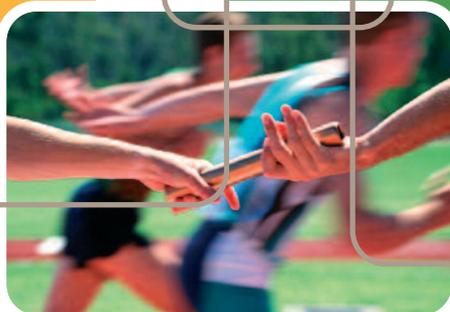
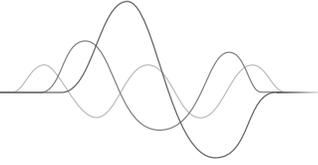


Sport and the Law Journal



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British Association for Sport and Law Ltd

5 Fleet Place · London · EC4M 7RD

Email: basl@britishsportslaw.org

www.britishsportslaw.org

Registered Office

c/o Charles Russell

5 Fleet Place · London · EC4M 7RD

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Editorial

BY SIMON GARDINER, EDITOR

This issue concerns a number of on-going and current topics. The Opinion and Practice section provides comment on two topical issues. First, Mary Mullen's 'Protecting the "Crown Jewels" – latest FIFA and UEFA Challenges to free-to-view World Cup and European Championship Matches,' provides an update of recent challenges to the EU-based provisions that support restrictions on the selling of TV rights for major sports events. Second, Laura Scaife's "An Own Cole": in the Tweet of the Moment,' provides an analysis of how sports teams should manage the use of a range of social media by players. Third, Meena Botros's 'Social Media – A Governing Body's Perspective,' considers the same issue but this time from the sports governing body perspective. Fourth, Walter Cairn's interview with the leading sports lawyer, Ian Blackshaw.

The Analysis section has two articles. Adam Berry's 'Challenging Football Transfer Windows: a Disproportionate Response to a Legitimate Aim' provides a detailed examination of this sporting rules that plays a central role in the current transfer system in football and other sports. They have attracted considerable criticism. Although they are predicated on the basis of establishing an appropriate balance between contract stability and player mobility, many argue that they essentially operate to the benefit of no one, except perhaps the top super-rich clubs.

The Journal is very happy to be able to republish a report written by Past-President of BASL, Maurice Watkins – 'The Watkins Review of Rugby League Governance'. In his role as interim Chairman of the RFL and his many years as board member at Manchester United and more generally in sports law practice, Maurice has provided a clear perspective of the challenges facing rugby league in an increasingly competitive environment in both the national market in the UK and more widely internationally.

The Reviews section has the usual items, the Sport and the Law Journal Reports, book review and the update on Corruption in Sport from around the world.

The publication of the Leveson Report has presented the British Press some interesting challenges in terms of improving internal governance so as to resist external regulation. What is at stake is the future of press regulation and governance consistent with maintaining freedom of the press and ensuring the highest ethical and professional standards. There is resonance with the on-going debate within sport for effective and good governance. As with other sectors such as the Press, there has been considerable thought as to what competing elements are in play and what characteristics will promote good governance in sport. This has been a consideration of sports management academics and practitioners for many years with a focus primarily in management structures. Legal compliance became a key issue largely because of the intervention of the European Union as far as infringement of freedom of movement provisions in *Bosman* and more widely compliance with competition law.

An on-going issue has been how to separate out the rules of the game of a non-economic nature from those that have an economic dimension. This dichotomy is clearly more important in the large federations than in the case of small ones where economic activity is insignificant and would probably fall within the *de minimis* rules of European law and be ignored. An important example can be illustrated by the negotiations between the Fédération Internationale de L'Automobile (FIA) and DG IV. There had been many years of tension between the Competition Commission and Formula I racing; of particular concern was the close relationship between the FIA and Formula One Administration, the company that markets the rights to Formula One racing. After a negotiated agreement was reached with the FIA divulging its commercial interests in F1, a conference was held in Brussels in March 2011 entitled, the First European Conference on the Governance of Sport.

The intention of the conference was to encourage a debate as to how it may be possible to provide clarification between the 'rules of the games' and the economic and commercial dimension related to the management of a sport. Because sport is based on ethics and fair competition, the governance of sport should fulfill the highest standards in terms of transparency, democracy and accountability. There was in addition, a focus on how best can bodies such as the EU Commission ensure sports governing bodies (NGBs and ISF) take seriously the need to seek greater compliance with external legal norms? Is it always possible to distinguish between sporting rules concerning governance of the game and those concerning the commercial dynamics of sport? What mechanism can best monitor continued compliance with these values of effective sports governance?

More than ten years on the quest continues for good governance. This is of course a continuing dialogue within UK national sport, with football prominent. More widely in Europe, good governance is often seen as an integral part of effective engagement with sports related problems such as doping, financial corruption and exploitation of minors. For example, in early 2012 the Committee on Culture, Science, Education and Media of the Council of Europe passed a resolution 'that Council of Europe member states and national and international governing bodies of the sport movement strive to strengthen financial fair play, ensure that young athletes are effectively protected and improve the machinery of governance within sports institutions'. Also the European Commission has one of its expert groups concerning sport focusing on sports governance. Again specific problems facing sport loom large. The Good Governance Group is mandated by the Commission to recommend ways to promote the integrity of sport, in particular the fight against match-fixing and the promotion of good governance.

The nomenclature is now often modified to talk about 'better governance'. An interesting project is being undertaken within the auspices of the journalism based organization, 'Play the Game' and the Danish Institute for Sports Studies. They were recipients of EU funding for a project entitled, 'Action for

Good Governance in International Sports Organisations' (AGGIS). A major objective is to global index for good governance in sport. An International Sports Governance assessment tool has been piloted with the Swiss academic Jean-Loup Chappelet prominent in its development. Seven 'dimensions' or characteristics have been identified. These are: organisational transparency; reporting transparency; stakeholders' representation; democratic process; evaluation; integrity; solidarity.

Each of these is measured by 8 indicators which are then given a grade from 0 (providing that indicator not present or not respected) to 4 (indicator perfectly fulfilled). This tool can provide evaluation of degree of governance at a particular time and map changes over a period. It is in a work in progress, but represents an important attempt to provide both a quantitative and qualitative evaluation of sports governance (for more information go to www.playthegame.org/theme-pages/action-for-good-governance-in-international-sports-organisations/news-on-good-governance.html).

Finally, the Journal welcomes contributions from all BASL members and other readers in any of the sections of the Journal including reviews of future sports law related publications. Please contact the Editor with any suggested offerings. 



Simon Gardiner
 s.gardiner@leedsmet.ac.uk

Opinion and practice



Protecting the “Crown Jewels” – Latest FIFA and UEFA challenges to free-to-view World Cup and European Championship matches

BY MARY MULLEN, SOLICITOR, DLA PIPER

In Europe, the Audiovisual Media Services (AVMS) Directive¹ provides that EU Member States may draw up lists of “major events” which, because of their importance at a national level, should be accessible to the public on free-to-view television.²

The UK has its own ‘listed events’ provisions,³ and last drew up its list of “Crown Jewels” major events in 1998, in doing so it determined that all football World Cup and European Championship (the “Euros”) matches were of sufficient importance to warrant being free-to-view by everyone in the UK - a decision that FIFA and UEFA have challenged. This article discusses aspects of FIFA and UEFA’s challenge, against the legislative background applicable to so called ‘listed events’.

Legislative Background

Under the Broadcasting Act,⁴ the Secretary of State designates “listed events” which are to be made available to the public without excluding television viewers who do not have access to pay TV. The broadcasting rights to these events are to be offered to qualifying broadcasters whose channels are offered for free and reach at least 95% of the population. In the UK the broadcasters currently meeting these qualifying conditions are ITV1, Channel 4, BBC 1, BBC 2 and Channel 5⁵.

By Article 14 of the AVMS Directive, each Member State may: *take measures in accordance with European Union law to ensure that broadcasters under its jurisdiction do not broadcast on an exclusive basis events which are regarded by that Member State as being of major importance for*

society in such a way as to deprive a substantial proportion of the public in that Member State of the possibility of following such events by live coverage or deferred coverage on free television. The Member State concerned shall draw up a list of designated events, national or non-national, which it considers to be of major importance for society.

Once drawn up by the appropriate authority (which in the UK in 1998 was the Independent Television Commission and since 2003 is the Office of Communications (“Ofcom”)), Member States submit their lists to the European Commission (the “Commission”) for approval so that they will be recognised by other Member States as being in force. Listed events cannot then be subject to exclusive broadcasting licences if this would prevent the event reaching the wider interested audience. In the UK, if the restrictions on broadcasting listed events have been breached, Ofcom can impose a financial penalty.

In a council decision of 2007⁶ (“Council Decision”), the Commission confirmed that the UK’s list, which included all matches of the World Cup and the European Championships, was valid and enforceable. The decision included notes on what Member States should consider when drawing up their lists of events. The following criteria were set out as “reliable indicators” that events were important enough to society to warrant being placed on national lists:

- (i) a special general resonance within the Member State, and not simply a significance to those who ordinarily follow the sport or activity concerned;

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- (ii) a generally recognised, distinct cultural importance for the population in the Member State, in particular as a catalyst of cultural identity;
- (iii) involvement of the national team in the event concerned in the context of a competition or tournament of international importance; and
- (iv) the fact that the event has traditionally been broadcast on free television and has commanded large television audiences.

The Council Decision established that the UK's list satisfied at least two of the above criteria and so was eligible to be enforced across Member States.

First Instance Decision

In February 2008 FIFA (in respect of the World Cup) and UEFA (in respect of the Euros) challenged the Council Decision,⁷ seeking its partial annulment on the grounds that not all matches of the respective tournaments were events of major importance. The challenge also extended to the Belgian list of major events which also set out that all of the World Cup and Euro matches should be free-to-view.

The European General Court (formerly the Court of First Instance) (the “Court”) delivered its judgments on 17 February 2011.⁸ The Court in particular considered the process of review and approval of national lists by the Commission, the impact of the World Cup and the Euros in terms of television broadcasting rights, the legal framework around broadcasting the games and finally whether restrictions could be placed on FIFA and UEFA's broadcasting rights for the benefit of the public interest.

The Court referred to the Broadcasting Directive (the “Directive”)⁹ which explicitly sets out at recital 18 that the World Cup and Euros were examples of events that should be protected from becoming subject to exclusive broadcasting rights; lending weight to the argument that Member States do not have to provide specific grounds for including the tournaments on their national lists. If the whole of the tournaments are to be listed as single events however, Member States must show that the importance of all the matches (the “prime” matches that involve the national team, and “non-prime” matches that the national team does not

compete in but which results it is concerned with) was considered. The Court recognised that it could not be established in advance of tournaments which matches would turn out to have an impact on the matches that national teams would be involved in, so in theory all matches could be of interest to the public of a particular Member State.

The Court also found that there was no need for uniformity in how lists are arrived at across Member States and national authorities should be free to decide, albeit in a clear and transparent manner, what events were of importance to their particular society. Each Member State has a different historical and social connection with certain events so they cannot be expected to compile their lists by reference to a rigid framework. The point was made that the UK is a hugely multicultural society made up of many nationalities who would be interested in matches other than those any of the UK national teams were playing in. Further, the UK has a particular and unique cultural connection with football and a history of making the tournaments free-to-view.

FIFA and UEFA's arguments that freedom to provide services and freedom of establishment were restricted by the listing system were considered but the Court deemed this restriction to be justified on the grounds of protecting the overriding right of information and the public's right of access to events of major importance to their society.

The Court also found that there was no need for uniformity in how lists are arrived at across Member States and national authorities should be free to decide, albeit in a clear and transparent manner, what events were of importance to their particular society

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Accordingly, the Court dismissed FIFA and UEFA's actions. In April 2011 FIFA and UEFA appealed the Court's decision to the Court of Justice of the European Union (“CJEU”)¹⁰ pleading again that not all tournament matches should be allowed to appear on national lists and that the Commission had failed in its duties by adopting a light-touch approach to its review of the lists of the UK and Belgium. Arguments from both FIFA and UEFA on the one hand and the UK, Belgium and the Commission on the other, were presented at an oral hearing on 13 September 2012. The Advocate General Niilo Jääskinen will deliver a non-binding opinion on the case on 12 December, after which the CJEU is expected to deliver its judgment within 3 to 6 months.

The Current Arguments

It is UEFA's position that the Commission's review of the UK and Belgium's national lists was unsatisfactory, with a failure to undertake “close scrutiny” of the contents of the national lists and the impact they would have on competition between broadcasters in EU States. They argue that protection afforded to the events on the lists puts some broadcasters at a disadvantage and distorts competition so, as with State Aid or mergers, a thorough competition law review should be carried out before lists are approved.

The Commission however, maintains that it should adopt a light-touch approach to its review of national lists, putting faith in the Member States' ability to compile fair and proportionate lists and deciding only whether national decisions are “compatible” with EU law. The UK argued in support of the Commission that the logic of the AVMS Directive is clear and cannot be side-stepped.

FIFA has followed a similar line of argument as UEFA, highlighting its dissatisfaction with the review process and calling for balance in national lists by excluding non-prime matches from their remit. FIFA suggests that the balance between access to information and protecting rights holders could be achieved by making a distinction between prime and non-prime matches and produced evidence to show that some World Cup matches are not widely viewed, and that some are not even broadcast. FIFA argues that only popular, widely viewed matches should be considered important enough to qualify as key sporting events of national importance. Belgium has pointed out that it is impossible to tell in advance which matches will be popular and noted that

recital 18 of the Directive does not distinguish between different matches in the tournaments.

The Judges raised some interesting questions during the arguments. Reporting Judge Jiří Malenovský noted that the Commission uses standardised wording in its decisions on national lists which could give the impression that the reviews were not sufficiently probing but the Commission went on to explain that although “the same words are used in judgments, that does not mean the analysis is not undertaken”.

Judge Malenovský also asked UEFA to comment on the recent case involving the UK Premier League in relation to the existence of copyright in football games.¹¹ UEFA pointed out that the market value of games had not suffered since the particular judgment and that broadcasting rights, including the copyrightable aspects such as music and graphics, were still valuable and worthy of protection. A similar point was raised by the Belgian government during FIFA's arguments, with lawyers questioning the property rights that FIFA was relying on in seeking to protect its exclusive rights to licence matches.

Comment

UK Review

The UK's current list, drawn up in 1998, includes major sporting events such as the Olympic Games and Wimbledon as well as the World Cup and the Euros. The then Secretary of State commissioned a review of the listed events in 2009¹² and appointed an independent advisory panel who recommended that the World Cup and the Euros should remain listed, but recognised that there could be scope for certain events to be de-listed in the future and that the regime's future “in a changing media landscape is by no means certain”.¹³ It is possible (assuming the listing system survives in its current form) that a reviewed list could be more conservative in its scope – including only prime World Cup and Euro matches and limiting the protection given to other sporting events.

The coalition government picked up the issue in 2010 and took the decision to shelve a review of the UK list until 2013, once the digital switchover had been completed. Digital switchover will impact on the audience reach of broadcasters,

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widening the circle of qualifying broadcasters which reach the required 95% of the viewing audience and reducing the audience numbers traditionally captured by terrestrial free-to-view TV channels.

Although all Member States may submit major event lists to the Commission, only eight (Austria, Belgium, Italy, France, Finland, Ireland, Germany and the UK) do, and Denmark has recently announced its intention to re-introduce listed events legislation. Of the eight participating countries, only the UK and Belgium place all the matches of the World Cup and the Euros on their lists. In its arguments to CJEU, UEFA submitted this fact as evidence that the UK and Belgian lists were not proportionate. The 2009 review compared the UK approach with those of other EU States and with Australia (which lists a substantial 25 events on its “antisiphoning list”).¹⁴ According to Ofcom’s Code on Sports and Other Listed and Designated Events,¹⁵ the UK currently lists 19 events without differentiation between games in the events. France lists around 20, but specifies which aspects of those events are protected. Austria, Finland, Germany, Ireland and Italy all list less than 10 events.

Although all Member States may submit major event lists to the Commission, only eight (Austria, Belgium, Italy, France, Finland, Ireland, Germany and the UK) do, and Denmark has recently announced its intention to re-introduce listed events legislation

The review found that the UK took a different approach to other countries in that it does not differentiate between games involving home countries and other games in the same tournaments and it does not include other (non-sporting) cultural events. The Commission has argued however, that the AVMS Directive is aimed at accommodating different views so there cannot, and should not, be a “one size fits all” approach in deciding what is important to a particular Member State.

It looks increasingly probable that a review of the UK listing process will need to result in something that changes the current system. The question is whether the Attorney General’s ruling will come just in time to influence such a review, whether the UK will simply adapt its process to get around any ruling about how its lists are approved, or whether UEFA and FIFA’s are in fact expending time and money trying to alter a system that the UK may already be inclined to change.

Other factors

The rightholders’ position may have been further impacted by the QC Leisure judgment¹⁶ referenced by Judge Malenkov?. The judgment confirms that sports events can, due to their original character, be transformed into subject matter worthy of copyright protection, but it has also set a precedent for the argument that football matches are not intellectual creations in themselves and do not attract copyright.

The judgment has however spurred the EU on to launch a study on sports organisers’ rights. Invitations to Tender to conduct the study were due on 1 October 2012 so there is still some time to go before the study is undertaken and findings released.¹⁷ The terms of reference of the Invitation to Tender cites section 3.2 (Sustainable financing of sport) of the Commission communication “Developing the European Dimension in Sport” which reads:

Exploitation of intellectual property rights in the area of sport, such as licensing of retransmission of sport events or merchandising, represents important sources of income for professional sports. Revenue derived from these sources is often partly redistributed to lower levels of the sports chain.

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*The Commission considers that, subject to full compliance with EU competition law and Internal Market rules, the effective protection of these sources of revenue is important in guaranteeing independent financing of sport activities in Europe. The licensing of sport media rights should respond to different market demands and cultural preferences while ensuring that Internal Market and competition law is respected.*¹⁸

These paragraphs are telling of the EU’s interest in protecting sports broadcasting licencing revenue. If the message feeds through it could influence the Commission’s future reviews of national major events lists, if not the Judges’ deliberations on how widely to allow Article 14 of the AVMS Directive to be interpreted by Member States.

Regardless of how the current appeal to the CJEU pans out, there are compelling reasons for a review of the current UK list and process for arriving at it. The wider concerns of competition law, investment in sport, giving sports organising bodies more control, protection of organisers’ income and the digital, multichannel landscape are all at play in the arena with EU citizen rights to information and access to important events. With all of these issues to be reckoned with it remains to be seen whether the UK’s sporting “Crown Jewels” will remain free-to-view or, as the market opens, possibly go the way of the real Crown Jewels – under lock and key behind a (pay) wall. **BAL**

- 1 2007/65/EC
- 2 The AVMS provisions are designed to be in line with Article 11 of the Charter of Fundamental Rights of the EU which guarantees freedom of expression and information.
- 3 The UK law behind the practice has been set out in the Broadcasting Act 1990, the Broadcasting Act 1996 and the Communications Act 2003.
- 4 Part IV of The UK Broadcasting Act 1996.
- 5 Ofcom Code on Sports and Other Listed and Designated Events, Annex 2, 2 September 2008
- 6 2007/730/EC
- 7 FIFA appeal lodged as T-68/08, UEFA appeal lodged as T-55/08
- 8 T-68/08, T-55/08 and T-385/073
- 9 Directive 97/36/EC
- 10 FIFA appeal listed as C-204/11P, UEFA appeal listed as C/201/11P
- 11 C-429/08
- 12 Review of free-to-air listed events: Report by the Independent Advisory Panel to the Secretary of State for Culture, Media and Sport, November 2009.
- 13 DCMS press release 13 November 2009, for more analysis on this see Barr-Smith, A and Hefner, A “He’s got ‘em on the list and they’ll none of ‘em be missed” (2009) 17(2) Sport and the Law Journal.
- 14 Review of free-to-air listed events: Report by the Independent Advisory Panel to the Secretary of State for Culture, Media and Sport, November 2009
- 15 Annex 3,
- 16 C-429/08
- 17 Open Call for tender EAC/18/2012
- 18 Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions- Developing the European Dimension in Sport -18 January 2011

“An own Cole”: In the Tweet of the Moment

BY LAURA SCAIFE, TRAINEE SOLICITOR AT HILL DICKINSON LLP

In October Ashley Cole was charged with misconduct by the FA for the contents of a Tweet after he reacted furiously on Twitter to doubts expressed about his evidence in the John Terry racial abuse case. Cole’s tweets have highlighted that while social media provides opportunities to interact with fans and offer sponsorship opportunities, there are potential pitfalls for clubs which they need to be alive to when their players engage with social media.

In light of the Premier League issuing guidance on players and their use of social media back in the early summer, this article will take a look at some of the issues which need to be considered from the perspective of the football club (with a wider application to other professional sports bodies). It will conclude by suggesting that there is significant merit in clubs of forming their own bespoke social media strategies which address such issues and put into place suitable safeguards to limit a clubs exposure to risk.

“An own Cole”

In response to John Terry’s racial abuse case, Cole called the FA a “bunch of t***s” on Twitter after he was accused of “evolving” his statement supporting Terry’s defence against a charge that Terry racially abused Anton Ferdinand. While inflammatory in itself, the matter was fuelled when Alan Shearer called for Cole to be banned from Roy Hodgson’s squad for the World Cup qualifiers against San Marino and Poland rather than receive a fine for his behavior.

Cole responded by retweeting a comment on Twitter by

@CollinR4 which referred to a Newcastle v Leicester match in 1998 when Shearer’s boot made contact with Neil Lennon’s face:

“Alan Shearer says @TheRealAC3 needs to be banned for comments. I want his opinion on bans for kicking Neil Lennon in the head. GlassHouses”.

As a result Cole faces discipline from the FA and his own club for the contents of his own post and for re-tweeting those of @CollinR4.

Cole is not the first player to fall foul of social media. Ryan Babel was the first Premier League footballer to be charged by the Football Association due to postings on a social media site. Following a match between Manchester United and Liverpool, Babel retweeted (forwarding another person’s tweet) a photograph of the match referee, Howard Webb, which contained the comment:

“[a]nd they call him one of the best referees? That’s a joke”

The picture which accompanied the Tweet showed a digitally manipulated photograph of Webb which had been altered so that it appeared that he was wearing a Manchester United team shirt. Babel subsequently apologised and was fined £10,000 despite the fact that Babel merely retweeted the posting of another rather than authored the tweet himself. The sanction imposed could offer some insight as to the punishment which Cole may face for re-tweeting the post by @CollinR4 in addition to the punishments for his own direct postings.

With the frequency of such occurrences increasing it is suggested that clubs need to set in place procedures to manage their player’s online presence and the content of posts which by association can be linked to their clubs.

Social Media Policy

As the use of social media becomes more prevalent and players increasingly use the medium in order to engage with fans, clubs need to consider what measures they need to take in order to protect their reputation should similar situations to Cole or Babel arise. One such club which does is Coles. In response to his Twitter outburst, Chelsea manager, Roberto Di Matteo, has responded by stating:

“We’ve got a social media policy at the club and there’s going to be a disciplinary process – action – against the tweet and that’s how I’ll leave it. The image of the club is very important to us of course. We have rules, and anybody who breaks the rules faces disciplinary action against them. We strive to have high standards and hopefully, going forward, we can be better at showing those.”

Surprisingly however, while the FA have recently mentioned the introduction of guidance for players on the use of social media and the Premier League having already produced their own guide, a number of professional sports clubs do not have an established social media policy either included in the playing contract or given to and agreed by the player. It is clear that there can be no “one size fits all” approach and while a comprehensive review of all aspects of a clubs targeted social media strategy are beyond the scope of this article, a good policy could be based around the following areas.

Player Education

Just like any other employee/employer relationship, the policy should set out what players can and should not comment on and needs to be communicated to players effectively. In order to do this it is important for clubs to educate their players as to the potential pitfalls of inappropriate use of social media and the likely sanctions they will face for non-compliance such as a ban from playing as well as fines from the governing body or players club.

Players should also be aware that sanctions do not end at the club doors; there may potentially be serious legal

consequences arising out of their posts such as potential claims for defamation or racial abuse. After Arsenal Football Clubs midfielder Emmanuel Frimpong sustained a serious knee injury sustained while on loan at Wolves, Frimpong posted a message on his official Twitter account which read “*if you going church today Pray For me Giving today A Miss*”, the Gunners midfielder retweeted a response from one Tottenham fan which read: “*I prayed you break your arms and legs*”, to which Frimpong replied “*Scum Yid*”.

Despite removing the comment shortly afterwards, the comment did not escape the watchful eye of the FA. Frimpong however could have ended up falling foul of the criminal law with the potential for prosecution under s127(1) (a) of the Communications Act 2003. Under s127 (a), a person is guilty of an offence (punishable under s127 (3) by up to six months’ imprisonment or a fine, or both) if they send “a message or other matter that is grossly offensive or of an indecent, obscene or menacing character” by means of a public electronic communications network. This inevitably raises the question of what is to be considered grossly offensive, or what is of an indecent, obscene or menacing character. In *DPP v Collins* ([2006] UKHL 40), Mr Collins made a number of racist phone calls to the offices of his local MP. In considering if an offence had been committed under s127(1)(a), the House of Lords considered the standards of an open and just multi-racial society, taking into account the context of the words and all relevant circumstances. This involved considering reasonably enlightened contemporary standards applied to the particular message sent, in its particular context, to see if its contents was liable to cause gross offence to those to whom it related, or to be aware that they may be taken to do so *DPP v Collins* ([2006] UKHL 40 at [9]). In *R v Joshua Cryer* a case that was also prosecuted under the Communications Act, Cryer was prosecuted and convicted for sending racially abusive messages on Twitter to the ex-footballer, Stan Collymore, and was sentenced to two years’ community service and ordered to pay £150 costs.

If Frimpong had posted a series or string of tweets in the heat of the moment, he may also have increased his exposure to

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prosecution under the Crime and Disorder Act 1998, like Liam Stacey, who was sentenced to 56 days’ imprisonment for 26 racially offensive tweets (amounting to 2.2 days per tweet) in relation to Bolton Wanderers footballer Fabrice Muamba, for racially aggravated disorderly behaviour with intent to cause harassment, alarm or distress under section 31 (1) (c) of the Crime and Disorder Act 1998. For the CPS, what has been determined as harassment, alarm or distress has revolved upon the particularities of each case.

However, it is not just from a regulatory perspective that Arsenal should have been concerned. The potential exposure for the club to damage due to the offensive content of the Tweet was significant, especially given the large proportion of Jewish fans at the north London club. The Frimpong Tweets also highlight that that sanctions or apologies may not always be enough, in a sense they shuts the door once the horse has bolted. Clubs need to communicate to players in manner that they clearly understand that their posts can be potentially damaging the clubs brand, exposing it to unacceptable reputational risk which could lead to a loss of confidence on the part of both fans and sponsors alike.

Control Content and Privacy Settings

In order to effectively communicate the parameters of what players can post about via social media a number of clubs have set strict guidelines in relation to issues such as matters relating to the club e.g. team selection, comments on fellow players or officials and transfer speculation. However, while guidelines are in place, any policy is only likely to be as good as its enforcement, if this is not the case then there is no guarantee that such policies followed by players (see for example Joey Barton’s tweets (@Joey7Barton) for a number of examples of disputes with fellow players).

In terms of managing such risk, it may be prudent for clubs to consider the implementation of blackout periods for a few hours before, during and after a game when tensions are running high. An example of a situation which would have benefited from this involved a series of Tweets passing between Joey Barton, Gary Lineker and Alan Shearer after they were critical of Barton’s behaviour on the final day of the 2011/12 season. The incident saw Barton sent off and receive a 12 match ban. Barton also admitted during the exchange that he had deliberately tried to get a Manchester City player sent off which was one of the leading factors to him receiving

the fourth longest match ban in the English games history. It is arguable that for situations such as Cole’s where disciplinary actions are being taken against other players, there should be additional strict rules on comments made in relation to ongoing FA panel decisions in continuing and recently decided investigations.

In addition the use of strict privacy settings should help to prevent situations of unauthorised tweets/comments being made from player accounts. Any such guidelines or advice should apply equally to persons connected to the player as it is often the case that comments of the player are displayed on their friends’ and family’s pages too. Both Twitter’s and Facebook’s default privacy settings are such that tweets and comments are publicly available. Clubs should be able to provide the necessary advice as to how to ensure the settings can be adjusted to avoid personal information being unintentionally sharing of personal information.

Pre-approval of content

While the steps highlighted above may seem onerous on players, the reality is that often ‘communications’ through player’s websites/blogs are not authored by the player themselves. It is suggested that given the complexity of the issues involved, it may be necessary to have dedicated individuals at the club who handle social media issues for players. If delivered effectively, this should allow clubs to have more control and awareness of any potential representational or legal conflicts and with appropriate damage limitation plans in place, be able to respond to any damaging content quickly and instigate the necessary limitation measures.

Clubs should be able to provide the necessary advice as to how to ensure the settings can be adjusted to avoid personal information being unintentionally sharing of personal information

“AN OWN COLE”: IN THE TWEET
OF THE MOMENT

Digital media is a specialist area and the specialist skills required to fully utilise its capabilities should not be underestimated. However without the commitment of the key people any planned strategy is likely to be unsuccessful. In order to achieve ‘success’ (measured against internal key indicators) it will be necessary to highlight shortcomings, and quite possibly advisable in the case of skill sets, to bring in consultants and legal consultants to work alongside the existing employees to create, implement and maintain a viable and legally compliant strategy which is effectively communicated to players and enforceable by club officials.

Damage Limitation

Whilst implementing, designing and enforcing an effective social media policy may help to limit a club or other sporting bodies exposure to risk, it is inevitable that situations will arise where unsuitable comments/links or photos have been posted. In this situation the player or club should have a clear and detailed damage limitation plan that should be implemented as soon as possible. While the damage may not be fully contained as it is likely to have been captured or retweeted, it is imperative to minimise the damage/publicity as far as possible as it is often the case that it is how a situation is handled rather than the situation itself which is remembered by fans and fuels media interest e.g. Suarez and surrounding allegations of racism.

In order to deal with these situations, a clubs dedicated social media representatives should respond in an appropriate manner to the situation. In the Ryan Babel example above, in addition to the deletion of the Tweet, Babel subsequently posted:

“My apology if they take my posted pic seriously. This is just an emotional reaction after loosing an important game”

Examples of the sorts of factors which a crisis management plan could take into account may include:

- Clarifying statements taken out of context
- Removing offensive content (quickly)
- Offering an apology should any offence (or potential offence) have been caused.

Getting the Message Across

In order to convey the contents of such a policy to players, a number of clubs have produced “best practice guides” which can act as a quick reference of key do’s and don’ts, scales of potential sanctions and list key contacts within the club who can deal with social media queries.

In addition to familiarising themselves with their clubs social media strategy, as part of a club delivered training programme, it is prudent for players to take responsibility for their digital presence and undertake the following:

1. Familiarise themselves with the clubs social media policy;
2. Regularly review the content of their personal social media channels;
3. Ensure all privacy settings are up to date;
4. Understand where the line between professional ends and private begins;
5. Logout of social media platforms when not at the computer; and
6. Think before uploading content as they may not be able to control who reads it.

Conclusion

Social media offers a previously unparalleled opportunity for engagement with brands, companies and users due to the instantaneous access to significant part of the global population. However, platforms such as Twitter and Facebook need to be handled carefully as part of a clubs (or individual players) digital strategy. It is clear that clubs cannot take a “one size fits all” approach to regulating social media and will need to consider their individual requirements, budgetary constraints and internal skill sets before creating, implementing and maintaining a suitable strategy.

Think a social media policy is unlikely to be that important? I wouldn’t bet your shirt on it... you may not be singing anymore... **BASL**

Social Media – A Governing Body’s Perspective

BY MEENA BOTROS, LAWYER, LAWN TENNIS ASSOCIATION

Introduction

The creation of social media and its huge popularity over recent years has affected the sports sector in a variety of ways. There are currently over one billion Facebook users worldwide and more than one billion tweets made on Twitter each week, this illustrating how wide an audience individuals and organisations can reach relatively easily. Previously, fans only had access to sports stars through the traditional media in forms such as television interviews and newspaper articles. However, with social media sites such as Facebook and Twitter, fans are now able to receive information directly from sporting individuals. This can be very beneficial to sports stars, allowing them to develop their profile and portray a different image to that which people see when they are competing. If used correctly, this can bring great advantages for sports stars. However, there are also great dangers which these individuals need to be aware of in relation to their use of social media.

Safeguarding

The issue of safeguarding is very relevant to sports stars’ use of social media. Being in the public spotlight, they can face greater dangers than other individuals and therefore they need to ensure that they use social media sensibly. Whilst it is understandable that individuals will want to promote the fact that they are competing in a particular tournament, they should not discuss specifics of where they are. Firstly, by advertising that they are not at home, there is a great risk that they will be burgled. There have been various incidents where sports stars have been burgled because they have made it public knowledge that they are away from home. Individuals also need to be careful of not disclosing specifics of where they are as they are at a greater risk of being stalked due to their public profile. This is an issue for all sporting individuals, but is particularly relevant to younger female sports stars who may be at greater risk. This has caused problems in the past for some athletes.

Serena Williams is an example of a sports star who uses social media extensively and on the whole to great effect. Williams has over three million followers on Twitter and uses the site to interact with fans in a variety of ways such as by announcing when her book is being released and when she will be making television appearances. However, sometimes Williams has been perceived to give too much away when she details specific information about her location and this has led to problems in the past. Last year, a man was arrested outside of Williams’ home in Florida. The police found a note on the man which stated “I love you Serena and I know you love me too, we’re soul mates”. When the police interviewed the man, they asked him how he knew Williams’ location. His response was “I follow her on Twitter”. Following this arrest, it emerged that this individual was known to Williams’ advisers as he had previously been seen outside radio stations and other venues where Williams was. It is a concern that this individual was able to follow Williams around the country due to the information she posted on her social media site. Whilst this danger is still an issue for Williams, it is less of a problem for her as it is for younger, less established sporting individuals who are in the public eye but do not yet have the same level of security around them as someone such as Williams. It is therefore very important for governing bodies and sporting organisations that employ sports stars to make such individuals aware of these issues in order to ensure their safety.

Corruption

Corruption is one of the biggest challenges facing sport at the moment. The Tennis Integrity Unit is the body tasked with protecting tennis from all betting related corrupt practices. It established the Uniform Tennis Anti-Corruption Code (the **Code**) which sets out various provisions in relation to what persons connected to tennis cannot do in relation to betting activities on the sport.

The topics of corruption and social media are ones that are closely linked. Inside information is one issue that links the two topics. Inside Information is defined in the Code as *“information about the likely participation or likely performance of a Player in an Event...or any other aspect of an Event which is known by a Covered Person and is not information in the public domain”*.

Clearly players will be privy to a great deal of inside information such as information relating to injuries that their fellow competitors may have that they have heard due to their position. Many betting companies monitor social media sites as there is a belief that there is information on the sites which is useful to them and to gamblers. Players need to ensure that they do not open themselves up to criticism or become associated with corrupt activities through their disclosure on social media sites of what was inside information.

Players also need to ensure that their social media activities do not make them a target for corrupt individuals. An example of this occurring is the case of Ekaterina Bychkova, the Russian tennis player, who was banned for 30 days and fined \$5,000 in 2010 by the Tennis Integrity Unit for failing to report an approach to throw a match. The individual who made the approach stated that he had read Bychkova’s online blogs and (wrongly) decided from that information that Bychkova would be someone who would cooperate with him in corrupt activities. Whilst Bychkova did not take part in any corrupt activities, her online blog played a part in her being targeted with the potential consequence of causing damage to her reputation.

Public Forum

Sporting individuals need to remember that social media sites are very public forums. Even if an individual restricts access to their Facebook profile to their friends or makes tweets private on Twitter, anything that is placed on a social media site can be “re-posted”, “re-tweeted” or reproduced in some other way meaning that if a comment is deemed to be interesting enough then it can end up becoming a worldwide news story.

For media organisations, social media is a great tool. Whereas in the past journalists would need to interview sports stars or conduct research in order to write articles, journalists now monitor sports stars’ social media accounts for quotes or stories that they can use. This can be a great tool for sports stars as it can allow them to have great exposure relatively easily. However, sports stars need to be aware of the dangers. Sports stars receive media training on how to deal with television interviews or interviews with journalists and over recent years have become very careful with what they say to the traditional media. However, with social media being a relatively new phenomenon, some individuals are not as cautious with regard to their social media activities. Due to the nature of social media, individuals can feel that they are only communicating with a limited number of people and therefore make statements that they would not have made in an interview. This can have significant negative consequences for sports stars, including in relation to their sponsorship potential and sanctions from their governing body.

Sponsorship

Whilst individuals can greatly increase their appeal to sponsors through their use of social media, sports stars can cause significant harm to their sponsorship potential through ill-advised statements made on social media sites.

One such individual is Stephanie Rice, the successful Australian swimmer who won three gold medals at the 2008 Olympic Games in Beijing. Due to her success and image, Rice had various sponsors, including Jaguar. However, in September 2010, following a rugby union match in which Australia beat South Africa, Rice posted on her Twitter page “suck on that faggots!”. Rice was criticised for what was widely deemed to be a homophobic comment and Jaguar terminated their sponsorship deal with her the following week. This case illustrates the huge impact that social media can have on sporting individuals, with years of hard work being significantly damaged with one statement on a social media site. This incident also shows the importance of sports stars treating social media in the same way as other media outlets. Rice would presumably not have made that

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statement in a television interview, but she failed to see the dangers when it came to making the statement on her social media site.

Governing bodies and other sporting organisations will not only be concerned about damage being done to a player's sponsorship potential but also to their relationship with their own sponsors. Such organisations need to make clear to the sports stars associated with them that they should not make any statements on their social media sites that would negatively affect the organisation's relationship with its sponsors and partners. Steve Nash, the American basketball player, experienced such a situation when he tweeted "*Wow! @US Airways with the worst customer service*". This may initially appear to be a harmless statement in relation to a bad experience by Nash. However, the issue in this case is that Nash's team at the time, the Phoenix Suns, are sponsored by US Airways. Given that Nash is one of the most famous basketball players in the National Basketball Association (the **NBA**) and that he has over 1 million followers on Twitter, this is a situation that both the Phoenix Suns and US Airways would have been extremely unhappy with. It is therefore very important that governing bodies and sporting organisations educate their sports stars of the need to ensure that they do not cause similar damage. However, in this case, given that the Phoenix Suns' home stadium which Nash regularly played in is named 'The US Airways Center', Nash should have known that this would be an inappropriate statement to make.

Governing Body Sanctions

It is not just the loss of sponsorship deals that sports stars need to be concerned about. Sports governing bodies have demonstrated that they will take action against certain statements made on social media sites in the same way that they do when statements are made in other outlets.

The Football Association (the **FA**) Rule E3(1) states "*a participant shall at all times act in the best interests of the game and shall not act in any manner which is improper or brings the game into disrepute*". Traditionally, this rule would have been broken through acts done by a footballer or statements made in a television interview. However, over the last two years, the FA has punished footballers who have made statements on social media sites which infringe this rule.

In January 2011, Ryan Babel, then a Liverpool player, became the first Premier League footballer to be charged by the FA for actions taken on a social media site. Following a match between Manchester United and Liverpool, Babel re-tweeted a photograph of Howard Webb, the referee, with a superimposed Manchester United shirt on, with the implication being that Webb had been biased towards Manchester United. Babel was found guilty of improper conduct (under Rule E3(1)) and fined £10,000. The FA stated that it had treated this case in the same way as if the statement had been made in a more traditional form of media.

Since the Babel case, there have been several instances of footballers breaching rule E3(1) through their use of social media. High profile footballers such as Frederico Macheda, Ravel Morrison and Nile Ranger were fined £15,000, £7,000 and £6,000 respectively having been found guilty of making homophobic comments on Twitter. Most recently, Ashley Cole received the highest fine that the FA has imposed in relation to social media (£90,000) for derogatory comments he made about the FA following the recent Independent FA Commission decision on the John Terry case.

Following a match between Manchester United and Liverpool, Babel re-tweeted a photograph of Howard Webb, the referee, with a superimposed Manchester United shirt on, with the implication being that Webb had been biased towards Manchester United

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The England and Wales Cricket Board (the **ECB**) has also taken action against cricketers when they have made harmful statements on social media sites. Kevin Pietersen was fined an undisclosed amount by the ECB for a tweet stating *"Man of the World Cup and dropped from the T20 side too. It's a fuck up"*. The ECB found that the comment was prejudicial to the interests of the game. As well as the risk of fines being imposed by the governing body, sports stars must also be aware of the risk of being banned from competing. The ECB demonstrated this when it took action against the promising young cricketer, Azeem Rafiq. Rafiq was unhappy with not being selected for a particular side and vented his frustration by referring to the individual in charge of selection as a *"useless wanker"*. Rafiq was banned for one month and fined £500.

Processes to put in place

Given the various risks outlined above, governing bodies and other sporting organisations need to take steps to ensure that they minimise the risk of situations such as these occurring and that any damage is limited should any situations occur.

Education is key and organisations need to have guidance in place to make sports stars aware of the risks associated with social media. This needs to be complimented with ongoing support which allows sports stars to approach certain individuals within the organisation for advice on any issues that arise.

Organisations can also consider the use of a 'blackout period', this being a period in which individuals are prohibited from using social media sites. A blackout period could be imposed for a certain period before, during and after an individual is competing. The advantage of this is that it decreases the chances of an individual making a statement in the heat of the moment after competing. Blackout periods are commonly used in the USA, with players in the NBA prohibited from communicating on social media sites from 45 minutes prior to any match until the end of the post-match obligations.

As well as the preventative measures, organisations should take steps to ensure that it can deal with any issues that arise. Organisations need to have a binding policy or code of conduct in order for them to have the authority to take action when incidents take place. The policy or code of conduct can contain social media specific provisions or more

general disrepute provisions (such as the FA Rule E3(1)) which can be applied to a variety of situations including social media. A disciplinary procedure also needs to be in place in order for there to be a transparent process for dealing with individuals who breach the social media provisions.

Finally, organisations need to consider whether they can have any crisis management procedures in place in order to contain any damage caused. For example, Ryan Babel deleted the tweet of Howard Webb and apologised for any offence that was caused. Whilst this will not undo all of the damage, steps such as this and having set statements that can be made can help to stop the issue from escalating.

Conclusion

Social media has a very large audience and has drastically changed the relationship between sports stars and their fans. The use of social media can be very beneficial to sports stars, their employers and governing bodies. However, there are extensive risks and great damage can be caused to all the parties involved when a simple statement is made on a social media site. It is therefore very important for governing bodies and other sporting organisations to educate individuals and to put in place procedures relating to social media to ensure that they reap the benefits rather than becoming the next bad example. **■ BASL**

The Journal Interview: Ian Blackshaw

BY WALTER CAIRNS

Ian Blackshaw is an international sports lawyer and a former Vice President (Legal Affairs) of the ISL Sports Marketing Group, Lucerne, Switzerland. He qualified as a Solicitor of the Supreme Court of England and Wales and also holds a Master's Degree in International Sports Law from Anglia Ruskin University (ARU), Chelmsford and Cambridge, United Kingdom, where he is a Visiting Professor. He is also a founder member of the ARU International Law Unit and has recently been awarded the Degree of Doctor of Laws by ARU. At Cambridge, he teaches Alternative Commercial Dispute Resolution as part of a Post Graduate Programme on International and European Business Law. He is also Visiting Professor of International Sports Law at the University of Staffordshire, United Kingdom. He has also acted as an international consultant on the Commercial Aspects of Sport and Sports Dispute Resolution Modules of the Sports Law and Practice LLM Programme of De Montfort University, Leicester, United Kingdom.

He is Visiting Professor and an Honorary Fellow of the International Sports Law Centre of the TMC Asser Instituut in The Hague, The Netherlands (official website: www.sportslaw.nl) and is also Contributing Editor of The International Sports Law Journal published by the Centre, as well as a frequent member of their 'Round Tables' and speaker at their Seminars on Sports Law, held in The Netherlands and the rest of Europe. He is also Visiting Professor of International Sports Business Law and Management at the University of Leiden Business School, The

Netherlands and the Universities of Pretoria and Johannesburg, South Africa, where he is also a member of the Isa Pele Consulting Legal and Business Training Group, for whom he leads Seminars on Alternative Dispute Resolution, including Arbitration and Mediation. He is also a member of the TCA Training and Consulting Group in Nairobi, Kenya, where he leads Seminars on Negotiating and Drafting International Commercial Contracts. He is a member of the Court of Arbitration for Sport, Lausanne, Switzerland; a member of the Expert Dispute Resolution Panel of EQUESTES in The Netherlands; and also a member of the World Intellectual Property (WIPO) Arbitration and Mediation Center, Geneva, Switzerland, where he adjudicates on the WIPO Panels on 'Domain Name Disputes' and 'Expert Determination' of International Commercial Disputes.

He is also a prolific author of articles for several Law Journals, including the Entertainment and Sports Law Journal, the World Sports Law Report and the IBA Business Law International Journal, and also several Books on Sports Law, many of which are part of the Asser International Sports Law Series, including Books on 'Sport and TV Rights' and 'Sport Mediation and Arbitration' published by the TMC Asser Press in The Hague, The Netherlands. His latest Book on 'Sports Marketing Agreements: The Legal, Fiscal and Practical Aspects' was published earlier this year by the TMC Asser Press. He is also Consulting Editor of Global Sports Law and Taxation Reports (official website: www.gsltr.com).

He also regularly chairs and speaks at International Sports and Commercial Law Conferences and Seminars in the UK, the rest of Europe, South Africa, Kenya and elsewhere in the world. He is a contributor on Sports Law to 'The New Oxford Companion to Law', and also contributes to 'The Times' of London, BBC World Service, BBC Five Live, TalkSport, Radio France International and the South African Broadcasting Corporation on topical Sports Law issues.

Professor Blackshaw, what do you see as the most pressing issues of sports law in the present climate?

In my view, the most pressing and overriding issue is – and, unfortunately, continues to be – doping, despite improvements to the WADA Code, as the Lance Armstrong affair clearly demonstrates. Of course the allegations made against Armstrong by USADA and supported by UCI, the world governing body in cycling, have not – as yet – been tested in a judicial forum, be they either the ordinary courts or the Court of Arbitration for Sport, and the allegations have been consistently denied by Armstrong.

Legally speaking, this is a strange – if not unique – situation. And, of course, Armstrong announced in August that he would no longer be fighting these allegations, but is that tantamount to an admission by him of being guilty as charged? I think not and find that hard to accept, because there has been no forensic examination of the allegations and there has been no process of examination and cross examination of Armstrong, his accusers and the witnesses claiming wrongdoing by him.

I notice that this case has provoked a range of predictable reactions from the sporting world generally and the fans of cycling, including those who think that doping should not be illegal, but that those who wish to dope should be allowed to do so. This is a proposition that I find unacceptable, given that doping is a form of cheating and totally inconsistent

with the idea of sport, which is all about – or, at least, should be – fair play!

But surely the issue went far beyond the question whether Lance Armstrong took illegal performance-enhancing substances. What about the allegations that he encouraged and even bullied his team-mates not only into consuming these drugs but also into remaining silent on the subject?

Yes, you are absolutely right and this shows the gravity of the allegations against Armstrong, which, as I have said, ought to be tested in a judicial or arbitral process, rather than be taken for granted and assumed to be proven.

Among your many attributes and positions of distinction, one surely stands out – that of judge with the Court of Arbitration for Sport. What is your verdict on its functioning thus far?

The CAS has been operating for 28 years and during this time has grown in stature and acceptance by the sporting world and has established itself – as its founders always intended it to be – as 'the Supreme Court of World Sport'. Indeed, the Swiss Federal Supreme Court, in a ruling of 27 May 2003 opined, in the case of the Russian cross-country skiers who challenged the independence of the CAS, as follows:

"... The CAS is meeting a real need. There appears to be no viable alternative to this institution, which can resolve sports-related disputes quickly and inexpensively. Having gradually built up the trust of the sporting world, this institution which is now widely recognised remains one of the principal mainstays of organised sport."

But, like other courts/tribunals, the CAS, from time to time, does make mistakes (compare, for example, the decisions in Webster and Matuzalem on the assessment of damages on anticipatory breach of football players' contracts), and these may not always be easily rectified, as the grounds for appeal to the Swiss Federal Supreme Court against the decisions ('awards') of CAS are rather limited.

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However, on 27 March, 2012, the Swiss Federal Supreme Court overturned an Appeal decision by the CAS in the case of the Brazilian professional footballer Matuzalem Francelino da Silva for the very first time, for a violation of public policy, pursuant to the provisions of article 190 (2) (e) of the Swiss Private International Law Statute of December 18, 1987. I should perhaps add that this particular ground for legally challenging arbitral awards in Switzerland, including those rendered by the CAS, is notoriously difficult to establish in practice, as 'public policy' ('ordre public') is such a complex and vague concept and one that is restrictively assessed and interpreted.

To summarise, I think that the CAS is doing a good job!

What about the 'access to justice' angle? In most cases, disputes land before the CAS after exhaustive domestic proceedings. Its location is such that, for most of the litigants, bringing or defending a case before it involves considerable expense – travel, accommodation, not to mention the costs of specialist legal assistance and representation. Surely that means that, realistically, only the wealthiest performers have access to it?

You certainly have a point there and the costs involved in mounting a case before the CAS may be an issue in some cases, leaving aside, of course, wealthy football clubs and players and sports governing bodies, many of whom use the CAS and can afford to bear these costs.

Which particular case with which you have been associated stands out in your memory?

I think the one case that I am proud of is the CAS Advisory Opinion that I gave in 2003 in the Badminton Scoring case, in which I held that the new rules unfairly discriminated between male and female players, contrary to the rules against discrimination of any kind enshrined in the IOC Charter. I am against discrimination of any kind in any field of human endeavour, including sport, which, again, is against the concept of fair play which is inherent in sport.

I should perhaps add that it is no longer possible to obtain CAS Advisory Opinions – a feature of the Continental European Civil Law tradition – as the Consultation Division of CAS has been abrogated. This, in my view, is a great pity because such Opinions, although non-binding, do help to

clarify legal issues, thus possibly avoiding the time and expense of taking legal proceedings in, of course, appropriate cases.

Perhaps the decision was taken on the grounds that the case law of the CAS was sufficiently developed to obviate the need for such advisory opinions?

The decision to abolish the CAS Consultation Division was taken because, although Advisory Opinions were popular in the earlier days of CAS, latterly very few of them have been sought. The reason for this may, as you suggest, be explained – at least partially so – by the fact that the CAS has now built up a very useful body of case law ('Lex Sportiva'), but there is still quite some way to go for this to be considered comprehensive. Another possible reason was that this process has been criticised by a number of commentators as being a political one, in that the actual questions to be considered in Advisory Opinions could be – and, indeed, were – reframed by the CAS President, under a wide discretion for doing so that he enjoys! See pp. 167 & 168 of 'Sport, Mediation and Arbitration' by Ian S. Blackshaw, 2009 TMC Asser Press, The Hague, The Netherlands.

Should sporting tribunals be made part of the ordinary court structure at the national level?

I would argue not. They should be kept entirely separate, as each fulfils its own particular and distinctive purpose in the administration of justice and its hierarchy (levels of instance).

For example, it would be a disaster to incorporate the FIFA Dispute Resolution Chamber, whose delays and inefficiencies are well known, into the Swiss Courts system!

But could the CAS not act in the same way as the European Court of Human Rights – as a lodestar whose case law, if not binding, would guide the national sporting courts as to the correct interpretation of the laws governing sport?

Perhaps this is unlikely to happen, in practice, as CAS is essentially an Arbitral Tribunal with, as such, a rather defined and particular remit.

It is sometimes maintained that the procedures before the disciplinary bodies and other quasi-judicial bodies attached to various sporting federations are tilted too far in favour of the federations at the expense of the sporting defendant. Do you agree?

I would tend to agree with this point of view, but then I think that this is an inevitable consequence of the power of sports governing bodies, especially the IOC and FIFA, which generally and jealously guard their autonomy and independence. However, sports bodies should always remember that they are not above law and can be called to account in the ordinary courts where the rules of natural justice (rules against bias and lack of a fair hearing) are infringed, which happens from time to time in various sports.

In that case, is it perhaps not time that the rules, procedures and practices of these international bodies were reviewed by the CAS?

Perhaps, but this, I have no doubt, would be resisted by the IOC, for example, who are notoriously independent and ready to defend their independence and the right to regulate their own affairs to the hilt.

Should there be more scope for alternative dispute resolution (ADR) in the settling of sporting disputes?

I think that ADR is particularly suited to sport, which has its own characteristics and dynamics, and the settlement of sports-related disputes, and should, therefore, be encouraged at the international and national levels. In fact, several

countries have introduced their own national sports disputes resolution bodies, modelled on the CAS – for example, Canada, Japan and the UK, amongst others. These bodies work well in practice and this kind of development, in my view and experience, is to be welcomed.

However, I would argue that, in the final analysis, the ordinary Courts are the ultimate custodians of justice.

I was thinking in particular of mediation, which takes the confrontational sting out of dispute resolution.

I agree that mediation, although seen by some, when agreeing to it, as a sign of weakness, is a particularly good way of settling sporting disputes, given that the sports world is a small one and future sporting and business relationships often need to be maintained and safeguarded, rather than destroyed by litigation, which, I agree, is a confrontational process. Most sports dispute resolution bodies offer mediation or, its first cousin, conciliation.

Your professional experience includes adjudicating in intellectual property disputes as a member of the various WIPO panels. Do you agree or disagree that this tends to confer excessive levels of protection on images, etc., which should properly be in the public domain?

No, I do not agree with this claim. Intellectual property rights, including those relating to sport and sports bodies and persons, are a valuable species of legal property and need to be protected as such. This is particularly true of sports-related domain names, to avoid Internet users and consumers being misled.

Of course, if the rights holders fail to commercially use and defend these rights, then it is right and proper that they should pass into the public domain and cease to be monopoly rights.

But there is a point of view which holds that the entire issue has reached levels of absurdity which hold it up to ridicule – for example, where it is now possible to plead IP protection for a goal celebration?

As an IP lawyer, as well as a sports lawyer, I have no comment!

The CAS has been operating for 28 years and during this time has grown in stature and acceptance by the sporting world and has established itself as ‘the Supreme Court of World Sport’

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Talking of absurdity, there is also the question of ambush marketing...

The pros and cons of outlawing and taking specific legal measures against 'ambush marketing', views on which range from clever marketing to outright theft, is a vast and controversial subject, to which quite easily an entire interview could be devoted!

Do you agree that the law often treats sporting activity as a privileged area, conferring favours and exemptions denied to other fields of human endeavour? For example, in what other field of human activity does changing one's employer require the payment of a transfer fee?

Yes, I do tend to agree with this view. But, take the European Union, for example. Whilst the so-called 'specificity of sport' concept (also referred to as the 'sporting exception') is generally recognised and sporting rules are taken into account and may and have been upheld, there is no general free for all or automatic exemption from EU Law in general and EU Competition Law in particular, as the leading case of Meca-Medina demonstrates.

In that case, the European Court of Justice, in its ruling of 18 July 2006, held that, because a rule qualifies as 'purely sporting', this does not automatically exempt that rule from EU Law, especially the EU competition rules. The rule, based on the particular facts and circumstances, has to be considered and evaluated accordingly.

This leading decision has not pleased sports bodies and, in fact, the decision has been criticised by UEFA as a step backwards for failing to lay down specific exceptions from EU Law and, thereby, defining what is meant by and included in the term 'specificity of sport'.

Well, that specificity seems to have persuaded other law enforcement agencies in bestowing favours on sporting performers and clubs which are denied lesser mortals – one has in mind particularly the Inland Revenue and its treatment of the tax arrears incurred by certain clubs....

Point taken!

I would add that for any and all anti-corruption bodies in sport to be successful and inspire confidence, they have to be independent of the sports bodies concerned

Are the current mechanisms and procedures to deal with corruption in sport adequate? If not, what improvements would you suggest?

Yes, I believe so. Corruption in sport is now being taken more seriously. For example, as a result the bidding scandals leading up to the 2002 Salt Lake City Winter Games, the IOC introduced its Ethics Commission, which seems to be working well. Thus Joao Havelange, the former FIFA President, resigned in December last year from the IOC just days before the IOC Ethics Commission was about to expel him, following an enquiry into a bribery scandal involving him and ISL, the former marketing partner of many leading sports bodies, including FIFA and the IOC. The IOC Code of Ethics, which the IOC Ethics Commission applies, is kept under constant review and regularly updated.

As regards FIFA and all the corruption that has come to light in 'the beautiful game', especially relating to the awarding of the FIFA World Cup to Russia in 2018 and Qatar in 2022, Sepp Blatter, the current President of FIFA, was rather slow in setting up the necessary machinery to deal with the corruption crisis in football, famously remarking 'what crisis?' At first, he suggested dealing with corruption 'within the football family' and then was forced to set up an independent Anti-Corruption Committee, after the shaky start mentioned above! It will be interesting to see how this Committee operates in practice.

I would add that for any and all anti-corruption bodies in sport to be successful and inspire confidence, they have to be independent of the sports bodies concerned; transparent and consistent in their approaches to the problems and the decisions they take in each individual case; and composed of members of the utmost integrity.

But is this not something of a pipe dream when confronted with forces which are totally beyond the control of the relevant bodies – such as the illegal betting organisations and rings in Asia, which seem to have played a prominent part in the cricket corruption scandal?

I agree with you that corruption in sport is a difficult nut to crack, especially when sports bodies are up against extremely powerful international betting syndicates operating on a global basis! This needs outside help, as FIFA has acknowledged when signing its landmark agreement with Interpol on 9 May 2011, to tackle match fixing and betting scandals!

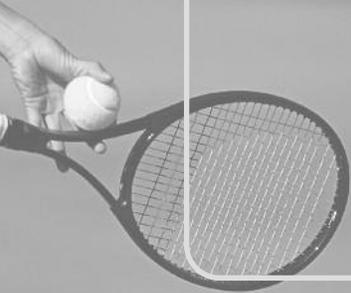
Are there any other areas of sporting jurisdiction which are capable of improvement?

I think that the grounds for appealing to the Swiss Federal Supreme Court could perhaps be extended to allow, in particular, for a review of the legal merits and basis of CAS awards (a ‘cassation’ process) – see my remarks under question 2 above. However, I fully recognise that, generally speaking, the grounds for legally challenging arbitral awards should be limited, to avoid the general criticism made against arbitration, namely, that arbitration although intended to avoid litigation often leads to litigation!

As I already mentioned in my answer to Question 4 above, the FIFA Dispute Resolution Chamber needs reforming. Under its operating rules, it is supposed to render a decision within 60 days, whereas, in practice, you are fortunate if you get a ruling within two years. FIFA needs to put more resources, including legally qualified personnel, behind this body to ensure its proper and efficient functioning!

Professor Blackshaw, thank you very much for this enlightening interview. ■ BASL

Analysis



Challenging Football Transfer Windows: A disproportionate response to a legitimate aim

BY ADAM BERRY, SOLICITOR, FINANCIAL SERVICES AUTHORITY (work originally submitted as part of the LLM Sports Law & Practice, De Montfort University)

Introduction – A record breaking day for English football

“Amazing” is a too commonly used word in football. However, even by the sport’s propensity to surprise, 31 January 2011 truly was an amazing day in the Premier League! And what is more, no football was even kicked! For 31 January 2011 was the final day of the 2010/2011 season’s January transfer window:

- Chelsea signed the Spanish striker, Fernando Torres, from Liverpool for an undisclosed fee reported to be £50 million, which set a new British transfer record and made him the sixth most expensive football player in history.¹
- They also signed Brazilian defender, David Luiz, for a fee which his former club, Benfica, confirmed to be €25 million.
- Liverpool used the money received for Torres in part to sign the England striker, Andy Carroll, for £35 million, which to date represents both Liverpool’s most expensive ever signing and the highest ever paid by one club to another for a British footballer.² Prior to his transfer, Carroll had made just 19 appearances in the Premier League (albeit in which he scored 11 goals).

So, fast forward two years on, have these record signings been a success and proved value for money? The answer is a resounding “no”. In the 2011/2012 season, Fernando Torres made 32 appearances for Chelsea, scoring just six goals. Andy Carroll fared even worse (35 appearances/four goals) and was sent on loan to West Ham United at the start of the 2012/2013 season, deemed surplus to requirements at Anfield. Finally, David Luiz, in reference to his defending, has been likened by television pundit, Gary Neville, to being controlled by “a ten year old on a PlayStation”.³

This article focuses on the football transfer system, specifically football transfer windows, and analyses their legality under EC free movement and competition rules.

It is acknowledged that football transfer windows were established with legitimate aims, in particular maintaining team and seasonal stability, and maintaining a competitive balance. However, it will be argued that the implementation of football transfer windows is a disproportionate response to trying to meet these objectives and should be abolished.

Objectives of the transfer system

FIFA made transfer windows compulsory for start of the 2002/03 season. The rules governing transfer windows, or “registration periods” as they are referred to, are contained in FIFA’s “Regulations on the Status and Transfer of Players”.⁴

* Art 6(1) states, “Players may only be registered during one of the two annual registration periods fixed by the relevant association”; and

* Art 6(2) states, “The first registration period shall begin after the completion of the season and shall normally end before the new season starts. This period may not exceed twelve weeks. The second registration period shall normally occur in the middle of the season and may not exceed four weeks.”

In England, the football transfer window opens at the end of the season and closes on 31 August, re-opening on the following 1 January and closing on 31 January.⁵

Certain needs in professional football contrast markedly with the ordinary employment position, leading governing bodies to seek to impose additional obligations in transfer rules. These rules aim to regulate transfers in such a way that offers protection to all participants in the sport, attempting to

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reflect a fair balance of the needs of all stakeholders including players, clubs, governing bodies, fans, broadcasters and sponsors.⁶

It is important to note that the European Commission has accepted that a fee based transfer system for players under contract is in accordance with EC law and a proportionate development to protect the specificity of sport.⁷

Stephen Sampson, Andrew Osbourne and Peter Limbert have identified three “legitimate needs” or objectives of the transfer system,⁸ two of which are of relevance to football transfer windows: (1) maintaining a competitive balance; and (2) maintaining team and seasonal stability. (Their other objective is the “trickle-down” benefits received through transfer fees and training compensation for players moving up the football pyramid.) Whether these objectives have been met by the establishment of football transfer windows will be analysed later in the article.

First, there must be a competitive balance between football clubs in order to preserve the integrity of competitions. At one extreme, it is no use one football club driving out of business the other clubs because then the “successful” club would have nobody to compete against and would then itself not be able to survive. Less extreme, but along similar lines, if one football club could obtain all the best players then it would be likely to always win the relevant competition. When a competition becomes predictable, experience shows that spectators and the public generally find it less interesting. Uncertainty of outcome and the possibility of an upset is crucial to the long-term survival of sports competitions. When a competition loses interest, it begins to wither because spectators, broadcasters, advertisers and sponsors begin to go elsewhere. Therefore, there is a mutual self-interest amongst football clubs and players in maintaining a competitive balance.⁹

If the unrestricted transfer of football players upsets the competitive balance or presents a serious risk of increasing competitive imbalance, it makes sense for restrictions on “normal” free movement and/or competition to be agreed in the interests of football as a whole. The issue that arises is the extent to which such restrictions are permissible in order to pursue the maintenance of competitive balance.¹⁰

There are natural limitations to the competitive balance of football clubs:

- The size and quality of a football squad that even an extremely rich club can employ is constrained by finances.
- Top (ambitious) players seldom wish to languish for lengthy periods in the reserve teams of a large squad.
- The inertia of players with family ties and commitments to a particular football club/area.

Therefore, it is unlikely that any one football club could ever employ all the best players over any length of time. However, these natural limitations on competitive balance have nothing to do with transfer rules and may now be of limited significance. Under the current transfer rules, experience in professional football shows that the financially most powerful clubs such as Manchester City and Chelsea can in fact assemble extensive squads comprising almost exclusively top-class international players, doing their best to satisfy player ambitions with a rotation policy. In the Premier League it has proven difficult for smaller clubs to compete against the financially powerful clubs, although the number of teams with such squads is increasing, notably due to foreign investment. Consequently, the natural limitations alone are not capable of maintaining competitive balance.¹¹ So, in addition to these natural limitations, there is a need for other mechanisms to be employed in order to maintain the competitive balance, including *inter alia* football transfer windows.

The objective of maintaining team stability relates to the seasonal nature of football. A Premier League team starts the football season in August with a certain squad of players and faces other teams with their own squads for the duration of that season until its conclusion in May. Managers are able to plan around the players in their squad and make seasonal plans for their team. The stability of a football team through the season is essential for two reasons:¹²

- First, if any or all players on a football team were free to depart on a whim, subject only to normal contractual principles of compensation (which, in the event of a dispute, is usually determined after the departure has already occurred), then planning and team performance could be severely hampered. This would have a

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corresponding impact not only on the fortunes of that one particular football team but, if the practice were widespread, on the integrity of the sport as a whole.

- Second, the viability of competitions would be compromised if a football team was able to purchase particular players at any time during the course of a season in order to secure previously unlikely success, for example, immediately prior to the FA Cup Final, or at particular crucial points, for example, by a struggling club before a “relegation six pointer”.¹³

Such behaviour would also be likely to lead to discontent among supporters, many of whom not only strongly support their particular team but also identify players with that team, at least during the course of one season.¹⁴

Similarly to the previous objective of maintaining a competitive balance set out above, if transfer rules promote team and seasonal stability, and do so proportionately, then it can be argued that the restrictions on free movement and/or competition may be justified.

Lehtonen Case Study

It should be pointed out at the outset that the ECJ has already considered the compatibility of transfer windows with EC law. This was in the key case of *Lehtonen*.¹⁵ However, it is crucial to note that *Lehtonen* related to transfer windows in the Belgian basketball championship, not in football. Whilst it is important to consider *Lehtonen* in detail, the appropriateness of transfer windows in basketball and football will be distinguished.

Alongside *Deliege*¹⁶ which was heard at a similar time, *Lehtonen* was the first time since *Bosman*¹⁷ that the ECJ was called upon to apply the provisions of the EC Treaty on free movement of workers and services (now Articles 45 and 56), and competition (now Articles 101 and 102) to sport. The referring national court sought clarification inter alia as to the application of the EC competition rules to the sports rules in question. However, the ECJ ultimately declined to pronounce on those questions, on the basis that it had not been provided with sufficient information on the factual and legal elements of the dispute.¹⁸ The ECJ did, on the other hand, address the questions in so far as they related to the free movement of workers.

The ECJ started by referring to its previous decisions in *Walrave*¹⁹ *Dona*²⁰ and *Bosman*, stating that sport is subject to EC law only in so far as it constitutes an “economic activity”. The ECJ recalled that the EC Treaty provisions concerning free movement of persons do not prevent the adoption excluding foreign players from certain matches for reasons which are “not of an economic nature” and are of “sporting interest only” (for example, matches between national teams from different countries).

Turner-Kerr and Bell opined that whether a rule is “non-economic” in nature or of “sporting interest only” is a rather vexed question. The ECJ clearly thought that if an international football team is confined to nationals of the relevant country then that is permissible under EC law. However, if a limit is placed on the number of non-nationals in a club side then that offends the principle of the free movement of workers (i.e. one of the results in the *Bosman*). In reality, this distinction is quite subjective which probably explains why some fairly remarkable questions have been referred to the ECJ (such as in *Deliege*).²¹

In any event, Turner-Kerr and Bell submitted that the “non-economic” test which the ECJ referred to was no longer appropriate to fit the circumstances of professional sport. They stated that it was fairly obvious that international sports teams engage in significant economic activity and so a rule restricting the composition of such teams to nationals is difficult to characterise as a “non-economic” rule. For the ECJ to continue with this test may make it a hazardous task to draw the line between legitimate sporting rules (which fall outside the scope of the EC Treaty) and non-sporting rules (which do fall under the provisions of the EC Treaty).²²

In *Lehtonen*, the ECJ provided a degree of clarification in relation to restrictions which may be justified in the context of sport. Turner-Kerr and Bell thought that this may provide some guidance for both the Commission and for sports governing bodies as they struggled to find solutions to a large number of cases in which the latter’s rules were being challenged under EC law. However, since these rules are examined in large part under competition rules (which the ECJ did not consider) this guidance is necessarily limited.²³

At world level, basketball is governed by the International Basketball Federation (“FIBA”). Within Belgium, both at amateur and professional level, it is governed by the

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Federation Royale Belge des Sociétés de Basketball ASBL (“FRBSB”). FIBA rules govern the international transfer of players. For national transfers, each national governing body is recommended to take the international rules as guidance. A licence issued by the governing body is required by any player wishing to play for a club which is a member of that association.

The FIBA rule in question prevented clubs from fielding any player in the national championship who had already played in another country in the same zone during the season unless the player was transferred before the relevant deadline. For the European zone, the deadline was 28 February. However, after that date, it was still possible for players from other zones to be transferred to the European zone.

Jyri Lehtonen, a Finnish basketball player, played for a team which took part in the Finnish championship in the 1995/96 season. After the Finnish season was over, he was engaged by Castors Braine, a club affiliated to the FRBSB, to take part in the final stage of the 1995/96 Belgian championship. Lehtonen entered into a contract with Castors Braine on 3 April 1996. Castors Braine were penalised twice by the FRBSB for fielding Lehtonen, after another club complained that there had been a breach of the FIBA rules on the transfer of players within the European zone. Lehtonen and Castors Braine brought proceedings against the FRBSB in the Brussels Court of First Instance (“CFI”). The CFI referred the following question to the ECJ for a preliminary ruling: are the rules of a sports federation which prohibit a club from playing a player in the competition for the first time if he has been engaged after a specified date contrary to the EC Treaty in the case of a professional player who is a national of a member state, notwithstanding the sporting reasons put forward by the federations to justify those rules, namely the need to prevent the distortion of the competition?

In relation to the concept of “economic activity”, the ECJ observed that it was settled case law that work as a paid employee or the provision of services for remuneration must be regarded as an economic activity. Lehtonen had entered into a contract of employment with a club in another member state with a view to being employed in that state. He therefore fell within the concept of a “worker” as defined in Art 45 EC, and the fact that he happened to work as a professional sportsman made no difference to that categorisation.

The ECJ considered that the transfer deadlines at issue were liable to restrict the free movement of players by preventing Belgian clubs from fielding basketball players from other member states if they were engaged after a specified date. The rules therefore constituted a de facto obstacle to free movement of workers. The fact that the rules in question concerned not the employment of such players, on which there was no restriction, but the extent to which their clubs could field them in matches was irrelevant. In so far as participation in matches was the essential purpose of a professional player’s activity, a rule restricting such participation also restricted the chances of employment of the relevant player.

Having established that the transfer deadlines constituted a de facto obstacle to free movement of workers, the ECJ then examined whether a possible justification might exist for such a rule. The basic question to be considered was whether the rule could be justified on “non-economic grounds concerning only sport as such”. The ECJ acknowledged that the setting of deadlines for transfers may meet the objective of “ensuring the regularity of sporting competitions”. It accepted that late transfers could substantially alter the sporting strength of one or other team in the course of the championship, thus calling into question the “proper functioning” of sporting competition.

The ECJ held as follows:

“On this point, it must be acknowledged that the setting of deadlines for transfers of players may meet the objective of ensuring the regularity of sporting competitions. Late transfers might be liable to change substantially the sporting strength of one or other team in the course of the championship, thus calling into question the comparability of results between the teams taking part in that championship, and consequently the proper functioning of the championship as a whole. The risk of that happening is especially clear in the case of a sporting competition which follows the rules of the Belgian first division national basketball championship. The teams taking part in the play-offs for the title or for relegation could benefit from late transfers to strengthen their squads for the final stage of the championship, or even for a single decisive match.”

Nevertheless, measures taken to ensure the proper functioning of competition “may not go beyond what is necessary for achieving the aim pursued”. In other words, the

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ECJ applied the “proportionality” test and in this regard observed that players from a governing body outside the European zone were subject to a transfer deadline of 31 March, whereas players inside the European zone were subject to a transfer deadline of 28 February.

At first sight, the ECJ considered that the FIBA rule “must be regarded as going beyond what was necessary” as no evidence was presented to show why the transfer of a player between 28 February and 31 March from a federation inside the European zone would jeopardise the course of the championship more than a transfer in the same period of a player from a federation outside the European zone. Having made this assessment, the ECJ then said it was for the national court to determine the extent to which objective reasons, concerning only sport as such, could justify this differential treatment of players from inside and outside the European zone.

Although it was regrettable that the ECJ declined to give directions as to the applicability of the EC competition rules, Lehtonen provided at least a measure of much-needed guidance on the ECJ’s position in relation to the place of sport within EC law. In Lehtonen, the ECJ identified a rule which it held had a valid sporting justification and as such fell outside the scope of EC law.²⁴

From Lehtonen, Turner-Kerr and Bell deduced that rules which are inherent in the conduct and/or organisation of sport events do not in themselves infringe EC law; and in relation to such rules, it is for the governing body in question to decide what the appropriate measures are.²⁵ They thought that it was too much to expect that Lehtonen would stem the

Having established that the transfer deadlines constituted a *de facto* obstacle to free movement of workers, the ECJ then examined whether a possible justification might exist for such a rule.

flood of sport cases being brought before national courts/deposited with the Commission as it is often a matter of fine judgment to determine whether a particular rule is “*non-economic*” in nature or of “*sporting interest only*”. Nevertheless, at a time when seemingly the legality of nearly every sports rule was being called into question, it was welcome for the ECJ to recognise that there are certain areas where governing bodies retain the authority and competence to regulate the disciplines for which they are responsible.²⁶

In Lehtonen, the ECJ permitted transfer windows in basketball. However, just because transfer windows have been permitted in one sport, does not mean they are appropriate for another. This view is shared by academic, Roger Welch, who stated “the fact that transfer windows have been objectively justified as having sporting benefits connected with team stability and “regularity” of sporting competition in one sport does not automatically mean that this must also be the case in all other sports.”²⁷

Football can be easily distinguished from basketball. First, football generates significantly more revenue than European basketball and significantly more income for its players. Second, the Belgian basketball championship took a “play-off format”, rather than a “league format”, adopted by most world-wide football leagues. A single league match during the course of a season is not as decisive as a play-off game. Therefore, the legality of football transfer windows must be assessed separately. Legal challenges will be analysed under EC free movement rules and competition rules.

Challenges under EC free movement rules

In relation to sport, the most relevant EC Treaty free movement rules are Articles 45 (free movement of workers), 49 (freedom of establishment) and 56 (freedom to provide services). In short, these rules stipulate that there must be no unjustifiable obstacles to free movement.

Art 39 EC provides that:

- 1) “Freedom of movement for workers shall be secured within the Community.
- 2) Such freedom of movement shall entail the abolition of any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.

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- 3) It shall entail the right, subject to limitations justified on grounds of public policy, public security or public health:
 - a) to accept offers of employment actually made;
 - b) to move freely within the territory of Member States for this purpose;
 - c) to stay in a Member State for the purpose of employment in accordance with the provisions governing the employment of nationals of that State laid down by law, regulation or administrative action;
 - d) to remain in the territory of a Member State after having been employed in that State, subject to conditions which shall be embodied in implementing regulations to be drawn up by the Commission.
- 4) The provisions of this Article shall not apply to employment in the public service.”

The free movement rules do not apply to all actions by all bodies. They primarily contain obligations on member states: a party may rely on the free movement rules in order to set aside contrary national laws and other state measures.²⁸

However, the scope of their application in relation to sport is not restricted to state measures, and extends to certain actions of certain private law sports governing bodies, as has been made clear by the ECJ in the cases of *Walrave*²⁹ and *Bosman*,³⁰ and confirmed by the Commission in its 2007 White Paper on Sport.³¹ These cases concerned rules that had been drawn up by international sports governing bodies (for cycling and football respectively) that were neither state nor public bodies. In *Walrave*,³² the ECJ held that the prohibition on the restriction of free movement should nevertheless apply to the rules of such bodies on the following basis:

“Prohibition of such discrimination does not only apply to the action of public authorities but extends likewise to rules of any other nature aimed at regulating in a collective manner gainful employment and the provision of services... Since, moreover, working conditions in the various Member States are governed sometimes by means of provisions laid down by law or regulations and sometimes by agreements and other acts concluded or adopted by private persons, to limit the prohibitions in question to acts of a public authority would risk creating inequality in their application.”

The free movement rules can therefore be said to affect sport and may be applied to issues relating to sport in a number of different ways. They have been held by the ECJ to apply to the rules of the following governing bodies: the International Cycling Federation,³³ the Italian Football Federation,³⁴ the Belgian Football Association, incorporating the rules of FIFA and UEFA,³⁵ the Francophone and Belgian Judo Leagues,³⁶ the Belgian Basketball Federation and International Basketball Federation,³⁷ the German Handball Federation³⁸ and the Spanish Football Federation.³⁹ They are therefore likely to apply to all national and international governing bodies and for the purposes of this article, to rules relating to football transfer windows.

The ECJ has consistently held that “*sport is subject to Community law only in so far as it constitutes an economic activity*”.⁴⁰ Since many sports and their rules increasingly involve such activity or the control of it, they may be affected by EC law in a number of ways. The greater the level of commercialisation of a particular sport, the greater the impact that EC law is likely to have on that sport. It is clear that football transfer windows constitute such an “*economic activity*”.

The ECJ has taken the view that there is no practical difference between the conditions which must be satisfied for the application of Arts 45, 49 or 56 EC.⁴¹ In order for us to establish whether football transfer windows constitute a breach of the free movement rules, it is necessary to ask the following three questions:⁴²

- Do football transfer windows constitute a restriction on free movement?
- If so, is the existence of football transfer windows justified on the basis of a legitimate objective?
- If so, are the restrictions imposed by football transfer windows proportionate?

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Step one - Restrictions

Restrictions on free movement may arise due to a rule which directly discriminates on the grounds of nationality; a rule which indirectly discriminates on the grounds of nationality (in other words, a rule that although not discriminatory on its face, has a discriminatory effect in practice); and a rule that, even though it is applicable without discrimination on grounds of nationality, is liable to hamper or render less attractive the exercise of the freedoms guaranteed by the EC Treaty.

In sport, the most obvious example of a discriminatory measure is a rule that imposes nationality restrictions on participation in a particular team or competition. For example, until the mid 1970s, the rules of the Italian football federation provided that only players who were affiliated to that federation could take part in matches as professional or semi-professional players, and affiliation was, in principle, only open to players who were Italian nationals. These rules were effectively declared to be illegal by the ECJ in *Dona*. Similarly, rules that limited the number of players that a football club from one member state could field from other member states at any one time were declared to be unlawful in *Bosman*.

The issue of non-discriminatory rules is more difficult. The leading case is *Bosman*⁴³ which related to transfer fees for out of contract football players. Jean-Marc Bosman, a Belgian footballer player, was employed from 1988 by RC Liege, under a contract expiring on 30 June 1990, and was subject to the rules of the URBSFA, the Belgian national football association, which incorporated the FIFA and UEFA

regulations by reference. Before the expiry of his contract, RC Liege offered Bosman a new contract, which he refused to sign, and he was subsequently put on the transfer list. An offer from a French club, UC Dunkerque, fell through and on 31 July 1990 RC Liege, pursuant to the relevant rules, suspended Bosman, thereby preventing him from playing for the entire season. The ECJ held that a rule which enabled a football club to demand a transfer fee from another club in respect of the transfer of a player whose contract had expired was capable of constituting a restriction for the purposes of Art 45 EC.

In reaching that conclusion in *Bosman*, the ECJ reasoned as follows: First, rules which preclude or deter a national of a member state from leaving his country of origin in order to exercise his right to freedom of movement constitute an obstacle to that freedom even if they apply without regard to the nationality of the workers concerned.⁴⁴ Second, since the transfer rules provide that a football player may not pursue his activity with a new club, established in another member state, unless it has paid the football player's former club a transfer fee agreed between the two clubs, or determined in accordance with the regulations of the relevant football association, those rules constitute an obstacle to freedom of movement for workers.⁴⁵ Furthermore, although the rules also apply to transfers between football clubs belonging to different national associations within the same member state and are similar to those governing transfers between clubs belonging to the same national association, they still directly affect players' access to the employment market in other member states and are therefore capable of restricting freedom of movement for workers.⁴⁶

In sport, the most obvious example of a discriminatory measure is a rule that imposes nationality restrictions on participation in a particular team or competition

This constituted a very broad approach to the definition of a restriction on free movement of workers as the effect of the obligation to pay a transfer fee was wholly neutral when viewed in terms of free movement.⁴⁷ The existence of the transfer rule did not make it more difficult to move between football clubs in different member states than between clubs in the same state. In effect, all regulatory rules or contractual obligations are capable of being "restrictions" on economic activity. For example, a notice period in a contract of employment makes it more difficult to move between employers. However, the obstacle that it imposes applies to the same extent regardless of whether a person wishes to move jobs whilst remaining in the same country or wishes to relocate to another member state.

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The ECJ took a more “sports-sensitive” approach in its later judgment in *Deliege*.⁴⁸ In this case, Ms Deliege complained of the fact that she had been prevented from competing in an important international competition as participation was only open to those selected by their national federations, and she had not been selected. In considering whether the relevant selection rules constituted a restriction on the freedom to provide services, the ECJ held that although selection rules inevitably have the effect of limiting the number of participants in a tournament, such a limitation is inherent in the conduct of an international sports event. Such rules may not therefore be regarded as constituting a restriction on the freedom to provide services. Also, it naturally falls to the bodies concerned, such as organisers of tournaments, governing bodies or professional athletes’ associations, to lay down appropriate rules and to make their selections in accordance with them. Delegation of such a task to the relevant governing body is the arrangement adopted in most sports. Moreover, the selection rules at issue in *Deliege* applied both to competitions organised within the Community and to those taking place outside it, and involved both nationals of member states and those of non-member countries.

Hoskins, Gray and Lewis argue that the approach adopted by the ECJ in *Deliege* was “*somewhat unorthodox*”.⁴⁹ The ECJ did not address the matter according to the three step approach outlined above. It did not analyse the effect of the selection rules in practice in order to determine whether, as a matter of fact, they constituted an obstacle to free movement. Instead, it held that the selection rules did not constitute an obstacle to free movement as they were justified by objective factors.⁵⁰ The question of justification would normally arise as a separate issue only after the Court had found the existence of a restriction. The ECJ therefore adopted a rule of reason approach under which not all of those rules which create obstacles as a matter of fact are treated as restrictions in law within the scope of the free movement rules.⁵¹

There are two further points to note. First, the ECJ relied on the fact that selection rules are neutral in terms of the effect on free movement. This can be contrasted with the approach adopted in *Bosman*. Second, the ECJ recognised that it was better to leave sporting issues to sporting bodies who had expertise in such matters. Again, this can be contrasted with *Bosman*.⁵²

However, the ECJ reverted to a more orthodox analytical approach by adopting the three step test, rather than a rule of reason approach, in *Lehtonen*.⁵³ considered in detail above. The ECJ held that because the transfer deadline rule restricted the ability of professional players to participate in championship matches, it constituted an obstacle to the free movement of workers. Having established the existence of a restriction, the ECJ then went on to consider the second and third steps in the test, i.e. whether the rule in question was justified and proportionate.

In *Meca-Medina*,⁵⁴ the ECJ held that certain rules adopted by the International Olympic Committee and implemented by the International Swimming Federation relating to doping control fell within the scope of Arts 45 and 56 EC, as well as Arts 101 and 102 EC (relating to competition rules), setting aside the judgment of the CFI to the opposite effect. The CFI had found that “*the mere fact that a rule is purely sporting in nature does not have the effect of removing from the scope of the Treaty the person engaging in the activity governed by that rule or the body which has laid it down.*”⁵⁵

In summary, as regards non-discriminatory rules, the ECJ has not always adopted a consistent approach to the question of whether a sporting rule or regulation constitutes an obstacle to free movement. It has applied both the orthodox analytical three step test, and also the rule of reason approach which is more sports specific. The judgment in *Meca-Medina* indicates that it is the orthodox approach that has gained the upper hand.⁵⁶ Applying the *Bosman* approach, football transfer windows constitute an indirectly discriminatory rule.

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Step two – Objective justification

Directly discriminatory rules are contrary to the fundamental principles of EC law, in particular those regarding free movement. They are closely scrutinised by the ECJ and any possible exceptions are narrowly defined. The only exceptions permitted are those based on public policy, public security or public health. However, in contrast it is a well established principle of EC law that indirectly discriminatory obstacles may be justified by “imperative requirements” or “mandatory requirements”.⁵⁷ The rationale for this is that some rules which regulate trade and are capable of restricting trade may, in fact, serve objectively justifiable purposes, and it may be inappropriate to render such rules unlawful per se. There is no exhaustive list of mandatory requirements.⁵⁸

In *Bosman*, the ECJ recognised that in view of the considerable social importance of sporting activities and in particular of football, restrictions on free movement were capable of being justified by the need to maintain a balance between clubs by preserving a certain degree of equality and uncertainty as to results⁵⁹ and the need to encourage the recruitment and training of young players. This sport-specific approach was confirmed in *Lehtonen*.⁶⁰ *Meca-Medina*, although concerned with the application of EC competition rules, indicates that restrictions on free movement arising from anti-doping rules would be capable of being justified on the basis that such rules are inherent in the organisation and proper conduct of competitive sport and to ensure healthy rivalry between athletes.⁶¹ A further example is provided by the decision of the Court of Arbitration for Sport in a case concerning a UEFA rule that prevented clubs under common ownership from participating in the UEFA Cup.⁶² It held that, even assuming that the contested rule restricted the right of establishment, it was justified by the need to preserve “the authenticity and uncertainty of results.”

In summary, a number of justifications particular to sporting activities have been identified by the ECJ as objectives which may justify the imposition of prima facie restrictions on free movement. As the jurisprudence develops, and the ECJ is asked to adjudicate on further cases concerning sport, it is likely that this list of sport-specific possible justifications will be added to incrementally.⁶³

Step three – Proportionality

Proportionality is another well established principle of EC law. In the leading case of *Fedesa*, the ECJ defined the proportionality principle as follows:

*“By virtue of that principle, the lawfulness of the prohibition of an economic activity is subject to the condition that the prohibitory measures are appropriate and necessary in order to achieve the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued.”*⁶⁴

When examining the legality of restrictions on free movement, it is necessary for us to consider whether they are proportionate to the specific objectives pursued. As the quotation from *Fedesa* indicates, in determining whether the restriction caused by a football transfer window is proportionate, Courts will ask the following three questions:

- Are football transfer windows an appropriate method for the attainment of a legitimate objective?
- Are the means employed limited to what is necessary for the attainment of the legitimate objective?
- Are the disadvantages caused or restrictions imposed unacceptable given the objectives pursued?

*Kolpak*⁶⁵ is an example of a case in which the ECJ found that a restriction was not an appropriate method for the attainment of a legitimate objective. The case concerned a rule applied by the German Handball Federation which limited the numbers of non EC nationals who could play in domestic club matches. The Federation argued that the purpose of the rule was to safeguard training organised for the benefit of young players of German nationality and to promote the German national team. This justification was rejected by the ECJ on the basis that the rule did not prevent clubs from fielding an unlimited number of nationals of member states.

The decision in *Bosman*⁶⁶ was also based upon the application of the proportionality principle. In *Bosman*, the ECJ held that the transfer rules were not proportionate as they were not an adequate means of achieving the objectives

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pursued (namely, maintaining a balance between clubs and encouraging the recruitment and training of young players);⁶⁷ the same aims could be achieved at least as efficiently by other means which did not impede freedom of movement for workers;⁶⁸ and they were not necessary either to safeguard the worldwide organization of football,⁶⁹ or to compensate clubs for the expenses which they have had to incur in paying fees on recruiting their players.⁷⁰

In reaching its conclusion, the ECJ expressly relied on the Opinion of Advocate-General Lenz in which he stated that the redistribution of income between clubs would provide a less restrictive means of achieving the objectives pursued than the system of transfer fees. The Advocate-General justified his idea of redistribution of income in the following terms:

“It can scarcely be doubted that such a redistribution of income appears sensible and legitimate from an economic point of view. UEFA itself has rightly observed that football is characterized by the mutual economic dependence of the clubs. Football is played by two teams meeting each other and testing their strength against each other. Each club thus needs the other one in order to be successful. For that reason each club has an interest in the health of the other clubs. The clubs in a professional league thus do not have the aim of excluding their competitors from the market. Therein lies... a significant difference from the competitive relationship between undertakings in other markets. It is likewise correct that the economic success of a league depends not least on the existence of a certain balance between its clubs. If the league is dominated by one over mighty club, experience shows that lack of interest will spread...

It therefore is indeed necessary, in my opinion, to ensure by means of specific measures that a certain balance is preserved between clubs. One possibility is the system of transfer payments currently in force. Another possibility is the redistribution of a proportion of income...

Finally, it must be observed that a redistribution of a part of income appears substantially more suitable for attaining the desired purpose than the current system of transfer fees. It permits the clubs concerned to budget on a considerably more reliable basis. If a club can reckon with a certain basis amount which it will receive in any case, then solidarity between clubs is better served than by the possibility of receiving a large sum of money for one of the

club's own players. As Mr Bosman has rightly submitted, the discovery of a gifted player who can be transferred to a big club for good money is very often largely a matter of chance. Yet the prosperity of football depends not only on the welfare of such a club, but also on all the other clubs being able to survive. That, however, is not guaranteed by the present rules on transfers.

In so far as the rules on transfers pursue the objective of ensuring the economic and sporting equilibrium of the clubs, there is thus at least one alternative by means of which that objective can be pursued just as well and which does not adversely affect players freedom of movement. The transfer rules are thus not indispensable for attaining that objective, and thus do not comply with the principle of proportionality.”

Hoskins, Gray and Lewis claim that it was optimistic to imagine that the individual football clubs, whose prime objective is the creation of maximum profits for themselves and their shareholders, would join together altruistically for the good of the sport. They claim that the problem with the approach of the Advocate General and the ECJ in *Bosman* is that they presumed that they were best placed to decide what is in the best interests for football, when in that instance, as in many other occasions, such decisions are often best left to the relevant sports regulatory bodies.⁷¹

In *Meca-Medina*, the ECJ held that in order for anti-doping rules to avoid the prohibition laid down in Art 101(1) EC, the restrictions imposed by those rules must be limited to what is necessary to ensure the proper conduct of competitive sport.⁷² Whilst the ECJ found that the appellants had failed to establish that the Commission made a manifest error of assessment in finding the rule in question to be justified, it considered certain technical aspects of the doping rules which arguably fell outside its expertise.

It is submitted that the legality of football transfer windows turns on this issue of proportionality.

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Sport must be organised and performed consistently with EC competition rules. However, sport is unlike other industries because of the need to preserve some equality between competitors and uncertainty of outcome. Accordingly, the application of the competition rules to sport involves a careful balance between the special characteristics of sport and the imperative of preventing restrictions on competition.⁷³

There can no longer be any suggestion that sport is somehow exempt from the application of competition law.⁷⁴ As the Commission notes in the Staff Working Document (“SWD”) accompanying its 2007 White Paper on Sport, it has long been established by the case law of the ECJ and the practice of the Commission that economic activities in the context of sport fall within the scope of EC law.⁷⁵ This has been confirmed specifically with regard to the competition rules, set out in Articles 101 and 102 EC, by the landmark *Meca-Medina* ruling.⁷⁶ This judgment is of extreme importance for the application of EC competition law to the sports sector since this is the first time that the ECJ has pronounced on the application of Arts 101 and 102 EC to organisational sporting rules.⁷⁷ In prior judgments, the cases were decided solely on the basis of other provisions of the EC Treaty, most notably those relating to the freedom of movement of workers and the freedom to provide services. The EC Treaty provides the basis for EC competition law in Arts 101 and 102 EC. Art 101(1) EC prohibits

“all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have as their object or effect the prevention, restriction or distortion of competition within the common market...”

Where an agreement is caught by Art 101, it will be void and unenforceable as between the parties to it (Art 101(2)).

However, an agreement that falls within the scope of Art 81 may be exempted if it satisfies the conditions set out in Art 101(3), i.e. if it

*“contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and... does not (a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives; [or] (b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question.”*⁷⁸

Whereas Art 101 is aimed at collusive conduct by two or more undertakings, Art 102 addresses monopolistic behaviour and prohibits

“any abuse by one or more undertakings of a dominant position within the common market or in a substantial part of it...”

It is submitted that Art 101 EC is more relevant to an examination of the legality of football transfer windows than Art 102.

The EC competition rules were drafted with more orthodox industries in mind than sport. Concepts such as “undertakings”, “cartels” and “the single market” do not translate easily when applied to sport. Therefore, the issue is whether the rules are sufficiently flexible in their application to take account of the specificities of sport. In its 2007 White Paper on Sport, the Commission set out its approach to this issue in a comprehensive manner. The White Paper and the accompanying SWD demonstrate that the Commission takes into account the specificities of sport in order to regulate the sector in the most effective and proportionate way.⁷⁹

The Community institutions have consistently taken into consideration the particular characteristics of sport which distinguish it from other economic activities.⁸⁰ While no strict concept of the specificity of sport has been formally

Traditionally, there is a single national governing body per sport and member state, which operates under the umbrella of a single European association and a single worldwide association

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recognised by the ECJ, Lewis and Kennelly have identified the following distinctive features which are likely to be of relevance when assessing the compliance of organisational sporting rules with Community competition law:⁸¹ First, sports events are a product of the contest between a number of clubs/teams or at least two athletes. This interdependence between competing adversaries is a feature specific to sport.⁸² Second, if sports events are to be of interest to the spectator, they must involve uncertainty as to the result. Therefore, there must be a certain degree of equality in competitions. Third, the organisational level of sport in Europe is characterised by a pyramid structure. Traditionally, there is a single national governing body per sport and member state, which operates under the umbrella of a single European association and a single worldwide association. The pyramid structure results from the fact that the organisation of national championships and the selection of national athletes and national teams for international competitions often require the existence of one umbrella federation. The ECJ and the Commission have both recognised the importance of the freedom of internal organisation of sport associations. Finally, sport fulfils important educational, public health, social, cultural and recreational functions. The preservation of some of these essential social and cultural benefits of sport which contribute to stimulating production and economic development is supported through arrangements which provide for a redistribution of financial resources from professional to amateur levels of sport (principle of solidarity).

Prior to the judgment of the ECJ in *Meca-Medina* there was a dispute as to whether the unique characteristics of sport provided a context in which “purely sporting rules” fell outside the scope of EC competition law. It was argued that although these “purely sporting” rules (for example, the FIFA rule as to the size of the football) might produce some economic effects, such effects were insufficiently direct to attract the application of EC competition law. The approach of the ECJ in *Meca-Medina* was to treat all organisational sporting rules which produced appreciable economic effects as subject to competition law scrutiny. It may be that the rule, by its nature and in the context of the specific characteristics of sport, does not infringe Arts 101 or 102. Similarly, such a rule may involve prima facie an infringement but may be justified. What the rule cannot avoid is the competition law scrutiny prescribed in *Meca-Medina*.⁸³

In *Meca-Medina*, the Commission had originally rejected the complaint by Mr Meca-Madina and Mr Majacen, professional swimmers, that the rule of the International Olympic Committee and implemented by the International Swimming Federation (“FINA”) relating to doping control were incompatible with Art 101(1) EC.⁸⁴ The swimmers had failed anti-doping tests having finished first and second in the long distance swimming World Cup in 1999. Applying the IOC regulations, FINA’s Doping Panel suspended the swimmers for a period of four years, although this was reduced to two years on appeal to the Court of Arbitration of Sport. The swimmers complained to the Commission that the fixing of the relevant doping threshold amounted to a concerted practice between the IOC and the 27 laboratories accredited by it and the strict liability nature of the offence and the lack of independence in the appellate tribunal led that practice to distort competition. Dismissing the complaint, the Commission found that Art 101(1) did not apply to the doping rules since they were rules “*that are inherent to sport and/or necessary for its organisation.*” On appeal, the CFI upheld the Commission’s decision on the basis that EC competition law did not affect “*purely sporting rules, that is to say rules concerning questions of purely sporting interest and, as such, having nothing to do with economic activity.*”⁸⁵

On appeal, the ECJ repeated the CFI’s restatement of the basic principle that sport is subject to EC law only in so far as it constitutes an economic activity.⁸⁶ Unlike the CFI, the ECJ expressly held that the qualification of a rule as “*purely sporting*” did not remove the athlete or the sports association adopting the rule in question from the scope of Arts 101 and 102.⁸⁷ The ECJ held, on the basis of the Wouters judgment,⁸⁸ that the specific requirements of Arts 101 and 102 must be examined irrespective of the nature of the rule, in particular it must be determined “*whether the rules which govern that [sport] activity emanate from an undertaking, whether the latter restricts competition or abuses its dominant position, and whether that restriction or that abuse affects trade between member states.*”⁸⁹ In this respect, the ECJ reiterated that account must be taken of (1) the overall context in which the rules were taken or produce their effects and of their objectives and (2) whether the restrictive effects are inherent in the pursuit of the objectives and (3) are proportionate to them.⁹⁰

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On the facts in *Meca-Medina*, the ECJ concluded that the anti-doping rules in question did not infringe Art 101(1) despite the fact that the penalties under the anti-doping rules were capable of producing restrictive effects on competition as they could lead to the exclusion of athletes from sports events. The ECJ held that the objective of the anti-doping rules was to ensure fair competitions with equal chances for all athletes, as well as the protection of athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. The limitations of action imposed on the athletes by the anti-doping rules were considered by the ECJ to be "inherent in the organisation and proper conduct of competitive sport".⁹¹ The ECJ also examined whether the rules were limited to what is necessary as regards (1) the threshold for the banned substance in question and (2) the severity of the penalties (in respect of which the ECJ also noted that the athletes had not argued that the penalties imposed were excessive). The ECJ found that the rules were proportionate in both of these cases.

Applying the ECJ's judgment in *Meca-Medina*, the Commission produced a detailed methodology as to how it will apply the competition rules in the sports sector in the SWD accompanying its 2007 White Paper on Sport. This methodology consists of the following four steps:⁹²

"Step 1 - Is the sports association that adopted the rule to be considered an "undertaking" or an "association of undertakings"?"

- *The sports association is an "undertaking" to the extent it carries out an "economic activity" itself (e.g. the selling of broadcasting rights).*
- *The sports association is an "association of undertakings" if its members carry out an economic activity. In this respect, the question will become relevant to what extent the sport in which the members (usually clubs/teams or athletes) are active can be considered an economic activity and to what extent the members exercise economic activity. In the absence of "economic activity", Arts 101 and 102 EC do not apply.*

Step 2 - Does the rule in question restrict competition within the meaning of Art 101(1) EC or constitute and abuse of a dominant position under Art 102 EC? This will depend, in application of the principles established in

the Wouters judgment, on the following factors:

- *the overall context in which the rule was adopted or produces its effects and its objectives;*
- *whether the restrictions caused by the rule are inherent in the pursuit of the objectives; and*
- *whether the rule is proportionate in light of the objective pursued.*

Step 3 - Is trade between member states affected?

Step 4 - Does the rule fulfil the conditions of Art 101(3) EC?"

Step one - Undertakings and associations of undertakings

There is no doubt that sports clubs are undertakings within the meaning of Arts 101 and 102 to the extent that they carry out economic activities.⁹³ Sports clubs carry out economic activity, for example, by selling tickets to sports events, selling broadcasting rights or concluding sponsoring or advertising agreements.

Step two - Restrict competition

Rules adopted by national or international sports associations are likely to constitute agreements or decisions by undertakings or associations of undertakings for the purposes of Art 101(1) EC.⁹⁴ Rules drawn up unilaterally by sporting associations consisting of undertakings will usually constitute decisions by an association of undertakings.⁹⁵ Putting to one side the later question of justification, it is clear that a broad range of such rules may have the effect, if not the object, of restricting competition which affects trade between member states. For example, collective selling rules and black out rules restrict the manner of exploitation of broadcasting rights to top football events. Similarly, the anti-doping regulations including lengthy suspensions from participation in the sport for transgressors, are by definition restrictive and can have an enormous economic impact on individual athletes.

Prior to *Meca-Medina*, the Commission asked whether a sporting rule pursued a legitimate objective whose effects were inherent and proportionate to that objective in order to decide if any competition law scrutiny should be applied to the rule.⁹⁶ Following *Meca-Medina*, the Commission no longer applies a sporting exemption but the same question arises in determining whether the competition rules have

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been infringed.⁹⁷ To that extent, the pre *Meca-Medina* case law is instructive.

The Commission states in the SWD that legitimate objectives of sports rules will normally relate to the “organisation and proper conduct of competitive sport”⁹⁸ and may include, for example, ensuring fairness in competitions, with equal chances for all athletes, ensuring uncertainty of results, the protection of athletes’ health, the protection of the safety of spectators, the encouragement of training of young athletes, ensuring the financial stability of sports clubs and the ensuring of a uniform and consistent exercise of a given sport. The specificity of sport, such as the interdependence between competing adversaries, will be taken into consideration when assessing the existence of a legitimate objective.

Sports rules which have restrictive effects but which are inherent in the pursuit of such legitimate objectives include the penalties contained in the anti-doping rules in *Meca-Medina* (inherent for the proper conduct of competitive sport and the healthy rivalry of athletes), the prohibition on the ownership of two or several sport clubs competing against each other upheld in *ENIC/UEFA* (inherent for ensuring the uncertainty of results) and the general rules of the game such as rules which determine the number of players, their function, duration of the competition/game etc. (inherent in the organisation and proper conduct of competitive sport).

In order to be proportionate, the rule must not go further than is reasonably necessary to secure its object and must be applied in a transparent, objective and non-discriminatory manner. The proportionality of each rule will be assessed on a case-by-case basis while taking into account the relevant facts and circumstances. For example, in *Meca-Medina* the ECJ considered whether the limit for the presence of the banned substance in question in the athlete’s body was disproportionate (i.e. too low) and concluded that the rules did not go beyond what was necessary to ensure the proper conduct of competitive sport. Similarly, the Commission found that the restrictions identified in the *ENIC/UEFA* case and *UEFA broadcasting regulations case*⁹⁹ were proportionate.

Step three - Effect on intra-Community trade

Rules adopted by international sports associations will normally affect trade between member states. Where the rules of a national sport association concern a sport in the whole territory of a given member state which is also played in another member state, intra-Community trade may also be affected because of player transfers etc.¹⁰⁰

Step four - Is the restriction justified?

Justification under Art 101(3) or “objective justification” under Art 102 EC is most likely to apply where a rule or conduct is not inherent in the organisation or proper conduct of sport but where the beneficial effects of a rule outweigh its restrictive effects.¹⁰¹

A proportionate response?

It is submitted that when analysing the legality of football transfer windows under EC free movement rules or under competition rules, the result will be similar. Football transfer windows were established with legitimate aims but the key question for us to consider is whether they are a proportionate response to that aim? It is argued that the simple answer to this question is “no” and accordingly that football transfer windows should be “smashed”.¹⁰²

It is argued that the objectives of the transfer system relevant to football transfer windows (i.e. those discussed above, maintaining a competitive balance and maintaining team and seasonal stability) have not been met. However, in any event, they crucially fail the proportionality test:

- In relation to the free movement rules, under the three step test used, for example, in *Alpine Investments*,¹⁰³ we must consider whether football transfer windows (a) constitute a restriction on free movement; (b) if so, whether they are justified on a basis of a legitimate objective; and (c) if so, are the restrictions **proportionate**?
- In relation to the competition rules, we must consider whether football transfer windows restrict competition within the meaning of Art 101(1) and this will depend on (a) the overall context in which football transfer windows were adopted or produce their effects and their objectives; (b) whether the restrictions caused by football transfer windows are inherent in the pursuit of their objectives; and (c) whether they are **proportionate** in light of the objectives pursued.¹⁰⁴

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The *Fedesa*¹⁰⁵ principles must be applied when assessing proportionality: (a) are football transfer windows an appropriate method for the attainment of a legitimate objective; (b) are the means employed limited to what is necessary for the attainment of the legitimate objective; and (c) are the disadvantages caused or restrictions imposed unacceptable given the objectives pursued?

A key justification for football transfer windows is that they maintain team and seasonal stability. In particular, the viability of competitions would be compromised if a football team was to purchase particular players at any time during the course of a season; and if any, or all, players on a football team were free to depart on a whim, subject only to normal contractual principles of compensation, then planning and team performance could be severely hampered.¹⁰⁶ Both of these points can be attacked.

It is submitted that whether purchasing players during the course of the season can be said to compromise the viability of the competition depends upon the particular nature of the competition. Roger Welch argued that “*the fact that transfer windows have been objectively justified as having sporting benefits connected with team stability and “regularity” of sporting competition in one sport does not automatically mean that this must also be the case in all other sports*”.¹⁰⁷

A key justification for football transfer windows is that they maintain team and seasonal stability. In particular, the viability of competitions would be compromised if a football team was to purchase particular players at any time during the course of a season

In *Lehtonen*, transfer windows were permitted. However, the Belgian basketball championship was in a “play-off format”, rather than a “league format”, adopted by most world-wide football leagues. A single league match during the course of a season is not as decisive as a play-off game. It is accepted that late transfers just before the finale of a league can have a significant effect on the final league positions. However, a proportionate response for sports which adopt such a “league format” would be to simply have a transfer deadline prohibiting late transfers (for example, in March as was the case in the English Premier League pre 2002/03), rather than prohibiting all transfers during the course of a season except those made in a small window. The football team I support, West Ham United, started last season on 7 August 2011 against Cardiff City and finished their season on 19 May 2012, beating Blackpool 2-1 in the Play-Off Final at Wembley. The summer transfer window concluded on 31 August 2011 and the winter transfer window was open between 1 January 2012 and 31 January 2012. So, during a 41 week season, West Ham were only able to buy and sell players in eight of those weeks.¹⁰⁸ This is disproportionate.

For knock-out/play-off competitions, there are already mechanisms in place to protect their integrity. For example, Art 18.07 of the Regulations of the UEFA Champions League 2011/12 states, “*As a rule, a player may not play in a UEFA club competition (i.e. UEFA Champions League and UEFA Europa League...) for more than one club in the course of the same season*”.¹⁰⁹ Similarly, a player who appears in the FA Cup for one team and subsequently transfers to another team is said to be “cup tied” and cannot play for his new team in later rounds. For example, Jermain Defoe had already played for Tottenham Hotspur in the FA Cup in the 2009/10 season and was subsequently unable to play for his new team, Portsmouth, when they reached the Final.¹¹⁰

Furthermore, in order to prevent football players from making multiple transfers during the course of a season, Art 5(3) of FIFA’s “Regulations on the Status and Transfer of Players” states, “*Players may be registered with a maximum of three clubs during one season. During this period, the player is only eligible to play official matches for two clubs*”.¹¹¹

Even with football transfer windows, team planning can still be considerably hampered. The Premier League has become extremely international. Only 40% of players in the Premier League are English.¹¹² However, the dates of transfer windows

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across Europe and the wider world are not consistent.¹¹³ For example, the dates of last season's English Premier League transfer window were 1 January 2012 to 31 January 2012. However, the dates of the Russian Premier League transfer window were 25 January 2012 to 24 February 2012. Therefore, English Premier League clubs risked losing players to a Russian club without being able to buy a replacement. This risk materialised for Blackburn Rovers, a club who were ultimately relegated at the end of the season, when they sold Christopher Samba, their star defender, to Anzhi Makhachkala.¹¹⁴ Due to weather constraints and football seasons running at different times in different countries across the world, it is impossible to make the dates of football transfer windows consistent. A better solution would be to abolish them.

Football transfer windows were introduced to avoid the disruption caused by a player changing teams mid-season. However, it is arguably even more disruptive, from a team morale perspective, by a player signing a pre-contract agreement to join another club at the end of the season but being prohibited from joining his new team until then. For example, Lukas Podolski agreed to join Arsenal from Cologne in March but was not able to complete the transfer until the end of the season.¹¹⁵

Despite one of its objectives of maintaining a competitive balance, it is arguable that, on the contrary, the system actually fosters an imbalance. As football teams can only purchase players in a small number of weeks a year, the market is constricted and prices are inflated. Football transfer windows favour large financially powerful clubs that can afford to spend a lot of money in a short period of time.

Whilst it is conceded that there are many factors which contribute to the competitiveness within a particular country's football league (not least investment from wealthy foreign owners), it should be noted that there is a common perception amongst Europe's top leagues that they have become less competitive since football transfer windows were introduced in the 2002/03 season. Up until the end of the 2010/2011 season, in the preceding decade in England, Italy and Spain there were only three different champions, in France there were four champions and in Germany and Russia there were five champions.¹¹⁶

Maintaining team and seasonal stability and maintaining a competitive balance are legitimate aims. Even if football transfer windows helped to meet these objectives, it is submitted that they would not be a proportionate response due to their numerous disadvantages.

It is widely believed that the pressurised nature of football transfer windows leads to bad business decisions being entered into. Steve Coppell, former manager of Reading, stated that they cause panic and encourage scurrilous transfer activity, adding "*I cannot see the logic in a transfer window. It brings on a fire-sale mentality, causes unrest via the media and means clubs buy too many players. The old system, where if you had a problem you could look at loans or make a short-term purchase, was far better than this system we have at the moment.*"¹¹⁷ Furthermore, Sven-Goran Eriksson, former England manager, said that football transfer windows should be scrapped, "*You do wonder at times if it is right to have a window, it was easier when it was open all the time and perhaps fairer for the players. I am sure much of the business being done on the last day is a little bit desperate and that is not right. I think it was better before, but then I am old.*"¹¹⁸

Football transfer windows are also disadvantageous to players, whose careers are often extremely short (at least compared to the normal employment market). Situations may arise whereby a player falls out of favour with a manager, or a player is needed as a temporary measure by a bigger club to stand-in for an injured player. Football transfer windows prevent players in such scenarios from moving clubs thereby potentially missing out on appearance bonuses or increased wages (and possibly an opportunity to prove oneself and further themselves at a better team). In relation to Zimbabwean international, Benjani Mwaruwani, who fell out of favour at Manchester City and secured a move to Sunderland in the January 2010 transfer window, Steve Bruce (the then Sunderland manager) stated, "*I wouldn't be surprised if a player stops the window by saying it's a restriction of trade. Take Benjani, for example. Benjani has come up here now to try and earn himself a contract. If the deal hadn't gone through, then it restricts his career, it restricts his movement.*"¹¹⁹

However, the biggest disadvantage of football transfer windows and the main reason why they are a disproportionate response to legitimate aims relates to football clubs in financial difficulties, particularly lower league clubs. For most sides, their players are their biggest

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financial assets. Situations arise where a football club may have to sell a star player in order to survive but is prohibited from doing so because the football transfer window is not open. David Burns, former Chief Executive of the Football League, said before their implementation: *“It is not uncommon for any business to find itself with a short-term cash flow problem and one remedy is to sell an asset. Football is no different; clubs often need to sell a player to meet a cash shortage. By limiting clubs’ freedom to trade as they see fit, according to their own short-term demands, such a proposal could very possibly wreak havoc on the future of our club system.”*¹²⁰

It is widely believed that Nottingham Forest were able to stay afloat by selling Jermaine Jenas to Newcastle United for £5 million in February 2002.¹²¹ Such a deal would no longer be possible at such a time because it does not fall during the dates when the football transfer window is open. Rangers went into administration on 14 February 2012 with debts that estimated at the time could have totalled £134 million. One option discussed was to sell players to clubs in countries whose transfer windows were still open.¹²² It is not fair or logical that Rangers could only have sold players to clubs in Eastern European or Scandinavian countries, but not to any other clubs in other countries who may have been interested in their players. Crucially, it is not proportionate to have a system in place where a football club could go into liquidation due to a quirk of the calendar and not being able to sell its biggest financial assets.

Conclusion - Smashed windows

It is acknowledged that football transfer windows were established with legitimate aims, in particular maintaining a competitive balance, and maintaining team and seasonal stability. However, it is questionable whether these aims have been achieved through the continued implementation of football transfer windows, particularly as the Premier League has become extremely international, yet the dates of transfer windows across Europe and the wider world are not consistent.

In any event, the football transfer window is a disproportionate response to the legitimate aims. It is submitted that the basketball transfer window in *Lehtonen* can be distinguished and any future challenge to football transfer windows brought under EC free movement rules and competition rules would be successful. Football generates

significantly more revenue than European basketball and significantly more income for its players. Crucially, the Belgian basketball championship in *Lehtonen* took a “play-off format”, rather than a “league format”, adopted by most world-wide football leagues. A single league game during the course of a whole season is not as decisive as a play-off game. It is not proportionate to prohibit transfers for the majority of the season where every single game is weighted equally, carrying three points for a win.

The two types of legal challenge would have a similar result, due to the likely failure to get over the proportionality hurdle. Applying the *Fedesa* principles, football transfer windows are not an appropriate method for the attainment of legitimate aims; the means employed are not necessary for the attainment of the legitimate aims; and, finally, the disadvantages are unacceptable given the objectives pursued. The most extreme example is football clubs in administration potentially not being able to escape liquidation by selling its players. Football transfer windows have not yet been challenged in the European Courts and one must recognise their continuity. However, it is submitted that a club in financial difficulty is the most likely future source of a legal challenge.

In the words of Roger Welch,

*“It remains to be seen whether they will be subject to any legal challenge, and, if so, whether they will meet the criteria of proportionality. In any case, it is contended that transfer windows should be abolished (smashed) as they do not provide any general sporting benefits to the majority of clubs, players or fans.”*¹²³

It is proposed that there should be a return to the pre 2002/2003 system and put one transfer embargo in place from March to the end of the season. In this way the desired objectives of the transfer system, maintaining a competitive balance in football competitions, and maintaining team and seasonal stability would still be met, but in a proportionate way. **BASI**

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The Watkins Review of Rugby League Governance

RFL - MAURICE WATKINS, JULY 2012

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Introduction

The sport of Rugby League and the Rugby Football League have evolved over the past 10 years so that the organisation has become one of the most respected National Governing Bodies in the United Kingdom. Throughout this period, the sport has built a positive reputation for good governance based upon the two fundamental ideals of an independent board and a unified structure for the whole of the sport.

Given the recent departure of Chairman Richard Lewis, it is entirely appropriate to review this structure to ensure that the governance model for Rugby League remains best practice, and to undertake a consultation process with all relevant stakeholders to ascertain whether further improvements could be made. It is also the case that all UK NGBs in receipt of Sport England funding will have to demonstrate continued adherence to the governance principles as set out in the Whole Sport Plan funding agreement.

It is important to stress at the outset that this is a review of the sport's governance structure. It is not a review of strategy and policy or executive performance. In respect of the former, this is a matter for the RFL Board and the sport's stakeholders to determine collectively. In respect of the latter, this is clearly a matter for the RFL Board.

We would like to place on record our thanks to the many stakeholders who contributed to this review. We are grateful for the time you provided to answer our questions and to give us your views on the state of the game's health. One of the great strengths of Rugby League is its people, and the consultation undertaken for this review proved once again that the sport is fortunate to have such committed and passionate people involved.

One of the issues that quickly became apparent in our consultation was how misunderstood the current governance model was among stakeholders. Therefore, we make no

apologies for spending considerable time in this report explaining clearly and coherently both the existing structure and indeed the events that delivered this. We believe these are important issues that the sport needs to be most mindful of.

The recommendations contained in this report relate to the governance of the sport. Whilst this document is first and foremost a Governance Review, it has also been quite clear from the consultation process that a further discussion about the direction, vision and strategy for the sport for the next five to 10 years should quickly follow, focusing particularly on the size and structure of the leagues, licensing and promotion/relegation, the sustainability of clubs and our approach to expansion. Some of this work has already begun, but the RFL Board is committed to the prompt development and implementation of these strategies so that the sport is ready and able to face future challenges and capitalise on opportunities.

We would like to conclude by stating that while there is an understandable focus on areas that are capable of improvement, the sport as a whole and the stakeholders in particular should remind themselves of the remarkable progress Rugby League has made over the past decade. The future is not without its challenges, but the prospect of hosting the Rugby League World Cup in 2013 provides a unique opportunity for the sport to propel itself to even higher plains. It is an opportunity of which Rugby League must take full advantage.

Maurice Watkins, CBE, Acting Chairman

Bob Stott, Non Executive Director

Clare Morrow, Non Executive Director

Executive Summary

The process of consulting with many of the RFL's key stakeholders has proved immensely worthwhile and in many ways an illuminating experience. We have listened to a wide range of views on the current strengths and weaknesses of both the governance model and the way it operates, and on wider issues in the game. All were expressed candidly, coherently and above all constructively.

What came across loud and clear was a desire for a new spirit of collective responsibility and transparency, which enables all sections of the game and the governing body to work together more closely on shared goals. It was recognised that without this co-operation it is unlikely that the game as a whole can achieve its potential and the step change in commercial success which is the aspiration of us all.

It is apparent that there are issues around trust which need to be addressed, both in terms of relationships between clubs, and between the clubs and the governing body. There is confusion about where decisions are made and by whom, and a perception that the governing body is not as open as it could be in communicating its decisions and the rationale for making them.

The current governance structure was set up following a strategic review in 2001 against a background of falling revenues and ineffective governance. It was amended slightly in 2006. The full background is set out in Appendix 1 and is a useful reminder of how and why previous governance arrangements proved unworkable.

Appendix 2 outlines the current governance arrangements, including where decisions are taken and by whom. It also looks at the complex financial profile of the sport and how money flows around the game. Since the introduction of the current governance model, the combined turnover of the RFL and SLE has risen year on year, increasing from £19m in 2001 to in excess of £47m in 2011.

As part of this review the revenues and operating costs of other National Governing Bodies were analysed and

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compared with those of the RFL. Average staff remuneration at the RFL was £31k per annum, compared with £47k at the Rugby Football Union, £58k at the Football Association, £41k at the Football League and £62k at the England and Wales Cricket Board.

In respect of key findings it would be fair to say that there is complete respect for the concept of the independence of the RFL Board and a unanimous assessment that this is hugely beneficial. Those with longer memories can recall the unsatisfactory position of clubs sitting in judgement on other clubs and are anxious not to return to those days. Similarly there is a virtually unanimous assessment that the whole game needs to stay together under a single structure, and that the sport is at its strongest when it is visibly unified.

Our conclusion therefore is that the basic governance model continues to be the right one for Rugby League at this stage, although we are recommending the following changes as a result of the review and feedback received:

- The new RFL Chair should be a non-executive part time role, rather than an executive role.
- The size of the RFL Board should be adjusted from five to seven to allow for the above change but keep the executive / non-executive balance the same.
- The three independent non-executive directors of the RFL will each take responsibility for attending one of the meetings of the three sections of the game - Super League, Championship and Community Board.
- The Community Game's representation on Council be amended to mirror the representation of the Community Game on the Community Board.
- RFL profits are equally distributed to each professional member of the RFL, with the Community Game continuing to receive 10 per cent.

Super League Europe (SLE) is a limited company separate from the RFL but with a shared shareholding, board and executive. This structure was agreed by the clubs and the RFL when previous arrangements failed, and there was a consensus in our discussions with clubs that this arrangement should not be fundamentally changed. There was, however,

recognition that mechanisms needed to be developed which gives clubs greater and more constructive input into key discussions at an earlier stage, and which encourages more collective responsibility for the success of Super League.

Championship clubs also expressed a desire to have greater input into the agendas for meetings, to meet together more regularly, and to see game-wide issues discussed fully at Council meetings.

To address the issues around trust, collective responsibility, accountability and transparency we are recommending a number of significant changes into the way the governing body and clubs work together:

- We believe that the introduction of a Chairmen's Charter for the Super League and the Championship could help to set out a framework of trust in which clubs in each division can operate, which balances the need to share best practice and work collectively for the overall good of the game with an appropriate level of competitiveness both on and off the field. The Chairmen's Charter currently operating in the Premier League is attached in Appendix 3 for information, and could prove a useful starting point.
- We propose a major overhaul in the way Council operates. It is currently seen by many as an unwieldy and ineffective body when it should be a key forum for discussion amongst the game's stakeholders.
- We have set out a series of operational recommendations for the Super League club meetings, including clarity on what decisions are required and by whom, and ensuring papers are distributed in good time for clubs to properly consult appropriate colleagues and bring clear views to the discussion table so that decisions can be expedited quickly. We propose setting up a series of sub-committees for key areas of the game as a mechanism for ensuring greater input from clubs on policy issues in advance of the full club meetings.
- We will encourage the Championship meeting and the Community Board to adopt a similar approach to managing their forums, although we recognise that the Community Board already has a well-developed sub-committee structure which works well.

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In reality, however, many consultations concentrated more on policy and strategy issues, rather than the system of governance, and it is clear that the game looks to the RFL Board to show strong leadership on these issues and to take brave decisions where necessary to ensure the game thrives. Many respondents felt that a review of policy and strategy in areas such as licensing, expansion and club financial viability would be timely. Accordingly we have instructed the CEO to draw up plans to review these issues with the RFL stakeholders, and we intend to begin that process immediately.

The sport of Rugby League has made remarkable progress over the course of the past 10 years since the last Strategic Review was undertaken. Revenues and participation numbers have never been greater, and the game's governance is strong and well respected. However, none of these factors provide immunity from the difficult economic backdrop in which the UK is operating, and the increasing commercial pressures on individual clubs and the game as a whole.

We have a good springboard from which to grow our sport to the next level, but this is the moment for joining forces to find solutions to the challenges we face, and a fresh collaborative approach to maximising the opportunities that present themselves. We believe our recommendations will set the tone for a new way of working for Rugby League for the next decade.

There is complete respect for the concept of the independence of the RFL Board and a unanimous assessment that this is hugely beneficial

What You Told Us – Stakeholder and Review Responses

The vast majority of responses to the review considered that the RFL Board must remain independent, and retain governance and management of the sport at all levels. Professional clubs placed great value in the neutrality of the non-executive directors, in particular their ability to

make decisions in the best interest of the whole of the sport and free from conflicts of interest. Whilst this neutrality was highly valued, many respondents also considered it important for the non-executive directors to remain visible to all clubs and fully informed about issues confronting the sport.

Many respondents also stated that the RFL Board should be responsible for setting the high level vision and strategy for the sport, and empowering the RFL Executive to deliver this vision. Further, there needed to be greater alignment of the objectives of the RFL, and a greater integration between each component part of the sport.

Most of those responding to the review also believed that there was significant benefit in a governing body with responsibility for the totality of the sport (including its elite professional competition). Indeed this structure was nearly unique to sport in the United Kingdom, and many respondents saw this as presenting Rugby League with a great opportunity to grow at all levels.

Almost all respondents to the review considered that the sport had now reached a position where there was no longer a need for an executive chairman. In 2001 an executive chairman had been vital to ending the dysfunctionality that had crippled the sport; however the growth of Rugby League since that time and the success of the independent RFL Board had removed the need for an executive chair. However many respondents did consider that there was room for an increase in the size of the RFL Board, provided that this did not impose a financial burden upon the RFL.

Great importance was also placed upon the support available to member clubs from the RFL, however some respondents also believed that there needed to be clear and transparent guidelines as to the support available. Further, whilst most respondents accepted that the balance between respecting confidentiality and discussing individual club issues was difficult, there needed to be more open communication

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between RFL and member clubs when assistance was being given to a club in difficulty. Respondents also considered that there needed to be an increase in transparency and accountability of the RFL Board and Executive. Respondents believed that the RFL should be more open, and prepared to explain and justify its decisions to the sport.

There was almost unanimous acceptance that Council meetings were in need of reinvigorating. Member clubs considered that the current meetings are ineffective and at times “pointless”, but should be a valuable forum for stakeholder engagement. Revitalising this important forum was considered a key outcome of this review.

Super League clubs were also asked to comment upon the current model of governance of SLE, and the powers and responsibilities confirmed in the Articles of Association. Whilst many respondents acknowledged confusion as to the division of responsibilities, most were of the view that the current system balanced the sometimes conflicting needs of Super League clubs with their relationship to the remainder of the sport. A number of respondents also suggested that Super League clubs should take a greater responsibility for the direction and performance of SLE, probably through the creation of smaller sub-committees with appropriate terms of reference. A number of clubs also queried whether the competition could support 14 clubs, and believed that further discussion was required on the optimum number of teams in the Super League.

A number of clubs raised the issue of the commercial performance of the sport. There was a consistent belief that the sport (both centrally and at club level) had not extracted maximum value for its commercial properties. Many respondents acknowledged that this under-performance was a combination of a number of factors; however it should be a priority of the RFL Board and member clubs to improve significantly the amount of revenue flowing into the sport. Further, almost all clubs were in support of benchmarking their own financial performance. However a number of clubs also stated that they lacked sufficient trust in their fellow clubs in order to perform this benchmarking exercise. There was also a view that there needed to be a more collective approach (particularly to issues of common need, such as collective purchasing).

This issue of trust between clubs and between sections of the game was highlighted by a number of respondents. These respondents believed that at various tiers in the game there was an “us and them” relationship (particularly between the Super League and Championships clubs). There was a clear recognition that the Super League is the “shop window” of the sport and that it needed the appropriate level of resource to flourish and succeed visibly. There was, however, a concern that the Championships also needed nurturing, yet was in a position of being beholden to SLE and therefore utterly dependent upon the discretion of the Super League clubs. It was felt both within Super League and Championships respondents that the game overall would benefit from a more positive relationship between the two sections of the professional game and consideration should be given to how this could best be created. While there was recognition of the need for a significant amount of self determination for SLE, this could not be totally unfettered from the overarching authority of the RFL which is responsible for ensuring that the whole game is as strong as it can be.

Many responses raised issue with the conduct of Super League, Championships and Council meetings. In particular there was frustration that the agenda and papers for these meetings were only provided seven days in advance of meetings, and that this period did not allow for club executives to discuss the agenda and papers with relevant staff to determine an informed club position.

A number of responses also noted that the membership of the RFL Community Board was clearly designed to be a proportionate representation of the Community Game; however the Community Game’s current representation on the RFL Council is not representative. At present BARLA, English Schools Rugby League, Combined Services Rugby League and Students Rugby League are members of the RFL and attend Council meetings. Those playing leagues and clubs that have now aligned with the RFL following the move to a summer based competition have a voice at the Community Board (and therefore with the RFL Board), but are not represented at the RFL Council. This situation will need to be remedied as part of this governance review, and the revision should also serve to ensure appropriate interaction between the Super League clubs, the Championships clubs and the Community Game.

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Conclusions and Recommendations

1. Rugby League maintains the current unified governance and executive structure, with the RFL Chairman and Chief Executive remaining as the Chairman and Chief Executive of SLE.

Our discussions reaffirmed the benefits and simplicity of Rugby League's unified governance structure, and there was a consensus across all parts of the game that the governing body must remain responsible for the whole game and that the RFL Chair and Chief Executive be retained as the Chair and Chief Executive of SLE. We endorse this consensus.

Consideration was given to other models of governance, for example reverting to a separate SLE Board and Executive or the creation of distinct business units within the RFL responsible for each component of the sport, however on balance the current model was seen as providing the sport with the best opportunity for continued growth in commercial and broadcast revenues, whilst maintaining a responsibility for the "whole of the sport". Any significant alteration to the SLE Articles of Association is also likely to return the sport to the era of dysfunctionality and instability that pre-dated the 2001 Strategic Review with consequential duplication of management structures and costs.

2. The RFL Board continues to play an active role in the development of a new high level vision and strategy for the sport.

We welcomed the chance to talk frankly to a wide range of stakeholders about the role they felt the RFL board and the individual non-executive directors should play. It is clear from the vast majority of responses that the RFL Board should continue to set the high level strategy and vision for the RFL as an organisation and the wider sport. Whilst consultation with clubs and other stakeholders is an important element of the development of this vision and strategy, ultimate responsibility rests with the RFL Board. The sport requires an active and energetic RFL Board, willing to take courageous decisions rather than simply providing a steady regulatory guardianship of Rugby League.

3. The RFL moves to appoint a non-Executive Chairman embarking immediately on an open and competitive recruitment process.

It is clear that Rugby League has moved on significantly in the last decade. At the time of the 2001 Strategic Review it was essential that the next Chairman of the RFL was an Executive Chairman, tasked with re-integrating a fragmented sport, improving credibility in its governance and restoring financial stability. Essential to the re-integration of the sport was the Executive Chairman's role chairing the RFL, SLE, RLEF and Community Board. However, the sport is now in a position to "move on" from this model, and there is no need for the next Chair to be an Executive Chair. Rather a non-executive Chair should be appointed to the RFL.

4. The RFL Board confirms as soon as possible the non-executive director (other than the RFL Chair) who will attend the Super League, Championship and Community Board meetings.

A common response to this review has been a desire from member clubs and the Community Board to see an increased involvement of the remaining RFL non-executive directors in the governance of the game. Wherever possible the RFL Chair should continue to chair all meetings, however it would be appropriate to designate that the Super League, Championship and Community Board meetings have a non-executive director appointed as an independent link into the RFL Board.

5. The Articles of Association of RFL (Governing Body) Limited be amended to increase the maximum number of Directors from five (5) to seven (7).

6. The Articles of Association shall be amended to confirm that the directors shall be up to three (3) executive directors and up to a maximum of four (4) non-executive directors.

7. The requirement that non-executive directors of the RFL Board remain "independent persons" should remain in place.

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At present the RFL Board is restricted to a maximum of five members (two executive and up to three non-executive directors). With a move away from an Executive Chair, it is appropriate to alter the Articles of Association to increase this maximum number of directors to seven in order for the RFL Board to have some flexibility in both the appointment of a new chair or new non-executive directors.

Club responses to this review indicated that regular contact and discussion with the non-executive directors was important. This could create an unworkable burden upon the non-executive directors if this number remains at three (including the Chair) indefinitely.

The independence of the RFL Board was commonly acknowledged by many respondents to this review as a great strength of the current governance structure. Consideration was given to a return to having representatives of the Super League and Championships on the RFL Board. However, the independence of the RFL Board and balance of non-executive and executive directors (and independence of the non-executive directors) has been almost universally regarded by member clubs as important to the past success and future prospects of the sport. On that basis the recommended increase in numbers and the split between executive and non-executive representation ensures that the appropriate independence and balance is maintained following the appointment of a non-executive Chair.

8. The RFL commit to ensuring Council meetings are increasingly relevant by a considered approach to agenda items and ensuring that the RFL Board and Executive team are in attendance at meetings.

Whilst the above recommendations confirm the independence of the RFL Board and the unified governance structure, we recognise that there is much work to be done in improving the current system of club meetings, and the way the RFL communicates with its stakeholders.

The RFL Board and Executive are accountable to the member shareholders, and the appropriate forum for them to be held to account is the RFL Council. Many respondents told us that they believed this key meeting had become ineffective, so much so that they did not regularly attend. It is clear that the Council meetings need reinvigorating as a

forum in which stakeholders can contribute effectively to policy discussions of relevance across the game, and hold the Board and the Executive to account for decisions made. This should lead to greater transparency when dealing with major issues involving the sport, and improved channels of communication between the RFL Board and its stakeholders.

A number of respondents to the review believed that the RFL Board and Executive needed to display greater transparency to stakeholders on the major issues confronting the game. However many respondents also accepted that the RFL Board should maintain the confidentiality of clubs when dealing with commercially sensitive issues, and balancing the need for transparency with this obligation of confidentiality was a difficult task.

A number of club responses to the review identified the growing gap between Super League and the remainder of the sport as a problem. Changing the way Council meetings operate is an opportunity to bridge some of the perceived distance between the component parts of the sport. Consideration will need to be given to how best to run an effective meeting in which everyone can contribute given the large numbers of attendees involved.”

9. RFL profit is equally distributed to each professional member of the RFL (whether they be Super League or Championship). 10 per cent of the profits should continue to be distributed to the Community Game.

The current distribution of RFL profits to members is also an issue that is in need of review. At present, 60 per cent of profit is directed to members in the Super League, 30 per cent to members in the Championships and 10 per cent to the Community Game. This split was in part determined by recognition of the contribution Super League clubs made in releasing players for international duties, which is now addressed through a separate financial mechanism. It is therefore now appropriate to amend this split to ensure a more even distribution of profits, recognising the valuable contribution all parts of the game play in its overall success, and ensuring that each tier of the sport has a vested interest in the financial performance of the RFL. The payment of an equal share of profit to each RFL professional club member would be appropriate.

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10. The Community Game's representation on Council be amended to mirror the representation of the Community Game on the Community Board.

Immediately improving the representation of the Community Game on Council was also identified as an important issue in many responses. The most appropriate solution is to ensure the Community Game's representation on Council mirrors the representation of the Community Game upon the Community Board. This will also assist in reinvigorating Council meetings through a more proportionate representation of the Community Game.

Recommendations for SLE

As SLE is a limited company separate from the RFL but with a shared shareholding, board and executive, a number of further recommendations have been made in relation to SLE meetings and the conduct of business. A number of these changes could spread to both the Championships and Community if desired, however for the purposes of this report and in light of SLE's special status the recommendations only concentrate on SLE. Indeed the Community Board already has a competent structure of sub-committees reporting to the Board.

11. Make it clear on the agenda for SLE meetings which items will require decisions to be made. The papers should remind the club shareholders of their decision making powers, what items are a joint decision between the SLE clubs and the RFL, and what matters are reserved for the RFL Board.

12. Agree to issue all papers two weeks in advance of meetings.

13. SLE immediately create four (4) sub-committees, Marketing; Commercial; Competition Structure and Regulation; and Player Development and Performance, composed of two/three members of the RFL Executive and two/three club representatives. These sub-committees should meet four (4) times per year.

14. SLE general meetings should take place four (4) times per year, in late January, late April (to avoid Easter), early July and late October. Only one of these meetings should be a two day meeting.

15. SLE business area meetings cease.

Significant changes are required to the conduct and structure of Super League club meetings. The RFL Executive should be tasked with ensuring that it maintains greater discipline in creating the agenda for Super League club meetings to ensure that clubs are in no doubt as to which matters for discussion and decision are within their gift, and which are not. This confusion has been a significant contributing factor in the current difficulties at club meetings, and greater clarity should assist a return to shorter and more efficient club meetings.

A number of respondents highlighted a lack of time to consult properly within their clubs, including with coaching and playing staff, prior to meetings if papers were issued too close to meetings or if they were not clear that a decision was required. RFL Executives commented that on occasion clubs were ill prepared to contribute to debate or decision making, or did not send appropriate representation with the ability to commit to decisions, and that this led to issues being protracted unnecessarily. To address both concerns the RFL Executive must ensure that papers are issued two weeks prior to meetings with items requiring decisions clearly marked, and clubs must take responsibility on receipt of papers to thoroughly discuss them with relevant club staff, including coaching staff where appropriate. This is with a view to ensuring that a club representative (at any meeting) is fully empowered to state the club's position and no member of club management should subsequently seek to amend decisions correctly tabled and fully discussed and agreed at a previous meeting.

A number of Super League club responses identified a lack of club responsibility for the direction and performance of the competition. Unlike a number of other elite competitions, little or no responsibility is delegated to club sub-committees containing members of the Executive. Compare this to Premier Rugby (which for example has a Salary Cap sub-committee accountable to its Board and the clubs for the operation and review of the Salary Cap Regulations,

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comprising representatives from four clubs, appointed for a fixed term of two years).

It is therefore appropriate to create sub-committees for SLE. It is suggested that four (4) sub-committees be created: Marketing; Commercial; Competition Structure and Regulation; and Player Development and Performance. Each committee would have strict terms of reference and be composed of 2/3 members of the RFL Executive Management Team, and 2/3 club representatives. The creation of these committees would also have the benefit of removing the need for business area meetings (Commercial, Performance and Regulatory) that are at present, too unwieldy. Responsibility for policy generation should be designated to the sub-committees, giving the clubs some control over and responsibility for the direction and performance of the SLE competition.

It is also appropriate that SLE should meet more regularly, with a subsequent reduction in the number of two-day meetings. At present the business area meetings do create a significant workload for club staff. It would be appropriate to increase the number of Super League club meetings (from three to four per year). However, only one of these meetings should be a two day meeting (reduced from two). Late January,

late April (to avoid Easter), early July and late October (overnight) would be the best schedule. Further, with sub-committees introduced these should meet four times, between the general club meetings and reporting into these club meetings. With the business area meetings removed, the creation of sub-committees and removal of an overnight meeting, this should reduce the current club staff meeting workloads.

Looking Ahead

16. The RFL Chief Executive immediately lead a review into the current RFL policies on:

- a) **Competition structures and game integration.**
- b) **Super League Licensing and Promotion/ Relegation.**
- c) **Club sustainability and the appropriate level of RFL support for clubs.**
- d) **Youth development and player production systems.**
- e) **Expansion of the sport and RFL's responsibility for European development**

It is clear from the responses to this review that there are a number of contentious areas of RFL or SLE policy that many in the game consider in need of review. The conclusion of this Governance Review presents the RFL Board and Executive with an opportunity for a significant review and further development of current policies. Consultation with member clubs and the Community Game will be central to this review of policy. The outcome of this policy review should in turn provide further direction and certainty about a number of issues. This review is a timely opportunity to review and reinforce the purpose of each tier of the sport (Full-Time, Part-Time and Community). It should be possible to develop and agree these strategies and policies as soon as possible following the conclusion of this Governance Review, put the policies in place for a minimum of three years and then allow the RFL Board and Executive to proceed with driving forward the commercial performance and improving the profile of the sport.

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Appendix 1 - Background

Pre-1995

The Northern Rugby Football Union was formed as the governing body for the sport of Rugby League in the United Kingdom in 1895. In 1922 it altered its name to the Rugby Football League (“the RFL”). For the majority of its existence, the RFL was governed by a Council of representatives of the member clubs. The Council employed a General Secretary who operated the day-to-day business, however almost all major decisions were taken by the Council at general meetings. In 1988 the Council made the decision to delegate responsibility for the day-to-day management of the business to a board of directors made up of club representatives, selected by the Council.

As part of its management of the sport, the RFL organised the Challenge Cup competition, the Championship competition (which in 1995 contained the elite 16 teams), a Premiership play-off competition for the best performing teams in the Championship, a Second Division competition for those outside the elite Championship, and a further knockout “Regal Trophy” competition for clubs in the Championship and Second Division competition.

The sport was played during the Northern Hemisphere winter and contained teams based in the North of England with a team in London. In 1995 few teams in the Championship were fully professional, most were run on a semi-professional basis. This divide was somewhat reflected in the fact that, in the 1994-95 season, Wigan won each of the Championship, the Premiership, the Challenge Cup and the Regal Trophy competitions. The previous season they had won the Championship, the Premiership and the Challenge Cup competitions and been the runner up in the Regal Trophy.

Until 1995 the RFL was also the owner of the broadcast and sponsorship rights to all professional Rugby League in the United Kingdom.

Following the formation of the British Amateur Rugby League Association (“BARLA”) in 1973, the amateur or community game was governed by this organisation rather than the RFL. In essence there existed two governing bodies, the RFL for the professional game and BARLA for the amateur game. For much of the period after 1973 these bodies remained largely autonomous, with little interaction or common purpose.

Advent of Super League

During 1995, the member clubs of the RFL were approached by News International and British Sky Broadcasting (“Sky”) with a proposal for the creation of a new, elite, full-time professional Rugby League competition in the United Kingdom and Europe. Following on from the creation of an equivalent competition in the Southern Hemisphere, News International and Sky were keen to obtain the television rights to a similar competition in the United Kingdom.

The creation of the Super League in 1995 was precipitated by a series of discussions as to how Rugby League could produce a more exciting and attractive sporting spectacle, one that would entice new supporters and sponsors to the sport. A major factor in these discussions was the desire to create an elite competition where every team was fully professional, with full-time employed players, and not reliant on significant numbers of “part-time” players who had traditionally combined full-time employment outside Rugby League with part-time playing. There was also a desire to see the reach of the sport expanded beyond its traditional base, with the addition of teams in France, Wales and other European Nations. Finally, it was envisaged that a meaningful club competition against teams from the Southern Hemisphere’s Super League competition would be played (“the World Club Challenge”).

On that basis, Sky eventually made a payment of £87 million for the rights to televise a newly-formed Super League competition, in addition to International Rugby League and other RFL-sanctioned competitions (except the Challenge Cup) for five seasons. This broadcast agreement was between Sky and the RFL, with the RFL Board allocating the distributions across the three divisions of the sport. With this development, Rugby League would move to be a sport primarily played at professional level in the summer months and teams in the Super League would contain full-time employed players. Super League clubs would also be expected to introduce and maintain acceptable standards of financial responsibility, on-field playing investment and commercial/marketing expertise within their executives.

In 1996 the clubs participating in the Super League also created a “trade association” by way of a company limited by shares, Super League Europe Limited (“SLE”). The main objects of this association were to exploit the commercial and marketing rights of the competition to their fullest. Each

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club participating in the Super League was entitled to a share in this new company, and an entitlement to any distributions from its revenue.

The original Articles of Association of SLE also created a Governing Body Share for the RFL, making it a Special Rights Preference Shareholder whose consent was required before certain decisions could be taken.

1997 to 2001

Despite the significant uplift in broadcast revenues following the Sky/RFL agreement in 1995, the financial stability of the sport did not improve. Clubs continued to rely upon advances of future television revenues (through the arrangement with merchant bankers Singer & Friedlander) to maintain solvency, the financial performance of the RFL deteriorated significantly and the creation of an SLE executive team had increased the cost base. These financial difficulties were exacerbated when in 1997, following the conclusion of the Super League war in Australia and concerned about their return on investment in Rugby League in the United Kingdom, Sky and News Limited sought to renegotiate the broadcast agreement with the RFL. Sky/News Limited had informed the RFL and its member clubs in 1997 that should they not renegotiate the broadcast agreements immediately, Sky would pay the sport what it believed its market value was at the conclusion of the existing deal (circa £8 million per annum).

At the time of the negotiations with Sky/News Limited, SLE and its member clubs had agreed with the RFL and Association of Championship clubs ("APC") that it would negotiate its own broadcast, sponsorship and other commercial agreements. All revenue raised from these agreements would remain with SLE. Further, SLE had expanded its executive to include a number of positions that mirrored those already in place at the RFL, but with responsibility for the Super League competition only.

As a result of these difficulties the RFL conducted a Strategic Review in 1997. However this was largely ignored save for an alteration to the composition of the RFL Board. The previous concept of a Board elected from club representatives at Council was replaced in 1998 with a Board consisting of:

- a. Chairman (Independent);
- b. Director nominated by SLE (with an additional observer drawn from this association);
- c. Director nominated by the APC (with an additional observer drawn from this association).
- d. Three RFL executive directors (the RFL's Finance Director, Director of Rugby and Communications Director).
- e. One non-executive director.

However, this structure failed to deliver the anticipated improvement in operational and financial performance. There remained on-going tension between SLE and the RFL, the boards of both organisations contained club representation which resulted in continued conflicts of interest and RFL broadcast revenues were reduced to a minimal figure following the transfer of Super League rights

to SLE. With net financial liabilities peaking at £1.9 million in 2000, the RFL faced insolvency. As an unincorporated association this would have created additional disruption in the sport, as the RFL members would have been required to cover the full liabilities of the RFL should it be declared insolvent.

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2001 Strategic Review

Following the years of deteriorating financial performance and significant losses arising from the organising of the 2000 Rugby League World Cup, in 2001 a Strategic Review Process was constructed by the RFL Chairman, Sir Rodney Walker, to address a number of fundamental issues that were adversely affecting the sport.

This 2001 review process was undertaken by a Strategic Planning Commission (“the SPC”) containing representatives from Super League clubs, Championship clubs (or APC as they were then), BARLA and Sport England. After consultation with other stakeholders, the SPC reported in August of 2001 with 118 recommendations across the following areas:

- a. Governance
- b. League Structure and Competitions
- c. Broadcasting
- d. Central Finance
- e. Club Finance
- f. Sales and Marketing
- g. Representative Calendar
- h. Player Production

The SPC recommended that for the first time, the RFL Board should comprise no individual with an active relationship at any club. Further, the Board should comprise an Executive Chairman and an appropriate mix of executive and independent non-executive directors. These independent non-executive directors should be selected based upon their ability to contribute individually to Rugby League, by way of business expertise or reflecting specific interest areas for the sport. These recommendations were accepted by

the RFL Council, and in 2002 the independent RFL Board was instituted, consisting of Richard Lewis as Executive Chairman; Ian Edwards, Tony Gartland and Maurice Watkins as non-executive directors and Nigel Wood as Finance Director.

A further recommendation of the review was the merger of the RFL and SLE executives. SLE and the RFL later agreed and implemented this recommendation on the basis that the employment of two executive teams had led to a significant increase in the cost base of the sport, and merging these two organisations represented an opportunity to restructure efficiently the administration of the sport.

A number of other recommendations from the SPC were also approved and implemented. These included the “unification” of BARLA and the RFL, the expansion of Council to incorporate all elements of the game, the creation of dedicated forums for each area of the game to discuss matters of common interest (for example the RFL Community Board) and the co-ordination of the Super League and RFL broadcast rights offerings to the market.

RFL Incorporation

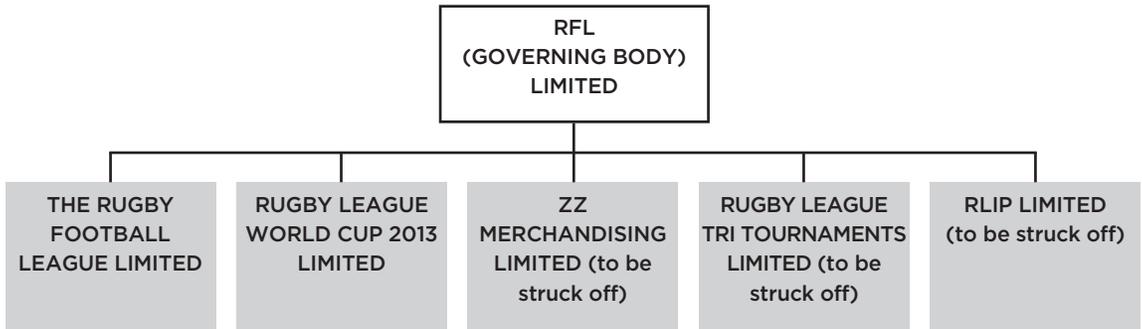
A significant recommendation of the 2001 Strategic Review had been the incorporation of the RFL. Since its inception in 1895 (as the Northern Rugby Football Union) the RFL had been an unincorporated association, carrying with it the inherent risk that its members were responsible for the liabilities of the RFL in the event of a financial failure. Following the heavy financial losses caused by the deteriorating performance and Rugby League World Cup in 2000, this risk had become a reality. After the newly independent Board restored the RFL to a positive net asset position in 2003, the move to incorporate began to gather further momentum and in 2005 the RFL incorporated as RFL (Governing Body) Limited.

Upon incorporation RFL (Governing Body) Limited became a company limited by guarantee, with each member club or organisation offering a guarantee of £1. The RFL became a separate legal entity in its own right and as such could hold assets (such as shares in subsidiary companies and property), making administration easier and more cost effective. The RFL (Governing Body) Limited members and Board also gained the benefit of limited liability with the assets of the Board members and RFL (Governing Body) Limited members not exposed should the business fail financially.

Set out below is a list of the RFL companies and subsidiaries. However, the RFL is currently in the process of consolidating

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the subsidiaries, with RLIP Limited, Rugby League Tri Tournaments Limited and ZZ Merchandising Limited to be struck off in the near future:



2006 SLE Article Amendment

Prior to 2006, the Board of SLE consisted of the Chairman of the RFL acting as Chairman of SLE, with each of the member/shareholder clubs entitled to provide one director (“club directors”). However this structure resulted in almost constant conflicts of interest, with each club director often asked to consider the best interests of the Super League at the same time as considering his/her own club’s best interests. This structure also required the club directors to sit in judgment upon other clubs within the Super League (for example, on the re-entry of London Broncos to Super League following administration in 2005 or on the distribution of central revenues).

Further, the independent RFL Executive were under-represented in policy making and frequently “governed” and/or led meetings only because of the goodwill of a sufficient number of member clubs. This often produced an unclear demarcation of responsibilities between the RFL and SLE (for example on issues such as the Salary Cap or minimum standards for membership of SLE).

Given the issues presented by the “club director model, in 2006 the clubs and RFL agreed to amend the SLE Articles of Association to re-insert a “Governing Body Share” for the RFL, to give greater clarity as to the powers and responsibilities reserved to the RFL and/or the SLE member clubs, and appointed the RFL Chairman and Chief Executive Officer as the Board of SLE.

Significant consideration was given to the powers and responsibilities reserved to the RFL and/or the SLE member clubs. These powers and responsibilities were carefully assigned to either the RFL, the Super League clubs or as matters that could only be agreed with the approval of both the RFL and a majority of the member clubs. The areas of broadcast and commercial revenue, as the primary reason for the split of SLE away from the RFL remained matters wholly within the gift of the Super League club shareholders. However issues such as the criteria for and membership of Super League, an area that clubs had been conflicted upon when deciding upon past cases, were assigned to be dealt with only by the RFL. Issues that were considered “whole of game” issues, such as promotion and relegation from the Super League, were assigned as matters that could only be dealt with following the agreement of both the RFL and club shareholders.

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Appendix 2 - Current Operation

Governance

The current governance structure for the sport is contained within the Articles of Association of both RFL (Governing Body) Limited and SLE, and the RFL Operational Rules. Whilst each of these documents is independent of the other, they confirm an inter-related governance structure that defines and protects the rights and responsibilities of each component part of the sport. A summary of this structure is as follows:

RFL Council

The RFL Council is made up of all member professional clubs, in addition to BARLA, English Schools Rugby League, Combined Services Rugby League and Student Rugby League. Each member is entitled to attend and vote at all meetings of the Council, share in the profits of the RFL or any distribution of its funds and participate in RFL competitions. The Council is the ultimate decision making body for the sport in England, with responsibility for the Laws of the Game and an entitlement to amend the Operational Rules on the passing of a Special Resolution.

Council Meetings must be held at least twice a year, with the Annual Council Meeting approving the accounts of the RFL, appointing/approving auditors, electing non-executive directors to the Board (where necessary) and electing a President. Changes to the Articles of Association of the RFL can only be made upon a Special Resolution approved by 75 per cent of voting members.

At Council, the number of votes held by each Club is calculated as follows:

- (a) if the number of SLE Members is identical to the number of Championship Members then each such member shall have one vote;
- (b) otherwise, the aggregate number of votes of SLE Members on the one hand and of Championships Members on the other hand shall be equal. For example, if there are 20 Championships Members and 14 SLE Members then:

each Championships Member gets one vote; each SLE

Member gets one and two-fifths votes.

Such that the total number of votes will be 20 for Championship Members and 20 for SLE Members.

Further, an ordinary resolution of the Council will be passed only where more than 50 per cent of the votes given in relation to that resolution include the affirmative votes of not less than four Championships Members and not less than four Super League members.

RFL Board

The business of the RFL is managed by the Board. The number of directors upon the RFL Board shall be not less than three and not more than five. The directors shall be a minimum of two executive directors and a maximum of three non-executive directors.

All non-executive directors are subject to election by the RFL Council at the first opportunity after their appointment, and to re-election at regular intervals and at least every three years. Non-executive directors retire by rotation and may offer themselves for immediate re-election. The Board also undertakes a formal annual evaluation of its own performance and that of its committees and individual directors. This includes a review of whether each director continues to contribute effectively and demonstrates

a commitment to the role. The Board has established three specific committees, the Audit Committee (to review internal control procedures, accounting procedures and consider the Annual Report before submission to Council), the Remuneration Committee (which benchmarks key staff against business of similar size and determines the terms and conditions of executive Directors and management staff) and the Nominations Committee (to deal with appointments of new members to the Board in addition to reviewing the size and composition of the Board).

The RFL Board is also responsible for the making and enforcing of the Operational Rules.

Day to day management of the RFL is delegated to the management team under the leadership of the Chief Executive Officer. The Board receives written reports from every member of the senior management team at each Board

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meeting and may also request updates or attendance at Board meetings from an individual departmental manager if there are significant issues to discuss in a particular area. By virtue of its funding arrangements with Sport England, the RFL is also subject to stringent annual governance audits and other financial assessment. As part of its governance audit, Sport England insists upon an appropriate balance of executive and non-executive directors on the RFL Board.

SLE

The RFL (Governing Body) Limited Chairman and Chief Executive Officer are also appointed as the sole directors of SLE. However the Articles contain a safeguard for the Super League clubs, who have the option either to appoint an independent non-executive director to the Board of SLE or return to the former system of “club directors” upon the passing of a special resolution to do so (i.e. with the approval of 75 per cent of the member clubs).

The Articles of SLE also reserve decision making powers to the club shareholders on a number of issues. Only the club shareholders have the power to agree:

- a. The competition broadcasting agreement.
- b. The title sponsorship of the competition.
- c. The number of rounds to be played in the Super League.
- d. The format of the Super League.
- e. The allocation of central television distributions, prize money and trading surpluses.

The Articles also confirm those issues upon which decisions can only be made where the approval of a majority of Super League clubs and the RFL has been obtained. They are:

- a. The number of clubs to play in Super League.
- b. The Super League Salary Cap Regulations.
- c. The name of Super League.
- d. Promotion and relegation to/from Super League.

- e. Commitment to the RFL Fixture List.
- f. Obligation of each club to enter the Challenge Cup.
- g. Ownership of more than one club.

Championship

Prior to the 2001 Strategic Review, the Championship clubs had formed an Association of Professional Clubs (APC) that met and elected a Chair who sat upon the board of the RFL. The APC conducted regular meetings and attempted to obtain television broadcast and sponsorship deals for its members. However on the implementation of the recommendations from the Strategic Review, the APC was disbanded and meetings of Championship clubs are now chaired by the RFL Chairman. These meetings are held at least three times a year.

The Championship clubs collectively have delegated to the RFL Board (on an exclusive basis) the negotiation of all broadcast and sponsorship agreements.

Community Board

By virtue of Article 79 of the Articles of Association of RFL (Governing Body) Limited, the Board has established a Community Board. This Board is accountable to the RFL Board for the management and development of all aspects of the community, grass roots and amateur game of Rugby League. The role of the Community Board shall be to assist in the organisation and management structure of the RFL, and to bring together all areas of the British Rugby League community, grass roots and amateur game under the governance of the RFL. The Community Board conducts its proceedings in accordance with Terms of Reference and Operation (Appendix “A”), which can only be amended by resolution of the RFL Board.

Regulatory

In accordance with the RFL (Governing Body) Limited Articles of Association, the Board has the responsibility for the drafting and enforcement of the Operational Rules (with the Super League clubs retaining a veto over the Super League Salary Cap Regulations). The Board also has the responsibility for organising and retaining all proceeds from

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the Challenge Cup and International competition; implementing the rules relating to players, agents, anti-doping and disciplinary; and controlling the recruitment and appointment of Match Officials. The RFL is also tasked with the formation of the fixture lists for the Super League, Championships, Challenge Cup and Northern Rail Cup competitions. The RFL Board also determines the membership and criteria for membership of the Super League competition (i.e. Licensing).

The Laws of the Game are the responsibility of the RFL Council, deciding upon any changes following receipt of recommendations or advice from the Laws Committee (a sub-committee of the RFL Board).

As recommended by the 2001 Strategic Review, dedicated forums currently exist for each area of the game to discuss matters of common interest. Super League club Chief Executives and Chairmen meet 3 times a year to consider general matters relevant to SLE. The Championship clubs also meet 3 times a year to consider matters relevant to the Championship. The Community Board meets at least 4 times per year. These meetings also present opportunities for RFL Executives to report or consult on certain matters, for example World Cup planning, the Laws Committee or Salary Cap Regulations.

There also exist a number of further opportunities for the Super League clubs to discuss matters of common interest, with business area meetings held across a number of disciplines in both the Super League and Championships. Super League clubs hold business area meetings across four disciplines:

- a. Regulatory (to discuss and decide upon Operational Rules, Salary Cap Regulation and other policies),
- b. Commercial and Marketing (to discuss and decide upon central and club commercial and marketing initiatives),
- c. Community Programmes (to discuss and share best practice on community foundations and other charitable activity) and
- d. Performance and Player Development (to discuss and decide upon initiatives involving playing and development programmes).

These meetings are held three times per year for each discipline and attended by relevant members of the RFL Executive and club staff. Minutes of these meetings are presented to the clubs at their general meetings. Where it is considered necessary (for example on matters pertaining to the Super League Salary Cap Regulations), proposals developed at the business area meetings will be voted upon by the club representatives at the general meetings.

Championships Clubs also have Regulatory meetings twice a year, and Community meetings three times a year. Again these meetings are attended by relevant members of the RFL Executive and club staff. Minutes of these meetings are presented to the clubs prior to their general meetings and where necessary, proposals developed at the business area meetings are voted upon by clubs at general club meetings.

International

The RFL was a founding member of the Rugby League International Federation (“RLIF”), the international governing body of the sport. Along with the Australian Rugby League Commission (“ARLC”) and the New Zealand Rugby League (“NZRL”) it is entitled to appoint two directors to the Board of the RLIF. At present, the RFL Chief Executive is also Deputy Chairman of the RLIF.

The RLIF controls the broadcast and commercial rights to the Rugby League World Cup. It has traditionally used the commercial revenues generated by this tournament, with levies on gate receipts at other international matches, to fund its activities (including grants to developing nations).

The RFL was also a founding member of the Rugby League European Foundation (“RLEF”). The RLEF is the governing body for Rugby League in Europe and the Northern Hemisphere. It oversees and co-ordinates the development of the sport in all its Member and affiliated countries and territories, as well as neighbouring organisations that choose to link to the RLEF. The RLEF is an Associate Member of the RLIF and is therefore entitled to appoint two directors to the Board of the RLIF.

The World Club Challenge, currently consisting of a single match between the NRL and Super League champions, is jointly owned and organised by the ARLC and SLE. Any proposals to amend or expand the format of the World Club Challenge require the approval of both the ARLC and SLE.

THE WATKINS REVIEW OF
RUGBY LEAGUE GOVERNANCE**Financial Profile****Introduction**

As has been previously discussed in the Background section, the creation of SLE caused a fundamental change in the financial structure of the sport. Previously all centrally generated revenue was received by the RFL, from which it was then expended across and around the whole of what was then identified as the “professional game”.

With the creation of SLE as a trade association, the RFL agreed to cede the revenue generated by the Super League title sponsorship, the end of season Play-offs and the television broadcast rights to the Super League competition (upon the renegotiation of the second Sky Sports contract in 1998). In practice this was a straight copy of the model adopted by football earlier in the same decade. SLE also agreed to pay for the competition’s marketing and invested in separate offices and human resources. The RFL retained the commercial and broadcast rights for the Challenge Cup, the non-Super League professional divisions and the International/Representative Game. Crucially the RFL also retained the central costs of administering the entire professional sport, including but not limited to operations, match officials, development, international performance, disciplinary, club insurance and all the obligatory central service functions of a National Governing Body (legal, finance, HR, and IT).

This unsophisticated division of revenue and allocation of costs proved hugely beneficial to SLE and its member clubs. Unfortunately it also served to weaken the RFL to the point where it was close to bankruptcy, which created an unsustainable situation given the then unincorporated status of the RFL. As each member club was responsible for the liabilities of the RFL, financial failure would have resulted in the RFL member clubs paying significant rescue costs. Further, the only group with any prospect of paying these rescue costs were (some of) the Super League clubs then in the competition and benefitting from the unsophisticated distribution of revenue and allocation of costs.

On that basis relatively drastic action was needed to avoid the financial failure of the RFL, and the reintegration of SLE into the RFL in 2002 delivered both significant efficiencies and removed duplication. The subsequent single integrated Executive took responsibility for ensuring the financial

security and sustainability of the sport. The aggregate revenues, together with the associated costs of delivering same, are presented below for the period since reintegration in 2002.

The Current Position

The financial model used in the sport has continued to evolve over recent years and the various TV arrangements for both professional competitions have been variously negotiated, while remaining faithful to the central principles agreed in 2002. On that basis it is appropriate to detail precisely Rugby League’s current financial model:

RFL

As stated previously the RFL retains the rights to the Challenge Cup competition and to International and Representative Rugby League. It also receives a 1/16th share of the SLE TV contract as a contribution towards the sport’s central costs. To add to these revenues the RFL receives funding from Sport England to deliver against the participation and performance directives (set by Sport England). Naturally all monies received from Sport England are expended upon delivery against participation and performance directives, or making a contribution towards the overhead of providing those services.

The RFL pays for all centrally provided services for the entire sport: the Community Game, the Championships and Super League. The cost of these central services in 2012 is estimated to be £2.8m, therefore the 1/16th share received from SLE represents 47 per cent toward these costs.

SLE

The central television contract is split 16 ways: - each Super League club receives a share; one share is paid to the Championship clubs; and one share is received by the RFL (as a contribution towards the Sport’s central costs). In addition, the Super League and the two divisions of the Championships share equally a further £2million per annum. SLE retains all revenues net of direct costs from its Play-offs, its title sponsorship and other commercial income generated by its competition. Historically SLE also shared the profit from the World Club Challenge match each year, although in the past two years this has been retained by the competing

THE WATKINS REVIEW OF
 RUGBY LEAGUE GOVERNANCE

clubs. The gross income of SLE is in the region of £24 million per annum.

From this revenue, SLE pays its prize money and any central initiatives that it determines, i.e. provision of statistical services, its share of the costs of providing a big screen at all televised matches, any central marketing of the competition, a contribution towards the full-time Match Officials squad and travel costs for travel to and from France. Any annual surplus in SLE is paid to the member clubs either equally or

by reference to the number of times a club hosts televised games and pitch painting. The RFL does not participate financially in the profits of SLE.

The Championships

Championships finances are not collected in a separate corporate structure but accounted for within the RFL. Income is derived from SLE (as explained above), the RFL and from commercial sponsorships and partnerships. Payments are made to clubs by way of a central monthly distribution and prize money to the Championship competitions.

The Community Game

Similarly to the Championships, expenditure in the Community Game is undertaken within a section of the RFL. The Community Game has no independent sources of income other than those granted from within the RFL. BARLA, while a member of the RFL, remains financially independent and retains all its subscription receipts and determines how these are expended.

Financial Performance

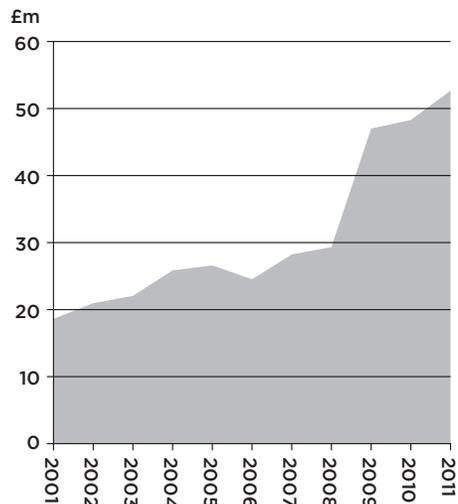
Since its appointment in 2002, the independent RFL Board and Executive have maintained three strategic priorities in assessing and managing the finances of the organisation:

- a. Increasing turnover.
- b. Increasing investment in the game.
- c. Controlling the costs of staff and overheads.

Increasing Turnover

Following the merger of the RFL and SLE executive teams in 2002, the day-to-day responsibility for the raising of revenue and central finance function of both SLE and the RFL has fallen to staff employed by the RFL. From 2003 onwards the broadcast properties of both SLE and the RFL have also been marketed jointly, and the RFL Chairman and Chief Executive have made up the board of SLE since 2006. Given this relationship between the two companies since 2002, the table below displays the level of combined RFL and SLE turnover since 2001. The combined turnover of the RFL and SLE has increased from £17m in 2001 to in excess of £47m in 2011.

RFL and SLE Central turnover: 2001-2011



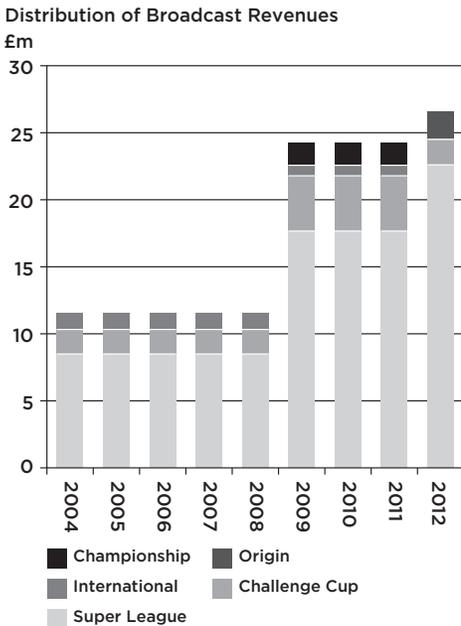
In light of its importance to any assessment of the turnover of the RFL and SLE, it is necessary to review broadcast revenues following the initial Sky/News and RFL agreement in 1995. As discussed above, following the initial £87million five year agreement of 1995, Sky/News Limited sought to renegotiate this agreement in 1997. In 1998 negotiations were concluded, with SLE agreeing a five year deal (1999-2003) in the sum of £45million. The APC clubs accepted a “termination payment” from Sky/News international in the sum of £10.8million with no further obligations to Sky/News Limited and the RFL agreeing a deal for the broadcast of international matches in the sum of £1million over five years (1999-2003). The RFL also realised a further £8million from the sale of broadcast rights to the Challenge Cup for the period 2000-2004.

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RUGBY LEAGUE GOVERNANCE

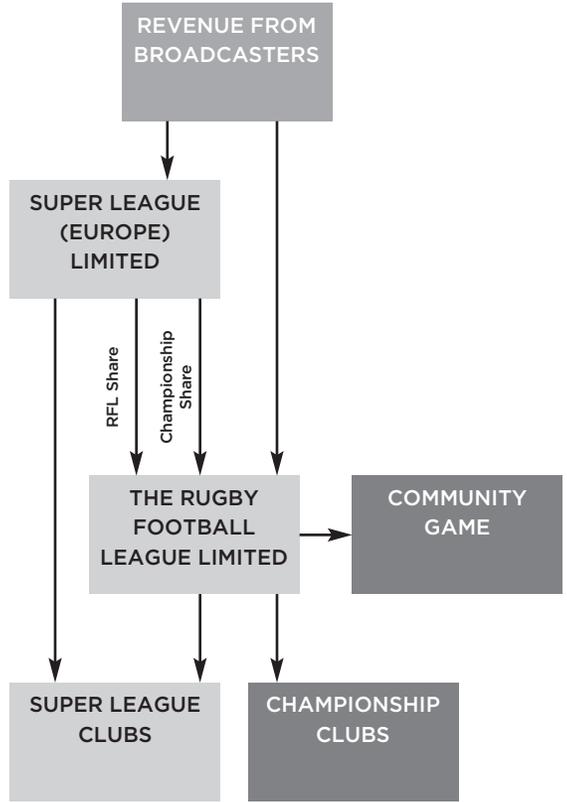
In 2003, the rights to the Super League, Challenge Cup, International Rugby League and the Championships were marketed jointly, with IMG engaged for the first time to assist in this process. Following lengthy negotiations, an agreement was concluded with Sky paying £45million for the rights to broadcast the Super League competition and International matches for the period 2004 to 2008. The BBC were awarded the rights to broadcast the Challenge Cup competition for the period 2005-2008 in return for the sum of £7.2million.

The rights to broadcast the Super League, World Club Challenge, Challenge Cup, International matches, the Northern Rail Cup and the Championships were again marketed jointly in 2007 (for the period 2009-2011). A joint bid from Sky and the BBC for all properties was accepted in the sum of £81million. For the sale of broadcast rights for the period 2012 to 2016, the rights to broadcast International matches were excluded from the joint offering. Agreements were concluded with Sky, the BBC and Premier Sport for the broadcast of the Super League, World Club Challenge, Challenge Cup, Championships and Northern Rail Cup in the sum of £135million for the period 2012 to 2016.

The table below shows the distribution of broadcast revenues into the sport since 2004:



The table below demonstrates the flow of television income into the sport and how this is then distributed to the member clubs.



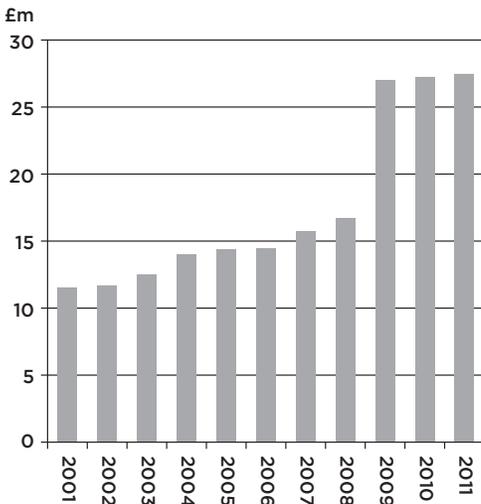
In addition to the broadcast revenues, the RFL is in receipt of significant levels of government funding for its work in both the development of elite athletes and increasing participation in the sport. During the current funding cycle (1st April 2009 to 31st March 2013) the RFL will have received in excess of £27m for this work. These funds have been used to deliver a number of programme and capital costs (for example the RFL was awarded £3million between 1 April 2009 and 31 March 2013 by Sport England for the improvement of facilities at Community Rugby League clubs). However the majority of this funding has been used to deliver employment opportunities within the sport in accordance with the terms of the funding agreements with the government bodies and agencies.

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Investment in the Game

The table below confirms the monies invested into the game by the RFL and SLE since 2001. In 2001 the RFL and SLE distributed in excess of £11m into the game, with this amount rising to £27m in 2011:

Distributions to the game from the RFL and SLE



Employment Costs

Funding for the employment of RFL staff can be divided into two categories. Those staff that are directly funded by the revenues received from Sport England and other government partners (“funded staff” or “relieved employment costs”) and those that are not (“unfunded staff” or “unrelieved employment costs”). The table below demonstrates the total employment costs (gross, employers NI and pension payments) of all RFL employed personnel.

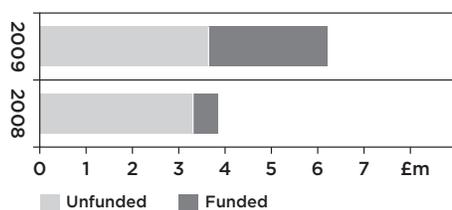
Staff Costs

Of RFL income (excluding Government grants) in 2008 of £9.2million, 36.7 per cent was spent on unrelieved employment costs (£3.4million). In 2011, RFL income (excluding Government grants) had increased to £18.9million, with 19.2 per cent of this income spent on unrelieved employment costs (£3.6million). Between 2008 and 2011 unrelieved staff costs rose by 7.2 per cent whilst non-government funded turnover increased by 105 per cent.

	2008	2011	Increase over period%
	£'000	£'000	
Staff Costs per financial statements	4,735	7,292	54.0%
Less Match Officials/Players/Coach Educators etc.	(859)	(1,063)	23.7%
RFL Staff (Funded and Unfunded)	3,876	6,229	60.7%
Less: Funded Staff (e.g. Sport England)	(504)	(2,614)	418.7%
Unfunded Staff Costs	3,372	3,615	7.2%
Turnover	14,541	27,042	86.0%
Less Government Funded Turnover	(5,347)	(8,166)	52.7%
Non-Government Funded Turnover	9,194	18,876	105.3%
Core RFL Staff Costs as a Percentage of Non-Government Funded Turnover	36.7%	19.2%	

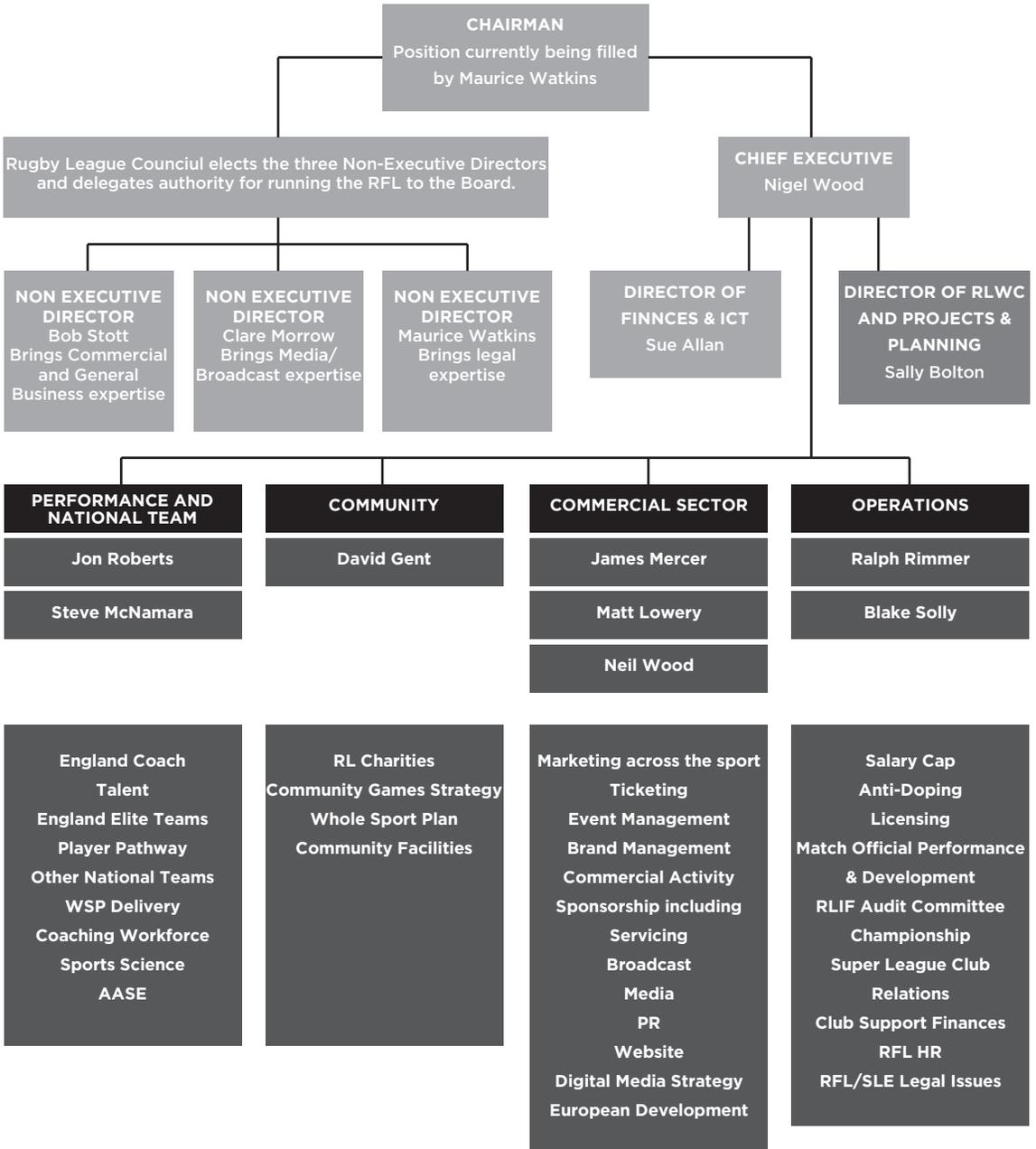
In 2008 the total cost of employment of RFL staff was £3.9million, of which £3.4million was unrelieved cost (i.e. costs not recovered through funding from government). In 2011 the unrelieved cost had increased to £3.6million, however overall employment costs had risen to over £6million. The table below demonstrates the employment costs of funded and unfunded staff.

Between 2008 and 2011, the number of RFL staff increased from 127 to 188. Of the total 2011 figure, 73 were posts funded by Sport England grants.



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The table below confirms the RFL's current management structure, Executive Management Team and the areas of responsibility for each member of the Executive.



■ The Board ■ Senior management ■ World Cup

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Balance Sheet and Treasury Policy

The losses brought about from the RFL's staging of the 2000 World Cup of £750K, in addition to the cumulative RFL losses from the preceding years and the further trading loss in 2001 had left the RFL with a balance sheet deficit of £2million at the end of 2001. Recognising the need for change, the RFL Board appointed in 2002 sought to return the RFL to a positive balance sheet within two years. The Board was able to return successfully the balance sheet to a positive position within that period, and the RFL's balance sheet now sits at a positive £1.7million, with liquid reserves making up just over 50 per cent of this amount.

In December 2002 the RFL posted a pre-tax profit of £809K. For each subsequent year the RFL has delivered member clubs a distribution of a minimum total of £150K whilst also posting pre-tax profits. As part of the RFL treasury policy, the Board has been mindful throughout this time to ensure that, in the main, operating surpluses flow back to the wider game rather than retaining large sums as reserves (thereby attracting corporation tax). Further significant donations have also been made to Rugby League charities (such as the RFL Facilities Trust) in order to fulfil the strategic priority of investing back into the sport.

In recent years the RFL has also established a Corporate Social Responsibility programme, with particular attention upon player welfare, equality and diversity within the sport and the safeguarding of children and vulnerable adults.

Appendix 3 - Premier League Chairman's Charter

PREMIER LEAGUE CHAIRMEN'S CHARTER SEASON 2011-12

Foreword

The Chairmen's Charter is a statement of our commitment and aim to run Premier League football to the highest possible standards in a professional manner and with the utmost integrity.

With that aim we, the Chairmen of the Clubs in membership of The Premier League, are determined:

- a. To conduct our respective Club's dealings with the utmost good faith and honesty.
- b. At all times to maintain a rule book which is comprehensive, relevant and up-to-date.
- c. To adopt disciplinary procedures which are professional, fair and objective.
- d. To submit to penalties which are fair and realistic.
- e. To secure the monitoring of and compliance with the rules at all times.

The Charter

The Chairmen's Charter sets out our commitment to run Premier League football to the highest possible standards and with integrity.

We will ensure that our Clubs:

- Behave with the utmost good faith and honesty to each other, do not unjustly criticise or disparage one another and maintain confidences.
- Will comply with the laws of the game and take all reasonable steps to ensure that the Manager, his staff and Players accept and observe the authority and decisions of Match Officials at all times.
- Follow Premier League and FA Rules not only to the letter but also to their spirit, and will ensure that our

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Clubs and Officials are fully aware of such rules and that we have effective procedures to implement the same.

- Will respect the contractual obligations and responsibilities of each other's employees and not seek to breach these or to make illegal approaches.
- Will discharge their financial responsibilities and obligations to each other promptly and fully and not seek to avoid them.
- Will seek to resolve differences between each other without recourse to law.

RFL

Red Hall, Red Hall Lane, Leeds, LS17 8NB

T: 0844 477 7113 F: 0844 477 0013

www.therfl.co.uk

@CommunityRL

www.facebook.com/rugbyfootballleague

Reviews and Reports



Corruption Watch

**COMPILED BY WALTER CAIRNS, SENIOR LECTURER IN LAW AND LANGUAGES,
MANCHESTER METROPOLITAN UNIVERSITY**

Corruption Watch is a new feature of this Journal, although in practice it is a continuation of the relevant section in the present author's general sports law surveys compiled over the past 14 years under the "Current Survey" and "Foreign Update" columns. Its specific focus is the various ways in which sport has been influenced by such malpractices as match-fixing, sport-fixing bribing, dubious transfer-inspired deals known as "bungs", and other untoward activities which have undermined the integrity of sporting activity, both professional and amateur.

OBITUARY

Giorgio Chinaglia

This footballer of multiple national allegiances – he was born in Italy, grew up in Cardiff, returned to Italy, later became a US citizen – died in early April 2012 at the age of 65. He appeared 14 times for Italy. In 2006 he was one of the nine people for whom the Italian authorities had issued arrest warrants on charges of extortion and insider trading. In the event, he was never charged.

could be taken against him. It also emerged that Joao Havelange, Sepp Blatter's Brazilian predecessor, had accepted kickbacks from the FIFA marketing agency ISL during the 1990s. Also named was Havelange's son-in-law Ricardo Teixeira, a member of FIFA's Executive Committee and the official in charge of Brazil's preparations for the 2014 World Cup, who resigned from both these positions for "health and personal" reasons. Concerns were also raised about the manner in which the 2018 and 2022 World Cups were awarded to Russia and Qatar respectively.

FOOTBALL

FIFA corruption scandal – an update

The reader will recall from previous issues of this Journal that the spectre of corruption, which has haunted football's world governing body for many years, culminated in the lifetime ban imposed by the organisation's Ethics Committee on former Qatari executive committee member Mohamed Bin Hammam, for allegedly offering bribes to Caribbean football officials during his campaign for the FIFA presidency. Jack Warner, the former chief of CONCACAF, the Caribbean football governing body, had also been accused of involvement in the affair, but resigned before any action

Following his ban, Mr. Hammam continued firmly to deny the allegations made against him and applied for a review of the decision before the FIFA Appeals Committee, claiming that his prosecution was politically motivated and orchestrated by the organisation's controversial President, Sepp Blatter, and General Secretary Jérôme Valcke (*The Daily Telegraph of 15/9/2011, p. S7*). However, Mr. Bin Hammam's challenge failed in mid-September. Undeterred, the former Qatari official announced his intention to appeal to the Court of Arbitration for Sport (*The Guardian of 16/9/2011, p. S4*). Sensationally, the Court overturned the lifetime ban on grounds of insufficient evidence (*Daily Mail of 20/7/2012 p. 81*). However, he lost an appeal to the

same Court to overturn a penalty that prevented him from being involved in national and international footballing affairs for an initial 90 days (*Daily Mail* 1/11/2012, p. 74). This did not prevent the Chairman of the investigatory chamber of the FIFA Ethics Committee from opening renewed investigation proceedings against the Qatari official in early November. Precisely what was being investigated was unclear at the time of writing.

As far as the two Brazilians are concerned, a Swiss court, in mid-July 2012, released documents revealing that senior figures at FIFA were aware of bribes paid to Mr. Havelange. Mr. Teixeira was also named in the court documents. Although, as indicated earlier, both had long been suspected of involvement in corrupt activity during their period of office on the Executive Committee of the world governing body, the full extent of the cash they received over an eight-year period only became clear on that day – as did the fact that senior members of the FIFA hierarchy were aware of at least one payment but did nothing (*The Independent* of 12/7/2012, p. 67). The Swiss court ruling in question related to the collapse of marketing company ISL and was finally published after attempts to block it were overturned. It gave details of payments amounting to £8.4 million between 1992 and 1997 to Teixeira, whereas Havelange received around £1 million in 1997. There were also payments of approximately £14 million “attributed” to accounts connected to the officials between 1992 and 2000. The document in question, compiled by Swiss prosecutors investigating the collapse of ISL, stated that FIFA was “accused of having a deficient organisation”, as well as

declaring “the finding that FIFA had knowledge of the bribery payments to persons within its organs is not questioned (*Ibid*). These revelations prompted Blatter to state that the world governing body should remove the honorary presidency which it conferred on the ailing Havelange, although to date this does not appear to have happened (*The Guardian* of 16/7/2012, p. S10). Mr. Blatter, for his part, declared himself “powerless” to take this step (*The Daily Telegraph* of 13/7/2012, p. S8).

Meanwhile, the Caribbean Federation scandal, referred to above, refused to die down. On the occasion of the FIFA annual conference in late May 2012 it was revealed that a £15 million centre of excellence in Trinidad, funded by development cash, secretly ended up in the ownership of former FIFA vice-president Jack Warner. The legal adviser to the Concacaf federation also informed the conference that the latter faced penalties after failing to make tax returns for a number of years. In addition, the former CONCACAF General Secretary Chuck Blazer, the whistleblower who exposed bribery allegations in the course of the previous year, was himself accused of overseeing financial irregularities and was considering taking legal action against the federation for commissions he claimed to be owed in respect of various television and sponsorship contracts (*The Guardian* of 24/5/2012, p. 42). In the course of the conference it became clear that an overwhelming number of CONCACAF members wanted Mr. Blazer to stand down immediately from the FIFA Executive Committee – yet such are the organisation’s unwieldy statutes that it would have required the support of 75 per cent of the 209-strong

electorate at the conference for the CONCACAF official to be removed from office prior to May 2013 (*Daily Mail* of 25/5/2012, p. 65).

Naturally, all these developments have merely confirmed what has become blindingly obvious to even the most casual of observers, to wit that FIFA is a fundamentally flawed organisation which requires root-and-branch reform if it is to retain any credibility as the official body overseeing “the beautiful game” at the world level. This reality had even dawned on some of the more perceptive of its members, and the FIFA Governance Committee accordingly set about the task of working out a programme for reform, under the eminent leadership of Mark Pith, professor of criminology at Basle University and is also a governance and anti-corruption adviser to the World Bank. This effort produced a set of sweeping proposals, including independent directors joining the Executive Committee, transparency over salaries, and an external judicial body adjudicating on future affairs involving corruption. They would also probe current corruption allegations such as the 2018 and 2022 World Cup issues referred to earlier (*Daily Mail* of 28/3/2012, p. 85). However, the initial promise shown by this initiative palled when Prof. Pieth admitted to having watered down his proposals following opposition from the FIFA Executive. He said:

“We were asking for independence in the Executive Committee. But they’re terribly afraid of that. It’s one of the major challenges. We’ve said you need to look at the board of a corporation, with independent directors” (*The Daily Telegraph* of 3/4/2012, p. S5).

Ultimately, the Congress did agree to a “road map” for reform, including plans for an independently-led Ethics Committee, which would conduct fit-and-proper-person tests on senior FIFA, although who exactly would be subjected to these remained uncertain. Neither was it clear whether the said Committee would be requested, or have the powers to, investigate the member’s past. A new “code of conduct” was also approved, although this did little more than state obvious levels of good practice. Other changes mooted were to be left undecided until the Congress reconvenes in Mauritius next year. Equally undecided was the fate of the Swiss court papers, referred to above, which name FIFA officials who took bribes. Mr. Blatter continued to assert that he could not do so because of Swiss court restrictions – a claim which has been denied by the Council of Europe on the advice of a Swiss magistrate (*The Independent of 24/5/2012, p. 79*).

Italian match-fixing scandals resurface

Widespread corruption has been a prominent feature of many aspects of Italian society for quite some time, and football, which enjoys equal levels of deification as it does in this polity, has not succeeded in escaping this blight, as the regular scandals of the past few decades have clearly shown. The last major scandal to hit the sport in that country occurred, as countless pages in this organ at the time will testify, in 2006 when multiple European Cup-winning team Juventus were relegated and deprived of two “Scudetto” titles following an investigation into referee “nobbling”. In mid-May of this year, it was three times of the top tier of Italian

football, to wit, Atalanta, Siena and Novara, who were among 22 clubs facing trial before a sporting tribunal, accused of match-fixing. The trial, in which 52 players were charged and 33 fixtures came under scrutiny, came after a prolonged investigation, which held out the prospect of even more of the biggest names in the sport being charged.

The fresh allegations for the most part covered matches played in the second tier (Serie B) in recent seasons. Atalanta, Novara and Siena were all competing in that division at the time, as were former European Cup finalists Sampdoria – also in the dock. A list of charges released by the federation made frequent references to a Balkan betting gang known as “the Gypsies”, which allegedly bribed players to “throw” games or ensure that a certain number of goals were scored, with payments ranging from €5,000 to €35,000. Players involved included Luigi Sartor, a former Inter Milan, Parma, Roma and Ternana defender. The federation operated with evidence based on hearsay and confessions provided by judges in Cremona, who are mounting their own investigation ahead of a possible criminal trial. At the time of the federation trial, the latter had already docked Atalanta six points and banned the former Atalanta idol and Italian international Cristiano Doni for three and a half years. Giuseppe Signori, who has played for Lazio and Italy, was banned for five years (*The Guardian of 10/5/2012, p. 19*).

In the midst of the trial proceedings, with the Italian national time fully engaged in preparing for the Euro 2012 tournament, police swept through the squad’s training camp near Florence as

part of their investigation into match-fixing. Eventually, it emerged that the player who came under particular investigation was Domenico Criscito, an “exile” who plays for Russian side Zenit St Petersburg.

As a result of the investigation and trial, a total of 22 Italian football clubs and 61 people, 52 of them players, were punished with penalties ranging from varying points deductions to five-year bans – in the case of the players – for their involvement in the web of match-fixing and sports betting fraud in Italian football. Reggina and Padova started the next league tournament with deductions of 4 and 2 points respectively, while Empoli received a one-point penalty. Albinoleffe started with a 15-point penalty in the third division, whilst Ancona was deducted 8 points, Novara 4, Piacenza 11, Ravenna 1 and Sampdoria and Siena escaped with a €50,000 fine. Atalanta, which is in the Serie A, previously agreed to start the season with a two-point penalty. The sports tribunal also penalised 52 players involved, most significantly Mario Cassano, Sartor, Zamperini and Santoni, who were banned for a period of five years. Those penalised also included Antonio Conte, fresh from steering Juventus to the scudetto during his first year in charge. He was banned for ten years for failing to report two incidents of match-fixing during the 2010-11 season, when he was coach to Siena. His appeal against this ban was dismissed in late August (*The Times 23/8/2012, p. 60*).

Shortly before this issue went to press, it was learned that Napoli faced a points deduction after the Italian Football Federation (FIGC) confirmed it was investigating the team for match-

fixing. More particularly their former goalkeeper, Matteo Gianello was accused of directly attempting to fix a match, and Gianluca Grava and the captain, Paolo Cannavaro, being accused of failing to report the incident after having been approached (*The Guardian of 27/10/2012, p. S4*).

No further details were available at the time of writing.

It would appear that a novel element has penetrated the murky world of football fixing – and not just in Italy – to wit the involvement of Asian betting rings. The man at the top of the Italian police's wanted list is a Singaporean, Tan Seet Eng, also known as Dan. He is believed to be at the heart of a match-fixing ring operated by South-East Asian crime syndicates which has targeted matches at club and international level, from Finland to the Baltic countries, and even as far afield as Africa, China and South America. It is a global market estimated by Interpol to be worth somewhere in the region of \$90 billion per annum. Dan is part of a sophisticated network that targets players from an early age. Considerable amounts of money are spent effectively grooming players who are then expected to deliver when they reach first-team level. This process can start, according to some sources, at as early a level as the age of 16, when players are "adopted" and awarded "tips" (€100 here, €100 there) for scoring or winning matches. That develops as the player climbs towards the higher level, through "nights out and girls", as the fixers continue to build their relationship. Obviously in due course they demand something back for their investment (*The Independent of 29/5/2012, p. 66*).

The process of slow corruption was very much the way in which Wilson Raj Perumal – no stranger to these columns – operated – he first assisted players from Africa to find clubs in Europe. Mr. Perumal is now sitting out a two-year jail sentence in Finland, having been convicted in 2011 of fixing games in the nation's domestic league. It has emerged since that Perumal and Dan have common history: Perumal is said to have been one of Dan's fixers, but the pair fell out, and Perumal has alleged since his conviction that it was another one of Dan's men who tipped off Finnish police that Perumal was in the country illegally. Dan and his fixers have also been linked to a range of high-profile cases: the fake Togo team which played a friendly fixture against Bahrain in 2010; the international friendly "double-header" in Turkey last year which ended with six referees being banned for life, and wide-ranging fixing in Zimbabwe. Perumal's conviction was a rare triumph for those involved in the bid to halt the poisonous advance of match-fixing. The European governing body UEFA and FIFA have linked up with Interpol in an attempt to address the problem, but each investigation needs to be carried out by the police force of the particular country involved (*Ibid*).

Lundekvam alleges match-fixing at Southampton FC

Widespread and systematic football corruption is something which has been alien to this country up to this point, which is why the claims made by Claus Lundekvam, the former Southampton and Norway defender, that Premier League games were manipulated by players as part of a betting swindle came as a major shock

to the world of English football. Mr. Lundekvam, who spent 12 years at the Hampshire club, stated that captains at rival Premiership clubs were also part of the fraud, with players regularly placing bets on developments such as the timing of the first corner kick or throw-in. He also claimed cash was sometimes wagered on the number of red and yellow cards in the game, and even penalties, which could have had a defining impact on the match result. In an interview with a newspaper in his native Norway, he said:

"It's not something I'm proud of. For a while we did this almost every week. We made a fair bit of money. We could make deals with the opposing captain about, for example, betting on the first throw, the first corner, who started with the ball, a yellow card or a penalty. The results were never on the agenda. That is something I never would have done. We were professional competitors. Even though what we did, of course, was illegal, it was just a fun thing" (*The Daily Telegraph of 12/7/2012, p. S6*).

The former Southampton chairman, Rupert Lowe, who was in office at the time of these allegations, urged the Football Association to conduct a full investigation, and criticised the governing body for failing to do so when the former club captain Matthew Le Tissier made a similar allegation in his autobiography *Taking Le Tis*. The latter wrote about a match against Wimbledon in 1995 when he had wagered that the ball would go out of play during the first minute and tried to kick it out from the kick-off, only for it to be blocked by team-mate Neil Shipperley. World governing body FIFA, however, has announced that it

intended to commence an investigation (*Ibid*). Former England international Le Tissier immediately tweeted denying Lunedvam's allegations, and that, apart from that one incident referred to above, he had not been involved in any betting swindles. Francis Benali, who also captained the side during the period in question, also denied the Norwegian's claims (*Daily Mail of 12/7/2012, p. 76*).

The results of the FIFA investigation were not yet known at the time of writing.

Portuguese police question Manchester United over Bébé transfer

In mid-May 2012, it emerged that anti-corruption police in Portugal intended to question Manchester United about the club's €9m (£7.2m) signing of the striker Bébé from the Portuguese club Vitória Guimarães, as part of their criminal investigation into the transfer. The judicial police national unit for combating corruption, which is part of the Justice Ministry based in Lisbon, is investigating the August 2010 transfer, by which United paid that fee for a player whose only competitive experience was a single season in the Portuguese third division. Mr. Bébé's agent, appointed days before he moved to United, was Jorge Mendes, also agent to top players Cristiano Ronaldo, Nani and Anderson, who moved from Portuguese clubs to Old Trafford in previous seasons. Of the €9m United paid to Vitória for Bébé, Mendes was paid 40 per cent, i.e. €3.6m (£2.89m). It was reported at Vitória's subsequent general meeting that Mr. Mendes's €3.6m share consisted of a 10 per cent agent commission, €900,000, and the

further €2.7m based on Mendes having also acquired 30 per cent of the player's "economic rights", i.e. part-ownership of the player (*The Guardian of 10/5/2012, p. S5*).

United manager Sir Alex Ferguson said at the time when the deal was concluded that Bébé was the only player he had signed in his long managerial career without having watched him at all first, even on video. United claimed that Bébé had been recommended by Carlos Queiroz, coach of the Portugal national team, formerly Sir Alex's assistant at Old Trafford. On 10 April, the police anti-corruption unit in Lisbon wrote to Bébé's former agent, Gonçalo Reis, requesting him to attend at their headquarters and act as a witness in order to provide his account of what happened in the deal. The letter informed Reis that a *processo-crime* – literally, criminal proceedings – relating to the "transfer of the professional football player Tiago Manuel Dias Correia (known as Bébé) from Vit. Guimarães to Manchester United (England)" had been commenced. The police unit declined to confirm officially to a leading British daily newspaper the scope of their inquiries or what precise aspects of the transfer they are investigating.

Mr. Reis has complained formally to the Portuguese Football Federation that Mendes improperly poached Bébé from him before very quickly sealing the United move, in breach of world governing body FIFA's regulations governing the conduct of agents (*Ibid*). Reis informed the newspaper that, on 23 April he was interviewed for around three hours by a police inspector, José Cunha Ribeiro, at the anti-corruption

unit's offices. He added that the police had questioned him in detail about every aspect of the transfer, and told him they planned to request the Manchester club to provide their version of the deal. Subsequently Reis emailed several documents to the inspector, including his contract to represent Bébé. Mendes and his agency Gestifute had previously denied poaching Bébé from Reis. In his complaint to the PFF, Reis claims he had an exclusive contract to represent Bébé as the player's agent for two years from 25 August 2009. Bébé, who had a poor, deprived childhood, his parents having abandoned him, was still living in a care home when he played for Estrela da Amadora, in Portugal's semi-professional third division, in 2009-10. He played one full season as a striker for Estrela, then after they failed to pay him because the club was in financial difficulties, Reis negotiated the termination of the player's contract and Bébé became a free agent. He moved to Vitória, a first division club, in June 2010, with Reis brokering the terms of the contract.

For a time Bébé lived in Reis's house as he came to terms with making his way into professional football. He played in just six pre-season friendlies for Vitória when a story appeared in *Marca*, the Spanish football newspaper, that Real Madrid, managed by José Mourinho, a client of Mendes, were suddenly interested in signing him. United have always said they then moved rapidly to sign him, on the recommendation of Queiroz, who is also represented by Mendes.

According to Mr. Reis's official complaint, on 9 August, 2010 he received a letter from Bébé, dated 5

August, in which Bébé dismissed Reis as his agent. Two days later, on 11 August, Bébé was transferred to United, who paid €9m to Guimarães for him, and gave the player a three-year full professional contract on wages Reis believes are €63,000 a month, net of tax. It emerged subsequently that Mendes had become the agent and owner of 30% of Bébé's economic rights, too, and made €3.6m from the United deal (*Ibid*).

At the time of writing, the Portuguese authorities had yet to announce the outcome of their inquiries.

UEFA urged to investigate \$4bn corruption allegations in Ukraine

The governing body of football in Europe, UEFA, has recently come under pressure to investigate claims of massive corruption during Ukraine's preparations for Euro 2012, amid allegations that as much as \$4bn (£2.5bn) in state funds allocated for the tournament was purloined by officials. Rebecca Harms, the leader of the Green faction in the European parliament, urged UEFA to investigate why Ukraine cancelled competitive tenders for all Euro 2012 projects in the course of 2010. Instead, contracts for building stadiums, roads and other infrastructure projects were awarded to a handful of shadowy companies, including one based offshore in Belize. Opposition politicians have claimed that the companies belong, directly or indirectly, to government officials. The Ukraine government has denied this. Ms. Harms, a German MEP who had visited Ukraine's second city, Kharkiv, informed *The Guardian* (21/6/2012) that she intended to confront UEFA

with these questions as well as raising them in the European Parliament. More particularly she wished to learn in whose private pocket the money went.

Ukraine embarked on a programme of modernisation ahead of the Euro 2012 tournament. It built or renovated four stadiums; upgraded airports in the four host cities, Kiev, Lviv, Donetsk and Kharkiv, and laid or repaired 1,000 miles (1,600km) of roads. It also purchased a fleet of Korean high-speed trains in order to transport fans between venues. The overall cost of Euro 2012 is in dispute. Borys Kolesnikov, the deputy prime minister, who was in charge of infrastructure and Euro 2012, claimed that the Government spent \$5billion, including \$800 million on stadiums. However, there are other voices that suggest the real figure, including related projects and state guarantees, is \$10bn – more than the \$2.25 billion originally envisaged when UEFA awarded the tournament to Kiev and Warsaw in 2007. Ostap Semerak, Ukraine's shadow sports minister, said that the then government of Yulia Tymoshenko wanted private investors to bear most of the cost. However, once Viktor Yanukovich had won power in 2010, defeating Tymoshenko (and subsequently jailing her!), his new government largely abandoned private investment. Approximately 80 per cent of the Euro 2012 budget came from state funds, he claimed, with expenditure rocketing "sky-high". The Ukraine parliament then cancelled competitive tendering for all state procurement contracts related to Euro 2012. A national agency, in effect operated by Mr. Kolesnikov, was given the power to award no-bid contracts. Kolesnikov claims that the exceptional

measure was necessary because UEFA were, in April 2010, on the brink of taking the tournament away from Ukraine – with stadiums unbuilt, preparations woefully behind schedule, and the country in crisis (*The Guardian* of 21/6/2012, p. 21).

On the other hand, Semerak alleges that contracts were given to firms with indirect or direct links to government officials, and other figures associated with Yanukovich's ruling Party of Regions. Either that, or they were part of a "corrupt pact" involving them. Writing in the *Kyiv Post*, he claimed:

"The scheme is very simple: the official and his chosen contractor agree to share the budget cash. They cook up an overblown budget, and the contractor pays off a part of it back to the official as soon as he receives a transfer – usually in cash. Sources in such companies have said that the scheme allowed officials to receive (or, to put it bluntly, steal) between 30% to 40% of the state funds allocated for the tournament's preparations. We're talking about up to \$4bn." (*Ibid*).

Yuri Gromnytsky, Kolesnikov's press secretary, dismissed Mr. Semerak's claims of large-scale corruption as "science fiction". He said the government would invite an external auditor after the Euro 2012 championship was over to examine the accounts. Mr. Semerak, for his part, claimed that the theft of state resources took place in relation to the most prestigious projects of Euro 2012, including Kiev's Olympic stadium, which hosted England's quarter-final against Italy. Also under scrutiny is the new, purpose-built, stadium in Lviv, airport terminals in Donetsk and Lviv, and roads. The Euro 2012 stadiums in

Donetsk and Kharkiv, by contrast, were privately financed. The reconstruction and development of the Olympic stadium cost the Ukrainian taxpayer \$585 million. Mark Rachkevych, a reporter for the Kyiv Post, who has investigated Euro 2012 corruption, said the bill was larger than for other similar-capacity European stadiums. He added:

“Euro 2012 was an amazing opportunity [for Ukraine] to really scale up the infrastructure projects by including public-private partnerships and private investors. But they [the government] decided to do it on their own, mostly with taxpayers’ money, in a non-transparent way. The question remains: how much money was really spent, and how much went into people’s pockets?” (Ibid)

Previously, the Olympic stadium’s general contractor, Volodymyr Artiukh, had confessed to helping embezzle \$3m of public money from a state bank. Mr. Artiukh was already under investigation for alleged fraud when in June 2010 Kolesnikov selected his company, AK Engineering, to reconstruct the stadium. The firm also renovated the nearby sport palace, used as the Euro 2012 accreditation centre. According to documents obtained by the Ukrainskaya Pravda newspaper, Mr. Artiukh has long-standing ties to Mr. Kolesnikov. Artiukh was in partnership with the minister’s lawyer, Ivan Shakurov, the paper alleges, even though Mr. Artiukh himself denied any connection to the minister Kolesnikov denies any connection to AK Engineering or Artiukh. Semerak, however, alleges that Kolesnikov eliminated companies already working on Euro 2012 construction sites,

replacing them with other companies connected to him “in one way or another”. There are also unanswered questions about a second mysterious firm, Altkom. Altkom, which is a large financial-industrial group based in Donetsk, the home region and political heartland in eastern Ukraine of President Yanukovych. Altkom received \$800 million from the Euro 2012 state budget and was given no-bid contracts to build an airport runway in Donetsk (\$225m), the Lviv stadium (\$175m) and several roads (Ibid).

It is unclear who actually owns Altkom. Formally, it belongs to Eurobalt Limited, a company registered in Newhall Street, Birmingham. Eurobalt is in turn owned by a mysterious offshore company based in Belize, Trinitron Investments. In the course of 2011, the Organised Crime and Corruption Reporting Project tracked down the company’s nominal “director” and discovered that she was a yoga teacher based in Cyprus. The latter turned out to be Lana Zamba, the firm’s proxy director until last December. (She was removed soon after her identity was made public.) She was also a “director” of 23 other British firms. In reality she has nothing to do with any of them, her husband told the Kyiv Post, and received a token salary of just \$534 a month. Zamba was born in Ukraine, received a Cypriot passport in 2006, and also “fronts” for several companies owned by Russians. Asked who might be Altkom’s ultimate beneficiary, Gromnytsky said:

“I don’t know who. Nobody seems to know who owns Altkom. But there is no direct connection between someone from the Ukrainian government and Altkom. The firm did a lot of construction. There was

a transparent procedure. There is no dark story here.” (Ibid)

Asked if Altkom was indirectly connected to government, he denied having any information on this subject.

Semerak told the leading British newspaper involved that he was about to approach the Home Secretary, Theresa May, requesting her to investigate Eurobalt Ltd, on suspicion of alleged money-laundering. The previous month Tymoshenko and Semerak had contacted the Financial Action Task Force (FATF) and asked it to examine alleged Euro 2012 corruption in Ukraine. Semerak said he approached the inter-governmental body because Ukraine’s prosecutor was not independent.

In a recent paper Poland’s Centre for Eastern Studies asserted that it was unclear “who really derives the profits” from Altkom’s activities. It concluded: *“The Ukrainian media most often mention Kolesnikov. However, given the scale of orders carried out by Altkom, it seems more likely that it is connected to a larger group of Ukraine’s most senior state officials and businessmen linked to [Yanukovych’s] Party of Regions” (Ibid).*

It noted that previous Ukrainian governments had handed lucrative state contracts to trusted “friends”. Altkom has denied links to any government officials.

Government insiders privately admit that money did disappear in the preparations for Euro 2012. But they stress that stadiums were all built on time to UEFA specifications – an epic

feat against an almost impossible timetable. "We have a result," one source stressed. The insiders also claimed that the corruption was on a far smaller scale than in neighbouring Russia, where as much as 100 per cent of the state budget can allegedly be stolen, especially with military procurement contracts.

Serhiy Shcherbina, an investigative reporter with *Ukrainskaya Pravda*, said his newspaper's allegations of Euro 2012 corruption were backed by evidence and research done over many months. He said: "There are stadiums, airports. Things were built. It's a fact. You can't dispute it. But the question remains: how were they built?" (*Ibid*)

Bahrain mammoth win investigated

For the loyal followers of the Bahrain national team, it must have seemed an insurmountable deficit. The players had to overcome a nine-goal gap on rivals Qatar in order to stand any chance of making it to the next stage of the 2014 World Cup Asian qualifiers. But this is precisely what they did, thrashing their Indonesian opponents by 10-0. However, the supporters' joy was short-lived – the indifferent performance by the Indonesians was so unusual that it aroused the suspicions of FIFA match-fixing investigators. And ultimately it did not matter, since secured the point they required to keep Bahrain out with a 2-2 draw against Iran. Indonesia have, it is true, incurred plenty of losses in the tournament, but nothing to match the sheer scale of this result. Defenders of Indonesia's paltry performance pointed out that an inexperienced side had been fielded after some of their best players were suspended for taking part

in a breakaway league at home. The country's football association denied corruption (*The Sunday Times of 4/3/2012, p. 7*).

The outcome of the investigation was not known at the time of writing.

Betting inquiry over Preston North End "leaks"

In early April 2012, following Preston North-End's 2-0 defeat to Sheffield Wednesday in League One their manager, Graham Westley, railed against the "losing ways" undermining his squad. He then claimed that on the day before the match four players had shared details with Wednesday counterparts about the team they would field. This development was closely monitored by Football Association (FA) compliance officials, since FA integrity rules specifically prohibit information-sharing if it "enable[s] any person to bet on the result, progress or conduct of a match or competition in which the [player] is participating."

Under routine agreements with the integrity units of the betting companies, the FA compliance team are informed of any spikes in betting data. If any had taken place over the Preston game and they correlated with the alleged leak, the FA would have pursued an investigation for misconduct. There is no rule to prevent players sharing information with the opposition, since technically it does not enable anyone to bet on it: opposing players are also bound by FA gambling rules. However, there may be a weakness in any regulatory regime that permits insiders to gossip about team information that has not been made

fully public (*The Daily Telegraph of 2/4/2012, p. S11*).

In this case, Wednesday insisted they gained no advantage from any such information. The club owner, Milan Mandaric, said:

"I spoke to David Jones, our manager, last night about the game and a couple of other things that he spoke to David Jones Wednesday's manager, about the game after it had finished but he has not mentioned it at all. It was not on his mind. But it has not got anything to do with us winning the game. We were the better team with stronger individual players and a stronger team. At the start it was still 0-0 and 11 on our side and 11 on theirs." (*Ibid*)

In the event, the FA took no action against either Preston or Sheffield Wednesday.

Other issues (all months mentioned relate to 2012 unless stated otherwise)

Blackpool anger at "illegal approach". In early August, English League One club Blackpool reported the Southampton football club to the Premier League, the Football League and the Football Association (FA) over an alleged illegal approach for their winger Matt Phillips. Manager Ian Holloway expressed his anger amid claims that Southampton contacted the player's agent without making an official approach to Blackpool (*Daily Mail 1/8/2012, p. 87*). To date, nothing appears to have come of this complaint.

Malta player banned. In late August, European governing body UEFA acknowledged that its showpiece international competition had been corrupted when it confirmed a ban of ten years imposed on Kevin Sammut, a Malta player, for assisting in the fixing of a qualifying game for the 2008 European Championship. Mr. Sammut was found guilty of “breaching UEFA’s principles of integrity and sportsmanship” in relation to a 4-0 defeat by Norway in 2007 (*The Times of 21/8/2012, p. 60*).

CRICKET

Westfield/Kaneria corruption scandal – an update

It will be recalled from previous issues of this Journal that, after admitting to receiving money in return for underperforming during a Pro40 fixture between Essex and Durham in 2009, fast bowler Mervyn Westfield was jailed for four months in February 2012. Since then, Westfield has appealed against his sentence – together with cricket agent Mazhar Majeed, who was jailed in a separate trial, having been sentenced in November 2011 to two years and eight months after pleading guilty to conspiracy to cheat and conspiracy to make corrupt payments. Both appeals were heard together in late May 2012 as they raised the same point of law. (The Majeed appeal is also dealt with below, under the heading “Pakistan Test players scandal – an update”).

Lord Chief Justice Lord Judge and two other judges in London, who had been urged to overturn their convictions,

rejected their appeals. Dismissing the challenges, Lord Judge stressed that for the health and survival of cricket as a truly competitive sport corruption “must be eradicated”. The men pleaded guilty following pre-trial argument and rulings, but their conviction challenges centred on the correct interpretation of gambling and betting legislation. Lord Judge said:

“These otherwise unconnected appeals against conviction arise in the same notorious context, ‘spot fixing’ in cricket matches. For cricket betting is not new. It has, however, become multi-faceted. Nowadays it is possible to place bets not only on the final outcome of a match, but on particular passages of play, such as how many runs will be scored or wickets taken in an over, or indeed on individual events during the course of an over or passage of play.

Cricket is widely televised, not only in the country where the match is being played, but throughout the cricket-playing world, and indeed further afield. The prizes for successful gambling can be very great, and the scope for corruption is therefore considerable. For the health, indeed the survival, of the game as a truly competitive sport, it must be eradicated.” (*The Daily Telegraph of 31/2/5/2012, p. S3*).

Following rulings by the trial judges on issues of law relating to the offences alleged against them, both appellants pleaded guilty. The appellants, he said, contended that the rulings were wrong – if they had won their appeals, the judges would have then ordered retrials. Lord Judge ruled that the “respective offences of conspiracy against Majeed

and cheating against Westfield were properly prosecuted”. The rulings on the law by the judges in the two trials “were right and these appeals against conviction are dismissed” (*Ibid*)

Far from closing this chapter, however, Westfield’s jailing and failed appeal has continued to give rise to plenty of questions about the involvement, direct or indirect of certain other parties in this tawdry affair.

In the first instance, this concerns the role played by Danish Kaneria, the Pakistani player who, during the trial, was revealed as the man who had set up the deal involving Westfield and had approached other players. More particularly the former Essex fast bowler told the court that Kaneria had introduced him to two underworld Asian bookmakers and pressured him into the spot-fixing which was the subject-matter of the trial. It also emerged in court that Kaneria had been officially warned by the International Cricket Council (ICC) in April 2008 about keeping “highly inappropriate company” with an Indian bookmaker called Anu Bhatt. Kaneria had been arrested alongside Westfield in 2010, but was released on the grounds that there was insufficient evidence to secure a conviction. The England and Wales Cricket Board (ECB), however, were sufficiently concerned to bring corruption charges against Mr. Kaneria in early April 2012. Both he and Westfield were notified that a disciplinary hearing would take place relating to breaches of the ECB anti-corruption directives (*Daily Mail of 6/4/2012, p. 71*).

The hearing took place in mid-June 2012, and resulted in the panel issuing

Kaneria with a life ban. In a strongly-worded ruling, the disciplinary panel found that the former Pakistan international, who had shown no remorse, was a “grave danger to cricket”, that corruption was “a cancer that must be rooted out” and that, if not tackled, there was a “catastrophic” danger that the general public and the sponsors would lose interest in the sport. Kaneria had persisted in denying the allegations, more particularly regarding the messages between him and Bhatt. The panel, made up of Gerard Elias QC, solicitor David Gabbitas, and James Dalrymple, the former England all-rounder, dismissed his explanations in the following terms:

“We reject the account of the calls and texts to and from Anu Bhatt. Analysis of length, sequence and timing of these calls does not permit of the innocent explanations given. If, as we find, he is lying about these calls and texts, there can only be one reason – to tell the truth would be damning” (*The Times* of 23/6/2012, p. S19).

As for Westfield, who pleaded guilty, the panel issued him with a five-year ban from cricket, with the qualification that he would be allowed to play club cricket again after three years. The panel concluded that Westfield was “relatively unworldly” and may have been going through a period of self-doubt, having failed to gain a regular place in the Essex first XI (*Ibid*). In the meantime, he had been released on licence two months into his prison sentence (*The Daily Telegraph* of 19/4/2012, p. S4).

Another cricketer indirectly involved in the affair, but in the most positive of ways, was Westfield’s former Essex team

mate Tony Palladino. Westfield had shown the latter the money he had been paid for his part in the spot-fixing scam, a move which led to his downfall. Six months later Palladino, who now plays for Derbyshire, reported Westfield to the authorities following an anti-corruption briefing by the Professional Cricketers’ Association. This brave move, however, has had its downside for the player, as he revealed a few months after the Westfield trial. He said:

“It’s not been the easiest time. I’ve had mostly positive stuff come back but quite a bit of negative stuff as well – not so much within the game but from supporters. Sometimes people didn’t 100 per cent believe me and it was a very tough two years. When it happened, it’s not a nice thing to see your team-mates cheating but people make mistakes. I’ve made plenty in my life. You’ve got to be able to forgive and if I saw Merv again I would speak to him and say, ‘I hope you’ve learnt from this and I hope you can move on and do something good out of it’. Merv knows he’s done wrong and he got caught at a young age and I hope the ECB use him as an example to go round and speak to clubs because it’s in the game now and it has to be combated.” (*Ibid*).

Palladino spoke to the ECB’s anti-corruption unit as it prepared the aforementioned disciplinary case against Westfield and Danish Kaneria. Palladino gave evidence at that tribunal which, coincidentally, took place two days before his new county, Derbyshire, were due to begin a championship match against Essex.

Another object of scrutiny and speculation was the role played by Westfield’s former employers, Essex CCC. Did they in any way orchestrate a cover up of the entire affair? Certainly during the trial the court was told that Westfield’s team mates and coaches had “turned a blind eye” to the corruption. These words, which featured in the remarks made by Mark Milliken-Smith QC, pleading for a more lenient goal term for Mr. Westfield. These observations plunged the club into crisis as questions were asked as to exactly how seriously they took Kaneria’s behaviour. The finger of censure was also pointed at the club when a senior official at the Professional Cricketers’ Association (PCA), the players’ trade union, claimed that the team, including Westfield, grew up in an “educational vacuum” about match-fixing. It is also a fact that the scandal emerged only when county cricket was exposed to its first sustained anti-corruption drive, an initiative launched after PCA officials witnessed at first hand the education provided to the England players. In fact, the aforementioned Tony Palladino came forward with his allegations after attending a PCA lecture on anti-corruption, a process that is now mandatory for all players (see also below) (*The Daily Telegraph* of 3/4/2012, p. S10).

The Essex officials responded indignantly to all these accusations and innuendo. The club chairman, Nigel Hilliard, made the following statement:

“It is widely reported that the barrister mitigating on behalf of Mervyn Westfield suggested that there was an air of complacency in the Essex changing room. In fact, it was only after the incident came to

light that several players realised conversations considered to be jokes at the time had real meanings. Mention of bookies or bets in the English county game now result in the same reaction as joking about bombs and guns at airport terminal security areas.

The sport is in a better situation now as a result of greater knowledge, new regulations and better education. The game owes a debt to the positive actions taken by the Essex players who came forward. Without them, the corruption that occurred might never have been exposed” (Ibid).

More information about the measures taken by the cricketing authorities in their bid to stamp out corruption can be found below.

Former England wicketkeeper reveals corruption attempts in autobiography

Paul Nixon was a stalwart wicketkeeper/batsman, both for his county club Leicestershire and, occasionally, for England. He has recently published his autobiography which sets out in disquieting detail the attempts which he witnessed at first hand at fixing top fixtures. Thus he related how, in May 2010, at Leicester’s plush Marriott Hotel, two men were sitting at a table in a discreet corner of the bar. One was in his early forties, Indian, suited and confident. The other a veteran English sportsman in a state of shock. “So...what sort of money are you talking about here?” the sportsman enquires. “Name your price” the

businessman replies. “Go on, how much?” “You tell me.” “Well, I don’t know... a million?” This is clearly an absurd suggestion. The Indian laughs. “More.” “More?” “More.” “OK...three million?” Another grin. “More.” “Five million?” Beaming smile. ‘No problem. Absolutely, no problem.’

The meeting ends with a handshake and a promise to meet again in the near future. The sportsman strides to his car with his head in a fuzz and wonders: did that just happen?

It appears that, some years ago Mr. Nixon became involved in a property development in the Bahamas. Port St George is a major project on Long Island, a luxury development that includes a marina, golf course, hotel and hundreds of homes. During his time playing in the breakaway ‘Indian Cricket League’, a common pastime was to look at Indian property websites. He sent a few emails to different companies. One morning in 2009 his inbox contained a message from an old Championship sparring partner. He was involved with one of the Indian property companies Nixon had contacted and urged him to join with his company. This led to a meeting in a London hotel involving him, a friend from the Port St George project, and an Indian man, K. The latter could not have been more enthusiastic about the Bahamas scheme and declared his interest in buying 100 plots. Over a period of months, always in London but in different hotels, K’s interest never faded, and a friendly, working rapport was established (*The Mail on Sunday of 1/7/2012, p. 10*).

It was that October, while driving to London, that the first surprise was

sprung. K called Nixon’s mobile and declared he had an “anniversary gift” to give him and his wife, which turned out to be a set of choice champagne flutes. Then in late May he attended the said gathering at the Marriott. He strolled through the hotel’s glass doors and was greeted by K. They traded pleasantries, sat down with drinks and he briefed me about his business idea. But this was not about property, but about cricket matches in India that were fixed. Dozens of them, he claimed. He explained how Nixon could become rich if he was prepared to help fix a Twenty20 game in England. He made it plain that if Nixon could help things go a certain way in that game, he could make himself very wealthy. All English televised games are beamed back to India, he explained, fuelling an underground betting market worth billions. If Nixon was able to arrange it so that his side lost the first six overs, he would receive a hefty payment. If he could influence the coin toss, all the better. And should he manage to fix the result, he could become stupidly rich. He made it clear Nixon could have access to £5million for himself and his team if he were able to organise a Twenty20 game to the Indian’s wishes.

K went on to observe that Leicestershire’s poor form on television was key to his scheme. Television cameras at Grace Road had become increasingly unwelcome once the team’s early Twenty20 successes had passed. In 2010 the club was not a happy place and the results followed accordingly, especially, it seemed, when Sky was in attendance. So the theory that Leicestershire losing an apparently random game on TV wouldn’t arouse any suspicion was quite sound. Any

tracks could be covered by the team's mediocrity. He had one more request. To do what he wanted Nixon to do, the latter would need the team on board. The openers would have to "lose" the first six overs, and the bowlers would have to send down an allotted amount of rubbish in order to squander the game. It would have to be a group effort (*Ibid*).

When K next called, he mentioned the IPL, claiming that that competition was not as sweet and innocent as it looked. For the next few days Nixon talked things over with his wife and lost sleep wondering whether he had done the right things and talked to the right people. That week he chatted to some of the players and put the dressing room in the picture. All responded with eyebrows raised. He also informed the Professional Cricketers Association, the ICC Anti-Corruption and Security Unit (ACU). Nixon then called K to inform him that the team were not interested in his proposal. An ACU official flew to England from Dubai and met Nixon – where else? – in the Marriott Hotel. He gave the official as full an account as possible of what had happened. Afterwards he never heard from K again – or from the ACU (*Ibid*).

Cricket authorities organise and educate against corruption

Anti-corruption unit strengthened

Whatever may have been their shortcomings in the past, the cricketing authorities are currently showing every sign of appreciating how important it is for the survival of the game thoroughly to organise and educate in their bid to

eliminate these evil and destructive practices. Accordingly, it came as very welcome news that, in the wake of the Westfield/Majeed trial, the England and Wales Cricket Board (ECB) expanded its anti-corruption department. A seven-strong team of officials were to be in attendance at Friends Life T20 and Clydesdale Bank 40 matches for the remainder of the 2012 season. The new ECB anti-corruption team operated for a 10-week period starting on 12/6/2012 and worked under the supervision of Chris Watts, the ECB anti-corruption official. Said ECB Chief Executive David Collier:

"The ECB has been at the forefront of efforts to stamp out corruption in cricket and the creation of a dedicated team of officials to monitor our domestic limited-overs competitions demonstrates our determination to protect the integrity of the sport. They will be a visible presence at matches and will act as a constant reminder to players, officials and club personnel of the need for constant vigilance with regard to this issue as we seek to identify, prevent and eradicate corrupt practices from our domestic game." (*The Daily Telegraph of 31/5/2012, p. S5*).

Spectators ejected from county grounds

That this development was long overdue was clearly shown when the new ACU team found spectators supplying information to bookmakers on the Indian subcontinent at several county grounds at televised one-day matches during the 2012 season. The spectators in question, who were ejected from the ground, were equipped with smartphones or laptops,

and attempted to take advantage of a slight delay in transmission time between England and the subcontinent to pass on match details. Thus a spectator posing as a journalist was removed from the St Lawrence ground at Canterbury during Kent's televised Clydesdale Bank 40 match against Yorkshire. Another spectator was ejected from a match at Derby but reappeared in Northampton for Northamptonshire's match against Yorkshire – another fixture broadcast live – where he was quickly identified by the ACU officer on duty.

There have been similar instances of suspicious behaviour on other county grounds, including one where a spectator was overheard giving a running commentary over his mobile telephone. The ECB spokesman said:

"The ECB has now got a strong team of anti-corruption officials who have been working closely with the first-class counties to identify any suspicious activity relating to illegal gambling at matches in this season's FLT20 and CB40 competitions. As a result of intelligence gathered by the anti-corruption team, club stewards have ejected a small number of spectators from individual county grounds over the second half of the season. There is no evidence that the outcome or course of any match has been influenced by this activity, but the anti-corruption team will continue to be vigilant and work with all 18 first-class counties to protect the integrity of our domestic game" (*The Daily Telegraph of 3/9/2012, p. S13*).

Cricketers' educational tutorial on corruption

The language used is pointed, the warning clear: "There are great similarities between the activities of fixers in corrupt gambling and the activities of paedophiles – in both cases we call it 'grooming'." This is typical of the tone of the PCA tutorial, which is being taken by 300 professional cricketers in England as the main training tool for educating and preventing today's players travelling the same path to jail as former Essex fast bowler Mervyn Westfield. The tutorial commences with an introduction outlining three crimes: fixing, releasing sensitive information and gambling on cricket matches, followed by the punishments ranging from a six-month suspension to a life ban.

A link to the tutorial is emailed to players and is designed to take 30 minutes. It is split into three modules with 12 multiple choice questions in total. There is no pass mark and all players receive a certificate for finishing the course, which is now mandatory. There is particular emphasis on the methods exploited by fixers to gather information via Facebook and Twitter as well as the use of entrapment. "This is your classic 'mafia' type tactic," players are warned. The multiple choice questions are a notch above the difficulty level of daytime television and include different scenarios (*The Daily Telegraph of 3/4/2012, p. S11*).

One example runs as follows: "You are introduced by a long time club member and fan who is well known to you to a guy who might be interested in doing a personal sponsorship deal with you. He comes across as an enthusiastic and knowledgeable fan who believes you're

going to be the next big thing. What is the correct response to his overtures of friendship and support?" There are four possible answers: a) Tell him you're not interested in support or in acquiring new friends; b) Be cautiously welcoming, get his business card and contact details and then check the guy out thoroughly before further contact; c) Start discussing the proposed sponsorship and negotiating the deal; and d) Report the meeting as an approach to your team management. [The correct answer is (b)]. All in all, a very sound initiative which challenges even the most thoughtful of performers (*Ibid*).

ICC launch urgent investigation of spot-fixing claims after TV sting

In mid-October 2012, the International Cricket Council announced that they had started an "urgent investigation" following allegations by an Indian television station that several umpires were willing to fix matches for cash. India TV broadcast footage of a "sting" operation, undertaken by undercover reporters during the previous three months which purportedly exposed six international-level umpires from Sri Lanka, Pakistan and Bangladesh. More particularly the television footage showed Nadeem Ghauri (Pakistan), Nadir Shah (Bangladesh) and Sagara Gallage (Sri Lanka) apparently agreeing to give favourable decisions in exchange for umpiring contracts and money from undercover reporters posing as members of a sports management company. While Ghauri and Shah appeared to agree to give wrong decisions, Gallage was prepared to pass on information about the toss, the

pitch and weather conditions in a match before it became available to the public (*The Standard of 10/10/2012, p. 38*).

Mr. Shah flatly denied the allegations, claiming that they were part of a plot to malign his character. He claimed that he was taken to Dehli by a Bangladeshi agent in order to sign a contract for umpiring in the Sri Lanka Premier League. However, when he saw that these people were corrupt, he changed his decision.

Following this operation, the ICC decided to suspend six umpires (The Standard of 11/10/2012). No further details were available at the time of writing.

Earlier that year, five Indian cricketers were suspended pending inquiries into allegations of spot-fixing by the Indian Premier League. The Board of Control for Cricket in India (BCCI) imposed the suspensions after India TV claimed to have carried out a sting operation similar to the one described above (*The Daily Telegraph of 16/5/2012, p. S11*).

Pakistan Test players scandal - an update

The infamous incident attending the 2010 Lord's Test between England and Pakistan, which resulted in criminal convictions and jail terms for three members of the Pakistan, as well as the agent who arranged the operation, has been adequately documented in earlier editions of this Journal. Ex-Test captain Salman Butt was jailed for two-and-half years for his role as the "orchestrator" of a plot to bowl deliberate no-balls in the 2010 Lord's Test against England. Mohammad Asif, the former world No

2 Test bowler, was sentenced to 12 months.

Mohammad Amir, who had been tipped to become one of the all-time great fast bowlers, was sentenced to six months. Amir and Butt failed in an attempt to have their sentences reduced at the Court of Appeal in November 2011. All three players were also issued with five-year bans from cricket imposed by the International Cricket Council (ICC).

Since then, the following developments have intervened:

- Mohammad Asif was released from jail in early May 2012 after serving half of his 12-month sentence (*Daily Mail of 4/5/2012, p. 90*)
- The same Asif appealed to the Court of Arbitration for Sport against his suspension, having accused the ICC of “prejudice”. It has since been learned that the appeal will be heard in February 2013 (*The Daily Telegraph of 30/10/2012, p. S15*)
- Mazhar Majeed, the South London property developer who facilitated the deal, had his appeal against his jail sentence dismissed in late May 2012 (see above, p. 000).

Modi loses appeal against Cairns libel award

In early November of this year, it was learned that Lalit Modi, the former Chairman of the Indian Premier League, had failed in his appeal against the £90,000 libel award to former New Zealand all-rounder Chris Cairns over an accusation of match fixing. The full

details of the trial were reported in the last issue of this Journal. It will be recalled that Mr. Cairns was awarded damages after the trial judge ruled that Modi had “singularly failed” to provide any reliable evidence that Cairns was involved in match or sport fixing (*The Daily Telegraph of 1/11/2012, p. 83*).

RACING

Kirsty Milczarek wins appeal against two-year corruption ban

In mid-April 2012, it was learned that jockey Kirsty Milczarek was cleared of two corruption charges after evidence supplied by her former boyfriend, Kieren Fallon, cast enough doubt on the original verdict of the British Horseracing Authority disciplinary panel for an appeal board to reverse the decision. It will be recalled from a previous issue of this Journal that the English rider was one of several jockeys, owners and associates issued with bans ranging from six months to 14 years – with Milczarek having been banned for two years. In crucial new material, Mr. Fallon told the hearing in a telephone conference call from Dubai that he had been driving Milczarek, his girlfriend at the time, to meetings in Britain, while he himself was serving a second ban for cocaine abuse.

Fallon’s version of events, involving an explanation of text messages transmitted between him and Ms. Milczarek on their journey to and from the races – it was alleged he was inside a petrol garage when Milczarek texted him from the forecourt – was sufficient to raise doubts over Milczarek’s alleged connection with the leading culprits in

a case which had been described as the biggest corruption case in BHA history. The case focused on 10 races run between January and August 2009, and allegedly netted the conspirators about £280,000.

Ms. Milczarek was naturally delighted at being cleared, particularly since she was henceforth is eligible to resume riding immediately. However, both Maurice Sines and James Crickmore, the two owners found to have masterminded a corruption plot that enabled them to lay horses in which they were involved, had their appeals dismissed and will still be forced to serve long periods of disqualification. This is in spite of the fact that, because of the Milczarek verdict, Sines and Crickmore each had their ban reduced by a year to 13 years – and Nick Gold, an associate, had his penalty reduced to five years (from seven) to match the ban of his father, Peter, as it was considered their conduct “matched” in levels of seriousness.

Paul Scotney, the BHA’s director of Integrity Services, commented:

“The scale and complexity of this case remains unprecedented in the history of the BHA. Consequently ... it was rewarding that the Appeal Board has endorsed the findings of the disciplinary panel regarding the activities of the individuals at the heart of the conspiracy. Indeed, to quote the Appeal Board, they said ‘taken as a whole, the BHA’s case against Maurice Sines and James Crickmore was a strong one’, adding that ‘... this conspiracy, and particularly the conduct of Sines and Crickmore struck at the heart of the integrity of racing. It must be made clear to all those who

contemplate taking part in this sort of conspiracy, in whatever capacity, that they must expect that the penalties for doing so will be severe.’” (The Daily Telegraph of 11/4/2012, p. S18).

It was not known at the time of writing whether Ms. Milczzarek intended to take any legal action over lost earnings.

Racing body defends bans handed to owners who broke betting rules

In mid-July 2012, it was learned that two owners have been banned from the sport by the British Horseracing Authority (BHA) after a two-year investigation led to them being found guilty of breaching the rules on betting-related corruption. However, the decision to exclude the pair for limited periods, Jason Parfitt for two years and John Spence for six months, has inevitably led to questions as to whether the BHA's pledges to clamp down on the misuse of inside information are yet being matched in deed.

Details of the disciplinary hearing were published on 25/7/2012 by the authority, revealing that Messrs. Parfitt and Spence claimed to be friends until falling out as a result of this investigation, Spence using Parfitt to place his bets at the best possible prices in return for a 10 per cent commission on winnings. Telephone records from the pair showed that they had been in contact in the build-up to the two races under investigation on 11/3/ 2010 and 1/5/2010. Parfitt used a Betfair account which had been dormant since 2006 to lay (i.e. back to lose) the Spence-owned Norisan on the first of those two dates,

having texted him once and called him twice the day before the race. Having never previously placed a bet with a liability greater than £297, he then deposited £10,000 into the account and laid Norisan in the place market after a further text and a 45-second phone call. A similar pattern of communication preceded the performance of Soccerjackpot in the second race involved in the case, in which Parfitt risked over £14,000 to win £2,104 by laying the horse, who was eventually pulled up with a broken blood vessel, in the place market. Spence admitted to BHA investigators that, having been in regular contact with Parfitt, who rang him every time Spence had a horse running, it was possible he had disclosed that Soccerjackpot's trainer, Alan Jones, had told him that the horse had bled in training and that he, Jones, was not confident of a good performance (*The Guardian of 26/7/2012, p. 35*).

Parfitt initially denied having contacted Spence either in the build-up to or on the day of Soccerjackpot's race, putting his dramatically increased stakes down to the success of his car sales business. However, the panel decided that he had acted with the benefit of inside information "in absolute confidence that these horses would not be placed". Spence, it concluded, had shown "a careless disregard for the rules and through his actions had provided inside information". Spence was also found guilty of laying another of his own horses, St Savarin, in a separate incident, despite having received two previous warnings. However, the panel took into account that he was a net backer of the horse by the time the race started and he was only given a six-month ban, to run concurrently with

his punishment for providing inside information, also a six-month ban.

Spence has 10 horses in training with Jones, all of whom are now effectively banned from running unless under new ownership. BHA spokesman Robin Mounsey said that any new owners for the horses during the banned period would have to provide written assurances that Spence was no longer involved. Mr. Mounsey also defended the limited extent of the penalties, explaining that the disciplinary panel had used the guidelines from 2010 when the offences took place. Under those directions, the entry-level punishment for committing a corrupt or fraudulent practice was a ban of 18 months, rather than the three years specified in the 2012 guidelines, saying:

"The disciplinary panel have taken several aggravating factors into account and chosen to issue a penalty to Jason Parfitt which is well above the entry-level penalty for a breach of this rule" (Ibid).

It was not known at the time of writing whether Messrs Parfitt and/or Spence intended to appeal against their ban.

OLYMPIC GAMES

Accusations of ticket corruption taints the London Games

In mid-June 2012, the International Olympic Committee (IOC) started an investigation into the sale of London 2012 tickets. In the process, the world governing body decided to suspend the sales process for the Sochi 2014 Winter Games while it investigates allegations that Olympic officials and agents

representing 54 countries offered London 2012 tickets on the black market. In the wake of an investigation in The Sunday Times that sparked an immediate IOC probe, it is understood that the process of approving the list of Authorised Ticket Resellers contracted by the Sochi organising committee has been suspended until after it reports. The investigation is expected to lead to a shake-up of the manner in which Olympic tickets are allocated ahead of the Rio 2016 Olympics.

The London 2012 organising committee chairman, Lord Coe, said the revelations were “deeply depressing”, especially after he had warned the Association of National Olympic Committees of the risks of breaking IOC rules on the resale of tickets at their general assembly in Acapulco in 2010. The Sunday Times, which was expected to hand its dossier of evidence to the IOC in the wake of its investigation, alleged that 27 agents representing 54 countries were prepared to sell thousands of tickets for up to £6,000 each. However, Spyros Capralos, the president of the Hellenic Olympic Committee who was implicated in the illicit sale of tickets to undercover reporters, claimed the allegations were untrue and misleading.

The HOC commented:

“The whole process was totally transparent and in accordance with the laws of the Greek state. Therefore, there can be no issue on creating a ‘black market’ by the HOC which did not buy any tickets, whatsoever. The quotes attributed to (Capralos) are fragmentary and a patchwork of answers, made in a way that served the authors of the article. The journalists of the

Sunday Time, violated all principles of journalistic ethics, pretended to be representatives of a ticket selling company, and had even created a fake webpage.” (The Guardian of 19/6/2012, p. 45).

It said that its entire allocation had been signed over to a company controlled by the Ipswich Town owner, Marcus Evans, so it did not have any tickets to sell. Evans paid €300,000 – 10 times more than the HOC received during the Beijing Games – for the exclusive rights to resell the tickets but it said all the money went towards team preparation. It claimed that the entire sum was exclusively allocated to the preparation of Olympic athletes of top level, at a time when, owing to difficult economic conditions, the state stopped funding the Olympic preparation. They claimed that the conversation with The Sunday Times journalist referred to the Sochi Games.

The former Olympic swimmer Yoav Bruck, authorised to sell tickets in Israel and Cyprus, also denied allegations that he offered undercover reporters the best seats in the house at the 100m final. He described the report as being “swamped with untruths, lies and inventions that cry to the heavens. He added that he and his associated were “clean” and were “not selling anything we are not allowed to” (*Ibid*).

Denis Oswald, the head of the IOC’s co-ordination commission and a member of the executive board that held an emergency meeting in response to the claims, announced that anyone found guilty of breaking IOC rules should be expelled from the Olympic movement. The report was the latest in a string of similar allegations. In May, a

top Ukrainian Olympic official resigned following allegations that he offered to sell tickets for the London Games on the black market. Volodymyr Gerashchenko, secretary general of Ukraine’s national Olympic committee, was accused by the BBC of telling an undercover reporter posing as an unauthorised dealer that he was willing to sell up to 100 tickets for cash (*Ibid*).

The following month, Scotland Yard launched an investigation into the affair. Detectives from Operation Podium, established in order to tackle Games-related crime, started the inquiry after studying more than 20 hours of recording provided by the newspaper in question. They intended to question the official ticket agents representing the national Olympic committees (NOCs) of China, Serbia and Lithuania for this purpose (*The Sunday Times of 29/1/2012, p. 1*). Although they were expected to make several arrests during the Games, this did not apparently happen.

SNOOKER

Leading players suspended following suspicious betting patterns

In mid-October 2012, Stephen Lee, the world No. 7, was suspended from the World Tour following reports of suspicious betting patterns prior to his match against John Higgins, which the latter won 4-2 (*The Times of 13/10/2012, p. 21*). His suspension led to the cancellation of the PartyPoker.com Premier League Snooker fixture in Penzance. It came only a week after the player had been

told that he would not face criminal charges over match-fixing allegations dating back to 2010 (*The Daily Telegraph* of 16/10/2012, p. S17). He appealed against this suspension – even enlisting the services of Robert Engelhardt QC for this purpose – but the World Professional Billiards and Snooker Association (WPBSA) dismissed the appeal (*The Independent* of 25/10.2012, p. 71).

The outcome of this affair was unknown at the time of writing.

Joe Jogia issued with two-year ban

Earlier that year, Joe Jogia, the world no. 47, was told that he could incur a life ban from the sport after being charged by the WPBSA with a breach of the rules. He had been the subject-matter of an investigation into his scheduled Sky Shootout match with Matt Selt in January 2012. Betting was suspended after large amounts were wagered on Mr. Jogia to lose to Mr. Selt, but Jogia withdrew, alleging that he was suffering a serious knee injury that would severely handicap him in the “quickfire” format of the competition. He was suspended pending the outcome of the hearing.

In the event, he was banned from snooker for two years and fined £2,000 for breaking the betting rules. The World Professional Billiards and Snooker’s disciplinary committee was chaired by Tim Ollerenshaw, a solicitor and sports law specialist (*The Times* of 26/7/2012).

BADMINTON

Badminton match-fixing eight expelled from London Olympics

The London Olympics have attracted widespread acclaim for the efficiency of the organisation, the amicable nature of the atmosphere and the excellence of the performances on display. Yet there were some unseemly aspects as well, and none more so than the “badminton farce” which took place during the early stages of the tournament. Two Korean women’s pairs, the Chinese top seeds and an Indonesian pair were booed off the courts at Wembley Arena as they deliberately attempted to lose matches so that they could avoid facing stronger teams in the next round. Twelve hours later, badminton’s governing body disqualified all eight following a lengthy disciplinary meeting (*The Independent* of 2/8/2012, p. 6).

The Badminton World Federation (BWF) faced sharp criticism itself after it introduced a new “round robin”, or group stage, format for the Olympics and then appeared paralysed by indecision when a referee disqualified participants in one of the matches, only to revoke the decision subsequently (*Ibid*). ■ BASL

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Football matches – policing – Special police services

LEEDS UNITED FOOTBALL CLUB LTD v CHIEF CONSTABLE OF WEST YORKSHIRE

High Court (Queen's Bench Division) Eady, J.,
24 July 2012

Facts

The claimant football club (L) brought proceedings against the defendant chief constable challenging the lawfulness of charges made for the provision of “special police services” under the Police Act 1996 Pt I s.25 on match days. The issue was whether the police were entitled to recoup from L the costs of policing and crowd control carried out in the immediate environs of the club premises or whether they were confined to recovering the costs of special police services provided on land which was owned, leased or directly controlled by the club. The immediate environs had been described as a “footprint”. In the instant case, no part of the footprint extended beyond a distance of 200m from the club premises. It embraced parts of the public highway, some parking areas, including a car park where until recently coaches would disgorge visiting fans, and the surrounding area where L's fans would lie in wait for them.

Held (judgment for claimant)

The police were not entitled to recoup from L the costs of policing and crowd control carried out in the footprint. Such costs fell within the normal constabulary duty to keep the peace. In *Reading Festival Ltd v West Yorkshire Police Authority* [2006] EWCA Civ 524, [2006] 1 W.L.R. 2005, Scott Baker L.J. had said that “special police services” would ordinarily require the presence of one of two key features: either the services would have been asked for but would be beyond what the police considered necessary to meet their public-duty obligations or they would be services which, if the police did not provide them, the asker would have to provide from his own or other resources. Neither of those two features was present in this case. L never requested

services which went beyond those thought by the police to be necessary, nor were the policing requirements outside the stadium, but within the footprint, such as L would have had to provide out of its own resources, *Reading Festival* applied. Further, s.25 of the 1996 Act plainly contemplated that special police services “may” be provided. There was an element of discretion as to whether the relevant police authority complied with a request. On the other hand, where attendance by officers was necessary to keep the peace or to prevent violence, a common law duty arose which had to be complied with. It did not depend on a request, *Glasbrook Bros Ltd v Glamorgan CC* [1925] A.C. 270 considered. The only discretion in such circumstances was as to how the chief constable deployed the available resources in the discharge of that duty. In seeking to charge L for the costs in question, the police had relied on the decision in *Chief Constable of Greater Manchester v Wigan Athletic AFC Ltd* [2007] EWHC 3095 (Ch), [2007] Po. L.R. 246. However, nothing said by Mann J. in that case lent support to the general proposition that a police authority could recover the cost of policing in respect of some conveniently designated footprint area which was not owned, leased or controlled by the relevant club. The important distinction was that he was confining his observations to special police services provided on land which had been leased by the club; it was thus implicit in his judgment that the cost would not have been recoverable if the services had been rendered on land in public ownership, *Wigan Athletic distinguished* and *Harris v Sheffield United Football Club Ltd* [1988] Q.B. 77 considered (see paras 26, 30, 34, 36, 40, 43 of judgment).

Commentary

The ruling is clear that the costs of policing in public areas, which falls within the traditional duty of police constables to keep the peace, would be met by public funds. The police could not justifiably charge for these as ‘special police services’.

It has been established by *Harris v Sheffield United Football Club Ltd* and *Chief Constable of Greater Manchester v Wigan Athletic AFC Ltd* that the police usually charged football clubs for the costs of policing and crowd control

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(special police services) carried out on the club's property. In the Wigan case, the Court of Appeal held that the special policing services at issue outside the ground were not "requested" by the club within the meaning of the 1996 Police Act and the police were therefore not entitled to recover the cost.

However it appears that a number of police authorities have broadened the basis of charging for match day policing services to include policing undertaken in immediate environs "surrounding football clubs' stadiums and not owned, leased or directly controlled by the clubs. This has been described as a "footprint".

In this case West Yorkshire Police has therefore been ordered to repay charges, which reportedly are around £1 million. This case has not only implications for policing of football and other sports grounds but other similar public events such as music concerts and festivals.

Reporter (SG)

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(2012) SLJR 2

Administration – Anti-deprivation principle – Articles of association; Corporate insolvency – Creditor – Football – Football clubs – Liquidation – Pari passu

REVENUE AND CUSTOMS COMMISSIONERS v FOOTBALL LEAGUE LTD

High Court, Chancery Division, David Richards, J., 25 May 2012 [2012] EWHC 1372 (Ch).

Facts

The claimant commissioners brought Part 8 proceedings seeking declarations that the so called "football creditor rule" operated by the defendant Football League (F) was void and unenforceable. F was a company limited by shares. The issued shares were held by the football clubs which played in the football league, each club holding one share. F's articles of association required a member club to give a transfer notice in respect of its share on the happening of an insolvency event. F's board had to the power to suspend the operation of a transfer notice on such conditions as it decided and to withdraw the notice if football creditors were paid in full. The "football creditors" were defined as various classes of

creditors such as other clubs in the league, the club's players, managers and other employees and F itself. By virtue of art.77 of F's articles, a member club had no right to the payment of any sum derived from television and other commercial contracts made by F unless and until it had completed all its fixture obligations for the relevant season, and payments made during the season were conditional payments on account. Article 80.2 required F to apply sums which would otherwise be payable to a defaulting club in discharging the football creditors. F had adopted an insolvency policy to provide guidance on the manner in which F's board would exercise its powers in the event of the insolvency of a club. The starting point was that no club should gain or seek to gain an advantage over other clubs by not paying all its creditors in full at all times. In practice the board suspended the transfer notice in respect of an insolvent club, typically in administration, pending a takeover or refinancing provided that, as part of the transaction, the football creditors were paid or provided for in full. The commissioners submitted that the terms of F's articles of association and its insolvency policy were an unlawful attempt to contract out of the provisions of the Insolvency Act 1986 requiring *pari passu* distribution of the assets of an insolvent company to the unsecured creditors, and also in breach of the anti-deprivation principle since, on insolvency, the member club was deprived of its share in F and of its right to payments from F, which were redirected to football creditors.

Held (Declarations refused)

(1) The *pari passu* principle only applied where the purpose of the insolvency procedure was to effect a distribution. In the case of administration, that was when the administrator gave notice of a proposed distribution. In a typical case, the provisions relevant to football creditors would have taken effect at an earlier stage (see paras 84-90 of judgment). (2) The purpose of the anti-deprivation rule was to prevent insolvency proceedings from being undermined by dispositions of assets designed to avoid the effects of the proceedings. Administration was as much a proceeding for the benefit of creditors as liquidation and would be equally hampered or frustrated by dispositions designed to avoid the administration process. The anti-deprivation rule applied when a company went into administration as it did when a company went into liquidation, *Belmont Park Investments Pty Ltd v BNY Corporate Trustee Services Ltd* [2011] UKSC 38, [2012] 1 A.C. 383 and *Lomas v JFB Firth Rixson Inc*

[2012] EWCA Civ 419, [2012] 2 All E.R. (Comm) 1076 considered (paras 96-100). (3) Unless art.77 was a sham, which was not suggested, it made the legal entitlement to payments conditional. The court could not disregard the legal rights and obligations created by the articles, even if they had been drafted to achieve a particular end, Belmont applied. If a member club had no legal entitlement to payments from F until it had completed the season, it was not deprived of an asset if, as a result of going into administration or liquidation, it could not complete the season. Likewise, there was no asset of the club to which the *pari passu* principle could be applied (paras 125-137). (4) Article 80.2 applied during the season, so that where there was a default in the payment of debts due to football creditors during the season, F was obliged to pay such debts out of the amount which would otherwise become due to the defaulting club at the end of the season, so far as not previously paid to the club on account. The result was that the only sum which became payable to a defaulting club which completed the season was the balance, if any, after F had paid football creditors during the season. The defaulting club was not deprived of an asset, because there was no debt due to it beyond the amount of the balance, if any. That was the result whether or not the club went into liquidation or administration during the season. The anti-deprivation rule only applied on administration or liquidation and not if the trigger for art.80.2 was default in paying a football creditor, Belmont applied (paras 145-154). (5) F's power to require the transfer of a member's share, if it went into administration or liquidation, was not void by reason of the anti-deprivation rule. The provisions of F's articles and insolvency policy, giving it power to permit an insolvent club to participate in its competitions on terms that other member clubs and other specified creditors were paid in full, were no more than the exercise by the member clubs through F of their right to refuse to participate further with the insolvent club save on those terms (paras 161-176).

Commentary

The Court declined to make the declarations sought by HMRC and concluded by saying "The FL should not regard the result of this case as an endorsement of its approach to football creditors. It is, as I said at the start, a decision on a challenge brought on a particular legal basis."

There has significant criticism of the football creditor rule. In his wider commentary, Mr Justice Richards was alert to this

and emphasized that "These proceedings are not concerned with whether giving priority to football creditors is socially or morally justified. The issue is one purely of law, whether the provisions which together accord this priority are void and of no effect on the grounds that they are contrary to insolvency law."

This decision has maintained the status quo. The potential problem with the football creditor rule is that football creditors' are paid in priority to other unsecured creditors. This is of course potentially subject to the anti-deprivation rules and this is increasingly becoming an issue in closed systems, where it appears that the rules of the system in question prefer those on the inside to the general body of unsecured creditors. There has been consideration of this before by the House of Lords as far as administration provisions that are determined as having offended the anti-deprivation principle (*British Eagle v Air France* [1975] 1 WLR 758). A key issue is that when drafting such provisions, the commercial rationale needs to be carefully explored to ensure that the intention of the parties is established rather than creating a sham.

This decision has attracted negative publicity. At a time of some general concern about tax avoidance schemes, it can be speculated that there may be some consideration around prohibiting these types of systems through future legislative intervention.

Reporter (SG)

(2012) SLJR 3

Implied agreements – Regulations – Rugby – Rules – Sports governing bodies

PARK PROMOTION LTD (T/A PONTYPOOL RUGBY FOOTBALL CLUB) v WELSH RUGBY UNION LTD

High Court – Queen's Bench Division 11 July 2012 Sir Raymond Jack [2012] EWHC 1919 (QB)

Facts

The claimant rugby club (C) claimed that the defendant rugby union (D) had breached its contract with C by refusing to allow C to play in the premier division. D had set new standards for membership of its premier division for an upcoming season. Membership was to be limited to teams

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that had obtained an A Licence, had signed a participation agreement, and were among the top ten teams in the union by merit. Obtaining an A Licence entailed certain requirements that included having covered hard-standing for 1000 spectators. The union rules stated that this requirement would be verified by an independent inspection. C applied for and was granted an A Licence and signed a participation agreement, but was excluded from the premier division on the basis of merit. However, certain other clubs, which were higher ranked in terms of merit, were admitted to the premier division despite their hard-standing not having been verified by an independent inspection. C argued that the rules constituted a contract between C and D under the Companies Act 2006 s.33(1) because a provision of D's articles of association stated that "each member shall ... conform with the provisions of those articles and regulations and resolutions of the Board of Directors", and the rules were "regulations" created by the board of directors, and that the rules required D to exclude certain other clubs from the premier division on the ground of failure to comply with the A Licence hard-standing requirements, leaving a place for C.

Held (claim dismissed).

The word "regulations" in D's articles of association referred to the regulations in the Companies (Tables A to F) Regulations 1985 Sch.1 Pt TABLEA, which had been incorporated as the regulations of the company. Also, the provision at issue laid the obligation to conform on the members, not on the company. The rules were not in the form of an agreement, but a promise could be inferred from the rules that, if C met the three matters required for admission into the premier division, D had to admit it. The parties had intended to give that promise legal effect, *Modahl v British Athletic Federation Ltd (No.2)* [2001] EWCA Civ 1447, [2002] 1 W.L.R. 1192 considered. It was a term of that agreement that D would assess clubs for an A Licence in accordance with the standards set out in the rules. D could not take into account matters not set out as a reason for refusing a licence. However, as a straightforward matter of contract law it could waive a requirement in the rules, such as a requirement for inspection, and grant a licence. Therefore, it was not a term of the agreement between C and D that D would assess the other clubs strictly in accordance with the rules and there had been no breach by D in not appointing an independent inspector to inspect club facilities. It was necessary to imply a term that there should be fairness between clubs when waiving requirements, but it was important that D's discretion to deal with a situation should

not be usurped by the court, *Bradley v Jockey Club* [2005] EWCA Civ 1056, Times, July 14, 2005 considered (see paras 38, 42, 44-45, 51 of transcript).

Commentary

The ruling is that the Welsh Rugby Union had not breached its rules for selection of teams to play in the premier division. There was no requirement in its agreement with individual clubs that it would assess the other clubs strictly in accordance with the rules; it could waive any requirement for an independent inspection of a club's facilities.

The message is clear that the promotion and relegation of a club should be determined by its performance on the pitch wherever possible; and the rules governing the game and its organisation should be respected and applied by everyone. Nonetheless, the clarity of the governing rules of the sport should be clear and 'comprehensive'. Rules will be comprehensive if they: sufficiently cover the situations that may arise and how they are to be dealt with; and strike a balance between overly technical drafting (seeking to address every possibility in a legalistic manner will only invite 'unwelcome legalistic dissection'), and rules that are insufficient and unclear.

There is an unequivocal message for sports administrators that practices, procedures and rules need to be reviewed to ensure that they do not restrict competition, are sufficiently comprehensive and clear, and are applied fairly, objectively and without discrimination.

Reporter (SG)

(2012) SLJR 4

Criminal law - Corruption - Transactions with agents - Professional cricketers - Prevention of Corruption Act 1906, s 1(1). - Cheating at gambling - Doing anything for the purpose of enabling or assisting another person to cheat at gambling - Scope of offence - Gambling Act 2005, s 42.

R. v MAJEED R. v WESTFIELD

Court of Appeal, Criminal Division, Lord Judge CJ, Openshaw and Irwin JJ, [2012] 24, 31 MAY 2012 EWCA Crim 1186

Facts

M, who was resident in the United Kingdom, was the agent for certain Pakistani professional cricketers. The cricketers' contracts with their employer, the Pakistan Cricket Board, prohibited them from accepting any form of bribe to influence or seek to influence the result of, and the progress or conduct of any aspect of, any test match. In August 2010 M arranged with certain of the cricketers in return for payment to bowl 'no balls' at specified times during the course of a test match between England and Pakistan played in England. W was a cricketer contracted to a county cricket club in England. In breach of his contract he was offered and accepted payment in return for agreeing to concede at least a specified number of runs at a specified point in a county cricket match. M was charged (i) with conspiracy to give corrupt payments, contrary to s 1(1)a of the Criminal Law Act 1977, invoking s 1b of the Prevention of Corruption Act 1906, which provided that if 'any agent corruptly accepts or obtains, or agrees to accept or attempts to obtain, from any person, for himself or for any other person, any gift or consideration as an inducement or reward for doing or forbearing to do, or for having ... done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business ... he shall be guilty', where 'agent' included any person employed by or acting for another, and 'principal' included an employer and (ii) with conspiracy to cheat, contrary to s 1(1) of the 1977 Act. The conspiracy to cheat involved a conspiracy to cheat at gambling, contrary to s 42c of the Gambling Act 2005, which provided that a person committed an offence if he cheated at gambling or did anything for the purpose of enabling or assisting another person to cheat at gambling. W was charged with accepting or obtaining corrupt payments contrary to s 1(1) of the 1906 Act. Following rulings by the trial judges relating to the ambit of the alleged offences, M and W pleaded guilty. They appealed against conviction, contending (i) that an essential element in the Crown's case in relation to s 1 of the 1906 Act could not be proved as the bribes had not been intended to and had not influenced the cricketers' employers (the Pakistan Cricket Board and the Essex County Cricket Club); and (ii) that as it had been agreed at trial and accepted for the purposes of the appeals that any gambling which had occurred as a result of the 'spot fixing' had taken place outside the domestic jurisdiction and as the s 42 offence was directed to cheating at gambling which would otherwise be lawful and occurred

within the jurisdiction, there had been no jurisdiction to try M for the s 42 offence.

Held

(1) The complete offence under s 1 of the 1906 Act included no requirement of action or inaction by the employer consequent on the agreement by the employee to accept the bribe. Although the way in which the players had performed was personal to them and far removed from the wishes of their employers, the contractual arrangements made it clear that the employers regarded the conduct of the players on the field as integral to the employers' affairs and business. The players' activities had been damaging to their employers' affairs; the employers had been victims of the corrupt activities. There could, in the language of the section, be no clearer indication that the actions of the conspirators, including the defendants, had arisen in relation to the respective employers' affairs or business; *Commissioner of the Independent Commission Against Corruption v Ch'ng Poh* [1997] 3 LRC 258 explained.

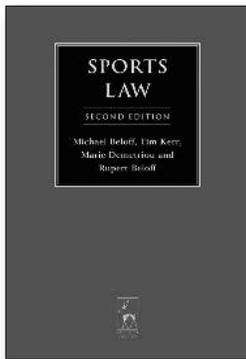
(2) The offence under s 42 of the 2005 Act was committed at the moment when 'anything' was done 'for the purpose of enabling or assisting' anyone else to cheat at gambling. In the instant cases the offence was complete before any bet had been placed. The prohibited criminal conduct had occurred within the jurisdiction; the corrupt and dishonest 'fix' had been organised in England, the matches which were the target of the 'fixing' took place in England and the rewards for participating had been paid in England. Accordingly, the appeals would be dismissed.

Commentary

This is a significant decision for sports administrators as far as charge against M based on s 42 of the Gambling Act 2005 as this is a section that has been little used in a sports context since it came into force and only in prosecutions involving professional poker. Additionally, although the Bribery Act 2010 has now replaced the Prevention of Corruption Act 1906, this case will inform events that occurred before the new act which may be prosecuted under the old law.

Reporter (SG) ■ **BASL**

Book review



SPORTS LAW by Michael Beloff, Tim Kerr, Marie Demetriou and Rupert Beloff.

(Hart Publishing, 2012, 2nd Edition, 346pp).
£95.00 hardback

This eagerly awaited new edition of Sports Law was published towards the end of October 2012. Michael Beloff and his fellow authors

recognise that this area of law has developed considerably since 1999 when the first edition was published. Their function is to continue to provide a “theoretical foundation for sports law”. However, they decided to include subject matter which reflects their legal background as “advisers, litigators and arbitrators in contentious disputes”. Importantly it was not their wish that this new edition is to serve as a mere reference text for sports administrators.

The first chapter of this work provides a general view of the nature and development of sports law coupled with, in deference to 2012, the influences of the Olympic movement. This opening chapter also discusses the general aims of the book.

An overview as to the ways in which law impacts on sport is provided in chapter two. Here there is particular reference to the sources of the various rights and obligations of participants in sport. Additionally the role of governance in relation to the various types of sporting organisations and governing bodies is discussed. The authors also provide a brief introduction to the application of EU Law to sport which is further developed in later chapters. Importantly the issue of child protection in sport, which has become a key issue in the last decade, is briefly covered; aided by reference to specific texts on this subject. In fact the authors are helpful to readers through providing information on specialised areas of sports law via skilful use of footnoting.

Chapter three relates to access to sporting competitions. Detailed comment is made on the duty of fairness regarding the procedural actions of sporting bodies. The relevance of decided cases in highlighting the ways in which these bodies control entry into various competitions is stressed by the authors. The role of contract on those who assert a right to participate and the problems associated with restraint of trade is well covered in this chapter. In addition the text includes useful references to the relevance of Articles 101 and 102 (TFEU), combined with discussion of the Meca-Medina litigation.

‘Players Rights’ form the content of the fourth chapter. The opening section includes analysis of the *Bosman* case. Allied to this, the effects on player transfer rules emphasised by the freedom of movement provisions of Article 45 (TFEU) is skilfully added to consideration of Advocate General Lenz’ comments on the relevance of competition rules within transfer situations.

The later sections within this chapter include further discussion on restraint of trade, combined with exposition of contractual issues concerning minors, salary caps and discrimination in the sporting world. The chapter closes with a comprehensive coverage of child protection which builds upon the subject’s introduction in chapter two.

The aim of the authors in chapter five is to provide an examination of the rights and obligations arising from sporting rules formed by the organisers of sporting competitions. The nature and categorisation of such rules and their development in line with natural law are used as a basis of regulating play. At the outset there is a brief but valuable consideration of some of the major statutes which directly affect sport, ie those relating to safety and other public order issues. Particular reference is made to those statutes associated with football and once again clever footnoting provides the reader with additional knowledge of these issues.

The main thrust of this chapter covers the relevance of the Law of Tort together with Criminal Law as they are identified

The authors recognise that this area of law has developed considerably since 1999 when the first edition was published. Their function is to continue to provide a “theoretical foundation for sports law”.

in a sporting context. Regarding the impact of Tort we are taken through sporting negligence and the concept of a ‘duty of care’ as it affects participants in sport: these include players, coaches, referees and general organisers of sport. Here we are conducted through an up-to-date interpretation of the major sporting case law, the defence of consent and the important area of ‘sports culture’ and its relevance to the understanding of various judgments. The chapter concludes with coverage of the leading case of *R v Barnes* and its impact of the principles of criminal law regarding violence on the field of play. The defence of consent is also discussed in relation to the factors mentioned in *Barnes* as to its application to sports violence. Again good use of referencing helps the reader to appreciate the finer points of this aspect of criminal law.

Chapter six concerns the general marketing of sport to the public and the authors look again at the impact of competition law with reference to Articles 101 and 102 (TFEU) in the light of their previous comments in earlier chapters. The area of broadcasting in sport is discussed in the second half of the chapter and is combined with brief discussions on ticketing arrangements, merchandising and sponsorship agreements. The recent *Murphy* case is integrated into the general issues of this wide area and once again the authors, helpfully, refer to major specialised texts as part of their analysis.

Disciplinary proceedings in sport provide a major contribution to the success of this book and are exclusively covered in chapter seven, drawing on earlier comments regarding the reluctance of the courts to be too involved in sporting disputes. The authors’ considerable experience in procedural matters comes very much to the fore in this chapter. They cover a wide range of case law relating to various forms of indiscipline by sporting participants including drugs and doping, match fixing and other fraudulent matters. Views on procedural fairness and natural justice are widely expressed. A useful checklist on these matters is provided which practitioners will find enlightening. The chapter closes with a valuable discussion on proceedings before the Court of Arbitration for Sport (CAS), which is enhanced by the use of up-to-date case law.

The eighth and final chapter looks at the remedies available for disputing parties in sport. The non-availability of judicial review is well covered with reference to the public versus private law divide which faces challenges to decisions made by sports governing bodies. The commentary on declarations and injunctions is particularly valuable and is built upon the extensive case law in this area. The chapter concludes with coverage of mediation and arbitration and their place in sporting disputes with added emphasis on the relevance of the CAS. Finally, the authors give their views on the future of alternative dispute resolution in sport.

In conclusion it is suggested that the aims and ultimate goals of updating Sports Law have been achieved. One regards this new edition as essential reading for all those interested in sports law, regardless of capacity. The main aspect of this book is that it is a collective work rather than a series of separate views on given topics. It is suggested that this collectiveness gives the text authority and credibility. With this in mind this book provides a valuable contribution to the literature concerning this important legal territory. **BASL**

**David Dovey LLM, Associate Lecturer in Sports Law,
 Buckinghamshire New University**

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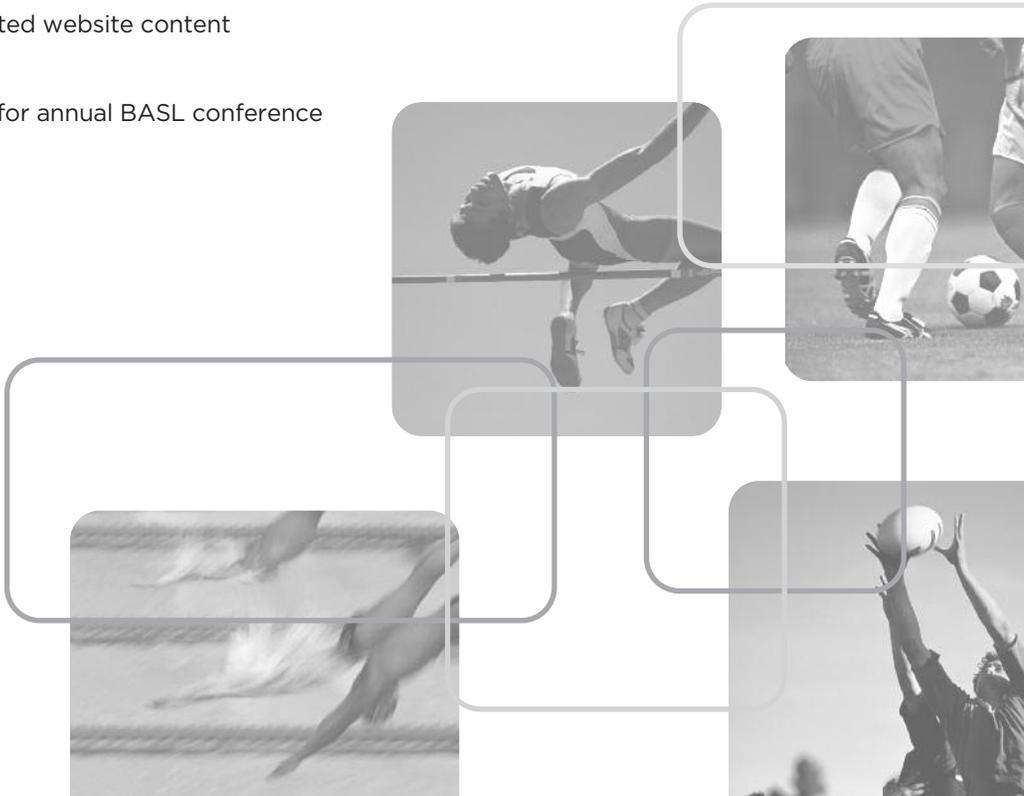
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