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Analysis: Donaghadee v IFA Arbitration

Following the Arbitration ruling in Donaghadee v Irish FA, it is necessary to write an extensive analysis in order to clear up much of the deliberately generated confusion, mistruths and utter fallacies circulating over the past number of days.

The confusion of many contributors to the debate is difficult to understand. The judgment is publicly available for anyone to read. There is no excuse therefore for some of the wildly inaccurate theories and analysis circulating online.

Much of this is generated by desperate online trolls, and likely is more about targeting me personally than Donaghadee Football Club. That is largely water off a duck's back, but it is important to remember that repetition of a lie does not make it the truth.

Let us begin with the big issue. The headlines screamed 'Donaghadee ordered to pay costs'. Without any understanding of what this means, instantly local football social media went into a tailspin with wild predications and entirely inaccurate assumptions.

It's important to note the reason for the headlines screaming about costs (including the BBC- it is notable that they did not cover the fact the IFA are guilty of breaking Section 26 (1) of the Companies Act 2006 and therefore the body and every officer has committed a criminal offence as per Section 26 (3)). This was deliberate and was being briefed by IFA and NAFL figures (its often hard to distinguish between the two given the reality that often they are the same person wearing a different hat).

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The purpose behind this emphasis was simple; to terrify not only junior but senior clubs and ensure they never dare challenge the IFA. It was about exercising coercive control via the fear that if you dare stand up to the governing body, then you will be put out of existence. That farcical proposition may be something dreamt up by Windsor Park spin-doctors, but it is far from reality.

Trying to use superior resources to bully smaller clubs and ensure they have no remedy by which to challenge you is an effort to impede access to justice. Whilst on the issue of fees rather than costs, the judgement of the UK Supreme Court in *R (on the application of UNISON) (Appellant) v Lord Chancellor (Respondent) [2017] UKSC 51* is instructive.

At paragraph 29 Lord Reed states:

"More fundamentally, the right of access to justice, both under domestic law and under EU law, is not restricted to the ability to bring claims which are successful. Many people, even if their claims ultimately fail, nevertheless have arguable claims which they have a right to present for adjudication.

Lord Reed further at paragraph 71:

"But the value to society of the right of access to the courts is not confined to cases in which the courts decide questions of general importance. People and businesses need to know, on the one hand, that they will be able to enforce their rights if they have to do so, and, on the other hand, that if they fail to meet their obligations, there is likely to be a remedy against them. It is that knowledge which underpins everyday economic and social relations. That is so,

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notwithstanding that judicial enforcement of the law is not usually necessary, and notwithstanding that the resolution of disputes by other methods is often desirable."

That judgement, in which the appellant succeeded, and it was found unlawful to set fees for Employment Tribunals so high so as to impede access to justice. It is also instructive in relation to the principles set out; people, and business (and sports clubs) need to know they will be able to enforce their rights, and on the other hand if there is an instance whereby a body or person fails to meet their obligations, then there is a remedy against them.

The IFA seek to create a situation whereby if a junior club wants to challenge them, they cannot because the risk is so great that it is effectively a barrier. It is not hard to see how such a situation is wide open to abuse. The IFA can effectively do whatever they want, because if you dare to challenge them- and do not succeed- then you will be obliterated. That simply cannot be right.

In this case the IFA instructed a large corporate law firm and a senior counsel (QC). Even in serious cases before the Crown Court, legal aid often would not be approved for a senior counsel. However, the IFA- in a case disputing the rules of the NAFL- decided that senior counsel was required. That is wholly disproportionate to the complexity of the case, and is a deliberate effort to ramp up costs for the losing side.

Knowing that I was representing the club free of charge, the IFA was in a situation whereby if they lost they had no costs liability to the applicant, whereas if they won, the applicant would (in theory) be forced into costs liability with them. It has hard to see how that chimes with the fair promotion of sport, or serves the wider football interest in Northern Ireland.

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We turn now to the reality of the hyperbole over ‘costs’. Some online ‘experts’ predicated Donaghadee Football Club would be placed into “liquidation”, or would be “insolvent”. It really shouldn’t be necessary to point out that an unincorporated association (such as all junior sports clubs are) has no legal identity in its own right and therefore cannot be placed into liquidation, or made insolvent. That is really pretty basic stuff, you would imagine those falling over themselves with excitement would have at least a basic understanding of what they are talking about.

We then turn to predication, delivered with a cast iron conviction, that Donaghadee Football Club will “fold”. When asked how this would be so, the answer varies between being bankrupt, liquidated or made insolvent. As already pointed out, that is legally impossible and accordingly the only way a club would fold is if the club itself chose to do so. I can absolutely give cast iron assurances that the belief that would even enter anyone’s head is absurd. It is not going to happen.

Then we have the predication Donaghadee will be “kicked out of the league”. This is just an excitable predication, because it has no basis either in the rules or reality. As will become clear later, the NAFL were not even a party to the Arbitration proceedings and as such could take no steps to enforce a civil matter between a club and the IFA. Any effort to do so would inevitably go down a legal rabbit hole with so much litigation that football would be near impossible. In short; it can’t happen, and even if it could (which it can’t), its rather absurd to believe there is anyone with any sense who would think that was a good idea. So, we can dismiss that ill-informed theory as well.

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So, what do the IFA do about costs. Well, in the first instance there needs to be a consideration as to whether the Court of Appeal would have jurisdiction to deal with the point as to whether the clause in relation to costs offers any discretion. We say it does, and even if it would have been applied adversely (to the applicant) in any event, the point still stands. This point requires a consideration as to whether the jurisdiction of the Court of Appeal is excluded by virtue of Article 3 of the IFA Articles and the Arbitration agreement. The point was previously run by Barry Macdonald QC on behalf of Dollingston. The club were unsuccessful (did that make Barry Macdonald QC, who is one of the finest legal minds of his generation- a 'fool'? of course not). Case law has moved on, and these matters are being considered currently.

Then the IFA must decide if they actually want to pursue costs. If so, they then must decide how much costs are reasonable and proportionate to pursue (note the IFA haven't even come up with a figure yet- however that does not stop the online trolls from inventing their own figures). Then a costs bill would be presented, which would inevitably be challenged as disproportionate. Then, if the IFA cleared all of those hurdles (which is a lot more complex and difficult than it appears on a prima facie basis) they would need to decide what steps they could take to enforce costs against a club with no assets, with limited liability on members (of a nominal fee of £5) in circumstances whereby the club was neither negligent nor fraudulent. Its not difficult to conclude that this isn't quite as straightforward as the 'terrifying' headlines would have you believe.

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So why did the IFA- publicly and privately- place such an emphasis on the issue. Why did they email two outstanding Appellants- Greenisland and Rosario- effectively seeking to coercive them into dropping their appeals?

Greenisland FC especially has a fabulous case. Mr Nicholas Stewart QC found that the delay in hearing our case was unjustified. The Appeals Committee itself in the recent Crusaders case found they had been unfairly prejudiced.

Greenisland, who had only 3 games to play, have been fatally prejudiced by the delay. Those 3 games could have been played between the 11th July (when football was permissible) and 31 July 2020. In any event, its arguable whether the season actually was required to end by 31 July 2020 given the wording of football regulation 36 (a). It is no wonder the IFA desperately want to put that club off proceeding with their challenge; because they have a good point which the IFA Appeals Committee will struggle to navigate around- regardless of their desire to assist the NAFL.

We can then turn to the judgement itself. We have had many contributions, mostly from those who haven't even read the judgement, much less had the ability to understand it. However, we had Andrew McCullough , supporter of Ards FC who came forward with his 'expert' analysis.

Mr McCullough began by saying it was a "senseless waste of effort and money". Let us break that down- is a case only worthy if you are ultimately successful? If so, how does one therefore decide whether to take a case, or not? What is the mechanism used to decide whether a case is worthy or senseless?

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It appears that Lord Reed in paragraph 29 of Unison has erred in his legal philosophy. If only he had checked in with Andrew McCullough, supporter of Ards FC, he would have been surprised to find that only cases which ultimately win are worthy, otherwise they are senseless.

So, dismissing that illogical assertion by Mr McCullough, we can then turn to his assertion that the Judge said the case had "no merit". This can be easily answered; no, he didn't. If Mr McCullough knew anything about the law, he may realise that when a point is unarguable or without merit, the Judge will usually clearly and explicitly say so. Nowhere over 31 pages does Mr Stewart QC say that. Mr McCullough confuses a point ultimately being dismissed, with a point being without merit. I suggest he educates himself in the distinction.

We can then briefly address the trolls criticising the presentation of the case. At paragraph 9 the Judge commended the "clear and concise oral submissions" of both parties. Perhaps he just made this comment for a laugh; High Court Judges tend to do that. Mr Shaw QC, representing the IFA, very kindly commended the written and oral submissions made on behalf of the applicant, labelling them "pointed and skillful" with "evident erudition". The High Court Judge remarked in oral argument that the Donaghadee FC submissions had "set a very high standard". As such, the notion that the case was handled poorly is quite frankly wrong, and the genesis of such is rooted in a desire by self-loathing internet warriors to try and demonise me personally, rather than based on even a basic knowledge of the case. The efforts to demonise and discourage has failed for almost a decade; its not going to succeed anytime soon.

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It is the case that we lost on our grounds of challenge. Some grounds were stronger than others, and some meant more to us than others. As set out at paragraph 70 by Mr Stewart QC, it is no surprise that our main issue was the Cup competitions. I set paragraph 70 out in full for ease of reference:

"70. DFC say that the last sentence of paragraph 37 expressed a decision of the Appeal Board that the LMC Decision had ended the NAFL 2020-21 Cup competitions as well as its league competitions. In practical terms, that is the crucial issue for DFC. As far as the league competitions were concerned, as an NAFL member club DFC is entitled to have the NAFL rules correctly interpreted and applied. However, when matches were suspended after 7 March 2020 neither of DFC's teams in the NAFL leagues still had any hope of promotion or was at any risk of relegation. For 2020-21 the league did not really matter any more to DFC. It was the Cochrane Corry Cup which did matter. DFC was already in the semi-final so was naturally keen for that competition to continue."

The issue was whether the error as to Cups lay with the IFA, or with the NAFL. It is worth at this stage pausing to set out the facts. The NAFL by virtue of letter dated 22 July 2020 relied on paragraph 37 of the impugned IFA Appeals Committee judgement to say the Cups had been concluded. This was in response to a letter issued to them on 16 July. This is outlined by Mr Stewart QC at paragraph 76:

76. The irony is that this correct view of paragraph 37 was clearly asserted by Mr Bryson in a letter to the NAFL dated 16 July 2020, which included these two observations:

- *The 'independent' IFA Appeals Panel issued a 'judgment' this morning (16 July) in relation to the curtailment of the league season.*

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- *The aforementioned decision expressly did not deal with Cup competitions.*

This alone is vindication in of itself. The 16 July letter was correct, the NAFL response was wrong. Technically therefore we succeeded on our core point; but for the purposes of this Arbitration it was between the IFA and Donaghadee FC, so the question was whether the error was on the part of the IFA, or on the part of the NAFL.

Mr Stewart QC found that the error was on the part of the NAFL, hence why we failed on this point in the case against the IFA. The practicial consequences are nevertheless the same; whether it was the IFA decision itself which was wrong at paragraph 37, or it was the NAFL's interpretation of paragraph 37 which was wrong- the outcome is the same. Donaghadee are right and either the IFA or NAFL are wrong. In this instance the fatal error was on the part of the NAFL.

This is set out explicitly at paragraph 84 of the judgement:

84. I do have some sympathy for DFC's and Mr Bryson position. The crucial error lay not in paragraph 37 of the July Decision but in the NAFL's apparent misunderstanding and misapplication of that paragraph on which it based its response in its letter dated 22 July 2020. Although I have reached a firm conclusion, it is easy to see how that last sentence of paragraph 37 could have been misunderstood. Nevertheless, if the NAFL decided to curtail the 2019-20 Cochrane Corry Cup competition in reliance on paragraph 37 of the July Decision, that was a flawed basis for such a decision. However, as explained in the previous paragraph, that is not a matter for any ruling by me in this arbitration.

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As such, even a basic reading of the judgement would illuminate that in terms of practical consequences, we succeeded on our core objective; to demonstrate the decision as to Cups was wrong in law and accordingly they have not been concluded and as such must be played. A careful reading an analysis would illuminate this reality. Hence why we are ultimately far from distraught with the judgement which is strategically a powerful tool not only to ensure the Cups are played, but also in using as a building block for future challenges not only by our club, but others.

Those celebrating our 'defeat' probably need to educate themselves on the issues at play. Often it feels like trying to play chess with a pigeon when it comes to pointing out that actually- when it comes to strategic litigation- it isn't always about winning outright.

The other issues were- in terms of importance to the applicant itself- subservient to the Cups issue. Some of these grounds of challenge were strong, and others were more speculative.

Did Rule 19 apply, rather than Rule 7 in their decision as to promotion and relegation. Mr Stewart QC found that although there was a "drafting imperfection" with Rule 7, that nevertheless there was an implied term that the season had to be concluded and as such an unfinished season was "a matter not provided for within the rules".

That comes down to differing views on legal construction. Some adopt a narrow strict construction approach, others a broad and purposeful approach. For example- to us a rather high profile American example- if you placed such a question before

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the recently deceased Ruth Bader Ginsburg and Antonin Scalia (two of the finest legal minds there has ever been, and former US Supreme Court Justices)- Justice Ginsburg would have said there was an implied term and as such adopted Rule 7 broadly and purposefully, whilst Justice Scalia would have said there was no such implied term and adopted a strict and narrow construction.

On another day, before another Arbitrator who preferred a strict construction approach, we would have succeeded on that point. That is the luck of the draw, but it most certainly was a point which had merit. I maintain that "imperfect drafting" means that the term isn't inserted, and Judges shouldn't assume terms which aren't there in black and white. Then again, I prefer a narrow interpretation.

I struggle to with the finding that Rule 19 could be used to override Rule 7 at the conclusion of 2020/21, in circumstances whereby 2020/21 would be a normal season and therefore Rule 7 would apply. It is hard to therefore tally the commentary at paragraph 54 of the judgement, with the finding that Rule 19 could be pre-emptively deployed for the conclusion of a normal season. In short, I think that is wrong and would be a sitting duck if such issues ever went forward to the Court of Appeal.

In regards to an LMC deploying powers for 2020/21 whilst only elected for 2019/20, I still hold to the position that the judgement has bestowed powers on an LMC which only reside with an AGM.

In regards to the apparent bias point, I was never convinced we would get home on that, however there were clearly significant issues with some actions of the IFA Appeals Committee, including the Chairperson. These criticisms were set out by Mr

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Stewart QC at paragraph 108 of the Judgement. It was worth running this point shoehorned in on the end of the submissions. The two-stage test is set out in *Porter v Magill* and on balance I think it was correct to dismiss this ground of challenge. However, there are some gaping holes in the IFA flank, which may be exploitable in a future challenge.

I acknowledge however that I have skin in the game and therefore of course I am going to remain faithful to my arguments.

I therefore sought the views of two QCs, one a retired High Court Judge and the other still practising prominently.

Both felt we should have succeeded on the application of Rule 19 for the conclusion of 2020/21.

One felt we should have succeeded in the exercise of powers beyond the annual term, whilst the other strongly agreed with Mr Stewart QC and went further, saying this point was unarguable and without merit.

Both felt that Rule 19 was permissible for the conclusion of 2019/20 and therefore that Mr Stewart QC was right to dismiss this ground of challenge.

Both felt that it was correct to dismiss our apparent bias challenge, whilst one felt that had we suffered prejudice (as for example Greenisland have) then we may have succeeded on this point under a different heading.

Both felt that the Arbitrator should have quashed paragraph 37 as read in conjunction with 25 it was clearly wrong, and whether confused terminology or not,

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there was enough of an error to warrant that particular portion of the judgment being quashed.

Both agreed that had Belfast Celtic YM challenged the sporting merit and standard applied to promote one team but not others, they would have likely succeeded.

Both agreed that the NAFL erred and accordingly the Cups have not been concluded and should now be played.

This is all opinions, and law is subjective. That is why we have appeal courts. Three different courts came to three different decisions in the Miller 1 and Miller 2 cases, which were ultimately definitively resolved before the Supreme Court.

Interpretation of public law is often subjective. Like football itself, there are different philosophies and interpretations. Mr Stewart QC is a High Court Judge, who also sits on what is known effectively as the Supreme Court for Sport (the CAS). He clearly spent significant time preparing his reasoned judgment and was scrupulously fair to all parties during the proceedings. Some would say the judgment is impeccable, others will say there is parts which could have went another way. *You win some, you lose some.* We accept the findings and move on.

Those who wish to criticise should read this article, read the judgment and then do their own research and come to their own reasoned conclusion. I would welcome such engagement and critical analysis; its worth far more than expressing online opinions without having even the faintest knowledge of the issues.

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