IN THE COMPETITION APPEAL TRIBUNAL

Case No. : 1402/5/7/21

Salisbury Square House
8 Salisbury Square
London EC4Y 8AP
(Remote Hearing)

Wednesday 29 September 2021

Before:
THE HONOURABLE MR JUSTICE MILES
(Chairman)
MICHAEL CUTTING
TIM FRAZER

(Sitting as a Tribunal in England and Wales)

BETWEEN:

ST JAMES HOLDINGS LIMITED

Claimant

v

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED

Defendant

APPEARANCES

Daniel Jowell QC and Tim Johnston (instructed by Reynolds Porter Chamberlain LLP appeared on behalf of the Claimant)
Adam Lewis QC and Ravi Mehta (instructed by Bird & Bird LLP appeared on behalf of The Football Association Premier League Limited)
Nick De Marco QC (instructed by Dentons UK and Middle East LLP appeared on behalf of Newcastle United Football Company Limited)

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Wednesday, 29 September 2021

(10.30 am)

MR JUSTICE MILES: Good morning, everyone. These proceedings are being live streamed and, of course, many are joining on the Microsoft Teams platform. I must start, therefore, with a customary warning: these are proceedings in open court, as much as if they were being heard before the Tribunal physically in Salisbury Square House.

An official recording is being made and an authorised transcript will be produced, but it is strictly prohibited for anyone else to make an unauthorised recording, whether audio or visual, of the proceedings and breach of that provision is punishable as a contempt of court.

Yes, Mr Lewis.

MR LEWIS: Good morning. I think that one of the matters that was to be dealt with in advance of my starting to make the application was the question of how we deal with the confidentiality of the underlying arbitration and of particular information that arises in it.

One of the possibilities was obviously to hold the hearing in private and that is not the course that's been adopted but rather, what is proposed is to -- when I come to an area which I consider the CAT should consider against the question of confidentiality, I will raise that in advance and then the point can be decided at that point and, if necessary, the stream can be turned off at that point.

If that is suitable and if that meets with what the CAT's expectations are in this context, then I propose to start my application.

MR JUSTICE MILES: Yes, we will deal with it in that way. We would hope that as far as possible, it's going to be possible for the four counsel to make their submissions without having to go into any great detail in relation to the contents of

the arbitration. The fact of the arbitration and certain details about it, as we understand it, are already in the public domain, including in a judgment that was given by His Honour Judge Pelling earlier this year, where, amongst other things, he referred to the decisions made by the League and it may be that counsel are able to make submissions without going much further than that.

But if they need to and questions of confidentiality do arise, then we will deal with them at that point.

Application by MR LEWIS

MR LEWIS: I'm grateful, and we obviously have the benefit of Mr De Marco appearing at the hearing today for the Club, as well as, obviously, Mr Jowell for SJHL and, therefore, any point that the Club wishes to take in relation to confidentiality can be taken at that stage and we don't have to worry about the Club not knowing what's happening.

The Premier League's position is that this claim should not proceed in the CAT at all or, alternatively, at this time and there are three separate reasons why the CAT does not have or should decline to exercise jurisdiction pursuant to the Premier League's application under CAT rule 34. Each reason is sufficient in itself.

The first is that this CAT claim is precluded by the arbitration agreement in Rule K of the FA Rules to which both the defendant, Premier League, as a competition and the claimant, SJHL, as a Director, in inverted commas, capital D, of Newcastle United Football Club, are party.

Second, jurisdiction should be declined by the CAT in its inherent jurisdiction, on the basis that the claim is moot and/or premature and/or an abuse and that is because SJHL is the 100 per cent owner of the Club. The Club is already pursuing the same issues as arise in this CAT claim in the arbitration that it has brought against the

Premier League. That arbitration will start on 3 January and that arbitration will determine the issues in a way that will make the CAT claim either unnecessary if the Club wins or impossible to sustain if the Club loses.

In any event, because the same issues arise in the arbitration, it's an abuse of process for the claimant to start this CAT claim at the same time as the arbitration being pursued by its 100 per cent subsidiary and seek to advance the CAT claim at the same time as the arbitration, when, as I say, the arbitration will imminently decide the matter, in a way that can only, we say, be designed to impose improper pressure on the Premier League by opening up a second simultaneous and duplicative front.

The third reason is that SJHL does not actually have standing because SJHL has not, at this point, suffered any loss or damage as a result of anti-competitive conduct as required by section 47A of the Competition Act 1998 and in any event, we say this is not, in fact, a proper competition law claim appropriate for the specialist CAT but rather, simply a question of whether the Premier League has, in this one instance, correctly applied its rules. The validity of which is not challenged, which is precisely what is being dealt with in the arbitration.

But in the alternative to that, there is a simple case management issue and we say on any basis, the CAT should temporarily stay the claim, pending the arbitration award and that's under CAT Rule 53(2)(k), because on any basis, the award will narrow, change and inform the issues. A temporary stay is necessary in order to avoid inconsistent decisions not only at the final stage but also at all interlocutory stages. A temporary stay is necessary, we say, to avoid complex confidentiality issues between the two sets of proceedings. A temporary stay prevents wasted costs and time. A temporary stay is necessary to achieve, therefore, CAT guiding principle 4.2 and a temporary stay will at least avoid or will at least mitigate the abuse of duplicitous simultaneous proceedings. And at the same time, a temporary

stay will in no way harm SJHL. Indeed, it is actually as much in its interests as it is in the Premier League's.

Now, in my submissions this morning I'll address each of these reasons in order and before doing that, I will address the factual context and in doing that, I will draw attention to the coincidence of the subject matter and issues in both sets of proceedings and it is necessary to do that in the facts because it informs all three of the reasons.

So, I will start with the factual context and to start off with, what I have to say is not confidential. The Premier League is my first topic. The Premier League is a private company owned and controlled by the 20 clubs that are from time to time members of it. It organises a football league competition for those clubs to play in. It is not the sport's regulator. That is the FA. The member-clubs decide and agree the rules of the Premier League that govern how that football competition is to be run and the rules that the member-clubs decide and agree include rules that contain many obligations on owners and Directors; Directors in the defined sense.

The owners and Directors of a club control what the club does, including what the club decides and agrees should be in the Premier League Rules. One of the Premier League teams, Newcastle United Football Club, is 100 per cent owned by Mike Ashley and for whatever reason, Mike Ashley has chosen to insert three 100 per cent owned holding companies between him and the Club and in downwards order: Mike Ashley 100 per cent owns MASH. MASH 100 per cent owns SJHL. SJHL 100 per cent owns Newcastle United Limited and Newcastle United Limited 100 per cent owns the Club.

Mike Ashley wants to sell the Club and a consortium, including the Public Investment Fund of the Kingdom of Saudi Arabia, wants to buy the Club. If the transaction goes through, the KSA PIF, as we have been calling them, would own 80 per cent of the

Club.

I turn, then, to the Premier League Rules in relation to Directors, with a capital D. So the Club, as a member of the Premier League, is contractually bound by the Premier League Rules. Where a change in ownership of a club is contemplated, the Premier League has to apply some of those rules. SJHL does not challenge the validity of those rules, only their application in this one instance and under the Premier League Rules, any entity that satisfies the definition of a Director of a club is subject to a range of requirements and obligations. The definition is in section A of the Premier League Rules. It's purposely a very wide definition, so that any entity that has the ability to exercise or require control over what a club does is caught by the obligations.

This is to make sure that the rules apply effectively in respect of all that have a significant role and to prevent evasion. Now, it may be that the CAT has already had a look at these but, if necessary -- perhaps we can turn them up. They're at B1/1/24 and 25. So A.1.60 is the definition of a Director and it means:

"Any person occupying the position of a director of a club whose particulars are registered or registrable under the provisions of section 162 of the Act and includes the shadow director, that is to say a person in accordance with whose directions or instructions the directors of the club are accustomed to act ..."

And here is the important bit:

" ... or a person having control over the club."

And then we look up on to B1/1/24 and we see A.1.52 which defines Control:

"Control means the power of a Person to exercise or to be able to exercise or acquire, direct or indirect control over the policies, affairs and/or management of the club, whether that power is constituted by rights or contracts, either separately or in combination, and having regard to the considerations of fact or law involved and

without prejudice to the generality of the foregoing, Control shall be deemed to include [and then] the power to appoint and/or remove any of the members of the board [and (b)], the holding and/or possession of the beneficial interest and/or the ability to exercise the voting rights applicable to, Shares in the Club … or by contract including, without limitation, on whatever basis, those shares which confer in aggregate on the holders thereof 30 per cent or more of the total voting rights exercisable at general meetings of the Club."

Now, one of the requirements, just keeping open also the rules at the moment, one of the requirements, that a Director is subject to, is to satisfy the minimum standards in the owners and directors' test. And that's in section F of the Premier League Rules. Now, those are perfectly sensible and appropriate minimum standards which are necessary for and proportionate to the proper operation of a league competition. And we see those at B1/1/48 and I'm not going to go through the whole of section F but just to highlight F.1:

"A person shall be disqualified from acting as a Director."

And:

"No club should be permitted to have any person acting as a Director of that club if ..."

And then there is a series of examples and they're quite a long list. I won't go through all of them but F.1.1 covers provision of misleading information. 1.2 and 1.3 cover involvement in a second club. 1.4 covers disqualification under companies legislation. 1.5 and 1.6 cover criminal conduct. 1.7 to 1.10 cover insolvency and so on.

So, what we know, then, from F.1, is a club cannot have a Director that does not satisfy the OADT and if the Director does not satisfy the OADT, the Director has to resign or be removed; that's rule F.6. If the Director does not do so, the club will be

suspended. That is rule F.9. So, where there is a proposed change of ownership, the Premier League will decide and inform the club in advance whether a new entity involved would be a Director under section A of the rules, if the transaction went ahead and then whether that entity would fail to satisfy the OADT.

Now, this is by no means a gatekeeper role in the sense alleged by SJHL. The Premier League does not have any general discretion or, indeed, any discretion to exclude a proposed owner. The Premier League merely has the minimum standards of propriety agreed upon by the member-clubs, defined in section F, that are appropriate for and proportionate to the proper running of the competition. So, it's only if an entity is or would be a Director that the Premier League applies those minimum standards to it.

Whether an entity is or would be a Director under rule A.1.60 is a matter of the application of the definitions of Director and Control to the facts in relation to the entity's relationship with the club. Now, that involves no discretion. Whether a minimum standard is not satisfied, in other words one of the section F minimum standards, is a question of, again, the application of the rules containing each standard to the relevant facts.

Most of the minimum standards involve no discretion whatsoever. So, it's at this point that I come on to what the Premier League decision in summer 2020 was and there's no doubt that what I have to say in relation to the facts here is going to describe what happened in the arbitration and is going to trespass on the confidentiality of the arbitration. I couldn't say that it's going to deal with information which is confidential in a more specific sense, in the sense that it's commercially confidential to either the Premier League or the Club. Confidentiality arises out of the nature of the arbitration itself.

Now, in these circumstances it is for the CAT, really, to decide whether or not this is

something which, in the light of what His Honour Judge Pelling held in Commercial Court proceedings and in the light, indeed, of what the CAT's position on this is, whether or not we should go into private hearing in relation to this section of the facts. It's relatively short. I expect to be through it in about quarter of an hour and then we will be back on to matters which deal with the mandatory stay because of the Arbitration Act and that isn't confidential, so I'm in the CAT's hands.

MR JUSTICE MILES: Well, to some extent it's a question, if I may put it back on to the parties, as to the extent to which they are concerned about revealing confidential information. Confidentiality is ultimately the parties' confidentiality in an arbitration. As I have said before, certain information is already in the public domain, information about the decisions which are made by the League and about certain steps that are being taken in the arbitration.

I think if the parties wish to make an application that certain parts of this hearing should be heard in private, they must do so. As far as we are concerned, we're hearing the matter in public. We expect the parties to tailor their submissions, as far as possible, to ensure that that should happen. There's obviously a great deal of public interest in this matter and, accordingly, I think it's really for the parties, if they wish to seek an order that some part of this hearing take place in private, to do so.

MR LEWIS: In that case, given the requirements in the Premier League Rules that confidence in the arbitration be maintained, I, representing the Premier League, have to make that application. The following section in relation to where I'm going to set out the facts in relation to the arbitration, should be heard in private.

MR JUSTICE MILES: Is it the case that any of what you are going to go on and tell us is, in fact, in the public domain and if so, is there a way of presenting this part of the case which allows that part to be given in public, even if part of the hearing then needs to go into private? So, for example, to the extent that you're going to go into

the decisions which were actually made by the League, as I have said a couple of times so far, those, at least one of them, I think the June decision, was referred to by His Honour Judge Pelling and, indeed, I think set out in some detail in his judgment. So, if there are matters of that kind, then I think it would be better, if possible, for those to be dealt with in public.

If there are details which are concerned with the conduct of the arbitration and the position taken by the parties in the arbitration, then that obviously -- which aren't yet referred to in any judgment in court -- then obviously, those are matters which might well be covered by confidentiality.

MR LEWIS: My short answer to that is that, effectively, everything I am going to be saying is in relation to the position of the parties in the arbitration and the fact of the decision is really only the initial point from which I am going to go on to deal with the position of the parties in the arbitration.

MR JUSTICE MILES: Right, I think what we will do is the Tribunal will briefly retire from this hearing to discuss this matter and we will come back into the main hearing briefly, having done so.

MR LEWIS: I'm grateful.

MR JOWELL: Would it assist for us to set out our position?

Our position as SJHL is that we have -- we are, of course, third parties to the arbitration. We have agreed to respect the confidentiality of the documents that we have received but as far as we are concerned, as long as the Club is content, and Mr De Marco is here to represent the Club, we see no need for any of this to be -- for confidentiality to be maintained from our own point of view, although of course we are prepared to respect the confidentiality obligations of the Club, insofar as it is bound by them.

MR JUSTICE MILES: Thank you.

MR DE MARCO: Sir, would it assist if I set out the club's position?

MR JUSTICE MILES: Yes.

MR DE MARCO: Which is that the Club's position is that there is no confidential information proper in the arbitration or very little, in any event. The only reason for confidentiality is the fact it is an arbitration and as one of the parties to that arbitration, the Club is fully content, indeed has requested, that the matters be dealt with in public because of the public interest in these matters, so the Club does not seek for any of this information to be in private but rather, seeks for it to be in public.

MR JUSTICE MILES: All right, thank you for that.

We will retire briefly. We won't take very long over it and we will tell you how we intend to proceed in a moment. Thank you.

(Pause).

We have considered this matter and I want to make the following clear: that there is a strong presumption in favour of these hearings taking place in public. There is a lot of public interest in this case.

Secondly, a good deal of information about the events that have happened are already in the public domain. I have already mentioned the judgment of His Honour Judge Pelling. There has also been a great deal of press comment on what has happened. In particular, the details about the decisions made by the League are in the public domain.

On the other hand, there is a confidential arbitration. It's in the nature of arbitration that it is confidential and it's not for one party to an arbitration to say that it does not wish the matter to be confidential and for that to override the confidentiality of the arbitration.

What we intend to do, having heard Mr Lewis' application, is to allow him to present the next part of his case in private. That is to say without the live stream but we want

to make it clear that to the extent that matters are in the public domain, we think they should be presented during this hearing openly. And if and to the extent that in the course of this part of his presentation, he refers to matters which the other parties consider to be in the public domain and they are able to persuade us of that, we would expect there to be a short summary of those when the public live stream resumes.

In other words, we don't want this part of the presentation to cover matters which are in the public domain. It seems to us that it's likely that they may be of some importance to the argument and in order for members of the public and the press to be able to follow the argument properly, there may need to be a summary of those parts which are in the public domain. So we will proceed in that way.

So, at this stage we will pause the live stream and hear this part of the hearing in private, but on the basis that I have just explained.

MR LEWIS: I'm grateful.

MR JUSTICE MILES: Will you just pause for a moment until we have confirmation that it's appropriate to continue.

(Pause)

In private

In public

MR LEWIS: Thank you. I have been asked to summarise some of the submissions that were made while the live stream was down. The summary is as follows:

The Premier League decided in the summer of 2020 that if the transaction went ahead, the KSA would be a Director. The Premier League did not then proceed to the question of the application of the OADT, because at that point, PIF was not prepared to proceed with the transaction, unless and until either the Premier League

decided that the KSA would not be a Director or a Tribunal, relevant Tribunal, decided that it would not be a Director.

The contention of the Premier League is that both the CAT claim here today and the arbitration, the underlying arbitration brought by the Club, involve exactly the same conduct and issues and make exactly the same complaints about that conduct and issues. In other words, that the issues in both the arbitration and the CAT claim are the same. That's the summary.

I am now, then, turning to a different factual element which is the Football Association Rules. So this other -- and there is only one other background factual element -- is that not only is this an attempt to go over the same ground simultaneously, but it's also an attempt to do so in the wrong forum, in the light of the provisions in the various football rules as to the resolution of football disputes. And the starting factual point in respect of those provisions is that from the top of the pyramid downwards, FIFA, downwards, all football disputes between Participants in the sport are required to be arbitrated. I won't take you to it. For your note, it's B2/1/157. It's Article 59 of the FIFA statutes.

Now, the football bodies regard it as important that football disputes should be decided by expert arbitrators familiar with the sport and on a basis that is confidential, speedy, flexible and cost-effective. That's the evidence of Jamie Herbert at paragraph 44. Again, for the note, A/3/74, not necessary to go to it.

One manifestation of that is the narrow Premier League section X arbitration. Section X, again not necessary to go to it, B1/1/110. That expressly applies only to disputes between clubs and the Premier League. The Club's arbitration against the Premier League is under Premier League section X. It's not suggested that SJHL's claim should be under section X of the Premier League Rules. A much wider manifestation of the sport's approach is contained in the rules of the English

governing body, member of FIFA, the Football Association. That's FA Rule K, which requires all disputes between Participants to be arbitrated. And FA Rule K does apply to SJHL's dispute and precludes the CAT claim and I will come on to the content of it when I deal with reason 1.

So, it would be against that factual background that I turn to the three reasons why jurisdiction should be declined and if that's a convenient moment for a transcriber break, then I can start with reason 1 after the break.

MR JUSTICE MILES: Sorry, we are bedevilled by mutes.

Let me just explain that we will now take a break of 10 minutes because this matter is being transcribed and it gives the transcribers a break to rest their fingers. We will therefore resume in ten minutes. Thank you.

MR LEWIS: I'm grateful.

(11.43 am)

(A short break)

(11.53 am)

MR JUSTICE MILES: Yes, Mr Lewis. Thank you.

MR LEWIS: Thank you very much. So, reason 1, mandatory stay under section 9 of the Arbitration Act 1996. There are six elements to this. The first element is the Arbitration Act 1996 under section 9(4),

"A Stay of Court proceedings must be granted where the proceedings are brought by and against a party to an arbitration agreement which covers the matter raised in the court proceedings."

The Premier League does not suggest that it's enough that the applicant alone is a party. That is a strawman that is set up by SJHL. The Premier League accepts that both parties must be parties to the arbitration agreement.

Section 5, the agreement must be in writing. An arbitration clause in written rules,

such as the FA Rule K, constitutes an agreement in writing. However, if it is that the rules are contractually acceded to, there does not need to be a specific written agreement signed between the two parties to litigation, where the rules of the sports body that have been acceded to involve an arbitration clause.

Now, it's not clear whether that's contested, but it's clearly established, in my submission, in Stretford v FA, by Andrew Morritt QC and that was endorsed in the Court of Appeal by Sir Anthony Clarke MR. That's worth going to. It's at D3/2 and page 41, paragraphs 25 to 27:

"In my judgment the obligation to observe the rules as a whole became a term of the contract between Mr Stretford and the FA by any one or more of three distinct processes. First, the obligation to observe the rules was a continuing obligation. It first arose in 1995 under Article 13 of the original players' agents regulations."

And then it carries on and then we see second, towards the bottom of the page -- maybe I should just read it as I go through:

"It first arose in 1995 under Article 13 of the original players' agent regulations. It was continued by Article 14 of the revised version. The exchange pursuant to Article 23 of the FIFA licence for the FA licence in 2002, altered the identity of the other party to the contract from FIFA to the FA but had no other effect on the obligations by which Mr Stretford was bound. This case is unlike those in which a contract is made for the first time without any prior course of dealing. Thus, in the well-known case of Olley, the terms were not incorporated into the contract because the relevant party had no notice of them before the time at which the contract was made. Second, if it is necessary to find some conventional offer and acceptance, then the supply of the licence on 9 April 2002, bearing the statement to which I have referred, followed by the acknowledgement of its receipt by Mr Stretford, would suffice. Thirdly, the transaction of businesses of licensed players' agent on the terms of Article 14A of

the revised players' agents regulations and the terms expressed on the face of the licence, constitute the acceptance of those terms by conduct.

"Counsel for Mr Stretford did not dispute that all the other provisions of the rules are binding on Mr Stretford. He sought to draw a distinction in respect of Rule K on the grounds I have already mentioned. I do not think that that is a distinction which can be validly drawn. Given that Rule K applies to all parties alike and in the way such clauses conventionally operate, I do not consider that it required any particular or special notice to be given by the FA to Mr Stretford.

"But even if I did conclude that such a notice was given, Mr Stretford knew that he was obliged to observe the rules. The rules were published by the FA as least once a year in its handbook and were available at all times through its website. At all times a copy of the rules was in Mr Stretford's possession. It was and since 1995 had been, his duty to inform himself of their contents. I am not prepared to go further and conclude that the FA had to make Mr Stretford sit down and read it in order to bring Rule K fairly and reasonably to his attention."

So, the second element is FA Rule K and the status of SJHL and the Premier League as Participants under it on its face. And Rule K is at B1/1/161. So, under Rule K1.1:

"All disputes between all Participants must be arbitrated."

So:

"Any dispute or difference between any two or more Participants, 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."

And then at 2:

"The rules and regulations of an affiliated association or competition."

Which is the Premier League. And then Participants are defined at B1/1/25 and:

"A Participant means an Affiliated Association, Competition, Club, Club Official [and then open brackets] (which for the avoidance of doubt shall include a Director) ... "

And then some others.

And, therefore, the definition includes a competition which is the Premier League and the definition includes a club Director and the definition of Director is a little earlier in A2 in the Football Association Rules. It's the same as that in the Premier League Rules. Premier League Rules follow the FA Rules and the definition of Director is at B1/1/22 and that includes those words:

"Or a person having Control over the club."

And then just above that there is the definition of Control which is the same definition as we have already seen.

So, again, purposely, the wide definition of Director ensures that any entity that has the ability to exercise or acquire control over what a club does is caught by the FA Rules, including the obligation to arbitrate and that's precisely in order to make sure that the FIFA requirement that football disputes be arbitrated should be effectively applied to all entities that have a significant role in the running of a club and in order to prevent evasion.

So, it is incontrovertible on those definitions on the face of the rules, that as the 100 per cent owner of the Club, NUL controls the Club. So too, as the 100 per cent owner of NUL, SJHL controls NUL and so the Club. So too, as the 100 per cent owner of SJHL, MASH controls SJHL, NUL and the Club. And so too, as the 100 per cent owner of MASH, Mike Ashley controls MASH, SJHL, NUL and the Club.

So consequently, all of those are Directors of the Club on the definitions and so Participants that are, on the face of Rule K, required to arbitrate. And those rules are widely published and available and under Rule J1.3.2, all Participants, including therefore, SJHL, are deemed to have knowledge of them from that publication. And

I need to speed up, in view of the time that has been taken so far, so I will just give you the reference. It's B1/1/160.

Now, Mike Ashley has unequivocally recognised and accepted the position that he controls the Club and is a Director, capital D, in the defined sense and that he is bound by the FA Rules, including FA Rule K, and he did this because he confirmed that he was so bound in a declaration in form 4 that he provided to the Premier League each season. And that is at B3/1/84 and that one is worth looking at.

So B3/1/84 and he says:

"I, Michael Ashley, by signing and dating this declaration, I acknowledge and agree to be bound by the Premier League Rules. I further acknowledge and agree that as a Director, I am a "Participant", as that term is defined in the Football Association Rules and, as such, will be bound by them. I am a Director of St James Holdings which owns Newcastle United Limited which in turn, owns Newcastle United Football Club, the Club. I am the person having control over the Club."

MR JUSTICE MILES: Sorry, Mr Lewis, can you just give me that reference again.

MR LEWIS: It's B3/1/84.

MR JUSTICE MILES: Sorry, just give me a moment.

(Pause).

Yes.

MR LEWIS: As the person in control of SJHL, Mike Ashley's recognised knowledge of those circumstances is also the knowledge of SJHL and in any event, SJHL's own evidence and this is first Barnes at paragraph 22, A/4/105, I don't need to go to it, confirms SJHL's knowledge.

Now, what SJHL says is, well, it played no meaningful role and does not control the Club because only Mike Ashley, apparently through SJHL, as a mere intermediate

vehicle, controls the Club. And that's SJHL's skeleton at paragraphs 23(g) and 44. Again, not necessary to look it up. But that is to ignore a number of really important circumstances.

First, the question here of whether the defined term Control, capital C, is satisfied. That is a question of that definition. It's not of some other concept of control, with a small C, involving who actually makes decisions in practice or whether or not somebody is at an intermediate stage. The question is whether the definition is satisfied.

Second, the terms of the FA Rule A2 definition refer to the ability to exercise or acquire control through ownership of shares which SJHL plainly has and, third, it ignores the group structure on which SJHL, in all other contexts, places so much reliance. SJHL tries to have its cake and eat it too.

Fourth, it ignores that each company in a 100 per cent chain controls the one below in all sensible meanings of the words and, fifth, it ignores that SJHL is the company that brings this CAT claim alleging loss.

So, there can be no doubt, in my submission, that SJHL controls the Club and is a Director, on the face of the FA Rules, within the definitions they contain.

Now, I should add here that it's a continuing requirement under PL Rule F2 that all Directors provide form 4s to the Premier League, amongst other things recognising and accepting the position that they control a club and are bound by the FA Rules in exactly the same way as Mike Ashley did. Now, if SJHL had fulfilled that obligation, then even on its own case, it would have recognised and accepted that it was bound by the FA Rules. Just as Mr Ashley accepts that he recognised and accepted that he was bound. And so, under those circumstances, if that obligation had been fulfilled, then SJHL would have been bound to arbitrate under Rule K, even on its own case.

Contrary to what SJHL suggests, it's not for the Premier League to request form 4s or to complain about a failure to lodge them. The obligation is to lodge the form 4 without request. The reason, according to skeleton paragraph 23(g), that SJHL did not do this is because it supposedly considered that it did not have Control as defined but rather, it played no meaningful role and was just an intermediate vehicle for Mike Ashley.

Since SJHL does have Control as defined, there is a breach of PL Rule F2. SJHL refused to correct that breach when the Premier League asked it to lodge a form 4 after these CAT proceedings were commenced, when the breach first came to the attention of the Premier League and, therefore, on any basis, SJHL relies on its own wrong as a necessary prerequisite of its case that it's not bound by FA Rules, including FA Rule K.

The third element: SJHL and the Premier League have agreed with the FA to be bound by the FA Rules. So, the third element is that there is a vertical agreement between each of the Premier League and the SJHL, with the FA, to be bound by the rules.

Now, it's not in issue that the Premier League has so agreed with the FA but SJHL says: well, it doesn't matter what it says on the face of Rule A2 and on the face of Rule K because we have never actually, we, SJHL, have never agreed with the FA to be bound by the FA Rules and it doesn't matter what the FA says in its rules, if we have not agreed to be bound by them. And that's in contrast to what the Club says. The Club accepts it's bound by the FA Rules and Mike Ashley, who 100 per cent owns SJHL, accepts that he is bound by the FA Rules.

Now, in our submission, SJHL is wrong that it has not agreed with the FA to be bound by the FA Rules. In the particular circumstances here, and it's all those facts that have to be taken into account, we say that SJHL has indeed agreed with the FA

to abide by the FA Rules as they apply to the Club's Directors, by its conduct and/or through the agency of the Club.

So as to conduct, first, we know from the passage in Stretford that there can be accession to the FA Rules by conduct and there it was the participation by the football agent in activity recognised under the FA Rules.

Second, as I have explained, there can be no doubt of SJHL's knowledge of the obligations on Directors and Participants under the FA Rules.

Third, it's clear that the FA expects any such Directors and Participants and their clubs only to have involvement in English football on the basis that they comply with their obligations as Directors and as Participants under the FA Rules. That expectation is plainly there because the FA Rules set it out in terms.

So it's equally clear that a club wishing to participate in English football comes to the FA on the footing that not only will it comply with its obligations as a club under the FA Rules but so too will its Directors.

Fifth, the Directors themselves wish to participate, wish their club to participate in English football and by virtue of the control over the club, it actually causes the club to do so and to present to the FA on that basis. By doing that, a Director participates in English football as a Director as soon as its club participates as a club.

So, sixth, that participation can only be, in our submission, on the basis of implicit agreement by the Director, here SJHL, by conduct, to be bound by the FA Rules insofar as they apply to Directors, including therefore, the obligation to arbitrate.

At the least, SJHL has, by participating and causing the Club to participate, implicitly made the representation that it's bound by the FA Rules through absence and assertion to the contrary in the circumstances which has resulted in the FA allowing SJHL and the Club to participate. It can be tested in this way:

The FA would not allow participation of a club if its Director expressly asserted that it

was not prepared to abide by the FA Rules governing Directors. It's not necessary to have evidence from the FA to have effect. The rules themselves, in the circumstances, are clear.

For the same reasons, then secondly, the Club here also acts as agent for the Director, SJHL, to agree on SJHL's behalf to be bound by the FA Rules insofar as they apply to Directors, including the obligation to arbitrate.

So, first, as a member of the FA, the Club agrees under FA Rule A1.

MR JUSTICE MILES: Sorry, just before we get there, Mr Lewis, just on your first analysis before we get to agency, you said a number of times that the SJHL causes the Club to enter the contract. What conduct are you relying on in that regard; what is the conduct by which it has caused the Club to do that?

MR LEWIS: It is the owner and controller of the Club and, therefore, in circumstances where it, as a Director, has obligations under the FA Rules, it has led its Club to participate on the footing of the FA Rules. It hasn't said to the Club: you cannot participate in football if I am going to be bound as a Director. So the Club participates on the basis of the rules which require its Directors to be bound. The controller of the Club has not at any point said to the Club: you can't do that because I don't want to be a Director or: I don't want to accept those obligations.

The route through the agency argument is that the Club agrees under FA Rule A1 to be bound by the rules as a member. In doing that, it comes to the FA as a club that has Directors that have their own obligations under the FA Rules which the Club agrees to be bound by. Again, the Directors want the Club to be able to participate in English football but the Club can only do so on the basis that it and its Directors comply with the FA Rules.

So, it follows that the Club has the actual implied or ostensible authority of the Director to contract on their behalf to comply with the FA Rules, insofar as they apply

to Directors.

Looking at it from the point of view of the FA, the FA expects and says: all Participants to be bound, all Participants know about this. Participants include Directors. That's what the FA says in Rule J and this Club comes along and this Club can only participate on the basis that its Directors are bound. Its Directors are, in this instance, 100 per cent controller of the Club. It follows, therefore, that the Club ostensibly has the authority of those Directors to bind them as the FA Rules require them to be bound.

Now, SJHL's case on agency and, again, just for the note, it's SJHL skeleton, paragraphs 41 and 45, is that its witnesses, Mandy Rice-Davies to a man, assert that SJHL did not confer actual express authority on the Club to accede to the FA Rules on its behalf and that there is no evidence that either thought it did so.

But, as we know from the quote from Garnac Grain which is in SJHL's skeleton, paragraph 40, an agency can arise by implication and it does not matter that the principal or agent either did not realise it or purports to disavow it. Here, the authority, actual implied or ostensible, arises from the circumstances that I have set out.

It's not necessary that FA Rule A1, which is the membership rule, should state that it's entered into on behalf of anyone else, when the rules as a whole so clearly impose obligations on Directors and Rule J1.3.2 provides that they're bound.

Now, SJHL appears to suggest, this is skeleton paragraph 46, that even if it acceded to the rest of the FA Rules, it did not assert to the obligation to arbitrate under Rule K. That makes no sense. It's contrary to what was said in Stretford. The accession is plainly to the obligations on Directors, of which the obligation to arbitrate is a fundamental one.

Now, in answer to this, in purported answer to this, SJHL sets up a series of

strawmen, asserting that the Premier League's case is other than it is and then seeking to knock down those strawmen. So, the Premier League does not say, as SJHL says in skeleton 29 to 30, that all group companies are bound to arbitrate if one group company is. Rather, what we are saying is first, the particular factual circumstances here mean that one group company, SJHL, has agreed by its conduct to be bound by the FA Rules, while another, the Club, has expressly agreed to be bound in A1, or, second, the particular factual circumstances here mean that one group company, the Club, which has expressly agreed to be bound by the FA Rules, as a member of it, has done so not only on its own behalf but also on behalf of another group company, SJHL, that falls into a class that has obligations under the FA Rules. Neither proposition is in any way to ignore the separate legal personalities involved here. On the contrary, both points affirm them. And so for the same reason, the Premier League does not seek to pierce the corporate veil, as SJHL suggests, and that's skeleton 31. Again, the separate legal personalities are not ignored.

SJHL then says, paragraph 32 of its skeleton, that it conferred no authority on the Club or its Directors to bind SJHL to comply with the PL Rules, when they submitted a form 4 to the Premier League. But that's a different point. That's nothing to do with the point that I am putting now which is that as a member of the FA, the Club agrees with the FA to be bound by the FA Rules, not only on its own behalf but also on behalf of its Directors.

And that case is not based in any sense on the form 4 or the PL Rules. And as to the authority, again, we don't need to establish actual express authority, we need only to establish actual implied authority or ostensible authority.

Now, I will come on in a moment to address how a direct agreement also arises between the Premier League and SJHL. That's a different point.

So then skeleton 36 to 39 of SJHL's submissions, in our submission, significantly misrepresent the Premier League's case, on the significance of J1.3.2, on the knowledge of the rules acquired from the participation of the Club, on the absence of any assertion in the past by SJHL that it is not bound by the FA Rules. So, the Premier League does not and plainly does not suggest that these matters individually give rise to a contract between SJHL and the FA.

What these matters do constitute is part of the factual matrix against which the CAT assesses the Premier League's case, that SJHL acceded to the FA Rules by conduct and that the Club acted as SJHL's agent, as well as on its own behalf.

So SJHL's case here has the very surprising consequence that it can supposedly slip through the net of entities that are bound by the FA Rules, notwithstanding that SJHL accepts that it's 100 per cent owned Club is bound by the FA Rules.

SJHL accepts that Mike Ashley, who 100 per cent owns SJHL, is bound by the FA Rules, but what we know, what we can see, is that SJHL plainly is a Director with obligations under the FA Rules because of the structure of the chain and it plays a separate and independent role in the chain of company ownership precisely to reflect the legal personalities involved. SJHL itself is to be taken as knowing under J1.3.2 and because of the knowledge of its controller Mike Ashley, of the obligations on Directors. So, it would be quite extraordinary in those circumstances, if SJHL could slip through the net. That would be to allow a corporate structure to be adopted, of various intermediate vehicles avowedly playing no role, that defeats the clear contemplation of the FA Rules, accepted to be binding on the entities either side of the vehicle in the 100 per cent ownership chain. In other words, the Club and ultimately, Mike Ashley.

Now, SJHL's only answer to that surprising consequence is that the Club and the ultimate controller would still be bound and that should be enough for the rules to be

effective. But it plainly is not enough, as is made clear by the very fact that we are in the position that we are in, that here, SJHL resists the proposition that it's bound to arbitrate and we have the CAT claim being brought, in circumstances which conflict with the rules of football that require such disputes to be arbitrated.

Now, the reason that SJHL does not slip through the net is precisely because, in the circumstances here, the inevitable conclusion must be that SJHL has, by its conduct, agreed to be bound by the FA Rules or the Club has agreed to be bound by the FA Rules as a member of it, not only on its own behalf but also as agent for SJHL.

I will come on in a moment to why the parallel agreements of each of the Premier League and SJHL, with the FA, to abide by the FA Rules, bind each other horizontally to arbitrate against one another. But there is a prior point which I am going to turn to first and that's the fourth element and that is that SJHL has also directly agreed with the PL to be bound by the FA Rules. This is because the same conduct of SJHL and the same agency of the Club on behalf of SJHL that give rise to SJHL's agreement with the FA to abide by the FA Rules, also gives rise to SJHL's agreement with the Premier League to abide by the FA Rules.

Now, if there is a direct agreement on this basis between SJHL and the Premier League to comply with the FA Rules, then one does not come on to why the parallel agreements of each of the Premier League and SJHL with the FA to abide by the FA Rules, horizontally bind them one with the other. And there is a direct agreement between the Premier League and SJHL because, first, the Club's agreement with the Premier League to abide by the FA Rules contained in Premier League Rule B.14 is made on its own behalf and on behalf of the Directors who have obligations under the FA Rules.

Now, that ought to be clear from the PL definition of Official at PL Rule A.1.141 and I should show you that. It's B1/1/28. We have there the definition of Official:

"Official means any director, secretary, servant or representative of a Club, excluding any player, intermediary or auditor."

Now, SJHL correctly points out that that definition only includes director with a small D which is not the same as the defined term "Director". Now, it's not clear why it is a small D. The Premier League Rules in this context follow the FA Rules. FA Rule A2 definition of Official, exactly the same, except it has a big D on Director and the factual matrix here certainly contemplates, big D, Directors being bound to the Premier League to comply with the FA Rules, but it does not matter either way, since it's not that clause that the Premier League has to rely on to establish the agency. Even if there were some separate meaning here intended, the presence of a small D cannot refute the arising of an agency on behalf of a, big D, Director on the basis of the other factual circumstances that I have already taken the CAT to. And those circumstances are SJHL's conduct in causing the Club that it controls to participate not only in English football but also in the Premier League's competition and the implied actual and ostensible authority of SJHL, in these circumstances, for the Club to bind SJHL to the PL Rules and, through them, to the FA Rules.

The second point SJHL relies on is its own failure to lodge its own form 4, which, if it had been lodged, as it was obliged to be lodged under F.2, would have meant SJHL recognised and accepted to the Premier League that it was bound by the FA Rules, on the basis I have just set out.

So, if SJHL had done what it had to do, it would have filed a form 4 exactly the same as Mike Ashley's and that would have said, as Mike Ashley's did: I control the Club and I am bound by it, including the FA Rules.

Now, we don't need to establish this direct agreement between SJHL and the Premier League because I will now come on to why the separate agreements of each of SJHL and the Premier League with the FA to abide by the FA Rules,

horizontally bind each other to arbitrate against one another.

Now, FA Rule K1 expressly imposes a multilateral obligation, in that it requires arbitration of disputes not only with the FA but also between any two or more Participants. So, on any basis, the starting point is each party has agreed, albeit with the FA, that any dispute that it has with another Participant, it will arbitrate.

So, assuming those vertical contracts which is what I have been dealing with just a moment ago, if they exist, the first question is satisfied. There is, in other words, an agreement by each of the parties to arbitrate with other Participants.

But the second question, then, is whether there is anything in the particular circumstances of this case that contradicts the horizontal contract arising between two Participants, notwithstanding that they entered into these two vertical contracts. Is there anything which suggests that there is no horizontal agreement.

Now, this was dealt with in Mercato, which followed on from a line of authorities which included The Satanita and what they provide in the context of sports rules, is that the existence of the two vertical agreements may impose a horizontal obligation as between Participants.

Mercato is at D5/3/41. So D5/3/41, and the test is analysed at paragraphs 24 and onwards at page 48. So, the approach he is to take is at paragraph 26 and at the top of D5/3/49, what he holds is as follows:

"An implied contract between two persons who have not engaged directly with each other [a horizontal contract], to adopt the language used by His Honour Judge Pelling in Bony, can arise where each of these persons has a separate contract, a vertical contract, with the same third party, committing them to abide by particular rules laid down by or stipulated for by that third party. Such a vertical contract can arise where a person's actions amount to an accession to the rules laid down by the relevant third party. Whether a series of vertical contracts

gives rise to a horizontal contract or a series of such contracts between particular persons, will depend on the facts and circumstances of each alleged party's entry into the vertical contract in question and the nature of their dealings with the other parties. Careful and fact-sensitive analysis of the particular circumstances will be required. Engagement in activities related to a particular sport does not, without more, and inevitably, amount to an agreement to be bound by the rules of the governing body of that sport, let alone to his horizontal contracts with all others engaged in that sport. However, accession to such rules can, in appropriate circumstances, give rise to such horizontal contracts with other participants in the sport."

So, the first question, again, is do the vertical contracts exist? And I have already explained why they do. The second is whether there is anything in the particular circumstances, the facts of the case, that contradicts the proposition that a horizontal contract arises.

So, His Honour Judge Eyre then analysed over the next few paragraphs, a number of authorities and then at 42, paragraph 42, at the bottom of D5/3/55, he considered what such circumstances might be and he said at 42:

"In many cases the court will readily conclude that there were both vertical contracts with the relevant governing body and horizontal contracts with other participants. Thus, those engaging in a sporting event organised under the auspices of a particular governing body are likely to be held to have agreed with those organising the event to be bound by the rules of that body and to have entered horizontal contracts to the same effect with the other participants. However, such a conclusion will be less readily reached, the further removed the activity in question is from the actual playing of the sport concerned."

He then concludes that although, in the case before him, the circumstances were far

removed from the playing of football and related to business dealings, a horizontal contract nevertheless did arise and then he stayed the claim in favour of arbitration.

Now, SJHL's contentions -- it's at, for the note, paragraphs 53 to 54 of their skeleton -- they contend, wrongly, that the dispute here is too far removed from the playing of the sport to give rise to a horizontal contract, but in fact here, the dispute is fundamentally linked to the playing of the sport and on any basis, more so than the business dispute held sufficient in Mercato and it is related to the playing of the sport because it relates to the terms on which a club can participate at all. So what's attacked in both the arbitration and the CAT claim is the lawfulness of the Premier League's decision under Premier League Rule A.1.60, that the KSA would be a Director and so falls to be assessed against the PL Rules section F OADT. And that is plainly within FA Rule K1.2 because it's a dispute arising out of or in connection with the rules and regulations of the competition, the Premier League, and it is closely linked to the playing of the sport because what A.1.60 does is define which entities are Directors and, therefore, have all the obligations of Directors under the Premier League Rules, including the section F OADT. And the section F OADT sets minimum participation standards for those that control clubs that are necessary for and proportionate to the proper operation of the Football League competition. And if not complied with, in other words, if a Director is in place who does not satisfy the OADT, then the club will be suspended.

So, the relevant dispute relates to the satisfaction of standards that are necessary for the sport to be played at all in the form of a league competition by clubs and the Club. And that's a very different animal from distinct commercial agreements that are separate from the actual organisation of the competition and the playing of the sport. It would be most surprising if vertical contracts agreeing a horizontal obligation here were not taken as, in fact, imposing that horizontal obligation.

So I come to the sixth and last element of this stay case and that is that FA Rule K extends to a competition dispute, such as the CAT claim.

Now, it's not actually clear whether that is disputed. It's dealt with in SJHL's skeleton at paragraphs 9, 33 and 54, but it's not quite clear and Mr Barnes purports to give supposed evidence that the dispute -- for the note, A/4/106 -- that the dispute here relates to infringement of the competition legislation as completely outside the scope of Rule K. That's not evidence, it's submission and Mr Barnes is entirely unqualified to make it but it is, in any event, incorrect. The starting point is, again, FA Rule K1.1.2 which provide that disputes arising out of or in connection with the rules of the Premier League are covered. As I have explained, the claim arises out of and is in connection with those rules. The fact that a claim is then shoehorned into the legal furniture of the competition law claim, does not mean that it ceases to be a dispute arising out of or in connection with the rules of the Premier League.

That's particularly the case here, where the supposed competition law claim is in fact a complaint about a single application of a Premier League rule, the validity of which is not challenged. The challenge is on the basis that that single application was incorrect, the decision was wrong, and that there were errors of process. So it's not, here, a matter of public policy that should not be dealt with in arbitration but should be dealt with publicly, as SJHL says in its skeleton, paragraph 33.

First of all, there is no discretion in the section 9 stay. If it is covered by the arbitration clause then the CAT claim must be stayed. But, secondly, as I will come on to ultimately in reason 3, this is very far from a proper competition law claim appropriate for a specialist CAT.

Now, what we set out in paragraph 32 of the skeleton is the Fiona Trust case, paragraph 13 of that case. It's at D3/4/74 at 78. That's authority that arbitration clauses should be construed as covering all disputes arising from the relationship.

And then at paragraph 40 of our skeleton, the various cases that demonstrate that competition law claims are arbitrable, including the clear finding to that effect in ET Plus SA, paragraph 51 of that case, and that case is at D3/1/4 at 22. It's not necessary to go to the authorities unless and until they are submitted to be incorrect. They are plainly applicable.

So, I then turn to reason 2 and reason 2 is that the CAT claim is moot and/or premature and abusive. Now, this, again, will involve me in making submissions that will touch on the arbitration. And I think for the same reasons as when we came to the facts section, that is a point at which we need, on the same rationale, to go into a private hearing.

MR JUSTICE MILES: Having heard your submissions in relation to the private bit before, I don't think we're persuaded at the moment that it's really going to be necessary to do that. The allegations which are made against your client in these proceedings which, as you summarised before in the public part of your submissions, are closely -- you say closely analogous to those in the arbitration, are not private. Those are part of the allegations in this case, so the allegations about various procedural breaches, steps that were taken, the idea that there is undue influence by various third parties, that's all open, because it's an allegation which is made in these proceedings.

I am bound to say that when balancing the question of the imperative of proceedings to be heard in public, which is clearly the general rule, and the need to protect the confidentiality of the arbitration proceedings, it seems to us that it's likely that you can make your submissions in such a way that you don't stray further into the confidentiality of those proceedings and so I would, again, urge that these parts of your submissions be made in public and that it be streamed and that you must just tailor your submissions appropriately.

So it should be possible, on the basis of what you have told us so far, Mr Lewis, for that to take place.

MR LEWIS: So be it.

So, reason 2, the CAT claim is moot and/or premature and/or abusive and in relation to this reason 2, there are five elements.

So, the first element is the 100 per cent ownership chain. Mike Ashley 100 per cent owns and controls SJHL. SJHL 100 per cent owns and controls the Club. A number of consequences. Both SJHL and the Club are controlled by the same person ultimately, Mike Ashley. Both SJHL and the Club have the same interest in the Premier League being found to have acted unlawfully. Because it owns the Club, SJHL can decide and is responsible for what the Club does and because Mike Ashley controls them both, the person who controls what the Club does can also decide what SJHL does.

The second element is the coincidence of the subject matter in issues and, indeed, of the underlying substantive illegality. And I have already taken the Tribunal, by reference to the pleadings, to the coincidence of the subject matter and the issues in the two claims. One only needs to look, in my submission, at what's alleged in the arbitration points of claim and what's alleged in the CAT claim form, to see that they both complain about exactly the same conduct and exactly the same vice. But it goes further, in my submission, than the conduct and the vice.

It also extends here to the substantive underlying illegality. So, certainly a distinction is to be drawn between the conduct or vice complained of and the formal legal furniture with which it is surrounded. And the same conduct or vice may be characterised as giving rise to a number of different formal legal claims, most notably contractual and tortious and here including, in this instance, the Bradley quasi-public law constraints on a public body, the Bradley v The Jockey Club case which

establishes those quasi-public law constraints on which part of the claim in the arbitration is mounted.

But the fact that a party dresses up its claim in a different way does not alter what the substantive underlying complaint of illegality is. So, for example, here, it is only the case that making an incorrect decision is A, a breach of the Premier League Rules and so of contract and so of the Bradley constraints and, B, an abuse or an unjustified decision of an association for the purposes of competition law, if the decision is indeed incorrect on the proper interpretation of the rules and on their application to the facts. So, both for the Bradley constraints and for competition law, the illegality is actually making an incorrect decision on the proper interpretation of the rules and their application to the facts.

Second, it's only the case that taking into account an irrelevant consideration or an improper purpose is, A, a breach of the Bradley quasi-public law constraints and, B, an abuse or an unjustified decision of an association for competition law purposes, if the consideration or purpose exists, is irrelevant or improper, is taken into account and affects the decision. That, again, is the substantive illegality. When one is talking about the Bradley position and one is talking about the competition law position, those are only the consequences of the same substantive illegality.

Characterising the conduct as an abuse of dominance or an unjustified decision of an association rather than as a breach of the other more immediate legal obligations makes no difference to the ultimate legal outcome. The substantive underlying illegality remains the incorrect decision and taking into account an irrelevant consideration or having an improper purpose.

So all that characterising the consequences of the conduct in terms of competition law does is to set up a series of additional hurdles that the claimant, SJHL, must overcome, including market, establishing dominance, effect on competition and

trade, appreciability and, indeed, justification.

So all of those additional elements that competition law brings are just that: additional. They do not determine the matter in themselves. The matter itself is determined on the basis of the underlying illegality which exists in both two claims.

Now, each of all of those additional hurdles look far from easy in this case when, as I have submitted, all there is here is a single application of a Premier League rule, the rule is not challenged itself. What is said is: you got the decision wrong and there were procedural defects; precisely what it is that is being decided in the arbitration.

Now, nor do these different legal forms or characterisations mean that there are any different claimants here. SJHL, just as much or as little as the Club, could rely on the Bradley quasi-public law constraints. On the Bradley case, those constraints arise irrespective of the existence of any contract and, for the note, that's paragraphs 34 and 40 in Bradley, and the Bradley case is at D2/6, and those references are at 124 and 127.

The club, secondly, just as much or as little as SJHL could rely on competition law. It could have relied on competition law in its arbitration. It did not choose to. It did not choose to because it was superfluous. Now, there might of course be a competition law case where infringing conduct was not unlawful on any other basis. That is not this case, not the way it's put and it's not the way it's capable of being put.

Each of the points, in our submission, that SJHL raises as to why the subject matter and issues are different is illusory. First, SJHL says: well, we're a different party to the Club. But that doesn't in any way preclude the Tribunal from assessing the prematurity of these proceedings in circumstances where a very closely connected and, indeed, controlled party with similar interests is pursuing exactly the same dispute against the same defendant.

Second, SJHL says it pursues a different cause of action because it complains about an effect on competition. But, as I have said, any unlawful distortion of competition can only ever be subsidiary to and only ever arise in the event of, on the pleadings and in the circumstances, the prior establishment of an incorrect decision and/or an improper purpose. That is exactly the way that it is put by SJHL in that paragraph 6 of its skeleton to which I took the CAT previously.

The only conduct that SJHL alleges amounts to a distortion of competition and an abuse is that the Premier League was influenced by lobbying by beIN and other clubs, with the result that it misapplied its rules and made an incorrect decision that the KSA would be Director. Now, if that conduct did not in fact occur -- and the arbitration will decide that -- then one never gets to the competition law furniture.

The third point SJHL takes is that the interests of the Club and SJHL are different because SJHL claims a different loss to the Club, but both SJHL and the Club want the transaction to proceed and seek that relief. They seek injunctions. They want the thing to go ahead. Both want the buyer to be the KSA rather than a less rich buyer. Only a very rich buyer pays both a high price and puts in substantial investment.

Both SJHL and the Club have the same ultimate beneficial owner, Mike Ashley. The supposed potential future divergence of interest or difference in loss between SJHL and the Club is accordingly entirely insufficient to justify the commencement now and the pursuit now of the two simultaneous claims.

Now, the third element is when the Arbitral Tribunal will decide the Club's claim. SJHL says in its skeleton at paragraphs 10 and 62 that it will not be until the middle of 2022. That is incorrect. The arbitration will start on 3 January and it will run for a little over a week. The Arbitral Tribunal intended at the end of July to reach a quick operative decision in time for transfers to be secured in the summer window and

there is nothing to suggest that it does not remain its intention to reach a rapid decision in January. It certainly will do so if asked to do so and, as we know, the winter window ends at the end of January, 31 January.

The fourth element, then, is the effect of the Arbitral Tribunal's award on the SJHL claim. Whatever the arbitration decides, in our submission, it will also dispose of this CAT claim. So, if the arbitration decides that the KSA would not be a Director then the transaction can and will go ahead with no question of the OADT applying to the KSA. And so there is no need, in those circumstances, for the injunctive relief sought from the CAT, prayer 2, and there is no damage to found the CAT claim or to recover under a claim form, prayer 1.

If, on the other hand, the arbitration decides that the KSA would be a Director, then each of the complaints in the CAT claim form must fail. The Premier League has not made an incorrect decision and, if its decision is correct, then it's not acted for an improper purpose or in an unfair or unobjective or discriminatory way. Or, in any event, these process complaints are irrelevant. They don't advance matters because the decision would have been the same absent what is complained of.

Now, it's again clear from that paragraph 6 of the SJHL skeleton that SJHL's entire case is that in its own words, lobbying by beIN and other clubs improperly influenced FAPL's decision-making, causing it to misapply its rules and incorrectly find that the KSA would be a Director.

So, the lobbying is only relevant to the extent it causes this supposedly incorrect decision. If the rules are correctly applied, and the Arbitral Tribunal so finds, then there is no sustainable CAT claim on SJHL's own summary of it.

But, in any event, the arbitration will also have decided, because of that decision back in April, the arbitration will also have decided the process complaints and ultimately, as we have seen, all of those process complaints are the same in the

arbitration as they are in the CAT claim, and the arbitration will have decided them one way or the other.

So SJHL suggests -- I am just noting the time. I don't know whether you want me to continue, Sir, on the basis of where I am, or whether you want to take a break now. I'm perfectly happy to carry on. Obviously we have the transcriber to think of.

MR JUSTICE MILES: If you continue now, how much more time will you be on this point?

(Pause).

Sorry, you're now muted.

MR LEWIS: Pardon me --

MR JUSTICE MILES: It's contagious.

MR LEWIS: -- this second reason does form most of what I have to say. The third reason is rather shorter but I think another 20 minutes. I could certainly proceed and finish this first point. I will try to speed up.

MR JUSTICE MILES: Well, I think what we will do is rise now and take a break and we will -- it is a convenient time to do so -- so we will resume at 2 o'clock. Thank you.

MR LEWIS: I'm grateful.

(1.00 pm)

(The luncheon adjournment)

(2.00 pm)

(Proceedings delayed)

(2.07 pm)

MR JUSTICE MILES: Thank you. Yes, Mr Lewis.

I understand that Mr De Marco may be not on the call at the moment, but it seems to me we should proceed with the submissions because a bit of time has already been

lost, so let's carry on.

MR LEWIS: Absolutely, and in relation to that, I had discussed with my learned friend before and my aim was to finish before lunch and, obviously, I have been slightly slowed down. I have about half an hour to go and I will try and speed things up as quickly as I can and I thought it might be prudent just to raise it because it would obviously be desirable to get everything decided today and so I was just hoping that we might have the indulgence and the Tribunal can sit, possibly, a little late if my learned friend requires it.

I'm grateful, thank you very much.

So before lunch, I explained why the arbitration award will either way determine the CAT claim because it will decide the correctness of the decision and it will decide the procedural complaints which are the only things which are relied upon to set up the competition law claim. So I turn, then, to what SJHL says about why the arbitration award will not be determinative, according to it and it suggests, first of all, and this is skeleton A/10 at 56 and 59, that it would not be bound by the decision of the arbitration or that it will not impact SJHL's position, as it is not a party to the arbitration.

But both the Premier League and the Club are bound by it. It would be an abuse of process for the 100 per cent owner of the Club, SJHL, to seek to resile from or to reopen matters that have already been decided against the Club or, indeed, in favour of the Club and that the Club and the Premier League are bound by.

So, the concept of abuse has always been or at least since 1981, with the Hunter v Chief Constable case, has always precluded overreliance on or over-technical reliance on the absence of res judicata, such as that now advanced by SJHL. And we say that's the Deutsche Bahn CAT case which is at D4/4/177 and the Ab Volvo Court of Appeal case at D5/6/159 and we deal with this in paragraph 46 of our

skeleton. I don't need to go to those at this point because I don't think the test is in issue.

So, where the parties are different, the second proceedings are an abuse of process, where, taking everything in the round, it would be manifestly unfair to a party to the earlier proceedings to have the same issues relitigated or to permit such relitigation would bring the administration of justice into disrepute and in our submission, both those propositions are satisfied here.

In any event, quite apart from the abuse of process, it is illusory to suggest that the CAT might ignore the arbitral award to reach a different view on whether the decision was correct or on the process complaints was unlawful on that basis, to the expert and experienced sports law Arbitral Tribunal made up of Michael Beloff, Lord Neuberger and Lord Dyson. Now, SJHL accepts that some of the potential outcomes in the arbitration may have an impact on the present proceedings but then states that it's equally possible that it will have no impact at all and that it will certainly not necessarily be dispositive of the CAT claim, they say.

What they don't do, what SJHL don't do is to advance any credible outcome of the arbitration that would in fact have no impact or would in fact not be dispositive. And the reality is that there is no such credible outcome. So SJHL points to the fact that the Arbitral Tribunal has refused the Club's request that the arbitrators bind themselves in advance to what standard of review will apply but as I have already submitted, that doesn't alter in any way the Arbitral Tribunal's decision and expressly set out that it will deal with all liability issues which expressly included whether the decision was correct, as well as the process complaints.

So SJHL says the Tribunal might decide the decision was incorrect but not determine improper influence and suggest that that would leave matters at large for the CAT. But that's, first of all, just not true. Improper influence cannot be left

undetermined because the Arbitral Tribunal has said that it will determine all the liability issues.

If the decision were held incorrect, in any event, the transaction could proceed, rendering the CAT claim unfounded and pointless. SJHL says that the Tribunal might decide that there was improper influence but not determine whether the decision was correct. Again, leaving matters for the CAT but, again, that's not true because, again, all issues, all liability issues are going to be determined and even if the decision were overturned on the basis posited by SJHL, the transaction could, in any event, proceed, rendering the CAT claim unfounded and pointless, if the decision has been overturned.

Lastly, SJHL alleges that the transaction might not go ahead at all or that it might be at a different price. Well, I have already explained why it's not the case that the transaction is lost but rather, it awaits the outcome of the arbitral award. The whole point of the arbitration and the CAT claim in the form they take and the relief sought, is that the transaction is very much still on the table. SJHL does not suggest the contrary, it does not say it will not happen. As to the allegation that there might be a different price, it's again marked that the evidence is not that there will be a different price.

If the discussions between SJHL and the Consortium are now that there will be a lower price, then that evidence would be given but it simply is not given and it's not given because it's not the case. So SJHL relies on the mere possibility that it might not go ahead, the transaction might not go ahead, to found its entire justification for bringing these CAT proceedings now. But the one thing that we know, what we know is that the single impediment to the deal is that the KSA does not want to be assessed against the OADT and the resolution, therefore, of the director issue, will remove that impediment if it goes the way that the Club says that it should.

But in any event, all of this is by the by, because the arbitration will bring resolution of the director issue much more rapidly than the CAT claim. The CAT claim adds nothing to the resolution of the issue which will then lead to the answer to the question, does the deal go ahead, does the deal not go ahead, does the deal go ahead at the same price, does the deal go ahead at a different price? That will be brought on by the arbitration claim being decided in January. The CAT claim does nothing to accelerate that or to mean that it will be determined more rapidly.

So the fifth element here is abuse of process. There are two aspects to this. There is the abuse of process in the sense that I have just dealt with, based on the duplicative nature of the CAT claim and on the basis of the Volvo case. The second aspect is that the opening up of a second simultaneous front in order to bring pressure to bear is abusive and the Premier League certainly maintains this point. It's well-founded and the Premier League's case has not moved on, contrary to what SJHL suggests, simply by virtue of the fact that there has been an adjournment.

The adjournment to 3 January does not alter the validity of the point. SJHL and the Club continue to run simultaneous proceedings unnecessarily and the Premier League's position is that it's abusive, here, for the 100 per cent owner of the claimant in the arbitration, both to start this CAT claim at the same time as the arbitration and then to seek to advance it at the same time as the arbitration, when that arbitration will imminently decide the matter in a way that can only be designed to impose improper pressure on the Premier League by opening up a second simultaneous and duplicative front.

That second front places strain on the availability of the Premier League's legal team which is already fully occupied fighting the arbitration. The adjournment does not alter this. That second front appears to be perceived, mistakenly, as advantageous in forcing the Premier League to alter its position as a result of sheer weight and cost

of litigation and that second front appears to be calculated to afford Mike Ashley a second bite at the cherry, not only in relation to the substance but also in relation to all of the interlocutory matters, such as disclosure, confidentiality, publication that we have already been having to deal with in the context of the arbitration.

Now, the Tribunal does not need to decide or to conclude that SJHL has intended to abuse the process in this way, nor to establish precisely the aims of SJHL in these proceedings, but the Premier League submits that a clear inference can be drawn from the timing, nature and contours of the claim that's brought here in the CAT, that it is brought and pursued now, in order to bring pressure to bear and not because it is necessary to separately decide the issues in the CAT claim. No CAT claim was, for example, brought by SJHL when the alleged loss is said to have occurred, which was in September of last year, a year ago, and these proceedings were commenced and continued only at a time when they caused disruption to the progress of the arbitration and they are incapable of proper determination before the resolution of the arbitration.

Now, that again, we say, is manifestly unfair and brings the administration of justice into disrepute. On the other side of the coin, what conceivable reason is there for why the 100 per cent owner of the Club, SJHL, should be allowed to open up and pursue, now, a second simultaneous and duplicative front? What conceivable harm would SJHL suffer in having to wait until its 100 per cent owned Club had completed its arbitration and only then bringing CAT proceedings, if there were then, genuinely, anything properly still in issue and fit for the CAT? And the answer, of course, is there is no harm. There is no harm that properly warrants it being prevented by the CAT by allowing these proceedings to continue. The only harm is the loss of the illegitimate tactical advantage that these abusive proceedings afford.

I turn, then, to reason 3. I turn to reason 3. There is no standing, as no loss has yet

been suffered and in any event, this is not a proper competition law claim appropriate for the specialist CAT. So, first of all, no standing. Competition Act 1998, section 47A requires that there has been a loss. SJHL relies on a purely speculative and hypothetical loss which has not yet occurred, namely loss of profit between the value of the bid and the current market value of the Club, as and when any sale of the Club is completed and loss of an opportunity to receive the premium price offered by the Consortium.

Now, against 47A(2), that is not a loss. 47A(2) requires the person to have suffered loss or damage. The language clearly denotes something that has already occurred. That is not the case here. As I said, there is nothing to show the transaction will not go ahead, if the KSA does not fall to be assessed against the OADT and the high point of SJHL's evidence is that it might not go ahead but it's mere conjecture.

Nor is there any evidence that the price will in fact be any different to what was proposed in the transaction. Again, mere conjecture. Even if the price were lower, SJHL would have to set-off any and all benefits that it's received in the interim period, including any benefits arising under the terms of the original transaction itself. So far from having suffered any loss at the moment, the position at the moment is that SJHL still owns the Club and still has the prospect of completing the deal, so it does not, on that footing alone, have standing to bring its claim and it may well never have standing because it may well never suffer any loss at all.

Now, that, therefore, disposes of the claim. You have to be able to show that the loss has occurred. They have shot their bolt too quickly. They should not have done so before the loss had occurred.

MR JUSTICE MILES: Mr Lewis, if I have something that I want to sell and I have entered a contract to sell it and some tort is committed against me which prevents me from selling it, even if I ultimately sell it, haven't I suffered a loss by not being

able to sell it, when I would have been able to sell it? I am out of my money, aren't I?

MR LEWIS: But that's not this case. This case is a situation where we're halfway through a regulatory process or a process that determines whether or not rules are met. What has happened is that a decision has been made that if the transaction is to proceed, one particular party, the KSA, would have to be assessed against the OADT.

Now, rather than letting the process proceed, one party has then challenged that and has challenged that and then that matter is pending and the KSA has stated that it is prepared to enter into the transaction if it doesn't have to be examined against the OADT. And so we're still in the middle of a preliminary stage of a process and the fact has not happened. The tort has not occurred. The situation is only that the regulatory process is paused while a particular issue is decided by the appropriate Arbitral Tribunal and when that Arbitral Tribunal decides one way or the other, the transaction either will or will not go ahead.

Only after that is there something that one can complain about in competition law terms, conceivably, where one says: look, this process has been completed, we have not been able to sell when we ought to have been able to and then if there is any basis for going behind the arbitral award which, in my submission, there is not, then there might conceivably be a basis at that point. But it simply hasn't got to that stage yet. And that leads me on to my last point on the third reason and that is this is not really a competition law case suitable for the specialist CAT at all. The only conduct here complained about relates to the single application of the PL Rules. The rules themselves are not challenged. This is not a wide-ranging complaint about the framework in the League's rules or a structural issue said to affect competition on the relevant markets.

Certainly it's capable of being shoehorned into a competition law claim but that does

not mean it's appropriate that it should be dealt with in that way or that it should be dealt with by the CAT in that way. It's not appropriate when it only alleges the same conduct, vice and underlying unlawfulness, that founds what is claimed by the Club in the arbitration on, in my submission, the much more obvious legal basis they're pleaded. Not an appropriate use of CAT resources.

Now, what SJHL say on that is: well, the issue in the CAT claim is whether there has been a breach of competition law and that cannot be pre-judged and so jurisdiction cannot be declined. Well, the Premier League doesn't ask for it to be pre-judged. What the Premier League says is that SJHL's position ignores the actual objection by Premier League. That objection is nothing -- there's nothing in the nature of the claim itself here that justifies its separate and additional pursuit as a competition law matter, still less before the CAT, when it is already being determined in the arbitration.

So I turn, then, to the alternative case and that is that there should be a temporary stay, pending the arbitral award and this is a simple case management issue. The governing principles underlying the CAT's exercise of its active case management powers are set out in Rule 4 of the CAT Rules. Three are of particular importance:

4.1:

"The need to deal with each case justly and at proportionate cost."

4.2:

"The need to ensure cases are dealt with expeditiously and fairly, including through the allocation of an appropriate share of the Tribunal's resources for this case, rather than to others."

That's 4.2(e). And, obviously, the need for active case management. And rule 53(2)(k) grants the power to stay a matter temporarily, as well as in part.

Now, it's cast in wide terms to allow the CAT to make appropriate procedural orders

as it thinks fit and the Premier League's position is that on any basis, the CAT should temporarily stay the claim, pending the arbitration award because the award will, on any basis, narrow, change and inform the issues in the CAT claim. A temporary stay is necessary in order to avoid inconsistent decisions, not only at the final stage but also at the interlocutory stages in the procedure, for example, as to the scope and nature of the disclosure. Disclosure has been a difficult process in the arbitration and it's important that the approach there is not second guessed by a second Tribunal while it is ongoing.

A temporary stay is necessary to avoid complex confidentiality issues between the two sets of proceedings. A stay prevents wasted costs and time. It is necessary in order to achieve guiding principle 4.2 and it will avoid or at least mitigate the abuse of duplicitous simultaneous proceedings. Now, what SJHL says on that, wrongly, in our submission, is that instead of a temporary stay pending the arbitration award, the CAT claim should be allowed to continue and that the Premier League can be compensated in costs if the arbitration is then -- or if the CAT claim is then abandoned following the award.

That, in our submission, does not work, for two principal reasons. First, that approach is not active case management. It's rather a hit and hope approach, putting off a present decision, on the basis that at some later stage these proceedings will be case managed or withdrawn, in the light of the outcome of the arbitration but allowing costs and time to be expended, likely unnecessarily.

The Premier League asks instead that the CAT proactively anticipates the very likely impact of the prior existing arbitration proceedings by ordering a stay at this point and then allowing itself, CAT, to take an informed view, following conclusion of that parallel dispute which, as I have said, is imminent. And that satisfies the factors justifying the exercise of the power in Rule 53(2)(k), while causing no meaningful

prejudice to any party.

The only conceivable prejudice asserted by SJHL is a delay in the resolution of the CAT claim, but any such delay would be very short, and in any event, inevitable, since no relevant loss will occur until the underlying issue of the Director status of the KSA has been determined, as it will be, in the arbitration.

Second, SJHL's suggestion that a future award of costs would be sufficient remedy for the Premier League is unfounded as well, and in this context, the passage of the judgment in the National Grid case, that case is at D3/7/102, that SJHL relies on in the skeleton at 61, does not have the effect suggested. So, the Chancellor then made clear at paragraphs 39 and 40 that:

"Costs protection was only a palliative and not a complete cure, since under the normal provisions for assessment, not all the costs usually incurred are recovered, nor is there any compensation for the waste of executive time in defending such proceedings."

Now in that case the Tribunal was content to allow proceedings to continue until the closure of pleadings, before staying them for the purposes of awaiting a reference from the CJEU, but only in circumstances where the relevant decision might not be completely annulled as against three of the four defendant groups, even if otherwise successful.

In other words, the substantial part of the case there would have been unaffected by the outcome of the reference in any event. That's not the case here.

Moreover, here, the costs that would be incurred by the matter proceeding would only be, will be substantially, only in relation to the additional purely competition law hurdles that I've already referred to. So, if there is a genuine difference in this claim, then it's going to be in those additional competition law hurdles that all of the time and additional wasted costs are going to have to be incurred, hurdles that I have

already referred to.

Now, those costs will be high because they involve different matters and they involve the initial preparation of a competition law claim requiring expert evidence on market definition, analysis, effect on competition and so on, so for all these reasons, a temporary stay would be a proportionate and effective measure to ensure the proper management of these proceedings, rather than allowing them to proceed and then trying to mend it all afterwards in costs.

Unless I can assist the Tribunal further, those are the Premier League's submissions and we ask that the Tribunal should make an order bringing these proceedings to an end. Alternatively, staying them temporarily.

MR JUSTICE MILES: Thank you very much, Mr Lewis. Yes, Mr Jowell.

Submissions by MR JOWELL

MR JOWELL: May it please the Tribunal. I would like to start, if I may, by giving you a brief roadmap to my submissions.

I am going to start, if I may, by taking you through some of the aspects of the claim that we advance in these CAT proceedings. Then I will turn to the applicant's contention that the Tribunal is obliged to stay these proceedings because it is said they are brought in violation of a supposed arbitral agreement that it is contended St James entered into with the Premier League, on the terms of section K of the FA Rules and finally, I will turn to the applicant's other contention that is even if there is no arbitral agreement between the parties, the Tribunal nevertheless should grant either a discretionary stay or a temporary stay under its case management powers.

So if I may start, then, with the competition claim that is brought in this Tribunal and the reason I want to start with that is it will inform, I think, the other submissions I wish to make and I think it will also be a convenient way to rebut a number of my

friend's submissions that suggest, for example, that the claim is invalid or confected or that we lack standing or as he put it at one point, that it's exactly the same conduct and issues that is claimed in the arbitration.

Now, just to be clear, of course we don't deny for one moment that there is an overlap in the underlying factual circumstances and certain of the allegations that we make in these proceedings and in the arbitration, but that does not gainsay the fact that this is quite a different claim and it is a sound prima facie claim alleging violation of competition law provisions. It is brought by a different party and as I will show you, the appropriate party and, importantly, it claims for genuine loss that is quite different and distinct to any loss that could be claimed by the Club in the arbitration.

If I may go back to the claim itself. It's in volume A, tab 1 at page 6. And as my learned friend showed you, the claim is advanced by St James which is 100 per cent owner of the company NUL, which in turn owns 100 per cent of the shares in Newcastle United Football Company Limited, otherwise known as the Club. So, the Club is the subsidiary of the subsidiary of St James. My learned friend sought to persuade you that there is something artificial about the claim being brought by St James rather than, on the one hand, by the Club or on the other hand, by Mr Ashley.

Not at all. The claim is brought by St James for a very simple reason: St James is the company that was going to sell its shares in NUL to the Consortium, to PIF, and it is therefore St James that has suffered the loss of the sale. As I will show you, it is compensation for that loss of the sale that it seeks in damages.

Now, any shareholder further up the chain, whether that be MASH or Mr Ashley personally, would be susceptible to a potential defence that its loss is reflective loss, since it would simply reflect the loss that has been suffered by its subsidiary and

would not be recoverable. So, any claim by Mr Ashley personally would be open to serious potential objection on that ground.

Now, my learned friend also makes the alternative point that: oh well, the Club could have brought it, but the Club is, obviously, not selling itself and the Club may well have suffered loss, its loss as a result of the alleged competition law infringement but its loss would take a very different form.

Its loss would be in the form of the extra investment that it would have had under a new owner and that, of course, is completely not loss that is available or that can be claimed by St James.

So that is the simple reason why St James is the claimant and is the appropriate claimant. Now, the defendant is the Premier League and we see in paragraph 13 on page 7 of our pleading that we allege that the Premier League organises Premier League football and controls and regulates ownership of Premier League football clubs and can effectively block purchases. And we allege also that the Premier League, and this is, of course, not in dispute, also commercially sells broadcasting rights and sponsorship rights.

So, we say that the Premier League has this dual role of both being a de facto regulator of ownership and also a commercial operator.

Now, my learned friend, I think, partly disputes this and he says that: well the Premier League is not the regulator, it's the FA. The FA is the regulator. But in our submission, in reality, the Premier League does carry out a quasi-regulatory function, both in deciding whether someone is a Director and also in applying the fit and proper person test pursuant to that.

Now, whether one characterises the Premier League as exercising a discretion or not in carrying out that function, well that may be a matter of fine legal distinction or perhaps of semantics but it must certainly exercise judgment when it decides

whether someone becomes a Director or not. It's not a mechanical exercise, notwithstanding my learned friend's contentions to the contrary and if it were, it's difficult to see why there would be an arbitration about it.

Now, we allege that the Premier League, if you go forward to page 11, and you see in paragraphs 25 and 26, we allege that the member-clubs of the Premier League and the Premier League itself, are undertakings for the purposes of competition law, the relevant provisions of competition law, and also that the Premier League is an association of undertakings and that's relevant for the application of Article 101 and Chapter I of the UK Act.

At paragraphs 27 to 31, we identify the relevant economic markets on which the Premier League operates and also the relevant markets on which the clubs that form a part of the Premier League operate. At paragraphs 33 to 36 we allege that the Premier League is in a dominant position within the sense of Chapter II of the UK Act and Article 102 on the relevant markets which are identified at paragraphs 27 and 29.

We say that the Premier League has acted to abuse its dominant position under Article 102 and Chapter II or alternatively or additionally, we say it has restricted competition under Article 101 and Chapter I.

The factual essence of the claim, as my learned friend, I think, rightly identified, identified in really -- or summarised, perhaps, in paragraph 20, where we set out how the Premier League, by exercising its power to block the takeover when making a Director decision, fails to apply its rules in a fair, objective and non-discriminatory fashion and used its powers for the improper purpose of promoting its own commercial interests or the interests of its business associates or of certain Premier League clubs and did so in a manner that was detrimental to competitors and to consumers.

In doing so we say that it infringed the relevant competition law provisions. And we also say that by reason of that, St James has suffered loss and damage because it has lost the sale or the likely opportunity of an immediate sale of its shares in NUL, which owns the Club, to the Consortium company and as a result, it has lost the premium that it would have secured, being the difference between the proposed purchase price from the Consortium and the market value of NUFC, of the Club.

And we provided with the claim form, an estimate of the loss and damage in a confidential addendum. We did so because you're required to do so under the terms of the rules. CAT Rule 33(e) requires not only an estimate of the amount claimed but also an explanation of how the amount has been calculated. Slightly different to High Court rules in that respect. Requires an explanation.

We provided that explanation in an addendum to the claim form that I will come to. And, of course, the factual foundation of the allegation that the Premier League was improperly influenced in its decision is not a fanciful one. It is not drawn out of thin air. It was very publicly reported at the time that a company called beIN Media Group actively and openly lobbied the Premier League against the takeover of Newcastle by PIF and you will see that all set out in paragraphs 50 to 51 of our claim form.

And I don't need to take you to it but the text of the beIN letter that was reported in the press is set out in paragraph 54. And it is undisguised lobbying against the purchase by PIF of Newcastle Football Club. And it is apparent that beIN had animus against the Saudi State, arising from its alleged failure to protect the intellectual property rights or alleged intellectual property rights of Qatari companies.

So that lobbying by beIN was all in the public domain at the time but what was not known at the time, at least to Newcastle, was quite how much commercial leverage beIN actually had with the Premier League. For what emerged later on is what is

reflected in paragraph 52 of the claim form which you will see on page 17 and that is that at the time, at that same time that the Premier League was reaching its decision about the PIF takeover, beIN was in the midst of negotiations with the Premier League for another three-year broadcast rights deal. Now, those negotiations were going on behind closed doors and without any competitive tender process, as is typical for Premier League rights, and that deal was only announced in December 2020, after the PIF purchase of Newcastle was effectively blocked by reason of the Premier League's decision.

And you will see over the page, on page 18, in paragraph 57 that we allege that a number of the major clubs that effectively control or at least strongly influence the Premier League, also joined in the lobbying against the deal.

And in paragraph 59 you will see it has been widely reported that Mr Masters, the Premier League chief executive, held more than one direct meeting with beIN at this time.

And we say that this lobbying and the pressure from the larger Premier League clubs distorted the Premier League's fair and objective application of the rules and you will see that set out in detail in paragraphs 78 and 79. And the result of all of this, as you will appreciate, is that PIF pulled out of the takeover.

Now, St James goes on, then, to allege in our claim form in paragraphs 97 and following that this was a breach of competition law. By applying the rules in an unfair and discriminatory and non-objective manner and to further its other commercial objectives, we say, the Premier League has acted to abuse its dominant position or has made a decision of an association of undertakings which has the effect of restricting or distorting competition. And that is all explained in paragraph 102(c) in some detail, where we state that, we explain that the Premier League has distorted competition on the markets and sub-markets of elite, professional football in

England, on which Newcastle, Club Newcastle, competes with other Premier League clubs, including direct sporting competition on the pitch and competition in an economic sense, including to attract supporters, in respect of sponsorship rights, sale of merchandise, acquisition of elite players and managers. And it has done so in a manner that is not inherent in the rules themselves and is not proportionate or consistent with the objectives sought by the rules. And by preventing the purchase of Newcastle Football Club, the Premier League has limited investment in the Club by its prospective purchaser and thereby diminished the potential of its products and services, to the detriment of competition, both sporting and economic, between football clubs and to the detriment of consumers.

We say that the effect of the decision was to weaken one competitor amongst the Premier League clubs, pursuant to the exercise of collective market power by the other clubs, through the Premier League.

We make similar allegations in paragraph 105 in relation to abuse of dominance.

Now, there is a sort of suggestion by my learned friend in his skeleton argument and his oral submissions that there is something unusual or unorthodox about the notion that the formulation or the application of sporting rules can amount to an infringement of competition law or at least that their application in one single instance can amount to an infringement of competition law -- and that's not correct. Perhaps I could just show you -- I'm sure the Tribunal will be well familiar with this but if we go, for example, to D6, bundle D6, tab 2, at page 55, you will see an extract from Bellamy & Child, one of the leading competition law textbooks, and if you go to page D6, tab 2, page 55, you will see a section entitled "Abuse by sporting bodies".

You will see it notes that:

"Given the economic importance of sport in relation to a variety of sectors, in particular television, broadcasting, application of the competition rules to sporting

bodies is an issue that has arisen in a variety of contexts. Although generally arising in the context of Article 101, such questions potentially involve the application of 102, in particular where a sporting body enjoys effective control over rights to participate in a major sport [which is, of course, just the case here] or to broadcast coverage of such a sport [which is also the case here]."

And it refers to a working paper of the European Commission which notes that:

"Sports associations usually have practical monopolies in a given sport and may, thus, normally be considered dominant in the market of the organisation of sport events under Article 102. Even where a sporting association is not active on a given market, it may be considered to hold a dominant position, if it operates on that market through its members, such as sport clubs and teams, and those clubs may also hold the collectively dominant position to the extent that they present themselves as a collective entity, as a result of the implementation of rules adopted by a national or international sports association."

So, this is all very familiar territory for competition law and there is nothing unusual at all in competition law about a single act or a single decision in this case amounting to an abuse or anti-competitive decision of an association of undertakings.

Indeed, exclusionary conduct in competition law is often the result of a single act, such as a refusal to supply, which act then has ongoing effects, as indeed with this particular decision, it has had ongoing effects for the last two years, on the markets that we have identified.

Another feature of competition law that's important to note and I don't think I need to take you to this case, it will be so familiar, it's the Courage v Crehan case in the Court of Justice. It's in the bundle at D6, tab 5/81. I simply remind you of the familiar statement in paragraphs 25 and 26 of that case which state that it is open to any individual to claim damages for loss caused to him by conduct liable to restrict or

distort competition.

And the loss and damage that was caused in the present case you will see pleaded in outline in paragraph 107 of our pleading which, if I could take you to that, it's back in bundle A1 at page 33 and you will see there that what we claim is the difference between, on the one hand, the value of the bid by the PIF Consortium company and, on the other, the current market value of NUFC. And this is, as I think, Mr Chairman, you were indicating in questions to my learned friend, this is a classic case of a loss of a sale, where the loss is ordinarily calculated as the difference between the price of the product, in this case the shares in the Club at the agreed price, by comparison with the price that would otherwise be available in the market for the product at the time of the tort.

That is a conventional form of loss and damage claim. It is loss that is causally connected to the anti-competitive conduct and abusive conduct that we allege, and you will see in paragraph 108 that the quantum of the loss is substantial. It exceeds £10 million. Now, the confidential addendum to the claim form, for some strange reason it has been put at a rather inconvenient location. In the same bundle but at tab 8, at page 151.

Now, we would like to be able to show this to the Tribunal in a wholly unredacted form but, unfortunately, the parties have not been able to reach agreement on a confidentiality arrangement to protect it. My clients, understandably, regard it as highly commercially confidential, what figures they have put in this addendum, particularly in relation to the market value of the Club, but unfortunately, the Premier League has not been prepared to enter into a confidentiality agreement on terms that it would only be seen by external lawyers, so I'm afraid we have a slightly redacted version.

But you will see from it that what has been carried out is, again, the same, the

estimate on the same basis that I explained to you, the difference between the value that it would have been sold for and the value, the market value. And the market value has sought to be ascertained by reference to credible other offers that the Club has received and not to sort of speculative or non-credible offers.

You will see over the page, on bundle A, tab 8, page 152, that we note that the precise quantum of the premium will be a question for expert evidence and may be affected by future events. By way of example, should the Club be relegated from the Premier League, the value of the Club is likely to fall, with the result that the premium would be considerably increased at the time of trial.

Now, one of the points my learned friend makes, seeks to make, is that: well, St James haven't yet suffered loss and I'm afraid that's simply not correct as a matter of routine legal analysis, for the reason I have already explained. St James have suffered loss. The loss as currently calculated is real and it is the conventional difference between the PIF offer and the current market value.

Now, of course, we do accept that if the Club were sold before the trial of this claim, then on ordinary principles we would also have to take that into account in calculating the ultimate amount of loss that we are entitled to. And that is simply on the basis of the Bwllfa principle which I'm sure, Mr Chairman, you will be familiar with, taken from Lord Macnaghten exposition of it in the case of that name. We don't have the case in the bundle. For the transcript writer's note, it's 1903, appeal cases 426. And that's just simply the basic principle that when the court is assessing damages at trial and it has knowledge of what has actually happened, it does not speculate about what might have happened but it bases itself on what is known to have actually taken place. I think Lord Bingham put it in a subsequent case, he said: why would you stare into the crystal ball when you can read the book? But that doesn't take away from the fact that loss and damage have been suffered. It's

simply the fact that future events prior to trial might affect the precise value of that loss.

MR JUSTICE MILES: I notice, Mr Jowell, that the way it's pleaded here is that the loss is the difference between the value at the time of decision and the value at the date of trial. A more conventional measure might be the value at the time of the September decision and the value as at that date and the Bwllfa principle would then come into play in throwing light on the second of those principles retrospectively, whereas actually what you have pleaded is the difference in value as at the date of trial and so Bwllfa doesn't even come into it, on your pleading. I wonder whether that is actually the right measure of damages.

MR JOWELL: Well, one needs to be careful because -- and in the pleaded case, if you go back to A/1/33, one has to remember this is just an addendum that is setting out how we estimate loss, if you like, and will estimate loss at trial. But the primary pleading is in paragraph 107(a) which is at page A/1/33 of the bundle and you see there, the way it's pleaded is:

"SJHL has suffered loss and damage, loss of profit, calculated by reference to the difference between the value of the bid offered by the Consortium company and the current market value of NUFC."

And then we say alternatively --

MR JUSTICE MILES: That's probably wrong also, for the reason I have just given.

(Overspeaking)

MR JOWELL: (Inaudible) the date of the tort. Yes.

MR JUSTICE MILES: It would normally be, you would take a comparison at the date of the tort and it's only in somewhat unusual circumstances that you take a later date.

MR JOWELL: I accept that. I accept that. But it is certainly the case that as at the

current time of the pleading, there is this difference between the value of the bid and the current market value and that is what is pleaded there and you may be correct to say that -- and what we are saying in the addendum is simply that it will be -- we accept that we will need to adjust it in the event that the value changes by the time of the trial.

But that doesn't take away from the fact that we clearly have standing to bring the claim as at the current time. There is just nothing in that point.

And the notion, my learned friend spoke of, us being halfway through a regulatory process and therefore, somehow, that the loss hasn't occurred yet, is just a complete fallacy because the tort, the competition law tort and the distortion and harm on the markets has been occurring over the last two years, if we are, of course, right on our point.

So, we say that if one reads the claim and goes through it, it is, in our respectful submission, a perfectly sound prima facie claim for damages for breach of competition law and, of course, we accept that whether that factual foundation is right will be a matter that will have to be resolved at trial after disclosure and our exchange of evidence. And, equally, my learned friend will no doubt have arguments on market definition or on abuse. It may be that the precise valuation of the market value of the Club will require assessment by a forensic accountant but if the facts are substantiated, it is on any view, not a demurrable claim or a fanciful claim or an artificial claim and as I have said -- and of course, there is nothing curious about the fact that it has been brought in this Tribunal. It has been brought in this Tribunal because that is the natural place to bring a competition law claim in this jurisdiction.

Now, that brings me then, I think, to the second part of my submissions which are my learned friend's application for a mandatory stay. And he says that St James is

bound by an arbitration agreement with the Premier League. It has to bring it, this same claim, in arbitral proceedings.

Now, to state the obvious, typically, I don't say always but typically, when two parties are said to have entered into an arbitration agreement, there is a signed written agreement between them and when the allegation of this arbitration agreement was first made in response to our letter before action, St James searched high and low for any agreement it might have entered into to arbitrate with the Premier League and it found none.

The Premier League then specified in correspondence that the arbitration clause that it alleges was not to be found between the Premier League and St James directly but, rather, as an arbitration clause of The Satanita variety, by which it was alleged that they were each contracted separately to abide by a separate set of rules, the FA Rules. And, of course, it's possible, we accept, to have a horizontal contract of that form, that emerges from two vertical contracts and that's typically where two parties independently contract to be members of an organisation or to abide by or adhere to a common set of rules and where those rules then also contain an arbitration clause between the members who are adhering to it.

It's possible in those circumstances, by no means always, but possible for there to be a binding horizontal contract between those two vertical adherents.

But in every case, it is an essential pre-condition for the horizontal contract to arise, that both parties should have agreed to adhere to the set of rules to begin with and by agreeing to adhere, one applies the ordinary principles of contract. They must have contracted to those rules.

So, when it became clear that the Premier League was relying on Rule K in the FA Rules, St James sought to check whether it had ever agreed to abide by those rules and, again, it found no such agreement or adhesion and it could identify no

conduct on its part that could amount to such adhesion.

In fact, before this dispute arose, and I think this is common ground, actually, St James had no direct contact with either the Premier League or the FA at all.

Now, my learned friend's starting point of his analysis was to take you through the FA Rules and the Premier League Rules and say: well, St James is a Director, with a capital D, and an owner and hence a Participant and therefore it falls within the rules. But the difficulty with that analysis is that the Premier League is just a private law entity. However widely it chooses to cast the net of its rules, it can't unilaterally impose them on other private law entities without their agreement. Those other entities, including St James, must give their contractual consent.

And in all of the cases that my learned friend mentions in his skeleton argument and the one that he took you to, and I will take you back to in a moment, which is the Stretford case, the relevant party found to be bound by the arbitration clause had clearly adhered to the rules, usually by agreeing to the terms of a licence from the FA or from FIFA. But St James hasn't entered into any licence. It hasn't signed or agreed to any set of rules.

Now, my learned friend's first answer is to say: well, the Club has. Look at the form 4. Mr Ashley has. And he effectively says: well, how absurd, how unfair that St James, the company in the middle, wouldn't be so bound.

Now, we say there is nothing absurd about that at all. It's just the result of the principles of separate personality under English company law. My learned friend said I was setting up a strawman in suggesting that they were blurring corporate entities in this way, but then when he returned to the point, that's just what he did. So, I think it is important just to, if you like, set the groundwork here, to remind oneself that those principles apply in the context of arbitration agreements, just as much as in any other context.

So the leading case is the City of London v Sancheti which you will find in bundle D3, tab 6, and if I could ask you to turn that up. It's D3, tab 6, page 93. Mr Sancheti had begun an investment treaty arbitration against the UK Government in relation to his treatment over his lease with the Corporation of London and the Corporation of London then sued him in court for unpaid rent. And Mr Sancheti relied on an earlier case of Roussel-Uclaf to suggest that it didn't matter that the Corporation of London was not itself a party to the arbitration.

If you could turn to page 98, you will see this is in the judgment of Lord Justice Lawrence Collins, as he then was. At paragraph 29, having cited section 9 of the Arbitration Act, he says:

"I have no doubt that section 9 cannot apply if the parties to the court proceedings are not the parties or persons claiming through or under a party to the arbitration agreement. It would be wholly inconsistent with the purpose and structure of the 96 Act if a stay could be obtained against a claimant who was not a party to the arbitration agreement."

And he goes on to say:

"Nor is it sufficient for there to be a mere connection between the claimant and another person who is bound by the arbitration agreement. For Mr Sancheti, reliance was placed on a case in which a subsidiary of a party to an arbitration agreement was held entitled to a stay because of an arbitration agreement with its parent company."

And that's Roussel-Uclaf case, where it was held that a wholly owned subsidiary company could claim to be a party to an arbitration where the arbitration agreement was between the parent and a third party, on the basis that the parent or subsidiary was so closely related that it could be said that the subsidiary was claiming through or under the parent.

You will see then, if you then go -- it goes on to describe the circumstances of the Roussel-Uclaf case and if you go over the page, please, you will see what he says in paragraphs 33 and 34:

"In Mustill & Boyd it's said that the decision can perhaps be explained [this is the Roussel-Uclaf decision] on the basis of agency and otherwise it's difficult to see how the subsidiary could have taken any part in the arbitration and elsewhere, the decision is described as curious. In Grupo Torres, Mr Justice Mance said that he didn't find it easy to extract any principle from the reasoning."

And Lord Justice Lawrence Collins goes on:

"Roussel-Uclaf was a case in which the subsidiary was seeking a stay of court proceedings brought against it in claiming the benefit of an arbitration agreement to which it was not a party. Here, Mr Sancheti seeks a stay of proceedings brought against him by the Corporation of London and thereby seeks to impose upon the Corporation the burden of an arbitration agreement to which it is not a party. But even without such a distinction, I don't consider that Roussel-Uclaf assists Mr Sancheti. In my judgment it was wrongly decided on this point and should not be followed. A stay under section 9 can only be obtained against a party to an arbitration agreement or a person claiming through or under such a party and a mere legal or commercial connection is not sufficient."

So, it is plainly not good enough for the Premier League to rely on the fact that St James' subsidiary or its parent may have entered into an arbitration agreement with the Premier League and nor is it sufficient for it to say: ah well, it should have entered into an arbitration agreement and the Club is at fault for not making it. The fact is it hasn't and what they must establish is that St James itself has actually consented to the rules.

Now here my learned friend puts his case in two ways. First of all, he says that they

have consented to the rules because the Club plays football and he seeks to infer that St James has given it permission to play football and he further seeks to infer that by giving the subsidiary of its subsidiary permission, as he puts it, to play football, St James has thereby agreed to abide by the rules.

In the context of his oral submissions, my learned friend repeatedly referred to the fact that St James is a director of the Club but in the ordinary sense of the word director, the Companies Act sense of the term director, St James is not a director of the Club. If I can just make that absolutely clear, it is not a director of Newcastle Football Club. It owns the owner of Newcastle Football Club. Now, one can debate whether St James is a Director, with a large D, within the terms of the Football Association and the Premier League Rules which gives it this extended meaning of including certain owners. We can debate that. We don't need to debate it because it's actually not relevant, not necessary to decide but on any view, St James is not a director in the ordinary sense of someone that controls the management of the Club or is a director for the purposes of company law.

Once one appreciates that, really, the notion that, this permission argument of my learned friend, just becomes completely far-fetched. St James is an intermediary -- it's an intermediate holding company. It doesn't give permission in any active or real sense for the Club to do or not to do anything. And even if it were permitted, even if it were properly regarded as having permitted conduct, a passive act of permitting the Club, by omission, to play football, couldn't possibly amount to conduct that binds St James to the Premier League or the FA Rules.

If we go back to the Stretford case that my learned friend cited to you, we can see how far away the circumstances of that decision are. It's in D3, tab 2 and my learned friend took you to page 41.

MR JUSTICE MILES: Could I just ask a question before you go to that.

MR JOWELL: Yes.

MR JUSTICE MILES: Mr Lewis was at pains to say that it wasn't one of these circumstances; it was a combination of circumstances which he said gave rise to the accession to the agreement.

Now, it might be the case that merely allowing the Club to enter the competition might not be considered conduct which would amount to accession, for example, but he emphasised a number of factors and two in particular -- no, three, I think, in particular.

One, he says that on the true construction of the rule, the company SJHL is a Participant.

Two, that SJHL was aware of the rules, including that particular definition of Participant.

Three, with that knowledge, it then permitted the Club to enter the competition and I think it's also part of their case that the company doesn't really have a function other than as a holding company of a football club which itself does not have any real function, other than to participate in football competitions.

So, it's a combination of all of those factors and it seemed to me that was the gravamen of his argument, not to seize on any one of those features separately.

MR JOWELL: I'm grateful and I think that is really all that it does amount to, those three factors and, I mean, the first factor, which is the existence of the rules, plainly can't suffice, because that would be allowing the FA by fiat, as it were, unilaterally to capture people within the net of its provisions, just effectively by definition. It could define the whole world as a Participant but that wouldn't make them so unless they adhered to the rules.

And, of course, even if the knowledge of Mr Ashley is properly to be imputed to SJHL, which is itself very questionable, in my view, whether he obtained that

knowledge as director of SJHL, but even assuming that, the fact is that their knowledge of the rules doesn't take one any further. And as to the third point, as I have already said, there is no active permission here. It's actually a misnomer. It's simply that they are a holding company. They're just owning the shares in the company that owns the shares in the football club. They don't permit anything. And I will take you in a moment to the Mercato case, where similar argument was made and roundly rejected by the judge in a moment but if I could first take you briefly to the Stretford case because it is important to put that case in context.

At D3, tab 2, page 41, and you will see that my learned friend took you to paragraphs 24 and 25, but as is so often the case, it is important to read the preceding paragraphs which explained what the conduct was that they found amounted to a contractual acceptance of the rules. And you see that in paragraphs 22 and 23 and what had occurred is that Mr Stretford had received a licence from FIFA and operated under that licence from FIFA from 1995.

There was then a rules change and then in 24 it says:

"Mr Stretford was well aware of the new FIFA requirements because he commented on them extensively in a letter to an official. He applied for the FA licence and it was sent to him and the licence stated on its face that the holder agreed to abide by the rules and regulations of, amongst others, the FA and he acknowledged receipt of the new licence."

You have -- well, it's understandable in those circumstances. Of course there is a course of conduct of adherence, but what is the conduct of St James'? There is simply nothing.

Then if I could take you to the Mercato case, as well, which is informative on this point. My learned friend took you to it already and the football agent in that case was bringing a claim for the introduction of a player to Everton and Everton sought a stay

of arbitration based on Rule K of the FA Rules.

Now, there were two claimants. The second claimant, everybody always knew all along, was a registered intermediary, but it was initially thought that the first claimant wasn't registered and it then emerged during evidence at the hearing that the first claimant was also registered. If I show you that, it's in D5, tab 3, you will see paragraph 7 notes this. It says, at page 43:

"The claimant's case at the time of the hearing before me on 28 March was that the first claimant wasn't so registered and indeed that it couldn't be and the defendant's case was that the first claimant was inextricably linked with the second claimant and was thereby bound by the rules and was a party to an arbitration agreement, in the same way as the second claimant was. Alternatively, the defendant asserted that the first claimant was bound by the rules by virtue of its participation in professional football."

So that was the original argument, very, very similar to the argument Mr Lewis advances today and you will see he then notes that in the course of the hearing, it was noticed that the first claimant had -- his invoice had a registration number and enquiries were made and that factual issue was then resolved.

If you then go forward to paragraph 23, you see he finds -- it's on page 48 -- you will see that the judge his Honour Judge Eyre, finds that the first claimant was indeed registered, contrary to what had first been thought.

And you see there then, he then goes on to consider the test to be applied. He says: "In those circumstances, did Rule K operate as an arbitration agreement between the first claimant and the defendant."

And he states in paragraph 25:

"The defendant initially argued that the first claimant was bound by the arbitration provision because it and the second claimant were inextricably linked and the claim

was pursued on a joint and several basis. In his oral submissions, Mr Gilroy QC appeared to be asserting that by virtue of the fact that the first claimant was engaging in activities connected with professional football, it was bound by the rules simply as a consequence of that participation. For the reasons set out below, I have concluded that both those lines of argument are incorrect as a matter of law and neither would be a basis for holding that the rules operated as an arbitration agreement between the first claimant and the defendant. The approach which I undertake as a matter of law is as follows: for there to be an arbitration agreement between two litigants, there must be a contract between those persons. Such a contract can only exist if the circumstances are such as to enable the court to find a contract by application of the normal rules governing formation of contracts."

And then he goes on to discuss an implied contract between two persons who have not directly engaged with each other and he says:

"That can arise where each of those persons has a separate contract, a vertical contract with the same party, committing them to abide by particular rules laid down by or stipulated by that third party. Such a vertical contract can arise where a person's actions amount to an accession to the rules laid down by the relevant third party. Whether a series of vertical contracts give rise to a horizontal contract between particular persons will depend on the facts and circumstances of each alleged party's entry into the vertical contract in question and the nature of their dealings with the other parties. A careful and fact-sensitive analysis of the particular circumstances will be required. Engagement in activities related to a particular sport does not, without more and inevitably, amount to an agreement to be bound by the rules of the governing body of that sport, let alone to horizontal contracts with all others engaged in that sport."

So, you then see that the judge then goes through the authorities in greater detail. He goes through The Satanita, the Bony v Kacou decisions, Fulham v Richards, and if I could pick it up again at paragraph 33, at the bottom of page 50, you see he says: "The defendant made a reference to the passage at 57 of the Fulham Football Club decision, where Vos J referred to the wording of the rules which made reference to any dispute or difference and to all disputes."

And he says:

"Vos J said that those were wide words which are to be construed widely. That reference doesn't, however, assist me in the circumstances of this case. Vos J was there dealing with the scope of the arbitration agreement which it was agreed had been constituted by the rules. He was not addressing a separate question of whether a particular person was a party to such an agreement. It is the latter question which I have to address. The language of the rules can give some limited assistance in determining whether a vertical contract of accession to the rules give rise to a horizontal contract with other persons who have acceded to the rules. It cannot assist in determining whether a person has in fact acceded to the rules."

And that, if I may say so, is put rather better than I did to you, Mr Chairman, a moment ago. But that is why my learned friend's first point about the terms of the rules is wrong.

And he goes on to say:

"No matter how wide the language used, the rules cannot impose obligations on a person who has not entered the requisite vertical contract with the Football Association and agreed to be bound by them."

And it goes on to similar effect in paragraph 34 and you will see, in particular the last ten lines and he says -- referring to His Honour Judge Bird in a previous judgment, he says that he didn't say that the rules operated as an arbitration agreement in

circumstances where one of the parties to the relevant dispute wasn't otherwise bound by them, nor is his decision authority for the proposition that a participant in activities connected with professional football is, by reason of that participation, necessarily and automatically bound by the rules.

MR FRAZER: Mr Chairman, could I just ask a question here. Your observations on Stretford and Mercato, are they affected to any extent by the fact that Mr Ashley appears to be signing his form 4, qua shareholder in SJHL?

MR JOWELL: Mr Ashley's evidence and it's very clear, is that he signed in his personal capacity and he notes in his evidence that he signs -- he gives his personal address, so in a sense, yes, you may be right, he's signing as a shareholder in that company but he's certainly not signing on behalf of SJHL itself, as a separate corporate entity.

MR FRAZER: It's just that in clause 2 of the form he expressly describes himself as a shareholder and doesn't describe it as a personal commitment, as it were.

MR JOWELL: Well, I don't think it's contended that Mr Ashley, in that document, is binding SJHL and his evidence is clearly that he was binding himself in his personal capacity. Now of course he's signing it, if you like, I agree, because he is a shareholder of SJHL. That is absolutely correct. And he says: that is what gives me the control down the line, if you like, but that doesn't mean that he's signing on behalf of SJHL and he clearly isn't, he's signing in his personal capacity as a shareholder. So, if you like -- so it's a different -- and he's the shareholder of a shareholder of SJHL, because there is another company interposed between them, the MASH company. But he's not and I don't think it's even contended, that he signed that form for SJHL and, indeed, if he had done, it would be inexplicable why they were writing to SJHL, seeking for SJHL to sign the form.

So I think that's clear.

MR FRAZER: Thank you.

MR JOWELL: If one goes further in the judgment, you see at paragraph -- onwards he goes on, at paragraph 41, again to make the point, that:

"Participation in a sport or in activities connected with that sport, does not of itself mean that those participating have, as between each other, the rights and obligations provided for in the rules of that sport's governing body. Whether there is an implied contract between such participants to the effect that they have, is to be determined by a fact-sensitive analysis ... "

And so on. And he goes on.

Now, I accept that, strictly speaking, this analysis is obiter because of what occurred in the hearing when it was found that claimant one was indeed registered. He goes on to conclude, as Mr Lewis pointed out, that they, both claimants, were bound on the facts of that case by the FA Rules. That's because they were registered. But in my respectful submission it is a very clear and persuasive and correct statement of the law. And the position that participation in a sport or knowledge of the rules doesn't suffice to bind a party to those rules, is a fortiori the case where the participation alleged is by not your own participation but the participation of your subsidiary's subsidiary.

Of course, there has been no registration, as I said, by St James here. So that's the first way my learned friend puts his point.

MR JUSTICE MILES: Can I just ask a question that follows on from Mr Frazer's question. Now, one of the factors that was relied on by Mr Lewis was the argument that even if it did not fill in a form 4 or whatever it's called, SJH should have done that under the rules of the Premier League and had it done so, that would have contained a statement that it was bound by the rules of the FA.

He says: well, in effect, the company is relying on its own wrong in running this

argument. Perhaps another way that it might be expressed and I would be interested to hear what you say about this, is that there is certainly a doctrine in some areas of law that equity looks on that as done that ought to be done and says you treat the parties as if they had complied with their obligations and if you followed through the logic of that argument, had they done what they ought to have done -- this is on Mr Lewis' argument, I'm not saying I -- (inaudible) --

MR JOWELL: No, no.

(Overspeaking)

MR JUSTICE MILES: -- it's a question, it would have been expressly stated that they were bound by the FA Rules.

MR JOWELL: Could I take that point? It's a very interesting point. I think the first point is it's based on a false premise, which is that St James has committed a wrong. And I say, on what basis has it committed a wrong? There needs to be, it's not a tort, not tortious, not to sign up with the FA. Has it entered into some other contract that it's breaching? No. So, St James has not committed a wrong. It may be or it may not be that the Club is in breach of its obligations to the Premier League for failing, as it were, to procure that all of its Directors signed up in this way. That's a matter for the Club. It can't affect St James. If you like, that's the short answer to that whole line, really.

Now, actually, as it happens, the Club considers very strongly that it wasn't obliged to procure that and notwithstanding its threats, the Premier League hasn't carried out any threats -- it hasn't carried through its threat to stop the club from participating in the competition and nor has it gone to seek an injunction from the Club to procure that SJHL should sign this contract.

So, you know, it simply hasn't taken any steps to enforce that obligation and the Club and SJHL vehemently consider that, actually, on its proper and true construction

against its full factual matrix, there isn't an obligation on them to do so. But the short answer is that's for another day and St James hasn't committed a wrong.

Would this be a convenient moment for the stenographer's break?

MR JUSTICE MILES: Yes, it would. There is one other question that arises out of that which you can think about and come back to us on afterwards.

MR JOWELL: Yes.

MR JUSTICE MILES: It appeared that Mr Lewis was contending more generally that Directors, with a capital D, owe various obligations under the rules, both of the FA and the Premier League. One example might be, for example, the prohibition on gambling which you find placed on Directors.

Now, something you might come back to after the break is this: do you say that the -- let us assume for this purpose that the company is within the extended definition of Directors, so just assume that for a moment -- would the company then be prohibited from gambling and if not, why not? So, we will just pause on that cliff hanger and return in ten minutes.

(3.34 pm)

(A short break)

(3.44 pm)

MR JUSTICE MILES: Yes.

MR JOWELL: Thank you. You posed a devilishly tricky question to me before the break, which I will endeavour to answer, to the extent that I follow it.

I think the point was that, essentially, it would be perhaps odd, might seem odd, if Directors were not bound by such things as prohibitions on gambling, even if they had not themselves adhered to the rules.

I think the answer to that, in a sense, is this -- two answers, really. One is that prohibitions on such things, you know, gambling, I'm sure there are other torts,

breach of confidence, potentially, perhaps insider trading, other torts that would be available against those Directors. And it might be that it's thought, well, this is the sort of reason why it is desirable that Directors should be bound. I make no comment on that. But the fact is you can't bind them to rules if they haven't adhered to them and the fact that their subsidiary's subsidiary participates in sport doesn't, on any kind of objective legal analysis, come even close to adherence to a set of rules.

Now, the other way, the second way my learned friend puts his case is to say that the Club acted as the agent of St James when it acceded to the Premier League Rules and then through that, to the FA Rules and that possibility, at least it's theoretically possible, so it might on first blush, seem to be more promising.

But what would be required for that argument to work is for him to satisfy two cumulative conditions. First, the Club has to have done something that can objectively be regarded as agreeing to the FA Rules, not only on its own behalf but also on behalf of SJHL. So the Club must have engaged in an act of accession that clearly was intended to bind its parent company of its parent company.

It, secondly, would also require the Club to have had authority so to act. The difficulty for my learned friend is that neither of those conditions are satisfied and the allegation really fails at the first hurdle because when one looks at the accession by the Club to the FA Rules which one finds in the Premier League Rules at B1/1, page 33 -- and my learned friend, I think, took you to this but it's worth perhaps going back to it -- at B1/1/33, Rule B.14 explains in terms the relationship between the clubs and the League and it says that:

"Membership of the League shall constitute an agreement between the League and Club, both on its own behalf and on behalf of its Officials and between each Club, to be bound by and comply with ..."

And then it goes through all the rules which include by incorporation, the FA Rules.

So, one must then look to the definition of Officials to find out who they are purporting to bind, in addition to the club, and the definition of Officials, my learned friend took you to it, is on B1/1/28 and it means "any director [with a small D], secretary, servant or representative of a club, excluding any player, intermediary or auditor." So, there is no doubt there, it's really just what one would expect in ordinary English, an official to be. It means a director, in the ordinary company law sense of that term and it doesn't extend, doesn't incorporate this extended definition of capital D, Director, which might or might not extend to all parent company -- holding companies of a club up the corporate chain.

So, I think that really is just a complete answer to that, because if the agent doesn't represent that he is entering into the agreement on behalf of a person who you say is bound, then how can you say that that person is bound? You clearly can't.

It's also the case that they didn't have actual authority to bind the Directors and you see that in the witness evidence of Mr Ashley and Mr Charnley. And there is no real basis to suppose that they would have had ostensible authority either, although it's a very hypothetical question in a way because you're asking the question: well, if they had purported to bind SJHL, would they have had ostensible authority to do so? But they never did, as one can see from the language used.

And there are additional points that we raise. We do say that even if, somehow, the Premier League could establish that there was a vertical contract between the FA and St James by this agency route, we do say that, actually, it still wouldn't follow that there would be a horizontal contract to arbitrate, still less to arbitrate this type of dispute as between the FA and St James. As the judge in Mercato observed, that certainly doesn't follow automatically from adhesion to the rules, it would require a careful and fact-sensitive analysis. And we say that if one steps back and actually asks oneself, is it really plausible that St James could have intended not just to bind

itself to the FA Rules but also to arbitrate disputes with all other adherents to the FA Rules, we say it isn't actually plausible, when one looks at it objectively. As we note in our skeleton argument at paragraph 53, one does have to bear in mind that on the defendant's theory, St James would be contracting at two stages removed. First of all, it would be contracting via the agency of the Club and secondly, it would be contracting, as it were, via the Premier League Rules which are then incorporating the FA Rules. And then one has to bear in mind that it's not just the FA Rules but the arbitration agreement in section K which is obviously a discrete arbitral agreement within a contract which is contained in the FA Rules. So, we say that in all those circumstances, an objective observer wouldn't conclude that St James intended to oblige itself to arbitrate all of its disputes with all other adherents to the FA Rules.

And certainly not, we say, a dispute of this nature. Now, of course, we don't dispute that competition law claims can be arbitrable but it's also possible that they are not arbitrable, that they fall outside arbitration agreements. It all depends upon the particular arbitration clause and the particular claim.

As the judge said in Mercato at paragraph 42 -- I don't need to take you back to it -- but he observed that the further away the claim or dispute is from the playing of sport, the less likely it is to be caught by the FA arbitration clause. And the present dispute is not about the playing of sport; it's an antitrust competition law claim of a quite different nature which arises from the application of -- the misapplication of the Premier League Rules, by reason of the Premier League having taken into account, on our case, irrelevant commercial considerations, to bring about a distortion of competition.

So, for all those reasons we say there is no arbitration agreement to which St James is a party. But I would emphasise that the key flaw in my learned friend's case is the

very starting point, that there is no arguable basis on which St James ever agreed to be bound, to adhere to the FA Rules to begin with.

I now come, if I may, to the question of the alternative submissions of discretionary stay and my learned friend says that the Tribunal should, even if there is no arbitration agreement, should stay these proceedings under its case management powers because it's appropriate to do so, in view of the separate arbitral proceedings that are underfoot between the Premier League and the Club. And they also say, rather ambitiously, that the present claim is abusive and the central submission underlying both of those contentions is that whatever the result of the arbitral proceedings between the Premier League and the Club, that result, they say, will resolve this competition claim, either by making it moot or by resolving it against St James. So this is all a waste of time, they say.

The key flaw in that submission is that it is based upon a number of incorrect assertions that have been made by my learned friend in his skeleton argument and some of which have been repeated by him in his oral submission. And the first point I have to correct and I think I have already done this in intervention, but I tried to take it quite quickly, is his assertion, as he puts it in his paragraph 63.3 of his skeleton argument. He alleged and also this was also alleged in the application, that the Consortium has confirmed, he says, that it intends to proceed with the transaction on its original terms, in the event that the Club succeeds in the arbitration.

And the only evidence to support that is Mr Herbert's evidence which he took you to and he referenced Ms Staveley's email. My learned friend didn't take you to that email but let me show it to you to show you its very limited extent. It's in bundle B2 at tab 1, page 170.

The first thing to note about it, of course, is that it is dated 9 August 2020, so it is over a year old and it says:

"Dear Justin, [it's to Mr Barnes] further to our meeting last week and subject to the Premier League confirming its readiness to find a workable solution, I write to confirm on behalf of the Consortium, our willingness to proceed with acquiring 100 per cent of the share capital of the Club."

So, there is no suggestion there that they will necessarily purchase it on the same terms as is alleged in my learned friend's skeleton argument. That is not correct. That's not what they say. And, of course, as I said, that is a year old and Mr Barnes' evidence on this is found in -- which I would like to take you to and, of course, Mr Barnes is right at the coalface of this and the negotiations -- is in bundle A, tab 4, page 116.

What he says is this:

"As far as I'm aware, subsequent to the defendant issuing its 9 September 2020 decision, neither the Consortium nor PIF have provided any confirmation or indication to either St James, the Club or the defendant, concerning whether they might still be willing to acquire the Club and if so, on what terms. Presently, I don't know for certain whether the proposed transaction will proceed, even if the KSA is not required to submit to the OADT process. I have had infrequent but ongoing communications with both the Consortium and PIF. Neither of them has provided any indication to me either way. If the Consortium is still minded to proceed with the proposed transaction, it's unclear to me on what terms it would do so. What is clear is it is extremely unlikely that the proposed transaction would or could proceed on exactly the same commercial terms as were agreed in the SPA signed back in April 2020. The overall structure of any new deal may be broadly similar, however, the commercial terms, including the value of the transaction, may well be different. The value of SJHL is likely to have altered to reflect the passage of time, the sporting performance of the Club, the impact of COVID and the overall

willingness of the Consortium to proceed. As a result, it is impossible to say with any certainty what the value of any new deal would be. No such deal is currently on the table and no new SPA has been negotiated and is ready for execution. It is not, therefore, correct to say that if KSA is not required to be assessed, the proposed transaction will simply go ahead on exactly the same terms as before and SJHL will suffer no loss. In reality, the proposed transaction has already been lost and it is by no means certain that the lost proposed transaction will be replaced by a new proposed transaction. All I can say is that since the SPA expired, no further sale has been agreed and if the proposed transaction does go ahead at some point in 2021 which I consider to be very unlikely, SJHL would have been deprived of the use of the consideration monies for at least a year."

And then Mr Barnes goes on to explain why it's not the case that, as the defendant maintained, it could simply go ahead anyway.

MR LEWIS: I hesitate to interrupt, I did raise a hand in relation to this. This raises a substantial difficulty. I wonder whether my learned friend might take instructions as to the accuracy of the reliance on Mr Barnes' historical evidence which is now out of date, is still accurate and if he takes instructions and he continues in that submission, well so be it but I don't see that he actually can.

MR JOWELL: Well, I have taken instructions and I was going to come to that but I am first of all taking you through the evidence that is in the papers and then I will come to the present position.

Now, the only response to this is in paragraph 19 of Mr Herbert's second witness statement and he refers to newspaper reports in or around November 2020, suggesting that PIF remained interested in resubmitting its bid if the Club was successful in the arbitration.

One is from the Daily Telegraph and one is from the Newcastle Chronicle. I don't

intend to take you to those newspaper reports. Leaving aside the obvious dubious reliability of them, they're not focused on the issue of whether PIF will enter into the agreement on the same terms. They don't quote or cite PIF as stating that they would proceed with the transaction on its original terms, in the event that the Club succeeds in the arbitration and in the case of the Daily Telegraph, the article relied on is almost a year old.

Now, it may also be interesting to note that insofar as one's going to go by the press, the most recent speculation in the press is that PIF may potentially be interested in buying an Italian football club and you will see that is in the bundle; that press article is in the bundle at C/76 at page 235.

So, there is no sound evidential basis for the confident assertion in my learned friend's skeleton that in the event that the Club succeeds in the arbitration, the Consortium will necessarily proceed with the transaction on its original terms.

Now, of course, we hope that if, tomorrow, the Premier League came to its senses and reversed its decision, we hope and probably expect that PIF would be prepared to go forward. We accept that. And possibly on similar terms. But there is no basis for assuming that PIF will be prepared to wait several more months until 2022 and the outcome of the arbitration which cannot be until at least 2022 and will then go ahead on precisely the same terms. That is the only relevant issue before this Tribunal to decide, which is what will happen in 2022. And even if, as Mr Barnes points out, even if PIF were prepared to go ahead in 2022 on the same terms as those it offered in 2020, St James would still have a claim for being kept out of its money for two years and given the large sums of money at stake, several hundred million, two years of compound interest, even in today's low interest environment, is not an inconsiderable sum. One would expect it to run into several millions.

And this really is the fundamental point because what it means is that if the Club wins the arbitration, then the competition claim for damages will not necessarily or even probably be moot, as my learned friend says. Rather, it's likely to proceed and that is really enough to dispose of the suggestion that the arbitration will be dispositive of this claim and also certainly dispositive of the allegation that the claim is an abuse of process.

My learned friend refers to cases on abuse of process and collateral attack, but this kind of situation doesn't come close to the sorts of highly exceptional circumstances that are required for a finding of abuse of process by reason of a collateral attack on the decision of another Tribunal.

If one looks at the authorities, it's very rare -- very rare cases where an Arbitral Tribunal's findings can give rise to an allegation of abuse consisting of collateral attack and I can't think of any case where it can be said to have been an abuse before the arbitral decision has even made any relevant finding. So, there is no basis for the allegation of abuse and there is every reason to suppose that if the Club succeeds in the arbitration, then this competition claim will be full steam ahead.

And so the question then for this Tribunal is, well, what's the appropriate thing to do in those circumstances? And as I will be submitting to you shortly, we say that in those circumstances, the appropriate thing is to permit this claim to proceed at least through to close of pleadings and to a listing of a CMC in the new year.

We say, as I will come to in a moment, we say that there will be no significant downside to that. It will allow the parties to proceed in the meantime and to start to identify their respective cases on the competition issues that arise in this case. And at the CMC in the new year, one will be able to take stock and on my learned friend's case, we will know the outcome of what's happened in the arbitration. And it may or may not be that it will mean that this case goes away and if the Premier League have

suffered some costs in the interim, then, well, we will be liable for those costs, but they will be fully compensated, effectively, in costs.

And if it proceeds after that, as we expect there is every probability that it will, then we won't be starting from a standing start. And as I will come to in a moment, that is the normal procedure where you have parallel proceedings in Europe which may be dispositive of claims that are brought in this Tribunal and we say there is no real difference, actually, here, in the current circumstances.

Now, before I come back to elaborate a little on those points and to take you to the parallel analogous position where you have a European judgment that is under appeal, I would like to make some submissions in relation to what is going to be decided and what is not going to be decided and when it is going to be decided in the arbitration.

Now, there are two ways that we can deal with this and we're very much in your hands, Mr Chairman and Tribunal, generally. One way is for me to provide you with my submissions on what my understanding is of what will be decided in the arbitration and when it is likely to be decided. The alternative is for Mr Nick De Marco, we have here, to give those submissions and we have spoken earlier and he has very kindly offered to take up the baton on that point and since he, obviously, has a much greater degree of familiarity with what has been decided in the arbitration, it may make sense for him to do so.

But, equally, I'm happy to make my own submissions on the back of what I understand to be the case, based purely on the papers.

So we're very much in your hands.

Forgive me, we can't hear you, Mr Chairman.

MR JUSTICE MILES: Sorry, I think it would be preferable for you to carry on, Mr Jowell, if you're in a position to do so. With no disrespect to Mr De Marco, rather

than, as it were, changing horses in mid race. I think if you carry on, that would be helpful, I think.

MR JOWELL: Right, very well.

MR JUSTICE MILES: Is there a confidentiality --

MR JOWELL: In a sense I am going to have to go into matters that are confidential to the arbitration, so it's very much up to the Premier League if they wish to apply to you, I think, for me to make those submission in private and then, of course, I will abide by that. But we're in the Premier League's hands and your hands as to whether you would prefer us to go into private, but I will have to go back to some of those materials that we already looked at, the orders in the arbitration and so on.

MR JUSTICE MILES: How long is this passage of your submissions likely to take?

MR JOWELL: I would say about ten minutes or so.

MR JUSTICE MILES: All right, well I think we better follow the same sort of course as we did before, I'm afraid, which is to go into private for a short period. We will have to hear the submissions and then it may be that a short summary of what was said can be given when we go back on to public streaming. So, what we will do now is go into private session for about ten minutes or so and the remote live stream will then resume.

So we will pause for a moment.

In private

In public

MR JUSTICE MILES: Yes.

MR JOWELL: Thank you, Sir.

Now, having dealt with those points as relating to the inter-relationship between the issues in the arbitration and the issues in the claim, I think I can move on to

something which is common ground between Mr Lewis and myself, which is that it is clear that the competition claim will need to grapple with a number of additional points that are not within the existing arbitral proceedings, and those will relate in particular to the specific competition law aspects: the definitions of the relevant market; the approach, whether the Premier League is accepted to be an undertaking; whether it's accepted that it is an association of undertakings; whether it's accepted that it occupies a dominant position and if so, on what markets; and whether it accepts that the misapplication, if it was a misapplication of the rules, led to a distortion of competition on those markets. All of those issues will arise in the competition claim that don't arise in the arbitration.

Additionally, of course, the question of whether St James has suffered loss by reason of the loss of the sale is not a question that can arise in the arbitration and doesn't arise in the arbitration.

So that leads me to the point which is this: which is surely it is desirable that the parties should make progress on joining issue in relation to those matters. At least through to a close of pleadings on these matters in the interim and is it not desirable, surely, that one should list a CMC so that it comes on shortly after the arbitration is currently scheduled to be resolved and on Mr Lewis' case, will be resolved.

And then at that point this Tribunal can take stock of the effect of the arbitration or if it hasn't been resolved by that stage, what further steps are appropriate. And that sort of staged approach, we say, that is what would constitute good case management in these circumstances, not a stay that brings these proceedings to a juddering halt. We should bear in mind that, of course, my learned friend has already, in a sense, had his stay, because these proceedings were lodged in April and we're now in September. Because of his application, he has already had a lengthy stay. We say there is no reason to have a further stay.

And if one goes back to the CAT's governing principles, you will find those in bundle D6, I believe -- and if I could perhaps just mention them to you rather than turning them up. Paragraph 4(2)(d) of the CAT Rules stipulates that cases should be dealt with expeditiously, as well as fairly, and paragraph 4(3) of the CAT Rules states that each party's case shall be fully set out in writing as early as possible.

Now, we have had no case in writing from the Premier League on the key competition law aspects and we see no reason why they can't, in the next few months, and indeed weeks, set out their competition law case by way of defence and that we can then reply to it.

And an informative analogy, as I said earlier, is what is the position where someone brings the claim in this Tribunal based upon a decision of a regulator, whether that regulator be the European Commission pre-Brexit or the CMA as now, or some other regulator and where that decision is also under appeal to the European Court or to an English court? And what this Tribunal typically does, as I'm sure the Tribunal will be well familiar, is not just to stay the proceedings and await the outcome of the appeal. Rather, what it does is to allow the claim to proceed, short of trial, but to make progress nonetheless, typically in steps or stages. And this approach was first definitively established in the judgment of the Chancellor in National Grid.

And if I could ask you just to take that up. It's in D3, tab 7, page 102. And in paragraph 4, you will see that he refers to this being a follow-on action because it's one that relies entirely on a Commission decision, finding a cartel in gas insulated switchgear. And you see over the page on page 5, that an application was made by the defendant for a stay of all further proceedings, pending the conclusion of the appeals to the European Court.

And the Chancellor then goes on to examine the European jurisprudence in this area and in particular the case of Masterfoods which is the case which establishes that

where a Commission decision is under an appeal, then the matter cannot come on for trial in a domestic court. It requires that the national court has to stay its proceedings to that extent, so that the case doesn't come on for actual trial.

But that did not mean in the Chancellor's view and according to established practice, that the proceedings were stayed entirely from the outset. And you can see, if you go forward to paragraph 23, his summary of the position. He says:

"The court should take all the steps required to ensure that the trial does not come on before all appeals to the CFI and, if brought by any party, to the ECJ have been finally concluded. Accordingly, the minimum requirement of this court is in order to ensure that the action isn't fixed for trial against any defendant, before, say, three months after the exhaustion of all rights of appeal."

And he says the defendants contend that such a minimum order is not sufficient to protect them.

Now, by analogy in the present case, you would say, well, no trial of this competition case, no trial of this competition case should come on until the arbitration with the Club has been concluded and that, one can see, might make sense. I don't bind myself to that or my client to that but one can see that might make some sense. But there is little prospect of that happening in any event because a trial of this competition claim is most unlikely to come on -- even on our more pessimistic scenarios of when we think the arbitration will be resolved, it is unlikely that the trial of the competition case will come on in advance of it.

Then if you go forward, you see how the Chancellor -- it was Andrew Morritt, of course -- at page 115, one sees the Chancellor balancing the various considerations and he says:

"It follows that I should consider the applications for a stay in the light of all relevant circumstances, the objective achieved and the balance indicated by the terms of the

overriding objective. Does such consideration lead to a conclusion that the stay should take effect before the latest appropriate point, as indicated in paragraph 23 above? This involves a comparison of the position of the parties, if a stay is granted with immediate effect and if it is not. The comparison must be made out on two alternative hypotheses, namely, the application of the defendants to the CFI and subsequently on appeal to the ECJ, are or are not successful in whole or in part and in their baldest terms, the defendants submit that this stage should be immediate, because if their applications or appeals subsequently succeed, substantial time and expense involved in preparing for the trial of this follow-on action will be wasted because its foundation, namely the decision, will have been removed. The response of National Grid is to suggest that even if the annulment applications are successful, the follow-on action is likely to proceed and defendants will be adequately compensated in costs but if it is not annulled, National Grid will have lost valuable preparation time for the immediate trial of the follow-on action, after the final dismissal of the applications or appeals to the CFI or ECJ, with the inherent risk that the relevant documents and other evidence may be loss or destroyed, to which the defendants replied that they have offered undertakings for the preservation of documents."

So, he's balancing the different considerations and then if you go forward to paragraph 44 on page 117, one sees his conclusions. He says:

"The proper balance, in my judgment, requires me to allow this action to proceed at least to the close of pleadings. In addition, I can see that it's premature to decide that no disclosure should take place before the conclusion of the applications and appeals to the CFI and the ECJ. In principle, therefore, I accept the submissions of counsel for National Grid that the action should proceed to the stage of the close of pleadings. The parties' advisers should meet to consider the scope and basis for

proceeding with disclosure and that that topic and the need for desirability of other directions should be reconsidered at a case management conference to be held in October. I reach this conclusion because I consider that the circumstances of this case, the time that's already elapsed since the occurrence of the relevant events, the need for the follow-on action to be processed so as to be ready for trial as soon after the conclusion of the proceedings before the CFI and ECJ are concluded as is reasonably possible, outweighs the need to avoid expenditure which may be wasted, if and to the extent that it is not compensated for by an award of costs. Unless the preparation for the follow-on action continues, the parties will not be on an equal footing because National Grid will not know what are the relevant issues or what documents relevant to those issues, particularly causation, are available."

And that has become the standard approach of English courts and this Tribunal, in circumstances where there is an appeal to the ECJ, even when that appeal, if it is successful, would be dispositive of the whole action. And the approach, as Mr Justice Teare once put it in court, is there is not so much a Masterfoods stay, as he put it, as a Masterfoods stagger, because one goes in stages, effectively, in this process and one evaluates it stage by stage. And we say that similar considerations apply here and the Tribunal should allow this proceeding, as I have said, allow this claim to proceed, at least to close of pleadings, so we know what the Premier League's case is on the competition issues and to the listing of the first CMC. And in practical terms, that's going to take us into early next year and one can then take into account the arbitration, if it is resolved and if it turns out that the competition claim is moot, then because of that, though we think that's rather unlikely, then St James will have to withdraw the claim and no doubt the Premier League will seek its costs.

The likelihood of significant amounts of unrecoverable costs by that stage is

relatively low. And notwithstanding my learned friend's appeals to the resources of the Premier League, it is not known to be an impecunious entity. It is not known to be short of lawyers that it can instruct to defend a competition law claim and there will be no harm, in our submission, by reason of the Premier League having to plead out its defence.

But if a stay is granted, as my learned friend seeks, there will be harm, because particularly if the arbitration doesn't proceed in January, as we anticipate, or fear, and -- forgive me. And in those circumstances, there will be real prejudice to the position of my client. And of course, in spring, at a CMC, the Tribunal will be able to give consideration then as to what further directions for the progress of the action are appropriate.

Unless I can be of further assistance, those are our submissions.

MR JUSTICE MILES: Thank you very much.

Yes, Mr Lewis.

Reply submissions by MR LEWIS

MR LEWIS: Thank you very much. My learned friend Mr Jowell has quite properly followed his skeleton argument almost to the letter. I have already dealt with his points in my submissions and unless I can assist the Tribunal further on them or on any particular one, I have only really two points to make in relation to what he has said.

The first is in relation to the confidentiality club that has not been possible to agree in relation to the confidential addendum. The stance of SJHL is that only the external lawyers of the Premier League, in other words, those of us in this room, are allowed to look at the confidential addendum. Not even the internal lawyers of the Premier League are supposed to be allowed to look at it and that obviously is of no

help at all. We can't take instructions on what is contained in the redactions and, therefore, we have held out and said that we need to have it on a different basis and that has not been agreed and, therefore, the confidential addendum has not been provided to us.

The second point is on this issue, the last issue of temporary stay versus carrying on. Now, the National Grid case is a very, very different case and I have already set out and I won't go over again, the reasons why a temporary stay is appropriate in the circumstances of this case but I would draw the Tribunal's attention to these facts which make it a very different case from National Grid.

The supposed delay here is very short. It is only until January and I will come on to why it's only until January. The costs that would be incurred are entirely unnecessary, because they would relate to pleading an answer to a competition law case that it will not be necessary to deal with and which isn't a proper competition law case for this Tribunal to deal with in any event.

On the other hand, there is no damage whatsoever to SJHL if it has to wait for those few months and if it then wants to persist with its competition law claim, well then it can be started up again after the arbitration, in the unlikely event that there is anything to be dealt with then.

As to Mr De Marco's intervention, it only goes to demonstrate the farce that underlies the situation that we're facing here, the farce in suggesting that these two parties are in any sense in a different interest or that they should in any sense be treated separately for the purposes of each of my applications today.

The arbitration will proceed on 3 January. The procedural course is set. The disclosure aspects will be dealt with by an independent assessor and that will then -- in time for the parties to prepare for the hearing on 3 January, when they have already prepared for that hearing up until July, with the only exception being the

disclosure issues. There is nothing at all to suggest that it will not do so, that it will not be heard on 3 January.

Equally, it's equally implausible to suggest that that arbitration will not decide the director issue. It is the central issue on the Premier League's case. The Premier League's case is that you have to decide this issue because in deciding this issue, you will also decide that the procedural issues, to the extent there is anything in them at all, which there isn't, will not be sustainable. And, therefore, it will have to be decided and it will be decided in January and to suggest that there is any loss before a decision has gone against the Club and SJHL at that arbitration, is simply illusory. There is no loss as yet suffered.

And so in those circumstances, I would, again, reiterate our request that the stay is granted, on the bases we have set out or alternatively, that there be a temporary stay pending the arbitration award. Unless I can assist the Tribunal further, those are our submissions.

MR JUSTICE MILES: Yes. One question that arises out of that: as to the suggestion that you put in a pleading if I've understood your submission in relation to that, the detriment to your client of doing that is essentially throwing away costs.

MR LEWIS: It's not only throwing away costs, it's that the legal team, when it's supposed to be preparing for the arbitration, is going to have to be dealing with that. It's also the costs of --

MR JUSTICE MILES: I would be surprised, Mr Lewis, if you were going to be preparing between now and January, but it may be that you take a very long time preparing your cases, but that does seem a bit far-fetched.

MR LEWIS: We are obviously engaged in the disclosure exercise pending that period when one would go into preparation and there is obviously the Christmas break, but I do accept that it's not the only time. But the point is this: what is being

proposed is we plead an entire competition law case which we would have to take expert advice on in relation to the market allegations and so on before we pleaded it completely, and it's an enormous amount of cost that is entirely unnecessary -- entirely unnecessary -- because the bottom line here is that nothing is actually alleged here that isn't already in the arbitration and that isn't already going to be decided.

And, as was clear, as I took the CAT to the statements in National Grid, that an award of costs is merely palliative and not an answer, and if you can avoid it you should avoid it. This is a very, very, very different situation from a National Grid-type situation where the amount of time involved might be very lengthy.

MR JUSTICE MILES: Yes, okay. That's very helpful, thank you very much.

I would like to thank all counsel for their very helpful submissions. It probably won't surprise you to hear that we will not give an ex tempore judgment at this stage. You will be notified in the usual way when we have reached our decision, which we will go away and consider with care.

I would like to thank also those who are supporting you today and also the administration here. I understand that at times there have been thousands of people -- and that's not an exaggeration -- watching this hearing and I think it's a tribute to the process that that has been possible today.

So thank you all for your submissions.

MR LEWIS: Thank you, Sir.

(4.47 pm)

(The hearing concluded)