

JUDGMENT : His Honour Judge David Wilcox : TCC. 30th July 2007

1. This is an application under Section 67 of the Arbitration Act of 1996 to appeal against an arbitration award made by D J Cartwright on 19 October 2006 against a preliminary award as to his jurisdiction in an arbitration between St Peter's Rugby Football Club represented by Robert Matthews on behalf of himself and all other members of St Peter's Rugby Football Club membership as at 15 October 2003. The contract that is relevant to this application is the J C T Intermediate Form of Building Contract agreement (incorporating amendments 1-5) dated 15 October 2003 whereby under Articles 9A and B disputes or differences between the parties shall be referred to arbitration.
2. The Arbitrator determined that the Employer under the Contract was R Matthews on behalf of himself and all members of the Club as at 15 October 2003. The claimant, Michael John Construction Ltd ("MJC") the Contractor under the Contract contends that the adjudicator was wrong in law and that the Employer in the Contract, and thus the proper party to the agreement to arbitrate were Richard Henry Golledge, Desmond Fielding Childs and Mario Carpanini.
3. His Honour Judge Havelock-Allen QC on 25 April 2002 ruled the claimant had not waived its right to pursue an application to appeal under Section 67 and gave leave for further evidence to be adduced at this hearing. The history of this matter reveals that there is a genuine dispute under the construction contract that should have been determined years ago expeditiously and economically and that well-meaning people, some out of their depths, have produced a sad and expensive muddle.

The Background

4. In 2002 St Peter's Rugby Football Club occupied a clubhouse and sports field in Newport Road in Cardiff. As an unincorporated club it could only hold land by lease or by freehold interest through trustees. The club constitution contained the following relevant provisions:

"3. Headquarters

The Registered headquarters of the club shall be the clubhouse, 118 Newport Road Cardiff and in the event of any change in the registered headquarters the new address shall be notified to the Clerk of the Justices within fourteen days.

5. *The management of the club shall be vested in the Management Committee which shall consist of the officers of the club and the appointed club coach (if any).*

(Paragraph 6 – the officers are set out)

10. General Meetings

General Meetings should be held at least once a year at such time and place as may be determined by the Management Committee, provided not more than 15 months shall elapse between each General Meeting. An Extraordinary Meeting may be convened by the Management Committee at least on fourteen days notice or by written application by not less than 20 members or one fifth of the total numbers of the members, whichever shall be the less, addressed to the Hon Secretary. In the latter case, the meeting shall be convened by the Hon Secretary within fourteen days after the receipt by him of such an application.

12. AGM

The business of the AGM shall be ...

(h) proposed changes to the constitution, due notice of which has been given.

15. Notice of Meeting

At least fourteen days prior notice of a General or Extraordinary General Meeting shall be given by the Hon Sec in writing. Such notice must be displayed prominently on the club notice board.

22. Appointments

The Management Committee shall have the power to appoint for any period of time an auditor, club solicitors and any other appointments whether paid or unpaid that shall be deemed necessary to the efficient administration of the Club.

23. Trustees

The Management Committee may appoint no more than four and no less than two trustees from within its ranks or from among life members. Such trustees, when duly authorised by resolution of the Management Committee, shall have the power to sign and execute on behalf of the club all deeds and documents without incurring any personal liability in respect hereof.

24. Rules

Any rule of the constitution can be made, amended or rescinded at a General Meeting provided notice of the proposed change of same has been received in writing by the Hon Secretary at least seven days before the meeting. In addition, the Management Committee shall be empowered to make, amend or rescind any Rule and such change shall take immediate effect and shall remain in force until submitted to an Extraordinary General Meeting, when it shall be confirmed, amended or rescinded. Such Extraordinary General Meeting shall be convened by the Secretary within seven days of the decision of the Management Committee. The majority required before any Rule can be made, amended or rescinded shall be not less than sixty per cent of those voting, provided that no amendment shall be in contravention of the Licensing Act 1964 and any new Rule shall be notified to the Clerk of the Justices within fourteen days"

5. The Management Committee of the Club on 12 August 2002 decided the Club would seek to sell the existing clubhouse subject to the agreement of an Extraordinary General Meeting to be called at an appropriate time. The option of a community based sports complex on the Harlequins ground was being progressed and it was noted that the architects had been engaged and a project manager. *"Plans for the complex had been prepared and the council had offered a lease to run co-terminus with the ground lease. The crucial matter was obtaining planning permission."*
6. The Trustees of the St Peter's Rugby Football Club at this time were R H Golledge, D S Childs and M C Carpanini. Mr Golledge was both Chairman of the Club at this time and Trustee. On 7 October 2002 he wrote to Mr Robert Matthews confirming his appointment as Director of Development of St Peter's RFC. On 14 October 2002 the Management Committee Minutes recorded the attendance of the three trustees, Golledge, Childs and Carpanini, together with Mr Amos, the Club Secretary and two others and that Bobbie Matthews was appointed Director of Development.
7. On Wednesday, 15 December 2002, a meeting described as a development meeting was held and the attendees again included Mr Golledge, Chairman and Trustee, Mr Childs, Trustee, and Mr Carpanini, Trustee. A Mr Corsi was also present and Mr Matthews, who reported that the lease agreement for the Minster Road ground would be discussed on 23 December 2002 by Cardiff City Council and that the planning application would be heard on 22 January 2003. It was noted: *"Obviously we need both the lease and the planning permission and it is uncertain whether you can be granted one without the other."*

The minutes also record:

"2. 118 Newport Road. The sale to a Housing Association is proceeding for a price of £300,000. However, this is dependent on a cleared site. Various options are being discussed with demolition contractors. This would include the salvage as such items as the fireplaces, stairs, picture window etc. Contracts should be exchanged soon and completion is anticipated late January/early February.

3. Lease of Harlequins ground. It is felt we should secure this lease and not wait for the sports complex position to be resolved. RM CC and DFC would meet with our new solicitor, Nigel Perris."
8. On 13 January 2003 at the Management Meeting it was confirmed that the Planning Committee was to hear the application for the sports centre on 22 January 2003 and that the Council Cabinet would consider the lease on 23 January 2003. At paragraph 5.3 the minutes record that an EGM had been called for Friday, 17 January 2003 to obtain members' approval of the sale of the Newport Road Clubhouse for £280,000 and the associated suspension of Rule 3 of the constitution which related to the registered headquarters.
9. On 17 January 2003 the Extraordinary General Meeting took place. It was minuted by Mr Childs, Trustee and chaired by Mr Golledge, Chairman and Trustee. The Management Committee recommendation was that there should be an immediate sale of the clubhouse to the Housing Association who had made the offer. Paragraph 6.3 of the minute records *"The Management Committee resolution was put to the meeting. This was that the clubhouse be sold immediately for £280,000 with the associated suspension of Rule 3."*

This was passed by 31 votes to 8. Approximately 50 persons attended the meeting out of a membership of 331 as at 15 October 2003, of which the club had the addresses of only 282. There could be no doubt that the meeting was quorate and that the meeting had been given the appropriate notice compliant with Rule 10 and confirmed by the evidence of Mr Childs, the Secretary.
10. Paragraph 6.4 of the minute records that *"The Director of Development was authorised by the members present to deal with and sign all relevant contracts to do with the sale of the existing clubhouse and acquisition of the sports complex at the Harlequins ground."*
11. This resolution was not described in the minutes as being a Management Committee resolution. There is no documentary evidence of notice having been given of this resolution. Neither the minute of the Management Committee meeting of 18 December 2002 nor the Minute of the Management Committee meeting of 13 January 2003 make any mention of it.
12. Mr Childs, the Club Secretary, said that both resolutions would have been incorporated in the notice displayed on the club notice board at least fourteen days before the meeting. No copy of that notice was retained.
13. The minutes of the EGM 17 January 2003 were approved as correct at the AGM held on 22 August 2003.
14. On 15 October 2003 the claimant, MJC as contractor entered into the JCT Intermediate IFC 98 Contract with St Peter's RFC. Mr Murphy signed on behalf of the contractor, Mr Matthews on behalf of the employer. St Peter's RFC is an unincorporated club and as such has no legal identity. The issue between the parties is who, if anyone, conferred any authority upon Mr Matthews to sign the contract. Mr Matthews was not a Trustee when he signed the contract on 15 October 2003. He did not become a Trustee until December 2003, when he and Mr Norman replaced the original three trustees, Messrs Golledge, Childs and Carpanini.
15. Clause 23 of the Constitution clearly envisages that transactions involving the club property should be undertaken by the Trustees and that when they are duly authorised by resolution of the Management Committee they shall have power to sign and execute on behalf of the Club all deeds and documents without incurring any personal liability in respect thereof. The authorisation gives rise to the indemnity.

16. In relation to the land and premises at Newport Road sold to the Housing Association there was a recommendation given by the Management Committee that they should be sold at £280,000 and authority was given by the EGM. The three Trustees signed the appropriate documentation and deeds on behalf of the Club.
17. At the time that the contract was signed by Mr Matthews the terms of the new lease had not been concluded. It was concluded in early December. On 8 December 2003 the Management Committee authorised the Trustees to sign the lease and the other Committee members witnessed their signatures. The procedure was compliant with clause 24 of the Constitution. Mr Matthews as Director of Development represented the Club in relation to the building project, liaising with the contractor, the project manager and the appointed architect. He is experienced in the contracting business and trades through a limited company and was aware of the importance of correctly identifying contracting parties.
18. The building work started in or about early 2004 and practical completion was achieved on 23 August 2004. There were problems with the payments to the claimant company, MJC. On 17 September 2004 MJC served a statutory demand under Section 268(1)(a) of the Insolvency Act 1986 in the sum of £117,943.26 upon St Peter's Rugby Football Club. Mr Matthews instructed O'Keeffe & Co, Solicitors, in an application to set aside the statutory demand. A supporting affidavit of Mr Perris, a partner in the firm, dated 7 October 2004 contains the following passage:
"(a) Insofar as the demand is addressed to the applicant it is defective as it does not identify the debtor within the statutory requirements so to do.
(b) Without prejudice to 2(a) above while it is admitted that while the applicant entered into a contract on behalf of St Peter's RFC with Michael John Construction Ltd wherein the applicant acted upon the authority of the Trustees of St Peter's RFC who constitute that unincorporated association, it is denied that the sum claimed in the demand is due."
19. In his affidavit of 18 November 2004 seeking to set aside a second demand, Mr Matthews says:
"(3) I am a Trustee of St Peter's RFC which is an unincorporated association.
(4) I on behalf of St Peter's signed a JCT agreement with the respondent and believe that the respondent's claims are based on that agreement."
He then sets out an argument as to quantum and at paragraph 9 says: "I ask the court to set aside the statutory demand on these grounds and those set out in the affidavit of Mr N C Perris sworn and filed herein." (emphasis supplied)
A second statutory notice dated 13 December 2004 was directed to the two Trustees appointed in December 2003, Mr Matthews and Mr Norman.
20. The disputes over the construction contract continued and on 30 March 2005 the Club's solicitor, O'Keeffe's wrote a letter containing the following: "... If when we receive your draft statement of claim ... we will supply you within a reasonable time of you requesting it names of the persons who the Club will nominate and who will agree to be named as representative defendants to any proceedings."
That elicited a reply on behalf of MJC:
"1. Is it admitted that the contract was made on behalf of all the members of the Club? If so we would be grateful if you would kindly provide us with copies of the Club's Rules, a list of members and the record of the meeting and resolution by which the members authorised Mr Matthews to enter the contract on their behalf.
2. If the answer to question 1 is yes, is it admitted that all the members of the Club are jointly and severally liable in respect of any sums due under the contract?
If we do not receive affirmative answers to the above questions it is our intention to serve an Adjudication Notice upon the Trustees of the Club, Mr Robert Matthews and Mr Norman."
21. No information was forthcoming in relation to this reasonable request and an Adjudication Notice was duly served on the two trustees on 3 May 2005 and the contractual adjudication procedure under Clause 9 was invoked. Mr Matthews signed the adjudication agreement between MJC "On behalf of St Peter's RFC my consent is given for and on behalf of St Peter's Rugby Football Club". In his letter of 17 May 2005 Mr Matthews confirmed to the adjudicator that he was not a trustee at the time that the contract was signed by him.
22. On 6 June 2005 the adjudicator made an award in the sum of £92,571 plus interest and costs in favour of MJC against the responding party, namely against Mr Matthews who signed the contract and against the two named trustees, Matthews in the capacity of Trustee and Norman.
23. Mr Matthews and those representing him failed to act with open-handed candour and the true position as to who were trustees at the material time or who were representative members was not forthcoming until 5 August 2005, after the adjudication and when the part 24 enforcement proceedings disclosure occurred. MJC's solicitors on hearing of the true position on 20 September 2005 wrote to the original trustees relating that Mr Matthews had asserted that the contract was signed on behalf of the trustees and asked them to confirm that the contract was signed on their behalf and that to avoid further costs would they comply with the adjudication as if they were the properly identified responding parties.

24. On the instructions of Golledge, Childs and Carpanini, Messrs O'Keeffe referring to the proposal and the adjudication noted that "You say it is not of any effect unless it is agreed that we be bound by it. We do not agree to be bound."

Thereafter following uncompromising correspondence conducted on behalf of the respondents.

A second adjudication was commenced, the responding parties being nominated as the signatory to the contract Matthews and the three original trustees. On 7 November 2005 Mr Fitzgibbon, claims consultant on behalf of the respondents wrote "The parties are specifically agreed that when Mr Matthews signed the contract he acted as the agent of Messrs Childs, Golledge and Carpanini in their position of trustees. See for example paragraph 8.1.2 of the referral. There being no dispute about that matter, you cannot find otherwise."

25. On 16 November 2005 the adjudicator made an award against the three original trustees and the contract signatory, Mr Matthews. He prudently considered the status of the parties with great care and sought counsel's advice, taking care to copy both his letter of instruction to counsel and the resulting Opinion to the parties. He found that Golledge, Childs and Carpanini were trustees of St Peter's Rugby Football Club at the time the contract was entered into by Matthews on behalf of the trustees. As such they were liable. Rule 23 of the constitution was governed the trustees' right to indemnity quâ club members. It did not affect the rights of third parties. Since Matthews was acting as agent for the trustees he was personally liable as were the trustees as his principals.

The Enforcement Proceedings

26. An adjudicator's award is enforceable under CPR Part 24 by way of summary judgment. The claimant duly issued a Particulars of Claim pleading that the contract was signed by the fourth defendant (Matthews) in his own name acting for and on behalf of the first, second and third defendants as trustees of the Club. The defendants entered a defence served 6 January 2006 admitting that they were trustees at the material time and it was admitted that the contract was signed by the fourth defendant on behalf of the Club. It denied that in so signing he incurred any personal liability or that he signed on behalf of the first, second and third defendants as trustees of the Club. The central question in the Part 24 application before HHJ Coulson QC was: Who was the Employer in the construction contract? Morgan Cole, who continued to act for Mr Matthews and the three original trustees, filed a sworn statement from Robert Matthews in the proceedings. The material parts are as follows:

"7. I was not a trustee of the Club at the time the contract was entered into with the claimant. The trustees at the time the contract was entered into were the first, second and third defendants ...

9. At the time the contract was entered into I was acting on behalf of the Club as Director of Development. I was appointed by the Club in this regard on 2 October 2002. A copy letter from the Club confirms my appointment which was approved by the trustees of the Club. The letter confirming my appointment is signed by the first defendant as Chairman of the Club and then trustee. The letter was also copied to the two other defendants in their capacities as trustees and members of the Club's Management Committee.

10. The purpose of my appointment as Director of Development was to act on behalf of the Club in relation to the procurement of land and the construction of the new clubhouse at Minster Road, Cardiff. Because of my experience in the construction industry it was felt that I was best placed to assist the Club in securing the proper and timely completion of the new clubhouse. I was expressly authorised to deal with all matters relating to the construction of the new clubhouse building and acted in this capacity on a day-to-day basis.

16. I signed the contract on behalf of the Club on 15 October 2005.

17. As Director of Development I was expressly authorised by the trustees to sign the contract on behalf of the Club. This authorisation was given during a meeting attended by the first, second and third defendants and by Larry Edmunds, the Project Manager.

19. The claimant was fully aware that I signed the contract on behalf of the club and not on my own personal account or in order to bind the trustees in their personal capacity. There was never any intention for the trustees or for myself to be personally liable. I did not make any representations to the Club in this regard ... "

27. Morgan Cole acted for all four defendants. Doubtless this sworn account accorded with the express instructions of the original three trustees.

28. The judgment of HHJ Coulson QC is reported in 2006 EWHC page 71. Section E of the judgment is entitled "Analysis of Central Legal Issue". At paragraph 37: "Before going on to consider the two adjudications, and the adjudicator's jurisdiction to make his two decisions it is convenient to set out in summary form, my analysis of the central legal question: namely who was the appropriate party or parties against whom the adjudication proceedings should have been commenced?"

At paragraph 41:

"It is clear that under Rule 23 it is the Trustees of the Club who are authorised to enter into contracts on behalf of Members of the Club. A Trustee who enters into a contract will generally be personally liable under the contract, like other contracting parties. Subject to any contractual limitations on a Trustee's liability – and here there were none – his personal liability to the other contracting party would be unlimited: see paragraph 21-05 of Lewin on Trusts, 17th edition, and *Marston Thompson and Evershed Plc v Benn* (1998) CLY No.4875. It is clear, therefore, that, providing that it can be shown that the fourth defendant was acting as agent of the first, second and third defendants at the time the contract was made, then the first, second and third defendants are liable to the claimant as the Employers under the contract.

42. As previously noted, the contract was signed by the fourth defendant. He therefore made the contract with the claimant. In such circumstances he has a prima facie personal liability. Paragraph 168 of Halsbury's Laws volume 6 states as follows: 'Trustees, members of the Managing Committee or other agents contracting or purporting to contract on behalf of a Club may incur a personal liability, either be reason of the form or terms of the contract, or because in making the contract they are acting in excess of their authority. If such persons contract in their own names, they are prima facie personally liable and may be sued without joining other Members of the Club, even though they may have been duly authorised to enter into the contract on behalf of the Members generally. If they were so authorised, the other contracting party may elect either to sue them, as having contracted personally or to sue the Members as the principals on whose behalf the contract was made'
43. On this basis, therefore, the fourth defendant may be held personally liable to the claimant. However in the present case it is right to note that both before the first adjudication and expressly during the second adjudication those acting on behalf of the defendants made it clear beyond doubt that the fourth defendant entered into the contract on behalf of (or as the agent of) the first, second and third defendants: see the evidence referred to in paragraphs 8 and 9 above. Accordingly it seems to me that the fourth defendant is liable to the claimant as agent of the first, second and third defendants. In those circumstances the claimant has an election: see Halsbury's Laws volume 2 (1) and *London General Omnibus Company v Pope* (1922) 38 TLR 270. Either the claimant can pursue the first, second and third defendants as the Trustees who, as principals, entered into the contract with the claimant; or alternatively, the claimant can pursue the fourth defendant who entered into the contract personally and/or who acted as agent for the first, second and third defendants."
29. Summary judgment was granted to the claimants who elected to pursue the first, second and third defendants. The decision was not subject to appeal.
30. The successful enforcement of an adjudicator's award by an action in the High Court between named parties presupposes either no challenge as to the adjudicator's jurisdiction to make an award and acquiescence as to the jurisdiction, or in the face of challenge a determination by the court in the enforcement action as to the jurisdiction of the adjudicator to make an award which is binding until a final determination as to the merits of the claim by arbitration or litigation.
31. That part of the judgment as to the issue of jurisdiction of the adjudicator contained in the court's determination as to who were the parties to the contract giving rise to the adjudication process, and thus who were properly applicant and respondent in the referred dispute, is binding upon the parties to the enforcement action. It is not a provisional finding.
32. On 8 February 2006 Morgan Cole served a Notice of Arbitration on MJC in the name of St Peter's RFC. It was not accepted to be a valid notice since it did not reflect the finding of the court in the enforcement action, HD-05-351. Morgan Cole in their letter to MJC's solicitors of 24 February 2006 wrote:
"We note that you have disputed the validity of the Notice of Arbitration dated 8 February 2006. In particular you dispute our entitlement to commence arbitration proceedings in the name of 'St Peter's RFC' given the comments made in the outcome of the recent enforcement proceedings between your client and Mr Golledge, Mr Childs and Mr Carpanini.
You appear to be suggesting that any arbitration must be initiated in the name of the former trustees. We do not agree with your contention. As we have previously stated in earlier correspondence the recent enforcement proceedings only have relevance insofar as the same are not superseded by any subsequent litigation, arbitration or agreement. As such the outcome of those proceedings is not binding on any arbitrator. Furthermore, neither the adjudicator's decisions nor the recent enforcement proceedings disputed that St Peter's RFC is named as the employer in the building contract. Those proceedings simply determined who should be liable for the debts of St Peter's RFC."
33. The agreement to arbitrate is incorporated in the JCT agreement made between MJC and the then trustees (see Section E of paragraph 84 referred to above). The JCT arbitration rules apply.
34. Mr D J Cartwright was nominated to be the arbitrator. The arbitration was brought in the name of St Peter's RFC represented by Robert Matthews (Trustee). The claimant was required by the defendants to challenge the jurisdiction within the terms of the reference to arbitration. The arbitrator directed the determination of a preliminary issue to determine his own jurisdiction under Section 30(1) of the Arbitration Act 1996. His ruling as to jurisdiction is challenged in accordance with Part 1 of the Arbitration Act 1996 whereby under Section 67(1)(a) a party may challenge an arbitrator's award as to his jurisdiction.

The Preliminary Issue: The Effect of the Judgment in HD-05-2006

35. The issue as to who were the contracting parties was expressly considered and determined by the court. The judgment was not the subject of appeal.
36. The defendant Matthews sought to re-open this issue in the arbitration reference and in this application both the defendant and the former trustees seek to re-open it.
37. In *Arnold v National Westminster Bank plc* (1991) 2 AC 93 at page 105D-E, Lord Keith said that issue estoppel: "... may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant one of the parties seeks to re-open that issue. "

At 109A-B in relation to issue estoppel Lord Keith went on to say: "*In my opinion your Lordship should affirm it to be the law that there may be an exception to issue estoppel in the special circumstance that there has become available to a party further material relevant to the correct determination of a point involving the earlier proceedings whether or not that point was specifically raised and decided, being material which could not by reasonable diligence have been adduced in those proceedings. One of the purposes of estoppel being to work justice between the parties, it is open to the court to recognise that in special circumstances inflexible application of it may have the opposite result.*"

He went on to consider the question, "*whether the further material which a party may be permitted to bring forward in the later proceedings is confined to matters of fact, or whether what may not entirely in appositely be described as a change in the law may result in or be an element, in special circumstances enabling an issue to be re-opened.*"

38. In my judgment the arbitrator erred in law by permitting the defendant to impugn the finding of the court in the enforcement action as to the parties to the contract and therefore to the arbitration agreement contained therein. The arbitrator was misled when he acceded to the defendants' submission that the adjudicator's award was provisional because it was only binding until subsequent litigation or arbitration and that any determination in enforcement proceedings in the High Court were similarly provisional. That submission ignored the requirement that for an award to be made an adjudicator had to have jurisdiction from the parties to make an award and that the court enforcing the award had to be satisfied as to the arbitrator's jurisdiction. It can only be in the most exceptional circumstances that a party may be permitted to bring forward further material relevant to the issue already decided by a court, in subsequent proceedings. The arbitrator in this case, in permitting the defendants to adduce further evidence failed to consider whether it was material which could not by reasonable diligence have been adduced in the earlier proceedings. Clearly it could have been. What is striking about this case is that material now sought to be relied upon by the defendant in this application, as before the arbitrator, is an account inconsistent with that he has alleged in the past.
39. His primary case in relation to the preliminary issue that he ran before the arbitrator and repeated before me in this application to resist the claimant's appeal was that he had the express authority of the Club members given at the Extraordinary General Meeting held on 17 January 2002. It was not until June 2006 in a response made by the defendants as to the preliminary issue that the defendant claimed that he had been authorised to sign the contract on behalf of all the members. It was contrary to sworn evidence that he had given in his witness statement of 6 January 2006 when his case was that he was expressly authorised by the original trustees to sign on their behalf. The defendant's present account is contradicted by his solicitor's sworn admission on 7 October 2004, the admission made on his behalf and that of the trustees Golledge, Childs and Carpanini by Mr Fitzgibbon in November 2005 and the account previously given by him in the sworn statement in the enforcement action.
40. In support of this application the claimant submits firstly that the question of parties to the contract has already been decided in the enforcement proceedings and that secondly, in any event, even looking at the defendants' new case put at its highest it does not justify an inference that Mr Matthews was given the express authority of the members of the Club in January 2003.
41. The defendant submits that the arbitrator properly acted upon the clear evidence of the resolution at the Extraordinary General Meeting of January 2003 and if that is liberally construed then it is a competent finding that the signing of the contract by Mr Matthews was by and on behalf of the members of the Club as constituted in January 2003.
42. For the reasons I have already given I hold that the arbitrator was wrong in law to ignore the judgment as to the issue of parties and furthermore failed to consider whether or not there were exceptional circumstances warranting the adducing of further evidence. Had he done so, he could not have failed to conclude that the evidence now relied upon could, with reasonable diligence, have been adduced before the enforcement court, had it suited the defendant and the three original trustees.
43. It is right that I should consider the effect of the evidence that was adduced before me in order to resist the claimant's application. The defendant adduced the evidence of Mr Robert Matthews, Mr Desmond Childs and Mr Amos.
44. Mr Matthews was an unimpressive witness who throughout the adjudication proceedings, the enforcement action and the arbitration proceedings, gave contradictory accounts of his role. He is not an impressive or reliable witness. Mr Childs and Mr Amos gave evidence before me, neither was able to produce any copy of notices for the Extraordinary General Meeting held in January 2003 or copies of the proposed resolutions. Neither gave any explanation as to why the trustees left uncontradicted statements made by Mr Matthews or Mr Fitzgibbon in the enforcement proceedings as to the trustees' role. Mr Childs, an original trustee, now says that authority was given at the Extraordinary General Meeting. I have no doubt that the enforcement proceedings in relation to the adjudication awards taken against the trustees doubtless prompted their recollections. It also served to emphasise the strong interest that they have now in supporting any account that exculpates them. Mr Clarke on behalf of the defendants submits that I should accept the present account of the defendants as being truthful and accurate and that a liberal construction of the resolution recorded in 6.4 of the EGM minutes was sufficient to confer the necessary authority upon Mr Matthews to enter into the construction contract on behalf of all the members of the Club as at January 2003.

45. I see no reason to reject the evidence of Mr Amos that he took a minute of the Extraordinary General Meeting and I accept that he gave proper notice of both the meeting and the resolution to sell the Newport Road premises. Had notice been given of a resolution empowering Mr Matthews to sign a building contract in such wide terms as contended for it would have been discussed at the preceding Management Meetings and been the subject of a minute.
46. At the time of the EGM the acquisition of the lease was by no means certain, neither was the grant of the necessary planning permission. Significantly, when the lease was signed it was signed by trustees duly authorised under Rule 23. In my judgment the terms of the resolution were not sufficient to give Mr Matthews the authority to sign the construction contract on behalf of the Club. That is why he invoked the authority of the trustees. They were content to permit him to do so because they had given him permission to act on their behalf in relation to the contract, doubtless in the belief that they were protected from personal liability by Rule 23. When they realised that they were being held personally liable following the enforcement action they sought to deny it. The likelihood is that Mr Matthews was prompted to change his account to accommodate them when he saw the difficulty that they were being placed under.

Conclusions

47. 1. The arbitrator was wrong in law to permit Mr Matthews to adduce further evidence as to the identity of the parties who concluded the construction contract.
2. Had he applied the right test he could only have concluded that such material was readily available to the parties from the outset.
3. Had he applied the appropriate test it would not have been open to him to find that there were exceptional circumstances.
4. There is no basis upon which this court in relation to such an application could find that the application of the estoppel could work in justice between the parties or others affected by it.
48. The appropriate order is as follows:
1. The award of 19 October 2006 shall be varied to the effect that there was no arbitration agreement between the claimant and the respondent as the representative of the members of the Club as at 15 October 2003.
2. The respondent shall pay the costs of the claimant of the arbitration to be assessed on a standard basis if not agreed.
3. The respondent shall pay the claimant's costs of the preliminary issue to be assessed on a standard basis if not agreed.

Mr Ralph Wynne-Griffiths (instructed by Davies Prichard and Weatherill) for the Claimant
Mr Patrick Clarke (instructed by Morgan Cole) for the Defendant