IN THE MATTER OF AN FA RULE K ARBITRATION

BETWEEN:

(1) LEEDS UNITED 2007 LIMITED

(2) THE ROTHERHAM UNITED FOOTBALL CLUB LIMITED

(acting by its administrator)

Claimants

-And –

THE FOOTBALL LEAGUE LIMITED

Respondents

THE AWARD

INTRODUCTION

1. This is an Arbitration pursuant to Regulation K of The Rules of The Football Association Ltd.

2. The Parties are:

   Leeds United 2007 Limited – 'Claimant'

   The Football League Limited – 'Respondents'.

   The Rotherham United Football Club Limited is seeking to join in the Arbitration as a Claimant.

3. The Claimant seeks a Declaration that the imposition of 15 points deduction for the 2007-8 season in League One (L1) was unlawful, void and of no effect.

BACKGROUND

4. On 4 May 2007, the day before the last weekend of the League football season 2006/7, Leeds United (the Club) went into administration and KPMG LLP were appointed Administrators. On the same day KPMG hived down the assets of the Club to Leeds 2007

and agreed to sell the entire issued share capital of Leeds 2007 ('Leeds OldCo') to a new company, Leeds United Football Club Limited ('Leeds NewCo').

5. When a Club goes into administration the Football League's Articles, Regulations and Insolvency Policy are engaged. The Insolvency Policy enables the Football League to establish a degree of control over the situation. The Policy's primary purpose is to protect the integrity of its competition and the image of the League by pursuing three basic objectives:

    (1) Survival of the club in membership of the League, where possible;

    (2) Satisfaction of the Football Creditors, by preventing the Club defaulting on their contractual obligations to their players even in insolvency;

    (3) Protecting the interests of other creditors, giving them the opportunity to determine their own financial settlement, by requiring the approval of creditors to a formal CVA or Scheme of Arrangement, save in the most exceptional circumstances.

    Thus the protection of unsecured creditors by the requirement of a CVA is very important to the public perception and credibility of the League.

6. The Administrators proposed a Company Voluntary Agreement ('CVA'). At the Creditors meeting held on 1 June 2007 Her Majesty's Revenue and Customs (HMRC) an unsecured creditor and the League (the Respondent) voted against the CVA. However, the meeting approved the CVA by the required majority.

7. On 3 July 2007 (the last day for the commencement of such proceedings) HMRC commenced proceedings in the Leeds District Registry of the High Court of Justice challenging the approval of the CVA. The challenge was based on the decision of the Chairman of the creditor's meeting as to the voting rights of three creditors, Astor Investment Holdings Ltd, Mark Taylor and Co. and Yorkshire Radio Ltd ('the Claims').

8. Directions were given for the determination of the proceedings. The substantive hearing was fixed for hearing on 3 September 2007 for five days. The Administrators decided to bring the CVA to an end on 6 July 2007 notwithstanding the approval of the creditors for the following reasons:

"[The listing of the trial] was three weeks after the 2007/2008 football season commences and our expectation was that the judgment might not be handed down until late September / early October 2007 and could be subject to appeal.

The challenge by HMRC meant the Club could not complete the existing CVA given the constraints of time and funding. In essence, the Administrators were not confident that sufficient funding could be generated from the sale of players to trade the Club through to a conclusion of the Court process. Therefore the Administrators concluded that embarking on such a process which would put realisations available for creditors at risk, was not appropriate."

9. The Administrators also indicated that it would not be appropriate to propose another CVA – for reasons which are not relevant to these proceedings. On the same day (Friday) the Administrators re-offered the business of Leeds OldCo for sale on an unconditional basis with a deadline for offers and proof of funding by 5p.m. on 9 July 2007 (Monday). The reasons given for the short timescale included that a substantial offer for the business from one potential purchaser (the 'Bates Consortium' led by Mr Ken Bates) was due to expire by 5p.m. on 9 July 2007, and that the majority of the Leeds players had not been paid since June 2007.

10. The Administrators received a number of enquiries from potential purchasers. Four offers were received. The respective potential dividend that each offer would make available to the creditors were: Leeds United Football Club Ltd (the Claimants, i.e. the 'Bates Consortium') increased that offer to 52.9p (in the £); Offer 'B' 26.7p; Offer 'C' 32.3p; Offer D 15.0p.

11. KPMG in a letter stated:

"in the absence of any certainty as to whether the League would agree to the transfer of the football share <u>without a CVA</u>, the Administrators accepted the offer for the sale on an <u>unconditional basis</u> to [Leeds NewCo] of the issued share capital of [Leeds OldCo]. (Emphasis added)

12. Thus, on 11 July 2007 the contract entered into on 4 May 2007 was varied to provide for the sale to Leeds NewCo of the issued capital of Leeds OldCo on an unconditional basis.

13. The Football League was faced with a novel situation: how to protect the interests of the unsecured creditors in the absence of a CVA? The completion of a CVA is not an absolute requirement of the Football League. The Board retained the discretion to waive

the requirement in exceptional circumstances and to fashion a situation to preserve the integrity of the competition, to protect Football Creditors, without letting down unsecured creditors. In doing so it had to be astute not to set a precedent that put the principle underlying the Insolvency Policy at risk.

14. Normally Regulation 11 requires that a new Member (i.e. Leeds NewCo) should start the following season in a lower League (here L2). Leeds NewCo wanted to avoid this 'relegation' and to ensure Leeds stayed in L1 it was prepared to pay a price to achieve this. The Football League was receptive to the idea and indicated that it might be prepared to exercise its discretion to permit this to happen.

15. On 27 July 2007, at an extraordinary meeting of the Board of the Football League it was decided that:

    (i) Efforts should continue to achieve a CVA or equivalent to satisfy the requirements of the Football League's Insolvency Policy; BUT

    (ii) If notwithstanding those efforts, the Board should conclude that a CVA was not a feasible option, the Board would exercise its discretion to agree to a transfer of the 'League Share' to Leeds NewCo, so that Leeds NewCo could start the 2007-8 season in League 1, on various terms and conditions to be accepted by Leeds NewCo, including the Condition that Leeds NewCo would be deducted 15 points from the commencement of the next season.

16. On 31 July 2007 a meeting was held between representatives of the League, Leeds NewCo (Mr Shaun Harvey, Chief Executive and Mr Mark Taylor) and the Administrators of Leeds OldCo to explain the Board's decision, including the proposed 15 point deduction. Mr Mark Taylor, a Director of the Claimant, enquired whether Leeds NewCo could make written representations to the Football League about the level of points deduction and this was agreed to.

17. Mr Nicholas Craig, the League's in-house Solicitor, later spoke to Mr Shaun Harvey and specifically mentioned that in the absence of a CVA or other method of demonstrating the agreement of secured creditors, the League would be imposing a deduction of 15 points as a condition of the transfer of the League Share to NewCo.

18. Mr Ken Bates telephoned Lord Mawhinney expressing his surprise and concern about the idea of points deduction 'in blunt and direct terms'. Lord Mawhinney's response was

that the waiver of the CVA requirement was exceptional and 'therefore might come with strings attached'.

19. On 2 August 2007 the Administrators informed the Club that there was no prospect of the CVA proceeding and that they intended to abort the CVA and resign their positions. Mr Taylor wrote to the Football League but did not mention the points deduction nor make any representations as to why it should be varied or waived. Mr Bates rang Lord Mawhinney. We accept Lord Mawhinney's account that Mr Bates asked that if the 15 point deduction was imposed he could appeal against it. Lord Mawhinney suggested that he would be prepared to recommend that to the Board but the appeal should be to the member clubs because it was the member clubs that the Board was supposed to be representing. Mr Bates agreed to this suggestion and Lord Mawhinney agreed to put his proposal to the Board which he did on the following day.

20. On 3 August 2007 a Board meeting was held when the 15 point deduction was confirmed and an appeal to the League was agreed to. Later that day Mr Taylor wrote to the Football League objecting to the points deduction on the basis that it was outside the powers of the Board or was an improper exercise of its discretion. However Mr Bates by telephone informed the Football League that this letter had been sent without his authority and that it should be withdrawn. Mr Taylor wrote a second letter acknowledging the receipt of the proposed Agreement (which included Clause 4) asking that his earlier letter should be disregarded and confirming that:

> "the conditions set out in your letter are acceptable to [the Claimants] save that the Company will appeal against the 15 point deduction ... with a view to the penalty being either withdrawn or reduced."

He told us that he wrote the second letter because it did not accurately reflect what had been agreed.

21. Later that day Mr Taylor signed the Agreement on behalf of the Claimants. What did he put his signature to?

THE COMPROMISE AGREEMENT

22. This was a carefully drafted and formal legal document (a copy is attached). The Recitals set the scene and describe the scope of the Agreement. Recitals 'E' and 'F' refer to the

Board's discretion. Recital 'G' records that the Board had agreed to facilitate a transfer under 'Option Three' (as distinct from 'Option Two', a L2 start under Regulation II),' subject to the terms of this agreement, including the conditions (emphasis added).

23. Under the heading 'Acknowledgement and Agreement' Clauses 1.1.1 and 1.1.2 Leeds NewCo recognised that the requirement of a CVA was "a reasonable and proportionate requirement of the Insolvency Policy having regard to the public perception of the League, the credit worthiness if the member clubs, the credibility of the League and the integrity of the League's competition and that no approval of the unsecured creditors had been secured." In Clauses 1.1.3, 1.1.4 and 1.1.5 Leeds NewCo expressly confirmed the Board's absolute discretion under Articles 4 and 6 to refuse or accept the transfer to Leeds NewCo.

24. Clause 1 concludes with Leeds NewCo acknowledging and agreeing the crucial Condition which is central to this Arbitration:

> "The Board has determined that the appropriate sanction should be the imposition of a penalty points deduction of fifteen championship points in Season 2007/8 subject to an appeal to the member clubs of the League as outlined in Clause 3 below".

25. Clause 4 is headed "Waiver of Claims" and provides as follows:

> "4.1 Leeds hereby release the League, any of its directors, officers, employees and any member club of the League (past, present or future) (the "Released Parties") from all claims, whether known or unknown to Leeds, which Leeds has or may have against the Released Parties arising out of or connected, whether directly or indirectly with the service of the Notice, the conduct of the League with regards to OldCo, the Conditions and the imposition of the sanction or, if passed, the Appeal Sanction (the "Claims").
>
> 4.2 Except for the obligations created by this Agreement Leeds hereby covenants that it shall not, and will procure that its directors, associated companies ..., shareholders, officers or other employees shall not commence, or threaten to commence, any proceedings in any jurisdiction before any court, arbitration panel or other similar judicial body against the Released Parties (including by way of third party claims in any other action) arising out of or connected, whether directly or indirectly with any of the Claims."

26. Mr David Philips QC on behalf of the Claimants submitted that the Clause should be construed strictly against the League. Furthermore the Clause is invalid as its effect is to oust the jurisdiction of the Courts and therefore contrary to public policy.

27. The Tribunal is unable to understand or accede to the Claimants argument that the condition should be strictly construed against the League. No alternative more benign construction has been suggested. This was a commercial bargain, at arms length between a powerful and rich Consortium of businessmen and a responsible professional Sports Governing Body. No authority has been cited to support the proposition that special rules of interpretation apply to general release or waiver clauses.

28. The Tribunal is not persuaded that the Clause is an ouster clause. As already stated this was a commercial agreement; it contained legitimate release and waiver provisions. The Football League consists of its Member Clubs and is the Governing Body. The agreement was between an Applicant and the League in respect of a dispute between them. The compromise was reached in order to resolve the parties' differences without resorting to the Courts. Such a negotiated settlement does not oust the jurisdiction of the Courts. Either party can seek to enforce the other party's obligations before the Courts or by Arbitration. In short, the agreement is not a procedural bar. Contrary to the Claimants contention public policy is firmly in favour of enforcing compromises and releases in the interests of avoiding or minimising litigation.

29. Leading Counsel also contended that the resort to arbitration is simply 'to enforce the obligations created by the Agreement'. These words merely mean that Leeds can <u>enforce</u> the Compromise Agreement should the League default (which it has not). They do not mean that Leeds can impugn the Agreement or its Conditions. Moreover the parties expressly provide in Clause 3.1 that:

> "The Club shall have a right to appeal against the [15 point Condition] in accordance with the terms of this Clause 3, <u>but not otherwise</u>. (Emphasis added)

We reject this contention.

30. In reaching our conclusion on the meaning and effect of this Agreement and in particular Clause 4 we have taken account of the circumstances in which the Compromise Agreement came into existence. Leeds OldCo went into administration. In accordance with its undisputed powers the League issued a Compulsory Transfer Notice

in respect of the League Share (which entitles it to membership of the League) in the name of Leeds OldCo requiring it to transfer the League Share at par value to the Secretary of the League. Leeds NewCo wished to succeed Leeds OldCo as owner of Leeds United FC, by becoming a Member Club and securing a transfer of the League share to enable them to do so. By Regulation 11, a new Member Club is required to leave League 1 (L1) and start the following season in League 2 (L2). Leeds NewCo wished the League to exercise its discretion so that it could succeed as new owners with the Club playing in L1 from the start of the 2007-8 season.

31. The Board was receptive to the idea. Article 4 and the Insolvency Policy allowed the Board to agree to withdraw the CTN and to register a transfer free of the CTN in circumstances, including on such terms as the Board "in its absolute discretion determines."

32. As already described Leeds NewCo (and in particular Mr Bates and Mr Mark Taylor) were well aware that in order to secure this indulgence the Board was stipulating that in order to remain in L1 the Club would have to start the new season with a 15 point deficit. This had been agreed by Mr Bates on behalf of the consortium, as the price which had to be paid for the indulgence and they were prepared to pay it – subject only to an Appeal to the League.

33. We are satisfied that Mr Taylor, in his capacity of Director of Leeds NewCo and their solicitor, was fully aware of the content and effect of what he was signing. Earlier that day he had received a letter from Mr Craig in which he had stated there was to be 'a legally binding agreement' in which the Claimants would undertake to observe and perform each of the conditions set out, and "waive any and all claims against the League regarding the sanction of matters arising out of the administration generally." Mr Craig told us that it was not standard practice for him to include release and waiver clauses in agreements between the League and insolvent Member Clubs. He consulted the League Solicitors, and included Clauses 4.1 and 4.2 because the Board had made it clear in its 27 July meeting that the terms of the agreement with Leeds NewCo had to "obviate anyone taking legal action once the process had been completed," and the Board re-affirmed at its 3 August meeting that they required "an assurance by the club that it would accept the decision of the meeting as final." As he put it:

"it was a crucial part of the deal that Leeds NewCo accept the points deduction and not seek to challenge it or have it overturned other than by means of the appeal to its fellow Member Clubs, as permitted by Clause 3."

34. We conclude that it is inherently improbable that Mr Taylor, as a solicitor of longstanding experience, would have put his signature to the document if he had intended to reserve the position that it is now adopted by the Claimants that the points deduction was outside the powers of the Board or was an improper exercise of its discretion. A simple 'save as to the legality of the Condition' phrase could have been proposed. We are satisfied that if he had attempted to do so, it would undoubtedly have been rejected by the Board, the deal would have been aborted and, in all probability the Club would have gone into liquidation, or at best, been relegated to League 2.

35. Finally, returning to Clause 4 the operative parts for our consideration are:

"4.1 Leeds hereby release the League ... from all claims, whether known or unknown to Leeds, which Leeds has or may have against [the League] arising out of or connected, whether directly or indirectly with ... the conduct of the League with regards to OldCo, the Conditions and the imposition of the sanction or, if passed, the Appeal Sanction (the "Claims"). (Emphasis added)

4.2 Except for the obligations created by this Agreement Leeds hereby covenants that it shall not ... commence, or threaten to commence any proceedings in any jurisdiction before any court, arbitration body ... against [the League] ... arising out of or connected, whether directly or indirectly with any of the Claims". (Emphasis added)

The effect of this Clause is that Leeds NewCo agreed to release the League from the claims now advanced and waived any right to do so. They also covenanted not to bring the claims it now seeks to bring.

CONCLUSION

36. **We are satisfied that the Claimants case begins and ends with the Compromise Agreement which clearly embodied the intention of both parties. Taking the Agreement as a whole and in particular Clause 4 Leeds NewCo agreed to the imposition of the 15 points and to release the League from the claims which have now been advanced and to waive any rights to do so. Leeds NewCo specifically covenanted**

not to bring the claims it has now sought to assert and there is no basis to allow it not to honour that covenant.

The Tribunal dismisses the Claim on this ground alone.

DELAY AND THE EFFECT ON OTHER CLUBS

A. Delay between 9 August and 12 February 2008

37. Even if the Claimants could avoid the effect of the release and waiver they still faced a formidable obstacle. On 9 August 2007, the League's member clubs by the requisite majority dismissed NewCo's Appeal and confirmed the Board's decision to transfer of the League membership to the First Claimant with the Condition.

38. The First Claimant first tried to get The Football Association (FA) to hold an inquiry into the validity of the League's decision to impose the Condition. The Football Association declined to hold an inquiry based (among other things) on its clear view that the imposition of the Condition as a condition of consent to transfer of membership to the First Claimant was within the League's powers and was a proportionate exercise of those powers. Correspondence covered the period 30 August and 5 December 2007. Even so, Leeds NewCo filed a Football Association Rule K arbitration proceedings purporting to challenge the legality of The FA's decision not to hold such an inquiry.

39. Subsequently, on 4 February 2008, the League received from Mark Taylor, the solicitor acting for the First Claimant, what purported to be a letter before action in the High Court on behalf of the First Claimant in relation to the Condition. That letter did not meet the requirements of the CPR and the Football League directors rejected the letter on that ground.

B. Delay in the High Court Proceedings

40. On 12 February 2008, proceedings were issued in the High Court on behalf of the First Claimant and Barnsley Football Club 2002 Limited against the League. The Claim Form and Particulars of Claim were deemed served on Bird & Bird (FL's solicitors) on 13 February 2008. The covering letter accompanying these documents asked the League to consent to an application for an expedited hearing.

41. On 20 February 2008, Bird & Bird wrote to Mark Taylor & Co., pointing out that the parties were subject to a valid pre-existing agreement to submit any disputes between them to arbitration and therefore asking them to agree to a stay of the proceedings in favour of a FA Rule K arbitration. No reply was received to that letter by the stated deadline and therefore Bird & Bird sent a chaser letter on the evening of 25 February 2008.

42. In response, NewCo's solicitor accepted that the dispute was covered by FA Rule K, and, despite some delay, signed a Consent Order on behalf of the First Claimant, providing for the mandatory stay of the proceedings in favour of a FA Rule K arbitration. Mark Taylor agreed to conduct the arbitration on an expedited basis, because of the potential impact on 2007/08 final League standings. The full hearing on the merits was therefore provisionally scheduled for 16-18 April 2008.

43. However, no such agreement was forthcoming on behalf of Barnsley. Instead, it became apparent that Mark Taylor did not have authority to act on behalf of Barnsley. On 25 February 2008, the League received a letter by fax from Brabners Chaffe Street LLP, acting "on behalf of Barnsley Football Club Limited". The letter states:

> "... We understand that our client has telephoned your Lord Mawhinney to inform you that our client did not agree to lend its name to the above proceedings and that it had not approved the Particulars of Claim before they were filed at Court (or indeed since).
>
> We are investigating the position on behalf of our client but wish to set the record straight at this earliest opportunity ..."

44. On 25 February 2008, Bird & Bird sent a letter by fax asking Mark Taylor for his urgent comments on the suggestion in Brabners' letter that the proceedings had been brought without Barnsley's authority. No such comments were received. Over the following days, Bird & Bird sought (without success) clarification on the position of Barnsley from Mark Taylor.

45. On 7 March Bird & Bird called Mark Taylor to clarify, as a matter of urgency, whether or not he was authorised to act for Barnsley in relation to the proceedings.

46. On 11 March Bird & Bird received an email sent on behalf of Mark Taylor attaching a copy of the Notice of Discontinuance signed on behalf of Barnsley. On the same day Bird

& Bird filed at Court the signed Consent Order and a copy of the Notice of Discontinuance.

47. Thus there was a delay of about 5 weeks primarily due to the misconceived High Court proceedings commenced by NewCo's solicitors and their conduct of them.

C. Delay in the Arbitration Proceedings

48. On 4 March 2008, Bird & Bird sent Mark Taylor a letter by fax confirming that the League agreed to the First Claimant's request that Arbitration be conducted in an expedited manner and set out some practical measures for achieving this. They included that (i) the First Claimant serve a Notice of Arbitration, as required pursuant to FA Rule K2(a)(i), in order to commence the Arbitration proceedings; and (ii) Leeds serve a Points of Claim in order to assist the tribunal to define and identify the true issues for the tribunal. The letter invited Mark Taylor to serve the Points of Claim by 10 March 2008.

49. On 7 March 2008, Bird & Bird received a letter from Mark Taylor sent by fax, in which he agreed to serve a Notice of Arbitration but stated that the Points of Claim would consist of the Particulars of Claim issued in the High Court.

50. On Saturday 8 March, Jonathan Taylor of Bird & Bird sent a letter by email to Mark Taylor requesting (among other things) that the Notice of Arbitration be served during the morning of 10 March 2008 at the latest and that a hearing of the tribunal be convened at short notice for the purpose of making directions on 11, 12 or 13 March 2008.

51. On 9 March 2008, Jonathan Taylor received an email from Mark Taylor confirming that the Notice of Arbitration would be served on 10 March 2008. In fact, the Notice of Arbitration was not served until 19 March 2008. Thereafter there may have been some dilatoriness on behalf of the Claimant but we do not regard it as critical or significant.

52. Leeds NewCo has neither tendered a credible explanation nor convincing excuse for their delay.

CONCLUSION

53. It is inescapable that if the appropriate Arbitration proceedings had been commenced in August or September or even October 2007 they would have been capable of resolution

before the end of 2007. Given the date when these proceedings were started (19 March) and the first day of the Hearing before this Tribunal (16 April) it is obvious that our decision could have been given comfortably before the end of 2007.

54. With this history of events we are satisfied that there has been unreasonable and inexcusable delay on the part of Leeds NewCo. It is plain that Leeds NewCo was in the same position in August as it was in March when it finally got around to commencing these Arbitral Proceedings. It was imperative that the appropriate action was taken expeditiously. When the High Court proceedings were commenced they were in breach of the Arbitration Clause in the Regulations. Even before the arbitration proceedings were finally commenced, the Claimants were dilatory in initiating them.

55. There was no reason, if Leeds NewCo were genuinely concerned and disgruntled with the outcome of the League Members decision on 9 July, why they should not or could not commence Regulation K arbitration proceedings soon thereafter. This step could have been taken simultaneously with the Regulation K proceedings against the Football Association. They then held back and commenced the misconceived and abortive High Court proceedings. By delaying seven months before commencing these proceedings (August – March) they were in danger of prejudicing the other Clubs in League 1 who were also fighting for promotion.

56. The resolution of this present challenge has been left to the eleventh hour. If the points were now to be restored a number of clubs eligible for automatic promotion and the play off positions might have been affected. As at 5 April 2008 there were two clubs entitled to automatic promotion and four other clubs entitled to a place in the play-off for the third promotion spot, with Leeds in sixth position. On 1 May the position is still the same.

57. If the 15 points were now to be restored it would place Leeds comfortably in second position (88 points) and with assured promotion. This would prejudice the second placed Club (currently Doncaster) by depriving it of its automatic promotion place, forcing it to compete for promotion through the play off process. This situation is worthy of our particular and sympathetic consideration. Thus the delayed restoration of points would, inevitably, and fundamentally alter the rights that would otherwise accrue to another club.

58. We have no doubt that if this dispute had been promptly and properly brought, then the other clubs vying for promotion might have addressed their season in a different way.

Until 19 March they will have proceeded on the legitimate assumption that there was to be no challenge and that the 15 points would not be restored. This late challenge brought uncertainty to the League near the end of the season at a time when other clubs had an understandable hope and expectation that they would enjoy automatic promotion, or the opportunity to compete for promotion through the play-off. In Stevenage Borough Football Club v The Football League Ltd CH [1996] 5 No 3043 Carnwath J was dealing with a similar case of delay and dismissed the proceedings. We see no reason to depart from his approach and apply it to the instant case.

59. **We also dismiss the Claimant's Claim on the ground of Leeds NewCo's unreasonable and inexcusable delay in bringing the claim to this Arbitration.**

THE CLAIMANT'S ALTERNATIVE CASE

60. As the Tribunal has already decided to dismiss the Claim on the two grounds specified above it is not necessary to undertake a detailed analysis of the alternative Case. We merely record in summary form what our conclusions would have been.

61. Mr David Phillips QC submitted that Clause 4 of the Compromise Agreement was entered into under a mutual mistake of law common to both parties and is consequently 'void ab initio'. The parties were mistaken as to the League's power to impose the 15 point Condition. It was a penalty which the League had no power to impose.

62. We are satisfied that by virtue of Article 41, Article 4 and Article 6 the Board had all the requisite authority to exercise its powers and discretion to impose a Condition of a 15 point deduction. Moreover, the Insolvency Policy (in particular G5), properly construed, did not prevent the Board imposing the Condition. The assertion that the Board lacked the power to impose the Condition is unsustainable.

63. Mr Phillips also contended that the Board and the League in reaching their decisions acted unfairly and unreasonably. We have no hesitation in rejecting this argument. The Board came to the conclusion that the point's deduction should be made a Condition of consent to the Cancellation of Withdrawal and Transfer as the most reasonable and proportionate way of protecting the legitimate needs underlying the Insolvency Policy. In doing so it rejected the other options open to the Board which included

(i) Simply expelling Leeds OldCo, so that Leeds United FC ceased to exist;

(ii) Allowing Leeds NewCo to join the Football League in L2, pursuant to regulation 11.

64. Given the absolute discretion afforded to the Board in this respect by the Memorandum, Articles of Association and the Insolvency Policy and having regard to the margin of appreciation afforded to a sport's governing body, the Claimant would have failed to establish that the Board's decision (or the League's) to include the points Condition was a decision that no rational decision maker in their position could make. As to the amount of points deducted it carefully carried out a balancing exercise between 0 to 20 and arrived at a decision that, in all the circumstances of this particular case (which we do not need to recite) was well within the range of decision reasonably open to it to make.

ROTHERHAM

65. The position of Rotherham can be dealt with summarily. This Club was also insolvent and went into Administration on 18 March 2008. It is likely that it will not be able to exit administration via a CVA and the Administrators will be obliged to sell the Club. The Club fears that if the League's decision to deduct 15 points from Leeds is a precedent, then the same condition will be applied to them. They therefore wish to support the Claimant's case and seek similar declaratory relief.

66. Mr Stephen Davies QC on behalf of the League submitted that Rotherham has no status (locus) in these proceedings. There is no dispute between Rotherham and the League. Rotherham cannot attempt to support Leeds in its challenge to the Compromise Agreement in an attempt to get round the fact Leeds NewCo has compromised its Claim.

67. The tribunal considered that the answer is to be found in Rule K which provides that the jurisdiction of the Arbitration Tribunal is confined to:

> "any dispute or difference between any two or more participants ... shall be referred to arbitration and finally resolved by arbitration under these Rules."

The only dispute is between Leeds NewCo and the League. There is no dispute between Rotherham and the League. The fear that they may be deducted 15 (or indeed, any)

points is not sufficient to amount to a 'dispute'. The League has not yet reached a determination of its case in the light of all the relevant circumstances.

68. Thus Rotherham have no right to declaratory relief in respect of the claim to such relief by Leeds, nor in respect of a decision which has not yet been, and might not even be, taken against Rotherham itself.

69. Accordingly the Tribunal has declined jurisdiction and dismissed Rotherham's purported claim.

THE AWARD

The Award of the Tribunal is that the Claims of both Claimants are dismissed.

Sir Philip Otton Chairman .....

Peter Leaver QC Arbitrator .....

Peter Cadman Arbitrator .....

POSTSCRIPT

1. During the four days of the Hearing we heard other evidence, arguments, submissions from both parties and certain ideas and suggestions were exchanged between Counsel and the Tribunal. In view of the two principle decisions in the Award it is not necessary to take such matters further.

2. However these proceedings have brought to light the necessity for a review of the Insolvency Policy. We were told that there are 40 or more current or anticipated insolvencies. In many cases (e.g. Rotherham, Luton Town and Bournemouth?) it will prove impossible to exit Administration via a CVA. The League in the course of the Hearing appeared to recognise the need to amend the Policy to make specific provisions where there is no CVA. It is to be hoped that this can be achieved during the coming close season. The Clubs should be entitled to clear guidelines, objectives and procedures.

3. The Board should be astute not to think in terms of 'penalty' or a 'norm' as a starting point of whatever Condition is to be imposed. We are concerned that the Condition was described by the Board as a 'penalty' and was understandably perceived to be so.

4. We accept that the imposition of the 15 points in the instant case was not (and was not intended to be) a precedent, i.e. an automatic sanction in the absence of a CVA. Each case has to be assessed by the League having regard to the Club's individual circumstances leading up to and of the insolvency itself. Such Conditions as the League considers are required will reflect these circumstances and any merits the Club can establish.

5. We feel obliged to record that we consider an Appeal to Members of the League to be unsatisfactory. Some Clubs in the same League may not readily agree to reduce a points sanction in the understandable self-interest of their Clubs. We recommend:

    1. That there should be an appeal to an Independent Tribunal;

    2. In order to reduce uncertainty for the Club and other Clubs the Appeal process should be determined without delay. We suggest an Appeal should be lodged within 7 days of the decision and the decision of the Appeal body should be given within 21 days thereafter.

6. We hope that these suggestions will be helpful to all concerned.

Sir Philip Otton Chairman .....

Peter Leaver QC Arbitrator .....

Peter Cadman Arbitrator .....