Challenging an SGB's right to hear a dispute on grounds of impartiality: the case of *Smith & McDonnell*

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The grounds on which the decisions of sports governing bodies may be challenged in the Courts in England and Wales is often the subject of comment and discussion.

It is now widely accepted that the Court will exercise its supervisory jurisdiction in appropriate cases; the key word is here is 'supervisory', in the sense that the stated function is not to take the primary decision, but to ensure that the primary decision-maker has operated within lawful limits (Richards J in *Bradley v The Jockey Club*[1]). Those limits are breached if the governing body has acted outside its powers (ultra vires), acted contrary to the tenets of natural justice, or has acted unreasonably, meaning in an irrational, perverse, arbitrary or capricious manner.

But can a governing body be prevented from hearing a dispute at the outset? In the context of the recent boxing case *Paul Smith & Jamie McDonnell v British Boxing Board of Control Ltd, Frank Warren & Dennis Hobson* (*Smith & McDonnell*),[2] the author examines this question in the context of a governing body that allegedly lacks impartiality under section 24 Arbitration Act 1996.[3]

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[1] Bradley v The Jockey Club [2004] EWHC 2164 (QB), 1 October 2004, last viewed on 21 May 2015, http://www.bailii.org/ew/cases/EWHC/QB/2004/2164.html

[2] *(1) Paul Smith (2) Jamie McDonnell v (1) British Boxing Board of Control Ltd (2) Frank Warren (3) Dennis Hobson (2015) QBD (Liverpool) 13/04/2015, avalible on Lawtel* https://www.lawtel.com/UK/FullText/AC0146050QBD(Liverpool).pdfhttps://www.lawtel.com/UK/FullText/AC0146050QBD(Liverpool).pdf (Note: the author acted as Counsel for Frank Warren)

[3] Arbitration Act 1996 c. 23, 17 June 1996, last viewed on 21 May 2015, http://www.legislation.gov.uk/ukpga/1996/23/contents

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The nature of arbitration clauses

Many sports incorporate into their rules, binding on all participants, provisions for referring any dispute to an arbitration conducted under the governing body's authority. The jurisdiction of the Courts cannot be entirely ousted but it can be substantially curtailed by a binding agreement to arbitrate (provided the process and tribunal is indeed arbitral in nature, as discussed further below). A party attempting to bypass a binding agreement to arbitrate will likely find its application to the Court stayed under section 9 of the Arbitration Act 1996.

The test for whether a sports dispute resolution procedure amounts to an arbitration provision that is binding on the parties was analysed by Thomas J in the motor-racing case *Walkinshaw v Diniz*.[4] One of the main questions is whether the procedural agreement to refer the dispute to the arbitral tribunal is intended to be enforceable in law. This will often depend on the specific language used in the clause.

For example, under the Football Association's Rule K procedure the language is clearly mandatory: "*any dispute or difference…shall be referred to and finally resolved by arbitration under these Rules*".[5] Compare that with the more permissive language of the standard form player/club contract in rugby league:

> *You and the Club agree that, whilst the jurisdiction of the Courts and Tribunals are not excluded, all matters of dispute relating to the rights and obligations of the parties under this Agreement or the Regulations, including termination of this Agreement (including any termination or purported termination pursuant to Clause 23) and any compensation payable in respect of termination or breach, should ordinarily be submitted in the first instance to the League*.

If there is a binding agreement to arbitrate then it is very difficult for a participant to avoid the effect of the arbitration clause. This was demonstrated by the failure of the football agent, Paul Stretford (*Stretford v The Football Association*[6]*) to* successfully argue that he had not agreed to the arbitration clause or, if he had, to enforce it would be a breach of Article 6 Convention rights.[7]

Some recent High Court litigation has, however, provided the opportunity to consider the grounds on which the arbitral panel of the governing body may be prevented from making a decision at all.

Section 24, Impartiality & *Smith & McDonnell*

The provisions of the Arbitration Act 1996 supervise any arbitral process stipulated under an arbitration clause (not just in sport). Section 1 makes clear that the parties have autonomy to agree almost everything about the arbitration – the way the panel is composed and chosen; the powers it will have in substance and procedurally.

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[4] *Walkinshaw v Diniz [2000] 2 All ER 237*
[5] 'Rules of the Association 2014-2015', The FA, 21 May 2014, last viewed on 21 May 2015, http://www.thefa.com/football-rules-governance/more/rules-of-the-association , p. 127
[6] *Stretford v The Football Association* [2007]EWCACiv238
[7] 'European Convention on Human Rights', Council of Europe, 3 May 2002, last viewed on 21 May 2015, http://www.echr.coe.int/Documents/Convention_ENG.pdf pg 9

Supervision resides in the Court's power under section 24,[8] which states:

> ***24 Power of court to remove arbitrator***
>
> *(1) A party to arbitral proceedings may (upon notice to the other parties, to the arbitrator concerned and to any other arbitrator) apply to the court to remove an arbitrator on any of the following grounds—*
>
> *(a) that circumstances exist that give rise to justifiable doubts as to his impartiality;*
>
> *(b) that he does not possess the qualifications required by the arbitration agreement;*
>
> *(c) that he is physically or mentally incapable of conducting the proceedings or there are justifiable doubts as to his capacity to do so;*
>
> *(d) that he has refused or failed—*
>
> *(i) properly to conduct the proceedings, or*
>
> *(ii) to use all reasonable despatch in conducting the proceedings or making an award,*
>
> *and that substantial injustice has been or will be caused to the applicant.*
>
> *…….*

The author is not aware of a recorded instance of an application being made under section 24 in a sporting context; that is until the case of *Smith & McDonnell*.

Facts

Paul Smith and Jamie McDonnell had terminated their management agreements early, alleging repudiatory breach by their respective managers Frank Warren and Dennis Hobson.

The managers contended that the allegations of breach were a cover for the boxers' decisions to join a new management/promotional team and thus commenced formal Complaints under the rules of the British Boxing Board of Control.

The boxers wished to prevent the Board from determining the Complaints, alleging in their challenge to the High Court with reference to section 24 that:

(1) *The Board would be required to adjudicate upon the enforceability of some of its own rules and as it would have an interest in the outcome of that adjudication was biased.*

[8] Ibid at 3, see Section 24, http://www.legislation.gov.uk/ukpga/1996/23/section/24

(2) *The standard manager's agreement "presents the opportunity for oppressive and restrictive action by the manager".*

(3) *The Board had, since his dispute with Mr Warren arose, acted towards Mr Smith in a manner which gives rise to concerns as to impartiality:*

(a) Requiring him to take a fight it knew he did not want

(b) Threatening action in relation to non-vacation of the British title

(4) *And in relation to Mr McDonnell, stripping him of a title for failing to confirm a fight it knew he did not want to take.*

(5) *And in both cases requiring the boxers to pay proportions of any purse to the Board as a precondition to allowing a bout to take place.*

Decision

The Court found against the boxers, for the reason that before making the challenge both boxers had participated in the arbitration: Mr McDonnell had sought an extension of time to comply with a direction issued by the Board dealing with witness statements and had engaged with the disclosure exercise and filed a witness statement and Mr Smith had also engaged on disclosure. Both had therefore 'participated' and so their challenge was barred by Section 73, which states:[9]

> ***73 Loss of right to object***
>
> *(1) If a party to arbitral proceedings takes part, or continues to take part, in the proceedings without making, either forthwith or within such time as is allowed by the arbitration agreement or the tribunal or by any provision of this Part, any objection—*
>
> *(a) that the tribunal lacks substantive jurisdiction,*
>
> *(b) that the proceedings have been improperly conducted,*
>
> *(c) that there has been a failure to comply with the arbitration agreement or with any provision of this Part, or*
>
> *(d) that there has been any other irregularity affecting the tribunal or the proceedings,*
>
> *he may not raise that objection later, before the tribunal or the court, unless he shows that, at the time he took part or continued to take part in the proceedings, he did not know and could not with reasonable diligence have discovered the grounds for the objection*.

[9] Ibid at 3, Section 73, http://www.legislation.gov.uk/ukpga/1996/23/section/73

Section 73 therefore acts as a strict procedural fetter on applicants wising to make such a challenge. 'Forthwith' means as soon as reasonably possible.

Comment on the test for impartiality

Notwithstanding the procedural bar on the application, the Court was not in any event persuaded that there were justifiable doubts about the Board's impartiality. The Court held that there is a difference between conduct simply regarded by one party as unfair and conduct which actually gives the appearance of impartiality.

The impartiality/bias test itself does not set the bar especially high. The common law test is that articulated by Lord Hope of Craighead in *Porter v Magill*[10], namely whether "the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."

In *Locobail (UK) Ltd v Bayfield Properties Ltd ,*[11] the Court of Appeal held that the common law test for apparent bias is reflected in section 24 (set out above). In *Sierra Fishing Co v Farran*[12], Popplewell J gave guidance on whether that test, and the section 24 test overall, was met in the operation of the red, orange and green list promulgated by the International Bar Association in its 'Guidelines on Conflicts of Interest in International Arbitration' (IBA Guidelines).[13] The circumstances listed there will be a relevant potential cross-check in any similar challenge.

There will be future cases where robust arguments could be made: for example that a proposed arbitrator (or a close family member) has an economic interest in the outcome, a significant personal interest in one of the parties, his/her firm derives significant income from one of the parties etc. These matters would form the basis of a viable section 24 challenge.

There is however (as the Court found) a further problem standing in the way of a successful section 24 challenge in sport. In boxing, as in other sports, independent and often eminent lawyers are brought in to hear appeals. The Board has a standing panel of appeal stewards. What falls to be assessed is the procedural fairness as a whole, not simply one stage of it.

In most cases therefore a successful challenge would require the integrity and impartiality of the persons conducting the appeal also to be in doubt. This was lacking altogether in Smith and McDonnell's claim. In other cases, it would be relevant to consider whether the appeal is a de novo hearing or a review and the possible irremediability of the bias claimed.

One matter left unresolved by the Judgment in this case is what happens if the section 24 challenge is successful i.e. who replaces the arbitrators? Direct recourse to the courts may then be possible instead, although this was not the subject of any argument in this case. One other possibility may be a request for Sport Resolutions or a similar organisation to accept an ad hoc referral. That would require the consent of both parties at that stage.

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[10] *Porter v Magill [2002] AC 357* at paragraph [103]
[11] *Locobail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451, 17 November 2000, last viewed on 21 May 2015, http://www.bailii.org/ew/cases/EWCA/Civ/1999/3004.html*
[12] *Sierra Fishing Company & Ors v Farran & Ors* [2015] EWHC 140 (Comm), 30 January 2015, last viewed on 21 May 2015, http://www.bailii.org/ew/cases/EWHC/Comm/2015/140.html
[13] 'IBA Guidelines on Conflicts of Interest in International Arbitration', IBA, 23 October 2014, last viewed on 21 May 2015, http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx

Lessons

The following lessons can be taken away from this case:

- Any participant contemplating a similar challenge under Section must expect a robust defence from the governing body (which will incur all parties in significant costs). Success for a claimant would throw the governing body procedures into disarray.
- Clearly, however, the Arbitration Act 96 does provide that arbitrators in sport *may* be removed if the court is satisfied that substantial injustice would be caused. The test for apparent bias is not unfavourable, and the IBA Guidelines will often be of assistance in finding other grounds.
- Nevertheless there will usually be practical difficulties in alleging that the *entire* arbitration process is tainted in that way because appeals are often conducted by independent lawyers. If the appeal panel cannot be challenged on the same or similar grounds then it is open to the Court to find that the appeal would remedy the injustice said to arise in relation to the first instance arbitration hearing.
- More importantly, claimants will find that the drawbridge comes up very quickly. Any participation in the process without taking the point 'forthwith' i.e. as soon as reasonably possible will operate as a complete procedural shut-out.

Comparisons to Pechstein

Some readers may already appreciate that the broad thrust of the attack by the Claimants in this case has echoes of the complaints in the now famous *Pechstein* litigation.

The circumstances of that case and potential ramifications have been analysed in other articles here and here.[14] It is beyond the scope of this article to revisit that again in any detailed way. Moreover, section 24, which was the only jurisdiction in issue in the instant case, is (a) self-contained and (b) fairly narrow, as discussed above. Nevertheless, Claudia Pechstein's measure of success in her travails to date does, it is considered, lead to some crossover.

The local court in Munich ruled that the arbitration clause in her licence with the national and international federations was void because it had been forced upon her. The Higher Regional Court in Munich disagreed, concluding that there was nothing unlawful per se about sports federations requiring competitors to sign up to an arbitration clause. It went on to say, however, that, in effect, CAS is institutionally biased in favour of sports federations owing to the particular way that it is constituted (and therefore its award amounted to an abuse of a dominant position). As per Christian Keidel's article:

[14] Christian Keidel, "A guide to the Higher Regional Court's decision in the Pechstein case", LawInSport.com, 29 January 2015, last viewed 29 July 2015, http://www.lawinsport.com/articles/item/a-guide-to-the-higher-regional-court-s-decision-in-the-pechstein-case?highlight=WyJwZWNoc3RlaW4iLCJwZWNoc3RlaW4ncyJd ; and, Adam Smith, 'The Pechstein Judgment: CAS's reaction and potential ramifications', LawInSport.com, 29 January 2015, last viewed 29 July 2015, http://www.lawinsport.com/articles/item/the-pechstein-judgment-cas-s-reaction-potential-ramifications?highlight=WyJwZWNoc3RlaW4iLCJwZWNoc3RlaW4ncyJd

> "However, importantly, the Court found that, under the current CAS structure, [*requiring athletes to sign an arbitration clause*] would qualify as an abuse of the federations' dominant position because the composition of the "*ICAS*" (the *International Council of Arbitration for Sport*, which administers the CAS and the list of arbitrators), with a majority of it representatives constituted of members of sports federations, fundamentally challenges the neutrality of the CAS itself."[15]

This author agrees that the concept of 'take it or leave it' arbitration clauses (i.e. you have to sign up to it in order to compete) has plainly not been struck down. Furthermore, the observation from Sir Anthony Clarke MR in the case of *Stretford v The Football Association* will, it is considered, always prove hard to dislodge in England and Wales,

> "*…An arbitration clause has become standard in the rules of sporting organisations like the FA. The rules regulate the relationship between the parties, which is a private law relationship governed by contract… Clauses like r K [of the FA Rules] have to be agreed to by anyone, like Mr Stretford, who wishes to have a players' licence, but it does not follow that the arbitration agreement contained in them was required by law or compulsory. To strike down clauses of this kind because they were incompatible with art 6 [ECHR] on that basis would have a far-reaching and, in our opinion, undesirable effect on the use of arbitration in the context of sport generally.*"[16]

It is suggested therefore that the real point of crossover is this: *Pechstein* sharpens the section 24 tool. It is a case that will always lurk in the background of any similar challenge to that made in Smith & McDonnell. In our jurisdiction, we can expect that any future section 24 application in a sporting context would put the constitution and appointments process of the governing body's arbitral panels under very close scrutiny. Legitimate concerns about objectivity and impartiality were fashioned from relatively little material in *Pechstein*. Any governing body here that proves unable in the future to show balance and neutrality in how it convenes its arbitral panels generally and certainly for any particular case is genuinely exposed by a *Pechstein*-influenced section 24 challenge. Could it have helped the Claimants in this case? Quite possibly. It probably came too late. They had already set their stall out.

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[15] Ibid at 14
[16] Paul Stretford v The Football Association Ltd & Another, [2007] EWCA Civ 238