OUTER HOUSE, COURT OF SESSION

[2012] CSOH NUMBER

OPINION OF LORD GLENNIE

in the Petition of

RANGERS FOOTBALL CLUB PLC

Petitioner;

For Judicial Review

Act: Keen QC, Dean of Faculty, Richardson; Biggart Baillie LLP
Alt: O'Neill QC; Burness LLP (for First Respondents)

[Note: this is a corrected transcript of a judgment delivered *ex tempore* on 29 May 2012.]

[1] This is a petition for judicial review by the Rangers Football Club plc, a company presently in administration. That company presently operates Rangers Football Club (to whom I shall refer as "Rangers"). Rangers are members of the Scottish Football Association ("the SFA"), and are bound by the Articles of the SFA and by the Judicial Panel Protocol which sets out the disciplinary rules relating to the conduct of members of the SFA and the conduct of disciplinary proceedings to enforce such rules. For present purposes it is sufficient to note that the SFA has established a "Judicial Panel" from whom they select a Disciplinary Tribunal and, if necessary, an Appellate Tribunal, to deal with complaints.

[2] A number of complaints were brought against Rangers by the SFA. Those complaints relate, amongst other things, to the fact that although their Director, Craig Whyte, had been disqualified for a period to act as a Director, Rangers had not

disclosed that to the SFA; and to the fact that Rangers had suffered what is called in the complaint "an insolvency event".

[3] Charge 4, with which I am concerned here, was a charge of bringing the game into disrepute in a number of ways, including by non-payment of a significant sum to Her Majesty's Revenue & Customs by way of PAYE and National Insurance contributions. That charge, as set out in the Notice of Complaint, specifically refers to Disciplinary Rule 66 which provides as follows:

> "No recognised football body, club, official, Team Official or other member of Team Staff, player, referee or other person under the jurisdiction of the Scottish FA shall bring the game into disrepute."

Rangers were found guilty of that charge and certain others with which I am not concerned. The Disciplinary Tribunal held in respect of that charge

> "...that it was proven upon a balance of probabilities that Rangers FC was in breach of Disciplinary Rule 66 as specified in the Notice of Complaint"

(subject to a deletion with which I am not concerned), and it went on to impose a sanction of a fine of £100,00 payable within 12 months. It then added this:

> "Further the Tribunal imposed an additional sanction, under the terms of Articles 94.1 and 95 of the Articles of Association, prohibiting Rangers FC, for a period of 12 months from the date of determination, from seeking registration with the Scottish FA of any player not currently registered with the club, excluding any player under the age of 18 years."

[4] Rangers appealed to an Appellate Tribunal of three members, presided over by a judge of the Court of Session, Lord Carloway. The appeal related only to the imposition by the Disciplinary Tribunal of the additional sanction. The Appellate Tribunal unanimously affirmed the decision of the Disciplinary Tribunal. A number of arguments were raised before the Appellate Tribunal and were rejected by it. These included an *ultra vires* argument, in other words an argument that the Disciplinary Tribunal had no power to impose that additional sanction. That is the only argument that is raised before the court on this occasion.

[5] In this petition Rangers seek judicial review of the decision of the Disciplinary Tribunal to impose the additional sanction and of the decision by the Appellate Tribunal to affirm that decision. The only ground put forward by them in the petition is that the imposition of the additional sanction was *ultra vires*, or outwith the power of both tribunals. Whether the Tribunals had the power to impose that additional

sanction depends on the proper construction and interpretation of the Articles of Association of the SFA and of the Judicial Panel Protocol. That is the only question with which I am concerned. There is no appeal to this court on the merits of the case or concerning the appropriateness of the sanction if it was within the powers of the Tribunals. Those are matters for the Tribunal set up by the SFA to consider, not for this court.

[6] Before coming to deal with the question of the power of the Tribunals, I should note that Mr O'Neill QC, who appeared for the SFA, took a jurisdiction point. He argued that, by signing up to the Articles of Association, Rangers had agreed that any dispute (including an appeal from the Appellate Tribunal) should be referred to the Court of Arbitration for Sport ("the CAS") in Lausanne. He based that submission on Article 5.1 (b) and (c) of the SFA Articles of Association, particularly 5.1(c), which says that all members shall

> "recognise and submit to the jurisdiction of the Court of Arbitration for Sport as specified in the relevant provisions of the FIFA statutes and the UEFA statutes".

That appears to say, so far as relevant to here, that members shall submit to the jurisdiction of the CAS insofar as that is required by the FIFA statutes. The FIFA statutes to which I was referred require FIFA to provide the necessary institutional means to resolve disputes and to recognise the CAS, and also provide for appeals to the CAS in certain circumstances. However, they do not in terms require members of associations to submit their disputes with their associations to arbitration before the CAS; and the rules which form the contract between the SFA and its members, that is to say the rules in the Articles of Association, do not require such disputes to be referred to arbitration before the CAS either. In such circumstances I cannot accept the argument advanced by Mr O'Neill QC that this court has no jurisdiction.

[7] I am reinforced in that view by two decisions of the CAS to which I was referred by the Dean of Faculty acting for the petitioners, namely *Ashley Cole* v *Football Association Premier League* (Arbitration Decision CAS 2005/A/952) and *Al-Wehda Club* v *Saudi Arabian Football Federation* (CAS 2011/A/2472). In *Cole* it was held not only that FIFA statutes did not contain any mandatory provisions obliging a national federation or league to allow appeals from its decisions but also that, even if the FIFA statutes did compel the national federation or league to provide the right of appeal from its decisions, no right of appeal would exist to the CAS unless

the national federation or the league actually made provision for this right in its statutes or regulations. Ultimately, as was noted also in that case, the question whether the Articles of Association do indeed make provision for a right to appeal to the CAS from decisions of the tribunal is a matter for Scots law. As a matter of Scots law I can see no reason to differ in this respect from the views of the two CAS tribunals.

[8] This matter is, in any event, to my mind, made clear by Rule 15.8.3.6 of the Judicial Panel Protocol to which I have referred, which provides that the Appellate Tribunal's determination "shall be final and binding on the parties and there shall be no further right of appeal." That excludes any appeal, including an appeal to the CAS. I note, as was submitted by the Dean of Faculty, that the present application to the court, by contrast, is not an appeal but an application to the court in its supervisory jurisdiction to correct what is alleged to be an excess of jurisdiction by the Tribunals.

[9] I turn back therefore to the question of whether the Disciplinary Tribunal and the Appellate Tribunal had power to impose the additional sanction complained of. That is a question of law, depending on the proper construction of the Articles of Association and of the Protocol.

[10] Both parties were agreed that the correct approach to interpretation was that set out by the Appellate Tribunal in its reasons at pages 4 to 5 and for convenience I will simply quote a short passage from that. The Tribunal says this:

> "...the appellants were at pains to emphasise that, in construing the Scottish FA's Articles of Association and the Protocol, the appropriate test was to determine what the parties meant by the language used and that, as a matter of contract law, involved ascertaining what a reasonable person would have understood the parties to have meant. The relevant reasonable person for that purpose is one who had 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. ... The Appellate Tribunal agrees that this is the correct approach. Thus, the Appellate Tribunal, with its specialist knowledge, is not looking at what the outside observer or disinterested lawyer might make of the Articles or Protocols but at what persons involved in football (i.e. those who agreed to the Articles and Protocol at the time) would have meant by the language used."

Mr O'Neill stressed the point that this was a specialist tribunal and the court should be slow to question the conclusions at which it arrived. I accept that argument in principle, although less deference is required when the issue is simply one of construction going to the question of *vires* and the powers of the Tribunal than if one is considering whether a particular decision is or is not "unreasonable" in the sense used in Judicial Review proceedings. Mr O'Neill argued that the reasonable person with all the background knowledge would be concerned with the proper administration of the game and the upholding of standards. The company Articles here should not be viewed as primarily a commercial contract but as a set of rules applied at all levels of the game, from Premier League clubs to schoolboy level. A reasonable person with knowledge of the rules would understand them in a way which enabled sanctions to be imposed which were "proportionate, effective and dissuasive". It would, he submitted, be absurd if the rule was construed in a way which was so rigid that it gave the Disciplinary Tribunal insufficient powers to deal with the particular problem or required it to use disproportionate and excessive powers.

[11] I accept that the rule should not be construed as statute, but even making full allowance for the consideration relied upon by Mr O'Neill, the primary starting point must be what the rules themselves say, albeit that common sense has to be introduced in cases of difficulty in interpreting those rules. There is nothing in the reasons given by the Appellate Tribunal which identifies particular considerations, apart from those referred to by Mr O'Neill, which the reasonable third party looking at the rules should be taken to have had in mind.

[12] The starting point therefore, so it seems to me, is the Articles of Association. Article 94.1 is important and it is in the following terms. It is headed "Judicial Panel's Powers" and it says this:

> "The Judicial Panel shall have the power to fine, suspend or expel or in relevant cases, to eject from the Challenge Cup competition or apply such other sanction as is provided for in the Judicial Panel Protocol any recognised football body, club, official, Team official or other member of Team Staff, player, referee or other person under the jurisdiction of the Scottish FA who, in its opinion brings the game into disrepute, or is likely to bring the game into disrepute or on any other grounds it considers sufficient and of which, subject to any right of appeal, it shall be the sole judge."

The reference there to applying such other sanction as is provided for in the Judicial Panel Protocol is a reference to the Protocol I referred to earlier which contains specific powers for specific offences and also a specific rule concerned with bringing the game into disrepute.

[13] I should also mention Article 95, which the Disciplinary Tribunal had regard to. This provides that

> "The Judicial Panel shall have jurisdiction, subject to the terms of the Judicial Panel Protocol, to deal with any alleged infringement of any provision of these Articles …"

and it goes on to say that if any recognised football body, including a club, is found to have infringed the Articles it should be liable to censure or a fine or suspension or expulsion or ejection from the Cup or any combination of each penalty or such other penalty, condition or sanction as the Judicial Panel see as appropriate, including such other sanctions contained in the Judicial Panel Protocol. As it emerged during the arguments, although Mr O'Neill relied upon Article 95 he was, to my mind, unable to identify any infringement of any provision of the Articles which would be relevant to this case, since Article 94 does not in terms prohibit the bringing of the game into disrepute; it simply allows a sanction to be imposed where the game is brought into disrepute. It does not seem to me that Article 95 has any application in the present case.

[14] As I have said, Article 94, which is the relevant Article here, gives the Judicial Panel power to fine, suspend and so on or apply my appropriate sanction in the Protocol. The Protocol deals with Sanctions in section 11. That is the relevant part of the protocol for present purposes. I will read sections 11.1 and 11.2, all under the heading "Sanctions":

> "11.1 The Disciplinary Rules provide a Scale of Sanctions to be imposed in respect of breaches of those rules, and the maximum limit of such sanctions.
>
> 11.2 When issuing a Determination the Tribunal may apply such number or combination of sanctions as specified in the Articles, the Disciplinary Rules or this Protocol and specify such time limit for compliance with each sanction as it considers appropriate."

The Disciplinary Rules, to which reference is made, are defined in section 1.1 of the Protocol. Disciplinary Rules means the rules and sanctions more particularly described at Annex A of the Protocol. Section 11.5 of the Protocol provides that

> "Where the Tribunal has discretion as to the appropriate sanction, and where applicable, the Disciplinary Rules provide a Scale of Sanctions."

They include lower end, mid range, top end and maximum levels of sanctions. In the present case the tribunal thought that the conduct complained of in charge 4 merited the maximum sanction and that is not challenged before this court.

[15] The possible sanctions applicable to each offence are set out in Annex A to which I have referred, i.e. in the Disciplinary Rules. Annex A begins with the heading "Disciplinary Rules" followed by these two paragraphs:

> "1 This Annex provides details of the Scottish FA's Disciplinary Rules and Scales of Sanctions for the breaches of them."

It explains that it is divided into a number of sections including the first section, which is the relevant one here, "General Disciplinary Rules". Paragraph 2 says this:

> "2. When issuing a Determination, a Tribunal may apply such number or combination of sanctions as specified in the Articles of Association of the Scottish FA currently in force, the Disciplinary Rules or the Judicial Panel Protocol, and specify such time limit for compliance with these sanctions as it considers appropriate."

[16] The General Disciplinary Rules, running to some 61 pages, are laid out in a Table which is self explanatory. I should read the headings of the various columns. The first column gives the rule number, i.e. the Disciplinary Rule number. There is then a column giving the relevant Article of Association. The third column sets out what the rule is. The fourth column says "Sanctions available to the Tribunal" and this states, against each rule, the possible sanctions applicable for a breach of that rule. I stress the words "Sanctions available to the Tribunal". It then goes on to the right hand side, under the general heading "Scale of Sanctions", to identify who the sanctions apply to, that is to say members or clubs, SPL clubs or whatever; lists the sanctions available (again the word "available") for each class of person; and then gives the lower end, the medium range, the top end and the maximum.

[17] In terms of Rule 66, which is the rule under which Rangers are charged in charge 4, the text is as follows. The rule number is given, Rule 66, and there is a reference to Article 94.1 of the Articles of Association. I note that there is no reference to Article 95 as well. The rule is stated in these terms, which I have already set out but I will read in short:

> "No recognised football body, club [and so on] shall bring the game into disrepute."

The sanctions stated to be available to the Tribunal for these offences are a fine, suspension, expulsion from participation in the game, ejection from the Scottish Cup and termination of membership. When it comes to the scale of the sanctions, those applying to SPL clubs (again different sanctions are listed as being available for each class of person) are the same five sanctions: fines, suspension, expulsion from participating in the game, ejection from the Scottish Cup and termination of membership. At the lower end is a fine of £1,000, in the middle range a fine of £5,000, at the top end a fine of £10,000, with the maximum penalty being a £100,000 fine and termination of membership.

[18] It is to be noted that nowhere in the list of available sanctions is there any reference to a ban for any period on registering new players. That is, in short, the basis of the challenge that is made to the additional sanction imposed by the Tribunal.

[19] Mr O'Neill, on behalf of the SFA, says, in effect, so what if it does not mention that. A fine would be ridiculously low for the conduct here complained of. Suspension or expulsion, or termination of membership would be too harsh. There must be room, reading the rule sensibly, for something in between which is proportional and effective. The Appellate Tribunal took a somewhat similar view though they expressed it rather differently. After referring to the fact that Rule 66 must be read along with Article 94, which is not in dispute, they said, and again I read briefly from their Reasons at pages 5 and 6:

> "the relevant reasonable person would understand that a Judicial Panel such as the Disciplinary Tribunal would be entitled to impose such lesser sanction, not amounting to termination or even suspension, as was available: provided of course that the sanction was something over which the Scottish FA had control and could thus enforce."

Then, dropping a few lines:

> "The registration of players is, as already noted, one of the Scottish FA's core activities as part of the regulation of football. Thus prohibition or restriction in that area forms an obvious lesser penalty to suspension or termination of membership. That is the interpretation which the Appellate Tribunal places on the Articles and Protocol read either separately or in conjunction with each other..."

Their interpretation therefore appears to be this, that the Tribunal can award anything which is a lesser penalty than the maximum of suspension or termination of membership.

[20] I regret that I cannot accept that view. If that was the true view there would, in my opinion, be no point in identifying specific sanctions in the columns headed "Sanctions available to Tribunal" and "Sanctions available to each class of person". A comparison with Rule 62, the example given to me on behalf of the petitioners, is instructive. That is a rule concerned with prohibiting a club paying more than the authorised tariff for the services of the match official from the list of referees. Sanctions available to the tribunal are a fine and termination of membership. There is no mention in that rule of suspension, expulsion or ejection from the Cup. The maximum is a £1,000,000 fine and termination of membership. On Mr O'Neill's argument, and on the reasoning of the Appellate Tribunal, notwithstanding the fact that the sanctions available are simply said to be fine and termination of membership, the Tribunal would be entitled to suspend or expel the Club or eject them from the Scottish Cup. It would make no sense in my opinion to have those sanctions spelt out in Rule 66 but omitted from Rule 62 if, on the proper construction, they were available in each case. The columns about "sanctions available" would be redundant.

[21] Looking at the Protocol as a whole, particularly Rules 11.1 and 11.2, when read with the Table in Annex A, and having regard to the terms of the Articles, it seems to me to be clear that the Protocol is laying down a specific range of sanctions which the Tribunal may impose, depending upon the particular offence with which the club or other member of the SFA is charged. The Tribunal cannot impose sanctions not given to it in Annex A. It follows that the Disciplinary Tribunal and the Appellate Tribunal were, in my view, wrong to hold that they had power to impose the additional sanction in this case. In imposing and affirming that sanction they acted *ultra vires*.

[22] The Dean of Faculty moved that I simply suspend the imposition, or the effect of the imposition, of that additional sanction. I consider it would be wrong to take that course, because it would in effect be altering the penalty which the Tribunal had imposed and reducing it to one of a fine of £100,000 when the Tribunal the clearly thought that was inadequate. I prefer to adopt the course suggested by Mr O'Neill. He, of course, argued that I should not make any such order, but submitted that if I was against him on the *ultra vires* question I should simply reduce the decision of the

Appellate Tribunal which affirmed that of the Disciplinary Tribunal. I propose to do that for three reasons. First, it is obviously a matter of some urgency that this matter be resolved. By reducing the decision of the Appellate Tribunal and simply sending it back to them I am enabling them to reconsider rather than requiring the whole matter to be started afresh. Second, this challenge only concerns the additional sanction. There is, so far as I am aware, no live dispute about the fine or about the findings of bringing the game into disrepute. If I were to reduce the decision of the Disciplinary Tribunal it might at least be arguable that all those matters were up for discussion and I would wish to avoid that. Third, and in any event, the Appellate Tribunal itself has power, if it thinks it appropriate, to refer the case back to the Disciplinary Tribunal. That is in Rule 15.6.1.6, and it seems to me it would be better to leave it to their discretion as to whether that is necessary.

[23] I should only add this. Mr O'Neill's argument that the construction of the Articles and the Protocol at which I have arrived deprives the Tribunal of the power to impose a penalty which is both effective and proportionate, is not necessarily shared by the Appellate Tribunal. They concluded their reasons by saying this:

> "Although the Appellate Tribunal agreed with the Disciplinary Tribunal that termination, suspension of membership would have been excessive, it made that assessment in the context of the availability of competent lesser sanctions such as the one actually imposed. Were that option not to have been available, suspension might have had to be considered appropriate for such serious misconduct, which has brought the game into disrepute."

I need not mention the other matters to which they refer. I simply refer to that passage to suggest that Mr O'Neill's argument that on the construction which I prefer the tribunal's powers are either insufficient or excessive is not necessarily correct; and to point out that the fact that I find the imposition of the additional sanctions to be *ultra vires* does not necessarily mean that the petitioners will escape to a lighter and ineffective punishment. That is entirely a matter for the Appeal Tribunal and not for this court.

[24] I propose to reduce the decision of the Appellate Tribunal and I shall formally remit the matter back to the Appellate Tribunal for reconsideration in light of this Opinion.