Neutral Citation Number: [2018] EWHC 1567 (Ch)

Case No: E30MA025

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
BUSINESS LIST (Ch D)

Manchester Civil Justice Centre
1 Bridge Street West
Manchester M60 9DJ
Date: 12 July 2018

Before:

HIS HONOUR JUDGE EYRE QC
(sitting as a Judge of the High Court)

- -

Between :

1) MERCATO SPORTS (UK) LIMITED **2) MARK McKAY**	**Claimants**
- and -	
THE EVERTON FOOTBALL CLUB COMPANY LIMITED	**Defendant**

- -
- -

Jonathan Crystal (instructed by **Mason & Co**) for the **Claimants**
Paul Gilroy QC (instructed by **Centrefield LLP**) for the **Defendant**

Hearing date: 28th March 2018

- -

JUDGMENT

HH JUDGE EYRE QC:

Introduction.

1. AB is a professional footballer. In 2017 he entered an employment contract with the Defendant. The Claimants say that they brought AB to the attention of the Defendant and that by so doing they enabled the Defendant to obtain the player registration of AB and to enter the employment contract with him. In the light of that the Claimants seek payment for their services either pursuant to an implied contract of retainer or by reason of the unjust enrichment of the Defendant. The Defendant does not accept that there is any such liability.

2. The Defendant has applied under CPR Parts 11 and 62.8 seeking a stay of the proceedings pursuant to Section 9 of the Arbitration Act 1996. The Defendant invokes the Football Association's "Rules of the Football Association Ltd 2017 – 2018" ("the Rules") and contends that Rule K thereof operated as an arbitration agreement between the Claimants and the Defendant in relation to the subject matter of the dispute. Although the Claimants accept that the Second Claimant was bound by the Rules they make no such concession in respect of the First Claimant and contend that the Defendant is not entitled to a stay of that claimant's claim.

The Arbitration Act 1996.

3. The relevant parts of Section 9 of the Act provide 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.
>
> …
>
> (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."

4. Section 5 of the Act provides that an arbitration agreement must be in writing. However, it was common ground between the parties that Rule K would operate as an agreement in writing for these purposes if the First Claimant was bound by it and if it took effect as an agreement between that claimant and the Defendant.

5. The parties were also agreed that the approach which I was to take was that laid down by Aikens LJ in *Joint Stock Company Aeroflot Russian Airlines v Berezovsky & others* [2013] EWCA Civ 784, [2013] 2 Lloyd's Rep. 242, at [72] - [74] namely:

> "72. It is necessary first to analyse the structure of section 9(1) and (4) of the AA 1996, to see where the burden lies and what standard of proof is required when there is an application for a stay of proceedings because one side asserts that two parties are bound by an arbitration agreement to submit the disputes being litigated to arbitration and the other side asserts that there was no concluded arbitration agreement or it is 'null and void'. Section 9(1) and (4) are based on Article II of the New York Convention 1958. That stipulates that each Contracting State 'shall' recognise arbitration agreements in writing and it further obliges a court of a
> Contracting State to refer the parties to arbitration if requested to do so by one of the parties in the context of an action in a matter which is the subject of an arbitration agreement, unless the court 'finds that the said agreement is null and void, inoperative or incapable of being performed'.
>
> 73. That has been translated into the terms of section 9(1) so as to give a party the right to apply for a stay of proceedings 'in respect of a matter which under the [arbitration] agreement is to be referred to arbitration'. Therefore, it seems to me in principle that there is a burden on the party asserting that there is (a) a concluded arbitration agreement as defined in the 1996 Act, and (b) that it covers the disputes that are the subject of the court proceedings, to prove that this is the case. This is borne out by the authorities.39 If the party seeking a stay cannot prove both (a) and (b), then there is no jurisdiction to grant a stay under section

> 9(1) and (4) of the AA 1996. However, if the court considers that it cannot decide those issues for itself in a summary fashion on the written evidence, it has two other options, as this court made clear in *Al-Naimi (t/a Buildmaster Construction Services) v Islamic Press Agency Inc*.40 It can direct an issue to be tried, pursuant to CPR Pt 62.8(3), or it can stay the proceedings (under its inherent jurisdiction) so that the putative arbitral panel can decide the issue of the existence of the arbitration agreement, pursuant to section 30 of the AA 1996. If the court decides that it will and can determine whether or not there was a concluded arbitration agreement on the written evidence before it, then, in my view, the authorities establish that it is for the party asserting the existence of the concluded arbitration clause to prove it on a balance of probabilities. As I point out below, the position appears to be different if the court decides, on an application for a stay, that it cannot, on the materials before it, determine whether there was a concluded arbitration agreement.
>
> 74. Under section 9(4) the court 'shall grant a stay' unless 'satisfied' thatthe arbitration agreement is 'null and void, [or] inoperative …'. This means, in my view, that once the first party has established the existence of an apparently concluded relevant arbitration agreement and that it covers the matters in dispute in the proceedings, it is for the party resisting a stay to 'satisfy' the court that the apparently existing arbitration agreement is 'null and void'. That was the position under the old law, i.e. section 1 of the A*rbitration Act* 1975, which provision first gave statutory effect in English law to the New York Convention.42 This court has said that this remains the position under the AA 1996, albeit without elaborating on its reasoning…."

6. In the circumstances of this case that meant that the Defendant had the burden of establishing that Rule K of the Rules bound the First Claimant and operated as an arbitration agreement between the Defendant and the First Claimant. It was not contended that the Second Claimant was not bound by the Rules nor that Rule K did not create an arbitration agreement between him and the Defendant. In addition the First Claimant did not suggest that if Rule K did take effect as an arbitration agreement between it and the Defendant then such agreement was in any way null, void, inoperative, or incapable of performance.

The Factual Background.

7. The transfer of professional footballers from one club to another can generate fees which are often substantial. The Football Association has laid down rules in respect of such transfers. The transfers often involve agents of various kinds acting on behalf of players and on behalf of football clubs. To regulate those dealings the Football Association has a system of registered intermediaries. There is no dispute that the Second Claimant is a registered intermediary. The Claimants' case at the time of the hearing before me on 28th March 2018 was that the First Claimant was not so registered and, indeed, that it could not be. The Defendant's case was that the First Claimant was "inextricably linked" with the Second Claimant and was thereby bound by the Rules and was a party to an arbitration agreement in the same way as the Second Claimant was. Alternatively the Defendant asserted that the First Claimant was bound by the Rules by virtue of its participation in professional football. It was only in the course of the hearing that it was noticed that the First Claimant's invoice bore a number relating to the First Claimant and which appeared to be the

registration number of an intermediary registered with the Football Association. This raised the question of whether in fact the First Claimant was a registered intermediary. It was not possible to resolve this factual issue at hearing. The matter was then put off for further evidence and for written submissions and I will set out the effect of those below.

8. The relevant parts of the Rules provide as follows:

Rule 2 sets out definitions and defines "Intermediary" and "Participant" thus:

> "Intermediary" shall have the meaning ascribed to the term within The Association's Regulations on Working with Intermediaries.
>
> "Participant" means an Affiliated Association, Competition, Club, Club Official, Intermediary, Player, Official, Manager, Match Official, Match Official observer, Match Official coach, Match Official mentor, Management Committee Member, member or employee of a Club and all such persons who are from time to time participating in any activity sanctioned either directly or indirectly by The Association"

Rule K is headed "Arbitration" and "Agreement to Arbitration". Rule K (1)(a) provides that:

> "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):
>
> (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;
>
> (iii) the statutes and regulations of FIFA and UEFA which are in force from time to time; or
>
> (iv) the Laws of the Game,
>
> shall be referred to and finally resolved by arbitration under these Rules."

9. The relevant parts of the Football Association's "Regulations on working with Intermediaries" are:

> "A General Principles:
>
> 1 Only an Intermediary may be used and paid by a Player or Club in relation to any Intermediary Activity. Alternatively, a Player or Club may represent themselves in any matter relating to a Transaction.
>
> 2 A Player or Club must not use or pay any person for Intermediary Activity unless that person is registered as an Intermediary and is entitled to act under a valid Representation Contract. An Intermediary must not carry out any Intermediary Activity in the place of, or on behalf of, or as agent or representative of, any person other than the Player and/or the Club he is engaged to act for (unless in accordance with Regulation B6)."

> "B Representation Contract
> 1 An Intermediary and a Player or a Club (as applicable) must have entered into a validly executed written Representation Contract prior to that Intermediary carrying out any Intermediary Activity on his or its behalf.
>
> Appendix I – Definitions
> "Intermediary" means any natural or legal person who carries out or seeks to carry out Intermediary Activity and has registered with The Association in accordance with Appendix II and/or III;
>
> "Intermediary Activity" means acting in any way and at any time, either directly or indirectly, for or on behalf of a Player or a Club in relation to any matter relating to a Transaction. This includes, but is not limited to, entering into a Representation Contract with a Player or a Club;
>
> For the avoidance of doubt, a Club Official is not acting as an Intermediary when he carries out any Intermediary Activity in relation to any matter relating to a Transaction for or on behalf of that Club. Similarly, a Lawyer is not acting as an Intermediary when he solely and exclusively undertakes or provides Permitted Legal Advice in relation to any matter relating to a Transaction;
> …
> "Organisation" means an agency, person, firm or company retaining, comprising, employing, or otherwise acting as a vehicle for one or more Intermediaries and not registered as an Intermediary itself pursuant to Appendices II and III;
>
> Appendix II – Registration of Intermediaries
> 1. Eligibility
> Any natural or legal person who wishes to act as an Intermediary shall register with The Association in the form as may be prescribed from time to time. The Registration shall be valid for 1 year."

10. I need not address the details of the dealings which led to the Defendant engaging AB. It suffices to say that the claimants contend that they brought that engagement about.

11. The First Claimant made a demand for payment from the Defendant by its invoice dated 3rd September 2017. The invoice is on the First Claimant's headed paper. Under the date it bears the First Claimant's name and "IMSC000572" which we now know was the First Claimant's registration number as an intermediary registered with the Football Association. The invoice is said to be "for work on behalf of the club relating to AB".

12. There is no dispute that the Second Claimant is registered with the Football Association as an intermediary. He is described in the Particulars of Claim as "an Intermediary registered with the Football Association with registration number IMS000486". It is to be noted that the First Claimant and the Second Claimant had different registration numbers.

13. In response to the application the Claimants had relied on a witness statement from their solicitor, Maurice Mason. At paragraph 4 of that statement Mr.

Mason, doubtless on instructions, said "the First Claimant is not registered as an Intermediary with the FA". In his initial skeleton argument for the Claimants Mr. Crystal, again doubtless on instructions, said at [3] that "The First Claimant is not and could not be registered as an in Intermediary with the FA". At other points in that skeleton Mr. Crystal contended that because the First Claimant was not a natural person it could not have been registered as an intermediary. In his further skeleton argument Mr. Crystal accepted that the latter contention was incorrect and that a company could be a registered intermediary. Mr. Crystal apologised for this error which he graciously acknowledged resulted from a misreading of the Rules on his part. However, the fact remains that the First Claimant's lawyers were caused to say on instructions that the First Claimant had not been registered as an intermediary.

14. As I noted above the potential significance of the number on the invoice was only noticed during the hearing before me and there have been further evidence and submissions in relation to that potential significance.

15. The Second Claimant says that on 28th March 2018 he telephoned Mr. Carter, the Football Association's Player Status Administrator (Intermediaries). Mr. McKay says that Mr. Carter told him on the telephone that the First Claimant was not listed as an intermediary with the Football Association. Mr. Mckay sought an e-mail confirmation and exhibits an e-mail from Mr. Carter saying "… please take this email as official confirmation that [the First Claimant] is no longer an active company on the FA Intermediary Companies system."

16. Mr. McKay caused his solicitors to make further inquiries and these resulted in an e-mail of 12th April 2018 from Mr. Andrew Furness of the Football Association which said "I can confirm that [the First Claimant] are a Registered Company Intermediary with the FA and have been since 15th May 2017. The company were listed as inactive on our system in error which has now been rectified."

17. In his statement Mr. Mckay said, at [7], that "I can confirm that neither the First Claimant nor I requested the FA to activate the First Claimant as a company on the FA Intermediary Companies system". At [10] he said that the First Claimant had not carried out any intermediary activity and suggested that "it may be the case" that the notification of the First Claimant's details to the Football Association "for payment purposes" in respect of transactions where Mr. McKay acted as an intermediary in his personal capacity had "resulted in the FA registering the First Claimant as an intermediary company."

18. Philip Bonner is a solicitor for the Defendant and he provided a witness statement addressing the question of registration. He annexed two lists produced by the Football Association recording those companies which are registered as intermediaries. The first list had been published in May 2017. The First Claimant appeared in that list and was identified by the number IMSC000572. The entry included the Second Claimant's name which was placed under the First Claimant's name (Mr. Bonner says that this was an indication that Mr. McKay was the natural person authorised to conduct intermediary activity on the First Claimant's behalf). The second list was published in January 2018 and bore no reference to the First Claimant. The

Defendant's solicitors queried the position with the Football Association and received an email response dated 12th April 2018 from Mr. Furness (and sent six minutes before that which he sent to Mr. McKay) in which he said he could confirm that the First Claimant was a registered company intermediary and had been since 15th May 2017. Mr. Furness went on to say that there was no requirement to renew such a registration and that this would remain active "so long as an individual FA Registered Intermediary is linked or [until] we receive notification to cancel the registration." Mr. Bonner subsequently spoke to Mr. Furness and was told that the omission of the First Claimant from the January 2018 list had been "the result of an IT-related administrative error on the part of the FA".

19. There was no application for cross-examination of any witness. I have not been provided with copies of any document or documents which are said to have caused the Football Association to register the First Claimant. Similarly, I do not have any direct evidence from the Football Association. In those circumstances I remind myself that I must be exceptionally wary in making findings of fact and that I have to have regard to the express assertions of Mr. McKay. Though in the latter regard I note the qualified terms in which he expresses matters in his witness statement. Thus he says that there was no request to "activate" the First Claimant as a company on the intermediaries system and that "it may be the case" that the registration of the First Claimant was brought about by the provision of its details for payment purposes.

20. I have regard to the following matters:

    i) The First Claimant was registered as an intermediary by the Football Association.

    ii) The Football Association issued a registration number to the First Claimant. Moreover, the registration number begins with the letters IM standing for "intermediary".

    iii) That registration number is different from the Second Claimant's registration number.

    iv) The invoice rendered by the First Claimant to the Defendant bore the First Claimant's registration number.

21. In considering those matters I regard the fact of registration as of itself indicating that the registration was brought about by action by or on behalf of the First Claimant with that objective. That indication could be displaced by evidence giving an explanation of what else might have caused the registration but Mr. McKay's somewhat guarded comments are not cogent evidence of such an alternative explanation.

22. As a bare minimum I find that the following must have happened. I make these findings as being the only explanation compatible with the contemporaneous documents.

i) A communication in some form from the First Claimant or the Second Claimant to the Football Association resulted in the Association registering the First Claimant as an intermediary.

ii) As a consequence of that registration the First Claimant was provided with a registration number by the Football Association.

iii) Neither the First Claimant nor the Second Claimant informed the Football Association that the First Claimant should not have been registered as an intermediary.

iv) The First Claimant used that registration number when it rendered an invoice to the Defendant.

23. Accordingly, I find that the registration resulted from the actions of the First Claimant or persons associated with it; that the First Claimant was aware of its registration; that the First Claimant did not challenge or seek to revoke the registration; and that the First Claimant used the registration number with which it had been provided. It follows that even if the initial registration of the First Claimant as an intermediary was made without its knowledge or authority and as the result of an error on the part of the Football Association (something which I regard as an unlikely explanation of these events) the First Claimant became aware of the registration and ratified or adopted it by using the registration number.

The Test to be applied.

24. In those circumstances did Rule K operate as an arbitration agreement between the First Claimant and the Defendant? If it did the claim falls to be stayed. If it did not then the Defendant is not entitled to a stay of the claim made by the First Claimant. In the latter scenario the claim of the Second Claimant would nonetheless be liable to be stayed. The Second Claimant did not argue against such a conclusion and Mr. Crystal accepted that in such circumstances there would need to be a radical recasting of the Particulars of Claim.

25. The Defendant initially argued that the First Claimant was bound by the arbitration provision because it and the Second Claimant were "inextricably linked" and the claim being brought was "pursued on a joint and several basis". In his oral submissions Mr. Gilroy QC appeared to be asserting that by virtue of the fact that the First Claimant was engaging in activities connected with professional football it was bound by the Rules simply as a consequence of that participation. For the reasons set out below I have concluded that both those lines of argument are incorrect as a matter of law and that neither would be a basis for holding that the Rules operated as an arbitration agreement between the First Claimant and the Defendant.

26. The approach which I am to take as a matter of law is as follows. For there to be an arbitration agreement between two litigants there must be a contract between those persons. Such a contract can only exist if the circumstances are such as enable the court to find a contract by application of the normal rules

governing the formation of contracts. An implied contract between two persons who have not engaged directly with each other ("a horizontal contract" to adopt the language used by HH Judge Pelling QC in *Bony v Kacou & others* [2017] EWHC 2146 (Ch)) can arise where each of those persons has a separate contract ("a vertical contract") with the same third party committing them to abide by particular rules laid down by or stipulated for by that third party. Such a vertical contract can arise where a person's actions amount to an accession to the rules laid down by the relevant third party. Whether a series of vertical contracts gives rise to a horizontal contract (or a series of such contracts) between particular persons will depend on the facts and circumstances of each alleged party's entry into the vertical contract in question and the nature of their dealings with the other parties. A careful and fact sensitive analysis of the particular circumstances will be required. Engagement in activities related to a particular sport does not without more and inevitably amount to an agreement to be bound by the rules of the governing body of that sport let alone to horizontal contracts with all others engaged in that sport. However, accession to such rules can in appropriate circumstances give rise to such horizontal contracts with other participants in the sport.

27. The Defendant referred to the decisions of HH Judge Bird in *Davies v Nottingham Forest Football Club* [2017] EWHC 2095 and of HH Judge Pelling QC in *Bony v Kacou & others*. The Defendant said that there was an incompatibility between those decisions and that the approach in *Davies* was "clearly to be preferred" to that in *Bony*. I do not accept either of those propositions. When properly examined there is no inconsistency or incompatibility between the two decisions and both show the legal approach I have just summarised being put into effect.

28. I derive my conclusions as to the approach to be taken from first principles and from the following authorities.

29. The starting point is the decision of the House of Lords in *Clarke v Earl of Dunraven (The "Satanita")* [1897] AC 59. There each entrant to a yacht club regatta signed a letter to the secretary of the yacht club agreeing to be bound by the rules of the Yacht Club Association. The House of Lords proceeded on the basis that those agreements constituted vertical contracts with the yacht club which had given rise to a series of horizontal contracts between the participants in the regatta (and so between the parties to the litigation) whereby each was bound to the other to keep those rules. The position was summarised thus by Lord Herschell at 63:

> "I cannot entertain any doubt that there was a contractual relation between the parties to this litigation. The effect of their entering for the race, and undertaking to be bound by these rules to the knowledge of each other, is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability."

30. As Judge Pelling QC says in *Bony v Kacou* at [39] – [42] the question of whether or not there was such a contract was not in issue before the House of Lords. There had been findings to that effect in the Court of Appeal and in the

House of Lords the appellants proceeded on the basis that there was a contract but sought to argue as to the terms of that contract (see the summary of counsels' argument at 61). The decision of the House of Lords when seen in the light of the conclusion reached in the Court of Appeal nonetheless demonstrates that a series of vertical contracts is capable of giving rise to horizontal contracts between participants in such circumstances. Neither that decision nor that of the Court of Appeal is authority for the proposition that such horizontal contracts will inevitably arise between all those participating in a given sport. Whether in any given case there are such horizontal contracts will depend on the particular facts of the case in question.

31. In *Fulham Football Club (1897) Ltd v Richards & another* [2010] EWHC 3111 (Ch), [2011] Ch 208 it was common ground that the claimant had agreed to be bound by the Rules (in an earlier form) and that the Rules constituted an arbitration agreement between it and the defendants. The issue before Vos J (as he then was) was whether such an arbitration agreement removed the right to present an unfair prejudice petition under the Section 994 of the Companies Act 2006. See:

> "9. It is common ground (subject to one argument that I shall address in due course) that, if the right to present an unfair prejudice petition can be removed or diminished by contract, Fulham has done so by agreeing to the arbitration provisions in both the FA Rules and the FAPL Rules. Thus, unless the right to present an unfair prejudice petition is inalienable, the stay that the respondents seek would be mandatory under section 9 of the 1996 Act.
> …
>
> 54 I have already said that it is common ground that, if the right to present an unfair prejudice petition can be removed or diminished by contract, Fulham has done so by agreeing to the arbitration provisions in both the FA Rules and the FAPL Rules. There is, therefore, no real construction question for me to consider, it being accepted by Fulham that the issues raised by its petition fall within the terms of the agreements to arbitrate contained in the rules I have set out.
>
> 55 I should deal at this stage, however, with the one wrinkle to that clear position. Mr Marshall submits that the relief that he seeks in his unfair prejudice petition is not of the nature that the arbitrators appointed under the FA Rules and the FAPL Rules could grant. He also, of course, accepted that that is not, in itself, a reason for not staying the proceedings in favour of arbitration, as Mustill LJ most notably held in giving the judgment of the Court of Appeal in *Société Commerciale de Réassurance v Eras International Ltd (formerly Eras (UK*)) [1992] 1 Lloyd_s Rep 570, 610, since the parties have chosen a forum with advantages and disadvantages."

32. It follows that the decision in *Fulham v Richards* addresses the scope of an arbitration agreement when one exists and was an example of a case where the parties accepted that they were bound by the Rules such as to constitute an arbitration agreement between them but it does not take matters further than that.

33. The Defendant made reference to the passage at [57] where Vos J referred to the wording of the Rules which made reference to "any dispute or difference"

and to "all disputes". Vos J said that those were "wide words which are to be construed widely". That reference does not, however, assist me in the circumstances of this case. Vos J was there dealing with the scope of the arbitration agreement which it was agreed had been constituted by the Rules. He was not addressing the separate question of whether a particular person was a party to such an agreement. It is the latter question which I have to address. The language of the Rules can give some limited assistance in determining whether a vertical contract of accession to the Rules gives rise to a horizontal contract with other persons who have also acceded to the Rules. It cannot assist in determining whether a person has in fact acceded to the Rules. No matter how wide the language used the Rules cannot impose obligations on a person who has not entered the requisite vertical contract with the Football Association and agreed to be bound by them.

34. In *Davies v Nottingham Forest Football Club* the defendant sought a stay contending that the Rules gave rise to an arbitration agreement between it and the claimant. The claimant accepted that he was bound by the Rules as between himself and the Football Association. It was also common ground that the defendant was bound by the Rules as between itself and the Football Association. Moreover, it was accepted in that case that the claimant and the defendant each knew that the other was so bound (see [16(c)]). The issue was whether in the circumstances this gave rise to an arbitration agreement as between the claimant and the defendant (see [14]). It was in that context and in the light of those acceptances that HH Judge Bird had to determine the question of whether there was such an arbitration agreement between the parties to the dispute. The learned judge dealt with that question by applying the approach set out in *The Satanita* (see [16]). It follows that the decision is an example of circumstances in which a series of vertical contracts were found to have given rise to the implication of a horizontal contract but where that conclusion was in the context of the acceptance by both parties that they were bound by the Rules as between themselves and the Football Association. HH Judge Bird did not say that the Rules operated as an arbitration agreement in circumstances where one of the parties to the relevant dispute was not otherwise bound by them nor is his decision authority for the proposition that a participant in activities connected with professional football is by reason of that participation necessarily and automatically bound by the Rules.

35. At [18] HH Judge Bird said:

> "There is nothing in the latest service agreement which contradicts the terms of Rule K. As a matter of fact the rule bind both parties. Part of the price to be paid for the privilege of involvement with a professional football club is adherence to the rules. Just as a firm of solicitors could not, as a matter of private contract, excuse a junior fee earner from the need to comply with his or her professional obligations, so a contract between a football club and its manager cannot in my view excuse a manager from compliance with the rules."

36. At first sight those comments might be thought to give some support for the view that those involved in a sport (or at least in professional football) are bound by the rules of the governing body simply by virtue of that involvement. They must, however, be seen in the context of the particular

case. As I have l said it was accepted in that case that both parties were bound by the Rules as against the Football Association. In addition HH Judge Bird expressly said that the terms of the agreement between the parties did not contradict the Rules. It follows that the learned judge did not need to address the position of those who contended that they were not bound by the Rules. To the extent that HH Judge Bird was saying, as I believe he was when the passage is seen in context, that an agreement between a football club and its manager could not release either of them from their obligations to the Football Association under the Rules that was manifestly correct as a matter of contractual analysis. Where a person, such as a club manager, has obligations to a body, such as the Football Association, arising from a contract between that person and the body in question then an agreement between the first person and a further person, such as the employing club, cannot have any effect on the obligations arising from the initial contract. To the extent that HH Judge Bird was saying that persons cannot by an express agreement between themselves modify the rights and obligations inter se which would otherwise flow from each party's relationship with the relevant governing body then that proposition was not necessary for the decision in that case and does not follow as a matter of law. Such persons can modify their contractual obligations to each other by agreement but neither can release the other from obligations owed to the relevant governing body by reason of the other's separate relationship with that governing body.

37. In *Bony v Kacou & others* the court was concerned with a dispute between a professional footballer and his former agents (the first and third defendants) and their corporate vehicles (the second and fourth defendants). The defendants sought a stay by invocation of the Rules. It is of note that the first, second, and fourth defendants had never been registered with the Football Association. The third defendant had been registered for a period but was no longer registered at the time when the dispute with the claimant arose. Moreover, as between the claimant and the third defendant their relationship was governed by express oral and written agreements.

38. The matter came before HH Judge Pelling QC by way of an appeal from District Judge Obodai. Before the District Judge the defendants had argued that their status was defined by reference to the Rules and was such as to give them the rights and obligations set out in the Rules even without there having been express accession by them to the Rules. Before Judge Pelling QC the appellants contended that the law implied a contract in the terms of the rules of the sport in question between all participants in organised sport by reason of their participation in the sport and regardless of any knowledge or ignorance of those rules (see [22]). Judge Pelling QC regarded that argument as a development of that which had been advanced before the District Judge.

39. The appellants had relied on *The Satanita* as authority for that argument. At [36] – [48] Judge Pelling QC analysed in depth the effect of *The Satanita* and the other cases on which the appellants relied in these terms:

> "36. The appellants submit that the Court will imply in effect by operation of law a contract between participants in an organised sport based on the rules that govern that sport. I do not accept that this is the effect of the authorities on

which the appellants rely. Rather I consider that in such circumstances the court can imply such a contract but whether it will do so depends on all the relevant facts and circumstances. My reasons for reaching those conclusions are set out below.

37. The principal authority on which the appellants relied was that of the House of Lords in *Clarke v. Dunraven (The Satanita)* (ante). It does not support the proposition for which the appellants contend.

38. In that case, each owner of a yacht entered a yacht race organised by a yacht club. The entrant expressly agreed to be bound by the Yacht Racing Association Rules. ("YRAR") By those rules, the owner of any yacht disobeying them was liable for all damage arising. Yacht A breached the YRAR and in consequence sunk Yacht B. The owner of yacht A offered only the maximum sum provided for by statute for collisions between merchant ships. The owner of yacht B sued the owner of yacht A for breach of contract claiming for the full amount of his loss. The owner of yacht A maintained that his liability was capped by statute either because there was no contract or because on true construction that was the effect of the contract. The owner of yacht A succeeded at first instance, lost in the Court of Appeal and appealed to the House of Lords. His argument before the House was that even if there was a contract, its terms did not exclude the statute. That argument failed.

39. Counsel for the Respondents were not called on – see [1897] AC at 61 - and the submissions on behalf of the Appellants proceeded on the assumption that there was a contract between the Appellant and the Respondent – see the summary of the argument at [1897] AC at 60-61. Thus Lord Herschell's statement that the "*… effect of their entering the race and undertaking to be bound by these rules to the knowledge of each other is sufficient, I think, where those rules indicate a liability on the part of the one to the other, to create a contractual obligation to discharge that liability …"* is a dictum (as both Mr Chaisty and Mr Casement accept) albeit a powerful one and on any view one that was dependent upon the particular facts of that case.

40. The Court of Appeal did consider the contract/no contract issue in full – see *The Satanita* [1895] P 248. The judgments delivered by the Court of Appeal show that whether there was an implied horizontal contract between competitors was fact sensitive and in that case depended on there being vertical contracts between each owner and the club, on the terms of those contracts and on the knowledge of each competitor concerning the terms of those contracts. Each Judge concluded that there was a horizontal agreement as and from the point when the yachts competed against each other. Lord Esher MR at 255-256, characterised the relationship between the yacht owners as arising from an undertaking by each competitor to the committee to enter into a relation with the other competitors, which crystallised when those competitors started to race against each other. Lopes LJ held at 260-1 that there was a contractual undertaking by each owner to the others to pay all damage caused to another competing yacht by an infringement of the Rules that arose when the owners entered their respective yachts and sailed, and Rigby LJ concluded at 262 that all that was required for there to be a contract between owners was knowledge that the race was to be run under the Rules and that each had entered the race on those terms. The conclusions reached were plainly fact sensitive. There is nothing within any of the judgments that supports the wide general proposition for which the appellants contend in this appeal.

41. Although Mr. Casement submits that the House of Lords assumed the existence of a contract, that does not take the issue very far given that the issue had been fully argued before the Court of Appeal and all three members of the Court of Appeal concluded that an agreement arose by each owner with the Committee on submitting an entry that was accepted and as between the competitors at the point when each competed in the race that they had each entered.

42. The key point is that the outcome was fact sensitive and arose from the fact that each party had entered the race by express reference to rules that (to their knowledge) imposed an obligation to make good loss as between those competing in a relevant race. The factual basis that underpinned Clarke was that both competitors had entered into separate agreements with the club in similar terms by which each competitor undertook to make good any damage caused to the other by reason of a breach of any of the Racing Rules, each had done so to the knowledge of the other and it was necessary to imply a contract as between the competitors in order to give effect to what each had agreed to the knowledge of the other with the club.

43. The facts of Clarke were obviously different from those of the present case – In this case there were express contracts between the claimant and each of the first and third defendants whereas in Clarke there was no express contract between competitors. There was no relationship of any sort between the claimant and the second and fourth defendants. Any contract between the claimant and the FA was implicit because there is no evidence of any express contract arising from the claimant's registration with the FA as a Player and there was no contract at all between the FA and the first, second and fourth defendants.

44. *Fulham Football Club (1987) Limited v. Richards and others* (ante) does not assist on the issues I am now considering. The only issue that was material to the present case was whether Sir David Richards was a Participant for the purpose of Section K. He conceded that he was, which is not surprising given his role at the time of Chairman of Football Association Premier League Limited. All the other parties to the dispute were undoubtedly Participants as well.

45. *Modahl v. British Athletic Federation (In Administration)* (ante) likewise does not assist because it was concerned with the existence of a vertical contract between a sports regulator and a competitor not a horizontal agreement between competitors. In any event the judgments in that case emphasise the ultimately factual nature of the enquiry that has to be undertaken in every case before an implied contract can be found – see paragraph 49 of Latham LJ's judgment where he warned that courts " *... should not merely assume a contract to exist but must consider all the surrounding circumstances to determine whether a contract can properly be implied*" before then asking at the end of the paragraph whether on the material available is was proper to infer a contract.

46. *Stretford v. FA* (ante) does not assist either because that too was concerned with a vertical contract between a regulator (the FA) and an agent and depended on factual findings concerning incorporation – see the Chancellor's first instance judgment at [2006] EWHC 479 (Ch) at paragraphs 12 – 27.

> 47. The onus rests on the appellants to establish the existence of an implied agreement between each of them on the one hand and the claimant on the other that incorporates by reference at least Section K of the FA Rules. They have failed to do so. It is not argued by the appellant that any of the express agreements impliedly include by reference Section K of the FA Rules.
>
> 48. The appellants' case depends upon the court implying a contract between the respondent and each of the defendants that incorporates by reference at least section K of the FA Rules. The authorities relied on by the appellant do not support the proposition that such an agreement should be applied as a matter of law. It follows that an agreement can be implied only if the implication of a contract can be justified applying general principles."

40. In those circumstances Judge Pelling QC concluded that the Rules did not operate as an arbitration agreement between the claimant and the defendants. The first, second, and fourth defendants had never been parties to an agreement with the Football Association while the third defendant's relationship with that body had ceased. Moreover, as between the claimant and the third defendant there were express agreements which provided mechanisms for dispute resolution and which precluded the implication of a contract in different terms.

41. The analysis undertaken in *Bony v Kacou & others* is compelling. Participation in a sport or in activities connected with that sport does not of itself mean that those participating have as between each other the rights and obligations provided for in the rules of that sport's governing body. Whether there is an implied contract between such participants to the effect that they have as against each other those rights and obligations is to be determined by a fact sensitive analysis undertaken by reference to the general principles of contractual formation. In particular the court has to consider whether a given participant is a party to a vertical contract making him subject to the rules of the sport's governing body and whether the circumstances as a whole are such as to give rise to consequent and corresponding horizontal contracts with other participants. That approach is correct both by reference to authority and as a matter of principle and is to be adopted here.

42. In many cases the court will readily conclude that there were both vertical contracts with the relevant governing body and horizontal contracts with other participants. Thus those engaging in a sporting event organised under the auspices of a particular governing body are likely to be held to have agreed with those organising the event to be bound by the rules of that body and to have entered horizontal contracts to the same effect with the other participants. However, such a conclusion will be less readily reached the further removed the activity in question is from the actual playing of the sport concerned. The conclusions which can be drawn from the actions of a footballer in putting on his or her team's strip and walking on to the pitch in a match organised by the Football Association are not necessarily appropriate when considering the same footballer's business dealings even when those dealings relate to his or her professional career. In my judgement the further removed the relevant activities are from the physical playing of a sport the more care is needed in considering whether persons involved in those activities have acceded to the

rules of the relevant governing body and whether horizontal contracts incorporating those rules are to be implied between such persons and the other participants in those activities. The current dispute is about matters far removed from the actual playing of football. The dispute is concerned not with AB's performance on the football pitch but with business dealings between the Claimants and the Defendant which are said to have led to the latter engaging AB as an employee.

The Application of that Test to the Issue of a Stay.

43. Accordingly, there are two questions to be addressed in this case. First, was there a vertical contract between the First Claimant and the Football Association Ltd which incorporated the Rules, whether by express agreement or by accession. Second, if there was such a contract between the First Claimant and that Association, did it give rise to a horizontal agreement between the First Claimant and the Defendant whereby each agreed to be bound by the Rules in their dealings between each other.

44. If there was no agreement whether by accession or otherwise between the First Claimant and the Football Association whereby the former agreed to be bound by the Rules then the Rules simply could not operate as an arbitration agreement between the First Claimant and the Defendant. The fact that the First Claimant was participating in activities connected with professional football would not, without more, make it bound by the Rules in relation to the Football Association let alone give rise to a horizontal agreement incorporating the Rules as between the First Claimant and the Defendant.

45. Similarly the contention that the First Claimant was subject to the Rules in its dealings with the Defendant because the two Claimants were "inextricably linked" is not tenable in those terms. The existence of an arbitration agreement between the Second Claimant and the Defendant entitles the latter to a stay of the former's claim but it does not entitle the Defendant to a stay of a claim by the First Claimant. In that regard it is relevant to note that the Defendant has characterised the Claimants' claim against it as being "joint and several". The situation might well have been different if the Claimants' entitlement was a joint entitlement which could not be maintained by one without the participation of the other but that is not said to be the position here.

46. The Defendant has revised its position in light of the information which has been obtained since the hearing. It now argues that the registration of the First Claimant as an intermediary made the First Claimant a "Participant" within the meaning of the Rules and that as such it was bound by the arbitration agreement. That approach remains erroneous as a statement or application of the relevant test. The issue is not whether the First Claimant falls within the definition of "participant" for the purpose of the Rules but whether the First Claimant acceded to or agreed to the Rules in circumstances which then gave rise to a horizontal contract on the terms of the Rules between it and the Defendant. The fact that the First Claimant was a "participant" for the purpose of the Rules would be interesting but irrelevant if it was not bound by the Rules and it could only be bound by the Rules if it had agreed to or acceded to them. Although at times in his argument Mr. Gilroy QC seemed to suggest the

contrary it cannot be the case that the Football Association can impose obligations on those engaged in activities connected with professional football unless such persons can be said to have agreed to be bound by rules imposed by that association. The Football Association is a private body with its rights and powers deriving from agreement and it cannot exercise control over those who have not agreed, expressly or impliedly, to be subject to such control.

47. The First Claimant's original position was that it was not and could not be registered with the Football Association as an intermediary. It said that the law was correctly set out in *Bony v Kacou & others* and that there was no contractual relationship between it and the Defendant incorporating expressly or by reference the Rules. In the light of the information now available that position has been modified. The First Claimant accepts that it could have been registered as an intermediary and that it had appeared on the Football Association's register of intermediaries. However, it invites me to accept that it was not "active" as an intermediary and that it was not acting as an intermediary in the dealings with the Defendant. It says that because of this it is not to be regarded as bound by the Rules in relation to those dealings.

48. I return to the core questions. In the circumstances here had there been an accession by the First Claimant to the Rules such as to give rise to an agreement between the First Claimant and the Football Association whereby the former was to be bound by the Rules and such as to give rise also to a horizontal contract between the First Claimant and the Defendant to the effect that their dealings between each other were governed by the Rules?

49. I have set out at [22] and [23] above my findings as to the First Claimant's registration with the Football Association. In my judgement that registration and the First Claimant's related actions operated as an accession by the First Claimant to the Rules. At the very least the First Claimant was aware of the Rules and it sought and obtained registration with the Football Association in a particular status or, as I have found at [23] above, adopted and ratified that status. That can only have been on the footing that the relations between the First Claimant and the Football Association were to be governed by the rules which applied to the status of registered intermediary. It follows that as between the First Claimant and the Football Association the former was bound by the Rules. Whether the First Claimant was regarded by the Football Association as an "active" or "inactive" intermediary is immaterial because the question is whether there was an accession by the First Claimant to the Rules. The situation might have been rather different if the First Claimant had sought to rescind its registration in its entirety and had informed the Football Association that it no longer regarded itself as bound by the Rules but that did not happen.

50. So the First Claimant was bound by the Rules in relation to the Football Association and there was the requisite vertical contract to that effect. Were the dealings of the First Claimant and the Defendant and the relationship between them such as to give rise to an implied horizontal contract whereby they were bound in those dealings by the Rules and in particular by the arbitration provision in Rule K?

51. The Particulars of Claim do not distinguish between the Claimants and the source of the First Claimant's entitlement as opposed to that of the Second Claimant is not spelt out. In paragraph 6 it is said that "the Claimants provided services to the Defendant at its request… The services provided to the Defendant were provided under an implied contract of retainer under which the Claimants are entitled to be paid reasonable remuneration." The unjust enrichment alternative is expressed thus in paragraph 8 "the Claimants rendered services to the Defendant which conferred a benefit on it and thus enriched it."

52. The First Claimant rendered its invoice to the Defendant. I have summarised the relevant parts of the invoice at [11**]** above. It is apparent that by the invoice the First Claimant was asserting that it had an entitlement to payment from the Defendant and that the entitlement derived from services rendered in respect of AB. In my judgement it is highly significant that the invoice rendered to the Defendant by the First Claimant bore the latter's number as a registered intermediary. That is a powerful, indeed a compelling, indication that the claim for payment was made in that capacity. It also indicates that the services were provided in that capacity. It then follows that the First Claimant was claiming for intermediary services provided to the Defendant. It follows that the First Claimant was dealing with the Defendant as an intermediary and in doing so was making reference to its position as a registered intermediary. At the very least it made reference to that position as a registered intermediary when it sought payment. Thus the First Claimant was invoking its capacity under the Rules in dealing with the Defendant. In those circumstances it must follow in my judgement that it was acting, and avowedly acting, on the basis that its dealings with the Defendant were subject to the Rules. Those dealings accordingly gave rise to an implied horizontal contract between the First Claimant and the Defendant whereby each was bound by the Rules.

53. At paragraph 16 of his initial skeleton argument for the Claimants Mr Crystal referred me to *Burridge v MPH Soccer Management Ltd* [2011] EWCA Civ 835 where there was found to have been an equitable assignment of the agent's fees. He invited me to approach the matter on the basis that the arrangements here amounted to an equitable assignment to the First Claimant of fees payable by the Defendant to the Second Claimant. There was, however, no suggestion either in the Particulars of Claim or in the witness statements for the claimants that the First Claimant's entitlement to payment arose in that way. In those circumstances it is not be open to me to conclude that the First Claimant's entitlement was as an equitable assignee. Such a conclusion would in any event be inconsistent with the terms of the invoice rendered by the First Claimant which on any natural reading is asserting an entitlement on the part of the First Claimant arising out of work it has done.

54. The dealings between the First Claimant and the Defendant were, therefore, governed by the Rules. I need nonetheless to consider whether those dealings were caught by Rule K. The First Claimant's original position had been that it was not a registered intermediary. It also argued that notwithstanding whether or not there had been registration it was not acting as an intermediary in this transaction and so was not a "Participant" for the purposes of Rule K. I have

already explained why I have concluded that the First Claimant was acting as an intermediary in the dealings with the Defendant. However, even if it had not been and even if by so acting it was in breach of the Rules it would still have been a "Participant" for the purposes of the Rules.

55. I have come to that conclusion for the following reasons. The Rules define "Participant" as "an …Intermediary … and all such persons who are from time to time participating in an activity sanctioned either directly or indirectly by The Association." In that regard the reference to an "activity sanctioned" by the Football Association must be read as an activity of a kind which is permitted and controlled by the Association. An activity can be sanctioned by the Rules for this purpose even if the Rules provide that it should not be done in the particular way or by the particular person. A person can be participating in such an activity even if he or she is doing so in breach of the Rules. A person who is bound by the Rules does not take him or herself outside the scope of the Rules by acting in breach of the Rules. The dealings in respect of AB were clearly such an activity. So the First Claimant was taking part in a sanctioned activity. Even if, contrary to my earlier conclusion, it was not doing so in its capacity as an intermediary it was doing so when subject to the Rules and would be within the definition of "Participant" by virtue of being a "person" participating in the activity.

56. The effect of this is that as between both Claimants and the Defendant their dealings were governed by the Rules and the dispute is within the scope of the arbitration agreement constituted by Rule K. It follows that the proceedings are to be stayed and the claim referred to arbitration.

Publication.

57. The Defendant applied for the case to be heard in private contending that a public hearing would in part frustrate the object of its application in circumstances where any arbitration would be in private. For the reasons I gave at the time I acceded to that request although allowing a representative of the press to be present. At that stage I indicated that I would in due course hear further argument as to whether any judgment should also be in private. In the draft of my judgment sent to the parties before the date for handing down I said that I would hear such submissions as the parties wished to make but that at that stage my intention was for this judgment to be made public mirroring the course taken in *Fulham v Richards* and in *Davies v Nottingham Forest Football Club.*

58. At the hearing for handing down of the judgment the Claimants took a neutral stance on the issue of publication but the Defendant contended that the judgment should remain confidential. Mr. Gilroy QC emphasised the confidentiality provisions of the Rules; the fact that publication of the judgment would make public the knowledge of a claim being made against the Defendant in relation to AB; and that publication of the judgment would give the Claimants "the publicity they had sought in the first place by (erroneously) issuing proceedings in the High Court". In his oral submissions Mr. Gilroy QC placed particular emphasis on the first of these elements contending that

publication of this judgment would strike at the heart of the confidentiality by which the parties were bound pursuant to the Rules.

59. The approach I am to take in considering this question was set out by the Court of Appeal in *Economic Department of City of Moscow v Bankers Trust Co* [2004] EWCA Civ 314, [2005] QB 207. I have had regard to the considerations set out by Mance LJ at [39] – [43] and by Sir Andrew Morritt VC at [54] – [57]. I have to have regard to the starting point that proceedings relating to arbitrations are to be heard and determined in private but also to the strong public interest in open justice. I have to be aware that different considerations apply when the court is deciding whether a hearing should be held in private from those which are relevant when deciding whether the consequent judgment should be public. Adopting the language of Mance LJ there is a spectrum in respect of the weight to be given to confidentiality with the hearing of the arbitration itself being at one end of that spectrum and the delivery of a reasoned judgment at the other.

60. I have considered the matters set out in the *Bankers Trust* case. In undertaking the necessary balancing exercise I have taken account of the interests of the parties and the desirability of preserving the confidentiality of the arbitration and of their dispute as provided for by the Rules. Those matters are related to the question of whether the judgment can be made public without the disclosure of significant confidential information. I have concluded that substantial protection of the relevant confidentiality can be achieved without any material harm to the public interest in open justice by the use of initials for the name of the player whose engagement triggered the claim and by the omission from the judgment of references to the amount being claimed. I have also taken account of the fact that the outcome of the application ultimately turned on my decision as to whether or not the First Claimant was a registered intermediary. However, I was addressed by reference to matters of legal principle with potentially more general relevance and in deciding the matter I have had to set out an assessment of the arguments raised. I have also had regard to the approach taken in *Fulham v Richards* and in *Davies v Nottingham Forest Football Club* as indicating the view of other judges as to where the appropriate balance between publicity and confidentiality lies in cases such as this.

61. In those circumstances I have concluded that the appropriate course is for this judgment to be made public in the form set out above and omitting the use of the name of the footballer concerned and of reference to the amount of money being sought by the Claimants.