Neutral Citation Number: [2008] EWHC 2855 (Comm)

Case No: 2008 FOLIO 1064

IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
COMMERCIAL COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 26/11/2008

Before :

MR.JUSTICE TEARE

- -

Between :

SHEFFIELD UNITED FOOTBALL CLUB LIMITED	**Claimant**
- and -	
WEST HAM UNITED FOOTBALL CLUB PLC	**Defendant**

- -
- -

Ian Mill QC , Adam Lewis and Andrew Hunter (instructed by **Denton Wilde Sapte**) for the **Claimant**
Paul Chaisty QC and Wilson Horne (instructed by **Brabners Caffe Street**) for the **Defendant**

Hearing dates: 10 November 2008

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Judgment

Mr. Justice Teare :

Introduction

1. There is before the Court an application by the Claimant, Sheffield United, for an interim order restraining the Defendant, West Ham, from taking any further steps to pursue an appeal or challenge to an award made by an arbitral tribunal in England other than by way of an application to this Court under the Arbitration Act 1996. There is also before the Court an application by West Ham seeking a stay of Sheffield United's application.

2. The circumstances in which these applications have been made are these. During the 2006/2007 football season Sheffield United and West Ham were in the Football Association Premier League. West Ham engaged the services of an Argentinean football player, Carlos Tevez. At the end of the season West Ham survived relegation but Sheffield United did not. Sheffield United considered that the engagement of Carlos Tevez had been in breach of the rules of the Premier League and that such breach was an effective cause of Sheffield United being relegated to the Championship. Sheffield United therefore wished to claim damages from West Ham. Since both clubs are party to an arbitration agreement contained in Rule K of the rules of the Football Association Sheffield United's claim was referred to arbitration. The arbitrators were Lord Griffiths, Sir Anthony Colman and Robert Englehart QC. Following a hearing held from 9 – 17 June 2008 and on 28 July 2008 the arbitral tribunal issued an interim award dated 18 September 2008. It was held that Sheffield United was entitled to recover damages from West Ham for breach of contract. The amount of the damages was to be assessed at a further hearing. On 2 October 2008 West Ham filed an appeal from the arbitral decision to the Court of Arbitration for Sport in Lausanne, Switzerland ("CAS").

3. Sheffield United say that the pursuit of an appeal to CAS is a breach of the arbitration agreement between the two clubs and that CAS has no jurisdiction to entertain any such appeal, that damages would not be an adequate remedy for that breach and that the balance of convenience lies in restraining West Ham from pursuing its appeal to CAS until the trial of Sheffield United's claim for a permanent injunction. The application for an interim injunction is made pursuant to section 37 of the Supreme Court Act 1981 and section 44 of the Arbitration Act 1996.

4. West Ham do not accept that an appeal to CAS is a breach of the arbitration agreement or that CAS has no jurisdiction to entertain the appeal. If there has been a breach West Ham say that damages would be an adequate remedy, that CAS ought to be allowed to determine whether or not it has jurisdiction to entertain the appeal and that the injunction should be refused. West Ham also seeks a stay of Sheffield United's proceedings pursuant to section 9 of the Arbitration Act 1996.

Rule K of the Rules of the Football Association.

5. Rule K provides as follows:

> Agreement to Arbitration

1. (a) Subject to Rule K1(b) below, any dispute or difference (a "dispute") 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)

(i) The Rules and Regulations of The Association;

(ii) The rules and regulations of an Affiliated Association or Competition;

(iii) The Statutes and Regulations of FIFA and UEFA; or

(iv) The Laws of the Game

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

…….

The Tribunal

3. (a) In these Rules, "Tribunal" means the arbitrator or arbitrators appointed pursuant to these Rules to determine the dispute. A Tribunal of three arbitrators shall be appointed unless the parties agree otherwise.

(b) The Claimant(s) and the Respondent(s) shall within 14 days of service of the Response(s) agree to the appointment of a third arbitrator who shall act as Chairman of the Tribunal.

……

(d) Each arbitrator must be, and remain, impartial and independent of all the parties to the arbitration at all times. Each arbitrator must be resident in England.

…….

Award

5. (a) The Tribunal shall make its award (the Award) in writing and, unless all parties otherwise agree in writing, shall state the reasons for its decision. The Award shall be dated and signed by the Tribunal. Without prejudice to its obligations under Rule K6, the Tribunal shall inform The Association of its Award and provide The Association with a copy of any written decision.

(b) The Award shall be final and binding upon the parties as from the date it is made.

(c) The parties shall be deemed to have waived irrevocably any right to appeal, review or recourse to a Court of law.

(d) Where there were three Arbitrators and the Tribunal fails to agree on any issue, the Arbitrators shall decide that issue by a majority. Failing a majority decision on any issue, the Chairman of the Tribunal shall decide that issue.

Governing Law

9. These rules and any arbitration pursuant to them shall be governed by English law. The Tribunal shall apply English Law (both procedural and substantive) in determining any dispute referred to arbitration under the Rules. The arbitration shall take place in England.

The rival cases

6. It is submitted on behalf of Sheffield United that Rule K clearly provides that where disputes are referred to arbitration they are to be finally resolved by arbitration. For this purpose reliance is placed upon Rule K 1(a) and 5(b). It is further submitted that since the seat of the arbitral tribunal is England (see Rule K 9) that is an implied choice of England as a forum for remedies seeking to challenge the award; see *C v D* [2008] 1 Lloyd's Rep. 239 at paragraph 17 per Longmore LJ.

7. It is submitted on behalf of West Ham that Rule K does not, on its true construction, oust the jurisdiction of an agreed arbitral appeal tribunal. It is further submitted that the parties have agreed to CAS having an appellate arbitral role. The latter submission is based upon the following propositions:

   i) The parties are bound by the rules of the Football Association Premier League. Those rules bind the clubs to comply with the statutes and regulations of FIFA; see paragraph 12.5 of the Rules of the Premier League.

   ii) The FIFA statutes oblige its members, namely, the national football associations, to comply with the decisions of CAS on appeal and to ensure that the members of the national football associations comply with such decisions; see Articles 13 and 64 of the FIFA statutes.

   iii) The jurisdiction of CAS is to consider "appeals against final decisions passed by …..Members", that is, in the present case, a final decision passed by the FA; see Article 63 of the FIFA statutes.

8. Where a final anti-suit injunction is granted the claimant must show that the foreign proceedings are vexatious or oppressive. Where the proceedings are brought in breach of an arbitration agreement or exclusive jurisdiction agreement and the defendant is unable to show a strong reason why he should not be held to his agreement the foreign

proceedings will be regarded as oppressive and vexatious; see *The Angelic Grace* [1995] 1 Lloyd's Rep. 87. However, this is not the trial of the action but an application for an interim injunction. There was a dispute between the parties as to the required strength of the claimant's claim on such an application. Counsel for Sheffield United submitted that the test was the conventional *American Cyanamid* test, namely, whether the claimant's case raises a serious issue to be tried. Counsel for West Ham suggested that the test was higher. In his written submissions it was said that a breach of contract had to be established (relying upon *National Westminster Bank v Utrecht-America Finance Co.* [2001] EWCA Civ 658 at paragraph 37 per Clarke LJ and *American International Speciality Lines Insurance Co. v Abbott Laboratories* [2003] 1 Lloyd's Rep. 267 per Cresswell J.). In his oral submissions it was said that it had to be shown that Sheffield United is "actually entitled" to the relief sought (relying upon *The Anti-Suit Injunction, edited by Fawcett,* paragraphs 13.27-13.29).

9. This dispute as to the appropriate test was not debated at length before me. Counsel for Sheffield United was content to say that however high the test the strength of Sheffield United's case passed it. Counsel for the West Ham went no further in his argument than the extent to which I have indicated.

10. There appears to be considerable support for the view that even if the *American Cyanamid* test applies it should be applied with caution in the case of an application for an interim anti-suit injunction; see the cases cited in *The Anti-Suit Injunction* paragraph 13.28 at footnote 66 and *Dicey on the Conflict of Laws* 14th.ed. paragraph 12-067 at footnote 91. There is also support for the view that, at any rate where the grant of an interim injunction will be determinative of the question of forum, the test is higher and requires the applicant to show a *prima facie* right to a final anti-suit injunction or even that he would be actually entitled to a final injunction; see *The Anti-Suit Injunction* paragraphs 13.28-13.29 at footnotes 67-73.

11. I will first consider the strength of Sheffield United's case.

12. It is common ground that Rule K is the arbitration agreement between Sheffield United and West Ham. The award of the arbitral tribunal is expressed to be final and binding upon the parties from the date it is made; see Rule K 5 (b). That rule reflects the language of section 58(1) of the Arbitration Act 1996 which provides that unless otherwise agreed an award is final and binding on the parties. Section 58(2) allows for a challenge to be made to an award by "any available arbitral process of appeal". However, there is no provision for any arbitral appeal in the FA Rules. By contrast there is in some arbitration agreements; eg certain trade association arbitration agreements and Lloyd's Standard Form of Salvage Agreement. In my judgment Sheffield United has a very strong argument that the effect of Rule K 5(b) and the absence of a provision for an arbitral appeal is that an award of the arbitral tribunal is final and binding on the parties in the sense that the decision of the arbitral tribunal alone will finally and exclusively determine the issues between the parties. Indeed, I am unable to discern a reason why this argument will not succeed.

13. It was suggested by counsel for West Ham that the circumstance that Rule K 5 contained both sub-rules (b) and (c) showed that sub-rule (b) was not intended to be final and binding in the exclusive sense suggested on behalf of Sheffield United. If it had been so intended sub-rule (c) would not be necessary. I cannot discern a real prospect of such an argument succeeding. Sub-rule (b) identifies an important

characteristic of an award of the arbitral tribunal, namely, that it is to be final and binding. Sub-rule (c) is concerned, not with the characteristics of an award of the arbitral tribunal, but with ousting such parts of the High Court's supervisory jurisdiction as can be excluded by agreement of the parties eg appeals on points of law pursuant to section 69 of the Arbitration Act 1996.

14. It was further said that sub-rule (c) did not exclude an appeal to an agreed arbitral appeal but only to a court of law. That would appear to be so. But sub-rule (c) cannot and does not create an arbitral appellate body.

15. Counsel for West Ham suggested that the arbitral right of appeal was to be found in article 63 of the FIFA statutes. I shall assume for this purpose that the FIFA statutes are binding upon Sheffield United. But, having made that assumption, I am unable to discern any real prospect that the argument that article 63 creates an arbitral right of appeal to CAS will succeed. The argument sought to be advanced is that the decision of the arbitral tribunal is a "decision passed by the FA". Counsel for West Ham did not articulate the steps in the argument which led to the conclusion that the decision of the arbitral tribunal was one "passed by the FA". I cannot envisage how such an argument could succeed because:

    i) The award of the tribunal is an award of the tribunal. It is not an award of the FA. The award states in terms that "This Tribunal now Awards as follows……"

    ii) There is no evidence that the award was issued or published by the FA.

    iii) The arbitral tribunal is and was independent of the FA; see *Stretford v FA* [2007] 2 Lloyd's Rep. 31 at para.40 per Sir Anthony Clarke MR.

    iv) Rule K contemplates that the FA will be informed by the arbitral tribunal of the award and will be provided with a copy of the decision by the arbitral tribunal; see Rule K.5(a).

16. In his skeleton argument counsel for West Ham adopted, but did not develop, the reasons set out in West Ham's Statement of Appeal to the CAS in support of his submission that CAS has jurisdiction to hear West Ham's appeal. Despite the length of the Statement of Appeal it does not explain why the decision of the arbitral tribunal is a decision passed by the FA. Paragraph 1 asserts, without explanation, that West Ham received a "decision passed by the FA" which it thereafter called "the FA Decision". Paragraph 4 states that the FA Rules provided for the dispute concerning Carlos Tevez "to be submitted to the jurisdiction of the FA for decision". However, the rule which referred the dispute to the FA is not identified. Paragraph 9 described the Interim Award of the tribunal as "a decision of the FA in relation to the dispute which was submitted to the FA for resolution by the FA under the FA Rules". How that description was justified by the FA Rules is not explained.

17. Instead, the description was said to be "confirmed by the analogous jurisprudence" in an arbitral award of CAS ref. CAS 2007/A/1370. However, in that case CAS decided that it had appellate jurisdiction because the "justice body" from which an appeal was sought to be brought was part of the national association (the equivalent of the FA) with no legal personality of its own. It could not "legally stand alone if [the national

association] did not exist." It was therefore possible to say that the decision was passed by the national association. Counsel said that West Ham would rely on the "stand alone" argument in this case. But he did not explain on what basis it could be said that the arbitral tribunal, comprising Lord Griffiths, Sir Anthony Colman and Robert Englehart QC, had no legal personality of its own. I cannot envisage any basis for such an argument; and none was suggested to me.

18. In my judgment Sheffield United has, to put it at its lowest, a very strong case that West Ham's recourse to CAS is a breach of the arbitration agreement. So strong is it that I cannot discern an answer to it.

19. I note that the FA has itself stated that the dispute between West Ham and Sheffield United was heard by a private independent arbitration tribunal set up under the FA's Rules, that the FA did not sit in judgment, did not have any influence on the decision and did not appoint any of the tribunal members and that the FA Rules do not provide any right of appeal to CAS (see the FA's statement dated 23 September 2008 and its letter to CAS dated 13 October 2008). I agree with those statements.

20. It follows that at trial the burden will, in my judgment, be upon West Ham to show a strong reason why it should not be held to its contract; see *The Angelic Grace* [1995] 1 Lloyd's Rep. 87. No such reason was identified to me. I cannot therefore envisage the Claimant failing at trial to secure a permanent injunction.

21. I can now return to the disputed question as to the test which must be satisfied by Sheffield United on this application for an interim anti-suit injunction. It seems to me that I need not determine that question. In my judgment the strength of Sheffield United's case is such that it is able to show that it will be "actually entitled" to a final anti-suit injunction. I am therefore able to assume that that is the test and hold that it is satisfied by Sheffield United.

Damages an adequate remedy ?

22. The next question on this application for an interim injunction is whether damages would be an adequate remedy. It was submitted on behalf of West Ham that damages would be an adequate remedy because if costs were expended in the appeal to CAS and it were later held that West Ham had no entitlement to take its appeal to CAS Sheffield United could be compensated for the costs thrown away by an award in damages. However, it is well established that the remedy of damages is not regarded as an adequate remedy for breach of an arbitration clause. In *Starlight Shipping Co. v Tai Ping Insurance Co.Ltd.* [2008] 1 Lloyd's Rep. 230 at paragraph 12 Cooke J. said:

> "Damages would, for all the reasons given in the authorities, be an inadequate remedy for breach of such a clause since its very nature requires the parties to have their disputes determined in arbitration. A party to such an agreement should not be put to the trouble of having disputes determined elsewhere in a manner contrary to the express contract between the parties."

23. For that reason I do not consider that damages would be an adequate remedy.

Balance of convenience

24. The next question, assuming that the normal undertaking in damages given by Sheffield United would not be an adequate remedy for West Ham, is whether the balance of convenience lies in favour of granting the interim injunction or in refusing it.

25. There are cogent reasons for granting the interim injunction:

    i) The parties will shortly be preparing for the hearing before the arbitral tribunal in early 2009 which will assess the quantum of Sheffield United's loss. It would be very inconvenient if, at the same time, the parties had to prepare to contest liability before CAS. I was told that the appeal before CAS would be in the nature of a re-hearing.

    ii) It was suggested that allowing the appeal to continue would have the effect of "derailing" the arbitration. Whilst the damages hearing might well still take place Sheffield United would be placed in the position of having to expand its legal resources in order to ensure that its case for the damages hearing is fully and properly prepared and that its case on appeal to CAS is fully and properly prepared.

    iii) In circumstances where West Ham have no real prospects of success at trial the maintenance of the status quo is inherently appropriate.

26. Counsel for West Ham submitted that an injunction should not be granted because it was appropriate that CAS determine its own jurisdiction, that that could be done without undue delay, and that, if matters are as clear as Sheffield United say they are, CAS will conclude that West Ham has no entitlement to appeal to CAS and then the quantum hearing in London can go ahead. Particular reliance was placed upon the decision of the Court of Appeal in *Weissfisch v Julius* [2006] 1 Lloyd's Rep.716.

27. I will consider first the decision in *Weissfisch v Julius* because it was the foundation of West Ham's case that the appropriate course is to permit CAS to determine its own jurisdiction in the absence of exceptional circumstances; see paragraph 33(v) of the judgment of Lord Phillips CJ. In that case there was an arbitration governed by Swiss law with its seat in Geneva. One of the parties sought from the English court an injunction restraining the arbitrator from acting as arbitrator on the grounds that the agreement had been induced by misrepresentation and was void or voidable. The Court of Appeal decided that the English court should not grant the injunction sought. The natural consequence of the arbitration agreement in that case was that any issue as to its validity would fall to be considered in Switzerland according to Swiss law. For the English Court to restrain the arbitration whose seat was in a foreign jurisdiction would infringe the principles of international arbitration agreed under the New York Convention and recognised in the Arbitration Act 1996. By contrast, in the present case there is an arbitration governed by English law with its seat in this country. The courts of this country therefore have supervisory jurisdiction over the arbitration. It has been asserted that the parties have agreed CAS as an appellate arbitral tribunal in Lausanne. But, whilst I accept that CAS would have competence to decide upon its own jurisdiction, this is not a case where the assertion that the parties have agreed CAS as an appellate arbitral tribunal has been supported by an argument

with any real prospect of success. For this reason I do not consider that the approach of the Court of Appeal in *Weissfisch v Julius* is appropriate in the present case.

28. I am not persuaded by the other points relied upon by West Ham to suggest that the balance of convenience lies in favour of refusing an injunction.

    i) The arbitration agreement between the parties contained in the Rules of the FA is governed by English law. That suggests that it is more appropriate that this court, rather than CAS, determine its true construction. West Ham has not articulated a coherent argument in support of the proposition that the award of the arbitral tribunal was "passed by the FA" within the meaning of Article 63 of the FIFA statutes. In those circumstances it is not at all clear why it is appropriate for CAS to determine an argument which has not been and probably cannot be articulated.

    ii) In the CAS arbitral award no. CAS 2007/A/1370 an objection to the jurisdiction of CAS was taken on 24 September 2007. That objection was determined on 6 December 2007. However prompt CAS would be in determining the question of its own jurisdiction the parties would be engaged in the process of arguing that question at a time when they should be engaged in the preparing for an efficient hearing of the damages issue in London.

    iii) West Ham's suggestion that it should be permitted to present such arguments as it has on jurisdiction to CAS ignores the rationale underlying this court's jurisdiction to restrain proceedings abroad which are in breach of an arbitration agreement as explained in *The Front Comor* [2007] 1 Lloyd's Rep. 391. Anti-suit injunctions promote "legal certainty" and reduce "the possibility of conflict" between the arbitration award and decisions in proceedings abroad (per Lord Hoffman at paragraph 21). They are a means "to give speedy effect to clearly applicable arbitration agreements" (per Lord Mance at paragraph 31). The reason why such agreements should be given effect is that:

> "Engagement in the foreign litigation is precisely what the person pursuing such litigation wishes to draw the other party into, but is precisely what the latter party aimed and bargained to avoid" (per Lord Mance at paragraph 32.)

29. Whilst the observations in *The Front Comor* concerned proceedings before a foreign court and have their full force at the trial of the action for a permanent injunction they are still persuasive in the context of proceedings before a foreign arbitral body and at the interim stage, especially where the claim of the party seeking relief is as strong as Sheffield United's claim is. I am satisfied that the balance of convenience is clearly in favour of granting the injunction sought by Sheffield United.

30. Counsel for West Ham made reference in his skeleton argument to the Lugano Convention, *Turner v Grovit* [2005] 1 AC 101 and *The Front Comor* [2007] 1 Lloyd's Rep. 391. It was suggested that the Court should not grant an anti-suit injunction because to do so would be inconsistent with the mutual trust between contracting states. However, this is not a case where the injunction is to restrain a person from taking a step in proceedings before a court of a member state. CAS is a private body.

In those circumstances the question which remains to be decided by the European Court of Justice in *The Front Comor*, namely, whether an anti-suit injunction should be granted in respect of proceedings before the court of a member state, does not arise.

Section 44 of the Arbitration Act 1996

31. The final matter to be determined is whether the present application satisfies the requirements of section 44(3) and (5) of the Arbitration Act 1996. Although the application can be and is brought under section 37 of the Supreme Court Act 1981 it seems to me that where the injunction sought under section 37 is in support of an arbitration the Court ought, when considering whether it is just and convenient to grant the injunction, to have regard to the requirements of section 44 of the Arbitration Act 1996.

32. Those requirements are that the case is one of urgency and that the tribunal is unable for the time being to act effectively. An application to enforce an arbitration agreement has been held to be within section 44(3) on the basis that the right to have disputes referred to arbitration is an "asset" of the claimant; see *Starlight Shipping Co. v Tai Ping* [2008] 1 Lloyd's Rep. 230 at paragraph 21 per Cooke J.

33. I am satisfied that the case is one of urgency. Although CAS has agreed to a moratorium in the service of submissions on the jurisdiction issue until 12 November and 26 November and may extend that moratorium further to enable this application to be determined it is clear that, absent this application, CAS expects the appeal to be prosecuted without delay.

34. Although Sheffield United does not accept that the dispute between the parties as to whether West Ham's conduct in seeking to appeal to CAS is a breach of the arbitration agreement is capable of being referred to the arbitral tribunal pursuant to Rule K of FA's rules it seems to me that it so capable. Such a dispute is within the phrase "a dispute arising out of or in connection with (including any question regarding the existence or validity of) (i) The Rules and Regulations of The Association…." The tribunal is constituted and in principle it could be requested to determine allegations of breach and issue a final award on that issue. The only question is whether the tribunal is "unable for the time being to act effectively."

35. If the tribunal were requested to rule on allegations of breach and decided that West Ham's conduct in seeking to appeal to CAS was a breach of the arbitration agreement it seems likely that West Ham would seek to appeal to CAS. Whilst a decision by the tribunal would resolve the question as a matter of law, the probabilities are that West Ham would not so regard it and would seek to appeal to CAS. Sheffield United would in turn be likely to issue proceedings in this court seeking an order restraining West Ham from appealing to CAS. Thus the parties would return to the position in which they presently find themselves. In these unusual circumstances I consider that it can properly and fairly said that the tribunal is unable to act effectively.

36. For the reasons which I have endeavoured to express I have concluded that, subject to the effect of West Ham's application under section 9 of the Arbitration Act 1996, Sheffield United is entitled to the interim injunctive relief it seeks. I must therefore deal with the application under section 9.

Section 9 of the Arbitration Act 1996

37. Section 9 provides as follow:

> "9(1) A party to an arbitration agreement against whom legal proceedings are brought ……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 proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> ……
>
> (3) An application may not be made by a person ……..after he has taken any step in those proceedings to answer the substantive claim."

38. Sheffield United commenced its proceedings in this court for an anti-suit injunction on 14 October 2008. The application was supported by a witness statement of Mr. Rosenheim dated 14 October 2008. Although West Ham issued an application for a stay of Sheffield United's proceedings on 29 October 2008 it was not immediately served on Sheffield United. Instead, West Ham served the witness statement of Mr. Canty dated 3 November 2008 in response to Sheffield United's application and in support of West Ham's application for a stay. In paragraph 22 Mr. Canty said on behalf of West Ham that it is for CAS to determine whether it had jurisdiction to hear an appeal. But he also said at paragraph 25 that the question was to be determined in accordance with the arbitration procedure in Rule K; hence the application for a stay pursuant to section 9.

39. This application for a stay raises the question whether an application for an anti-suit injunction based upon a breach of an arbitration clause is a dispute referred to arbitration by terms such as those in Rule K of the FA Rules. This question was the subject of short written submissions in counsel's skeleton arguments which were not developed orally. I was not referred to any decision on the question after the coming into force of the Arbitration Act 1996. The question is however discussed in *The Anti-Suit Injunction* at paragraphs 7.36-7.38 where two cases decided under the law prior to the 1996 Act are mentioned; *Compagnie Eurpeene de Cereals SA v Tradax Export SA* [1986] 2 Lloyd's Rep. 301 and *Toepfer International v Cargill* [1998] 1 Lloyd's Rep. 379.

40. My approach to this question is as follows. As was stated by Lord Hoffman in *The Front Comor* [2007] 1 Lloyd's Rep. 391 at paragraph 19 the English courts have for many years exercised a jurisdiction to restrain parties from pursuing foreign proceedings in breach of an arbitration clause. He described such jurisdiction as part of the court's supervisory jurisdiction over the arbitration. Whilst an arbitral tribunal can determine issues of breach between the parties and whilst the remedies available to the tribunal include making orders restraining a party from acting in breach (see section 48(5)(a) of the Arbitration Act 1996) the court nevertheless has its supervisory jurisdiction which includes its powers under section 44 of the Arbitration Act 1996. There might in some cases, such as the present, be an overlap between the powers of the arbitral tribunal to determine issues of breach between the parties concerning their

contractual relationship and the court's supervisory jurisdiction when it is invoked in support of an arbitration agreement. But I do not consider that the class of disputes referred to arbitration by Rule K of the FA Rules encompasses a dispute as to whether the court should exercise its supervisory jurisdiction. Were it otherwise that part of the court's supervisory jurisdiction referred to by Lord Hoffman would usually be subject to a stay pursuant to section 9 of the Act. Moreover, whilst the parties have agreed that disputes between them should be referred to arbitration they have also agreed, by reason of the seat of the arbitration being England, that the English court is the forum which can exercise a supervisory jurisdiction in support of the arbitration; cf *C v D* [2008] 1 Lloyd's Rep. 239 at paragraph 17 per Longmore LJ. My approach to the question therefore appears to be the same as or similar to that suggested in *The Anti-Suit Injunction* at the end of paragraph 7.38. For this reason I must dismiss West Ham's application for a stay.

41. In any event there is a further reason for dismissing the application. The stay application sits unhappily with West Ham's determination to appeal to CAS. I asked counsel for West Ham whether, if Sheffield United's application were stayed, West Ham would require the arbitral tribunal or CAS to determine the question whether CAS was an agreed appellate arbitral tribunal. Counsel replied that West Ham would say that the matter should be determined by CAS and not by the arbitral tribunal. In those circumstances the application for a stay might well be regarded as frivolous or vexatious. However, that possibility was not debated before me in terms. What was said in response to the stay application was that West Ham had taken a step in the anti-suit proceedings before seeking a stay, namely serving a witness statement in which it was made clear that West Ham challenged Sheffield United on the merits of its application. It might be said that there is a difficulty with this argument in that the application for a stay was issued on 29 October (before the date of the statement) and, in any event, the witness statement gave simultaneous notice of both West Ham's opposition to Sheffield United's proceedings and West Ham's application for a stay. However, I consider that it can properly be said that the application for a stay was made after West Ham had taken a step in the proceedings to answer the substantive claim.

    i) Section 9(1) requires an application to be made on notice. Thus the mere issue of an application seeking a stay is not sufficient to amount to the making of an application.

    ii) It is plain that West Ham's primary argument in the statement was that the anti-suit injunction should be refused because CAS should be permitted to decide upon its own jurisdiction. The application for a stay was very much an unexplained "add-on" to that primary argument.

    iii) Had West Ham wished to seek a stay under section 9 the application seeking a stay should have been served promptly and/or the witness statement ought to have made plain that West Ham required the arbitral tribunal appointed pursuant to Rule K to determine the question whether or not CAS had been agreed as an appellate arbitral tribunal. West Ham did not do either but instead made plain in the statement (and in the hearing before me) that it required CAS to determine that question.

Conclusion

42. Sheffield United is entitled to the interim relief which it seeks. West Ham's application for a stay is dismissed. I shall ask counsel to prepare a draft order giving effect to my decision.