OUTER HOUSE, COURT OF SESSION

[2020] CSOH 68

P499/20

NOTE BY LORD CLARK

In the petition of

Heart of Midlothian Football Club plc and The Partick Thistle Football Club Ltd

Petitioners

for

orders in terms of sections 994 and 996 of the Companies Act 2006 in respect of The Scottish Professional Football League Limited

Respondents

Petitioners: Thomson QC, Paterson; Gilson Gray LLP
First Respondent: Moynihan QC; Shepherd and Wedderburn
Second, Third and Fourth Respondents: Borland QC; Lindsays

3 July 2020

Introduction

[1] In a case of this urgency and significance it is appropriate that I give my ruling as soon as reasonably possible. This Note sets out the decisions and reasons in summary form and if it becomes necessary to issue a written Opinion, for example if a reclaiming motion (an appeal) is to be made, I may require to explain my reasoning in more detail in that written Opinion.

[2] The petitioners, whom I shall refer to as Hearts and Partick Thistle, allege that the affairs of the Scottish Professional Football League Limited ("the SPFL") have been

conducted in a manner which is unfairly prejudicial to them. Orders are sought in terms of sections 994 to 996 of the Companies Act 2006. On 15 April 2020, a decision was made by the member clubs of the SPFL to pass a Written Resolution which altered the rules of the SPFL. This alteration resulted in the relegation of Hearts and Partick Thistle from their respective divisions and the promotion of Dundee United, Raith Rovers and Cove Rangers from their respective divisions. In this petition, Hearts and Partick Thistle set out the grounds upon which the affairs of the company are said to have been conducted in an unfairly prejudicial manner and seek three main orders from the court:(i) to suspend the Written Resolution insofar as it deals with relegation and promotion; (ii) to interdict (prohibit) the SPFL or its directors and others from implementing the terms of the Written Resolution insofar as it deals with relegation and promotion; (iii) to reduce (in effect, to cancel) the Written Resolution in that regard. The SPFL and Dundee United, Raith Rovers and Cove Rangers oppose the petition.

[3] The case called before me for a by-order hearing on Wednesday 1 July and that hearing continued yesterday and today. The orders which I have just identified as being sought by Hearts and Partick Thistle were not the subject-matter of the by-order hearing. Rather, the hearing concerned procedural issues. There were three opposed motions before the court. I shall deal firstly with the two motions made on behalf of Dundee United, Raith Rovers and Cove Rangers (the second of which is also made by the SPFL). I shall then deal with the motion made on behalf of Hearts and Partick Thistle, which concerns the recovery of documents. Before dealing with these motions, it is convenient to set out the key provisions of the SPFL's articles of association and rules and of the articles of association of the Scottish Football Association (the SFA). Article 196 of the SPFL's articles states:

> "Each Member shall be liable for the discharge of the obligations and duties and shall be entitled to the benefits and rights accruing under and in terms of these Articles, the Rules and Regulations of and to the Club which it owns and operates"
>
> Rule B4 of the SPFL's rules provides that:
>
> "Membership of the League shall constitute an agreement between the Company and each Club, and between each of the Clubs, to be bound by and comply with:
>
> B4.1 these Rules and the Articles
> ….
> B4.3 the articles of association…of the Scottish FA…"

Article 99.7 of the SFA's articles defines the term "Football Dispute" as meaning:

> "a dispute between or among members and/or any associated person(s) arising out of or relating to Association Football (with the exception of a matter which falls within the supervisory jurisdiction of the Court of Session, and with the exception of any matter for which the Judicial Panel or tribunals appointed therefrom have jurisdiction under these Articles)"

The term "associated person" means any body or person who is involved in Association Football in Scotland under the auspices of or pursuant to a contract with a member. The term "Association Football" is defined in article 1.1 as essentially meaning any football played under the jurisdiction of FIFA.

Article 99.13 of the SFA's articles states:

> "The fact of membership of the Scottish FA and/or the submission to the jurisdiction of the Articles and/or association with such member by an associated person shall constitute an agreement by (i) a member; and/or (ii) an associated person that such member and/or associated person shall settle a Football Dispute by arbitration conducted in accordance with Articles 99.13 to 99.19."

Article 99.15 of the SFA articles states:

> "A member or an associated person may not take a Football Dispute to a court of law except with the prior approval of the Board. For the avoidance of doubt, this Article 99.15 does not prevent a member or associated person from raising proceedings for time bar purposes, subject to such proceedings being sisted at the earliest opportunity for resolution in accordance with this Article 99."

The motion to dismiss the petition

[4] The first motion made on behalf of Dundee United, Raith Rovers and Cove Rangers is to have the petition brought by Hearts and Partick Thistle dismissed by the court. The grounds for that motion are that the member clubs are bound by the terms of the SFA's articles of association and in terms of Article 99.15 of those articles Hearts and Partick Thistle are prohibited from raising these court proceedings without the prior permission of the Board of the SFA, which was not asked for or granted. As noted, this hearing is a by-order hearing. It was fixed largely to determine the further procedure in the case. It is appropriate for certain motions to be dealt with at this early by-order hearing. Amongst the type of motions which, in my view, can properly be dealt with are the second motion on behalf of Dundee United, Raith Rovers and Cove Rangers, supported by the SPFL, to sist (suspend) the proceedings. That is a matter which can appropriately be raised at this initial or preliminary stage. In the extraordinary circumstances of the present case, which include that the football leagues are due to start in less than twenty-eight days' time and may be seriously affected by the outcome of this dispute, the same can be said about the motion on behalf of Hearts and Partick Thistle for the recovery of documents.

[5] However, a motion to dismiss a petition, where that relates to legal issues requiring full and proper discussion and detailed submission, is not something to be dealt with at this stage. Normally, the parties would be allowed to set out their respective positions in the pleadings having been given ample opportunity to adjust those pleadings. Detailed notes of argument would then be required and the hearing (commonly described as a debate) would be fixed for the full legal arguments to be heard.

[6] There are plainly a number of important legal questions which arise from the terms of Article 99.15 of the SFA's articles of association. As was discussed in submissions at the

hearing, an earlier version of the SFA' articles of association, which stated that legal proceedings could not be brought without consent of the SFA's Council, was held to be unlawful: *St Johnstone Football Club Limited* v *Scottish Football Association Limited* 1965 SLT 171. A similar position was taken by the English court in *Enderby Town Football Club Ltd* v *Football Association Ltd* [1971] Ch 591. But it is also, of course, correct that matters have moved on, in relation to both the details of the SFA's articles of association (including that raising legal proceedings under the supervisory jurisdiction of the court does not require permission of the Board) and the introduction into Scots law of the Arbitration (Scotland) Act 2010.

[7] In my view, a further issue arises from a point made by Mr Moynihan QC on behalf of the SPFL about the disciplinary process and the potential sanctions applicable to SFA members. I was taken to the SFA's Judicial Panel Protocol and shown a provision which applies where a member or an associated person takes a dispute, which is referable to arbitration in terms of Article 99, to a court of law, in circumstances other than those expressly provided by the terms of Article 99. The provision refers to penalties of up to £1,000,000 and/or suspension or termination of the club's membership of the SFA being imposed if a court action is raised. In my opinion, the existence of that potential penalty (which includes expulsion or as Mr Moynihan put it, being put "out of the game") is a factor which requires to be considered when analysing the lawfulness or otherwise of Article 99.15. In response to a question from the court, Mr Borland QC, on behalf of Dundee United, Raith Rovers and Cove Rangers, accepted that this matter should form part of the context in which the lawfulness or otherwise of the terms of Article 99.15 fall to be assessed. In this petition, Hearts and Partick Thistle argue that the decision to accept the Written Resolution which gave rise to their relegation was unfairly prejudicial, for a number of reasons. These include that Dundee football club submitted a vote which was against the Written Resolution. On

behalf of the SPFL, as Mr Moynihan indicated yesterday, it is admitted that this vote was received at 4.48pm on the day in question. The SPFL explain in their answers to the petition why the email containing the vote was not seen or read at that time. Hearts and Partick Thistle contend that if this vote by Dundee had been counted at this time, then the Written Resolution would not have been passed, the alterations to the rules of the SPFL made by it would not have occurred and relegation, based on that alteration, would not have happened. Relegation can plainly have significant financial and other implications for a football club. On the advice of responsible counsel, Hearts and Partick Thistle brought these proceedings in court alleging unfair prejudice on that and several other grounds. In my opinion, questions may arise as to whether in that context a bar on raising legal proceedings without the permission of the Board of the SFA, subjecting a club which does so to the potentially extreme sanctions mentioned by senior counsel for the SPFL, can be viewed as contrary to public policy and hence unlawful. In the absence of detailed submissions, I cannot reach any concluded view on that matter. It is something which would require to be addressed in a proper legal debate on this issue.

[8] I conclude that the nature and relative complexity of these issues makes it inappropriate that I deal with the question of dismissing the petition at this early stage. I therefore refuse the motion on behalf of Dundee United, Raith Rovers and Cove Rangers to have this petition dismissed.

The motion to sist these proceedings to allow the dispute to go to arbitration

[9] I now turn to the second motion, which is that these proceedings should be sisted (that is suspended) pending the outcome of an arbitration process. In terms of section 10(1) of the Arbitration (Scotland) Act 2010 the court must grant a motion to sist the cause if the

conditions set out in section 10 are satisfied. One of these conditions (in section 10(1)(d)(i)) is that the respondents have taken no step to answer any of the substantive claims made by the petitioners. On a literal view of the language of that provision, the respondents in the present case have taken such steps. However, the interpretation of legislation is more sophisticated than proceeding solely on the literal view and in particular a purposive approach is commonly adopted.

[10] The provision in question, as is the case with many of the provisions in the 2010 Act, is similar to a provision in the English legislation, that is, section 9(3) of the Arbitration Act 1996. One difference is that the English legislation expressly provides that taking such a step is a bar to having the action sisted. The position in Scotland under the 2010 Act is different in that if the condition is not satisfied the result is that the court is not obliged to grant the sist. In those circumstances, the question arises as to whether the decision on granting the sist becomes a matter of discretion for the court. I deal with that below, but the first point to be addressed is the true meaning of section 10(1)(d)(i).

[11] Several authorities in England (including decisions by the Court of Appeal in *Patel* v *Patel* [2000] QB 551 and *Capital Trust Investments Ltd* v *Radio Design TJ AB* [2002] 2 All ER 159 and other first instance decisions, as I understand it including *Bilta (UK) Ltd (in liquidation)* v *Nazir and others* [2010] Bus L R 1634) deal with the proper interpretation of the provision in the English legislation. Given that the Scottish legislation is modelled on the English provisions (and indeed is very similar in its wording) I regard the English case law as being of assistance. These authorities found strongly upon the principle that if any responses given to substantive claims are subject to the clear qualification that a sist for arbitration is requested, then no step has been taken which should bar the request for arbitration.

Applying that interpretation, the argument for Hearts and Partick Thistle on this point must fail.

[12] Turning to the other points raised, I do not accept the submission for Hearts and Partick Thistle that there is nothing in the SPFL's articles of association which refers this matter to arbitration. In terms of articles 2 and 196 of the SPFL's articles, Hearts and Partick Thistle are contractually obliged to comply with the SPFL's rules. By virtue of rule B4 of the SPFL's rules, Hearts and Partick Thistle have to comply with the SFA's articles of association. In my view, it is clear that all of the member clubs and the SPFL have agreed that the articles of the SFA, the articles of the SPFL and the rules of the SPFL are binding upon them. As to whether the terms of the SFA's articles of association were incorporated into the SPFL articles and rules, I apply the approach taken by Lord Hamilton in *Babcock Rosyth Defence Ltd* v *Grootcon (UK) Ltd* 1997 SLT 1143, at 1150-1151 and I conclude that there can be no real room for doubt that the parties intended to embrace article 99 of the SFA's articles (as well as the other articles) into their contract. In any event, I also accept the submission that the issue of incorporation is not itself essential for the reason that all of the parties in this litigation have signed up to and agreed to be bound by the terms of the SFA articles themselves.

[13] Mr Thomson also submitted that the present dispute is not the subject of arbitration as provided for in Article 99 because of its nature (being a claim based upon unfair prejudice). Reliance was placed on the decision of Judge Weeks in the case of *Exeter City AFC Ltd* v *Football Conference Ltd* [2004] B.C.C. 498 and it was submitted that the decision of the English Court of Appeal in *Fulham Football Club (1987) Ltd* v *Richards* [2011] EWCA Civ 855 is incorrect. I do not intend to go into the details of the case law, but in my opinion the reasoning in the *Fulham* decision, which rejected the position taken by Judge Weeks in the

Exeter case and explained why allegations of unfair prejudice can suitably be determined by arbitration is persuasive. I note that the decision in *Fulham* has been followed by the English Court of Appeal in another decision issued about two weeks ago (*Bridgehouse (Bradford No. 2) Limited* v *BAE Systems plc*, [2020] EWCA Civ 759). Accordingly, this issue of unfair prejudice is a matter which can be determined by arbitration.

[14] Mr Thomson also submitted that the SPFL is not an "associated person" for the purposes of clause 99 of the SFA articles and also that to be referred to arbitration this dispute requires to be a "Football Dispute", as defined, which, he argued, it is not. I conclude that the language of the relevant articles is expressed in relatively wide terms and plainly covers this dispute. SPFL is an "associated person" and, in any event, if it is not Dundee United, Raith Rovers and Cove Rangers are member clubs who can rely upon and enforce the provisions. The definition of "Football Dispute" is a matter "arising out of or relating to Association Football". I am in no doubt that issues of relegation and promotion, and consequently the compositions of the divisions of the football leagues, arise out of or at the very least are related to "Association Football". Hearts and Partick Thistle themselves contend that the Written Resolution did not meet the requirement of competitive fairness and sporting integrity, which I view as integral aspects of football.

[15] I turn next to the submission made by Mr Thomson that the condition in section 10(1)(e) of the 2010 Act is not met. For that to be the position, something must have caused "the court to be satisfied that the arbitration agreement concerned is void, inoperative or incapable of being performed". This is a high test. It applies to the arbitration agreement. There was no basis suggested for regarding the arbitration agreement as void or inoperative. Rather, the contention was that in the present circumstances the arbitration agreement is incapable of being performed. While I accept that there are challenges in relation to timing,

these do not suffice to meet the test that the arbitration agreement is incapable of being performed. In relation to this usage of the word "incapable", in *Gatoil International plc* v *National Iranian Oil Company* (unreported) 22 February 1990, CA (Civ) Bingham LJ (as he then was) took the view that it was necessary for a party who has agreed to go to arbitration, who now sought to be freed from that obligation, to show that the arbitration agreement simply cannot, with the best will in the world, be performed. I therefore do not accept that condition 10(1)(e) is not satisfied.

[16] For these reasons, each of the conditions in section 10(1) of the 2010 Act are satisfied and I am required in terms of that statute to grant the application to sist these proceedings.

[17] If, against the view I have reached, section 10(1)(d)(i) is construed as Mr Thomson suggested, and that condition is not met here because the SPFL, Dundee United, Raith Rovers and Cove Rangers have lodged answers which deal at least in part with the substantive claims, the question would arise as to whether the court has a discretion which could still allow the granting of the sist. The principal problem, as I see it, is that I was given no proper basis for concluding that under our common law such a discretion exists. In particular I was shown no authority in support of that proposition. I have great difficulty in concluding that, merely by implication, the statute provides for the exercise of discretion. Moreover, it is difficult to see how the policy behind the 2010 Act could be manifest in a provision which amounts to a bar even by simply submitting defences or answers, when (i) these are accompanied by a clear statement that a sist is to be sought and (ii) these assist in identifying that there is a dispute which is covered by the provisions on arbitration, a matter about which the court requires to be satisfied. This supports my earlier view that, read purposively and having regard to the relevant English case law, section 10(1)(d)(i) does not preclude a sist in such circumstances. In other circumstances, where the test in that

provision is not met, then in the absence of a basis in law for the exercise of discretion as an alternative ground for granting a sist, that could not be done.

[18] In any event, if I am able exercise my discretion, then taking into account all of the relevant factors I am not in a position to refuse the motion to sist. I accept entirely, as Mr Thomson submitted, that the media and the general public have a great interest in this dispute and would prefer to have the issues aired in open court. However, as a matter of law, the parties have agreed to the terms of SFA articles of association and to be bound by them. Accordingly, SPFL and Dundee United, Raith Rovers and Cove Rangers are entitled to invoke the arbitration provisions within these articles of association of the SFA, which will result in the dispute being dealt with by arbitration. I am not entitled as a matter of law to refuse the application to sist on the grounds that the interest of public in the dispute should override the agreement reached by the parties. Scots law has recognised for a very long time that individuals and other legal persons, including the private limited companies who are the parties in this litigation, are able to agree that their disputes are to be resolved by arbitration rather than by the court. As my colleague Lord Woolman mentioned in an earlier case, there is clear authority on this matter:

> "15. Scots law has always "permitted private parties to exclude the merits of any dispute between them from the consideration of the Court by simply naming their arbiter": *Hamlyn & Co v Talisker Distillery (1894) 21R (HL) 21* , 27 per Lord Watson. As Lord Dunedin succinctly put it "If the parties have contracted to arbitrate, to arbitration they must go": *Sanderson & Son v Armour & Co 1922 SC (HL) 117* , at p.126."

[19] During the hearing I raised questions about whether the arbitration procedure will be able to determine this matter before 1 August. While, for obvious reasons, I have not been given any absolute assurances on this matter, senior counsel for the SPFL and for Dundee United, Raith Rovers and Cove Rangers have each submitted that there is no reason

to conclude that the matter cannot be dealt with in arbitration before 1 August and indeed, as I understood it, that their clients are reasonably confident that it can be. Mr Borland said that there was a realistic prospect of the arbitration being completed and Mr Moynihan advised that the SPFL is not aware of any difficulty at all of having an arbitration concluded speedily or in the arbitral tribunal being persuaded to deal with the matters urgently because everyone is aware of the ultimate deadline. I trust that every possible step will be taken to have it dealt with in time.

[20] In terms of the Article 99.19 of the SFA's articles of association, the arbitral tribunal ("the Tribunal") may consist of three arbitrators. One of the provisions states that, if so, each party shall nominate an individual from the Tribunal Candidate List as its arbitrator, and the two arbitrators so appointed shall appoint a third arbitrator who shall be or has been a solicitor or advocate or member of the judiciary (Sheriff Court or Court of Session) of not less than 10 years' standing (including cumulatively in a combination of the said functions) and who shall act as chairman of the Tribunal ("the Tribunal Chairman"). Accordingly, the SFA will not judge the issue in the arbitration. The independent arbitral tribunal will be presided over by an experienced lawyer or member of the judiciary. The arbitral tribunal is able to require evidence from witnesses and if required, in terms of rule 45 of the Scottish Arbitration Rules, the court can make appropriate orders in that regard.

[21] I should add that I do not regard Mr Moynihan's submission that persons with an interest in football are better placed than the court to deal with this issue as well-founded. The case involves allegations of unfair prejudice. It is a matter of company law, upon which there is substantial authority in the case law, and it will require appropriate legal expertise in the arbitration tribunal. However, as I have just noted, that appropriate expertise is available. I also place no weight on the submission that the SPFL could itself be disciplined

if it participated in legal proceedings. That is not borne out by the terms of the disciplinary provisions.

[22] The 2010 Act sets out its founding principles, including: (a) that the object of arbitration is to resolve disputes fairly, impartially and without unnecessary delay or expense; and (b) that parties should be free to agree how to resolve disputes subject only to such safeguards as are necessary in the public interest. When I take these into account along with the long-standing position in the law of Scotland, that the parties to an agreement that their disputes should be referred to arbitration, are bound by and must respect the terms of that agreement, then even if this issue was simply about an exercise of my discretion I would not be able to refuse the motion to sist. As I have indicated, the dispute will be dealt with by an arbitral tribunal which has wide and flexible powers, including to hear evidence on any relevant matters.

Recovery of documents

[23] Before I grant the motion for a sist, I wish to turn to deal with the motion on behalf of Hearts and Partick Thistle for the recovery of documents. I begin by accepting the submissions made by Mr Moynihan to the effect that article 99 of the SFA's articles of association, properly construed, may not exclude all of the default provisions in the Scottish Arbitration Rules. That is a matter of interpretation of the words in article 99, which are not, as Mr Moynihan accepted, absolutely clear. As he put it, there is a peculiarity and difficulty of interpretation of this wording, although as he explained there is, later on in article 99 (99.19) specific reference to excluded default rules in relation to arbitration dealing with Football Disputes. Rule 28, which is a default rule and therefore applies unless the parties have excluded it, permits the arbitration tribunal to grant disclosure of documents.

[24] If rule 28 is not excluded, which on balance I think was the intention, I recognise that in accepting the motion to grant a sist of these proceedings the central purpose is to hand over the conduct and resolution of this dispute to the arbitration tribunal. I also recognise that, put broadly, it is proper for this court to respect the powers and duties of the arbitration tribunal and to leave it to that tribunal to deal with the evidential, procedural and substantive matters in this dispute. However, it is not entirely clear whether rule 28 is excluded. More importantly, this case arises in unprecedented circumstances. We are now just 28 days away from the start of the football season and in my view every effort must be made to resolve the dispute before then. While there are a number of admissions made in the pleadings on behalf of the SPFL and Dundee United, Raith Rovers and Cove Rangers, there are still significant issues in dispute.

[25] I should say that I do not accept the submissions made on behalf of those parties to the effect that any delay in these proceedings lies at the door of Hearts and Partick Thistle. On the contrary, those clubs were faced with the decision in mid-April which would result in their relegation, which they say could readily have been avoided if the league was played out, and which plainly will have drastic financial and other consequences. Quite understandably, rather than raising a legal action or proceeding to arbitration the opportunity was taken, which the SPFL actively facilitated, to try to obtain a reconstruction of the leagues which would result in their relegations not occurring. It would make no commercial sense for Hearts and Partick Thistle to have raised proceedings while the issue of reconstruction was ongoing. As I understand it, the present petition was raised within a couple of days of the reconstruction proposals failing. I do not blame the petitioners for not raising proceedings or seeking arbitration whilst that important and potentially crucial alternative was available and was actively being facilitated by the SPFL.

[26] In these unprecedented circumstances, it is, in my view, open to me under the inherent jurisdiction of the court, to make an order for the recovery of documents. I do not accept the contention of Mr Borland that granting such an order is not competent; the issue is before the court. I have had full regard to the points made on behalf of those parties in opposition to the motion for Hearts and Partick Thistle for recovery of documents. I can see some force in the submission that the terms of the order sought are wide and that there may be some issues about the relevancy of some of the documentation sought to be recovered. However, having considered the submissions and the calls set out in the specification of documents, I am satisfied that all of the documents that are identified are of potential relevance to the issues to be determined. These issues require to be determined with real expedition. The motion is not premature given the timing and the matters which are in dispute. Far from in way usurping or interfering with the tribunal's powers, I am seeking to assist. I regard it as appropriate that I ensure that the parties and the arbitral tribunal are given full and proper disclosure of all material relevant to this claim. Put more broadly, the approach I take to the recovery of documents in a dispute of this nature, significance and urgency is to require the parties to put their cards on the table. I therefore do not accept the submissions made on behalf of the SPFL and Dundee United, Raith Rovers and Cove Rangers on prematurity or lack of relevance of the documents.

[27] Any issues of confidentiality can be dealt with in accordance with the normal practice of the court. Documents will be produced in an encrypted password protected file and if there is any legal issue that can be addressed before the court. Of course, any documents recovered will be subject to the restrictions as to their use which is made clear in the authorities.

[28] Accordingly, I shall grant the motion on behalf of Hearts and Partick Thistle for the recovery of documents.

[29] I shall also grant the motion made by the other parties to sist the proceedings pending the outcome of the arbitration. If for any reason, difficulties arise with whether the arbitration tribunal is able to deal with the issues in the time available and the parties change their minds and wish the court to deal with, time will be made available for that to happen.