Neutral Citation Number: [2017] EWHC 2146 (Ch)

Case No: C31MA092

IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION
MANCHESTER DISTRICT REGISTRY

Civil Justice Centre
1 Bridge street West
Manchester M60 9DJ

Date: 04/09/2017

Before:

HIS HONOUR JUDGE PELLING QC
SITTING AS A JUDGE OF THE HIGH COURT

- -

Between:

WILFRIED GUEMIAND BONY	**Claimant and Respondent**
- and -	
(1) GILBERT FRANCIS KACOU **(2) GILBERT FRANCIS KACOU PROMOTION S.A.R.L** **(3) DALIBOR LACINA** **(4) INTERNATIONAL FOOTBALL MARKETING & MANAGEMENT S.R.O** **(5) SWANSEA CITY ASSOCIATION FOOTBALL CLUB LIMITED**	**Appellants and Defendants**

- -
- -

Mr Paul Chaisty QC (instructed by **Squire Patton Boggs LLP**) for the **Appellants**
Mr David Casement QC and Ms Kelly Pennifer (instructed by **JMW Solicitors LLP**) for the **Respondents**

Hearing dates: 24 July 2017

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

.....

HIS HONOUR JUDGE PELLING QC SITTING AS A JUDGE OF THE HIGH COURT

HH Judge Pelling QC:

Introduction

1. This is an appeal by the first to fourth defendants ("the defendants") from an Order of District Judge Obodai made on 19 July 2017 by which she dismissed an application by the defendants for orders sought pursuant to CPR Part 11 and r.62.8 and s.9 of the Arbitration Act 1996 staying these proceedings on the basis that the disputes the subject of these proceedings should be determined by arbitration under Section K, Paragraph 1 of the Rules of the Football Association Limited ("Rule K Arbitration", "FA Rules" and " FA" respectively). The application before the District Judge was put on a rather wider basis than I have so far described - see the summary at paragraph 11 of the District Judge's judgment - but it is only her refusal to stay these proceedings pending a reference of the dispute to a Rule K Arbitration that is challenged in this appeal.

Background Facts

2. The claimant is a professional footballer, and a national of the Republic of the Cote d'Ivoire ("RCI"), who has been resident in the UK since 9 July 2013, when he transferred from a Dutch Football Club to the fifth defendant ("Swansea"). On 14 January 2015, he was transferred by Swansea to Manchester City Football Club ("City") and is currently registered with Stoke City Football Club ("Stoke") on loan from City. He is and was from the date he was transferred to Swansea registered as a player with the FA and a "*Player"* as defined by the FA Rules. Swansea, City and Stoke are each a "*Club"* as defined by the FA Rules.

3. The first and third defendants are the claimant's former agents. The first defendant is an RCI national. He is registered as a football agent by the RCI Football Association but he is not (and never has been) registered with the FA. He is and was at all times material to these proceedings an "*Unauthorised Agent*" as defined by the FA Rules. I explain why this is so in more detail later in this judgment. The second defendant is a corporate vehicle incorporated in accordance with the laws of the RCI controlled by the first defendant. It is not and never has been an "*Authorised Agent"*.

4. The third defendant is a Czech national. He is registered as a FIFA agent and was registered as an overseas agent with the FA between September 2009 and no later than 1 April 2015 and was for that reason an "*Authorised Agent*" as defined by the FA Rules down to that date. The fourth defendant is a corporate vehicle incorporated in accordance with the laws of the Czech Republic controlled by the third defendant. It is not and never has been an "*Authorised Agent"*.

5. Although the legal basis of the claims made in these proceedings are put in a number of different ways, the factual allegation is that while ostensibly acting on behalf of the claimant in negotiations concerning his contract of employment with Swansea, the first to fourth defendants received secret commissions totalling in excess of £8m from the fifth defendant under four written agreements between various combinations of the first to fourth defendants and the fifth defendant made between July 2013 and February 2015. There is a free-standing allegation of fraudulent or negligent misrepresentation made against the first defendant by which it is alleged that the

claimant was induced to enter into an Image Rights Agreement with the second defendant.

6. The circumstances in which the claimant came to discover what is alleged is set out in paragraph 52 of the Particulars of Claim. This information does not appear to be in dispute at any rate for the purposes of the present appeal. It suggests that the claimant did not know of what is now alleged until sometime between 20 March and 20 April 2016. The fraudulent misrepresentation claim could not have arisen earlier than February 2016, because it was only in that month that the representations were made which it is alleged induced the claimant to enter into the Image Rights agreement. No claims relating to the subject matter of these proceedings were made prior to the period referred to in paragraph 52 of the Particulars of Claim. In these circumstances, it is difficult to see how a difference or dispute could be said to have existed between the parties prior to March 2016 at the earliest.

7. There were various express agreements between the claimant and the first and third defendants that governed their relationship. There were no agreements (or indeed, any relationship of any sort) between the claimant and either the second or fourth defendants.

8. The relationship between the claimant and first defendant was governed between 1 December 2012 and 30 November 2014 by a written agreement referred to in the evidence and submissions in these proceedings as the "*4th Kacou Agency Agreement*". The only point relevant for present purposes is that it did not contain an arbitration clause. After 30 November 2014, the first defendant continued to act as the claimant's agent with the knowledge and consent of the claimant. There was no written agreement entered into.

9. The contracts between the claimant and the third defendant material to the relationship between the claimant and Swansea were oral other than an agreement in writing known in these proceedings as the Lacina 2013 Agreement, which was in force between 9 February 2013 and 8 February 2015 and contained an express dispute resolution provision to the following effect:

> "… The settlement of disputes between the Player's Agent and the Client, club or another player's agent of whom all are registered with the same national association (national disputes) is the responsibility of the respective national association. As regards FACR, the respective arbitration committee will be in charge.
>
> "… Any other complaint which is not subject to the preceding Paragraph hereof shall have to be transferred to the FIFA Players' Status Committee."

I return to this provision in more detail below.

Issues Before and Submissions made to the District Judge

Defendant's Written Submissions to the District Judge

10. The submission made on behalf of the defendants to the District Judge by leading counsel then instructed (not Mr Chaisty QC, who appears before me on behalf of the defendants and appellants) at paragraph 5 of his skeleton submissions was that:

> "… there must … be a binding arbitration agreement between the parties under Rule K … arising from (a) the claimant's status as a "Player"; (b) the Defendants' status as "Agents" or (in later versions of the Rules) "Intermediaries" or their acting as such; and (c) the status of both Swansea …and …City as "Clubs".

Having developed his submission that each of the claimant, defendant, Swansea and City fell within the detailed definitions set out in the FA Rules of Player, Agent and Club respectively, counsel then submitted to the District Judge that professional football is a highly regulated sport, that the Federation Internationale de Football Associations ("FIFA") requires all disputes between "*... members of the football family ...*" to be resolved through arbitration and that Section K of the FA Rules reflected that requirement by being drafted in the broadest terms before submitting that the proceedings commenced by the claimant were misconceived on that account, that the court could not escape that conclusion and in consequence these proceedings should be stayed. There was no express mention within the defendants' skeleton of anything concerning incorporation by implication of the FA Rules or at any rate Section K of the FA Rules into any of the contracts between the claimant and any of the defendants.

Claimant's Written Submissions to the District Judge

11. Mr Casement's submission to the District Judge as set out in his skeleton argument at paragraph 7.4 onwards was that there were no grounds on which any of the claims could be stayed to arbitration because there was no arbitration agreement as between the claimant and defendants.

Oral Submissions to the District Judge

12. Mr Casement submits and it does not appear to be in dispute that at the hearing before the District Judge, leading counsel then instructed on behalf of the defendants advanced his application concerning a stay to enable the dispute to be referred to arbitration by reference to the arguments set out in the skeleton summarised above. In answer, Mr Casement submitted orally to the District Judge that however wide the terms of Rule K were, it had to be incorporated into a legally binding contract between the parties for there to be an arbitration agreement within the meaning of the Arbitration Act 1996 ("AA96"). In reply, counsel then instructed on behalf of the defendants referred to an authority he did not produce which he referred to as the "*Stretford case"* (as to which see further below) as providing support for his case

based on status and referred back to the submissions made earlier concerning the status of the claimant as a Player and the third defendant as an Authorised Agent.

The District Judge's Judgment

13. At paragraph 15 of her judgment, the District Judge concluded that "... *as a matter of basic law of contract, there has to be incorporation within the contract of any arbitration agreements ...*". She referred to AA96, s.5 and directed herself that the effect of this provision was that "... *there has to be an agreement in writing and incorporated into that agreement an arbitration agreement*". The District Judge then held at paragraph 18 that:

> "The submission made by … [counsel then appearing for the defendants] … which was … that anyone involved in the sport must take on these Rules … cannot … be right. … it would mean that anyone who is involved in the sport of football or anything to do with football (provided they are Participates as defined in the Rules) would be bound irrespective of whether there was a written provision in the agreement to that effect. Mr Casement QC gave the example of two football players involved with each other in a road traffic accident and one of them wanting to make a claim for personal injury as a result of that accident against the other – a dispute between the parties. On [counsel then appearing for the defendants]' analysis, they would have to submit to arbitration under Rule K."

At paragraph 19 of her judgment the District Judge added that:

> "Where there is a term it is essential that it is included. The court rejects the argument that all one has to do as a [P]articipant is to read Rule K and then as a [P]articipant he/she is somehow bound by it without it being included in a contract. As Mr Casement QC submitted, unless it is included it is worth absolutely nothing. The court agrees with him and disagrees therefore with [counsel then appearing for the defendants] who submitted that just by taking part in the game of football one is bound by the provisions of Rule K, subject to whether they are participants as defined in the Rules."

Where the Judge refers to a "*term*", she is clearly referring to an arbitration clause and her reference to "*included*" is equally clearly to incorporation.

14. The District Judge then turned to the facts of this case.

15. In respect of the first defendant she held that:

> "There are no arbitration clauses incorporated into any of the agreements between the claimant and the first defendant. It follows therefore, that the first defendant did not and could not in his witness statement suggest that any of the allegations made against him be referred to arbitration pursuant to Rule K

> … no matter how wide the terms of Rule K are they must be incorporated into an agreement to be binding."

16. In respect of the third defendant, she concluded that for most of the time the relationship between the claimant and the third defendant was governed by an oral agreement between them. She accepted there was a written agreement that governed their relationship that was in force between 9 February 2013 to 8 February 2015 (the Lacina 2013 Agreement) that was subject to a dispute resolution provision in the following terms:

> "1. The Contracting Parties undertake that all disputes arising here from shall be settled by agreement. Unless a dispute is to be settled by agreement any Contractual Party is entitled to refer to decision-making bodies stipulated in Paragraphs 2 and 3 of this Article hereof.
>
> 2. The settlement of disputes between the Player's Agent and the Client, club or another player's agent of whom all are registered with the same national association (national disputes) is the responsibility of the respective national association. As regards FACR, the respective arbitration committee will be in charge.
>
> 3. Any other complaint which is not subject to the preceding Paragraph hereof shall have to be transferred to the FIFA Players' Status Committee."

The Judge concluded that this clause was of no assistance because

> "... insofar as it relates to arbitration, refers to the parties being registered with the same national association; at the relevant time the Claimant was registered only with the English Football Association and the third Defendant was not. The reference to FACR is a reference to the Football Association of the Czech Republic."

Mr. Casement's submission to the District Judge had been that the clause was of no effect because at the time the current dispute arose – March 2016 – the claimant was registered with the FA but the third defendant was not. Thus, the reference to "*relevant time*" in the District Judge's judgment must be to the time when the dispute arose. In my judgment, the District Judge was right to accept that submission – the clause applied to the settlement of disputes and thus can apply only at the point at which a dispute has arisen, and the clause is cast in the present tense so that the registration issue is concerned with registration at the date when the relevant dispute arose. There has been no appeal from this finding – see the Grounds of Appeal *passim*. It is common ground that clause 3 of the Lacina 2013 Agreement is of no assistance because in fact the committee referred to does not have competence to resolve disputes between players and agents. There is no evidence that either party knew that to be so at any stage prior to the commencement of these proceedings and the inference to be drawn from the inclusion of paragraph 3 is that the parties intended

that the dispute resolution provision within the Latina 2013 Agreement should provide a comprehensive dispute resolution mechanism.

The FA Rules and Rule K Arbitrations

17. Section K, paragraph 1 of the FA Rules provides as follows:

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

18. Paragraph A2 of the FA Rules defines "*Participant*" as meaning:

> "… an Authorised Agent… Club … Licensed Agent, Player … and all such persons who are from time to time participating in any activity sanctioned either directly or indirectly by the Association."

There is no dispute that the claimant is a "*Player*" as defined or that Swansea is a "*Club*" as defined. An "*Authorised Agent*" is defined by reference to the definition of that term in the FA's Football Agents Regulations ("FARs"). "*Agent"* is defined in the FARs as meaning any person carrying out Agency Activity including Authorised Agents and an "*Authorised Agent"* means either a Licenced Agent or a Registered Agent. A "*Licenced Agent*" means an Agent holding a licence issued by the FA. None of the defendants fell into this category. A Registered Agent is a category that includes a Registered Overseas Agent and a "*Registered Overseas Agent*" is an individual holding a licence to act as an agent issued by a National Association affiliated to FIFA other than the FA, "*... and who has registered with the Association in accordance with these Regulations"*. The first defendant did not fall into this category at any stage because he was not registered as an overseas agent with the FA, the third defendant fell into this category between September 2009 and April 2015 and the second and fourth defendants never fell within this category. Finally, "*Unauthorised Agent"* is defined as meaning any person who acts as an Agent who is not an Authorised Agent. Reg. A1 of the FARs prohibits Players and Clubs from using the services of an "*Unauthorised Agent*" in relation to any Agency Activity. "*Agency Activity"* is defined as meaning acting in any way and at any time as an agent, representative or advisor in connection with a Player's contract of employment with a Club or registration of a Player with a Club or transfer of registration of a Player from one Club to another.

19. It follows from what I have said so far that none of the first, second and fourth defendants were an Authorised Agent at any material time. The first defendant was thus always an Unauthorised Agent. The second and fourth defendants did not act at

any stage as an agent or carry on Agency Activity. The third defendant had ceased to be registered with the FA as an overseas agent by no later than April 2015.

20. Reg. K7 of the FARs provides that:

> "Any dispute between an Authorised Agent, Player and/or Club in relation to any matter within the scope of these Regulations, including any Agency Activity shall be dealt with as between the parties under Rule K (Arbitration) of the Rules of the Association. …"

This provision is of no application in the circumstances of this case because that clause is cast in the present tense and thus whether someone is an Authorised Agent must be tested at the date when the dispute or difference in question arises. At the date when the dispute the subject of these proceedings arose none of the defendants were Authorised Agents. I do not understand Mr. Chaisty to contend otherwise since he did not suggest that clause 7 was of any direct application.

21. It follows that Section K can apply to the defendants only if they are Participants by reason of them "… *participating in any activity sanctioned either directly or indirectly by the Association*." I question whether an Unauthorised Agent would satisfy the definition of a Participant within the FA Rules by being "… *persons who are from time to time participating in any activity sanctioned either directly or indirectly by the*…" FA in relation to Agency Activity carried on by them since by definition dealings between Clubs, Players and Unauthorised Agents are not sanctioned in the sense of approved by the FA or the FA Rules. To the contrary, such dealing in relation to Agency Activity is prohibited by Reg. A1 of the FARs. It may also be necessary to decide the point at which a person must be a Participant. The operative words within Section K for present purpose are "… *any dispute or difference between any two or more Participants* …" As I have explained already, there was no dispute between the parties prior to March 2016. Thus, whether Section K applies at least arguably depends on whether the first to fourth defendants were Participants – that is "… *participating in any activity sanctioned either directly or indirectly by the Association...*" - in March 2016. However, that question is different from, and logically arises only after it has been determined, whether there was an agreement between the claimant and any of the first to fourth defendants that incorporated by reference Section K of the FA Rules. It is only this last question that has been argued on this appeal. I return to the potential issue concerning the point at which a person must be a Participant at the end of this judgment.

The Parties' Appeal Submissions

Appellants' Submissions

22. The Appellants submit that there was an implied contract between the claimant and each of the defendants which incorporated the FA Rules and thus Section K and that it is "*... absurd to suggest that contractual relationships can only be established in a sporting context by each individual participant having to contract with each other on an individual basis."*. The Appellants submit that in order to overcome this alleged absurdity, the court implies a contract between participants in organised sports based on the rules of the relevant sport, whether or not the participants are aware of them or

not. It is submitted that this wide-ranging proposition is supported by the decision of the House of Lords in Clarke v. Dunraven (The Satanita) [1897] AC 59 and by the judgments of the Court of Appeal in Modahl v. British Athletic Federation (In Administration) [2001] EWCA Civ 1447, Stretford v. FA [2007] EWCA Civ 238 and Fulham Football Club (1987) Limited v. Richards and others [2011] EWCA Civ 855.

23. The authorities relied on by the appellant form the springboard for a wide-ranging attack on the District Judge's judgment. It is suggested that the District Judge failed to grasp that AA96, s.5 did not require the substantive agreement between the parties to be in writing as long as an arbitration agreement was incorporated into that agreement and that arbitration agreement was evidenced in writing. It was submitted that the District Judge embarked on the wrong exercise because the issue was not whether there was an express contract between the parties that incorporated Rule K when all the Appellants had to show was an implied contract that included Rule K.

24. Mr Chaisty is not the author of the written submissions filed on behalf of the Appellants and thus he is not responsible for the terms and tone of the document. The document is signed by counsel previously instructed on behalf of the defendants. However, I am bound to record that much of the criticism of the District Judge is inappropriate. It is inappropriate for the District Judge to be described as having "... *failed to grasp the concept of implied contracts in this case ...*" when counsel advancing these criticisms failed formally to cite any of the authorities relied on in the skeleton or as far as I can see even to mention the concept of an implied contract as the answer to the submission made by Mr Casement to the District Judge that reliance on Rule K was misplaced in the absence of incorporation of that rule into a contract between the claimant and relevant defendants. If the point is one on which the Appellants are entitled ultimately to succeed, the District Judge cannot be criticised for failing to address a point, and authorities, that were not deployed before her.

Respondent's Submissions

25. Mr Casement QC argued that the point relied on by Mr Chaisty is not one that he ought to be permitted to rely on because it is an issue of fact or mixed fact and law that was not deployed before the District Judge but in any event the point is a bad one that ought to be rejected.

26. Mr Casement accepted that AA96, s.5 is satisfied if parties have entered into an agreement otherwise than in writing into which a written arbitration agreement has been incorporated by reference either expressly or impliedly, submitted that none of the cases relied on by the Appellants departed from the general principles that apply before a contract can be implied, that the existence of such contracts must not be assumed and that none of the authorities relied on by the Appellant assist because on proper analysis they were concerned either with implied contracts between a sporting regulator and the participant which depended on the facts found or were based on concessions or assumptions not made in this case. In those circumstances, it was submitted, the appeal ought to be dismissed.

Discussion

The New Argument Point

27. The appellants' skeleton argument was served as part of the application for permission to appeal process in late April 2017. Permission was granted on 8 May 2017. The respondent served a Respondent's Notice on 14 June 2017. The Respondent's Notice asserted that the implied incorporation argument that Mr Chaisty has advanced during this appeal is not one that the appellants should be permitted to advance since it is not one that was advanced before the District Judge – see paragraph 3 of the Respondent's Notice. Although it is asserted in paragraph 3.5 of the Respondent's Notice that the appellants should not be permitted to advance the argument because the respondent has not had the opportunity to address the argument with evidence, what evidence the respondent might have wished to adduce is not identified either there or for that matter in any witness statement or in the respondent's skeleton argument in answer to this appeal or in the oral submissions made by Mr Casement notwithstanding an invitation from me to him in the course of his argument to do so.

28. I reject Mr Casement's submission concerning this issue. I do so for the reasons that follow.

29. It is questionable whether the point relied on by Mr Chaisty is truly a new point although it is certainly true that the authorities now relied on were not cited to the District Judge and that the concept of an implied agreement between the parties was not mentioned expressly. However, the question of whether there was an arbitration agreement between the parties was one that was argued before and determined by the District Judge. I think there is significant force in Mr Chaisty's submission that in advancing the appellants' case as he has he is merely developing an argument that started before the District Judge. The argument before the District Judge was that the parties were bound by Section K of the FA Rules by reason of their status. However, that argument was one that could only succeed if the parties' status resulted in either an express or implied agreement that any dispute between them falling within the scope of Section K paragraph 1 of the FA Rules would be submitted to arbitration in accordance with Section K.

30. Even if that is wrong, the point is nonetheless one that must fail. There is, as Mr Casement points out, a distinction drawn in the authorities between issues that involve questions of fact and those that are pure issues of law. Mr Casement submits (for reasons that will become apparent when I come to the main issue in this appeal) that the question whether a contract is to be implied between participants in an organised sport is fact sensitive. For the reasons that I explain below I accept that submission. Mr Casement submits that a point that was not taken at first instance cannot be taken on appeal "*... if evidence could have been adduced which by any possibility could have prevented the point from succeeding ...*" – see paragraph 15 of Mr Casement's appeal skeleton argument. The point was most recently and succinctly summarised by Lewison LJ in Prudential Assurance Company Limited v. HMRC [2016] EWCA Civ 376 at paragraph 25 in these terms:

> "If the point is a pure point of law, and especially where the point goes to the jurisdiction of the court, the appeal court may permit it to be taken for the first time on appeal. But where the point, if successful would require further findings of fact to be

> made it is very rare case indeed in which an appeal court would permit the point to be taken"

31. It is worth noting that Prudential (ante) and the authority that Lewison LJ referred to in his judgment in that case concerned appeals following trials when of course findings of fact would have been made on the basis of the evidence that had been adduced. However, it was not submitted by Mr Chaisty that there was any relevant distinction to be drawn between the approach to be adopted on an appeal following a trial and that to be adopted on an appeal following a challenge to the court's jurisdiction and no authority was cited to me that suggested a different approach was required. Thus, I proceed on the basis that the principles that apply are broadly the same although in my view the points made in the authorities concerning the cost and inconvenience of allowing new fact sensitive points in appeals are unlikely to be as acute in a case such as this as they would be following a trial.

32. The difficulty about Mr Casement's submission is that identified above – it is not good enough simply to assert that the issue is one of fact and that the point should not be permitted to be taken because there is un-adduced evidence that could or might have prevented the point from succeeding if that evidence and what is contended to be its effect is not identified. The point is all the more problematic in an application of this sort where the court is not able to resolve contested issues of fact and where the point taken is one that is relevant to the jurisdiction of the court to determine the dispute. In a case such as this, it would have been open to the respondent to apply to the appeal court for permission to adduce any relevant evidence. He could certainly have identified the issues that required further evidence from his side, in summary the evidence that would have been adduced had he had the opportunity to do so and what he contended would have been the effect of that evidence had he been able to adduce it. Without such evidence the point is mere assertion. In the circumstances of this case, it would be unreal for the respondent to suggest that there was insufficient time to identify the evidence that he would otherwise have sought to adduce.

33. *The Effect of AA96 S.5*

AA96, s.5 provides:

> "5. Agreements to be in writing.
>
> (1) The provisions of this Part apply only where the arbitration agreement is in writing, and any other agreement between the parties as to any matter is effective for the purposes of this Part only if in writing.
>
> The expressions "agreement", "agree" and "agreed" shall be construed accordingly.
>
> (2) There is an agreement in writing—
>
> (a)if the agreement is made in writing (whether or not it is signed by the parties),

> (b)if the agreement is made by exchange of communications in writing, or
>
> (c)if the agreement is evidenced in writing.
>
> (3) Where parties agree otherwise than in writing by reference to terms which are in writing, they make an agreement in writing.
>
> (4) An agreement is evidenced in writing if an agreement made otherwise than in writing is recorded by one of the parties, or by a third party, with the authority of the parties to the agreement.
>
> (5) An exchange of written submissions in arbitral or legal proceedings in which the existence of an agreement otherwise than in writing is alleged by one party against another party and not denied by the other party in his response constitutes as between those parties an agreement in writing to the effect alleged.
>
> (6) References in this Part to anything being written or in writing include its being recorded by any means."

34. The "*Part*" referred to in s.5(1) is Part 1 of the AA96. S.9 forms part of Part 1 and thus if a stay is to be sought it must be by reference to an arbitration agreement that satisfies the requirements of s.5 and the definitional requirements within s.6. Thus, for an arbitration agreement to come within the scope of s.9 of AA96 it must be in writing as defined in detail within s.5. A non-written agreement that incorporates by reference written terms that consist of or include an arbitration clause constitutes an arbitration agreement in writing – see s.5(3). Thus, for example, it is not unusual for a ship salvage agreement to be made orally by reference to the Lloyds Open Form. Where such an agreement is made, the agreement includes an arbitration agreement in the terms set out in the form.

35. If and to the extent that the District Judge was suggesting that was not the case in the part of her judgment referred to in paragraph 13 above, then she was mistaken. However, the key point that emerges from this provision is the need within the non-written agreement between the parties for agreement by *"... reference to terms which are in writing ..."*. This point is also emphasized by AA96, s.6(2), which provides that the "*… reference in an agreement to a written form of arbitration clause or to a document containing an arbitration clause constitutes an arbitration agreement if the reference is such as to make that clause part of the agreement*". I accept that in principle an implied agreement between parties is capable of being an agreement otherwise than in writing for the purposes of AA96 s.5(3) but it remains the case that a party asserting that such an agreement incorporated an arbitration agreement must establish that the implied agreement was by reference to terms which are in writing and which included the arbitration clause relied on.

The Appellant's Central Submission

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 RA 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.

49. The most recent Court of Appeal authority cited by the parties on this issue was Baird Textile Holdings Limited v. Marks & Spencer plc [2001] EWCA Civ 274, where at paragraph 18, Sir Andrew Morritt VC set out the principle, based on previous authority, that a contract should not be implied unless it was necessary to do so and that "*... it must be fatal to the implication of a contract if the parties would or might have acted exactly as they did in the absence of a contract"* before concluding at paragraph 21 that this was the correct approach to an assertion that a contract was to be implied from conduct. Mance LJ agreed with this approach at paragraph 62. It is thus fatal to the implication of a contract that the parties would or might have acted as they did without any such contract. Although these principles were not identified by either the Court of Appeal or the House of Lords in Clarke v. Dunraven (ante) they are nonetheless satisfied on the facts of that case. It was necessary to imply a contract between the competitors in order to give effect to what each had promised to the club to the knowledge of the other concerning the liability of each competitor to all other competitors (as well as the club) for losses caused by infringement of the YRARs.

50. Here there was no necessity to imply the alleged contract. The relationship between the claimant and each of the first and third defendants was subject to and governed by express agreements including those I have referred to. None of those agreements contained arbitration provisions other than the Lacina 2013 Agreement, which contained a dispute resolution provision which was obviously intended to provide a comprehensive dispute resolution mechanism. Given the existence of those agreements, there is no basis on which it was necessary to imply the agreement contended for and the conduct of the claimant and defendants from first to last was referable to those agreements. The inclusion within the Lacina 2013 Agreement of the dispute resolution provision referred to earlier is not consistent with that contract impliedly incorporating by reference Section K of the FA Rules.

51. Similar considerations apply to the second and fourth defendants. The claimant did not at any stage enter into a contract with either because neither provided services of any sort to the claimant. The only role of each in the context of this present dispute was allegedly to receive the alleged secret commissions that the claimant seeks to recover.

52. The only case referred to by the Defendants in which a contract has been implied between competitors was Clarke v. Dunraven (ante). However, that case is plainly distinguishable from the facts of this case for reasons that I have set out above. That case would have satisfied the modern test for implied contracts for the reasons already given - that is because it was necessary on the facts of that case to imply an agreement in order to deliver to each competitor what had been promised to the race organiser by each competitor to the knowledge of the other competitors.

53. In the light of these conclusions, it is not necessary that I consider further the issues identified in paragraph 22 above. Had it been necessary to consider those issues further I would have directed that the appeal be restored for further argument on those points.

Conclusion

54. The appellants have failed to establish an implied agreement between them or any of them with the claimant that incorporated by reference section K of the FA Rules. In those circumstances, the District Judge was right to refuse to stay these proceedings by reference to AA96, s.9 and in consequence this appeal must fail and is dismissed.