Case No: 3534 of 2010

Neutral Citation Number: [2010] EWHC 3111 (Ch)
IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 01/12/2010

Before :

MR JUSTICE VOS

- -

Between :

Fulham Football Club (1987) Limited	**Petitioner**
- and -	
(1) Sir David Richards	**Respondents**
(2) The Football Association Premier League Limited	

- -

Mr Philip Marshall QC and Mr Paul Harris (instructed by Lewis Silkin LLP) for the Petitioner
Mr Richard Snowden QC and Mr James Potts (instructed by BrabnersChaffe Street LLP) for the 1st Respondent
Mr Ian Mill QC and Mr Andrew Hunter (instructed by DLA Piper UK LLP) for the 2nd Respondent

Hearing dates: 22nd and 23rd November 2010

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Judgment

Mr Justice Vos:

1. By these applications, the Respondents each seek a stay of the unfair prejudice petition presented by Fulham Football Club (1987) Limited ("Fulham") on 27th April 2010, under section 9 of the Arbitration Act 1996 (the "AA 1996"), and the first Respondent applies also pursuant to the inherent jurisdiction of the Court. The Respondents are the Football Association Premier League Limited (the "FAPL") and the FAPL's long-standing Chairman, Sir David Richards ("Sir David").

2. Fulham's complaint in its petition is that, between the 24th and 26th July 2009, Sir David interfered in the negotiations for the transfer of Mr Peter Crouch, the famous England football player ("Mr Crouch"), so as to procure Mr Crouch's transfer from Portsmouth City Football Club Limited ("Portsmouth") to Tottenham Hotspur Football & Athletic Company Limited ("Tottenham"), instead of to Fulham.

3. Fulham alleges that Sir David acted as an unauthorised agent contrary to the FA Football Agents Regulations (the "Regulations"), and was guilty of misconduct and breach of fiduciary duty, thereby causing the FAPL to act in breach of its Articles of Association (the "Articles") and of its Rules (the "FAPL Rules"). The essence of the allegation against Sir David is that he failed to act fairly as between members of the FAPL by promoting the interests of one club over another, thereby failing to act in the best interests of the FAPL. As against the FAPL, Fulham alleges that it has failed to take adequate action to rectify Sir David's alleged breaches, so that the affairs of the FAPL have been conducted in a manner which is unfairly prejudicial to Fulham's interests as one of the 20 football club members of the FAPL.

4. The relief that Fulham seeks by its petition includes injunctions to restrain Sir David from acting in further breach of the Regulations and participating in future player transfer negotiations, and an order that Sir David cease to be the Chairman or a director of the FAPL.

5. The Respondents' response to Fulham's petition has, as I have said, been to apply for a stay on the grounds that the matters in issue between the parties fall within the terms of arbitration agreements contained respectively in the FAPL Rules and the Football Association's Rules (the "FA Rules").

6. The Respondents' stay applications were listed to be heard in private because: (a) they are "*arbitration claims*" within the meaning of CPR Rule 62.2(1)(a) as being "*any application to the court*" under the AA 1996; (b) CPR Rule 62.10(2) dis-applies CPR Rule 39.2 to the effect that the general rule is that hearings are to be in public; and (c) the effect of CPR Rule 62.10(3) and the effect of the decision of the Court of Appeal in Department of Economics, Policy and Development of the City of Moscow v. Bankers Trust Co [2005] QB 207 is that the starting point is to treat the parties' wish for privacy and confidentiality as outweighing the public interest in a public hearing.

7. At the beginning of the hearing, Mr Philip Marshall QC, counsel for Fulham, raised the question of whether the hearing and/or the judgment should be in public. After argument, I decided that the hearing should continue in private notwithstanding that there had already been a considerable amount of coverage of this dispute in the popular press, but that I would make this judgment publicly available as the applications raised an important point of law. I will not repeat my reasoning in this

judgment, but I have recounted the outline of what occurred so as to explain why I shall limit the factual material that I refer to in this judgment.

8. There has been no need, in any event, in dealing with these applications, to delve deeply into the facts relied upon by Fulham in support of its substantive complaints, because the issue between the parties is a stark legal question. That question is simply whether the statutory right of a member of a company to present an unfair prejudice petition under section 994 of the Companies Act 2006 ("CA 2006") can be removed or diminished by contract, or whether it is an inalienable right, as was decided by HHJ Weeks QC in Exeter City Association Football Club Ltd. v. Football Conference Ltd. [2004] 1 WLR 2910 ("Exeter City") at paragraph 23. Exeter City is said to be directly in conflict with an earlier decision of Rimer J (as he then was) in Re Vocam Europe Ltd [1998] BCC 396 ("Vocam").

9. It is common ground (subject to one argument that I shall address in due course) that, if the right to present an unfair prejudice petition can be removed or diminished by contract, Fulham has done so by agreeing to the arbitration provisions in both the FA Rules and the FAPL Rules. Thus, unless the right to present an unfair prejudice petition is inalienable, the stay that the Respondents seek would be mandatory under section 9 of the AA 1996. But if the right to present an unfair prejudice petition cannot be removed or diminished by contract, the applications for a stay must be rejected.

10. Before turning to deal with the authorities that give rise to this stark legal issue, I will set out the rules concerned, the relevant statutory material and the essential factual background relied upon by the parties.

The FAPL Rules

11. Rule B.12 of the FAPL's Rules provides that membership of the FAPL is deemed to constitute an agreement between the FAPL and the club members and between each club to be bound by and comply with, among other things, the FA Rules, the Articles, the FAPL Rules and the Statutes and Regulations of FIFA (Fédération Internationale de Football Association).

12. Rule 2 of section S of the FAPL Rules provides that membership of the Premier League constitutes an agreement in writing between the FAPL and the 20 clubs and between each club for the purposes of section 5 of the AA 1996 as follows:-

> "*2.1 to submit all disputes which arise between them ... whether arising out of [the FAPL Rules] or otherwise to final and binding arbitration in accordance with the provisions of the [AA 1996] and this Section of [the FAPL Rules]*".

13. Rule 3 of Section S of the FAPL Rules provides that disputes are deemed to fall into one of three categories, including:-

> *"3.2 disputes arising from the exercise of the Board's discretion ("Board Disputes");*
>
> *3.3 other disputes arising from [the FAPL Rules] or otherwise*".

14. Rules 21-22 of Section S give the arbitral tribunal broad general powers including the power to take the initiative in ascertaining the facts. Rule 28 of Section S provides for the arbitral tribunal to have extensive remedial powers including the power to "*order a party to do or refrain from doing anything*".

The FA Rules

15. Section K of the FA Rules includes the following provisions:-

> "*1.(a) Subject to Rule K1(b), K1(c) and K1(d) below, any dispute or difference between any two or more Participants (which shall include, for the purposes of this section of the [FA Rules], [the FA]) including but not limited to a dispute arising out of or in connection with (including any question regarding the existence or validity of):*
>
> *(i) the Rules and regulations of [the FA] which are in force from time to time;*
>
> *(ii) the rules and regulations of [a] … Competition which are in force from time to time;*
>
> *…*
>
> *shall be referred to and finally resolved by arbitration under [the FA Rules].*
>
> *…*
>
> *(c) Rule K1(a) shall not apply to any dispute or difference which falls to be resolved pursuant to any rules from time to time in force of any … Competition.*
>
> *…*
>
> *(e) The parties agree that the powers of the court under pages 44, 45 and 69 of the [AA 1996] are excluded and shall not apply to any arbitration commenced under these Rules*".

16. "*Participant*" is defined by Rule A2 as including (in addition to the FA itself under Rule K1(a)) any Club, Competition or Official and "*all such persons who are from time to time participating in any activity sanctioned either directly or indirectly by the [FA]*".

17. "*Official*" is defined by Rule A2 as "*any official, director, secretary, servant or representative of an Affiliated Association or Competition*".

18. "*Competition*" is defined by Rule A2 as "*any competition (whether a league or knock-out competition or otherwise) sanctioned by [the FA]*", thus including the Premier League.

19. Rule 7 of Section K provides for the arbitral tribunal to have the same remedial powers as the FAPL Rules including the power to "*order a party to do or refrain from*

doing anything". The tribunal also has similar broad general powers to those of an FAPL tribunal.

The Articles of Association of the FAPL

20. Articles 44 to 46 provide for the appointment and removal of the Chairman by resolution of a general meeting of the member clubs.

21. Article 79 provides that the FAPL shall adhere to and comply with the FA Rules.

Other rules and charters

22. The Premier League Chairman's charter provides that the FAPL will ensure that the member clubs follow FAPL Rules and FA Rules not only to the letter but also to their spirit, and that they will seek to resolve differences between each other without recourse to law.

23. Article 64 of the FIFA Statutes prohibits recourse to ordinary courts of law, and provides for arbitration by the Court of Arbitration for Sport. Articles 59-63 of UEFA's Statutes (Union des Associations Européennes de Football) make similar provisions.

The Arbitration Act 1996

24. Section 1 of the AA 1996 includes the following principles:-

> "*(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 in this Part*".

25. Section 9 of AA 1996 provides as follows:-

> "*9(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.*
>
> *(2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.*
>
> *(3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.*

(4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed".

26. Section 48 of the AA 1996 provides that:-

"*(1) The parties are free to agree on the powers exercisable by the arbitral tribunal as regards remedies.*

(2) Unless otherwise agreed by the parties, the tribunal has the following powers. …

(5) The tribunal has the same powers as the court – (a) to order a party to do or refrain from doing anything".

The Companies Act 2006

27. Section 33 of the CA 2006 provides that a company's constitution (including the articles of association) "*bind the company and its members to the same extent as if there were covenants on the part of the company and of each member to observe those provisions*".

28. Section 171 of the CA 2006 provides that a director must act in accordance with the company constitution and only exercise powers for the purposes for which they were conferred.

29. Section 172 of the CA 2006 sets out the duty of a director to act in the way most likely to promote the success of the company for the benefit of its members as a whole having regard, amongst other things, to long term consequences, the interests of employees, and the need to act fairly between members of the company.

30. Section 994 of the CA 2006 is headed "*Petition by company member*" and reads as follows:-

"*(1) A member of a company may apply to the court by petition for an order under this Part on the ground—*

(a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial".

31. Section 996 of the CA 2006 provides as follows:-

"*(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.*

(2) Without prejudice to the generality of subsection (1), the court's order may -

(a) regulate the conduct of the company's affairs in the future;

(b) require the company –

(i) to refrain from doing or continuing an act complained of …

(e) provide for the purchase of the shares of any members of the company by other members of the company or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly".

Factual background

32. The FAPL was incorporated on 27th May 1992. Each of the 20 member clubs for the time being hold one share in the FAPL, and the FA holds a non-voting special share. The board of directors of the FAPL comprises only Mr Richard Scudamore, the chief executive, and Sir David.

33. In July 2009, as is well known, Portsmouth was in financial difficulties and was looking to sell the transfer of the registration of Mr Crouch. It appears that, at least, Fulham and Tottenham were interested and entered into negotiations with Portsmouth.

34. By 25th July 2009, Fulham alleges that it had offered £9 million for Mr Crouch's transfer, and was prepared to offer more. At that stage, Mr Crouch had indicated his preference to play for Tottenham, but Tottenham had allegedly offered less than Fulham and its offers had been rejected.

35. The core factual allegation in the petition is that, on or about 24th July 2009, Portsmouth sought Sir David's help in facilitating Mr Crouch's transfer to Tottenham, and that Sir David agreed to give such help. It is alleged that his help included talking to Mr Daniel Levy at Tottenham resulting in an increased offer of £9 million payable immediately being made by Tottenham for Mr Crouch on 26th July 2009, which offer was accepted, thereby pre-empting Fulham's intended increased bid.

36. On 10th August 2009, Fulham complained to the FAPL about Sir David's conduct in relation to Mr Crouch's transfer from Portsmouth to Tottenham. On 19th August 2009, the FAPL informed Fulham that Mr Peter McCormick, a legal advisor to the FAPL, had been appointed to inquire into the circumstances surrounding the transfer of Mr Crouch from Portsmouth to Tottenham and the role played by Sir David in the transfer negotiations.

37. On 4th September 2009, Fulham's then solicitors wrote to the FAPL complaining that the inquiry was materially deficient and unfit for its purpose in that it had, amongst other things, no set terms of reference and inadequate procedures.

38. On 22nd February 2010, Mr McCormick produced his final report making certain findings as to the facts to the effect that Sir David had played a part in "*mediating*" between Portsmouth and Tottenham, but that the transaction was not brokered by Sir David.

39. On 3rd March 2010, the FAPL informed Fulham that the board of the FAPL had considered Mr McCormick's report and concluded that Sir David's action did not cause detriment to Fulham, and that his quasi-mediation role was a legitimate one for the Chairman to perform.

40. On 15th March 2010, Lewis Silkin LLP, Fulham's solicitors, wrote to the FAPL alleging that Sir David had acted "*so unfairly as to prejudice the interests of Fulham as a Member [of the FAPL]*".

41. On 23rd April 2010, the FAPL wrote to Fulham's solicitors rejecting Fulham's allegations and suggesting that it should ask the Board to put the matter on the agenda for the shareholders' meeting scheduled for the first week of June 2010, and indicating that the Board would then follow the wishes of the majority of the members. The FAPL reminded Fulham that, if it still wished to take some form of proceedings, it was bound by the FAPL Rules to proceed by way of arbitration.

42. On 27th April 2010, Fulham presented its petition to the court, and on 21st June 2010, the FAPL issued its application notice seeking a stay under section 9 of the AA 1996.

43. On 2nd July 2010, Registrar Simmonds gave directions for the determination of the FAPL's application.

44. On 9th July 2010, Sir David issued his application for a stay of the petition under the inherent jurisdiction of the court, alternatively pursuant to section 9 of the AA 1996. In the result, nothing turns on Sir David, but not the FAPL, having formally invoked the inherent jurisdiction of the court.

The two conflicting authorities

45. Since the single issue in this case concerns the conflict between two first instance decisions in the Chancery Division, it is useful to deal first with those cases. All parties have submitted, in one way or another, that one or other of these decisions was *per incuriam*, or at least decided without regard to other material authorities from other jurisdictions.

46. In Vocam in 1997, an unfair prejudice petition was presented by two members of a company, who had been removed from the board. The petition sought an order that the respondent majority shareholders should purchase the petitioners' shares. The majority shareholders applied to stay the petition under section 9 of the AA 1996 on the grounds that the members had agreed in a shareholders' agreement to refer all disputes between the parties, whether or not arising under the shareholders' agreement, to arbitration in accordance with the laws of the State of Victoria. It was submitted, in reliance on the case of Re Harrods (Buenos Aires) Ltd [1992] Ch 72, that it was no answer to the stay application that the remedies available to the arbitrator might not be as extensive as would be available under the legislation. In answer, the petitioners submitted that the arbitration clause only covered claims for relief of a nature capable of being granted by an arbitrator. Rimer J held that: "*the claims made by the petitioners in the petition relate to matters of dispute arising under the [shareholders' agreement] and that VIP is entitled to the stay it seeks*".

47. In Exeter City in 2004, Exeter City Association Football Club (the "Club") petitioned on the grounds of unfair prejudice as a member of Football Conference Limited ("FCL"), which ran the National Conference football league. The Club proposed to enter into a creditors' voluntary arrangement ("CVA"), which gave preference to "football creditors". It did so because the articles of FCL provided that a member entering into a CVA was liable to expulsion, subject to a discretion to allow the Club to retain membership, such discretion being exercised as a matter of policy if football creditors were to be paid in full. The Revenue then applied to revoke the CVA on the grounds that it had been prejudiced by the preferential treatment of football creditors, and the Club responded by presenting an unfair prejudice petition. FCL applied for a mandatory stay under section 9 of the AA 1996 on the basis of the widely drawn arbitration clause in the FA Rules.

48. Judge Weeks QC, sitting as a High Court judge, decided that part of the dispute fell within the arbitration clause in the FA Rules and part within a provision in the FCL's rules. The Judge regarded the bifurcation as unsatisfactory, but decided the stay issue on the basis of a consideration of three authorities (though he was referred to many more). First, he mentioned A Best Floor Sanding Pty Limited v. Skyer Australia Pty Ltd [199] VSC 170 ("Best Floor"), where Warren J had held that the right of a contributory to apply to wind up a company should not be stayed under the discretionary statutory provisions applicable in Victoria, and said that he could "*see no difference in principle for this purpose between a winding up petition and a petition under [section 994]*". Secondly, the Judge referred to In re Magi Capital Partners LLP [2003] EWHC 2790 (Ch), a case he had decided, in which counsel had conceded that it was not possible to exclude the statutory right to wind up a limited liability partnership. He continued by saying: "*The Companies Court has jurisdiction to wind up a company or limited liability partnership, and the same court has supervisory powers, designed to give protection to shareholders by enabling them to apply to the court for special relief. In effect, the court controls by statute the creation and extinction of the company, and it also attends to it during midlife crises*".

49. Judge Weeks QC then held as the *ratio decidendi* of the case that: "*The statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise*". Finally, he referred to Vocam and to Magi, holding that in Vocam, the main point taken before him and conceded in Magi had not been argued, and that Rimer J had simply rejected the submission that no stay could be granted because the arbitrator could not grant the same relief as the court. Finally, Judge Weeks QC distinguished his decision in Magi, where he had stayed the petition to allow some allegations to proceed by way of an existing arbitration, as being a case management decision.

Should this court regard the decision in Exeter City as settled law?

50. The first point taken by Mr Marshall was that, where there are two conflicting first instance decisions, the court should regard the later of the two as settled law and follow it automatically, leaving it to the Court of Appeal to decide between them. Mr Marshall relied on a series of authorities, but primarily on (a) Re A E Farr Ltd [1992] BCC150, in which Ferris J had declined to follow his own previous decision on the basis that a subsequent decision of Vinelott J had decided not to do so; and (b) Re Bishopsgate Investment Management Ltd [1992] BCC 214 (Hoffmann J) and [1993] Ch. 1 (CA), where Hoffmann J had followed the same process, choosing to follow

Vinelott J's decision on the same point, and expressing no views of his own, and the Court of Appeal said he was plainly right to have left it to them to decide.

51. With the exception of these two cases, all the other relevant authorities are summarised in meticulous detail by Judge Kershaw QC, sitting as a judge of the High Court, in Re Taylor (A Bankrupt) [2007] Ch. 150. I shall not seek to summarise that decision, because ultimately it was common ground between the parties that the applicable test was contained in a widely cited decision of Nourse J in Colchester Estates (Cardiff) v. Carlton Industries plc [1986] Ch. 80, where he said at page 85 that such matters should be regarded as settled law "*when the earlier decision has been fully considered, but not followed, in a later one*". The only exception was described thus: "*I would make an exception only in the case, which must be rare, where the third judge is convinced that the second was wrong in not following the first. An obvious example is where some binding or persuasive authority has not been cited in either of the first two cases. If that is the rule then, unless the party interested seriously intends to submit that it falls within the exception, [a hearing] at first instance in the third case will, so far as the point in question be concerned, be a formality, with any argument upon it reserved to the Court of Appeal*".

52. I propose to apply this test to the situation in this case. Both Mr Richard Snowden QC, counsel for Sir David, and Mr Ian Mill QC, counsel for the FAPL, have, however, submitted that the decision in Exeter City was wrong, and ignored much persuasive authority that was not cited to Judge Weeks QC. In these circumstances, it seems that I cannot avoid dealing with that submission and thereby expressing views of my own, despite the good practice followed by Hoffmann J and Ferris J in the cases I have mentioned, and the Court of Appeal's approval of that practice in Bishopsgate Investment Management Ltd.

53. I suggested to Mr Snowden in reply that I would be doing no more than deciding which party would be opening the case in the Court of Appeal, but the Respondents were unmoved. Nonetheless, I bear in mind that the Respondents have a high threshold to surmount if they are to persuade me to refuse to follow Exeter City. I must be persuaded that Judge Weeks QC was wrong in not following Rimer J in Vocam. Bearing in mind the limited significance of my decision, I will deal with the abundant authorities cited by the parties briefly. But it will come as no surprise to anyone to be told that the question is not free from difficulty.

The construction question

54. I have already said that it is common ground that, if the right to present an unfair prejudice petition can be removed or diminished by contract, Fulham has done so by agreeing to the arbitration provisions in both the FA Rules and the FAPL Rules. There is, therefore, no real construction question for me to consider, it being accepted by Fulham that the issues raised by its petition fall within the terms of the agreements to arbitrate contained in the rules I have set out.

55. I should deal at this stage, however, with the one wrinkle to that clear position. Mr Marshall submits that the relief that he seeks in his unfair prejudice petition is not of the nature that the arbitrators appointed under the FA Rules and the FAPL Rules could grant. He also, of course, accepted that that is not, in itself, a reason for not staying the proceedings in favour of arbitration, as Mustill LJ most notably held in

giving the judgment of the Court of Appeal at page 610 in Societe Commerciale de Reassurance v. Eras lnternational Ltd [1992] 1 Lloyd's Rep.570, since the parties have chosen a forum with advantages and disadvantages.

56. Mr Marshall's only construction point was, in effect, that the claims he makes for relief from unfair prejudice under section 996 of the CA 2006 are claims that have not been agreed to be referred to arbitration, because only the court can grant such relief, the statute providing that: "*[i]f the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief …*". There is no point, argues Mr Marshall, in the arbitrators making a finding of unfairness, because they do not have the powers, for example, to "*regulate the conduct of the company's affairs in the future*" under section 996(2)(a) of the CA 2006. So, the argument runs, a dispute about unfairly prejudicial conduct cannot have been agreed to be referred to arbitration.

57. In my judgment, this argument is wrong as a matter of construction. The FA Rules and the FAPL Rules constitute agreements to submit "*any dispute or difference*" and "*all disputes*" between respectively Sir David and Fulham and the FAPL and Fulham to arbitration. These are wide words, which are to be construed widely (see paragraph 13 of Lord Hoffmann's speech in Fiona Trust v. Privalov [2007] 4 All ER 951). Disputes about whether Sir David's conduct and the response of the FAPL to it have unfairly prejudiced Fulham and all the allegations in Fulham's petition fall squarely within the scope of these words and they have been agreed to be referred to arbitration. In fact, the arbitrators can decide that dispute and make the same kinds of order as are contemplated by section 996 of the CA 2006, because their powers include, as I have already set out, powers to "*order a party to do or refrain from doing anything*". But even if their powers were not as extensive as the court's power, that is because the parties chose arbitration in preference to court determination, and are to be taken as having understood that there would be advantages and disadvantages in so doing.

58. I turn then to consider briefly the main points from the other authorities that are said to bear upon the correctness of Judge Weeks QC's decision.

The other authorities

59. In re Peveril Gold Mines, Limited [1898] 1 Ch. 122, the Court of Appeal decided that the right given by section 62 of the Companies Act 1862 to a contributory to petition for the winding-up of a company could not be excluded or limited by the articles of association of the company. Lindley MR said at page 131 that any provision in the articles that stated that the persons, who the statute had said could petition for dissolution, could not do so was invalid, and it was no answer to say that the right could be waived by a contributory personally, although he concluded: "*I do not intend to decide whether a valid contract may or may not be made between the company and an individual shareholder that he shall not petition for the winding up of a company*". I find this a difficult decision because it seems to me that Lindley MR's concluding words deprived his earlier holding of substance. Mr Snowden sought to square the circle by submitting that the learned judge was referring only to provisions applying to the company itself in the articles (as to which see Russell v. Northern Bank Development Corporation [1992] 1 W.L.R. 588), but that puzzles me because the articles amount, now at least, to an agreement between the members and the company

by which they are all bound, as is now made clear by section 33 of the CA 2006 which I have set out above. In the end, as appears below, it seems to me that I am not called upon in this case to decide the extent of the ability of parties to agree restrictions on the court's jurisdiction over the winding up of companies.

60. In Phoenix v. Pope [1974] 1 W.L.R. 719, it was held that, notwithstanding section 35 of the Partnership Act 1890, which provided that the court might decree a dissolution of a partnership, the partners had validly agreed to submit all matters to arbitration, and that the arbitrator had power to order dissolution. This case seems to me to be important, because it demonstrates that, where a statute says that the court may make certain orders, if the parties submit all disputes to arbitration, they may be held to be accepting that the arbitrator can consider granting similar relief.

61. In O'Neill v. Phillips [1999] A.C.1092, the House of Lords analysed the nature of an unfair prejudice petition in a way that all parties rely upon. Lord Hoffmann's speech is too well known to require much repetition, but suffice it to say that he made clear that ordinarily unfairness to a member, such as is required to be proved under section 994, required some breach of the terms on which it had been agreed that the company's affairs should be conducted. Mr Marshall relied particularly on the passages in Lord Hoffmann's speech that emphasised that equity allowed the court to restrain the exercise of strict legal rights where it would be contrary to good faith (page 1098H), and that unfairness might consist in a use of the rules in a manner which equity would regard as contrary to good faith (page 1099). The purpose of these citations was to demonstrate that the court in determining whether there had been unfairness under section 994 would not simply be determining a contractual dispute, but would be having regard to wider factors of equity and good faith. This much, I entirely accept.

62. I have already referred to the Best Floor case, decided on 19th May 1999. There, Warren J referred to Re Peveril and to the dictum of Lord Macnaghten in Welton v. Saffery [1897] A.C. 324 which Lindley MR had cited in Re Peveril. Having said that the application to stay a winding up petition on the grounds of an arbitration agreement raised a fundamental principle of corporations law, she said: "*the Corporations Law controls by statutory force the creation and demise of the company; it oversees the birth, the life and death of the company. Such matters cannot and ought not be subject to private contractual arrangement*". Warren J dealt also with voluntary windings up, holding (in effect) that the possibility of them did not invalidate her decision, and concluding that "*the application … to stay … strikes at the very heart of the corporation structure enshrined in the Corporations Law*" and that "*the arbitration clause … is null and void insofar as it purports to subject the parties to an arbitration with respect to the dissolution or winding up of a company. The provision is null and void because it has the effect of obviating the statutory regime for the winding up of a company*".

63. In Wine Inns Limited 30th June 2000, in the Northern Irish Court of Appeal, Carswell LCJ decided that the two issues of winding up and unfair prejudice did not, as a matter of construction, fall within the terms of a wide arbitration clause because they did not constitute a doubt, difference or dispute affecting the shareholders agreement or the construction thereof or any clause or thing contained therein. This decision does not, turning as it did on construction, much assist the debate between the parties either way.

64. In Via NetWorks Ireland Limited [2002] IESC 24, Keane CJ gave the judgment of the Supreme Court of Ireland saying that the submission that it would be contrary to public policy to operate an arbitration clause in a manner which would deprive one party of its statutory right to have its oppression allegations determined by the High Court was misconceived. Keane CJ cited Vocam, and held that it was irrelevant whether the right of action the parties might otherwise have enjoyed was one which arose at common law or was statutory in origin.

65. In ACD Tridon v. Tridon Australia [2002] NSWSC 896, Austin J sitting in the Supreme Court of New South Wales had to consider whether to stay proceedings alleging oppressive conduct in the management of the company's affairs, and seeking remedies including rectification of the share register and winding up. Austin J cited Mustill & Boyd on the Law and Practice of Commercial Arbitration in England, 2nd edition, 1999, as saying that "*the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties, or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding up order or a decision that an agreement is exempt from the competition rules of the EEC under Article 85(3) of the Treaty of Rome*".

66. Austin J then referred to the Best Floor case, saying that one basis of Warren J's decision was that a winding up order operated to affect the rights of 3rd parties, which he found a strongly persuasive ground, continuing: "*However, I would not regard these public policy considerations as preventing parties to a dispute from referring questions to arbitration merely because those questions arise under the Corporations Act*". He concluded by saying: "*Specifically, the public policy considerations held by Warren J to be applicable to a disputed claim to wind up a company do not seem to me to prevent the parties from referring to arbitration a claim for some merely inter partes relief under the oppression provisions of the Corporations Act …*".

67. In the Ontario Court of Appeal decision of Woolcock v. Bushert (2004) 246 D.L.R. (4th) 139, there was an attempt to stay court proceedings claiming, amongst other things, winding up and oppression remedy-related relief in favour of arbitration. The Court said that: "*the fact that part of the dispute among the parties involves oppressive conduct does not preclude resort to arbitration where the dispute is captured by an arbitration agreement made by the parties*".

68. The parties also referred to numerous text books which cite Exeter City without apparent criticism, and to one article by a Mr Robert Goddard in the Company Lawyer 2005 suggesting that the decision creates uncertainty and that it would have been better if Judge Weeks QC had referred to Tridon and the distinction between relief that is merely *inter partes* and relief that affects (by which I suspect he meant 'binds') third parties.

The competing positions

69. Mr Marshall's main argument is that Fulham's section 994 petition requires the court to consider the broader picture than simply the relationship between the two parties between whom one or other of the arbitrations could take place. He submits that the

unfair prejudice regime is part of the court's supervisory jurisdiction over companies, which brings into play factors that go beyond an *inter partes* contractual dispute, so that the jurisdiction can and should only be exercised by the court. The jurisdiction requires the public interest, the rights of employees, creditors, other members and third parties alongside other extraneous matters to be taken into account. It is, therefore, akin to the making of a compulsory winding up order, which only the court can do. The seeds of this argument are contained in Judge Weeks QC's judgment in Exeter City, which referred to the court's "*supervisory powers*", and it supports the correctness of the decision in that case.

70. Mr Marshall also asks me to look at the detail of the dispute reflected in the petition, and say that it is one that affects third parties, in the form of the other club members of the FAPL and the FA itself. It would be absurd, he submits, to allow it to go to two separate arbitrations, to which other clubs could not be joined without all parties' consent. Against that submission, Mr Mill points to the wide powers of the arbitrators to obtain evidence themselves, and says that, if Fulham consents, the two arbitrations could be consolidated. It is only if it stalwartly refuses to co-operate in this way that the procedure will be more cumbersome than court proceedings. In terms of section 9(4) of the AA 1996, Mr Marshall submits that the arbitration agreement is, or should be regarded as, "*inoperative*" for the reasons I have mentioned.

71. On the other hand, Messrs Snowden and Mill submit that Judge Weeks QC made his decision without having the persuasive Commonwealth authorities of Via, Woolcock and Tridon referred to him, so that I should decide that the Exeter City case falls within Nourse J's stated exception in the Colchester case, and decline to follow it.

Discussion

72. Having considered the authorities that I have mentioned and the numerous other authorities placed before me with some care, I have reached a clear conclusion. With the greatest possible respect to him, I cannot see how, as a matter of law, Judge Weeks QC can have concluded that: "*[t]he statutory rights conferred on shareholders to apply for relief at any stage are … inalienable and cannot be diminished or removed by contract or otherwise*". The Best Floor decision on which he based his reasoning had not so held. It had simply held that the parties could not agree to submit a claim for dissolution or compulsory winding up to an arbitration. That much is not in dispute between these parties. Judge Weeks QC extended the reasoning in the Best Floor decision on the ground that he could see no difference in principle between a winding up petition and an unfair prejudice petition. This holding seems to me to have gone too far and to have lost sight of the applicable principles, which I believe to have been correctly stated in Mustill & Boyd in the passage which Austin J cited in Tridon. As far as the matters there stated are relevant to the issues in this case: (a) the types of remedies which an arbitrator can award are limited by considerations of public policy; and (b) an arbitrator cannot make an award which is binding on third parties, or one that affects the public at large, or grant a judgment *in rem*.

73. These things are not sought in Fulham's petition, which seeks only remedies against the FAPL and Sir David. Third parties, in the shape of other member clubs and the FA, will obviously be affected in some way by the arbitrators' decision, but that does not mean they will, in any sense, be "*bound*" by them. No order is sought requiring

the other clubs to do anything or to refrain from doing anything. The relief sought that comes closest to binding third parties is the "*order that [Sir David] cease to be the Chairman or a director of [FAPL]*". Directors are normally removed by an ordinary resolution of the members under section 168 of the CA 2006, not by orders of the court. This is the reason for the formulation that Fulham has adopted seeking an order that Sir David "*cease*" to be a director. The parties did not explore the precise mechanism by which this might be achieved, but there are many ways in which the court or arbitrators could, by ordering the company and the director in question to do certain things, bring about the removal of a director. It is also true that members not party to the petition or the arbitrations, in the form of other clubs, could bring about the removal of Sir David if they chose. But that does not mean that the order sought by Fulham against FAPL and Sir David would bind other members. Those other members would, no doubt, be involved in voting for Sir David's replacement or even possibly for his reappointment, if the outcome were that he ceased to be a director. But none of this means that the relief sought by Fulham in any proper sense seeks to "*bind*" third parties in the circumstances of this case.

74. Nor will the arbitrators' decisions affect the interests of the public at large or amount to an order *in rem*, though the football supporting public may, of course, be keen to know what decisions are made. The remedies sought are not in a category that is limited by public policy. All the relief sought by Fulham can be granted by the arbitrators, and they can determine whether or not there has been unfairness as envisaged under section 994 of the CA 2006 entitling Fulham to relief that the court would grant under section 996 of the CA 2006, but that the arbitrators can grant under their wide powers in the FAPL Rules, the FA Rules and the AA 1996.

75. It is, of course, a quite separate matter that other clubs may wish to give evidence or otherwise have their views heard at the arbitrations. Indeed, they have already been asked if they wish to provide evidence in this petition. They can either provide evidence for the arbitrations or be joined as parties by consent.

76. Returning then to the law, in my judgment the preponderance of persuasive authority is strongly in favour of the view that a stay can (and indeed should under section 9 of the AA 1996) be granted, at least in a case like the present, where the disputes fall squarely within the terms of the arbitration agreements and a party has alleged unfair prejudice under section 994 of the CA 2006, but none of the factors mentioned in Mustill & Boyd is present so as to limit the scope of the available arbitrations.

77. This result seems to me to accord with legal common sense. It is true that the CA 2006 establishes a complex statutory regime for the birth, life and death of companies, but there are very few steps that fall within that regime that only the court can take. One of them is certainly the making of a compulsory winding up order. But no such order is sought here, and, moreover, companies can, and most commonly are, put into liquidation by voluntary non-court based means in any event. It is common ground that the order sought to the effect that Sir David cease to be a director can be made by arbitrators.

78. In my judgment, to prevent the parties agreeing to arbitrate disputes that normally come to court in the form of unfair prejudice petitions would be wholly contrary to the requirements of party autonomy, enshrined in the AA 1996 (see section 1 of that Act cited above, and the eloquent description of Lord Fraser of Carlyle QC, the

Minister of State at the DTI, quoted by HHJ Toulmin CMG QC in R Durtnell & Sons Ltd v. Secretary of State for Trade and Industry [2000] All ER (D) 755). Moreover, the course proposed by Mr Marshall would take the law in a direction that is precisely the reverse of that which so many judges and academics have suggested, by forcing parties into court, even though they wish to save time and costs by using arbitration as their alternative dispute resolution mechanism of choice.

79. I have, therefore, concluded that the statutory right conferred on shareholders to apply for section 994 relief is not an inalienable one. Members of companies and the companies themselves can agree to refer disputes that might otherwise support unfair prejudice petitions to arbitration, provided that third parties are not to be bound by the award (as they will not be in this case), and provided that the other kinds of relief mentioned by Mustill & Boyd are not sought (as again they are not in this case). It is beyond the scope of this judgment to consider what might happen if one or more such features were to be present, since they are not in this case.

80. It seems to me that, despite the fact that Rimer J had very little authority cited to him, he was entirely correct in deciding that the petition in Vocam could and should be stayed. In my judgment, therefore, the decision in the Exeter City case was wrong and should not be followed.

Conclusion

81. For the reasons I have given, I hold that this is one of the rare cases mentioned by Nourse J in the Colchester case that I have cited. I am convinced that Judge Weeks QC was wrong not to follow Rimer J, and it seems clear to me that the persuasive authorities in Via, Woolcock and Tridon were not cited in either of the first two cases. I am, therefore, obliged to make my own decision.

82. My conclusion is, therefore, that a stay of Fulham's petition should be granted under section 9 of the AA 1996 to allow arbitrations under the FAPL Rules and the FA Rules to proceed. I would urge Fulham to agree: (a) to a consolidated arbitration to cover all the issues, rather than insisting on different (or even overlapping) arbitrators as would be their right under those rules; and (b) to the joinder of any clubs that would wish to be heard in the consolidated arbitration. The arbitrators will have adequate powers to deal with Fulham's complaint properly, fairly and satisfactorily, and it would be extremely desirable for all concerned if they were permitted to do so without further delay.

83. I will hear counsel on the precise form of order and as to permission to appeal, if that is sought, and as to costs.