



Neutral Citation Number: [2021] EWHC 349 (Comm)

Case No: LM-2020-000206

**IN THE HIGH COURT OF JUSTICE**  
**BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES**  
**LONDON CIRCUIT COMMERCIAL COURT (QBD)**  
**IN PRIVATE**

Royal Courts of Justice, Rolls Building  
Fetter Lane, London, EC4A 1NL

Date: 24/02/2021

**Before:**

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

**Between:**

**NEWCASTLE UNITED FOOTBALL COMPANY LIMITED**

**Claimant**

**- and -**

**(1) THE FOOTBALL ASSOCIATION PREMIER  
LEAGUE LIMITED**  
**(2) MICHAEL BELOFF QC**  
**(3) LORD NEUBERGER**  
**(4) LORD DYSON**

**Defendants**

**Ms Shaheed Fatima QC, Mr Nick de Marco QC and Mr Tom Richards (instructed by Dentons UK and  
Middle East LLP) for the Claimant**

**Mr Adam Lewis QC and Mr Jason Pobjoy (instructed by Bird & Bird LLP) for the First Defendant  
The Second Defendant in Person (Written Submissions only)**

**The Third and Fourth Defendants did not appear and were not represented.**

Hearing date: 18 January 2021

**Approved Judgment**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that  
copies of this version as handed down may be treated as authentic.

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

## **HH Judge Pelling QC: Introduction**

### *The Applications*

1. This is the hearing of two applications by the Claimant (“NUFC”) being:
  - i) An application by NUFC under section 24(1)(a) of the Arbitration Act 1996 (“AA”), made by way of arbitration claim form sealed on 9 November 2020, for the removal of the second defendant as an arbitrator on the ground that circumstances exist that give rise to justifiable doubts as to his impartiality (the “Section 24 Application”); and
  - ii) An application by NUFC under CPR r. 62.10(1), for an order that the Section 24 Application be heard in public (the “Public Hearing Application”).

So far as the Public Hearing Application is concerned, having heard argument in relation to it at the start of the hearing, I directed that the hearing take place in private whilst indicating that any judgment would be published subject to any anonymisation or redaction necessary in order to preserve the confidentiality of the arbitral process. I said that I would give expanded reasons for reaching that conclusion in this judgment. They are set out below. After circulation of this judgment in draft, I heard submissions from NUFC and the first defendant (“PLL”) as to whether this judgment should be anonymised or redacted or not published at all. For reasons contained in a separate judgment handed down with this judgment I conclude that this judgment should be handed down un-anonymised and unredacted for publication is the usual way.

### **Background**

2. NUFC is a limited liability company that trades as a football club, which currently plays in a football league owned and controlled by PLL (“the League”). NUFC is a shareholder in PLL, as are all other clubs playing in the League and, as is common ground, is bound by PLL’s Rules.
3. The current owners of the shares in NUFC wished to sell their shares to PZ Newco Limited, which is ultimately owned by the Public Investment Fund, a Saudi Arabian sovereign wealth fund (“PIF”). PLL contends, but NUFC does not accept, that PIF is controlled by the government of the Kingdom of Saudi Arabia (“KSA”). Section F of PLL’s Rules requires PLL to disqualify individuals and entities from acting as a “*Director*” of a club in certain defined circumstances and to refuse to agree a change of control or the proposed appointment of a director for like reasons.
4. By a decision letter dated 12 June 2020 (the “decision letter”), PLL concluded that KSA would become a Director of NUFC as that term is defined in Section A of PLL’s Rules by reason of the Control (as that term is defined in Section A of PLL’s Rules) that was or would be exercised by KSA over PZ Newco Limited via PIF. It was not suggested that it had decided that KSA had been or would be disqualified from being a “*Director*” or that it would refuse to agree the proposed change of control. I set out the material parts of the Rules later in this judgment. The decision letter set out the substance of PLL’s reasoning in these terms:

“... PIF expressly recognises that it will fall within the definition of “Director” under [PLL’s] Rules, even though it would not be formally appointed as a director of [NUFC]. [PLL] agrees. Having taken external legal advice, [PLL] is also provisionally minded to conclude that KSA would become a Director under the Rules as well.

Pursuant to [Section A], the definition of “Director” includes any “Person” (as defined under [Section A]) that will have “Control” over [NUFC] (as defined in [Section A]). [PLL] has accordingly been considering the scope of those two words, “Person” and “Control”, under the Rules.

The definition of “Person” under [Section A] includes “any ... legal entity”. [PLL]’s provisional view is that KSA ... is a legal entity under English law. As such, it is a Person under the Rules, and thus capable of being a Director. If you disagree, [PLL] would welcome a reasoned explanation.

The definition of “Control” in [Section A] includes either effective management control or beneficial ownership, or both. In particular, the relevant parts of the definition describe “Control” as “the power of a Person to exercise ... direct or indirect control over the policies, affairs and/or management of a Club ... and, without prejudice to the generality of the foregoing, Control shall be deemed to include: (a) the power (whether directly or indirectly ... ) to appoint and/or remove all or such of the members of the board of directors of the Club as are able to cast a majority of the votes capable of being cast by the members of that board; and/or (b) the holding and/or possession of the beneficial interest in, and/or the ability to exercise the voting rights applicable to, Shares in the Club (whether directly, [or] indirectly ...) which confer in aggregate on the holder(s) thereof 30 per cent or more of the total voting rights exercisable at general meetings of the Club”.

From the information you have provided, [PLL] is provisionally minded to conclude that KSA satisfies both elements in the test for “Control” over [NUFC] through its control over PIF (which, as noted, recognises that it will be a Director). In summary:

1. As to management, ... PIF’s directors are appointed by Royal Decree, and its current board is almost exclusively composed of KSA Government Ministers. The PIF Law puts [it] expressly under the direction of ... a KSA Government Ministry. Its function is to serve the national interest of KSA.
2. As to ownership, it would appear that PIF is state-owned, and that it manages only state-owned assets.

Again, if you disagree with either of these provisional conclusions, we would welcome your reasoned response.

Following receipt of any submissions, [PLL] will fully consider them before reaching a final decision on the issues.

If [PLL] then decides that KSA will not become a Director, then it will proceed to a decision on the application of Section [F] to the individuals who have been declared, including PIF. However, should the Board decide that KSA is also to be regarded as a future Director, then there will have to be a declaration in respect of KSA and the Board's decision on the application of [Section F] will have to be made in respect of KSA also."

NUFC disputes this conclusion and the lawfulness of the process by which it was arrived at by PLL. It is this dispute that is the subject of the reference with which these proceedings are concerned.

5. It is submitted by PLL, and I accept, that the decision contained in the decision letter was one that is concerned exclusively with the question whether KSA would be a "Director" under PLL's Rules and not with the question whether *if* KSA was a "Director" it would be disqualified under Section F of PLL's Rules. As the decision letter makes clear, no decisions under Section F of PLL's Rules had been made at that stage. This is important because, as I explain below, one of the grounds on which NUFC relies in support of the Section 24 Application to remove the second defendant is that he had previously advised PLL in relation to Section F of PLL's Rules. PLL maintains this point does not withstand scrutiny because the arbitration can only be concerned with the decision actually taken by PLL, which was that KSA would be a Director applying Section A of its Rules if the disposal proceeded. The second defendant's advice (which was given jointly to PLL and the English Football League ("EFL")) was concerned with Section F not Section A of PLL's Rules. NUFC submits that this is wrong because the second defendant could not have advised in relation to Section F without considering the definitions in Section A. I return to this issue further below.
6. The arbitration provisions contained within section X of PLL's Rules ("the Arbitration Code") requires that any dispute between its members, or between a member or members and PLL, be referred to and resolved by arbitration in accordance with the detailed rules contained in the Arbitration Code. The dispute identified in paragraph 4 above is a "*Board Dispute*" within the meaning of the Arbitration Code. This limits the grounds of review available under PLL's Rules. On 10 September 2020, NUFC referred the dispute to arbitration in accordance with the Arbitration Code.
7. Under the Arbitration Code, an arbitral tribunal is required to consist of three persons with an arbitrator being appointed by each party and those arbitrators then appointing the chair of the tribunal. NUFC appointed the third defendant and PLL appointed the fourth defendant. On 9 October 2020, the third and fourth defendants appointed second defendant to be the chair of the tribunal, having previously enquired of the parties whether either objected to second defendant's appointment. Both parties indicated they had no objections to the appointment. As part of the appointment process each arbitrator

is required to provide a statement of impartiality. On 9 October 2020, the second defendant provided such a statement and by so doing certified that “... *there are no circumstances which exist that give rise to justifiable doubts as to my impartiality in that role.*”

8. On 23 October 2020, PLL’s solicitors (Bird & Bird LLP (“BB”)) disclosed to NUFC’s solicitors (Dentons UK and Middle East LLP (“Dentons”)) that (i) in the last three years, BB had been involved in 12 arbitral proceedings in which the second defendant had been an arbitrator, in three of which he had been appointed by BB but with 2 of those appointments being made after the second defendant had accepted his appointment in the arbitration with which these proceedings are concerned and (ii) the second defendant had advised PLL on four separate occasions all in excess of two years prior to the appointment under challenge in these proceedings including in March 2017 (more than three years prior to the appointment under challenge in these proceedings) when he provided an advice in relation to a potential amendment to Section F of PLL’s Rules (“2017 Advice”). None of this had been disclosed by the second defendant prior to his appointment. NUFC maintains that had it been informed of these facts and matters prior to the second defendant’s appointment it would not have consented to his appointment. It is not suggested that either the third or fourth defendants knew of any of these facts and matters at any time prior to the disclosure by BB.
9. NUFC invited the second defendant to recuse himself. He declined to do so. On 25 October 2020, Dentons wrote to the tribunal asking the second defendant to reconsider recusing himself. On 26 October the second defendant provided a note in which he confirmed his decision not to recuse himself. In that note, the second defendant accepted that he ought to have disclosed the three appointments by BB but in relation to the 2017 Advice stated:

“Section F is not relevant to the issue to be decided in this Arbitration by this Tribunal, albeit it might become so, dependent on its outcome. Whichever body might become seized of Section F will have to apply Section F as it stands to any relevant facts”

He concluded that note by stating that

“For the above reasons (i) I do not consider, applying the Porter and Magill test as reflected in the [International Bar Association] Guidelines that I should recuse myself. (ii). I consider that I can fairly and impartially play my role as Chair in the present arbitration but that, (materially), no reasonable person fully apprised of the facts, could think otherwise or could consider that I am in some way beholden to [PLL’s solicitors] or EFL” (Typographical errors are as they appear in the Note quoted from)

Dentons’ response was a lengthy letter dated 27 October 2020, the primary focus of which was the 2017 Advice, which culminated in them stating at paragraph 9 that:

“[NUFC] therefore formally objects to [the second defendant] continuing as chairman of the Arbitral Tribunal. If [the second

defendant] does not consider in light of this letter that he must now recuse himself, [NUFC] will after 11am tomorrow morning commence preparations to make an application to the High Court pursuant to section 24 of the Arbitration Act 1996 for his removal as chair.”

10. Thereafter, the second defendant entered into correspondence with BB, which was not copied contemporaneously to Dentons, seeking access to the 2017 Advice and then consent from PLL to disclose that the 2017 Advice did not include advice concerning the definitions of “*Director*” or “*Control*” in Section A of PLL’s Rules. In his initial 28 October 2020 email (timed at 07.51) the second defendant communicated with BB materially as follows:

“You will note from the most recent letter from [Dentons] requesting my recusal that emphasis is placed as follows ‘[The second defendant] accepts that he advised [PLL] on a potential amendment to Section F of [PLL’s Rules] in March 2017’ I had no recollection of this Advice. Are you able as a matter of obvious urgency to procure me a copy so that I can assess whether the conclusions drawn from it are accurate? Best wishes ...”

In this quotation and all those that follow, various obvious typographical errors appear in the text quoted and I have left them uncorrected to preserve authenticity.

11. The second defendant subsequently found the 2017 Advice from within his own records and then sent five further emails to BB. The first dated 28 October (10.36) was in these terms:

“You will have seen the above letter sent last night. I remain firmly of the view that there is no basis for me to recuse myself applying the Porter v Magill test or, a fortiori (sic), the IBA Guidelines. Given the shortness of time available I will put the matter shortly.

Apart from [Dentons’] reliance on my advice in March 2017 on Section F of [PLL’s Rules], what is left is one my appointment of me as an arbitrator by [PLL]<sup>1</sup> of October 2020, and two CAS cases, one of 2018 and one of 2020, in which my appointment was made by parties other than [PLL], albeit parties whose lawyer was [BB] and two advices on unrelated matters to [PLL] in 2018. These could not reasonably give rise to the possibility of bias and might not even be disclosable under the IBA guidelines given their dates and infrequency.

As to the Advice as I see the case the issue for the arbitrators in exercise of their power of review will be whether [KSA] would be a Director as a person having control over the Club within the relevant Section A definitions (which is indeed, as I read the

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<sup>1</sup> The second defendant referred to PLL but he should have referred to EFL

POC, [NUFC's] own perception see para 72.2.. It is only if KSA were a director that Section F comes into play. I have reread my Advice and cannot, for my part, see that I dealt with the meaning of any of the definitions 'person' director' or 'control all of' which I took as a given. [PLL] can show you the Advice if you wish to see it for yourselves.

All that said, **I wish to check whether you remain of your previously expressed view that there is no reason for me to recuse myself.**

Obviously if your or [PLL]'s view has changed, I will of course, step down since I could not sensibly remain Chair of a Tribunal against the wishes of both parties to the Arbitration. I would be grateful if you could reply as soon as possible giving me a deadline of 11am to respond"

This was followed by a further email on 28 October at 12.41 to this effect:

"It does occur to me that with EFLs permission I could respond by saying that my advice did not discuss (sic) the meaning of the definitions in the (sic) rules of person' director' or control'. (sic) The club (sic) would have to and (sic) might not take my word for it, and (sic) would say that without the advice they could not be confident that this was so"

It was followed by a further email in reaction to one sent by Dentons to all parties concerning the recusal issue and what was to be done concerning the reference pending resolution of the issue. This further email from the second defendant was on 28 October at 12.46 and was in these terms:

"Duly noted. you will; see my last which must have crossed with yours. Could you get instructions on it

Given your position in first bullet point I am not minded to recuse myself but would like to be able today to respond to [Dentons'] email of 23.30. 27/10/2020"

At 13.33 on 28 October, the second defendant sent a further email to BB, which was in these terms:

"I am not asking to be able to show the advice itself to NUFC given the sensitivity of the context, but only what I've highlighted below

;and would also hope you agree with what I say as highlighted.

the EFL can send you a copy of my advice, or with its authority, I could send you my own copy. I've promised to send [Dentons] my response by 6pm today- though he has asked for 5pm"

This was followed by a further chasing email at 15.54.

12. BB responded to the second defendant in these terms:

“In answer to your question as to you disclosing to [NUFC] what the advice provided by you to [PLL] did or did not cover, [PLL’s] view is that your communicating that the advice did not relate to the definitions of 'Director' and/or 'Control' does not conflict with the privilege in the advice. [PLL] does not object to you telling [NUFC] that the advice did not relate to the definitions of 'Director' and/or 'Control', on the understanding that [PLL] does not in so doing waive privilege in the advice (which was provided to both [PLL] and the EFL).

In light of our recent exchanges with Dentons on ex parte correspondence, we feel a little uncomfortable corresponding with you separately and would therefore propose to send to Dentons a copy of your emails to us of today at 10:36, 12:08, 12:41, 12:46, 13:34 and 15:54 (and this email), unless you ask us not to do so. Would you mind please confirming your view on that?”

The second defendant responded to this at 17.30 in these terms:

“I am shortly to send to all parties my response to [Dentons] which will encompass the point made in your first para. I shall myself disclose (sic) that I have sought on several occasions throughout the day as a matter of urgency [PLL’s] position on my disclosing what I asked to be permitted to disclose for the purposes (sic) of a response to [Dentons] That will make it clear that I have been in communication (sic) with you ex parte. If Dentons then ask to see the actual correspondence so be it. In those circumstances (sic) I accept that you should disclose it” (sic).

13. The second defendant emailed Dentons at 17.53 in which in relation to recusal he stated that:

“It remains my position that in circumstances where(i) each party to the arbitration take diametrically opposite views about whether I should remain Chair(ii) my fellow arbitrators position is as previously stated(iii) I am, with respect, unpersuaded of the correctness, as distinct from the genuineness of your views, the appropriate course is to leave it to the Court(absent agreement to an alternative mechanism) to decide.”

In relation to the 2017 Advice, he reproduced word for word what BB had said he could say, adding

“I apologise again for my inadvertent omission to refer to it, to the extent that it may have been disclosable, in my declaration.



You make no express comment on my previous explanation for that omission but for the avoidance of doubt I reiterate that the omission was unintentional.”

14. By an email of 29 October 2020, BB disclosed to Dentons copies of all the emails between the second defendant and BB sent on 28 October 2020 and in the same email indicated (i) it was seeking instructions from PLL as to whether the 2017 Advice could be disclosed and (ii) sought NUFC’s consent to disclose details about the arbitration to the EFL for the purpose of seeking its consent to disclosure. This was necessary because as I explained earlier, the 2017 Advice was the subject of joint instructions from PLL and EFL. That consent was given but by an email of 2 November 2020, BB informed Dentons that:

“I can now confirm that [PLL] is not prepared to disclose to [NUFC] the privileged advice (or any related documents that are privileged) from 2017. In light of [PLL’s] position (the effect of which is that the relevant documents will not be disclosed), we have informed the EFL that it no longer needs to let us know whether or not it is willing to waive privilege.”

15. On 4 November 2020, NUFC issued the Section 24 Application and Public Hearing Application. PLL contests both applications and the second defendant contests the Section 24 Application but has done so with permission by written submissions only. The third and fourth defendants have played no part in these proceedings and have remained neutral in respect of both the Section 24 Application and Public Hearing Application.

### **The Application by NUFC under CPR r. 62.10(1)**

16. At the outset of the hearing I heard and ruled on NUFC’s application under CPR r. 62.10(1). In summary NUFC sought an order that the whole of the proceedings be heard in public. PLL resisted that application and the only other active party – the second defendant – took no formal position on it. I ruled that the hearing should be in private with all issues concerning the publication of the substantive judgment being left over for determination at the hand down hearing<sup>2</sup>. When stating my decision, I also gave skeletal reasons for reaching the conclusion that I did. I indicated that fuller reasons would be given in this judgment to the extent that I considered it necessary to do so. I set out my fuller reasons in this section of this judgment.
17. Although CPR r. 62.10, confers a discretion whether to hear an arbitration claim in public or private – see CPR r. 62.10(1) – the default position is that such hearings will be in private – see CPR r. 62.10(3)(b), City of Moscow v. Bankers Trust Co [2004] EWCA Civ 314; [2005] QB 207 *per* Mance LJ (as he then was) at paragraphs 32, 34 and 42 and Halliburton Co v Chubb Bermuda Insurance Ltd [2020] UKSC 48; [2020] 3 WLR 1474 *per* Lord Hodge at paragraph 6 – unless CPR r. 62.10(3)(a) applies. CPR r. 62.10(3)(a) does not apply to the Section 24 Application so it follows that the default position is that it will be heard in private. This balance reflects the fact that whilst the

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<sup>2</sup> **Post Judgment Note:** My decision in relation to this issue is contained in a judgment handed down with this one, which follows a hearing following the circulation in draft of this judgment to determine amongst other things whether and if so to what extent this judgment should be published.

parties have agreed that their dispute should be resolved by an entirely private and confidential arbitral process, that ceases to be the only relevant consideration where one or more of the parties invokes the jurisdiction of the court over arbitration proceedings conferred by the AA because from that point the proceedings are not consensual, the proceedings are taking place before a court exercising the judicial powers and functions of the state and the agreement of the parties that their dispute be resolved in private must be weighed with the default principle of open justice that applies to proceedings in such courts. Nevertheless, the effect of CPR r. 62.10 is that it will be for the party asserting that an arbitration claim should be heard in public to establish why the agreement of the parties that their dispute be resolved in private is outweighed by the public interest in state court proceedings taking place in public or by some other relevant interest.

18. In arriving at a conclusion, it is necessary to bear in mind that (a) not all arbitration claims will need to be treated as confidential; (b) where arbitration claims do need to be treated as confidential, the extent to which it will be necessary for them to be treated as confidential will be fact sensitive and (c) it is likely that a greater need for confidentiality will be required if it is to be directed that a judgment or order is not to be published than if it is to be directed that a hearing should be in private – see City of Moscow v. Bankers Trust Co [2004] EWCA Civ 314; [2005] QB 207 *per* Sir Andrew Morritt V-C at paragraph 56. This is largely because anonymisation and redaction will usually enable a judgment to be published that makes apparent the decision that has been taken and the reasons for it whilst at the same time preserving the privacy of the arbitral process. Where it is decided that confidentiality must be preserved the court must ensure that the method adopted is proportionate – that is the least that is necessary to preserve the level of privacy that is appropriate in the circumstances.
19. NUFC submitted that the hearing should take place in public because the existence of the dispute was already in the public domain and thus arbitral confidentiality has already been lost and so could no longer justify “... *a derogation from the open justice principle*”. Whilst I disagree with this submission as I made clear in the skeletal reasons I gave when dismissing the application, I agree with NUFC that who is responsible for the information that is in the public domain having got there is immaterial. I also agree that (generally at any rate) protecting the identity of the arbitrators will not of itself be a reason for maintaining the privacy of the proceedings, particularly where, as here, the Section 24 Application does not involve an assertion of actual bias but “... *relies entirely on an assertion of an objective appearance of bias* ...” – see Halliburton Co v Chubb Bermuda Insurance Ltd (ibid.) *per* Lord Hodge at paragraph 6. However, I do not read that paragraph as ruling out protection of the identity of the arbitrators as a relevant consideration in all circumstances because as Lord Hodge emphasised in the final sentence of paragraph 6, his conclusion was that no good reasons for maintaining the anonymity of the arbitrators had been made out in the appeal he was determining. However it will be an exceptional case where preserving the anonymity of the arbitrators will be a material consideration and I consider could be justified only in circumstances where identifying the arbitrators would defeat the purpose of maintaining the confidentiality of an arbitration and the parties to it or for exceptional reasons relating to the arbitrators' right to privacy or their safety.
20. Turning now to the facts of this case, I do not consider that the fact the existence of the reference and its subject matter has entered the public domain is a sufficient reason for

deviating from the norm established by the Rules and authorities referred to earlier. My reasons for reaching that conclusion were those set out in my skeletal reasons for dismissing the CPR r. 62.10 application, as expanded upon by what follows.

21. Firstly, contrary to a submission made by NUFC, it is not the case that references to arbitrations are private solely to preserve commercial confidences although one of the reasons why parties enter into an agreement to refer their disputes to arbitration may be a desire to protect commercially confidential material. Commercially confidential information has to be considered in numerous cases heard across the specialist courts and lists of the Business and Property Courts without any real difficulty. The reasons why arbitration proceedings are private are much wider and more fundamental than that. Parties who enter into arbitration agreements do so in the expectation that the entire process will be confidential in the interests of protecting the privacy of the parties, their disputes and the evidence and arguments that each deploy in the course of resolving those disputes. There are a number of different ways in which this issue has been expressed over the years but the point was summarised succinctly by Sir George Jessel MR in Russell v. Russell (1880) 14 Ch D 471 at 474-5 as being:

“As a rule, persons enter into these contracts with the express view of keeping their quarrels from the public eyes, and of avoiding that discussion in public, which must be a painful one, and which might be an injury even to the successful party to the litigation, and most surely would be to the unsuccessful.”

22. Secondly, whether the information in the public domain means that maintaining the norm will have no practical benefit is a question of fact and degree. It was submitted by PLL and I accept having reviewed the material included in the evidence that the material that has been disclosed is limited. If the hearing of these proceedings was to take place in public it is inevitable that much more of the detail surrounding the dispute including the facts and more critically the disputed facts of the dispute would become public. Such disclosure is precisely what the parties are to be taken to have wished to avoid by their agreement to refer their disputes to arbitration, would defeat their purpose in agreeing to arbitration and would do so in circumstances where disclosure could satisfy no legitimate public interest. One of the areas which it will be necessary to consider is the degree to which the second defendant gave material advice concerning the wording and effect of Section A of PLL’s Rules and on the interaction between the wording and effect of this provision and the issues in dispute in the arbitration. As PLL put it in its opening submissions, “... *This arises by reason of the nature of the arguments advanced by the Claimant. Any hearing and/or judgment will need to address, in detail, the assertion that there is overlap between the Section [F] Advice and the subject matter of the Arbitration.*”. Whilst I accept that the existence of the dispute and that it has been referred to arbitration has entered the public domain and that in consequence great interest has been generated amongst sections of the public, I do not accept that the detail of the dispute that it will be necessary, or may be necessary, to go into on the hearing of the application has entered the public domain.
23. That great interest has been generated by the release of information into the public domain in breach of the express and implied terms of the parties' arbitration, or that sections of the public have an interest in the underlying dispute does not justify the hearing of this arbitration claim in public. The purpose of public hearings in state courts

has been summarised in various ways over the years but most recently by Toulson LJ (as he then was) in R (Guardian News and Media Ltd) v City of Westminster Magistrates Court [2013] QB 618, in a passage approved by the Supreme Court in Dring v. Cape Intermediate Holdings Limited [2019] UKSC 38; [2020] AC 629 at paragraph 2, in these terms:

“How is the rule of law itself to be policed? It is an age old question. ... who will guard the guards themselves? In a democracy, where power depends on the consent of the people governed, the answer must lie in the transparency of the legal process. Open justice lets in the light and allows the public to scrutinise the workings of the law, for better or for worse.

Whilst interest in the underlying dispute may be a factor in considering whether or to what extent substantive proceedings in a court should be heard in private, this is the hearing of an arbitration claim, where the default position is different. The rationale for court hearings to be in public does not extend to requiring that an arbitration claim be heard in public because of the great interest that sections of the public may have in the subject matter of the dispute. To the contrary, that is if anything a reason for giving effect to the agreement of the parties by requiring such proceedings to be in private. Indeed the possibility of such interest may well be the reason or one of the reasons why the parties agreed that their disputes be referred to arbitration.

24. Thirdly, although NUFC suggests or implies that PLL’s role is regulatory thereby creating a public interest that may not arise in many other commercial arbitrations, I consider that this misses the point and does not justify a departure from the norm. PLL is a limited liability company that owns or controls its league or at least that part of its league’s activities with which this dispute is concerned. NUFC is a shareholder in PLL and PLL’s Rules apply both to PLL and to each of its members including NUFC as if the Rules were a contract between them both by express provision and as a matter of legal analysis – see by way of example Clarke v. Dunraven (The Satanita) [1897] AC 59, Modahl v. British Athletic Federation (In Administration) [2001] EWCA Civ 1447 and Stretford v. FA [2007] EWCA Civ 238. Thus as I said in paragraph 9 of my skeletal reasons for directing a private hearing, “... *This is from beginning to end a private dispute between private parties in relation to private contractual arrangements, powers and duties and is not and never has been a public law dispute ...*” It is simply incorrect to suggest that PLL performs a regulatory function in any public law sense. Its relationships with its members are entirely contractual.
25. Finally, it was at one stage suggested on behalf of NUFC that there was a public interest in the proceedings taking place in public because there was a public interest in the specialist arbitral law community hearing the arguments or at least reading summaries of them and the judgment so as better to be able to advise and represent parties in arbitration claims where similar issues might arise. I reject that argument for two reasons. First, I do so for the reason set out in paragraph 11 of my skeletal reasoning given for directing this hearing take place in private. No new point of law arises for decision in this case. It is exclusively concerned with the application of well-established principles, most recently re-stated by the Supreme Court in Halliburton Co v Chubb Bermuda Insurance Ltd (ibid.), to the particular facts of this dispute. As I see it at the moment there is nothing material that this case will contribute to the development of

the law in this area. Secondly, if and to the extent that proves to be wrong it can be catered for at a later stage by publishing the judgment, if necessary in an anonymised or redacted form.

## NUFC's Section 24 Application

### *Applicable Principles*

26. By AA, s.24(1)(a):

“(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds –

- a) That circumstances exist that give rise to justifiable doubts as to his impartiality ...”

This in substance includes what is sometimes referred to as “apparent bias”. The test applicable to an allegation of apparent bias is the same as that which applies at common law to judges sitting in courts and tribunals – see Halliburton Co v Chubb Bermuda Insurance Ltd (ibid.) *per* Lord Hodge at paragraphs 52 and 56. In applying that test the court is directed by s.24 to the circumstances as they exist at the time at which it hears the application for removal of the arbitrator – see Halliburton Co v Chubb Bermuda Insurance Ltd (ibid.) *per* Lord Hodge at paragraph 50. The applicable test is that identified in Porter v Magill [2002] 2 AC 357 by Lord Hope at paragraph 103:

“whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.”

This test is an objective one. Significant guidance as to how a court should apply that test has been given in subsequent cases. Such an observer

“...always reserves judgment on every point until she has seen and fully understood both sides of the argument... is not unduly sensitive or suspicious ... But ... is not complacent either ... will take the trouble to inform herself on all matters that are relevant... put whatever she has read or seen into its overall social, political or geographical context... is fair-minded ... [and] ... will appreciate that the context forms an important part of the material which she must consider before passing judgment.”

see Helow v Secretary of State for the Home Department [2008] UKHL 62; [2008] 1 WLR 2416 *per* Lord Hope at paragraphs 2-3. The objective observer will have regard to the possibility of opportunistic or tactical challenges - see Halliburton Co v Chubb Bermuda Insurance Ltd (ibid.) *per* Lord Hodge at paragraph 68. This last factor is material because “... *the arbitrator may reasonably feel under an obligation to carry out the remit unless there are substantial grounds for self-disqualification. Similarly, a court, when asked to remove an arbitrator, needs to be astute to see whether the ground of real possibility of bias is made out*”. Ultimately, a court is required to evaluate on the

whole of the evidence available at the hearing of the application whether a real (as opposed to a fanciful) possibility of bias has been made out, assessed by reference to the circumstances known at the time the section 24 application is heard.

27. The arbitrator is under a duty to disclose to the parties to an arbitration matters that could arguably lead a fair minded and informed observer to conclude that there was a real possibility that the arbitrator was biased because such disclosure demonstrates impartiality from the beginning – see Halliburton Co v Chubb Bermuda Insurance Ltd (ibid.) *per* Lord Hodge at paragraphs 70 and 76 - 81. The duty to disclose applies to a potentially wider group of circumstances that might on ultimate examination justify recusal. The rationale for this is simply that unless there is disclosure the parties may or will not know of the circumstances so as to enable them to decide whether to challenge the appointment or not. Not every circumstance that an arbitrator will be under a duty to disclose will justify recusal but the failure to disclose even that which on investigation does not justify recusal or removal may support a conclusion that an arbitrator is apparently biased.
28. Here an issue concerns the degree to which the second defendant should have disclosed his role in other arbitrations and his role in advising PLL and EFL in relation to Section F of PLL’s Rules. It is necessary at this stage to note only that if:

“... the information which must be disclosed is subject to an arbitrator’s duty of privacy and confidentiality, disclosure can be made only if the parties to whom the obligations are owed give their consent. In such a circumstance, if a person seeking appointment as an arbitrator in a later arbitration does not obtain the consent of the parties to a prior related arbitration to make a necessary disclosure about it, or the parties to the later arbitration do not consent to the arbitrator’s disclosure of confidential matters relating to that prospective appointment to the parties to the earlier arbitration, the arbitrator will have to decline the second appointment.”

– see Halliburton Co v Chubb Bermuda Insurance Ltd (ibid.) *per* Lord Hodge at paragraph 88. The only exception is where disclosure is of another arbitral appointment by a party to both the instant and another arbitration because consent by the common party to this level of disclosure is to be inferred from the common party seeking to appoint the arbitrator in the later arbitration - see paragraph 104. Here however, no complaints are made about the information disclosed in relation to prior appointments. Rather the complaint is that what was ultimately disclosed was not disclosed earlier and by the second defendant himself rather than BB. In relation to instructions to advise such a party, it is plain that prior consent would be required before the subject matter or substance of the advice could be disclosed and that is particularly so where the instructions were given jointly by such a party and another who is not even a party to the relevant arbitration.

29. The International Bar Association Guidelines on Conflicts of Interest in International Arbitration (“IBAG”) can assist a court in identifying what is an unacceptable conflict of interest and what matters may require disclosure in an arbitral context – see Halliburton Co v Chubb Bermuda Insurance Ltd (ibid.) *per* Lord Hodge at paragraphs

71. It is relatively frequently referred to and relied on by arbitrators. However, the principles to be derived from those Guidelines do not take effect as if they are English law. The provisions of IBAG are simply a material consideration in the evaluation that the general principles referred to above require to be undertaken in each case.

30. In relation to disclosure, the IBAG creates three lists of potential conflict situations being the Red List, which sets out situations objectively amounting to a conflict, which can be waivable or non-waivable depending on the facts; the Orange List, which contains situations that may give rise to doubts over impartiality and so should be disclosed in case the parties wish to explore the issue further; and a Green List that lists situations that do not suggest any conflict. The Orange List includes situations (a) where the arbitrator has, within the past three years, served as counsel for one of the parties, or an affiliate of one of the parties, or has previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter, but the arbitrator and the party, or the affiliate of the party, have no ongoing relationship; and (b) where the arbitrator has, within the past three years, been appointed on more than three occasions by the same counsel, or the same law firm.

#### *NUFC's Case*

31. NUFC's case that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the second defendant was biased depends on the cumulative effect of four separate factors being (a) that the second defendant had given PLL and the EFL the 2017 Advice concerning Section F of PLL's Rules; (b) the second defendant's other appointments as arbitrator by BB; (c) the second defendant's failure to disclose these events prior to BB disclosing them in their letter of 23 October 2020 and (d) the private communications between the second defendant and BB on 28 October 2020.

#### *PLL's Case*

32. PLL's case is that no circumstances exist that would lead a fair-minded and informed observer to conclude that there is a real possibility that the second defendant is biased and NUFC's case to the contrary is "*unsustainable*" because:
- i) The 2017 Advice on which NUFC relies did not relate to any of the issues raised in the arbitration and in particular to the true meaning and effect of the words "*Director*" and "*Control*" as defined in Section A of PLL's Rules;
  - ii) The previous appointments are irrelevant because (a) the second defendant has not been appointed in the reference that is the subject of these proceedings by either NUFC or PLL but jointly by the third and fourth defendants; (b) none of the other appointments are on behalf of either NUFC or PLL; (c) the second defendant is not dependent for appointments by either PLL or its solicitors for his income and (d) the number of appointments relied on does not exceed the number referred to in the IBAG; and
  - iii) The non-disclosure of the factors referred to in (i) and (ii) and/or the communications on 28 October is not a breach of the IBAG and in any event would not of itself result in a real (as opposed to a fanciful) possibility of bias when all the relevant facts are considered.

*The Second Defendant's Case*

33. The second defendant's case is that the relevant test is not satisfied by any or all the matters relied on by NUFC because:
- i) In relation to the 2017 Advice:
    - a) It is not relevant to the issue that is to be decided by the tribunal because it did not address, or relate to, whether an individual or entity would fall within the definition of "Director" in Section A of PLL's Rules or be considered as exercising "Control";
    - b) The inference that the 2017 Advice may have required consideration of the definitions within Section A of PLL's Rules is wrong and unarguable given BB's and the second defendant's assurances that in giving the 2017 Advice, the second defendant did not have regard to the scope of the underlying definitions;
    - c) The 2017 Advice was given in March 2017, in excess of three years prior to the second defendant's appointment under challenge in these proceedings; and
    - d) The second defendant does not now nor has he ever regularly advised PLL;
  - ii) In relation to the private communications with BB:
    - a) None of the communications related in any way to the substance of the issues in the arbitration and were concerned with the necessary step of obtaining the consent of PLL and the EFL as the second defendant's former clients to the disclosure of the 2017 Advice;
    - b) The second defendant's enquiry as to whether PLL wished him to recuse himself does not justify the inference that he was biased when all the circumstances are considered;
    - c) There was never any intention not to notify Dentons of the communications; and
    - d) The correspondence would not lead a fair minded observer to conclude that there was inappropriate closeness between PLL and the second defendant;
  - iii) In relation to the other arbitral appointments:
    - a) The appointments were spaced over three years; were made by BB on behalf of clients other than PLL and it cannot be inferred that the second defendant is BB's arbitrator of choice because (1) he had not been appointed by them in this arbitration as their chosen arbitrator and (2) in 9 other cases where BB acted for one of the parties, they had not appointed him either;



- iv) In relation to non-disclosure:
- a) The second defendant's non-disclosure of the 2017 Advice was inadvertent and arose in circumstances where the second defendant does not and never has regularly advised PLL.

*Discussion*

34. The scheme of what follows is that I first consider each of the four grounds separately and then consider whether viewing all the grounds cumulatively but qualified by the conclusions I have reached in relation to each individually there is a real possibility of bias has been made out, assessed by reference to the circumstances as at the date of the hearing of this application. I adopt this course because I accept NUFC's submission that it is the cumulative effect that matters.

*The 2017 Advice*

35. There appear to be two interrelated issues on which NUFC places reliance – first that the arbitration will be concerned with the effect of Section F of PLL's Rules, being the Section with which on any view the 2017 Advice was concerned and/or secondly, even if that is not so, that in advising about the scope, effect and possible amendment of Section F of the Rules, any lawyer would necessarily have to review and come to a view concerning the true meaning and effect of the words "*Director*" and "*Control*" defined in Section A of the Rules.
36. In considering these points it is necessary to consider the terms of the definitions within Section A and F that matter. A "*Director*" is defined as meaning:

"... any Person occupying the position of director of a Club whose particulars are registered or registrable under the provisions of section 162 of the Act and includes a shadow director, that is to say, a Person in accordance with whose directions or instructions the directors of the Club are accustomed to act, or a Person having Control over the Club, or a Person exercising the powers that are usually associated with the powers of a director of a company; ... "

The "*Act*" is the Companies Act 2006. "*Control*" is defined as meaning

"... the power of a Person to exercise, or to be able to exercise or acquire, direct or indirect control over the policies, affairs and/or management of a Club, whether that power is constituted by rights or contracts (either separately or in combination) and having regard to the considerations of fact or law involved, and, without prejudice to the generality of the foregoing, Control shall be deemed to include:

- a) the power (whether directly or indirectly and whether by the ownership of share capital, by the possession of voting power, by contract or otherwise ... ) to appoint and/or remove all or such of the members of the board of directors of the Club as are able

to cast a majority of the votes capable of being cast by the members of that board; and/or

(b) the holding and/or possession of the beneficial interest in, and/or the ability to exercise the voting rights applicable to, Shares in the Club (whether directly, indirectly (by means of holding such interests in one or more other persons) or by contract ...) which confer in aggregate on the holder(s) thereof 30 per cent or more of the total voting rights exercisable at general meetings of the Club.

For the purposes of the above, any rights or powers of a Nominee for any Person or of an Associate of any Person or of a Connected Person to any Person shall be attributed to that Person ...”

“Person” includes “... any natural person, legal entity, firm or unincorporated association and in the case of a Person which is incorporated any of its Associated Undertaking, Fellow Subsidiary Undertaking, Group Undertaking, Parent Undertaking or Subsidiary Undertaking ...”. Section F of PLL’s Rules is lengthy and it is not necessary that I set it out in full. It is necessary to note only the opening words of the Section which are that “...A Person shall be disqualified from acting as a Director and no Club shall be permitted to have any Person acting as a Director of that Club if...” There then follows a series of facts or matters that may have this consequence including if:

“... [i] he has a Conviction (which is not a Spent Conviction) imposed by a court of the United Kingdom or a competent court of foreign jurisdiction:

[a] in respect of which an unsuspended sentence of at least 12 months’ imprisonment was imposed;

[b] in respect of any offence involving any act which could reasonably be considered to be dishonest (and, for the avoidance of doubt, irrespective of the actual sentence imposed); or

[c] in respect of an offence set out in Appendix 1 (Schedule of Offences) or a directly analogous offence in a foreign jurisdiction (and, for the avoidance of doubt, irrespective of the actual sentence imposed);

[ii] in the reasonable opinion of the Board, he has engaged in conduct outside the United Kingdom that would constitute an offence of the sort described in Rules [b] or [c], if such conduct had taken place in the United Kingdom, whether or not such conduct resulted in a Conviction ...”.

37. I turn now to the two points summarised in paragraph 35 above. I am unpersuaded by the first of these points. The only dispute between the parties concerns and can only concern the issues decided by the decision letter under challenge. It is common ground

that the decision letter (the material part of which is quoted above) contains the decision under challenge. It is exclusively concerned with whether KSA is capable of being a “*Director*” as defined by Section A of PLL’s Rules, by reason of it having “*Control*” also as defined by Section A of PLL’s Rules. The text of the letter makes it abundantly clear that the sole issue that PLL had decided (and then only provisionally) was that KSA satisfied the definitions so that it was to be regarded as a Director for the purpose of applying Section F of PLL’s Rules. In those circumstances, I accept PLL’s submission that the only dispute that can or will be decided in the current arbitration is whether this conclusion is correct.

38. NUFC submits that whether PLL and the second defendant “...*have a shared and secret understanding of Section F, and the materiality of that understanding to the issues in the arbitration ...*” cannot be tested because PLL has asserted privilege over the 2017 Advice. This submission misses the point because the reference giving rise to these proceedings is not concerned with Section F of PLL’s Rules as I have said but with the logically prior and separate issue of whether KSA satisfies the test for being a “*Director*”, which is concerned exclusively with the effect of Section A of PLL’s Rules. It is fanciful to suggest that the tribunal will undertake any wider investigation given the terms of the decision letter.
39. It is equally fanciful to suppose that in deciding whether KSA satisfies the definition of “*Director*”, whether by reason of it having “*Control*” over NUFC if the acquisition were permitted to proceed (or otherwise) it will be necessary for the tribunal to consider the terms of Section F. As NUFC submits, that question depends on the application of the Section A definition to the facts. No allegation of breach of Section F by KSA is to be found in the decision letter. It is only if KSA is found to be a Director that such an issue could arise. That requires a further decision and any challenge to any adverse decision that is reached will be by another and separate reference to a different tribunal.
40. No construction issue has been identified or is apparent on the face of the decision letter that depends upon or will otherwise be informed by the terms of Section F, nor has any attempt has been made by NUFC to identify any content within Section F that could be material to what NUFC has identified as being the “... *core part of ...*” of PLL’s case, which is that if PIF and KSA are indistinguishable as a matter of law, then there is no basis for treating both KSA as well as PIF as a “*Director*”. This is not obviously an issue of construction but an issue of law but even if that is wrong no attempt has been made to formulate the construction issue that might arise nor, critically, what within Section F could inform the resolution of that issue. Although it is submitted that the challenge includes the degree to which PLL had regard to issues concerning the substantive effect of Section F in arriving at the decision under challenge, no conclusions concerning that effect have been identified nor are any apparent on the face of the decision letter.
41. I now turn to NUFC’s submission that it must necessarily be inferred that in advising about the meaning and effect of Section F of PLL’s Rules and the need for any amendment, the second defendant must necessarily have considered and come to a conclusion about the true meaning of the words “*Control*” and “*Director*” as defined in Section A of PLL’s Rules, since those words are used in their defined sense in Section F of PLL’s Rules.

42. The second defendant was instructed by PLL and the EFL to advise as to the scope and effect of Section F of PLL's Rules and whether and if so to what extent they should be modified. Section A of PLL's Rules contains various definitions that apply to Section F (but not only Section F) of PLL's Rules. NUFC maintains that this gives rise to a real as opposed to fanciful possibility of bias because in Dentons' opinion

“In order to advise on Section F, a lawyer would not be able to exclude all consideration of Section A: the lawyer would need to have read, understood and come to a view on the definitions in Section A. This is particularly so where the lawyer is not merely advising on the application or interpretation of Section F but is advising on a potential amendment to Section F. In that case it is, putting the matter at its lowest, a reasonable inference that such an exercise would require close textual consideration of the concepts in Section F, including the definitions in Section A of 'Control' and 'Director'.”

In my judgment, whilst this may be so, it is not certainly or necessarily so. It depends on the focus of the instructions. It is more than realistically possible that the sole focus of the instructions and advice would be on the circumstances in which PLL could refuse to agree a change of control of the appointment of a Director on the assumption that the definition of “Control” and “Director” were as the second defendant put in one of his responses “*a given*” – that is that the advice proceeded on the basis that the definitions were as set out in Section A of the Rules and were not to be altered. That this was probably so receives very substantial support from the terms of Section F, the apparently relevant part of which I have set out above. Section F consists of a list of facts and matters that disqualify a “Person” from being a “Director”. There is nothing within this provision that varies or augments the definition of any of “Director”, “Control” or “Person” within Section A. In this regard, I accept the second defendant's submission that:

“... [PLL's Rules] Section A ... contains the definitions of 'Director' ... and of 'Control'... (which is necessary to construe Director). [Section F of PLL's Rules] deals with disqualifying events and opens with the words “*A person shall be disqualified from acting as Director and no Club shall be permitted to have any person acting as Director of a Club if*” and a sequence of disqualifying events ... is then set out. ... before the question as to whether any person is to be disqualified from acting as a Director, he, she or it must be a Director as defined in Section A, there being no other definition of Director provided in Section F itself. It is therefore perfectly possible for a lawyer to advise on Section F (since Section F is only engaged **if** an identified person is a Director), without needing to consider **whether** the identified person **is** a Director as defined in Section A. Whether an identified person is a Director is a discrete question which would require separate consideration. This would be a fortiori if the Director was not an identified but simply a hypothetical person.”

43. That leads to the question whether as a matter of fact the second defendant considered the meaning and effect of the defined words even though it was not necessary for him to have done so. This issue could probably if not certainly have been resolved by production of the 2017 Advice and also, possibly, the instructions that led to the 2017 Advice. However, that has not happened because PLL has asserted privilege as it is fully entitled to do. It is entirely impermissible to speculate as to why that might be because it is not suggested that privilege has been wrongly or improperly claimed or in some way has been lost by reason of PLL resisting NUFC's arbitration claim. No adverse inferences can be drawn from the proper assertion of privilege. In those circumstances, it is necessary to consider the evidence that is available and assess it applying the principles set out earlier. The only evidence is that provided by the second defendant and BB since NUFC could not have any relevant evidence to give on the issue. Its sole source of information is the disclosure made by BB and the second defendant. This means that some care needs to be taken when evaluating the effect of this material.

44. The evidence relevant to this issue that matters starts with the second defendant's email to Dentons, in which he stated that with the consent of PLL, he was able to say "... *that the advice did not relate to the definitions of 'Director' and/or 'Control' ...*". This was augmented by evidence from PLL's solicitor to the effect that "... *The Section F Advice was exclusively focused on the application of the contents of Section F. The Section F Advice did not address, or relate to, whether an individual or entity would fall within the definition of 'Director' in Section A of the Rules or be considered as exercising 'Control' (as defined in the Section A of the Rules). These were prior questions, that were not relevant to the advice that was sought by the [PLL], or the advice that was provided by...*" the second defendant. This led PLL's solicitor to say in paragraph 62 of his witness statement that:

"In circumstances where this has now been confirmed in clear and unequivocal terms by both [the second defendant] and subsequently [PLL] and me, there is no credible basis for [Dentons'] speculative assertion that "*it is a reasonable inference that the [Section F Advice] may have required consideration to be given to the definitions of 'Person,' 'Control' and 'Director'*"

45. It is now necessary to take a step back from the detail for a moment. BB is a well-known full service law firm based in the City of London. PLL's solicitor and the person giving the evidence I have referred to earlier is a partner in that firm. The second defendant is described in paragraph 69 of PLL's skeleton argument as being:

"... a highly respected legal professional practitioner who became a Queen's Counsel in 1981. Alongside his well-known work as an arbitrator, he has also enjoyed a distinguished judicial career as a Recorder of the Crown Court, a Deputy High Court Judge, Senior Judge ... of the Courts of Appeal of Jersey and Guernsey, and Deputy Chairman of the Information (National Security) Tribunal. He is a long standing (since 1996) and highly respected arbitrator in the Court of Arbitration for Sport ...."

It would be fanciful to suppose (and NUFC does not suggest) that both the second defendant and PLL's solicitor would have lied in the evidence they have given. In reality, there can be no half way house on this issue not least because both PLL's solicitor and the second defendant have reminded themselves of the terms of the 2017 Advice. Unless therefore there is some credible basis for concluding that both PLL's solicitor and the second defendant have lied then an observer with the attributes attributed to him or her by the case law referred to earlier would be bound to accept what PLL's solicitor and the second defendant have said. The professional repercussions for each of them lying about an issue such as this would be severe and in relation to PLL's solicitor would engage the consequences that follow from lies contained in witness statements. I conclude therefore that the fair-minded and informed observer, having considered the facts, and being neither unduly sensitive or suspicious nor complacent would accept this evidence and the assurances referred to above at face value.

46. There remains one further issue to consider however and that concerns the issue of disclosure. The facts came to light only because they were disclosed by PLL's solicitors by their letter of 23 October 2020. The initial disclosure was not given by the second defendant and the disclosure when it was given came about 2 weeks after the second defendant had certified that "... *there are no circumstances which exist that give rise to justifiable doubts as to my impartiality in that role.*"
47. As I have explained, a judicial office holder or arbitrator is expected to disclose matters that could arguably lead a fair minded and informed observer to conclude that there was a real possibility that the arbitrator was biased. The category of matters that require disclosure is wider than those that may ultimately lead such an observer to conclude that there was a real possibility of bias. The disclosure of matters that should be disclosed applying the test to which I have referred helps dispel any suggestion of bias, whereas a failure to disclose something (even if ultimately what should have been disclosed does not lead to the conclusion that there is a real risk of bias) is capable of supporting (but does not lead necessarily to) the conclusion that there is a real possibility of bias. In my judgment such an inference is inappropriate in the circumstances of this case applying the fair minded and informed observer test. My reasons for reaching that conclusion are as follows.
48. First, whilst the IBAG are not decisive on an issue such as this, they provide a practical benchmark against which issues of this kind can be judged. Had the 2017 Advice been concerned with the very issue that arises in this arbitration then it is at least probable that the reasonable bystander test would have been satisfied without further enquiry and without the need to consider further the failure to disclose. However, where, as here, the 2017 Advice is concerned with an issue that does not arise, different considerations apply. The longer the gap between being instructed to give advice to a client and the appointment under challenge, the less likely it will be that the mere fact of a past professional relationship will cause the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility of bias. Where on the time continuum that will be is fact sensitive. However, all other things being equal the IBAG sets the balance by limiting its Orange List requirements to disclosure where the arbitrator has, within the past three years, previously advised or been consulted by the party, or an affiliate of the party, making the appointment in an unrelated matter and the arbitrator and the party, or the affiliate of the party, have no ongoing relationship.

49. A number of points arise from this. First and least importantly the second defendant has not been appointed by PLL but by the third and fourth defendants. Secondly and more importantly the second defendant was instructed in excess of 3 years before being appointed chairman of the tribunal by the third and fourth defendants. Thirdly and most importantly there is no continuing relationship between PLL and the second defendant. The last instruction given to the second defendant on behalf of PLL concerned an unrelated issue where the work was completed in July 2018. Whilst it is true to say that there were two instructions in 2018, that should have been disclosed, it is not alleged that either instruction relates to the issues in the arbitration with which these proceedings are concerned. All these factors suggest that it goes too far to say that the second defendant should have disclosed the fact that he had been instructed by PLL in excess of three years earlier to provide a single piece of advice in relation to an issue that was different from the issue that arises on the reference.
50. Secondly, even if that is wrong, I do not consider that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the second defendant was biased from the fact of non-disclosure for the reasons identified already and in addition because the disclosure was inadvertent. The second defendant has so stated and there is no fact or matter that would suggest this was wrong. I am not concerned with careless inadvertence, because someone cannot be expected to disclose that which has been forgotten, unless it would support an inference by a fair-minded and informed observer that there was a real possibility of bias. There is nothing in the background material that suggests this is so. The 2017 Advice was completed more than three-and-a-half years prior to the second defendant's appointment, neither of the other two instructions were within the last two years and none of the instructions concerned any issues relevant to the arbitration.
51. All this leads me to conclude that of itself the fact that the second defendant had been instructed on behalf of PLL and the EFL to give advice as to the meaning of Section F in excess of three years prior to his appointment would not cause the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the second defendant was biased.

*The Other Arbitral Appointments*

52. In my judgment none of these appointments would of themselves cause the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the second defendant was biased, nor would such an observer infer bias on the part of the second defendant from his failure to disclose them.
53. Of the 12 appointments relied on, only 3 were by BB. Of those, two were made after the second defendant had accepted appointment in respect of the reference I am concerned with. In relation to disclosure, the three in respect of which the second defendant was appointed by BB were not disclosable as being within the (non-exhaustive) Orange List guidelines because the second defendant had not been appointed by BB on more than three occasions in the three years prior to the second defendant's appointment to chair the arbitration with which I am concerned. As I have said already, the second defendant was appointed in the reference with which I am concerned by the third and fourth defendants not by or on behalf of PLL or by PLL's solicitors. It is conceded by NUFC that "...in light of the information now given by [the

*second defendant] in his written submissions as to the relative significance to his practice and income of appointments by [BB], that this is not a case where any financial ties between [the second defendant] and [BB] undermine his independence ...”*

54. Whilst I accept that circumstances such as this ought to be considered carefully by someone asked to accept an appointment before deciding to accept the appointment, deciding whether to disclose such appointments would depend on the circumstances. Where none of the other appointments were on behalf of a party who was also a party to the reference I am concerned with and where the subject matter was not the same as the reference I am concerned with, I conclude that the fair-minded and informed observer, having considered the facts, would not infer a real risk of bias from the non-disclosure concerned. This is likely to be particularly the case in sports arbitrations, where the number of suitably qualified and experienced arbitrators is limited – something expressly recognised in the IBAG.
55. The concession by NUFC that the second defendant is not financially dependent on work from either PLL or its solicitors is plainly correct and supported by each of the points made by the second defendant in paragraph 18 of his written representations concerning this application, each of which I accept:

“More significant may be the following matters of which NUFC and Dentons will be unaware but would be relevant circumstances to be taken into account by the fair-minded and informed observer.

(i) On the 50th anniversary of my call to the Bar on 21 November 1967, when I was 75 years old, I started a process of withdrawal from my practice as a barrister. In consequence I argued my last case in December 2018 and gave my last advice in October 2019.

(ii) In terms of my practice as a sports arbitrator I am similarly downsizing and am selective in the appointments which I accept. By way of downsizing I declined reappointment as the Chair of the IAAF (World Athletics) Disciplinary Panel in November 2019 in which capacity I had previously handed down approximately a dozen decisions.

(iii) I remain Chair of the ICC (World Cricket) Code of Conduct Commission and Dispute Resolution Committee. I remain also, a member of the Lausanne based CAS. These posts (together with my membership of the Mixed Martial Arts Doping Appeal Tribunal), as long as I choose to retain them, (which will not be for much longer), provide me with more than sufficient remunerated work as an arbitrator (at a rough count I have more than a dozen cases in various stages, but all uncompleted, under the auspices of these various bodies). But more relevantly I now accept appointments as an arbitrator only when the case interests me, and, happily, not because I need the attendant fees.

For all those reasons I do not, and cannot reasonably be thought to, depend upon [BB] or [PLL] for future income”



*The 28 October Correspondence*

56. For the most part these communications were concerned exclusively with obtaining the consent of PLL and the EFL as to what if anything the second defendant could say to NUFC and its solicitors concerning the 2017 Advice. In my judgment communications confined to that issue would not cause the fair-minded and informed observer, having considered the facts, to conclude that there was a real possibility that the second defendant was biased. This follows from the need for an arbitrator to obtain the consent of his former client commenting on the substance of work done for one of the parties to an arbitration. As to that, the concern was the subject matter and contents of written advice. The fact that the second defendant had been instructed had been disclosed by BB. I consider that the consent of both clients (PLL and the EFL) was required before the second defendant could have disclosed the or any part of the substance of the 2017 Advice. In the event only limited consent was forthcoming and once that consent had been obtained, the information the second defendant was authorised to release was supplied. The second defendant cannot be criticised for not copying these emails to NUFC prior to that because that would or might have resulted in the breach of confidence that the second defendant was attempting to avoid. It would have been better if the emails had been supplied as and when BB informed the second defendant that they could be, but in the end nothing material turns upon that because the second defendant had made clear in his correspondence that he was content for the emails to be supplied to NUFC. None of this satisfies the apparent bias test I have summarised above.
57. Different considerations apply potentially to the second defendant's request that PLL confirm whether it wished him to continue or recuse himself. I accept that the second defendant was entitled to request that information from BB for the reasons that he gave. However, there was no reason why that request for clarification could not have been set out in a separate email copied to all other parties and it should have been. Similar considerations arose in relation to the second defendant's request for confirmation as to PLL's position as to whether a directions hearing scheduled to take place could still take place given the challenge by NUFC to the second defendant's appointment.
58. As to the first of these points, the second defendant's explanation - "*... had I been informed that [PLL] no longer wished me to continue as Chair I would promptly have recused myself and so informed all the Interested Parties ...*" does not explain why this confirmation should have been requested in correspondence addressed to PLL alone when it could and should have been contained in an email addressed to both parties. The inclusion of this request in the 28 October correspondence concerning the 2017 Advice was an error of judgment and ought not to have occurred. Similar considerations apply to the request for information from PLL as to whether the directions hearing could proceed or not. The second defendant's explanation - that "*... it appeared that [PLL] ... did not wish the Directions hearing to proceed on that day, and ... NUFC were of like view ...*" is not an answer to the point that the second defendant should not have been communicating with one party alone in relation to that issue.
59. The communication concerning recusal is the more potent of the two because looked at in isolation it appears as though the second defendant was willing to be guided as to whether he should recuse himself by the views of one of the parties. Notwithstanding my conclusion that the failure of the second defendant to set out this request in

correspondence copied to all parties was an error of judgment, the only relevant question that arises is whether the fair-minded and informed observer, having considered the facts, would infer a real risk of bias from this error. In my judgment such an observer having all the attributes referred to in the authorities would not have come to that conclusion. Had these incidents been the only incidents and had the proper course been to view them in isolation the issue might have been more difficult to resolve but as I have said – and as is NUFC’s case – none of these various incidents can be viewed in isolation. The vast majority of the communications on 28 October were concerned with the 2017 Advice issue. The various emails appear to have been written in some haste and under some pressure of time as is apparent from the typographical errors that appear in them. As soon as the issue was raised by BB, the second defendant made clear that he was content for all the communications to be provided to Dentons.

60. In viewing this material it is relevant to consider the second defendant’s reputation applying what Lord Hodge said in paragraph 88 of his judgment in Halliburton Co v Chubb Bermuda Insurance Ltd (ibid.). I have already quoted in part from paragraph 69 of PLL’s skeleton argument concerning this issue. That paragraph continued in this way:

“... All of these positions entail an awareness of the obligations of independence and impartiality, and the need to decide cases on the merits of the facts and the law. He has provided previous examples where he has stood down in high profile cases because, e.g., he had played a role in drafting rules which were relevant to the arbitration.”

The substance of this is not challenged by NUFC. This is material that the fair-minded and informed observer having the attributes referred to earlier would take into account when deciding whether to infer a real risk of bias from the conduct I am now considering. This material, in combination with the fact that the second defendant made clear that he was content for all the communications to be provided to Dentons, that the issues were not ones on which PLL’s or the second defendant’s views could be decisive and that the communications were written in haste and under some pressure of time would on balance lead such an observer to conclude that these events were errors of judgment made in pressured circumstances rather than evidence of a real risk of bias. Such a conclusion again would follow where the observer was not being either unduly sensitive or suspicious nor complacent.

*Cumulative Effect*

61. Finally, it is necessary to take a step back and examine everything that has happened in the round but taking account of the conclusions that I have reached so far.
62. In this case at least the weight of the whole does not exceed the sum of its parts. The fair-minded and informed observer, having considered the facts would have reached the conclusions I have summarised above and would have concluded that there was no real risk of bias from this conduct when viewed as a whole and assessed by reference to the evidence as is stood at the date of the hearing.
63. As part of that evaluation exercise it is probable that such an observer would have been influenced by each and every one of the factors to which I have referred, which he or

she would have viewed against the backdrop of the second defendant's very substantial experience and unquestioned reputation coupled with the fact that at the time when the events on which NUFC relies occurred (a) the income the second defendant derived from PLL and its solicitors was immaterial; (b) the second defendant had to all intents and purposes retired from practice at the Bar and so was not looking for further advisory work from either PLL or its solicitors and (c) was winding down his practice as a sports arbitrator.

64. Whilst such an observer would have taken account of the fact that the opportunity for scrutiny of arbitrators is more limited than is the case with judges and the grounds on which arbitral awards can be challenged are more limited than is the case with judgments, he or she would have tested what occurred against the IBAG requirements as part of his or her evaluation. None of the instructions and other appointments relied on by NUFC were disclosable applying those guidelines other than the two instructions in 2018, which in the event are not relied on by NUFC. In relation to the correspondence such an observer would not consider it material from which a risk of bias was to be inferred in all the circumstances and that does not alter when considered together with the other matters relied on by NUFC. All this viewed in the round would lead the fair-minded and informed observer to conclude as I have indicated.

### **Disposal**

65. In those circumstances the Section 24 Application fails and is dismissed.

### **Post Judgment Issues**

66. Following delivery of this judgment to the parties in draft, I received a submission from NUFC's counsel suggesting that because I had not addressed each and every argument they had advanced I had failed to engage sufficiently with its case and inviting me to give further reasons or change my mind. I reject those submissions because it necessarily follows from the conclusions I have reached that I rejected NUFC's case on those issues. However for the avoidance of doubt I set out or repeat my conclusions on those points below summarily.
67. NUFC maintains that the scope of the arbitration is wider than the "*Director*" issue. I do not accept that to be so. The decision letter is entirely clear for the reasons explained above. Paragraph 5 of NUFC's skeleton submissions misstates the effect of the decision letter. None of the facts and matters referred to in paragraphs 8 and 17 of NUFC's skeleton submissions engage in any relevant way with Section F of PLL's Rules or with the issues that the 2017 Advice was concerned with. Section F of the Rules is not material in the circumstances to the true construction of the definitions within Section A for the reasons already explained in paragraphs 38-40 of the judgment. I reject the submission that the second defendant has prejudged a point in dispute as alleged by NUFC in paragraph 25 of its skeleton submissions because the second defendant's conclusion is plainly correct for the reasons explained above. The arbitration is concerned ultimately with and only with the applicability of the definitions in Section A to KSA. Similarly, NUFC's criticism of the second defendant's failure to refer to Section A when giving the 2017 Advice misses the point as well. The second defendant's evidence which I have accepted is that in giving his 2017 Advice his

exclusive focus was on the provisions within Section F. Nothing within that section impacts on, expands or augments the definitions in Section A.

68. The points made concerning the correspondence do not require further reasons. My conclusions and the reasons for them are set out above and do not require further expansion. I have rejected NUFC's submissions for the reasons that I have given. Similar considerations apply to the issues concerning prior appointments. NUFC's contention that the second defendant is an arbitrator of choice for BB is not sustainable for the reasons explained earlier. It is submitted by NUFC that non-disclosure was not limited to the 2017 Advice. I have addressed the other advices in paragraph 49. No further reasoning is required. I set out my conclusions in relation to the other arbitral appointments in paragraphs 52-55 above. It was submitted by NUFC that if the disclosure had taken place earlier it is improbable that the third and fourth defendants would have appointed the second defendant. As to that, there is no evidence to that effect and unless both parties agreed that the second defendant should not be appointed (something that is itself improbable given the position adopted by PLL when the issue arose) it is likely that the third and fourth defendants would have resolved the dispute that would then have arisen applying the principles set out above and with the same result. As to the second defendant's personal integrity and experience, NUFC submitted that it was relevant to the assessment. Plainly that concession was correctly made on the authorities. The weight to be given to that factor is a matter for me to assess as part of the overall evaluative exercise. My reasoning in relation to that issue is set out above and it necessarily follows that I have rejected the submissions on this issue advanced by NUFC.
69. In those circumstances, I reject NUFC's submission that I have failed to engage with its arguments.