Case No: A3/2010/2975

Neutral Citation Number: [2011] EWCA Civ 855
IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
COMPANIES COURT
VOS J
3534 of 2010

IN THE MATTER OF THE FOOTBALL ASSOCIATION PREMIER LEAGUE LTD
AND IN THE MATTER OF THE COMPANIES ACT 2006

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 21st July 2011

Before :
LORD JUSTICE RIX
LORD JUSTICE LONGMORE
and
LORD JUSTICE PATTEN

- -

Between :

FULHAM FOOTBALL CLUB (1987) LIMITED	**Appellant/ Petitioner**
- and -	
(1) SIR DAVID RICHARDS **(2) THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED**	**Respondents**

- -

(Transcript of the Handed Down Judgment of
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Official Shorthand Writers to the Court)

- -

Mr Philip Marshall QC, Mr Paul Harris QC and **Mr Owain Draper** (instructed by **Lewis Silkin LLP**) for the Appellant
Mr Richard Snowden QC and **Mr James Potts** (instructed **by Brabners Chaffe Street LLP**) for the 1st Respondent
Mr Ian Mill QC and **Mr Andrew Hunter** (instructed by **DLA Piper UK LLP**) for the 2nd Respondent

Hearing dates : 8th and 9th June 2011
THE HEARING WAS IN PRIVATE

- -

Judgment

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Lord Justice Patten :

Introduction

1. Fulham Football Club (1987) Limited ("Fulham") appeals with the leave of the judge against an order of Vos J dated 1st December 2010 made under s.9 of the Arbitration Act 1996 ("the AA 1996"). Under this order the judge stayed a petition presented by Fulham on 27th April 2010 under s.994 of the Companies Act 2006 ("the CA 2006").

2. The petition relates to the affairs of the Second Respondent, The Football Association Premier League Limited ("the FAPL"), which was incorporated in 1992 in order to give the Premier League the commercial independence to organise its own broadcast and sponsorship agreements. Under its memorandum of association, the FAPL is empowered to organise and manage the Premier League (under the jurisdiction of the Football Association ("the FA")) and, for these purposes, to make its own rules. Each of the 20 clubs in the Premier League holds a share in the company. The allegations of unfair prejudice raised in the petition do not, however, relate to the conduct of the other members of the FAPL but rather to that of the First Respondent, Sir David Richards, who is its chairman. What is alleged is that Sir David acted as an unauthorised agent in breach of the FA Football Agents Regulations ("the Agents Regulations") when in July 2009 he was asked by the Chief Executive of Portsmouth City Football Club Limited ("Portsmouth") (Mr Peter Storrie) to approach the chairman of Tottenham Hotspur Football & Athletic Company Limited ("Tottenham") (Mr Daniel Levy) in order to facilitate the transfer to Tottenham of one of Portsmouth's players, Mr Peter Crouch.

3. At the time Portsmouth was in severe financial difficulties and needed to raise £9 million in order to avoid winding-up proceedings threatened by HM Revenue & Customs. It is alleged that by 25th July Fulham had made an offer of £9 million to secure the registration of Mr Crouch which had been rejected but was prepared to increase its offer to £11 million. Mr Crouch had indicated his preference to play for Tottenham but Tottenham had made lower offers for the player which had also been rejected.

4. The principal allegation made in the petition is that on 24th July Mr Storrie approached Sir David and asked him to assist Portsmouth in facilitating the transfer of Mr Crouch to Tottenham. It is said that Sir David agreed to help and subsequently entered into negotiations with Mr Levy on behalf of Portsmouth to secure an increased offer for the player. What is not in dispute is that on 26th July Tottenham did make an improved offer of £9 million payable immediately which was accepted by Portsmouth and that Mr Crouch was then transferred to Tottenham.

5. Article 79 of the Articles of Association of the FAPL ("the Articles") requires the company to comply with the rules of the Football Association ("the FA Rules"). The FA Rules empower the FA to make regulations such as the Agents Regulations which prohibit any player or club from using or seeking to use the services of an unauthorised agent in relation to Agency Activity as defined. This includes acting in the capacity of an agent, representative or adviser to a club, either directly or indirectly, in the negotiations or arrangements of any transaction facilitating or effecting the transfer of the registration of a player from one club to another.

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6. On 10th August 2009 Fulham made a complaint to the FAPL about Sir David's involvement in the transfer of Mr Crouch to Tottenham. Mr Peter McCormick, a legal adviser to the FAPL, was appointed to inquire into the matter. He produced a report on 10th February 2010 in which he made findings that Sir David had spoken to Mr Levy and did play a part in "mediating" between Portsmouth and Tottenham. He concluded, however, that Sir David had not brokered the transfer of Mr Crouch to Tottenham. The board of the FAPL considered the report on 2nd March 2010 and concluded that Sir David's role in the transfer was one which it was legitimate for him to perform as chairman of the FAPL. Fulham was informed in a letter of 3rd March that its complaint would be dismissed.

7. On 15th March 2010 Fulham's solicitors wrote to the FAPL stating that Sir David had acted unfairly so as to prejudice the interests of Fulham as a member of the FAPL. The FAPL offered to place the matter on the agenda of a shareholders' meeting which was scheduled to take place at the beginning of June 2010 and indicated that it would be bound by the decision of the majority of the member clubs taken at the meeting. Article 46 of the Articles entitles the members to dismiss the chairman and the chief executive officer. In the same letter it put Fulham on notice that if it wished to take further action in respect of the complaint then it was bound under the FAPL Rules to submit the dispute to arbitration.

8. On 27th April 2010 the petition was presented and on 21st June 2010 and 9th July 2010 the FAPL and Sir David issued their respective applications for a stay of the proceedings.

9. The FA Rules (see Rule B.12) provide that membership of the Premier League constitutes an agreement between the FAPL and the member clubs to be bound by and comply with the FA Rules, the Articles and the FAPL Rules. The FAPL Rules are those made by the FAPL from time to time under the power contained in Article 16.1 for the purpose of regulating the organisation and management of the Premier League. The combined effect of Article 79 and Article 16 is that member clubs are bound by both the FA and the FAPL Rules and any regulations made under the FA Rules.

10. In its petition Fulham alleges that it is an implied term of the FAPL Rules that members of the board of the FAPL will comply with their fiduciary obligations and not act so as to prefer the interests of one member club over another. The duties of Sir David as a director of the FAPL include the general duties set out in Part 10 of the CA 2006 to act in accordance with the company's constitution and to exercise his powers for a proper purpose (s.171); to act in the way he considers, in good faith, would be most likely to promote the success of the company for the benefit of the members as a whole having regard (*inter alia*) to the need to act fairly as between members of the company (s.172); and to avoid conflicts of interest (s.175).

11. It is alleged that, by acting as he did in connection with the transfer of Mr Crouch, Sir David acted in breach of the FA Rules and caused the FAPL to act in breach of the Articles and the FAPL Rules (para. 23 of the petition); exercised his powers for an improper purpose, namely to advance the interests of Portsmouth and Tottenham over those of other members such as Fulham (para. 24.2); and failed to act in the best interests of the FAPL or to act fairly between its members (para. 24.3).

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12. The board of the FAPL has failed, it is said, to take action to rectify these breaches of the Articles and the FAPL Rules and of Sir David's duties as a director and, by dismissing Fulham's complaint based on the findings in the McCormick report, has conducted the affairs of the FAPL in a manner which is unfairly prejudicial to the interests of some part of its members including Fulham (para. 26).

13. By way of relief, Fulham seeks an injunction restraining Sir David from acting as an unauthorised agent or from participating in any way in negotiations regarding the transfer of players. In the alternative, it seeks an order that Sir David should cease to be the chairman of the FAPL and such other relief as the Court thinks fit.

14. The central allegation that Sir David acted as an unauthorised agent for Portsmouth is strongly denied by both Sir David and the FAPL. Sir David has indicated that he intends (if Fulham succeeds in this appeal) to apply to the Companies Court for an order striking out the petition. They have also, through their counsel, made various submissions to the effect that the principal purpose of the petition is to provide a public hearing of the allegations against Sir David. But none of these matters is material to the disposal of this appeal. The issue for the judge was whether the conditions for a stay of proceedings set out in s.9 of the AA 1996 were made out. If so, then the grant of a stay is mandatory: see s.9(4). As to this, Vos J was faced with two conflicting decisions of the High Court. The first in time is that of Rimer J in *Re Vocam Europe Ltd* [1998] BCC 396 who stayed an unfair prejudice petition under s.9 where a shareholders' agreement provided for all matters in dispute to be referred to arbitration. The second is the decision of HH Judge Weeks QC (sitting as a judge of the High Court) in *Exeter City Association Football Club Ltd. v. Football Conference Ltd.* [2004] 1 WLR 2910 who declined to grant a stay of an unfair prejudice petition because (as he put it):

> "the statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise".

15. Vos J followed the decision in *Vocam* in preference to that in *Exeter City* and granted a stay of the petition under s.9. Fulham appeals on the grounds that *Exeter* was correctly decided and should have been followed by the judge. Alternatively, it is contended that the arbitration clauses contained in the FAPL Rules and the FA Rules, which are relied on in this case, should be construed so as to exclude a dispute about unfair prejudice. Both grounds of appeal depend to some extent on the argument that a s.994 petition is concerned to protect class rights and to secure relief which will be effective to bind third parties. The inability of an arbitrator to grant such relief is relevant both to the fundamental issue of whether a dispute of this kind is arbitrable at all and to the narrower issue of construction of the arbitration agreements. But before turning to the particular arguments it is necessary to set out the relevant provisions of the FAPL and FA Rules which contain the arbitration clauses and to examine more generally the provisions of the AA 1996 and the CA 2006 which are relied on.

The FAPL Rules

16. As already mentioned, Rule B12 of the FAPL Rules provides that membership of the FAPL is deemed to constitute an agreement between the FAPL and the member clubs and between clubs to be bound by and comply with the FAPL Rules, the Articles and

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the FA Rules. This is supplemented by Article 79 which requires the FAPL to comply with the FA Rules.

17. Section S of the FAPL Rules contains the agreement to arbitrate. Rule 2 provides that:

> "Membership of the League shall constitute an agreement in writing between the Company and Clubs and between each Club for the purposes of section 5 of [the AA 1996] in the following terms:
>
> 2.1 to submit all disputes which arise between them (including in the case of a Relegated Club any dispute between it and a Club or the Company the cause of action of which arose while the Relegated Club was a member of the League), whether arising out of these Rules or otherwise, to final and binding arbitration in accordance with the provisions of the Act and this Section of these Rules;
>
> 2.2 that the seat of each such arbitration shall be in England and Wales;
>
> 2.3 that the issues in each such arbitration shall be decided in accordance with English law;
>
> 2.4. that no other system or mode of arbitration will be invoked to resolve any such dispute."

18. Rule 3 of Section S places disputes under these rules into three categories including:

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

19. In terms of relief Rule 28 of Section S gives the arbitral tribunal wide powers including the power to "order a party to do or refrain from doing anything".

The FA Rules

20. The arbitration provisions are contained in Section K of the FA Rules. So far as material, they provide that:

> "1. (a) Subject to Rule K1(b), K1(c) and K1(d) below, any dispute or difference between any two or more Participants (which shall include, for the purposes of this section of the Rules, The Association) including but not limited to a dispute arising out of or in connection with (including any question regarding the existence or validity of):

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(i) the Rules and regulations of The Association which are in force from time to time;

(ii) the rules and regulations of an Affiliated Association or Competition which are in force from time to time;

…

shall be referred to and finally resolved by arbitration under these Rules.

…

(c) Rule K1(a) shall not apply to any dispute or difference which falls to be resolved pursuant to any rules from time to time in force of any Affiliated Association or Competition.

…

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

21. "Participant" is defined by Rule A2 to include any Club, Competition or Official and "all such persons who are from time to time participating in any activity sanctioned either directly or indirectly by the [FA]".

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

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

24. It is common ground that, although Sir David is not a party to the arbitration agreement contained in Section S of the FAPL Rules, he is a Participant (along with Fulham and the FAPL) within the meaning of Section K of the FA Rules. Subject to the issues of arbitrability and construction, there could therefore be an arbitration of the dispute between the parties under the FA Rules. But if the dispute between Fulham and the FAPL proceeds as a reference under Section S of the FAPL Rules, it will have the effect of removing that dispute from the terms of Section K leaving only the dispute between Fulham and Sir David within the scope of the FA Rules: see Rule K1(c).

25. Sir David has indicated in evidence that he is willing to be joined as a party to an arbitration under Section S of the FAPL Rules. He would also favour consolidation of the two references if the dispute is not referred to a single arbitration or at least concurrent hearings. This would require the agreement of all parties: see AA 1996 s.35. Points have been taken about the practical difficulties of consolidation due to

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the possibility of different arbitrators being selected for each reference. But, in my view, none of this really impacts on what we have to decide. Although it would undoubtedly be convenient for the disputes to be determined in a single arbitration or at least a single hearing, the procedural inconveniences of not taking that course are not sufficient to create an objection to the arbitrability of the disputes based on grounds of public policy or some other legal principle and the decision in *Exeter* was not based on considerations of that kind. The right of a shareholder to invoke the Court's jurisdiction under s.994 of the CA 2006 unrestricted by an arbitration agreement covering the same subject-matter cannot depend on whether the agreement would achieve a single hearing of all issues. If such a right exists it must apply as much to a dispute between the parties to a single arbitration agreement as it would do to the present case.

Arbitrability

26. The first step in the appeal must be to identify the legal principle which is said to prevent disputes between a shareholder and the company or between shareholders from being determined by arbitration. This is central to the principal ground of appeal which proceeds on the assumption that each of the matters complained of in paragraphs 23-26 of the petition falls within the terms of the relevant arbitration agreement.

27. On that premise one has to be looking for a statutory provision or a rule of public policy which has the effect of rendering the arbitration agreement either void or unenforceable insofar as it purports to bind the parties to an arbitral determination of the s.994 issues.

28. The first point to make is that there is no express provision in either the AA 1996 or the CA 2006 which excludes arbitration as a possible means of determining disputes of this kind. Section 1 of the AA 1996 sets out the general principles which govern the construction of the Act:

> **"General principles**
>
> The provisions of this Part are founded on the following principles, and shall be construed accordingly—
>
> (a) the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay or expense;
>
> (b) the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest;
>
> (c) in matters governed by this Part the court should not intervene except as provided by this Part."

29. Section 1(b) recognises the principle of party autonomy which underpins much of the AA 1996. This is relied on by the Respondents to the appeal as providing a strong contextual pointer in favour of the disputes in this case being capable of arbitration.

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But it is, in my view, little more than a neutral factor in this appeal. I say that for two reasons. The first is that even if one construes s.1(b) as directed to the issue of arbitrability, it gives no indication of when public policy considerations should intervene, although it recognises that they are preserved by the statute. The second reason is that it is doubtful whether s.1(b) is really concerned with this overarching issue of arbitrability as opposed to the conduct of the dispute within the arbitration itself. On this view s.1(b) is simply affirming the right of the parties to determine the method of resolution of their arbitrable disputes subject to the overriding duties imposed on the tribunal under s.33 to adopt procedures suitable to the circumstances of the particular case.

30. This is certainly the view of Lord Mustill and Mr Boyd QC in the 2001 Companion to the Second Edition of *Commercial Arbitration*. They say (at p. 27) that since the reference to public policy:

> "is embodied in a general principle concerned with the manner of resolving arbitrations, and not with the permissible subject-matter of arbitrations, it is not aimed at questions of 'arbitrability'."

31. What the AA 1996 does, however, clearly do is to give primacy to the arbitration agreement even in domestic disputes by making a stay of court proceedings relating to the same dispute mandatory. This is a significant change from the Arbitration Act 1975 under which it was a matter of discretion.

32. Section 9 now provides that:

> "(1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
>
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
>
> (4) On an application under this section the court shall grant a stay unless satisfied that the arbitration agreement is null and void, inoperative, or incapable of being performed.
>
> (5) If the court refuses to stay the legal proceedings, any provision that an award is a condition precedent to the bringing

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> of legal proceedings in respect of any matter is of no effect in relation to those proceedings."

33. This section is modelled on Article II of the New York Convention and the wording of s.9(4) is taken directly from the Convention. Section 9(1) draws a distinction between the legal proceedings (in this case the petition) and the subject matter of the reference which is the dispute. At some points Mr Marshall QC's argument for Fulham seemed to come close to suggesting that the matter to be referred to arbitration was what might be termed the s.994 claim but one needs to be precise about this. The dispute between the parties and therefore the subject matter of the arbitration agreement is the allegation of unfair prejudice set out in paragraphs 23-26 of the petition. In terms of relief, it is, I think, common ground that the arbitrators could make an order against Sir David preventing him from acting as an agent of any club in the future and could also order him to resign as chairman. What they could not do is to wind-up the FAPL or make orders regulating the affairs of the company which bind other shareholders who are not parties to the arbitration. But no orders of that kind are sought in this case and, even if they were, they would not, in my view, form part of the "matter" to be referred to arbitration. The inability, however, of an arbitral tribunal to wind up a company or make third party orders in the context of a complaint of unfair prejudice is relied on in support of an argument that claims where that or comparable relief could be sought in court proceedings and might be granted lie beyond what the law will permit the parties to submit to arbitration.

34. If Fulham is right about this one needs to identify how the legal bar to arbitration is to be accommodated within the provisions of s.9. There are two possible views about this. One is to treat the arbitration agreement as either null and void or inoperative at least insofar as it relates to the unfair prejudice dispute. Section 81(1) of the AA 1996 expressly preserves:

> "the operation of any rule of law consistent with the provisions of this Part, in particular, any rule of law as to—
>
> (a) matters which are not capable of settlement by arbitration;
>
> (b) …"

35. Consistently with this, an arbitration agreement which purports to refer such matters to arbitration would, to that extent, be treated as unenforceable. Mr Marshall referred to Professor Merkin's book on *Arbitration Law* (2010) where the author treats "inoperative" as including a case where the dispute is not arbitrable. The alternative argument (put forward by Mr Mill QC) is that issues of validity or enforceability come into play in s.9(1) so that the conditions for the making of an application for a stay are not satisfied if the dispute is not arbitrable.

36. On balance, I prefer Mr Marshall's approach to this issue. It seems to me that the conditions for a stay prescribed by s.9(4) make it unlikely that Parliament intended to deal with any issues of arbitrability except on the substantive hearing of the stay application. Section 9(1) is concerned only to identify the existence of an arbitration agreement which in terms covers the matters in dispute as the pre-conditions for the making of the stay application. Section 9(4) also makes it clear that the determination

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of whether the agreement is null and void, inoperative or incapable of being performed is a matter for the Court whereas a challenge to the validity of the agreement ahead of any application for a stay might itself be considered to be arbitrable.

37. There is, however, nothing between the two arguments in terms of outcome. Neither side suggests that a rule of public policy or statutory provision which renders an arbitration agreement void or unenforceable in respect of some particular matter within its scope could not be determined at the latest on the hearing of the stay application. The issue which divides the parties is that of arbitrability itself.

38. This brief excursion through the relevant provisions of the AA 1996 is enough to indicate that the statute leaves open the possibility of a challenge to an application for a stay on grounds of arbitrability but does little to identify the basis of any such challenge. In the Second Edition of Mustill & Boyd on *Commercial Arbitration* this aspect of the law is given a somewhat cursory and inconclusive treatment. The authors (at p. 149) say that:

> "English law has never arrived at a general theory for distinguishing those disputes which may be settled by arbitration from those which may not. The general principle is, we submit, that any dispute or claim concerning legal rights which can be the subject of an enforceable award, is capable of being settled by arbitration. This principle must be understood, however, subject to certain reservations.
>
> First, certain types of dispute are resolved by methods which are not properly called arbitration. These are discussed in Chapter 2, ante.
>
> Second, the types of remedies which the arbitrator can award are limited by considerations of public policy and by the fact that he is appointed by the parties and not by the state. For example, he cannot impose a fine or a term of imprisonment, commit a person for contempt or issue a writ of subpoena; nor can he make an award which is binding on third parties or affects the public at large, such as a judgment in rem against a ship, an assessment of the rateable value of land, a divorce decree, a winding-up order or a decision that an agreement is exempt from the competition rules of the EEC under Article 85(3) of the Treaty of Rome. It would be wrong, however, to draw from this any general rule that criminal, admiralty, family or company matters cannot be referred to arbitration; indeed, examples of each of these types of dispute being referred to arbitration are to be found in the reported cases."

39. Mr Marshall relied upon this passage as a recognition that there are limits to what can legitimately be arbitrated. It confirms, he submitted, that arbitration is a consensual dispute resolution process and therefore one which is unsuitable for use in connection with a dispute in which the interests and representations of third parties need to be taken into account or where the appropriate relief is an order which creates rights in

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rem or affects the public at large. A similar statement of principle can be found in Born on International Commercial Arbitration (2009) (at p. 768) where the author says that:

> "Although the better view is that the Convention imposes limits on Contracting States' applications of the non-arbitrability doctrine, the types of claims that are non-arbitrable differ from nation to nation. Among other things, classic examples of non-arbitrable subjects include certain disputes concerning consumer claims; criminal offenses; labor or employment grievances; intellectual property; and domestic relations.
>
> The types of disputes which are non-arbitrable nonetheless almost always arise from a common set of considerations. The non-arbitrability doctrine rests on the notion that some matters so pervasively involve public rights, or interests of third parties, which are the subjects of uniquely governmental authority, that agreements to resolve such disputes by "private" arbitration should not be given effect".

40. This extract is interesting because it attempts to identify some common criteria applicable in the cases in which the matter in dispute has been held to be non-arbitrable. But it also, I think, indicates that the limitation which the contractual basis of arbitration necessarily imposes on the power of the arbitrator to make orders affecting non-parties is not necessarily determinative of whether the subject matter of the dispute is itself arbitrable. As Mustill & Boyd point out, it does not follow from the inability of an arbitrator to make a winding-up order affecting third parties that it should be impossible for the members of a company, for example, to agree to submit disputes *inter se* as shareholders to a process of arbitration. It is necessary to consider in relation to the matters in dispute in each case whether they engage third party rights or represent an attempt to delegate to the arbitrators what is a matter of public interest which cannot be determined within the limitations of a private contractual process.

41. Not surprisingly, the source of such restrictions cannot be found in the AA 1996 or what might be termed the law of arbitration itself. The statements of principle set out in the textbooks referred to above are simply recognitions that the scope of even the most widely drafted arbitration agreement will have to yield to restrictions derived from other areas of the law. Sections 9(4) and 81 of the AA 1996 confirm this. But the source of those restrictions is to be found elsewhere. The judgment in the *Exeter City* case, which I will come to shortly, is based on a principle of inalienable access to the Companies Court which can only be derived from the CA 2006. One can point to a number of examples of statutory intervention designed to preserve a right of access to the courts. In the field of matrimonial law post-nuptial agreements dealing with maintenance on any subsequent separation were held to be unenforceable on grounds of public policy insofar as they purported to remove the right of the parties to apply to the Court for financial relief. This reservation is now statutory: see *Hyman v Hyman* [1929] AC 601 and ss.34-36 of the Matrimonial Causes Act 1973. In relation to employment and discrimination, there are statutory restrictions on the enforceability of any agreement which excludes or limits an employee's access to the employment tribunal: see Employment Rights Act 1996 s.203 and Equality Act 2010 s.144(1) as discussed in *Clyde & Co LLP v Van Winkelhof* [2011] EWHC 668 (QB).

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42. These examples show that in a number of areas the right of the party to apply to the court or tribunal is expressly preserved. Such a provision is inconsistent with an agreement to submit the dispute to binding arbitration and would therefore defeat any application for a stay of the proceedings either under s.9 or under the inherent jurisdiction. Vos J at one point in his judgment (para. 8) adopted Mr Marshall's way of characterising the issue as whether a member of a company can agree to remove or diminish, by contract, his right to present a petition under s.994 based on unfair prejudice: i.e. to contract out of the Act. This may be an inaccurate way of formulating the question insofar as most arbitration agreements will not expressly exclude any reference to the Court. But the combined effect of an arbitration agreement which covers the dispute and s.9(4) of AA 1996 is that the agreement to refer the dispute to arbitration will exclude the parties' right to bring or continue legal proceedings covering the same subject matter unless one of the exceptions contained in s.9(4) is established. I will deal later in this judgment with the separate question of whether any stay should be a permanent one or should at least be the subject of re-consideration in a case where the arbitrators consider that the winding-up of the company is the appropriate relief but are, of course, themselves unable to make such an order.

Unfair Prejudice

43. There are no provisions in the CA 2006 which correspond to those I have referred to in other areas of the law and if a company dispute about unfair prejudice is to be held to be non-arbitrable then Fulham has to rely on either an implied restriction in the statute or some equivalent rule of public policy based on the considerations referred to in paragraph 40.

44. Section 994 provides that:

> "(1) A member of a company may apply to the court by petition for an order under this Part on the ground—
>
> (a) that the company's affairs are being or have been conducted in a manner that is unfairly prejudicial to the interests of members generally or of some part of its members (including at least himself), or
>
> (b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be so prejudicial."

45. If the petitioner establishes unfair prejudice to at least himself as a member, the Court has wide powers. Section 996 provides that:

> "(1) If the court is satisfied that a petition under this Part is well founded, it may make such order as it thinks fit for giving relief in respect of the matters complained of.
>
> (2) Without prejudice to the generality of subsection (1), the court's order may—

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

(b) require the company—

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

(ii) to do an act that the petitioner has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the court may direct;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the court;

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

46. In the present case the relief sought is limited. But Mr Marshall reminded us that the petition contains the usual prayer for such further or other relief as the Court shall think fit and the form of relief granted at the conclusion of a trial is not limited to the express relief sought in the petition. Under s.996 the Court can grant the relief which it considers appropriate and can also take into account the interests of other members and creditors in formulating that relief: see *Re Neath Rugby Ltd* [2009] EWCA Civ 291.

47. That said, the scope for much wider relief than that sought in the petition is extremely limited in the present case. The decision was taken in 1992 to establish the FAPL as a limited company in order to give it the commercial independence I have mentioned. But the nature of the Premier League and the kind of disputes which can occur are very different from those in the case of an ordinary private trading company. The value of the shares is nominal and they can only be held so long as the club in question continues to participate in the Premier League. Demotion to the Championship results in the transfer of the relevant shares to the promoted clubs. For the same reason, there can be no question of any one or more member clubs seeking or successfully obtaining a buy-out order in respect of any of the other shares. Share ownership is further complicated by the fact that the FA retains a special share which carries with it a power of veto in respect of a number of matters including the alteration of certain of the articles; the name of the Premier League; and the promotion to and relegation of clubs from the Premier League.

48. Such disputes as are likely to occur in the conduct of the affairs of the Company (not the competition) are therefore likely to be limited and the same will apply to the scope for relief. Buy-out orders are not appropriate for the reasons I have mentioned and an order for the winding-up of the FAPL on just and equitable grounds under s.122(1)(g) of the Insolvency Act 1986 ("the IA 1986") is similarly unrealistic as well as being

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highly undesirable in the interests of the member clubs whose fortunes depend upon the income generated by the broadcasting of Premier League fixtures.

49. It is not therefore surprising that the FAPL and FA Rules contain arbitration clauses which are designed to resolve disputes between clubs and between clubs and the FAPL by a process of arbitration conducted by a panel of specialist arbitrators with experience in this field. The exclusive nature of that process depends on whether the disputes which arise are arbitrable. Mr Marshall submits that the allegations contained in paragraphs 23-26 of the petition differ from other possible disputes because a s.994 petition is presented in respect of unfair prejudice to members as a whole (or, at least, some section of the membership of the company) and requires the Court, in granting relief, to have regard to the interests of members and other interested parties such as creditors who, in this case, will be strangers to the arbitration agreement. By the same token, it can grant relief (e.g. a change in the Articles, Rules or officers of the FAPL) which will affect all the member clubs and possibly other third parties.

50. Fulham's argument about the arbitrability of an unfair prejudice dispute cannot therefore turn on the precise relief which is sought or even appropriate in any individual case. It has to be that any unfair prejudice claim under s.994 attracts a degree of state intervention and public interest such as to make it inappropriate for disposal by anything other than judicial process. The questions which we have to decide do not therefore turn on the nature of the company in this case or the nature of this particular dispute. If Mr Marshall is right, there is no obvious basis for differentiating in this context between particular cases which can be brought within s.994. If s.994 itself operates to preserve a right of access to the court, it must do so in respect of any petition which is properly brought within the section.

51. I turn therefore to consider the constituent elements of a s.994 petition which are said to give it the protection claimed. Mr Marshall submits that the presentation of a s.994 petition invokes the supervisory jurisdiction of the Court. By this he means that the petition seeks a class remedy which requires the Court to have regard to the interests of other shareholders and perhaps even creditors particularly in formulating the relief to be granted. The position, he says, is analogous (and, in substance, identical) to that under a winding-up petition brought on just and equitable grounds under s.122(1)(g) of the IA 1986 which, like any of the grounds for compulsory liquidation, seeks to invoke the Court's statutory jurisdiction to make a winding-up order and to subject the rights of both contributories and creditors to control by a liquidator.

52. It is, of course, common ground that a creditor's petition under s.122(1)(f) based on the alleged insolvency of the company does undoubtedly seek relief on behalf of the creditors generally even though the petition relies as evidence of insolvency on the company's failure to pay the petition debt which is due and owing to the petitioner: see *Re Crigglestone Coal Co Ltd* [1906] 2 Ch 327.

53. A winding-up order in insolvency proceedings brings into effect a statutory regime which Lord Hoffmann described in *Cambridge Gas v Navigator Holdings* [2007] 1 AC 508 at [14] in these terms:

> "The purpose of bankruptcy proceedings, on the other hand, is not to determine or establish the existence of rights, but to

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> provide a mechanism of collective execution against the property of the debtor by creditors whose rights are admitted or established. That mechanism may vary in its details. For example, in personal bankruptcy in England, the assets of the bankrupt are vested in a trustee for realisation and distribution to creditors. So the mechanism operates by divesting the bankrupt of his property. In corporate insolvency, on the other hand, the insolvent company continues to be owner of its property but holds it in trust for the creditors in accordance with the provisions of the Insolvency Act 1986: see *Ayerst v C & K (Construction) Ltd* [1976] AC 167. In the case of personal bankruptcy, the bankrupt may afterwards be discharged from liability for his pre-bankruptcy debts. In the case of corporate insolvency, there is no provision for discharge. The company remains liable but when all its assets have been distributed, there is nothing more against which the liability can be enforced: see *Wight v Eckhardt Marine GmbH* [2004] 1 AC 147, 155-156. At that point, the company is usually dissolved."

54. The power of the court to wind up on the just and equitable ground is also contained in s.122 of the IA 1986 but, in relation to a contributory's petition, the conditions for its exercise are very different. As a general rule, the shareholder seeking the winding-up order must be able to establish that the company is solvent and that there will be a surplus remaining for distribution after the payment of the company's debts and the costs and expenses of the liquidation: see *Re Rica Gold Washing Co Ltd* [1879] 11 Ch D 36.

55. A shareholder will not therefore be permitted to petition under s.122(1)(g) for the winding-up of an insolvent company and, in the case of a solvent company, the court's power will only be exercised in his favour with a view to dividing the net assets of the company where no other means can be found of resolving the dispute between shareholders in relation to their rights and interests as members. To this end, s.125(2) of the IA 1986 provides that:

> "If the petition is presented by members of the company as contributories on the ground that it is just and equitable that the company should be wound up, the court, if it is of opinion—
>
> (a) that the petitioners are entitled to relief either by winding up the company or by some other means, and
>
> (b) that in the absence of any other remedy it would be just and equitable that the company should be wound up,
>
> shall make a winding-up order; but this does not apply if the court is also of the opinion both that some other remedy is available to the petitioners and that they are acting unreasonably in seeking to have the company wound up instead of pursuing that other remedy."

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56. Section 994 will usually provide the source of a satisfactory alternative remedy such as a buy-out order so that winding-up under s.122(1)(g) is therefore a last resort and, in my experience, an exceptional remedy to grant in the context of disputes between shareholders. This is confirmed by the terms of the current Practice Direction 49B which draws attention to the undesirability of asking, as a matter of course, for a winding-up order as an alternative to an order under s.994.

57. The remedy to deal with unfair prejudice introduced by s.210 of the Companies Act 1948 and now contained in s.994 like the court's use of its jurisdiction under s.122(1)(g) to wind up companies formed on the basis of a quasi-partnership was designed to deal with disputes between the members of private companies (usually minority shareholders) who may be the subject of oppression but are prevented by the articles or a shareholder's agreement from taking effective steps to resolve their difficulties or to realise the value of their investment in the company by a sale of their shares.

58. This kind of dispute, taking place as it must do in the context of a solvent company, will not therefore ordinarily involve the creditors and is intended to avoid causing damage to the value of the company which is not in the interests of any of its members. For that reason, advertisement of the petition is exceptional. The residual power of the court under s.122(1)(g) to order winding-up where no other remedy would be appropriate or available does not therefore support the characterisation of a petition for s.994 relief as a class remedy. It is designed to resolve issues of unfair prejudice without the winding-up of the company. These are essentially internal disputes about alleged breaches of the terms or understandings upon which the parties were intended to co-exist as members of the company.

59. The nature of the permissible grounds for seeking relief under s.994 was explained by Lord Hoffmann in *O'Neill v Phillips* [1999] 1 WLR 1092 in a well-known passage at pp. 1098G-1099B:

> "In the case of section 459, the background has the following two features. First, a company is an association of persons for an economic purpose, usually entered into with legal advice and some degree of formality. The terms of the association are contained in the articles of association and sometimes in collateral agreements between the shareholders. Thus the manner in which the affairs of the company may be conducted is closely regulated by rules to which the shareholders have agreed. Secondly, company law has developed seamlessly from the law of partnership, which was treated by equity, like the Roman societas, as a contract of good faith. One of the traditional roles of equity, as a separate jurisdiction, was to restrain the exercise of strict legal rights in certain relationships in which it considered that this would be contrary to good faith. These principles have, with appropriate modification, been carried over into company law.
>
> The first of these two features leads to the conclusion that a member of a company will not ordinarily be entitled to complain of unfairness unless there has been some breach of the terms on which he agreed that the affairs of the company

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> should be conducted. But the second leads to the conclusion that there will be cases in which equitable considerations make it unfair for those conducting the affairs of the company to rely upon their strict legal powers. Thus unfairness may consist in a breach of the rules or in using the rules in a manner which equity would regard as contrary to good faith."

60. The jurisdiction now contained in s.994 originated as an alternative to winding-up on the just and equitable ground. Section 210 of the 1948 Act required the Court to be of the opinion that the facts would justify the making of a winding-up order on the just and equitable ground. But this link was broken in s.75 of the Companies Act 1980 as a result of the recommendations of the Jenkins Committee (Cmnd 1749) in 1962 that the grounds for seeking alternative relief should be widened. The decision in *O'Neill v Phillips* was intended to define the circumstances in which the s.994 jurisdiction should be exercised but it has not re-forged the original link with s.122(1)(g). Although Lord Hoffmann described these provisions as parallel jurisdictions, he was keen (at p. 1099) to emphasise the limits of their common features:

> "I should make it clear that the parallel I have drawn between the notion of "just and equitable" as explained by Lord Wilberforce in *In re Westbourne Galleries Ltd* and the notion of fairness in s.459 does not mean that conduct will not be unfair unless it would have justified an order to wind up the company. There was such a requirement in s.210 of the Companies Act 1948 but it was not repeated in s.459. As Mummery J observed in *In re A Company (No. 00314 of 1989), ex p Estate Acquisition and Development Ltd* [1991] BCLC 154, [1990] BCC 221, page 161 of the former report the grant of one remedy will not necessarily require proof of conduct which would have justified a different remedy:
>
> > "Under sections 459 to 461 the court is not . . . faced with a death sentence decision dependent on establishing just and equitable grounds for such a decision. The court is more in the position of a medical practitioner presented with a patient who is alleged to be suffering from one or more ailments which can be treated by an appropriate remedy applied during the course of the continuing life of the company."
>
> The parallel is not in the conduct which the court will treat as justifying a particular remedy but in the principles upon which it decides that the conduct is unjust, inequitable or unfair."

61. The analogy which Mr Marshall seeks to draw between s.994 and s.122(1)(g) does not therefore assist him in providing a basis for the restriction on arbitrability he contends for and one is thrown back to s.994 itself to consider whether that should be the law. I accept, of course, that some of the relief which can be granted under s.996 is capable of affecting third parties: e.g. orders for the regulation of the company's affairs or restraints upon its power to make alterations in its articles. Orders of this

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kind will inevitably impact on other shareholders who can be joined to court proceedings for the purpose of being bound by any order. But that does not make a s.994 petition an application for a class remedy. What it may, however, do is to impose limitations on the scope of relief obtainable in arbitral proceedings.

62. At this point it is convenient to look at the two English cases where the High Court has had to consider the grant of a stay under s.9 in respect of an unfair prejudice position.

Vocam

63. The petitioners in this case were minority shareholders who had been removed as directors of a joint venture company. There was a shareholders' agreement under which all disputes between the parties whether or not arising under the agreement were to be resolved by arbitration.

64. The argument presented to Rimer J (as recorded in his judgment) appears to have been primarily directed to the construction of the agreement and it does not look as if the judge was troubled with the authorities on arbitrability to which we have been referred. The judge ordered a stay of the petition.

Exeter

65. The complaint in this case was that the rules of the Nationwide Conference League under which a member club was required to pay football creditors in full as part of any CVA had caused Exeter City unfair prejudice because it exposed the club to an application by HM Revenue & Customs for the revocation of the CVA. The Football Conference then applied for a stay of the petition under s.9(4) of the AA 1996 because the dispute was referable to arbitration under the rules of the FA.

66. In this case the argument was clearly based on the issue of arbitrability. The judge refused the stay on the following grounds:

> "[21] As to s 9, it is common ground that there are some disputes which are not susceptible to arbitration and that section 9 does not apply to such disputes. There is a tension here between reserving matters of public interest to the courts and the public interest in the encouragement of arbitration. In *A Best Floor Sanding Party Ltd v Skyer Australia Party Ltd* [1999] VSC 170, Judge Warren held that the right of a contributory to apply to the court for a winding up order could not be limited by agreement and refused to stay a winding up petition because it did not fall within the scope of the discretionary provisions of section 53 of the Commercial Arbitrations Act 1984.
>
> [22] I find her reasoning compelling and I can see no difference in principle for this purpose between a winding up petition and a petition under s 459. If the right to petition to wind up conferred on every single shareholder is a condition of incorporation under the Companies Act 1985, then so in my

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> judgment is the right to petition for relief for unfair prejudice. In *Re Magi Capital Partners LLP* [2003] EWHC 2790 (Ch), leading counsel, probably with the Australian authority in mind, conceded that a limited liability partnership was a creature of statute and that it was not possible to exclude the statutory right to apply to have the statutory entity wound up by the court. The Companies Court has jurisdiction to wind up a company or limited liability partnership, and the same court has supervisory powers, designed to give protection to shareholders by enabling them to apply to the court for special relief. In effect, the court controls by statute the creation and extinction of the company, and it also attends to it during midlife crises.
>
> [23] The statutory rights conferred on shareholders to apply for relief at any stage are, in my judgment, inalienable and cannot be diminished or removed by contract or otherwise."

67. *A Best Floor Sanding Pty Ltd v Skyer Australia Pty Ltd*, which was relied on by the judge as establishing an unfettered right of access to the court in the case of an unfair prejudice petition, was concerned with a contributory's petition to wind-up a joint venture company under s.462(2) of the Corporations Law of the State of Victoria. This entitles a contributory to apply to the court for a winding-up order in a case where the affairs of the company are conducted in a manner that is unfairly prejudicial to the interests of a member or is contrary to the interests of the members as a whole: see s.461(1)(f). There is also power under s.461(1)(k) for the court to wind up the company on just and equitable grounds.

68. Section 461 therefore resembles s.122 of the IA 1986 but includes unfair prejudice as an additional ground for winding-up. There is, however, no provision equivalent to s.994 under which the court, on an application by a shareholder, can make other types of order to deal with the prejudice complained of.

69. The reasoning of Warren J which Judge Weeks found so compelling turned on the construction of s.462(2) of the Corporation Law which sets out a list of the persons (including contributories) who "may apply for an order to wind up a company". The section is in similar but not identical terms to s.124(1) of the IA 1986. The judge was faced with a submission that s.462(2) conferred a right which could not be excluded or modified by agreement.

70. The arbitration clause in clause 16 of the joint venture agreement provided that:

> "If during the continuance of the association or at any time afterwards any dispute, difference or question shall arise between the parties or their legal personal representatives touching the association or the accounts or transactions thereof or the value of the share of a party in the assets of the association or <u>the dissolution or winding up thereof</u> or the construction meaning or effect of these presents or anything herein contained or the rights and liabilities of the associates or their representatives under these presents or otherwise in relation to the premises then every such dispute difference or

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> question subject as otherwise herein expressly provided shall be referred in the first instance to the President for the time being of the Law Institute of Victoria and if within the period of fourteen days from the referral of the matter concerned as aforesaid the parties do not agree to abide by the solution proposed by the President for the time being of the Law Institute of Victoria then the same shall be referred to arbitration in accordance with the Arbitration Act 1959 or any statutory modification or re-enactment thereof for the time being in force (*emphasis added*)".

71. The clause was therefore very widely drawn and, as a matter of construction, extended to a dispute or question touching the winding-up of the company. On one view this would include the question whether the company should be wound up and not merely a dispute about unfair prejudice which might (once adjudicated upon) entitle the court to grant that kind of relief. This is certainly the way in which the judge interpreted it because in paragraph 11 of her judgment she says that:

> "The issue as to whether parties associated with a company can enter into an agreement that the statutory rights and powers under the Corporations Law, in particular, the winding up power under s.462 be referred to arbitration does not appear to have been the subject of consideration by the courts."

72. Her reasons for refusing a stay are set out in the following passages of her judgment:

> "13. The application to stay the winding up application on the basis of an arbitration agreement between the joint venture parties raises a fundamental principle of corporations law. To state the very obvious, a company is a corporation in the common law sense formed by registration under Part 2A.2 of the Corporations Law or under corresponding earlier legislation. In the words of Ford, Austin & Ramsay in Ford's Principles of Corporations Law (at p.1061): "a corporation (or body corporate in the common law sense) is a legal device by which legal rights, powers, privileges, immunities, duties, liabilities and disabilities may be attributed to a fictional entity equated for many purposes to a natural person ... The fictional entity acquires rights and liabilities by the acts of persons behind it." Upon incorporation, the Corporations Law applies to the new entity. Its company directors and management are subject to regulation under the Corporations Law. The Corporations Law contains provisions relating to the company's constitution, general meetings of members, management of the company, the company's dealings with other parties, the company's financing, the handling of its affairs when it is subject to a financial crisis and, most significantly for present purposes, its winding up and dissolution. The Corporations Law controls by statutory force the creation and demise of the company; it oversees the birth, the life and death of the

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company. Such matters cannot and ought not be subject to private contractual arrangement.

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15. Throughout Chapter 5 of the Corporations Law there exists a statutory structure setting out the manner in which applications for the winding up of a company are to be made, the persons or parties who are permitted under the Law to make an application for the winding up of a company and, most significantly, the effect of a winding up order on creditors and contributories. A major aspect of the control by the court of the winding up of a company is the fact that the court appoints an official liquidator to be liquidator of the company. In this respect the Corporations Law sets out the powers and duties of a liquidator or a provisional liquidator of the company in the course of the winding up of that company. Indeed, the order of the court for the winding up of the company does not in effect wind up that company. Rather, the effect of the court order is that it directs that the process of liquidating the assets of the company and the winding up of its affairs should begin (see Re Crust 'n' Crumbs Bakers (Wholesale Pty Ltd) (1992) 2 Qd R 76, 78; (1991 5 ACSR 70). Upon a court ordering a winding up and so long as the winding up of the company remains unterminated no further order can be made by a court with respect to that company (see Commonwealth v. Emanuel Projects Pty Ltd (1996) 21 ACSR 36; Dewina Trading Sdn Bhd v. Ion International Pty Ltd (1996) 141 ALR 317; 22 ACSR 352).

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18. The application by A.B. Floor to stay the winding up application strikes at the very heart of the corporation structure enshrined in the Corporations Law. The arbitration clause in the joint venture agreement is null and void insofar as it purports to subject the parties to an arbitration with respect to the dissolution or winding up of the company. The provision is null and void because it has the effect of obviating the statutory regime for the winding up of a company. More so, the arbitration clause, if adhered to, would frustrate the contributory, Skyer Australia in its efforts to seek relief from the court under the winding up provisions of the Law. In essence, the arbitration clause in the joint venture agreement is contrary to the provisions of the Corporations Law and cannot be applied."

73. Much of this analysis is uncontroversial. Companies are undoubtedly the creations of statute and operate in accordance with the provisions of the CA 2006 which governs their registration; the rights of their members; and the duties of their directors. In the event of insolvency, they become subject to the statutory regime set out in the IA

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1986 which places their assets under the control of a liquidator and invests him with statutory powers to get in and realise those assets for the benefit of the creditors. He is empowered to take proceedings against the former directors for fraudulent or wrongful trading and to apply to the court for orders setting aside transactions between the company and third parties at an undervalue or dealings with creditors which amount to preferences: see ss.238-239 of the IA 1986.

74. There is no doubt that many aspects of this regime are immune from interference by the members of the company whether by contract or otherwise. They cannot override the provisions of the IA 1986 which apply on liquidation by agreeing between themselves or with a particular creditor that property which belongs to the company in liquidation should be dealt with other than in accordance with the Act: see *British Eagle International Air Lines Limited v. Compagnie Nationale Air France* [1975] 1 WLR 758. The same must go for the exercise of the liquidator's powers under ss.238-9 IA 1986. They involve an exercise of a statutory power to intervene in and set aside transactions with third parties in the context of the insolvency regime. These are rights vested in the liquidator for the benefit of the creditors as a whole and cannot be overridden by a contract entered into by the company prior to its liquidation.

75. This was the conclusion reached by the Singapore Court of Appeal in *Larsen Oil and Gas Pte Ltd v Petroprod Ltd* [2011] SGCA 21 where an arbitration clause in a management agreement was relied on as the basis of an application for a stay of proceedings brought by a liquidator for recovery of payments said to constitute preferences or transactions at an undervalue. V K Rajah JA said that:

> "44. The concept of non-arbitrability is a cornerstone of the process of arbitration. It allows the courts to refuse to enforce an otherwise valid arbitration agreement on policy grounds. That said, we accept that there is ordinarily a presumption of arbitrability where the words of an arbitration clause are wide enough to embrace a dispute, unless it is shown that parliament intended to preclude the use of arbitration for the particular type of dispute in question (as evidenced by the statute's text or legislative history), or that there is an inherent conflict between arbitration and the public policy considerations involved in that particular type of dispute.
>
> 45. A distinction should be drawn between disputes involving an insolvent company that stem from its pre-insolvency rights and obligations, and those that arise only upon the onset of insolvency due to the operation of the insolvency regime. Many of the statutory provisions in the insolvency regime are in place to recoup for the benefit of the company's creditors losses caused by the misfeasance and/or malfeasance of its former management. This is especially true of the avoidance and wrongful trading provisions. This objective could be compromised if a company's pre-insolvency management had the ability to restrict the avenues by which the company's creditors could enforce the very statutory remedies which were meant to protect them against the company's management. It is a not unimportant consideration that some of

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> these remedies may include claims against former management who would not be parties to any arbitration agreement. The need to avoid different findings by different adjudicators is another reason why a collective enforcement procedure is clearly in the wider public interest.
>
> 46. We, therefore, are of the opinion that the insolvency regime's objective of facilitating claims by a company's creditors against the company and its pre-insolvency management overrides the freedom of the company's pre-insolvency management to choose the forum where such disputes are to be heard. The courts should treat disputes arising from the operation of the statutory provisions of the insolvency regime *per se* as non-arbitrable even if the parties expressly included them within the scope of the arbitration agreement."

76. Warren J was, I think, right to regard the arbitration clause she had to consider as unenforceable insofar as it included within the scope of the reference the question whether the company should be wound-up. Such an order lies within the exclusive jurisdiction of the court and the discretion as to whether or not to make that order is for the court, not the arbitrator to exercise. But I part company with her if and insofar as she suggests in paragraph 18 of her judgment that there can be no resort to arbitration in respect of the dispute between shareholders or the company which forms the grounds upon which such relief may be sought.

77. The determination of whether there has been unfair prejudice consisting of the breach of an agreement or some other unconscionable behaviour is plainly capable of being decided by an arbitrator and it is common ground that an arbitral tribunal constituted under the FAPL or the FA Rules would have the power to grant the specific relief sought by Fulham in its s.994 petition. We are not therefore concerned with a case in which the arbitrator is being asked to grant relief of a kind which lies outside his powers or forms part of the exclusive jurisdiction of the court. Nor does the determination of issues of this kind call for some kind of state intervention in the affairs of the company which only a court can sanction. A dispute between members of a company or between shareholders and the board about alleged breaches of the articles of association or a shareholders' agreement is an essentially contractual dispute which does not necessarily engage the rights of creditors or impinge on any statutory safeguards imposed for the benefit of third parties. The present case is a particularly good example of this where the only issue between the parties is whether Sir David has acted in breach of the FA and FAPL Rules in relation to the transfer of a Premier League player.

78. Judge Weeks was therefore wrong in my view to extend the reasoning of Warren J in *A Best Floor Sanding Party Ltd* to a petition under what was then s.459. The statutory provisions about unfair prejudice contained in s.994 give to a shareholder an optional right to invoke the assistance of the court in cases of unfair prejudice. The court is not concerned with the possible winding-up of the company and there is nothing in the scheme of these provisions which, in my view, makes the resolution of the underlying dispute inherently unsuitable for determination by arbitration on

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grounds of public policy. The only restriction placed upon the arbitrator is in respect of the kind of relief which can be granted.

79. The same view has been taken by the Supreme Court of New South Wales in *ACD Tridon Inc v Tridon Australia Pty Ltd* [2002] NSWSC 896. Austin J treated the decision in *A Best Floor Sanding Party Ltd* as turning very much on the exclusive jurisdiction of the court to make a winding-up order:

> "… Her Honour's decision was partly based on public policy considerations surrounding the process of winding up a company pursuant to court order. An additional ground seems to have been that a winding up order operates to affect the rights of third parties, not merely the rights of the parties to the arbitration clause.
>
> 192. In my opinion, the latter ground is a strongly persuasive one, in keeping with the general observations by Mustill & Boyd. I accept, as well, that public policy considerations operate against referring to arbitration a determination to wind up a company on the grounds upon which a court may order that a company be wound up. However, I would not regard these public policy considerations as preventing parties to a dispute from referring questions to arbitration merely because those questions arise under the Corporations Act. I see nothing special about the Corporations Act that would distinguish it, as a whole, from other legislation such as the http://www.austlii.edu.au/au/legis/cth/consol_act/tpa1974149/Trade Practices Act. This seems to be the position reached by United States courts: see *Dean Witter Reynolds Inc v Byrd* [1985] USSC 44; 470 US 213 (1985); *Shearson Lehman Hutton Inc v Wagoner* 944 F 2d 114 (2nd Cir 1991); also *Pick v Discover Financial Services Inc* 2001 No.Civ.A 00-935-SLR (D) Del Sept 28, 2001.
>
> 193. The statutory powers of a Court under the Corporations Act are, generally speaking, comparable to the powers exercised by a court under the general law (the power to make a winding up order being an exception to this proposition). They are generally not special powers to be exercised having regard to specialist public interest criteria.
>
> 194. Specifically, the public policy considerations held by Warren J to be applicable to a disputed claim to wind up a company do not seem to me to prevent the parties from referring to arbitration a claim for some merely inter partes relief under the oppression provisions of the Corporations Act, or for access to corporate information under s 247A. However, the "in rem" nature of an order for rectification of the share register of a company may prevent reference of that power to an arbitrator."

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80. One of the cases referred to by Warren J and relied on by Mr Marshall in the present case is the decision of the Court of Appeal in *Re Peveril Gold Mines Ltd* [1898] 1 Ch 122. This concerned an application by shareholders for a stay of a winding-up petition presented by another shareholder under what was then s.79 of the Companies Act 1862. Section 82 of the Act (like s.124 of the IA 1986) conferred locus on a contributory to bring such proceedings but the articles of the company provided that no winding-up petition should be presented by a member unless one of three conditions was satisfied. These were the consent in writing of at least two directors; the permission of the majority of members given in general meeting; or the holding by the petitioner of at least one-fifth of the issued share capital.

81. The restriction in the articles was held to be invalid because it imposed on the petitioner conditions which were at variance with those specified in s.82 of the 1862 Act. But the court did not suggest that it would have been unlawful for the members to have agreed not to petition to wind-up. Lord Lindley MR (at p. 131) said that:

> "Sect. 79 states the circumstances under which such a company may be dissolved by the Court, and s. 82 states the persons who may petition for a dissolution. Any article contrary to these sections - any article which says that the company is formed on the condition that its life shall not be terminated when any of the circumstances mentioned in s. 79 exist, or which limits the right of a contributory under s. 82 to petition for a winding-up, would be an attempt to enforce on all the shareholders that which is at variance with the statutory conditions, and is invalid. It is no answer to say that the right to petition may be waived by any contributory personally. I do not intend to decide whether a valid contract may or may not be made between the company and an individual shareholder that he shall not petition for the winding up of the company. That point does not arise now. But to say that a company is formed on the condition that its existence shall not be terminated under the circumstances, or on the application of the persons, mentioned in the Act is to say that it is formed contrary to the provisions of the Act, and upon conditions which the Court is bound to ignore."

82. The decision is therefore limited to the narrow point of whether the articles of a company can effectively restrict or re-model the conditions for the presentation of a petition under what would now be s.122 of the IA 1986. It does not suggest that an agreement to resolve a dispute between shareholders which might justify a winding-up order on just and equitable grounds would either infringe the statute or be void on grounds of public policy. In fact it suggests the opposite.

83. It is therefore open to us to decide whether the provisions of s.994 are to be construed as restricting the resolution of unfair prejudice disputes to the exclusive jurisdiction of the court free of any binding authority. I have already set out my own reasons for preferring the view that disputes of this kind which do not involve the making of any winding-up order are capable of being arbitrated. Although not necessary for the resolution of this appeal, I also take the view, as Austin J did in the *ACD Tridon* case, that the same probably goes for a similar dispute which is used to ground a petition

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under s.122(1)(g) to wind up the company on just and equitable grounds. In those cases the arbitration agreement would operate as an agreement not to present a winding-up petition unless and until the underlying dispute had been determined in the arbitration. The agreement could not arrogate to the arbitrator the question of whether a winding-up order should be made. That would remain a matter for the court in any subsequent proceedings. But the arbitrator could, I think legitimately, decide whether the complaint of unfair prejudice was made out and whether it would be appropriate for winding-up proceedings to take place or whether the complainant should be limited to some lesser remedy. It would only be in circumstances where the arbitrator concluded that winding-up proceedings would be justified that a shareholder would then be entitled to present a petition under s.122(1)(g). In these circumstances the court could be invited to lift any stay imposed on proceedings imposed under s.9(4). In much the same way, it would, I think, be open to an arbitrator who considered that the proper solution to a dispute between a shareholder and the company was to give directions for the conduct of the company's affairs to authorise the shareholder to seek such relief from the court under s.994. But such cases are likely to be rare in practice. If the relief sought is of a kind which may affect other members who are not parties to the existing reference, I can see no reason in principle why their views could not be canvassed by the arbitrators before deciding whether to make an award in those terms. Opposition to the grant of such relief by those persons may be decisive. Similarly if the order sought is one which cannot take effect without the consent of third parties then the arbitrators' hands will be tied.

84. But, as explained earlier in this judgment, these jurisdictional limitations on what an arbitration can achieve are not decisive of the question whether the subject-matter of the dispute is arbitrable. They are no more than the practical consequences of choosing that method of dispute resolution: see *Société Commerciale de Réassurance v ERAS (International) Ltd* [1992] 1 Lloyd's Rep 570; *Wealands v CLC Contractors Ltd* [1999] 2 Lloyd's Rep 739.

85. This leaves for consideration what amounts to the alternative argument that regardless of any general considerations of public policy, s.994 ("a member of a company may apply to the Court") should be construed as granting an unfettered right of access. This would have to be an implied restriction but, aside from the argument that it creates a class remedy which I have already dealt with, Mr Marshall also relies on a comparison between the treatment of s.994 relief in the context of companies and the equivalent provisions which apply to limited liability partnerships ("LLPs").

86. Under the Limited Liability Partnership Act 2000 an LLP is given the status of a body corporate and the members are liable to contribute to its assets on a winding up: see s.1(1), (4). The Limited Liability Partnerships (Application of Companies Act 2006) Regulations 2009 ("the 2009 Regulations") which took effect on 1st October 2009 apply ss.994-996 of the CA 2006 to LLPs but in a modified form. As modified, s.994(3) provides that:

> "The members of an LLP may by unanimous agreement exclude the right contained in subsection (1) either indefinitely or for such period as is specified in the agreement. The agreement must be recorded in writing."

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87. Mr Marshall makes the point that no equivalent opt-out was given to the members of companies when s.994 of the CA 2006 came to be amended in 2008 by the insertion in the form of s.994(1A) of provisions dealing with the removal of a company's auditors. It is to be inferred from this, he says, that Parliament considered that the provisions of s.994 should be immutable in the case of companies. Similarly the recommendations of the Company Law Review Steering Group contained in its 2001 Report (*Modern Company Law for a Competitive Economy*) which favoured the promotion of ADR including arbitration for the resolution of shareholder disputes were not taken up. By 2008 *Exeter City* had been decided but Parliament chose to make no changes to the CA 2006 to counter its effect.

88. I am not persuaded that we should draw any inferences from these aspects of the legislative history of the CA 2006. The absence of any change to the provisions of s.994 following the decision in *Exeter City* cannot be taken as some kind of affirmation of the correctness of that decision, let alone a statutory embodiment of its effect. The Act remained unchanged throughout the period. The consequence is that if *Exeter City* was correctly decided then there has been no statutory change to displace it. Conversely if it was, as I believe, wrongly decided then we are free to overrule it unhindered by any alteration in the relevant legislation. Similarly, although the provisions of the 2009 Regulations in relation to LLPs are interesting, the absence of any opt-out provision in relation to companies merely confirms that this form of statutory relief remains available to contributories. Again, it cannot justify giving to the provisions of s.994 (which remain unchanged) a meaning which they cannot otherwise bear.

Construction

89. Fulham's alternative argument is that the arbitration clauses contained in the FAPL and FA Rules should be construed so as to exclude claims for unfair prejudice which fall within s.994.

90. It is said that s. 994 creates an important form of shareholder protection and the loss of that right should require the use of clear language in the arbitration agreement. Similarly the possibility of the arbitrator being unable to bind all the relevant parties or even to provide effective relief by regulating the affairs of the company is also said to militate against the all-embracing effect of the language used.

91. Since the clauses in question refer in wide terms to "all disputes which arise between [the FAPL and the member class] .. whether arising out of [the FAPL Rules] or otherwise" and to "any dispute or difference [between the FAPL and the clubs] .. including but not limited to a dispute arising out of or in connection with [the FA rules]" any limitation on the scope must, I think, come in the form of an implication derived from the arbitrability of the subject matter.

92. The argument about construction therefore turns on the issues already considered about the effectiveness of any agreement to refer questions of unfair prejudice to arbitration. If, as I believe, there is no statutory restriction or rule of public policy which prevents the parties from agreeing to submit such disputes to arbitration, it is not possible to read into the language of the arbitration clause the limitation contended for. The wide terms of the clauses also negative, in my view, any

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suggestion that the parties intended to limit the scope of the arbitration agreements out of concern for the inability of the arbitrator to make orders binding on non-parties.

Conclusions

93. For these reasons, I would affirm the decision of Vos J and dismiss the appeal.

Lord Justice Longmore:

94. I agree with Patten LJ that there are three questions which need to be determined, although I would prefer to consider them in a slightly different order:-

i) Whether the arbitration agreements contained in the FAPL Rules and the FA Rules purport, on their true construction, to refer to arbitration the issues which arise between the parties namely; (i) whether Sir David acted as an agent on behalf of Portsmouth in and about the procurement of Mr Crouch's transfer to Tottenham rather than to Fulham or in any other way in breach of his duties as chairman of the FAPL in relation to that transfer and (ii) whether Sir David's conduct constituted such unfair prejudice on the part of the FAPL as to entitle Fulham to invoke section 994 of the CA 2006;

ii) Whether, if so, the CA 2006 expressly or impliedly prohibits the reference to arbitration of such matters;

iii) Whether, if there is no statutory prohibition of such a reference, public policy of the law of England and Wales prohibits such a reference.

95. In relation to the first question, my Lord has set out the terms of the FAPL Rules which bind the clubs and the Premier League itself and the FA Rules which bind Sir David and the clubs as participating in activity sanctioned by the FA. These rules are very wide being, in the case of the FAPL and its members, an agreement

> "to submit all disputes which arise between them ..... to final and binding arbitration"

and in the case of the FA and its participants an agreement that

> "any dispute or difference between any two or more Participants … shall be referred to and finally resolved by arbitration."

The phrases "all disputes" and "any dispute or difference" mean what they say and must cover the disputes that have arisen between Fulham on the one hand and Sir David and the Premier League on the other.

96. In relation to the second question, it is clear that there is no express requirement in the CA 2006 that matters arising on an unfair prejudice petition under section 994 should not be referred to arbitration. Nor do I consider that there is any implied prohibition of arbitration. It is true that section 994(1) empowers a company member "to apply to the court by petition" and section 996(1) provides that "if the court is satisfied that a petition … is well-founded, it may make such order as it thinks fit for giving relief". But the fact that a statutory power, which a court would not have at common law

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apart from the statutory provision, is given to the court does not mean that an arbitrator, to whom a dispute is properly agreed to be referred, does not have a similar power. Power to make awards of monetary sums as between joint tortfeasors and between those who together have acted in breach of separate contracts are given to "the court" by various statutory provisions but it cannot be suggested that arbitrators are prohibited from making such awards: see *Wealands v ICLC Contractors Ltd* [1999] 2 Lloyd's Rep 739 paras. 16-18. Such awards are frequently made. If, therefore, one looks at the actual wording of the relevant sections of the CA 2006, there is no ground for supposing that there is any implicit prohibition on agreeing to refer an allegation of unfair prejudice to arbitration.

97. Thirdly, does public policy prohibit or invalidate an agreement to refer to arbitration the question whether a company's affairs are being (or have been) conducted in a manner that is unfairly prejudicial to the interest of at any rate some of its members? If public policy does prohibit such an agreement, there could of course be no question of the court staying any petition seeking relief under sections 994-996 of the CA 2006 because the court would be satisfied (within the meaning of section 9(4) of the AA 1996) that the arbitration agreement would, to the extent that it purported to apply to unfair prejudice petitions, be "null and void" or, perhaps, "inoperative".

98. It is this question that is at the heart of the appeal and I would, for my part, derive some guidance from the principle set out in section 1(b) of the AA 1996 namely

> "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest".

To the extent therefore that public policy has a part to play it can only be as a "safeguard … necessary in the public interest".

99. This is a demanding test and I cannot see that it is necessary in the public interest that agreements to refer disputes about the internal management of a company should in general be prohibited; nor can I see any reason why it is necessary to prohibit arbitration agreements to the extent that they, in particular, apply to disputes whether a company's affairs are being (or have been) conducted in a manner unfairly prejudicial to the interests of its members.

100. Mr Philip Marshall QC for Fulham suggested two reasons why there might be good reason for public policy to prohibit agreements to refer unfair prejudice disputes to arbitration. The first was that an arbitrator might feel inhibited from making an award in favour of a petitioner because there was no way in which he could assess whether any conduct of the company was unfairly prejudicial to the interests of any member who was not a party to the arbitration. The second reason was that, if the arbitrator did issue an award, it might or would affect such members and there would be a risk that the award would be unenforceable because it would purport to affect the interests of members of the company who were not parties to the arbitration.

101. For my part I find it difficult to see why an arbitrator should feel any such inhibition as Mr Marshall suggested since there is no reason why any member of the FAPL who considered that its interests might be affected should not be able to give such evidence to the arbitrator as it wanted to. But even if any inhibition did exist, that could not

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amount to a reason why in the public interest an agreement to refer an unfair prejudice dispute should be prohibited. It would just be an incident of the agreement and an example of a reason why in some circumstances arbitration could be less satisfactory than court proceedings. The risk of that occurring cannot mean that it is necessary in the public interest to prohibit such agreements.

102. The second reason is likewise somewhat fanciful but, again, the risk that an award might ineffectively purport to affect parties other than the immediate parties to the arbitration and, to that extent, be unenforceable cannot render it necessary that agreements to refer unfair prejudice allegations should be banned as a matter of public policy.

103. It is well settled that the fact that an arbitrator cannot give all the remedies which a court could does not afford any reason for treating an arbitration agreement as of no effect, see *Eras Eil* Actions [1992] 1 Lloyd's Rep 570, 610. The inability to give a particular remedy is just an incident of the agreement which the parties have made as to the method by which their disputes are to be resolved. The reason put forward by Mr Marshall for regarding the FAPL Rules and FA Rules as inapplicable to unfair prejudice petitions (because of the effect any award might have or might not have on third parties) is of even less substance than the supposed inability of an arbitrator to give any particular remedy.

104. For these reasons and those given by Patten LJ I agree the judge reached the right conclusion. I would also commend his reluctance to treat the hearing before him as a foregone conclusion in the light of the decision of *Exeter City* merely because it was a second decision of a judge at first instance which had taken into account (and differed from) an earlier decision of a first instance judge. First instance judges have the luxury (which we do not) of not being bound by each other's decisions and, particularly in a specialist jurisdiction, it is usually useful to this court to have a considered view even if it is at variance with the latest first instance decision. I must confess to being much assisted by the views of Vos J in coming to my own conclusion in this case.

105. I would also dismiss this appeal.

Lord Justice Rix :

106. I agree with both judgments.

107. To the extent that there may be any difference of emphasis between Lord Justice Patten and Lord Justice Longmore, I can detect only the passages at paras. 29-30 of the former's judgment and paras. 98-99 of the latter's, concerning the scope of section 1(b) of the 1996 Act. On this point I would rather discount the doubts of Patten LJ about the subsection dealing with arbitrability. I do not myself see why the autonomy of the parties to which the subsection gives primacy (subject to such safeguards as are necessary in the public interest) should not apply to the choice to arbitrate, i.e. to resolve their disputes by arbitration, as well as to the manner in which an arbitration is conducted. It seems to me that "how the disputes are resolved" involves the former as well as the latter.

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