision of a Commission or Appeal Board by way of arbitration.

42. It was submitted for the Club that in the case of disciplinary disputes, X.3.1 had the effect of limiting the scope of the arbitration disputes under Section X to disputes which had been dealt with under Section W, the rationale being that in accordance with Section X.4 the grounds to review such a decision were limited (in a way equivalent to the power of judicial review).

43. It was submitted for the Club that because X.3.1 deals with disputes arising from decisions of a Commission or an Appeal Board that "*recognises*" that where the PL alleged a breach of the rule book it needed to follow Rule W.

44. In my view, the difficulty with this submission (as recognised by the arbitrators at paragraph 68 of the Award) is that the definition of "*Disciplinary Disputes*" in X.3.1 is a dispute arising from a decision of a Commission or an Appeal Board. Whilst it is clear that the power to review such decisions by way of arbitration is limited (pursuant to section X.4) Section X.3 does not define "*Disciplinary Disputes*" as any dispute falling within Section W nor does it define it as any dispute arising from an allegation by the PL of a breach of the Rules by a club.

45. On the other hand X.3.3, "*other disputes arising from these Rules*", is very broad. It was submitted for the Club that it would cover disputes between clubs and disputes

about other contracts other than under the Rules. However that is not what the language of X.3.3 says. The parties could have expressly restricted the ambit of X.3.3 in the way suggested for the Club but on its face it is not so limited. Disputes which fall within, or could be dealt with under, Section W are potentially within the scope of X.3.3.

46. Whilst therefore the grounds for review of decisions of a Commission or Appeal Board are clearly and expressly limited, the language of X.3 does not place a limit on the otherwise wide language of X.2.1. by expressly excluding disputes which could fall within Section W.

Section W

47. Turning then to the provisions of Section W, it was submitted for the Club that the powers of the PL to deal with a suspected or alleged breach of the Rules were set out in W.3 and that the PL may only deal with an alleged breach of the Rules by using one of the six mechanisms set out in W.3. It was submitted that there was no basis for writing into W.3 a new W.3.7 "*commencing arbitration under Rule X*".

48. It was further submitted for the Club that the PL had a range of powers under W.21 that it could exercise in order to enforce the Rules, including imposing unlimited fines and even expulsion from the League.

49. I note that Section W sets out the "*powers*" of the PL to inquire into a suspected or alleged breach of the Rules and to deal with any suspected or alleged breach by imposing the sanctions or taking the steps set out in Rule W.3.

50. In its terms however Section W does not state that the PL may <u>only</u> deal with an alleged breach of the Rules under Section W.

51. In considering whether the language in Section X permitting "*all disputes*" to be referred to arbitration is implicitly limited by Section W one would have to conclude that notwithstanding the absence of any provision in Section W stating that the exclusive means by which the PL can deal with any suspected or alleged breach of the rules is by Section W, this is nevertheless to be inferred from the overall framework of Section W.

52. The Club also sought to rely on the "*principle of construction*" that:

> "in the absence of any contrary intention, the general gives way to the specific": *Bennion, Bailey and Norbury on Statutory Interpretation* at [21.4].

53. Further counsel for the Club relied on the "Comment" in *Bennion* to that paragraph:

> "Where the literal meaning of a general enactment covers a situation for which specific provision is made by some other enactment within the Act or instrument, it is presumed that the situation was intended to be dealt with by the specific provision…

> This principle is sometimes expressed in the [Latin] maxim …'special provisions override general ones' or the converse…, 'general provisions do not override special ones'. The principle as Lord Cooke of Thorndon said in *Effort Shipping Co Ltd v Linden Management SA, The Giannis NK*:
>
> "*…is not a technical rule peculiar to English statutory interpretation. Rather it represents simple common sense and ordinary usage*.""

54. It was submitted for the Club that this is a "*general principle of interpretation*" which applies not just to statutes but also to contractual provisions. It was accepted for the Club that the principle may be overborne by the express wording of the document itself but it was submitted that it was a valuable principle of interpretation in the circumstances of this case where the PL is seeking to use a general provision, Section X, when the Rules expressly provide in Section W, for a specific procedure for determining disciplinary disputes.

55. In my view Section W does not provide an exclusive procedure for determining disciplinary disputes and as such Section W and Section X cannot be characterised as respectively, specific and general provisions such that the principle of construction relied on should be applied. In my view these sections are rather to be characterised as different provisions which both concern the rights of the PL in respect of potential breaches of the Rules. (I note that the arbitrators reached a similar view at paragraph 58 of the Award.)

The implications of rival constructions

56. Turning then to consider the implications of the rival constructions and noting as set out above, that Lord Hodge in *Wood* accepted (by reference to Lord Clarke in *Rainy Sky*) that where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense.

57. Firstly, the PL submitted that the construction for which the Club contend would result in asymmetry namely that a club accused of a breach of the Rules could seek a declaration pursuant to Section X whereas the PL would be constrained by the remedies in Section W.

58. Secondly, it was submitted for the PL that the sanctions open to the PL under Section W would not allow it to enforce the Rules through court methods of enforcement.

59. I accept the submission for the Club that under Section W the PL have a range of "*powerful sanctions*". I note that the arbitrators concluded that in some circumstances the sanctions may not be sufficient for example if a Club was insolvent or no longer wished to participate in the League (paragraphs 78-81 of the Award). However I do not regard these examples (although possible) as particularly persuasive.

60. However of more weight in my view is the principle of construction expressed in *Gilbert-Ash* that one does not assume that rights were to be excluded without the use of clear language:

> "…But in construing such a contract one starts with the presumption that neither party intends to abandon any remedies for its breach arising by operation of law, and clear express words must be used in order to rebut this presumption."

61. It was submitted for the Club that there are clear express words here namely Rule W.3 which says if the PL alleges a breach of these Rules, the steps which the PL can take are set out in Rule W.3.

62. However it is accepted that Rule W.3 does not extend to an order for specific performance which can be enforced by the court. I do not accept that W.3 amounts to clear and express words that the parties intended the PL to abandon its remedies for breach of contract.

63. Further I take into account the asymmetry which on the Club's construction would result. In other words, if the Club's construction were correct, any club may seek declaratory relief that it has not breached the Rules but the PL cannot.

64. It was submitted for the Club that where the PL is seeking to exercise its disciplinary powers, Section W sets out what the PL may do and confers what the parties regarded as appropriate procedural safeguards. It was submitted that if the PL, performing its disciplinary regulatory functions, sought to discipline a club for suspected non-compliance with the Rules, it was bound to follow the disciplinary process that Section W sets out and thus there was no asymmetry.

65. I do not accept that Section W provides safeguards which are being circumvented by using Section X. Arbitration takes place subject to the safeguards in the Act including the supervision of the court to the extent provided for by Section 67 and 68 of the Act.

66. In my view there is no good reason to justify the asymmetry which would not allow the PL to seek a declaration. Like the arbitrators (paragraph 82 of the Award) I am of the view, that this is a factor which weighs in favour of the PL's interpretation of the Rules.

67. As to the overall scheme of the Rules and whether, as submitted for the PL, the distinction lies between the remedies in Section W and common law remedies of Section X, I do not see this as determinative although I accept that this is a distinction which could be drawn.

Conclusion on construction

68. It seems to me that the crux of the case advanced by the Club is that Section W was the scheme for dealing with disciplinary matters in relation to clubs which the Club submitted means any breach of the Rules and Section X is therefore to be read as implicitly limited as a result.

69. It was submitted by the Club that the PL was alleging a breach of the Rules and that W.3 sets out the menu of options together with the procedures to be followed if the PL makes an allegation that the Rules have been breached.

70. In my view the PL's case does not depend on reading a new right to arbitrate into W.3; the issue in my view is the construction of the arbitration provisions and in particular X.2 (and the associated remedy in X.27) and it is not implicit from the context of the rest of the contract, including Section W, that any breach of the Rules can only be dealt with by the PL through Section W.

71. In *Wood* (as set out above) Lord Hodge said:

> "Textualism and contextualism are not conflicting paradigms in a battle for exclusive occupation of the field of contractual interpretation. Rather, the lawyer and the judge, when interpreting any contract, can use them as tools to ascertain the objective meaning of the language which the parties have chosen to express their agreement. The extent to which each tool will assist the court in its task will vary according to the circumstances of the particular agreement or agreements…"

72. Further as stated by Lord Hodge:

> "…where there are rival meanings, the court can give weight to the implications of rival constructions by reaching a view as to which construction is more consistent with business common sense. But, in striking a balance between the indications given by the language and the implications of the competing constructions the court must consider the quality of drafting of the clause…"

73. In considering whether the language in Section X permitting "*all disputes*" to be referred to arbitration is implicitly limited by Section W, one would have to conclude that notwithstanding the absence of any provision in Section W stating that the exclusive means by which the PL can deal with any suspected or alleged breach of the Rules is by Section W, this is nevertheless to be inferred from the overall framework of Section W.

74. Even if Section W is capable of applying in the circumstances of the dispute, there is no express language in Section W which precludes the PL from invoking the arbitration provisions in Section X and the provisions giving power to the PL to impose sanctions under Section W do not in my view override the conclusion to be drawn from the language of Section X and in particular X.2.

75. It is to be inferred that this was a professionally drafted contract and the evidence is that it was amended from time to time (and thus reviewed). It was not informal or brief. Accordingly although the court must consider the contract as a whole and the implications of rival constructions, in considering the weight to be given to the wider context it has regard to the nature, formality and quality of drafting of the contract. In these circumstances the proposition that the parties failed to state expressly that they intended Section W to be the exclusive way in which suspected breaches of the Rules would be dealt with, carries less weight.

76. It seems to me that as set out by Lord Hodge in *Wood*, the language of Section X must be considered in the context of the contract as a whole. However to the extent that

there are no express terms, one cannot imply words which are not there, as part of the exercise of construction.

77. In my view the Club is in substance seeking to imply a term into the Rules which is not there.

78. The Club expressly rejected any reliance on an implied term. Even had it sought to do so, it has not shown that the requirements set out in *Marks & Spencer* to imply a term of "*necessity*" and "*obviousness*" are met.

79. In my view the objective meaning of the language in Rule X.2 is that all and any disputes can be submitted to arbitration, although as discussed, where there has been a decision of a Commission or Appeal Board the grounds of review are limited as set out in Rule X.4.

80. Accordingly I find that on a proper construction of the Rules, the PL had power to institute the arbitral proceedings under Rule X and the tribunal did not err in concluding that it had jurisdiction to hear the arbitration.

Impartiality challenge

The Club's case

81. The Club submitted that the proceedings under Rule X of the Rules were unfair and in breach of the principles of independence and impartiality due to the method of appointing and reappointing potential arbitrators to the Panel (the "Impartiality Objection").

82. The Club challenged the Award under Section 68 of the Act on the basis that, by reason of the method of appointing and reappointing potential arbitrators to the Panel, the tribunal members had failed to comply with Section 33 of the Act which sets out the "*general duty*" of the tribunal to, inter alia, "*act fairly and impartially as between the parties*". Consequently, it was submitted that there is a serious irregularity affecting the tribunal within the meaning of section 68(2)(a) of the Act.

83. Further, or in the alternative, the Club challenged the Award under Section 67 of the Act on the basis that, by reason of the method of appointing and reappointing potential arbitrators to the Panel, the tribunal has not been properly constituted within the meaning of section 30(1)(b) of the Act and therefore lacked substantive jurisdiction.

Statutory framework

84. Section 68 reads so far as material:

> "(1) A party to arbitral proceedings may (upon notice to the other parties and to the tribunal) apply to the court challenging an award in the proceedings on the ground of serious irregularity affecting the tribunal, the proceedings or the award. A party may lose the right to object (see section 73) and the

> right to apply is subject to the restrictions in section 70(2) and (3).
>
> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant-
>
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
>
> …
>
> (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may-
>
> (a) remit the award to the tribunal, in whole or in part, for reconsideration,
>
> (b) set the award aside in whole or in part, or
>
> (c) declare the award to be of no effect, in whole or in part.
>
> The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration."

85. Section 33 provides:

> "General duty of the tribunal."
>
> (1) The tribunal shall-
>
> (a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
>
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding unnecessary delay or expense, so as to provide a fair means for the resolution of the matters falling to be determined.
>
> (2) The tribunal shall comply with that general duty in conducting the arbitral proceedings, in its decisions on matters of procedure and evidence and in the exercise of all other powers conferred on it."

The PL's response

86. There are three ways in which the PL submitted that the Impartiality Objection was not made out:

i) There is no real possibility on the facts of this case that the tribunal was biased.

ii) The test for bias must be measured at the date of the hearing by reference to the circumstances at the date of the hearing: *Halliburton Company v Chubb Bermuda Insurance Ltd* [2020] UKSC 48.

iii) The Club had waived any right to object to the process by which individuals were appointed to the Panel from which the arbitrators were selected: *Sumukan Ltd v Commonwealth Secretariat (No 2)* [2007] EWCA Civ 1148.

Was there a real possibility of bias?

87. I propose to address firstly the question of whether the substantive objection of apparent bias is made out.

Decision in *Halliburton*

88. The Supreme Court in *Halliburton* has recently considered the circumstances in which an arbitrator in an international arbitration may appear to be biased.

89. As in *Halliburton* the Club does not suggest that the arbitrators were guilty of any deliberate wrongdoing or actual bias. The Club's case is one of apparent unconscious bias.

90. Lord Hodge gave the judgment of the court in *Halliburton* (with whom Lord Reed, Lady Black and Lord Lloyd-Jones agreed).

91. In considering this issue Lord Hodge started with the proposition that:

> "49. Impartiality has always been a cardinal duty of a judge and an arbitrator. Thus, the first of the principles set out in section 1 of the 1996 Act is that disputes should be resolved fairly by an impartial tribunal. The duty is now enshrined within section 33 of the 1996 Act…"

92. At [52] he expressed the test as follows:

> "…There is no disagreement as to the relevant test. As Lord Hope of Craighead stated in *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357, para 103:
>
> "The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."
>
> The courts have given further guidance on the nature of this judicial construct, the "*fair-minded and informed observer*" (to whom in this judgment I also refer as "the objective observer"). Thus, in *Helow v Secretary of State for the Home Department* [2008] UKHL 62; [2008] 1 WLR 2416 , Lord Hope (paras 1-3) explained that the epithet "fair-minded" means that the observer

> does not reach a judgment on any point before acquiring a full understanding of both sides of the argument. The conclusions which the observer reaches must be justified objectively and the "real possibility" test ensures the exercise of a detached judgment. He continued:
>
> "Then there is the attribute that the observer is 'informed'. It makes the point that, before she takes a balanced approach to any information she is given, she will take the trouble to inform herself on all matters that are relevant. She is the sort of person who takes the trouble to read the text of an article as well as the headlines. She is able to put whatever she has read or seen into its overall social, political or geographic context. She is fair-minded, so *she will appreciate that the context forms an important part of the material which she must consider before passing judgment* .
>
> I have added the emphasis in this citation because the context in which the test falls to be applied in this appeal is of particular importance. ”

93. In relation to the objective observer Lord Hodge added at [53]:

> “53. Finally, in my consideration of the characteristics of the objective observer, I adopt Kirby J's neat phrase in *Johnson v Johnson* (2000) 201 CLR 488 , para 53, which members of the House of Lords approved in *Helow* (above, Lord Hope para 2, Lord Mance para 39) that the fair-minded and informed observer is "neither complacent nor unduly sensitive or suspicious".”

94. Lord Hodge stated that the test for arbitrators and judges applied equally; however he said at [55] that in applying the test one had to bear in mind the nature and circumstances of arbitral determinations.

> “55. The objective test of the fair-minded and informed observer applies equally to judges and all arbitrators. There is no difference between the test in section 24(1)(a) of the 1996 Act, which speaks of the existence of circumstances "that give rise to justifiable doubts as to [the arbitrator's] impartiality" and the common law test above. <u>But in applying the test to arbitrators it is important to bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes</u>.” [emphasis added]

Other authorities

95. I note that in its submissions the Club referred to various other authorities in the context of European Convention of Human Rights (“ECHR”) Article 6. In particular it made submissions (paragraph 27 of its skeleton) that:

i) there must be "*sufficient guarantees to exclude any legitimate doubt about impartiality*"; and

ii) the question of impartiality is "*closely linked*" to the question of independence.

96. To the extent that the Club sought to put a gloss on the statutory test as clearly set out by the Supreme Court in *Halliburton* I do not accept these submissions.

97. The Club sought to rely on dicta from cases dealing with the position of judges such as *Kearney v HM Advocate* [2006] HRLR 15 at [44]:

> "Evidence that a temporary judge was dependent for his appointment or its renewal to any extent on decisions taken by the Lord Advocate would be bound to lead to a suspicion that he might favour the prosecutor, albeit unconsciously."

98. The Club also referred to the decision of the European Court of Human Rights ("ECtHR") in *Brudnicka v Poland* (3 March 2005) at [41] where the court held that the appointment of members of the Polish maritime court breached ECHR Article 6 because they were appointed by the Minister of Justice.

99. However it is clear from the judgment of Lord Hodge referred to above, that in applying the statutory test one has to bear in mind the nature and circumstances of arbitral determinations.

100. In relation to the issue of independence, Lord Hodge in Halliburton formulated the issue in relation to arbitrators as follows:

> "126. Arbitration involves the conferral of jurisdiction by contract, through the consensus of the parties to the reference. As it is a contract-based jurisdiction, the degree of the independence of the arbitrators from the parties and the extent of their prior knowledge of the circumstances of an event giving rise to the arbitration or the market in which the arbitrating parties operate may, subject to the requirements of the 1996 Act, be determined by the agreement of the parties, express or implied. The 1996 Act contains no provision which directly addresses the arbitrator's independence and prior knowledge, but it imposes the centrally important obligations of fairness and impartiality. Therefore, an arbitrator would be in breach of the requirements of the 1996 Act if his or her lack of independence compromised the duties of fairness and impartiality." [emphasis added]

Submissions

101. It was submitted for the Club that the process of appointment and reappointment of potential arbitrators to the Panel led to a breach of the principles of impartiality and independence; that the process by which members were appointed (prior to the amendment to the Rules in February 2020) failed to "*ensure their independence*" and

together with the powers and controls held by the PL Board, "*gave rise to justifiable doubts*" as to their objective impartiality.

102. In particular the Club complained that:

i) the PL proposed and appointed people to the Panel and there was no written policy governing the process or any selection criteria; it was an informal process based on word of mouth and personal connections;

ii) the members lacked security of tenure being appointed for renewable terms of three years and as a result were in a "subordinate position" to the PL for both appointment and reappointment; and

iii) the remuneration paid was significant and even if it was not sufficient of itself to give rise to the real possibility of bias, there were reputational benefits to being on the Panel.

103. It was submitted for the Club that the Panel members were "*in a subordinate position*" to the PL Board for both appointment and reappointment thus creating a "*justifiable doubt*" as to their impartiality.

104. It was submitted for the PL that:

i) The arbitrators in this case were very experienced practitioners and arbitrators with an impeccable reputation; that it is well established that an apparent bias challenge against such experienced arbitrators is not one that is easy to establish.

ii) The Club's case that the arbitrators on the tribunal might find for the PL against the merits presupposes that the value of appointments to the Panel or nomination for cases is consciously or unconsciously perceived by them to be worth the candle of breaching professional obligations as lawyers and of risking one's reputation and practice.

Discussion

105. In my view:

i) The test is whether there was a real possibility that the tribunal was biased.

ii) The application of the test requires consideration of not just how the informed observer would view the process of appointment and reappointment of potential arbitrators to the Panel but whether as a result the informed observer would conclude there was a real possibility that the arbitrators in this case were biased.

iii) As stated in *Halliburton* the informed observer appreciates that context forms an important part of the material which the observer must consider before passing judgment. Accordingly it seems to me not determinative that in other contexts the presence or absence of certain matters have supported a finding of apparent bias. As stated in *Halliburton*, in applying the test it is important to

bear in mind the differences in nature and circumstances between judicial determination of disputes and arbitral determination of disputes.

iv) As to the circumstances of this case, the fair minded and informed observer will appreciate that the context forms an important part of the material which she must consider and in this case the main factors to be considered in the context of this case are the following:

a) the remuneration of the arbitrators;

b) the process by which individuals were appointed to the Panel;

c) the control by the PL of reappointments;

d) the professional reputation and experience of these arbitrators;

e) the possibility that this is a tactical challenge to delay the production of documents.

The remuneration of the arbitrators

106. The Club made two submissions in this regard:

i) in *Amazeedi v Penner* [2018] UKPC 3 a case involving Sir Peter Cresswell, the judge had received no remuneration as a judge in the Qatar Financial Centre but the Privy Council concluded that it was inappropriate for the judge to sit in the Grand Court in the Cayman Islands without having disclosed his position in Qatar.

ii) the fees that were paid to the arbitrators in this case were "*far from derisory*": in a case in which the standard rates were applied the chair received £1,500 per day and the wing members £750 per day and in this case the parties agreed that the members each received £450 per hour.

107. The differences in nature and circumstances of arbitral determinations identified by Lord Hodge in *Halliburton* included the method of appointment and of remuneration of arbitrators which could mean that the arbitrator has a financial interest in obtaining further appointments. Lord Hodge said:

> "59. Thirdly, a judge is the holder of a public office, is funded by general taxation and has a high degree of security of tenure of office and therefore of remuneration. An arbitrator is nominated to act by one or both of the parties to the arbitration either directly or by submitting names to the appointing body, whether an institution or the court, for appointment. The arbitrator is remunerated by the parties to the arbitration in accordance with the terms set out in the reference, and often is ultimately funded by the losing party. He or she is appointed only for the particular reference and, if arbitral work is a significant part of the arbitrator's professional practice, he or she has a financial interest in obtaining further appointments as arbitrator. Nomination as an arbitrator gives the arbitrator a

> financial benefit. There are many practitioners whose livelihood depends to a significant degree on acting as arbitrators. This may give an arbitrator an interest in avoiding action which would alienate the parties to an arbitration, for example by assertive case management against the wishes of the legal teams who are presenting their clients' cases…" [emphasis added]

108. In this case the remuneration, whilst not insignificant in absolute terms, does not lead to the conclusion that the arbitrators who were leading practitioners at the Bar derived their livelihood from acting as arbitrators and even if it were viewed as material in the context of their practice, either from a monetary perspective or from wider perspective of reputational value, it was expressly recognised in *Halliburton* that arbitrators are appointed by one or both parties and may derive their livelihood from acting as arbitrators. I do not accept the submission (paragraph 34 of the Club's skeleton) that Lord Hodge in *Halliburton* at [59] indicated that this was a matter of concern in assessing impartiality. Rather it seems to me that Lord Hodge acknowledged this as one of the differences in the arbitral process. The informed observer in this case would therefore have regard to this feature of arbitrations as distinct from judicial roles.

109. As to the case of *Almazeedi* this is a case which did not concern an arbitration and in which the challenge was made having regard to the particular circumstances of the case: Sir Peter Cresswell's appointment as a judge in Qatar and in the proceedings before him in the Grand Cayman the nature of the Qatari interests. At [32] and [33] of the judgment the Board set out the circumstances which led them to the conclusion in that particular case:

> "32. In these circumstances, the Board is in the invidious position of having to decide whether the fair-minded and informed observer, would see a real possibility that the judgment of an experienced judge near the end of his career would be influenced, albeit sub-consciously, by his concurrent appointment which was at the outset still awaiting its completion by swearing in. The fair-minded and informed observer is in this context a figure on the Cayman Islands legal scene. But she or he is a person who will see the whole position in "its overall social, political and geographical context": see para 20 above. She or he must therefore be taken to be aware of the Qatari background, including the personalities involved, their important positions in Qatar and their relationships with each other as well as the opacity of the position relating to the appointment and renewal of members of the relatively recently created Civil and Commercial Court.
>
> 33. The key to the resolution of this appeal is not simply that the proceedings in which the judge sat concerned issues arising between investors belonging or close to the Qatari state and the appellant. It is, in the Board's view, that the disputes involved in such proceedings concerned two personalities, Mr Al-Emadi and Mr Kamal who were so closely connected with each other

> as to make it readily appear unrealistic to distinguish their respective attitudes; that the disputes in which the appellant was engaged up to the date of the winding-up order took place against a background of personal threats, one of which (by Mr Longmate on 8 December 2011) associated the appellant's resistance to the winding-up order with a challenge to the state of Qatar itself; and that first Mr Kamal and then from 26 June 2013 Mr Al-Emadi, was closely concerned, to an extent which remains opaque, in at least some aspects of the arrangements by or under which the judge was in the process of becoming a new part-time judge of the relatively new Qatar Civil and Commercial Court."

110. The decision in *Almazeedi* therefore provides no assistance to the present case.

The process by which individuals were appointed to the Panel

111. This is the crux of the Club's Impartiality Objection. It is linked with the submission that the process of appointment breached the "*principle of independence"*.

112. It is a feature of arbitrations, recognised by the Supreme Court in *Halliburton*, that the arbitrators will often be nominated by one of the parties to the arbitration. In this case the parties had agreed in the Rules the process by which individuals would be appointed to the Panel and the individuals selected were lawyers of some years standing.

113. It was accepted for the Club that it had a "*limited role*" in being able to approve appointments to the Panel at General Meetings but it was submitted for the Club that this did not detract from the level of control and influence of the PL over appointments (paragraph 35a of the Club's skeleton).

114. Irrespective of the "*limited role*" of the Club in approving appointments to the Panel at the General Meeting, the Club agreed to the process and was able to exercise its rights in relation to approval of individual appointments to the Panel as part of the process. Leaving aside the issue of waiver (which is discussed below), the ability of one party to appoint individuals to the Panel from which the tribunal is drawn is not fatal to the issue of impartiality in this context and was acknowledged by Lord Hodge in *Halliburton* at [59] as one of the differences in nature between a judicial determination and an arbitral determination. As referred to above, in my view the authorities relied upon by the Club (*Kearney* and *Brudnicka*) relating to the position of judges can therefore be distinguished. It is implicitly acknowledged in *Halliburton* (at [63]) that in arbitrations there may be a party-appointed arbitrator but that this does not of itself preclude an arbitrator from meeting the standards of fairness and impartiality; once appointed they have a duty to act independently of the appointing party and not promote that party's interests.

115. In support of its submission that the Rules gave rise to justifiable doubts as to the objective impartiality of members of the tribunal the Club relied (amongst other things) on the absence of a written policy or selection criteria (paragraph 32b of the Club's skeleton) and the "*informal process based on word of mouth and personal connections*" (paragraph 32c and d of the Club's skeleton).

116. In my view, the absence of an "open" competition and written selection policy for the appointment to the Panel is not material unless the result is a real possibility of a lack of independence on the part of this tribunal which compromised the duty of fairness and impartiality. Similarly the fact that "*personal and subjective preference figures large in the discourse around appointments*" is not of itself sufficient. It is recognised in *Halliburton* that in arbitrations where specialist knowledge is required, the pool of potential candidates may be small but this does not mean that the duties of fairness and impartiality are compromised. In *Halliburton* at [135], addressing the requirement for disclosure in the context of multiple appointments, Lord Hodge noted that:

> "…There may also be circumstances in which because of the custom and practice of specialist arbitrators in specific fields, such as maritime, sports and commodities and maybe others, such multiple appointments are a part of the process which is known to and accepted by the participants."

117. It was submitted for the Club (paragraph 36 of the Club's skeleton) that the PL clubs were unable to make any properly informed decision as to the suitability of any particular candidate to be appointed to the Panel.

118. In my view the Club would have been able to make such enquiries as it thought fit into these particular arbitrators but irrespective of this would have been aware that they were senior commercial Queen's Counsel subject to professional obligations to the Bar Standards Board under the Bar Code of Conduct. Accordingly in assessing whether an informed observer should give weight to the impact on the independence of the arbitrators of any perceived shortcomings in the process of appointment to the Panel, an observer would consider the professional reputation and experience of the arbitrators in question and in my view would give weight to that factor in the circumstances of this case. I note the observations of Lord Hodge at [67]:

> "67. The fair-minded and informed observer would also be aware that in international arbitration the parties to an arbitration and their legal advisers may often have only limited knowledge of the reputation and experience of a professional who is appointed by an institution or by the court to chair their arbitration. While many parties and their advisers who are engaged in high value international arbitrations devote considerable resources to researching the background of people who might be suitable for selection as party-appointed arbitrators or as nominees for third party appointment, there is no basis for assuming that that practice is universal. The professional reputation and experience of an individual arbitrator is a relevant consideration for the objective observer when assessing whether there is apparent bias as an established reputation for integrity and wide experience in arbitration may make any doubts harder to justify. But the weight which the fair-minded and informed observer should give to that consideration will depend upon the circumstances of the arbitration and whether, objectively and as a generality, one could expect people who enter into references of that nature to be informed about the experience and past performance of

> arbitrators. In the context of many international arbitrations, it is likely to be a factor of only limited weight. The weight of that consideration may also be reduced if the circumstances give rise to a material risk of unconscious bias on the part of a person of the utmost integrity: *Almazeedi v Penner* [2018] UKPC 3 at [1], per Lord Mance JSC." [emphasis added]

119. As discussed above in my view the circumstances of this case are entirely different from *Almazeedi* and thus the qualification of Lord Hodge by reference to *Almazeedi* to the weight to be given to the experience of the arbitrators in this case does not in my view apply.

120. I do not accept that any "management" of the process by individuals at the PL had any substantive impact on that process such that the informed observer would conclude that there was a real possibility of a lack of independence on the part of these arbitrators in a way which compromised the duties of fairness and impartiality.

121. It is not enough for the Club to allege (paragraph 32 (d) of the Club's skeleton) that the "*culture of recruitment is inimical to the appearance of impartiality*". That is not the test. In my view the Club have not shown that notwithstanding the process adopted, there was a real possibility that the impartiality of these arbitrators has been compromised.

122. It was submitted for the Club (paragraph 38 of the Club's skeleton) that it was "*telling*" that the PL amended its dispute resolution procedures and that the "*substantial changes recognise the force of the Club's objections to the process by which the Tribunal was appointed*".

123. In my view the subsequent changes to the Rules in February 2020 do not establish a real possibility that as a result of the process of appointment and reappointment to the Panel, these arbitrators lacked independence in a way which compromised the duty of impartiality. At best the change in the Rules supports a conclusion that the arbitrators could have been drawn from a wider pool of individuals and from a pool that was not nominated by the PL but the absence of these factors does not establish the Club's case in relation to the impartiality of these arbitrators.

The control by the PL of reappointments

124. It was acknowledged in *Halliburton* at [59] (set out above) that arbitrators often have an interest in further appointments but this does not mean that the arbitrator is biased.

The possibility that this is a tactical challenge

125. I note the need for caution on the part of the informed observer. Lord Hodge said in this regard:

> "68. On other hand, the objective observer is alive to the possibility of opportunistic or tactical challenges. Parties engage in arbitration to win. Their legal advisers present their cases to the best of their ability, and this pursuit can include making tactical objections or challenges in the hope of having

> their dispute determined by a tribunal which might, without any question of bias, be more predisposed towards their view or simply to delay an arbitral determination…"

126. It was submitted for the Club that there were no findings by the tribunal that the Club had delayed by seeking to take a series of misconceived challenges. It was further submitted for the Club that the Club has taken two points before the court, each of which the Club was perfectly entitled to take; the tribunal did not accept them but they are perfectly proper points for the Club to take regarding the relationship between Section W and Section X and the Impartiality Objection.

127. For the PL it was submitted that the tactic that the Club has adopted has been to make as many procedural applications and complaints as it possibly can in order to slow the day when it will actually have to provide the documents and information. Counsel for the PL stressed that the Club has never complained before about the previous system for appointments to the Panel and that is despite the Club -- like all other clubs -- having every opportunity to do so.

128. In my view it is not necessary to decide whether the challenge in this case was tactical as in my view it is clear that the application fails for the reasons set out in the rest of this judgment.

Conclusion on apparent bias

129. I do not accept on the facts of this case and for the reasons discussed above, that a fair minded and informed observer would conclude that as a result of the methods of appointment and reappointment to the Panel, the arbitrators in this case were "beholden" to the PL (Club skeleton paragraph 37) and would thus conclude that there was a real possibility of bias.

130. Even if the Panel members were dependent for their appointment (and reappointment) on the PL Board, it does not follow that this led to a real possibility of bias on the part of these arbitrators.

131. Applying the objective test of the fair-minded and informed observer and having regard to the factors referred to above and the context of arbitration, I find that the fair-minded and informed observer, having considered the facts, would not conclude that there was a real possibility that the arbitrators were biased.

132. In the light of my conclusion on the substantive issue of apparent bias I do not need to decide the other two issues raised. However for completeness I will deal with them shortly.

The time for assessing impartiality

133. It was submitted for the Club that the time for the application of the test for impartiality is the moment the tribunal was seized of the matter. The tribunal was constituted by 16 December 2019 and held a directions hearing on 14 January 2020.

134. It was submitted for the Club that the question was whether it sufficed for the Club to show that as at the date of appointment, and indeed up until 5 February 2020 (prior to

the Rules change), this tribunal was objectively biased. It was submitted that if the tribunal was objectively biased up to that date, it is nothing to the point that after 6 February 2020, the objective impartiality dispute falls away. It was submitted that the Club was entitled to a tribunal which was objectively impartial as from the date of appointment.

135. In support of its submissions the club relied on *Millar v Dickson* [2001] UKPC D4 at [63]:

> "As Lord Clarke said in *Rimmer v HM Advocate* (unreported) 23 May 2001, the question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case."

136. I set out below the relevant dicta but also the context in which the statement in *Millar*, relied on by the Club, was made.

> "62. The essential point on which he based his main argument was that the question as to whether the Lord Advocate's act was unlawful had to be tested at the date when the challenge was made. This had to be done in the light of all the facts and circumstances which were known to exist at that time. All there was in this case was a perception that the temporary sheriffs lacked independence. But the reality was that they did not lack independence in fact. Their judgment was unaffected, and there were no grounds for saying that the verdicts of guilty were unsafe or the sentences imposed were excessive. The appellants were unable to show that they would derive any real benefit from being retried or sentenced again. He invited us to hold that the decisive factor in these cases was not that the right to an independent and impartial judge had been waived because no plea in bar of trial had been taken at the outset, but that the use of temporary sheriffs in these cases made no difference in fact to the result.
>
> 63. In my opinion this argument overlooks the fundamental importance of the Convention right to an independent and impartial tribunal. These two concepts are closely linked, and the appearance of independence and impartiality is just as important as the question whether these qualities exist in fact. Justice must not only be done, it must be seen to be done. The function of the Convention right is not only to secure that the tribunal is free from any actual personal bias or prejudice. It requires this matter to be viewed objectively. The aim is to exclude any legitimate doubt as to the tribunal's independence and impartiality: *McGonnell v United Kingdom* 30 EHRR 289 , 306, para 48, quoting *Findlay v United Kingdom* 24 EHRR 221 , 245, para 73. As Lord Clarke said in *Rimmer v HM Advocate* (unreported) 23 May 2001, the question of impartiality, actual or perceived, has to be judged from the very moment when the judge or tribunal becomes first seized of the case. It is a

> question which, at least in a case of perceived impartiality, stands apart from any questions that may be raised about the character, quality or effect of any decisions which he takes or acts which he performs in the proceedings." [emphasis added]

137. The Club sought support from the reference in *Halliburton* at [70] to a dicta in *Davidson*:

> "70. An arbitrator, like a judge, must always be alive to the possibility of apparent bias and of actual but unconscious bias. The possibility of unconscious bias on the part of a decision-maker is known, but its occurrence in a particular case is not. The allegation, which is advanced in this case, of apparent unconscious bias is difficult to establish and to refute. One way in which an arbitrator can avoid the appearance of bias is by disclosing matters which could arguably be said to give rise to a real possibility of bias. Such disclosure allows the parties to consider the disclosed circumstances, obtain necessary advice, and decide whether there is a problem with the involvement of the arbitrator in the reference and, if so, whether to object or otherwise to act to mitigate or remove the problem: see *Almazeedi* (above) para 34; *Davidson v Scottish Ministers (No 2)* 2005 1 SC (HL) 7 . In the latter case, Lord Hope stated (para 54):
>
> "the best safeguard against a challenge after the event, when the decision is known to be adverse to the litigant, lies in the opportunity of making a disclosure before the hearing starts. That is the proper time for testing the tribunal's impartiality. Fairness requires that the quality of impartiality is there from the beginning, and a proper disclosure at the beginning is in itself a badge of impartiality."
>
> That statement *mutatis mutandis* applies to the arbitrator as much as to the judge. In *Davidson* (above, para 19) Lord Bingham of Cornhill spoke with approval of the practice of judges to "disclose a previous activity or association which would or might provide a basis for a reasonable apprehension of lack of impartiality" (emphasis added). When, on being asked to accept an appointment, an arbitrator knows of a matter which ought to be disclosed to the parties to the reference, prompt disclosure to those parties of that matter provides the safeguard as the quality of impartiality is shown to have been there from the beginning. But the obligation of impartiality continues throughout the reference and the emergence during the currency of the reference of matters which ought to be disclosed means that an arbitrator's prompt disclosure of those matters can enable him or her to maintain what Lord Hope calls the "badge of impartiality"." [emphasis added]

138. However this discussion was in the context of the obligation of disclosure. By contrast the point at issue in these proceedings was addressed directly in *Halliburton* at [121]-[123]:

> "121. What is the time by reference to which the court must assess the question of the possibility of bias? This question is, in my view, of central importance to the outcome of this appeal. As we have seen, section 24(1)(a) empowers the court to remove an arbitrator on the ground that circumstances exist that give rise to justifiable doubts as to his impartiality. The use of the present tense ("exist") directs the court to assess the circumstances as they exist at the date of the hearing of the application to remove the arbitrator by asking whether the fair-minded and informed observer, having considered the facts then available to him or her, would conclude that there is a possibility that the arbitrator is biased.
>
> "122. There is support for this view in the case law concerning the application of the test in other circumstances. In *R v Gough* [1993] AC 646 , Lord Goff of Chieveley stated (p 670E) that the court had to ascertain the relevant circumstances "from the available evidence, knowledge of which would not necessarily be available to an observer in court at the relevant time". In *AT&T Corpn v Saudi Cable Co* [2000] 2 Lloyd's Rep 127 the Court of Appeal (Lord Woolf MR, Potter and May LJJ) dealt with an application for the removal of an arbitrator as chairman of an ICC Tribunal on the ground of apparent bias. Lord Woolf MR in para 42 of his judgment described the court's task in this way:
>
> "The court considers on all the material which is placed before it whether there is any real danger of unconscious bias on the part of the decision maker. This is the case irrespective of whether it is a judge or an arbitrator who is the subject of the allegation of bias."
>
> Lord Woolf MR's formulation of the test pre-dated the refinement of Lord Goff's formulation by Lord Hope in *Porter v Magill* [2002] 2 AC 357 but that refinement is not material to the point for which I cite this passage. In *R (Condron) v National Assembly for Wales* [2007] LGR 87 the Court of Appeal (Ward, Wall and Richards LJJ) addressed a challenge to a decision to allow a planning application taken by the Planning Decision Committee of the Assembly on the basis of apparent bias arising from a remark made by a member of the committee to an objector on the day before the decision. After the decision, the objectors to the application complained to the Commissioner for Standards who produced a report several months later which stated that he found no evidence of bias in the members' consideration of the application. The judge disregarded evidence of the Commissioner's assessment of

> what had occurred at the meeting of the committee, because it would not have been available to the objectors or the hypothetical observer at the time of the decision. Richards LJ, with whom the other Lord Justices agreed, disagreed with the judge's approach and stated (para 50): "The court must look at all the circumstances as they appear from the material before it, not just at the facts known to the objectors or available to the hypothetical observer at the time of the decision." At para 63 of *AT&T Corpn* Potter LJ in his concurring judgment described the court's task as embodying the standards of the informed observer viewing the matter at the relevant time, "which is of course the time when the matter comes before the court". ”
>
> 123. In the present appeal the Court of Appeal was correct in para 95 of its judgment to apply the test for apparent bias by asking whether "at the time of the hearing to remove" the circumstances would have led the fair-minded and informed observer to conclude that there was in fact a real possibility of bias.” [emphasis added]

Conclusion on the time for assessing impartiality

139. It seems clear (as the arbitrators found at paragraphs 162-164 of the Award) that the issue that was being addressed in *Millar* was whether there had been a breach of the Convention rights and is not authority for the issue raised in this case in relation to a challenge under Section 24 of the Act namely whether if the circumstances are to be evaluated at the time of hearing, any lack of impartiality can be cured by a change of circumstances after first seizure.

140. *Halliburton* is clear that Section 24 directs the court to assess the circumstances as they exist at the date of the hearing. Whilst it does not deal directly with whether any lack of impartiality prior to such date can be cured by a change of circumstances after first seizure, if it had been necessary to decide the point, I would have agreed with the conclusion of the arbitrators (paragraph 166 of the Award) that in the present case where the tribunal has not taken any material step in relation to the substantive aspects of the case there is no reason why impartiality should not be assessed at the date of the hearing in the light of the then circumstances. This seems to me to be consistent with the decision in *Halliburton*.

141. Accordingly the Impartiality Objection would fail on this ground.

Waiver

142. The other basis on which the PL submitted that the Impartiality Objection is not made out is that the Club had waived its right to object to the process by which individuals were appointed to the Panel.

143. The tribunal held that the decision of the Court of Appeal in *Sumukan 2* provided a complete answer and was not *per incuriam* or wrong.

144. It was submitted for the Club that under the Act the right of the parties to agree how their disputes are to be resolved (section 1(b)) is subject to the safeguards necessary in the public interest (section 4) and the provisions in Schedule 1 which includes section 33 and the duty to act impartially.

145. The PL rely on *Sumukan 2* at [9]:

> "[9]…This was a commercial contract. True, Sumukan had no choice as to the terms of the contract so far as arbitration was concerned but that is a common feature of and the reality of many commercial contracts. Sumukan are not a consumer with the protection of consumer legislation and are bound by the terms of the contract they made. It follows they were bound to accept a tribunal appointed in accordance with the relevant statute to which the term refers. As we will see there may be room for argument as to which that statute was, and what it requires. I will come to that. But what seems to me to flow from that first point is important. If and in so far as Sumukan would seek to attack the award on the basis that a procedure in accordance with the statute could not produce an impartial tribunal, and that on that basis there was a serious irregularity (relying on section 68(2)(a) taken together with section 33 of the 1996 Act), that attack is doomed to failure. Having agreed to it, they must be taken to have waived any objection." [emphasis added]

146. I accept the submission for the PL that the Court of Appeal in *Sumukan 2* is not saying that the right to an impartial tribunal is waived. What the court is saying is that the specific grounds of objection are waived. The decision is not therefore in my view inconsistent with the Act. I accept the submission for the PL that, consistent with the policy underlining the Act, which is freedom of contract, parties can agree not to advance specific grounds of objection to arbitral tribunals. They can do that in advance by saying that they agree to particular individuals or to particular methods of appointment.

147. It was submitted for the Club that the Club had no alternative but to accept the Rules. It was further submitted that waiver, as Lord Bingham explained in *Millar v Dickson*, requires a voluntary, informed and unequivocal election by a party to the proceedings. It was submitted that here there was no such waiver.

148. The Club relied on the authority of *Mutu and Pechstein v Switzerland* in the ECtHR. Counsel for the Club accepted that there are "*real differences*" between a football club like Manchester City and an ice skater (as in *Mutu*) but submitted that it is the principle stated in *Mutu*, that the fact that the entity signs up to an arbitration contract when it has no practical choice but to accept it, is not a waiver under ECHR Article 6. It was submitted that the Club had no effective choice because in order to play at the top level of football it had to accept these Rules.

149. The Club first signed up to the Rules in August 2001 and since then, it has been able to participate as a shareholder in the amendment or annual reapproval of those Rules including the appointment of individuals to the Panel. Mr Herbert's first statement sets

out the process for consultation with clubs and for clubs to make proposals for the adoption and amendment of Rules.

150. Having regard to the principle in *Mutu*, in my view in the circumstances of this case there was a voluntary, informed and unequivocal election by the Club to the disciplinary and dispute process.

Conclusion on waiver

151. Had it been necessary to decide this issue, I would have held that the Club had validly waived its right to object to the process by which individuals were appointed to the Panel. Accordingly the Impartiality Objection would fail on this ground.