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*Judgment: approved by the Court for handing down (subject to editorial corrections)** | *Delivered:* **19/8/2011**

IN THE HIGH COURT OF JUSTICE IN NORTHERN IRELAND

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QUEEN'S BENCH DIVISION

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Watson's (Hubert) Application (For Leave to Appeal) [2011] NIQB 66

IN THE MATTER OF AN APPLICATION BY HUBERT WATSON (ON BEHALF OF DOLLINGSTOWN FOOTBALL CLUB)

AND IN THE MATTER OF THE DECISION OF AN INDEPENDENT ARBITRATION PANEL HANDED DOWN ON 13 JULY 2011

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COGHLIN LJ

[1] This is an application under Section 69 of the Arbitration Act 1996 ("the 1996 Act") on behalf of Dollingstown Football Club ("the applicant") for leave to appeal from an award by the Independent Arbitration Panel ("the Panel") delivered on 13 July 2011. At a preliminary hearing on 29 July 2011 the court directed that a "rolled up" hearing should take place in the course of which the court would hear not only the arguments relating to the grant of leave to appeal but also submissions with regard to the substantive merits of the appeal in a single hearing. For the purposes of the hearing the applicant was represented by Mr Barry MacDonald QC and Ms Fiona Doherty while Mr Mark Horner QC and Mr William T Gowdy appeared on behalf of the respondent, the Irish Football Association ("the IFA"). The court wishes to acknowledge the considerable assistance that it has derived from the carefully prepared and attractively delivered written and oral submissions of both sets of counsel.

The background facts

[2] The relevant facts are set out in the Panel's award. The applicant is a football club which played a match in the Mid-Ulster Football League ("MUFL") on 5 March 2011 against Tandragee Rovers Football Club ("Tandragee"). All matches played in the MUFL are subject to the jurisdiction of the IFA which, in turn, is subject to

Regulations on the Status and Transfer of Players promulgated by the Fédération Internationale de Football Association ("FIFA"). The applicant won the game against Tandragee with a score line of 3-1. Tandragee formed the opinion that the applicant had played an ineligible player, namely, Ashley Gregg, and on 6 March 2011 Tandragee lodged a protest with the MUFL. The protest brought by Tandragee was grounded on the belief that Ashley Gregg, who had been transferred to Dollingstown from Loughgall Football Club, had not been registered with Dollingstown until after 31 December 2010. Rule 7(*f*) of the relevant MUFL rules stated:

> "(*f*) A Player's registration may be transferred on a permanent or temporary (loan) basis in strict accordance with the OPOC/CRS Regulations as stated. No permanent internal or incoming transfers shall be permitted after December 31st."

While there appeared to be some confusion as to the precise date of the transfer in terms of the oral and documentary evidence presented to the Panel, it appears to be common case that the transfer took place "some time in January 2011" as recorded at paragraph 15 of the award (the written submission placed before the Panel by the applicant referred to his registration with the applicant on 27 January 2011). In such circumstances, the transfer was clearly contrary to Rule 7(*f*) of the relevant MUFL rules which had been agreed and accepted by all teams participating in MUFL competitions.

[3] The protest brought by Tandragee was considered at a Management Committee meeting of the MUFL on 16 March 2011 with the meeting being addressed by representatives of both the applicant and Tandragee. No decision was taken at that stage since the Committee indicated that it needed further clarification of a number of matters from the IFA. The MUFL Management Committee met again on 28 March 2011. That meeting was not attended by representatives of either the applicant or Tandragee. The Committee decided that the protest should fail and this was communicated to Tandragee by letter dated 29 March 2011. The MUFL Committee gave no reason to Tandragee as to why its protest had failed.

[4] On 30 March 2011 Tandragee appealed the decision of the MUFL Management Committee to the Appeals Board of the IFA and that appeal was heard on 19 April 2011. The applicant was not represented at that hearing. The Board upheld the appeal and determined that the applicant had played an ineligible player and that the matter should be dealt with by the MUFL in accordance with their rules and, in particular, Rule 9.

[5] On 6 May 2011 the applicant referred the matter to the Panel seeking a determination that the transfer was in order and that Ashley Gregg was not an ineligible player at the material time.

The relevant statutory provisions

[6] Paragraph 69 of the 1996 Act provides as follows:

> "**69- Appeal on Point of Law**
>
> (1) Unless otherwise agreed by the parties, a party to arbitral proceedings may (upon notice to the other parties and to the tribunal) appeal to the court on a question of law arising out of an award made in the proceedings.
>
> An agreement to dispense with reasons for the tribunal's award shall be considered an agreement to exclude the court's jurisdiction under this section.
>
> (2) An appeal shall not be brought under this section except –
>
> (*a*) with the agreement of all the other parties to the proceedings, or
>
> (*b*) with the leave of the court.
>
> The right to appeal is also subject to the restrictions in Sections 70(2) and (3).
>
> (3) Leave to appeal shall be given only if the court is satisfied –
>
> (*a*) that the determination of the question will substantially affect the rights of one or more of the parties,
>
> (*b*) that the question is one which the tribunal was asked to determine,
>
> (*c*) that, on the basis of the findings of fact in the award –
>
> (*i*) the decision of the tribunal on the question is obviously wrong, or

(*ii*) the question is one of general public importance and the decision of the tribunal is at least open to serious doubt, and

(*d*) that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all the circumstances for the court to determine the question.

(4) An application for leave to appeal under this section shall identify the question of law to be determined and state the grounds on which it is alleged that leave to appeal should be granted."

[7] Part I of the 1996 Act deals with arbitration pursuant to an arbitration agreement and Section 1 sets out the general principles upon which that part is founded and shall be construed as follows:

"(*a*) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;

(*b*) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;

(*c*) in matters governed by this Part the court should not intervene except as provided by this Part."

The relevant regulatory framework

[8] Article 2 of the IFA Articles of Association passed on 23 September 2010 contains the following relevant provisions:

"**Article 2**

Registration

1. The Association is a member of FIFA and UEFA. Accordingly, the Association and its members will at all times:

(*a*) respect the Statutes, regulations and decisions of FIFA and UEFA …

(*c*) refer any dispute arising from or related to the application of these Articles only to the Independent Arbitration Panel, which will settle the dispute to the exclusion of any ordinary court, unless to do so is contrary to the laws of Northern Ireland …

Where there is a conflict between the statutes of FIFA and UEFA and these Articles, the Statutes of FIFA and UEFA shall prevail."

[9] Relevant provisions of FIFA Regulations on the Status and Transfer of Players include the following:

"**1**. **Scope**

(1) These regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations.

(2) The transfer of players between clubs belonging to the same association is governed by specific regulations issued by the association concerned in accordance with Article 1 paragraph 3 below, which must be approved by FIFA. Such regulations shall lay down rules for the settlement of disputes between clubs and players, in accordance with the principles stipulated in these regulations. Such regulations should also provide for a system to reward clubs investing in the training and education of young players.

2. Status of players: amateur and professional players

(1) Players participating in organised football are either amateurs or professionals.

(2) A professional is a player who has a written contract with a club and is paid more for his footballing activity than the expenses he effectively

incurs. All other players are considered to be amateurs.

5. Registration

(1) A player must be registered at an association to play for a club as either a professional or an amateur in accordance with the provisions of Article 2. Only registered players are eligible to participate in organised football. By the act of registering, a player agrees to abide by the statutes and regulations of FIFA, the confederations and the associations.

(2) A player may only be registered with one club at a time.

6. Registration periods

(1) Players may only be registered during one of the two annual registration periods fixed by the relevant association. …

(2) The first registration period shall begin after the completion of the season and shall normally end before the new season starts. This period may not exceed 12 weeks. The second registration period shall normally occur in the middle of the season and may not exceed four weeks. …

(4) The provisions concerning registration periods do not apply to competitions in which only amateurs participate. The relevant association shall specify the periods when players may be registered for such competitions provided that due consideration is given to the sporting integrity of the relevant competition."

[10] The relevant IFA Player Registration Regulations for the season 2010/11 provided as follows:

"**Registration periods**

2. The following registration periods will apply:

IFA Premiership

9 June 2010-31 August 2010

AND

1 January 2011-31 January 2011

All Intermediate and Junior Leagues

1 June 2010-31 March

The submissions of the parties.

[11] Subject to determination of the question whether the jurisdiction of the court was excluded by agreement, the parties agreed that the relevant paragraphs of Section 69(3) of the 1996 Act were (*a*), (*b*), (*c*)(*i*) and (*d*). It was also common case that (3)(a) and (b) applied in this case. On behalf of the applicant Mr MacDonald argued that there was no effective agreement to exclude the jurisdiction of the court and, in such circumstances, he advanced three main submissions:

(*a*) That the factual findings by the Panel were so unreasonable and unsupported by evidence as to be irrational and perverse which, on the authority of cases such as Edwards v Bairstow [1956] AC 14, amounted to a question of law. He further argued that the Panel in finding that the MUFL League was 'one in which it appears that only amateurs are playing' the Panel answered the wrong question whereas the correct question to be determined should have been whether it was "*open*" to professional players to participate in that league.

(*b*) In such circumstances, Mr MacDonald argued that the registration period for intermediate and junior leagues specified in Regulation 2 of the IFA Regulations was ultra vires the FIFA Regulations and he advanced a similar submission with regard to Rule 7(*f*) of the relevant MUFL Regulations.

(*c*) Mr Macdonald also relied upon an estoppel/legitimate expectation which he argued had arisen in favour of the applicant insofar as the transfer of Mr Gregg had been specifically sanctioned by officials of the MUFL and the IFA.

[12] On behalf of the respondent Mr Horner made the following submissions:

(*a*) By virtue of Rule 7(*a*) of the MUFL Rules all matches in the MUFL are played under the jurisdiction of the IFA and, consequently, Article 2(1)(*c*) of the IFA Articles of association clearly constitutes an agreement to refer any dispute to the Independent Arbitration Panel "to the exclusion of any ordinary court" which includes any appeal in accordance with Section 69 of the 1996 Act. Mr Horner submitted that such an agreement required clear wording but did not

need to expressly refer to the right of appeal under Section 69 in reliance upon Essex County Council v Premier Recycling Limited [2006] EWHC 3594 (TCC).

(*b*) Section 69 of the 1996 Act expressly confines any appeal to a point of law. Therefore Mr Horner argued that this court was confined to the facts as found by the arbitral tribunal and that, in such circumstances, even an irrational or perverse finding of fact could not amount to a point of law, relying the judgment of Steyn LJ in The Baleares [1993] 1 Lloyds Rep. 215, 228 and London Underground Limited v City Link Telecommunications Limited [2007] EWHC 1749.

(*c*) Mr Horner rejected Mr MacDonald's argument on *vires* on the basis that the Panel had reached a clear finding of fact that the MUFL was a league in which only amateurs participated and therefore that league was not subject to the registration periods specified in Regulation 6(2) of the FIFA Regulations by virtue of Regulation 4 of those Regulations. Mr Horner sought to establish a distinction between transfer and registration and argued that nothing in the FIFA or IFA Regulations prevented clubs from agreeing that a player transferred after a particular date should not be eligible to take part in MUFL competitions. In support of that argument Mr Horner submitted that the date of transfer of a player constituted one of the criteria for the eligibility of players playing in the league and therefore was a matter that could be determined by the MUFL in accordance with Regulation 19 of the IFA Regulations.

(*d*) In response to the argument advanced based on estoppel/legitimate expectation Mr Horner emphasised the universal agreement of all participating clubs to abide by the MUFL Rules and argued that purported sanction by either MUFL or IFA officials of flagrant breach of those rules by which a club sought to gain the very advantage that the rules were intended to prevent would be clearly unfair and unconscionable.

The Panel's Decision

[13] The Panel reviewed the background facts and the submissions made by the various parties. In the course of so doing it noted that the applicant agreed that it, together with all the other clubs in the league, had been consulted on the proposed MUFL Rules for the season 2010/11 and that it had been aware of Rule 7(*f*) when it signed Ashley Gregg. The Panel expressed the view that the submission that the secondary registration period provided for in Regulation 2 of the IFA Regulations was contrary to Article 6 of the FIFA Regulations had some merit and that, in such circumstances, it became necessary to consider whether the MUFL came within Regulation 6(4) as a league responsible for organising competitions in which only amateurs participated. The Panel recorded that there was an "absence of persuasive or compelling evidence that professionals, as defined under the FIFA Regulations

are in fact playing in the MUFL", that the evidence given about the terms and conditions of any such players was "largely anecdotal" and that no copies of any contracts for any such players were submitted to confirm whether they fell within the definition of 'professional' specified in Article 2 of the FIFA Rules. In such circumstances, the Panel found, on the balance of probabilities, that the MUFL was an amateur competition and that, therefore, the IFA had a discretion to define a secondary registration period and was not in breach of FIFA Rules in so doing. The Panel then proceeded to deal with the argument that the transfer had been sanctioned by the MUFL/IFA. The Panel found that the MUFL had no authority to sanction a transfer that had not been carried out in accordance with the relevant Rules. The Panel also found that there was no relevant regulatory provision enabling the IFA to sanction such a transfer. The Panel noted that there was some confusion as to what actually transpired in the telephone calls between the Chairman of Dollingstown, Mr McCullough, and IFA employees noting that clubs and league may well consult the IFA from time to time about transfers given its responsibility for the Central Register of Players. However, the Panel found that this would not absolve clubs from the central tenet of club responsibility for the eligibility of their players as defined in Article 30(10)(*f*) of the IFA Rules and such responsibility was central to the integrity of competitive matches and could not be seen as a matter which could be referred elsewhere for sanction or approval. For the reasons given in its award, the Panel concluded that Ashley Gregg had been ineligible to play for Dollingstown in their match against Tandragee on 5 March 2011 since the registration of his transfer from Loughgall had taken place after 31 December 2010 contrary to Rule 7(*f*) of the MUFL Rules.

Discussion

[14] Before turning to deal with the specific circumstances of this particular application I think that it might be helpful to give some general consideration to the context in which the 1996 Act came to be passed and to the relationship between sporting arbitrations and the formal legal system.

The Arbitration Act 1996

[15] The opening words of the Arbitration Act 1996 referred to the Statute as:

> "An Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement; to make other provision relating to arbitration and arbitration awards; and for connected purposes."

As noted above the general principle underlying Part I of the Act is to restrict the intervention of the court with a view to encouraging parties to exercise their freedom to agree as to how their disputes should be fairly resolved without unnecessary delay or expense. The three most litigated provisions of the 1996 Act

are probably Section 67, 68 and 69. However, unlike the former two sections which, respectively, deal with challenges to arbitral jurisdiction and serious irregularity affecting the Tribunal, access to the courts under Section 69 is not automatic and leave is required. As a prelude to the passage of the Act the Departmental Advisory Committee on Arbitration Law ("DAC") report confirmed that:

> "Nowadays the courts are much less inclined to intervene in the arbitral process than used to be the case. The limitation on the right of appeal to the courts from awards brought into effect by the Arbitration Act 1979, and changing attitudes generally, have meant that the courts nowadays generally only intervene in order to support rather than displace the arbitral process. We are very much in favour of this modern approach…."

The eventual wording of the statute clearly indicated that the 1996 Act was intended to be seen as formal confirmation of the primacy of voluntary arbitration proceedings, whether purely commercial or otherwise, in conjunction with which the court was to perform a supporting rather than an interventionist role.

[16] In Lesotho Highlands Development Authority v Impregilo SpA and Others [2005] 3 A.E.R 789, a case involving a challenge under Section 68, Lord Steyn included a section on the ethos of the 1996 Act in his judgment. At paragraph 18 Lord Steyn referred to the following passage from a speech delivered by Lord Wilberforce during the second reading of the Bill in the House of Lords in which he explained the essence of the new philosophy enshrined in the 1996 Act in the following terms:

> "I would like to dwell for a moment on one point to which I personally attach some importance. That is the relation between arbitration and the courts. *I have never taken the view that arbitration is a kind of annex, appendix or poor relation to court proceedings. I have always wished to see arbitration, as far as possible, and subject to statutory guidelines no doubt, regarded as a freestanding system, free to settle its own procedure and free to develop its own substantive law – yes, its substantive law.* I have always hoped to see arbitration law moving in that direction. That is not the position generally which has been taken by English law, which adopts a broadly supervisory attitude, giving substantial powers to the court of correction and otherwise, and not really defining with any exactitude the relative positions of the arbitrators and the courts.

> Other countries adopt a different attitude and so does the UNCITRAL model law. The difference between our system and that of others has been and is, I believe, quite a substantial deterrent to people to sending arbitrations here …
>
> How then does this Bill stand in that respect? After reading the debates and the various drafts that have been moving from one point to another, I find that on the whole, although not going quite as far as I should personally like, it has moved very substantially in this direction. It has given to the court only those essential powers which I believe the court should have; that is rendering assistance when the arbitrators cannot act in the way of enforcement or procedural steps, or, alternatively, in the direction of correcting very fundamental errors."

Lord Steyn felt that these remarks reflected the ethos of the Act and the radical changes that it had brought about. He also expressed the opinion that this change in philosophy should inform the approach to interpretation of the 1996 Act.

Arbitration in sport

[17] The courts in the UK have long supported the practice in accordance with which sporting disputes are dealt with by "in-house" tribunals staffed by individuals with substantial knowledge and experience of the particular sporting activity concerned. Such tribunals can generally provide the benefits of expert adjudication, speed and flexibility of resolution, cost effectiveness and privacy. R v Football Association ex parte Football League [1993] 2 A.E.R 833 was a case that arose out of the decision by the Football Association ("FA") to form a Premier League to be run by the FA rather than the Football League. The League brought proceedings for, inter alia, judicial review of the FA's decision to set up the Premier League. In the course of giving judgment Rose J carried out a careful and meticulous review of the relevant authorities at the conclusion of which he decided that the FA was not a body susceptible to judicial review. In reaching that decision he made the following observations at page 849:

> "I do not find the conclusion unwelcome, although thousands play and millions watch football, although it excites passions and divides families, and although millions of pounds are spent by spectators, sponsors, televisions companies and also clubs on salaries, wages, transfer fees and the maintenance grounds, much the same can also be said in relation to cricket, golf, tennis, racing and other sports. But they are all

> essentially forms of popular recreation and entertainment and they are all susceptible to control by the courts in a variety of ways. This does not, of itself, exempt their governing bodies from control by judicial review. Each case will turn on the particular circumstances.
>
> But, for my part, to apply to the governing body of football, on the basis that it is a public body, principles honed for the control of the abuse of power by government and its creatures would involve what, in today's fashionable parlance, would be called a quantum leap. It would also, in my view, for what it is worth, be a misapplication of increasingly scarce judicial resources. It will become impossible to provide a swift remedy, which is one of the conspicuous hallmarks of judicial review, if the courts become even more swamped with such applications than they are already. This is not, of course, a jurisprudential reason for refusing judicial review, but it will be cold comfort to the 7 or 8 other substantive applicants and the many more ex parte applicants who have had to be displaced from the court lists in order to accommodate the present litigation to learn that though they may have a remedy for their complaints about the arbitrary abuse of executive power, it cannot be granted to them yet."

[18] In R (Mullans) v Appeal Board of the Jockey Club [2005] EWHC 2197 (Admin) Stanley Brunton J described the decision of Rose J in the Football Association case as "highly persuasive" and he added at paragraph 25 of his judgment:

> "I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of Government."

[19] In Flaherty v National Greyhound Racing Club Limited [2005] EWCA Civ. 1117, a case involving a challenge to the finding by the Racing Club that Mr Flaherty had been in breach of the rules of racing the President, Scott Baker LJ, in the course of giving his judgment in the Court of Appeal made the following observations at paragraph 19:

> "It seems to me inherently unsatisfactory that a hearing before a sporting tribunal lasting between one and two hours should be followed by a High Court

hearing lasting ten days and an appeal taking up a further day and a half. It is important to bear in mind the words of Mance LJ in Modahl v British Athletic Federation Limited [2002] 1 WLR 1192, at page 1226 para. 115 to the effect that a conclusion that the disciplinary process should be looked at overall matched the desirable aim of affording to bodies exercising jurisdiction over sporting activities as great a latitude as is consistent with the fundamental requirements of fairness. In this regard he cited the words of Sir Robert Megarry V-C in McInnes v Onslow Fane [1978] 1 WLR 1520 at 1535F-H approved by Sir Nicholas Browne-Wilkinson V-C in Cowley v Heartley, The Times 24 July 1986:

> 'I think that the courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the court for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens. Bodies such as the board which promote a public interest by seeking to maintain high standards in a field of activity which otherwise might easily become degraded and corrupt ought not to be hampered in their work without good cause'."

[20] Scott Baker LJ agreed with those observations and expressed the view that it was not in the interests of sport or anybody else for the courts to seek to double guess regulating bodies in charge of domestic arrangements. At paragraph 21 he went on to state:

> "Sports regulating bodies ordinarily have unrivalled and practical knowledge of the particular sport that they are required to regulate. They cannot be

> expected to act in every detail as if they are a court of law. Provided they act lawfully and within the ambit of their powers, the courts should allow them to get on with the job they are required to do."

[21] In the course of expressing "an overview" when concluding his judgment in the Flaherty case Scott Baker LJ made the following observations at paragraph 78:

> "It is in my judgment of paramount importance that sporting bodies should be given as free a hand as possible, consistent with the fundamental requirements of fairness, to run their own disciplinary processes without the interference of the courts."

I respectfully agree and consider that those remarks should extend generally to the conduct of business by voluntarily agreed sporting arbitration tribunals. Accordingly, I now propose to turn to a consideration of the specific questions raised in the course of this application.

Has the jurisdiction of this court been effectively excluded?

[22] The MUFL Rules provided that all matches shall be played under the jurisdiction of the IFA and the obligation to refer disputes to the Panel imposed by Article 2(1)(*c*) of the IFA Articles of Association has been set out in detail above. Article 2(1)(*c*) provides that the Panel ".. will settle the dispute to the exclusion of any ordinary court...". As Mr MacDonald pointed out, Article 2(1)(*c*) does not include any specific reference to Section 69 or to an appeal. By way of contrast Mr MacDonald referred to the equivalent provision in the English FA Rules, namely, Rule K(*e*) which states:

> "(*e*) The parties agree that the powers of the court under Sections 44, 45 and 69 of the Arbitration Act 1996 are excluded and shall not apply to any arbitration commenced under these Rules."

While he accepted that, in order to be effective, an exclusion agreement does not have to refer expressly to Section 69, Mr Macdonald submitted that clear wording was required to confirm a common intention to exclude a right of *appeal* to the court as opposed to a right to litigate the dispute in a court of first instance. He argued that Article 2(1)(*c*) could reasonably be interpreted as simply meaning that members had agreed to initially refer disputes to the Arbitration Panel rather than to the courts.

[23] On behalf of the respondent Mr Horner accepted that an exclusion agreement requires clear wording but submitted that an express reference to the exclusion of the right of appeal under Section 69 was not required relying on the authority of Essex County Council v Premier Recycling Limited [2006] EWHC 3594 at

paragraphs [24] to [26]. In the circumstances, he submitted that agreement to settle any dispute ".. to the exclusion of any ordinary court" could only sensibly be effective if construed not only as an agreement to arbitrate rather than to litigate at first instance but also as an agreement to exclude any recourse to litigation.

[24] In the Essex County Council case the relevant agreed contractual clause provided for disputes to be referred ".. to arbitration under the provisions of the Arbitration Act 1996 by a single arbitrator to be appointed by agreement between the parties." The parties then agreed the basis of the appointment of an arbitrator on terms that included the following:

> "This request follows extensive discussions between the above parties aimed at resolving this dispute. It is now jointly agreed that an expert third-party is needed to provide a final and binding decision."

After a detailed and careful analysis of a number of relevant authorities Ramsey J concluded at paragraph 22:

> "22. On the basis of those authorities, it is in my view clear, that the words 'final and binding' have to be considered in the context of the other circumstances of the arbitration, and it is now necessary to turn to consider the specific provisions of the case. However, in summary, I conclude that the use of the words 'final and binding,' in terms of reference of the arbitration are of themselves insufficient to amount to an exclusion of an appeal. Such a phrase is just as appropriate, in my judgment, to mean final and binding subject to the provisions of the Arbitration Act 1996."

A similar view of the wording "final, conclusive and binding" was taken by Gloster J in Shell Egypt v Dana Gas Egypt Limited [2009] EWHC 2097 (Comm.). In reaching such a view Gloster J took into account the longstanding use of the term "final and binding" in the context of arbitration observing at paragraph [38]:

> "Although, on their face, the words 'finding, conclusive and binding upon them' are words of considerable width, which might, in an appropriate context, appear to be sufficient to exclude a right of appeal, the reality is that the expression 'final and binding', in the context of arbitration, and arbitration agreements, has long been used to state the well-recognised rule in relation to arbitration, namely that an award is final and binding in the traditional sense and creates a *res judicata* between the parties."

Gloster J did not consider that the addition of the word 'conclusive' added anything of significance in the circumstances of that case.

[25] In my opinion interpretation of Article 2(1)(*c*) must take its colour from the specific character of the organisations concerned together with the activities sought to be regulated. It is also necessary to take into account the more general contexts to which I have referred above. The wording here was not the traditional "final and binding" phraseology referred to by Ramsey J and Gloster J but to the "*exclusion*" of "*any*" court. While it is not necessary to refer specifically to the Arbitration Act or Section 69, it is necessary to determine whether that wording is sufficient to exclude the right of appeal. In reaching a final conclusion I also remind myself of the need to take into account the fundamental requirements of fairness bearing in mind that to exclude the right of appeal under Section 69 would be to exclude that right in the case of a decision that was "obviously wrong". It is not an easy question to resolve and, as Mr MacDonald pointed out, it would have been a simple matter to refer specifically to section 69 or to the right of appeal. However, after careful consideration, I have reached the conclusion that, in the circumstances of this particular case, Article 2(1)(*c*) is effective to exclude the right of appeal under Section 69.

[26] If I had not reached such a conclusion, as an alternative, Mr Horner submitted that the agreement contained in Article 2(1)(*c*) together with the need for a quick, final and binding determination of a dispute should be important factors persuading the court to exercise its discretion not to grant leave to appeal in accordance with Section 69(3)(*d*). That was an approach adopted by Ramsey J in the Essex County Council case who, after deciding that the relevant clause did not exclude the right of appeal, proceeded to refuse to grant leave on the basis that to do so would not be just and proper in all the circumstances noting that "a full appeal with oral submissions protracting the time to reach a final and binding decision is not, in my judgment, what the parties envisaged." In the particular circumstances of this case the admirable degree of co-operation between the parties together with the efforts of the Court Service, particularly in the vacation, have succeeded in dealing with this application upon a "rolled up" basis and, consequently, had it become necessary, I would not have been prepared to exercise my discretion under Section 69(3)(*d*).

[27] The decision that I have reached with regard to the effect of the exclusion clause disposes of this application but out of deference to the industry of the parties and the quality of their submissions I propose to deal briefly with the other issues raised before the court.

Perverse findings of fact as a point of law arising out of an award by an Arbitration Panel

[28] The availability of this type of submission is fundamental to the argument on the merits of an appeal since Mr MacDonald relied upon it as a basis for rejection of

the finding by the Panel that only amateur players participated in the MUFL. He referred to the decision in Edwards v Bairstow and to the observation by the learned authors of 23rd Edition of Russell on Arbitration at paragraph 3-126 that "the distinction between questions of fact and law is a notoriously difficult one which arises generally in appellate practice". At that point the authors refer in a footnote to the 4th Edition of the Judicial Review Handbook by M Fordham and it is to be noted that a similar section has been included in the 5th edition of that work.

[29] By way of response Mr Horner maintained that an appeal under Section 69 was confined to a question of law and that, on such an appeal, it was not open for the court to decide questions of fact being confined to the facts as found by the Arbitral Tribunal. Mr Horner relied upon the judgment of Steyn LJ in The Baleares [1993] 1 Lloyds Reports 215 at pages 227-228 and paragraphs 62 to 65 of the judgment of Ramsey J in London Underground Limited v City Link Telecommunications Limited [2007] EWHC 1749 (TCC).

[30] The passage from the judgment of Steyn LJ in the Baleares relied upon by Mr Horner contains some fairly robust assertions including, at page 228 the following:

> "On an appeal the Court must decide any question of law arising from an award on the basis of a full and unqualified acceptance of the finding of fact of the arbitrators. It is irrelevant whether the Court considers those findings of fact to be right or wrong. It also does not matter how obvious a mistake by the arbitrators on issues of fact might be, or what the scale of the financial consequences of the mistake of fact might be. That is, of course, an unsurprising position. After all, the very reason why parties conclude an arbitration agreement is because they do not wish to litigate in the Courts. Parties who submit their disputes to arbitration bind themselves by agreement to honour the arbitrators' award on the facts. The principle of party autonomy decrees that a Court ought never to question the arbitrators' findings of fact."

Mr MacDonald urged caution with regard to that passage and it is to be noted that the other Lord Justice delivering judgment in the case, Neill LJ, did not feel able, without further argument, to reach a final conclusion on the question whether, subsequent to the coming into force of the Arbitration Act 1979, it was permissible to review a finding of fact by arbitrators, challenged on the ground there was no evidence to support it, as an error of law. Nevertheless, he expressed himself to be impressed by the argument and the observations of Lord Steyn have received recent

approval from Blair J in his judgment in Guangzhou Dockyards v E.N.E [2010] EWHC 2826 (Comm). At paragraph 17 of his judgment in that case Blair J said:

> "17. It is not in dispute that s.69 of the 1996 Act provides for, and only provides for, an appeal to the court on a question of law. In my view, the opening words of the section ("Unless otherwise agreed by the parties…") have to do with agreement between the parties in the context of an appeal on a question of law. The words cannot be construed as expanding the jurisdiction of the court to include an appeal to the court on a question of fact on the basis that the parties have agreed to such an appeal…….. I reject the Dockyard's primary contention therefore that the factual appeal in Part B of the Dockyard's claim form can stand as a s.69 appeal."

[31] Ramsey J in the section of the judgment in the London Underground case upon which Mr Horner relied considered the judgment of Steyn LJ in The Baleares to be relevant, even though based on the 1979 Act. After a careful analysis of the relevant authorities Ramsey J adopted the reasoning of Cooke J in Demco v S. E.Banken Forsakring [2005] 2 Lloyds Reports 650. He did so, in particular, because the findings of fact made by the arbitrator are taken as being the accepted basis for the appeal under Section 69(2)(*c*) and because the admissibility, relevance or weight of any material (oral, written or other) is a matter wholly for the arbitrator under Section 34(2)(*f*).

[32] For the reasons set out earlier in this judgment it seems to me that a court should be extremely cautious about importing public law concepts into arbitral proceedings. Scott Baker LJ observed in the quotation referred to above that sports regulating bodies cannot be expected to act in every detail as if they are a court of law. The authorities are replete with criticisms of attempts by appellants to "dress-up" issues of fact in order to constitute questions of law. The reference to the decision of the Tribunal being "obviously wrong" in Section 69(3)(*c*)(*i*) might well be seen as supporting the legitimacy of a resort to a perversity submission but it would appear from sub-section (3)(*d*) that, even in such circumstances, the court would still have a discretion to refuse leave to appeal. I have referred earlier to the fundamental requirements of fairness. They might include the general natural justice tenets such as absence of bias, the availability of cross-examination, the disclosure of adverse evidence, the ability to make representations, the giving of reasons etc. without resort to the Edwards v Bairstow principle. I accept that much depends on the circumstances of the individual case and situations with a significantly wider public implication might call for a different approach to those in which the relevant decision affects only those voluntarily and willingly subscribing to the relevant rules and procedures – see, for example, the debate in R v Jockey Club ex parte RAM Race Courses Limited [1993] 2 AER 225 or, possibly, the proportionality of a sanction imposed in the course of a disciplinary procedure – see the judgment of Richards J in

Bradley v The Jockey Club [2004] EWHC 2164 QB subsequently approved by the Court of Appeal (2005) EWCA Civ. 1056.

[33] It seems to me that this is a case to which the observations of Lord Steyn probably apply. However, in the circumstances, I do not think that it is necessary to reach a final conclusion on this point. Viewed against the background outlined above and, bearing in mind that its procedure and award are not to be subjected to rigorous legal analysis or approached with a "meticulous legal eye, endeavouring to pick holes inconsistencies and faults."(see Bingham J in Zermalt Holdings v Nu-Life [1985] 2 EGLR 14) I am not persuaded that the Panel reached a perverse conclusion of fact. The award did contain a reference to "persuasive or compelling evidence" and did not explicitly discuss a burden of proof or any other technical rule of evidence or procedure. However, it seems clear that the Panel listened to the case made by each of the parties, who were allowed to cross-examine and make submissions. Once the appropriate allowances have been made, it is clear that the Panel considered the evidence called on behalf of the various parties relating to whether the MUFL was an amateur competition as defined by the FIFA Regulations and, having done so it reached the conclusion, on a balance of probabilities, that MUFL was an amateur competition.

Can a valid distinction be drawn between the transfer of a player and registration of a player?

[34] Having found that the IFA was entitled, in accordance with Regulation 6.4 of the FIFA Regulations, to specify a separate period for intermediate and junior leagues, the panel proceeded to consider the validity of the 31st December 2010 deadline for transfers specified in Rule 7*(f)* of the MUFL Rules. At paragraph 44 of the award the panel expressed the view that the answer to this question lay in the interpretation of paragraph 19 of the IFA Player Registration Regulations which provides as follows:

> "**Leagues retain the Right**
>
> 19 Leagues retain the right to determine the criteria for the eligibility of players playing for clubs within their leagues and to impose sanctions where appropriate in accordance with their rules but must comply with the FIFA Regulations as adopted by the IFA."

In my opinion it was reasonably open to the panel considering MUFL Rules 7*(e)* and *(f)* to conclude that a distinction could be made between registration and transfer and that the MUFL was entitled to fix the date of transfer as one of the criteria of player eligibility in accordance with Regulation 19 of the IFA Player Registration Regulations. In so doing the MUFL was complying with the period allowed for registration for all intermediate and junior leagues by Regulation 2 of the IFA

Regulations while at the same time ensuring that the strength of all participating clubs would remain unchanged during the vital "run-in" period for league and cup honours. MUFL Rule 7(f) provided separate deadlines for registration and transfer and, in so doing, gave "due consideration to the sporting integrity of their competitions" as permitted by FIFA Regulation 6(4).

The estoppel argument

[35] The applicant argued that the actions of the MUFL and the IFA in relation to the transfer of Ashley Gregg were such as to create a legitimate expectation on the part of the applicant that the transfer had been sanctioned or, alternatively, sufficient to estop the IFA from denying that it had sanctioned the transfer to the extent that it would be unfair if the applicant was now to be punished for acting upon those representations. In its written submission to the Panel the applicant asserted that prior to Ashley Gregg's transfer on 18 January 2011, the applicant's Chairman, Colin McCullough, had telephoned the IFA about the transfer. He claimed that he had spoken to Tracey Scott and explained that Loughgall FC was releasing players because of financial difficulties. It was further alleged that Mr McCullough had asked if the applicant could sign Mr Gregg, that he had then been put on "hold" for a minute and, when she returned, Ms Scott had said "The boys here think as far as they would be concerned the Mid-Ulster Rules are internal and this is an external". Mr McCullough alleged that Ms Scott had told him that if MUFL put it through the IFA would facilitate the transfer. It was also alleged that on 25 January 2011 the applicant's Chairman had spoken to the Chairman of the MUFL, Isaac Gilkinson, who is alleged to have said there would not be any problem with the transfer and registration. It was further alleged that in the course of subsequent telephone conversations the IFA confirmed that Ashley Gregg was cleared to play for the applicant.

[36] This aspect of the application was dealt with by the Panel at paragraphs 46 to 53 of the award. The Panel found that Mr Gilkinson had no authority under the MUFL Rules to sanction a transfer that was not in accordance with those Rules. The Panel also referred to a letter from the Management Committee of the MUFL dated 8 June 2011 addressed to the Chief Executive of the IFA which confirmed that, apart from Mr Gilkinson, none of the members of the MUFL Committee knew anything about the transfer at the time. The letter confirmed that had the other members of the Committee been consulted in advance the transfer would not have taken place.

[37] The Panel also concluded that there was no provision in the IFA Rules enabling the IFA to sanction a transfer in breach of the Rules. In the case of the IFA the Panel found that there was "confusion" as to what actually transpired in the relevant telephone conversations and, consequently, did not reach any specific findings of fact as to what may or may not have been said by IFA employees/officials. Even on the basis of the evidence discussed it is difficult to see how the Panel could have found a prima facie case of estoppel/legitimate

expectation against the IFA. Irrespective of what may actually have taken place during such conversations the Panel emphasised the fact that Article 30(1)(*f*) of the IFA Rules placed responsibility for ensuring the eligibility of their players centrally and squarely upon clubs playing in any match played under the jurisdiction of the IFA.

[38] The finding of fact by the Panel that neither Mr Gilkinson nor the IFA had any authority to sanction the transfer of Ashley Gregg in breach of the rules is fatal to this element of the applicant's case. As I have indicated earlier in this judgment extreme caution should be exercised before importing any of the more technical legal concepts of public law into the proceedings of privately agreed sporting tribunals but, in any event, it is trite law that an expectation grounded upon an ultra vires representation cannot be legitimate. In private law the estoppel doctrine may sometimes be relied upon in the interests of fairness to an individual who has relied upon an unauthorised representation by someone in a position of ostensible authority. The doctrine thereby serves to prevent unconscionable conduct. However, in my opinion the applicant has no basis upon which it can resort to the benefit of that doctrine in this case. Quite the reverse, in my view it would be wholly unfair to allow the applicant to take advantage of a transfer deliberately effected in full knowledge that it was in breach of the Rules to which all the other clubs competing in MUFL had voluntarily agreed.

[39] Accordingly, for the reasons set out above, this application must be dismissed.