CASE 36 – Decision

PROCEDURAL BACKGROUND

1. By a decision of the Independent Disciplinary Hearing Board dated 16 September 2013 the Appellant ("Player M") was found guilty of a breach of Rule 2.9 of the World Professional Billiards and Snooker Association ("WPBSA") Members' Rules and Regulations 2005 and 2008 at seven matches played in 2008 and 2009. For reasons which will be made clear later we do not need to be concerned at this stage with the details of the charges and findings. The Independent Disciplinary Hearing Board comprised Mr Adam Lewis QC ("Mr Lewis").

2. The sanction imposed on 24 September 2013, after a sanctions hearing, was that Player M should serve a suspension of 12 years and that he should pay a contribution of £40,000 towards the costs incurred by the WPBSA.

3. By Notice of Appeal submitted on 8 October 2013 Player M appealed against the finding of guilt and the imposed sanctions both as to the suspension and the order as to costs.

4. The WPBSA served a Respondents Notice dated 18 October 2013 seeking to uphold the decision as to Player M's guilt and seeking to increase the length of the suspension and to increase the contribution towards their costs.

RULES GOVERNING THE APPEAL

5. Player M's right to appeal and the jurisdiction of the Appeals Committee to determine it are governed by the Disciplinary Rules (2011) ("the Rules"). It is accepted by both parties that the Appeals Committee, as constituted, has jurisdiction to decide this appeal.

6. Mr Edwin Glasgow was appointed on 25 October 2013 by Sport Resolutions in accordance with Rule 11.2. He issued Preliminary Directions on 11 November 2013, having determined in the light of the matters raised in the Notice of Appeal, that he should co-opt another person who was independent of Sport Resolutions to sit as a member of the Appeals Committee. Mr Peter Stockwell was co-opted after representations from, and with the consent of, Player M and

the WPBSA.

7. In view of the limited nature of the Appeal at this stage, the Appeals Committee have not considered in detail or reviewed all of the documents and evidence submitted to the Independent Disciplinary Hearing Board. The parties were notified of this orally during the course of the hearing that took place on 30 January 2014.

THE APPEAL PROCEDURES

8. The Notice of Appeal advances 5 Grounds of Appeal. For the purposes of this preliminary decision it is necessary for us to refer only to the first of those Grounds, and to the 11 matters relied on in support of the first contention made under it:

"1. The Appellant did not receive a fair hearing by an independent and impartial tribunal, in that

i. The hearing should not have been presided over by Adam Lewis QC

a. The Independent Disciplinary Hearing Board appointed under Rule 9 of the WPBSA's disciplinary rules was presided over by Adam Lewis QC sitting alone.

b. At the time of the alleged charges in this case (the period February 2008 to April 2009) Mr Barry Hearn was the chairman of WPBSA. Mr Hearn was chairman until July 2010[1]. Since June 2010 Mr Hearn has had held the controlling interest in WPBSA's commercial arm, World Snooker. Further, Mr Hearn is widely seen as the public face of snooker.

c. Mr Hearn is also the chairman of Leyton Orient Football Club and has been since 1995.

d. Adam Lewis QC, is a leading sports law barrister in independent practice.

[1] This was acknowledged by Mr Spencer at the hearing on 30 January to be factually incorrect. Mr Hearn was on the Board of WPBSA from 3 December 2009 until 30 July 2010 - the whole of that period being after the breaches for which Player M was suspended.

e. *Mr Lewis QC has previously acted for Leyton Orient FC. On 19 September 2013 Mr Lewis QC appeared in the High Court again representing Leyton Orient in an application for judicial review.*

f. *As from circa. June 2013 [Player M] was not represented in these proceedings and he appeared at the final hearing, held between 9 to 11 September 2013, as a litigant in person.*

g. *The fact of on-going or close links between Mr Hearn and Adam Lewis QC or of any potential conflict of interest was not disclosed or referred to by either WPBSA, Sports Resolutions or Adam Lewis QC at that hearing.*

h. *Whilst Adam Lewis QC's CV had been sent to the Appellant's former solicitors in March 2013, and no objection had been raised, that CV contained no direct reference to Hearn or the precise detail of any on-going professional relationship.*

i. *Prior to the appointment of Adam Lewis QC, the Appellant had objected to the appointment of Charles Hollander QC who had disclosed previously advising or acting for Mr Hearn at some point prior to 1999. The Appellant's objection resulted in Mr Hollander QC standing down.*

j. *In all the circumstances, the above gives rise to a real danger of bias or a reasonable apprehension of bias, such that Adam Lewis QC i) should never have been appointed and ii) should have recused himself.*

k. *In all the circumstances, the Appellant did not receive a hearing in front of an independent and impartial tribunal."*

9. In view of the fact that all these matters were advanced in support of the Ground of Appeal that the hearing should not have been presided over by Mr Lewis, and the fact that, if we accepted that submission, the matter would have to be referred for a rehearing before another Independent Disciplinary Hearing Board, we directed on 21 November 2013 that "the bias issue" should be determined in advance of, and separately from, the other grounds of appeal.

10. Both parties to the appeal made written representations to us that Mr Lewis should be invited to comment on the allegations being made against him. In view of the

fact that both parties considered that we would be assisted by hearing from him, we gave Directions on 23 December 2013 that he should be invited to respond to certain questions of fact which we agreed would be put to him. Having heard further from the parties, we initiated a letter dated 10 January 2014 from Sport Resolutions ("SR") to Mr Lewis to which he responded on the 13 January. As the answers are significant in this part of the appeal, we set out the questions and answers in full:

1. Do you have any association, professional or personal relationship with Mr Barry Hearn. If so, please could you outline the extent and nature of that association, professional or personal relationship?

1. *No, I do not have any association, professional or personal relationship with Barry Hearn:*

   1.1. *To the best of my recollection, I have only met or spoken to Mr Hearn once. He attended a hearing at which I represented Leyton Orient Football Club Limited, and which I believe to have been on 27 March 2012, in his capacity as Chairman of the Club.*

   1.2. *I acted for Leyton Orient Football Club Limited on its application for judicial review of the first decision to lease the Olympic Stadium to West Ham. The application was heard on 24 August 2011, and following the hearing the respondents decided to recommence the tendering process. In the same context and at the same time, I acted for Leyton Orient Football Club Limited in its FA Rule K arbitration against the Premier League, challenging the grant of permission to West Ham to move ground to the Olympic Stadium. That arbitration did not proceed beyond interim hearings in the light of the result of the first judicial review proceedings. The hearing on 27 March 2012 was a costs hearing in respect of previous interim hearings in that arbitration. My Instructions in both the first judicial review proceedings and the arbitration were from Mishcon de Reya acting on behalf of Leyton Orient Football Club Limited, and I had no contact at all with Mr Hearn other than briefly at the 27 March 2012 hearing. On 19 September 2013 I appeared for Leyton Orient Football Club Limited on its renewed application for judicial review of the second decision to lease the*

Olympic Stadium to West Ham. I had no contact at all with Mr Hearn in the context of the second judicial review proceedings.

1.3. In March 2013, I was appointed by Sport Resolutions to act as an independent hearing board in the context of the governing body World Professional Billiards and Snooker Association's disciplinary proceedings against [Player M]. I received my Instructions from Sport Resolutions alone. I had no contact at all with Mr Hearn in any capacity, including in his capacity as Chairman of World Snooker Limited, which as I understand it owns the commercial rights to professional snooker and which was divested from the WPBSA in 2010.

2. Have you discussed the case of Player M with Mr Hearn? If so in what circumstances, when did that discussion take place and what was said?

2. No, I have never discussed [Player M's] case with Mr Hearn.

3. Did you receive Player M's email complaint dated 27th June 2013? If so, what if any further action was taken? A copy of that e-mail is attached.

3. No, I did not receive a copy of [Player M's] email dated 27 June 2013 addressed to [Witness A] of WPBSA and making a complaint about documents asserted to be held by the Police or Gambling Commission:

3.1. I have checked my email records from that date to 9 September 2013, the date of the substantive hearing, and there is no record of the email being sent to me by [Player M], by WPBSA or by Sport Resolutions.

3.2. I was not asked to consider, or make any directions on, any such complaint at an interim stage. The last occasion prior to the substantive hearing on which I was asked to give and gave interim directions was on 17 June 2013.

3.3. The first time I saw [Player M's] email dated 27 June 2013 was when in the days immediately before the substantive hearing I read the Trial Bundle including the file entitled "Respondent's Documents", where it was contained at page 30.

3.4. At the hearing, [Player M] argued in relation to such documents only

that the Police or the Gambling Commission via the Police would have the contents of the relevant texts as well as the timeline. As I held at paragraph 74 of my Decision: (a) [Player M] suggested that the reason the Police had decided not to bring charges is that they knew that the content of the texts exonerated [Player M](b) there was no evidence at all that the Police actually had the content of the texts (c) the WPBSA did not accept that the Police actually had the content of the texts (d) this operated at the level of assertion only, therefore. I have no record of any application by [Player M] at the hearing for directions in relation to such documents or for an adjournment for such directions to be carried out.

11. The preliminary issue was set down for hearing before us on 30 January. However, on 22 January, a written Advice of Mr Michael Spencer QC ("Mr Spencer"), leading counsel for Player M, was placed before us. Mr Spencer expressed the view that the questions that had been asked and had been answered by Mr Lewis *"did not cover the factual position adequately and that some of his answers give rise to the need for further information*" and he then identified nine further questions to be asked of Mr Lewis and also advocated that the WPBSA, Sport Resolutions and the solicitors and indeed, at that stage, Counsel for the WPBSA, should answer the first 8 of them.

12. By letter dated 23 January 2014, the Respondent's solicitor objected to these proposals and the matter was put before us. We decided that the issue should not be determined without argument being heard but that, in the interests of saving as much time as we properly could, consistent with the need to ensure that justice was seen to be done, Mr Spencer's Advice should be treated as an Application and the letter from the Respondent's solicitor as a Response and we issued a Direction on 27 January that it should be argued and determined at the 30 January hearing. Further representations were made in writing on behalf of each party.

13. Before embarking on the hearing of the bias issue on 30 January as we had directed, we heard oral argument from both Mr Spencer and Mr Weston on behalf of the WPBSA in relation to what was, as agreed by both parties, an application for further directions in respect of the issue as to whether or not the additional questions that had been posed should be put to anyone and, if so, to whom.

14. In the course of that argument, Mr Spencer indicated that he reserved his position as to whether or not he would ultimately submit that Mr Lewis had been "at fault", to use a neutral term, in failing to recuse himself.

15. In view of the notice that had been given by Mr Spencer that allegations of fault might be made against Mr Lewis, who was neither present nor represented before us, we decided that in principle we should give Mr Lewis the opportunity of responding to 5 questions which were, at our request, helpfully agreed between counsel for the parties. We directed that none of those questions should be put to any party or person other than Mr Lewis.

16. An undertaking was given by Mr Spencer in the following terms:

> "that he will clearly state, in the light of such response as Adam Lewis QC may be willing to provide:
>
> 1) whether or not he is going to make any submission that Mr Lewis acted improperly in failing to recuse himself; and
>
> 2) the nature of the bias which it is alleged could reasonably have been perceived."

17. We directed that Mr Lewis should be invited to respond to the agreed further questions. In view of their central position to some of the arguments we have heard from counsel for the parties we set out in full the questions and the answers which Mr Lewis promptly gave to them:

    1. At or about the time of his appointment, did Mr Lewis know about Player M's objection to Mr Hollander? If yes, when did he first learn of the same?

        1. *No, at or around the time of my appointment, I did not know about [Player M's] objection to Mr Hollander.*

    2. If he was aware of Player M's objection to Mr Hollander, did Mr Lewis know he reason for Player M's objection to Mr Hollander? If yes, when did he first learn of the same?

        2. *I was not aware of the objection*

3. At or about the time of his appointment, was Mr Lewis aware of Mr Hearn's previous involvement in WPBSA? If yes, when did Mr Lewis first become aware of that?

3. No, at or about the time of my appointment, I was not aware of Barry Hearn's previous involvement in WPBSA. I was broadly aware that Barry Hearn's Matchroom company had had commercial involvement in snooker through its promotions and its management of leading snooker players, but not of any previous involvement in the sport's governing body.

4. At or about the time of his appointment, was Mr Lewis aware of Mr Hearn's involvement in World Snooker? If yes, when did Mr Lewis first become aware of that?

4. No, at or about the time of my appointment, I was not aware of Barry Hearn's involvement in World Snooker. As set out above I was broadly aware that Matchroom had had commercial involvement in snooker, but I was not aware of the separate existence of World Snooker or of its relationship with WPBSA.

5. Was Mr Lewis aware of any of the comments made by Mr Hearn about Player M and Mr Lewis's finding of a breach of the rules by Player M made by Mr Hearn on television and in the press after the result of the substantive hearing became public? The comments referred to are those contained in Divider 4 of the Preliminary Issue bundle at pages 154 – 156 and 170 – 177 (inclusive).

If yes, please could he specify the comments made by Mr Hearn about which he became aware, and in respect of each when he learned of the same and how or from whom?

5. No, I do not recall seeing the press reports at pages 154-156 or 170-177 at Divider 4 of the Preliminary Issue Bundle or the comments reported in them. To my recollection I was broadly aware, I think from the television, that after the finding on breach Ronnie O'Sullivan had made a comment that had led to criticism of him from Barry Hearn, but I was not aware of the nature or extent of that exchange.

18. On 17 February we heard argument from counsel for the parties on the bias issue. Mr Spencer QC, with Mr Robin Leach and Mr Tom Horder, appeared on behalf of Player M and Mr Weston appeared for the WPBSA. We also heard oral evidence from five witnesses; Player M, Witness A, Witness B , Witness C and Witness D.

THE ISSUES

19. It is common ground between the parties that there are essentially two issues, although there are understandable differences as to the sub-issues which may also arise.

20. Having considered and been assisted by submissions (both written and oral) and skeleton arguments on behalf of both parties, we are satisfied that we can do justice to both parties, and be fair to the witnesses who gave evidence to us, if we address two questions:

    (i) In the light of the facts as we find them to be, do we, putting ourselves in the position of fair minded and informed observers, consider that there was a real possibility that Mr Lewis was biased; and

    (ii) If that real possibility did exist, did Player M know of the material facts which gave rise to it, and waive his right to object to Mr Lewis's appointment?

THE BIAS ISSUE

21. In addressing the first question, we are reminded by Mr Spencer, in paragraph 3 of his closing submissions that: "Rule 9.4 provides that a person may not sit upon the Independent Disciplinary Hearing Board where "he has any prior involvement with the case or has any material financial, familial or other relevant interest in the outcome of the proceedings".

22. In paragraphs 2 (iii) and 3 of the Appellant's Response to Respondent's Final Submission, which was served late on 20 February 2014, it appears to be argued, we think for the first time, that the ambit of Rule 9.4 is extended

by Rule 9.3. Rule 9.3 permits the Member (and of course the Association) to object to an appointment if he (or it) reasonably believe *"his or her independence to be in doubt or in accordance with 9.4…".*

23. We have not had the benefit of submissions on behalf of WPSBA as to how this provision is to be construed. We will accordingly deal with this new argument by giving the widest construction to each of the elements referred to under Rule 9.4 that we think is sensible in all the circumstances and having regard to the general principles of law on apparent bias (about which there appears effectively to be complete agreement between the parties), and then to ask ourselves whether Article 6 of the European Convention on Human Rights, which is relied on in the Grounds of Appeal but not addressed in any oral or written argument, assists us – or either party.

24. We have been greatly assisted by the full and careful submissions to which all Counsel have contributed and which do not reveal any material difference between the parties as to the principles of the general law on apparent bias, insofar as they do apply to this appeal. We can, therefore, deal with those principles quite shortly and without extensive citation of the 12 authorities which were also helpfully copied and made available to us before it was appreciated that there was so much common ground.

25. The principles which, even in the absence of Rule 9.4, we would and do apply to this case are most conveniently and authoritatively to be found in the speech of Lord Hope in *Porter v Magill [2002] 2 AC 357,* helpfully set out by Mr Spencer in paragraph 49 of his Skeleton Argument and in paragraph 8 of Mr Weston's which we gratefully adopt:

> *"the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased".*

26. Before seeking to apply that test, we must have regard to what is meant by bias in this context. Mr Spencer cites in *Re Medicament & Related Classes of Goods (No.2) (2001) 1 WLR 700*, where bias was described in the following way:

> *"Bias is an attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reasons to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of a prejudice in favour of or against a particular witness which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a Judge towards a particular view of the evidence or issues before him".*

27. Mr Weston relies on a rather shorter judicial definition provided by Scott Baker LJ *Flaherty v National Greyhound Racing Club [2005] EWCA 1117* at paragraph 28*:*

> *"Bias" means a predisposition or prejudice against one party's case or evidence on an issue for reasons unconnected with the merits of the issue"*

28. We consider that there is no significant difference between these definitions but we have them both in mind as we move on to address the test in *Porter v Magill*.

29. Mr Weston has also drawn our attention to the amplification and definition of the test summarised in the recent decision of Mr Justice Flaux in *A v B and X [2011] EWHC 2345* at ¶¶21 to 29. In that decision three aspects of the test are identified:

    (1) First, that the test is objective. Sensitivities peculiar to the parties are not relevant considerations for the test (¶¶21-24).

    (2) Second, that the fair minded and informed observer should be equipped with knowledge known to the reviewing Court and would approach it without assumption (¶¶25-27).

    (3) Third, that the observer is "expected to be aware of the way in which the legal profession in this country operates in practice" (¶28) and generally at ¶¶28-29.

30. We are also mindful that the test must be applied with precision to the allegation that is in fact made. It is for the Appellant to identify with precision what the facts that are alleged to give rise to bias (per Scott Baker LJ in *Flaherty v The National Greyhound Racing Club Ltd* at ¶33). That case is also authority for the proposition that we must adopt a two stage process. First, we must ascertain all the circumstances which have a bearing on suggestions that the Tribunal was biased and secondly we must ask ourselves whether those circumstances would lead a fair minded observer to conclude that there was a real possibility that the Tribunal was biased.

31. It was for these reasons that we expressed concern, echoed by Mr Weston, at the first hearing, that we were unclear as to the bias that was in fact being alleged and which should have been apparent. Mr Spencer accordingly undertook to set out what the precise nature of the bias that he was alleging was, and duly did so (we note expressly by reference only to Rule 9.4) in paragraph 14 of the Appellant's Second Addendum Skeleton Argument dated 10 February 2014. The case was that:

   (i) *sitting as an Independent Disciplinary Chairman was someone who was effectively acting for, and instructed by, Mr Hearn (albeit as chairman of Leyton Orient.)*

   (ii) *As the owner of the sport's commercial rights, any fair minded observer would perceive Mr Hearn to have an interest in the governance of the game and the successful outcome and prosecution of a high profile and wildly (sic) publicised investigation.*

   (iii) *World Snooker Limited provides the money that supports WPBSA. Any costs or fine imposed against [Player M] in the proceedings would be payable to and enforceable by WPBSA. This would reduce the requirement of World Snooker to fund WPBSA and any such financial gain would impact on the value of shares in World Snooker and/or any dividend payable. Mr Hearn, via his interest in and ownership of Matchroom would stand to benefit in this way.*

(iv) *the fair minded observer would inevitably have an apprehension that the Chairman, whether consciously or not, may favour the Respondent's case as a result.*

32. We are, however, conscious of the need to address those four contentions in the light of all the facts as disclosed by the evidence and, in particular what can now be seen that the Chairman knew at the time the case was being heard (*Locabail (UK) Ltd v Bayfield Properties Ltd [2000] QB 451* at ¶51)

33. To ensure that there is complete transparency in our application of the test we set out below the facts which seem to us to have a bearing on the allegation of bias:

(i) Player M is a professional snooker player and a member of the WPBSA.

(ii) Player M was "prosecuted for match fixing" in relation to snooker matches by WPBSA.

(iii) Mr Lewis is a leading sports law barrister in independent practice.

(iv) Mr Lewis was the sole member of the Independent Disciplinary Hearing Board set up and administered by SR

(v) Mr Lewis was acting for Leyton Orient Football Club in connection with an arbitration and Judicial Review relating to the future use of the Olympic Stadium in East London as a football ground.

(vi) In respect of his professional involvement on behalf of Leyton Orient Football Club Mr Lewis was instructed by London solicitors.

(vii) Mr Barry Hearn is Chairman of Leyton Orient Football Club.

(viii) Mr Hearn was a member of the Board of the WPBSA from 3 December 2009 until 30 July 2010. Mr Lewis was not aware of this.

(ix) Mr Hearn has a controlling interest in World Snooker Ltd which controls the commercial activities of the WPBSA. Mr Lewis was broadly aware that Mr Hearn's Matchroom Company had a commercial involvement in snooker through its promotions and its management of leading snooker players but

was not aware of the separate existence of World Snooker or of its relationship with the WPBSA.

(x) Mr Lewis did not know that Player M had objected to Charles Hollander QC because he had acted in a case brought by Mr Hearn.

(xi) Mr Lewis had no association, professional or personal relationship with Mr Hearn. He met Mr Hearn once, in his capacity as Chairman of Leyton Orient Football Club, at a Court hearing in March 2012. He never discussed Player M's case with Mr Hearn.

(xii) The outcome of the disciplinary proceedings against Player M so far as the order for costs is concerned would have no financial impact on Mr Hearn directly or indirectly through Companies in which he had a controlling interest.

34. In the light of the evidence and arguments that we have now heard, we make the following comments on the specific matters relied on, as set out at paragraph 31 above:

(i) There is no evidence that Mr Lewis was instructed by Mr Hearn, and we do not accept that he was "effectively acting" for him.

(ii) So far as Mr Hearn's interest in the outcome of the case is concerned, we consider that there is considerable force in Mr Weston's submission that ".. the fact of Player M being found to be a corrupt snooker player is inherently more likely to harm the commercial interests of snooker than benefit it." In any event, we have no evidence that would entitle us to conclude that Mr Hearn would wish Player M to be convicted, indeed we consider that it must be at least equally likely that he would regard it as being more in the interests of the sport, and his own interests, that it be found that there had been no improper conduct.

(iii) As to sub paragraph (iii) we accept the evidence of Witness A that there would be no financial implication for Mr Hearn in relation to any fine or costs

and we accordingly reject this point – both as assertion of fact and as argument.

(iv) In the light of the evidence which we heard we firmly conclude that no fair minded observer would have considered that there was any real possibility that Mr Lewis would have been biased.

35. Having addressed the arguments in respect of apparent bias in the way in which we have set out above, we should also consider the new point which is made in paragraph 36 of the Appellant's Closing Submissions: *"The apparent bias in this case, occasioned by the appointment of Mr Lewis QC, is obvious and has previously been set out. It is perhaps best encapsulated in the observations of [Witness B] at p.122a and b".*

36. Without any disrespect to Mr Spencer we have to say that it is not obvious to us. We accordingly re-examined the documents referred to. The first was Witness D 's note of what Witness B apparently said to him. It is submitted on behalf of Player M, at paragraph 29 f. of Mr Spencer's Closing Submission, that Witness D 's attendance note at p 122a amounts to a *"record …of WPBSA's own view that Lewis was conflicted."* In view of the fact that the note in fact expressly, albeit very briefly, purports to record Witness D 's understanding of Witness B 's "fears" as to what *"the other side may think"* we do not regard this submission as having any substance. We do not accept that it is accurate or fair to either Witness D or to Witness B , and we reject it.

37. The second attendance note anticipates that *"the other side may object due to the Leyton Orient conflict (re Barry Hearn)"* but that seems to us effectively to beg the very question that we asked as to what that "conflict" might have been. Neither Witness D nor Witness B was asked about that word, whether it had actually been used, by whom, and/or to what it was intended to refer. In those circumstances we are concerned that it would not be fair to either of them retrospectively to infer that its appearance in that brief note constitutes an admission that a conflict which gave rise to apparent bias had been recognised by either or both parties to the conversation particularly as that would, in fact, be contrary to the evidence that

each of them gave to the effect that neither of them considered there was a difficulty about appointing Mr Lewis.

38. In paragraphs 14-23 of his Closing Submissions, Mr Spencer, set out his contention that there was "late disclosure of documents". The documents which are expressly identified are Witness D 's three attendance notes; two of his conversations with Witness B on 28 February 2013, which we consider above, and one of his conversation with Player M on 12 August 2013.

39. These three documents were produced by SR, from their own files, during the cross examination of Witness D. In fairness to Witness D it should be noted that he was excluded from the hearing, because Mr Spencer argued that he should be, until he was called to give evidence. In the course of cross examination his evidence about all three of the conversations to which the attendance notes referred was challenged. He responded to those challenges by saying that he believed that he had made attendance notes which should be on the case file. The file was examined and the three notes were duly produced. Again in fairness to Witness D, all three attendance notes confirmed the oral evidence that he had given, he having been deliberately prevented from knowing what question he was to be asked.

40. We were also informed during the course of the hearing that both Counsel had very properly agreed a redacted version of a request which Mr Weston had made in October 2013 for any notes that SR had of *"any discussion of the appointment [of ALQC]."* Witness D had apparently responded to this request by email addressed to Witness B and dated 11 October 2013, which attached 10 emails and one File Note – but not any of the three attendance notes now complained about. He was asked why he had not produced the first two documents and told us that he did not know why but that he had been conscious throughout his administration of the case of his duty to be impartial and that he honestly believed that he had been. That important statement of belief was not challenged when he expressed it. Nor was it put to him that he had acted deliberately.

41. While we understand the concerns which Mr Spencer expressed as to "late disclosure" of documents and we agree that it would have been of assistance to

both parties if these attendance notes had been produced at an earlier stage, we must have regard to the fact that SR were not and are not a party to the proceedings; were not served with any formal notice of allegations that were to be made against them, or requests for production of documents; and were not represented at either hearing. It seems obvious that the documents would have been produced if a statement had been taken from Witness D. The WPBSA raised the question of a statement being taken from Witness D and SR responded at our direction, by email dated 28 November 2013, addressed to both parties, inviting the Respondents to put in writing any specific questions which it wished Witness D to answer. In the event, neither party raised any question of Witness D in advance of the hearing, and we should make plain that we do not criticise either of them for not doing so. However, the result was that Witness D was called "blind" and cross-examined without being questioned in chief. While we agreed with both parties that this course could be taken, and we understand why it was, we do not think that it would be fair to impugn Witness D 's integrity because of what we regard as the probable consequences of it.

42. However, these events have now led Mr Spencer to contend, at paragraph 22 of his Closing Submission, that Witness D "*appears*" to have made a *"deliberate decision to suppress production of relevant evidence…"* Having heard Witness D give evidence to us, in the circumstances in which he did, and having listened to the questions that were put to him, we very firmly reject that submission.

43. Not only did we find Witness D to be a transparently honest and careful witness but we find that his repeated claims that he was conscious of his obligation *"not to be partisan"* to have been wholly justified and manifestly corroborated by the fact that he did not seek to damage Player M's case by producing the attendance note dated 12 August 2013 [p112c] until his evidence about his conversation with Player M on that day was challenged in cross examination. When that note was produced from the file (to which Witness D had not had access during the hearing – because it had remained on SR's table in the hearing room in front of us throughout the day) it transpired that he had indeed recorded that Player M had told him that he had *"researched Adam Lewis and was aware that he was one of the finest barristers available."* We consider below our conclusions about the effect that this attendance note has on Player M's credibility.

44. Following the approach that we have outlined above, we have been unable to find any evidence, or even contention, that Mr Lewis could even arguably have had any prior involvement with the case; any financial or familial interest in it; or other relevant interest in its outcome. We accordingly reject the contention that Mr Lewis was not independent within the meaning of either Rule 9.4 or 9.3 or that a fair minded and informed observer would have believed that there was a reasonable possibility that he was biased.

45. Notwithstanding our conclusion on the "bias issue" we appreciate that it might be contended that we are wrong and, in any event, in fairness to the witnesses whose testimony and integrity has been robustly challenged, we consider that we should deal, albeit briefly in these circumstances, with the second issue.

46. We have also decided that it is right to examine this issue because the WPBSA themselves considered, through Witness B who accepted that he was responsible for the investigation; and SR, through Witness D who accepted that he was responsible for the fair administration of the hearing, that Mr Lewis's connection to Leyton Orient Football Club, and arguably through that company to Mr Hearn, should be disclosed to Player M and/or his legal representatives.

PLAYER M'S KNOWLEDGE – AND WAIVER

47. There are stark conflicts between the cases which the parties advance and between the evidence that we have heard on this issue.

48. We consider the arguments advanced on behalf of the WPBSA first on this issue. We do so because we are of the view that, if we were to be wrong in the view that we take on the bias issue, and in the event that any case of apparent bias could have been made out, the onus would clearly have been on the WPBSA to establish any case of waiver, and not on Player M to disprove it.

49. On behalf of the WPBSA, it is argued that Player M had actual knowledge: (i) of the contents of Mr Lewis's CV, which included the fact that he was currently acting for Leyton Orient Football Club; and (ii) that Mr Barry Hearn was closely associated with that Club.

50. Mr Weston's primary contention is that Player M himself was personally aware of both the facts to which we have just referred. Mr Weston relies first on the fact, which plainly cannot be disputed, that Mr Lewis's full professional CV was disclosed to Player M's solicitor on 28 February 2013. That is plain from Witness D 's email at page 123 of the bundle. It is also clear, and not disputed, that the CV records the fact that Mr Lewis was *currently* acting for Leyton Orient (see page 126 and 134).

51. Mr Weston's second contention is that the CV was provided to Player M personally. In support of this contention Mr Weston relies principally on Player M's evidence in paragraph 8 of his witness statement, the truth of which he confirmed both in chief and in answer to a specific question in cross examination. The first sentence of paragraph 8 of Player M's statement reads as follows: *"Mr Lewis provided a CV prior to his appointment but I did not see this at the time."* In cross examination Player M accepted that this was not accurate. It was not immediately clear to us what his evidence was as to what he had done with this document. He said that when he looked at it, he had not read beyond the first page, which we understood to be an acceptance that he had at least read that page, but he did not say when that was. On being pressed as to what he had read, as distinct from what he had not, he then said, twice, that he had only looked at the photograph. His words were: *"I didn't look at it; I glanced at the photo – that was all."*

52. The explanation now offered on behalf of Player M, in the paragraph numbered 22 of the Appellant's Response to Respondent's Final Submission, served late on 20 February 2014, is that Player M's statement *"would be clearer if "read" is substituted for "see" and "seen" in the first two lines".* This explanation is advanced (and conveniently numbered as 22) because it is suggested that counsel was overstating the WPSBA's case in submitting at paragraph 22 of the Respondent's Closing Submission, that Player M's *"evidence (statement para 8 [2/70]) is that he did not receive the CV...is obvious untruth".* While it is right to say that the word "receive" is not, and does not purport to be, a quotation from

Player M's statement, we have to say that our reading of the precise words that are used in the statement accord with Mr Weston's reading of them and justify his submission to us and what he very clearly put to Player M in cross examination. The suggested substitution of the word "read" for the word "see" in the important sentence does not, in our view, make it "clearer"; it seems to us that it quite plainly changes its whole meaning.

53. Further, if that is the explanation that Player M had genuinely wished to give, we think it inconceivable that the need to give it would not have been obvious at the time when he was expressly invited to say whether there was anything in the statement that he wished to change. There could have been no doubt in anyone's mind that Mr Weston was, courteously but firmly, putting to Player M that what he had confirmed as true in his witness statement was in fact a lie – and he used that word. Player M's evidence was also that he had written his statement with the assistance of his solicitor. It was, of course, perfectly proper and wholly understandable that he should have had assistance when drafting that statement but we are surprised, given the very obvious and central importance of this matter to the appeal, that the explanation that is now advanced should only have been made in the way and at the time that it now is.

54. Mr Weston submits that Player M's claim to ignorance of the contents of the CV was and is untrue. He contends that we should reject it, for four reasons. In view of the importance of this matter we set out below the arguments which Mr Weston makes in paragraph 22 of his closing submissions:

   a. First, Player M's position was that this was an important case for him 'not a slap on the wrist'; his career was at stake. Why be so cavalier with such an important issue? Particularly so when this was the 3rd proposed Chairman.

   b. Second, Witness D 's evidence and the note of the conversation recorded on 12.8.13 [at p 122C] suggest Player M had in fact properly "researched" Mr Lewis, whereas if he had in fact just looked at a photograph, he would not have said that to Witness D.

   c. Third, the chronology makes plain that there was significant delay between the receipt of the CV and Player M giving his approval to Mr Lewis's

appointment. That delay is not explicable by 'looking at a photo'. That delay included two telephone calls from Mr Miles to Player M and pause for consideration between them: see Ms Northeast's email of 6 March 2013 at p 142 '*[Miles] has spoken with client and is expecting to hear back from him today in relation to the new proposed chairman*'. Why the need for two calls if a photo was all that was needed to be considered? It is plain that Miles wished to have Player M consider the matter fully his email enclosing the CV of 4.3.13 [3/140A] suggests '*we meet up*'. Confronted with that evidence, Player M retreated to the position of no clear recollection of what happened, he being a busy man. Whilst lack of recollection is of itself not a matter for criticism, Player M's other position is to clearly remember only looking at the photograph. He cannot be accepted to remember only things favourable to his case.

d. Fourth, Player M when he accepts he knew everything about Lewis, QC from Quigley on 9th and 10th September 2013 did nothing, and he did nothing after that date until the appeal. His general evidence that any connection with Hearn would have been grounds for instant removal is obviously false; when he did know everything on his own case, he did nothing.

55. We now turn, finally on this matter, to consider the arguments which are advanced on behalf of Player M in response to each of those four contentions:

a. The response to the first contention is that, if Player M was lying, why would he have volunteered that he knew that Mr Hearn was chairman of Leyton Orient Football Club and that he was informed of the link by his manager, Mr Quigley. Paragraph 29 b of the Closing Submissions continues with what appears to us to be speculation as to where Mr Quigley got his information from. Our view is that it is unhelpful to speculate as to Player M's intentions, or as to the source of Mr Quigley's knowledge – or, indeed, as to whether Mr Quigley knew about what Player M had read, and/or researched. It may well be that, at least in the snooker world, if not in the sports world as a whole, it is common knowledge that Mr Hearn has interests in Leyton Orient Football Club. The only evidence that we have, from Player M himself, was given orally. Player M told us that he knew that *"Barry Hearn had an interest*

in Leyton Orient – I had known this all along." We do not know why Mr Quigley was not called to give evidence but it would be wrong and unhelpful for us to speculate about any aspect of this matter. In the absence of any evidence which might explain why he might have acted in the way in which he alleges he did, we find it incredible that Player M, over a period of about 6 months, during which time we find that he told Witness D that he had researched Mr Lewis, could have totally ignored the CV which had been sent to him by his solicitor, under cover of an email [p140a] which expressly asked Player M "are you OK with him" – after Player M accepts that he had engaged, however briefly, in the decisions to object to two previously proposed chairmen.

b. As to the second contention, it is submitted on behalf of Player M, at paragraph 29d of the Closing Submissions, that the attendance note of Witness D 's conversation with him on 12 August 2013 does not suggest *"what Player M's research may have been".* The difficulty that we have with that argument is that Player M did not tell us anything about his research; he could have done; no request to recall him was made; and the fact that he told Witness D , as we accept he did, that he had *"researched Adam Lewis and was aware that he was one of the finest barristers available"* cannot in our view be reconciled with his repeated claim that he did nothing with the CV other than look at the photograph. The implicit suggestion that we should "guess", in the absence of any evidence, that Player M would have conducted his research into Mr Lewis, and reach the conclusion that he did, without reading the CV which had been provided to him for that purpose, strikes us as being wholly unrealistic to the point of being fanciful. The additional point is made under paragraph 29g of the Closing Submission that we should have regard to the fact that Player M was not cross examined on the attendance note. We consider that this puts the matter the wrong way round; the accuracy of the attendance note not having been challenged (only the lateness of its production – which point we considered when looking at the bias issue) it was for Player M to say anything that he wanted to about it. He said nothing. Player M having not been recalled, for whatever reason, to deal with evidence which had been elicited as a result of assertions made on his behalf, it is not in our view open to those

who decided not to recall him to invite us to guess about what he might have said.

c. As to the third contention, it is submitted at paragraph 29c of the Closing Submissions that the email by which Player M's solicitor sent the CV to him *"merely advises that Adam Lewis QC was known to Richard Smith…".* With respect to Mr Spencer that is not right. The email in fact asked whether Player M was *"OK with him"* <u>and</u> suggested a meeting between solicitor and client. Player M told us that he had no recollection of any meeting or conversation with his solicitor. He purported to explain this because he had been "very busy" and that he had children to look after. Given the fact that;

   (i) he was suspended throughout this period;

   (ii) he had engaged with his lawyers over the issues as to the objection to two previous chairman;

   (iii) he volunteered that he knew that his whole career was in jeopardy; and

   (iv) his leading counsel's clerk had reported to SR by email dated 6 March [p 142] that Player M's solicitor *"has spoken with client ([Player M]) and is expecting to hear back from him today in relation to the new proposed chairman. He has indicated to me (informally) that he does not anticipate any objection – but….we need to hear that from client officially".*

We found it impossible to accept Player M's evidence that he had not discussed the suitability of Mr Lewis with his solicitor or that he had no recollection of the substance of any conversation. We formed the clear impression that his answers on this matter also were untruthful. We have rightly been warned about the dangers of speculating about what any of the lawyers might have said if they had given evidence. We have not done so. We do, however, consider that it is inconceivable that leading counsel's clerk

would have written in the terms of her email at (iv) above; or that Player M's solicitor would have sent his email dated 6 March [p 114] if he had not had any meaningful discussion about the matter with his client.

d. As to the fourth contention, it is submitted at paragraph 35b and c of the Closing Submissions, that, as a litigant in person at the hearing, Player M could not reasonably be expected to know what to do. Player M's evidence to us was that Manager A had advised him that he was "*going into the lion's den*", and that he, Player M, was in a state of shock. Having regard to the way in which he conducted himself before us; the forceful tones in which he expressed his ***"Complaint to Adam Lewis QC"*** (about the alleged withholding of evidence and "time wasting") in his email dated 27 June [p 147]; the fact that Mr Lewis recorded that, though not legally represented at the hearing before him, Player M "*was ably assisted by [Manager A], his former manager";* and the fact that Player M argued his point before Mr Lewis about the withholding of evidence (as appears from Mr Lewis's answer 3.4 above), we are confident that, if Player M had genuinely been taken by surprise in the way in which he now alleges, he would undoubtedly have said something, even if only to seek confirmation of what he had been told.

56. We repeat that, because the issue as to Player M's own knowledge of what was in Mr Lewis's CV is central to his case, as must always have been obvious to him, we have examined all the evidence, both written and oral, that is available to us, and the arguments that have been advanced and responded to. We have to say that what Player M said to us and the manner in which he said it, left us in no doubt at the time that he was not telling us the truth about this matter and that our full reconsideration of all the arguments submitted to us subsequently confirms that firm conviction.

57. In view of the conclusion which we have come to about Player M's own personal knowledge of the contents of Mr Lewis's CV, his admission that he knew of the connection between Mr Hearn and Leyton Orient Football Club, and his claim to Witness D that he had researched Mr Lewis, specifically in respect of his work as a barrister, we do not find it necessary to express any view about what may or may not have been communicated between Player M and any of his lawyers.

58. We have, however, not overlooked the criticism made of Witness D in paragraph 32 d of the Closing Submissions. It is asserted here that *"It is hardly surprising that [Witness D] was forced (sic) to observe in his response [to the email at p 150] that 'what I am unable to comment on is what and how any information was subsequently conveyed to [Player M'] – the matter should never have been left in that position".*

59. We need to address that submission in two stages. Insofar as paragraph 32 d is a distinct point made in support of this appeal, as appears from the final observation quoted above, it seems to us to beg the question as to whether or not whatever Witness D had said to the clerk did in fact have the effect that the matter was "left in that position". That appeared to us to have been the very matter on which he was accepting that he could not comment, because he had and has no personal knowledge as to what was done following his conversation.

60. We are of course conscious of the fact that we have evidence only from one party to that. Witness D 's evidence was that he did tell counsel's clerk about what he referred to as the "Leyton Orient/Barry Hearn" point. He said that he had passed on, although not immediately, the matters which Witness B had raised with him on 28 February, as recorded in the attendance notes [pp 122a and 122 b]. 28 February was a Thursday and he recalled that he had gone to Cardiff where Witness A eventually tracked him down, as appears from his email on Monday 4 March [p 140 s], Witness D said that it was in response to this reminder (which is plainly what it was) that he called counsel's clerk.

61. Witness D was unable to recall why he had not spoken to the clerk more promptly or why he had not drawn Player M's then solicitor, Mr Miles's attention to the matter to which Witness B was concerned their side might object. He had pointed out to Mr Miles when proposing Mr Charles Hollander QC as Chairman, on 14 February that his CV referred to a *"challenge to rules brought by Davis/*Hearn*".* His explanation to us was that he regarded the specific reference to Mr Hearn in a CV as being material but, despite Witness B 's fears, did not personally accept that the reference in Mr Lewis's CV was.

62. In respect of the conversation that he did have with the clerk, Witness D repeated twice, in almost precisely the same terms, his recollection of what the clerk had said to him. His first recollection was that she had said *"We know all about the Leyton Orient Barry Hearn connection"* and, a few minutes later; *"Mr Smith knows all about the Leyton Orient Barry Hearn connection".*

63. We should add at this point that, accepting the truth of Witness D 's evidence as we do, whichever recollection may be precisely accurate, either would confirm our experience of contacts between instructing solicitors and barristers' clerks; both the solicitor and the barrister work, and are entitled to work, on the basis that the clerk has ostensible authority to communicate such a matter as this on behalf of her or his barrister. If it be true that this information was not passed on to Player M, and we repeat our finding that he already knew it, neither the WPBSA nor SR was at fault or responsible for having "left it in that position".

64. The second matter which we have to address in respect of this submission is the assertion that this was a concession which had to be forced from Witness D. In fairness again to Witness D, we have to say that we do not share the view expressed in paragraph 32 d and we are concerned, with respect to Mr Spencer, that this may not be a fair way of putting the matter. We did not consider Witness D was "forced" to make this concession; it was our impression that, consistent with his reluctance to produce his attendance note of Player M's admission to his of research on Mr Lewis, Witness D was volunteering that he could not comment at all on what might have been said to Player M.

65. The final matter which concerned us during the course of the hearing and which we invited the parties to address us on was the question of waiver which appeared to us to have been raised in the course of oral submissions at the preliminary hearing and which we wished in any event to resolve if, as appeared from the Grounds of Appeal, Article 6 of the European Convention on Human Rights was being relied on.

66. We note that this argument is not pursued in the Closing Submissions but, through abundance of caution and in case it may be thought that we had overlooked the point, our view is that, at least for the purposes of what we have to decide in this case, Article 6 adds nothing to the principle that we have set out above from *Porter v Magill*.

67. We referred the parties to *R on the Application of Hill v Institute of Chartered Accountants [2013] EWCA Civ 555* which confirms our view and accords with Mr Spencer's submission at paragraph 35 e of his Closing Submissions. If (as we of course appreciate Mr Spencer of course does not accept) Player M did give his voluntary and unequivocal agreement to Mr Lewis conducting the hearing, which we find as a fact that he did, the irregularity which would have resulted from any apparent bias, which we have found not to have arisen, would have been waived.

68. Further, and in any event, we accept the submission made by Mr Weston under para 15 b of the Respondent's Submissions in Reply, *R on the Application of Hill v Institute of Chartered Accountants* is authority for the proposition that *"a* professional *(or indeed any other) tribunal must be entitled to rely on the agreement of a properly qualified advocate to any proposed course without having to go behind the advocate and check that his client personally agrees with what the advocate has said"* [at para 32 of the judgment]. Applying that principle to the facts of this case;

(i) once it was plain that the Appellant was not blaming Mr Lewis but SR, it must be SR that stands in the shoes of "the tribunal" in the cited passage; and

(ii) it was SR that was entitled to rely on the properly qualified Mr Miles's unequivocal confirmation that "Adam Lewis QC is acceptable."

69. Finally, in fairness to the witnesses who gave evidence to us, and because a number of assertions were made to them (the most serious of which having been very properly withdrawn in respect of Witness B) we should say that we found both Witness B and Witness A to be truthful and careful in what they said and we confirm the view that we expressed about Witness D at paragraph 43 above.

CONCLUSION AND DECISION

70. It follows from the matters that we have set out above that:

(i) No fair minded and informed observer would have considered that there was a real possibility that Mr Lewis was biased; either for any of the reasons set out in Rule 9.4; or because he was not independent within the meaning of Rule 9.3; or within the principles exemplified by decision in *Porter v Magill*.

(ii) Further and in any event, the Appellant was at all material times aware of the facts on which he now relies in support of his assertion that any fair minded and informed observer would have considered that there was a real possibility that Mr Lewis was biased for any reason.

(iii) Further and in any event, whether or not the Appellant was personally aware of the material facts on which he relies, the Respondent was and is entitled to rely on the unequivocal waiver that was given by his solicitor on 6 March 2013.

Edwin Glasgow QC (Signed on behalf of the Appeals Committee)

Peter Stockwell

24 February 2014

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