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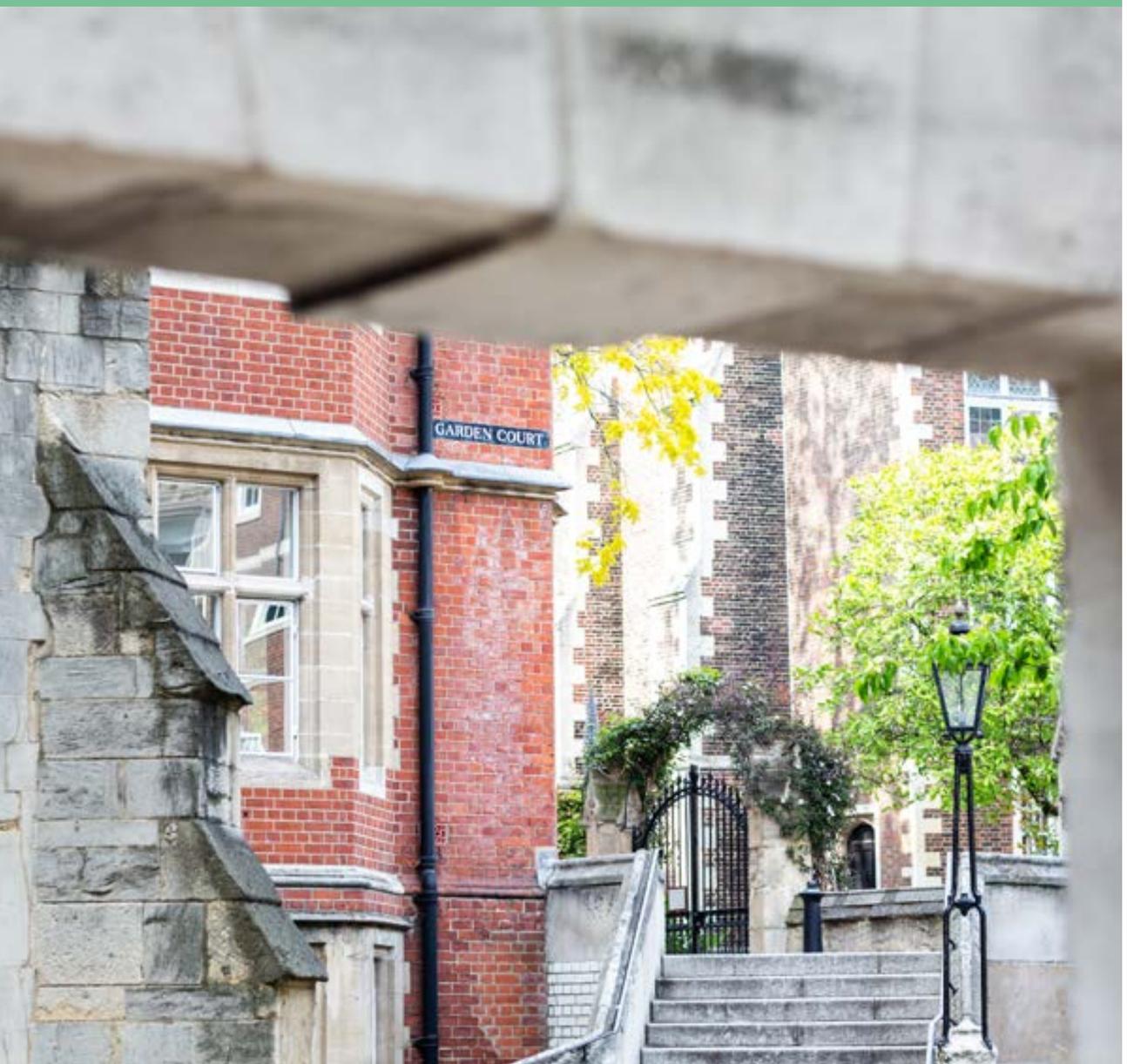

The Sports Law Bulletin is written by members of Blackstone Chambers' highly rated sports law team. Members of Blackstone Chambers have incomparable expertise and experience across all areas of sports law, ranging from state control of the sector, through sports body governance and regulation, and employment and other horizontal relationships between participants, to all aspects of the commercial exploitation of sport. Members of Blackstone Chambers attract a wide range of clients, from international and national sports governing bodies, through sporting individuals, teams, clubs and agents, to broadcasters and other commercial partners, and regularly appear before all courts and tribunals, nationally and internationally, dealing with sports cases.

The Bulletin aims to produce analysis of all the key decisions and developments in the field, with this Digest covering the period January 2019 to March 2020.

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25 January 2019

Timothy Lau

Olympic athlete receiving funding from sports body not an employee: *Varnish v British Cycling Federation, UK Sport*

Summary
In *Varnish v British Cycling Federation*, UK Sport (Case No 2404219/2017), the Employment Tribunal considered whether the claimant, a former Great Britain cyclist, was an employee or worker for either of the respondent organisations (or jointly under a tripartite agreement) within the meaning of the Employment Rights Act 1996 or the Equality Act 2010. In December 2019, the Claimant won the right to appeal the Tribunal's decision and the appeal is likely to be heard soon.

The Tribunal held that she was not. Instead, the Tribunal found that the relationship was more analogous to the provision of an education grant to a student. The dominant purpose of the contractual arrangements entered into by the claimant was to enable her to be the best athlete she could possibly be. In those circumstances, no employment relationship arose.

Background
The claimant brought claims of unfair dismissal, direct sex discrimination, victimisation and unlawful detriment for having made protected disclosures. Her claims centred on the termination and non-renewal of her contractual arrangements when she was a professional cyclist with the GB Cycling Team.

The claimant was a very talented track cyclist. Since 2010, she had been part of the Podium Programme for elite world class cyclists run by the first respondent, British Cycling. The relationship between British Cycling and the claimant was reflected in an "Athlete's Agreement". Although no funding was provided under this agreement, the claimant agreed to develop and agree an "individual rider plan" which was effectively an agreement to train in the hope she would be selected to compete for the British Cycling Team.

The claimant also received (following an application) a tax-free grant (known as an "Athlete Performance Award") from the second respondent, UK Sport (a public body responsible for funding Olympic and Paralympic sport at a UK level, represented by Jane Mulcahy QC). Although administered by UK Sport, the Award was funded by the National Lottery. The purpose of this funding was to provide the claimant with a financial platform to be able to focus on full or part-time training. The funding was subject to means-testing and provided solely at the discretion of UK Sport (upon receipt of recommendations by British Cycling).

Was there an employment relationship?
The Tribunal considered that there was no employment relationship between the claimant and British Cycling giving rise to employee or worker status. In this respect:
(1) There was no mutuality of obligation. British Cycling did not provide any remuneration to the claimant (and nor could the clothing, coaching, personal development and other benefits or services provided to the claimant constitute such remuneration). Instead, the claimant was eligible as an athlete selected for British Cycling's Podium Programme to apply to UK Sport for funding from the National Lottery. British Cycling did not provide any work for the claimant.
(2) The claimant was not personally performing work provided to her by British Cycling. Rather, she was personally performing a commitment to train in accordance with the individual rider plan in the hope of achieving success at international competitions.
(3) Control of the claimant by British Cycling was a significant feature of the relationship, including via the clauses of the Athlete Agreement. British Cycling had control over where and when the claimant trained, the terms of her media image and contractual appearances for British Cycling and restrictions on her personal commercial work. Ultimately, however, although the claimant was subject to control, this factor was outweighed by the lack of mutuality of obligation and no personal performance consistent with an employment relationship.
(4) The Tribunal also considered other factors including that: state-of-the-art equipment was provided to the claimant although she could choose to use alternative equipment; British Cycling was a membership organisation; the claimant had established a business on her own account, and the fact that the benefits received by the claimant from British Cycling were not taxable. The Tribunal considered that these other factors pointed against employee status.

The Tribunal also considered that there was no employment relationship between the claimant and UK Sport. In this respect:
(1) There was no mutuality of obligation. The claimant was simply provided with a tax fee grant to enable her to fulfil her dreams as an athlete. Further, the grant was provided on an annual basis based on an assessment of future performance by British Cycling; it was not "payment" for past performance in any sense.
(2) The claimant was not personally performing work provided to her by UK Sport. In fact, there was no day-to-day relationship between them.
(3) UK Sport did not have any control over the claimant, save for an agreement by the claimant to carry out a maximum of three appearance days every year for the National Lottery. (In fact the claimant never made any such appearances.)

Finally, the Tribunal rejected the submission that there was a tripartite agreement between the claimant and the respondents, with both of them acting as the claimant's employer.

Comment
National sporting and funding bodies are likely to breathe a collective sigh of relief following this judgment. Had an employment relationship been found to exist, this would have had significant consequences for organisations such as British Cycling and UK Sport and their contractual and funding arrangements for elite athletes. Such organisations would have been subject to the obligations required of employers under the Employment Rights Act and related legislation, as well as by reference to the Equality Act 2010.

The Varnish case, however, was at the outer edge of what might possibly constitute an employment relationship. Given different facts – contractual arrangements that imposed a work for wage component and/or greater degrees of control, for example – the employment relationship line may well have been crossed.

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Legal 500

26 February 2019

Michael Beloff QC

Good at Games—Does Law Help or Hinder Sport?

In the summer of 2004 I was in Athens as a member of the ad hoc panel of the Court of Arbitration for Sport appointed to resolve disputes at the summer Olympiad. Seeking to return to my hotel I found the entrance temporarily blocked. Along with other guests I waited patiently to ascertain the cause of the hold up. After a few moments all was revealed. Tony Blair, then in his political pomp and only a year away from a third successive election victory, strode up at the apex of a flotilla of advisers and security men. He was, obviously, on a mission to lobby members of the International Olympic Committee, in support of London's bid to stage the quadrennial event in 2012, which was, as you will know, successful. Catching sight of me among the crowd, he called out "Michael, what are you doing here?" to which I replied, somewhat vaingloriously "I'm here to try to bring justice to the Games".

Now I start my lecture to you in this way not just to show that I was on first name terms with the then Prime Minister—that's what I might call a purely incidental benefit though its value somewhat fluctuates in today's market place—but rather because it signposts my direction of travel in your company this autumn afternoon.

I am very honoured, indeed very humbled to have been chosen as this year's High Sheriff's lecturer not least because of the distinction of those who preceded me—a line of legal luminaries bookended by two of our greatest lord chief justices—Lord Bingham and Lord Judge—with a goodly selection of law lords and supreme court justices in between.

I willingly acknowledge that at first sight my subject matter may seem a little frivolous compared with the Rule of Law or the Legacy of Magna Carta—among the topics developed by previous lecturers —still more so when juxtaposed to Mr Justice Baker's title "A matter of Life and Death". But then I reminded myself of what was once said by the late Bill Shankly, Manager of Liverpool about football "it's not just a matter of life and death, it's far more important than that".

And whether Mr Shankly was guilty of going verbally "over the top" as football managers are just occasionally prone to do, there is no doubt that football and a multitude of other sports are by no means unimportant.

Sport ranks in the top twenty of global industries but it does so only because it reflects popular interest, indeed popular passion. Football is the world's, though not the Olympic's, premier sport; but as Matthew Syed recently pointed out in the Times, in 2016 there were 48 clubs in Europe with annual revenues of above 100 million Euros which is the annual revenue of a single Tesco superstore. As he put it "football is unusual, perhaps unique, in the schism between its commercial and cultural significance". It is the latter, not the former, which is truly impressive.

If I needed to provide an evidenced based justification for that statement, I can do no better, and need do no more, than to ask you to turn your minds back three months to the FIFA World Cup in Russia, and, to the kaleidoscope of emotions aroused across the nation as the young English team travelled through the rounds to the semi-final and so called Waistcoat Wednesday, - apprehension, joy, despair, pride, regret.

Mark Damazer the former controller of the BBC Radio 4 and currently Master of St Peter's College somewhat incautiously wrote in the Evening Standard on the eve of the tournament "after years of working to implant some realism about our sustained football mediocrity, the drumbeat of optimism is getting louder. We are, yet again, being encouraged to hope. It is a mistake".

It was only the skill of the Croatian midfield that stopped this being the greatest miscalculation by a prominent Oxford academic since the sometime Regius Professor of History, Hugh Trevor Roper, gave his seal of authentication to the forged diaries of Adolf Hitler.

As Huw Fullerton wrote in the Radio Times "There are only two things absolutely everybody has been talking about this summer—the FIFA World Cup in Russia or the latest series of Love Island." and explained "In a way, the shared popularity makes sense—both feature moments of incredible drama, surprise match-ups and incredibly fit people awkwardly wrestling with each other in front of millions."

But there are other yet more significant examples, not just from football, to underpin my contention that sport truly matters.

The sporting boycott of South Africa was a powerful force in dismantling the structure of apartheid, not least because rugby was an essential part of the identity of the white South African regime's base. Later when Nelson Mandela wore the green and gold Springbok jersey and cap in front of 62,000 white South Africans at the 1996 Rugby World Cup final in Ellis Park, the climax of the film Invictus starring Morgan Freeman and Matt Damon, he brought the nation still closer together.

On this prefatory point I will rest my case.

In a characteristically generous foreword to the first edition of my book Sports Law, that great local, indeed national, hero, Sir Roger Bannister, wrote *"Since my own sporting days there has been an astonishing and alarming escalation of legal cases!"* Escalation certainly; alarming possibly; but, as I will argue, inevitable, indeed desirable, too. I am going to concentrate on the core issue of how the game should be played and whether law helps or hinders it. I shall ignore the peripheral and parasitic commercial activities unless they bear on my central theme.

So what is sport?

As to that issue we have the benefit of a decision of the European Court of Justice which will doubtless survive Brexit. The question which engaged that multi-national judicial body was whether entry fees for Bridge Tournaments qualified for exemption from value added tax for sports related activities.

The Court held *"The concept of 'sport' appearing in that provision is limited to activities satisfying the ordinary meaning of the term 'sport', characterised by a not negligible physical element".*

A not negligible physical element—a low threshold indeed for even the more senior members of this audience—is no doubt a necessary but it is hardly a sufficient description of sport.

I would submit that to qualify as a sport a physical activity must have rules which govern how it must be played. Boules, the French cousin of Bowls, is seeking to transform itself from a mere game played by geriatrics in sun dappled squares in Provence into a true sport by adopting rules and establishing a Governing body in what may be a vain attempt to add itself to the Olympic calendar in time for Paris 2024.

Such rules—a match's length, the weight of a discus, the width of a goalmouth—are not compelled by the laws of physics or by some moral code. Subject always to the need to comply with the law of the land, they are constantly under review by the Sports Governing bodies influenced by considerations such as the safety of the participants (for example the acceptable height for a tackle in rugby union), the enjoyment of spectators (for example the one strike and you're out false start rule in athletics), the demands of television (for example tie breaks in the fifth set of tennis grand slams apart from Wimbledon), or of diversity (for exotic example admitting mules to dressage competitions traditionally reserved for horses).

Such reviews are particularly prevalent in games which involve use of a ball, whose invention, or more aptly adaptation from phenomena as distinct as pigs' bladders or human skulls, was as important to the development of sport as was the wheel to the development of civilization generally. There is a constant itch to modernize and to reflect the modern taste for instant gratification and excitement as can be seen in the development of one day internationals and T20 at the expense of the more langorous county game in cricket.

These rules, be they old be they new, would be meaningless if they could not be enforced. In football, rules define how victory is achieved that is to say by one team—scoring more goals than the other—as well as how a goal is scored—kicking the ball across the goal line from an onside position. Therefore there must be someone to determine whether that has actually happened.

But in all sports decisions of this kind are not for courts of law. They are for the officials-, referees, umpires and the like in charge of the game - whose judgments can be reinforced by technology—Hawkeye in tennis or as in the still controversial VAR, used in the World Cup but not in the Premier League. Alas even video replays cannot resolve all disputes.

The camera may not lie but it can be economical with the truth.

So a key edifice in the architecture of sports law itself is the field of play doctrine. In the absence of evidence of corruption or bias the decision of match officials cannot be appealed other than by a mechanism provided internally by the sport itself - such as juries of appeal in track and field against a decision to disqualify a competitor for running outside his lane. And even the scope for such remedial measures is limited.

Officials do make mistakes, which are uncorrected but un-correctable. Rough justice may be all that sport can afford if only because the game, like any form of show, must go on.

It is incidentally because of the key role played by sports officials that they require regulatory protection from the kind of abuse levelled at the umpire of her match in the US tennis open final by Serena Williams, a form of contempt *at* court rather than the traditional contempt *of* court.

Adaptation, rather than abstention, is the way in which the law of the land acknowledges the specificity of sport Breaches of criminal or civil law do occur on the field of play, and can and should attract appropriate penalties or remedies. Sport has no immunity but the law itself sensibly adjusts to the sporting context. In Barnes the Court of Appeal considered when it was appropriate for criminal proceedings to be instituted for an injury caused by one player to another player during a game.

"The fact that the play is within the rules and practice of the game and does not go beyond them, will be a firm indication that what has happened is not criminal. In making a judgment as to whether conduct is criminal or not, it has to be borne in mind that, in highly competitive sports, conduct outside the rules can be expected to occur in the heat of the moment, and even if the conduct justifies not only being penalised but also a warning or even a sending off, it still may not reach the threshold level required for it to be criminal."

The same tolerance, I add, would not be shown to a player who was proved beyond reasonable doubt to have gratuitously assaulted someone in a drunken brawl outside a night-club ,although, if, as in the case of the gifted English all-rounder Ben Stokes, that high threshold is not reached, acquittal of a criminal offence necessarily follows Combat sports creates their own problems. In Brown (a case about sado-masochistic activities where the legal issue was whether consent of the participants provides a defence to the infliction of actual bodily harm), Lord Mustill, to test the proposition, considered how the law treated boxing. He said that what he described as:

"The heroic efforts" of an Australian judge "to arrive at an intellectually satisfying account of the apparent immunity of professional boxing from criminal process have convinced me that the task is impossible. It is in my judgment best to regard this as another special situation which for the time being stands outside the ordinary law of violence because society chooses to tolerate it."

I doubt that even superhuman efforts could provide a more coherent justification for mixed martial arts.

As to civil law the English law of tort in its protection of the person makes the nature of behaviour of the person who caused the injury determinative of whether liability arises.

Assault and battery, respectively the threat of and the actual infliction of physical injury, requires intent in the tortfeasor.

Negligence requires the infliction of such injury in circumstances where the tortfeasor's act or omission fell short of an appropriate objectively set standard.

But what is reasonable is again conditioned by the context. As one judge said

"The conduct of a player in the heat of a game is instinctive and not to be judged by standards suited to polite social intercourse."

Were it not for this indulgence it would be risky for anyone to take part in combat sports or indeed non-combat sports where there was a risk of collision with another participant or, depending on the nature of the sport, a horse, motorcycle, car or yacht.

The common law helps sport not by action, but by inaction.

But more is asked of sport than that competitions should proceed expeditiously and lawfully.

Those who play and those who watch want—or at any rate—should want, competitions should be between the best equipped athletes—hence, for example. rules to ensure the integrity of a selection process and to exclude political interference. The same cohort was or should want that competitions should be fair—that the playing field should be level, even if the players' talents are not.

Sport's attraction depends upon its unpredictability. In other forms of entertainment, music or theatre the outcome is pre-ordained.

Members of an audience would be disconcerted, not to say disappointed, if a performance of Beethoven's ninth unexpectedly stopped short after the end of the third movement or if, in a performance of Hamlet, the Prince of Denmark was still alive at the end of the fifth act.

But no-one would spend any time watching the Boat race if a dead heat was always guaranteed.

The results of sporting competitions should depend upon a combination of skill, application, tactics, playing conditions, and even luck—though as the great South African golfer Gary Player famously said *"The harder I practice, the luckier I get".*

They should not depend upon some form of unacceptable manipulation or cheating.

In a case *Ivey* about alleged sharp practice in a casino earlier this year the Supreme Court, whose members seemed to have a knowledge about card games surprising, if not I hasten to add unbecoming, for our most senior judges, took the opportunity to consider cheating in sport generally even if that involved going, as it were, off-piste.

The Supreme Court expressed the opinion that *"the expression 'cheating' in the context of games and gambling carries its own inherent stamp of wrongfulness"* and while saying that *"honest cheating is … an improbable concept"* concluded that not all cheating is dishonest.

With the greatest respect—the conventional advocate's euphemism for saying I fundamentally disagree—though the conclusion indubitably flows from the premise, the premise itself is false. Cheating in sport is necessarily dishonest.

The Supreme Court went on to say that *"it would be very unwise to attempt a definition of cheating"* regarding it as *"a near impossible task".*

Nonetheless, not giving up as easily as Lord Mustill in Brown and warming to their theme the Justices gave some illustrative examples

"The runner who trips up one of his opponents

The stable lad who starves the favourite of water for a day and then gives him two buckets of water to drink just before the race so that he is much slower than normal

The taking of performance enhancing drugs

Deliberate time wasting in many forms of game."

But they could only deny these well-chosen instances the adjective 'dishonest' by adopting an artificial and lawyerly description of that word as involving deceit.

The Supreme Court might have done better, if I may extend the skiing metaphor—to have cloven to the main run—the case before them—if not to the nursery slopes.

Now while crimes are for the national courts, cheating, short of crime, must be dealt with by sports officials, sports governing bodies and sports tribunals.

The sanctions can be immediate - in football a yellow or red card—or postponed—a fine or period of suspension for a serious foul. Sometimes the same behaviour can be a breach both of the law of the land and of the rules of the sport.

In a test match at Lords in 2010 between Pakistan and England the captain of the Pakistan team Butt and two fast bowlers Asif and Amir arranged for the promise of money that three no balls would be bowled at prearranged moments in the match.

Such activity, so called spot fixing, can be used to facilitate a betting coup for gamblers who will wager large sums that something will happen at a particular time in a particular match.

A disciplinary tribunal of the International Cricket Council, which I chaired, banned them from participation in any cricket-related activities for ten and five years respectively for breach of its anti-corruption regulations. Later they were convicted in the Crown Court for conspiracy to cheat on exactly the same facts and were sentenced to prison sentences (or in the case of Amir detention in a Young Offenders Institution).

The case also neatly illustrates the different roles of the law of the land and the law of the sport. The arsenal of punishments available

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to Courts of Law does not include depriving unincarcerated sportspeople from playing sport.

The arsenal of punishments available to sports disciplinary tribunals does not include deprivation of liberty.

Imprisonment or detention of the three miscreant cricketers for periods as long as their ban would have been on any view disproportionate to their offence. But to have banned them for periods as short as the sentences imposed by the Crown Court would have been a disservice to the interests of the sport; indeed there were several persons including Freddie Flintoff, former distinguished England Captain if somewhat less distinguished as a jurist, who argued that all three should have been banned for life.

For all these distinctions in substance and severity of sanction imposed by these different bodies the fundamental rationale for each was expressed in ways which were interchangeable.

To justify its conclusion for imposing the bans the ICC tribunal quoted and relied on a dictum in a case of the Court of Arbitration for Sport— *Orievkov* which concerned a football referee who took decisions calculated to fix a match result,

"it is essential in the Panel's view for sporting regulators to demonstrate zero tolerance against all kinds of corruption and to impose sanctions sufficient to serve as an effective deterrent to people who otherwise might be tempted through greed or fear to consider involvement in such criminal activities"].

To justify its conclusion dismissing the appeals against sentence Lord Judge said

"The criminality was that these three cricketers betrayed their team, betrayed the country which they had the honour to represent, betrayed the sport that had given them their distinction, and betrayed the very many followers of the game throughout the world. In exchange for the privilege and advantages of playing Test cricket it was required of them that at all times they should perform honestly and play to the best of their respective abilities - no more, but certainly no less. If for money or any other extraneous reward it cannot be guaranteed that every Test player will play on the day as best he may, the reality is that the enjoyment of many millions of people around the world who watch cricket, whether on the television or at Test Matches, will eventually be destroyed".

To put it more pithily spot fixing just wasn't cricket. Corruption apart, the major threat to the integrity of modern sport lies in doping.

And in this area the relationship between the law of the land and the law of the sport is yet more remote.

Criminal law prohibits and penalises the use of proscribed drugs for its antisocial consequences as well as to preserve the wellbeing of the users.

Sports law, in this area underpinned by the World Anti-Doping Code an instrument of global reach—a kind of loi sans frontiers—first published in 2004 now in its third iteration, and the template for most domestic codes in most sports, has a specific focus.

As it states in its introduction:

"Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport". It is the essence of Olympism, the pursuit of human excellence through the dedicated perfection of each person's natural talents".

While also concerned with the protection of athlete's health—to ensure that the quick do not too soon become the dead - its primary target is to outlaw the ingestion or injection of those substances which enhance athletic performance—a matter with which the criminal law, at any rate in this country, is not concerned.

The two mechanisms to that end are annulment of results obtained with the aid of such substances and the imposition of periods of ineligibility.

The former is not concerned with the athlete's own culpability at all; the latter is.

In the docket of the cases of the peripatetic CAS Ad Hoc Panel at the Sydney Olympics the one which attracted most international attention was that of the young Romanian teenage gymnast Ms Raducan who, to cure the symptoms of a cold, took that familiar medicine Nurofen which contained the stimulant ephedrine, on the list of prohibited substances.

The fact that she had no intention to cheat and acted only on the advice of the team doctor did not entitle her to retain her gold medal.

The Panel said:

"the system of strict liability of the athlete must prevail. This means that once a banned substance is discovered in the urine or blood of an athlete, he must automatically be disqualified from the competition in question… it would indeed be shocking to include in a ranking an athlete who had not competed using the same means as his opponents, for whatever reasons".

Questions of intent, negligence or fault—the various consequences of each are the subject of sophisticated analysis in the Code—bear only on the issues of the length of period of ineligibility (if any) resulting from the anti-doping rule violation.

There are those who argue that the rules against doping in sport should be abolished.

They say that in so far as the aim is to achieve equality of opportunity between athletes the objective is already fatally undermined by the differences, depending on where the athlete resides, of access to funding and, as a result of superior food, equipment, coaching.

They say that the playing field will be as level if all are entitled to take drugs than if none, therapeutic exemptions apart, are entitled to do so—though I would observe that the phenomenon of differential access would be replicated in that cowardly new world too.

They say that the battle against such drug abuse will never be won so that surrender is the wiser as well as cheaper option.

As against this in his preface to the book "Good Sport" by Tom Murray, a persuasive analyst of sporting ethics says compellingly

"Doping undermines what gives sport its value and meaning … Performance enhancing drugs distort the connection between natural talents, the dedication to perfect those talents, and success in sport that's good enough reason to ban doping".

In the formula adopted by concurring judges in an appellate court *"I agree and have nothing to add".*

Sport must not surrender to malign science, designer drugs, or, in the not distant future, genetic manipulation.

Unless the line, fortified by such developments as retrospective analysis of previous tests or the biological passport which identifies suspicious surges in an athlete's levels of testosterone, a naturally produced or endogeous hormone—but which can be ingested or injected exogenously to build up the body, is held the punishment of the few athletes who cheat in the interests of the many athletes who do not may too swiftly become the punishment of the many in the interests of an ever diminishing few.

The aim of fair competition, the golden thread that runs through sports law, may of course be distorted by factors which may not involve any wrongdoing on the part of the competitor at all.

Disability sport has its own distinctive regime, differentiating between various categories of physical or mental impairment with a complexity which would challenge the intellect of a Fellow of All Souls or Senior Wrangler which, though itself vulnerable to abuse by those who exaggerate their symptoms, is designed to ensure, as best it can, that like compete against like.

But occasionally a disabled athlete seeks to compete against the able bodied; the most celebrated case being that of the South African sprinter Oscar Pistorious, who was accorded the soubriquet, the "Blade Runner" now alas, serving a long prison sentence for murder wholly unconnected with sport.

The issue which confronted the International Athletic Federation or IAAF was whether his prosthetic limbs gave him an unfair competitive advantage. A CAS panel held that it was for the Federation to prove its case and that it had failed on the evidence to do so.

As a result Mr Pistorious competed both in the London Olympics and later in the London Paralympics as well. The rules have now changed to impose on the athlete the duty to prove that he gained no such advantage. But whether in their previous or present incarnation the objective of fair competition was the same.

To give another example, all sports, for the same fundamental reason, must have rules as to what clothing and equipment can be used. Some, of course, have nothing to do with sporting performance, but with commercial considerations only.

In the Athens Olympics a CAS panel had to wrestle with the question of whether the maximum permitted size of a logo on a sporting vest applied to the vest as bought or the vest as worn.

Given the elasticity of the material, the dimensions inevitably varied between both situations in circumstances which you can well visualize without any verbal explanation by me. The rival arguments succinctly juxtaposed the principle of contractual construction which promoted purpose and that which promoted certainty.

That case was more about marketing than about sport but serious sports—related issues arise in this context too.

Only the hardiest or most masochistic of runners attempt to run in bare feet which explains the burgeoning market in sporting footwear bought for speed as well as style.

The IAAF has recently asserted that Nike's state of the art game-changing shoe, the Zoom Vapor Fly, *"does not require any special inspection or approval."*

Inevitably one day it will have to rule on the permissible amount of energy return allowed from cushioning materials and whether carbon-fibre devices in midsoles should be banned.

Similar regulations apply on water as well as on land. From the start of 2010 swimmers were no longer allowed to wear the full body length polyurethane and neoprene suits during competition which assisted Michael Phelps in his medal winning exploits in the Beijing Olympics—It is, however, noteworthy that the ban did not prevent him from accumulating yet further medals in London and Rio. The man was mightier than his apparel.

Most sports provide too for competitions for different age groups—up to, say, under 21 at one end, or, say, over 35 at the other to ensure again that like compete with like.

Many recognize in pursuit of the same objective the need to differentiate between classes of competitors by reference to weight, for example boxing which has a number of different categories from flyweight to heavyweight (or in the amateur version super heavyweight) or rowing which has a mere two—lightweight and other.

Disputes in the former context could be resolved by birth certificates, in the latter by scales. In practice, if not in principle, lawyers are unlikely to be engaged in resolving any controversy.

The same certainly cannot be said about the most notable dividing line in sporting competition—that between men's and women's events, embedded in almost all sports, other than, notably equestrian where the horse eliminates the impact of the human difference.

The basic law, of which a UK statute supplies the paradigm, is clear enough. Section 195 of the Equality Act 2010 allows separate sporting activities to be organised for men and for women where such activities are "gender affected" in that

"physical strength, stamina or physique are major factors for determining success or failure and in which one sex is generally at a disadvantage in comparison with another".

The provision itself defines its purpose.

But if sport is binary, gender is not. There are intersex athletes who have the sexual characteristics of men and women, and some female athletes who are born with abnormally high concentrations of the male hormone testosterone.

The consequential gender verification issues have been a long and controversial part of athletics history. Dora Ratjen participated in the 1936 Berlin Olympics in the High Jump as a woman. But in September 1939, an unusually inquisitive ticket collector reported that there was a transvestite on his train.

Removed and questioned by the police, Ratjen produced official papers which appeared to verify his female gender, but a doctor concluded as a result of a gynaecological examination that Ratjen was a man. Consistent with that conclusion Ratjen later changed his name from Dora to Heinrich.

To avoid such unsatisfactory outcomes, crude physical inspections were prevalent in the 1950s and 60s in the athletics world—a distasteful form of unclothed beauty parade without the need for the participants, as in conventional contests of that kind to pretend to a knowledge of Plato or a desire for world peace.

Chromosomal testing was introduced for the 1968 Olympics and, as perception of gender differences became more sophisticated, in 2011 the IAAF introduced Regulations Governing the Eligibility of Females with Hyperandrogenism, which would prohibit a woman with more than a particular level of testosterone, a predominantly masculine hormone, from competing in a woman's race unless she had treatment to reduce those levels.

These regulations were themselves suspended by the CAS in the case of the Indian sprinter Dutee Chand on the basis that the scientific evidence relied on was insufficient to justify them. Since then yet further studies have been carried out and a refined set of regulations will come into effect on 1st November of this year.

More of the recent attention has focussed on a single athlete—the South African runner Caster Semenya who has over the last decade won one Olympic title and three world championships in her favoured event the 800 metres.

The IAAFs proposals, calculated to affect cases such as hers, has aroused high concerns among various human rights bodies, including the United Nations Human Rights Commission as well as high profile feminist spokespersons such as Billie Jean King, the tennis champion, whose victory over former men's Wimbledon Champion Bobby Riggs, albeit past his prime, is celebrated in the film 'Battle of the Sexes'.

It is suggested that the rules are discriminatory against women because no similar rules about abnormal testosterone levels apply to men; that they offend against female dignity and privacy; that it is unacceptable that a woman can be compelled to undergo some form of therapy, albeit not actual surgery, as a precondition for participation in her sport; that the science said to justify the rules is flawed; and that the benefits enjoyed are both natural and therefore no different in kind from other physical advantages such as long legs or fast twitch fibres. Inevitably a fresh challenge to their legitimacy has been launched before CAS. The sporting world waits.

Transgender athletes present still more formidable problems, especially at the extreme end of a complex spectrum. There are several countries, spread across the globe, whose laws allow someone who was born a man to identify himself as a woman and afterwards be treated in law as a woman. But I hope I shall not be trolled as transphobic if I say that a person who remains biologically a man, even if legally a woman, cannot be permitted to compete in women's sporting events without making a nonsense of the competition.

If Usain Bolt were, unthinkably, to decide that he wished henceforth to be identified as a woman and were participate in the women's sprints events, he would multiply his already unique collection of Olympic and world championships medals. Cui bono? To whose benefit apart from the hypothetical Ms or Ze Bolt?

In the musical version of Bernard Shaw's Pygmalion, My Fair Lady, Rex Harrison in the role of Professor Higgins famously sang *"Why can't a woman be more like a man?"*

The problem for sport arises when that actually happens.

It is an irony that the best-known transgender person is the former Olympic men's champion in the decathlon whose athletic fame has been curiously overshadowed by his relationship with the clan Kardashian.

Section 195(2) of the Equality Act indeed permits organisers of competitions to restrict the participation of a transsexual person in sporting activity but only if it is necessary to do so to secure …—
(a) fair competition, or
(b) the safety of competitors
but its definition of transsexual may not embrace all conceivable examples of gender reassignment and it says nothing about intersex persons.

The law may be a lap behind increasing knowledge about physiological and psychological nuance as well as social and cultural developments, but catch up it must.

Fair competition must be guaranteed not only in individual but in team sports.

In the ENIC case the issue was whether it was acceptable that the same person could own two teams in the same competition. CAS held that there was a risk that results could be manipulated in the owner's commercial interests. It said memorably

"Sports Law has developed and consolidated along the years, particularly through the arbitral resolution of disputes, a set of unwritten legal principles—a sort of lex mercatoria for sports, or, so to speak, a lex ludica—to which national and international sport federations must conform, regardless of the presence of such principles within their own statutes and regulations or within any applicable national law, provided they do not conflict with any national "public policy" (ordre publique) provision applicable to a given case."

Another CAS case FC Seraing has outlawed third party ownership of football players where persons other than the player's club hold so called economic interests in him. It was held that, amongst other considerations, such a peculiar phenomenon created a risk of impairing the purity of competition where the ownership extends to two players in opposing teams.

And yet another CAS case Galatasary has upheld the validity of the FIFA Financial Fair Play Regulations which forbid clubs to emulate the economics of Charles Dickens' Mr Micawber and insist on them breaking even in their dealings in the transfer market.

The three cases have this in common. All of them involve restrictions on economic freedom and so engage principles of competition law but all of them recognize that such restrictions are necessary in the interests of fair competition itself.

Such rules, as others like them, for example salary caps or the requirement, under FIFA regulations, that compensation be paid by a club which engages a player to a club which has contributed to his development, reflect the paradox that there is a mutual interdependence of participants in team sports unlike in commerce where, subject to laws about monopolies and cartels, each business seeks to eliminate its rivals.

In the Bosman case the European Court of Justice said:

"in view of the considerable social importance of sporting activities and in particular football in the community, the aim of maintaining a balance between clubs by preserving a certain degree of equality, and uncertainty as to results must be accepted as legitimate."

There cannot be a competition of one. It takes two to tango and more than that number to make sports attractive to the non-participant who wants to watch, listen to commentary on, or simply read about results in the newspapers. Competition must not only be fair, but, more fundamentally there must in the first place be competition.

If there is to be disciplinary action, fortified by penalties, for breach of the rules, the rules must themselves be fair. In Quigley a doping case CAS said:

"The fight against doping is arduous and it may require strict rules. But the rule makers and rule appliers must begin by being strict with themselves. Regulations that may affect the careers of dedicated athletes must be predictable. They must emanate from duly authorised bodies. They must be adopted in constitutionally proper ways. They should not be the product of an obscure process of accreditation. Athletes and officials should not be confronted with a thicket of mutually qualifying or even contradictory rules that can be understood only on the basis of de facto practice over the course of many years of a small group of insiders."

Breach of the rules cannot merely be asserted; it must be established. In doping cases the evidence of an anti-violation will ordinarily emanate from the accredited testing laboratories complying with established protocols under the general supervision of a national anti-doping authority or NADA recognised by the World anti-doping authority (WADA).

WADA's recent conditional lifting of the suspension of Rusada, Russia's NADA, has proved highly controversial because in the eyes of many critics it has allowed a poacher not so much to turn gamekeeper but to play both roles at once.

But in corruption cases the acquisition of inculpatory material is more difficult. Investigators for bodies such as FIFA or the IAAF lack the powers available to law enforcement agencies: search, seizure, surveillance, subpoenas. They cannot compel potential witnesses to speak to them or obtain crucial documents such as bank accounts. They cannot require such agencies to make inquiries on their behalf or, to share the findings of the inquiries those agencies.

Their regulatory powers stem from contract only between those bodies and those who participate in sport under their aegis.

Nor, unlike investigative journalists, can such bodies resort to entrapment of the kind which ensnared the Pakistani trio at Lords; and whistle-blowers, like Mr Rodchenkov, former head of the Moscow laboratory, require protection against reprisals, and, in his case, exile too.

Sports law diverges from the law of the land in a number of ways. It does not ordinarily demand that a disciplinary offence be proved beyond reasonable doubt—the formula deployed in criminal law. It has designed the more flexible standard of comfortable satisfaction.

It does not ordinarily have detailed rules for the admissibility of evidence. Some fundamental principles like those of legal professional privilege, guaranteeing that a lawyer's client can discuss his case with a lawyer under a seal of confidence, or the right not to be compelled to incriminate oneself are recognized, the former in an absolute, the latter in a modified form.

Otherwise any potentially relevant evidence is admitted; what weight it is to be given is a matter for a judgment of an expert sole arbitrator or arbitral panel. not necessarily specialist lawyers.

Lord Denning once said:

"Justice can often be done in them better by a good layman than by a bad lawyer. This is especially so in activities like football and other sports, where no points of law are likely to arise, and it is all part of the proper regulation of the game".

although as sports law has developed, given what is so often at stake in disciplinary cases lawyers are often involved, and CAS, the world court of sport, is entirely composed of senior lawyers.

Nonetheless the twin pillars of natural justice—let no one be a judge in his own cause and hear the other side apply to sporting cases as they do throughout the law.

The former guarantees that the adjudicator must not only be free from actual bias from the perception of bias, the latter that the defendant has an opportunity both to know the nature of the charge he faces and to defend himself against it.

A sporting disciplinary case does not have to ape the elaborate procedures appropriate to a terrorist trial at the Old Bailey but the basic principles of fairness are no less applicable.

Critical above all is the integrity and intelligence of those who have responsibility to decide these cases, each of which must be subject to fair assessment. They must remind themselves that suspicion is not the same as comfortable satisfaction.

Doping cases present particular challenges since the person accused who actually admitted the offence is so rare as to justify inclusion in a Bateman cartoon.

Denial is the default reaction to the charge, and, if I may be forgiven for plagiarising my own dictum in a CAS award *"It is regrettable that the currency of such denial is devalued by the fact that it is the common coin of the guilty as well as of the innocent")*

Bizarre explanations on a par with "the dog ate my homework" (or nowadays "pressed the delete key") are not unknown.

Dennis Mitchell the US Olympic sprint medallist claimed that the elevated level of testosterone in his bodily fluids was the product of a combination of a strenuous amount of sex coupled with the consumption of still more generous amount of beer.

Two Brazilian long distance swimmers, indicated Sarapatel, a local delicacy whose main component was boars' testicles, as the source of the prohibited substance found in their system. Unfortunately, there was no evidence that such a dish had been served in the hotel where they ate their pre-race meals.

Javier Sotomayor, still the record holder for the men's high jump claimed that the laboratory test carried out in Montreal had been manipulated at the instigation of the USA as a by-product of the Cold War. He produced a statement in support by the then President of Cuba, Fidel Castro, whose relevance was in inverse proportion to its length.

Just because a particular defence say that a competitor spiked the accused's energy drink, is advanced in one case where there was no evidence to that effect, does not mean that it may not be sustainable in another case.

In no less than three cases after careful scrutiny of the evidence CAS panels have accepted that the prohibited substance, cocaine or steroid, was transferred by the passionate kissing indulged in by the athlete with his girlfriend, who, whether for therapy or recreation, had taken it in the first place. There is always a presumption of innocence; and each charge in each case must be approached with an open mind.

So my message is that Sports law both in its elements and in its enforcement must be fair as well as firm in the interests of those who play it and those who follow it through whatever medium, for unless participant or spectator know that the sport is clean in the end there will be no sport, but merely a circus. In the Black Sox Scandal of 1919, sometimes described as the Sports Scandal of the Century, the famous American baseball player "Shoeless Joe" Jackson was found to have thrown a match. A distraught fan, not wishing to believe that his hero had not only a golden arm but unshod feet of clay uttered the unforgettable and poignant words "Say it ain't so Joe Say it ain't so".

Sports law should aim to ensure that, as far as possible, it ain't ever so.

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28 February 2019

Nick De Marco QC

Excessive punishment for sarcastic applause? *Zaha v The FA*

Crystal Palace FC's Wilfried Zaha is one of the fastest players in the Premier League. He is also one of the most fouled. After a number of serious challenges in a match at Southampton at the end of January, Zaha was booked for his reaction to a player who had just pushed him over the touchline. He sarcastically applauded the referee in response to the yellow card, which was then followed immediately with a second yellow and therefore a red. As he left the field, Zaha sarcastically applauded the referee again, on more than one occasion, and did so *"theatrically"* according to the Football Association (FA). This led to him being charged with misconduct outside the jurisdiction of the match referee.

The proceedings were conducted under FA fast track rules, meaning the Regulatory Commission hearing took place just before Palace's Premier League home match against West Ham. Zaha accepted he was in breach and apologised, explaining his frustration got the better of him. It was his first ever red card in the Premier League, and he had already served a one-match ban as a result of it. His main argument was that given other Commissions had found the appropriate penalty for a player who aggressively confronted a referee after being sent off was a one-match ban and a fine, and that aggression is more serious than sarcastic applause, a one match ban was not appropriate. The Commission imposed a one-match ban and a £10,000 fine.

Zaha appealed on the grounds that the one-match ban was excessive. The effect of his appeal was to suspend the ban until after the appeal was heard, which meant he was available to play the match against West Ham. Somewhat surprisingly, the FA had, unsuccessfully, argued that the ban should not be suspended, which would have meant the Player would have served the ban even if he went on to win his appeal, rendering the appeal provisions futile.

Zaha's appeal was unsuccessful. Essentially, the Appeal Board (Chairperson, Mr Graeme McPherson QC) found that while aggressive conduct following dismissal would frequently justify a suspension, it was not a pre-requisite to a suspension being imposed [44], and *"that the Player's overt, protracted and repeated conduct 'totally undermined the referee'."* [47]

But perhaps of more general interest was the Appeal Board's decision on two issues that may arise in other appeals: the meaning of *"excessive"* under the appeal provisions and when the match ban should take place.

The meaning of "excessive"

A common ground for appeal under various FA provisions is that the penalty of sanction imposed was *"excessive"*. The Player argued excessive meant *"materially more than was necessary or proportionate in the circumstances of the case"*. Importantly, the rules did not use the words *"manifestly excessive"* commonly found in other appeal regimes. While the FA appeared to agree with this definition, it went on to argue that an Appeal Board should not interfere in the decision of a Regulatory Commission unless it concluded the sanction was *"one to which no reasonable Regulatory Commission could have come"*.

The Appeal Board rejected this argument, noting the difference between the wording of the regulation allowing a Participant to appeal against a penalty that was excessive and to appeal against a decision that no reasonable body could have come to, and they noted *"that there may be instances where application of each test leads to different results"* [33].

When the match ban should take place

The appeal was heard the last working day before the Club's 5th round FA cup fixture, and so the practical effect would be for Zaha to miss that match instead of the next Premier League fixture. The FA invited the Commission to consider imposing the ban on the next Premier League match (against Leicester City). This was rejected:

"During the course of those submissions it became apparent that there was a concern (on the part of both the Player and the FA) that the Player's appeal from the Decision of the Commission has been perceived in some circles as an attempt to manipulate the date of any suspension and thus to enable him to play in one match at the expense of missing another. Whilst we cannot influence how others might think, we make it clear that there is no basis for such a conclusion in this case. The Player had a right to appeal against the Decision of the Commission. The Decision of the Commission was reached by a majority rather than unanimously. While we have ultimately dismissed the appeal, the appeal was in no way vexatious or frivolous – the Player was perfectly justified in commencing and pursuing the appeal. The Player has not 'manipulated' the timing of the appeal or the fixture from which he will be suspended." [58]

With respect, that reasoning was both fair and sensible. It would be wrong for Regulatory Commissions and Appeal Boards to themselves manipulate the timing of match suspensions because of potential public perceptions, rather than to follow the Rules. The Commission had imposed a one-match ban "from all domestic club football until such time as [the Club] has completed one (1) first team competitive fixture in an approved competition"; it had not focussed its sanction on a Premier League match.

On the other hand, Participants should be warned that a frivolous or vexatious appeal, brought only to manipulate the timing of a sanction and with no prospects of success, may be good grounds for increasing or varying the sanction.

The FA Appeal Board's written reasons can be found here.[1]

Nick De Marco QC *(instructed by David Nichol, Head of Legal, Crystal Palace FC) acted for Wilfried Zaha.*

[1] *http://www.thefa.com/-/media/files/thefaportal/governance-docs/discipline-cases/2019/wilfried-zaha-v-the-fa---appeal-board---15-february-2019.ashx*

"Gold standard of quality when it comes to regulatory, contract or competition work in sport."
Chambers and Partners

28 February 2019

Celia Rooney

Fleetwood Wanderers Limited v AFC Fylde Limited: a cautionary tale for arbitrators in sports law disputes

Summary
In Fleetwood Wanderers Limited *(t/a Fleetwood Town Football Club) v AFC Fylde Limited* [2018] EWHC 3318 (Comm), the High Court upheld a challenge to an arbitral award on the grounds of serious irregularity under section 68(2)(a) of the Arbitration Act 1996 *(AA 1996)*. The Arbitrator had failed to inform the parties that, following the hearing, he had been in communication with The Football Association *(The FA)* as to the scope and content of its rules, and had in turn failed to provide either party with the opportunity to make representations on the issues raised in that correspondence.

A battle of the Titans it was not. This case is nonetheless a useful reminder as to the circumstances in which the Courts will uphold a challenge to an arbitral award and is a cautionary tale to all those who arbitrate disputes in the tight-knit sports law community.

Background
At the relevant time, the claimant, Fleetwood Town Football Club (Fleetwood), was a professional football club in League One of the Sky Bet Football League. The defendant, AFC Fylde (AFC), competed in the Vanarama National League North.

AFC had entered into two consecutive employment contracts with a professional football player, Dion Charles (the Player). It had, however, failed to register the second contract with The FA or National League, as it was required to do.

During the term of the second employment contract, the Player was also engaged by Fleetwood. AFC commenced arbitral proceedings under Rule K of the FA's rules, seeking damages at common law for the Player's alleged repudiatory breach of contract. AFC subsequently amended its claim, to include a claim for compensation under Article 17.2 of the FIFA Regulations on the Status and Transfer of Players (FIFA RSTP), which provides that *"… if a professional is required to pay compensation, the professional and his new club should be jointly and severally liable for its payment".*

The Arbitrator found that, while AFC had failed to make out its common law claim, it succeeded under Article 17.2 FIFA RSTP. That provision was said to have been incorporated into The FA Rules, and thus to apply as a matter of English law, in circumstances where Rule A1(b) of The FA Rules required the parties to play and/or administer football in conformity with the statutes and regulations of FIFA (amongst other governing bodies).

Grounds of challenge
Fleetwood originally sought to challenge the arbitral award on the ground that the Arbitrator lacked substantive jurisdiction to make the award (under section 67(1)(a) of the AA 1996), alternatively, that he had exceeded his powers within the meaning of section 68(2)(b).

After Fleetwood commenced its claim in the High Court, solicitors for The FA drew the Club's attention to various communications between the Arbitrator and the Judicial Services Manager at The FA, which had taken place between 17 and 21 July 2017 - nearly a month after the proceedings had been heard, and shortly before the Arbitrator had made his award.

Specifically, on 17 July 2017, the Arbitrator emailed The FA, seeking to *"ascertain whether The FA has adopted, and incorporated into its Rules, the [FIFA RSTP]".* The Arbitrator set out his own preliminary view that, *"in the absence of any conflicting provisions in the FA Rules, it is arguable that [Rule A.1(b) of The FA Rules] incorporates FIFA Statutes en masse."* He also sought information as to whether the issue had been considered in previous cases involving The FA.

There was further communication between the Arbitrator and The FA and on 20 July 2017, the former sent a further email to the latter stating as follows.

"… As I was carrying out some research a couple of days ago, I looked at the Irish FA's website and saw that they have expressly incorporated FIFA's RSTP into their domestic rules via the Professional Game Player Regulations…

The first question that I have to resolve is whether the RSTP are incorporated into FA Rules. Subject to that, the second question is whether Article 17.2 of the RSTP… should 'trump' English law…

I do not expect an answer to either of these questions. I will have to resolve them myself. It is really some help with The FA's understanding of the position regarding the incorporation of FIFA's RSTP into FA Rules (and whether I am missing something), and whether Article 17 has ever been considered by a Regulatory Commission or a Rule K Tribunal."

The FA's Judicial Services Manager replied on 21 July 2017, confirming the Arbitrator's view that Rule A1(b) of The FA's Rules required all clubs and affiliated associations to comply with the statutes and regulations of FIFA. The email went on to state that while *"[t]he Association does not usually get involved directly in disputes…. [i]f such a case was before a FIFA Single Judge of the Players' Status Committee, the Association would be notified of such proceedings for information purposes only".* The FA's representative concluded by stating that he had *"been informed Art. 17.2 of RSTP would only come into scope where involving an international transfer", such that "with domestic only disputes English law should supersede other regulation".*

The Arbitrator replied to that email on the same date, setting out his preliminary conclusion that *"a Rule K arbitrator would have jurisdiction to consider the RSTP in a domestic dispute between two clubs [who] are members of the same national association",* but noting that he would *"have to reconsider all of that"* in light of what he had been told.

Upon disclosure of the above, Fleetwood applied to amend its claim, challenging the arbitral award on the ground of serious irregularity under section 68(2)(a) of the AA 1996.

Finding of the Court
His Honour Judge Halliwell, sitting in the Circuit Commercial Court, upheld the challenge on the ground that the Arbitrator's communications with The FA, as outlined above, gave rise to "serious irregularity" contrary to section 68(2)(a) of the 1996 Act.

Under section 33(1) of the AA 1996, the Arbitrator was under a duty to act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of

his opponent. That duty required the Arbitrator to give the parties an opportunity to deal with any issue that may be relied upon by him as the basis of his findings. The parties were thus *"entitled to assume that the [Arbitrator would] base [his] decision solely on the evidence and argument presented by them prior to the making of the award and if the [Arbitrator was] minded to decide the dispute on some other point, [he] must give notice of it to the parties to enable them to address the point"* (Russell on Arbitration, para. 5-049, cited with approval in *Pascol v Rossakhar* [2001] 1 Lloyd's Rep 109, at [114]). See further: *Fox v Wellfair Limited* [1981] 2 Lloyd's Rep 514; *Interbulk Limited v Aiden Shipping Co Ltd* [1984] 2 Lloyd's Rep 66; and, most recently, *Brockton Capital LLP v Atlantic-Pacific Capital Inc* [2015] EWHC 1459.

The Arbitrator's correspondence with The FA, after the conclusion of the hearing, was in breach of his duties under section 33 of the AA 1996 and thus amounted to an irregularity within the meaning of section 68(2) thereof (para. 39 of the judgment). The Arbitrator had, for example, "implicitly sought to ascertain whether [the] FA had done anything to incorporate the RSTP without notifying the parties of his intention to do so" (para. 36) and had also carried out his own extrinsic research into the issues (para. 38).

Such irregularities will give rise to substantial injustice where they cause an arbitrator to reach a conclusion which he might not otherwise have reached, as long as the alternative was reasonably arguable: Merkin on Arbitraton Law, cited with approval by Mr Justice Andrew Smith in Alfred Uwe Maass v Musion Events Limited [2015] EWHC 1346. Applying that test, the Judge concluded that the Arbitrator's own investigations and communications with The FA gave rise to substantial injustice to Fleetwood. By failing to copy the parties to the proceedings into his correspondence, the Arbitrator had denied them the opportunity to provide submissions and evidence on his further lines of inquiry and on the information he had in turn received from The FA.

The case was thus remitted to the Arbitrator to consider the limited issue of the incorporation of Article 17 of the RSTP into The FA Rules and its applicability to a dispute between two domestic clubs. While The FA Rules expressly exclude an appeal on a point of law, the Judge nonetheless noted that, in his view, it was reasonably arguable that this was not the case. Whereas certain of the provisions of the FIFA RSTP were binding at national level (see further FIFA RSTP, Article 1(3)(a)), in the Judge's view, The FA was only required to consider the principles under Regulation 17 of the FIFA RSTP, which were thus discretionary.

Mr Justice Halliwell nonetheless rejected Fleetwood's other grounds of challenge, under sections 67 and 68(2)(b) of the AA 1996 as "misconceived from the outset" (para. 42). While the Club's arguments had been dressed up as a challenge to jurisdiction, alternatively as an excess of powers claim, they were in fact based on allegations that the Arbitrator had erred in law. In any event, Fleetwood has lost its right to bring a challenge on those grounds by failing to raise its objections promptly during the course of the hearing (AA 1996, section 73(1)).

Comment

Despite the very high threshold applied to cases under section 68(2) of the AA 1996, this case remains a clear example of irregularity in circumstances where the Arbitrator decided a central issue without giving any notice to the parties to the proceedings: see further Russell on Arbitration, para. 8-089; Alfred Uwe Maass, above at [39]. While the Arbitrator's inquiries were undoubtedly well-intentioned, they strayed far beyond that which is permissible. Thus the Arbitrator did not only apply his expertise to the evidence before him but essentially sought to introduce new evidence to the dispute.

It is less clear, however, whether the Judge was correct to conclude that the Arbitrator could remedy his errors simply by inviting the parties to make representations on the contentious correspondence. Arbitral tribunals are entitled to determine the extent to which they may adopt an inquisitorial approach to the proceedings under section 34(2) of the AA 1996, but there is no evidence that any such approach was adopted in this case.

Subject to that concern, the decision not to set aside the award and instead to remit only a limited issue to the Arbitrator for reconsideration appears to be in line with existing principles. Remission is the default option and the court should not set aside an award unless it would be inappropriate to remit the matter to the arbitrator (see further, AA 1996, sections 68(3) and 69(7)). As the Court recognised remission was appropriate in this case where: (1) the irregularity applied to a discrete aspect of the claim, upon which very little evidence had been directed; (2) the irregularity could be remedied by allowing further submissions and evidence; and (3) there was no suggestion of bias or reason to challenge the professionalism of the Arbitrator, in circumstances where his communications with The FA had been driven by his *"anxiety to achieve the correct outcome, as he perceived it"*.

While many sporting disputes are resolved by way of arbitration, examples of successful challenges to any resulting arbitral award remain uncommon. In those circumstances, while the principles applied in this decision will (for the most part) be familiar to every seasoned arbitrator, the case remains a useful reminder of the dangers of being over-familiar in the discharge of one's duties, particularly in the closely integrated sports law community.

3 May 2019

Celia Rooney

Sex on a spectrum in the binary world of sport: the CAS's decision in the case of *Caster Semenya & Ors v the IAAF*

On 30 April 2019, the Court of Arbitration for Sport *(CAS)* delivered its award in the case of *Caster Semenya & Athletics South Africa v the International Association of Athletics Federation*, dismissing Ms Semenya's request for arbitration and upholding the validity of the IAAF Regulations for Female Classification (Athletes with Differences of Sex Development) (the *DSD Regulations*).

In one of the most controversial sporting disputes in recent years, Ms Semenya sought to challenge the DSD Regulations, which place restrictions on the eligibility of women to compete as women in certain sporting events. The finding against her means that, unless she takes measures to reduce her endogenous testosterone levels, she will be unable to compete in her chosen events on the international stage.

While the CAS's full award is yet to be published, the reasons offered for the decision to date make for an interesting read and are considered below. The Executive Summary and Press Release are available on their website .[1]

Who is Caster Semenya?

Caster Semenya is a 28-year old South African middle-distance runner. These days a household name, Ms Semenya burst onto the stage of international athletics in 2009, winning gold in the 800m at the World Championships in Berlin.

Ms Semenya's success was quickly tarnished by allegations that she was not biologically female and that she was undergoing tests to confirm her sex. While the results of those tests have never been made public, it is understood that Ms Semenya has a "difference or disorder of sex development" – a DSD – which, as explained further below, means that while she is female, her sexual development has been atypical.

Following the controversy in Berlin, Caster Semenya was subsequently withdrawn from international competition until 6 July 2010 when, following hormone treatment, she was allowed to return to international athletics. Ms Semenya went on to compete successfully in a number of international events, winning silver medals in the 800m at both the World Championships in South Korea in 2011 and the London Olympics in 2012 (both of which were bumped up to gold, following the disqualification of the winning Russian athlete for doping offences). For the reasons set out below, Ms Semenya was also able to compete without any hormone treatment between July 2015 and April 2018, during which time she won the gold medal for the 800m at the Olympic Games in Rio de Janeiro, Brazil.

What is a DSD? What is hyperandrogenism?

In cases of typical sexual development, an individual will have XX chromosomes if she is female and XY chromosomes if he is male. Where a Y chromosome is present, a baby will ordinarily develop testes around the tenth week of pregnancy. Absent any Y chromosome, a baby will ordinarily develop ovaries.

"Disorders of sex development", or DSDs, are a group of rare conditions, characterised by atypical sexual development. There are many different types of DSD. Some individuals with a DSD, for example, will have XX chromosomes but "ambiguous" or male-looking genitalia, or will be born without a womb. Others may have neither a second X chromosome nor a Y chromosome (XO), or will have an additional chromosome (XXY), which will typically result in atypical development during puberty. In exceptionally rare cases, it is believed that individuals can have both ovarian and testicular tissue.

A further type of DSD exists where individuals have female external genitalia, despite having XY chromosomes, most commonly occurring where the individual's testicles have remained in the body or have not developed properly. This particular DSD is referred to by doctors as **"46 XY"** (the DSD that is the subject of the DSD Regulations, as set out further below).

Athletes with a DSD will typically have hyperandrogenism, meaning that they will have naturally elevated levels of androgens (sometimes referred to as "male hormones"), including testosterone. An athlete may have high levels of testosterone without displaying any masculine physical characteristics because, for example, she is 'insensitive' to androgens.

Binary categories: distinguishing sex for sporting purposes

Elite male athletes outperform elite female athletes by an estimated 10% in sports that rely on endurance and strength. In recognition of that competitive advantage, since 1928, athletics competitions have been strictly divided into male and female classifications.

Those binary categories, however, are deceptively simple and the eligibility criteria and the means of their application have long been a source of controversy in sport. Before the development of molecular medicine, for example, all female athletes – with the exception, rumour has it, of Princess Anne - were subjected to a compulsory physical examination to verify their sex. Thereafter, while scientific developments enabled sports governing bodies to test for X and Y chromosomes and even for specific genes on those chromosomes, there was still considerable room for error (arising, for example, from genetic mutations).

In April 2011, the IAAF enacted its Regulations Governing Eligibility of Females with Hyperandrogenism to Compete in Women's Competition (the Hyperandrogenism Regulations). The enactment of the Hyperandrogenism Regulations represented a major shift in sex verification for sporting purposes in that, for the first time, an international sports governing body was focusing primarily on testosterone, instead of genetics, to determine sex.

In 2014, a 19-year old Indian athlete, Dutee Chand, appealed to CAS, challenging her indefinite ban for elevated testosterone levels under the IAAF's Hyperandrogenism Regulations. The CAS cleared Ms Chand to compete, suspending the Hyperandrogenism Regulations for two years.

In that case:

- it was not in dispute that the Hyperandrogenism Regulations were prima facie discriminatory, since only female athletes were required to undergo testing for endogenous testosterone and the regulations placed restrictions on the eligibility of athletes on the basis of certain natural physical characteristics;
- on the balance of probabilities, the CAS concluded that there is a scientific basis for using testosterone as a marker for the purposes of the Hyperandrogenism Regulations, finding that testosterone was a key biological indicator of the difference between male and female athletes; however,
- while the CAS recognised that the over-representation of DSD females in elite sport constituted indirect evidence that high levels of endogenous testosterone improved athletic performance, there was insufficient evidence about the degree of the advantage that androgen-sensitive hyperandrogenic females (i.e. female athletes who not only had high levels of testosterone but were also able to use that testosterone) had over other female athletes. In the absence of such evidence, the CAS could not conclude that the Hyperandrogenism Regulations were proportionate. The CAS therefore suspended the regulations for two years, during which time the IAAF was permitted to submit further written evidence of the performance advantage arising from testosterone.

The DSD Regulations

The IAAF did not submit further evidence in support of the Hyperandrogenism Regulations. Instead, in March 2018, it informed the CAS that it intended to withdraw and replace them. The following month, the IAAF enacted the DSD Regulations.

The DSD Regulations establish new requirements governing the eligibility of women with certain DSDs to participate in the female classification in eight events (the ***Restricted Events***). The Restricted Events include the 400m, 800m and 1500m races (Regulation 2.2(b)). Caster Semenya regularly participates in each of those events at the international level.

DSD athletes with XX chromosomes do not fall within the scope of the new regulations. Instead, a female athlete will only fall within the scope of the DSD Regulations where she has: one of seven specific DSDs (all of which involve XY chromosomes); an endogenous testosterone level of 5 nmol/L or above; and *"sufficient androgen sensitivity for those levels of testosterone to have a material androgenising effect"* (Regulation 2.2(a)). Athletes with 46 XY DSD ordinarily have testosterone levels well into the male range.

An athlete that falls within the scope of the DSD Regulations will only be able to compete in a Restricted Event on the international stage where she:

- is recognised at law as female or intersex or an equivalent;
- reduces her blood testosterone to below 5 nmol/L for a continuous period of at least 6 months by, for example, using hormonal contraceptives; and
- maintains that level of testosterone both in and out of competition.

There is strict liability for compliance with the eligibility requirements (Regulation 3.14), which is the sole responsibility of the affected athlete (Regulation 3.11).

The DSD Regulations expressly note that the eligibility requirements do not prohibit an athlete from competing in non-international competitions or in anything other than the Restricted Events (Regulation 2.6). The regulations also seek to reassure affected athletes that "surgical anatomical changes are not required" (Regulation 2.4) and that they are permitted to compete in the male classification or any intersex competition (Regulation 2.6(b) and (c)).

The stated purpose of the DSD Regulations is to ensure *"fair and meaningful competition in the sport of athletics"*, by making sure that competition is organised *"within categories that create a level playing field"*. The Regulations are premised upon the idea that *"high levels of endogenous testosterone circulating in athletes with certain DSDs can significantly enhance their sporting performance"*, a proposition for which there is said to be a *"broad medical and scientific consensus"* (Regulation 1.1(d)).

The Challenge

The DSD Regulations came into force on 1 November 2018. Before that date, Caster Semenya and Athletics South Africa commenced arbitral proceedings before the CAS challenging the validity of the regulations.

The precise way in which Ms Semenya articulated her grounds of challenge will remain unclear unless and until further details of the CAS's award are published. In summary, however, it is understood that the position of Ms Semenya and Athletics South Africa was that the DSD Regulations:

- unfairly discriminate against athletes on the basis of sex and/or gender because they only apply to female athletes and to female athletes having certain physiological traits;
- lack a sound scientific basis;
- are not necessary to ensure fair competition within the female classification; and
- are likely to cause grave, unjustified and irreparable harm to affected female athletes.

On that basis, Ms Semenya and Athletics South Africa claimed that the Regulations are unfairly discriminatory, arbitrary and disproportionate and therefore violated the IAAF Constitution, the Olympic Charter, the laws of Monaco, the law of the various jurisdictions in which international athletics competitions are held and universally recognised fundamental human rights.

In response, the IAAF submitted that the DSD Regulations did not discriminate on the basis of a protected characteristic, were based on the best available scientific evidence, and were a necessary, reasonable and proportionate means of pursuing the legitimate aim of safeguarding fair competition and protecting the ability of female athletes to compete on a level playing field.

Decision of the CAS

By a majority, the CAS dismissed Ms Semenya's requests for arbitration and confirmed the validity of the DSD Regulations.

The Panel unanimously concluded that the DSD Regulations are prima facie discriminatory, since they target a subset of female athletes (without imposing any restriction on their male counterparts) and since the regulations target a group of individuals on their immutable biological characteristics: see further, paragraphs 14 and 15 of the Executive Summary. That finding is unsurprising in light of the decision in *Dutee Chand*.

A majority of the Panel concluded that the IAAF had succeeded in establishing that the DSD Regulations were necessary: see further paragraphs 16 to 24 of the Executive Summary.

- It was not in dispute that it was legitimate to have separate, binary categories in sports for men and women, which in turn required the IAAF to devise a means of determining which athletes fall into each category. The Panel in turn accepted the IAAF's submission that categorisation on the basis of a person's legal sex may not always constitute a fair and effective means of categorising athletes for the purpose of sport. The purpose of having separate categories for men and women was not to protect women from having to compete against men per se, but rather to protect those individuals who *"lack insuperable performance advantages"* from having to compete against those with such advantages. The fact that a person was recognised as a woman in law did not mean that she lacked those performance advantages.
- The Panel unanimously found that endogenous testosterone is the primary driver of sex difference in sports performance between men and women. The CAS agreed with the IAAF that all of the factors that contributed to sporting performance are equally available to men and women, except exposure to adult male testosterone. Thus if the male-female divide in sport is really a divide between those with and without the testosterone-derived advantage, then it is necessarily *"category defeating"* to permit any individuals who possess the higher levels of testosterone to compete in the lower-testosterone category.
- A majority of the panel concluded that elevated testosterone levels in athletes with 46 XY DSD gave such athletes a significant performance advantage over other female athletes. That conclusion – which is likely to be a source of controversy amongst experts in the field – was based on evidence concerning the performances and statistical over-representation of female athletes with 46 XY DSD,

Finally, a majority of the Panel concluded that the DSD Regulations constituted a proportionate interference with the rights of 46 XY DSD athletes: see further paragraphs 25 and 26 of the Executive Summary. The CAS appears to have reached that conclusion on the basis that the DSD Regulations do not require athletes to undergo surgical intervention, and instead rely on athletes taking oral contraceptives. The CAS nonetheless expressed concerns as to how the DSD Regulations would operate in practice.

In particular, the CAS voiced its concerns:

- about the side effects of hormonal treatment;
- that while the DSD Regulations imposed strict liability on athletes, athletes may inadvertently be unable consistently to maintain a natural testosterone level below 5 nmol/L; and
- that there was a lack of concrete evidence of actual significant athletic advantage by a sufficient number of 46 XY DSD athletes in both the 1500m and 1 mile events, and the IAAF was cautioned against applying the regulations to those events until further evidence is available.

Comment

Caster Semenya's athletic achievements have been the source of controversy for nearly a decade. Her CAS case has been no less charged. On being informed of the decision, for example, Athletics South Africa went as far as to say that, by allowing the IAAF to justify the *prima facie* discrimination in this case, the CAS had *"seen fit to open the wounds of apartheid"*.

As the CAS recognised, the *"imperfect alignment of nature, law and identity"* is what gives rise to the conundrum in Caster Semenya's case. The CAS was in the invidious position of having to reconcile the existence of the binary male/female athletics system (itself not in dispute in the case) with the biological reality that sex is not binary and instead exists on a spectrum. The controversy generated by this case is further exacerbated by the conflation of issues of sex and gender – the former a matter of biology, the latter of sociology.

As noted above, the CAS was not invited to question the binary categorisation of athletes into male and female competitors. Its decision was nonetheless inextricable from its conclusion that *"the male-female divide in competitive athletics is not to protect athletes with a female legal sex from having to compete against athletes with a male legal sex"*, nor to protect athletes with a female gender identity from having to compete against those with a male gender identity, but is rather to protect those without certain *"insuperable performance advantages"* from having to compete against those with those advantages. There may well be logic in that criterion, but it is unsurprising that its application to distinguish athletes into two camps – male and female, with outliers that fall into neither group – generates controversy and stigma.

It is difficult to assess the legal or evidential merits of the CAS's position, in circumstances where the full award with reasons has not yet been published. The entire decision pivots on the CAS's finding, as a matter of medical evidence, that high levels of endogenous testosterone necessarily give 46 XY DSD athletes a significant performance advantage over other female athletes. There have always been scientists who question the simplicity of that conclusion pointing to, amongst other things, the importance of an athlete's sensitivity to such androgens and (as the CAS itself recognised in respect of the longer races) the lack of available evidence. The merits of the CAS judgment therefore are likely to be best assessed by the medical community, upon further disclosure of the Panel's reasons.

Ultimately, there are no simple answers to the Caster Semenya saga, or the issues arising from the inclusion of DSD athletes in elite sport. It may be that scientific evidence supports the conclusion that eligibility requirements for DSD athletes are a necessary evil to ensure fair competition in female sport. That said, there are good reasons to approach the DSD Regulations with caution. As the CAS itself recognised, there is a paucity of evidence of performance advantage – particularly in respect of certain events. Moreover, there are good historical and ethical reasons to raise an eyebrow in respect of any law that requires women to artificially alter their naturally occurring hormones so as to enter their preferred profession. In this respect, the fact that the regulations do not mandate surgical intervention will be of little consolation to the athletes affected by the DSD Regulations, nor can it possibly be indicative of their proportionality.

Caster Semenya – like other DSD athletes before her – has found herself at the heart of one of the most difficult and controversial issues in sport. The CAS was right to recognise the *"grace and fortitude"* with which she has conducted herself for the last decade, and that she has done nothing wrong. When bringing her CAS case, Caster Semenya made one simple public statement: *"I am Mokgadi Caster Semenya. I am a woman and I am fast"*. Whatever the complexities of this case, that much is not in dispute.

[1] *https://www.tas-cas.org/en/general-information/news-detail/article/semenya-asa-and-iaaf-executive-summary.html and https://www.tas-cas.org/fileadmin/user_upload/Media_Release_Semenya_ASA_IAAF_decision.pdf*

4 July 2019

Nick De Marco QC

A Guide to The FA's New Intermediaries Regulations 2019-2020

The FA recently brought in various amendments to its Regulations on Working with Intermediaries1 and, on 29 June 2019 published guidance notes on them. In this article, Nick De Marco QC who advises the Association of Football Agents along with all the major football agencies, and who was involved in discussions with The FA about the new Regulations, discusses their meaning and likely application.

These new Regulations are not part of the much anticipated and controversial wholesale reform led by FIFA that we expect to come in for the 2020/21 season at the earliest; discussions are still on foot as to the content of those – which shall most likely see the return of a licensing system, as well as potentially provisions regarding agents' remuneration.[22]

There are more modest, yet still important, changes in some of these new Regulations. Anyone involved in the football transfer market or agency business needs to carefully consider how new Regulations may affect their business. The new Regulations are already now in force and shall apply for the 2019-2020 season. Links to the new Regulations and recent Guidance[3] are available on The FA website[4].

Fiduciary Duties

Regulation **A.7** provides that an Intermediary must always act in the best interests of the Club/Player for whom they act, and in accordance with their **fiduciary duties**. This obligation already exists in law; football agents already face losing their entitlement to commission if they breach their important fiduciary duties to their clients[5]. Reg. A.7 means this can now also be a regulatory offence.

Notification of an "offer"

Regulation **A.8.1** imposes an obligation on an Intermediary to notify a Player they represent of an **"offer"** (both orally and with written confirmation of the offer) within 24 hours of receipt of the offer. Some concerns have been raised about the practicality of this new Regulation. What exactly is an offer? What if the offer is received the day before the player is to appear in an important match, and has been made just to unsettle him?

The definition of *"offer"* is included within the Regulations, but it is not entirely clear. Following discussion, The FA have issued guidance confirming that it considers an offer should *"set out the proposed terms of employment (including fixed or continuing remuneration and term)"* and must *"comply with any relevant rules and regulations, particularly regarding illegal approaches"*. Therefore, a club phoning up an agent and asking if Player A is available for a transfer fee of £1 million and wages of about £40,000 per week would unlikely be an *"offer"*, and an Intermediary would have no duty under A.8.1 to inform the player of the approach. Only an offer which sets out the detail as to the important terms of employment should be regarded as an *"offer"* for the purposes of the Regulation. Clubs, players and agents would be well advised to insist that such offers are recorded in writing and clearly headed as an *"offer of employment"* so there is certainty for all parties.

Approaching minors

Regulation **B.8** imposes further prohibitions on agents approaches to **Players under the age of 18.** Agents are advised to read these regulations carefully. The overwhelming majority of recent FA proceedings against agents, often leading to substantial bans, involve breaches of the strict rules concerning working with or approaching minors. The main change to Regulation B.8 is the additions of sub-paragraphs:

(ii) which prevent an intermediary approaching a player between 1 January of the year of his 16th birthday and the date of his 18th birthday without the prior written permission of the player's parents; and,
(iii) confirming that an approach includes approaching via various social media. Previously it had been necessary to obtain the parents' consent upon signing a Representation Contract with a minor.

The additional requirement that consent must be obtained to even approach a minor appears onerous.

What if, having been introduced by an existing client to a young player who might be interested in finding an agent, the agent asks that player for his parents contact details so the agent can obtain written consent to approach the player? Is that itself an "approach"? If so, the Regulation may be unworkable. It is unlikely the rule shall to be given such a wide and absurd meaning, but agents are well advised to keep a good written record (including saving What's App messages etc) of all communications of this sort and to make sure they seek approval by a player's parents in writing before speaking to the player about representing him.

Annual returns

Regulation **C.12** has been controversial with many agents. It requires an intermediary to provide, within 30 days of the end of each Reporting Period (a calendar year ending 30 June 2019) each of their clients with an **Annual Return** showing all of the remuneration made by a player or club on a player's behalf to the intermediary. While on its face this might appear a simple transparency requirement, unlike in other industries a football agent is already required to provide the player with precise details of all the commission they shall receive upon the making of every deal, and there are standard written forms that must be provided to and be signed by the player relating to each payment. The additional requirement to provide annual returns is thought by many in the industry to impose an additional, unnecessary, administrative burden on agencies. For example, if an agent has 40 players signed will they really be expected to provide this annual return every year for each player when every player already has the information? And to make matters worse, the Regulation suggests that a failure to provide the Return can amount to a breach and therefore misconduct.

It would have been more sensible to provide a player with a right to request an Annual Return (with a failure to provide one being a breach). Some agents have suggested that a Return is provided at the time the remuneration is agreed which incorporates words to the effect that such Return constitutes a Return for each subsequent year concerned by the remuneration, unless the player requests a specific Return in every year. Whether or not this might fall within the letter of the Regulation, it would appear to fall within its spirit,

and charging an agent for misconduct for this type of thing would be a waste of The FA's resources. Perhaps because of the continued controversy over the operation of this Rule, The FA's guidance says that further guidance will be issued *"in due course and ahead of the end of the Reporting period on 30 June 2020."* It is hoped such guidance can reflect a practical solution that does not impose an unnecessary burden on agents while maintaining the principle of transparency.

Agreements with other intermediaries
Regulation **D.5** states that an intermediary **must disclose any agreement with another intermediary** which purports to resolve disputes between them relating to a player or Intermediary Activity. There are two problems with this. First, it suggests that confidential settlement agreements made in legal proceedings (such as FA Rule K arbitrations and/or international arbitrations, perhaps under the Rules of the CAS) shall be required to be disclosed to The FA despite the parties agreeing to their confidentiality. That in turn may act to discourage parties settling disputes and lead to more costly disputes between them. Second, if the aim here is transparency (as the guidance suggests), why is it limited to agreements between agents? Exactly the same issues may arise in disputes between a club and an agent, or a player and an agent, but the rule does not then apply. That suggests an inconsistent approach which undermines the stated purpose of the Regulation. The guidance is useful in pointing out that *"The FA is particularly concerned about agreements which include percentage of future fees"*, and that might suggest it shall be more interested in investigating agents who settle disputes by apportioning future fees, as opposed to by agreeing to pay another agent who has a claim part of commission already received. In any event, agents shall now need to take careful legal advice about this point before settling any disputes.

Interests in economic rights
Regulation **E.5** prohibits an intermediary from having any economic interest in relation to a registration or economic right of a player, other than when acting solely for a club in relation to the sale of a player when they can receive commission based on the transfer fee received (but only on future contingent payments). The new wording makes clear this includes a prohibition on receiving **"payments contingent on the future transfer of a Player."** The wording clarifies but doesn't add anything. It was already the case that an agent could not have a such a right given the prohibition on third party interests in a player .

Agreements with a club
Regulation **E.8 (iii)** requires a club to **disclose any agreement** *"of any nature"* it has entered into with an intermediary regarding the provision of services. It appears that the reason for this new regulation is a concern about clubs entering into *"sham agreements"* with agents so pay them agency fees disguised as something else. In various cases such arrangements have been described as scouting or consultancy agreements, entered into between a club and an agent/agency[7]. However, there are also genuine commercial agreements made by agencies (some of which are not only involved in intermediary activity) and clubs. The disclosure of confidential commercial terms in such agreements may be unwelcome, but it is noted that this particular obligation falls on the club, not the agent. A club must disclose all such agreements and shall be in breach if it does not (club secretaries, in particular, need to make sure this is done in the future), but an agent shall not be in breach as the obligation does not fall on them.

Sponsorship agreements
Regulation **E.11** prevents **sponsorship agreements** being entered into between football agencies and clubs at higher levels (Premier League, EFL, National League and Steps 1 to 4). It means a football agent cannot sponsor a club at the highest level of the men's game. The guidance is clear that it does not prevent sponsorship in women's football (an agency could sponsor the *"ladies' team"* of a Premier League club) and nor does it prevent intermediaries from purchasing commercial hospitality packages from Clubs.
It is important to recall that any breach of one of the Intermediates Regulations may be regarded as misconduct by The FA, leading to disciplinary proceedings, possible fines or sporting sanctions. Technical breaches, or those where no real harm has been caused, ought not to lead to charges or at least serious sanctions, and arguments about legitimate expectations, fairness and proportionality are likely to arise if they do. But all participants are best advised to avoid putting themselves in breach in the first place.

[1] The FA Handbook 2019/2020, Version 1.0, Working with Intermediaries Regulations, https://www.thefa.com, the-fa-regulations-on-working-with-intermediaries---2019-20.pdf
[2] The Author's view is that it remains unlikely a suggested mandatory cap on agents' commission shall be adopted in the new Regulations, but that if it is, it shall be face serious legal challenge. See, for example, 'The 2018 Report to the EC on the Football Transfer Market: Fascinating data but flawed conclusions', Nick De Marco QC.
[3] Working with Intermediaries Regulations Guidance Notes, https://www.thefa.com/-/media/files/thefaportal/governance-docs/agents/intermediaries/intermediary-guidance-notes-2019-2020.ashx
[4] Intermediaries Regulations, Guidance and Forms, https://www.thefa.com/football-rules-governance/policies/intermediaries/regulation-and-forms
[5] See, for example, the leading Court of Appeal case on the issue, Imageview Management Ltd v Jack [2009] EWCA Civ 63.
[6] See, for example. The FA v Phil Smith & Wycombe Wanderers FC (FA Regulatory Commission, 26 April 2014) where, under previous regulations, the club and the agent were found to have breached a similar rule by agreeing to pay the agent his commission for acting for the club in the sale of Matt Phillips by way of a percentage of any future sell on fee the club received following the sale. Such conduct was not then, and more clearly by this amendment is not now, permissible. A breach of this regulation is likely to be regarded as serious. Mr Smith was banned for 6 months as a result of the agreement, even though he in fact received no commission at all; and albeit the ban was reduced on appeal due to other reasons.
[7] See, e.g. The FA v Leeds Utd., Massimo Cellino and Derek Day (FA Regulatory Commission, 5 December 2016).

4 July 2019

Ravi Mehta

All in a Day's Work: Salary caps in the cross-hairs of UK and EU sports regulation

The past couple of weeks have seen a major ruckus run through the world of Rugby Union, raising questions about the financial aspects of the game and how to ensure fair competition.

On 5 November 2019, an Independent Panel of Premiership Rugby, the league for the first division rugby club championship in England & Wales, announced its eagerly awaited decision concerning alleged breaches of the sport's salary cap by Saracens Rugby Club ("Saracens" or "The Club") . The Panel upheld the charges against the Club, concluding that in relation to each of the seasons 2016-17, 2017-18 and 2018-19:

— Saracens had failed to disclose payments to senior players; and
— The Club had exceeded the ceiling for payments to senior players.
The Panel imposed a sanction of (i) a total fine of £5,360,272.31 and (ii) and a total deduction of 35 league points. The Club initially indicated that it would appeal the decision, meaning that the sanctions would have been suspended pending determination of that appeal. On 18 November 2019, however, Saracens confirmed that no appeal will be pursued.

Saracens is a leading team at the English and European level and has enjoyed a period of unparalleled success as the champions of the Premiership in four of the past five seasons. They are the current title holders of the European Rugby Champions Cup, which they also won in 2016 and 2017. The captain of the English national team, Owen Farrell, and seven other members of the national squad, which reached the final of this year's Rugby World Cup, are among its players. The imposed deduction has taken Saracens to the bottom of the league table, from 3rd place, and means that the Club is at risk of relegation[2].

The Salary Cap
Rugby Union is one of several sports in England (rugby league, county cricket, and basketball) which imposes what is often referred to as a "salary cap" on professional players[3].

For Rugby Football Union **("RFU")**, the provisions for this cap are contained in the Salary Regulations or Salary Capping Regulations, some form of which were first introduced in 1999. The Regulations were designed to act as cost control measures and to ensure the financial viability of clubs, as well as to maintain competitive balance (see §2.2 of the Regulations).

In essence, the Regulations stipulate that Clubs (or a Connected Party to a Club) can only pay their Players or their Connected Parties up to a maximum amount, or "ceiling", of total financial compensation (whether as traditional salary or other payments) within a set period, defined as the "Salary Cap Year" (1 July – 30 June). The maximum amount is expressed as a collective sum which Clubs can pay out rather than restricting what an individual player can be paid. The concept of "salary" is relatively broadly defined in the Regulations (at r.1.1 and §1(a)-(w) of Schedule 1), to include salary, wages and fees as well as bonuses, insurance premiums and accommodation costs.

Background to the case
Limited details as to the facts behind the investigation into Saracens are available and the Independent Panel's decision does not shed any light on the factual circumstances. News reports suggest that the allegations related to business connections (which were openly declared) between players at the Club and persons connected to the Club's ownership, including through the use of jointly held companies or investments .
All that is really known is that, following a nine-month investigation, in June 2019 Premiership Rugby charged the Club with breaches of the salary cap for the three years from 2016-2019. The Club rejected those charges and, according to Premiership Rugby, challenged the validity of the Regulations "on competition law grounds" though it remains unclear what the scope of that challenge was.
The charges were considered by an eminent Independent Panel, chaired by the Rt. Hon. Lord Dyson (former Master of the Rolls and Justice of the Supreme Court). The hearing took place over five days in September and October 2019. The Club initially indicated an intention to appeal the Independent Panel's decision, which would have resulted in a review of that decision by an arbitration body. However, it has now confirmed that an appeal will not be pursued[5].

Comment
Salary caps have become an ever more present feature of European sports, having been well-established in the 'Big Four' professional sports in the United States (baseball, basketball, grid-iron football and ice-hockey) for some time. Salary caps also exist in, for example, the European ice hockey leagues. Although there was some investigation of a potential cap in European football, initiated by the governing body UEFA in 2001, the ultimate cost-control measures selected were "Financial Fair Play". The Women's Super League (WSL), however, does operate a salary cap[6].

It is difficult to decipher or analyse the effect of the Independent Panel's decision on the operation of such salary caps given the paucity of information that is publicly available and the lack of reasons provided. The Panel's only statement was that *"the Panel noted that the salary cap operates in a pro-competitive manner by promoting the objectives of ensuring the financial viability of Clubs, controlling inflationary pressures, providing a level playing field, ensuring a competitive league and enabling Clubs to compete in European competitions."* Nevertheless, two interesting issues arise. Firstly, the Panel's statement suggests that it accepted that competition law applies to the salary cap. Secondly, it would appear that the Panel adopted a relatively broad interpretation of the concept of 'salary'.

In the US, baseball has been exempt from antitrust scrutiny since the US Supreme Court's decision in *Federal Baseball Club v. National League*, 259 U.S. 200 (1922), but other professional sports are not – see, for example in relation to American football - *Radovich v. NFL*, 352 U.S. 445 (1957). The US judicial practice has been to extend a so-called "labor exemption", i.e. exemption from antitrust scrutiny and justification for agreements which pursue positive objectives for labour relations, for collective bargaining agreements concluded between players and Clubs/Leagues in these sports (see, e.g. *Brown v. National Football League*, 518 U.S. 231, 255 (1996)). A number of antitrust challenges to salary caps have failed on this basis (see, e.g. *Wood v. NBA*, 809 F.2d 954 (2d Cir. 1987) and *Mackey v. National Football League*, 543 F.2d 606, 615 (8th Cir.1976)).

As a matter of EU and UK law, the established competition law considerations in the regulation of sport consist of three principal questions namely: (i) does the sporting rule cause a restriction of competition within its overall context?; (ii) are the restrictions caused by the rule inherent in the pursuit of its objectives?; and (iii) is the rule proportionate in light of those objectives?[7]? Also of relevance is the decision in Case C-67/96 Albany [1999] ECR I-5751 in which the CJEU concluded that the requirements of competition law would not apply to collective agreements between employers and employees if such agreements (i) were the result of negotiations between management and labour and (ii) had the effect of improving employees' working conditions (including their remuneration). This is similar in philosophy to the US labour exemption from antitrust rules.

In this case, the key question seems to have been whether, when assessed in context and in light of the specific circumstances of the sport, the Regulations are a proportionate response. On the face of their statement, the Panel's conclusion accepts the premise behind the Regulations and the objectives which are pursued by them – namely emphasizing the importance of the corrective design of the rules, to address any financial imbalances within and between Clubs. This echoes the decision of a CAS Panel restricting common ownership of competing clubs in the same competition (the ENIC case - *AEK PAE and SK Slavia Praha v UEFA*, CAS 98/2000, Digest of CAS Awards II 1998-2000 (Kluwer, 2002) at [150]-[151]).

The second issue of interest concerns the Panel's approach to what constitutes 'salary' in this context, and how the Regulations should be construed. Evidently, this will turn on the specific facts of the case but it does raise a wider question about the scope of financial relationships between clubs and players, as well as third parties associated to them. The Regulations seek to strike a balance between the freedom of players employed by the Club to pursue economic activities outside of their playing career – including with third parties who might have some connection to rugby - and ensuring that there is no circumvention or dilution of the rules designed to maintain competitive balance.

It is regrettable that the Panel's decision has not been published in greater detail, so as to shed light on issues which cut across different sports, and which would no doubt advance understanding of the application of domestic and EU rules to professional sports. The absence of any appeal means that no further detail is likely to emerge. For the moment, therefore, the salary cap emerges intact and is potentially of wider scope than was previously understood by Clubs and participants.

[1] *https://www.premiershiprugby.com/news/premiership-rugby-statement-decision-on-salary-cap-charges*

[2] *See "Saracens boss Mark McCall admits club will sacrifice Europe to avoid relegation as he hails 'united spirit' in victory over Gloucester", telegraph.co.uk, 9 November 2019, available at https://www.telegraph.co.uk/rugby-union/2019/11/09/saracens-boss-mark-mccall-admits-club-will-sacrifice-europe/*

[3] *In addition to a salary cap, county cricket also operates a salary 'collar', i.e. a minimum amount a county must spend on player salaries.*

[4] *See "The Business Links – How Saracens' salary cap breach became the biggest story since Bloodgate", TheRugbyPaper, 12 November 2019, available at https://www.therugbypaper.co.uk/domestic-club-rugby-union/34171/the-business-links-how-saracens-salary-cap-breach-became-the-biggest-story-since-bloodgate/. Contrast this with reports in "Saracens plead their innocence but rugby union's whole structure is on trial", Michael Aylwin, 10 November 2019, Guardian online, which contains a different account of the conduct at issue: https://www.theguardian.com/sport/blog/2019/nov/10/saracens-plead-innocence-premiership-rugby-structure-on-trial*

[5] *See "Saracens: Premiership club set to drop appeal over points deduction and fine after breaching salary cap", I. Parkes, independent.co.uk, 17 November 2019, available at https://www.independent.co.uk/sport/rugby/rugby-union/club-rugby/saracens-rugby-point-deduction-gallagher-premiership-fine-table-rules-a9206236.html.*

[6] *https://www.bbc.co.uk/sport/football/50487790*

[7] See the judgments of the Court of Justice of the EU ("CJEU") in Case C-519/04P *Meca Medina v Commission* [2006] ECR I-6991 at [22]-[28] and [42] and Case C-309/99 *Wouters* [2002] ECR I-1577 at [97].

[8] *This is the definition used by the Commission of the European Communities. Commission White Paper on Sport, at note 210, COM (2007) 391 final (July 11, 2007). Economic scholars doing research in the field also use this definition, see, e.g., Helmut Dietl et al., The Effect of Salary Caps in Professional Team Sports on Social Welfare, 9 B.E. J. ECON. ANALYSIS & POL. 1, 1 (2009); Paul D. Staudohar, Salary Caps in Professional Team Sports, in COMPETITION POLICY IN PROFESSIONAL SPORTS: EUROPE AFTER THE BOSMAN CASE 71, 71 (Stefan Késenne & Claude Jeanrenaud eds., 1999). Three of America's four largest leagues have hard team salary caps: the National Basketball Association (NBA) has had a salary cap in place since 1984, the National Football League (NFL) followed in 1994, and the National Hockey League (NHL) implemented one in 2005. Additionally, NBA and Major League Baseball (MLB) have a luxury tax*
Andrew Howarth, The Impact of the Salary Cap in the European Rugby Super League, 3 INT'L J. BUS. & MGMT. 3, 4 (2008).
See, e.g., Mélanie Aubut, When Negotiations Fail: An Analysis of Salary Arbitration and Salary Cap System, 190 SPORTS LAW. J. 189 (2003); D. Albert Daspin, Of Hoops, Labor Dupes and Antitrust Ally-Oops: Fouling Out the Salary Cap, 62 IND. L.J. 96 (1986); Scott J. Foraker, The National Basketball Association Salary Cap: An Antitrust Violation?, 59 S. CAL. L. REV. 157 (1985).

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6 January 2020

Nick De Marco QC

TPO in Football: What it is, how it is developing, and what it should be

The issue of Third Party Ownership in football remains a live one, despite FIFA's outright prohibition in 2015. The below article, written by Nick de Marco QC was published by Football Legal.

Defining TPO?

The issue of Third Party Ownership in football remains a live one, despite FIFA's outright prohibition in 2015. Any analysis of the current landscape needs to start with an understanding of what is meant by Third Party Ownership, or TPO for short. A short, precise, definition is that it describes:

"A financial interest in the future transfer of a player's registration."

It reflects the practice, previously widespread in large parts of world football, whereby an investor, the third party, would invest in a player, a club or an academy, usually by way of a loan, in return for a right to a percentage of the future transfer fee or fees that the player who is the subject of the investment attracts. It is special to football because football is one of the only global sports with an open transfer market whereby players are traded between clubs, and because of the substantial sums that can be exchanged in football transfer fees.

For example, in the last summer transfer window (2019) alone, there were 530 transfers to clubs within FIFA's top 5 football nations (England, France, Germany, Italy and Spain) attracting a total of USD 2,689.7 million3 (approx. EUR 2,450 million) - an average of over USD 5 million (approx. EUR 4.55 million) per transfer. A third party that had a 30% interest in the future transfer value of a player might easily receive over USD 1.5 million (approx. EUR 1.36 million) on an average European transfer, and the sums that can be earned on some of the larger transfers, involving tens of millions of dollars, are obviously much higher.

TPO was a common practice in many parts of the world before FIFA banned it – in particular in Latin America and in Spain, Portugal and Italy. It allowed many smaller clubs to compete with bigger clubs by being able to purchase players for less than they would do had there not been third party investors holding some of the rights of the player. Typically, a young promising player from, for example, Latin America could be purchased for a reduced price from a club because a third party with a right to the future transfer value of the player would cover some of the fee to the club or investment in the player. That would allow the player to perform on a bigger stage, provide the club engaging him with a promising player at a reduced price enabling it to compete with bigger clubs, and often lead to the sale of the player to an even bigger club to the benefit of the selling club, the third party and the player. In this model, everybody seems to be a winner.

The main problem with TPO, however, was the risk of Third Party Influence, that is the risk of third party investors influencing the playing or trading polices of the engaging club. Third Party Influence leads to a number of other problems – potentially undermining the integrity of football, especially where a third party has an interest in a number of players in the same competition, and undermining team stability where third parties are incentivised to force multiple transfers for economic and not football reasons. Thus, for many years Third Party Influence, as distinct from Third Party Ownership, was prohibited by FIFA. Regulation 18bis of the FIFA Regulations on the Status and Transfer of Players (RSTP) provides (amongst other things):

"(1) No club shall enter into a contract which enables the counter club/counter clubs, and vice versa, or any third party to acquire the ability to influence in employment and transfer-related matters its independence, its policies or the performance of its teams."

The focus of this regulation is influence - the third party being in a position to affect the employment or transfer policies of the club employing the player, or indeed the performance of its teams - for example to influence the selection of players for a match. The prohibition is not only on direct influence itself, but on any contract that enables a party to "acquire" an interest.

FIFA's Ban on TPO

But in 2015 FIFA decided to extend the ban on Third Party Influence to a total worldwide prohibition on TPO. This was a controversial move, not least because TPO was a common means to fund clubs across many regions - before 2015 England, France and Poland were the only three countries in the world that banned the practice. The material part of Article 18ter, the prohibition on TPO, reads as follows:

"No club or player shall enter into an agreement with a third party whereby a third party is being entitled to participate, either in full or in part, in compensation payable in relation to the future transfer of a player from one club to another, or is being assigned any rights in relation to a future transfer or transfer compensation."

So, for example, a loan from a bank to a football club securitized against a 20% assignment of the future fee the club might receive from a transfer of its best playeris prohibited. A club's right to a "sell-on fee" from a second club to which it has sold a player (something not prohibited, because the first club is not a "third party") cannot be assigned to another party. Imagine Club A sells Player X to Club B for GBP 1 million (approx. EUR 1.17 million) and there is a 25% sell-on fee; three years later Player B's value has increased to GBP 4 million (approx. EUR 4.7 million), Club A shall receive GBP 1 million when Club B sells the Player for GBP 4 million to Club C. But Club A cannot assign the right to that future sell-on fee, even though there is little real risk in Club A (as a third party) assigning the right or indeed interfering in the ability of Club B to decide whether or not to sell Player X.

The legality of FIFA's ban

The ban on TPO led to a spate of legal challenges across Europe. The most significant is the case of CAS 2016/A/4490 RFC Seraing v FIFA. The Belgian football club, RFC Seraing, had concluded TPO contracts with the company Doyen Sports in breach of Article 18ter of the FIFA RSTP. FIFA's Disciplinary Commission imposed a 4-year transfer ban and a substantial fine against the club. The club's appeal to CAS included a claim that FIFA's ban on TPO breached EU Law.

Many previous CAS tribunals have been reluctant to properly scrutinise whether sporting rules are in accordance with EU Law, but in this case, at least, the tribunal found that EU Law was applicable. They went on to hold that Articles 18bis and 18ter of the RSTP constituted a restriction to the free movement of capital in the EU that could be justified by a legitimate aim so long as the restrictive measures constituted a proportionate means to attain that objective. FIFA said that the legitimate objectives for the ban were:

- Preservation of contractual stability;
- Preservation of the independence and autonomy of clubs' recruitment policy;
- Securing the integrity of football and preservation of the loyalty and equity of competitions;
- Prevention of conflicts of interests and securing transparency in the transfer market.

The CAS found the measures were proportionate: they did not limit all types of investments in clubs, they followed extensive consultation, and the club had failed to specify less restrictive measures that could achieve the legitimate aim.[3]

The CAS decision in *RFC Seraing v. FIFA* was then challenged in the Swiss Federal Tribunal (the SFT) - the main argument being that the arbitration clause providing CAS with jurisdiction to consider the appeal from FIFA was unlawful because (amongst other things) of FIFA's dominant position in CAS. The SFT rejected the challenge, finding the CAS was *"a genuine, independent and impartial arbitral tribunal"*.[4]

RFC Seraing also brought a challenge to the CAS decision in the Belgian courts. The Belgian Court of Appeal decided that the FIFA statute providing that CAS had jurisdiction to determine disputes was not a valid and enforceable arbitration clause as a matter of Belgian Law, as it was too vague and did not concern a *"specific legal relationship"*.[5]

Despite the interesting, and as yet not finally resolved, issues concerning the validity of the CAS arbitration clause, FIFA's ban on TPO has so far resisted legal challenge.[6] That does not mean it will resist every other legal challenge - not least as the CAS in *RFC Seraing* remarked that the appellants had failed to specify the less restrictive measures that could achieve the legitimate aims pursued by the ban, and thus failed to show it was disproportionate. In another case, on other facts, possibly before a different tribunal, where a party does so specify, the result may be different.

FIFA's 2019 amendment to the rules – Players are not Third parties

In June 2019 FIFA amended the "Definitions" section of the RSTP to clarify that a player was not a Third Party in relation to his own transfer. While this might seem obvious, until the change in definitions the position was uncertain. The previous definition of Third Party under the RSTP was as follows:

"Third party: a party other than the two clubs transferring a player from one to the other, or any previous club, with which the player has been registered."

On one (and the literal) reading of the definition the player would be a Third Party: he is not one of the two clubs involved in his transfer. Yet it seems odd that while the two clubs transferring the registration of the player are entitled to have an economic interest in respect of the player's transfer, the player himself cannot. The situation was so uncertain that disciplinary proceedings were brought in four different cases against clubs[7] who had entered agreements entitling some of their players to receive compensation linked to their future transfer to another club.

The FIFA Disciplinary Committee decided that the agreements were part of the remuneration due to the players under their employment relationship so that the players could not be considered a Third Party with respect to their own future transfers.[8]

FIFA's new *"Definition 14"* in the June 2019 edition of the RSTP makes the position certain:
"Third party: a party **other than the player** being transferred, the two clubs transferring the player from one to the other, or any previous club, with which the player has been registered." (emphasis added).

A number of important consequences flow from players having a right to compensation related to their future transfer. There are key new areas for clubs, players, player agents and federations to consider.

Clubs should be able to benefit from including clauses in an employment contract with a player that grants him a percentage of any future transfer fee received for his transfer instead of agreeing to a higher wage demand from the player. This may provide clubs with some of the advantages of TPO - a smaller *"cash-strapped"* club may be better able to compete for promising players with a richer club that it would be unable to compete with if it was only able to offer salary and not an interest in a future transfer. It costs the smaller club nothing during the employment of the player to agree to assign part of the future transfer fee. Taken with the stringent spending limits on clubs arising from some of the various *"financial fair play"* rules in operation in football, it may provide a very useful tool for minimising a club's annual expenditure. One can therefore expect clubs to be keen to utilise this contractual mechanism in future negotiations.

The player may also find the promise of a share in a future transfer fee an enticing prospect. A young player, hoping his value may reach a few million after a couple of years, but having not yet sufficiently proved himself to secure a high salary, is likely to want to secure a percentage of that future fee if he can. A more experienced, highly valued player with confidence a club should be able to transfer him for a significant fee will also be interested in a promise of a future share of that sum to be included in his contract.

Increasingly we see players insisting on *"Release Clauses"* in their employment contracts - clauses that allow the player to insist on a transfer if a minimum fee is offered to the club. These become more significant where the player has an interest in a future transfer fee. The fundamental purpose of a Release Fee is to provide the player with some security that his club shall not be able to tie him to a contract by insisting on too high a fee, when the player could obtain a far better contract from another club if the transfer took place. With the player having an interest in the future transfer fee there is an additional consideration. The player might want a transfer to take place at a certain fee precisely because of the percentage he shall earn from that transfer.

Some of the main objections to TPO may arise - the risks to *"contractual stability"* and the dangers of a party influencing the transfer policies of clubs. Players may have an active interest in forcing a transfer to take place, by triggering a Release Clause, because of their economic interest in the transfer fee. This is not *"Third Party Influence"* however, because the player is not a Third Party under the new definition.

The other issue for players will be what, if anything, they can do with their interest in the future transfer fee. If a player has a right to 20% of a future fee, and he is relatively confident that should mean a few hundred thousand pounds, he may wish to borrow money against that future right, or to use it to pay his agent. But this would likely place the player in breach of 18ter because he may be entering into an agreement with a third party whereby that party becomes entitled to compensation payable in relation to the future transfer of the player. It depends on the agreement, however. If the player believes he should be transferred by September 2022 and would receive at least GBP 200,000 (approx. EUR 235,000) as a result he could not enter an agreement with a third party to borrow GBP 200,000 payable on condition of his transfer for a certain minimum amount, but he would be able to borrow the same sum on condition he pays it back, regardless of any transfer, by the end of September 2022. There are likely to be all sorts of permutations of this as investors and player's agents think of creative ways to utilise the permitted future financial interest of players – and these are likely to raise some complex regulatory issues.

The new definition is very important for agents. It is almost always the agent (and not the player) who will be involved in contractual negotiations of the player's contract. An agent negotiating on behalf of a player is obliged to seek the best deal for the player, and usually that means (amongst other things) the highest wages possible. Since the agent's commission is linked to the player's salary this creates no conflict. But what about the future transfer interest? This may be a considerable sum in some cases, and the player may want his agent to negotiate the highest percentage possible linked to the future transfer fee. However, this may be at the expense of the player's basic wage. That puts the agent in a difficult position - an agent is only entitled to be remunerated *"on the basis of the player's basic gross income for the entire duration of the contract"*.[9] That suggests he is not entitled to a percentage of the amount the player can receive from his future transfer (even though the FIFA Disciplinary Committee seem to regard this as remuneration under the employment contract - it is not "basic gross income"). The danger here is that FIFA has created a regulation that puts agents in direct conflict with the interests of their clients and this is further compounded by FIFA's plans to bring in a mandatory cap on agents' commissions of 3% of the player's salary.[10] As *Roberto Nájera Reyes* and *Matilde Costa Dias* point out in a previous edition of *Football Legal*[11], there are risks some player's agents may seek side agreements with their players entitling them to a share of the future transfer interest, outside of FIFA's knowledge and control - such schemes raise the real prospect of TPO (and indeed Third Party Influence) being re-introduced by the unregulated *"back door"*, and of players and agents exposing themselves to disciplinary action.

FIFA's Abdication of Regulation

2015 was the year FIFA decided to walk away from regulating two important sectors of the global transfer market, football agents and TPO.

Before 2015, FIFA operated a worldwide football agents' licensing system. In 2015, it scrapped agents' licensing, effectively removed agents as participants in football, opened up the market and brought in new lighter touch *"Intermediary"* regulations. The name, *Intermediaries*, never really caught on. The deregulation was, as many of us warned it would be[12], even more of a disaster.

In the same year, FIFA introduced its worldwide ban on TPO. The reason for both decisions were remarkably similar. FIFA decided that effective regulation of these key financial areas of the world transfer market was just too difficult for it to do. The easy way out, it assumed, was not to regulate but, in the case of agents to deregulate, and in the case of TPO, to simply ban the whole thing. A decision by the regulator to essentially abdicate its regulatory responsibilities was dressed up and sold to the stakeholders, such as FIFPro the players union, the clubs and the national federations, as (with respect to agents): breaking the power of big agents and reducing the amount of money *"going out of the game"*; and (with respect to TPO): ending *"modern slavery"*. Such hyperbolic window dressing may have persuaded FIFA Congress, but has since proven to be empty rhetoric.

"A properly regulated and transparent system of TPO could be utilised in the interests of clubs and players alike"

With respect to agents, the numbers involved radically increased, but this time they had no education, no licensing and no quality control. The sums paid to agents increased, as a natural result of player's wages rising. FIFA has finally come to realise its mistake and are now committed to bringing back a worldwide licensing and regulatory system (though it still mistakenly believes a mandatory cap on agents fees would be lawful and effective).

But TPO remains unregulated. A properly regulated and transparent system of TPO could be utilised in the interests of clubs and players alike - but that would require significant administrative resources to be dedicated and FIFA continue to prove reluctant to do so. The result of the worldwide ban on TPO was as predictable as the result of the deregulation of agents: practices have been driven underground; new, complex and less transparent methods of third party financing in football have been created; other ways of achieving similar advantages, such as multi-ownership of clubs in different jurisdictions, have prospered. These developments risk the same concerns associated with TPO, in particular the risks of third party influence - but the failure to regulate heightens the risks: unregistered and underground interests, happy to evade and breach rules that do not apply to them, are far more of a risk to the integrity of football than regulated and transparent interests.

Some claim that one result of the ban of TPO is the rise of so called *"bridge transfers"* - where clubs collaborate to transfer players through a *"bridge"* club to a destination club where the player was never fielded by the *"bridge"* club. FIFA's *"Football Stakeholders Committee"* announced plans to prohibit "bridge transfers", as part of the current reforms to the world transfer market.[13] But precisely how a *"bridge transfer"* is defined by FIFA, and how the regulation will work in practice, remains to be seen.

Towards rational regulation

The real problem with all of the arguments about TPO, and indeed many of those about the regulation of agents, is that they ignore the market reality of football. Unlike most other professional sports, and unlike normal employment relationships, the world football transfer market is a peculiar thing. Despite the enormously significant *BOSMAN* [14] case, there is an unfinished revolution in the football transfer market. It remains the case that footballers are unable to move freely between clubs by giving reasonable notice and/ or paying the club a reasonable

compensation fee, commensurate, for example, with the outstanding wages due for the unexpired part of the contract. Rather clubs can hold on to and trade footballers for increasingly rising transfer fees. That is why the most trotted out objection to TPO, that it is a type of "modern slavery" is so absurd. It is the trade in football players carried out by their employers, the clubs, which is, (if anything is) "modern slavery" - all that TPO does is assign a portion of the selling club's interest to a third party. A slave owner allowing another to use his slave does not create slavery by doing so, rather it is the existence of the relationship of slave ownership in the first place that allows for the arrangement - in a similar way it is the football transfer market that is the cause of players being traded for economic reasons, not the interests of third parties in that trade.[15]

Many of the objections to the role of football agents are equally facile - in particular in relation to the complaints about agents taking a share of transfer fees or working for different parties. In a world without the transfer market player's agents could be just that, negotiating wages for players free to move from club to club. FIFA has created the behemoth that is the world transfer system but then decries or tries to prohibit the necessary economic consequences of it.

"Despite the enormously significant BOSMAN case, there is an unfinished revolution in the football transfer market"

There are various rational approaches to regulation of football. FIFA could abolish the transfer system altogether, allowing for greater freedom of movement and competition, getting rid of the need for TPO, limiting the role of agents but inevitably increasing player power which would inevitably be opposed by clubs and national federations. That is one rational approach. Another is a more heavily regulated system, similar to that operated in many North American sports, where there is less competition, salary caps reached by collective bargaining and no transfers of players between teams. That is another rational approach. But FIFA's system is a problematic hybrid. There is in one respect heavy regulation - players being unable to move freely, transfers being permitted only during limited times of the season and so on. On the other hand, player salaries and transfer fees are unregulated, there are no caps. The parties are free to decide. But clubs are not permitted to spend as much as their investors choose, by *"financial fair play"* and are not permitted to borrow money against their most valuable assets (the players). Players are inhibited not only by the transfer system itself but by not being permitted to accept investment from third parties to allow them to develop and move from a smaller club (or footballing nation) to a larger one. Financial fair play creates an artificial obstacle to their wages and the threatened cap on their agents' fees reduces their bargaining position with employer clubs. The result of all these measures is actually to weaken the position of players as against clubs, and increase the power and competitive advantage of the biggest clubs against the smaller clubs. That in turn threatens the integrity and attraction of football itself. Which is why it is a mistake to consider questions such as the prohibition of TPO, the implementation of FFP or the capping of agents fee in isolation as opposed to within the context of the global football transfer market.

In the author's opinion, for so long as the world football transfer market exists, TPO should be permitted but effectively regulated.
Its advantages are obvious – in particular for clubs and players. Smaller clubs especially can benefit from being able to acquire the services of promising young players they would be unable to compete for if it were not for the investment of a third party. Financially struggling clubs can borrow money against the future transfer value of their players. Players, especially from poorer countries or lower leagues, can benefit by investment in them or their academies that would not be available if the investor could not see a return; such investment might help the best of those players get on the world stage and start a lucrative professional career.

On the other hand, there are no **necessary** downsides of TPO. The *"modern slavery"* argument is flawed for as long as the transfer market exists. The legitimate concerns about third party influence and the consequential risks to contractual stability, integrity, and corruption can all be best met by effective and transparent regulation. Third Party Interests should be registered and regulated. TPO investors would have to pass similar fit and proper persons tests as may be applied to club owners or agents, and would have to be transparent. The percentage of interests allowed in any player or club should be limited and defined. These sorts of steps would no doubt involve the expenditure of significant resources by FIFA and others, but taxes on transfer fees can always be brought in to pay for such additional resources, as well as to pay for the development of grassroots football.

"For so long as the world football transfer market exists, TPO should be permitted but effectively regulated"

The argument is a little like that concerning betting in football. You can ban betting outright, worldwide, and banish it from football. That is one rational approach. Or you can allow betting, but if you do so it must be properly regulated. Of course, rules need to be in place to prevent corruption linked to betting, but there is increasing pressure to introduce regulation to prevent some of the other necessary evils of betting in sport - in particular, the rise of addiction to gambling by those who watch sport. Taxes on betting sponsorship where some of the monies raised is used to combat addiction to gambling is one such reform growing in popularity. [16]

The danger of corruption linked to sports betting usually arises where you have criminal gangs operating betting syndicates in countries where betting is unlawful (and therefore by nature those involved in bookmaking are criminals) placing bets on sports where betting is lawful. The prohibition of TPO in a global market where economic interests of players are already bought and sold causes similar problems - third party interests are an inevitable consequence of the global transfer market and if they are prohibited and underground, as opposed to open and regulated, they are far more likely to have a negative and corrupting influence.

[1] *Daniel Geey is a Partner in the Sports Group at Sheridans solicitors. A short article he co-wrote, "Third Party Investment Update: Players Can own their Transfer Rights" is available on his blog: www.danielgeey.com.*
[2] *Award in French: http://jurisprudence.tas-cas.org*
[3] *5 For an analysis of the CAS Award, see: "RFC Seraing at the Court of Arbitration for Sport: How FIFA's TPO ban Survived (Again) EU Law Scrutiny", Antoine Duval, Asser International Sports Law Blog, 26 April 2017; www.asser.nl.*
[4] *SFT Judgment 4A_260/2017 of 20 February 2018 par. (3.4.1). For an analysis of the SFT Award, see "SFT Judgment 4A_260/2017 in the TPO case between FC Seraing v. FIFA & the Brussels Court of Appeal Decision: A parallel Universe", Despina Mavromati; http://sportlegis.com. See also, a case review by Jan Kleiner in Football Legal Database: www.football-legal.com.*
[5] *For an analysis of the Decision see "Brussel's Court of Appeal Challenges CAS Jurisdiction Clause in FIFA Statutes", Simon Grossobel, Sports Legal, 17 September 2018: www.sports.legal. See also, a case review by Jan Kleiner in Football Legal Database: www.football-legal.com*
[6] *8 In addition, on 12 December 2019, the Brussels Court of Appeal finally dismissed the substance of appeal, acknowledging the full effect of res judicata (that a final judgement no longer subject to appeal cannot be litigated again in another court) confirming the decision of the CAS and the Swiss Federal Tribunal.*
[7] *SV Werder Bremen (Germany), Panathinaikos FC (Greece), CSD ColoColo (Chile) and Club Universitario de Deportes (Peru).*
[8] *See FIFA Media Release, 26 June 2018: "Latest decisions of the FIFA Disciplinary Committee in relation to third-party rules": www.fifa.com.*
[9] *See Regulation 7.1 of the FIFA Regulations on Intermediaries (mirrored by e.g. Regulation C.3 of the English FA's Regulations on Working With Intermediaries)*
[10] *FIFA's proposals for a mandatory cap on remuneration payable to player's agents of 3% of their commission (rising to 6% only if they act for both the engaging club and the player under a dual representation contract) were approved by the FIFA Council in October 2019 and it has been suggested the cap shall be brought in from July 2021. There are likely to be a number of challenges to the legality of the proposed cap throughout Europe, however; the author is acting for a number of English and European agents in respect to such challenges*
[11] *The new definition of Third-Party in the FIFA RSTP and its potential consequences, R. Najera Reyes & Matilda Costa, Football Legal #11 (June 2019), p. 59-61*
[12] *See, e.g. "The New FA Football Intermediaries Regulations and the disputes likely to arise", Nick De Marco, Blackstone Chambers Sports Bulletin, April 2015: www.blackstonechambers.com.*
[13] *Football stakeholders endorse landmark reforms of the transfer system - FIFA Media Release, 25 September 2018: www.fifa.com.*
[14] *ECJ, 15 December 1995, Case C-415-93, Union Royale Belge des Sociétés de Football Association ASBL v. Jean-Marc Bosman*
[15] *FIFPro, the international players' union, has previously challenged the existence of the world transfer market (see, e.g: "FIFPro challenge the football transfer system", Nick De Marco & Dr Alex Mills, 9 February 2016 (www.sportslawbulletin.org) and may be renewing calls for it, and transfer fees, to be abolished (see: www.smh.com.au).*
[16] *See, e.g. "TAX THE BOOKIES: Big five sports to push new government for betting crackdown and demand 'fair return' on profits." By Matt Hughes, Daily Mail, 22 November 2019, reporting on lobbying by the English Premier League, The FA, the ECB, the RFU, the RFL and the LTA for a tax on bookmakers profits to improve grassroots facilities and fund anticorruption measures: www.dailymail.co.uk.*

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Celia Rooney

For the Love of Money: Exploring the Decision in the Saracens Salary Cap Casee

In November 2019, an Independent Panel of Premiership Rugby handed down its eagerly anticipated decision concerning the Club's alleged breaches of the Premiership Rugby Salary Regulations (the "Regulations"), which impose salary caps on elite rugby clubs.

As my colleague Ravi Mehta's blog post regarding salary caps within UK and EU sports regulation (found on page 24) records, a distinguished panel which included the Rt Hon Lord Dyson found against the Club, imposing a total fine of £5,360,272.31 and docking it 35 league points. The points deduction resulted in the relegation of the reigning premiership union champions to the second tier of the game.

The reasons for that decision, and indeed, the conduct giving rise to the charges were not originally disclosed. The decision was instead confined to a brief public announcement and an accompanying statement (available here[1] and here[2]). The Panel's decision[3] has now been published. Running to over 100 pages, the decision is an interesting read for sports lawyers and competition lawyers alike.

The Premiership Rugby Salary Regulations

The stated objectives of the Regulations are: *"(a) ensuring the financial viability of all Clubs and of the Aviva Premiership competition; (b) controlling inflationary pressures on Clubs' costs; (c) providing a level playing field for Clubs; (d) ensuring a competitive Aviva Premiership competition; and (e) enabling Clubs to compete in European Competitions"* (Regulation 2.2). The Premier Rugby Limited ("PRL") - the Respondent to the proceedings – is tasked with enforcing those regulations in an *"appropriate and proportionate manner"* (Regulation 2.2).

In order to meet those objectives, the Regulations provide for a detailed set of rules which cap the sums that can be spent on player salaries by the clubs in the top-tier of rugby. The cap is a 'collective cap', or *"Senior Ceiling"*, comprised of the combined salaries of all the Club's players in a particular year (referred to as a Salary Cap Year or "SCY"). The Regulations do not therefore purport to limit the sum that a club can pay an individual player.

The types of payments that constitute 'Salary' are set out in Schedule 1 of the Regulations, the interpretation of which is at the heart of the Saracens decision. For the purpose of the Regulations, "Salary" is defined broadly (Schedule 1, para. 1). It includes any *"salary, wage, fee, remuneration…"*, as well as any *"payment or benefit in kind which the Player would not have received if it were not for his involvement with a Club"*. Salary is further defined to include *"any loan pursuant to which the Player or any Connected Party of the Player [as defined] is not obliged to replay the full sum advance in the Salary Cap Year in which the loan is made"*.

The Schedule also specifies a number of express exceptions to the definition. The exceptions include certain payments or benefits in kind made in connection with *"individual sponsorship, merchandising, employment or other individual arrangements"*.

The Regulations are made by the Premiership Rugby Board, which is comprised of the 12 Premiership clubs, as well as the Salary Cap Manager ("SCM"). The role of the SCM is to monitor and investigate player recruitment and remuneration across clubs, to ensure the system is managed in a fair and reasonable way (Regulation 6). As part of that role, the SCM is tasked with determining what payments or benefits in kind should, on the balance of probabilities, reasonably be excluded from the meaning of 'Salary'.

The Regulations enumerate a number of factors relevant to that determination. While the SCM has an absolute discretion as to 'any other matter' that may be relevant to his or her decision, the Regulations specify that the SCM is to take into account factors including the following:

- whether the arrangement is with a 'Connected Party' (as defined)
- whether the transaction was negotiated at arm's length or is typical of a commercial contract of its type, or whether it exceeds the market value
- whether the arrangement was negotiated around the time of the Player's contract
- whether the Player's obligations are linked to his Club, are performed at its direction or in the Club's uniform
- whether any remuneration is payable 'as and when' services are performed
- any involvement of any Club agent in the negotiation of the arrangement

A Club which exceeds the salary cap is liable to be fined and suffer a deduction of league points. The penalties that may be imposed form part of a graduated scheme.

The charges

The Saracens are a London-based rugby club. In recent years, they have been the dominant force in English rugby union and a serious threat in European competitions.

The Club was charged with a breach of Regulations 3 and 11.1. The former prohibits clubs from exceeding the 'Senior Ceiling', which specifies the collective sum that they are entitled to spend in the relevant SCY. The latter specifies procedures that must be followed where the Senior Ceiling is exceeded by more than 5% (which in the relevant SCYs equated to £350,000).

The proceedings concerned the Saracens' payments of Salary in SCYs 2016/17, 2017/18 and 2018/19. More specifically, the PRL alleged that:

- **The Saracens had failed to declare £1,134,968.60 of salary in SCY 2016/17.** The SCM concluded that the Club had failed to declare salary contributions, which were alleged to arise from: (1) capital contributions to the purchase of properties and contributions to capital expenditure for renovation and refurbishment, made by the Club's majority shareholder and director, Mr Wray; (2) the grant of a purchase option in respect of a property purchased by Mr Wray; and (3) payments made to Players by MBN Productions, a hospitality company owned and operated by Mr Wray's daughter and son-in-law.
- **The Saracens had failed to declare £347,645.28 of salary in SCY 2017/18.** That sum was alleged to be comprised of: (1) the 20% stake that Mr Wray and Mr Silvester (another Club director) held in a Player's home; (2) the exercise of the purchase option granted in 2016/17; and (3) further contributions by Mr Wray towards the renovation and refurbishment of the properties in question.

- **The Saracens had failed to declare over £800,000 of salary in SCY 2017/18**, primarily attributable to a share purchase by Mr Wray, Mr Silvester and the Club's then board member, Mr Nick Leslau.

The Club had previously been the subject of investigation under the Regulations. In 2014, it was charged with failing to cooperate with an Investigatory Audit by the SCM. The charge gave rise to disciplinary proceedings, but was ultimately settled by the Saracens in 2015.

The preliminary issue – the competition law implications of the decision

The Saracens challenged the legality of the Regulations as contrary to competition law. It was common ground that the Regulations amounted to a decision by an association of undertakings for the purpose of Article 101 TFEU. That was the principal basis of challenge, although an abuse of dominance was also alleged. The competition law issue was determined as a preliminary point.

The Saracens claimed that the Regulations had both an anticompetitive object and effect. The Panel rejected both allegations. As to the former, the Panel relied on the decision in Queens Park Rangers v English Football League, in which a distinguished arbitral panel had concluded that the 'Financial Fair Play' Rules ("FFP Rules") did not amount to an infringement of Article 101 TFEU or the Chapter I prohibition under the Competition Act 1998. The Panel recognised that the FFP Rules did not involve a salary cap, and instead limited the investment owners could make in football clubs. It found that the decision strongly indicated that *"rules of [that] nature aimed at promoting financial stability are not of such a nature as to reveal a sufficient degree of harm to competition absent an examination of their effects"* (para. 33).

The stated objectives of the Regulations included, *inter alia*, protecting financial stability, promoting a competitive balance between the clubs, and ensuring that the sport was attractive to spectators (para. 34) and were consistent with EU law. The measure adopted need not be the least restrictive means of achieving those objectives since the CJEU recognised that a margin of appreciation was afforded to the organisers of sports competitions (para. 42-47). There was no evidence of a subjective intention to distort competition; indeed, the Saracens' witnesses were broadly supportive of a salary cap (albeit in a different form).

Nor were the Regulations found to have an anti-competitive effect. The Saracens contended that the PRL had a *"captive group of players – elite English qualified players"* (para. 75), arising from the "English club only" rule of the RFU. The Court rejected a market so defined as there was no evidence that only elite English players chose to remain in jurisdiction or that they were paid below the market rate. Nor was there evidence of an adverse effect on the global market for elite players – the Saracens' fall-back market definition. Any claim that the cap had had a deleterious effect on the Club's performance was countered by its stellar results.

The Saracens had not in any event put forward any 'counterfactual' that would apply absent a salary cap. It was not permissible to assume a counterfactual of no restriction without any other change to the competitive landscape - *"a counterfactual has to be realistic: what would have happened in the competitive landscape had the restriction in issue not been put in place"* (para. 89). The Panel rejected the Saracens' suggestion that *"clubs would compete on an unfettered basis", since that had "led to financial ruin for some clubs in the past and is too big a risk for the PRL and clubs, including the Saracens, to accept"* (para. 103). The relevant counterfactual was therefore *"some other form of financial self-discipline imposed by clubs on themselves through the PRL"* which, in all likelihood, would be a *"differently organised salary cap"* (para. 101).

The Panel concluded that the Club had not discharged the burden of proof so as to establish an effects restriction. Amongst other things, evidence as to the continuing financial viability of clubs in the Aviva Premiership and the success of English clubs in European competition supported a finding that the Regulations were pro-competitive (para. 107-110).

The decision on the charges

The Panel also substantially upheld the decision of the SCM, rejecting the Club's invitation to conduct a de novo review. The Panel instead exercised a review function, assessing the judgment exercised by the SCM against the various 'Salary factors' outlined above. That approach was said to be justified since the question as to what constitutes salary was not a *"hard-edged judgment, but one on which opinions can reasonably differ"* (para. 134).

Applying that approach, the Panel found:

- **That the capital contributions and contributions to capital expenditure by Mr Wray constituted Salary.** The Tribunal did not express a view as to the motive or purpose of the payments, but found that this was the true meaning and effect of the payments (para. 179). The SCM was not only reasonably entitled, but right, to conclude that the transactions were not made at arm's length (para. 183).
- **The purchase options amounted to Salary,** notwithstanding the fact that the player did not in fact profit from those arrangements. The SCM was required to determine whether an arrangement gave rise to salary each SCY: *"He cannot wait to see what happens in a later SCY before determining it. The scheme… does not admit of a "wait and see" approach"* (para. 203).
- **The payments from the hospitality company amounted to Salary,** and there was no evidence to show that any of the events in question had in fact taken place (para. 209). The SCM's conclusions fell within the range of reasonable decisions (para. 219).
- **The buy-out of the 20% share that the directors had in a Player's home constituted Salary.** Saracens had argued that Mr Wray and Mr Silvester had received a higher price in exchange for delayed repayment, such that those repayment terms did not involve a net transfer of value to the Player, who would not receive the 20% interest until he had repaid. The Panel concluded that it was not required to determine whether that arrangement amounted to a loan. The Player had received property without having to pay for it during the period of deferment of payment of the price. The transaction was not at arm's length.
- **The SCM was reasonably entitled to find that the purchase price under the share purchase agreement was above the market value and constituted Salary.** Valuation was not a science and that conclusion was open to the SCM.

The decision on sanction
The Panel found that, on a strict application of the Regulations, the financial penalties payable amounted to £5,360,272.31 and 70 league points fell to be deducted. While it declined to exercise its discretion to reduce the former, the Panel reduced the points deduction to 35. It nonetheless emphasised the seriousness of the Saracens' breaches, finding that the Club *"continually and recklessly"* failed to comply with its obligations to cooperate, that the case was not one involving an isolated breach, and that the Club had *"massively"* exceeded the financial limits in the Regulations (Appendix 3, para. 7).

Case comment
The Panel's decision is comprehensive, running as it does to 103 pages. The decision on the preliminary issue is important reading for any budding lawyer with an interest in both sports and competition. That is particularly so in circumstances where the decision in **QPR v EFL** – something of a precursor to this case – was unpublished at first instance and settled on appeal.

Notwithstanding the distinguished composition of the Panel, the Decision may raise a few eyebrows. The Panel concluded, for example, that it was unconstrained by the limits of the original Charge. It is hard to understand how that finding can be reconciled with the 'review function' the Panel purported to adopt. Nor, with respect, is it immediately clear why the question as to what constitutes 'Salary' is anything other than hard-edged and therefore why a 'review-only' role was in any event justified.

Query, however, whether the Saracens would have profited from *de novo* findings. The Panel was clearly unimpressed by the evidence that the Saracens had offered for the complex financial arrangements it had entered with its Players in respect of the more serious charges against the Club. And while the Panel was careful to avoid any finding as to the motive behind those arrangements, its finding that the Saracens were *"continually and recklessly"* in breach of its obligations is a serious one. It is perhaps unsurprising, however, where the Club had repeatedly failed to disclose the arrangements to the SCM.

The Club has since apologised unreservedly for its mistakes. That apology unfortunately came too late to be of assistance in mitigation.

[1] *https://www.premiershiprugby.com/news/premiership-rugby-statement-decision-on-salary-cap-charges*
[2] *https://www.premiershiprugby.com/news/joint-statement-by-premiership-rugby-and-saracens*
[3] *https://media-cdn.incrowdsports.com/fa097ce0-fc01-4b01-bbb0-e147ffa67de6.pdf*

13 March 2020

Nick De Marco QC

Coronavirus, sport & the law of frustration and force majeure

The decision of the English Premier League, Football League and the Scottish FA to suspend football matches as a result of corona virus is the latest in a series of unprecedented responses to the global pandemic. Nick De Marco QC discusses the legal issues in sport arising from the worldwide health crisis.

Coronavirus is affecting every part of our lives, and while the health effects are of most immediate concern, the long term social and economic implications are also likely to be very significant. Legal issues arising in commercial, employment and human rights law will be played out for many years to come. They are often brought into especially sharp focus in sport – because sporting events are a common cause of people coming together in large groups, but also given the commercial and cultural value of many of those events. The news about the development of the virus throughout the world is punctuated with references to the cancellation of major sporting events, or for arrangements being made for contests to be played 'behind closed doors'.

What happens when a sports event gets cancelled as a result of steps being implemented by a government or regulator to prevent the spread of Covid-19? Or where a team or player refuses to participate because of their fears of infection? Or where a match must be played behind closed doors, but spectators have already bought their tickets? The litigation implications are almost endless: claims by broadcasters and sponsors against those not performing their obligations; by players for negligence exposing them to infection; by spectators who have bought tickets or hospitality packages; and by clubs who have lost substantial revenue.

A key focus in many of these potential disputes will be whether the outbreak of Covid-19, or mandatory measures imposed on organisers of sports events to cancel, delay or play them behind closed doors, will release a party from its contractual obligations.

Civil law systems generally recognise that parties are released from a contractual obligation which has become impossible to perform. Art. 119(1) of the Swiss Code of Obligations, for example, provides that an *"obligation is deemed extinguished where its performance is made impossible by circumstances not attributable to the obligor"*.

The English common law has developed its own responses to this problem, often in the context of large spectator events. The first is the common law doctrine of *'frustration'* which will have effect where an event arises, which the parties have not provided for in their contract, which makes performance of the contract impossible and which does not arise as a result of breach by one of the parties. The second is the inclusion in contracts of *"force majeure"* clauses, where the parties expressly provide that they are released from performing their obligations by the happening of a specified event outside their control.

The principle of frustration developed in the context of the cancellation of large public events. In 1861, Taylor, an entertainment events organiser, hired a music hall to put on extravagant concerts and fairs over four days and nights featuring the English operatic singer, Sims Reeves, and a band of minstrels, with fireworks, rifle galleries, air gun shooting, *"a wizard and Grecian statues"*, tightrope performances and *"Chinese and Parisian games"*. Unfortunately, a few days before the performances were to take place the music hall burned down. Drawing on principles of civil and common law the High Court decided that both parties were discharged from their obligations under the contract because the music hall had ceased to exist through no fault of either of them.[4] The judge gave a most visual example of the principle: where a painter employed to paint a picture is suddenly struck blind, performance of the contract may be excused.

In 1902, there followed a series of *"coronation cases"*: various contracts had been made to hire accommodation for viewing processions during the coronation of King Edward VII. But the coronation was postponed, and the processions called off, because the King had appendicitis. Mr Henry refused to pay Mr Krell the balance for renting his rooms on Pall Mall to watch the procession that didn't take place, and the Court of Appeal, relying on the doctrine of frustration, found he was discharged from his obligation to do so.[5]

As the doctrine of frustration releases a party from the promises it has made in a contract, the courts will not invoke it lightly. It is necessary to establish that an event was unforeseen by the parties, that it makes them incapable of performing the promises they made, and that that event is not their fault.

Force majeure, like the words (meaning superior force), derives from civil law and refers to an unforeseeable and irresistible event which prevents a party from performing a contract. English law does not recognise force majeure as a particular doctrine (such as frustration). Rather, contracting parties can include force majeure terms in their contracts which provide that they are excused from performing their obligations by the intervention of a specifically defined event. The existence of force majeure clauses further narrows the scope of the doctrine of frustration. If the parties have carefully contemplated the circumstances in which they may be released from performing their obligations in a contract, it will be harder for them to rely on the doctrine of frustration.

In *Matsoukis v Priestman & Co.*[6] the 1912 miners' strike caused the defendant to be late in building a steamship for the plaintiff, who happened to be Romanian. The contract contained a force majeure clause and the English Court noted, with a little parochialism, *"The words 'force majeure' are not words which we generally find in an English contract. They are taken from the Code Napoléon, and they were inserted by this Romanian gentleman or by his advisers, who were no doubt familiar with their use on the Continent."* Grappling with this foreign concept, the Court found that the complete dislocation of business in the north of England caused by the strike came within the reasonable meaning of the words, force majeure. Unsurprisingly, the defendant's claim that the steamer was also delayed because the workmen went to football matches was not force majeure: it was a usual incident interrupting work that the defendants, in making their contract, no doubt took into account.

In CAS 2015/A/392,[7] the Court of Arbitration for Sport (CAS) found that the Royal Moroccan Federation of Football (FRMF) was not entitled to postpone the African Cup of Nations tournament in 2015 due to concerns about the Ebola virus. The CAS found that Ebola was not a force majeure event because it did not make the organising of the tournament impossible; rather, it only made it difficult. Caution ought to be applied with respect to this case given its highly fact specific nature: it was partially dependent on expert evidence suggesting that, at the time, Ebola was transmitted by direct contact with organic liquids and

there was no proof it could be transmitted through the air or from touch. In addition, the CAS was sympathetic to the FRMF's legitimate fears about Ebola, and although it did not agree to it being a force majeure event, it allowed the FRMF's appeal against the heavy financial and other sanctions imposed upon it by the Confederation of African Football.

A contract, or set of rules for a sporting body, may specify precisely what events constitute force majeure or it may delegate to a body the determination of whether or not something constitutes force majeure. For example Article 83 of the Regulations of the UEFA Champions League 2019/20, 'Unforeseen circumstances' provides that:

Any matters not provided for in these regulations, such as cases of force majeure, will be decided by the UEFA Emergency Panel or, if not possible due to time constraints, by the UEFA President or, in his absence, by the UEFA General Secretary. Such decisions are final.

Many sports clubs in England have force majeure clauses in their ticketing or hospitality terms and conditions, but the drafting of these clauses varies considerably. Many simply refer to *'force majeure events'* without anywhere defining what those events are – which might work in a civil law jurisdiction but is risky in common law as the term has no general meaning other than what the parties explicitly agree. Some clauses refer to *"epidemics"* which would apply to Covid-19, but others don't. Clause 5 of Leicester Tigers Seasonal Hospitality terms and conditions, for example, excludes liability for failure to perform due to a force majeure event defined as *"strikes, lockouts, industrial disputes, riots, wars, civil disturbance, fire, explosions, storms, power failure, governmental or local authority or rugby authority regulations and requirements, loss of liquor licence and difficulties relating to venues"*; while epidemics are not mentioned, governmental or regulatory requirements are. If the government or Premiership Rugby ordered that a match must be cancelled or played behind closed doors that would appear to fall squarely within the definition. If the Club voluntarily agreed that it should cancel a match, it might not.

Delay in the performance of an obligation is not necessarily a frustrating event, a party claiming frustration must show that the delay would make the ultimate performance of the relevant contractual obligation radically different that which was undertaken by the contract.[8]

The postponement of a football match caused by an outbreak of Covid-19 is likely to be an event outside the control of the parties, for which they have no fault and did not contemplate. But postponement, as opposed to cancellation or a requirement to play a match behind closed doors, is less likely to render performance of a contractual obligation impossible. If I buy a ticket to watch a football match, and that match is postponed, I should be able to use my ticket when the match is rescheduled some weeks later.

The decision of the Premier League and EFL to postpone matches, instead of waiting for the government to ban large gatherings or play matches behind closed doors, would appear to be the most sensible one – allowing those matches to be played at a later stage, rather than abandoned altogether or played in circumstances where a season ticket holder will lose the value of their season ticket and, if the season is cancelled, a club the value of its performance to date.

Yet there will undoubtedly be a number of further consequential tricky legal issues – what if I am a shirt sponsor who has paid 3 of 4 instalments to have my brand on the front of a club's shirt until 30 May 2020, but the season does not end until the end of June? A sensible response of the parties might be to vary their agreement, agreeing the real purpose was for a season long sponsorship – but either party might have other reasons they do not want or cannot afford for the contract to continue. If the football season went beyond the end of the middle of summer, when many players' contracts end, there may be a plethora of problems for clubs. What about clubs who are unable to earn match day revenue during any period of postponement, while still being required to pay players wages, suppliers invoices and tax bills? Will the various financial fair play rules have to be relaxed or even temporarily suspended?

The only certainty in these most uncertain times is that Covid-19 is likely to generate a plethora of future legal disputes which will shape our legal landscape, especially in the world of sport.

[4] *Taylor v Caldwell [1863] EWHC QB J1*
[5] *Krell v. Henry [1903] 2 K.B. 740*
[6] *[1915] 1 K.B. 681*
[7] *Fédération Royale Marocaine de Football v. Confédération Africaine de Football, Award of 17 November 2015 and see Bône N. (2017) CAS 2015/A/3920 Fédération Royale Marocaine de Football v. Confédération Africaine de Football, Award of 17 November 2015. In: Duval A., Rigozzi A. (eds) Yearbook of International Sports Arbitration 2016. Yearbook of International Sports Arbitration. T.M.C. Asser Press, The Hague*
[8] *Pioneer Shipping Ltd. and Others Respondents v B.T.P. Tioxide Ltd. Appellants [1982] A.C. 724*

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