Claim No D40MA064

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS IN MANCHESTER
CIRCUIT COMMERCIAL COURT

IN THE MATTER of a challenge to the Award of an arbitral tribunal under Rule K of the Football Association Rules
AND IN THE MATTER of the Arbitration Act 1996

Before His Honour Judge Halliwell sitting as a Judge of the High Court on 15th, 16th, 17th, 18th and 19th October 2018, judgment handed down on 30th November 2018

B E T W E E N:

FLEETWOOD WANDERERS LIMITED
(t/a Fleetwood Town Football Club)

Claimant

AND

AFC FYLDE LIMITED

Defendant

Mr Paul Gilroy QC (instructed by Centrefield LLP) for the Claimant
Mr Martin Budworth (instructed by Harrison Drury) for the Defendant

JUDGMENT

(1) Introduction

1. By these proceedings, the Claimant challenges an arbitration award in respect of a dispute arising from the termination of a professional footballer's contract of employment.

2. The Claimant and the Defendant are football clubs. At the relevant time, the Claimant was in League One of the Sky Bet Football League and the Defendant was in the Vanarama National League North.

3. On 5th August 2014 and, again, on 18th September 2015, the Defendant entered into written contracts of employment with a professional footballer called Dion Charles ("the Player"). However, it failed to register, as required, the second contract ("the Contract") with the Football Association ("the FA") or the National League ("NL")

4. During the currency of the Contract, the Claimant itself engaged the Player. This gave rise to a dispute ("the Dispute") between the Defendant and the Claimant in which the

Defendant contended that, by joining the Claimant when contracted to the Defendant, the Player committed a repudiatory breach of his contractual obligations and the Claimant wrongfully procured the breach. On this hypothesis, the Defendant was furnished with a claim against the Claimant for damages at common law.

5. On 28th September 2016, the Defendant referred the Dispute to arbitration under *Rule K1* of the *FA Rules*. The Claimant and the Defendant were the only parties to the arbitration. Mr Craig Moore ("the Arbitrator") was appointed arbitrator. During the arbitration, the Defendant amended its case so as to add a claim for compensation based on *Article 17* of the *Regulations on the Status and Transfer of Players ("RSTP")*, issued by the Federation Internationale de Football Association ("FIFA"). As will be seen, *Article 17* contains a principle for the payment of compensation where a relevant contract is terminated without just cause. *Article 17.2* provides that if a professional player is required to pay compensation, the player and his new club are jointly and severally liable.

6. Following a hearing on 20th to 22nd June 2017, the Arbitrator made an award dated 24th July 2017 ("the Award") in which he concluded the Defendant had failed to establish its common law claim against the Claimant on causation but succeeded under *Article 17*. This was on the basis that the *FA Rules* had operated to incorporate the *Article 17* principle without derogation and the Claimant was thus jointly and severally liable for the payment of compensation regardless of the requirements of a successful claim at common law.

7. When, on 21st August 2017, the Claimant issued the current proceedings, its claim was based on the propositions that the Arbitrator lacked "substantive jurisdiction" to make the Award under *Section 67(1)(a)* or had exceeded his powers within the meaning of *Section 68(2)(b)* of the *Arbitration Act 1996.* However, it obtained permission to amend the claim after the FA's solicitors drew its attention to an exchange of emails ("the Contentious Emails") between the Arbitrator and the FA shortly before the Award. Following the substantive hearing, the Arbitrator had apparently communicated with the FA in relation to issues in the Arbitration without notifying the parties or giving them an opportunity to make representations. The Claimant contends that this amounted to a "serious irregularity" owing to a breach of the Arbitrator's statutory duties to act fairly and give the parties a reasonable opportunity to put their case. In seeking to challenge the Award it thus relies on *Section 68(2)(a)* of the *1996.*

(2) The Regulatory Framework

8. As the English game has grown and developed, a number of regulatory and representative organisations have been created to accommodate it. This includes the FA (incorporated as the Football Association Limited), the Professional Footballers Association ("the PFA") and several organisations separately responsible for administering and regulating the leagues and other competitions.

   8.1. The FA is essentially the governing body. As such, it issues rules ("*the FA Rules*"). All parties who agree or accede to the FA Rules are bound to comply with the same by express or implied contract, *Mercato Sports (UK) Limited v the Everton Football Club Company Limited [2018] EWHC 1567*. This includes football clubs and players. It is common ground that the parties to these proceedings are bound to comply with the *FA Rules*.

   8.2. An organisation known as "the Professional Football Negotiating and Consultative Committee (England and Wales)" ("the PFNCC") has been formed to address issues such as the terms and conditions of the players' employment, disciplinary procedures and health and safety. The PFNCC is a committee formed from representatives of the FA, the PFA, The Football League Limited and The FA Premier League Limited. It meets on a regular basis. The members of the PFNCC can reasonably be expected to ensure that the views of their respective organisations are taken into consideration at PFNCC meetings. As a general rule, the FA can be expected to endorse all PFNCC decisions on matters within their competence.

   8.3. The PFNCC were involved in the preparation of standard forms of employment contract for players participating in the Premier League and the English Football League. These have been formally approved by the FA-or treated as such-and incorporated in obligations under the FA Rules. In addition to the standard contracts, the PFNCC were involved in the preparation of an explanatory document denoted as the "Code of Practice and Notes on Contract". Subject to statutory intervention, the contracts take effect in accordance with common law principles.

9. FIFA is an international organisation. It issues rules to its members, including the FA. In the present case, there is no suggestion that there was or is any direct relationship,

contractual or otherwise, between FIFA and the parties to these proceedings under which FIFA are authorised to regulate the latter directly.

10. When the Contract was terminated and the Dispute referred to Arbitration, the *FA Rules* adopted on 18th May 2016 and the *RSTP* approved on 17th March 2016 were applicable. Save where the context otherwise requires, I shall thus refer to these versions of the *FA Rules* and the *RSTP*.

11. At all times, the *FA Rules* provided a detailed code ranging from matters such as contracts of employment (*Rule C*) to the FA's powers of inquiry (*Rule F*) and disciplinary powers (*Rule G*).

    11.1. By *Rule A1(b),* the Claimant and the Defendant were expressly required, as football clubs, to "play and/or administer football in conformity with" the FA Rules "and…the statutes and regulations of FIFA and UEFA in force from time to time".

    11.2. By *Rule C(j)(i),* all football clubs were required to enter into a written contract of employment with their players on an approved form, incorporating all the terms and conditions of employment. The Contract was to be of stated duration and signed at the same time as the player's registration form.

    11.3. By *Rule E1(d),* it was provided that the FA "may act against a participant", such as clubs and players, "in respect of any 'Misconduct'", in turn defined so as include "a breach of…the statutes and regulations of FIFA".

    11.4. By *Rule K1(a),* disputes were generally to be referred to arbitration including disputes arising in connection with the FA Rules and the statues and regulations of FIFA and UEFA, in force from time to time. However, rights of appeal on a point of law were expressly excluded. By *Rule K14(a),* it was expressly provided that "these Rules and any arbitration pursuant to them shall be governed by English law" and that "the Tribunal shall apply English law (both procedural and substantive) in determining any dispute referred to arbitration under the Rules".

12. Although the *RSTP* have been amended from time to time, it was common ground that the material provisions have been in essentially the same form since September 2001. The 2016 version of the *RSTP* includes the following provisions.

"*Scope*

1.1 These regulations lay down global and binding rules concerning the status of players, their eligibility to participate in organised football, and their transfer between clubs belonging to different associations.

1.2 The transfer of players between clubs belonging to the same association is governed by specific regulations issued by the association concerned in accordance with article 1 paragraph 3 below, which must be approved by FIFA. Such regulations shall lay down rules for the settlement of disputes between clubs and players, in accordance with principles stipulated in these regulations. Such regulations should also provide for a system to reward clubs investing in the training and education of young players.

1.3 (a) The following provisions are binding at national level and must be included without modification in the association's regulations: articles 2-8, 10, 11, 12bis, 18bis, 18ter, 19 and 19bis.

(b) Each association shall include in its regulations appropriate means to protect contractual stability, paying respect to mandatory national law and collective bargaining agreements. In particular, the following principles must be considered:

-article 13: the principle that contracts must be respected;

-article 14: the principle that contracts may be terminated by either party without consequences where there is just cause;

-article 15: the principle that contracts may be terminated by professionals with sporting just cause;

-article 16: the principle that contracts cannot be terminated during the course of the season;

-article 17: paragraphs 1 and 2: the principle that in the event of termination of contract without just cause, compensation shall be payable and that such compensation may be stipulated in the contract;

-article 17: paragraphs 3-5: the principle that in the event of termination of contract without just cause, sporting sanctions shall be imposed on the party in breach.

13 *Respect of contract*

A contract between a professional and a club may only be terminated upon expiry of the term of the contract or by mutual agreement.

14 *Terminating a contract with just cause*

A contract may be terminated by either party without consequences of any kind (either payment of compensation or imposition of sporting sanctions) where there is just cause.

15 *Terminating a contract with sporting just cause*

An established professional who has, in the course of a season, appeared in fewer than ten per cent of the official matches in which his club has been involved may terminate his contract prematurely on the ground of sporting just cause. Due consideration shall be given to the player's circumstances in the appraisal of such cases. The existence of sporting just cause shall be established on a case-by-case basis. In such a case, sporting sanctions shall not be imposed, though compensation may be payable. A professional may only terminate his contract on this basis in the 15 days following the last official match of the season of the club with which he is registered.

16 *Restriction on terminating a contract during the season*

A contract cannot be unilaterally terminated during the course of a season.

17 *Consequences of terminating a contract without just cause*

The following provisions apply if a contract is terminated without just cause.

17.1 In all cases, the party in breach shall pay compensation. Subject to the provisions of article 20 and Annexe 4 in relation to training compensation, and unless otherwise provided for in the contract, compensation for the breach shall be calculated with due consideration for the law of the country concerned, the specificity of the sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the former club (amortised over the term of the contract) and whether the contractual breach falls within a protected period.

17.2 Entitlement to compensation cannot be assigned to a third party. If a professional is required to pay compensation, the professional and his new club should be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.

17.3 In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the protected period. This sanction shall be a four-month restriction on playing in official matches. In the case of aggravating circumstances, the restriction shall last six months. These sporting sanctions shall take effect immediately once the player has been notified of the relevant decision. The sporting sanctions shall remain suspended in the period between the last official match of the season and first official match of the net season, in both cases including national cups and international championships for clubs. This suspension of the sporting sanctions shall, however, not be applicable if the player is an established member of the representative team of the association he is eligible to represent, and the association concerned is participating in the final competition of an international tournament in the period between the last match and the first match of the next season. Unilateral breach without just cause or sporting just cause after the protected period shall not result in sporting sanctions. Disciplinary measures may, however, be imposed outside the protected period for failure to give notice of termination within 15 days of the last official match of the season (including national cups) of the club with which the player is registered. The protected period starts again when, while renewing the contract, the duration of the previous contract is extended.

17.4 In addition to the obligation to pay compensation, sporting sanctions shall be imposed on any club found to be in breach of contract or found to be inducing a breach of contract during the protected period. It shall be presumed, unless established to the contrary, that any club signing a professional who has terminated his contract without just cause has induced that professional to commit a breach. The club shall be banned from registering any new players, either nationally or internationally, for two entire and consecutive registration periods. The club shall be able to register new players, either nationally or internationally, only as of the next registration period following the complete serving of the relevant sporting sanction. In particular, it may not make use of the exception and the provisional measures stipulated in article 6 paragraph 1 of these regulations in order to register players at an earlier stage.

17.5 Any person subject to the FIFA Statutes and regulations who acts in a manner designed to induce a breach of contract between a professional and a club in order to facilitate the transfer of the player shall be sanctioned."

13. Although the concept of "contractual stability" in *Article 1.3(b)* is not specifically defined, it connotes the adherence of the parties to their contractual rights and obligations. Whilst according due respect to mandatory national law and collective bargaining agreements, the associations must make appropriate provision in their regulations for the contracting parties to adhere to such rights. Moreover, in doing so, the associations must *consider inter alia* the principles that, in the event of termination without just cause, compensation is payable and sporting sanctions imposed.

14. FIFA has itself circulated a Commentary on the *RSTP* in which it draws a distinction between *Article 1.3(a)* and *1.3(b)* observing that, whilst the provisions of *Articles 2-8, 10, 11* and *18* "are binding at national level and have to be included without modification in the association's regulations" (Para 2.2), "the associations are…free to establish in which way [the] obligation" to provide appropriate means to protect contractual stability in Article 1.3(b) "has to be complied with" (Paras 3-4). This is on the basis that "the various principles outlined in" *Article 1.3(b)* "are to be considered as a strong recommendation, i.e. every association is allowed to include the principles it deems necessary and appropriate for its own football system in order to reflect the particular needs of the country concerned" (Para 4).

15. Since *Article 1.3(b)* only imposes on the associations-at national level-an obligation to make *appropriate* provision, the obligation is *discretionary*. However, it is implicit that this discretion must be exercised *reasonably* according respect to "mandatory national law and collective bargaining agreements" and taking into consideration the co-called "principles" in *Article 17*. Applying, by analogy, the well-known test in *Associated Provincial Picture Houses v Wednesbury Corporation [1948] 1KB 223* at *223-4*, the FA would no doubt be under a duty, in the exercise of its decision-making powers, to take relevant considerations into account (including the principles in *Article 17*) and exclude irrelevant considerations. Irrational decisions would have been open to challenge. If appropriate, FIFA would be entitled to impose sanctions for non-compliance with the RSTP. However, non-compliance is not alleged here.

16. Before me, the Claimants called two expert witnesses, Messrs John Bramhall and Nicholas Craig, to give evidence about the steps taken by the regulatory authorities in England to apply the *RSTP*. Mr Bramhall is the Deputy Chief Executive of the Professional Footballers' Association and Mr Craig is Governance and Legal Director of the English Football League. They did not personally attend the initial meetings at which the PFNCC considered the relevant provisions of the RSTP. However, their evidence was consistent with the limited documentary evidence available and there is nothing convincing to the contrary. Based on their evidence, I am satisfied that, at various times since May 2001, the PFNCC, the FA and the EFL have considered the provisions of the RSTP when addressing their own regulatory regimes. Messrs Bramhall and Craig both accept that *Articles 2-8, 10, 11* and *18* of the *RSTP* apply in English football, having been incorporated through the FA Rules. However, they maintain that the FA and the PFNCC have elected not to incorporate, in express terms, the principles in *Articles 13-17* since they are satisfied that there is already adequate provision for the protection of contractual stability in the FA Rules.

17. No comprehensive minutes or reports were available from any of the relevant organisations and, to the extent that the relevant issues have been addressed at all, this appears to be have been done on an intermittent and *ad hoc* basis.

    17.1. It appears from the minutes of a special meeting, on 15th May 2001, of the PFNCC that "a copy of the principles for the amendment of the FIFA rules regarding international transfers" was presented before them and this was the subject of discussion at the meeting. More likely than not, this included the *RSTP* in its original draft form. I was only shown a redacted copy of the Minutes. However, the members of the PFNCC present at the meeting apparently had reservations about at least some of the provisions of *Article 1.3* and noted that the European Commission had not given its approval. They thus decided that there should be no rule change at that stage.

    17.2. On 23rd October 2001, there was another meeting of the PFNCC. Only one page of the Minutes of the meeting is available from which it appears that the PFA informed the PFNCC that FIFpro-the worldwide representative organisation for professional footballers-had withdrawn "their action against FIFA subject to…particular points being accepted by FIFA". The background to this is obscure.

However, under the heading "stability period" it was recorded in the Minutes that "if a club chooses to break this stability period and sell a player to a new club then it must be clearly shown that the new club was fully informed (sic) both the old club and the player in writing. The player must demonstrate that he had not been forced against his wishes to leave the club. If the new club has not fulfilled this obligation then they will be subject to a sanction of being embargoes (sic) from signing new players for a period of 12 months". It was also recorded that the Committee briefly considered each point and the PFA observed that "there were still many problems with the new system".

17.3. No minutes were produced of any subsequent PFNCC meetings. Mr Bramhall considered that the PFNCC can reasonably have been expected to discuss such matters in subsequent meetings. In view of their overall remit, this is likely but there is no evidence on which I can reach specific conclusions.

17.4. Mr Craig did not attend the 2001 meetings but, when giving his evidence, he confirmed that the FA and the EFL had considered the principles of Article 17 when "designing" their regulatory regime. He maintained that this sufficed to "protect contractual stability" without superimposing, in terms, the principle in Article 17.

17.5. It is apparent from the 2001 minutes that the Committee did consider the *RSTP* at that stage and, more likely than not, they considered whether the FA Rules should be amended to reflect the same. On the balance of probability, they would have considered, in general terms, whether the existing regime adequately catered for the contractual rights of the players and their employers and concluded that it did so. It cannot be ruled out that the PFNCC were ultimately persuaded to propose minor amendments to the FA Rules. However, although the evidence on the point is obscure, it does not appear that they did do so.

17.6. On 1st July 2005, FIFA apparently introduced further amendments to the *RSTP*, particularly in relation to the requirements for incorporation of the mandatory articles. By letter dated 4th June 2007, the FA advised FIFA that it was thus in the process of preparing changes to comply with FIFA's requirements under the Regulations. This is at least consistent with the proposition that the PFNCC and the FA kept the *RSTP* continuously under review when considering what, if any,

amendments to make to the regulatory regime in England. Again, it is unclear precisely what changes were made to the FA Rules at that stage.

18. On behalf of the Defendant, I heard evidence from Messrs Frans De Weger and Roberto Branco Martins, Dutch attorneys at law, in relation to the background and operation of *Article 17*, including the steps taken in the Netherlands to implement FIFA statutes and regulations. They expressed the view that, since FA Rules A and E referred to the FIFA statutes and regulations, they had been implemented into the FA Rules. However, this is essentially a question of construction in accordance with the laws of England. Whilst, Messrs De Weger and Martins were able to provide me with an insight on the international experience which is, in principle, capable of being admitted as evidence of the surrounding circumstances, their evidence was of limited assistance only.

19. Since the FA Rules are binding as a contract, they are to be construed according to contractual principles. According to Lord Hoffman's classical formulation in *Investors Compensation Scheme Limited v West Bromwich Building Society [1998] 1 WLR 896* at *912*, this involves ascertaining the "…the meaning which the document would convey to a reasonable person having all the background knowledge which would reasonably have been available to the parties in the situation in which they were at the time of the contract…" Evidence of the surrounding circumstances is thus admissible but not direct evidence of intention such as what the parties said or did prior to the contract, *Chartbrook Limited v Persimmon Homes Limited [2009] 1 AC 1101.* In the present case, the parties were bound by the FA Rules when they acceded to them according to their present formulation subject to any variations from time to time. In that sense, the present case differs from the more common situation in which two parties enter into a negotiated agreement. No doubt, the FIFA regulations (including the *RSTP*) are admissible as part of the construction process, not least because they are expressly referred to in the FA Rules. However, a strong case could be made that the internal deliberations of the FA and the PFNC are not generally admissible as a guide to the interpretation of the FA Rules since they could not reasonably be taken to have formed part of the background knowledge of the parties. Conversely, evidence of the evolution of the FA Rules in response to changes in the *RSTP* is admissible. It is also conceivable that, if publically available, formal minutes

of the PFNCC meetings would be admissible to the extent they throw light on the surrounding circumstances. However, this is by no means self-evident.

20. In the present case, evidence has not been adduced in relation to the evolution of the FA Rules. The 2016 version does not contain provisions replicating the relevant FIFA Articles. However, it is expressly provided in *Article A.1* that the clubs and players "shall play and/or administer football in conformity with…the statutes and regulations of FIFA…".

    20.1. So far as necessary, this formula is apt to encompass the mandatory provisions in *Articles 2-8, 10, 11* and *18* of the *RSTP. Article 1.3(a)* of the *RSTP* provides, in terms, that such provisions are binding at national level and must be included without modification in the association's articles. It can readily be inferred that the FA Rules require clubs and footballers to recognise and adhere to these provisions.

    20.2. However, it is reasonably arguable that the formula did not operate to elevate to the status of a binding rule the so-called "principles" in *Articles 13-17*. These principles were merely matters which the FA or, on their behalf, the PFNCC were expected to take into consideration when deciding what provision to make in support of contractual stability. Had the FA intended to elevate them into rules with binding effect at national level, they could have been expected to do so expressly in clear and unambiguous terms.

21. Before the Arbitrator and, indeed, before me the Defendant relied on an arbitral award, dated 30th January 2008 of the Court of Arbitration for Sport ("the Panel"), *Cas 2007/A/1298-1300 Wigan Athletic FC v Heart of Midlothian.* This was an appeal from the FIFA Dispute Resolution Chamber arising from the termination of a footballer's contract of employment in an international arbitration involving the footballer himself and football clubs from the English Football Federation and the Scottish Football Association.

    21.1. At Paras 75-76, the Panel observed that the player's contract of employment required the player and the club to observe the rules, regulations and bye-laws of the Scottish Football Association, the Scottish Premier League and such other organisations as which they were a member. This included FIFA.

    21.2. The Panel found that the parties had "chosen the primary application of the FIFA regulations to the matters in dispute…" (Para 81) and that "the interpretation of

the FIFA regulations and the validity of the DRC decision under appeal must be determined in application of Swiss law" (Para 84).

21.3. At Para 88, they indicated that "…article 17(1) does not require that compensation be determined in application of a national law or that the rules on contractual damage contained in the law of the country concerned have any sort of priority over the other elements and criteria listed in article 17(1). It simply means that the decision-making body shall take into consideration the law of the country concerned while remaining free to determine what weight, if any, is to be given to the provisions thereof in light of the content of such law, the criteria for compensation laid down in article 17(1) itself and any other criteria deemed relevant in the circumstances of the case".

21.4. Whilst *Article 17.1* required compensation to be calculated with reference to the "law of the country concerned"-in this case, Scotland-they decided, in Para 126, that they had a discretion whether to apply the law of Scotland and ultimately decided not to do so.

21.5. They awarded compensation in a reduced amount with reference to the so-called residual value of the player's original contract with Hearts (Para 152) and concluded that the player's new club, Wigan FC, were jointly liable under Article 17.2 regardless of fault (Paras 158-162).

22. Whilst the decision provides an insight on the approach of the Panel, it does not provide me with significant assistance. Self-evidently, the present case is not an international arbitration and it does not raise material issues arising from the choice of law. Moreover, it involves the interpretation of a different set of Rules. In the present case, the Claimant and the Defendant are governed by the *Rules* of the *FA*. By virtue of *Rule A1(b)* of the *FA Rules*, they must thus comply with the regulations of FIFA but it is not conceded that this includes the discretionary obligations of the football associations.

23. For material purposes, the main issue before the arbitrator was essentially one of construction of *Rule A1* of the *FA Rules*, namely whether, at the time of the putative breach or indeed at any relevant time thereafter, *Article 17* of the *RSTP* was implicitly incorporated in the *FA Rules* so as to apply at national level and bind the parties. Without

wishing to pre-empt the issue, I am of the opinion it is reasonably arguable the answer was and is no.

(3) The Award

24. The Arbitrator concluded that the *FA Rules* had incorporated the *RSTP* in full, including *Article 17.*

    24.1. At Paragraph 10.25(iv) of his Award, he stated that "…in the absence of any qualifying provision in *Rule A* or *paragraph 1* of *FA Rule E*, it is difficult to see how one can read into the wording of either Rule the exclusion of all, or any, of the discretionary provisions of the *RSTP* under *Article 1.3(b),* which include *Article 17. Rules A* and *E* can therefore be reasonably read as incorporating both the mandatory and discretionary provisions of the RSTP into FA Rules".

    24.2. At Paragraph 10.26, he concluded that "there was no extraneous evidence to show that the FA has, or has not, made a conscious decision about which of the discretionary provisions of the RSTP to apply at national level. I am extremely doubtful that the FA has applied its mind to the specific conflict of English law and *lex sportiva* which arises in this case. Nevertheless, for the reasons set out above, the reasonable inference to draw from the wholesale incorporation of FIFA statutes into its Rules and regulations under Rule A is that the RSTP apply in full and without derogation. Paragraph 14 of Rule K, when read in the context of the FA's Rules as a whole, does not merit a narrow and overly literal interpretation so as to enable the English common law in *Jones Brothers* to defeat the football-specific solutions which the RSTP provides".

25. It is not open to the Claimant to appeal the Award on the grounds that it contains errors of law and it is generally inappropriate for a court to conduct a trial of the substantive issues to ascertain whether substantial injustice has been caused, *Vee Networks Limited v Econet Wireless International Limited [2004] EWHC 2909 (Colman J at Para 90).* However, it is reasonably arguable that the Arbitrator's conclusions on the *Article 17* issue are incorrect in law.

    25.1. *Rule A.1* required the Clubs to "play and administer football in *conformity*" with the statutes and regulations of *FIFA*. This was apt to encompass the provisions

in the *RSTP* which were intended to take effect as obligations binding on the Clubs, such as the mandatory provisions imposed by *Article 1.3(a).* However, it is difficult to see why it should require the Clubs to act on the hypothesis that the FA had chosen to "protect contractual stability" by incorporating each of the principles for consideration under Article 1.3(b). No doubt, the FA could have eliminated any doubt by inserting a proviso that Article 1.3 should not be construed so as to require the Clubs to act in accordance with the principles in Articles 13-17.

25.2. *Rule E.1* provided for the FA to act against clubs and players for "Misconduct", defined so as to encompass "a breach of…the statutes and regulations of FIFA". However, the relevant FIFA regulations in in *Articles 13-17* are no more than principles for consideration by the football associations; they are not formulated as free-standing rules binding, with immediate effect, on the clubs and players themselves.

25.3. Whilst it may be correct that no extraneous evidence was adduced before the Arbitrator to show that the FA made "a conscious decision" in relation to the application of the discretionary provisions of the RSTP, such evidence was not, in itself, separately admissible as a guide to the interpretation of the FA Rules. The reference to a "conflict of English law and *lex sportiva*" appears to have been founded on the differences between the requirements of the common law and the *RSTP* in relation to liability, causation and loss. Again, it seems to me that the issue of whether the FA "applied its mind" to this has no direct bearing on the material questions of construction. No doubt the Arbitrator was correct in concluding that *Rule K.14* did not, in itself, preclude him from giving effect to the obligations of the parties, under *Rule A.1(b)* of the *FA Rules*, to "play and administer football in conformity with…the statutes and regulations of FIFA". However, "wholesale incorporation" of the FIFA statutes and rules would, not in itself, have converted into absolute obligations the principles for consideration under *Article 1.3*.

(4) The Contentious Emails

26. The Contentious Emails were first brought to the attention of the parties by the FA's solicitors, Charles Russell Speechlys ("CRS"). By letter dated 6th October 2017, CRS advised their respective solicitors as follows.

"We are instructed by the Football Association ("the FA"). We write in relation to the High Court proceedings commenced by Fleetwood.

Our client has identified an email which, on 17 July 2017, was sent by Craig Moore to Paddy McCormack (Judicial Services Manager at The FA) and which appears to relate to the arbitration between Fylde and Fleetwood. Please find the exchange enclosed.

You will note that the issue raised by Mr Moore concerned whether The FA has adopted and incorporated into its Rules, the FIFA Regulations on the Status and Transfer of Players. The email did not refer to the arbitration to Fylde and Fleetwood. Mr McCormack responded on 21 July 2017, with Mr Moore sending a reply to Mr McCormack later that day".

27. The Contentious Emails, enclosed with CRS's letter, were exchanged between 17th and 21st July 2017, shortly before the Arbitrator made his Award. They commence with an email timed at 08:26 on 17 July from the Arbitrator to Mr McCormack in the following form.

"Dear Paddy,

I hope that you are well and enjoying some free time at the weekends now that you have finished your studies-until September!

Could I ask you to help me please? I am trying to ascertain whether The FA has adopted, and incorporated into its Rules, the FIFA Regulations on the Status and Transfer of Players. As you are no doubt aware, it is a key piece of FIFA's regulatory framework to maintain contractual stability. I am considering the RSTP generally, but Article 17 in particular which requires a player and his new club to pay compensation to the former club where the player has breached his contract 'without just cause'.

I cannot find any provision in The FA's Rules where FIFA's RSTP is expressly incorporated, or which resembles them. Section C deals in some detail with players' contracts, and registration requirements, but does not include anything that reflects Article 17. However, Rule A.1(b) of the FA's Rules requires all Clubs and Affiliated Associations to play and/or administer football in conformity with its Rules and also 'the statutes and regulations of FIFA which are in force from time to time'. In the absence of any conflicting provisions in the FA Rules, it is arguable that that provision incorporates FIFA statutes en masse. I have noted that the RSTP appear on The FA's website.

Is this something that you have ever had to consider in the context of a case? There are a number of CAS decisions involving international transfers. I have not been referred to any case under FA Rule E, or Rule K arbitration, where the application of FIFA's RSTP has been tested at international level between two clubs who are members of the same Association.

I would be grateful for your comments. I appreciate that you are always busy, although hopefully there is a lull before the storm at the moment.

Kind regards,

Craig".

28. The Arbitrator sent a further email to Mr McCormack on 20th July 2017. The email itself is not available but at least part of it was pasted to Mr McCormack's subsequent email. It is in the following form.

"I apologise for troubling you, but I was wondering whether you had heard anything from the person in the office who you spoke to.

As I was carrying out some research a couple of days ago, I looked at the Irish FA's website and saw that they have expressly incorporated FIFA's RSTP into their domestic Rules

via the Professional Game Player Regulations. You may or may or recall them! I have not been able to find equivalent in The FA's Rules, although Rules A, C and K all make reference to FIFA statutes (as if to suggest that they are adopted wholesale).

The first question that I have to resolve is whether the RSTP are incorporated into FA Rules. Subject to that, the second question is whether Article 17.2 of the RSTP, which imposes strict liability on a new club to pay compensation where a player terminates his contract with his former club without just cause, should 'trump' English law. Rule K provides that English law should apply to all substantive and procedural matters. It is something of a conundrum.

I do not expect an answer to either of these questions. I will have to resolve them myself. It is really some help with The FA's understanding of the position regarding the incorporation of FIFA's RSTP into FA Rules (and whether I am missing something), and whether Article 17 has ever been considered by a Regulatory Commission or a Rule K Tribunal.

Kind regards,

Craig"

29. It appears from this email that, by that stage, there had been additional communication between the Arbitrator and Mr McCormack in which the Arbitrator was advised of a conversation with a "person in the office". However, it is unclear what, if anything, was disclosed to the Arbitrator in relation to that conversation or, more generally, in the communication itself.

30. By an email timed at 14:34 on 21st July 2017, Mr McCormack responded to the Arbitrator without disclosing anything further "from the person in the office". His message was as follows.

"Good afternoon Craig,

I refer to your two recent emails in respect of the RSTP (original inquiry is at the first email of this thread and second email pasted below for ease).

Further to the aforementioned correspondence, my understanding is that pursuant to Art. 14.1(a) of the FIFA Statutes the Association is obliged to fully comply with the Statutes, regulations etc of FIFA bodies as a condition of membership of FIFA. You are correct that is what FA Rule a1(b) on page 89 covers All Clubs and Affiliated Association to also comply.

The Association does not usually get involved directly in disputes, such as training compensation and/or solidarity contribution. If such a case was before a FIFA Single Judge of the Players' Status Committee, the Association would be notified of such proceedings for information purposes only. However, this would always involve an international transfer.

With regards to disputes of two members of the same association, I've been informed that Danny Ings may have a domestic issue recently. FIFA would not have been involved for the reasoning below. In this millennium the only domestic case where FIFA have involved themselves was that of Marco Branco of Middlesbrough (link). Unfortunately, I haven't been able to obtain any such examples expressly involving 'without just cause' but am informed that's generally a FIFA term and would be considered simple breach of contract in this jurisdiction. A contract would then stipulate the usual remedies where disputes arise (PFCC below).

However, if such scenarios were to arise under this jurisdiction, and concerned professional clubs, it would involve the Association directly and would be a matter for the relevant leagues/clubs to deal with via the Professional Football Compensation Committee ("PFCC"). This is the agreed domestic dispute channel with regards to the collective bargaining

agreement, which underpins employment relationships. If my be helpful to note the following information in respect of this committee:

- Premier League Handbook 2016-17 (https://www.premierleague.com/publications)
  - Appendix 11 (commencing page 520). Regulations of the Professional Football Compensation Committee;
  - You'll note in the PL Handbook there is reference of RSTP and such related terms from it as solidarity payments, training compensation etc
- Professional Football Compensation Committee- https://thepfa.com/thepfa/committees
- EFL Regs:http://origin-www.football-league.co.uk/regulations/20130704/appendix-4 2293633 2128219

I've been informed Art. 17.2 of RSTP would only come into scope where involving an international transfer. Therefore, with domestic only disputes English law should supersede other regulation.

I'm not sure if any of the above is going to assist but hopefully it is of some use.

Kind regards,

Paddy"

31. By an email timed at 15:09 on 21st July 2019, the Arbitrator replied as follows.

"Good afternoon Paddy,

Thank you so much for all your trouble, that is very helpful. I had worked a route through to the conclusion that a Regulatory Commission would have power to consider a breach of a FIFA statute in disciplinary proceedings under FA Rule E and a Rule K arbitrator would have jurisdiction to consider the RSTP in a domestic dispute between two clubs wo are members of the same national association. That is what Article 1.2 and 1.3 of the RSTP envisage, provided that the member association has incorporated the Statute in full into its own rules and regulations (because of the application of Article 17 is discretionary at national level). Paragraph 1 of FA Rule A appears to incorporate all FIFA statutes into FA Rules on a wholesale basis, without qualification.

I will obviously have to reconsider all of that in the light of what you have told me.

Once again, thank you and have an enjoyable weekend.

Kind regards,

Craig."

(5) The Section 68(2)(a) challenge

32. The Claimant seeks to challenge the Award on the grounds that the Contentious Emails reveal failures, on the part of the Arbitrator, to comply with his duties under *Section 33(1)* of the *1996 Act* which amount to a "serious irregularity" within the meaning of *Section 68(2)*. By definition, an arbitrator's failure to comply with his general duties in *Section 33* is an "irregularity". However, it will only be regarded as a "serious irregularity" if it "has caused or will cause *substantial injustice* to the…" Claimant. There is thus a two-stage test.

33. I am satisfied that the Arbitrator failed to comply with his general duties under S*ection 33(1)* of the *1996 Act* and this amounts to an irregularity within the meaning of *Section 68(2)(a).*

34. By *Section 33(1),* duties were imposed on the Arbitrator to:

> "(a) act fairly and impartially as between the parties, giving each party a reasonable opportunity of putting his case and dealing with that of his opponent, and
> (b) adopt procedures suitable to the circumstances of the particular case, avoiding un-necessary delay to expense, so as to provide a fair means for the resolution of the matters falling to be determined."

35. "To comply with its duty under *Section 33(1)* of the *Arbitration Act 1996* to act fairly, the tribunal should give the parties an opportunity to deal with any issue that may be relied upon by it as the basis of its findings. The parties are entitled to assume that the tribunal will base its decision solely on the evidence and argument presented by them prior to the making of the award and if the tribunal are minded to decide the dispute on some other point, the tribunal must give notice of it to the parties to enable them to address the point" (See *Russell on Arbitration (24th edn*) *Para 5-049*, cited, from a previous edition, by the successful counsel before Colman J in *Pacol v Rossakhar [2000] 1 Lloyds Rep 109 at 114.)* This passage is consistent with a substantial body of authority, including *Fox v Wellfair Limited [1981] 2 Lloyds Rep 514* (arbitrator's "function is not to supply evidence for the defendants but to adjudicate upon the evidence given before him…At any rate he should not use his own knowledge to derogate from the evidence of the plaintiff's experts-without putting his own knowledge to them and giving them a chance of answering it and showing that his own view is wrong"), *Interbulk Limited v Aiden Shipping Co Ltd [1984] 2 Lloyds Rep 66 at 75* ("it is not fair to decide a case against a party on an issue which had never been raised in the case without drawing the point to his attention so that he may have an opportunity of dealing with it, either by calling further evidence or by addressing argument on the facts r the law to the tribunal"*)* and, more recently, *Brockton Capital LLP v Atlantic-Pacific Capital Inc [2014] EWHC 1459 (Para 30)* ("…the tribunal dealt with an issue of which Brockton had had no notice and no opportunity to address and, in so doing the tribunal in my judgment acted in breach of *s33(1)(a)").*

36. Contrary to these principles, by his emails dated 17th and 20th July 2017, the Arbitrator implicitly sought to ascertain whether the FA had done anything to incorporate the *RSTP*

without notifying the parties of his intention to do so. In response, he received Mr McCormack's email dated 21st July 2017 in which he was advised about a number of matters but not specifically whether the FA had done anything to incorporate the *RSTP*. Mr McCormack advised the Arbitrator that he had been informed Article 17.2 of the "*RSTP* would only come into scope where involving an international transfer". It also appears that there was at least one additional occasion when Mr McCormack or someone associated with him advised the Arbitrator about a conversation with a "person in the office". However, there was no other evidence before me about this aspect of the case.

37. It also appears that the Arbitrator carried out some extrinsic research himself, which included viewing the Irish FA's website.

38. The Arbitrator has not filed evidence. Although he was initially served with the originating process in these proceedings, he has not been served with a copy of the Claim Form, as amended.

39. In my judgment, by making the relevant inquiries and eliciting information without at least sharing the information with the parties and giving them an opportunity to make representations, the Arbitrator committed a breach of his duties under *Section 33* of the *1996 Act*. This amounts to an irregularity or irregularities within the meaning of *Section 68(2).*

40. The more difficult question is whether the irregularity is causative of "substantial injustice". In *Alfred Uwe Maass v Musion Events Limited [2015] EWHC 1346*, Andrew Smith J concluded, at Paragraph 40, that the test is accurately set out in the following passage from *Merkin, Arbitration Law* at *Para 20.8.*

> "The burden is squarely on the applicant, who invokes the exceptional remedy under section 68, to secure (if he can) findings of fact which establish the pre-condition of substantial injustice". If the result would most likely have been the same despite the irregularity there is no basis for overturning an award. However, in determining whether there has been substantial injustice, the court is not required to attempt to determine for itself exactly what result the arbitrator would have come to but for the alleged irregularity, as this process would in effect amount to a rehearing of the arbitration. Instead, if the court is satisfied that [had] the applicant…not been deprived of his opportunity to present his case properly, …he would have acted in the same way with or without the alleged irregularity, then the award will be upheld. By contrast, if it is realistically possible that the arbitrator could have reached the opposite conclusion had he acted properly in that the argument was better than hopeless, there is potentially substantial injustice. The accepted test now seems to be that there is substantial injustice if it can be shown that the irregularity in the procedure caused the

arbitrators to reach a conclusion which, but for the irregularity, they might not have reached, as long as the alternative was reasonably arguable".

41. In the present case, the Arbitrator ought to have copied the parties into his inquiries and provided them with a copy of Mr McCormack's email dated 21st July 2017 and a note of the additional communication in which the Arbitrator was advised of a conversation with a person in the office. He ought also to have given them the opportunity to provide their own observations in relation to his inquiries and the response he received. Had he done so, I am satisfied that both parties would have sought to make representations. It seems to me likely that the Claimant would have made representations in response to the proposition, in the Arbitrator's own email dated 17th July 2017 that "in the absence of any conflicting provisions in the FA Rules, it is arguable that that provision incorporates FIFA statutes en masse". There is also every chance that the Claimant would also have sought to obtain and provide the Arbitrator with further information in response to the Arbitrator's inquiry about the action taken by the FA to adopt or incorporate the RSTP into its own rules, as indeed, it subsequently chose to do in support of its case before me. Had it done so, it is realistically possible that information could have been adduced to persuade the Arbitrator that, contrary to the conclusions implicit in the Arbitrator's Award, the FA had considered whether to incorporate Article 17 of the RSTP and decided not to do so. Moreover, had they persuaded the Arbitrator that this was the case, it appears, from the tenor of his inquiries, there is a real prospect that the Arbitrator would ultimately have concluded that *Article 17* was not applicable. Had the Arbitrator reached such a conclusion and decided that Article 17 was not applicable, it is reasonably arguable that this conclusion would have been correct in law (see Paragraph 25 above).

42. On this specific basis, the Claimant succeeds in its claim under *Section 68(2)(a)* of the *1996 Act.*

(6) *The Section 67 and 68(2)(b) challenges*

43. Having succeeded in its amended claim under *Section 68(2)(a)* of the *1996 Act*, it is un-necessary for the Claimant to establish its alternative claims under *Section 67* and *68(2)(b)*. However, in my judgment, the alternative claims were misconceived from the outset.

44. *Section 67* applies where the arbitral tribunal lacked substantive jurisdiction to make its award. *Section 68(2)(b)* applies where the arbitral tribunal has exceeded its powers, for example where it makes directions that are beyond the scope of the arbitration agreement, *Lesotho Highlands Development Authority v Impregilo SpA [2005] UKHL 310 at 319 (Para 29).*

45. The alternative claims are not founded on lack of jurisdiction or excess of powers. Several such claims are based on allegations that the Arbitrator made errors of law in reaching his conclusions which do not go to his jurisdiction, for example deciding that *Article 17* had been incorporated into the *FA Rules,* failing properly to take account of the Player's non-registration or making an Award against the Claimant without establishing the liability of the Player. One claim was based on the proposition that *Rule K14* did not permit the Arbitrator to apply *Article 17* since it required the Arbitrator, in terms, to apply English law. However, the Award was based on the proposition that the *FA Rules* required the Claimant to comply with *Article 17* as a matter of English law. In any event, the Claimant lost the right to challenge the Award on these grounds by failing forthwith to advance a jurisdictional challenge or otherwise object in accordance with the requirements of *Section 73* of the *Arbitration Act 1996*.

(7) Relief

46. *Section 68(3)* confers powers on the Court to remit, set aside or declare the Award to be of no effect.

47. In my judgment, the Award should be *remitted* to the Arbitrator for him to reconsider whether *Article 17* applies and thus whether the Claimant's claim under *Article 17* succeeds. I have reached this conclusion for several reasons.

    47.1. Firstly, *Section 68(3)* expressly provides that the Court must not set aside or declare the Award to be invalid unless satisfied that it would be inappropriate to remit to the Arbitrator for reconsideration. This is consistent with the principle that the courts should generally do the minimum to interfere in the arbitral process. I must thus remit the Award unless there is convincing reason for me to reach a contrary conclusion. I have not been furnished with any such reason here.

47.2. Secondly, the material irregularity in the present case relates to a discrete aspect of the Claim. It is possible to remit the *Article 17* issue for further consideration without re-opening the rest of his conclusions. Most of the factual evidence in the arbitration was apparently directed to the Defendant's claim for damages in accordance with common law principles. If the claim is remitted on the narrow *Article 17* issue only, significant additional expense will be spared.

47.3. Thirdly, the material irregularity in the present case is itself within a narrow compass. It relates to the Arbitrator's inquiries in the Contentious Emails and the replies to such inquiries. No doubt, the mischief can be met through tailored directions providing for the parties to make representations about the Contentious Emails and to adduce such further evidence as might be considered necessary. As part of this process, the Arbitrator can be asked to confirm the contents of the communication in relation to the unidentified person "in the office" to whom Mr McCormack spoke prior to the Arbitrator's email dated 20th July 2017 so that the parties can make their own observations about it.

47.4. Fourthly, in the present case there is no suggestion of bias, whether actual or apparent, on the part of the Arbitrator nor is there any good reason to challenge his professionalism. The Contentious Emails were driven by his anxiety to achieve the correct outcome, as he perceived it. With the exception of one communication relating to the unidentified person "in the office", the information that was made available to him has been disclosed. There is no reason to believe that, in the event the Award is remitted to him, this will compromise his future conduct of the reference.

48. I will hear further submissions in relation to the terms on which the Award is to be remitted and on the issue of costs.