FIRST DIVISION, INNER HOUSE, COURT OF SESSION

[2021] CSIH 61
P639/21

Lord President
Lord Woolman
Lord Pentland

OPINION OF THE COURT

delivered by LORD CARLOWAY, the LORD PRESIDENT

in the Reclaiming Motion

by

PARK'S OF HAMILTON (HOLDINGS) LIMITED

Petitioners and Respondents

against

THE SCOTTISH FOOTBALL ASSOCIATON LIMITED

Respondents and Reclaimers

THE RANGERS FOOTBALL CLUB LIMITED

Interested Parties

for Judicial Review of a failure by the respondents to comply with their Articles of Association, interdict and interdict *ad interim*

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Petitioners and Respondents: MacColl QC; Brodies LLP
Respondents and Reclaimers: Borland QC; BTO Solicitors LLP
Interested Parties: DM Thomson QC; Anderson Strathern LLP

20 October 2021

Introduction

[1] The SFA reclaim (appeal) the interlocutor of the Lord Ordinary, dated 23 August 2021. He granted an *interim* interdict which prohibits the SFA from appointing an arbitral

tribunal in a dispute between the Scottish Professional Football League and Rangers, without having first issued a Secretary's Notice to the petitioners. The issue is whether the petitioners have a *prima facie* case based upon the SFA's Articles of Association.

Contractual Terms

[2] The SFA's Articles of Association provides that "parties who are subject to the jurisdiction" of the SFA must submit certain disputes to arbitration (Article 99.1). Associated persons also agree to settle Football Disputes in that manner (Art 99.13). Both these terms are defined. An associated person is someone who is "involved in Association Football in Scotland under the auspices of or pursuant to a contract with a member" (Art 1.1). A Football Dispute is "a dispute between or among members and/or any associated person(s) arising out of or relating to Association Football" (Art 99.7). As a generality, members or associated persons cannot take a Football Dispute to court (Art 99.15). They can instead submit it to arbitration by lodging a Notice to Refer with the SFA, and intimating it to the other party or parties to the dispute (Art 99.16). The Notice should contain: a description of the dispute "and … the parties involved"; details of where and when the dispute arose; a note of the redress sought; and the names and addresses of "the parties to the contract" (Art 99.16).

[3] On receipt of a Notice to Refer, the SFA Secretary must send a notice to the referring party "and to any other party or parties with an interest in the Dispute" (Art 99.19(a)). The Secretary's Notice is to include: (i) a copy of the Notice to Refer; (ii) the Tribunal Candidate List; (iii) a copy of Article 99; and (iv) an invitation to nominate, or agree to, the appointment of arbitrators.

Facts

[4] The petitioners specialise in the sale of new and used cars. They have a longstanding commercial relationship with Rangers. This includes advertisement by Rangers of the petitioners' business. A written contract has been in existence since June 2015. It was renewed on 17 May 2021. The following month the SPFL entered into a sponsorship contract with Cinch; a business concerned in the sale of second-hand cars. Previously, Rangers had expressed their concerns to the SPFL that the terms of the two contracts might conflict with one another. Subsequently, Rangers have refused: (a) to provide the SPFL with the rights, facilities and properties required under SPFL's contract with Cinch; and (b) to produce a copy of their contract with the petitioners.

[5] The SPFL referred their dispute with Rangers to arbitration. In their Notice of Referral, the SPFL seek an order to produce the contract between Rangers and the petitioners. The substance of the dispute is whether the Cinch contract takes precedence over Rangers' agreement with the petitioners. The SPFL maintain that Rangers are in breach of their rules, notably rule 17, and seek an order requiring Rangers to put the name of the sponsors (Cinch) on their players' shirts and on interview backdrops.

[6] The Secretary's Notice intimating the arbitration was issued on 9 August 2021. It was not sent to the petitioners. Their central contention is that they are a "party … with an interest in the Dispute" in terms of Article 99.19(a) and, as such, the Secretary requires to issue them with his Notice. The SFA do not accept this.

Decision of the Lord Ordinary

[7] The Lord Ordinary held that the petitioners' averments did disclose a *prima facie* case that they were parties with an interest in the dispute. They could not be categorised merely

as persons who were interested in the outcome. They had a direct patrimonial interest. The definitions of "football dispute" and "associated persons" could be widely construed, with the result that Article 99 could apply to disputes between parties who were not members of the SFA. It accorded with common sense and fairness that a party with a direct patrimonial interest in a dispute should be entitled to be heard.

[8] On the balance of convenience, the Lord Ordinary concluded that, if *interim* interdict were granted, it was difficult to see what prejudice any party would suffer pending resolution of the petition. Having regard to his assessment of the strength of the *prima facie* case, and to the potential prejudice to the petitioners if *interim* interdict were not granted, he held that the balance of convenience favoured them.

Submissions

SFA

[9] The SFA submitted that there was no *prima facie* case, on the basis that the petitioners were not parties with an interest in the dispute, because they were not: (i) members in terms of the SPFL Articles; (ii) subject to the jurisdiction of the SFA; (iii) entitled to refer the dispute to arbitration in terms of the SPFL Rules and (iv) parties to the contract between the SPFL and the SPFL clubs. Taken cumulatively, these factors suggested that they were not entitled to receive the Secretary's Notice.

[10] The SFA advanced several other arguments in support of its position. Arbitration was a private agreement between two or more parties (Lord Hope: *Arbitration* in Stair Memorial Encyclopaedia (re-issue) para 2)). A third party could not intervene (*The "Eastern Saga"* [1984] 2 Lloyd's LR 373 at 379) at least without clear wording. The petitioners were third parties. In terms of section 11(1) of the Arbitration (Scotland) Act 2010, the decision of

the arbitrator would not be final and binding upon them. A legal or commercial connection to Rangers was not sufficient to allow them to participate in the arbitration. The petitioners, as third parties, would not be able to invoke an arbitration provision and seek to sist the proceedings in terms of section 10(1)(b) of the 2010 Act.

[11] The SFA was performing an administrative function when carrying out its role under Article 99.19. They should not be required to engage in substantive legal and/or factual analyses in relation to whether third parties might have an "interest" in the dispute. The Lord Ordinary's over literal approach flouted common sense. It required the Secretary to notify a person who was not a party to the contract. They would have a say in the nomination of the arbitrator.

Petitioners and Rangers

[12] The petitioners replied that the proper approach at the *interim* stage was "not so much the absolute relevancy of the case as the seeming cogency of the need for *interim* interdict", Burn-Murdoch, *Interdict*, at para 143 (affirmed in *Highlands and Islands Enterprise* v *CS Wind UK* [2020] CSIH 48, at para [5]). It was not appropriate for the court to embark upon a detailed assessment of issues of substantive law (*Toynar* v *Whitbread & Co* 1988 SLT 433, at 434). Only in a clear case would the appellate court interfere with an *interim* order.

[13] The Lord Ordinary was correct to find that there was a *prima facie* case. Article 99.19(a) did not place a restriction on who may properly be considered a party with an interest. A person, whose patrimonial interests would (or might) be affected by any such dispute, was such a party. Article 99.19(a) did not restrict those having an interest to members of the SFA or associated persons. The petitioners were specifically named in the Notice to Refer. The dispute was best resolved by all relevant parties being bound by the

arbitration, including both the petitioners and Cinch, since otherwise the excluded parties may have to resort to litigation.

[14] Rangers submitted that it was difficult to see what interest of the SFA had been affected by the *interim* interdict, given that they were simply concerned with the administration of the arbitration. It was open to the SFA to fix a substantive hearing in order to address the merits expeditiously.

Decision

[15] It is not now disputed that the balance of convenience favours the petitioners. The focus is therefore on a single question; has a *prima facie* case been made out? At the *interim* stage, it is not normally appropriate for the court to reach a definitive conclusion on the merits of the petition. Nevertheless, in a case where all the facts are known, the point of construction is well focused and the court has heard a full argument on the applicable law, it may be of considerable benefit to the parties if the court felt able to express a preliminary view (cf *Reed Stenhouse (UK)* v *Brodie* 1986 SLT 354, LJC (Wheatley), delivering the opinion of the court, at 358).

[16] It is, of course, correct to describe arbitration as a private process. A standard arbitration clause in a commercial contract is unlikely to permit intervention by a third party. Whether it does must depend on the particular wording of the clause. If it does permit a third party to intervene, they will become a party to the arbitration and will be bound by its decree (*Brown* v *Gardner* 1739 Mor 5659).

[17] A contract must be construed objectively, contextually, purposively, and in a manner which accords with commercial common sense (*Ardmair Bay Holdings* v *Craig* 2020 SLT 549 (Lord Drummond Young, delivering the opinion of the court, at para [47] *et seq*).

[18] Article 99.1 refers to "parties who are subject to the jurisdiction of the Scottish FA". That is in relation to the power to refer disputes to arbitration, which only a member of the SFA or an associate has. The petitioners are not attempting to refer the dispute to arbitration. They wish to participate in a prospective arbitration process. It is in relation to that process that the phrase a "party … with an interest in the Dispute" appears relative to the potential participants. Article 99.19(a) does not restrict intimation of the Secretary's Notice to parties who are subject to the SFA's jurisdiction.

[19] The words of Article 99.19(a) should be given their ordinary meaning in the context in which they occur, having regard to the Article's purpose and common sense. Applying that meaning, both the petitioners and Cinch have an interest in the dispute between Rangers and the SPFL. The phrase occurs in the context of an arbitration clause whose purpose is to prevent disputes relating to football and football clubs being litigated in the public forum. The airing of such disputes may carry a reputational risk to the game and its participants which the SFA, as the supervisory body, will be keen to avoid. These disputes may not always be confined to members of the SFA, the SPFL or associated persons. A clause which permits third parties with an interest to enter the arbitration process, and thereby be bound by it, accords with common sense. It carries with it the prospect of the whole dispute being resolved in one process rather than being partially settled but with satellite litigation to follow. The third parties cannot be compelled to agree to arbitration, but they may be anxious to do so.

[20] There is at least a *prima facie* case. It is impossible to find fault in the Lord Ordinary's approach. The reclaiming motion must be refused.