LEABHARLANN CHOLÁISTE NA TRÍONÓIDE, BAILE ÁTHA CLIATH | TRINITY COLLEGE LIBRARY DUBLIN
Ollscoil Átha Cliath | The University of Dublin

Terms and Conditions of Use of Digitised Theses from Trinity College Library Dublin

Copyright statement

All material supplied by Trinity College Library is protected by copyright (under the Copyright and Related Rights Act, 2000 as amended) and other relevant Intellectual Property Rights. By accessing and using a Digitised Thesis from Trinity College Library you acknowledge that all Intellectual Property Rights in any Works supplied are the sole and exclusive property of the copyright and/or other IPR holder. Specific copyright holders may not be explicitly identified. Use of materials from other sources within a thesis should not be construed as a claim over them.

A non-exclusive, non-transferable licence is hereby granted to those using or reproducing, in whole or in part, the material for valid purposes, providing the copyright owners are acknowledged using the normal conventions. Where specific permission to use material is required, this is identified and such permission must be sought from the copyright holder or agency cited.

Liability statement

By using a Digitised Thesis, I accept that Trinity College Dublin bears no legal responsibility for the accuracy, legality or comprehensiveness of materials contained within the thesis, and that Trinity College Dublin accepts no liability for indirect, consequential, or incidental, damages or losses arising from use of the thesis for whatever reason. Information located in a thesis may be subject to specific use constraints, details of which may not be explicitly described. It is the responsibility of potential and actual users to be aware of such constraints and to abide by them. By making use of material from a digitised thesis, you accept these copyright and disclaimer provisions. Where it is brought to the attention of Trinity College Library that there may be a breach of copyright or other restraint, it is the policy to withdraw or take down access to a thesis while the issue is being resolved.

Access Agreement

By using a Digitised Thesis from Trinity College Library you are bound by the following Terms & Conditions. Please read them carefully.

I have read and I understand the following statement: All material supplied via a Digitised Thesis from Trinity College Library is protected by copyright and other intellectual property rights, and duplication or sale of all or part of any of a thesis is not permitted, except that material may be duplicated by you for your research use or for educational purposes in electronic or print form providing the copyright owners are acknowledged using the normal conventions. You must obtain permission for any other use. Electronic or print copies may not be offered, whether for sale or otherwise to anyone. This copy has been supplied on the understanding that it is copyright material and that no quotation from the thesis may be published without proper acknowledgement.

COLLECTIVE ORGANISATION AND EXTERNAL REGULATION OF PROFESSIONAL RUGBY LEAGUE IN THE UNITED KINGDOM

A thesis submitted to the University of Dublin for the Degree of Doctor of Philosophy

Leanne O'Leary

Trinity College Dublin, February 2010

School of Law

Trinity College Dublin

DECLARATION

Thesis 9364

I hereby declare that this thesis has not been submitted as an exercise for a degree at this or any other University and that it is entirely my own work.

I agree that the Library may lend or copy this thesis upon request. This permission covers only single copies made for study purposes and subject to the normal conditions of acknowledgement.

SUMMARY

This thesis examines the external regulation of professional rugby league in the United Kingdom. It considers specifically the employment of players in the Super League competition by British clubs. In the course of this research interviews with thirty stakeholders in the industry (including: the Rugby Football League; Super League clubs; Championship clubs; professional players; sports agents; professional coaches; the Rugby League Players' Association; and a sponsor) were conducted and statements from these interviews are incorporated throughout the thesis in support of the arguments presented.

In 2009 the Super League competition is comprised of fourteen professional clubs: thirteen clubs are situated in the United Kingdom; and one club is located in France. The competition is regulated by the Rugby Football League ("RFL"). In conjunction with the clubs, the RFL organises the competition under Super League (Europe) Ltd ("SLE"), a private limited liability company.

The primary employment relationship in the Super League competition is between the player and the club. A player enters into a contract of service with a club that includes terms, such as: the implied term of trust and confidence; and the implied term to provide work. Arising from the terms of the player's contract is also a contractual right to work. It is arguable that the standard form players' contract used by all British clubs and players in 2009 includes the RFL as a party.

In addition to signing an employment contract, a player signs a registration form that establishes a contract between the

player and the RFL pursuant to which: the player agrees to abide by the RFL Operational Rules in place from time to time; and the RFL agrees for the player to participate in Super League. The club is also a party to the registration contract. The registration contract arguably forms a collateral contract that depends upon the existence of an employment contract and terminates simultaneously with the employment contract.

The RFL and the clubs adopt measures which directly or indirectly affect a player's employment in the Super League competition. Some measures detrimentally affect the players' right to work. The measures are adopted using decision-making processes that do not involve the players. The clubs and the RFL are not obliged to consult with players prior to the implementation of a regulatory measure.

The regulatory activities of a private sporting code's governing body are not subject to direct government regulation in the United Kingdom. Challenging a rule implemented by the RFL or the clubs is by means of a private legal challenge brought by an affected player after the rule is adopted. The RFL is not subject to judicial review.

The implied term of trust and confidence contained in the players' contract may constrain the regulatory activities of the RFL and the clubs. As a member of SLE, a club will make decisions that benefit the club's financial interests but which conflict with the club's obligation of trust and confidence owed to a player under an individual employment contract. The RFL may find its decision-making powers similarly constrained if it is also viewed as an employer of players in the competition. However, the scope of the implied term is

unclear and its application as a constraint on the regulatory activities of the RFL and the clubs is uncertain. Furthermore, the private nature of contractual relations enables a party, such as the RFL, to remove itself from the employment relationship.

European competition law and the free movement provisions of the Treaty of Rome are, however, an external restraint on the regulatory activities of the RFL and the clubs. The salary cap; the "club trained rule"; the terms of the players contract pertaining to the supply of a player's intellectual property; and the anti-competitive foreclosure which arises in the labour market and which limits access by other employers to playing services, all infringe European competition law. The "club trained rule" also infringes Article 39 (EC). The measures described disadvantage professional players and are not a proportionate means of achieving an aim associated with the administration of a professional sporting competition. The application of European competition law to the market for playing services provided to the Super League competition can compel the separation of the RFL's regulatory and commercial functions.

External regulation of the RFL and the clubs alone will not guarantee a right of consultation for players. Players must organise collectively in order to obtain that benefit. Through a process of collective bargaining, professional rugby league players can obtain a right to be involved in the game's decision-making processes at a regulatory level. Incorporating the player rules into a collective bargaining agreement benefits the RFL, clubs and players.

ACKNOWLEDGEMENTS

I would like to express my sincere gratitude to the following people for their valued assistance in the preparation of this thesis:

Mr Alex Schuster, PhD Supervisor

The Rugby Football League
The Super League clubs, Championship clubs, professional players, coaches and sports agents who provided their time for interview
The Rugby League Players' Association
Mr Oliver Marns
Mrs Audrey Roberts
The New Zealand Rugby Union and provincial unions that participated in the research
The New Zealand Rugby Union Players' Association
Adidas New Zealand
The Scottish Rugby Union
My family in New Zealand and elsewhere

This thesis is dedicated to my grandfather, Mr Kevin O'Leary.

CONTENTS

CHAPTER 1: INTRODUCTION 1

1.0 Background 1

1.1 Regulatory Framework: Super League Competition ... 2

1.2 Competitive Balance 5

1.3 Public Interest 6

1.4 Direct Regulation: European Union; United Kingdom . 7

1.4.1 European Union 7

1.4.2 United Kingdom 8

1.5 Regulation by Means of Private Legal Challenge 10

1.5.1 Judicial Review 10

1.5.2 Employment Law 12

1.5.3 Common Law Doctrine of Restraint of Trade .. 14

1.5.4 European Law; Competition Law 20

1.5.4.1 Article 39 (EC) 21

1.5.4.2 Articles 81 and 82 (EC) 24

1.5.5 Disadvantages 31

1.6 Mode of Regulation for the Super League Competition 32

1.6.1 European Competition Law 34

1.6.2 Collective Organisation of Players 35

1.6.3 An Obligation of Consultation 37

1.7 Thesis Aims 38

CHAPTER 2: RUGBY LEAGUE AND RUGBY UNION: A HISTORICAL SYNOPSIS 41

2.0 Introduction 41

2.1 "Association Football" and "Rugby Football": The First Breakaway 42

2.2 The International Rugby Board: Formation and Early Years 43

2.2.1 The Issue of Mr Arthur Gould 46

2.3 The Evolution of Rugby League 48

2.4 Dominant Party Response to a Breakaway 50
2.4.1 Player Payments; Product Innovation; Consumer Effects 51
2.5 The Growth of Rugby League Internationally 54
2.5.1 The 1907 "All Golds" Tour 54
2.5.2 Australia and Wales 57
2.5.3 France 57
2.6 A Player's Contract in the Early 1900s; The Players' Union 58
2.7 Separation of Amateur and Professional Rugby League: Breakaway and Amalgamation 61
2.8 Competition in the Market for the Organisation of International Rugby Union Matches; Product Innovation; and the Rugby Union World Cup 62
2.9 Rugby Union: 1988 to 1995 64
2.9.1 Allegations of Player Wage Payments 65
2.9.2 Continued Exclusion of Rugby League Players From Rugby Union 69
2.9.3 Proposed Government Intervention in the Governance of Rugby Union in England 70
2.10 Organisation of Rugby League: Early 1990s 72
2.11. 1995 73
2.11.1 Competition in the Market for the Organisation of Professional Rugby League Matches in Australia 74
2.11.2 Breakaway: The Formation of Super League in the United Kingdom; Increased Demand for Rugby League Playing Services 75
2.11.3 Competition in the Market for Rugby Union Playing Services; Product Innovation 77
2.11.4 The World Rugby Corporation 79
2.11.5 Increased Demand for Rugby Union Playing Services 81
2.12 Rugby Union Permits Professionalism 82

2.12.1 Aftermath: Rugby Union in England 82
2.12.2 Aftermath: Rugby Union in New Zealand 86
2.12.2.1 Collective Organisation of Rugby Union Players in New Zealand 87
2.13 Super League Competition 1997 to 2008 88
2.14 Conclusion 90
CHAPTER 3: THE SUPER LEAGUE COMPETITION 2009: REGULATORY FRAMEWORK; GOVERNANCE STRUCTURE; AND STAKEHOLDERS 95
3.0 Introduction 95
3.1 Regulation of Rugby League: United Kingdom 95
3.1.1 The Rugby Football League 96
3.1.2 The Rugby League International Federation 99
3.2 The Super League Competition 100
3.2.1 The Super League Clubs 100
3.2.2 Super League (Europe) Limited 104
3.2.3 Competition Format 107
3.2.4 Mode of Entry into the Competition: Clubs 107
3.2.5 Players 107
3.2.6 Players' Contract 108
3.2.7 RFL Operational Rules 109
3.2.8 The Rugby League Players' Association 110
3.2.9 Sports Agents 113
3.3 Championship and Championship 1 Competitions 115
3.3.1 Competition Formats 116
3.3.2 Championship Cup Competition 116
3.4 Challenge Cup Competition 117
3.5 Conclusion 117
CHAPTER 4: THE EMPLOYMENT RELATIONSHIP IN THE SUPER LEAGUE COMPETITION DEFINED 118
4.0 Introduction 118
4.1 A "Contract of Service": General Principles 120
4.1.1 Control 122

4.1.2 Mutual Obligation 124
4.1.3 Conclusion 126
4.2 The Employment Relationship in the Super League Competition 127
4.2.1 Bi-Lateral Relationship 127
4.2.2 Tri-Lateral Relationship 130
4.3 Players' Contract: Status of the RFL Operational Rules 137
4.4 Players' Contract: Implied Terms 138
4.4.1 Mutual Trust and Confidence 139
4.4.2 Duty to Provide Work 143
4.4.3 Contractual Right to Work 147
4.5 Restraining Player Movement 149
4.5.1 Players' Contract: Specific Performance 149
4.5.2 Registration Contract: A Collateral Contract 152
4.6 Conclusion 155
CHAPTER 5: MARKET FOR PLAYING SERVICES TO THE SUPER LEAGUE COMPETITION DEFINED 158
5.0 Introduction 158
5.1 Market Definition: General Principles 158
5.2 Market Definition: Case Authorities Concerning Professional Sport 160
5.3 Market for Playing Services to the Super League Competition 162
5.3.1 Demand-side 163
5.3.2 Supply-side 164
5.3.3 Market Power 166
5.3.4. Dominance 172
5.3.4.1 Individual Dominance: The RFL 174
5.3.4.2 Collective Dominance: The Super League Clubs and the RFL 176
5.3.5 Geographical Scope 180
5.4 Undertaking 180

5.4.1 A Super League Club 182
5.4.2 The RFL 183
5.4.3 Super League (Europe) Ltd 184
5.4.4 A Professional Rugby League Player 184
5.5 Single Entity Doctrine..... 191
5.5.1 United States of America 192
5.5.2 The Super League Clubs, the RFL and SLE as a Single Entity 196
5.6 Jurisdiction of European Competition Law 199
5.6.1 Effect on Trade Concept..... 200
5.6.2 A Substantial Part of the Common Market ... 202
5.6.3 Extra-Territorial Effect 203
5.7 Conclusion 204
CHAPTER 6: PRICE-FIXING BETWEEN HORIZONTAL COMPETITORS IN THE SUPER LEAGUE COMPETITION..... 205
6.0 Introduction 206
6.1 Price Fixing Between Horizontal Competitors 208
6.2 Salary Cap Effects 212
6.3 Salary Cap Objectives 218
6.3.1 To Protect and Promote the Long-Term Health and Viability of the Game of Rugby League..... 218
6.3.2 To Protect the Integrity of the Super League Competition By Ensuring That the Determinative Factor in the Sporting Outcome is On-Field Sporting Merit and Not Off-Field Considerations 220
6.3.3 To Ensure the Super League Competition Remains Competitive and Attractive to Spectators and Commercial Partners 221
6.3.4 To Protect and Nurture a Broad Competitive Playing Structure By Preventing Clubs Trading Beyond Their Means and/or Entering Into Damaging and Unsustainable Financial Arrangements 232

6.3.5 To Protect the Welfare and Interests of All Players Participating in The Super League Competition and of All Those Aspiring to Participate in the Super League Competition 234
6.4 Conclusion..... 234
CHAPTER 7: ANTI-COMPETITIVE FORECLOSURE IN THE MARKET FOR PLAYING SERVICES 237
7.0 Introduction 237
7.1 Players' Contract; RFL Operational Rules; and Contracting Practices 239
7.1.1 Contract Termination 239
7.1.2 Restraint of Trade..... 241
7.1.3 Option..... 241
7.1.4 Prohibition Against Player Approach 242
7.1.5 Right to Retain a Player's Registration..... 242
7.1.6 Contract Duration 243
7.1.6.1 Annual Recruitment Timetable 243
7.1.6.2 Synopsis of Player Interviews: Contract History 244
7.2 Asymmetry of Information in the Industry..... 248
7.3 Foreclosure and Article 81(EC)..... 251
7.3.1 Delimitis; Unilever Best Foods (Ireland) Ltd . 251
7.3.2 Player Exclusivity and Foreclosure 254
7.4. Foreclosure of Access: Other Super League Clubs 258
7.5 Foreclosure of Access: A Sporting Code's Governing Body 261
7.5.1. Pathway of Access Provided Under the Regulatory Framework 262
7.5.1.1 Players' Interest..... 265
7.5.1.2 The Interests of a Sporting Code's Governing Body; and Consumers 267
7.6 Article 81(3)..... 271

7.7 Foreclosure and Article 82 (EC) 271
7.7.1 Mr Iestyn Harris 273
7.7.2 Mr Jordan Tansey 279
7.8 The RFL's Registration System: A Barrier To The Supply Of Playing Services 280
7.8.1 Reasons for a Refusal or Cancellation of a Player's Registration 282
7.8.2 Justifications Advanced for Refusing Registration 284
7.8.2.1 To Ensure the Long Term Financial Survival of the Club 284
7.8.2.2 To Ensure Adherence to the Salary Cap Rules. 285
7.8.2.3 To Protect the Integrity of the Competitions and Prevent the Game Being Brought into Disrepute 286
7.8.2.4 Absence of a "Clearance" 286
7.8.2.5 Cancellation of the Player's Registration 289
7.8.2.6 Rejection of the Player's Contract or Contract Extension 290
7.8.2.7 Registration Deadlines 290
7.9 Conclusion 290
CHAPTER 8: TYING THE SUPPLY OF A SUPER LEAGUE PLAYER'S INTELLECTUAL PROPERTY TO THE EMPLOYMENT CONTRACT 292
8.0 Introduction 292
8.1 Scope of a Player's Intellectual Property 295
8.2 Terms of the Players' Contract 299
8.3 Relevant Markets 301
8.4. Tying 304
8.4.1 Inequality of Bargaining Power 306
8.4.2 Unfair Licence Terms 307
8.4.2.1 Revenue-Earning Potential 312

8.4.2.2 Opportunity Cost 312
8.4.2.3 The Value of A Player's Consent 313
8.4.3 Commercial Necessity 314
8.5 Conclusion 315
CHAPTER 9: REGULATING AGAINST "PLAYER DRIFT" IN THE SUPER LEAGUE COMPETITION: "THE CLUB-TRAINED RULE" 318
9.0 Introduction 319
9.1 "Player Drift" 321
9.2. Principal Pathway Into a Professional Rugby League Career in the United Kingdom 324
9.2.1 Factors Which Influenced Club Investment In the Development of Junior Players 326
9.2.2 Player Recruitment 327
9.2.3 Factors That Influenced Club Demand For Foreign Players 328
9.2.4 Effects of Foreign Players in the Super League Competition 329
9.2.5. Case Examples: Wigan Warriors; Castleford Tigers; Hull KR; Catalans Dragons 331
9.2.5.1 Wigan Warriors 331
9.2.5.2 Castleford Tigers 333
9.2.5.3 Catalans Dragons 334
9.2.5.4 Hull Kingston Rovers 335
9.2.6 Conclusion 336
9.3 "Club Trained Rule" and "Overseas Quota Rule" ... 337
9.4 The Rule's Effects 340
9.4.1 Age-Related Discrimination 341
9.4.2 Loss of "Club Trained Player" Status 343
9.4.3 Professional Rugby Union Players 344
9.4.4 Access to Employment 344
9.4.5 Conclusion 351
9.5 Justifications 352

9.5.1 To Encourage Investment in the Development of Junior Players 353
9.5.2 To Provide Junior Players With the Opportunity To Play At an Elite Level and to Aid Their Development and the Development of the Sport. 355
9.5.3 To Increase the Pool of Players Eligible For Selection to the England International Representative Team 357
9.5.4 To Reduce Super League Club Demand For Overseas Players 359
9.5.5 To Protect the Health and Safety of Players . 361
9.5.6 To Increase Supporter Interest 361
9.5.7 Inuem Consulting Study into UEFA's "Home-grown Player Rule" 362
9.6 Conclusion 365
CHAPTER 10: CONCLUSION 368
BIBLIOGRAPHY 383
APPENDIX 1: RFL SUPPLEMENTAL CLAUSE BANK (AUGUST 2007) 437
APPENDIX 2: RFL REGISTRATION FORM (JUNE 2008) 441
APPENDIX 3: RFL FULL TIME PLAYER'S CONTRACT OF EMPLOYMENT (FTC/08/05) 445

CHAPTER 1: INTRODUCTION

> *'Since rugby league's very beginnings it had fought a long running guerrilla war against the amateurs of rugby union. For the last century or so, the monied war-lords of league had made an art form out of periodically tearing down from the hill-tops on hit-and-run raids, where they lured away which ever union player took their fancy with promises of enormous amounts of moolah.'*[1]

1.0 Background

Rugby league is a sport that evolved from the game of rugby union. In 1895 twenty one rugby union clubs withdrew from the Rugby Football Union (the national governing body for rugby union in England) and formed the Northern Rugby Football Union ("NRFU"). The NRFU modified the rugby union playing rules and created the sport of rugby league. The sport was played principally in the north of England and rugby league players received payments for providing playing services to the NRFU clubs (unlike rugby union players who did not). During the years in which rugby union was organised as an amateur sport some rugby union players moved to the professional code.

One hundred years later, in 1995, competition between two media magnates in the pay television market in Australia was the catalyst for, inter alia, the formation of the Super League rugby league competition in England. The competition (then) comprised of twelve professional clubs and provided rugby

---

[1] Peter Fitzsimons, *The Rugby War* (Harper Collins Publishers, Australia 2003) 9.

league players in Europe with the opportunity to pursue a career full time as a professional player.

1.1 Regulatory Framework: Super League Competition

In 2009 the Super League competition comprises of fourteen professional clubs (including a club based in France). It is organised within a regulatory structure that extends internationally, and assumes the form of a pyramid. At the apex of the pyramid is the Rugby League International Federation ("RLIF"). It is a collective association of national governing bodies for rugby league (such as, for example the Rugby Football League ("RFL"), the New Zealand Rugby League ("NZRL"), and the Australian Rugby League ("ARL")).

The RLIF is a private regulatory body which is responsible, inter alia, for the organisation of matches between international representative rugby league teams. It exercises monopoly power and promulgates rules that apply to the employment of professional rugby league players (for example, rules concerning player eligibility for international representative teams or the movement of players between RLIF members). Rules adopted by the RLIF form a contract between the RLIF and its members, and are usually implemented without consultation with rugby league players (or the general public).

The RFL is the sporting code's governing body in the United Kingdom. The RFL's membership is comprised of professional and amateur clubs. It also includes two professional French clubs (Catalans Dragons Rugby League

Club and Toulouse Rugby League Club) that participate in the RFL's competitions. The RFL promulgates rules that apply to all RFL members and those professional and amateur players who wish to play the sport. The RFL is not obliged to consult with players when implementing rules that directly or indirectly affect the employment relationship.

Insofar as the professional game is concerned, the RFL regulates access to the Super League competition for players and clubs. It also prescribes the terms and conditions of employment for professional rugby league players and determines the eligibility of players to play for a Super League club (amongst other things). The RFL rules and regulations apply to all players who wish to participate in the competition.

A third entity is also involved in the organisation of the Super League competition, namely Super League (Europe) Limited ("SLE"). SLE's members are the Super League clubs and the RFL. SLE acts an agent of the Super League clubs in commercial transactions which concern the clubs collectively. It does not function as a sporting code's governing body although some of its decision-making processes involve the RFL.

Individually, the RLIF, the RFL and SLE are monopolistic, entities that exercise private power (namely, power that derives from a contract between members). Collectively, the entities regulate the employment of professional rugby league players in the Super League competition. The entities: control the provision of playing services to the Super League competition and the terms upon which the playing services are provided.

The RLIF, the RFL and SLE in turn are controlled by their respective members (a nucleus of who are the Super League clubs, the employers of labour in the Super League competition). The rules or regulations of each entity are promulgated in accordance with an internal decision making process, usually found in a constitutional document (such as for example, the Articles of Association). The rules which regulate the employment of professional players may form an agreement between the Super League clubs but do not constitute an agreement between an employer and employee. The rules may also serve to protect the business interests of members.

Rugby league players do not have a right of representation or consultation concerning the form of a governing body rule or regulation. The RLIF, RFL and SLE are not legally obliged to consult with players when implementing rules that affect a player's employment. Some players are collectively represented by the Rugby League Players' Association ("RLPA") which consults with the RFL but the RLPA does not represent the interests of all players, and its bargaining power in the industry is limited. The interests of players are not represented collectively at an international level.

Due to the regulatory framework and the organisation of the Super League competition, there is an inequality of power between a player and a Super League club which can affect the employment relationship. Furthermore, a conflict of interest may arise between a Super League club's role as an employer, a purchaser in the market for playing services and a member of the RFL and SLE.

1.2 Competitive Balance

The Super League competition is an entertainment product that competes with other entertainment products or leisure activities for consumers. The clubs which participate in the competition are commercial entities whose sporting success - and thus financial success - is dependent upon attracting, developing and retaining skilled players. The even distribution of playing talent throughout the clubs in the competition allegedly creates competitive balance. A competitively balanced sporting competition improves the quality of a sporting competition which benefits consumers of the product. It can also increase revenue for the benefit of the Super League clubs and players.

By means of regulation and contract the movement of players between clubs and/or sporting competitions is controlled. The regulation of the employment relationship in the Super League competition is influenced by a desire to achieve competitive balance in the Super League competition (amongst other things). Thus, restraints are imposed to limit a player's capacity to move freely between clubs and to another sporting competition. For example: the players' contract includes a restraint of trade clause; the contract duration may tie a player to a club for a lengthy period; and the RFL registration system restricts the free movement of players between competitions or between clubs. In some cases the regulatory measures adopted in the competition may conflict with the right of free movement contained in the Treaty of Rome (EC).

The free movement of professional rugby league players from one sporting competition to another competition (inter-

competition); or from one rugby league club to another club (intra-competition) purportedly: harms competitive balance; de-stabilises a sports team; and causes commercial loss for a club that may have invested money in procuring or developing a player. On the other hand, free movement may assist a less competitive team to improve thereby promoting competitive balance and improving the spectacle for consumers.[2]

1.3 Public Interest

The Super League competition is affected by public interest considerations. The public interest may be expressed in a number of ways. For example, there is the consumer interest in the efficient allocation of playing resources in order to produce an entertainment product; or the public interest in a government - funded sporting code's governing body organising a sport in a non-discriminatory manner; or the public interest in rugby being *'consistently made available to a wide audience.'*[3] Finally, there is the players' interest in gaining access to a sporting competition in order to exercise a right to work.

Private regulation of the employment relationship in the Super League competition by commercial entities that are

---

[2] Stephen Ross, 'The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws [1997] 2 University of Illinois Law Review 519, 522. According to Ross, *'If a team in need of selective or wholesale improvement cannot obtain the players it needs because of a blanket restraint, it simply cannot make a meaningful run for the league championship. In a free market, a team with a specific need can obtain a crucial player without having to yield any other players as compensation, which, if the signing is a good one, will convert a contender into a champion, enhancing the quality of the experience for loyal fans and attracting new fans'* - ibid 568.

[3] Second Report From the Culture, Media and Sport Committee, 'The Future of Professional Rugby' HC (1999-2000) 99 para 7.

not legally obliged to consider the public interest: may reduce the quality of the rugby competition for consumers; result in discriminatory practices; and unreasonably restrict a player's right to work.

1.4 Direct Regulation: European Union; United Kingdom

1.4.1 European Union

The European Union recognises the important social role that sport assumes in the community.[4] The European Union does not have specific legal competence to regulate sport. Instead through soft law processes the European Parliament and the Commission have developed the concept of "specificity of sport".[5] The "specificity of sport" is taken into account when policies are developed and judicial decisions

---

[4] The societal role of sport is described by the European Commission as follows: *'In addition to improving the health of European citizens, sport has an educational dimension and plays a social, cultural and recreational role. The societal role of sport also has the potential to strengthen the Union's external relations'* – Commission (EC), 'White Paper on Sport' COM (2007) 391 final, 11 July 2007, 3. The European Commission acknowledges that: *'Sport is a growing social and economic phenomenon which makes an important contribution to the European Union's strategic objectives of solidarity and prosperity'* - ibid 2; and *'Sport makes an important contribution to economic and social cohesion and more integrated societies'* – ibid 7. See also S Weatherill, 'Sport as Culture in EC Law' in S, Weatherill, *European Sports Law Collected Papers* (TMC Asser Press, The Netherlands 2007) 215.

[5] See, for example: The Treaty of Amsterdam 1997, Declaration on Sport, Declaration No 29; Presidency Conclusions of the December 1998 Vienna European Council; Commission (EC), 'The Helsinki Report on Sport' COM (1990) 644 final, 10 December 1999; Presidency Conclusions of Santa Maria da Feira June 2000; European Council, Declaration on the Specific Characteristics of Sport and Its Social Function in Europe, of Which Account Should be Taken in Implementing Common Policies annexed to the Treaty of Nice 2000 ("The Nice Declaration"); and Commission (EC), 'White Paper on Sport' COM (2007) 391 final, 11 July 2007. See also the draft Treaty on European Union and the Treaty Establishing the European Community as Modified by the Treaty of Lisbon, Title XII, Article 16A.

made which concern the industry. The European Commission defines the "specificity of sport" as including: the necessity for limitations on the number of participants in a sporting competition; the need to ensure uncertainty of outcome and to preserve competitive balance; the autonomy and diversity of sports organisations; the organisation of sport on a national basis; and the principle of a single federation per sport.[6] At a European level there is latitude for a sporting code's governing body to operate autonomously whilst at the same time limiting the actions of a sporting code's governing body which impinge upon principles enshrined in the Treaty.[7]

1.4.2 United Kingdom

A sporting code's governing body provides a link between government agencies (such as, for example, the Department of Culture Media and Sport, Sport England) and the wider community. It is involved in the development of sports policy and is a vehicle through which central government achieves a plethora of public policy objectives (for example, increased public participation and social inclusion in sport, improved public health and well-being and the prevention of racism etc). But there is no direct government regulation of sport in the United Kingdom; in particular, there is no legislation which concerns specifically the regulation of the employment relationship in a professional sporting competition.

---

[6] White Paper (n 4) 13 - 14.
[7] Erika Szyszczak, 'Competition and Sport' [2007] ELR 95, 110.

In 1999 following the Culture, Media and Sport Select Committee Inquiry into the Future of Professional Rugby, the Government described its interest in sport as follows:

> *'Sport has a huge contribution to make to the lives of all people in this country. It provides health benefits, a sense of purpose, an opportunity to take part in something worthwhile and it has a significant role to play too in pursuing the Government's social inclusion agenda...The top clubs and international sides of both codes provide great shop windows for their respective games, helping to promote interest and participation as well as revenue which can be recycled into the development of the games. As with all sports, Government keeps in contact with rugby governing bodies and encourages them to use their top class game in a more structured and systematic manner as a means of developing and delivering the sport at grass-roots level....'*[8]

The Government confirmed, however, that:

> *'The sustainability of either Rugby Union or Rugby League as professional sports, or individual professional clubs which are run as commercial concerns, is primarily a matter for the rugby authorities and the clubs themselves'.*[9]

Generally, the regulation of the employment relationship involves: central government (through the enactment of employment laws); a trade union (through a collective bargaining agreement); and the employer (through the individual employment contract). These entities are obliged to consult with employees concerning changes in the work environment which may directly or indirectly affect the employee. An obligation to consult arises from the legislative process; processes attached to collective negotiation; and the individual employment relationship respectively. Where

---

[8] Culture, Media and Sport Committee, 'The Future of Professional Rugby: Government Response to the Second Report From the Culture, Media and Sport Committee, Session 1999-2000' HC (1999 – 2000) 268, page v.
[9] Ibid.

relevant, changes to the employment relationship may require an employee's agreement.

In contrast to central government, a trade union or an individual employer, the RLIF, the RFL and SLE are not obliged to consult with professional players concerning regulatory changes or changes in the organisation of the Super League competition. In circumstances where a player's terms of employment are affected, Super League clubs are individually responsible for consulting with employees and where relevant seeking a player's agreement to changes in the work place.

1.5 Regulation by Means of Private Legal Challenge

Restraining the exercise of regulatory power in the Super League competition requires a private legal challenge through the judicial system. Legal challenges brought against a sporting code's governing body highlights the intersection of private law and public law; a point at which an English sporting code's governing body sits *'at the edge of the divide'*.[10]

1.5.1 Judicial Review

In England the decisions of a sporting code's governing body are not subject to judicial review.[11] When determining the

---

[10] Lord Woolf, 'Droit Public-English Style (1994) Public Law 57, 64.

[11] *Law v National Greyhound Racing Club Ltd* [1983] 3 All ER 300 (CA); *R v Disciplinary Committee of the Jockey Club, ex p Aga Khan,* [1993] 2 All ER 853 (CA); *R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy* [1993] 2 All ER 207 (DC); and *Bradley v Jockey Club* [2005] EWCA Civ 1056 (CA). By contrast in New Zealand, Scotland,

scope of the Courts' judicial review jurisdiction, English common law distinguishes between those entities which derive power from statute and are amenable to judicial review; and those entities which derive power from a contract and are not amenable to judicial review, unless exercising a public function.[12]

A private sporting tribunal's disciplinary decision may be subject to review on grounds of fairness, procedural irregularity, bias and proportionality under the Court's general supervisory jurisdiction.[13] However, thus far the Courts have declined to hold the decisions of a sporting code's governing body amenable to judicial review principally because: a sporting code's governing body derives its power from a private contract; and does not exercise a public function.[14]

Ireland and South Africa, a sporting code's governing body is amenable to judicial review.

[12] *R v Panel on Takeovers and Mergers ex parte Datafin plc* [1987] QB 815 (CA). The Court's judicial review jurisdiction is defined in Part 54.1(2) of the Civil Procedure Rules (UK). The debate concerning whether or not a sporting code's governing body falls within the scope of the Court's judicial review jurisdiction forms part of a wider debate regarding the boundary between public law and private law generally: see Wade & Forsyth, *Administrative Law* (9ed Oxford University Press, Oxford 2004); Michael J Beloff QC, 'Who, Whom? Unresolved Issues in Judicial Review' [2008] Denning LJ 35; and cases concerning s 6 of the Human Rights Act 1998 such as: *Aston Cantlow and Wilmcote with Billiesley Parochial Church Council v Wallbank and Another* [2004] 1 AC 546 (HL); *YL v Birmingham City Council* [2007] 3 WLR 112 (HL).

[13] *Bradley* (n 11). See Tim Kerr, 'Disciplinary Regulation of Sport: A Different Strand of Public Law' in Barbara Bogusz (ed) *The Regulation of Sport in the European Union* (Edward Elgar Publishing Ltd, Cheltenham 2007) 97.

[14] See: *Law* (n 11); *Jockey Club ex p Massingberd-Mundy* (n 11); *R v The Jockey Club ex p RAM Racecourses Ltd* [1993] 2 All ER 225 (QBD); *Jockey Club ex parte Aga Khan* (n 11); *R v Football Association ex parte Football League Ltd* [1993] 2 All ER 833 (QBD); *R (on the Application of Mullins) v Jockey Club Appeal Board (No 1)* [2005] EWHC 2197 (QB); *Flaherty v National Greyhound Racing Club Limited* [2005] EWCA Civ 1117 (CA); and *Mullins v McFarlane* [2006] EWHC 986 (QB); cf: *In The Matter Of An Application For Judicial Review By Patrick Wylie* [2005] NI 359 (QB). See also Jack Anderson, 'An Accident of History: Why the Decisions of Sports Governing Bodies are Not Amenable to Judicial

Restraining the regulatory actions of the RFL by means of judicial review would balance the relationship between the RFL, the clubs, players and members of the public. It would compel the RFL to follow decision-making processes which comply with judicial review principles;[15] and in some cases oblige the RFL to consult with parties whose interests may be affected by the implementation of an operational rule. Amenability to judicial review would secure the players (and where relevant the public) a right of consultation. However, even if judicial review were available as a method of restraining power exercised by a sporting code's governing body, procedural difficulties may arise in respect of challenging the decisions of the RLIF and SLE. The latter entity is not per se a sporting code's governing body; and the former is located in another legal jurisdiction.

1.5.2 Employment Law

Where an express or implied employment contract exists, employment law may restrain employment practices which are unfair or unreasonable. The principal enactment which is concerned with employment rights in England is the Employment Rights Act 1996 ("ERA 1996"). In the Super League competition the primary employment relationship arises between a player and a Super League club. An individual Super League club may not unilaterally vary a

---

Review' [2006] 35 Comm L World Rev 173; and Leanne O'Leary, 'The RFL's "Club Trained Rule": The Case For Judicial Review' [2009] 2 ISLR 15; and Michael J Beloff QC, 'Watching Out For The Googly: Judicial Review in the World of Sport' [2009] JR 136.

[15] Illegality, irrationality and/or procedural impropriety form the general basis for declaring a decision to be null and void: see Wade & Forsyth (n 12).

player's terms and conditions of employment;[16] and the club is legally obliged to comply with legislation concerning minimum employment rights.

An express employment contract does not exist between a player and the RLIF, the RFL or SLE; and implying a contract of employment between a player and these entities is problematic.[17] Thus, employment law is limited as a means of restraining the exercise of regulatory power in the Super League competition.

The rules and regulations promulgated by a sporting code's governing body may form a general contract between the governing body and its members or sports participants.[18] A player is required to register with the RFL in order to play in the Super League competition. The terms of registration require the player to abide by the RFL's rules and regulations (including the relevant RLIF rules). The relationship between the RFL and a Super League player may be described as contractual (albeit not a contract of service).

Provided the player can demonstrate a breach of contract, he may bring a claim against the RFL. However, insofar as alleging a breach of contract arising from a failure to consult, there is no express obligation to consult a player prior to the implementation of a regulatory rule and implying a term may

---

[16] See: *Cantor Fitzgerald International v Callaghan* [1999] IRLR 235 (CA); *Rigby v Ferodo Ltd* [1988] ICR 29 (HL); and other case authorities concerning the implied term of trust and confidence: *Western Excavating Ltd v Sharp* [1978] QB 761 (CA); *Woods v WM Car Services (Peterborough) Ltd* [1981] ICR 666 (CA); *Malik and Anor v Bank of Credit and Commerce International (SA) (in liquidation)* [1997] IRLR 462 (HL).
[17] See, for example: *Dacas v Brook Street Bureau (UK) Ltd* [2003] IRLR 190 (CA); *Cable & Wireless plc v Muscat* [2006] ICR 975 (CA); and *James v London Borough of Greenwich* [2008] IRLR 302 (CA).
[18] *Modahl v The British Athletics Federation Ltd* [2002] 1 WLR 1192 (CA).

prove difficult. There may also be difficulty establishing a contract between a player and the RLIF or a player and SLE.[19]

1.5.3 Common Law Doctrine of Restraint of Trade

The common law doctrine restraint of trade - which is not founded on a contractual relationship[20] - provides a method of challenging rules implemented by the RLIF, the RFL or the clubs collectively. Prima facie, a rule that prevents a player from earning a living is a restraint of trade and void unless:

> *'reasonable that is in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour they are imposed, while at the same time in no way injurious to the public.'*[21]

Claims alleging restraint of trade have successfully restrained the actions of a sporting code's governing body at a national and international level. In *Blackler v New Zealand Rugby Football League Inc*[22] a rule that prevented a New Zealand rugby league player from moving to Australia to take up employment at a professional club was declared void.[23]

---

[19] See, for example, *Gasser v Stinson and Anor* (unreported, 15 June 1988, QB).

[20] See, for example: *Pharmaceutical Society of Great Britain v Dickson* [1970] AC 403 (HL); and *Buckly v Tutty* (1971) 125 CLR 353 (HCA).

[21] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535, 565 (Lord Macnaghten); *Mineral Water Bottle Exchange and Trade Protection Society v Booth* (1887) 36 Ch 465 (CA); *Herbert Morris Ltd v Saxelby* [1915] 2 Ch 57 (CA); *Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd* [1968] AC 269 (HL); and *Scully UK Ltd v Lee* [1998] IRLR 259 (CA).

[22] [1968] NZLR 547 (CA).

[23] Ibid 234. According to the New Zealand Court of Appeal, a rule adopted by the RLIF and enshrined in the NZRL's rules enabled *'the respondent, acting in conjunction with the leagues governing the game overseas to prevent any player, whether of international rank or merely a junior player, exercising his right to seek this type of employment*

Similarly, in *Buckly v Tutty*[24] a rule which prevented a rugby league player from being employed by a club, other than with the approval of the player's former club, was held to be an unreasonable restraint of trade.[25]

In *Eastham v Newcastle United Football Club*[26] the English High Court concluded, inter alia, that a transfer and retention system which applied in professional football interfered with a player's right to seek employment and was therefore an unreasonable restraint of trade.[27] The inequality of bargaining power which characterised the employment relationship was a factor in the Court's conclusion.[28] In *Johnston v Cliftonville Football and Athletic Club*[29] a part time professional football player successfully challenged the legality of a rule that limited the amount of: the signing on bonus; the weekly wages; and the match bonus payments that his club could pay him. The rule was declared void on the basis that it unreasonably restrained the player's capacity to negotiate his wages.[30]

---

overseas. It places in the hands of the respondent a complete and unfettered discretion to withhold its consent or to refuse a clearance in respect of any of its players. It is unrestricted in point of time and place' – ibid. The same conclusion was reached in the similar-fact case of *Kemp v New Zealand Rugby Football Inc* [1989] 3 NZLR 463.

[24] (1971) 125 CLR 353 (HCA).

[25] Ibid 373.

[26] [1964] Ch 413 (ChD).

[27] Ibid 438.

[28] According to Wilberforce J: '*The authorities make clear the distinction between contracts entered into by vendors and purchasers of a business, where the parties are of equal strength, and contracts between master and servant when often they are not; and it is relevant that in the football industry players commonly enter into their first contract either while they are under 21 or shortly afterwards, and that wherever they may subsequently go, within the Football League, there is only one form of contract they can sign. The Court must be careful to see that contracts made in these circumstances are justifiable in the interests of both parties'- Eastham* (n 26) 428.

[29] [1984] 2 NI 9 (ChD).

[30] Ibid 19 - 22.

Finally, in *Greig v Insole*[31] the English High Court considered whether: a ban which prevented professional cricket players - who had provided services to a rival cricket promoter – from participating in matches organised by the International Cricket Council ("ICC); and a ban which prevented those players from participating in the English county cricket competition, were void as unreasonable restraints of trade. The High Court accepted that the ICC and the Test and County Cricket Board ("TCCB") which organised the English county cricket competition had a legitimate interest in the organisation of professional cricket and were entitled to protect that interest by proper means.[32] However: the retrospective and prospective application of the bans; and the effect of the bans for professional players and the public, outweighed the advantages to the ICC and the TCCB of imposing the bans.[33] Both bans were declared invalid.[34]

The common law doctrine of restraint of trade provides a useful means of regulating the decision-making processes of the RLIF, the RFL and the clubs. In the course of a restraint of trade claim the Court will take into account: the inequality of bargaining power which frequently arises in employment relationships; the fact that the sporting code's governing body or the club may be protecting business interests other than their own; and the restraint's effects for the player's interest and the public interest.

However, the common law doctrine does not secure a right of consultation for players or the public. In addition, there are a number of procedural issues which may limit the

---

[31] [1978] 1 WLR 302.
[32] Ibid 347.
[33] *Greig* (n 31) 352 – 356.
[34] Ibid.

effectiveness of the doctrine. First, whilst the public interest is considered in the course of hearing a restraint of trade claim, the legal proceeding may only be brought by a professional player who is affected by the restraint. Secondly, a professional sports person may delay bringing a claim which can affect adversely the outcome of the legal proceeding. In *Stevenage Borough Football Club Ltd v Football League Ltd*[35] the club successfully demonstrated that regulatory rules - which prevented the club's promotion to a higher competition division – were an unreasonable restraint of trade. However, owing to the club's delay in challenging the rules, the High Court denied the club injunctive relief.[36]

Delay was also a factor which militated against British athlete Dwain Chambers succeeding with his claim against the British Olympic Association.[37] Mr Chambers was a successful British sprinter who competed in the 100m. In August 2003, he tested positive for the banned substance, Tetrahydrogestrinone (or THG as it is commonly known). Following a contested hearing, Mr Chambers received a mandatory two-year ban from competing in athletics events. Mr Chambers later admitted to taking a cocktail of different performance-enhancing drugs (such as, insulin, human growth hormone and testosterone).[38]

At the end of the ban period, Mr Chambers returned to athletics and subsequently qualified for selection to the

---

[35] The Times 9 August 1996 (CA).
[36] Ibid.
[37] *Chambers v British Olympic Association* [2008] EWHC 2028 (QB); [2008] 4 ISLR SLR-115.
[38] Evan Fanning, 'Walking Junkie' Chambers Reveals Full Extent of Drug Use' *The Guardian* (London, 2 March 2009) <http://www.guardian.co.uk/sport/2009/mar/02/drugs-in-sport-athletics> accessed 18 May 2009.

British Olympic team ("Team GB"). Owing to his previous ban for a doping offence, eligibility criteria set by the British Olympic Association for selection to Team GB precluded Mr Chambers' competing at the Beijing Olympics even though he had gained the Olympic qualifying time for 100m.

Mr Chambers argued that his non-selection to Team GB was an unreasonable restraint of trade. In declining Mr Chambers' application for an injunction, the Court took into account the likely detrimental effect for other athletes of Mr Chambers' delay in prosecuting his claim.[39] According to the High Court:

> *'The result of this delay has not just made for difficulties in the presentation of the case (that is a minor feature), but, more importantly, what it has done for other athletes and the proper administration by the BOA of the running of the British Olympic effort. The adverse effects of this delay is such that I consider that I would have denied relief on this ground alone...*
>
> *[T]he effect of a grant of this injunction on third parties is clearly of prime importance, by definition. One athlete, the athlete who came fourth in the trials, will, if the order is made, be excluded from the 100m (not just probably but as a matter of near certainty), and it is possible additionally that another will be excluded from the relay team. Mr Crystal grasps this problem and says, frankly, 'well, such are the misfortunes of the life of a professional sportsman-they cannot run as fast as Mr Chambers can', and he argues that they would accept that. On the other hand those excluded will be clean athletes who I think I should assume have planned their year and their training professionally, will have known of the byelaw and will therefore have conducted themselves on the basis that one obstacle they did not have to overcome to get to Beijing was Dwain Chambers.'*[40]

---

[39] *Chambers* (n 37) para 62.
[40] *Chambers* (n 37) paras 62 - 64.

Thirdly, whilst a player's interests and the public interest are frequently aligned (as demonstrated in *Greig v Insole* where a cricket player's right to work aligned with the public interest of seeing the best cricket players performing on the field), occasionally those interests diverge. In those circumstances, a player may not challenge the restraint; or protection of the player's interest may undermine the public interest as demonstrated in the case of *Leeds Rugby Limited v Iestyn Harris and Bradford Bulls Holdings Limited.*[41]

In that case Mr Harris was employed by Leeds Rhinos under the terms of a five-year employment contract. During the contract term, Mr Harris sought an early termination of his employment contract so that he could accept an offer of employment with Cardiff Rugby Union Football Club ("Cardiff"). Leeds Rhinos agreed to the premature termination of Mr Harris' employment contract in consideration of, inter alia, Mr Harris providing the club with an option to re-employ Mr Harris ("the re-employment option") in the event that the player returned to a career in the Super League competition.

When he returned to a career in the Super League competition, Mr Harris did not fulfil the terms of the re-employment option but instead entered into an employment contract with Bradford Bulls. In the legal proceedings which followed, Bradford Bulls and Mr Harris alleged that the re-employment option was an unreasonable restraint of trade and void. The High Court disagreed.[42] Owing to the fact that Mr Harris: was legally represented at the time he provided the re-employment option; had secured an early termination

---

[41] [2005] EWHC 1591 (QB).
[42] Ibid para 56.

of his (then) employment contract so that he could pursue a job opportunity elsewhere; and had secured for himself future employment at an equivalent salary to that on which he had been employed at Cardiff, [43] the Court upheld the re-employment option.

Although the re-employment option was reasonable, inter partes, it placed consumers and third parties at a competitive disadvantage (a factor which was not considered by the High Court). The option denied other Super League clubs the opportunity to compete for Mr Harris' services and thereby denied consumers of those clubs the opportunity to see Mr Harris performing for their respective team. It also denied other Super League clubs the opportunity to acquire Mr Harris' intellectual property and to benefit from the sale of merchandise adorned with his image or likeness.

Finally, in cases where the restraint affects markets that have a European dimension, the direct effect of European competition law may reduce the scope of the doctrine.[44]

1.5.4 European Law; Competition Law

Professional sport is not exempt from the application of European law.[45] The regulatory actions of a sporting code's

---

[43] *Leeds Rugby Limited* (n 41) paras 50 - 53.

[44] For a discussion concerning the interface between the common law doctrine and competition law, see Mary Catherine Lucey, 'Regulating Post-Employment Relationships: The Restraint of Trade Doctrine Versus the Competition Act 2002' [2003] 25 DULJ 124.

[45] It is often asserted that professional sport performs important socio-cultural functions which justify the industry's exclusion from the parameters of European law: see Erika Szyszczak, 'Is Sport Special?' in Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds) *The Regulation of Sport in the European Union* (Edward Elgar Publishing Ltd, Cheltenham 2007) 3; and Robert Siekmann 'Is Sport 'Special' in EU Law and Policy' in

governing body which impinge upon the principles enshrined in the Treaty of Rome may be subject to claims under Article 39 (EC);[46] or European competition law.[47]

1.5.4.1 Article 39 (EC)

European law applies to private organisations which regulate employment (or the provision of services).[48] In circumstances where the activities of a sporting code's governing body are of an economic nature, the rules pertaining to free movement apply.[49] The movement of workers is a fundamental freedom protected by Article 39 (EC) which prohibits *any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment.*[50]

Roger Blanpain (ed) *The Future of Sports Law in the European Union: Beyond the EU Reform Treaty and the White Paper* (Kluwer Law International, The Netherlands 2008) 37, 46 – 47.

[46] See, for example, Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECR 1405; Case 13/76 *Dona v Mantero* [1976] ECR 1333; Cases C-51/96 and 191/97 *Deliege v Ligue Francophone de Judo et Disciplines Associees ASBL* [2000] ECR I-2549; Case C-415/93 *Union Royale Belge des Societes de Football Association v Bosman* [1995] ECR I-4921; Case C-438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECR I-4135; Case C-176/96 *Lehtonen and Another v Federation Royale Belge des Societes de Basket-Ball ASBL* [2000] ECR I-4921; Case C-265/03 *Simutenkov v Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol* [2005] ECR I-2579; and Case C-325/08 *Olympique Lyonnais v Olivier Bernard and Newcastle United* (under consideration by the European Court of Justice at the time of writing).

[47] See, for example: Case T-193/02 *Piau v Commission* [2005] ECR II-209; Case C-519/04 P *Meca-Medina v Commission of the European Communities* [2006] ECR I-6991; and Case C-49/07 *Motosykletiski Omospondia Ellados Npid ("MOTOE") v Ellinik Dimosio* [2008] 5 CMLR 11.

[48] *Walrave and Koch* (n 46) paras 17 - 18; *Bosman* (n 46) paras 82 - 83; and *Lehtonen* (n 46) para 35.

[49] *Walrave and Koch* (n 46) para 4.

[50] Treaty of Rome, Art 39(2).

Illustrative of the effects of European law for the regulation of the employment relationship in professional team sports are the decisions in *Union Royale Belge des Societes de Football Association v Bosman,*[51] and *Deutscher Handballbund eV v Kolpak*.[52] In *Bosman* the European Court of Justice considered whether: a rule which limited the number of foreign players that a football club could select for its team ("the foreign quota rule"); and a rule requiring the payment of a transfer fee before a player at the end of his employment could move to a new club, were precluded under Article 48 (EC) (now Article 39) ("transfer rule").

The Court concluded that the transfer rule was an obstacle to the freedom of movement of professional football players because it prevented or deterred a player from leaving the club with which the player belonged even after the player's employment had terminated.[53] It directly affected a player's access to the employment market in other Member States.[54] The "foreign quota rule" was also precluded since it discriminated on the basis of nationality by quantifying the number of foreign players that a club could field.[55] Neither rule was able to be justified on the basis of '*pressing reasons of public interest*'.[56] Thus a professional rugby league with nationality to a Member State is exempt from the application of a "foreign quota rule".

---

[51] *Bosman* (n 46).
[52] *Kolpak* (n 46).
[53] *Bosman* (n 46) para 103.
[54] Ibid. The transfer system in professional football is also the subject of a claim under Article 39 (EC) in Case C-325/08 *Olympique Lyonnais v Olivier Bernard and Newcastle United* (at the time of writing under consideration by the European Court of Justice).
[55] *Bosman* (n 46) paras 116-120.
[56] *Bosman* (n 46) para 104. See also Richard Parrish and David McArdle 'Beyond Bosman: The European Union's Influence Upon Professional Athletes' Freedom of Movement' [2004] 7(3) Sport in Society 403.

The principles established in *Bosman* were extended further by the European Court of Justice in *Deutscher Handballbund eV v Kolpak*.[57] In *Kolpak* the issue for consideration was whether a "foreign quota rule" imposed by a sporting code's governing body applied to a Slovakian handball player who was legitimately employed in a German sporting competition. Mr Kolpak argued that he was exempt from application of the "foreign quota rule" on the basis that: he was a national of a country with which the European Union had signed an Association Agreement; and the Association Agreement contained a clause similar in effect to Article 39 (EC).

In the circumstances of that case the European Court of Justice held that a professional sports player: whose nationality was that of a country with which the European Union had signed an Association Agreement; and who was already lawfully employed in the host Member State, had a right to be employed under the same working conditions as applied to a national of the host Member State.[58]

The European Union has a special relationship with some African, Caribbean and Pacific countries which provides, inter alia, for equal treatment of nationals from those countries employed in Member State countries.[59] A rugby league player based in Australia, New Zealand or a Pacific Island who: has nationality to a Pacific Island country; and is legitimately employed in the Super League competition, is excluded from the application of a "foreign quota rule". As a consequence, there is increased competition for employment

---

[57] *Kolpak* (n 46).
[58] *Kolpak* (n 46) para 49. See also *Simutenkov* (n 46).
[59] Partnership Agreement ACP-EC signed in Cotonou on 23 June 2000, revised in Luxembourg on 25 June 2005 (EC De-132 September 2006).

at a Super League club between British players and players based abroad.[60]

1.5.4.2 Articles 81 and 82 (EC)

Articles 81 (EC) and 82 (EC) are concerned with protecting competition in the common market. The objective of Article 81 (EC) is described in the Commission guidelines on the application of Article 81(3) as being *'to protect competition on the market as a means of enhancing consumer welfare and of ensuring an efficient allocation of resources"*[61] An efficient allocation of resources can create tangible benefits for the consumer in the form of lower costs and prices, improvements in quality, choice and services, and the introduction of new and innovative products.[62] Article 81 (EC) prohibits agreements, decisions by associations of undertakings and concerted practices which prevent, restrict or distort competition in a market.

Article 82 (EC) is concerned with controlling the conduct of a dominant entity that prejudices consumers,[63] or is

---

[60] For a general discussion concerning the effects of Article 39(EC) in the context of professional sport, see Robin CA White, 'Free Movement of Persons and Sport' in Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds) *The Regulation of Sport in the European Union* (Edward Elgar Publishing Ltd, Cheltenham 2007) 33.

[61] Commission (EC), 'Guidelines on the Application of Article 81(3) of the Treaty' [2004] OJ C101/97.

[62] Philip Marsden and Peter Whelan, 'Consumer Detriment and its Application in EC and UK Competition Law' (2006) 26(10) ECLR 569, 569.

[63] Commission (EC), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) COM (2009) 864 final, 9 February 2009 para 5: *'In applying Article 82 to exclusionary conduct by dominant undertakings, the Commission will focus on those types of conduct that are most harmful to consumers. Consumers benefit from competition through lower prices, better quality and a wider choice of new or improved goods and services. The Commission, therefore, will direct its enforcement to ensuring that markets function properly and*

detrimental to consumers through an impact on an effective competition structure.[64] It is not unlawful to hold a dominant position per se; but it is unlawful to use that position in a manner that amounts to an abuse.[65] A dominant undertaking is permitted to protect its own commercial interests and to take reasonable steps to protect those interests, provided that its actions do not strengthen or abuse a dominant position.[66] The actions of a dominant undertaking are prohibited from going beyond what is necessary in the circumstances, and the measures which it chooses to attain its objectives must be the least restrictive available.[67]

European competition law may regulate the economic activities of a sporting code's governing body which affect trade in the common market. In *Meca-Medina and Majcen v Commission*[68] the European Court of Justice considered whether anti-doping rules - which were promulgated by the International Olympic Committee and adopted by the International Swimming Federation ("FINA") - infringed Article 81 (EC). The European Court of Justice concluded that the rules did not, and in so doing confirmed the methodological approach to apply in competition law cases arising in the context of professional sport:[69]

---

that consumers benefit from the efficiency and productivity which result form effective competition between firms'.

[64] C-95/04 P *British Airways v Commission and Virgin Atlantic Airways Ltd* [2007] ECR I-2331 para 106; Case 6/72 *Europemballage Corp and Continental Can Co Inc v Commission* [1973] ECR 215 paras 26 - 27.

[65] Case 322/81 *Michelin v Commission* [1983] ECR 3461 para 57.

[66] Case 27/76 *United Brands v Commission* [1978] ECR 207 para 189; and Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969 para 112.

[67] Case 127/73 *Belgische Radio en Televisie and Societe Belge des Auteurs, Compositeurs et Editeurs (BRT) v SV SABAM* [1974] ECR 313 para 11

[68] *Meca-Medina* (n 47).

[69] *Meca-Medina* (n 47) para 42.

'...the compatibility of rules with the Community rules on competition cannot be assessed in the abstract...Not every agreement between undertakings or every decision of an association of undertakings which restricts the freedom of action of the parties or of one of them necessarily falls within the prohibition laid down by Article 81(1) EC. For the purposes of application of that provision to a particular case, account must first of all be taken of the overall context in which the decision of the association of undertakings was taken or produces its effects and, more specifically, of its objectives. It has then to be considered whether the consequential effects restrictive of competition are inherent in the pursuit of those objectives and are proportionate to them.'

Specifically relating to the issue at hand, the European Court of Justice stated:[70]

'As regards the overall context in which the rules at issue were adopted...the general objective of the rules was...to combat doping in order for competitive sport to be conducted fairly and that it included the need to safeguard the equal chances for athletes, athletes' health, the integrity and objectivity of competitive sport and ethical values in sport. In addition given that penalties are necessary to ensure enforcement of the doping ban, their effect on athletes' freedom of action must be considered to be, in principle, inherent itself in the anti-doping rules. Therefore, even if the anti-doping rules at issue are to be regarded as a decision of an association of undertakings limiting the appellants' freedom of action, they do not, for all that, necessarily constitute a restriction of competition incompatible with the common market, within the meaning of Article 81 EC since they are justified by a legitimate objective. Such a limitation is inherent in the organisation and proper conduct of competitive sport and its very purpose to ensure healthy rivalry between athletes.'

A measure adopted by the RFL, RLIF and the clubs may restrain competition in the plethora of markets in which

---

[70] *Meca-Medina* (n 47) paras 43 - 45.

those entities operate. When regulating the employment relationship, the market most frequently affected is the market for playing services to the Super League competition. Measures such as a salary cap or a restrictive covenant contained in the players' contract affect competition in that market. The measure may not infringe European competition law if: it seeks to achieve a legitimate objective; the consequential effects of the measure which restrict competition are inherent in the pursuit of that objective; and the restriction goes no further than is necessary (or proportionate) to achieve that legitimate aim.[71]

In essence the Court engages in a balancing exercise, weighing up the effects for competition and consumers in the relevant market against factors such as the administration of sport; the necessity to safeguard an athlete's health; or the

---

[71] The decision in *Meca-Medina* removed the distinction which arose previously between rules adopted by a sporting code's governing body which were of a "purely sporting interest" and fell outside the scope of European law; and those rules which related to economic activity and thus were subject to European law: see *Walrave and Koch* (n 46); *Bosman* (n 46); and *Kolpak* (n 46); and the approach of the Court of First Instance in *Meca-Medina* (n 47).
The European Court of Justice decision in *Meca-Medina* confirmed that the test established in Case C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 applies to the professional sports industry and other commercial industries equally: *'it is apparent 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' – Meca-Medina* (n 47) para 27.
See also: N Cox and A Schuster, *Sport and the Law* (First Law Limited, Dublin 2004) 416-421; P Turner-Kerr and A Bell, 'The Place of Sport Within the Rules of Community Law: Clarification From the ECJ? The Deliege and Lehtonen Cases' [2002] 23(5) ECLR 256; S Weatherill, 'Fair Play Please!: Recent Developments in the Application of EC Law to Sport' (2003) 40 CMLR 51; Pablo Ibanez Colomo, 'The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases' [2006] (2)3 ESLJ <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2/colomo> accessed 16 May 2008; and S Weatherill, 'Anti-Doping Revisited – The Demise of the Rule of 'Purely Sporting Interest' in S Weatherill, *European Sports Law Collected Papers* (2007, TMC Asser Press, The Netherlands) 335.

integrity and ethical values of sport. The case law does not define the precise factors which prevail over the anti-competitive effect of a restrictive practice. Instead a test based on proportionality is applied in each case which takes into account the unique features of the sport at issue.

In 2007 the European Commission outlined the type of legitimate objectives which might prevail against competition law concerns in claims concerning professional sport. In the White Paper on Sport,[72] the Commission stated that the legitimate objectives of sporting rules '*will normally relate to the organisation and proper conduct of competitive sport*'[73] and may include objectives such as:[74] maintaining fair sport competitions which provide equal chances for all athletes; providing for uncertainty of outcome in matches; protecting athletes' health; protecting the safety of spectators; encouraging the development of young athletes; promoting financial stability of sports/clubs and teams; and providing for the consistent and uniform application of the playing rules of the respective sport. Additionally, the objectives will be assessed in light of the "specificity of sport" or the unique economic characteristics that distinguish sport from other industries.[75] Whether a rule is proportionate is determined on a case-by-case basis.[76] If the rule does not satisfy the

---

[72] White Paper (n 4).
[73] Ibid 68.
[74] Ibid.
[75] White Paper (n 4) 68.
[76] White Paper (n 4) 69. The types of rule which may not infringe European competition law are listed in the *White Paper on Sport* and include: a selection rule that determines which athletes participate in a competition; a rule which provides for the nationality of athletes participating in international representative matches; a rule limiting the time period during which a professional athlete may move from one club to another; and a licensing arrangement which does not go beyond what is necessary to achieve a legitimate aim: White Paper (n 4) 70 - 73. Examples provided by the European Commission of a rule which may infringe competition law provisions include: a rule which prohibits

Meca-Medina test, it may nonetheless be upheld under Article 81(3).[77]

The conduct of a sporting code's governing body may also be constrained under Article 82 (EC) as the European Court of Justice decision in *Motosykletistiki Omospondia Ellados NPID v Elliniko Dimosio*[78] demonstrates. That case concerned the activities of the Automobile and Touring Club of Greece ("ELPA") (the official Greek representative of the International Motorcycling Federation) which was responsible under Greek national law for authorising the organisation of motorcycling events. The ELPA also organised its own motorcycling events for commercial gain. Owing to the ELPA's dual functions of regulator and commercial operator, it was in the position of authorising motorcycling events which competed with its own. The ELPA refused an application by Motosykletistiki Omospondia Ellados ("MOTOE") for authorisation to hold a motorcycling event. As a consequence, MOTOE brought legal proceedings, alleging, amongst other things, that ELPA's refusal infringed Article 82 (EC).

The European Court of Justice concluded that an infringement of Article 82 (EC) had occurred. By virtue of its regulatory function, ELPA was in a position to prefer its own commercial interests ahead of those of competing organisers

---

athletes who hold a licence to participate in events sanctioned by a sporting code's governing body, from participating in events organised by an entity other than the sporting code's governing body; and a rule that limits the employment of foreign athletes; and a rule which prevents an athlete from moving between clubs following the termination of an employment contract: White Paper (n 4) 73 - 76.
The examples provided are not a final assessment of the compatibility or non-compatibility of the rule with competition law.

[77] White Paper (n 4) 77 – 78.

[78] *MOTOE* (n 47).

of motorcycle events. Its regulatory function enabled it to determine whether and in what conditions other undertakings had access to the market and engaged in activities on that market. Accordingly, exercising the regulatory function led to an abuse of a dominant position or created a situation in which the undertaking might commit such an abuse.[79]

The dual functions of a sporting code's governing body as regulator and commercial operator may in some cases lead to a conflict of interests.[80] Where the conflict affects competition in the common market, European competition law may apply, and a separation of the regulatory and commercial functions may be required.[81]

---

[79] *MOTOE* (n 47) para 51. According to the European Court of Justice: *'A system of undistorted competition, such as that provided for by the Treaty, can be guaranteed only if equality of opportunity is secured between the various economic operators. To entrust a legal person such as the ELPA, which itself organises and commercially exploits motorcycling events, the task of giving the competent administration its consent to applications for authorisation to organise such events, is tantamount de facto to conferring upon it the power to designate the persons authorised to organise those events and to set the conditions in which those events are organised thereby placing that entity at an obvious advantage over its competitors...Such a right may therefore lead the undertaking which possesses it to deny other operators access to the relevant market. That situation of unequal conditions of competition is also highlighted by the fact...that when ELPA organises or participates in the organisation of motorcycling events, it is not required to obtain any consent in order that the competent administration grants it the required authorisation. Furthermore, such a rule which gives a legal person such as the ELPA the power to consent to applications for authorisation to organise motorcycling events without that power being made subject by that rule to restrictions, obligations and review, could lead the person entrusted with giving that consent to distort competition by favouring events which it organises or those in which organisation it participates'* – *MOTOE* (n 47) paras 51 - 52.

[80] See also, S Weatherill, 'Article 82 and Sporting 'Conflict Of Interest': The Judgment in MOTOE' [2008] 3/4 ISLJ special addendum.

[81] See also Commission (EC), 'Notice Published Pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163 – Notification of FIA Regulations - COMP/36.638 – Notification by FIA/FOA of Agreements Relating to the FIA Formula One World Championship - and COMP/36.776 – GTR/FIA and Others' [2001] OJ C169/05.

Insofar as the Super League competition is concerned a Super League club is an employer, a purchaser of playing services and a regulator of the employment relationship. The multiple roles of a Super League club raise issues concerning the organisation of the Super League competition. Similarly, the RFL's position as regulator and commercial operator may raise issues for enquiry under Article 82 (EC). If an abuse of a dominant position arises, then competition law may compel organisational change through the separation of the regulatory and commercial functions of the RFL and the clubs.

1.5.5 Disadvantages

The primary focus of a professional rugby league player is to play rugby. Sport as a professional occupation requires physical skill, mental focus and dedication to a regimen of eating well, training and sleeping. A professional player may place trust in advisers to deal with his financial affairs, and few players may wish to get involved in lengthy and costly court proceedings to assert legal rights. As a consequence, measures which detrimentally affect a player's employment may go unchallenged.

Moreover, the employment setting of a professional sports competition is usually a closed environment. The stigma which attaches to a player who challenges the decision of a sporting code's governing body may affect detrimentally the player's opportunities for future employment in the competition. Private law challenges are also outcome uncertain. A professional rugby league playing career is of limited duration and lengthy legal proceedings can distract a

player from his performance and/or reduce the length of a career.

The effectiveness of some legal remedies may be reduced in circumstances where a sporting code's governing body is not based in the United Kingdom or a player does not have legal standing to bring a claim. Finally, it is often preferable to prevent a claim arising rather than challenge the legality of a rule after its implementation. None of the private law challenges described above provide a player with a right of consultation prior to the implementation of a regulatory measure.

1.6 Mode of Regulation for the Super League Competition

In order to protect the employment interests of professional players (and the public interest) it is preferable that the employment relationship in the Super League competition is subject to external regulation. The regulation may take the form of: legislation which protects the employment rights of professional players; legislation which compels the separation of the regulatory and commercial functions of the RFL and the clubs; or the appointment of an external regulator. External regulation of the Super League competition may benefit the employment of professional players and the public interest by limiting the regulatory authority of the RFL and the clubs.

However, direct government intervention is not always desirable as a mode of regulation. In competition law terms direct government intervention to control monopolistic or

monopsonistic markets often distorts the operation of a free market by placing restrictions on output or price.[82] A monopoly is a market situation in which there is only one supplier of a product or service.[83] A market characterised by a monopoly leads to: higher prices; restricted output; a transfer of wealth from consumers to the monopolist; wasted resources; little or no incentive for the monopolist to reduce costs or to innovate and improve production methods; and overall, the inefficient allocation of resources.[84]

A monopsonistic market - or a market characterised by a single purchaser of a product or service -[85] may also lead to adverse effects for consumers. A monopsonist has no incentive to increase the quantity purchased. It can also exploit a competitive supplying industry by depressing the market price below a competitive level.[86] Monopolistic and monopsonistic markets are generally considered to be inefficient unless inefficiencies are offset by a Pareto improvement for consumers.[87] By contrast, a competitive market leads to cost efficiency, low prices, innovation and the efficient allocation of scarce resources.[88]

Government intervention also requires political will which may be absent in the situation of well remunerated

---

[82] Stephen Ross, 'Player Restraints and Competition Law Throughout the World' [2004-2005] 15 Marq Sports L Rev 49, 49.
[83] Paul Samuelson and William Nordhaus, *Economics* (16ed McGraw-Hill Companies Inc, United States of America 1998) 752.
[84] Alison Jones and Brenda Sufrin, *EC Competition Law* (3ed Oxford University Press, Oxford 2008) 10.
[85] Samuelson and Nordhaus (n 83) 752.
[86] O'Sullivan, Sheffrin and Perez, *Economics: Principles, Applications and Tools* (5ed Pearson Education Inc, New Jersey 2008) 729.
[87] A Pareto improvement is defined as including a change that would benefit at least one person and would, through the use of transfer payments, simultaneously eliminate harm to others: Jones and Sufrin (n 84) 14.
[88] S Bishop and M Walker, *Economics of EC Competition Law* (Sweet and Maxwell Ltd, London 2002) 11.

professional sportspeople. Furthermore, Government intervention may only arise if an effective lobby group acting on behalf of the players is formed.

The rigorous application of European competition law by a competition authority may provide the external constraint required and protect all interests attached to the Super League competition.[89]

1.6.1 European Competition Law

European competition law may regulate the Super League competition in a way which: protects the terms and conditions of employment of professional players; protects the public interest; promotes competition in the single market; and enables the free movement of professional players between clubs and sporting competitions.[90] It may restrain the exercise of private power by the RFL and the clubs; and - owing to the extra-territorial effect of competition law – the private power exercised by the RLIF.[91]

European competition law is of direct effect;[92] and infringements are investigated following a complaint or investigations initiated without complaint by the European Commission and/or the national competition authorities of Member States. There is thus no need to establish an

---

[89] See generally, Stephen Ross, 'Competition as a Constraint on Monopolistic Exploitation by Sports Leagues and Clubs' [2003] 19 Oxford Review of Economic Policy 569.
[90] See also Alex Schuster, 'The Interface Between Competition Law and Sport' [2009] Pennsylvania State Law Review (forthcoming).
[91] For a discussion concerning the extra-territorial effect of competition law, see Sufrin and Jones (n 84) 1371 – 1377.
[92] Case 127/73 *BRT v SABAM* [1974] ECR 51 para 16; and Case C-453/99 *Courage Ltd v Crehan* [2001] ECR I-6297 para 23.

independent regulator when regulatory agencies already exist to enforce infringements of European competition law. However, in order for players and consumers to benefit competition law must be robustly applied by the relevant regulatory authorities.

Competition law principles balance the interests of professional clubs and a sporting code's governing body with the interests of players. A regulatory rule or contracting practice which: restricts competition; and is not proportionate to the aim legitimately pursued, infringes Articles 81 or 82 (EC) and is void.[93] Moreover, competition law can protect the consumer interest. Consumers wish to view the best rugby league competition that the Super League clubs can produce taking into account each club's financial circumstances. The consumer interest is not necessarily served by rules agreed by private regulatory bodies that limit the efficient allocation of playing resources.

Finally, insofar as the Super League competition is concerned, a Super League club is an employer, a purchaser of playing services and a regulator of the employment relationship. The requirement for open competition in the market for playing services may compel organisational change in the regulatory framework which benefits the professional game overall.

1.6.2 Collective Organisation of Players

Anti-competitive restraints may be protected from competition law scrutiny if contained within a collective

---

[93] *Meca-Medina* (n 47) para 42.

bargaining agreement (although restraints contained in a collective bargaining agreement which infringe the Treaty's free movement provisions are still subject to European law).[94] There is thus an incentive for the Super League clubs and players based in the United Kingdom to negotiate a player's terms and conditions of employment collectively.[95] Collective negotiation may enable players to achieve conditions of employment which are more beneficial than those gained in a monopsonistic employment environment. It can also provide players with a right of consultation regarding the implementation of regulatory rules that impinge upon the employment relationship.

The terms of a collective bargaining agreement can create a partnership between the RFL, the clubs and the players, all of whom contribute real and intellectual property which enables the sporting competition to take place (the RFL provides the regulatory rules; a professional club provides assets - such as a stadium and training facilities - and a club brand; and a player provides playing skills and intellectual property). A partnership between all stakeholders may not necessarily arise in a monopsonistic employment environment or a private regulatory environment.

---

[94] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751, para 60; and Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, Ou Viking Line Eesti* [2008] All ER (EC) 127 paras 53 - 54

[95] The terms and conditions of employment of professional players employed at Catalans Dragons in France are the subject of collective negotiation under French labour law. This thesis concerns the regulation of the employment relationship between the British Super League clubs and players.

1.6.3 An Obligation of Consultation

The employment of professional players in the Super League competition identifies a lacuna in the employment protection afforded to most categories of employees. A professional sports person who is:

- a party to an employment contract with a employer who is not a sporting code's governing body;

- employed in a professional sports competition which is subject to private regulation; and

- not protected by a protected by a collective bargaining agreement,

- does not have a right of consultation against the implementation of regulatory rules that directly or indirectly affect the employment interests of the player. Judicial review of RFL decisions would secure a limited right of consultation for players. The RFL would be obliged to take into account the players' interests when adopting certain rules (although it would not need to obtain the agreement of players). However, a sporting code's governing body is not subject to judicial review in England.

Other private law challenges (such as: restraint of trade; breach of contract; a claim arising under Article 39 (EC); or the application of the principles of natural justice to disciplinary decisions) do not secure a right of consultation. In the absence of Government intervention, the application

of European competition law may secure for professional players that which is unobtainable under English employment law or administrative law: a right of consultation.

1.7 Thesis Aims

This thesis draws upon an analysis of the regulatory rules and contracting practices applied in the Super League competition to demonstrate that: the regulatory framework in which the Super League competition is played detrimentally affects the employment of professional players; (and the interests of consumers). It asserts that: European competition law regulates the conduct of the RFL, the RLIF and the clubs in a way that balances the interests of all parties in the competition; that the application of competition law may protect the right of free movement for players; and that the interests of the principal stakeholders in the Super League competition are best served through the negotiation of a collective bargaining agreement.

Chapter 2 will provide a historical synopsis of rugby league and demonstrate, inter alia, that the employment interests of professional rugby players benefit when there is strong external regulation; and effective collective organisation of players. Chapter 3 will describe the organisation of the Super League competition in 2009 and the relevant regulatory rules on which the competition law analysis is based. Chapter 4 will define the employment relationship in the Super League competition and highlight the implied terms of the players' contract which are unique to the employment of a professional rugby player.

Chapter 5 will define the market for playing services ("the relevant market"). Chapter 6 will discuss the salary cap as a price-fixing agreement between horizontal competitors. Chapter 7 will examine clauses contained in the players' contract and certain regulatory provisions which promote anti-competitive foreclosure in the relevant market; and limit the movement of players between clubs or the release of players for international representative matches. The registration system as a barrier to the supply of playing services will also be discussed. Chapter 8 will analyse the incorporation of terms in the players' contract which pertain to the supply of a player's intellectual property. Tying the supply of a player's intellectual property to a contract for the provision of playing services may infringe Article 82 (EC). Chapter 9 will consider the anti-competitive effects of the "club trained rule". Chapter 10 will draw conclusions from the arguments raised in this thesis and will recommend changes for the industry.

Finally, this thesis incorporates (where relevant) the statements made by thirty one stakeholders interviewed in the Super League competition and professional rugby union in New Zealand during the course of the research in 2007 and 2008. Those people and organisations interviewed included: the RFL; executives from Super League clubs participating in the Super League competition in 2007; executives from the Championship (formerly known as National League 1) clubs; professional Super League players; sports agents; professional coaches; a sponsor; the Rugby League Players' Association; the New Zealand Rugby Union; the New Zealand Rugby League Players' Association;

provincial rugby unions in New Zealand; and Adidas New Zealand.[96]

[96] The author obtained approval from a research ethics committee prior to commencing the interviews with stakeholders. All participants consented to interview. Where relevant, the names of stakeholders - and in some cases, the geographical location of the interview - have been omitted to protect confidentiality. Copies of the interview transcripts are held by the author in accordance with research guidelines applicable at the time of interview.

CHAPTER 2: RUGBY LEAGUE AND RUGBY UNION: A HISTORICAL SYNOPSIS

> *'1. The guarantee made by the clubs to the Northern Union is that the share of the New Zealanders shall not be less than £50 if a mid-week match and £100 if a Saturday or general holiday match.*
>
> *2. Every facility must be given to the Manager and the Secretary of the New Zealand team to check the gate receipts.*
>
> *3. The share to which the New Zealanders are entitled is seventy per cent of the gross receipts so that the Home Club must pay all the expenses of the match out of the remaining thirty per cent...'*[97]

2.0 Introduction

The regulatory structure for rugby league developed historically as a private, collective organisation of rugby clubs. The sport's history is intertwined with the history of rugby union and consideration of both codes provides an understanding of the way in which rugby league is currently organised. It also highlights the factors which affect competition in a market for playing services and which contribute to improved terms and conditions of employment for players (most notably external influences that beyond the control of the sport's administrators and effective collective organisation of professional players).

---

[97] Revenue-sharing arrangements agreed between the Northern Rugby Football Union, the clubs of the Northern Rugby Football Union and the players of the professional New Zealand Rugby Union team ("the All Golds") which toured the United Kingdom in 1907 (recorded in the Minutes of the Joint Meeting of Northern Union Sub-Committee and New Zealand Executive held at the Grand Central Hotel, Leeds 1907).

2.1 "Association Football" and "Rugby Football": The First Breakaway

In the mid-1800s, numerous versions of "football" were played throughout the United Kingdom. Some versions of the sport involved dribbling the ball whilst other versions were played under rules which permitted: a player to handle the ball; "hacking" (kicking - below the knee - an opposing player who had the ball); and scrummaging.[98] According to one historical account, the sport of rugby union was created when Mr William Webb Ellis picked up and ran with the ball in hand during a football match at Rugby School in the early 1800s (it is difficult to prove, however, that Mr Webb Ellis was the first person to run with the ball).[99]

In 1863 the Football Association ("the FA") was formed. Its initial membership comprised of clubs that played a version of football that included running with the ball as well as those clubs that played football with more limited handling rules. A preliminary draft of the rules for "association football" - or soccer as the sport came to be known – included running with the ball and kicking the ball through an eight metre high goal.[100] The suggestion that "hacking" be excluded from "association football" rules contributed to some clubs – namely, those clubs which preferred the rule to remain - declining to attend future FA meetings.[101] Thus "association football" with its characteristic feature of "dribbling the ball" and "rugby football" with its feature of players running with

---

[98] Huw Richards, *A Game for Hooligans: The History of Rugby Union* (Mainstream Publishing Company Ltd, Edinburgh 2006) 28 - 30.
[99] Tony Collins, *Rugby's Great Split: Class, Culture and the Origins of Rugby League Football* (2ed Routledge, London 2006) 5.
[100] Richards (n 98) 33 - 34.
[101] Richards (n 98) 33 - 34.

the ball and "hacking" grew into two separate and distinct sports. The division between the two codes was confirmed in 1871 when the Rugby Football Union ("RFU") was formed and the *Laws of the Game of Football as Played by the Rugby Football Union* codified.

2.2 The International Rugby Board: Formation and Early Years

On 5 December 1887 the International Rugby Board was formed. Its founding members were Scotland, Ireland and Wales; and its mandate was to act principally as an arbitrator of disputes which arose in matches played between the member countries. The minutes of the meeting record the IRB's role as follows:[102]

> *'Minutes of the International Board held at Manchester – Messers Carrick, Gardner (Scotland); Lyle McAlister (Ireland); Mullock, Lyne (Wales).*
> *Mr Carrick in the chair.*
>
> *The following resolutions were adopted:-*
>
> *1. That all International Matches must be played under Rules approved of by an International Board.*
>
> *2. That an International Board be immediately formed under the above resolution.*
>
> *3. That the same International Board shall have absolute and exclusive jurisdiction over all disputes arising in International Matches played under their Rules.*
>
> *4. That the Board shall consist of three representatives from each of the Unions, that the*

[102] Minutes of the IRB Meeting held 5 December 1887, Manchester, England. Copies of the IRB Minutes are held at the Rugby Union Museum, Twickenham, London and were viewed by the author in October 2006.

Chairman shall be appointed at each Meeting in regular rotation from the different Unions commencing in the order of seniority, and that the Board shall appoint as Hon. Secretary anyone they may think fit.

Horace S Lyne
Chairman

5/12/'87'

In 1888 the IRB adopted byelaws which provided that:

> *'4. All International Matches shall be played under the rules approved of by this Board.*
>
> *5. The Board shall have absolute and exclusive jurisdiction over all disputes arising in connection with International Matches [or otherwise between two countries] played under their Rules; and it shall have no power to interfere with the game as played within the limits of the different Unions.'*[103]

The IRB also issued a manifesto which stated that the IRB's mandate was *'primarily to settle disputes arising in International Matches, and secondarily to determine a uniform code of Rules under which these matches shall be played'.*[104] The IRB limited its jurisdiction to disputes arising from matches played under its rules and was not authorised to intervene in the game as it was played in each member's respective country. The IRB created a monopoly over the organisation of rugby union matches at an international level, and each member held a monopoly over the organisation of the sport in their respective jurisdictions.

---

[103] The words "or otherwise between two countries" contained in Bye-law 5 were included subsequently on 20 March 1896: Minutes of the IRB Meeting held 20 March 1896, London, England.
[104] IRB Manifesto adopted 29 September 1888.

Within six months of its formation, the IRB was involved in a dispute with the RFU regarding the playing rules which applied in matches played between international representative teams. The RFU objected to international matches being played according to IRB rules. The matter was resolved at arbitration and as part of the arbitral award, it was agreed that: all international matches would be played under RFU rules; the RFU would join the IRB as a member; and the IRB would increase to twelve members, with six members representing England, and two members from each of Ireland, Scotland and Wales.[105]

The minutes of meetings held during the years immediately following the Board's inception, record the issues of concern for the IRB. For example, at a meeting held between September 1890 and February 1892 all members agreed to discuss the timetable for forthcoming international matches with *'a view to avoiding a clashing'*.[106] Similarly, an issue of player eligibility was discussed at a meeting of the IRB held on 2 July 1892. The player 'J Marsh' was selected for England despite having played for Scotland previously. The IRB's bye-laws did not provide for the matter but the Board recommended the adoption of an eligibility rule under which a player's eligibility would be determined by country of birth or - in the case of colonials residing in the United Kingdom - by residence.[107] The IRB also resolved that *'no man should play for two countries'*.[108] In 1893 the transfer of players

---

[105] Award by Arbitrators, Lord Kingsburgh and Major F A Marindin, who met in April 1890 which Defines the Regulations of the International Rugby Football Board (recorded in the IRB Minutes for that year).
[106] Minutes of the IRB Meeting held 8 February 1892, Manchester, England.
[107] Ibid.
[108] Minutes of the IRB Meeting held 8 February 1892, Manchester, England.

between member unions was the subject of discussion and the IRB resolved to leave the issue for determination by its members.[109]

At a meeting on 4 January 1895, the Welsh Rugby Union protested against playing at the Ulster Ground in Belfast on the basis that the ground was not of the correct size and *'unfit for football'*.[110] The IRB agreed that the Welsh Rugby Union would not be required to play on the ground again.[111] Hence, issues of concern for the IRB in the late 1800s (such as: fixture clashes; player eligibility; transfers between member unions; ground size; and governance structures) mirror those of concern for the organisation of rugby union, rugby league and some other professional team sports in Europe in the modern era.

2.2.1 The Issue of Mr Arthur Gould

The scope of the IRB's regulatory authority did not initially extend to promulgating rules concerning player wage payments.[112] Instead the issue of whether a player was entitled to payment for providing playing services was determined by an individual rugby union. The absence of regulatory authority to act on the matter did not, however, prevent the IRB from involving itself in issues concerning player wage payments.

---

[109] Minutes of the IRB Meeting held 4 March 1893, Leeds, England.
[110] Minutes of the IRB Meeting held 4 January 1895, Swansea, Cardiff.
[111] Ibid.
[112] The IRB adopted rules prohibiting player wage payments in 1958: Eric Watts Moses, *A History of Proceedings of the International Rugby Football Board 1886 – 1960* (Walker & Co (Printers) Ltd, Twickenham 1961) 28.

For example, in 1896 the IRB recorded its disapproval of plans by the Welsh Rugby Union to permit a gift to Mr Arthur Gould (a retiring Welsh international rugby player). The gift took the form of a leasehold house and was organised by supporters outside the Welsh Rugby Union.[113] On 20 March 1896, the IRB adopted a resolution which required the Welsh Rugby Union to prevent the gift exchange (at the same time it also amended its bye-laws to provide it with authority to act on such matters).[114]

In January 1897 the IRB also resolved:

> *'1. That the gift of a testimonial in money or kind in opposition to the suggestion of the Board is on the part of the givers or Mr Gould an act of professionalism.*
>
> *2. That the keeping of the fund in hand with the possible intention of presenting a testimonial in opposition to the suggestion of the Board on Mr Gould's retirement is also an act of professionalism.'*[115]

In the opinion of the Welsh Rugby Union, the IRB *'was not formed for the purpose of dealing with the rules as to professionalism, but merely to settle the Laws of the Game and disputes arising between different unions'*.[116] In particular, the Welsh Rugby Union pointed out that:[117]

> *'..assuming the International Board had any right to deal with the question of professionalism, they have not made any rules relating to it, neither have they adopted the Rules now made by either the English or this Union; therefore that the question of professionalism can only be dealt with under the*

---

[113] Moses ibid. See also Minutes of the IRB Meeting held 20 March 1896, London, England.
[114] Minutes of the IRB Meeting held 20 March 1896, London, England.
[115] Minutes of the IRB Meeting held 25 January 1897, London, England.
[116] Undated Resolutions Passed by the Welsh Union appended to the Minutes of the IRB Meeting held 20 February 1897.
[117] Ibid.

Rules of the Union of which each player is a member, and therefore that even if the International Board have any power to deal with the matter of the Gould testimonial, the case can only be judged by the Rules as to professionalism made by this Union...this Committee is of the opinion that neither the subscribers to the Gould testimonial nor Gould have broken the Rules as to professionalism made by this Union'.

As a consequence of the IRB's involvement, the Welsh Rugby Union withdrew from the organisation in early 1897. It subsequently re-joined the IRB in 1898 but its re-admission was conditional upon the Welsh Rugby Union agreeing: to abide by the IRB's rules; and to accept the IRB's conclusion that Mr Gould was a professional insofar as the international game was concerned and was unable to play in international rugby union matches.[118]

It is unclear from the IRB minutes whether the IRB acted ultra vires or retroactively when it involved itself in the matter of Mr Gould. In any event, the conditions imposed for the re-admission of Welsh Rugby Union demonstrate – in the 1890s – the influence that an international sporting code's governing body asserted over the policies or rules adopted by a national rugby union. In the case of Mr Gould, the influence affected detrimentally his participation in a sporting competition.

2.3 The Evolution of Rugby League

In the late 1800s the terms and conditions under which rugby union players played the sport within England were determined by the RFU. In 1886 the RFU adopted rules

---

[118] Minutes of the IRB Meeting held 25 January 1898, Crewe, England.

which strictly prohibited payment of any kind to players thus setting the market value of rugby union playing services at £0. Expressed in terms of the restraints imposed in the modern era of professional team sports, the salary cap level in English rugby union competitions in the late 1800s was £0.

According to one historian, the prohibition against player wage payments did not prevent some clubs paying players:[119]

> *'Between October 1888 and January 1890 six of the leading clubs were suspended for periods of up to fourteen weeks for offering money or jobs to players. In the same period, ten players were put on trial by the Yorkshire committee for violating the amateur code, six of whom were suspended from the game for receiving cash, testimonial gifts and, in one case, an unauthorised wedding present from his club.'*

Leicester Football Club (at that time the biggest club in English rugby union) was frequently suspected of paying players and offering players inducements to join the club.[120]

In the Victorian era social strata in England were divided between: the wealthier middle and upper classes (generally landowners or salaried professionals) who resided in the south of the country; and the working classes (generally waged workers from the mines or factories) who resided mainly in the north. The working – week included a Saturday and workers in the north who played rugby union often sacrificed income in order to play games which fell on the same day. Rugby players in the south, who because of

---

[119] Collins, *Rugby League in Twentieth Century Britain: A Social and Cultural History* (Routledge, Abingdon 2006) 2.
[120] Collins (n 99) 190.

their social status and income were not required to work on Saturdays, did not incur the same financial penalty.[121]

The RFU's reluctance to permit player payments was the catalyst for twenty one rugby clubs in the north of England withdrawing from the RFU on 29 August 1895 at the George Hotel in Huddersfield.[122] The clubs formed the Northern Rugby Football Union ("NRFU"), and immediately resolved to permit payments to players as compensation for *'bona fide broken time only'.*[123] The maximum level of a player's wage payment was set at six shillings provided a player could demonstrate he was in employment and had lost a day's pay.[124]

The formation of the NRFU created a duopoly in the market for the organisation of rugby union competitions in England. The majority of clubs that remained with the RFU were located in the south of the country; whilst the twenty one clubs that formed the NRFU were located in Lancashire and Yorkshire in the north of England. In the modern era of professional rugby union and rugby league, the geographical division between the clubs is still present today.

2.4 Dominant Party Response to a Breakaway

Immediately following the breakaway, the RFU amended its rules and declared that all NRFU clubs and players were

---

[121] Geoffrey Moorhouse, *At the George and Other Essays on Rugby League* (Hodder & Stoughton, London 1989) 4.
[122] Ibid.
[123] Moorhouse (n 121) 6.
[124] Moorhouse (n 121) 6.

"professional" and prohibited from playing rugby union.[125] The RFU's members and rugby union players were prohibited from playing a match on a ground operated by a "professional rugby club"; and a "professional rugby club" was not permitted to play on a ground operated by a rugby union club.[126] The RFU's actions were a way of preventing the NRFU from developing beyond its initial membership.

2.4.1 Player Payments; Product Innovation; Consumer Effects

In matches held under the auspices of the NRFU, a player received six shillings per match provided the player could demonstrate that: he was in employment; and had lost a day's pay.[127] Professionalism was not permitted and the penalty for receiving payment other than a payment for broken time was a maximum of £150.[128] Three years later in June 1898, the NRFU passed a formal resolution which permitted professionalism.[129] With the added financial cost of players' wages, the NRFU changed the rules of rugby union to make the game quicker and more exciting for the spectators who paid to attend matches; and the game of rugby league evolved.[130]

In 1901 the clubs merged the Lancashire and Yorkshire senior competitions to form a single senior competition

---

[125] Minutes of the Meeting of the Rugby Football Union held 19 September 1895.
[126] Ibid.
[127] Moorhouse (n 121) 6.
[128] Moorhouse (n 121) 56.
[129] Moorhouse (n 121) 61.
[130] The rule changes included: penalising a deliberate knock-on with a penalty; removing the line-out; permitting a tackled player to get up and play the ball with his feet; and reducing the number of players on each team from 15 to 13 – Moorhouse (n 121) 7.

league, the Northern League, which comprised of 15 clubs. The creation of the Northern League was controversial since those clubs not accepted into the new senior league argued that *'a super league would skim the cream from the senior competitions and kill the smaller and less glamorous clubs'*.[131] Nonetheless, the competition went ahead as proposed; a second competition division beneath the Northern League was added in 1902.[132] Professional rugby league in the United Kingdom is organised along similar lines in the modern era.

The presence of a competitor in the market for the organisation of rugby union matches in England coupled with economic factors (such as the necessity to pay player wages) contributed to product innovation. The new product was branded rugby league and in 1922 the NRFU changed its name to the Rugby Football League (the name by which the sporting code's governing body is still known).

As a result of the breakaway, the market value of playing services provided to NRFU clubs increased. Players gained the financial benefit of remuneration for lost time, and when the game turned professional, the opportunity of a career in rugby league. Rugby union players were also able to pursue a professional career at an NRFU club. But once employed by an NRFU club, the limitations imposed by the RFU concerning the movement of players between the rugby codes limited the capacity of players to return to rugby union. The exclusion of rugby league players from rugby

---

[131] Keith Macklin, *The History of Rugby League Football* (Stanley Paul and Co, London 1974) 25.
[132] Ibid 29.

union continued until the IRB amended its rules to permit player wage payments in August 1995.

The effects of the breakaway for consumers were four-fold. First, the product market for rugby union matches was divided geographically. Matches between RFU clubs were played principally in the south of England and matches between NRFU clubs were played in the north. Secondly, there was a marked decline in the results of the English international representative team in the years following the breakaway, and a decrease in the quality of international rugby union matches involving England.[133] This was attributed by some people to the absence of the NRFU players who had traditionally provided the stronger forward players.[134]

Thirdly, consumers were provided with an alternative entertainment product in the form of a domestic rugby league match. The game grew in popularity in the North of England as illustrated by the number of spectators who attended the Challenge Cup Final Replay between Warrington and Halifax at Odsal Stadium, Bradford, Yorkshire in 1954. Attendance for the game was recorded at 102,569.[135] Finally, the new rugby league product created a spin-off product in the form of international rugby league matches played between representative rugby league teams.

---

[133] Moorhouse (n 121) 6. Between 1890 and 1895 England won eleven of eighteen matches played against Ireland, Scotland and Wales; and almost 43% of players selected to play international rugby union between 1890 and 1894 came from clubs in the North of England or would go on to join those clubs after the separation: Collins (n 99) 188. In the five seasons following the breakaway, of 15 matches played, England won four and drew two: ibid.

[134] Moorhouse (n 121) 6.

[135] Moorhouse (n 121) 7.

2.5 The Growth of Rugby League Internationally

The spread of rugby league to other countries was assisted, ironically, by the 1905 New Zealand Rugby Union ("NZRU") tour of the United Kingdom ("the 1905 tour").[136] The "All Blacks" (as the NZRU team was called because of the team's distinctive black playing gear): lost one game; scored 839 points; conceded 39 points; and contributed to a tour profit of £8,908.[137] Rugby union in 1905 was a very profitable business. The players, however, were not paid for playing and received only 3 shillings per day to cover touring expenses.[138]

During the tour, the All Blacks observed the rugby played by the NRFU clubs for which: players were paid; the crowds attracted to the game much larger than crowds drawn to some rugby union clubs; and the differing style of rugby which suited the way in which the All Blacks played rugby union.[139]

2.5.1 The 1907 "All Golds" Tour

Following the 1905 tour, a professional All Black team was formed to tour England and play against the NRFU clubs. The team was organised by a rugby union player, Mr Albert Baskerville. Each team member was required to pay £50 and at the end of the tour, the team profits were divided equally between the players irrespective of the number of games

---

[136] Collins (n 99) 171.
[137] Ibid.
[138] Collins (n 99) 171.
[139] Collins (n 99) 172.

played or whether a player was injured and unable to play.[140] Although the team's official title was the "All Blacks Rugby Football Team 1907", the media named the team the "All Golds" owing to the fact that the All Black players were paid for providing their services.[141] Regulations adopted jointly by the NRFU, the NRFU clubs and the NZRU team management provided for revenue-sharing between players and the NRFU clubs, and included the following:

> *'1. The guarantee made by the clubs to the Northern Union is that the share of the New Zealanders shall not be less than £50 if a mid-week match and £100 if a Saturday or general holiday match.*
>
> *2. Every facility must be given to the Manager and the Secretary of the New Zealand team to check the gate receipts.*
>
> *3. The share to which the New Zealanders are entitled is seventy per cent of the gross receipts so that the Home Club must pay all the expenses of the match out of the remaining thirty per cent.*
>
> *4. The Secretary of the Home club shall within three days of the match forward to J Platt a statement showing gate receipts in detail (such statement to be countersigned by Mr Baskerville, the New Zealand Secretary) along with a cheque for the amount due to the visitors...'*[142]

It was also agreed that the NRFU clubs would not approach any New Zealand player prior to the termination of the tour.[143]

---

[140] John Haynes, *From The All Blacks To The All Golds* (Ryan and Haynes, New Zealand 1996) 36.
[141] Ibid 142.
[142] Minutes of the Joint Meeting of Northern Union Sub-Committee and New Zealand Executive held at the Grand Central Hotel, Leeds 1907 (on display at the Rugby League Heritage Museum, The George Hotel, Huddersfield, England and viewed by the author on 13 July 2008).
[143] Ibid reg 13.

At the time of the tour's announcement, Mr Baskerville was immediately banned from all rugby grounds in New Zealand; and the RFU informed the NZRU that if the NZRU were to support the tour *'all relations would be broken'*,[144] thereby pressuring the NZRU against any involvement in the tour's organisation. In this way, the RFU was able to use its position on the IRB to influence the actions of another member against matters which might be injurious to the RFU's interests.

The tour departed for the United Kingdom on 10 August 1907. En route the team played three test matches under rugby union rules in Sydney and one match in Sri Lanka (then Ceylon).[145] It also attracted the services of Mr Herbert Henry 'Dally' Messenger (then) an Australian rugby union player, who travelled and played with the team.[146] The tour was financially successful and the total profit divisible between all players who participated was £5,641.[147]

The revenue-sharing arrangements between the NRFU clubs and the "All Golds" team mirror those practised in the modern era by sports, such as for example, the NBA Basketball Association and the New Zealand Rugby Union. Additionally, many professional rugby league clubs recruit the services of players from southern hemisphere countries such as Australia, New Zealand and the Pacific Islands (although the number of players a club may recruit is regulated by the RFL).

---

[144] Collins (n 99) 176.
[145] Haynes (n 140) 80.
[146] Collins (n 99) 176.
[147] Haynes (n 140) appendix.

2.5.2 Australia and Wales

The success of the "All Golds" tour encouraged the formation of the New South Wales Rugby Football League in Australia (which in turn resulted in the sport's growth in that country).[148] It also encouraged: NRFU clubs to form in Wales; and several Welsh Rugby Union ("WRU") clubs to withdraw from the WRU and join the NRFU.[149] The clubs, however, were not successful in remaining a part of the NRFU competition and eventually withdrew from the NRFU.[150] In 2008 Welsh rugby league club, the Celtic Crusaders, successfully applied for a license to participate in the Super League competition from 2009.

2.5.3 France

A dispute between members of the IRB influenced the growth of rugby league in France. In 1931, the French Rugby Union was excluded from the Five Nations rugby union tournament on the basis of allegations concerning player wage payments in that country.[151] Additionally, in 1933 an international rugby league match played in Paris between the representative teams of Australia and Great Britain encouraged some French rugby union players to form a team and tour England.[152] The Ligue Francaise de Rugby a Trieze

---

[148] Collins (n 99) 176.
[149] Collins (n 99) 181.
[150] The playing disparity between the Welsh NRFU clubs and other British NRFU clubs; the success of the Welsh international representative rugby union team between 1899 and 1909 which *'gave rugby union a national importance unrivalled by any other sport'*; and the increased popularity of soccer in Wales, contributed to the withdrawal of the clubs: Collins (n 99) 183 - 185.
[151] Collins (n 119) 71.
[152] Ibid.

("LFRT") was subsequently formed.[153] Rugby league became a popular sport in France, particularly in the south of the country where the culture of the game was similar to that in the north of England.[154]

However, during World War II, the Vichy Government banned rugby league because of its alleged links to the Allies.[155] Property and funds belonging to rugby league clubs were confiscated.[156] By contrast rugby union clubs were permitted to continue and that sport regained a lot of the popularity that it had lost previously to rugby league clubs.

In 2006 a French rugby league club, Catalans Dragons, was permitted to enter the Super League competition by agreement between the British Super League clubs and the RFL. The club also successfully applied for a Super League license to participate in the competition for a further three years from 2009. Another French rugby league club, Toulouse Olympique XIII, will play in the competition division below Super League – the Championship competition - from 2009.

2.6 A Player's Contract in the Early 1900s; The Players' Union

In the early 1900s NRFU players typically received payments for a win, a loss or a draw. In some cases a "signing on" fee was paid as an inducement for a player to join a club.[157]

---

[153] Collins (n 119) 71.
[154] Collins (n 119) 73.
[155] Information on display at the Rugby League Heritage Museum, The George Hotel, Huddersfield, England (viewed 13 July 2008).
[156] Ibid.
[157] Collins (n 119) 44.

Welsh players, overseas players and high profile players were also provided with jobs outside rugby league (since rugby league wages alone were usually insufficient to support a player's living costs).[158] A player's employment contract with Keighley Rugby League club in 1909 read as follows:[159]

> *'I agree to play NRUF [Northern Rugby Union Football] for the Keighley FC from September 21, 1909 to April 30, 1910 for the sum of ___ win, ___draw, ___loss for each First Team Match that I take in and for ___win, ___draw and ___loss for each Second Team Match in which I play.*
>
> *I also agree to obey all rules and directions of the Committee of the Club, also the rules of the Northern Union.*
>
> *The employers shall at their own expense, cause an insurance policy against accidents at football to be issued in respect of the player to secure payment of 25 shillings per week in case of accident and the player shall be entitled to the monies to become payable thereunder in lieu of his salary.*
>
> *Signature of Player_____*
> *Signature of Witness _____*
> *Signed on behalf of the clubs_____*
>
> *Terms as follows: 6 shillings per match whilst out of employment; 4 shillings per match when in employment.'*

By contrast in 2009 the RFL's standard form players' contract - which is used by all clubs in the Super League competition - extends to fourteen pages of small typed print.

Industrial disputes which arose during the formative years of the sport principally concerned player wage payments. For example, in 1914 players at five NRFU clubs went on strike in

---

[158] Collins (n 119) 45-46.
[159] Copy of contract on display at the Rugby League Heritage Museum, The George Hotel, Huddersfield, England (viewed 13 July 2008).

protest against a 25% wage cut; and in 1919 player strikes over wage amounts occurred again.[160] In 1920, in Huddersfield, the Northern Rugby Union Players' Union ("NRUPU") was founded by Mr Harold Wagstaff, a player from Huddersfield. Its founding aims were to: promote friendship among players; redress grievances; modify the transfer system to the advantage of players; and guarantee players a benefit after six years continuous service.[161]

The NRUPU successfully: achieved recognition by the NRFU; and obtained a transfer arrangement whereby a transferred player received 25% of any transfer fee, but it failed to achieve any of its other objectives and folded after three years.[162] According to Collins, the NRUPU was:

> *'...comprehensively outmanoeuvred by NRFU leadership. Unlike in any other industry it was very easy for the NU's clubs to divide and rule' by offering players covert payments to undermine collective action.'*[163]

Nowadays, there is a union representing the interests of players in most professional team sports in Europe. The effectiveness of the union depends upon: player interest; the way in which the union organisation is administered; and the laws governing collective organisation which exist in Member State countries. In 2009, the Rugby League Players' Association ("RLPA") represents the collective interests of some (but not all) professional rugby league players.

---

[160] Collins (n 119) 12-13.
[161] Collins (n 119) 50.
[162] Collins (n 119) 51.
[163] Ibid.

2.7 Separation of Amateur and Professional Rugby League: Breakaway and Amalgamation

In 1973 all amateur rugby league clubs in England withdrew from the RFL and formed the British Amateur Rugby League Association ("BARLA"). The reasons for the breakaway were described by BARLA as threefold.[164] First, the amateur clubs did not have voting rights in the RFL. Decisions concerning the governance of the amateur game were made by the professional clubs. Secondly, the amateur clubs did not believe the RFL acted in the best interests of the amateur sport. Thirdly, the Government through the Sports Council funded amateur sports. As amateur rugby league was governed by a professional organisation, it did not receive funding. By breaking away from the RFL, BARLA was able to access Government funding.[165] The amateur code was also funded through player subscriptions. Sponsorship or revenue from the sale of television rights were not sources of income for amateur clubs at the time.[166]

In response to the breakaway the dominant party, the RFL: ordered professional clubs to deny amateur clubs access to those facilities operated by a professional club; and it stopped the funding it provided to the amateur clubs[167] The RFL eventually recognised the organisation as the amateur code's governing body in May 1974.[168]

---

[164] Interview with a BARLA Administrator (former), 24 July 2008, Huddersfield, England.
[165] Ibid.
[166] BARLA interview (n 164).
[167] Collins (n 119) 167.
[168] Ibid.

BARLA did not sever its ties with the RFL completely; representatives from both organisations met regularly as the Rugby League Joint Policy Board.[169] The organisations co-existed with BARLA administering and organising the amateur sport with the help of public funding, and the RFL regulating thirty professional clubs.[170] Players entered the sport by playing for a school team or local club under the umbrella of BARLA and talented players were scouted from the amateur clubs to trial for a professional club. Small payments were made by a professional club to an amateur club in respect of any player who was subsequently recruited.

In 2004 BARLA amalgamated with the RFL to create a single governing body for rugby league in England. According to BARLA, the principal reason for the merger was a change in the way Government funding was channelled into amateur sport.[171] Funding, commercial necessity and the desire for one entity to control the pathway for players were provided as reasons for the merger by the RFL. Overall, funding was a catalyst for the breakaway and also the amalgamation. In 2009, BARLA is a member of the RFL.

2.8 Competition in the Market for the Organisation of International Rugby Union Matches; Product Innovation; and the Rugby Union World Cup

The inaugural Rugby Union World Cup ("RWC") was held in New Zealand in 1987. The IRB-organised tournament resulted from several failed attempts by entrepreneurs to

[169] BARLA interview (n 164).
[170] BARLA interview (n 164).
[171] BARLA interview (n 164).

create an international rugby union tournament to rival the international matches played under the auspices of the IRB.[172] The RWC was introduced primarily to prevent an *'unpalatable brand of professionalism'* taking control of the game. [173] The unpalatable brand of professionalism was described as the prospect of the IRB losing control of the administration of rugby union, and the rules of the game being changed to create a new sport (something rugby union had experienced previously).[174]

The RWC presented an opportunity for international representative teams to compete in a single tournament.[175] Sixteen teams participated in the inaugural competition. The RWC stimulated public interest in rugby union and improved the sport's commercial value.[176] An increasing number of people watched the game on television and live at matches, and the increased spectator interest benefited the sport financially through sponsorship revenue, gate receipts and the sale of television broadcast rights contracts. With money flowing into the game, rugby union players demanded a

---

[172] Interview with a NZRU administrator (former), 7 January 2006, New Zealand.
[173] Ibid.
[174] NZRU interview (n 172).
[175] Ibid. Prior to the Rugby World Cup, rugby competitions between international representative teams (with the exception of the Five Nations tournament in Europe) typically took the form of a rugby tour or single test matches.
[176] Total cumulative television audiences and total match attendance for the Rugby World Cup have increased steadily in the twenty year period of the tournament. The total cumulative television audience is recorded as follows: 1987 (New Zealand) 230 million; 1991 (UK and France) 1.4 billion; 1995 (South Africa) 2.3 billion; 1999 (UK and France) 3.1 billion; 2003 (Australia) 3.4 billion; and 2007 (France) 4.2 billion – International Rugby Board Official Website, 'RWC Confirmed as Record-Breaker' 18 February 2008 <http://www.irb.com/newsmedia/mediazone/pressrelease/newsid=2022301.html> accessed 15 July 2008. The total attendance is recorded as: 1987 (New Zealand) 600,000; 1991 (UK and France) 1 million; 1995 (South Africa) 1.1 million; 1999 (UK and France) 1.7 million; 2003 (Australia) 1.9 million; and 2007 (France) 2.24 million: ibid.

greater share of the financial reward that the clubs and the rugby unions were making.[177]

2.9 Rugby Union: 1988 to 1995

Senior rugby union administrators were keen for rugby union to retain its amateur status despite pressure from senior players for the game to turn professional. Of principal concern for the IRB was the prospect of rugby union suffering a *'loss of independence'*.[178] Amateurism assisted the sport to retain its independence, protected from perceived *"predatory commercial interests"*.[179] According to Dudley Wood (former Secretary of the English Rugby Union) if rugby union was to be played for payment:[180]

> *'We would have to bow to the demands of the sponsors of television and so on in how we [run] the game, because the money would become paramount.'*

Another view was that professionalism was simply *'not needed'*.[181] The national rugby unions were making sufficient money to develop the game and cover the costs of hosting international rugby tours:[182]

> *'It was not needed because players didn't play nearly as much back then as they do now but they just played for the honour and glory of playing for their country. I think the best example of this is the UK in that I was told by a very good authority*

---

[177] Peter FitzSimons, *The Rugby War* (Harper Collins Publishers, Australia 2003) 44.
[178] House of Commons National Heritage Select Committee Third Report, 'Relations Between Rugby Union and Rugby League' HC (1994 – 1995) 276 para 29.
[179] Ibid para 47.
[180] Evidence of Mr Dudley Wood provided to the National Heritage Committee Inquiry into Relations Between Rugby Union and Rugby League on 23 March 1995.
[181] NZRU interview (n 172).
[182] Ibid.

> *that England returned huge amounts of money for seats they didn't have. Whenever, England played Wales at Twickenham they would return hundreds and hundreds of pounds for seats because they did not have the seats to accommodate the people. That's why it wasn't needed because they could pay Wales for the costs of a train trip and one night's accommodation and make a lot of money. In Ireland, there would be the ferry back and forth and two night's accommodation so it wasn't resisted. It wasn't needed.'*[183]

Furthermore, rugby union's amateur status aligned with its historical roots as a sport played principally for pleasure and not for financial reward.[184]

2.9.1 Allegations of Player Wage Payments

In the years preceding the decision to turn rugby union into a professional sport, it was alleged that:[185] payments to players for participation in rugby matches were widespread; the rules regarding amateurism in rugby union were not enforced adequately; and rugby union's status as an amateur sport was a "sham". The RFU investigated and produced a report into the allegations relating to its member clubs.[186] The report confirmed that players were receiving inducements, incentives and other payments in breach of the game's regulations regarding amateurism.[187] The benefits or payments generally took the form of, inter alia: increased car

---

[183] NZRU interview (n 172).
[184] Evidence of Mr Dudley Wood provided to the National Heritage Committee Inquiry into Relations Between Rugby Union and Rugby League on 23 March 1995.
[185] P Williams, 'Battle Lines on Three Fronts: The RFU and the Lost War Against Professionalism' (2002) 19 The International Journal of the History of Sport 114, 118.
[186] Rugby Football Union, *Final Report of the Working Party on Illegal Payments* R A G Rogers (Chairman) 1 April 1993 (held at the Rugby Union Museum, Twickenham).
[187] Ibid 1.

mileage payments for travel to and from games; excessive expense payments; fictitious employment, expense or appearance payments; free or subsidised accommodation, housing or mortgage support; and gifts from sponsors and club members.[188]

To eliminate or "curtail the payments", the RFU introduced new regulations which, inter alia:[189]

- Limited the amount that clubs could pay to reimburse players for expenses (for example, mileage rates were set at 20 pence per mile and meal allowances were capped at £20 per day);

- Banned Clubs from supplying cars (other than hire cars) to players for rugby-playing purposes; and

- Introduced penalties for contravention of the new rules.[190]

Enforcement of its new regulations, however, was not overly rigorous since the RFU only investigated breaches if a complaint was made.[191]

---

[188] Ibid.
[189] Rugby Football Union Regulations Relating to Amateurism (April 1993) reg 4.
[190] The penalties applied to a player for breaching the rules included: a severe reprimand; suspension from playing or being an administrator for one season; and/or forfeiture of amateur status. The penalties applied to a club were: a severe reprimand; deduction of points; relegation to a lower league; exclusion from competitions; and/or expulsion or suspension from the RFU: Rugby Football Union Regulations Relating to Amateurism (April 1993) reg 4.2.
[191] Rugby Football Union Regulations Relating to Amateurism (April 1993) reg 4.4.

At an international level, the IRB commissioned a Working Party to investigate breaches of its amateur regulations. The Report of the IRB's Amateurism Working Party concluded that:[192]

- The game's amateur status was no more than a "veil";
- There were differing interpretations of the IRB's regulations amongst Member Unions;[193] and
- Breaches of the IRB's regulations were so widespread that '*consistent and effective disciplinary action*' was not possible.

The Working Party also recorded several other observations about the game at an elite level. First, it noted that rugby union was undergoing a period of rapid and continuing expansion in terms of the number of people playing and watching the game. Its popularity was making it a desirable sport to broadcast, and to market consumer products, and the commercial opportunities available to rugby unions and rugby players were steadily growing.[194]

Secondly, the game's popularity amongst spectators required players to play good, entertaining rugby more often. This in turn was placing onerous demands on elite players who were required to train harder, to train more often and to attend an increasing number of sponsor commitments. Maintaining a

---

[192] International Rugby Board, *Report of the International Rugby Board's Amateurism Working Party,* Mr V Pugh QC (Chairman) (February 1995) b.
[193] One example of a differing interpretation of the regulations arose in respect of the French Rugby Union which considered a rugby player to be an "amateur player" so long as his remuneration did not exceed a certain amount: ibid 8.
[194] IRB Report (n 192) 1.

balance between rugby training, playing matches and full time employment was thus becoming increasingly difficult for elite players.[195]

Thirdly, there was an expectation amongst elite players in some unions that the players would be paid for playing.[196] Some players and coaches were receiving a form of remuneration either openly in breach of the regulations or by means of a device - such as a trust scheme - to circumvent the amateur regulations.[197] The inconsistency between the unions was creating unfairness for everyone involved in the game.

Fourthly, the game's amateur principles derived from a social era where receipt of payment for *bona fide* loss of time was considered unacceptable. In the Working Party's view, a game in the 20th century that limited participation at an elite level to those who were willing to lose time and wages, or endure blighted careers without compensation, was socially unacceptable and divisive.[198]

Finally, the Working Party considered the commercial pressures in rugby union to be so great that unless the IRB reconsidered its regulations regarding amateurism: [199]

> *'...the game will become unregulated and its control may be lost from the IB, whether to rugby bodies professional or amateur or more likely by the commercial world of the communications giants trading on the real and perceived disaffection of the game's most essential participants.'*

---

[195] IRB Report (n 192) 2.
[196] IRB Report (n 192) 8.
[197] Ibid.
[198] IRB Report (n 192) 3 - 4.
[199] IRB Report (n 192) 19.

2.9.2 Continued Exclusion of Rugby League Players From Rugby Union

Since the NRFU breakaway from the RFU, rugby league players and those associated with the game were prevented from playing or otherwise being involved in the game of rugby union. At various times before August 1995, IRB regulations prevented: school children from playing both codes; amateur rugby union and amateur rugby league players moving between codes; and former professional rugby league players being rugby union coaches.[200]

The only period of time over which players of both codes were permitted to play without restriction arose during World Wars 1 and 2. In the Armed Forces during those times, people who fought together were permitted to play in matches of both codes, although the game of rugby league was not promoted or recognised as a sport by the Armed Forces in England until April 1994 (unlike rugby union which was a recognised sport).[201]

The non-recognition of rugby league by the Armed Forces allegedly contributed to the difficulties the RFL encountered expanding the game internationally.[202] According to the RFL, the Armed Forces were the primary means by which sport spread throughout the world during the 1900s and the non-recognition of rugby league restricted the international

---

[200] G Williams, P Lush and D Hinchcliffe, *Rugby's Berlin Wall: League and Union From 1895 to Today* (London League Publications Ltd, London 2005) 12 - 17.
[201] National Heritage Select Committee Third Report (n 178) para 24.
[202] Memorandum submitted by the Rugby Football League to the National Heritage Select Committee Inquiry into Relations Between Rugby Union and Rugby League, March 1995, para 5.

development of the game.[203] The exclusion of rugby league players from rugby union had contributed to the limited growth of rugby league internationally and nationally in England:[204]

> *'Our primary argument against this (asides of those which concern natural justice and the rights of the individual) is that it prevents us from developing Rugby League to its full potential. We believe that these regulations are used to prevent rugby league developing as an independent sport.'*

The reasons for the continued exclusion of professional rugby league players from rugby union were expressed in 1995 as two-fold. First, permitting professional rugby league players to participate in rugby union allegedly undermined the amateur status of the sport; excluding these players thus preserved rugby union's amateur status.[205] Paradoxically, professional athletes from other sports were not excluded from playing rugby union.[206] Secondly, it was considered undesirable that rugby union players, whose skills had been developed by rugby union resources, should be able to use those skills to the advantage of another sport.[207]

2.9.3 Proposed Government Intervention in the Governance of Rugby Union in England

Between June 1994 and May 1995 the RFU's amateur regulations were the subject of Government scrutiny in England. The Sports (Discrimination) Bill proposed to *make*

---

[203] Ibid.
[204] Memorandum submitted by the Rugby Football League to the National Heritage Select Committee Inquiry into Relations Between Rugby Union and Rugby League, March 1995, para 3.
[205] Dudley Wood evidence (n 184).
[206] Ibid.
[207] Ibid.

it unlawful for any rule-making body for a sport to discriminate against persons who have participated, are participating or are expected to participate in any lawful sport and for any connected purposes.[208] The Private Member's Bill - which was the initiative of Mr David Hinchcliffe (then) Labour Member of Parliament for Wakefield - was introduced in Parliament on 21 June 1994. The idea of the Bill resulted from the continued exclusion of professional rugby league players from rugby union, although the Bill was of general application to all sports.[209]

Simultaneous with the Bill's consideration in Parliament, the National Heritage Select Committee commenced an inquiry into the relationship between rugby league and rugby union.[210] The genesis for this inquiry arose from the view that public money in the form of lottery funding should not be provided to rugby union clubs which openly excluded former professional rugby league players. The Committee recommended that:[211]

> *'...until the regulations governing Rugby Union are amended to remove discrimination against Rugby League, no further money from the Sports Council or any other body which distributes public funds either at national or local level should go to the RFU or any of its member clubs. The Committee also recommends that no further distribution of National Lottery proceeds should be made to Rugby Union clubs until Rugby League is treated equally with all other sports in Rugby Union's Regulations'.*

The IRB's decision to adopt professionalism avoided any direct Government intervention into the administration of

---

[208] Preamble to the Sports (Discrimination) Bill HC (1993-1994) 129.
[209] D Hinchcliffe (MP), *Rugby's Class War: Bans, Boot Money and Parliamentary Battles* (2000) 61.
[210] National Heritage Select Committee Third Report (n 178).
[211] Ibid para 65.

rugby union. The Sports (Discrimination) Bill was defeated by the House of Commons and the recommendations of the National Heritage Select Committee later became redundant when the exclusion against rugby league players was removed from IRB regulations in September 1995.

2.10 Organisation of Rugby League: Early 1990s

In the early 1990s the majority of rugby league clubs in the United Kingdom were in financial trouble.[212] A report and survey undertaken by the RFL in 1993 concluded that the professional game: had an over-concentration of professional clubs in a limited geographical area; was under-funded; operated facilities of a poor standard; and that some professional clubs were poorly managed.[213] Moreover, changes to legislation following the Hillsborough Soccer Disaster, required all sports clubs, including rugby league clubs, to comply with minimum safety requirements for stadia.[214] The construction costs placed additional financial pressure on some rugby league clubs.

Rugby league received less revenue from the sale of its television broadcast rights when compared with sports such as football or rugby union.[215] The RFL's (then) contract with

---

[212] Memorandum submitted by Super League (Europe) Limited to the Culture Media and Sport Committee Inquiry into the Future of Professional Rugby, June 1999, para 8.
[213] Ibid.
[214] The Hillsborough Stadium soccer stadium tragedy occurred on 15 April 1989 and resulted in the deaths of a number of spectators. An Inquiry into the tragedy conducted by Lord Justice Taylor recommended changes to minimum safety standards in sports stadia, some of which were later enacted in legislation: see *The Hillsborough Soccer Stadium Disaster (Final Report)* Cm 962 1990 (The Taylor Report).
[215] Super League (Europe) Limited memorandum (n 212) para 13. The sport's inability to generate revenue from the sale of television rights was attributed to a perception that rugby league's appeal was limited to

the British Broadcasting Corporation concerning the broadcast of rugby league matches, including all international test matches and domestic games provided revenue of under £1 million pounds a year.[216]

Moreover, at that time the premier professional competition was dominated by one club, namely, Wigan Warriors. Due to the club's history of playing success and the financial investment of a wealthy owner, the club was able to field a strong team when compared to other less affluent clubs. For a period of time from 1986, Wigan was the only club which employed players as full time professionals.[217] It won the British rugby league championship for seven successive years between 1989 and 1996.[218]

2.11. 1995

1995 proved a pivotal year for both codes of rugby. A Government Inquiry into Relations Between Rugby Union and Rugby League in England was concluding; the Sports Discrimination Bill (UK) proposed changes to the administration of sport; some professional rugby league clubs were in financial difficulty; and spectator interest in rugby league was decreasing. Competition in the pay

---

spectators in the north of England. This in turn discouraged sponsors from associating products with the sport and resulted in reduced competition between television companies for the rights to broadcast the sport: Evidence and submissions presented to the Culture Media and Sport Committee Inquiry into the Future of Professional Rugby 28 June 1999.

[216] Super League (Europe) Limited memorandum (n 212) para 8.

[217] Collins (n 119) 2.

[218] Wigan Warriors Official Website, 'Honours' <http://www.wiganwarriors.com/MidContent.asp?cid=8> accessed 14 July 2008.

television market in Australia was to catapult both sports into a new commercial era.

2.11.1 Competition in the Market for the Organisation of Professional Rugby League Matches in Australia

In the early 1990s the Australian broadcasting industry was de-regulated. Owing to competition between two rival media companies for subscribers in the pay-television market, competition arose in the market for the organisation of professional rugby league matches in Australia. The two companies, Foxtel (a company owned by media magnate Mr Rupert Murdoch) and Optus-Vision (a company owned by media magnate Mr Kerry Packer) both identified the eighteen to thirty-five year old age demographic as a lucrative source of pay television subscriptions.[219] Rugby league was a popular sport amongst the age group and televising rugby league games was considered essential to the successful marketing of a pay television network.[220] At the time, the Australian Rugby League ("ARL") was the sporting code's governing body in Australia and all rugby league games were held under its auspices. The rights to broadcast ARL games were held by media companies associated with Mr Packer.[221]

In order to break the monopoly control of the ARL and Optus Vision, Mr Murdoch and his media companies, Foxtel and News Limited, launched a new rugby league competition called "Super League". It aimed to compete directly with the ARL competition, and to be broadcast only on Foxtel. News

---

[219] FitzSimons (n 177).
[220] Ibid.
[221] FitzSimons (n 177) 2.

Limited induced ARL clubs to join Super League and significant salaries were offered to rugby league players and rugby union players to play in Super League. The matter resulted in litigation between Mr Murdoch's media companies and the ARL concerning allegations of breach of contract, inducing breach of contract and restraint of trade.[222] The dispute between the rival rugby league competitions ended in 1998 with the two competitions being merged to form the Australian National Rugby League (as it is now known). The Australian NRL is currently organised pursuant to a partnership arrangement between News Limited and the ARL.[223] The ARL remains the governing body for rugby league in Australia.

2.11.2 Breakaway: The Formation of Super League in the United Kingdom; Increased Demand for Rugby League Playing Services

The departure of players from clubs in the ARL competition to clubs affiliated to News Limited's Super League encouraged the ARL to recruit players from the rugby league clubs in the United Kingdom.[224] In Australia, Super League players' salaries were 400% higher than salaries offered by clubs aligned to the ARL, and in some cases, individual salaries exceeded $A700,000 per annum.[225]

---

[222] *News Limited and Ors v Australian Rugby Football League Ltd and Ors* (1996) 139 ALR 193 (HCA).
[223] The National Rugby League, 'History', <http://www.nrl.com/NRLHistory/tabid/270/Default.aspx> accessed 20 July 2006.
[224] Supra League (Europe) Limited memorandum (n 212) para 11.
[225] FitzSimons (n 177) 1.

Owing to the increased demand for playing services in Australia, player salaries increased in the United Kingdom. British rugby league clubs offered higher salaries in order to retain rugby league players.[226] One player interviewed described his experience as follows:

> *'...all the clubs basically got all the players they wanted to hold onto, they brought those players in and offered them a sign-on bonus and for the majority of players a boost on their contracts and an extension on their contracts...I got a phone call from the Chief Executive, saying could I come into his office so I rang my manager and... we went into the offices and within an hour I had re-signed... I had extended my contract by a year, signed a loyalty bonus with Super League. There were a lot of players doing that at the time...'*[227]

In April 1995, following the launch of Super League in Australia, News Corporation, paid £87 million for the right to broadcast British domestic and international rugby league on SKY television.[228] The revenue from the sale of television rights to News Corporation provided the finance for the re-branding of British rugby league and the creation of a new competition product, the Super League competition.[229]

One Super League Club executive interviewed described the competition as a breakaway of twelve clubs:

> *'Super League Europe Ltd, at the start of the Super League competition, a dozen or so years ago, it was in effect a breakaway. At that time the game was played in winter and some far sighted people said, "What we need to do is play this in summer, in an English summer, on harder grounds in nice weather so that crowds will come and watch us." The RFL said, "Nonsense, we've been going 90 years, we're*

---

[226] Super League (Europe) Limited memorandum (n 212).
[227] Interview with Player I, 18 July 2007, England.
[228] Moorhouse (n 121) 345.
[229] D Thomas, 'The Rugby Revolution: New Horizons or a False Dawn?' Institute of Economic Affairs (September 1997) 20.

a winter game and that's the way we are going to stay", so there was a breakaway in effect and Super League was invented... Rupert Murdoch and Co were absolutely instrumental in that."[230]

There was also discussion of establishing a single global Super League but the logistics of holding a global competition prevented it from occurring at that time.[231]

The Super League competition initially comprised of twelve elite professional clubs. So as to encourage the growth of the sport outside its traditional supporter base in the north of England, one club was based in London (London Broncos) and another club in Paris (Paris St Germaine). The remaining professional and semi-professional clubs which were not included in the Super League competition were divided into two competition divisions beneath Super League. The competition playing season was altered so that Super League matches were played during the summer months rather than the winter months.[232] The competition format involved the twelve clubs playing each other and points were awarded based on the outcome of the match. The Super League champion was the club with the most points at the end of the playing season.

2.11.3 Competition in the Market for Rugby Union Playing Services; Product Innovation

The scale of salaries on offer to Super League players induced many rugby union players to switch codes.[233]

---

[230] Interview with Club J, 24 July 2007.
[231] Ibid.
[232] Thomas (n 229) 19.
[233] FitzSimons (n 177) 9.

Although rugby union administrators believed that the accolades associated with playing international rugby union (which players moving to rugby league would no longer be eligible to play) were adequate reward for rugby union players, the level of money on offer in Super League was concerning.[234] The formation of Super League illustrated to rugby union administrators, the ease with which control could be wrested from a sporting code's governing body by a commercial interest outside the game; something that rugby union administrators feared.

In order to counter the significant salaries offered by Super League clubs, in June 1995 the South African Rugby Union ("SARU"), the Australian Rugby Union ("ARU") and the New Zealand Rugby Union ("NZRU") created two entertainment products: the Super 12 competition; and the Tri-Nations competition. The Super 12 competition involved games between twelve rugby union teams: five teams situated in New Zealand; four teams based in Australia; and three teams located in South Africa.[235] The Tri-Nations tournament comprised of annual matches played between the international representative teams of Australia, New Zealand and South Africa. A company called South Africa New Zealand Australian Rugby Ltd ("SANZAR") was formed to organise the competitions; and SANZAR subsequently sold the rights to broadcast the Super 12 and Tri-Nations competitions to News Corporation for $US555 million.[236] In this way, the unions commercialised rugby union in their respective countries. It also created a schism between the

---

[234] Ibid.
[235] The Super 12 competition was enlarged in 2006 to include two extra teams: one team from Australia; and another team from South Africa. At the time of writing it is known as the "Super 14".
[236] FitzSimons (n 177) 94 - 98.

northern hemisphere rugby unions and the three southern hemisphere rugby unions.[237]

2.11.4 The World Rugby Corporation

Simultaneous with SANZAR launching the Super 12 competition, a competitor – the World Rugby Corporation ("WRC") - entered the market for the organisation of rugby union matches.[238] Financial backing for the competition was provisionally agreed by Mr Packer, but was only guaranteed if the WRC signed a majority of the world's senior rugby union players to play in the competition.[239]

The proposed WRC competition involved:

- A global competition with 30 franchise teams based in major cities around the world (for example, Sydney, New York, Paris).[240]

- The franchises were to be 50% owned by the national rugby unions and 50% owned by private interests.[241]

- Each team would employ 30 players and the players would be ranked according to ability. The number of top – ranking players contracted to play in a particular

---

[237] Williams (n 185) 133.
[238] FitzSimons (n 177) 153.
[239] Ibid. Mr Packer's involvement with WRC arose at a time when Rupert Murdoch's News Limited was endeavouring to secure the television broadcast rights to rugby league matches in Australia. It is unclear whether Mr Packer intended to fully support the WRC or whether his involvement was simply a device: to upset the agreement between News Corporation and SANZAR; and/or to negotiate a favourable settlement to the dispute between the ARL and News Media Ltd: FitzSimons (n 177) 154 - 155.
[240] FitzSimons (n 177) 45.
[241] Ibid.

team would be restricted, so that the standard of competition throughout the world could be even and thus promote greater interest in the game.[242]

- The proposed playing season would run from March to October and result in one team being declared the world champion each year.[243]

Rather than market the proposal to the IRB's member unions, the WRC approached and encouraged rugby union players throughout the world to sign contracts in confidence (although eventually details of the competition were publicised). Whilst the WRC was initially successful in signing a majority of rugby union players from various countries, it was unable to secure the services of any members of the South African national team (which in July 1995 won the third RWC). Without players from the South African international representative team in favour of the proposal, the WRC was unable to finalise its financial arrangements and the proposed competition folded.[244] The competition for playing services, however, benefited rugby union players in Australia, New Zealand and South Africa who were able to negotiate larger salaries from their respective unions than might otherwise have been obtained.[245]

---

[242] FitzSimons (n 177) 13.
[243] FitzSimons (n 177) 9.
[244] FitzSimons (n 177) 279 - 301.
[245] Over the period during which the WRC was demanding playing services, the NZRU increased its salary package on offer to players by providing: a 75% advance on the first years' payment, a payment of $10,000 for a forthcoming test match with Australia plus an additional payment of $30,000 for a tour of France in late 1995: FitzSimons (n 177) 172. Similarly, the Australian Rugby Union's salary offers to its players increased from $A220,000 to $A250,000: FitzSimons (n 177) 192.

2.11.5 Increased Demand for Rugby Union Playing Services

With competition for rugby union playing services arising between SANZAR, the WRC, and to a lesser extent from Super League clubs in Australia and rugby league clubs in England, global demand for rugby union playing services increased. Rugby union players in New Zealand, Australia and South Africa negotiated collectively with SANZAR and the WRC, and individually with potential employers in Super League.

WRC salaries were substantially greater than those offered by Super League and SANZAR, although SANZAR offered rugby union players the opportunity to play international representative matches, which the WRC and Super League could not. The WRC classified the rugby union players into five tiers of payment. The top tier was reserved for the best players, of which Jonah Lomu (a New Zealand rugby union player) was offered a three-year contract for $US1.5 million.[246] For a standard three-year contract in the remaining tiers, salaries were approximately $US825,000, $US725,000 $US300,000 and $US200,000 respectively.[247]

By contrast, the NZRU offered its players one of four contracts: elite All Blacks were offered $NZ250,000; All Blacks were offered $NZ200,000; at risk players or those most likely to defect to rugby league were offered an equivalent amount; and players on standard contracts were

---

[246] FitzSimons (n 177) 67.
[247] Ibid.

offered up to $NZ150,000 conditional upon the number of games played.[248]

2.12 Rugby Union Permits Professionalism

On 26 August 1995, almost one hundred years after the NRFU withdrew from the RFU for reasons related to player payments, the IRB removed the prohibition against player wage payments:

> *'Subsequent to the repeal of the amateur regulations, rugby will become an open game. There will be no prohibition on payment or the provision of any other material benefit to any person involved in the game.'*[249]

2.12.1 Aftermath: Rugby Union in England

The decision to permit player wage payments took the RFU by surprise.[250] The RFU did not have a plan prepared for the organisation of the professional sport, and the elite clubs did not have the finance immediately available to pay players.[251] As a result the RFU declared a one-year moratorium on the

---

[248] FitzSimons (n 177) 147.

[249] Press statement given by the (then) Chairman of the International Rugby Board, Mr Vernon Pugh, Paris, 27 August 1995. The factors which influenced the adoption of professionalism in rugby union have been described as follows: *'The absorption of professionalism into Rugby Union in the Northern Hemisphere was dictated by the reality of shamateurism at the highest levels of the game, particularly in the Southern Hemisphere, where the pretence of amateur status had become severely undermined and unsustainable'* – Second Report From the Culture, Media and Sport Committee: 'The Future of Professional Rugby' HC (1999 – 2000) 99 page vi.

[250] Memorandum submitted by English First Division Rugby Ltd to the Culture Media and Sport Committee Inquiry into the Future of Professional Rugby, July 1999, para 1.10.

[251] The rights to broadcast English international and domestic club rugby matches had been previously sold to the British Broadcasting Corporation and SKY television and were not due for renewal until 1997: 'RFU Bars Clubs From Paying' *Guardian* (London, 8 September 1995) Sport, 24.

implementation of the professional game in England,[252] and set up a commission to consider, amongst other things: the structure of a domestic professional rugby union competition; any amendments that were required to RFU regulations to accommodate player wage payments; and the sources of finance for a professional sport.[253] During the moratorium period, however, private investors acquired interests in the elite rugby clubs.[254] The private investment enabled the clubs to enter into employment contracts with players and to undertake improvements to stadia.[255]

The influx of private investment and the collective organisation of the clubs into a company (then named England First Division Rugby Ltd) led to conflict between the clubs and the RFU concerning the administration and structure of the professional game. The elite clubs negotiated collectively with the RFU on issues concerning, inter alia: the structure of the professional domestic club competition; the right to negotiate television broadcast rights agreements; the form of the players' contract; and the release of players for international competitions.[256]

---

[252] 'RFU Bars Clubs From Paying' *Guardian* (London, 8 September 1995) Sport 24.
[253] Ibid.
[254] Evidence of Mr Howard Thomas (then) Acting Chief Executive of English First Division Rugby Ltd to the Culture Media and Sport Committee Inquiry into the Future of Professional Rugby, 15 July 1999.
[255] English First Division Rugby Ltd memorandum (n 250) para 1.11.
[256] Other issues of concern included: the right to representation on the RFU; the right to benefit exclusively from other commercial arrangements; the power to determine the number of games played in a season and against whom; the power to determine when players would participate in international representative matches; and the participation of English clubs in a professional European club competition: English First Division Clubs, *A Report to the Rugby Football Union Commission* October 1995 3 - 5.

Negotiations between the parties were protracted and acrimonious.[257] Of primary importance for the elite clubs was the ability to operate a professional competition with limited interference from the RFU. The elite clubs desired a competitive domestic club rugby competition which would generate revenue from gate receipts, merchandising and other commercial opportunities. An important part of that was the ability of clubs to field a full strength team. Players who were absent from club teams because of recruitment to the international representative team disrupted the English club playing season with a consequent financial detriment to a club's sports business. Of primary importance for the RFU, however, was unrestricted access to playing services in order to field a competitive international representative team.

The negotiations between the clubs and the RFU concluded with the parties signing the "Leicester Agreement" on 1 February 1997. The agreement did not provide the elite clubs with complete autonomy of the professional domestic club competition. Instead, it represented a compromise whereby the elite clubs obtained: the right to participate in negotiations on the sale of television rights and sponsorship matters;[258] a limited power to arrange and determine the form of the competition structure;[259] a restriction on the number of international matches the RFU could schedule without consultation with the elite clubs;[260] and

---

[257] See, for example: 'Twickenham and Clubs Split Over Contracts' *Guardian* (London, 26 March 1996) Sport 23; 'Clubs Slide Closer to Schism' *Independent* (London, 5 April 1996) Sport 30; 'Brittle Dares Leading Clubs To Break Away' *The Independent* (London, 10 April 1996) Sport 24; and 'Rugby Union: Spats All the Way' *Observer* (London, 8 September 1996) Sport 7.
[258] Leicester Agreement, cl 10.
[259] Leicester Agreement, cl 5.
[260] Leicester Agreement, cl 3.

representation on the RFU Committee.[261] The RFU retained significant control of the professional club competition, including: the right of final approval of the form and structure of any domestic competition;[262] the right of final approval of any agreement for the sale of broadcast rights or any agreement for sponsorship;[263] and the right to negotiate and organise any European club competition.[264]

Since 1997 the organisation of professional rugby union in England has been administered by compromise between the clubs and the RFU through a succession of private agreements.[265] Despite the agreements, however, relations between the RFU and the elite clubs have often been strained. A recent example arose in July 2006 when Premier Rugby Limited (the collective organisation of English rugby union clubs) brought legal proceedings in the High Court seeking a declaration regarding the correct interpretation of several clauses within the Long Form Agreement (the agreement then existing between the clubs and the RFU).[266]

---

[261] Leicester Agreement, cl 13.
[262] Leicester Agreement, cl 5.2.
[263] Leicester Agreement, cl 10.
[264] Leicester Agreement, cl 4.
[265] For example: the Leicester Agreement; the Mayfair Agreement; the Long Form Agreement dated July 2001. For a description of the agreement in place in 2009 see: 'Clubs Agree Truce With Twickenham' *BBC Sport* (London, 15 November 2007) <http://news.bbc.co.uk/sport1/hi/rugby_union/7095006.stm> accessed 23 March 2009.
[266] See *Premier Rugby Ltd and Ors v Rugby Football Union and Ors* [2006] All ER (D) 412 (Jul). The legal proceedings arose from a dispute between the RFU and the elite clubs regarding the release of elite players for an international match against New Zealand scheduled for 5 November 2006. See also 'RFU and Clubs Agree Release Dates' *BBC Sport* (London, 31 August 2006) <http://news.bbc.co.uk/sport1/hi/rugby_union/english/5302678.stm> 23 March 2009.

2.12.2 Aftermath: Rugby Union in New Zealand

By contrast, in New Zealand, the IRB's decision to remove the prohibition against player wage payments validated the NZRU's process of commercialisation which it had commenced earlier in 1995. The structure of the professional game in New Zealand was determined by the NZRU's involvement in SANZAR and the creation of the Super 12 and Tri-Nations tournaments. Funding for the professional game derived primarily from the sale of television broadcast rights for the new competitions.

The NZRU allocated franchises in the Super 12 competition by dividing its member provincial unions into groups, and allocating each group the right to host a Super 12 franchise.[267] The NZRU entered into contracts with 150 elite players, which later increased in number to include younger players and those identified as "developing players".[268] Pursuant to the contract with the NZRU, a player was required to play, if selected, for a number of teams, including: a Super 12 franchise; the National Provincial Championship (then New Zealand's domestic club rugby competition); the All Blacks; and other national representative teams. In effect, the player was seconded by the NZRU to play in each team. A player was only entitled to payment for the matches played.

---

[267] Interview with Provincial Union A, February 2008, New Zealand. For example, the *Blues* Super Rugby franchise was initially administered by the Counties Rugby Football Union (Inc); the North Harbour Rugby Football Union (Inc); and the Auckland Rugby Football Union (Inc) respectively. The *Highlanders* Super Rugby franchise was administered by Otago Rugby Football Union (Inc) and Rugby Southland (Inc) etc.

[268] P D Owen, 'Professionalisation of New Zealand Rugby Union: Historical Background, Structural Changes and Competitive Balance' University of Otago Economics Discussion Papers No 0214 (December 2002) 12.

Throughout the period of transition from an amateur sport to one in which the players received payment, the NZRU and its commercial partners were well-organised and able to broker deals which benefited the commercialisation of the game. The players, however, were not well organised and had little involvement in how the professional game was structured. Furthermore, other issues of importance for players - such as, for example, a player's professional development outside the sport; the management of agents; and the provision of financial advice - were not a focus for the NZRU.

The increased demand for playing services during 1995 influenced the salary amounts that New Zealand rugby union players eventually agreed with the NZRU. The NZRU as a monopsony employer (and a monopoly provider of rugby union matches in New Zealand), however, was not compelled by competition in the labour market to improve the terms and conditions of employment of professional players or to employ a minimum number of players (amongst other things). That changed, however, through the collective organisation of professional players in New Zealand.

2.12.2.1 Collective Organisation of Rugby Union Players in New Zealand

In 1999 a senior New Zealand rugby union player, Mr Sean Fitzpatrick, was seriously injured and unable to play rugby union for a number of months.[269] Under the terms of his then employment contract with the NZRU (and those of many other players) Mr Fitzpatrick was only entitled to

[269] Interview with the NZRPA, February 2008, Auckland, New Zealand.

payment for matches played.[270] As a result, Mr Fitzpatrick and several other professional players formed a collective association of rugby union players, registered as a trade union – the New Zealand Rugby Players' Association ("the NZRPA") – and encouraged all rugby union players to join.[271]

The NZRPA's efforts to negotiate more favourable terms and conditions of employment were assisted in 2000 by legislative change. The enactment of the Employment Relations Act 2000 (NZ) enabled employees to require an employer to enter into negotiations for a collective bargaining agreement.[272] As a consequence, the NZRPA entered into negotiations with the NZRU and concluded a collective bargaining agreement. The terms of the collective bargaining agreement included the following: a minimum salary payment level; minimum player employment numbers; revenue-sharing arrangements; payment of a guaranteed retainer for players; provisions concerning the use of a player's intellectual property; and an agreement from the NZRU that the NZRPA would be consulted on issues pertaining to the organisation of the game in New Zealand.[273]

2.13 Super League Competition 1997 to 2008

In 1997 the Super League competition format was amended to include a play-off system. Regulatory changes made at the same time included: the introduction of a salary cap (which set the maximum limit that a club was permitted to spend on player wage payments at £1.2 million or 50% of

---

[270] Ibid.
[271] NZRPA interview (n 269).
[272] Employment Relations Act 2000 (NZ), s 40.
[273] NZRPA interview (n 269).

the club's revenue); and the implementation of the "20:20 rule". The "20:20 rule" limited to twenty, the number of players earning over £20,000 which a club was permitted to register.[274]

After two years of participating in the Super League competition, the French club, Paris St Germaine folded. During the 2004 playing season, London Broncos was placed into administration. Rather than permit a club to cease trading during the playing season, the remaining Super League clubs and the RFL agreed to London Broncos re-forming and continuing in the competition. London Broncos entered into a partnership agreement with Harlequins Rugby Union Club and the club was re-named Harlequins RL. Both Paris St Germaine and London Broncos were located in geographical areas where there was an absence of traditional support for the sport (and which may have contributed to the financial misfortune of both clubs).

Between 1995 and 2008, clubs entered the Super League competition through: promotion from the competition division below Super League ("the rule of promotion and relegation"); or by agreement of the existing Super League clubs and the RFL (as occurred in 2006 in the case of the French club, Catalans Dragons). A French club was included in the competition:[275]

- to provide interest for supporters;

---

[274] The income threshold was subsequently increased from £20,000 to £25,000 and the rule became known as the "20:25 rule". The rule was removed at the end of the 2007 playing season.
[275] Interview with the RFL, 29 October 2007, England.

- to provide supporters with a different destination to visit;

- to assist the development of French rugby league; and

- to develop a professional competition for French rugby league players.

In order to assist Catalans Dragons to remain in the competition the club was exempt from relegation for two years; and provided with a coach and administrative assistance. As part of the club's application for entry into Super League competition, the club agreed to apply a policy of recruiting only French rugby league players and a limited number of players from the Southern Hemisphere. The policy was an initiative of the French club and was welcomed by the RFL since it: was consistent with the RFL's object of developing rugby league in France; and benefited the game at an international level by improving the quality of the French international representative team.[276] At the time of interview in 2007, the club confirmed that it did not hire British players.

At the end of 2007 "the rule of promotion and relegation" was removed as a means of entry into the Super League competition and replaced by a licensing system.

2.14 Conclusion

In relation to the market for the organisation of rugby matches (of either code), the synopsis of key developments

[276] Ibid.

in the history of rugby union and rugby league demonstrates that:

- Competition in the market arises either: through a breakaway of clubs from an existing organisation which in turn establishes as a separate competitor in the market; or through commercial investment and the entry into the market of a new competitor (for example, the World Rugby Corporation). Player discontent and/or club dissatisfaction with the status quo may influence whether competition enters the market.

- It is difficult for a new entrant to establish in a market monopolised by a sporting code's governing body (as demonstrated by the situation of the World Rugby Corporation). Existing contractual arrangements between a sporting code's governing body, clubs and players; player and club loyalty to a sporting code's governing body; and restrictions imposed on clubs and players by the sporting code's governing body in response to the new competitor, may militate against a new entrant successfully establishing in the market.

- A sporting code's governing body may use its dominant position to prevent competition in the market by: restricting access to an essential resource such as players or sports stadia; and/or discouraging a player or club from moving to the new competitor (for example: in 1895 the RFU introduced a ban on all NRFU clubs and players participating in rugby union; in 1973 the RFL denied breakaway amateur clubs access to sports grounds and funding; whilst during 1995 the

NZRU declared that rugby union players who signed for the WRC would be ineligible to provide playing services to the international representative team);

- Competition in the market leads to product innovation in the form of a new rugby competition (such as the Rugby World Cup or the Australian NRL). Product innovation benefits consumer choice.

- Competition in the market increases demand for playing services (as illustrated by the events of 1995).

- Competition in the market may be difficult to sustain in the long term and may result in the market returning to a monopoly situation either: through amalgamation of existing competitors (as occurred in rugby league in Australia in 1995); or the withdrawal of a new entrant (as occurred with the WRC). Product innovation may cause the competitor to exit the market and establish in another market altogether (as occurred with the formation of rugby league in the late 1800s).

Insofar as the market for playing services is concerned:

- An increase in demand for playing services enables players to benefit individually through improved terms and conditions of employment. The player is able to negotiate a higher salary or an extension to an existing contract from a position of improved bargaining power. However, over time as competition reduces in the market, improvements in player wages and other terms and conditions of employment level out.

- A monopsonistic market, however, does not provide an employer with an incentive to improve the terms and conditions of a player's employment. Instead the formal collective organisation of players may promote the players' interests in a way that secures improved conditions of employment and an involvement in the organisation of the sport (as demonstrated by the circumstances of professional rugby union players in New Zealand post-1995).

The player issues of concern which arose in the formative years of rugby union and rugby league mirror those of concern for rugby league in the modern era (for example: disputes regarding player wage payments; breaches of wage payment rules; governance issues; player eligibility for selection to an international representative team; and the recruitment of foreign players by a professional club). The matter of Mr Arthur Gould is an early example of a regulatory body exceeding its authority with detrimental consequences for a player's access to a sporting competition.

The history of rugby union and rugby league demonstrates the shortcomings of organising a professional sporting competition within a self-regulating framework that comprises of a collective association of clubs. Only in circumstances of:

- competition in the market for the organisation of the respective code (as occurred in 1995 in Australia);

- the organisation of the player rules within a single framework that involves all stakeholders (as arose in the organisational structures adopted for the 1907 "All

Golds" tour or by the New Zealand Rugby Union in the aftermath of professionalism); or

- proposed government intervention in the governance of sport (the Sports Discrimination Bill),

- has rugby fostered the interests of players.

The remainder of this thesis considers the organisation of the Super League competition; the framework in which it operates; and the way in which European competition law may obtain improved terms and conditions of employment for rugby league players. It commences with the following section that describes the organisational and regulatory structure of the Super League competition in 2009.

CHAPTER 3: THE SUPER LEAGUE COMPETITION 2009: REGULATORY FRAMEWORK; GOVERNANCE STRUCTURE; AND STAKEHOLDERS

> *'[T]he rule of law, if it is to mean anything, has to embrace state, corporation and individual alike; that the law's chief concern about the use of power is not who is exercising it but what the power is and whom it affects...'*[277]

3.0 Introduction

The regulatory framework and the governance of Super League affect the employment interests of professional rugby league players in the United Kingdom. This chapter: describes the regulatory framework and governance of the Super League competition in 2009. It explains the Super League competition format and the means of entry to the competition for clubs; considers the principal stakeholders involved in the industry; and introduces the contractual and regulatory mechanisms used to regulate the market for playing services. The contents of this chapter form the basis for the legal analysis which follows throughout the thesis.

3.1 Regulation of Rugby League: United Kingdom

There are a number of stakeholders involved in the regulation of professional rugby league in the United Kingdom. These entities are described below.

---

[277] Sir S Sedely, 'Public Power and Private Power' in C Forsyth (ed) *Judicial Review and the Constitution* (Hart Publishing, Oxford 2000) 291, 306.

3.1.1 The Rugby Football League

The Rugby Football League ("RFL") is the sporting code's governing body in the United Kingdom. It comprises of: 34 professional rugby league clubs (including one club which is based in France); and a number of rugby league organisations (such as, for example, the British Amateur Rugby League Association ("BARLA"), the Welsh Rugby League, the Combined Services, the Student Rugby League and English Schools). All members - with the exception of the French club - are represented on the RFL's Council which meets three times a year to consider matters pertaining to the sport's administration.

The RFL operates as a private company limited by guarantee.[278] Its constitution, objectives and powers are set out in the company's memorandum and articles of association. The RFL's objects include the following:[279]

- To foster, govern, develop, organise and manage the game of rugby league football in respect of all age groups;

- To develop and manage the playing of the game at an international level.

- To make adopt, vary and publish bye-laws, regulations and conditions for the management and/or governance of the game and its competitions; and

---

[278] RFL (Governing Body) Limited is registered under the Companies Acts 1985 to 1989 (UK) and its registered office is in Leeds.
[279] Memorandum of Association for RFL (Governing Body) Limited, cl 3.

- To ensure that the culture, philosophy and processes within the RFL and the sport are free from bias and discrimination.

The regulations applicable to the RFL's competitions (including the Super League competition) are set out in the RFL Operational Rules, which are published annually in the RFL's Official Guide. The RFL also prescribes the standard form players' contract ("players' contract") used by all professional clubs.

During an interview in 2007, the RFL described its role as being divided into four main areas.[280] First, it determines and enforces the sport's playing rules and its administrative regulations. It also arbitrates disputes that arise from the application of those regulations. Secondly, it promotes the development of rugby league (for example, through encouraging clubs to adopt good business practices or developing pathways for talented athletes). It also organises community-based rugby league programmes for which it receives public funding. Thirdly, it is responsible for the sale of the common properties (such as, for example, the sale of television broadcast rights for the Challenge Cup and Super League competitions). Finally, the RFL promotes and manages the international representative sport teams (with the exception of a junior amateur international representative team which is administered by BARLA).

The RFL is involved in the organisation of three competition divisions in which professional and semi-professional clubs

---

[280] Interview with the RFL, 29 October 2007, Leeds, England.

participate. Those divisions are: the Super League Competition; the Championship Competition; and the Championship 1 Competition. In addition, the RFL organises and promotes the Challenge Cup and Championship Cup competitions. A brief description of the competitions appears later in this chapter.

In 2007 the RFL's principal sources of revenue were: match income such as ticket sales from major events (for example, the Challenge Cup final); revenue from the sale of television broadcast rights; sponsorship monies; and Government funding.[281] Its expenses included: match costs; costs associated with Government funded activities; sponsorship and promotional costs; organisational costs (such as the cost of match officials, insurance, disciplinary costs and compliance with anti-doping regulations); and administration staff costs (amongst others).[282]

The RFL described providing financial assistance to the professional clubs by way of direct monetary payments or indirect payments (such as, for example, providing a club with a team coach or other administrative staff).[283] The financial assistance provided to the Super League clubs included a "development payment" made to a club when a player it employs debuts for the English international representative team. A payment was also made for every

---

[281] For the financial year ending 31 December 2007, the total turnover of Rugby Football League Limited (a wholly owned subsidiary of Rugby Football League (Governing Body) Limited was £13,439,345. The total income comprised of: match income (£4,201,948); television broadcast revenue (£2,833,192); sponsorship (£1,241,290); Government funding (£4,218,018) and other (£944,897): The Rugby Football League, *Annual Report 2007*, 39. Match income fluctuates annually depending upon the number of international representative matches played in the United Kingdom.

[282] Ibid.

[283] RFL interview (n 280).

subsequent appearance that the player makes for the team. The RFL covered the costs of insurance for players on behalf of the clubs; and it provided the Super League match officials. The Super League clubs also received a distribution of the RFL's profit (if a profit was made).

The day-to-day administration of the RFL is undertaken by a Board of Directors – two executive directors and three non-executive directors - and a management team.

3.1.2 The Rugby League International Federation

The RFL is a member of the Rugby League International Federation ("RLIF"). The RLIF was formed in 1948 and comprises of all national rugby league governing bodies. It operates as a public company limited by guarantee and is registered under the Corporations Law of New South Wales, Australia.[284] The RLIF promulgates rules for the administration of the game at an international level, including rules which: regulate player eligibility for international representative teams; and which regulate the movement of players between countries.[285] The RLIF is also responsible for the organisation of the Rugby League World Cup.

---

[284] The company is registered as the Rugby League International Federation Limited (ACN 091 594777) and its registered office is in Sydney, Australia.

[285] Rugby League International Federation Rules (January 2001). The rules are appended to the Constitution of Rugby League International Federation Limited (ACN 091 594777).

3.2 The Super League Competition

The Super League competition is organised by: the Super League clubs and the RFL collectively under the umbrella of Super League (Europe) Limited ("SLE"). The following section describes the participants in the competition; the competition format; and the method of entry for the clubs into Super League.

3.2.1 The Super League Clubs

The Super League competition comprises of fourteen professional rugby league clubs.[286] Thirteen of the clubs are located in the United Kingdom; and one club is located in France. Of those clubs based in the United Kingdom: eleven clubs are situated in the north of England; one club is located in London; and another club is situated in Wales. Two clubs are located in the same city (namely, Hull KR and Hull FC). With the exception of the French club, Catalans Dragons, all Super League clubs operate as a private limited liability company. Catalans Dragons is a professional sports club incorporated under French law.[287]

---

[286] In 2009 those clubs are: Bradford Bulls (Bradford, England); Castleford Tigers (Castleford, England); Catalans Dragons (Perpignan, France); Celtic Crusaders (Bridgend, Wales); Harlequins RL (London, England); Huddersfield Giants (Huddersfield, England); Hull FC (Hull, England); Hull KR (Hull, England); Leeds Rhinos (Leeds, England); Salford City Reds (Salford, England); St Helens - also known as "Saints" - (St Helens, England); Wakefield Trinity Wildcats (Wakefield, England); Warrington Wolves (Warrington, England); and Wigan Warriors (Wigan, England).

[287] The Code of Sport in France prescribes the framework for the organisation of professional sport at a local and federal level in that country: see Articles L132-1 and L132-2 of the French Code of Sport.

Information extracted from the interviews conducted during 2007 provided the following general information concerning the business organisation of the Super League clubs.

The shareholding structure and the size of each business operation differed between each club. For example, Bradford Bulls, had a share register of approximately 1000 people; Castleford Tigers had approximately 130 shareholders; whilst, some other clubs were in the majority ownership of a private individual. Each club had a Board of Directors; and a Chief Executive Officer (or a senior management executive) who was responsible for the day-to-day administration of the club.

The clubs typically divided their respective business operations into four areas. For example, each club had a football department (which comprised of the coaching and playing staff, and other ancillary staff such as medical professionals, physiotherapists etc); a commercial department (which was responsible for the club's income streams); a marketing department (which was concerned with advertising and promoting the club) and a finance department (which was concerned with the club's overall business administration). The different business areas generally operated as separate cost centres and each department was allocated a budget for expenditure and income.

The size of each Super League club's operations in terms of the number of staff employed and the amount of revenue generated also varied. The number of administrative staff employed - that is, those staff employed in areas other than the football department – ranged from twelve full time

employees in one club to approximately one hundred full time employees in another club. Additional part time staff members were usually employed for home games in order to assist with, amongst other things, security, catering and public entry to the stadium. The number of playing staff recruited by a club was principally determined by the salary cap,[288] and the number of players that a club was permitted to register.[289]

Each club was responsible for generating its own revenue and the amount of total revenue earned by the clubs and the income streams from which it was earned varied according to the circumstances of each sports business. Factors such as: the geographical location of the club; the age of the stadium and the quality of the stadium facilities; the club's supporter base; the number of years in which the club had participated in Super League; and the level of financial investment in the club, were all factors which influenced a club's income streams. As one club interviewed described:

> *'All the businesses are slightly different. They all have different circumstances. London is a very different sort of business to Castleford. But each club has to cut its cloth accordingly of course. They've got to manage their affairs prudently in that respect. A club based in a city has a lot more commercial opportunities than a club in a small town for example, in terms of access to major companies and corporate hospitality and things like that so all the business models are a little bit different...'*[290]

Some clubs interviewed referred to the importance of generating income streams which were independent of the

---

[288] RFL Operational Rules 2009, E1.
[289] RFL Operational Rules 2009, C1:2:5. Under the RFL's Operational Rules clubs can register up to three teams: a first team squad; and two teams in the academy competition: ibid.
[290] Interview with Club B, 10 August 2006.

club's main activities (for example, some clubs operated restaurants, conference facilities or other forms of hospitality). In this way, a club's revenue was less dependent upon the playing success of the team; and a club was able to sustain its business throughout the year (including over periods outside the playing season and on days when the club's team was not playing at home).

The sources of revenue for clubs were described as: television broadcasting revenue; gate receipts (including season ticket sales); sponsorship and advertising revenue obtained by individual clubs; sponsorship and advertising revenue distributed by Super League (Europe) Ltd; revenue from the sale of merchandise; corporate hospitality; income from a club-administered lottery; public funding from sources such as the National Lottery, local authority and/or central government; and club donations. Gate receipts were kept by the club hosting the Super League match and were not shared between clubs.

Those clubs situated in the United Kingdom identified the main sources of income as: revenue from the sale of the television broadcast rights for Super League; and gate receipts. Catalans Dragons identified revenue from the sale of the television broadcast rights for Super League; and public funding as its main sources of income.

Player wage payments were identified by all clubs interviewed as the main cost incurred by the business. Other costs incurred were: the costs associated with playing staff (for example: coaching staff salaries, medical costs etc); administration staff costs; stadium rental costs (for those clubs that did not own the stadium in which home games

were played); the costs of renting training facilities; ground/stadium maintenance and utility costs; marketing; game-day running costs; the costs associated with merchandising; and the costs associated with hospitality; and travel. Due to the club's location in France, Catalans Dragons incurred higher travel costs than other Super League clubs.

3.2.2 Super League (Europe) Limited

SLE is the vehicle by which the clubs and the RFL organise the Super League competition.[291] It is a private limited liability company in which each Super League club holds one ordinary share. The RFL is also a member and holds a special rights preference share (referred to in the SLE's articles of association as "the governing body share"). Specific voting rights attach to each type of share. The SLE voting process is the way in which some rules which regulate the conduct of clubs and players participating in the Super League competition are agreed.[292]

Matters which are deemed to be exclusive rights attaching to the ordinary shares and which are effective with the approval of the Super League clubs only, are those relating to:[293] entry into a titular sponsorship agreement; entry into a primary broadcasting agreement; the number of rounds to

---

[291] The Super League competition, the property rights attached to the competition and the competition's 'arrangement, management, promotion and administration' vests absolutely in SLE: Undated Articles of Association of RFL (Governing Body) Ltd, cl 2.1.

[292] The RFL also follows its own decision-making process under which it promulgates rules and regulations relevant to the sport generally which may also apply to Super League clubs and players (for example: the playing rules, the rules relating to registration etc).

[293] Undated Articles of Association for Super League (Europe) Limited, cl 3.5.

be played in a Super League season; the Super League competition format; and the allocation of central television revenue, distribution of any surpluses and/or prize money.

Matters which are deemed to be rights attaching equally to the ordinary shares and the governing body share, and that require the approval of a simple majority of the Super League clubs and the approval of the RFL before being effective are those which concern:[294] the number of clubs to play in Super League; and the Super League salary cap regulations.

Matters which are deemed to be exclusive rights attaching to the governing body share and which can only be adopted, varied or removed by the RFL's written consent include those relating to:[295] the membership of and criteria for membership of the Super League; the RFL Operational Rules (excluding the Super League Salary Cap regulations); the disciplinary rules; prosecution and tribunals (including those relating to the Super League Salary Cap Regulations); the playing rules; the appointment of referees; and the Super League fixture list.

Finally, matters which are deemed to be a variation of rights attaching to the governing body share and which can only be effective with the RFL's consent in writing include those relating to:[296] the name of the Super League competition; the number of members or clubs and the issues of promotion and relegation to Super League; the criteria for membership

---

[294] Undated Articles of Association for Super League (Europe) Limited, cl 3.4

[295] Undated Articles of Association for Super League (Europe) Limited, cl 3.3.

[296] Undated Articles of Association for Super League (Europe) Limited, clause, 3.2.

of Super League; each club's obligation to enter the Challenge Cup; the ownership of more than one club; and rules common to Super League and the Championship competitions (amongst other things).

The sale of television broadcast rights is negotiated collectively by SLE on behalf of the clubs (in practice the RFL negotiates on behalf of SLE although the members of SLE determine whether or not to accept the contract).[297] Revenue from the sale of the television broadcast rights, and other central sponsorships (which are also negotiated by SLE) are distributed equally between the Super League clubs. In addition SLE distributes to the clubs: prize money (the amount of which depends upon the club's final position in the Super League competition); and profit. Up to and including 2007, the profit was distributed in a way that: first, compensated those clubs that were required to change a fixture on short notice at the request of SKY television; and rewarded those clubs that provided advertising space for central sponsors during televised matches. The remaining profit was then distributed equally between the clubs. In the years 2004 to 2007, SLE paid approximately £250,000 to the Championship clubs for the purposes of club development.

Finally, SLE and the RFL share a common directorship. The RFL's Chairman and Chief Executive Officer are directors of SLE. A management agreement also exists between the RFL and the clubs under which the RFL provides services to SLE (such as, for example, legal services) in exchange for a fee.

---

[297] Personal correspondence with the RFL dated 3 September 2008.

3.2.3 Competition Format

The Super League playing season is played annually between February and October. The clubs play 27 rounds and points are awarded following each match. At the end of the 27 rounds, the eight clubs with the most points play off in order to determine the two clubs that will compete in the Grand Final at Old Trafford in Manchester. The winner of the Grand Final is the Super League champion.

3.2.4 Mode of Entry into the Competition: Clubs

Those professional clubs that wish to participate in the Super League competition are required to submit a license application to the RFL. The application process assesses each club against criteria which includes, *inter alia*: the quality of the club's stadium facilities; the club's playing strength (including investment in the development of junior players); the club's financial position and business performance; and the club's commercial and marketing skills. A license is valid for three years and a club must re-apply at the end of the license period. Licenses for clubs participating in the Super League competition in 2009 expire at the end of the 2011 playing season.

3.2.5 Players

A Super League club's first team comprises of 25 professional players. The majority of players are British although the clubs also employ players from France, New Zealand, Australia, and other Pacific Island nations. Players are

required to be registered with the RFL and may only play in the Super League competition if registered to play for a specific club.[298]

The Super League clubs also operate club academies which employ junior players aged over 16 (usually on a part time basis). There are two competitions in which a Super League Club is required to enter teams from the academy: the Reserve Competition; and the Academy (Under 18) competition.[299] The number of junior players employed in a club's academy is influenced by the RFL's limit on the number of players a club may register; and a club's financial circumstances. A club may also participate in the RFL's scholarship scheme which enables junior players below the age of 16 to train with a professional club; and receive fitness and nutritional advice.

3.2.6 Players' Contract

A player employed in a Super League club's first team is engaged under the terms and conditions of the RFL's standard form players' contract of employment ("players' contract").[300] A player is employed for a fixed term which is the subject of individual negotiation between the parties. The players' contract includes: a restraint of trade clause which prevents, inter alia, a player taking up employment with another sporting organisation during the term of the

---

[298] RFL Operational Rules 2009, C1:2:1.
[299] RFL Operational Rules 2009, B7:4. There is also a third competition, the academy foundation competition (under 16), although a Super League club is not obliged to field a team in that competition.
[300] The version in effect at the time of writing is the Full Time Player's Contract of Employment (FTC/08/05). See Appendix 3 of this thesis for a copy of the contract.

contract;[301] and provisions concerning the commercial use of the player's intellectual property.[302] The legality of these contractual provisions and their effect for competition in the market for playing services are discussed further in chapters 7 and 8 of this thesis.

3.2.7 RFL Operational Rules

The *RFL's Official Guide*, which is published annually, contains the sports regulatory rules. The guide includes: the RFL Operational Rules; and the various codes of conduct which apply to the Super League competition.

Included in the RFL Operational Rules are provisions for: a salary cap, which limits the total amount that a club may spend on players' salaries;[303] the "club trained rule" which requires a club to recruit a certain number of players trained by the club and/or other RFL-member clubs;[304] and the "rule against player approach", which limits the capacity of a club to approach a player under contract to another club;[305] and details of the RFL's registration system.[306] The effects of these regulations for competition in the market for playing services are discussed further in chapters 6, 7, 8 and 9 of this thesis.

---

[301] Players' Contract, cl 13.
[302] Players' Contract, cls 6, 7 and 8.
[303] RFL Operational Rules 2009, E1:3:1.
[304] RFL Operational Rules 2009, B1:11A-C.
[305] RFL Operational Rules 2009, C1:5:10.
[306] RFL Operational Rules 2009, C1:2.1.

3.2.8 The Rugby League Players' Association

Some professional players in Super League are members of the Rugby League Players' Association ("RLPA"). The RLPA is the players' union for rugby league players in the United Kingdom and is recognised by the RFL. It represents the interests of Super League players, players from clubs in the competition divisions below Super League and amateur players. In respect of its amateur members, the RLPA provides representation on matters arising in a player's work environment outside rugby league. At the time of interview in 2007 the RLPA represented approximately 250 professional, semi-professional and amateur players.

Although it is an association with its own constitution, the RLPA is a division of the GMB Union (which is one of the largest trade unions in the United Kingdom and represents the interests of employees from many different industries). Through its association to the GMB, the RLPA is affiliated with other industrial trade unions but it is not affiliated with other players' associations in the United Kingdom or elsewhere in the world.

The RLPA described providing services to its members which included: player representation at disciplinary hearings; legal advice; contract negotiation services; career advice post-rugby league; advice concerning insurance and other financial services.[307] The services provided by the RLPA differed to those provided by a sports agent in two ways. First, the RLPA provided legal advice free of charge to

[307] Interview with the RLPA, 12 November 2007, Wakefield, England.

members (the cost being included in the player's membership fee) whereas a sports agent generally referred a player to a solicitor for advice at an additional cost to the player. Secondly, in respect of its contract negotiation services, the RLPA admitted that it did not have the breadth of club contacts which sports agents rely upon in order to source contracts for players.[308]

During interview, the RLPA described that it had not previously provided a strong collective voice for its members'.[309] This was due in part to: the absence of strong leadership; the absence of a co-ordinated approach within the organisation for gauging issues of concern for its members; and a lack of consultation with the RFL and the Super League clubs concerning rules which affect the employment of professional rugby league players.[310] At the time of interview the union did not have elected union representatives in each Super League club nor did it hold regular membership meetings.[311]

The RFL had in the past consulted with the RLPA on issues (such as, for example, the players' contract) although the level of consultation undertaken had depended upon the RLPA leadership.[312] The RLPA stated that in most cases it was only aware of RFL rules and regulations which affected a player's employment after the rule had been implemented.[313]

During times when the RLPA has been led by a high profile rugby player, the organisation had increased its membership

---

[308] Ibid.
[309] RLPA interview (n 308).
[310] Ibid.
[311] RLPA interview (n 308).
[312] Ibid.
[313] RLPA interview (n 308).

and advanced the interests of players collectively from a position of strength.[314] Over the past few years, however, the RLPA had not had such leadership and consequently had been less effective as the collective representative of professional rugby league players.[315] At the time of interview, the RLPA was in a process of re-organisation.

Those players interviewed were generally critical of the RLPA's role within the industry. One player believed the RLPA: "*didn't do anything*"; had "*no voice*"; was not involved in RFL decision-making processes; and was essentially "*non-existent*".[316] For these reasons, he had cancelled his membership. The player was strongly in favour of a players' union because in his view players were: an integral part of the sport; had never been consulted about issues of importance for players; and ought to be involved in the sport's decision-making processes.[317]

A second player interviewed resigned his membership owing to the RLPA's involvement in a wage dispute to which he was a party. The player was previously employed at Castleford Tigers, a club which was sponsored by the GMB union. The club was relegated to the competition division below Super League and a dispute arose between the club and some players concerning the non-payment of remuneration. Although the dispute was eventually resolved in the players' favour, the player was of the view that the RLPA failed to act

---

[314] Ibid.
[315] RLPA interview (n 308).
[316] Interview with Player I, 18 July 2007, England.
[317] Ibid.

in the players' best interests because of its sponsorship ties with the club.[318]

Another player interviewed criticised the RLPA for not being *"any good"* and thus refused to join the union. In his view the RLPA did not operate from a position of strength within the industry. The player compared the RLPA unfavourably to its Australian counterpart which was, in his experience as an NRL player, *"very well organised"* and acted in the players' best interests.[319]

3.2.9 Sports Agents

Sports agents represent the interests of players, coaches and clubs in the Super League competition. The RFL regulates the provision of agency services to the Super League competition.[320] All sports agents who represent professional rugby league players are required to be authorised by the RFL (including lawyers, overseas agents and those people related to a player).[321] A person who is subject to the RFL's Operational Rules (for example, a club or player) may only deal with an authorised agent in relation to contract negotiations or other transactions arising from participation in the Super League competition.[322]

Those agents interviewed described providing the following services to professional players: contract negotiation

---

[318] Interview with Player E, 13 November 2007, England.
[319] Interview with Player A, 7 August 2007, England.
[320] RFL Operational Rules 2009, C4.
[321] RFL Operational Rules 2009, C4: Appendices II and III.
[322] RFL Operational Rules 2009, C4.A:1.

services; financial advice; media training; endorsement contract negotiation services; and player representation in disciplinary matters. The principal service provided by a sports agent was described as that of sourcing contract opportunities and negotiating a player's contract. The playing requirements of each Super League club are not publicly advertised and generally the way a player is informed of a forthcoming contract opportunity is through an agent, or on limited occasions by direct contact from the club. Those agents interviewed stated that it was a standard practice for a sports agent – during a playing season - to provide all Super League clubs with a list of players who were out of contract at the end of the season.

Those agents interviewed with experience of representing a club stated that services provided were limited to finding a player who fulfilled the club's recruitment specifications.

All players interviewed were represented by an agent. The players interviewed chose to retain a sports agent principally for the contract negotiation process. Some players commented that engaging an agent: de-personalised the contract negotiation process; avoided the awkwardness and embarrassment of discussing financial matters with a club; allowed the player to concentrate on his performance on the field without the distraction of face-to-face contract negotiations; and enabled the player to receive advice on the legal terminology used in the contract. Additionally, a sports agent possessed industry knowledge which was beneficial to the player when finding employment (such as, for example, knowledge of: a player's market value; player remuneration amounts and benefits; recruitment opportunities within clubs; contract termination dates; etc). The majority of

players interviewed had changed agents at least once during a professional career.

3.3 Championship and Championship 1 Competitions

The two competition divisions below Super League are known as the Championship and Championship 1 divisions (formerly National Leagues 1 and 2). The Championship comprises of 11 clubs (including a French club, Toulouse Olympique XIII). Championship 1 comprises of 10 clubs.

Clubs enter the Championship by means of promotion from the Championship 1 competition. In 2009 the two clubs with the least points in the Championship competition at the end of the playing season will be relegated to Championship 1. Toulouse Olympique XIII is protected from relegation. The club with the most points in the Championship 1 competition will be automatically promoted to the Championship. A second Championship 1 club will also be promoted following a play off.

Owing to the financial circumstances of clubs in the Championship and Championship 1 divisions, professional players at those clubs are generally employed on a part time basis. Players are usually employed for a period of one year under the terms and conditions of the RFL's part time player's terms and conditions of employment contract.

Each competition level operates under competition rules which include: a salary cap; and a restriction on the number of foreign players a club may employ.[323]

3.3.1 Competition Formats

The competition format is similar in the Championship and Championship 1. A round robin competition is played between all clubs in each division. Following each match a club is awarded points. In the Championship competition the top six clubs play off to determine the best club. In Championship 1, the club with the greatest number of points at the end of the season is automatically promoted to the Championship. The Championship 1 clubs that place from second to seventh play off to determine the second club that will be promoted to the next division.

3.3.2 Championship Cup Competition

In addition to the league competition described in 3.3.1 above, all Championship clubs (with the exception of Toulouse Olympique XIII) and Championship 1 clubs participate in the Championship Cup Competition ("Championship Cup"). The Championship Cup comprises of twenty teams from both divisions divided equally into two pools. The two pools of ten clubs play two home games and two away games ("the group stage"). At the conclusion of the group stage, the top four clubs in each pool progress into an open draw for the knock-out stage. The remaining two

[323] RFL Operational Rules 2009, E2 and C1:4:2.

clubs at the end of the knock-stage play in a final to determine the Championship Cup winner.

3.4 Challenge Cup Competition

The Challenge Cup competition has been held annually since 1897. It is a knock-out competition between amateur and professional clubs; and includes clubs from England, France, Scotland, Wales and Russia. Rounds one and two are played between the amateur clubs; the Championship and Championship 1 clubs enter the competition at round three; and the Super League clubs enter the competition at round four. The remaining two teams at the end of the knock-out rounds play in the Challenge Cup final at Wembley Stadium in London. The competition is organised and promoted by the RFL.

3.5 Conclusion

The Super League competition is organised by the RFL and the clubs collectively. The principal stakeholders in the industry are the clubs, the players, the RFL, sports agents and the RLPA. In order to understand the effect of the competition's organisational structure for the employment of players, it is necessary to consider the nature of the contract between a Super League club and a professional player. The following chapter analyses the contractual relationships in the Super League competition.

CHAPTER 4: THE EMPLOYMENT RELATIONSHIP IN THE SUPER LEAGUE COMPETITION DEFINED

> *'Obviously a company can have regard to its own financial interests but only to the extent that in so doing, it does not breach the obligation of good faith to its employees.'*[324]

4.0 Introduction

Under English employment law, an employment relationship is based on a bi-lateral contract of service.[325] If a contract of service is not present, a party may be considered in law as an independent contractor or worker. The advantage of employee status is that it entitles a person to minimum statutory employment rights for which an independent contractor or a worker may not be eligible. Additionally, employee status is relevant to matters pertaining to vicarious liability, health and safety legislation and tax law.

In the context of modern contractual relationships, determining whether a contract of service exists is often complex and controversial.[326] When distinguishing between

---

[324] *Imperial Trust Pension Group Ltd v Imperial Tobacco* [1991] 1 WLR 589, 599.

[325] For a general discussion concerning the definition of "employee" see S Honeyball, *Textbook on Labour Law* (9ed Oxford University Press, Oxford 2006) 20-29; N M Selwyn, *Law of Employment,* (14ed Oxford University Press, Oxford 2006) 41–49; I Smith and G Thomas, *Smith & Wood's on Employment Law* (9ed Oxford University Press, Oxford 2008) 62 - 88; and S Deakin and G Morris, *Labour Law* (4ed Hart Publishing, Oxford 2005) 136 – 187. For a discussion on the concept of employee in the tort context, see K Oliphant (ed), *The Law of Tort* (2ed LexisNexis Butterworths, London 2007) 95 – 109.

[326] See, for example, M Wynn and P Leighton, 'Will the Real Employer Please Stand Up? Agencies, Client Companies and the Employment Status of the Temporary Agency Worker' (2006) 35 ILJ 301; F Reynold, 'The Status of Agency Workers: A Question of Legal Principle' (2006) 35 ILJ 320; and G Davidov, 'Who is a Worker' (2005) 34 ILJ 57.

a contract of service and a contract for service *"it is often easy to recognise a contract of service when you see it, but difficult to say wherein the difference lies."*[327] The matter is further complicated by the: absence of a uniform statutory definition for "employee";[328] differing judicial views on the appropriate criteria to apply when determining whether a contract of service exists; and the evolution of different categories of employment.

In the Super League competition a rugby league player is in a contractual relationship with a Super League club and the RFL. This chapter considers the nature of the contractual relations in the Super League competition. It canvasses the common law principles applied to determine whether a contract of service exists; the scope of the employment relationship in the Super League competition; and the implied terms contained in the players' contract. It highlights the ambiguities contained in the players' contract concerning the status of the RFL and the RFL's Operational Rules. Finally, it examines the common law approach to labour restraints contained in a professional rugby league player's employment contract; and considers the status of the registration contract between the RFL and an individual player.

---

[327] *Stevenson Jordan and Harrison Ltd v McDonnell and Evans* [1952] 1 TLR 101, 111 (Lord Denning).

[328] See, for example, the definition contained in the Sex Discrimination Act 1975; the Race Relations Act 1974; the Disability Discrimination Act 1995 (amongst others).

4.1 A "Contract of Service": General Principles

The principal enactment which provides for employment rights in England and Wales is the Employment Rights Act 1996 ("ERA 1996"). Section 230(1) of the ERA 1996 defines the term "employee" as "*an individual who has entered into or works under (or where the employment has ceased, worked under) a contract of employment.*"[329] "Contract of employment" is defined further in s 230(2) as "*a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing*". The broader employment category of "worker" is also defined in s 230(3). A "worker" can be either an employee or any individual who has entered into or works under, '*any other contract, whether express or implied and (if it is express) whether oral or in writing, whereby the individual undertakes to do or perform personally any work or services for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual.*'[330]

In order to determine whether a contract is a contract of service, the Courts have devised numerous tests, such as: the "control test";[331] the "mutual obligations test";[332] the "integration test";[333] and the "economic reality test".[334]

---

[329] An identical definition also appears in the following enactments: National Minimum Wage Act 1998; the Employment Act 2002; the Maternity and Parental Leave etc Regulations 1999 SI 1999/3312; and the Paternity and Adoption Leave Regulations 2002 SI 2002/2788 (amongst others).

[330] Employment Rights Act 1996 ("ERA 1996"), s 230 (3).

[331] *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance* [1968] 2 QB 497 (QB).

[332] *Carmichael v National Power plc* [2000] IRLR 43 (HL).

[333] The integration test (or business organisation test as it is sometimes known) considers the question of whether the employee has been

Relevant factors to consider when assessing the nature of the contract include: an obligation of personal service;[335] the label the parties place on the relationship;[336] and the contract terms.[337] No single test is determinative of employee status and the weight ascribed to each relationship feature may differ between cases.[338] However, recent case authorities suggest that the presence of a mutual obligation

---

integrated into the business. The test was expressed by Lord Denning in *Stevenson Jordan* as: *'...under a contract of service a man is employed as part of the business and his work is done as an integral part of the business but under a contract for services his work, although done for the business is not integrated into it but only accessory to it' – Stevenson Jordan* (n 327) 111. See also: *Bank voor Handel en Scheepvaart NV v Slatford and Anor* [1953] 1 QB 248 (CA); and *Whittaker v Minister of Pensions and National Insurance* [1967] 1 QB 156 (CA).

[334] The economic reality test was described by the Court of Appeal in *Hall (Inspector of Taxes) v Lorimar* [1994] ICR 218 as follows: *'In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in or absent from a given situation. The object of the exercise is to paint a picture from the accumulation of detail'*: ibid 226 (Nolan LJ).

The test considers factors such as, inter alia: the payment of taxation; the method of payment of remuneration and benefits like holiday pay, sick pay etc; the ownership of equipment used to undertake the work; the ownership of assets and equipment used to undertake the work; and the entity responsible for the financial risk, investment and management of the work - see *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] IRLR 346 (CA); *Young and Woods Ltd v West* [1980] IRLR 201 (CA); *Hewlett Packard Ltd v O'Murphy* [2002] IRLR 4 (EAT); *Global Plant Ltd v Secretary of State for Social Services* [1972] 1 QB 139 (QB); *Airfix Footware Ltd v Cope* [1978] ICR 1210 (EAT); and *Market Investigations Ltd v Minister of Social Security* [1969] 2 QB 173 (QB).

[335] An employee is obliged to provide personal service. If the contractual arrangements permit the worker to substitute his or her services with that of another person, then this may point in favour of the person's status as an independent contractor: *Ready Mixed Concrete* (n 331); and *Express and Echo Publications Ltd v Tanton* [1999] ICR 693 (CA). Cf *Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR 667 (EAT) and *McFarlane v Glasgow City Council* [2001] IRLR 7 (EAT).

[336] *Ferguson* (n 334).

[337] *Cable & Wireless plc v Muscat* [2007] ICR 975 (CA).

[338] The current judicial approach to determining employment status has created confusion and uncertainty, and some academics have called for greater clarity concerning the definition of "employee": see for example, P Davies and M Freedland, 'Employees, Workers, and the Autonomy of Labour Law' in Collins et al (eds) *Legal Regulation of the Employment Relationship (*Kluwer Law International, The Hague 2000) 267-286; and M, Freedland, *The Personal Employment Contract* (Oxford University Press, Oxford 2003) 13.

together with a degree of control asserted by one party over another point in favour of an employment relationship.[339] These two elements are considered in further detail below.

4.1.1 Control

In the work environment an employee is usually subject to managerial control and follows instructions concerning how, when and where a job is undertaken.[340] Historically "control" was viewed as the determining factor of whether a contract of service existed. If a person was *'subject to the command of his master as to the manner in which he shall do his work'*, then that person was employed by another.[341] The test was applied in the context of professional sport in *Walker v Crystal Palace Football Club.*[342] In that case the Court considered whether a professional football player was engaged under a contract of service with a club so as to be a "workman" of the club (for the purposes of the Workmen's Compensation Act 1906). Applying the control test, the Court held that the player's contract was a contract of

---

[339] See for example, the comments of the Court of Appeal in *Cable & Wireless*: *'The essentials of a contract of employment are the obligation to provide work for remuneration and the obligation to perform it, coupled with control'* – (n 337) 984; and in *James v London Borough of Greenwich* [2007] ICR 577 the Employment Appeals Tribunal commented as follows: *'In short, some mutual irreducible minimum obligation is necessary to create a contract; the nature of those mutual obligations must be such as to give rise to a contract in the employment field; and the issue of control determines whether that contract is a contract of employment or not'* – ibid, 582. The EAT decision was confirmed on appeal in *James v London Borough of Greenwich* [2008] IRLR 302 (CA).

[340] *'Control includes the power of deciding the thing to be done, the way in which it shall be done, the means to be employed in doing it, the time when and the place where it shall be done. All these aspects of control must be considered in deciding whether the right exists in a sufficient degree to make one party the master and the other his servant'* – *Ready Mixed Concrete* (n 331) 515.

[341] *Yewens v Noakes* (1880-1881) LR 6 QBD 530, 532 – 533 (Bramwell J).

[342] [1910] 1 KB 87 (CA).

service. The contract expressly required the player to obey the club's instructions; and during a match, the player was subject to the club's control through instructions issued by the team captain.

The leading case authority is *Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance,*[343] which concerned the legal status of truck drivers hired to deliver concrete to construction sites. The terms of the drivers' contract included (inter alia): a declaration that the truck driver was an independent contractor; a requirement that the truck driver deliver only the company's product in his vehicle; a requirement that all maintenance costs for the vehicle were the truck driver's responsibility; and an obligation on the truck driver to wear the company's uniform and for the vehicle to be painted with the company's colours and insignia. If at any time the driver was unable to perform services personally, the driver was contractually entitled to substitute a person to drive the truck on his behalf.

In finding that the truck drivers were engaged as independent contractors, MacKenna J stated the following:[344]

> *'A contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in performance of that service he will be subject to the other's control in a sufficient degree to make that other*

---

[343] [1968] 2 QB 497.
[344] Ibid 515.

master. (iii) The other provisions of the contract are consistent with its being a contract of service.'

Whilst the truck drivers provided services for remuneration and were controlled as to the manner in which the job was undertaken, a condition in the contract which permitted the driver to substitute personal service for that of someone else was considered inconsistent with the contract being a contract of service.[345]

Factors identified by the Courts which indicate whether a party is subject to the control of another party are: a contractual right to select the person for recruitment;[346] the power to discipline employees and resolve employee grievances;[347] and an entitlement to give detailed instructions as to how a job is performed, the place of work and the hours over which the job is done.[348] Although control *'can no longer be regarded as the sole determining factor,'*[349] the greater the degree of control exerted by one person over another, the more likely that the relationship is one of employee and employer.

4.1.2 Mutual Obligation

In the context of employment law "mutual obligation" generally refers to: a continuing obligation on the part of an

---

[345] Supra (n 343) 525 - 526.
[346] *Short v J & W Henderson Ltd* (1946) 62 TLR 427 (HL).
[347] *Morren v Swinton and Pendlebury Borough Council* [1965] 1 WLR 576 (QB).
[348] *Whittaker* (n 333).
[349] *Market Investigations Ltd* (n 334) 10 (Cooke J). By contrast in tort law control is the principal focus when issues of vicarious liability fall for consideration. See, for example: *Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited* [1947] AC 1 (HL); *Gibb v United Steel Companies Ltd* [1957] 2 All ER 110 (Carlisle Assizes); and *Hawley v Luminar Leisure Limited and Ors* [2006] EWCA Civ 30 (CA).

employer to provide work and remuneration; and a continuing obligation on the part of the employee to do the work provided. The precise nature of the mutual obligation has been expressed in different ways. In *James v London Borough of Greenwich*[350] the Court of Appeal stated that the obligation on the employer was to provide work.[351] In *Nethermere (St. Neots) Limited v Taverna and Gardiner,*[352] *Carmichael v National Power plc,*[353] and *Cable & Wireless plc v Muscat*[354] the Court refers to the employer's obligation to provide work and pay wages, whilst in *Stevedoring & Haulage Services Ltd,*[355] the mutual obligation was expressed as the obligation to offer work and a corresponding obligation to accept it.[356]

Howsoever the mutual obligation is expressed, it is an important consideration in cases concerning the legal status of workers. The concept has been instrumental in applying employee status to categories of workers previously considered to be independent contractors. For example, a mutual obligation was considered present in contractual arrangements with: a self employed home worker;[357] a home tutor engaged on a succession of short term teaching assignments;[358] and a telecommunications specialist

---

[350] [2008] IRLR 302 (CA).
[351] Ibid 307. Cf: With those Court decisions which discuss an employer's implied obligation to provide work: *Collier v Sunday Referee Publishing Co* [1940] 2 KB 647 (KB); *Devonald v Rosser & Sons* [1906] 2 KB 728 (CA); and *Marbe v George Edwardes (Daly's Theatre) Ltd* [1928] 1 KB 269 (CA).
[352] [1984] ICR 612 (CA).
[353] [2000] IRLR 43 (HL).
[354] [2006] IRLR 354 (CA).
[355] [2001] IRLR 627 (CA).
[356] Ibid 628 – 629. A further definition is provided by the Court of Appeal in *Clark v Oxfordshire Health Authority* [1998] IRLR 125, 130 (CA).
[357] *Nethermere* (n 352).
[358] *Cornwall County Council v Prater* [2006] IRLR 362 (CA).

engaged by a company but paid through an agency.[359] Even though the parties may not have contemplated entering an employment relationship, the Court nonetheless concluded that such a relationship existed.

The cases in which the concept of mutual obligation has developed can be divided into two categories, namely: those cases where work is carried out periodically and an employment relationship is alleged (even when the individual is not working) on the basis of a single over-arching employment contract;[360] and those cases concerning agency workers (or another triangular employment situation) where it is alleged that an implied contract of employment is necessary to create legally enforceable obligations.[361]

4.1.3 Conclusion

In order to determine the legal status of a contractual relationship, the terms of the contract and its mode of implementation are taken into account. The case authorities emphasise that no single criterion is conclusive, although a mutual obligation coupled with a degree of control is important for determining whether an employment relationship exists between the parties. Applying the law to the contractual relations in the Super League competition,

---

[359] *Cable & Wireless* (n 354).

[360] See, for example: *Nethermere* (n 352); *O'Kelly and Others v Trusthouse Forte plc* [1983] IRLR 369 (CA); *Clark* (n 356); and *Stevedoring & Haulage* (n 355); *Carmichael* (n 353); and *Cornwall City Council* (n 358).

[361] See, for example: *Brook Street Bureau (UK) Ltd v Dacas* [2004] IRLR 358 (CA); *Cable & Wireless* (n 354); and *James* (CA) (n 350). The definition of "employee" provided in s 230 of the ERA 1996 expressly contemplates that an employee may be employed under an implied contract of employment.

the issue of whether or not a professional rugby league player is an employee of a Super League club is discussed in the following section.

4.2 The Employment Relationship in the Super League Competition

A professional rugby league player recruited to play in a Super League first team enters into a contract with a Super League club. The following section considers the nature of that contract.

4.2.1 Bi-Lateral Relationship

The parties to the players' contract are expressed as the player and the club. The players' contract is divided into six sections which set out, inter alia: the player's obligations; the club's obligations; the duration of the contract; the remuneration; and other benefits. The contract expressly contemplates that the relationship is one of employer/employee. For example, the contract:

- is titled "contract of employment";

- contains an express statement that *"this agreement includes a statement of your main terms and conditions of employment in accordance with the Employment Rights Act 1996"*;

- uses language consistent with that of a contract of service (such as, for example: the word "*employment*" in the title to section 2; and references to the ERA 1996); and

- contains clauses consistent with that of an employee/employer relationship (such as, clauses which concern: a player's obligation to provide personal service;[362] the provision of holiday pay[363] and sick pay;[364] disciplinary procedures and grievance procedures).

The way in which the parties conduct the agreement is also consistent with an employment relationship. For example, a player receives an annual salary which is typically paid by the club – after deductions for tax and national insurance - into a player's personal bank account. The club sets the times at which a player must attend for: training; games; and club sponsor commitments. The club provides a player with: a uniform and training kit to wear; transport to and from a match; a venue for training; and training equipment. The club also instructs players how to play through its coaching staff and team management. Although, it is the player's own skill and initiative that determines the way in which a particular match is played, in exercising that skill and initiative during a match, a player follows instructions issued by a coach or a senior player. Finally, the club is responsible for: the recruitment of its players; player

---

[362] Players' Contract, cl 5.
[363] Players' Contract, cl 4.
[364] Players' Contract, cl 11.

discipline;[365] and grievance matters.[366] It also has a contractual right to terminate the player's contract.[367]

The club, therefore, exerts a significant degree of control over the way in which a player performs his work either through provisions contained in the players' contract or through work practices.

The players' contract also includes a mutual obligation on the part of both parties. Pursuant to the players' contract, the club agrees to pay remuneration and other benefits as consideration for the player agreeing to provide playing services.[368] Applying *Stevedoring & Haulage Services Ltd,* the mutual obligation may be expressed as the club's agreement to pay remuneration coupled with the player's express agreement to *'play, if selected and if deemed fit to play.'*[369]

Alternatively, if the concept of mutual obligation requires an obligation on the part of the employer to provide work, then that too is present. A Super League club's obligation to provide work is not expressly incorporated into the contract but is an implied term (discussed below at 4.4.2 of this chapter). The mutual obligation may be expressed, therefore, as: the obligation on the part of the employer to

---

[365] Clause 27 and Annexure 2 of the Player's Contract prescribe the disciplinary rules and procedure. Some clubs also issue players with a separate list of conduct rules which may form the basis of disciplinary proceedings.
[366] Clause 26 and Annexure 2 of the Players' Contract prescribe the grievance procedure.
[367] Players' Contract, cl 21 and Annexure 2.
[368] Players' Contract, cl 3. The details of remuneration and benefits are recorded in Schedule 1 of the players' contract.
[369] Players' Contract, cl 5.1(a).

pay wages and to provide a reasonable opportunity to play; and the player's obligation to play if selected.

Other factors also point in favour of an employment relationship. First, a professional rugby player is an integral part of a club's sports business. Without a player providing his playing skills in a team environment, a club is unable to operate as a sports business within the Super League competition. Secondly, various financial factors support a finding that the contract is a contract of service. The financial risk of operating a sports business is assumed by the club. The club is responsible for player wage payments and other liabilities incurred. The club also benefits from profits derived from participating in the Super League competition. The stadium, training facilities and other equipment used by a player to provide playing services are either owned or leased by the club. All of these factors illustrate that the club is in business on its own account and not the player.

In conclusion, for the reasons set out above the contract between a professional rugby league player and his club is a contract of service; and a professional rugby league player is an employee of the Super League club for whom he plays.

4.2.2 Tri-Lateral Relationship

The RFL is not described as a party to the players' contract and it does not view itself as an employer of players in the Super League competition (the RFL accepts that it is an employer of a player selected to play for the England

international representative team).[370] However, the construction of the players' contract raises questions concerning the RFL's status under the contract.

The players' contract is drafted by the RFL usually following consultation with the clubs, the RLPA and sports agents (although the extent and form of consultation undertaken is unknown). Variations to clauses contained in the contract require the approval of the RFL;[371] and a player's registration with a club may be rejected or delayed if the players' contract is not in the prescribed form.

The players' contract states that: the agreement is "*subject to the League's regulations*";[372] and that a player is employed by a club "*as a professional rugby league player on the terms and conditions of this Agreement and subject to the regulations.*"[373] The term "regulations" is defined in the players' contract as meaning "*the Constitution and Operational Rules, the Laws of the Game of Rugby League and the anti-doping Regulations of the League, in each case in force for the time being*".[374] Pursuant to the players' contract, a player agrees with the club that he will "*comply with the Regulations including the Anti-Doping Regulations (as amended from time to time) at all times all of which shall take precedence over the club rules*".

In addition, there are numerous references to the "*League*" (or RFL) throughout the contract. For example, a player

---

[370] Interview with the RFL, 29 October 2007, Leeds, England.
[371] RFL Operational Rules 2009, C1:1:7.
[372] Players' Contract, introduction.
[373] Players' Contract, cl 2.1.
[374] Players' Contract, definitions.

agrees to make himself available if selected to play for an RFL representative team;[375] a player has an obligation to the RFL to ensure that his conduct "*on and off the field is of the highest standard*";[376] and a player agrees that he will conduct "*himself at all times in a manner which upholds the good reputation of the club and the League*".[377]

Furthermore: a player is obliged to comply with the provisions of any insurance policy taken out by the RFL;[378] and a player agrees not to engage in any sport, activity or practice that might endanger his fitness, health or capacity to comply with his obligations to the RFL.[379]

Under the terms of the players' contract, the RFL acquires the commercial use of a player's intellectual property.[380] A player is also obliged to "*assist and co-operate with the club and/or the League and comply with all reasonable requests to assist their sponsors and commercial partners to maximise the promotional benefits from their support of, or supply to, the Club and/or the League.*"[381] A player is forbidden from entering into a contract with a sponsor that is a direct competitor of an RFL sponsor;[382] and where a player wears items of clothing not supplied by the club, the clothing must comply with RFL guidelines or, if instructed by the RFL, be unbranded.[383]

---

[375] Players' Contract, cl 5.1.(b)
[376] Players' Contract, cl 5.1(e).
[377] Players' Contract, cl 5.1 (k).
[378] Players' Contract, cl 5.1 (l).
[379] Players' Contract, cl 5.2(c).
[380] Players' Contract, cl 6.5.
[381] Players' Contract, cl 7.2(b).
[382] Players' Contract, cl 7.2(a).
[383] Players' Contract, cl 8.2.

The contract termination provisions permit the club to terminate the contract if the player is guilty of fraud, dishonesty or conduct which brings the RFL into disrepute.[384] Following the termination, the club is obliged to provide a copy of the contract termination notice to the RFL.[385] The RFL is involved in the disciplinary procedure; an appeal against termination of the contract - by the player or the club – may be made to the RFL.[386]

The contract sets out the player's obligations concerning registration with the RFL. The player's contract is "*deemed to be terminated by mutual consent*" upon the transfer of a player's registration to another club.[387] Under the contract the RFL also attains the player's consent to it collecting and processing personal data about the player.[388] Finally, the contract permits the RFL to stand in the place of the club and enforce any obligation in the players' contract.[389]

The status of the RFL under the contract is ambiguous. The contract contemplates that the club is an employer of the player. The club has primary control over the player on a daily basis; provides the player with work; and pays the player's remuneration in return for the player providing his services. Yet, the provisions described above provide the RFL with control of a player's on-field and off-field conduct during the contract term. Under the contract the RFL may enforce obligations in place of the club; it is involved in the contract termination process; and it acquires the commercial

---

[384] Players Contract, cl 21.1.
[385] Ibid.
[386] Players' Contract, cl 22 and Annexure 2.
[387] Players' Contract, cl 24.2.
[388] Players' Contract, cl 29.
[389] Players' Contract, cl 30.5.

use of a player's intellectual property right. The RFL's registration process – which a player is obliged under the terms of contract to complete - determines whether or not a player is permitted to play in the competition. A player's eligibility for registration determines whether a player is recruited by the club at all. Under the terms of the players' contract, it is arguable that the RFL exerts a degree of control over the player.

It may be argued that the RFL is not a party to the players' contract because: it is not expressed as a party to the contract; it has no intention to create legal relations with the player under the terms of the contract; and it does not provide consideration. Whilst the contract does not expressly identify the RFL as a party to the employment contract, it is a party owing to the obligations owed by the player to the RFL under the contract terms. The substitution clause permits the RFL to stand in the place of the club thereby demonstrating an intention on the part of the club, the player and the RFL for the RFL to be a party to the contract.

The consideration provided under the contract is the remuneration paid by the club. The club secures the player's services to compete in the Challenge Cup competition; and obtains the player's intellectual property for the benefit of the RFL. In the absence of the club's participation in the competition, the RFL would be required to enter into a playing contract with a player in order to secure playing services for its competition. Through the club and its contractual relationship with the player, the RFL acquires those playing services. The contract is also an additional

means by which the RFL may secure compliance with its Operational Rules.

In effect there is a juxtaposition of the RFL and an individual Super League club in the role of employer. A tri-lateral employment relationship arises in respect of every player in the Super League competition which may require the implication of a contract of service between the RFL and a player in order to create legally enforceable obligations.

Establishing a contract of employment between the RFL and a player in Super League leads to the unorthodox situation of a player being employed simultaneously by two entities. The idea that an employee may have two different employers for the purposes of asserting employment rights has met with limited success in the Courts. Employees working within a partnership are employed jointly and severally by all partners.[390] The administration of the Super League competition and the Challenge Cup competition does not, however, take the legal form of a partnership.

Obiter statements in *Dacas* expressed the view that an implied contract of employment between the worker and agency client and an express contract between the worker and agency were not mutually exclusive.[391] More recently in *James v London Borough of Greenwich,* the Court of Appeal

---

[390] *Cowell v Quilter Goodison & Co Ltd* [1989] IRLR 392 (CA). See *Harold Fielding Ltd v Mansi* [1974] 1 All ER 1035 (NIRC) in which the National Industrial Relations Board (the predecessor to the Employment Appeals Tribunal) accepted that a chorister in a West End production was employed jointly by two limited liability companies operating in partnership: ibid 1038; cf *Jeetle v Elster* [1985] ICR 389 (EAT) and *Bower v Stevens and Another* [2004] ICR 1582 (CA).

[391] *Brook Street Bureau* (n 361) paras 19 and 20 (Mummery LJ); and paras 36 (Munby LJ).

stated that a worker could have two contracts simultaneously with different entities concerning the provision of services at a particular work place.[392] However, in *Cairns v Visteon UK Ltd,*[393] the Employment Appeals Tribunal declined to imply a contract of service in circumstances where a contract of service already existed.[394] By contrast, recent tort law cases have recognised that an employee may have two employers for the purposes of determining dual vicarious liability where control of the employee is shared.[395] In the context of tort law, however, the necessity to provide victims of personal injury with an avenue of redress is an important policy consideration which may not be present in a claim concerning employment protection.

In professional rugby league in the United Kingdom the employment circumstances of a professional rugby league player form a unique situation. The Courts may be willing to accept based on: the construction of the contract; the degree of control exerted by the RFL; the consideration provided by the club; and the relationship formed between the player and the RFL for the purposes of the Challenge Cup competition, that the RFL is a party to the contract. A rugby

---

[392] *James* (CA) (n 350) para 303 (Mummery LJ).
[393] [2007] ICR 616 (EAT). In that case the issue for consideration was whether an administrative assistant employed by an agency under an express employment contract was also employed under an implied contract of employment with the company in which she was placed.
[394] According to the EAT: there were no good policy reasons for extending employment protections to a second and parallel employer where employment protection was already provided under an existing contract of employment; the facts of the case at hand did not suggest that implying a second contract of employment was necessary; and there were also practical difficulties with apportioning responsibility between two employers for the purposes of compliance with statutory employment rights (such as for example the statutory disciplinary procedures: ibid 620 – 622.
[395] *Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Limited and Ors* [2005] EWCA Civ 1151; *Hawley* (n 349).

league player may therefore have two contracts simultaneously with different entities concerning the provision of services at a particular workplace.[396]

The absence of an employment relationship between the RFL and a player does not prevent a player asserting employment rights against an individual Super League club. Establishing an employment relationship may be useful, however, for restraining the exercise of regulatory power by the RFL, particularly where that power impinges upon the employment interests of players.

4.3 Players' Contract: Status of the RFL Operational Rules

The construction of the players' contract contemplates that the RFL Operational Rules ("the Rules") take precedence over the employment contract.[397] Insofar as an inconsistency arises between a clause in the players' contract and a Rule, then the Rule takes precedence.

The RFL Operational Rules have contractual effect through the terms of the players' contract by virtue of the player's contractual obligation to *"comply with the Regulations [the Rules] including the Anti-Doping Regulations (as amended from time to time) at all times all of which shall take precedence over the Club Rules."*[398] Some of the Rules are irrelevant to the employment of a professional player (for example, rules pertaining to minimum ground standards or

---

[396] *James* (CA) (n 350).
[397] Players' Contract, introduction.
[398] Players' Contract, 5(d).

the RFL's child welfare policy). Nonetheless, those Rules which are "apt" for incorporation in the contract as a term are, arguably, included.[399]

It is unnecessary for the RFL Operational Rules to be incorporated into the players' contract with the effect that the RFL may be liable for changes to the Rules under employment law. Construing the rules as incorporated into the contract, places an obligation of consultation on the RFL in respect of every player with whom it has a contractual relationship. A variation of a contractual term requires the employee's consent; a unilateral variation of the contract may repudiate the contract and enable the employee to claim for breach of contract.[400]

In conclusion, it is arguable that the RFL is a party to the employment contract and that the Rules form a part of a player's terms and conditions of employment. The ambiguities concerning the RFL's status and the provisions of the players' contract may provide players with a right of consultation if construed in favour of the player.

4.4 Players' Contract: Implied Terms

In addition to the express terms of the players' contract, a number of terms are implied by common law. These terms include: the implied term of trust and confidence; and the implied term to provide work, and are discussed in turn below.

---

[399] *Keeley v Fosroc International Ltd* [2006] IRLR 691 (CA).
[400] Selwyn (n 325) para 3.92.

4.4.1 Mutual Trust and Confidence

An employer and employee are frequently required to work together over a period of time in a continuing and sometimes open-ended contractual relationship. Thus, the Courts recognise that underpinning every employment relationship is the implied term of mutual trust and confidence. The term obliges the employer to:

> *'...not without reasonable and proper cause to conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of mutual trust and confidence between employer and employee.'*[401]

Although the obligation is a mutual term and applies equally to an employee's conduct:

> *'The major importance of the implied term of trust and confidence lies in its impact on the obligations of the employer...and the implied obligation as formulated is apt to cover the great diversity of situations in which a balance has to be struck between an employer's interest in managing his business as he sees fit and the employee's interest in not being unfairly and improperly exploited.'*[402]

The impact of the employer's conduct is assessed objectively; and a significant factor is the effect of the employer's conduct for the employee rather than the employer's intention behind the action.[403]

---

[401] *Woods v W M Car Services (Peterborough) Ltd* [1981] 666, 670 (Browne-Wilkinson J). Approved in: *Lewis v Motorworld Garages Ltd* [1986] ICR 157 (CA); and *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* [1998] AC 20 (HL). For a discussion concerning the scope of the implied term, see D Brodie, 'Recent Cases, Commentary, The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 ILJ 121.

[402] *Malik* (n 401) 46 (Lord Steyn).

[403] *Malik* (n 401) 47 (Lord Steyn).

The scope of the term is wide-ranging and various types of conduct have been held to breach the implied term. For example: in *Horkulak v Cantor Fitzgerald International*[404] an employer's failure to assess whether or not an employee was entitled to a discretionary bonus payment in a bona fide and rational manner was held to breach the implied term of trust and confidence;[405] in *Morrow v Safeway Stores*[406] an employer who reprimanded an employee in public was held to have breached the implied term of trust and confidence; and in *British Gas v O'Brien*[407] an employer who denied an employee the opportunity provided to all other employees of entering a contract with enhanced redundancy terms was held to have breached the term.

An employer's conduct need not be directed at an individual employee but can extend to a group of employees as a whole.[408] Furthermore, the way in which a company conducts its business affairs may be constrained by the implied term. In *Malik v Bank of Credit and Commerce International*[409] the House of Lords held that the fraudulent manner in which a bank carried out business amounted to a breach of the implied term of trust and confidence; and in *Imperial Group Pension Trust Limited v Imperial Tobacco Ltd*[410] the Court concluded that a company was required to exercise its rights held under a pension trust deed taking into account the obligation of trust and confidence that it owed to its employees.

---

[404] [2005] ICR 402 (CA).
[405] Ibid 47.
[406] [2002] IRLR 9 (EAT).
[407] [2001] IRLR 496 (EAT).
[408] *Malik* (n 401).
[409] Ibid.
[410] [1991] 1 WLR 589 (ChD).

In the circumstances of the latter case a conflict of interest arose between the exercise of the employer's powers under the terms of a pension trust deed, and the employer's obligation of trust and confidence owed under an employment contract with an employee. The Court accepted that an employer was entitled to look after its own financial interests but '*only to the extent that in so doing it does not breach the implied obligation of good faith to its employees.*'[411] The exercise of an employer's power under the terms of a pension deed was invalid if the company used the power in a manner which breached the obligation of good faith.[412] The employer's decision never to increase pension benefits and its decision to exercise its powers under the trust deed in a way that coerced employees to give up existing beneficial rights were held to breach the implied term of trust and confidence.[413]

The players' contract contains the implied term of trust and confidence which raises two issues of importance. First by seeking the player's agreement to comply with the Rules under the terms of the employment contract,[414] the club elevates the importance of a player complying with the Rules. A failure to adhere to the Rules may breach the employment contract which in turn may result in disciplinary proceedings and ultimately termination of the employment contract. The consequence of non-compliance with the Rules for a player's employment with a club creates a positive obligation on the club to inform a player of the Rules

---

[411] Ibid 599.
[412] Ibid.
[413] *Imperial Group Pension Trust Ltd* (n 410) 599.
[414] Players' Contract, cl 5.1(d).

including any changes.[415] A failure to comply with the positive obligation may amount to a breach of the implied term of trust and confidence.

A player will be unaware of changes to the RFL Operational Rules because he is not a party to: the RFL's decision-making processes; or the decision-making processes of SLE. The club, however, by virtue of its membership to SLE and the RFL, will be aware of the Rules. In those situations it is incumbent upon the club to inform players of the Rules and subsequent amendments (such as for example the implementation of the "club trained rule"). An application of the implied term in this manner is consistent with the recognition that '*employment contracts are no longer regarded as purely commercial contracts entered into between free and equal agents*'.[416]

Secondly, in the course of the club's membership to SLE or the RFL, it may make decisions which benefit its own financial interests but which conflict with the interests of its employees. Applying the principles established in *Malik* and *Imperial Group Pension Trust Ltd,* a club is obliged to make certain financial decisions taking into account the obligation of good faith (or trust and confidence) owed to employees. The extent to which the implied term may constrain a club's decision-making powers under the terms of membership to SLE or the RFL is unclear. However, it may extend to consulting with and seeking agreement from its employees

---

[415] *Scally v Southern Health and Social Services Board* [1997] IRLR 348 (HL); and *Ibekwe v London General Transport Services* [2003] EWCA Civ 1075 (CA).

[416] *Johnson v Unisys Ltd* [2003] 1 AC 518, 549 (Lord Millett). See also Douglas Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (Oxford University Press, Oxford 2005) 68 – 73.

when a contractual right which benefits the player – such as a right to work – is affected detrimentally. The RFL as a party to the employment contract may find its decision-making powers similarly constrained.

4.4.2 Duty to Provide Work

Generally, an employer is not obliged to provide an employee with work (although an employer is obliged to pay remuneration which is due under a contract of employment).[417] As Asquith J averred:

> *'Provided I pay my cook regularly she cannot complain if I choose to take any or all of my meals out.'*[418]

There are exceptions to the general principle, however, which usually arise in circumstances where an employee relies upon doing the work in order to generate an income. Such employment situations include those of: a piece work employee;[419] an employee paid by commission only;[420] an actor;[421] or an employee whose skills will atrophy through lack of use.[422] In respect of the latter, the Court of Appeal stated in *Langston v Amalgamated Union of Engineering Workers (No 2)*[423]:

> *'In a contract for the employment of one who needs practise to maintain or develop his skills, the consideration will include an obligation to pay the*

---

[417] *Turner v Sawdon and Co* [1901] 2 KB 653 (CA).
[418] *Collier* (n 351) 236.
[419] *Devonald* (n 351).
[420] *Turner v Goldsmith* [1891] 1 QB 544 (CA); and *Bauman v Hulton Press Ltd* [1952] 2 All ER 1121 (QB).
[421] *Marbe* (n 351); and *Herbert Clayton and Jack Waller Ltd v Oliver* [1930] AC 209 (HL).
[422] *William Hill Organisation Ltd v Tucker* [1999] ICR 291 (CA). See also *Langston v Amalgamated Union of Engineering Workers (No 2)* [1974] ICR 510 (NIRC).
[423] *Langston* (n 422).

salary or wage but it may also extend to an obligation to provide a reasonable amount of work.'[424]

Regarding the employment of an actor or actress, the Courts recognise that the profession is *'peculiar'* because an actor's *'success entirely depends on pleasing the public and constantly being before the public'*.[425] The nature of an actor's employment, therefore, obliges an employer to provide the actor with a reasonable opportunity to work.[426] The obligation is more onerous in circumstances where a contract contains express or implied restrictive covenants which prevent an actor from engaging in other work during the course of the contract.[427]

Due to the nature of a professional rugby league player's job, it is arguable that the players' contract includes the implied term to provide work. First, the nature of professional sport requires a player to maintain high levels of athletic ability in order to participate at an elite level. "Match fitness" can only be gained and maintained by playing regularly in a professional match. A rugby league player's occupation is work of a type that involves *'some special skill or talent, whose continued display is essential to the psychological and material, and sometimes the physical well-being of the servant.'*[428] Thus, in order to gain and

---

[424] *Langston* (n 422) 521 - 522 (Sir John Donaldson).
[425] *Herbert Clayton* (n 421) 216.
[426] *Herbert Clayton* (n 421) approving the earlier decisions of *Turner* (n 417) and *Marbe* (n 351).
[427] *Herbert Clayton* (n 421).
[428] *Warren v Mendy and Anor* [1989] 1 WLR 853, 857. See also *Provident Financial Group plc and Another v Hayward* [1989] ICR 160 (CA) in which Dillon LJ stated: *'The employee has a concern to work and a concern to exercise his skills. That has been recognised in some circumstances concerned with artists and singers who depend on publicity, but it applies equally to skilled workmen and even to chartered accountants'* – ibid 168.

maintain professional rugby league playing skills a player must be provided with an opportunity to play.

Secondly, a player's opportunity: to obtain a future employment contract with a club; or to obtain an endorsement contract; or to generate a public profile from which other commercial opportunities may be gained, depends entirely upon playing in front of the general public. Without the opportunity to play, a professional sports player's ability to pursue a professional sports career is limited. In that regard, a rugby league player's profession is analogous to that of an actor or actress.

Thirdly, the remuneration provided to some rugby league players is performance-based. Prize money, appearance bonuses, win or loss payments to which a player may be contractually entitled can only be obtained if the player is provided with the opportunity to play.

Fourthly, the player's obligations are listed in clause 5.1 of the players' contract and include (amongst other things) obligations: to play; to make himself available to play if selected for RFL representative teams; to play and train to the best of the player's ability; to maintain the highest possible performance and fitness standards; and to play solely for the club or as authorised by the club. Playing is an integral part of a player's contractual obligations and in order to fulfil those obligations the club must provide the player with a reasonable opportunity to play.

Finally, legal authority at a Tribunal level recognises that the contract of a professional rugby league player contains such

a term. In *Kirk v Salford Football Club (1914) Limited*[429] the Employment Tribunal at Manchester held, inter alia, that an implied term to provide work was included in the contract between Mr Andrew Kirk (a professional rugby league player) and Salford City Reds.[430] The Employment Tribunal concluded that:

> *'given the type of work of the Claimant and the full terms and effect of his contract of employment that there was an implied term to the effect that the Claimant would have an opportunity to play for the first team within the terms of his contract of employment.'*[431]

There are a number of caveats attached to implying the obligation in the context of a professional rugby league player. First, it is difficult for a club to provide work to every player it recruits since:

- a club typically recruits more players than it is entitled to play in a match under the sport's playing rules;[432]

- the number of players a club may select in a team for a weekly match is limited; and

- the game's playing rules permit only thirteen players to be on the playing field at any given time.[433]

---

[429] Manchester Employment Tribunal, 1 September 2005, Case No 2400724/05.
[430] Ibid para 81.
[431] *Kirk* (n 429) para 77.
[432] Recruiting a greater number of players enables a club to cover for injury. Additionally, the nature of some playing positions encourages a club to recruit more than one player per position (for example, players in some forward positions may be substituted more often during a match owing to the level of physical contact applied during a match).
[433] RFL Laws of the Game available on the RFL's official website at <http://www.therfl.co.uk>.

In addition, individual player performance is an important factor in team selection and a player: may not be selected because of poor performance; or may be selected to play on the bench but not substituted because the team's performance does not require his substitution.

Taking into account these factors, the obligation to provide a player with work may be expressed as an obligation to provide the player with a reasonable opportunity to play. The obligation to provide the work is all the more onerous taking into account the restrictive covenants contained in the player's contract;[434] and the payment of performance-related bonuses.

Even if a Court determines that as a matter of course a professional rugby league player's contract does not include an obligation to provide the reasonable opportunity to play, it is likely that representations made by a club during the recruitment process could support the inference of such a term. Those players interviewed indicated that the opportunity to play was an important consideration when determining whether or not to agree a contract with a club. It is an issue that is often discussed by a club and a player prior to entering a contract.

4.4.3 Contractual Right to Work

Arising from an express or implied term to provide work is a contractual right to work.[435] The right to work is not an

---

434

435 *William Hill* (n 422). The case concerned a senior dealer in a spread betting business who: was employed in a specific and unique post; and

absolute right; *'an employer is not obliged to find work if there is none to be done, or none to be done with profit to the employer'*.[436] Moreover, an employer is not obliged to allocate work to one employee ahead of another if there is insufficient work for both to do.[437] An employee's right to work turns upon the employee being ready and willing to perform the work.[438]

In the context of a professional rugby league player: who is employed under a contract which includes the implied term to provide work; and is employed in a role which requires the frequent exercise of skills in order to perform that work, a contractual right to work exists.

---

used skills which were required to be frequently exercised in order for the dealer to discharge his duties. In that case the Court concluded that: the dealer's contract and the nature of his job gave rise to an obligation on the part of the employer to provide work; and therefore provided the dealer with a contractual right to work: ibid 300.
See also *Langston* (n 422); and *SG and R Valuation Service Co v Boudrais and Others* [2008] EWHC 1340 (QB) in which the High Court confirmed: *'Although cases like Collier v Sunday Referee Publishing Co are still authoritative, the approach now is to determine whether an employer has the right to work by means of the construction of the contract of employment. The test laid down in the leading decision, William Hill Organisation Ltd v Tucker [1999] ICR 291, is to ask whether the bargain between the employer and the employee is such that there is a right to work, in other words, whether the obligation of the employer is not confined to payment of the agreed remuneration, but also includes the obligation to provide work'* – ibid para 20. Note also case authorities which recognise a general right to work based on public policy: see, for example, *Nagle v Fielden* [1966] 2 QB 633; and *Chambers v British Olympic Association* [2008] 4 ISLR SLR115-124.

[436] *William Hill* (n 422) 299.

[437] Ibid.

[438] *Miles v Wakefield Metropolitan Borough Council* [1987] AC 539 (HL): *'...a plaintiff in an action for remuneration under a contract of employment must, in my judgment assume the initial burden of averring and proving his readiness and willingness to render the services required by the contract (subject, no doubt, to any implied term exonerating him from inability to perform due, for instance, to illness)'* – ibid 574 (Lord Oliver of Aylmerton).

4.5 Restraining Player Movement

Measures adopted by the RFL and the clubs to control player movement must take into account the nature of the contract between a club and a player as a contract of service; and the nature of the work undertaken by the player. A restraint of trade clause and the terms of a player's registration are just some measures used to prevent a player moving between clubs. The effectiveness of these mechanisms as a means of restraining player movement is limited by the common law principles pertaining to specific performance; and considerations of "reasonableness".

4.5.1 Players' Contract: Specific Performance

Generally, a Court will not order specific performance of a contract which concerns the provision of personal services (whether it is a contract of service or a contract for service).[439] The common law has, on occasion, enforced a negative contractual restraint with the practical effect that a

---

[439] *Whitwood Chemical Co v Hardman* [1891] 2 Ch 416 (CA): *'It would be quite impossible to make a man work, and therefore the Court never attempts to do it'* – ibid 420.
See also *CH Giles & Co Ltd v Morris* [1972] 1 WLR 307 (ChD): *'The reasons why the court is reluctant to decree specific performance of a contract for personal services (and I would regard it as a strong reluctance rather than a rule) are, I think, more complex and more firmly bottomed on human nature. If a singer sang flat, or sharp, or too fast, or too slowly, or too loudly, or too quietly, or resorted to a dozen of the manifestations of temperament traditionally associated with some singers, the threat of committal would reveal itself as a most unsatisfactory weapon: for who would say the whether the imperfections of performance were natural or self-induced? To make an order with such possibilities of evasion would be vain; and so the order will not be made'* – ibid 318.
For a discussion concerning specific performance generally, see Gareth Jones and William Goodhart, *Specific Performance* (2ed Butterworths, London 1996) 168-170.

person may be compelled to continue working under the original contract.[440] But in the context of an entertainment contract or a contract concerning a professional sportsperson, the Court of Appeal has indicated a reluctance to enforce a negative restraint.[441]

In *Warren v Mendy*[442] the Court of Appeal considered the terms of a standard form contract prescribed by the British Boxing Board of Control and used by a professional boxer and a promoter. The agreement contained a clause whereby the boxer agreed to be managed exclusively by the promoter for the duration of the contract ("the exclusivity provision"). The boxer subsequently lost confidence in the promoter and sought to enter a contract with a second promoter thereby breaching the exclusivity provision. In the legal proceedings which followed, the promoter sought an injunction to prevent the boxer from entering the contract with the second promoter. The boxer argued that the exclusivity provision in the standard form contract was an unreasonable restraint of trade.

The Court of Appeal declined the application for injunction on the basis that the injunction would compel specific performance of the contract:

---

[440] *Lumley v Wagner* (1852) 1 De GM & G 604 (Court of Queen's Bench); and *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209 (KBD). In both cases the defendants were restrained for a short duration not exceeding three months. Cf: With the approach in *Page One Records Ltd v Britton* [1968] 1 WLR 157 (ChD); and *A Schroeder Music Publishing Ltd v Macaulay* [1974] 1 WLR 1308 (HL); *Nichols Advanced Systems Inc v de Angelis* (unreported, 21 December 1979 ChD); *Subaru Technica International Inc, Prodrive Ltd v Burns and Ors* (unreported, 12 December 2001, HC01C05152, ChD); and *Warren* (n 428).

[441] See, for example, *Nicholls Advanced Vehicle Systems* (n 440) in which the Court refused to issue an injunction preventing a professional racing driver driving for a competitor because the effect of doing so was to compel specific performance of the original contract or to compel the driver to give up a career for a period of time.

[442] *Warren* (n 428).

> *'It is well settled that an injunction to restrain a breach of contract for personal services ought not to be granted where its effect will be to decree performance of the contract. Speaking generally there is no comparable objection to the grant of an injunction restraining the performance of particular services for a third party, because by not prohibiting the performance of other services, it does not bind the servant to his contract. But a difficulty can arise usually in the entertainment or sporting worlds, where the services are inseparable from the exercise of some special skill or talent, whose continued display is essential to the psychological and material, and sometimes to the physical, well-being of the servant. The difficulty does not reside in any beguilement of the court into looking tenderly on such who breach their contracts, glamorous though they often are. It is that the human necessity of maintaining the skill or talent may practically bind the servant to the contract, compelling him to perform it.'*[443]

The nature of the boxer's employment as one of personal service which required the frequent exercise of a special skill or talent; the presence of an obligation of mutual trust and confidence in the relationship; the duration of the injunction;[444] the number of promoters with whom the boxer could work; and the likelihood of legal proceedings being brought against other promoters, were considered by the Court of Appeal to be important factors to take into account when determining whether or not to issue an injunction the effect of which would be to compel specific performance of the original contract.[445]

---

[443] *Warren* (n 428) 857.

[444] *'Although it is impossible to state in general terms where the line between short and long term engagements ought to be drawn, it is obvious that an injunction lasting for two years or more (the period applicable in the present case) may practically compel performance of the contract'* – *Warren* (n 428) 865 - 866.

[445] *Warren* (n 428) 865 - 867. The Courts have on occasion issued an injunction declaring a contract of service is still extant in circumstances: where trust and confidence has not been broken; or where it is *'workable to do so'* - see for example: *Hill v C A Parsons and Co Ltd* [1972] Ch 305

The players' contract is a contract of service which involves the personal provision of skills and talent that must be frequently exercised. The contract also includes the implied term of trust and confidence. The enforcement of restraints contained in the players' contract or in the Rules is therefore limited by the common law principles relating to specific performance.

4.5.2 Registration Contract: A Collateral Contract

In order to participate in the Super League competition, the player requires an employment contract and registration with the RFL. A player may be unable to provide playing services under an employment contract if he is refused registration by the RFL.

The registration process occurs concurrently with a player entering an employment contract with a club. Generally, a professional player signs his employment contract and an RFL registration form at the same time.[446] The onus is then on the club to complete registration by sending the registration form and a copy of the employment contract to the RFL. Following receipt of the relevant documents, the RFL enters the player's name in the register of players.

The register of players is divided into subsections which each represent a club's list of registered players. It also includes a

---

(CA); *Irani v Southhampton and South West Hampshire Health Authority* [1985] IRLR 203 (Ch.D); *Powell v London Borough of Brent* [1987] IRLR 466 (CA); and *Robb v London Borough of Hammersmith and Fulham* [1991] IRLR 72 (QB).

[446] See Appendix 2 of this thesis for a copy of the RFL Registration Form (June 2008).

subsection for free agents.[447] The player's name is entered in the subsection of the club with whom the player has an employment contract. A player's name is entered in the register of free agents if the RFL receives a written request from the club or the player to remove the player's name from the club register (usually in circumstances of contract termination).[448]

Whilst registered as a free agent, a player remains bound by the Rules.[449] A player remains on the RFL's register of free agents unless he applies for his name to be removed from the players' register altogether (de-registration) or obtains employment with a new club. A player is required to inform the RFL in writing of his desire to be removed from the players' register and de-registration takes effect 12 months after the RFL receives the players' written request.[450] During that time the player remains bound by the RFL's Operational Rules.[451]

The registration forms a contract between the RFL, the player and the club pursuant to which the player agrees to be bound by the Rules; the RFL agrees to permit the player to participate in the competition for the club with whom the player has an employment contract.[452] Pursuant to the registration contract, the club has an on-going obligation to provide registration documents as required by the RFL "*from time to time*". It also agrees to ensure the player's eligibility

---

[447] RFL Operational Rules 2009, C1:1.
[448] RFL Operational Rules 2009, C1:2:12.
[449] RFL Operational Rules 2009, C1:1:3. See also the construction of the RFL Registration Form (June 2008), a copy of which is included in Appendix 2 of this thesis.
[450] RFL Operational Rules 2009, C1:1:3.
[451] RFL Operational Rules 2009, C1:1:3.
[452] See *Dinah Modahl v British Athletic Federation* [2002] 1 WLR 1192 (CA).

to play in the competition. In addition, the club agrees not to play the player in its first team squad until: acknowledgement of registration is confirmed; the player has been included in the club's first team squad; and baseline testing has been completed. Both the club and the player sign the RFL registration form.

The consideration provided under the registration contract is the remuneration the player receives for providing his services under the employment contract; and the benefit to the RFL and the club of the player providing services in the Super League competition and also the Challenge Cup competition. Applying this analysis, the registration contract forms a collateral contract which is dependent upon the existence of a valid employment contract between a player and a club.[453]

Following termination of the employment contract, the registration contract also terminates. A player is no longer able to provide playing services in the competition from which the RFL, the club and the player may benefit. Those Rules which rely upon the continued existence of a registration contract are, therefore, invalid. A player is no longer bound by the Rules and may enter into an employment contract with another club (including a club in another country).

Although the player is still obliged to adhere to the RFL Operational Rules until such time as he applies for de-

---

[453] For a general discussion concerning collateral contracts see Edwin Peel, *Treitel: The Law of Contract* (12ed Sweet & Maxwell Ltd, London 2007) 616 - 618; and also *Shanklin Pier LD v Detel Products LD* [1951] 2 KB 854 (KB).

registration,[454] it is unclear on what basis the registration contract with the RFL continues. If following termination and placement on the free agents register, the player receives a benefit from being on the free agents register (for example the RFL circulates the player's name to clubs announcing the player's availability for employment), then in return for the player's agreement to comply with the Rules, a new registration contract may come into existence. It is unclear, however, whether the player communicates his acceptance to the new contract.[455]

There is also the issue of the twelve month period during which a player remains bound by the Rules even after notifying of his desire to be removed from the players' register. During this time, the player will be playing in the Super League competition and, further, has no intention of taking up employment at a Super League club. In those circumstances the common law doctrine of restraint of trade may apply.[456]

4.6 Conclusion

For the duration of the player's contract, a professional rugby league player is an employee of the club with whom he has an employment contract. The contract includes the implied term to provide work and the implied term of trust and confidence. Arising from the implied term to provide work is

---

[454] RFL Operational Rules 2009, C1:1.3.
[455] *Carlill v Carbolic Smoke Ball Company* [1893] 1 QB 256 (CA).
[456] *Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd* [1894] AC 535 (HL); *Blackler v New Zealand Rugby Football League (Inc)* [1968] NZLR 547 (CA); *Buckly v Tutty* (1971) 125 CLR 353 (HCA); *Kemp v New Zealand Rugby Football Inc* [1989] 3 NZLR 463; *Grieg v Insole* [1978] 1 WLR 302 (ChD); and *Eastham v Newcastle United Football Club* [1964] 3 All ER 139 (ChD).

also a contractual right to work. The RFL is arguably a party to the employment relationship; and those Rules which are apt for incorporation into the players' contract are so included. Changes in the Rules may therefore require consultation and agreement with individual players.

Owing to the nature of a professional player's occupation as one which requires the frequent use of skills to retain match fitness (amongst other things), a Court may be reluctant to enforce a negative restraint which has the effect of compelling specific performance of the original contract or preventing a player from earning a living.

In certain circumstances employment law may limit the decision-making powers of the RFL and the clubs to the benefit of the employment interests of players (who currently have no involvement in those processes). Overall, the extent to which employment law may constrain those decision-making powers is uncertain. The application of the implied term of trust and confidence as a method of constraining the exercise of regulatory power has yet to be tested in the manner described; and ambiguities in the construction of the contract may be amended by the parties.

Of greater benefit to the players is European competition law. Recent case authority in the context of professional sport has constrained the exercise of regulatory power.[457] European competition law may provide the means by which a player can secure an involvement in the decision-making processes of the RFL and SLE.

---

[457] *Motosykletiski Omospondia Ellados Npid v Ellinik Dimosio* (Case C-49/07) [2008] 5 CMLR 11.

The remainder of this thesis contemplates the application of European competition law to rules which affect the employment relationship, commencing with the salary cap in the next chapter. It will demonstrate that the application of European competition law can secure changes to the organisation of the Super League competition to the benefit of professional players.

CHAPTER 5: MARKET FOR PLAYING SERVICES TO THE SUPER LEAGUE COMPETITION DEFINED

> *'The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure.'*[458]

5.0 Introduction

A professional rugby league player offers his skills in a labour market for purchase by a Super League club. The conclusion of a transaction between the parties forms an employment relationship to which employment law applies. The labour market and conditions within the market that constrain competition between competing undertakings, however, may be subject to regulation under European competition law. In order to assess the lawfulness under Articles 81 and 82 (EC), of regulations adopted by the RFL and the clubs or terms of the players' contract, the market for playing services provided to the Super League competition requires defining.

5.1 Market Definition: General Principles

Market definition is an economic concept which provides the framework for the application of competition law.[459] It is:

---

[458] Commission (EC), 'Definition of the Relevant Market for the Purposes of Community Competition Law' (Notice) [1997] OJ C372/5 para 2.
[459] Richard Whish, *Competition Law* (6ed Oxford University Press, Oxford 2009) 26 - 27. For a general discussion concerning market definition, see also Nikpay and Faull, *The EC Law of Competition* (2ed Oxford

> *'...of crucial importance, for the possibilities of competition can only be considered in the light of the characteristics of the products in question'.*[460]

Guidance issued by the European Commission concerning market definition describes "the relevant product market" as comprising of:[461]

> *'all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.'*

Factors such as: the ease with which a consumer can substitute one product for another in the event of a product price increase ("demand-side substitution"); the ease with which alternative suppliers, who do not produce a particular product, may switch production in response to a price-increase for the product ("supply-side substitution"); the product's characteristics and its functional inter-changeability with other similar products; consumer preferences; the cost of switching between products; the product price; and price-elasticity (amongst other things), are relevant to an assessment of which products and services are offered within a market.[462]

University Press, Oxford 2007) 40 - 85; Bellamy and Child, *European Community Law of Competition* (6ed Oxford University Press, Oxford 2008) chapter 4; Alison Jones and Brenda Sufrin, *EC Competition Law* (3ed Oxford University Press, Oxford 2008) 58 - 93; and the European Court of Justice decisions in Case 6/72 *Europemballage Corporation and Continental Can Co Inc v Commission* [1973] ECR 215; Case 27/76 *United Brands Co v Commission* [1978] ECR 207; and Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461; and the Court of First Instance decision in Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309.

[460] *Europemballage* (n 459) para 32.

[461] Commission Notice (n 458) para 7.

[462] Bellamy and Child (n 459) paras 259 – 281.

The relevant market definition also includes an assessment of the geographical area over which the market is based.[463] A market's geographical scope encompasses the territory in which all undertakings operate under the same conditions of competition insofar as the relevant product or service is concerned.[464] When determining a market's geographical scope, the following factors are considered: demand-side substitution; supply-side substitution; transport costs; price; consumer preferences; and national preferences or cultural features (amongst other things).[465]

If competitive conditions within the market vary over time (for example, due to weather conditions or consumer demand) the market may also have a temporal dimension.[466] The relevant market definition is determined on a case-by-case basis (since a market is fluid by nature) and is generally narrowly construed.[467] Finally, the market is defined from the standpoint of the product or service at issue.[468]

5.2 Market Definition: Case Authorities Concerning Professional Sport

In the context of professional sport, cases arising under Articles 81 and 82 (EC) have concerned: the market for the

---

[463] Commission Notice (n 458) para 8.
[464] Case C-49/07 *Motosykletistiki Omospondia Ellados Npid ("MOTOE") v Elliniko Dimosio* [2008] 5 CMLR 11 para 34.
[465] Bellamy and Child (n 459) 282 – 292.
[466] Bellamy and Child (n 459) 293 – 294.
[467] See for example: *United Brands* (n 459) in which the European Court of Justice concluded that a market for bananas existed which was sufficiently distinct from the broader fresh fruit market: ibid para 25; and *Michelin* (n 459) in which the European Court of Justice held that the market for new replacement tyres for heavy vehicles did not include, inter alia, tyres for cars: ibid para 42.
[468] *United Brands* (n 459) para 25.

sale of television broadcast rights;[469] the market for ticket sales to an individual sports event;[470] the market for the organisation of European club football competitions;[471] the market concerning the application of anti-doping rules;[472] and the market concerning the provision of sports' agency services in football.[473]

The market for playing services provided to a professional sport has yet to receive substantive judicial consideration at a European level. In *Lehtonen and Another v Federation Royale Belge des Societes de Basket-Ball ASBL,*[474] the European Court of Justice considered whether the transfer rules that applied in the market for the acquisition of professional basketball playing services in Belgium infringed Article 85 (now Article 81) (EC). The European Court of Justice declined to consider the claims made under the competition law provisions owing to the absence of information provided by the national court on the issue of market definition.[475]

---

[469] See for example: Case T-528/93 *Eurovision I* [1996] ECR II-649; Case T-185/00 *Eurovision II* [2002] ECR II-3805; *Joint Selling of the Commercial Rights of the UEFA Champions League* (Case COMP/37398) Commission Decision 2003/778/EC [2003] OJ L291/25. For a case determined under the provisions of the Competition Act 1998 (UK), see *Re Television Premier League Football Matches* [2000] EMLR 78 (Restrictive Practices Court).

[470] See for example: *Football World Cup 1998* (Case COMP/36888) Commission Decision 2000/12/EC [2000] OJ L5/55; and *Distribution of Package Tours During the World Cup* (Cases COMP/33384 and COMP/33378) Commission Decision 92/521/EEC [1992] OJ L326/31.

[471] *CU de Lille/UEFA (Mouscron)* (Case COMP/36851) IP/99/965 9 December 1999 (unpublished).

[472] Case C-519/04 *Meca-Medina and Majcen v Commission* [2006] ECR I-6991.

[473] Case T-193/02 *Piau v Commission* [2005] ECR II-209.

[474] Case C-176/96 [2000] 3 CMLR 409.

[475] Ibid para 30. Submissions made by parties to the proceeding described the effects of the transfer rules in the "market for players": *Lehtonen* (n 474) para 95 (Opinion of Advocate General Alber).

In *Hendry and Others v The World Professional Billiards and Snooker Association Ltd*[476] the English High Court considered a claim which arose in the context of professional snooker. The case concerned the establishment of a tour of professional snooker tournaments to compete with those tournaments organised by the World Professional Billiards and Snooker Association Limited (the international governing body for professional snooker) ("WPBSA"). In the course of that case, the High Court concluded, inter alia: that a market existed whereby a snooker tournament organiser (the WPBSA) purchased playing services from snooker players.[477] The High Court also observed that a separate market existed in which a player sold *'personal advertising rights, whether by way of the wearing of logos or undertaking personal appearances to promote some business or other activity'*.[478]

Applying the market definition principles to the purchase of playing services to the Super League competition, the following section defines the relevant market.

5.3 Market for Playing Services to the Super League Competition

The market for playing services provided to the Super League competition is defined from the perspective of the player providing the service.

---

[476] [2002] UKCLR 5 (ChD). For a discussion of the case, see Paul Harris, 'Abusive Sports Governing Bodies: Hendry and Others v The World Professional Billiards and Snooker Association Ltd' [2002] Comp Law 101; and Cento G Veljanovski, 'Markets in Professional Sports: Hendry v WPSBA and the Importance of Functional Markets' [2002] 23(6) ECLR 273.
[477] *Hendry* (n 476) para 87.
[478] *Hendry* (n 476) para 84.

5.3.1 Demand-side

The Super League clubs which compete in the competition from time to time comprise the demand-side. A Super League club is permitted to name 25 registered players in its first team and therefore each club requires the services of at least 25 players. Over time the collective demand of the Super League clubs in the market for playing services remains constant.

Demand in the market for playing services to the Super League competition is influenced by the organisation of the competition and the regulatory environment in which the entertainment product is produced. A change in the number of clubs participating in the Super League competition may increase (or decrease) the collective demand for playing services. The Super League licensing system determines which clubs participate in the competition. The conditions of entry to the competition are set by the RFL and a license to participate in the competition is valid for three years. In 2009 the number of clubs participating in the competition increased from twelve to fourteen thereby increasing the demand for first team players from 300 to 350. A change in the regulatory rules to permit clubs to register a greater number of players will also positively affect demand.

Demand for playing services by an individual Super League club may vary throughout the season due to injury or the termination of a player's contract. It may also be affected by the club's overall position in the Super League competition. (for example, when a "rule of promotion and relegation" existed as a means of entry into the competition, a club that

faced relegation increased its demand for players towards the end of the competition so as to avoid relegation).[479]

5.3.2 Supply-side

On the supply-side, the market is comprised of those rugby league players with skills of a standard required to compete in the Super League competition. Those players are in the main: players with prior experience of playing in Super League. Additionally, players employed at a Super League club academy, a Championship club or an Australian NRL club may fall within the market provided those players have the requisite skill level and/or talent to play in the competition.

Some clubs interviewed described recruiting players from: other Super League clubs; Australian NRL clubs; and the club's own academy. Occasionally, a player from a Championship club was recruited. None of the clubs described recruiting a player from a Championship 1 club.

Those players recruited from an academy club are more likely to be senior academy players rather than junior academy players (although it is the player's talent, the player's attitude and playing experience - amongst other factors - which determine whether he is employed in a first team rather than the player's age or the number of years spent in the academy).

---

[479] For a further discussion of the effects of the "rule of relegation and promotion", see chapter nine of this thesis.

The standard of rugby played in the Championship division is of a lower standard than that played in the Super League competition. Players employed at a Championship club are usually employed on a part time basis.[480] A player in the Championship will typically spend less time training and is less likely to have the benefit of full time professional coaching or training facilities. Be that as it may, players with the requisite skill level to play in Super League are able to compete in the market.

Professional players from outside the European Union ("foreign players") who have experience of playing in the Australian NRL also offer services in the relevant market. The skill level required to participate in the Australian NRL is generally perceived to be of a higher standard than that required to participate in the Super League competition. Players with experience of the Australian NRL are recruited by the Super League clubs. The capacity of a foreign player to offer services to a Super League club depends on: the player's salary cost (including the cost of moving to a Super League club); and whether the player satisfies national immigration rules to work in the United Kingdom (or France).

The skills of players from other sporting codes are not usually substitutable for those of a professional rugby league player (although some exceptional athletes may be able to make the transition from another sporting code to rugby

---

[480] When the Super League competition operated under the "rule of promotion and relegation" some clubs in the competition division below Super League employed players on a full time basis (see for example, Castleford Tigers in 2007; and Salford City Reds in 2008). Owing to the removal of the "rule of promotion and relegation" as a means of entry into the Super League competition there is now less incentive for a Championship club to employ players on a full time basis.

league).[481] A rugby union player is more likely to possess skills which transpose to rugby league; although the ease with which a player may move between the codes depends on the player's talent and the position played in rugby union. For example, rugby union players who play in a "forward position" have "rucking and mauling" skills which are of limited use in rugby league.

Prior to rugby union turning professional, professional rugby league clubs frequently recruited international representative rugby union players. [482] Since rugby union became a professional sport, however, fewer rugby union players have been recruited by the Super League clubs. Those players recruited to a Super League club generally have prior experience of playing professional rugby league.[483]

5.3.3 Market Power

Market power refers to the capacity of a firm - individually or collectively with other firms - in the market to profitably raise

---

[481] An example of an athlete who tried to switch between sporting codes is that of Dwayne Chambers, a Great Britain representative track athlete who temporarily played for Castleford Tigers in April 2008: see 'Chambers Secures Castleford Trial' *BBC Sport* (London, 31 March 2008) <http://news.bbc.co.uk/sport1/hi/rugby_league/super_league/castleford/7321908.stm> accessed 25 June 2008; and 'Chambers Not Wanted by Castleford' *BBC Sport* (London, 6 May 2008) <http://news.bbc.co.uk/sport1/hi/rugby_league/super_league/castleford 7385928.stm> accessed 25 June 2008.

[482] For example: Mr John Gallagher (New Zealand Rugby Union ("NZRU") to Leeds Rhinos 1990); Mr Mathew Ridge (NZRU to Manly Sea Eagles, Australian NRL 1990); Mr Inga Tuigamala (NZRU to Wigan Warriors 1993).

[483] For example: Mr Iestyn Harris (Leeds Rhinos: Cardiff Rugby Union Club; Bradford Bulls); Mr Henry Paul (Bradford Bulls; Gloucester Rugby Union; Harlequins RL); Mr Chev Walker (Leeds Rhinos; Bath Rugby Union Club; Hull KR); and Mr Karl Pryce (Bradford Bulls; Gloucester Rugby Union Club; Wigan Warriors).

prices above marginal cost.[484] A firm or firms with market power are able to restrict output, increase prices above the competitive level and earn monopoly profits to the detriment of consumers.[485] The firm can also influence the: variety or quality of goods or services; innovation; and the other parameters of competition.[486]

Individually, a Super League club does not exercise market power. A club with unlimited financial resources may be able to increase player wages. However, few Super League clubs are in the financial position to dominate the market in this way. Furthermore, the capacity of an individual club to exercise market power may be constrained by the desire of players to play (rather than remain on the sidelines albeit well-paid); and the limited number of players a club may register in its first team.

Collectively, however, the clubs and the RFL exercise market power. As the Super League competition is the only full time professional rugby league competition in Europe, the clubs collectively operate de facto as a monopsonist (or a single purchaser of full time professional rugby league playing services). A labour market characterised by a single buyer of labour can result in a low wage price and fewer workers being hired.[487] Collectively, the clubs and the RFL control the price paid for labour (purchasing power) and the number of workers hired (regulatory power).

---

[484] Jones and Sufrin (n 459) 58.
[485] Ibid.
[486] Ibid.
[487] O'Sullivan, Sheffrin and Perez, 'Economics: Principles, Applications and Tools' (5ed Pearson Education Inc, New Jersey 2008) 729.

The clubs and the RFL face little or no competition from within the market or outside the market which would encourage the clubs to increase wage levels. On the supply-side, there are always more professional rugby league players than there are positions to fill. In addition, there are few other professional sporting competitions in Europe to which a professional rugby league player would turn if the wages paid in the Super League competition were at a level where a player was unable to supply his services profitably. It is unlikely the player would turn to a career in a lower competition division. The Championship competition divisions do not hire players full time; the wage levels are below those of the Super League clubs; and a lower standard of rugby league is played. The stigma attaching to a Super League player who has spent a period of time in a lower competition division may also act as a disincentive.

A player with skills that transpose to rugby union may seek employment in a professional rugby union competition. In the recent past a number of high profile rugby league players have moved to professional rugby union competitions.[488] But the capacity of a player to switch codes depends upon individual playing talent; the demand of professional rugby union clubs; a shortage of skilled professional rugby union players; and the absence of incentives applied in professional

---

[488] For example: Mr Jason Robinson (Wigan Warriors to Sale Sharks 2000): Mr Iestyn Harris (Leeds Rhinos to Cardiff Rugby Union Club, 2001); Mr Henry Paul (Bradford Bulls to Gloucester Rugby Union Club 2001); Mr Nathan McAvoy (Bradford Bulls to Gloucester Rugby Union club 2003); Mr Tevita Vaikona (Bradford Bulls to Saracens Rugby Union Club, 2004); Mr Andrew Farrell (Wigan Warriors to Saracens Rugby Union club 2005); Mr Chev Walker (Leeds Rhinos to Bath Rugby Union Football Club 2006); Mr Brian Carney (Wigan Warriors to Australian NRL Club Newcastle Knights to Munster Rugby Union Club 2007); Mr Lesley Vainikolo (Bradford Bulls to Gloucester Rugby Union Club 2007); Mr Karl Pryce (Bradford Bulls to Gloucester Rugby Union Club 2007); Mr Chris Ashton (Wigan Warriors to Northampton Rugby Union Club 2007); Mr Shontayne Hape (Bradford Bulls to Bath Rugby Club, 2008).

rugby union competitions that encourage rugby union clubs to invest in junior development. For example, in 2008 the Rugby Football Union announced that it would no longer financially support a professional rugby union club to hire a professional rugby league player. This will likely negatively affect demand by a professional rugby union club in England for a player with professional rugby league skills.[489]

A player may turn to employment in the Australian NRL. However, Australian NRL clubs seldom recruit directly from the Super League competition.[490] The differing skill levels required to participate in the Australian NRL when compared to the Super League competition; and an excess supply of players in the southern hemisphere, were reasons provided by one Australian NRL club for not recruiting players from the Super League competition. Those Super League players who obtain employment in the Australian NRL generally have prior experience of playing in that competition. Immigration requirements may also provide a barrier to a player providing services to an Australian NRL club. Thus, potential competition for players from Australian NRL clubs is low.

A potential constraint on the behaviour of the Super League clubs in the relevant market arises in related markets. The market for playing services in the Super League competition is inextricably attached to the markets for the organisation of professional rugby league competitions in the United Kingdom and Australia (The United Kingdom and Australia are important consumer markets for rugby league and it is unlikely that economic conditions in another country would

---

[489] 'RFU Ends Pursuit of League Stars' *BBC Sport* (London, 29 August 2008) <http://news.bbc.co.uk/sport1/hi/rugby_union/7586836.stm> accessed 17 April 2009.
[490] Interview with Australian NRL Club A, February 2008.

support the establishment of a full time professional rugby league competition at this point in time).

A new entrant in the market for the organisation of professional rugby league competitions in the United Kingdom (or in Australia) requires professional playing services. Those professional playing services will usually be tied by contract to clubs in the Australian NRL or the Super League competition. Increased competition for a player's services will likely increase the price of labour in the market for playing services to the Super League competition as a clubs seeks to retain the services of a player it already employs or enter a contract with another Super League player. This was demonstrated in 1995 when News Limited established a new professional rugby league competition in Australia to rival that already organised by the Australian Rugby League. An effect of competition in the Australian market for the organisation of professional rugby league competitions was an increase in the price of labour purchased by professional clubs in the United Kingdom as those clubs sought to prevent players from leaving to take up employment in the new competition.[491]

However, owing to the significant barriers of entry into the market for the organisation of professional rugby league competitions in the United Kingdom (or in Australia) competition in those markets is rare. The cost of establishing a professional sporting competition is high and depends on: the availability of investment; the availability of playing resources (at any given time there is only a finite

---

[491] For a synopsis of the effects of market competition in the organisation of professional rugby league in Australia, see chapter two of this thesis.

number of skilled professional rugby league players); and consumer demand, amongst other things.

The skilled professional rugby league players required by the new entrant will generally be under contract to clubs in the Super League competition (or the Australian NRL). Other semi-professional players and amateur players with potential for a career as a professional player will be affiliated with clubs that are members of the Rugby Football League or the Australian Rugby League. The Super League clubs, the Australian NRL clubs and the sporting code's governing bodies will, therefore, control the supply of a key raw material required by a new entrant. Club loyalty and player loyalty to an existing sporting competition may also serve as a barrier.

A new entrant into the market for the organisation of professional rugby league competitions in the United Kingdom or in Australia will be faced with the choice of: establishing with the support of the existing clubs and governing bodies (and self-interest will determine whether or not that support is forthcoming); or establishing on its own account at a considerable financial cost. History demonstrates that in rugby league and rugby union, a professional sporting competition which seeks to establish without the support of the sporting code's governing body is usually unsuccessful in the long term. Monopoly control of the market for the organisation of professional rugby league competitions reinforces the market power assumed by the clubs and the RFL in the market for playing services to the Super League competition. If a firm is simultaneously a monopsonist (as regards input suppliers) and a monopolist

(as regards final customers), consumers may be worse off than if only one of either monopsony or monopoly existed.[492]

In summary, therefore, an individual club may not exercise market power in the Super League competition. However, the clubs and the RFL collectively exercise market power. Market power is used to determine whether an entity holds a dominant position in the relevant market.

5.3.4. Dominance

A dominant position is defined in case law as:

> *'A position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by affording it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of the consumers.*
>
> *Such a position does not preclude some competition, which it does where there is a monopoly or quasi-monopoly, but enables the undertaking which profits by it, if not to determine, at least to have an appreciable influence on the conditions under which that competition will develop and in any case to act largely in disregard of it so long as such conduct does not operate to its detriment.'*[493]

A number of factors are taken into account when determining whether an undertaking occupies a dominant position,

---

[492] Robert O'Donoghue and A Jorge Padilla *The Law and Economics of Article 82 (EC)* (Hart Publishing, Oxford 2006) 165.

[493] Case 85/76 *Hoffman la Roche v Commission* [1979] ECR 461 paras 38 - 39. See also: *Michelin* (n 459) para 31; and *MOTOE* (n 464) para 37. For a case concerning abuse of a dominant position by a purchaser, see C-95/04 P *British Airways plc v Commission* [2007] ECR I-2331. For guidance concerning the definition of market power and dominance, see Commission (EC) 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) COM (2009) 864 final, 9 February 2009.

including the competitive structure of the market (for example, constraints imposed by competitors, constraints imposed by potential new entrants to the market and countervailing buyer power) and the degree of market power held.[494] An undertaking with a market share of greater than 50% will generally be presumed dominant (unless the undertaking can demonstrate otherwise).[495] Undertakings with a market share of less than 50% may, nonetheless, still hold a position of dominance when other factors such as barriers to market entry are taken into account.[496]

A finding of dominance against an entity attaches special significance to the way in which that entity undertakes business transactions on the relevant market. An entity that occupies a dominant position *'has a special responsibility not to allow its conduct to impair undistorted competition on the common market'*.[497] The scope of that responsibility is considered in light of the special circumstances of each case.[498] Owing to the special responsibility, conduct which may be permissible in a normal competitive situation may if undertaken by a dominant undertaking, amount to an abuse.[499]

---

[494] Commission Guidance (n 493) para 10.
[495] Case 62/86 *AKZO v Commission* [1991] ECR I–3359.
[496] See for example, *United Brands* (n 459) in which the European Court of Justice determined that a firm with a market share of 40-45% was dominant.
[497] *Michelin* (n 459) para 57.
[498] Case C-334/94 P *Tetra Pak v Commission* [1996] ECR I-5951 para 24.
[499] *Michelin* (n 459) para 57. For a case concerning an abuse of a dominant position by a purchaser of services, see *British Airways* (n 493).

5.3.4.1 Individual Dominance: The RFL

Although the RFL does not operate a club in the Super League competition and does not purchase playing services in the relevant market, it is nonetheless an actor on the market for playing services to the Super League competition. In *Piau*[500] the Court of First Instance concluded that the Federation Internationale de Football Association ("FIFA") was an actor in the market for players' agents' services even though it did not purchase the services in question.[501] The Court's conclusion was based on the fact that FIFA: operated on the market through its members; was an emanation of the clubs (the clubs and the national associations were FIFA members); and prescribed the rules which affected the relevant market.[502]

The RFL is an emanation of the professional and semi-professional rugby league clubs in England (which include those English clubs participating in the Super League competition). It promulgates and enforces rules which affect the market for playing services. The Super League clubs also participate in the RFL's Challenge Cup competition from which the RFL derives financial benefit. The RFL does not contract directly with players but acquires playing services for its competition through its relationship with the clubs. Furthermore, the RFL co-ordinates the conduct of the clubs and the players who participate in the market for playing services. It is therefore an actor on the market for playing services.

---

[500] *Piau* (n 473).
[501] *Piau* (n 473) para 112.
[502] *Piau* (n 473) para 116.

Owing to its regulatory function, the RFL occupies a singly dominant position on the market. As industry, regulator it determines amongst other things, access to the Super League competition for the clubs and players. Without access to the competition, a player is prevented from offering his services in the relevant market. The RFL's regulatory function is undertaken pursuant to its constitutional authority and which it alone can amend. It holds significant market power which it can exercise independently of the clubs, the players and consumers.

It is unlikely that the RFL's regulatory function would be usurped by another entity. The Government could appoint a new regulator in place of the RFL; or the RFL's member clubs could vote for its dissolution and re-form the organisation, but either scenario is unlikely at the present time. In addition, the English Sports Council encourages the organisation of sport under a single regulatory body to enable the efficient distribution of Government funding. The availability of finance is an important factor which may deter a new and independent regulator from entering the industry (particularly in view of the many non-commercial functions that a regulator undertakes).

In light of these considerations, as industry regulator the RFL occupies a dominant position in the market for playing services to the Super League competition.

5.3.4.2 Collective Dominance: The Super League Clubs and the RFL

The RFL and the clubs are also collectively dominant in the relevant market. Collective dominance arises in circumstances where, inter alia, two or more legally and economically independent undertakings act on the market as a collective economic entity and together hold a collective dominant position.[503]

The types of economic links or factors which point towards the existence of a collective entity include:[504] the nature and terms of any agreement between the undertakings; the way in which the agreement is implemented on the market; any connecting economic links or factors between the undertakings; and an assessment of the relevant market structure amongst other things.

A leading case concerning collective dominance is that of *Compagnie Maritime Belge Transport v Commission.*[505] In that case individual shipping companies formed a liner

---

[503] Joined Cases C-395/96P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission* [2000] ECR I-1365. See also Case C-393/92 *Municipality of Alemo v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477; Joined Cases C-68/94 and C-50/95 *France and Others v EC Commission* [1998] ECR I-1375; *Michelin* (n 459); Joined Cases T-68, 77 and 78/89 *Societa Italiana Vetro* [1993] ECR II-1403. The principles applied under Article 82 (EC) to determine whether a collective dominant position exists are identical to those applied in the context of Council Regulation (EC), 139/2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation) [2004] OJ L24/1. See for example: Case T-102/96 *Gencor v Commission* [1999] 4 CMLR 971; Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585. For a discussion of the concept of collective dominance in European law see Giorgio Monti, 'The Scope of Collective Dominance Under Articles 82 EC' [2001] 38 CML Rev 131.

[504] *Compagnie Maritime Belge* (n 503) para 45.

[505] *Compagnie Maritime Belge* (n 503).

conference in order to carry goods between North Africa and Europe. The companies were held to form a collective entity on the relevant market because of the terms of agreement between the entities; and the cooperation between the companies on issues such as: freight rates; haulage capacity; the allocation of cargo between the companies; and income.[506]

In *Piau*[507] the Court of First Instance concluded that a group of professional football clubs formed a collective entity in the market for the provision of agency services to players:

> *'A decision like the FIFA Players' Agents Regulations may, where it is implemented result in the undertakings operating on the market in question, namely the clubs, being so linked as to their conduct on a particular market that they present themselves on that market as a collective entity vis a vis their competitors, their trading partners and consumers...Because the regulations are binding for national associations that are members of FIFA and the clubs forming them, these bodies appear to be linked in the long term as to their conduct by rules they accept and that other actors (players and players' agents) cannot break on pain of sanctions that may lead to their exclusion from the market, in particular, in the case of players' agents.'*[508]

In *Bosman,* Advocate General Lenz stated that football clubs in a professional sports league were united by connecting economic links.[509] The economic links arose from the nature of the industry and the necessity for co operation between the professional clubs in order to produce the relevant entertainment product:[510]

---

[506] *Compagnie Maritime Belge* (n 503) paras 46 - 48.
[507] *Piau* (n 473); order upheld in Case C-171/05 P [2006] ECR I-37.
[508] *Piau* (n 473) paras 113 - 114.
[509] Case C-415/93 *Union Royale Belge des Societes de Football Association v Bosman* [1995] ECR I-4921 para 285.
[510] Ibid paras 227 and 285.

> *'Football is characterised by the mutual 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 other clubs. The clubs in a professional league thus do not have the aim of excluding their competitors from the market. This is a significant difference between the competitive relationship between undertakings in other markets.'*

Advocate General Lenz also cited the rules implemented to govern the sports league as another economic link between the clubs.[511] The European Court of Justice did not rule on the issue.

The Super League clubs are separate legal and economic entities that present as a collective entity on the market for playing services. The economic links between the clubs arise from the nature of a professional sports competition and requirements for the clubs to co operate in order to produce the Super League competition. The clubs are linked through their membership to Super League (Europe) Ltd ("SLE") and the Rugby Football League ("RFL"); and through the sharing of revenue from the sale of television broadcast rights for the Super League competition and central sponsorship arrangements. In addition, the clubs are linked by the regulatory framework or the rules which each club agrees to follow in relation to transactions which affect the market for playing services.

Also included in the collective entity is the RFL. It too is a member of SLE and the clubs and the RFL are bound in contract by SLE's Articles of Association ("the articles"). The

---

[511] *Bosman* (n 509) para 282.

articles prescribe the voting rights which attach to each share and the matters upon which, the clubs on their own account, the RFL on its own account, or the clubs and the RFL jointly may decide. Decisions on issues concerning the salary cap regulations and the number of clubs to play in Super League require the consent of the RFL and the Super League clubs before the decision may take effect. The salary cap influences purchasing decisions made on the market for playing services. Penalties apply for breaching the salary cap which may result in a club being excluded from participation in the relevant market.

Other economic links between the RFL and the clubs include the management contract under which the RFL receives a fee for management services provided to SLE; and the players' contract. The players' contract is prescribed by the RFL; and the players and clubs are not permitted to agree terms other than those approved by the RFL. It may be argued that the RFL is a party to the contract.[512] Under the contract terms obligations are owed by a player to the RFL and a Super League club. In addition, clause 30.5 permits the RFL to stand in the place of the club and enforce obligations owed under the contract.

The RFL receives income and incurs some costs on behalf of SLE. It also negotiates the sale of the television broadcast rights for the competition on behalf of the clubs.[513] Overall, there is a considerable amount of co operation between the RFL and the clubs to produce the Super League competition which points to the entities being economically linked.

---

[512] See the discussion concerning the construction of the players' contract in chapter four of this thesis.
[513] Rugby Football League, *Annual Report 2007*, 47.

For the reasons set out above, the clubs and the RFL present on the market for playing services as a collective entity. The collective entity exercises considerable market power and is able to operate independently of other competitors, the players and consumers. The clubs and the RFL, therefore, occupy a collectively dominant position in the market for playing services to the Super League competition.

5.3.5 Geographical Scope

The Super League clubs are based in the United Kingdom and France. The geographical scope of the relevant market therefore covers the countries in which the clubs are located.

5.4 Undertaking

Article 81 (EC) applies to agreements or decisions made by an undertaking; and Article 82(EC) applies to conduct of an undertaking which may amount to an abuse of a dominant position. It is a well-established principle that an undertaking '*encompasses every entity engaged in economic activity regardless of the legal status of the entity and the way in which it is financed*'.[514] The term 'undertaking' designates an economic unit for the purpose of the subject matter of the agreement in question even if in law that economic unit consists of several legal persons.[515] The

---

[514] Case C-41/90 *Hofner and Elser v Macroton GmbH* [1991] ECR I-1979 para 21; and *MOTOE* (n 464) para 21.
[515] Case C-217/05 *Confederacion Espanola De Empresarios De Estaciones De Servico v Compania Espanola De Petroleos SA* [2007] CEC 143 para 40.

concept of an undertaking is separate from the issue of an entity's legal personality.

Any activity which involves offering goods and services on a market is an economic activity.[516] Some entities (for example, a public authority or a regulatory body like the RFL) may engage in economic and non-economic activities; and only where an entity is engaged in an economic activity will the definition of undertaking apply.[517] An entity may be engaged in economic activity even though the economic activity arises on a different market to that in which the restriction of competition arises.[518]

A professional football club engaged in economic activity is an undertaking.[519] A national or international sporting code's governing body is an undertaking in relation to economic activity it undertakes.[520] A sporting code's governing body may also be an "association of undertakings".[521] The fact that the sporting code's governing body may also include amateur clubs as well as professional clubs within its membership does not alter its categorisation as an association of undertakings.[522]

In *Meca-Medina and Majcen v Commission*[523] the European Court of Justice confirmed that, for the purposes of Article 81 (EC), the International Olympic Committee was an

---

[516] Case C-35/96 *Commission v Italy* [1998] ECR I-3851 para 36; and Case C-180 - 184/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451 para 75.
[517] *Hofner and Elser* (n 514) paras 22 - 23.
[518] Case T-99/04 *AC-Treuhand AG v Commission* [2008] 5 CMLR 13 para 136.
[519] *Piau* (n 473).
[520] *Distribution of Package Tours* (n 470) paras 49 – 53.
[521] *Piau* (n 473) para 69.
[522] *Piau* (n 473) para 70.
[523] Case C-519/04 [2006] ECR I-6991.

undertaking and *'within the Olympic Movement, an association of international and national associations of undertakings.'*[524] More recently in *Motosykletistiki Omospondia Ellados NPID v Elliniko Dimosio*[525] the European Court of Justice concluded that the Automobile and Touring Club of Greece (the official Greek representative of the International Motorcycling Federation) was engaged in the organisation and commercial exploitation of motorcycling events and accordingly fell within the definition of 'undertaking'.[526]

For the purposes of Article 81 (EC) - and where relevant Article 82(EC) - it is asserted that: individually the RFL and SLE are an "undertaking" or "an association of undertakings"; and a Super League club is an "undertaking". The issue concerning the status of a professional player is more problematic. Each entity is discussed in turn below.

5.4.1 A Super League Club

Each Super League club engages in economic activity when it participates in the Super League competition; and also in relation to commercial enterprises the club is engaged in outside the Super League playing season.[527] In the market for playing services a Super League club purchases playing services and acquires the intellectual property rights of players. It may be described, therefore, as an undertaking.

---

[524] Ibid para 38.
[525] *MOTOE* (n 464).
[526] Ibid para 26.
[527] For a description of a Super League club's economic activities, see chapter three of this thesis.

5.4.2 The RFL

The RFL exercises non-economic regulatory functions and a commercial function.[528] Although the RFL does not engage directly in economic activity on the market for playing services, it nonetheless operates on the market through the clubs. The playing services acquired by the clubs are used in the Challenge Cup competition (from which the RFL derives income). The RFL also acquires through the clubs the commercial use of a player's intellectual property right which it then uses to generate revenue from: the sale of television broadcast rights for the event; sponsorship; and advertising. The RFL also arranges the insurance contracts for the clubs and players participating in the competition. It may, therefore, be described as an "undertaking" with respect to certain activity that arises in the market for playing services.

The RFL is also an "association of undertakings" since its membership is comprised of all professional rugby league clubs (which individually may be defined as undertakings). It is irrelevant for definitional purposes that the RFL's membership also includes the British Amateur Rugby League Association (which represents the interests of amateur rugby league clubs in the United Kingdom).[529]

---

[528] For a description of the RFL's commercial activities and regulatory function, see chapter three of this thesis.
[529] *Piau* (n 473) para 70.

5.4.3 Super League (Europe) Ltd

SLE is the limited liability company used by the Super League clubs and the RFL to organise the Super League competition.[530] It may be described as an undertaking even though its economic activity is conducted in markets other than the market for playing services. It is sufficient that SLE co ordinates the conduct of the RFL and the Super League clubs on that market for it to be considered a party to an agreement or decision which restricts competition in the relevant market.[531] It is also an association of undertakings since it comprises of the Super League clubs and the RFL (which are undertakings in their own right).

5.4.4 A Professional Rugby League Player

The issue of whether or not a player is an undertaking is relevant when considering the lawfulness of labour restraints contained in the players' contract. If the players' contract forms an agreement between undertakings, then it may be subject to scrutiny under Article 81 (EC).

The difficulty is, however, that an employee is not considered to be an undertaking for the duration of his or her employment contract. In *Criminal Proceedings Against Becu*[532] the European Court of Justice concluded that dock

---

[530] For a description of SLE's commercial activities, see chapter three of this thesis.
[531] *AC Treuhand* (n 518) 120 - 121.
[532] Case C-22/98 [1999] ECR I-5665.

workers who performed job duties under the supervision of another entity were not undertakings:

> *'Since they are, for the duration of that relationship, incorporated into the undertakings concerned and thus form an economic unit with each of them....'*[533]

In *Albany International BV v Stichting Bedrijfspensionenfonds Textiekindustrie,*[534] Advocate General Jacobs expressed the view that European competition law is not tailored for application to an employee:

> *'Dependent labour is by its very nature the opposite of the independent exercise of an economic or commercial activity. Employees normally do not bear the direct commercial risk of a given transaction. They are subject to the orders of their employer. They do not offer services to different clients but work for a single employer. For those reasons there is a significant functional difference between an employee and an undertaking providing services.'*[535]

The situation in *Becu* contrasts with that of *Wouters v Algemene Raad van de Nederlandse Order van Advocaten*[536] where members of the Dutch Bar Association who offered legal services - such as drafting legal opinions or contracts, and client representation at legal proceedings - for a fee were defined as undertakings.[537] The fact a member assumed the financial risk attaching to the performance of the activities concerned was a factor in favour of the finding.[538] Similarly, in *Pavlov v Stichting Pensioenfonds Medische Specialisten,*[539] a self employed medical specialist

---

[533] Ibid paras 25 - 26.
[534] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751.
[535] Ibid para 215.
[536] Case C-309/99 [2002] ECR I-1577.
[537] Ibid para 49.
[538] *Wouters* (n 536) para 48.
[539] *Pavlov* (n 516) para 111.

was held to be an undertaking;[540] in *Commission v Italy*[541] a self-employed customs agent was considered an undertaking;[542] and in *Federation Nationale de la Cooperation Betail et Viande (FNCBV) v Commission*[543] a farmer was held to be an undertaking.[544] Finally, in *BASF/Reuters*[545] a self employed researcher was considered an undertaking for the purposes of determining the validity of a restraint of trade clause contained in a contract for the sale and purchase of a business.

Defining a player as an undertaking depends on: whether the player forms an economic unit with the club; whether the player is in business on his or her own account; and whether the player assumes the financial risk associated with the services provided. Prima facie, a professional rugby league player may not fall within the definition of an undertaking because of the employment relationship with the club. The player receives remuneration; follows instructions from the club; and does not bear the financial risk associated with participation in the Super League competition. The club

---

[540] *Pavlov* (n 516) para 76.
[541] Case C-35/96 [1998] ECR I-3851.
[542] Ibid paras 37 - 38. According to the ECJ: *'The activity of customs agents has an economic character. They offer for payment, services consisting in the carrying out of customs formalities, relating in particular to the importation, exportation and transit of goods, as well as other complementary services such as services in monetary, commercial and fiscal areas. Furthermore, they assume the financial risks involved in the exercise of that activity...If there is an imbalance between expenditure and receipts, the customs agent is required to bear the deficit himself'* – ibid.
[543] Joined Cases T-217/03 and T-245/03 [2006] ECR II-4987 ("FNCBV"). (Confirmed on appeal in relation to other points of law in Joined Cases C-101/07 P and C-110/07 P *Co op de France Betail et Viande v Commission* [2009] 4 CMLR 15).
[544] *'The activity of farmers, whether arable or stock farmers, is certainly of an economic nature. Their activity is indeed the production of goods which they offer for sale in return for payment' - FNCBV* (Court of First Instance) (n 543) para 53.
[545] *Reuter/BASF AG* (Case IV/28.996) Commission Decision 76/743/EEC [1976] OJ L254/40.

provides the player with a uniform to wear; transports the player to and from games; and pays the player remuneration for his services (from which the club is responsible for deducting tax). For the duration of his contract, a player is integrated into the club's business.

However, it may be argued that a professional rugby league player is one of the 'borderline cases' to which Advocate General Jacobs referred in *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie*.[546] In the market for playing services there is an absence of unity of conduct between the club and a player. A professional rugby league player sells his personal services to a club for payment. For some players the payment is paid direct into the player's personal bank account but for others it may be paid to a limited liability company without deduction for tax. In addition an element of the payment may be a performance-related bonus, receipt of which is dependent upon the player's performance. There is thus an element of financial risk incurred by the player when providing his services to the club. On this basis, a professional rugby league player may be viewed as an economic unit independent of the club in the market for playing services.

In *Deliege v Ligue Francophone de Judo et Disciplines Associees ASBL,*[547] the European Court of Justice held that an amateur judoka performing at an international meeting - without receipt of remuneration - was engaged in economic

---

[546] '*The future will probably show whether that principle applies also in certain borderline areas such as, for example, professional sport*'- *Albany* (n 534) para 217 (Advocate General Jacobs).
[547] Cases C-51/96 and 191/97 *Deliege v Ligue Francophone de Judo et Disciplines Associees ASBL* [2000] ECR I-2549.

activity.[548] The activity arose from participation in an event for which spectators paid to attend, television broadcast revenue was received and advertising revenue obtained. The fact the revenue was not received by the judoka from the event organiser was irrelevant.

Applying *Deliege,* an amateur rugby league player engages in economic activity by virtue of the club's involvement in commercial activity (for example, through receiving a transfer payment when a player moves to a professional club). A professional player provides services in a similar environment to that of an amateur player. Therefore, the professional player also engages in similar economic activity.

The principal distinction between an amateur and a professional player lies in the value to the club of the playing services provided. An amateur player does not receive remuneration because the market value for the playing service provided is £0 (usually because a regulatory rule precludes the payment of players and/or because the revenue received by the club does not support the payment of players).

Unlike the amateur player, a professional player is able to command a monetary value for his services because of: the increased commercial value of the tournament in which a professional player participates; the absence of regulatory rules which preclude payment; and forces of demand and supply in the market for professional playing services. The value applied to a player's services strengthens the argument that the player is engaged in economic activity. Case

---

[548] Ibid paras 56 - 57.

authorities establish that the way in which the player is financed is irrelevant and the player's legal status under national law is irrelevant also. The payment of remuneration and the employment relationship formed as a result masks the nature of the contractual arrangement between a player and a club as an agreement between undertakings.

In *Rai/Unitel*[549] the Commission stated that an opera singer was an undertaking for the purposes of Article 85 (now Article 81) by reason of the fact that an opera singer commercially exploited an artistic performance. Drawing an analogy, the occupation of a professional rugby league player is similar to that of an opera singer. Both occupations are undertaken in view of the public for a limited duration. An opera singer and a rugby league player apply their respective skills in an environment under the direction of another person. Displaying his or her skills on a theatre stage provides an opera singer with the opportunity to gain future employment just as a stadium provides a public platform from which a rugby league player may gain future contracts.

If an opera singer may be considered an undertaking in relation to contracts entered into for the purposes of opera performances, then a rugby league player may also be an undertaking in relation to a contract entered into for the purposes of providing rugby league playing services. Although an opera singer may usually be engaged on a short term contract and a rugby league player contracted for several years, the duration is irrelevant. The relevant factor is the nature of the services provided.

---

[549] (Case IV/29.559) Commission Decision 78/516/EEC [1978] OJ L157/39.

Even if a player is not considered an undertaking vis-à-vis his agreement with a club with whom he is employed, it may be that for the purpose of considering the legality of a post-termination restraint of trade clause, the player is an undertaking vis-à-vis his former club. The player will no longer be an employee of his former club. Furthermore, he will be involved in economic or commercial activity at his new club.[550]

The law in this area is by no means certain and further clarity is required. However, even if a professional rugby league player is not considered an undertaking and the players' contract falls outside the scope of Article 81, the Court may nonetheless inquire into the anti-competitive nature of particular clauses contained in the players' contract if a clause affects a market's competitive structure.[551]

Playing services are a pivotal factor of production in the Super League competition and a club's playing strength determines the club's playing success and contributes to a club's financial success. It is in a club's self interest to restrict competition for a player's services – particularly the services of a talented and high profile player – and to limit the capacity of a player to move between clubs. Open competition within the market for playing services would be hindered if clauses contained within an employment contract were free from competition law scrutiny simply because the

---

[550] Mary Catherine Lucey, 'Regulating Post Employment Relationships: The Restraint of Trade Doctrine Versus the Competition Act 2002' (2003) 25 DULJ 124, 137.

[551] See by analogy *Confederacion Espanola De Empresarios* (n 515) in which exclusivity and non-competition clauses contained in an agreement between an agent and its principal were held to be subject to European competition law even though the agency relationship placed the agreement outside the scope of Article 81 (EC) insofar as challenges from third parties were concerned: ibid para 62.

employment relationship formed subsequently removes the contract from the scope of Article 81 (EC).

5.5 Single Entity Doctrine

Two or more undertakings may be treated as a single undertaking if the undertakings are closely related economically.[552] The benefit of status as a single economic entity is that relations within that entity cannot amount to an agreement or concerted practice between undertakings for the purposes of Article 81 (EC).[553] The doctrine is relevant in the context of professional rugby league because if the clubs and the RFL operate as a single economic entity then agreements between the clubs and the RFL – such as the salary cap or the "club trained rule" – may fall outside the scope of Article 81 (EC).[554]

Two or more entities are treated as a single undertaking if the undertakings are closely related economically.[555] The single entity doctrine focuses on the economic unity of the group's members.[556] Factors such as: the composition of shareholders in each undertaking; the composition of the Board of Directors; and the extent to which the parent company influences the policy of the subsidiary or issues instructions to the subsidiary company, are relevant to a determination of the economic entity's status.[557] Cases in

---

[552] Case 107/82 *AEG – Telefunken v Commission* [1983] ECR 3151; and Case C-73/95 P *Viho Europe BV v Commission* [1996] ECR I-5457.
[553] *Viho Europe BV* (n 552).
[554] See Simon Gardiner and Others (eds) *Sports Law* (3ed Cavendish Publishing, London 2006) 382 – 391.
[555] *AEG – Telefunken* (n 552); and *Viho Europe* (n 552).
[556] *Confederacion Espanola de Empresarios* (n 515) paras 39 - 41.
[557] *AEG – Telefunken* (n 552). See also: Case 22/71 *Beguelin Import v GL Import Export* [1971] ECR 949; Case 15/74 *Centrafarm BV v Sterling*

which two or more legal entities have been held to be a single economic entity are: a corporate group of companies;[558] a company and a wholly owned subsidiary;[559] and an agent and principal.[560] In *Ijsselcentrale,*[561] four electricity companies which formed a subsidiary company to operate a joint venture in order to distribute electricity were not considered to form a single economic entity. The electricity companies: did not form a company group; were not controlled by a single person; and acted independently of each other.[562] By contrast in *Daimler Chrysler,*[563] the Court of First Instance concluded that agents engaged by Daimler Chrysler to locate potential purchasers of Mercedes Benz vehicles were integrated into Daimler Chrysler's undertaking and formed a single economic unit.[564]

5.5.1 United States of America

The European Court of Justice has yet to consider the application of the doctrine to the organisation of professional sport in Europe. However, in the United States of America - where a similar doctrine applies for the purposes of anti-trust

---

Drug Inc [1974] ECR 1147; Case T-68/89 etc *Societa Italiana Vetro v Commission* [1992] ECR II-1403; Case 30/87 *Corinne Bodson v Pombes Funebres de Regions Liberees SA* [1988] ECR 2479; *Viho Europe* (n 552); and Wouter PJ Wils, 'The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons' (2000) 25 EL Rev 99.

[558] Case 170/83 *Hydrotherm v Compact* [1984] ECR 2999.

[559] Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925.

[560] Joined Cases 40/73 to 48/73 etc *Suiker Unie and Others v Commission* [1975] ECR 1663 para 480; and *Confederation Espanola de Empresarios* (n 515).

[561] *Ijsselcentrale* (Case IV/32.732) Commission Decision 91/50/EEC [1991] OJ L28/32.

[562] Ibid paras 23 - 24.

[563] Case T-325/01 *Daimler Chrysler v Commission* [2005] ECR II-3319.

[564] Ibid para 102.

law in that jurisdiction[565] - the issue has received judicial consideration. In the majority of cases the Courts have rejected the notion that a professional sports league is a single economic entity and thus exempt from s 1 of the Sherman Act 1890.[566] In the majority view, teams participating in a professional sports league are separate and distinct entities, and do not form a single economic unit.

The conclusion has been criticised by some academics for disregarding the economic reality of the professional team sports environment.[567] A club cannot produce a sports competition on its own account. Individual clubs participating in a professional sports league must co operate to produce a sports entertainment product (which competes on the entertainment market with other products). In some

---

[565] See *Copperweld Corp v Independence Tube Corp* 467 US 752, 104 S Ct 2731, 81 L.Ed.2d 628 (1984).

[566] See for example: *Levin v National Basketball Association* 385 F Supp. 149 (SDNY 1974); *NFL v National American Soccer League* 459 US 1074 S Ct 499 (1982); and *Chicago Professional Sports Ltd v National Basketball Association* 95 F.3d 593 (7th Cir 1996); cf *San Francisco Seals Ltd v NHL* 379 F Supp 966 (CD Cal 1974). See also Gary Roberts, 'Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry' (1984) 32 UCLA L Rev 219; and L Goldman, 'Sports Anti-trust and the Single Entity Theory' [1989] 63 Tul L Rev 751. Recent cases suggest that a determination of whether a sports league operates as a single entity should address one league at a time and one facet of a league at a time: see *American Needle Inc v NFL* 538 F.3d 736 (7th Cir 2008); and James T McKeown '2008: Antitrust Developments in Professional Sports: To the Single Entity and Beyond' (2009) 19 Marq Sports L Rev 363.

[567] See for example: Walter Neale, 'The Peculiar Economics of Professional Sports' (1964) 78 QJ Econ 1, in which Neale asserts that *'the firm of economic theory is the league, and the league is a natural monopoly with demand and cost and profit adjustments always tending toward unification of all league-firms into a single firm'*: ibid 13. See also T Rosenbaum, 'The Anti-Trust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era' (1987) 41 University of Miami Law Review 729; and Roberts (n 566); cf P J Sloane, 'The Economics of Professional Football: The Football Club as a Utility Maximiser' (1971) 18 Scot J Poli Econ 121; M Flynn and R Gilbert 'The Analysis of Professional Sports Leagues as Joint Ventures' (2001) 111 Econ J F27; and Stephen F Ross and Stefan Szymanski, 'Antitrust and Inefficient Joint Ventures: Why Sports Leagues Should be Organised More Like McDonald's and Less Like the United Nations' [2006] 16 Marq Sports L Rev 213.

commercial industries horizontal co operation between several undertakings is collusive and evidence of economic entities failing to operate independently. In the professional sports industry, however, horizontal co operation is necessary for the production of the entertainment product.[568]

Economic theory refers to the professional team sports industry as characterised by the production of an 'inverted joint product': that is, a situation where two production processes by two companies are needed to produce and supply one single product.[569] In professional team sports, the companies are the sports clubs and the product is the game. In order to facilitate the production of the product: clubs: organise within a single governance structure; rules are promulgated for the organisation of the league; and decisions made centrally concerning the sale of common properties and the distribution of revenue. Individually, the clubs create a team brand with which to differentiate competition on the field and adopt a legal form to administer the revenue generated from that brand. Although clubs take the form of separate and distinct entities, it is simply a device with which to create the overall sports entertainment product.[570]

---

[568] Rosenbaum (n 567) 741.

[569] Stefan Kesenne, *The Economic Theory of Professional Team Sports* (Edward Elgar Publishing Limited, Cheltenham 2007) 2.

[570] For further discussion on the application of the doctrine to North American sports leagues, see: J, Weistart, 'League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry' (1984) Duke L J 1013, 1044 - 1055; W Freedman, *Professional Sports and Antitrust* (Quorum Books, Connecticut 1987) 22-24; J Bauer and Michael S Jacobs, 'Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo' [1991] 67 Ind L J 25; T Kennedy, 'Will America's Pastime Be a Part of America's Future?: An Antitrust Analysis That Enables Sports Leagues to Compete Effectively in the Entertainment Market' (1998) 46 UCLA L Rev 577, 590-593; Edward Mathias, 'Big League Perestroika? The Implications of Fraser v Major League Soccer' (1999) 148 U Pa L Rev 203; Nathaniel Grow, 'There's No 'I' in League: Professional Sports Leagues and the Single

A case in which the doctrine was successfully applied is that of *Fraser v Major League Soccer*.[571] In that case professional soccer players alleged that the Major Soccer League ("the League") operated in a manner which substantially lessened competition in the market for player services thereby infringing s 1 of the Sherman Act 1890 (amongst other things). The League defended the claim on the basis that it operated as a single entity and accordingly did not restrict competition in the market.

At the relevant time, the League owned the teams, the intellectual property rights, the television broadcast rights and equipment. The League: determined the teams' playing schedules; negotiated the stadium leases and assumed the liabilities related to the leases; and paid the referees' salaries and the salaries of other League personnel. It also: recruited the players; negotiated player salaries (which were paid from League funds); and allocated players to the teams. The League entered into management contracts with private investors concerning nine of the twelve teams participating in the Major League Soccer competition. The management contracts gave the investors limited rights to run the team and to benefit financially from the team's involvement in the League (for example, investors were: responsible for local office expenses, local promotional costs, and the sale of home tickets; were liable for 50% of stadium rental costs; retained some team revenues; and played a limited role in the selection of players).

Entity Defense' [2006] 105 Mich L Rev 183; and Tim Bezbatchenko, 'Bend it For Beckham: A Look at Major League Soccer and its Single Entity Defence to Antitrust Liability After the Designated Player Rule' (2008) 76 University of Cincinnati Law Review 611.

[571] *Fraser v Major League Soccer* 284 F 3d 47 (2002) (CA1 Mass).

Although the doctrine was successfully applied by the District Court of Massachusetts, on appeal concerns were raised regarding the doctrine's application. In the Court of Appeal's view the League and its private investor management contracts comprised a *'hybrid arrangement, somewhere between a single company (with or without wholly owned subsidiaries) and a co operative arrangement between existing competitors'*.[572] Applying the single entity doctrine in those circumstances required an extension of legal principles which in the circumstances of that case, the Court of Appeal declined to consider.[573]

5.5.2 The Super League Clubs, the RFL and SLE as a Single Entity

The clubs, the RFL and SLE co operate to produce the Super League competition. It may be argued that the clubs and the RFL are organised as a single economic entity under the umbrella of SLE. Consistent with a single economic entity, revenue-sharing occurs and there is a common directorship between the RFL and SLE.

The entities also act in a manner analogous to that of a single entity when decisions are made concerning the product's quality and appeal to television broadcasters and sponsors. These decisions may in some cases require the clubs to forgo the profit maximisation of an individual club in favour of the product's quality and appeal to a broader spectrum of viewers. By way of example, one club

---

[572] *Fraser* (n 571) 58.
[573] Ibid.

interviewed commented that it had put the needs of the organisation ahead of its own sports business on a number of occasions:

> *'Would it be fair to say that having a London team in Super League is beneficial for us financially? Absolutely not, no. Catalans? Absolutely not, no. Why do I say that? Because when we have a home game against Harlequins or Catalans, how many people do they bring to the game? Not many is the answer. In the case of Catalans they've got to travel away every two weeks, their fans can't afford to do that so therefore they don't bring many fans with them.*
>
> *If we therefore said, "OK, I'll tell you what we are to do, to make it smarter for me financially... take Harlequins out, let's take Catalans out, let's put in... two [other] clubs". Would they give me two local derbies, two sell-out games? Yes they would. Would it be financially better for me? Absolutely. But it's not right for the sport and what we've got to do is sacrifice money now for the good of the long term growth of the sport....'*[574]

Another example was the decision to implement a salary cap. The measure was introduced to encourage the distribution of playing talent throughout the competition thereby promoting uncertainty of outcome and improving the product's appeal to consumers. A salary cap is potentially a disadvantage for the more affluent clubs that can afford to pay wages in excess of the cap. However, the salary cap was viewed by the clubs as beneficial for the production of the entertainment product as a whole. Finally, in some commercial transactions SLE acts as an agent of the club. In that regard, it does not determine its own course of action.

Despite the unique economic circumstances of a professional sports league, it is unlikely that the clubs and the RFL would

---

[574] Interview with Club F, 29 May 2007.

be viewed as a single economic entity. First, SLE, the RFL and the clubs do not share a common ownership. SLE's ownership comprises each of the Super League clubs and the RFL. The RFL's membership includes the Super League clubs (as well as the Championship clubs and amateur clubs); and the Super League clubs are independently owned. It is the separate and distinct ownership of the clubs which militates against a finding of single entity status. It cannot be asserted that the three entities form part of a corporate group which share a common ownership.

Secondly, each club has a distinct brand which it is responsible for marketing. A club: retains the revenue received from the sale of tickets to home games (excluding ticket sales for the play-offs and Grand Final); recruits and pays its own players; is responsible for its own stadium costs; operates a separate administration; and in the case of some clubs, generates revenue streams which do not rely upon the Super League competition (for example, some clubs operate bars, restaurants and conference facilities and/or earn rental income). Although the clubs share some revenue, some clubs operate as businesses independent of the Super League competition. Moreover, each club pursues its own business goals. Therefore, it cannot be argued that the clubs act in all respects as a single economic entity.

Thirdly, none of the clubs individually can influence or control the actions of SLE since each club holds only one share in the company to which voting rights attach. Therefore, it cannot be asserted that the clubs' joint ownership of SLE forms a single economic entity.

Finally, SLE is described as an agent of the clubs with regards to the administration of the Super League competition and the sale of the competition's common properties. Consistent with an agency relationship, SLE is an extension of each individual club. Since each club is a separate and distinct economic entity from the other clubs, it cannot be asserted that the agency relationship points in favour of a single economic entity.

Even if the single entity doctrine applied to the governance structure of the Super League competition (and it is unlikely), liability may still arise under Article 82 (EC).[575] The unique economic characteristics of the Super League competition are relevant, however, to an assessment of the proportionality of an anti-competitive measure introduced in the competition.

5.6 Jurisdiction of European Competition Law

The jurisdictional parameters of European competition law are determined by the requirement that an alleged anti-competitive measure has an effect on trade between Member States. In addition, Article 82 (EC) requires an entity to be dominant in the common market or a substantial part of the common market. These requirements are discussed further below.

---

[575] *Viho Europe* (n 552).

5.6.1 Effect on Trade Concept

Article 81 and 82 (EC) apply only if there is an effect on trade between Member States.[576] The Commission has issued guidelines which outline the approach adopted to determine whether an agreement, practice or conduct affects inter-state trade.[577] The concept is applied broadly and the relevant test is that established in the case of *Societe La Technique Miniere v Maschinenbau Ulm GmbH,*[578] namely:

> *'Is it possible to foresee with a sufficient degree of probability on the basis of a set of objective factors of law or of fact that the agreement in question may have an influence, direct or indirect, actual or potential, on the pattern of trade between Members States.'*[579]

The concept does not require the effect to be demonstrated only that there is potential for inter-state trade to be affected.[580] The effect on trade must be *'appreciable'* or *'not insignificant'*.[581] Whether the effect is appreciable, is determined on a case-by-case basis taking into account: the nature of the restrictive practice; the nature of the products;

---

[576] For a detailed discussion of the effect on trade concept, see Bellamy and Child (n 459) 70 – 89. See also Richard Brunley, 'Interstate Trade Revisited – the Jurisdictional Criterion for Articles 81 and 82 EC' [2002] ECLR 217.

[577] Commission (EC), 'Guidelines on the Effect of Trade Concept Contained in Article 81 and 82 of the Treaty' (Notice) 27 April 2004 [2004] OJ C101/81.

[578] Case 56/65 [1966] ECR 235.

[579] Ibid para 249; Case 42/84 *Remia BV v Commission* [1985] ECR 2545 para 22; Case C-359/01 P *British Sugar v Commission* [2004] ECR I-4933 para 27; and *MOTOE* (n 464) para 39. See also Commission Guidelines (Effect on Trade) (n 577) para 23.

[580] Case 19/77 *Miller International Schallpatten GmbH v Commission* [1978] ECR 131. See also Commission Guidelines (Effect on Trade) (n 577) paras 36 – 43.

[581] Commission Guidelines (Effect on Trade) (n 577) para 11.

and the market position of the undertaking concerned.[582] The European Court of Justice defines "trade" broadly as including all forms of economic activity.[583] For example, consultancy services provided by an individual;[584] the supply of professional services;[585] and the performance given by an opera singer,[586] have been considered items of trade.

Insofar as Article 82 (EC) is concerned, conduct which arises in a single Member State or only part of a single Member State may impinge on inter state trade if it affects the pattern or structure of competition in the common market.[587] Such conduct may have the effect of reinforcing the partition of markets on a national basis *'thereby holding up the economic interpenetration which the Treaty is designed to bring about'*.[588] It may also alter the normal flow of trade and lead the market to develop in a different way.[589]

The sale and purchase of rugby league playing services in the relevant market constitutes trade. The relevant market also includes the French club Catalans Dragons. It is likely, therefore, that an effect on trade – actual or potential – will be present in relation to restraints discussed further in this thesis owing to the presence of French and British clubs in the market.

---

[582] Commission Guidelines (Effect on Trade) (n 577) paras 45 - 57.
[583] Case 172/80 *Zuchner v Bayerische Vereinsbank AG* [1981] ECR 2021, para 18.
[584] *Reuter/BASF* (n 545).
[585] Case T-513/93 *Consiglio Nationale degli Spedizionieri Doganali* [2000] ECR II-1807 (customs agents); *Pavlov* (n 516) (specialist medical services); and *Wouters* (n 536) (legal services).
[586] *Rai/Unitel* (n 549).
[587] *United Brands* (n 459) para 201; and *Michelin* (n 459) para 24; *British Airways* (n 493) paras 142 - 149. Cf Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869.
[588] *MOTOE* (n 464) para 42.
[589] Cases 209-215 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125 para 172.

5.6.2 A Substantial Part of the Common Market

Article 82 (EC) applies only to abuses within the common market or a substantial part of it which affect trade between Member States.[590] Factors such as: the volume of consumption of the product at issue; the habits and economic opportunities of vendors and purchasers; and the geographic area of the market, are all relevant to a determination of whether the relevant market forms a substantial part of the common market.[591]

Alleged abusive conduct may arise in a market which covers: several Member States; a single Member State; only part of a single Member State; or trade with countries outside the European Union.[592] In *Suiker Unie v Commission*[593] the European Court of Justice concluded that the southern part of Germany was a substantial part of the common market whilst in *Merci Convenzionale Porto di Genova*[594] the Port of Genoa was held to form a substantial part of the Common Market owing to: the volume of traffic that passed through the port; and its importance for exports from and imports into the common market as a whole.[595]

---

[590] For further discussion, see O'Donoghue (n 492) 659 - 675; and Bellamy and Child (n 459) 70 - 89.
[591] *Suiker Unie* (n 560) para 43.
[592] Commission Guidelines (Effect on Trade) (n 577) paras 77, 93 - 109.
[593] (n 560).
[594] Case C-179/90 [1991] ECR I-5889.
[595] Ibid para 15. See also *Suiker Unie* (n 560) para 371 (Belgo-Luxembourg sugar market held to form a substantial part of the common market); and Case 226/84 *British Leyland plc v Commission* [1986] ECR 3263 paras 3 - 10 (United Kingdom considered a substantial part of the common market).

The market for playing services to the Super League competition covers two Member States; is extremely important for the production of the Super League competition (which is the only full time professional rugby league competition in Europe); and is the only market in Europe which provides for the purchase of full time professional rugby league playing services. On this basis it may be described as forming a substantial part of the common market.

5.6.3 Extra-Territorial Effect

Articles 81 and 82 (EC) also apply to undertakings located outside the European Union provided the alleged agreement, practice or conduct is implemented, or has effects, in the European Union.[596]

The Rugby League International Federation ("RLIF") is located in Australia, however, RLIF regulations which affect the relevant market would fall within the scope of Articles 81 and 82 (EC). In this way, the extra-territorial effect of European competition law may regulate the actions of an international sporting code's governing body. Normally the RLIF's regulations (such as, for example, regulations pertaining to the movement of players between RLIF member countries) are adopted by the RFL and implemented through the RFL in the market for playing services. Any claim brought under Articles 81 or 82 (EC) in relation to an RLIF regulation would likely be against the RFL in the first instance.

---

[596] Cases 48/69 etc *ICI v Commission* [1972] ECR 619; Cases 114/85 etc *A Ahlstrom Oy v Commission* [1988] ECR 5193; and Case C-306/96 *Javico v Yves St Laurent* [1998] ECR I-1983.

5.7 Conclusion

The market for playing services to the Super League competition includes the Super League clubs, the RFL, and players with skills of a standard to participate in the competition. It is characterised by the presence of a collectively dominant entity in the form of the Super League clubs and the RFL. The collectively dominant entity is monopsonistic and wields significant market power.

The collectively dominant entity also forms a monopoly in the market for the organisation of professional rugby league competitions in the United Kingdom. Owing to its position as a monopsonist and a monopolist it is "super-dominant"[597] in the market for playing services and, at the time of writing, faces no competitive pressure to raise the price paid for playing services or to increase the number of players hired. Its capacity to control the movement of players by means of a salary cap, the "club trained rule" or provisions contained in the players' contract is unrestricted. Relying upon this analysis of the relevant market, the next chapter considers the lawfulness of the Super League salary cap under Article 81 (EC).

---

[597] *Compagnie Maritime Belge* (n 503) para 114 (Advocate General Fennelly).

CHAPTER 6: PRICE-FIXING BETWEEN HORIZONTAL COMPETITORS IN THE SUPER LEAGUE COMPETITION

'Had you any signing-on fee in mind?
'Five hundred pounds,' I told him.
...'What about three hundred down, and one fifty for county honours and one fifty if you play for Britain?'
'I'd want county and international honours on top of that', I said, seeing myself saving them three hundred quid by being just a good club player. 'Five hundred down.'
'You'd want', Riley began, gathering up late surprise himself, 'five hundred down, plus one hundred and fifty for county and international honours respectively?
'Yes'.
...That's a lot for somebody just coming into the game. Tha's no experience at all of the professional code, you know.'
'You saw me play last week.'
'That's one match, lad. And an "A" team one at that. There's at least thirty-six matches a season – you see what I'm getting at? I'm not suggesting you didn't play well last Sat'day...Would you consider this? We pay you six hundred pounds – six hundred – three hundred now, three hundred after completing a full season with us, that's this time next year, and one hundred pound bonuses for county and international honours respectively.'
'I want five hundred down, and two bonuses of one fifty.'
'But you'd get the same amount this way, exactly the same,' Riley said. 'Either way it's eight hundred pounds... As a safeguard three hundred of it is retained for a year – it's purely as a safeguard.'
'But more of a safeguard to you than to me.'
...'Now Arthur, Wade said, 'you're putting us in the position of a gambler. If we accepted your way we'd have no guarantee that we'd see adequate returns for our investment. I'm not saying it isn't a good gamble, and that, but on principle alone we try and avoid circumstances like that. You see, you're not dealing with us as individuals. Personally we might think you're worth every penny of what you're asking. But it's not our money that we would be paying you. You see – that's the point,' he added after discovering it. 'This is a company.

We've responsibilities stretching beyond this football ground. By Mr Riley's suggestion we have a safeguard that covers both our interests – yours and ours.'
...'I can't change my mind', I told him, 'I feel I'm worth it'.
He sighed, maybe rudely. 'We're not trying to put anything over on you, Arthur,' he said. 'I wish you'd try and get that into your head. It's in our interests to satisfy you with conditions of employment here. But we're representing other people. We're responsible for investing their money soundly. What will they say when I tell them I've handed over five hundred of their money to somebody who, as far as we know, has played one good "A" team game in his life? I mean, all the arguing we're doing is only over how the money's to be paid. We've agreed on the sum: six hundred pounds and bonuses.
'Five hundred.'[598]

6.0 Introduction

The Super League competition operates under a salary cap which limits to £1.6 million the total amount that a club is permitted to spend on player wage payments.[599] A club is not permitted to spend more than the salary cap on payments to players in its first team squad.[600] Failure to observe the salary cap rule may result in a club being penalised by way of:[601] a warning; a fine; a deduction of up

---

[598] David Storey, *This Sporting Life* (Vintage, Random House, London 1960) 52 - 55.
[599] RFL Operational Rules 2009, E1:3:1:1. The form and amount of the salary cap has varied since the cap was introduced in 1997. For example during the 2005 playing season the salary cap was £1.7 million or 50% of relevant salary cap income determined by agreement with the salary cap auditor following the club's submission of an annual budget: RFL Operational Rules ("the Rules") 2005, E1:3.
[600] The Rules outline the types of payments which are included in a salary cap calculation (such as, gross salary, appearance bonuses, win bonuses, image rights payments) and the types of payments which are excluded (prize money and international representation bonuses up to a maximum of £5,000): RFL Operational Rules 2009, E1:5.
[601] RFL Operational Rules 2009, E1:9.

to twenty competition points; a restriction imposed on the club's capacity to register new players; and/or a recommendation that the Rugby Football League ("RFL") Board withdraw a club's license to participate in the Super League competition. Penalties also apply to players and other people who are subject to the salary cap regulations. Failure to abide by the salary cap regulations may result in the player (or another person) being suspended from involvement in the game of rugby league.[602]

The salary cap regulations are determined in accordance with the decision-making processes set down in the Articles of Association for Super League (Europe) Ltd ("SLE"). The consent of a simple majority of the Super League clubs and the RFL's approval are required before the regulations are implemented, amended or removed.[603] For the purposes of Article 81 (EC) the salary cap forms an agreement between horizontal competitors, (namely the clubs) and/or a decision of an association of undertakings.[604] There is an effect on inter-state trade because the relevant market for playing services includes the French club, Catalans Dragons. Recruitment between the British clubs and Catalan Dragons is affected by the salary cap.

This chapter considers whether the salary cap infringes Article 81 (EC) by fixing the total amount that a club will pay for playing services in the relevant market. It examines the

---

[602] RFL Operational Rules 2009, E1:9. The scope of the salary cap regulations is broad and the regulations apply to: the clubs, club officials, players, licensed agents and any other party participating in any capacity in any events or other activities organised, convened or authorised by the RFL (whether or not that person is a citizen of or resident in the United Kingdom): RFL Operational Rules 2009, E1:1:4.

[603] Undated Articles of Association of Super League (Europe) Limited, cl 3.4.

[604] For further discussion, see chapter five of this thesis.

effects of the salary cap; and the justifications advanced by the RFL and the clubs for implementing the measure. Finally, it concludes that the salary cap restricts, distorts and prevents competition between the clubs in the market for playing services to the Super League competition. In the absence of empirical evidence to support the necessity for the measure, the unilateral implementation of the salary cap by the Super League clubs and the RFL infringes Articles 81 and 82 (EC).

6.1 Price Fixing Between Horizontal Competitors

It is a requirement of competition law that horizontal competitors act independently.[605] Direct or indirect contact between competitors which has the object or effect of influencing conduct on the market of an actual or potential competitor is strictly prohibited.[606] Collusion between horizontal competitors can achieve the economic benefits of a monopoly. It may result in higher prices, restricted output and increased profitability for the firms in the industry and lead to market inefficiencies. Collusion between buyers of a raw material can depress prices below competitive levels and achieve the economic benefits of a monopsony.

A price-fixing agreement by its nature is anticompetitive since such agreements restrict an undertaking's capacity to determine its own price on a free market.[607] An agreement

---

[605] Joined Cases 40-48/73 etc *Suiker Unie and Others v Commission* [1975] ECR 1663 para 173; and Case C-49/92 P *Commission v Anic Partecipazoni SpA* [1999] ECR I-4125 para 116.
[606] *Suiker Unie* (n 605) para 173.
[607] For a general discussion regarding price-fixing agreements, see Bellamy and Child, *European Community Law of Competition* (6ed Oxford

which directly or indirectly fixes price on the open market is prohibited under Article 81 (EC). Price fixing includes setting a maximum or minimum price, determining components of the price, or establishing a percentage increase or a range of prices.[608]

Price-fixing also includes an agreement between firms to fix the purchase price of a production factor (otherwise known as a buyer cartel). The absence of buying price competition between horizontal competitors can lead to lower prices for the supplied product than would otherwise prevail under normal market conditions. Members of the cartel may benefit through a lower purchase price which can lead to increased profitability (equal to that of monopsonistic market power). Suppliers may be forced from the industry and there may be a negative effect for consumers in the downstream market (being the market in which the final product which incorporates the raw material is sold) unless the benefit derived by the cartel is passed on to consumers through, for example, lower prices.

In *Zinc Producer Group*[609] the Commission held that an agreement between zinc mining and smelting companies to fix the purchase price of zinc concentrates infringed Article 85 (EC) (now Article 81 (EC)).[610] The parties' defence that the price-fixing was necessary to counter difficult market

---

University Press, Oxford 2008) 311 – 336; and Richard Whish, *Competition Law* (6ed Oxford University Press, Oxford 2009) 505 - 511.

[608] Bellamy and Child (n 607) 312. See for example: *Vimpoltu* (Case COMP IV/30.174) Commission Decision 83/361/EEC [1983] OJ L200/44; Case 123/83 *Bureau National Interprofessionnel du Cognac v Guy Clair* [1985] ECR 391; and Case 246/86 *Re Roofing Felt Cartel: BELASCO v Commission* [1989] ECR 2117.

[609] (Case COMP/30.350) Commission Decision 84/405/EEC [1984] OJ L220/27.

[610] Ibid para 66.

conditions was rejected by the Commission.[611] In *French Beef*[612] the Commission concluded that the decision of six French farming federations to (inter alia) fix a minimum purchase price for some types of cattle meat was anti-competitive.[613] In *Italian Raw Tobacco,*[614] six Italian undertakings operating in the raw tobacco processing sector infringed Article 81 (EC) by agreeing the maximum and average prices that the entities would pay for the delivery of raw tobacco.[615] A similar situation also arose in the tobacco industry in Spain. In *Spanish Raw Tobacco*[616] the Commission concluded that tobacco companies breached Article 81 (EC) when agreeing: the maximum average delivery price each entity would pay for the purchase of raw tobacco; the quantities of each product brought and price brackets per quality grade of each variety of raw tobacco.[617] Measures agreed by the companies which penalised a cartel member for purchasing in excess of the amounts agreed also infringed Article 81 (EC).[618]

---

[611] *Zinc Producer Group* (n 609) para 73. According to the Commission: '*...in attempting to cope with difficult market conditions or extreme falls in demand, firms must use only means which are consistent with competition law. The fixing of purchase or selling prices by competitors is not a legitimate means of combating alleged difficult market conditions'* – ibid.

[612] (Case COMP/38.299) Commission Decision 2003/600/EC [2003] OJ L209/12.

[613] Ibid para 125. (Upheld on appeal: see, Case T-217 and 245/03 *Federation Nationale de la cooperation Betail and Viande and Others v Commission* [2006] ECR II-4987; and Cases C-101/07 P and C-110/07 P *Coop de France Betail et Viande v Commission* [2009] 4 CMLR 15 (ECJ)).

[614] *Italian Raw Tobacco* (COMP/38.281) Commission Decision 2006/901/EC [2006] OJ L353/45.

[615] Ibid para 7. The decisions are currently under appeal: Case T-12/06 *Deltafina SpA v Commission.*

[616] *Raw Tobacco Spain* (Case COMP/38.238) Commission Decision 2007/236/EC [2007] OJ L102/14.

[617] Ibid para 7. The decisions are currently under appeal: see Case T-29/05 *Deltafina SpA v Commission*.

[618] *Raw Tobacco Spain* (n 616) para 7. Buyer cartels may be contrasted with the situation of a joint purchasing arrangement in which a number of companies agree to purchase raw materials in large volumes. A joint purchasing arrangement can provide pro-competitive benefits (which derive from economies of scale, for example, savings on transport costs,

A price-fixing agreement is usually considered to have the object of restricting competition with the result that an analysis of the agreement's effect is not required.[619] Recent case authority has suggested, however, that some types of price fixing agreements may not have an anti-competitive object thereby necessitating an analysis of the agreement's effects.[620] An agreement between firms in a buyer cartel may be the type of agreement that requires consideration of the effect for competition in the relevant market.[621] In addition, an agreement which allegedly infringes Article 81 (EC) must be considered within the context in which it occurred.[622] Insofar as professional sport is concerned, the Commission has indicated that any determination of whether a rule adopted in the industry is anti-competitive requires consideration of the "specificity of sport".[623]

The RF: Operational Rules ("the Rules") state that a purpose of the salary cap is *'to regulate the value of playing talent available to each Club in the league competition'*.[624] It: prescribes a maximum price ceiling for each club's

---

or bulk buying discounts) and are permissible under European competition law: see for example, Case C-250/92 *Gottrup-Klim Grovvareforeninger and Others v Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641.

[619] If an agreement's object is to prevent, restrict or distort competition, there is no need to consider the agreement's effects: Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Anor* [2009] 4 CMLR 6 paras 16 - 17.

[620] In *Visa-Multilateral Interchange Fee* (Case COMP/29.373) Commission Decision 2002/914/EC [2002] OJ L318/17 the Commission inquired into circumstances surrounding the subject of the price-fixing agreement before concluding that the effect of the agreement was to restrict competition: ibid paras 68 - 69.

[621] I Kokkoris, 'Purchase Price-Fixing: A Per Se Infringement?' [2007] ECLR 473.

[622] Case C-234/89 *Delimitis v Henninger Brau AG* [1991] ECR I-935 para 14.

[623] Commission (EC), 'White Paper on Sport' COM (2007) 391 final, 11 July 2007 70 – 73.

[624] RFL Operational Rules 2009, E1:1:1.

expenditure on player wage payments; and determines the parameters within which the clubs and players may negotiate, thereby distorting competition between clubs in the relevant market. The salary cap is reinforced by measures which penalise a club for breaching the cap and from which it may be inferred that the cap has anti-competitive effects.[625] A salary cap by its very nature has the object of distorting and restricting competition.

Whilst the salary cap may appear to have the object of distorting competition between the clubs for playing services, an analysis of the salary cap's effect and the context in which it arises is also required. The following section summarises the cap's effects as described by the RFL, the clubs, players and others involved in the competition in 2007.

6.2 Salary Cap Effects

According to those stakeholders interviewed, the salary cap has:

- Limited the amount clubs spend in total on player wages (which is the main cost incurred by each club) and limited the wage amounts paid to individual players;[626]

---

[625] In Joined Cases T-259-264/02 etc *Re Austrian Banks Cartel ("Lombard Club"): Raiffeisen Zentralbank Osterreich AG and Others v Commission* [2007] 5 CMLR 13 the Court of First Instance stated that in circumstances of a price cartel the Commission may infer that the arrangement had anti-competitive effects from measures adopted by cartel members to monitor and implement the arrangement, even if proving the precise effect of the anti-competitive agreement was difficult: paras 285 - 286.

[626] Club H commented: *'I'm a big fan of the salary cap; I like it. But if I were a player you would have to say that potentially it might cap my earnings because I do have to say to players, they might say they want £60,000 and I have to say £50,000 because that is all that I am allowed*

- Determined the level and range of player wage payments within some clubs;[627]

- Decreased the range of salary between the highest paid player and the lowest paid player;[628]

- Limited the overall quality of playing services that an individual club can recruit.[629]

- Prevented the more affluent clubs from "stock-piling" players;[630]

---

by the Super League body to spend. Now I might have the £60,000 but I'm not allowed to spend it...'
Four players interviewed reported that the salary cap had affected the amount of salary upon which they were employed. Their respective clubs had all cited the salary cap as the reason for not agreeing to the player's salary request. A fifth player stated that a club at which he was already employed referred to the salary cap as the reason for not entering a new employment contract, whilst another player commented that during negotiations to extend his existing employment contract a request for additional bonus payments was refused owing to the club's position under the salary cap. Two players commented that the salary cap was usually always raised by a club during negotiations but did not refer to how the cap had personally affected their employment (if at all). Two players stated that the salary cap had had no effect on their individual contract negotiations. One of those players attributed this to his position as a high profile player within the industry.

[627] Club D stated: *'[Y]ou know how much you've got to spend and you know how many players can be on £25,000 or more so...basically how we operate it is, we take the players out of it and we break down the budget and put pockets of money from the highest earner to the lowest earner within the budget and fit the players to the budget...Basically the bottom line is to ensure that clubs budget'.*

[628] According to Coach A: *'The high earners still get a good wage but the low earners are pushing up a bit more...and the difference between the top earner and the low earner is big but it has been bigger.'*

[629] Club F commented: *'[Y]ou can only spend so much. So...you have to cut your cloth accordingly. It's very frustrating when you need a certain key player but you can't afford him because you are restricted by the salary cap.'*

[630] Club G stated: *'[I]f there was no salary cap the richest clubs would spend more money and eventually you would have to say, 'Well who are they playing?' because they could acquire all the best players and they could stockpile them if there's no salary cap at all...Would the crowds be good if you wanted to see your team inevitably beaten easily by another club?'*

- Created more uncertainty as to the outcome of matches within the Super League competition which has purportedly increased the competition's spectator appeal;[631]

- Encouraged fiscal prudence within clubs;[632]

- Increased the profitability of clubs;[633]

- Caused players to move between clubs thereby distributing playing talent throughout the competition;[634]

- Caused some players to move to professional rugby union clubs;[635]

---

[631] Some clubs interviewed believed the cap had created uncertainty of outcome and contributed to competitive balance within the competition as a whole. Improvements in, for example, stadium facilities and coaching techniques, were not considered to have been as significant as the salary cap towards improving the spectacle of the Super League competition. Club B commented that: *'Most teams now have good quality of coaching and good quality facilities etc so the salary cap does become quite a significant factor in that because no matter how good a coach you've got or how good the facilities, if the amount of money that you can spend on your playing resource is half that of somebody else's, the chances are you have no chance of competing'.*

[632] Club B commented: *"It means that if we are going to run our business effectively, we will not be tempted to spend money we don't have and make short term decisions...I don't believe it restricts our ability to sign quality players. It does equalise the competition. There's no doubt about that but if we want to achieve one of our business aims and that is to make a profit then a salary cap is certainly of great assistance in that process.'*

[633] Club G stated that the salary cap, *'gives me the certainty that if we are doing alright, I haven't got to spend the profit I'm making by giving it to the players that we've got or bringing in new players because we can afford it'.*

[634] One player interviewed stated that the salary cap was the reason provided by a former club for not offering the player a new contract (the player subsequently obtained employment at another Super League club). A second player commented that the salary cap was a contributing factor to his club agreeing to release the player from his existing employment contract so that he could enter into a new contract with a second Super League club.

- Had no effect for the pricing decisions of those clubs that were not spending to the salary cap level;[636]

- Assisted the less affluent clubs to be competitive by limiting the amount that the more affluent clubs could spend;[637]

- Limited the growth potential of the more affluent clubs;[638]

- Resulted in some clubs being penalised for spending in excess of the salary cap maximum level;[639] and

---

[635] Club I commented: *'We can still only spend £1.6 million on players. So you can still only have a top squad of 20, with seven or eight kids in there and we are still losing players like [names withheld for reasons of confidentiality] because we can't afford to pay them the rates that rugby union can afford to pay them because of the salary cap; not because we as a club can not afford it. We as a club can sustain paying them that kind of money but we are being held back by the salary cap.'*

[636] Club E stated that: *'[W]e never reach the maximum so for the moment... there is no disadvantage to having a salary cap'.* Information provided during the interviews indicated that, in 2007, seven clubs were spending to the maximum salary cap amount.

[637] Club D commented *'...a cap enables us to be able to meet some of the teams and doesn't let the top teams run away by putting a ceiling on.'* Club E commented that, *'Thanks to the cap, the competition is much more fair and we can enjoy close games. For example, we have beaten St Helens this year and...it would be more difficult to beat such teams with no salary cap as they will use their financial power to buy the best players during the season.'*

[638] Club I commented: *'I suppose what we want to do is generate more profit but ultimately that profit will get reinvested into the playing side of it. Now our frustration with the salary cap is that you get to a cut-off point where you can't spend anymore on the playing side...We've got a world class training facility, we've got more coaches...but the frustration for us is that the salary cap is now holding us back and other clubs. We can still only spend £1.6 million on players.'*
A similar view was expressed by Club J: *'We take the view that it is our responsibility to put out on that field over there, the best talent from anywhere in the world that talent originates that we can possibly afford having regard to what we can afford...We can't go and spend money that we haven't got but within the realms of what we can afford we should be putting out the best team and therefore the best entertainment we possibly can.'*

[639] In 2006 Wigan Warriors was fined and deducted competition points for spending in excess of the salary cap; in 2007 Bradford Bulls, St Helens

- Contributed to a change in contracting practices.[640]

Overall, there was a marked difference between the views of two clubs interviewed that favoured a less restrictive approach to player wage payments, and the remaining clubs which were in favour of the salary cap.[641] The majority of clubs interviewed considered the cap to be detrimental to players because it limited a player's earning potential.

In the RFL's view, the Super League competition benefited from a salary cap because the cap maximised revenue and kept spectators entertained by creating a situation where each club had a *'decent chance of winning a contest'*.[642] As a result of the salary cap, teams were winning games irrespective of a club's position on the Super League table, and match attendances were improving annually. The salary cap thus created a contest which contributed to the financial growth of the game. The RFL accepted that some clubs were in a position to spend more than the salary cap permitted but in its view the competition was *'only as strong as its weakest clubs not its strongest clubs'*.[643]

---

and Wigan Warriors were fined and/or deducted competition points for infringing the salary cap regulations; and in 2008 St Helens was fined for a breach of the salary cap.

[640] Club G commented that: *'...one of the problems you get is that if you want to improve your team and you want to sign a quality player you generally have to wait for that quality player to come out of contract and when he comes out of contract there may be half a dozen clubs who want to sign him because there are so few players on the market then they'll chase that player and then the wage goes up and that is affected by the salary cap. An opposite way of looking at it would be to actually approach a club offer a transfer fee when nobody else would, pay it out, [transfer fees are not included in the salary cap] and then probably not have to pay quite so much... to the player...'*

[641] See the comments of Clubs I and J (n 638).

[642] Interview with the RFL, 29 October 2007, Leeds, England.

[643] Ibid.

The RFL considered that the salary cap was *'not necessarily detrimental'* to players because: players were still able to individually negotiate employment contracts; the earnings of individual players were not restricted and a player was entitled to whatever was negotiated with the club.[644] Also, clubs were less likely to become insolvent and players benefited from the security of employment that this created. The RFL profited from a salary cap applied to Super League clubs because the teams play in the RFL's Challenge Cup competition from which the RFL derived revenue.

On the basis of the above, the salary cap has clearly had the effect of distorting, restricting and preventing competition between the Super League clubs for playing services. It may also have benefited the competition - and therefore consumers - through a positive effect for competitive balance (although confirmation of the cap's effect for competitive requires economic analysis).

Those entities who allege that the salary cap has had a positive effect for competitive balance and the competition are those entities that profit most from its implementation. It is also noteworthy that the salary cap appears to have been implemented (and subsequently amended downwards in 2005) unilaterally without consultation with the competition authorities and without specialist economic evidence which supports the necessity for a cap in the competition. The following section considers whether the salary cap satisfies the *Meca-Medina* test.[645]

---

[644] RFL interview (n 642).
[645] For a discussion of the *Meca-Medina* test, see chapter one of this thesis.

6.3 Salary Cap Objectives

The salary cap's paramount purpose is to *'protect and promote the long term health and viability of the game of rugby league'*.[646] Within that over riding purpose, the cap's specific objectives are:

> *'1.1.1 to protect the integrity of the Super League competition by ensuring that the determinative factor in the sporting outcome is on-field sporting merit and not off-field financial considerations;*
>
> *1.1.2 to ensure that the Super League competition remains competitive and therefore attractive to spectators and commercial partners by preventing clubs with greater financial resources dominating the competition and by ensuring a balanced spread of players among the participating clubs;*
>
> *1.1.3 to protect and nurture a broad competitive playing structure by preventing clubs trading beyond their means and/or entering into damaging and unsustainable financial arrangements; and*
>
> *1.1.4 by means of the foregoing, to protect the welfare and interests of all players participating in the Super League competition and of all those aspiring to participate in the Super League competition.'*

Each of these objectives is discussed in turn.

6.3.1 To Protect and Promote the Long-Term Health and Viability of the Game of Rugby League

It is unclear whether the reference to 'the game of rugby league' refers to the game as a whole (including the amateur

---

[646] RFL Operational Rules 2009, E1:1:1.

code) or whether it is limited to the Super League competition only. In any event, it may be that preserving the longevity of the competition (or the rugby league industry) is a legitimate aim to pursue by means of a salary cap.

Excluding international matches, the Super League competition is the pinnacle of the sporting code's competitions in Europe. SLE makes payments to the professional competition divisions below Super League. The individual clubs participate in community development initiatives and are involved with promoting the sport in schools and throughout the local community. Additionally, the competition promotes the sport through its exposure on television. Were the competition to cease, then there would be wide-ranging effects for those participants involved in the sport, for supporters of the game, and for public perception of the sport as a whole.

Nonetheless, the Super League competition and the clubs that participate in it are businesses. When it comes to the sale of a product, most commercial businesses are concerned with a product's value in the short term and the long term, and the position of the industry overall. In this regard there is nothing different between the Super League competition and a general commercial business.

Moreover, many types of commercial businesses get involved in community programmes or charitable causes for philanthropic or self-promotional reasons (amongst others). It is in the interest of a professional sports club to have a high community profile and to encourage people to play the sport. First, it raises the club's profile in the entertainment

market which can benefit the club financially through increased gate receipts or merchandise sales; and secondly, it encourages people to play the sport at a young age which serves, ultimately, to increase the talent pool available to professional clubs. Finally, the objective overstates the salary cap's importance to the 'long term health and viability of the game'. The long term health and viability of professional rugby league requires increased numbers of people playing the sport and the professional management of sports businesses (the latter being achieved by means other than a salary cap).

6.3.2 To Protect the Integrity of the Super League Competition By Ensuring That the Determinative Factor in the Sporting Outcome is On-Field Sporting Merit and Not Off-Field Considerations

A rule which ensures that on-field sporting merit determines the outcome of matches and not off-field conduct (such as, for example match fixing or anti-doping) is accepted as a legitimate objective for a sporting code's governing body to pursue.[647] Such rules may fall within the category of regulations aimed at the organisation and proper conduct of professional sport. Consideration of whether a salary cap is required for the organisation of a professional sports competition touches upon issues of the uncertainty of outcome hypothesis, competitive balance and talent distribution. These issues are discussed below in relation to the third objective of the Super League salary cap.

---

[647] Case C-519/04 *Meca-Medina and Majcen v Commission* [2006] ECR I-6991.

6.3.3 To Ensure the Super League Competition Remains Competitive and Attractive to Spectators and Commercial Partners

A third objective of the salary cap is to protect the commercial value of the Super League competition. The salary cap aims to do this by: preventing a club with greater financial resources dominating the competition; and distributing playing talent across the teams.

It is widely acknowledged that a sports competition appeals to consumers when the result of a match is not able to be predicted prior to the game being played; in other words, when there is 'uncertainty of outcome'.[648] In circumstances where there is uncertainty of outcome, spectator interest is believed to increase with resultant increases in attendance and positive effects for the competition's sponsorship and television revenue. The aim of most sports leagues, therefore, is to reach a point of balance where each team has an equal chance of winning the league competition every few years and the results of a match are unpredictable.

The difficulty for a professional team sports competition is that a club - acting in its own best interests - may seek to improve the playing performance of its team by employing as many talented players as possible. The more money a club can spend on employing skilled players, the greater the chance of the club winning games. Furthermore, the greater

---

[648] Economics literature distinguishes between three categories of uncertainty of outcome: match uncertainty; seasonal uncertainty (being a close championship race during a playing season); and championship uncertainty (which refers to a number of different teams winning the league over a period of years rather than domination by one or two teams): S Szymanski, 'Economic Design of Sporting Contests' [2003] 41(4) Journal of Economic Literature 1137, 1155 - 1156.

the number of talented players a club has, the easier it is for the club to cover for injury or other player absences during a playing season. The depth of playing talent in a team is a factor which may contribute to the success of a club throughout a playing season. Of course, it does not always follow that the team with the greatest number of highly paid players wins.[649]

Whilst an individual club may benefit from increased spending on player wage payments (through, for example, improved attendance at games and increased merchandise sales, club sponsorship or advertising contracts) other clubs - with differing financial circumstances - may find it difficult to field a competitive team. The outcome of a match or championship may become more certain as a result. Expressed in terms of economic theory, in a professional team sport environment that is characterised by a competitive labour market (that is, a labour market without any restraint mechanisms): the league competition will generate an equilibrium of success; that equilibrium will arise when the marginal revenue of a win equals the marginal cost; and the distribution of wins at that equilibrium will not generate enough outcome uncertainty to the financial detriment of the league.[650]

---

[649] For example, in 2008 the Indian Premier League cricket tournament was won by the team that reported the least amount of money spent on player wage payments: see 'Indian Cricket Bonanza is Massive Hit' *BBC Sport* (London, 2 June 2008) <http//:news.bbc.co.uk/1/hi/world/south_asia/7430529.stm> accessed 1 July 2008. See also Stephen Hall, Stephen Szymanski and Andrew Zimbalist, 'Testing Causality Between Team Performance and Payroll' [2002] Journal of Sports Economics 3(2) 149.

[650] Stefan Szymanski, 'Uncertainty of Outcome, Competitive Balance And the Theory Of Team Sports' in Wladimir Andreff and S Szymanski *Handbook on the Economics of Sport* (Edgar Elgar Publishing Limited, Cheltenham 2006) 597, 597.

Economic research which considers the uncertainty of outcome hypothesis has produced mixed results. Of twenty two studies which sought to confirm the uncertainty of outcome hypothesis across different sports between 1974 and 2002, ten offered clear support for the theory; seven offered weak support; and five contradicted the theory.[651] As Szymanski comments, *'even quite unbalanced matches, championships and leagues can be attractive to consumers'*.[652] Additionally, Szymanski notes that there are reasons why the hypothesis needs to be treated with caution:[653]

> *'First, while balance can be exciting, so can a contest between a Goliath and a David. Even if David seldom wins, the realisation of the completely unexpected can generate enormous satisfaction. Second, the performance of a perpetually successful team can also provide extra interest, either among those who support the dynasty, or among those who are rooting for it to fail...third, even if it were true that a completely predictable contest would be unattractive, it is hard to say what the effect of a small change in balance would be, starting from a given distribution of wins.'*

Research into the validity of the uncertainty of outcome hypothesis does not suggest the theory is false but that its importance may be overstated.[654] Attendance levels at games can also be affected by other factors such as the

---

[651] Szymanski (n 648) 1156.
[652] Ibid. The example Szymanski uses is that of the English Premier League which in the twelve year period to October 2004 was won by Manchester United (eight times), Arsenal (three times) and Blackburn Rovers (one time) yet attendance increased from 9.8 million to 13.5 million: S Szymanski, 'Tilting the Playing Field: Why a Sports League Planner Would Choose Less, not More, Competitive Balance, Tanaka Business School Discussion Papers: TBS/DP05/35, Tanaka Business School, London, October 2004) 32. Economic research also indicates that insofar as attendance at home games is concerned demand for match tickets peaks at the point where a home team's probability of winning is about twice that of the visiting team: Szymanski (n 648) 1156.
[653] Szymanski (n 650) 597.
[654] Szymanski (n 650) 598.

weather or live television coverage of the match (amongst other things) rather than an absence of outcome uncertainty.

The general view asserted by professional sports leagues is that the free market cannot deliver competitive balance and requires artificial mechanisms to distribute talent in order to promote competitive balance. A seminal study conducted into the effectiveness of the reserve clause in Major League Baseball – a clause which prohibited a player from moving to another team without the permission of his current team's owner – came to the opposite view insofar as that restraint was concerned.[655] It concluded (inter alia) that:

- talent distribution under the reserve clause occurred in the same manner as the free market (that is, the reserve clause made no difference to the distribution of talent);

- through the clause the club controlled the player so as to drive down the player's wages and enhance the profitability of the club;

- the profit motive of teams would limit accumulated talent on a single team; and

- the free market was superior to a market restrained by a reserve clause since in the free market each worker received the full value of his service, and exploitation did not occur.[656]

---

[655] S Rottenberg, 'The Baseball Players' Labor Market' [1956] 64 Journal of Political Economy 242, 255 - 258.

[656] Ibid. Noll asserts that restrictions on competition for players: lowers player salaries, but does not prevent, *'the movement of players among teams through trades, sale of players contracts and the trade or sale of*

In 1976 the reserve clause was replaced by a free agency rule that permitted a player - after six years of employment with one team- to seek employment at another club without restriction. Since the free agency rule was introduced, economic studies have analysed whether or not limited free agency status has undermined competitive balance in baseball. Szymanski summarises the conclusions of those studies as follows:[657]

> *'Most of the studies find either no change (seven cases) or an improvement in competitive balance (nine cases), contrary to the claim of the owners that free agency would reduce competitive balance (four cases only)'.*

Economic research concerning the effectiveness of a salary cap for levels of competitive balance illustrate that the success of such a measure may depend upon the salary cap's design, enforcement mechanisms and club observance of salary cap limits. Szymanski asserts that in theory a salary cap should improve competitive balance,[658] although for a salary cap system to be fully effective: small revenue generating teams must raise spending to the level of the cap; and the salary cap system should be complemented by revenue sharing mechanisms as well.[659]

---

draft choices. If one team values a player more than his current team, it will acquire him by offering a higher salary if the player market is competitive or by striking a deal with the player's current team if the market is not': Roger Noll, 'Professional Basketball: Economic and Business Perspectives' in Staudohar and Mangan (eds) *The Business of Professional Sports* (University of Illinois, United States of America 1991) 39; cf with Sloane's view that restricted measures are required to prevent a few teams dominating a sports league: P J Sloane, 'Sporting Equality: Labour Market versus Product Market Control – A Comment' [1976] 18(1) Journal of Industrial Relations 79.

[657] S Szymanski, 'The Champions League and the Coase Theorem' [2007] 54(3) Scottish Journal of Political Economy 355, 359.

[658] Szymanski (n 648) 1171.

[659] Szymanski (n 648) 1172.

Fort and Quirk suggest that *'an enforceable salary cap applied to all teams leads to competitive balance in a closed league'* but that enforcement of the cap is often difficult.[660] Kesenne states that a salary cap imposed in a league comprising of profit maximising clubs: improves competitive balance; lowers salary levels; assists less affluent teams to maintain financial viability; but generally will not bring ticket prices down.[661] Noll concludes that a salary cap does not assist weak teams so much as prevent wealthy teams from competing for each other's players.[662] By contrast, Vrooman asserts that a salary cap promotes competitive imbalance since equal spending on players does not necessarily lead to equal playing strengths among teams.[663]

Identifying and achieving the optimal level of competitive balance in a professional sports league is complex. Economic studies use a variety of methods to measure competitive balance and are based on assumptions which differ according to the subject sport and the methodology applied. Competitive balance may also be affected by factors other than the wealth resources of one team over another (for example, technology, scientific advances in sports equipment, quality of training facilities, advances in coaching techniques, playing rules, the sports league structure and field conditions etc).[664] Furthermore, to a certain degree

---

[660] James Quirk and Rodney Fort, *Pay Dirt,* (Princeton University Press, Princeton New Jersey 1997) 292.
[661] Stefan Kesenne, *The Economic Theory of Professional Team Sports* (Edward Elgar Publishing Limited, Cheltenham 2007) 141. League profits are assumed to decrease because the inefficient allocation of playing talent means players are not playing for the team where there marginal product is maximised: ibid 127.
[662] Noll (n 656) 38.
[663] John Vrooman, 'A General Theory of Professional Sports Leagues' [1995] 61(4) Southern Economic Journal 971, 980.
[664]. Allen Sanderson, 'The Many Dimensions of Competitive Balance' [2002] 3(2) Journal of Sports Economics 204.

'imbalance is an inherent, intractable part of all competitions'.[665]

According to the European Commission, *'ensuring uncertainty of results'* within a competition is a legitimate aim of a professional team sports league.[666] In *Bosman*[667] Advocate General Lenz stated that:

> *'...it should be observed that I share the opinion that...a professional league can only flourish if there is a not too glaring imbalance between the clubs taking part. If the league is clearly dominated by one team, the necessary tension is absent, and the interest of the spectators will thus probably lapse within a foreseeable period.'*[668]

The European Court of Justice also accepted that:

> *'In view of the considerable social importance of sporting activities and in particular football in the Community, the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results and of encouraging the recruitment and training of young players must be accepted as legitimate.'*[669]

In *Bosman,* however, the Court did not consider the effects of a restraint mechanism on competition within a relevant market; nor did it weigh up differing economic opinion on the validity of the uncertainty of outcome hypothesis. It is unclear how the Commission or the Court will deal with the issue of a salary cap in professional sport.

---

[665] Ibid.
[666] White Paper (n 623) 68.
[667] Case C-415/93 *Union Royale Belge des Societes de Football Association ASBL v Jean-Marc Bosman* [1995] ECR I-4921.
[668] Ibid para 219.
[669] *Bosman* (n 667) para 106. In *Bosman* neither the Advocate General nor the European Court of Justice considered economic theory when arriving at that conclusion. In *Re Televising Premier League Football Matches* [2000] EMLR 78, the Restrictive Practices Court (UK), with the benefit of economic opinion, accepted that creating and preserving competitive balance was *'a vital factor in maintaining the equality and interest of Premier League Football'* – ibid 174.

There has been no research published concerning competitive balance in the Super League competition or the effectiveness of the Super League salary cap for promoting and maintaining competitive balance. The RFL and the majority of clubs justify the salary cap on the basis of: the uncertainty of outcome hypothesis; and the cap's purported beneficial effects for competitive balance within the competition as a whole. In the majority's view, the cap has distributed the playing talent throughout the competition, created a 'level playing field' which in turn has promoted competitive balance within the competition and led to uncertainty of outcome. Those statements are the reported observations of the clubs and the RFL (entities which benefit financially from the salary cap). In the absence of empirical research to support a conclusion that a salary cap in Super League improves competitive balance it is difficult to confirm whether the salary cap has had that effect.

The salary cap directly affects player wages and also reduces consumer welfare. Some players interviewed confirmed that the cap had been raised by clubs during contract negotiations; and in some cases had limited the amount of money eventually received. For clubs spending at the salary cap limit who may forego the opportunity to sign a player because of the cap limit (and yet can afford to pay the market value for the player), the club's supporters lose the opportunity to see the very best team that the club can employ.

Even if competitive balance is a legitimate aim to pursue, it may be that the salary cap is not a proportionate means of achieving that aim. First, the salary cap is, to use the words

of one club interviewed, *'artificially engineering the competition'*. In a free market situation without a salary cap, and in the absence of any other restraints, a player would move to the club where he was most valued (in economic terms where the club's marginal revenue product is maximised). This would produce positive effects for consumers since the clubs would be fielding the best team possible and there would be an efficient allocation of resources within the market for playing services. Occasions - like those described by Club I of being unable to retain players it values because of salary cap limitations[670] - would not occur.

Secondly, as a result of the salary cap the market value of playing services is artificially restrained. A players' salary is determined by market forces and the salary cap mechanism prevents some players from receiving the true market value for their playing services.

Thirdly, one club described how the salary cap had encouraged it to obtain the services of a player it valued whilst that player was still employed by another club. By doing so, the club incurred a "transfer fee" payment to the player's (then) employer but had saved on the actual market cost of the player's services. In this way, the salary cap influences transactions in the market for playing services to the detriment of players and the benefit of the clubs. The player does not receive his full market value; his former employer receives a payment; and the player's new club obtains the benefit of the player's services at a lower salary cost. On the one hand, this type of transaction reflects

---

[670] Statement of Club I reported at (n 635).

market efficiency since the player is moving to the club that values his services the most. But as Rottenberg asserts the free market outcome is superior since in the absence of a salary cap, the player would receive the full value of his service, and exploitation would not occur.[671]

Fourthly, the salary cap restrains the cost of player wages, thereby improving the profit for clubs. Many of the clubs interviewed confirmed that they had made a profit at some time over the last five years. In the words of Club B, *'if we want to make a profit then a salary cap is certainly of great assistance in that process'*. It is unclear whether consumers in turn have benefited from the increased profitability of clubs through lower ticket prices.

Fifthly, in 2007 not all Super League clubs spent to salary cap level. Therefore, the likelihood of the cap promoting competitive balance is reduced. The effectiveness of the cap is also reduced by some clubs spending in excess of the cap level.

Sixthly, the RFL and the clubs believed that in the absence of a salary cap, a wealthy club would dominate the competition because it could afford to pay for the best players and *'stock pile playing talent'*. Rottenberg stated that talent accumulation on one team would be limited by a club's profit motivations.[672] Additionally, in the course of the interviews, players were asked to identify the factors considered when deciding whether to enter into an employment contract with a club. Of the ten players interviewed the factor most frequently identified as of primary importance when choosing

---

[671] Rottenberg (n 655).
[672] Ibid.

to contract with a club was the opportunity to play regularly for the club's first team. In a free market the ability of a club to stock pile talent may be restrained, therefore, by the value a player assigns to playing. Players may be more likely to move to a team where the opportunity to play is present rather than remain on the bench albeit well paid at a club where the opportunities of playing are reduced.

Finally, in a professional sporting competition where the objective of clubs is win maximisation (as opposed to profit maximisation), economic theory asserts that revenue-sharing improves competitive balance.[673] Win-maximisation is generally considered to be the objective of clubs in English Premier Football,[674] and may also apply to the clubs in the Super League (although further research is required before this can be asserted conclusively). If Super League clubs are win-maximisers, then revenue sharing would achieve competitive balance by ensuring less affluent clubs are provided with additional income in order to compete for professional players. Revenue-sharing would provide teams in financially weaker markets with extra income and likely increase the number of financially viable teams. It would also be a means of achieving competitive balance without distorting competition in the market for playing services. The clubs share SLE revenue and profits, although gate receipts from Super League round-robin games are not shared.

It is evident that the clubs and the RFL have benefited financially from the salary cap whilst some players may have

---

[673] Stefan Kesenne, 'The Objective Function of a Team' in Wladimir Andreff and Stefan Szymanski *Handbook on the Economics of Sport* (Edgar Elgar Publishing Limited, Cheltenham 2006) 601, 608.
[674] Ibid 601.

incurred a reduction in earnings over the same period. This raises the issue of whether and in what circumstances private enterprise profit considerations should outweigh an employee's interest of receiving the market value for work undertaken. Certainly, a sporting code's governing body and/or a collective association of clubs like SLE should not be permitted to implement an anti-competitive measure unilaterally without first justifying the necessity for the measure to the satisfaction of competition law authorities.

6.3.4 To Protect and Nurture a Broad Competitive Playing Structure By Preventing Clubs Trading Beyond Their Means and/or Entering Into Damaging and Unsustainable Financial Arrangements

The White Paper on Sport states that a legitimate objective of sporting rules will normally relate to the organisation and proper conduct of competitive sport and may include *'the ensuring of financial stability of sports clubs and teams'.*[675] In the history of the Super League playing competition two clubs have encountered serious financial difficulties: Paris St Germaine (prior to the salary cap's introduction); and London Broncos in 2005 (following the salary cap's introduction). In the case of London Broncos the club was permitted to reform and continue operating in the Super League competition. Paris St Germaine was dissolved at the end of 1997.

Both clubs were located in a geographical area which did not have a supporter base with a strong tradition of following rugby league and which may have contributed to the financial misfortune the clubs encountered. The fact that

---

[675] White paper (n 623) 68.

London Broncos encountered financial difficulties after the salary cap had been in place for a number of years suggests that a salary cap does not prevent clubs *'entering into damaging and unsustainable financial arrangements'*, contrary to its stated aim.

Other rugby league clubs in competition divisions below Super League have encountered financial difficulties. In 2007 Widnes Vikings, a National League 1 (now known as the Championship competition) club was placed into administration following its unsuccessful attempt to secure promotion to the Super League competition. The Super League competition no longer operates under a "rule of promotion and relegation" thereby lessening the tendency for clubs to invest heavily in playing talent to gain promotion to Super League.

In addition, the licensing regime recently introduced into the Super League competition provides an incentive for clubs not to get into financial difficulty. From 2009 clubs require a licence to participate in the competition. Licences are issued for a three-year period and clubs are required to re-apply for a licence in 2011. The criteria applied for issuing a licence includes consideration of the financial stability of the club and its business performance. A club that gets into financial trouble is likely to have difficulty obtaining a Super League licence. The licensing regime, thus, provides a means of *'preventing clubs entering into damaging and unsustainable financial arrangements'* in a manner that is less restrictive - for competition in the market for playing services - than the salary cap.

6.3.5 To Protect the Welfare and Interests of All Players Participating in The Super League Competition and of All Those Aspiring to Participate in the Super League Competition

A salary cap by its very nature cannot achieve this objective. The salary cap restrains the earning potential of some players and thus does not protect the welfare and interests of all players. A player's interests are best served by receiving the market value for his playing services. A salary cap may through its restraining influence on club expenditure provide job security for players. However, the licensing regime also provides a level of job security for players without limiting a player's earning potential.

6.4 Conclusion

In the absence of economic evidence to support the necessity of the measure for improving competitive balance in the competition, the Super League salary cap infringes Article 81(1) and is void under Article 81(2).

The salary cap may, nonetheless, be exempt under Article 81(3) which provides a mechanism under which the pro-competitive benefits of the restrictive agreement are balanced against the agreement's anti-competitive effects.[676] The arguments advanced above in relation to whether the

---

[676] See the Commission (EC) 'Guidelines on the Application of Article 81(3) of the Treaty' (Notice) [2004] OJ C-101/97. Parallels may also be drawn between: the approach adopted in *Meca-Medina*; the balancing test conducted under Article 81(3); and the 'rule of reason' standard applied under the Sherman Act 1891 (USA): for a general discussion, see Anthony Arnull, Alan Dashwood etc (eds) *Wyatt & Dashwood's European Union Law* (5ed Sweet & Maxwell Ltd, London 2006) 1004 – 1014.

cap is a proportionate means of achieving a legitimate aim, apply also to arguments advanced under Article 81(3). In order to benefit from the exemption, the salary cap must satisfy four cumulative criteria, namely:

- It must contribute to improving the production or distribution of playing services or to promoting technical or economic progress;

- It must provide consumers with a fair share of the resulting benefit;

- It must impose restrictions which are reasonably necessary to the attainment of the agreement's objectives; and

- It must not afford the undertakings concerned the possibility of substantially eliminating competition for rugby league playing services.

Even if it is accepted that the salary cap: improves the distribution of playing services throughout the competition thereby improving uncertainty of outcome and benefiting the less affluent clubs and consumers, the salary cap substantially eliminates competition in the market for playing services. There is no incentive for the clubs and the RFL to raise the price above the salary cap level and no provision in the cap's administration for its increase. Unilaterally implementing a salary cap secures a competitive advantage in the market for playing services vis-à-vis an essential input used to produce the Super League competition.

Competition in the market is already restricted by the presence of a collectively dominant entity in the form of the RFL and the clubs. A dominant undertaking owes a special responsibility not to operate in a manner that distorts competition on the common market.[677] Unilaterally imposing a price fixing mechanism that distorts competition in the market and induces a player to accept a lower salary price (than might otherwise be achieved in a market that is free from the restraint) may be contrary to Article 82 (EC). Removing the cap protects the consumer interest and promotes a valuable social policy objective outlined in Article 136 (EC), namely *'the promotion of...improved living and working conditions'* for employees.

Continuing the competition law analysis, the following section demonstrates how terms contained in the players' contract and other regulatory measures combine to foreclose competition for a player's services. The effect of foreclosure is to deny a sporting code's governing body access to players for an international representative match; and to limit competition between the clubs for playing services.

---

[677] *Nederlandsche Banden-Industrie Michelin NV v Commission* (Case 322/81) [1983] ECR 3461 para 57. See also *Communication from the Commission - Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings* [2009] OJ C 45/7; and for a general discussion see Robert O'Donoghue and A Jorge Padilla *The Law and Economics of Article 82 (EC)* (Hart Publishing, Oxford 2006).

CHAPTER 7: ANTI-COMPETITIVE FORECLOSURE IN THE MARKET FOR PLAYING SERVICES

> *'People seem to expect that when you are in the final year of a contract you will do a re-negotiation. That's not always the case. You might start it two or three years before that because you recognise that player has got age on his side, he's coming good, he's going to peak in three years time, so you might want to extend their contract. So it depends on the individual player, their own circumstances and whether they have an agent or not. There's no hard and fast rule to it...*
>
> *If they are performing really well on the field and you recognise they have only got the remainder of that season to go, you might tie them up for another three years. You might do it when they have only got two years to go, or three years to go. It depends on the quality of the player again, the calibre of the player and what you want from your team...'*[678]

7.0 Introduction

Playing services are a pivotal factor of production for the Super League clubs. The provisions of a fixed term contract tie a player's services to a club; and some Rugby Football League ("RFL") Operational Rules apply to reinforce the contractual relationship. The fixed term nature of the contract and the industry practice of re-negotiating a player's contract in advance of the termination date can create labour market rigidity which in turn limits the movement of players throughout the competition.

---

[678] Interview with Club F, 29 May 2007.

Whilst under contract to a Super League club, a player may not, without the club's permission, provide playing services to an international representative team or move to another Super League club. The contractual relationship enables the club to plan a team strategy around a fixed group of players and to protect its business interests (amongst other things). During the contract term, however, circumstances may arise whereby a player may wish to terminate his employment prematurely and move to new employment; or he may wish to provide playing services to an international representative team. In those circumstances the player must obtain the agreement of his club for a release from his contractual obligations. Sometimes the agreement is not always forthcoming.

This chapter considers whether certain regulatory and contractual restraints create anti-competitive foreclosure in the market for playing services thereby infringing Articles 81 and 82 (EC). The chapter considers exclusivity and demonstrates the anti-competitive foreclosure which arises in the relevant market. It demonstrates how contractual and regulatory mechanisms: distort competition; harm competitive balance; reduce the earning potential of a player; and operate as barriers to supply in the relevant market. Finally, it concludes that more flexible contractual relations between a club and a Super League player may protect the interests of players (and consumers).

7.1 Players' Contract; RFL Operational Rules; and Contracting Practices

Set out below is a summary of the contractual provisions, regulations and contracting practices that are relevant to a consideration of anti-competitive foreclosure in the market for playing services.

7.1.1 Contract Termination

The express provisions of the contract permit termination by the player in circumstances of a club's serious or persistent breach of the terms and conditions only.[679] A club may terminate a contract in the following circumstances:

- Serious or persistent breach of contract by the player;
- Serious or persistent misconduct or wilful neglect of duties;
- Fraud, dishonesty or conduct which brings the player, the club, the RFL or the game of rugby league into disrepute;
- Conviction of a criminal offence (other than minor road traffic offences) which adversely affects the player's performance of his duties; and

[679] Players' Contract, cl 22.

- Capability (either serious injury or poor performance).[680]

The parties may also mutually agree to the contract termination. The contract provides a procedure to follow in the event of contract termination by the club and the player.[681]

In addition to the standard form clauses described above, the parties may agree to insert either or both of the following clauses from the RFL's "supplemental clause bank"[682]:

- A "prohibition against arbitrary termination" clause whereby the parties agree that the contract will terminate only in accordance with the terms of the agreement;[683]

- A "break clause" whereby a specified year of the players' contract may be conditional upon the player making a prescribed number of appearances for the club's first team in preceding playing seasons. The contract terminates in the event the player does not make the prescribed number of appearances.[684]

---

[680] Players' Contract, cl 21. Note: termination provisions may differ for those players employed at Catalans Dragons owing to French labour laws and the collective bargaining agreement which covers professional rugby league players in that country.
[681] Players' Contract, cl 21, 22 and Annex 2.
[682] The "supplemental clause bank" is a list of additional clauses which the RFL permits the parties to insert into the standard form players' contract. A copy of the supplemental clause bank is included in this thesis at Appendix 1.
[683] Rugby Football League, *Supplemental Clause Bank* (August 2007) cl 6.
[684] Rugby Football League, *Supplemental Clause Bank* (August 2007) cl 8.1(a).

7.1.2 Restraint of Trade

For the duration of his contract a player may not, without the express permission of the club:[685]

> *'a) play rugby league...for any other club or organisation whether that club or organisation be situated in England or elsewhere in the world. You recognise, accept and acknowledge that damages may not be an adequate remedy for breach of this clause and that the Club shall be entitled to an injunction or other equitable relief for any threatened or actual breach of this clause;*
> *b) take up any other employment or be engaged or involved in any trade business or occupation or participate professionally in any other sporting or athletic activity...'*

The clause, *inter alia,* precludes a player from taking up employment with an international representative team unless the club provides its consent.

7.1.3 Option

The RFL's "supplemental clause bank" permits the parties to agree to an option clause in the standard form players' contract.[686] The option is provided in favour of the club. In the event the club exercises the option, the contract term is extended and the agreement continues until the end of the extended period.

---

[685] Players' Contract, cl 13.1.
[686] Rugby Football League, *Supplemental Clause Bank* (August 2007) cl 13.

7.1.4 Prohibition Against Player Approach

The RFL Operational Rules prohibit a club from approaching a player under contract to another club until 1 September of the year in which the player's contract is due to expire, unless both clubs agree to the negotiations in writing.[687] A breach of the rule is an act of misconduct and may be subject to the RFL's disciplinary procedure.[688]

7.1.5 Right to Retain a Player's Registration

Following the termination of a player's employment contract, a player's former club may elect to retain the player's registration.[689] If the RFL subsequently registers the player at another club, the player's former club may be entitled to compensation. The rule does not prescribe the duration over which a player's former club may retain the player's registration.

---

[687] RFL Operational Rules 2009, C1:5:10.

[688] RFL Operational Rule 2009, D1:10 (f). In order to facilitate the Rule's application, the parties may agree to insert the following clauses from the RFL "supplemental clause bank" into the player's employment contract: a clause whereby the club agrees that in the event of another Super League club wishing to employ the player, the player's club will enter into negotiations in good faith with a view to reaching an agreement for the player's release and transfer (Rugby Football League, *Supplemental Clause Bank* (August 2007) cl 10); and a clause whereby the club agrees to inform the player of any approaches made by another Super League club and to permit the player to negotiate a contract with the other club: Rugby Football League, *Supplemental Clause Bank* (August 2007) cl 11.

[689] RFL Operational Rules 2009, C1:5:5.

7.1.6 Contract Duration

A Super League player's contract is a fixed term contract. The contract duration is subject to negotiation between the parties and may be any length (although typically the contract duration is between 1 and 5 years). The contract terminates on 30 November of the agreed year (unless renewed by the parties prior to the end of the fixed term period).[690] Information extracted from interviews with stakeholders during 2007 demonstrated an industry practice of re-negotiating a contract prior to its termination. A synopsis of the contract history of players described below illustrates that a player may be employed at a club for a considerable period of time in excess of the initial agreed duration. In order to place the practice in context, the annual recruitment timetable for a Super League club is also described.

7.1.6.1 Annual Recruitment Timetable

Team recruitment is an on-going process that occurs throughout the year. In general, a Super League club will begin finalising the team for the following playing season between April and June/July of each year. A club will assess the performance of a player, the duration of the player's contract and commence contract re-negotiation (if necessary) by the middle of the playing season.[691]

---

[690] RFL Operational Rules 2009, C1:1:8.

[691] Club B described its re-negotiation timetable as follows: *'We would normally meet with a player who is coming out of contract in this year by the end of June and we would tell the player whether it was our intention*

Contract re-negotiation may not necessarily occur in the final year of a player's contract. Factors such as, for example, a player's performance and age may encourage a club to re-negotiate a player's contract several years in advance of the contract termination date (and whilst the prohibition against player approach applies).[692]

On 1 September a club is permitted to approach a player who is in the final year of a contract with another club without requiring the permission of the player's then employing club. A Super League club will likely have completed its recruitment for the following playing season by October. A Super League club is required to notify the RFL of the 25 registered players who will form the club's "provisional first team squad" by 31 October; and a final first team squad list must be submitted to the RFL by 1 February.[693]

7.1.6.2 Synopsis of Player Interviews: Contract History

Set out below is a summary of the contract history of the players interviewed.

Player A was employed as a first team squad member at the club with which he was employed as an academy player. The

---

to offer a new contract and within a week we would present that offer and we would want a decision within a couple of days. We would need to know by the end of June ideally whether the player is staying at the end of the season because if he doesn't want to stay, we've got to start our recruitment programme as well.'

[692] See comment of Club F in the introduction to this chapter.

[693] RFL Operational Rules 2009, B1:9.

contract terminated when the club was relegated to the competition division below Super League. Player A's next two employment contracts (one with a second Super League Club and another with a club in the Australian NRL competition) were each of one year duration and terminated by effluxion of time. Player A then entered a three-year contract with a Super League club. The player's performance during the first year of his contract resulted in the club and A agreeing to extend the contract duration by a further three years. The total duration that A was contracted to the club was six years.

Player B was employed as a first team squad member - under the terms of a three-year contract - by the club with which he was also employed as an academy player. Prior to the termination of the contract, B agreed a new three-year contract with the club. In the second year of the latter contract, B's improved playing performance resulted in the club and B agreeing to terminate the existing contractual arrangement and enter into a new three-year fixed term contract. The total duration that B was contracted to the club was eight years.

Player C did not obtain his first full time professional contract with the club at which he was employed as an academy player. Instead, owing to a period of time spent on loan to a second Super League club whilst an academy player, C signed a two-year contract with the second Super League club. Prior to the termination of the contract, the parties agreed a new three-year contract. The total duration that C was contracted to the club was five years.

Player D was employed as a first team squad member at the club with which he was employed as an academy player. The two-year contract duration terminated by mutual consent at the end of the contract's first year. D subsequently agreed a contract with a second Super League club for a three-year fixed term. During the contract term, the parties agreed to extend the contract duration by a year. The total duration that D was employed by the club was four years. The contract terminated without the parties entering a new agreement.

Player E was employed as a first team squad member under the terms of a four-year contract at the club with which he was also employed as an academy player. The contract terminated prematurely when the club was relegated to the competition division below Super League. E then agreed a two-year contract with a second Super League club. The contract terminated without the parties entering a new contract. E subsequently agreed a two-year contract with a third Super League club. E's contract with the third Super League club terminated after one year by mutual consent. E entered into a one-year fixed term contract with a fourth Super League club.

Player F was employed as a first team squad member at the club with which he was employed as an academy player. The contract duration was three years and it terminated without the parties entering in to a new contract. F then agreed a three-year contract with a second Super League club. It also terminated without the parties entering a new contract. F subsequently entered into a three-year fixed term contract with a third Super League club.

Player G was employed as a first team squad member at the club with which he was employed as an academy player. G then entered into two successive two-year contracts with the club before the club was relegated and his then existing contract terminated. Subsequently, G agreed a three-year contract with a second Super League club. The contract terminated after one year due to the club's relegation to the competition division below Super League. G signed a new contract with a third Super League club which terminated after one year. Following that contract termination, G signed a one-year contract with a fourth Super League club which terminated without the parties entering a new contract. G then agreed a one-year contract with a Championship (formerly known as National League 1) club. The club was promoted to Super League and G signed a two-year employment contract with the newly promoted club. The total duration that G was contracted to the club was three years.

Player H was employed as a first team squad member at a Super League club following a period of employment at two National League 1 clubs. The contract with the Super League club was a two-year fixed term contract. Prior to its termination, the parties entered a three-year contract. The total duration that H was contracted to the club was five years.

Player I was initially employed by a Super League club as a first team squad member under the terms of a three-year contract. At the end of the first year, the contract was re-negotiated and its duration extended by a year. Prior to the extended contract terminating, the parties agreed a two-year contract. Player I and the club subsequently entered into

successive contracts of varying lengths. The final contract between the club and Player I terminated prematurely by mutual consent. Player I was employed by the club for a period in excess of ten years.

Player J was employed as a full time first team squad member at a Super League club following a period of employment in the Australian NRL. His contract terminated after two and a half years without the parties agreeing a new contract. J then agreed a two-year contract with a second Super League club.

The interviews with players demonstrated the way in which the termination of a fixed term contract contributed to the movement of players throughout the competition. It also illustrated that the total period of time over which a player may be contracted to a specific club can exceed the initial agreed duration. The player's performance was an important factor in the decision to re-negotiate the contract and the time at which contract re-negotiation took place.

7.2 Asymmetry of Information in the Industry

The players' contract is prescribed by the RFL and sets out the terms and conditions of employment between a player and a Super League club.[694] Remuneration, other financial benefits and contract duration are matters for individual

[694] The contract is used by the French and British Super League clubs. Players employed by Catalans Dragons sign two employment contracts: the players' contract; and a French employment contract. The French employment contract incorporates the terms of a collective bargaining agreement which covers players employed at Catalans Dragons; and provides for employment matters in accordance with French labour law.

negotiation between a club and a player (and are subject to constraints imposed by the salary cap regulations). But the terms contained in the standard form players' contract may not be altered. The RFL permits limited amendments to the contract by the parties inserting clauses from a "supplemental clause bank".[695] The players' contract was drafted following consultation with the clubs, sports agents and the Rugby League Players' Association (although the extent of the consultation is unclear). The RFL Operational Rules are usually implemented without consultation with players. Failure to comply with the RFL's requirements concerning the form of contract is an act of misconduct.[696] It may also delay a player's registration with a club.

The interviews with stakeholders demonstrated an asymmetry of information in the industry, specifically concerning the legal effect of regulations and the players' contract. All players interviewed stated that they did not seek legal advice prior to entering their first full time employment contract with a Super League club. Seven of the players took advice from someone with knowledge of sports employment contracts (for example, a sports agent, a family member, retired professional player or current professional player); one player took advice from a family member who did not have experience of sports employment contracts; and two players did not seek any advice.

As the player progressed through a professional career he retained the services of an agent. At the time of interview all players were represented by an agent, although contact with

---

[695] See Appendix 1 for a copy of the supplemental clause bank.
[696] RFL Operational Rules 2009, C1:1:7.

the agent was usually limited to discussions concerning salary and remuneration during a contract negotiation.

Only a few players were aware of the effect for their employment of some regulatory rules (for example, the effect of registration or the "club trained rule"). Players were not informed by the RLPA of the effect for their employment of certain RFL Operational Rules or contract provisions. By contrast, the clubs were aware of the regulatory rules and the contents of the players' contract. Overall, the interviews with stakeholders demonstrated an information gap between the clubs on the one hand and players on the other.

The asymmetry of information in the industry; the standard form nature of the players' contract; the non-negotiability of some contract clauses; and the player's potential exclusion from the industry in the event that he refuses to accept the standard terms provided, highlights the unequal position of the parties during a contract negotiation. It also creates inequality of bargaining power.[697] These factors are relevant to a consideration of the anti-competitive effect of the players' contract and other mechanisms under European competition law.[698]

---

[697] One academic describes how inequality of bargaining power may create market failure as follows: *'two distinct forms of market failure are likely to occur when a trader deals on standard terms: first, the consumer faced with a [standard term contract] may not know of or understand the meaning of the contract terms and is therefore unable to make a proper choice among the options available on the market (inability to choose); secondly even when the consumer is able to do so, he will lack the power to have the contract changed (inequality of bargaining power): a supplier is unlikely to find it worth altering his standard terms just to satisfy one customer, unless of course the latter is particularly important (has, in other words, bargaining power)'* – Paolisa Nebbia, 'Standard Form Contracts Between Unfair Terms Control and Competition Law' [2006] EL Rev 102, 103.

[698] See for example, Cases T-191/98 *Atlantic Container Line v Commission* [2003] ECR II-3275.

7.3 Foreclosure and Article 81(EC)

In order to determine whether or not the mechanisms described above infringe Article 81 (EC), the principles established in *Delimitis v Henninger Brau AG*[699] and *Unilever Bestfoods (Ireland) Ltd (formerly Van Den Bergh Foods Ltd previously named HB Icecream Ltd) v Commission*[700] are relevant.

7.3.1 Delimitis; Unilever Best Foods (Ireland) Ltd

In *Delimitis* the European Court of Justice considered whether or not a beer supply agreement contained within a café lease infringed Article 81 (EC). Clauses contained within a lease agreement obliged the tenant to purchase a minimum amount of: specified alcoholic drinks from the brewery; and non-alcoholic drinks from a brewery subsidiary.

The European Court of Justice confirmed that a beer supply agreement similar to that at issue was prohibited if two cumulative conditions were met: first, that having regard to the economic and legal context of the agreement at issue it was difficult for competitors to gain access to the market; and secondly, that the agreement in question made a significant contribution to the sealing off effect brought about

---

[699] Case C-234/89 [1991] ECR I-935.

[700] Case 552/03 P [2006] ECR I-9091; Case T-65/98 *Van den Bergh Foods Ltd (formerly HB Ice Cream Ltd) v Commission* [2003] ECR II-4653; and *Van den Bergh Ltd Foods* (Cases IV/34.073, IV/34.395 and IV 35.436) Commission Decision 98/531/EC [1998] OJ L 246/1.

by the totality of all similar agreements operating in the market.[701]

The agreement at issue in *Delimitis* also contained a clause which permitted the tenant to purchase beer from undertakings based in other Member States thereby potentially reducing the anti-competitive effect of the agreement. On this issue, the European Court of Justice averred that:

> *'If an interpretation of the wording of the access clause or an examination of the special effect of the contractual clauses as a whole in their economic and legal context shows that the limitation on the scope of the prohibition of competition is merely hypothetical or without economic significance, the agreement in question must be treated in the same way as a classic beer supply agreement...The position is different where the access clause gives a national or foreign supplier of beers from other Member States a real possibility of supplying the sales outlet in question. An agreement containing such a clause is not in principle capable of affecting trade between Member States within the meaning of Article 85(1) with the result that it escapes the prohibition laid down in that provision.'*[702]

Drawing an analogy with *Delimitis*, the contractual clauses and the regulatory provisions may be prohibited if - having regard to the economic and legal context in which the agreement arises (including the similarity of the agreement with others on the relevant market):

- it is difficult for another club or a sporting code's governing body to compete for a player's services; and

---

[701] *Delimitis* (n 699) para 27. The question of whether the beer supply agreement at issue *Delimitis* was prohibited under Article 81 (EC) was left for the national court to determine.
[702] *Delimitis* (n 699) paras 31 - 32.

- the player's individual agreement makes a significant contribution to sealing off competition in the relevant market (taking into account, in particular the duration of the individual contract).

Delimitis was followed in *Unilever Bestfoods Ltd,* a case which concerned a claim arising from the terms of a distribution contract used by Ireland's largest manufacturer of ice cream, HB Icecream Ltd ("HB Ice cream"). HB Icecream manufactured and supplied ice creams to retail outlets under a contract which included a term that HB Icecream would provide the retailer with a freezer free of charge (or for a nominal rent) for the purposes of storing and selling ice cream. The supply of a freezer was conditional upon the retailer only using the freezer to stock products made by HB Ice cream ("freezer supply term").

Mars Ltd, a competitor of HB Ice cream, alleged that the freezer supply term limited competition in the market for the supply of ice creams and affected detrimentally competition in the market for the sale of ice cream. Owing to the freezer supply term a retailer: was less likely to purchase another freezer in order to stock ice creams manufactured by HB Ice cream competitors; and/or was less likely to purchase an additional freezer if space constraints precluded installing a second freezer in the retailer's shop.

The European Court of Justice confirmed the Commission's findings that the clause infringed Articles 81 and 82 (EC). The effect of the freezer supply term was to create de facto "outlet exclusivity" to the benefit of HB Ice cream; and to foreclose access to those retail outlets to the company's

competitors. The fact that the retailer could terminate the distribution contract on short notice did not preclude such a conclusion.[703] When assessing the effect of the clause on the relevant market the duration of the contract and the cumulative effect of all similar contracts on the market were relevant.[704] Evidence collected by the Commission demonstrated that a retailer terminated a distribution contract on average every eight years therefore the fact the retailer could terminate the contract on short notice did not operate to reduce the degree of foreclosure in the market.[705] Applying the principles described, the effect of the contract terms and regulations for competition in the market for playing services is discussed below.

7.3.2 Player Exclusivity and Foreclosure

The contract duration; the limited way in which a player may terminate the contract; the restraint of trade clause; a Super League club's right to retain a player's registration; and the prohibition against player approach; apply to foreclose competition for a player's services. If the parties agree to an option clause, then that too contributes to foreclosure in the market for playing services to the Super League competition ("the relevant market").

The fact that the contract may be terminated prematurely by the player; or that a club may consent to the premature termination of a contract in order for a player to take up employment at another club; or that regulatory rules

---

[703] *Unilever Bestfoods* (ECJ) (n 700) para 55.
[704] *Unilever Bestfoods* (ECJ) (n 700) paras 55 and 84.
[705] *Unilever Bestfoods* (CFI) (n 700) para 105 (confirmed on appeal in *Unilever Bestfoods* (ECJ) (n 700)).

promulgated at an international level may contractually oblige a Super League club to release a player for international representative matches, does not operate to reduce the degree of foreclosure on the relevant market.

First, the contract is enforceable during the period when the player does not terminate the agreement. The foreclosure effect continues for the entire period that a contract between the club and player is extant. Secondly, a player is unlikely to terminate a contract prematurely preferring instead to remain employed. Furthermore, regulatory penalties apply to a player who unilaterally terminates his contract and also to a club that induces a player to breach a contract. The penalties may apply to discourage the premature termination of a player's contract.

By way of example, in 2007 Mr Paul Cooke unilaterally terminated his contract with Hull FC and took up employment at Hull KR. At the disciplinary proceedings which followed Mr Cooke was suspended for six Super League matches and ordered to pay the costs of the disciplinary hearing.[706] If Mr Cooke's employment contract had provided for the payment of appearance bonuses, then the financial penalty for the player would have been considerably greater.

Thirdly, it is unlikely that a club will terminate a player's contract prematurely unless it is in the club's best interests (for example, the club receives a transfer payment as consideration for agreeing to the early termination of the player's contract; or the player's services are no longer

---

[706] 'Cooke Suspended Over Hull KR Move' *BBC Sport* (London, 14 November 2007) <http://news.bbc.co.uk/sport2/hi/rugby_league/super_league/hull_kr/6976654> accessed 10 January 2009.

required by the club; or the player is permanently injured; or conduct issues arise).

Finally, a club acting in its own self-interest is unlikely to consent to a player providing services to another employer (for example, a sporting code's governing body) during the contract duration.[707] The issue is particularly acute in instances of a scheduling conflict between an international representative rugby league match and a Super League or Challenge Cup match. In those circumstances, it is likely that the club will prefer arrangements which minimise inconvenience to it.[708]

In summary, a Super League club acquires "outlet exclusivity" in respect of every player with whom it enters a contract. The exclusivity enables a Super League club to foreclose competition for a player's services for the duration of the contract. Competition may arise from another Super League club or a sporting code's governing body. Competition is not completely foreclosed because: a player may move to a new club with the agreement of his former club; or a club may give its consent to a player providing his

---

[707] The release of players for international matches has been an issue of dispute in other sports such as rugby union: see *Premier Rugby Ltd and Ors v Rugby Football Union and Ors* [2006] All ER (D) 412 (QB). See also (Jul); 'English Club-v-Country Row Ended' *BBC Sport* (London, 2 November 2007) <http://news.bbc.co.uk/sport2/hi/rugby_union/7074681.stm> accessed 21 January 2009; 'IRB Seeks to Settle Scotland Row' *BBC Sport* (London, 23 September 2008) <http://news.bbc.co.uk/sport2/hi/rugby_union/scottish/7629463.stm> accessed 21 January 2009; 'Player Release Move Upsets Scots' *BBC Sport* (London, 26 November 2008) <http://news.bbc.co.uk/sport2/hi/rugby_union/scottish/7750215.stm> accessed 21 January 2009; and 'RU High Court Player-Row Win' *BBC Sport* (London, 24 October 2008) <http://news.bbc.co.uk/sport2/hi/rugby_union/welsh/7687755.stm> accessed 21 January 2009.

[708] *Sea Containers/Stena Link: Interim Measures* (Case IV/34.689) Commission Decision 94/19/EC [1994] OJ L15/8.

services to an international representative team. However, it is not necessary for complete foreclosure to arise; the fact that access by competitors is rendered *'very difficult'* is sufficient.[709]

The degree of foreclosure increases as the contract duration lengthens. In respect of some players the contract duration may be one year and therefore the period of time over which access to the player's services is foreclosed brief. As the contractual circumstances of the ten players interviewed demonstrates, however, a player may be employed by a club for a period considerably in excess of the initial agreed duration. Potentially, a player may be tied to a club for the duration of his playing career and competition from other clubs (or a sporting code's governing body) foreclosed significantly. The foreclosure effect is likely to be more significant in the circumstances of talented players because a club may be more inclined to tie up the services of a talented player for a lengthy period.

The regulatory penalties which apply for a breach of the RFL Operational Rules; the potential for a player's registration to be refused; and the prospect of paying a transfer fee may discourage a club from approaching a player before 1 September. Waiting until a club is permitted to approach in September of the final year of a player's contract may result in reduced employment opportunities for a player. Clubs have usually finalised a team list for the forthcoming season by that time. In order to secure his continued participation in the Super League competition, a player is more likely to enter a new contract with his current club (or extend an

---

[709] *Van den Bergh Ltd Foods* (Cases IV/34.073, IV/34.395 and IV 35.436) Commission Decision 98/531/EC [1998] OJ L 246/1 para 149.

existing contract) at the earliest opportunity (provided the terms are favourable) rather than wait until other clubs are permitted to approach.

Finally, players employed in the competition are engaged under identical terms and conditions of employment. The regulations apply to all players and clubs equally. Thus, there is a cumulative effect for competition in respect of every player employed in Super League.[710]

In conclusion, the combination of the contractual provisions and the relevant regulations tie a player to a Super League club. The resultant effect is to deny access to a player's services by another Super League club or a sporting code's governing body. Whether the foreclosure of competition is justified taking into account the context in which the agreement arises and the nature of professional sport is considered in the following section.

7.4. Foreclosure of Access: Other Super League Clubs

The calibre of players employed at a club usually determines the on-field competitiveness of the club in the Super League competition. The capacity to retain talented players to the exclusion of other Super League clubs benefits a club's on-field performance and consequently the financial success of a club's business.

The players' contract is inherently restrictive since it obligates a player to play for a club for a fixed term in return

---

[710] *Unilever Bestfoods* (ECJ) (n 700) para 53. See also *Delimitis* (n 699) paras 14 - 15; and Case 23/67 *Brasserie de Haecht SA v Wilkin (No 1)* [1967] ECR 407 paras 4 - 6.

for payment of remuneration. Limiting competition from other Super League clubs by means of contractual provisions and regulations may be justified on the basis that it enables a club to:

- manage team stability;
- design the team's playing strategy with knowledge of its team members;
- plan for future recruitment;
- protect the business interests of a club; and
- maintain competitive balance in the Super League competition by preventing a club from poaching a player (particularly during the playing season).

These factors may all be legitimate aims of a professional sports business which relies upon the team's competitiveness on the field to generate revenue. A limited period of exclusivity (such as, for example, one year or two years) may be a proportionate means of achieving those aims. However, owing to the contract re-negotiation practice, the duration of exclusivity is indeterminate in respect of every player in the competition. Furthermore, in the case of talented players the period of exclusivity may be quite lengthy.

Foreclosing competition for a player's services for an indeterminate period of time creates an unduly rigid labour market. It allows a club to retain the services of skilled players to the exclusion of other teams, particularly a weaker

team who may require talented players in order to improve quickly. The effect is demonstrated by the experience of a club promoted to the Super League competition (when the competition operated under a "rule of promotion and relegation"). Those clubs interviewed referred to difficulties recruiting players following promotion owing to:

- The requirement to recruit players with playing skills of a standard for the Super League competition.[711]

- The time of confirmation that the club was promoted to Super League (promotion into Super League was confirmed in early October);[712] and

- The fact most players were already under contract to another Super League club.[713]

The recruitment difficulties had flow-on effects for other facets of a club's business and also contributed to a pattern of promotion and relegation for the club.[714] The capacity of a

---

[711] According to one Championship club (formerly National League One): *'...you've got to transform from a part time club to a full time club and basically decimate your squad because they may have been good enough to win National League One but nine out of ten players in National League One wouldn't hack it in Super League because there is a huge gulf between Super League and National League One'* – interview with Championship Club B, 21 September 2007.

[712] According to one Super League club the main difficulty was: *'lack of time to prepare for the beginning of the season...The grand final for promotion was October 8. The first League game was 10 February so you have very very little time to recruit players; to financially fund ground improvements which are required to meet the Super League standards; and without a doubt the overriding timescale or lack of particularly when you bear in mind that you have Christmas and New Year in between...'* – Interview with Club D, 22 February 2007.

[713] Championship Club B stated: *'...you're literally behind the eight ball because anyone who is moving has already moved by this time or signed up with a Club so all you're left with is what's left...'*

[714] Championship Club A described the difficulties as follows: *'The main [difficulty] is in terms of your on-field competitiveness because you are very late in finding out that you have gained promotion and that means*

team to improve quickly is important otherwise weaker teams remain at the bottom of the league table thereby potentially harming competitive balance. On this basis, the consumer interest may be served by more *not less* competition between clubs for playing services.

A balance is required between the business interests of a club and the interests of consumers. Reducing the period of exclusivity may increase competition between the clubs for playing services. It may also increase the price of the player's services thereby promoting a valuable social policy objective outlined in Article 136 (EC), namely the *'promotion of...improved living and working conditions'*.

7.5 Foreclosure of Access: A Sporting Code's Governing Body

A sporting code's governing body requires playing services to field a team in an international representative match. Those playing services are usually tied by an employment contract to a club in the Super League competition or the Australian NRL. Participation in international matches alone does not provide a full time income for a player. Also, international matches are played infrequently and a player must practise his skills to remain "match fit".

---

that all the players are signed and you are left with players who nobody else wants when you are recruiting. That obviously proves difficult the following year when you haven't been able to recruit the quality of players that you need to compete at the highest level. That then impacts on everything else because it means that you have a very difficult job just to stay in Super League let alone to develop your club and build for a strong future' – interview with Championship Club A, 19 November 2007.

In respect of those players participating in the Super League competition, restraints in the players' contract may create a barrier to the supply of playing services. Foreclosure in the market for playing services may limit access by a sporting code's governing body to a player's services with consequent detrimental effects for: innovation; competition in a downstream market; and the consumer interest. The following sections consider the effects for players, consumers and a sporting code's governing body when competition in the market for playing services is foreclosed to a sporting code's governing body.

7.5.1. Pathway of Access Provided Under the Regulatory Framework

The regulatory framework for rugby league provides a pathway of access to a professional player's services for a sporting code's governing body. Rule 4.1(a) of the Rugby League International Federation Rules states that a player who has been selected to play in an international representative match *'must be made available by his club for all such matches for which he is selected and for training sessions where possible'*.[715] The RFL is obliged *'if the Federation so directs'* to ensure that its rules and by-laws *'contain provisions requiring that all contracts between clubs and players shall give effect to'* the rule.[716]

Rule B6:5 of the RFL Operational Rules 2009 gives effect to Rule 4.1(a). Under Rule B6:5, *'each club agrees to release any player selected to play in a Representative Match'*

---

[715] Rugby League International Federation Rules (January 2001), 4.1(a).
[716] Rugby League International Federation Rules (January 2001), 4.2.

subject only to a requirement that an international representative squad training session is '*fixed so as not to interfere with the integrity of the Super League season*'.[717] Furthermore, pursuant to the RFL Operational Rules, '*each club agrees to be bound by and comply with RLIF regulations*'.[718] Finally, clause 15 of the players' contract states that '*the club shall observe the Regulations all of which take precedence over the club rules*'. Although the players' contract contains a restraint of trade clause which, prima facie, permits a club to refuse a player's release for an international match, insofar as an inconsistency arises between the players' contract and the regulations, the RFL Operational Rules take precedence.[719] A club is therefore obliged under the players' contract and the regulatory framework to release the player.

Sometimes, however, a Super League club will not release a player for an international representative match. The situation generally arises in circumstances where the international representative match conflicts with a domestic match and the club requires the player's services.

In taking into account, the effect of foreclosing access by a sporting code's governing body to a player's services, the collectively dominant position of the clubs and the RFL on the market for playing services is relevant.[720] The clubs and the RFL collectively operate as a de facto monopsonist in the market for playing services. The players are dependent upon the clubs for employment in the Super League competition;

---

[717] RFL Operational Rules 2009, B6:5.
[718] RFL Operational Rules 2009, B6:13.
[719] See chapter four of this thesis.
[720] Case T-65/98 *Van den Bergh foods Ltd (formerly HB Icecream Ltd) v Commission of the European Communities* [2003] ECR II-4653 paras 90 - 91. Confirmed on appeal in *Unilever Best Foods* (ECJ) (n 700).

the players' contract and the RFL Operational Rules are non-negotiable; and a player has limited bargaining power to negotiate more favourable terms for his release.

A player who wishes to play in the Super League competition must accept the terms and conditions contained within the RFL's standard form players' contract and must comply with the RFL Operational Rules or forfeit playing in Super League. During the contract negotiation process, a player is unable to compel changes to terms and conditions which may reduce the foreclosure effect; or secure his release for an international representative match.

In addition, the reasons provided by a club for not releasing the player are relevant. During interview, the clubs provided the following as reasons for the non-release of a player:

- the absence of insurance cover provided by a sporting code's governing body to cover a player for injury;
- the necessity for a player to participate in forthcoming domestic competition fixtures;
- injury; and
- other player welfare concerns (such as fatigue).

Due to the nature of professional sport and the likelihood of a player sustaining injury whilst playing, making access to a player's services conditional upon the sporting code's governing body holding a valid insurance policy may justify a refusal to provide access. The refusal in those circumstances

is based on player welfare and is a proportionate response to a legitimate aim.

A club refusing to release a player because of injury or fatigue invites an inquiry into the reasons behind the club adopting such a paternalistic position. That is because the decision not to participate in an international match on the basis of injury or fatigue is for a player to make. A player provides a personal service to an international sporting code's governing body. If a player is injured or considers the distance of travel to be too fatiguing, then a player may decline to participate in the international representative match. A player cannot be compelled to provide personal services;[721] if a player were to decline to play, a sporting code's governing body would have to accept the decision.

A refusal to release a player on the basis that the player's services are required for a domestic fixture may not be justified taking into account the collectively dominant position of the clubs and the RFL in the market for playing services; and the bargaining power of the player. Furthermore, the commercial necessity for the clubs must be balanced against the players' interests of participating in an international representative match; the interests of a sporting code's governing body; and the consumer interest.

7.5.1.1 Players' Interest

The pinnacle of sporting achievement for a professional rugby league player is selection to an international representative team. A player achieves selection to an

---

[721] *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209 (KB).

international representative team through participation in a domestic rugby league competition. The RFL selects its players principally from the Super League competition; the Australian Rugby League ("ARL") selects players from the Australian NRL; and the New Zealand Rugby League ("NZRL") selects its players from the Super League competition and the Australian NRL.

Some clubs interviewed commented that releasing a player for an international representative match benefited the player and the club. According to some clubs interviewed, a player benefited through the opportunity: to improve playing skills at an international level; to learn new playing skills under a different coach; and to advance a playing career. The club (as the player's employer) and the club's sponsors benefited through an association with the player.

In the modern era of professional sport, participation in an international representative team also:

- provides income for a player under a contract with a sporting code's governing body;

- provides financial benefits under a professional club contract in the form of performance bonuses and/or an improved salary and/or a contract extension and/or a contract re-negotiation;

- enhances a player's public profile with potential for endorsement opportunities to follow; and

- provides the opportunity to obtain an employment contract at another professional club.

Refusing permission for a player to participate in an international representative match on the basis that his services are required in a domestic fixture causes financial detriment to the player (which the player may be unable to recover). A player does not receive a separate payment for consenting to the restraint of trade under the terms of the contract which may compensate for the lost opportunities to participate in an international match. Potentially a player could be prevented by the club from participating in any international representative match for the duration of his contract.

7.5.1.2 The Interests of a Sporting Code's Governing Body; and Consumers

Professional playing services enable a sporting code's governing body to field a team in an international representative match and to earn income. A match between two international representative sides generates income through ticket sales, merchandising, sponsorship and the sale of television broadcast rights. A sporting code's governing body may use that revenue to fund its activities (including, for example, the development and promotion of the sport at an amateur level).

A match between international representative teams provides consumers with the opportunity to see the world's best players. If access to eligible international representative players is foreclosed because the player's services are required in the domestic competition, the quality of the international representative match may decrease. A

consumer may be discouraged from attending the international game or viewing it on television. In the short term there may be a decrease in ticket sales (or demand) for the international product.

Moreover, sponsorship contracts and the contract for the sale of television broadcast rights are concluded in advance of the international match being played and before the international representative team is selected. Consumer demand is a factor which determines the value of sponsorship deals and the sale of television broadcast rights. In the long term, foreclosure of access to international representative playing services may result in a decrease in consumer demand for the international match; and a de-valuing of sponsorship contracts and/or the contract for the sale of the television broadcast rights. (European competition law may still apply even if the international match takes place outside the European Union. The foreclosure effect arises in the common market; and international matches are televised to consumers in Europe).

In addition to acquiring a player's playing services, a sporting code's governing body will also acquire the commercial use of the player's intellectual property. A player may have a photo taken or a shirt may be produced with the player's name on it for sale by the sporting code's governing body. If denied access to a player's services, merchandise which uses the player's intellectual property is not produced.

By way of example, in April 2008 Mr Brent Webb (Leeds Rhinos) and Mr Thomas Leuluai (Wigan Warriors) were selected to play for the New Zealand international representative team in the annual ANZAC test in Australia.

Leeds Rhinos and Wigan Warriors refused permission for the pair to play in the test because of forthcoming Challenge Cup fixtures and Super League fixtures for which the players' services were required.[722] The travelling involved over a short period of time was also of concern for the clubs. The RFL supported the clubs' position.[723] The issue was resolved by the Rugby League International Federation and the players were eventually released to play for the New Zealand representative team.[724]

A similar dispute did not arise concerning the release of players for the international match between France and England, which was played in France in June 2008. Players were released by the Super League clubs despite round nineteen of Super League fixtures being played that same weekend. The match involving Catalans Dragons was held during the week after the international representative match because the majority of Catalans Dragons' players were selected to play for France.

---

[722] 'Leeds and Wigan to Lose Kiwi Pair' *BBC Sport* (London, 2 May 2008) <http://news.bbc.co.uk/sport1/hi/rugby_league/7375188.stm> accessed 28 July 2008; 'Anzac Test Cash Worth Fighting For' *The New Zealand Herald* (Auckland, 4 May 2008) <http://www.nzherald.co.nz/section/4/story.cfm?c_id=4&objectid=10507808> accessed 28 July 2008.

[723] 'RFL Backing Rhinos and Wigan' *Skysports* (London, 30 April 2008) <http://www.skysports.com/story/0,19528,12196_3500086,00.html> accessed 29 July 2008. The article reported the following statement made by the RFL: *'The Rugby League International Federation's (RLIF) rule states that international selections should take priority over domestic playing requirements. The RFL fully supports that principle; however, in respect of mid-season internationals, we clearly understand the legitimate concerns of our clubs when travel between hemispheres places an unreasonable demand on players. Also in this case the international in question falls within an extremely important period for the clubs. This includes the showcase Millennium Magic event which places additional heavy demands on players and the Carnegie Challenge Cup fifth round, which is a sudden-death fixture in a hugely important competition'.*

[724] 'World Body Has Say Over Kiwis' *The New Zealand Herald* (Auckland, 2 May 2008) <http://www.nzherald.co.nz/section/4/story.cfm?c_id=4&objectid=10507423> accessed 28 July 2008.

Co-ordinating the international playing calendar in a way that minimises scheduling conflicts benefits the clubs, players, a sporting code's governing body and consumers. As the Advocate General observed in *MOTOE:*[725]

> *'...it is in the interests of the sportspersons participating in the event, but also of the spectators and the public in general, that the individual competitions in a particular sport are incorporated into an overarching framework so that, for example, a specific timetable can be followed. It may make sense to prevent clashes between competitions so that both sportspersons and spectators can participate in as many such events as possible.'*

In rugby league the international calendar is usually organised in a way that minimises conflicts with fixtures in the Super League competition and the Australian NRL. The scheduling of the international match in June 2008 between England and France is an example. However, that does not prevent disputes concerning the release of players arising (particularly disputes concerning access to playing services by a sporting code's governing body located in the southern hemisphere).

In the situation of Messrs Webb and Leuluai neither the terms of the players' contract or the RFL Operational Rules secured the release of the players. The RFL supported the position adopted by the clubs thereby obstructing the pathway of access for the NZRL. Although player fatigue was a reason for the non-release, commercial reasons were also a factor. The players' services were required for Super League fixtures and Challenge Cup fixtures (the latter competition being one from which the RFL benefits financially).

---

[725] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID ("MOTOE") v Elliniko Dimosio* [2008] 5 CMLR 11 para 94 (Advocate General Kokott).

The incident demonstrates the necessity for competition law to secure the pathway of access to playing services for a sporting code's governing body in order to protect the players' interest, the consumer interest and the interest of sporting code's governing bodies. It also highlights the need for an independent regulator of the Super League competition.

7.6 Article 81(3)

The contractual and regulatory restraints which create a barrier to the supply of playing services to a Super League club and a sporting code's governing body may not be justified when the employment interests of players, the interests of a sporting code's governing body and the consumer interest are taken into account. The foreclosure of competition: does not improve the distribution of playing services throughout the competition; may not benefit consumers; and eliminates competition for a player's services for an indeterminate period. An exemption under Article 81(3) is, therefore, unlikely.

7.7 Foreclosure and Article 82 (EC)

The RFL and the clubs form a collectively dominant entity on the market for playing services and owe a special responsibility not to act on the market in a manner which distorts competition for a player's services.[726] Recourse to

[726] See discussion in chapter five of this thesis.

means other than those based on competition on the merits may be an abuse of a dominant position.[727]

Competition in the market for playing services is already restricted owing to the collective dominance of the RFL and the clubs. The foreclosure of competition in the manner described above may be an abuse of a collectively dominant position. The abuse arises when the club induces the player to provide "outlet exclusivity" on terms which are favourable to the club without providing the player the opportunity to negotiate more favourable release terms and/or compensation in respect of the restraints.[728] The fact that the player signs the contract thereby accepting its terms; and that the agreement and the relevant regulations may be standard practice in the professional sports industry, are irrelevant to a consideration of abusive conduct under Article 82 (EC).[729]

The exclusivity created operates: to deny a player the opportunity to move to a new club on more favourable terms; and to deny a player the opportunity to play in an international representative match, even though there may be demand for the player's services. The reasons discussed previously in relation to justification under Article 81 (EC) are also relevant to an alleged infringement of Article 82 (EC). For the reasons already discussed, the justifications are unlikely to succeed in relation to an alleged infringement of Article 82 (EC).

---

[727] Case 85/76 *Hoffmann-La Roche v Commission* [1979] ECR 461 para 91.
[728] See by analogy *Unilever Bestfoods* (CFI) (n 700) para 159.
[729] Ibid paras 159 - 160.

Foreclosure of competition in the market for playing services may also lead to abusive conduct in the form of tying and leveraging practises. Examples of further abusive conduct are illustrated by the contract termination circumstances of Mr Iestyn Harris and Mr Jordan Tansey which are examined below.

7.7.1 Mr Iestyn Harris

In 2001 Mr Harris was mid-way through a five-year employment contract with Leeds Rhinos. He approached Leeds Rhinos seeking the club's agreement to an early termination of his employment contract so that he could accept an offer of employment with Cardiff Rugby Union Football Club ("Cardiff"). Mr Harris' intention was to play professional rugby union and gain selection to the Welsh international representative team for the Rugby Union World Cup in 2003.

The club was reluctant to release Mr Harris from his contract owing to the fact that Mr Harris had '*established himself as a world-class rugby player of outstanding talent*'.[730] Nonetheless, Leeds Rhinos agreed to the premature termination of Mr Harris' contract in consideration of:

- An agreement from the Welsh Rugby Union for the payment of £750,000 and the use of a hospitality box at the Millennium Stadium; and

---

[730] *Leeds Rugby Limited v Iestyn Harris and Bradford Bulls Holdings Limited* [2005] EWHC 1591 (HC) para 4.

- An agreement from Mr Harris that upon termination of his employment contract with Cardiff, Mr Harris would - if required by Leeds Rhinos - enter into a twelve-month employment contract with the club ("the re-employment option").

The terms and conditions of the re-employment option included, inter alia, that Mr Harris' remuneration at Leeds Rhinos would be no less favourable than the remuneration paid under his employment contract with Cardiff. Mr Harris' employment with Leeds Rhinos was subsequently terminated and he took up employment with Cardiff. In July 2004, following the termination of his Cardiff employment contract, Mr Harris entered into a contract with Bradford Bulls (instead of returning to employment with Leeds Rhinos as he was obliged under the re-employment option).

Leeds Rhinos commenced legal proceedings against Mr Harris and Bradford Bulls alleging breach of contract against Mr Harris; and inducement of breach of contract against Bradford Bulls. The proceedings were defended on the basis, inter alia, that the re-employment option was an unreasonable restraint of trade and void. The High Court concluded that the re-employment option was, in the circumstances of the case, a reasonable restraint of trade.[731] In the Court's view whilst the clause prevented Mr Harris from plying his trade it did no more than was reasonably necessary taking into account the interests of the parties and the interests of the public.[732]

---

[731] *Leeds Rugby Limited* (n 730) para 56.
[732] *Leeds Rugby Limited* (n 730) paras 50 - 53.

The Court was reluctant to intervene in the private contractual relations between Mr Harris and Leeds Rhinos owing to the fact that Mr Harris:

- Secured an early termination of his (then) employment contract in order to pursue a job opportunity elsewhere; and

- Secured future employment at an equivalent salary to that on which he was employed at Cardiff.[733]

Freedom of contract is a fundamental tenet of contract law. In the area of competition law, freedom of contract

---

[733] *Leeds Rugby Limited* (n 730) paras 50 - 53. According to the High Court: *'As to Leeds, it appears to me to be plain beyond argument that it was reasonable for the club to secure, if it could, the services for Mr Harris, for another year even if that year was some distance away in time. It is true that the clause was not required for the conventional reason (trade secrets, customer connection and the like) but in circumstances such as obtain here, that is immaterial. It was in my judgment entirely reasonable for Leeds to reserve the right to call upon its former star player to play again for the Rhinos in the event that he chose to revert to rugby league...*
I reject the suggestion that securing the services of Mr Harris for that year was just another way of increasing the transfer fee or can be regarded as treating Mr Harris as if he were a chattel. I do not find it helpful to test the reasonableness of the clause by reference to fanciful scenarios such as that Mr Harris might (when still in his 20s) decide to leave rugby for a career in the media. I doubt if retaining Mr Harris on terms no less favourable to him than were payable by Cardiff was, from a purely financial point of view, commercially advantageous to Leeds...
Treated in isolation, clause 5 may be said to be contrary to the interests of Mr Harris in the sense that it would be better from his point of view to have complete freedom of choice as to which, if any, club he might play for if and when he left Wales in 2004....At the time when the release contract was entered into, no one concerned had any reason to doubt that if Mr Harris decided to return to rugby league, Leeds would be the club of his choice.
Moreover whether he appreciated it or not at the time, I have no doubt that Mr Harris (who, it should be remembered, had both an agent and a solicitor representing him at the time) was more than willing to accept the option as part of the price to be paid for being free to pursue his dream of playing for Wales. Moreover it would be wrong to overlook the fact that it was Mr Harris's decision to leave Cardiff in 2004 which triggered the option...the result of the option was that Mr Harris became employed and not that he was denied employment' - Leeds Rugby Limited (n 730) paras 50-53.

frequently defers to the interests of competition in the open market. Case authority asserts that *'undertakings can not avail themselves of criteria based on the law of contract in order to prevent the realisation of the objectives of competition law in the community.'*[734] Arguments concerning the validity of the re-employment option under European competition law were not raised by the parties and therefore were not considered by the Court.[735] It may, however, have been advantageous for the Bradford Bulls and Mr Harris to have defended the proceeding relying upon Article 82 (EC). Mr Harris' employment contract with Leeds Rhinos was negotiated prior to the current version of the players' contract taking effect therefore its precise terms are unknown; and the extent of the foreclosure effect unclear. However, the following general points can be made.

At the relevant time, Leeds Rhinos formed part of a collectively dominant entity, together with the other Super League clubs and the RFL, in the market for playing services. The club tied the re-employment option to an agreement for the early termination of Mr Harris' employment. Mr Harris was unable to secure his release unless he provided the re-

---

[734] *ABG Oil Companies operating in the Netherlands* (Case IV/28.841) Commission Decision 77/327/EEC [1977] OJ L117/1 para 91. In the context of copyright protection, the European Court of Justice has concluded that an exclusive right to license copyright under intellectual property law does not always prevail over European competition law: Case C-241/91 *Radio Telefis Eireann and Independent Television Publications Limited v Commission* [1995] ECR I-743; and Case C-418/01 *IMS Health GmbH and Co OHG v NDC Health GmbH and Co KG* [2004] 4 ECR I-5039.

[735] Owing to the direct effect of European competition law, national courts may raise competition law issues even if the issue is not pleaded by the parties: Bellamy and Child, *European Community Law of Competition* (6ed Oxford University Press, Oxford 2008) para 14.058. See also Cases C-430 and 431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705. A consideration of whether or not the English High Court was obliged to raise the issue in the absence of legal submissions is beyond the scope of this thesis.

employment option. The effect of the option was to foreclose competition for Mr Harris' services in the market for playing services in the event that Mr Harris chose to return to a career in professional rugby league. The club's conduct provided it with a competitive advantage at the expense of competition from other clubs. Once re-employed with Leeds Rhinos, the club would have been in a position to re-negotiate Mr Harris' employment contract thereby foreclosing competition for his services again.

In the absence of the re-employment option, Mr Harris was free to negotiate with all interested Super League clubs in an open market; and an efficient allocation of playing resources would have occurred. Instead the re-employment option: denied other Super League clubs the opportunity to compete for Mr Harris' services and to acquire the commercial use of his intellectual property; and denied consumers of those clubs the opportunity to see Mr Harris performing for their respective team or to purchase merchandise in their team colours adorned with Mr Harris' intellectual property. The foreclosure of competition in this way also prevented the distribution of playing services throughout the competition (potentially harming competitive balance).

Mr Harris was *'a very important asset and a key player'* to the club.[736] The club required the transfer payment and re-employment option in order to *'protect its interests.'*[737] The club would likely have benefited commercially in a number of ways (for example, through the sale of merchandise, ticket sales or the payment of a higher transfer fee) had Mr Harris remained at the club. The commercial interests that Leeds

---

[736] *Leeds Rugby Limited* (n 730) para 4.
[737] *Leeds Rugby Limited* (n 730) para 9.

Rhinos sought to protect may also have been satisfied by additional monetary compensation agreed between the parties.

Once Mr Harris expressed a desire to move to another employer, it was difficult for Leeds Rhinos to prevent that occurring. The personal nature of the services provided and the length of time remaining on his (then) employment contract may have prevented the club from enforcing the restraint of trade clause by way of an injunction.[738] In the circumstances, Leeds Rhinos was in the position of having to mitigate its losses (which could have been satisfied by way of agreement on the monetary payment).

By tying the re-employment option to an agreement for the player's early release, Leeds Rhinos abused a collectively dominant position. The exclusivity acquired by the club through a collectively dominant position in the market for playing services, enabled it to tie the re-employment option to an agreement for Mr Harris' early release. The conduct resulted in anti-competitive foreclosure.[739] An individual member of a collectively dominant entity can infringe Article

---

[738] For a discussion concerning specific performance of a contract for personal service, see chapter four of this thesis.

[739] The Commission defines "anti-competitive foreclosure" as: *'a situation where effective access of actual or potential competitors to supplies or markets is hampered or eliminated as a result of the conduct of the dominant undertaking whereby the dominant undertaking is likely to increase prices to the detriment of consumers'*: Commission (EC), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) COM (2009) 864 final, 9 February 2009 para 19.
The expression 'increase prices' refers to: *'the power to maintain prices above the competitive level and is used as shorthand for the various ways in which the parameters of competition – such as prices, output, innovation, the variety or quality of goods or services – can be influenced to the advantage of the dominant undertaking and to the detriment of consumers'* – ibid para 11.

82 (EC) even if others within the collective entity do not act in a similar way.[740]

The re-employment option went further than was reasonably necessary in the circumstances to protect Leeds Rhinos' commercial interests; its effect of foreclosing the market for playing services militated against the measure being a proportionate means of protecting those interests. The re-employment option was thus void and unenforceable, and Mr Harris was entitled to enter into the employment contract with Bradford Bulls. The subsequent legal proceedings were misconceived as a breach of contract and the result in favour of Leeds Rhinos merely reinforced the abusive conduct.[741]

7.7.2 Mr Jordan Tansey

A similar situation appears to have arisen in the case of Mr Jordan Tansey.[742] At the relevant time Mr Tansey was a 22

---

[740] See Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969 in which the Court of First Instance stated in reference to an abuse of a collectively dominant position: '*the abuse does not necessarily have to be the action of all the undertakings in question. It only has to be capable of being identified as one of the manifestations of such a joint dominant position being held. Therefore, undertakings occupying a joint dominant position may engage in joint or individual abusive conduct. It is enough for the abuse conduct to relate to the exploitation of that joint dominant position which the undertakings hold in the market*' – ibid para 66.

[741] Legal principles concerning severance may apply in circumstances where the abusive conduct relates to clauses contained within an agreement: see *English Welsh and Scottish Railway Ltd v EON UK plc* [2007] EWHC 599; and Richard Whish *Competition Law* (6ed Oxford University Press, Oxford 2009) 312 – 314.

[742] The facts describing Mr Tansey's circumstances arise from a statement issued by the club on its website and a report of the contractual arrangements published by the British Broadcasting Corporation: Leeds Rhinos Official Website 'Rhinos Agree New Deal With Tansey' (Leeds, 1 October 2008) <http://www.leedsrugby.com/> accessed 17 October 2008. See also 'Tansey Set For Move to Australia' *BBC Sport* (London, 1 October 2008) <http://news.bbc.co.uk/sport1/hi/rugby_league/leeds/7646053.stm> accessed 17 October 2008.

year old professional rugby league player and mid-way through a contract with Leeds Rhinos. Leeds Rhinos agreed to release Mr Tansey from the final year of his (then) employment contract in return for Mr Tansey entering a new contract. Under the terms of the new contract Mr Tansey agreed to play for the Sydney Roosters (an Australian NRL club) in 2009 and 2010; and to play for Leeds Rhinos in 2011.[743] The precise circumstances of Mr Tansey's contract termination and the terms of the new contract are unknown. The contract re-negotiation circumstances suggest, however, that the club may have infringed Article 82 (EC) again in order to retain a young player's services for the future.

7.8 The RFL's Registration System: A Barrier To The Supply Of Playing Services

A valid employment contract with a Super League club does not guarantee a player entry into the Super League competition. Every rugby league player who wishes to participate in the Super League or Challenge Cup competitions must register with the RFL. Only registered players are eligible to play in Super League or Challenge Cup matches, or to train with a Super League club.[744] A player may only register with one club at a time,[745] and the total

---

[743] Commenting on the club's website the Leeds Rhinos Chief Executive, Mr Gary Hetherington, stated: *'We recognised that Jordan's opportunities have been limited in his favoured positions of full back or in the half backs because of the presence of world class players like Brent Webb, Rob Burrow and Danny McGuire at the club. This is a fantastic opportunity for him to go and play in the NRL and hopefully he will return in 2011 to put his experience to use with the Rhinos'*- Leeds Rhinos Official Website 'Rhinos Agree New Deal With Tansey' (Leeds, 1 October 2008) <http://www.leedsrugby.com/> accessed 17 October 2008.

[744] RFL Operational Rules 2009, C1:2:1.

[745] RFL Operational Rules 2009, C1:1:2.

number of players that a club may register is limited.[746] A club that permits an unregistered player to train or play is guilty of misconduct and disciplinary penalties apply.[747]

Registration with the RFL requires a player to have an employment contract with a Super League club. In the event that registration is refused, the consequences for competition in the relevant market are severe. Refusing registration eliminates the supply of a production factor to a club; and distorts competition in the relevant market. A club is unable to use a player's services and a player is unable to provide services, even though a valid employment contract may exist between the club and player.

Owing to the dominant position occupied by the RFL, competition in the market is already restricted. If the RFL acts in a manner that further reduces competition in the market by, for example, refusing a player's registration, an infringement of Article 82 (EC) may arise. The abusive conduct is the refusal to supply the player's registration.[748]

Although the consequences of refusing registration are severe, the conduct must be assessed in light of the unique characteristics of professional sport. Refusing to supply the playing services may be justified if the non-registration of the

---

[746] A club is not permitted to have more than 40 players on its club register unless it enters teams in the academy competition: RFL Operational Rules 2009, C1:2:5. If the club enters one team in the academy competition, it is permitted to register 50 players; and if it enters two teams in the academy competition, it is permitted register a total of 65 players: ibid.

[747] RFL Operational Rules 2009, C1:2:1.

[748] See Commission Guidance (Article 82 Enforcement) (n 739) paras 75 – 90; and cases concerning a refusal to supply such as: Cases 6 and 7/73 *Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission* [1974] ECR 223; *Sea Containers/Stena Link: Interim Measures* (n 708); and Case C-7/97 *Oscar Bronner GmbH & Co v Mediaprint Zeitungs* [1998] ECR I-7791.

player supports the pursuit of a legitimate aim and is proportionate.[749] The section below considers the reasons provided for refusing to register a player with a club.

7.8.1 Reasons for a Refusal or Cancellation of a Player's Registration

Rule C1:2:3 of the RFL Operational Rules outlines the RFL's power to refuse a player's registration. The RFL may refuse to register a player with a club if, inter alia:

- the club with whom the player seeks registration owes money to the RFL or another club;
- the player's registration would bring the game into disrepute or adversely affect the integrity of the competition;
- the player's registration with the club would adversely affect the club's ability to remain within the salary cap regulations (or the club has failed to provide information as required under the salary cap regulations);
- the club has failed to provide documentation to the RFL concerning the club's tax liabilities or the documentation provided suggests that it is not prudent to register the player;

---

[749] Case C-519/04 *Meca-Medina and Majcen v Commission* [2006] ECR I-6991.

- the player is serving a suspension or ban imposed by the RFL or another governing body of any sport in any part of the world; or

- the player or club has not complied with the rules pertaining to registration;

In addition, the RFL may refuse a player registration if: the player is moving from a club in another country and does not have a "clearance" from the governing body with whom the player was previously registered;[750] or the RFL has placed an embargo on a club's capacity to register players.[751]

The RFL is also entitled to cancel a player's registration if inter alia:

- the club or player provides misleading or incomplete information during the registration process;[752]

- the RFL believes that to allow the registration to continue would bring the game into disrepute or adversely affect the integrity of the competition;[753]

- the player's immigration status changes '*or is such that it is illegal for the player to be registered or to play for a club'*;[754] or

- the club breaches the "overseas quota" rule.[755]

---

[750] RFL Operational Rules 2009, C1:4:5.
[751] RFL Operational Rules 2009, C1:2:13(g), C1:5:1, and C1:5:6.
[752] RFL Operational Rules 2009, C1:2:3(h).
[753] RFL Operational Rules 2009, C1:2:3(i).
[754] RFL Operational Rules 2009, C1:2:3(j).
[755] RFL Operational Rules 2009, C1:4:6.

In some circumstances, the RFL may refuse to accept a player's contract thereby preventing the registration of the player.[756] There are also deadlines for registration of a player.[757]

7.8.2 Justifications Advanced for Refusing Registration

Rule C1:2:3 provides that the purpose of the rules pertaining to the refusal of a player's registration is:

> *'To ensure as far as possible the long term financial survival of rugby league clubs and adherence to the salary cap rules and to protect the integrity of the competitions and prevent the Game being brought into disrepute'*

The objectives are discussed in turn.

7.8.2.1 To Ensure the Long Term Financial Survival of the Club

These objectives mirror those pursued by the salary cap and were discussed previously in chapter 6 of this thesis. Ensuring the financial viability of clubs that participate in its competition may be a legitimate objective for the RFL to pursue as part of the administration and proper conduct of rugby league. However, other mechanisms within the regulatory framework monitor the long term financial survival of the clubs, most notably the licensing system.

---

[756] RFL Operational Rules 2009, C1:2:3.
[757] RFL Operational Rules 2009, C1:2:6 - C1:2:8.

Furthermore, at the time of entering a contract with a Super League club, the asymmetry of information within the industry is such that a player will not know the financial situation of the club. He will be unaware of whether the club has paid its tax liabilities; or adhered to the salary cap rule; or paid money owing to another club. The RFL does not publish financial information concerning the clubs.

During the contract negotiation the player accepts at face value the club's capacity to negotiate a contract. By agreeing a contract with the player, the club demonstrates it can satisfy the obligations under an employment contract including that of providing the player with a reasonable opportunity to play. Applying the registration system as a debt collection mechanism penalises the player in circumstances where the player is not aware of the club's infringement. Arguably, it is unfair for the RFL to apply the registration system in this manner.[758] It may also induce a breach of the employment contract.

7.8.2.2 To Ensure Adherence to the Salary Cap Rules

Refusing a player's registration as a means of reinforcing other anti-competitive conduct that arises in the market for playing services is unlikely to satisfy the *Meca Medina* test.[759]

---

[758] See for example *BBI/Boosey & Hawkes: Interim Measures* (Case IV/32.279) Commission Decision 87/500/EEC [1987] OJ L 286/36 para 19 in which the Commission stated, *'a dominant undertaking may always take reasonable steps to protect its commercial interests but such measures must be fair and proportionate'* – ibid.

[759] For an explanation of the *Meca-Medina* test, see chapter one of this thesis.

Refusing registration on this basis is, therefore, an abuse of a dominant position.

7.8.2.3 To Protect the Integrity of the Competitions and Prevent the Game Being Brought into Disrepute

These objectives are similar to those discussed previously in relation to the salary cap. Refusing a player's registration may be justified for public policy reasons (for example, the fact the player is serving an anti-doping ban or has been convicted of conduct which brings the game into disrepute). In those circumstances it is the player's conduct which prevents the registration; the player forecloses competition in the market himself not the RFL or the club. The player may also be in breach of the employment contract.

7.8.2.4 Absence of a "Clearance"

The system of registration for rugby league players in the United Kingdom is determined by the RFL subject to: directions issued by the Rugby League International Federation ("RLIF"); and the RLIF's regulations pertaining to the movement of players between countries.

In respect of a player who moves between countries, a "clearance" must be obtained from the sporting code's governing body with whom the player was formerly registered before the player may be registered within another jurisdiction.[760] An RLIF member is not permitted to

---

[760] Rugby League International Federation Rules (January 2001), r 2.5. "Clearance" is defined in the Rugby League International Federation Rules as *'the consent of a Clearing Member to the registration of a player under*

register a player from another jurisdiction without a clearance.[761] The sporting code's governing body with whom the player was formerly registered is obliged to provide the clearance unless that sporting code's governing body's system of registration permits the player's former club to retain the registration.[762]

The RFL Operational Rules state that '*no club shall register a player who has previously been registered with a member of the RLIF until such time as the RFL has received a clearance from that member*'.[763] It is a misconduct offence if a club registers or attempts to register a player contrary to RLIF Regulations.[764]

The RLIF's requirement for a player to obtain a clearance may create a barrier to the supply of playing services to a club in the Super League competition if the absence of a clearance prevents a player from being registered by the RFL. The RLIF rule is implemented by the RFL and therefore may be subject to European competition law.

There may be valid administrative reasons for requiring a clearance from the sporting code's governing body with whom the player was formerly registered. For example, the document may confirm whether or not a player has the qualifications to play; and whether or not the player has outstanding disciplinary penalties to serve. It may be

---

whose system or registration a player is currently or was last registered as a player for a club under the system of registration of another Member, Affiliate or Honorary Member': Rugby League International Federation Rules (January 2001), r 2.

[761] Rugby League International Federation Rules (January 2001), r 2.3.

[762] Rugby League International Federation Rules (January 2001), r 2.4.

[763] RFL Operational Rules 2009, C1:4:5.

[764] RFL Operational Rules 2009, C1:2:10.

justified, therefore, for the organisation of professional rugby league and for the timely transfer of players between jurisdictions.

However, if another sporting code's governing body refuses to provide a "clearance" on the basis that the player's former club is owed money, then the principal purpose of the clearance system is to protect the financial interests of clubs (specifically the player's former club). If the "clearance" is not forthcoming on this basis, then refusing access to the Super League competition may be unjustified. Neither the RLIF rule nor the RFL rules limit the time period over which a former club may retain the player's registration. Potentially a player may be excluded from the Super League competition for an unlimited duration. In those circumstances the registration system operates as a barrier to supply for an unlimited period of time.

If the reason the player's registration is retained by his former club relates to the non-payment of transfer fees between two clubs, then by refusing to register the player, the RFL forecloses access and abuses a dominant position in the market for playing services. The player has no involvement or interest in the financial transactions between clubs. The player may have a valid employment contract with a Super League club and therefore a contractual right to work. The nature of a player's employment requires the frequent exercise of playing skills; and consumers will be denied indefinitely the opportunity of seeing the player perform in the Super League competition if financial transactions between clubs take precedence.

The issue is more problematic if the player's clearance is not forthcoming because of an outstanding contract dispute between the player and the player's former club. In those circumstances the terms of the player's contract with his former club are relevant, specifically the terms of a restraint of trade clause. In circumstances where a player is still under contract, the RLIF rules provide that a conditional "clearance" may be issued. The RFL may therefore register the player on the basis of a conditional clearance pending resolution of the dispute.

7.8.2.5 Cancellation of the Player's Registration

By cancelling a player's registration, the RFL terminates an existing supply relationship. The cancellation of registration prevents the player providing services under a valid employment contract and may lead to termination of the latter contract. Termination of an existing supply relationship may be an abuse of a dominant position.[765] The reason for the cancellation will be relevant to a consideration of justification. It may be reasonable for the RFL to provide the player and the club with a hearing prior to the decision being made, and for the RFL to provide a reasonable period of notice before the cancellation takes effect.[766]

---

[765] Commission Guidance (Article 82 Enforcement) (n 739) para 84; and *Commercial Solvents* (n 748); and Case 27/76 *United Brands Co v Commission* [1978] ECR 207.

[766] *British Midland/Aer Lingus* (Case IV/33.544) Commission Decision 92/213/EEC [1992] OJ L96/34.

7.8.2.6 Rejection of the Player's Contract or Contract Extension

The reasons, upon which the RFL would rely to "reject" a player's contract and therefore refuse his registration, are unclear. If the contract is not of the prescribed form, the RFL may reject the registration application and return the contract to the club thereby delaying registration until the prescribed documents are in order. The latter course of action is an example of administrative conduct applied for the benefit of the organisation of the competition and not abusive conduct.

7.8.2.7 Registration Deadlines

Refusing a player's registration on the basis that the registration application is submitted after the registration deadline, may be justified in the interests of the organisation and proper conduct of sport (provided the deadlines are proportionate and reasonable).[767]

7.9 Conclusion

In conclusion the contractual relations and regulatory framework in the Super League competition foreclose access to a player's services by another professional club or a

---

[767] See Case C-176/96 *Lehtonen v Federation Royale Belge des Societes de Basket-ball ASBL* [2000] ECR I-2681, in which the European Court of Justice acknowledged in the context of claim under Article 39 (EC) that transfer deadlines may regulate competitive balance in a competition and promote the effective functioning of the competition: ibid 53 – 55.

sporting code's governing body. The result is an unduly rigid labour market which may inhibit the movement of players throughout the competition and prevent weaker clubs improving quickly. The "outlet exclusivity" acquired by a club under the terms of the players' contract and the relevant RFL Operational Rules, enable a Super League club to attach conditions to the access, which may abuse a collectively dominant position. The supply of playing services to a Super League club is pivotal for the production of the competition. Barriers to supply may reduce the quality of the competition for consumers.

The following section considers whether the terms of supply of a player's intellectual property infringe Article 82 (EC).

CHAPTER 8: TYING THE SUPPLY OF A SUPER LEAGUE PLAYER'S INTELLECTUAL PROPERTY TO THE EMPLOYMENT CONTRACT

> *'If it moves out there, we sell it. If it is capable of carrying an advertisement, we sell it.'*[768]

8.0 Introduction

A property right does not exist in a sports event per se.[769] A sports event is a plethora of tangible and intangible properties which, when combined, produce an entertainment product that is sold to consumers. Those properties include: the regulatory framework and playing rules; the stadium and other fixed assets supplied to hold a match; a club brand; playing skills; and a player's intellectual property (amongst others).

A significant amount of revenue is generated in the Super League competition from the sale of intellectual property. The clubs organise collectively to sell properties such as the television broadcast rights and other central sponsorship arrangements. From the perspective of a sponsor or advertiser, the Super League competition is a platform on which a firm can advertise a product to consumers. A firm may enter into a sponsorship contract with a club, Super League (Europe) Ltd ("SLE") or a player in order for its product, logo or advertisement to be displayed during

---

[768] Interview with Club J, 24 July 2007.

[769] *Victoria Park Racing and Recreation Grounds Co Ltd v Taylor and Others* [1937] 58 CLR 479; *Sports and General Press Agency Ltd v 'Our Dogs' Publishing Co Ltd* [1917] KB 125.

matches: on a billboard in a stadium; a playing shirt; or other clothing worn by the player.

The Super League competition has a specific audience demographic that appeals to sponsors who wish to market a product to that particular audience. [770] According to one sponsor of rugby league, the sport appeals as a vehicle to promote a product because it: has a reputation for being a "family sport"; is largely devoid of hooliganism, drugs scandals or other controversial issues which may discourage sponsorship; and is played by a range of ethnic minority groups.[771]

Rugby league is the ninth most popular sport by general interest in the United Kingdom.[772] In 2004 it was the ninth most televised sport.[773] Market research indicates that television viewer interest in rugby league is spread across socio-economic levels, with the majority of viewers falling within the lower middle class category (32%) followed by skilled working class viewers (25%) and those viewers who fall within the upper middle and middle class categories (21%).[774] The sport's television audience in the United Kingdom is located principally in Yorkshire and Lancashire, Cumbria, the North East and London. The average weekly

---

[770] According to the Rugby Football League ("RFL"), *'We have a decent understanding of where our core markets are and we don't get many sponsors like the Famous Grouse or Land Rover...our support base on the whole comes from northern working class communities and therefore the kinds of companies that need visibility in those areas are different from the kinds of companies that need visibility along the M4 corridor for instance'* – interview with the RFL, 29 October 2007, England.

[771] Interview with Sponsor 1, 26 November 2007, England.

[772] Mintel, *Report on Cricket and Rugby* February 2006. Football is the most popular, followed in order by snooker, cricket, rugby union, motor racing, tennis, athletics and golf: ibid.

[773] Ibid. The most televised sport was football, followed in order by golf, motorsports, cricket, tennis, motorcycling, rugby union and general sports. Snooker was the 12th most televised sport: ibid.

[774] Mintel (n 772).

match attendance for a Super League game is 10,420.[775] The average weekly attendance for an individual club varies considerably.[776] The television audience and the number of consumers that attend a Super League game or watch the competition on television encourages some firms to associate their products with the competition.

A club requires a player's intellectual property in order to satisfy commercial obligations under contracts for sponsorship, advertising, and the sale of television broadcast rights. In addition, limiting the capacity of a player to sell his intellectual property protects the value of the contracts the club has entered; and limits opportunities for "ambush marketing".[777] The contractual arrangements in place for acquiring the intellectual property of a Super League player raise a number of competition law concerns, specifically in relation to: the commercial value paid by the clubs for the intellectual property; the method of acquiring the intellectual property; and the scope of the terms imposed.

---

[775] RFL, *Record of Super League Attendance 2000-2008* (as at 4 September 2008).

[776] Average club attendances for the Super League Competition in 2008 (as at 4 September 2008) were: Leeds Rhinos 17,043; Wigan Warriors 14,505; Warrington Wolves 9,572; Wakefield Trinity Wildcats 7,042; St Helens 10,404; Hull KR 8,417; Hull FC 13,432; Huddersfield Giants 8,179; Harlequins RL 3,888; Catalans Dragons 8,376; Castleford Tigers 7,454; and Bradford Bulls 10,287: ibid.

[777] Ambush marketing is defined as *'the unauthorised association by a business of its name, brand, products or services with a sports event, through any one of a range of marketing activities in order to benefit from the goodwill the organiser has generated in the event without paying any rights fees for the privilege'* – Iain Higgins, Stephen Boyd and Richard Hawkins, 'Image Rights' in Lewis and Taylor (eds) *Sport: Law and Practice* (2ed Tottel Publishing Ltd, Haywards Heath 2008) para G1.21.

8.1 Scope of a Player's Intellectual Property

A professional rugby league player relies upon his: playing skills; physical body; reputation; goodwill; and personality, in order to generate income from a professional career which is of a limited and uncertain duration. These qualities and characteristics comprise a player's image. There is, however, no legal recognition in the United Kingdom of a property right in a person's image per se.[778] The Courts have frequently asserted that an "image right" (or "character right" as it has often been termed) does not exist:

> *'Although the position is different in other jurisdictions, under English law it is not possible for a celebrity to claim a monopoly in his or her image, as if it were a trademark or brand'.*[779]

---

[778] For a general discussion, see: Higgins (n 777) G3; Dominic Farnsworth, 'Does English Law Lack Personality' 3(AUG) [2001] ISLR 210; Ian Blackshaw, 'Protecting and Exploiting Sports Image Rights' 3-4 [2005] ISLJ 42; and Jennifer Davis 'Fame and it Exploitation: The Legal Protection of Celebrity in the United Kingdom' in Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds) *The Regulation of Sport in the European Union* (Edward Elgar Publishing Ltd, Cheltenham 2007) 181.

[779] *Douglas and Others v Hello! Ltd and Others* (No 3) [2008] 1 AC 1, 83 (Lord Walker of Gestingthorpe). Whilst an athlete can not assert a property right in his or her image per se, for tax purposes, it is recognised that image rights are capital assets: see *Sports Club plc v Inspector of Taxes* [2000] STC (SCD) 443.

In some European countries (such as, for example, Spain) a legal right of personality, often combined with a right to protection and family life, is expressly protected by a constitutional document: Ian Blackshaw and Robert CR Siekmann (eds) *Sport Image Rights in Europe* (TMC Asser Press, The Netherlands 2005) 387.

In the United States of America, the Courts recognise a right of publicity which: attaches to a person's name, likeness or persona; and can be assigned, licensed, sold and protected from commercial misappropriation: *Haelan Labs v Tops Chewing Gum* 2002 F 2d 866 (2nd Cir 1953); and *Cardtoons LC v Major League Baseball Players Association* F 3d 959 (CA 10 Okl 1996, August 27 1996). In *Carson v Here's Jonny Portable Toilets Inc* (1983) 698 F 2d 831 the right was described as follows: '*The theory of the right is that a celebrity's identity can be valuable in the promotion of products, and the celebrity has an interest that may be protected from the unauthorised commercial exploitation of that identity...The famous have an exclusive legal right during life to control and profit from the commercial use of their name and personality*': ibid 835.

Professional sports people and celebrities have instead relied upon a number of different legal claims in order to control the commercial use of an image. These include copyright law,[780] trademark law,[781] passing off,[782] defamation,[783] the tort of malicious falsehood,[784] the Data Protection Act 1988[785] and some regulatory codes (for example: the Advertising Authority's Code of Practice for Television or Radio; or the

---

[780] See the Copyright Designs and Patents Act 1988 (UK) ("CDPA 1988"). Copyright exists in original literary, dramatic, musical or artistic works, sound recordings, films or broadcasts and the typographical arrangement of published editions: CDPA 1988, s 2. Copyright exists in a photograph of a professional sportsperson or in a broadcast of a sporting event but not in the sportsperson's image or the event per se: *Victoria Park Racing* (n 769). A copyright owner is entitled to sell, licence or assign the copyright in a work. The author of the work, namely the person who creates it, is the first owner of the copyright. The author and first copyright owner of a photograph is the photographer, whilst the author of the broadcast of a sports event is the television production company that produces the broadcast. Copyright in a sports event may be licensed to generate additional revenue through the sale of video recordings, DVDs, CD-Rom, advertising video games or transmission on the internet: R Verow, *Sports Business: Law, Practice and Precedents* (2ed Jordans, Bristol 2005) 114.
SLE and the clubs provide a licence to SKY television to attend and broadcast Super League matches. Copyright in the broadcast is assigned to SLE under a contract between SKY television and the Super League clubs: personal correspondence with the RFL dated 3 September 2008.

[781] Registration of a distinctive mark creates a legal right which may be commercially exploited. There are limitations to acquiring trademark registration for a sportsperson's image. An entire image may not obtain registration although aspects of a sportsperson's image may be capable of registration. Also, a trademark indicates the origin of merchandise. Some unauthorised uses of a professional sports person's image may be descriptive rather than indicative of the origin of the product and thus not a breach of trademark law: see the Trademarks Act 1994 (UK), s 1(1); *Sid Shaw Elvisly Yours v Elvis Presley Enterprises* [1997] RPC 543 (ChD); and Case C-206/01 *Arsenal Football Club v Mathew Reed* [2003] 3 All ER 865 (ECJ).

[782] *Eddie Irvine v Talksport Ltd* [2002] 1 WLR 2355 (appealed to the Court of Appeal on the issue of damages only: see *Irvine v Talksport Ltd (Damages)* [2003] EMLR 26 (CA)).

[783] *Tolley v Fry* [1931] AC 333 (HL).

[784] *Kaye v Robertson* [1991] FSR 62 (CA).

[785] Claims brought under the Data Protection Act 1988 have focussed upon the unauthorised processing of personal data: see, *Campbell v Mirror Group Newspapers Ltd* [2004] 2 AC 457 (HL); and Stephen Boyd and Rosemary Jay, 'Image Rights and the Effect of the Data Protection Act 1998' 15(5) [2004] Ent L R 159.

Press Complaints Authority's Code of Practice).[786] More recently, the common law doctrine of breach of confidence has developed so as to protect the unauthorised commercial exploitation of a person's image based on the right to respect for private life enshrined in the European Convention on Human Rights (and ratified in the United Kingdom by the Human Rights Act 1998).[787] Increasingly, the common law doctrine is being used to protect the commercial exploitation of a person's image.[788] Whilst falling short of recognising an image right per se or a right of personality, the Courts accept: that there may be commercial value in an image

---

[786] *Outcome of Appeal by the Number (UK) Ltd regarding complaint by David Bedford* Oftcom Advertising Complaints Bulletin, 27 January 2004.

[787] Article 8 of the European Convention of Human Rights ("the Convention") provides that: '*Everyone has the right to respect for his private and family life, his home and his correspondence.*' In *Von Hannover v Germany* [2004] EMLR 21, the European Court of Human Rights confirmed that the concept of private life extends to aspects relating to personal identity such as a person's name, or picture: ibid para 50. It also includes a person's physical and psychological integrity: ibid. See also *Sciacca v Italy* (2005) 43 EHRR 20, in which the European Court of Human Rights reiterated that the concept of private life included elements relating to a person's right to his or her picture: ibid para 29. The right to respect for one's private life is not absolute. In circumstances where a right to a private life conflicts with the right to freedom of expression, which is protected by Article 10 of the Convention, a balancing exercise is undertaken to determine which Convention right prevails: see Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe para 11 which states: '*The Assembly reaffirms the importance of everyone's right to privacy, and of the right to freedom of expression as fundamental to a democratic society. These rights are neither absolute nor in hierarchical order, since they are of equal value'.* Public interest considerations which favour publication of certain information (irrespective of how the information is obtained) may outweigh privacy considerations in some circumstances.
The extent to which fundamental human rights may be relied upon to challenge clauses within a private contract is unclear: see generally Dawn Oliver 'The Human Rights Act and Public/Private Law Divides' [2000] 4 EHRLR 343; H Beale and N Pittam 'The Impact of the Human Rights Act 1998 on English tort and contract law' in D Friedmann and D Barak-Erez (eds) *Human Rights in Private Law* (Hart Publishing, Oxford 2008) 131; O Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights' (2006) 13(2) MJ 195; and O Cherednychenko, 'Fundamental Rights and Contract Law' (2006) 2(4) ERCL 489.

[788] See: *Campbell* (n 785); *Douglas and Others v Hello! Ltd and Others (No 3)* [2006] QB 125 (CA); *Max Mosely v News Group Newspapers Ltd* [2008] EWHC 1777 (QB); *McKennitt v Ash* [2008] QB 73 (CA); and *Murray v Big Pictures (UK) Limited* [2008] ECDR 12 (CA).

when contained in, for example, a photograph; and that the value may be protected from commercial exploitation under common law by application of the breach of confidence doctrine.[789]

A professional rugby league player's image has commercial value. The player's skills and the nature of his occupation serve to create a public profile. By cultivating a reputation, persona or image which appeals to consumers and product managers, a player may earn money through endorsements. The player's image also has commercial value for a club and the Rugby Football League ("RFL") since it is used in the sale of merchandise; brand promotion; advertising; sponsorship; and television broadcast rights from which the clubs and the RFL benefit financially.

---

[789] In *Douglas* (CA) (n 788), the Court of Appeal upheld a damages award made to the actors Catherine Zeta Jones and her husband Michael Douglas following the unauthorised publication of wedding photos. According to the Court of Appeal, *'We can see no reason in principle why equity should not protect the opportunity to profit from confidential information about oneself in the same circumstances that it protects the opportunity to profit from confidential information in the form of a trade secret...Where an individual 'the owner' has at his disposal information which he has created or which is private or personal and to which he can properly deny access to third parties, and he reasonably intends to profit commercially by using or publishing that information, then a third party who is, or ought to be, aware of these matters and who has knowingly obtained the information without authority, will be in breach of duty if he uses or publishes the information to the detriment of the owner'*- ibid 164 - 165.
Photographs are considered particularly intrusive of a person's right to a private life: *'...the courts have consistently recognised that photographs can be particularly intrusive and have showed a high degree of willingness to prevent the publication of photographs, taken without the consent of the person photographed but which the photographer or someone else sought to exploit and publish. This protection extended to photographs, taken without their consent, of people who exploited the commercial value of their own image in similar photographs, and to photographs taken with the consent of people but who had not consented to that particular form of commercial exploitation, as well as to photographs taken in public or from a public place of what could be seen if not with a naked eye, then at least with the aid of powerful binoculars' - Theakston v MGM Ltd* [2002] EMLR 398, 423 - 424 (QB).

8.2 Terms of the Players' Contract

In the course of a player's employment with a Super League club, the player provides: his playing skills; and his intellectual property. A player's skills and intellectual property have separate and distinct commercial values and these are acquired by a club (and the RFL) under the terms of the players' contract. Pursuant to the relevant terms the player:[790]

- Consents to being *'filmed, televised, photographed, identified and otherwise recorded during matches'*;[791]

- Agrees to provide the use of his name, signature, and/or likeness *'free of charge'* for the club's own commercial purposes;[792]

- Agrees that the club may use his name, signature or image for its own commercial purposes *'including the grant of rights to use the same to the Club's sponsors, commercial partners or suppliers (including Super League (Europe) Limited and the Rugby Football League)'* provided that the use is limited to the player being portrayed as a member of the club;[793]

- Agrees that in circumstances where the club requires the player's additional consent to a use of the player's

---

[790] Players' Contract, cl 6, 7 and 8. See Appendix 3 for a copy of the players' contract.
[791] Players' Contract, cl 6.3.
[792] Players' Contract, cl 6.4.
[793] Players' Contract, cl 6.5(b).

intellectual property, the player will not unreasonably withhold or delay that consent;[794]

- Agrees not to enter into any endorsement contract without the prior written approval of the club;[795]

- Is expressly forbidden from entering into any endorsement contract with a sponsor that is a direct competitor of club sponsor or an RFL sponsor;[796]

- Agrees to wear clothing and equipment provided by the club. In circumstances where the player is entitled to wear clothing not supplied by the club, then the items of clothing worn must comply with club and RFL guidelines concerning trade mark identification or be unbranded;[797] and

- Agrees not to *'wear, have tattooed, branded, shaved, cut, applied or affixed to, into or onto your body (including onto your hair and/or nails or onto or into your spectacles or contact lenses) any name, logo or design of any commercial entity other than as expressly permitted by the agreement'*.[798]

A breach of the provisions pertaining to the commercial use of a player's image may result in termination of a player's contract.[799] The player's contractual obligations are also

---

[794] Players' Contract, cl 6.5(a).
[795] Players' Contract, cl 7.2(a).
[796] Players' Contract, cl 7.2(a).
[797] Players' Contract, cl 8.2.
[798] Players' Contract, cl 8.3.
[799] Players' Contract, cl 21(1)(a) and Annexure 2.

reinforced by penalties provided in the RFL Operational Rules.[800]

A player with considerable bargaining power may be able to negotiate more favourable provisions concerning the use of his image or an image rights agreement. An amount paid by the club under an image rights agreement is subject to the salary cap.[801] The majority of players, however, are not in a position of equal bargaining power with a Super League club and must accept the terms and conditions of the players' contract.

8.3 Relevant Markets

The markets relevant to a consideration of abusive conduct are the market for playing services and the market for the acquisition and supply of a Super League player's intellectual property ("the market for a player's intellectual property"). The former market has been discussed at length in Chapter 5 and the clubs and the RFL form a collectively dominant entity within that market.[802]

The definition of the market for the acquisition and supply of a professional sports person's intellectual property has not received judicial consideration at a European level. In *Deliege v Ligue Francophone de Judo et Disciplines Associees*

---

[800] For example, a player may be fined up to £400 (per item) for wearing an item of clothing adorned with sponsor branding that exceeds 2 square inches: Super League Club Code of Conduct 2009, 1.
[801] RFL Operational Rules 2009, E1:5.1 and E1:5.6.7
[802] For a discussion of collective dominance, Alison Jones and Brenda Sufrin, *EC Competition Law* (3ed Oxford University Press, Oxford 2008) 301 – 303 and 918 – 939.

ASBL and Ors,[803] a case which concerned a claim brought under the free movement provisions of the Treaty (EC), the European Court of Justice observed that:

> *'sporting activities and in particular, a high-ranking athlete's participation in an international competition are capable of involving the provision of a number of separate, but closely related services.'*[804]

In *Hendry v World Professional Billiards & Snooker Association*[805], the English High Court accepted that a market existed for players to sell personal advertising rights *'whether by way of the wearing of logos or undertaking personal appearances to promote some business or other activity'.*[806] The activity was considered ancillary to the principal activity of snooker players which was to compete in snooker competitions for prize money.[807]

The market for the supply and acquisition of a Super League player's intellectual property comprises, on the supply-side, all those players who are employed in the Super League competition. Supply is constant and each player is a monopoly supplier. Furthermore, an individual player's intellectual property is unique and the value of the property differs between players. Owing to the confidentiality that surrounds a contract negotiation, a high price paid for the acquisition of the intellectual property of a high profile player may be off-set by the low price paid for that of a player with a lower public profile. Individually, a player may not be able to increase the market price. Collective organisation and/or

---

[803] Joined Cases C-51/96 and 191/97 [2000] ECR I-2549.
[804] Ibid para 56.
[805] [2001] All ER (D) 71.
[806] Ibid para 84.
[807] *Hendry* (n 805) para 84. See also Paul Harris, 'Abusive Sports Governing Bodies: Hendry and Others v The World Professional Billiards and Snooker Association Ltd' [2002] Comp Law J 101.

greater transparency in the contract negotiation may increase the market price overall.

On the demand-side, the market comprises of the Super League clubs and those non-Super League firms who wish to acquire the intellectual property of a player participating in the Super League competition for marketing purposes during and after a match. Demand by the clubs may be described as constant and inelastic. The intellectual property of a Super League player is unable to be substituted by the intellectual property of a rugby union player or any other professional sports person, and an increase in overall market price would leave the clubs with no option but to pay the higher price.

Demand by other firms for the intellectual property right of a Super League player may be interchangeable. An increase in the market price of a Super League player's intellectual property may encourage other firms to acquire the intellectual property of another sports person in a different sport. Furthermore, the players' contract and the requirements set down in the RFL Operational Rules may create a barrier of entry into the market for those sponsors who wish to acquire the intellectual property of a Super League player. The capacity of other non-Super League firms to constrain the market behaviour of the Super League clubs may be minimal (if at all).

On this basis, the clubs exercise market power in the market for the acquisition and supply of the intellectual property of a Super League player. The clubs occupy a position of strength and are an unavoidable trading partner of the

players in the relevant market.[808] Since the clubs and the RFL are economically linked,[809] the respective undertakings present on the market as a collective entity and collective dominance is present.

The clubs and the RFL are therefore collectively dominant on three separate markets: the market for the organisation of professional rugby league competitions in the United Kingdom; the market for playing services to the Super League competition; and the market for the supply and acquisition of a Super League player's intellectual property. A dominant entity has a special responsibility not to use the position in a manner that prejudices competition and the interests of suppliers, customers and consumers. The dominant position occupied by the collective entity across three related markets may affect the scope of the special responsibility owed by the RFL and the clubs in each respective market.[810]

8.4. Tying

Tying the terms for the supply of a player's intellectual property to the players' contract may abuse a collectively dominant position in the market for playing services (and the market for the supply of a Super League player's intellectual property). "Tying" arises in circumstances where a customer

---

[808] See by analogy Case 85/76 *Hoffman la Roche & Co v Commission* [1979] ECR 461 para 41.
[809] See discussion in this thesis at chapter five.
[810] Case T-83/91 *Tetra Pak International SA v Commission ("Tetra Pak II")* [1994] ECR II-755; and Cases C-395 and 396/96 P *Compagnie Maritime Belge Transports SA v Commission* [2000] ECR I-1365. For a discussion of the concept of "super-dominance", see Jonathan Faull and Ali Nikpay, *The EC Law of Competition* (2ed Oxford University Press, Oxford 2007) paras 4.103 – 4.104.

that purchases a product is also required to purchase another product from a dominant undertaking.[811] By tying two separate and distinct products together a dominant undertaking may foreclose competition in a market related to the one in which it is dominant.[812]

The terms for supply of a player's intellectual property are contained in the players' contract. The principal object of the latter contract is to secure the player's playing services for the club. The primary contractual obligation of the player is to play (and the reciprocal obligation on the part of the club is to provide remuneration and a reasonable opportunity to play[813]).

The provisions concerning the supply of the player's intellectual property are not necessary in order for the player to fulfil the principal object of the contract; the provisions are ancillary to the player's primary obligation under the contract. Although the provision of playing services and endorsement services manifest from a single sporting activity, both items hold separate and distinct commercial values.[814] In the course of his employment, a player will inevitably provide his intellectual property but how the property is used by the club and its sponsors, may be controlled by the player. A player is also entitled to benefit from an improvement in the property's value. The provision

---

[811] Commission (EC), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) COM (2009) 864 final, 9 February 2009 para 48. For further discussion concerning tying, see Jones and Sufrin (n 802) 514 – 528.

[812] Commission Guidance (Article 82 Enforcement) (n 811) para 49; Case T-30/89 *Hilti v Commission* [1991] ECR II-1439, upheld in Case 53/92 P *Hilti v Commission* [1994] ECR I-667; and *Tetra Pak II* (n 810); and Case T-201/04 *Microsoft Corp v Commission* [2007] 5 CMLR 11.

[813] See discussion in this thesis at chapter four.

[814] *Deliege* (n 803) para 51 (Advocate General).

of the player's: intellectual property right; and playing skills, are separate commodities which may be the subject of separate agreement.

Prima facie, it may be argued that tying the contractual arrangements is justifiable owing to: commercial necessity; and the natural link which arises between the two items.[815] In order to satisfy contractual obligations with broadcasters, advertisers and sponsors, or to generate income through the sale of merchandise, a club requires a player's intellectual property. These income streams enable the club to meet its expenses including player wage payments. Tying the two items is therefore commercially necessary. Moreover, the natural link arises through the personal provision of a player's skills; and the personal aspect of the player's intellectual property; the two cannot be separated. Thus, tying the provision of playing services to the provision of a player's intellectual property right may be justifiable and not contrary to Article 82 (EC).[816] However, in the circumstances of the supply of a player's intellectual property the tying is an abuse of a collectively dominant position for the following reasons.

8.4.1 Inequality of Bargaining Power

First, a player's intellectual property has a separate commercial value. By incorporating the terms for its

---

[815] According to the European Court of Justice: '*Even where tied sales of two products are in accordance with commercial usage or there is a natural link between the two products in question, such sales may still constitute abuse...unless they are objectively justified*': Case C333/94 P *Tetra Pak International SA v Commission of the European Communities* [1996] ECR I-5951 para 37.

[816] See arguments raised by defendants in *Tetra Pak II* (n 810); and Case T-210/01 *General Electric v Commission* [2005] ECR II-5575.

provision in the players' contract, the club is able to benefit from the inequality of bargaining power that arises during the contract negotiation in the market for playing services. All players interviewed referred to the importance of playing as a principal reason for choosing to enter a contract with a club. A player will likely accept without objection the terms pertaining to the provision of intellectual property rather than forego the opportunity to play in Super League.

Also, during the contract term and in circumstances where a club requires the additional consent of the player to the commercial use of his intellectual property, the inherent imbalance of power in the employment relationship may operate to the benefit of the club. In the interests of preserving the employment relationship, a player may consent to the additional use of the intellectual property.

Under the terms of the players' contract, a player is required: to consent to any additional use of his intellectual property without further payment; not to unreasonably with hold his consent to the additional use; and to provide his consent without delay. Withholding consent; demanding payment; or delaying consent may breach the contract and result in disciplinary action. Disciplinary action can include termination of the employment contract. Therefore, incorporating the terms of supply in the contract may prejudice the player's employment at the club.

8.4.2 Unfair Licence Terms

Secondly, the players' contract requires the player to provide his intellectual property *"free of charge"*. Only a high profile

player will be in a position to demand an amount in excess of £0 for the intellectual property. Furthermore, the amount that a player could demand is limited in the market by a salary cap. Any amount paid in excess of £0 is subject to a price-fixing agreement between horizontal competitors in the market for playing services.[817]

Article 82(a) lists abusive conduct as including: *'directly or indirectly imposing unfair purchase or selling prices'*. A fair price is one that represents the economic value of the product (or service) supplied.[818] Generally, cases concerning unfair pricing practices have related to a situation of excessive high pricing by a dominant entity rather than a situation of excessive low pricing. The Commission has acknowledged, however, that imposing unfair purchase prices may also form abusive conduct.[819]

On the issue of unfair pricing practices, the leading case is that of *United Brands v Commission.*[820] In that case the European Court of Justice confirmed that:

> *'Where a dominant undertaking makes use of the opportunity arising out of its dominant position in such a way as to reap trading benefits which it would not have reaped if there had been normal and sufficient competition, the charge of a price which is excessive because it has no reasonable relation to the economic value of the product supplied is an abuse.'*[821]

The European Court of Justice did not specify how the "economic value" of a product was determined except to

---

[817] RFL Operational Rules 2009, E1:5:1 and E1:5:6:7.
[818] Case 27/76 *United Brands Co v Commission* [1978] ECR 207.
[819] Case 298/83 *Comite des Industries Cinematographiques des Communautes Europeennes v Commission* [1985] ECR 1105, para 22.
[820] *United Brands* (n 818).
[821] *United Brands* (n 818) para 250.

state that the economic value of the product is determined by undertaking a cost analysis and considering:

> *'whether the difference between the costs actually incurred and the price actually charged is excessive, and, if the answer to this question is in the affirmative, to consider whether a price has been charged which is either unfair in itself or when compared to other competing products.'*[822]

In *Port of Helsingborg*[823] the Commission elaborated that an assessment of the "economic value" of a product or service included tangible costs and intangible items (such as the value of the product to the customer).[824] In that case, the Commission concluded that the economic value of port fees charged to ferry operators using the Port of Helsingborg included: the high sunk costs of providing the port infrastructure; the intangible benefit provided by the location of the port for ferry operators; and the opportunity cost for the city of Helsingborg of using the land for a ferry terminal rather than another purpose.[825] In the circumstances of that case, however, there was insufficient evidence to conclude

---

[822] *United Brands* (n 818) para 252 followed in Case T-306/05 *Scippacercola and Another v Commission* [2008] 4 CMLR 20; and *Attheraces Ltd v The British Horseracing Board Limited and Another* [2007] ECC 7 (CA). See also: Case 226/84 *British Leyland plc v Commission* [1986] ECR 3263; Case 30/87 *Bodson v Pompes Funebres des Regions Liberees* [1988] ECR 2479; and Case 395/87 *Ministere Public v Tournier* [1989] ECR 2521.

[823] *Scandlines Sverige AB v Port of Helsingborg* (COMP/36.568 and COMP/36.570) 23 July 2004 [2006] 4 CMLR 1224.

[824] Ibid paras 227 - 228.

[825] *Scandlines* (n 823) para 109. According to the Commission: *'The determination of the economic value of the product/service should also take account of other non-cost related factors, especially as regards the demand-side aspects of the product/service concerned. The demand side is relevant mainly because customers are notably willing to pay more for something specific attached to the product/service that they consider valuable. This specific feature does not necessarily imply higher production costs for the provider. However, it is valuable for the customer and also for the provider and thereby increases the economic value of the product/service'*- ibid paras 226 - 227.

that the port had abused a dominant position by charging excessive port fees.[826]

In *Attheraces Ltd v The British Horseracing Board Limited and Another,*[827] the English Court of Appeal considered whether charges levied for the supply of pre-race data were excessive. The British Horseracing Board ("BHB") was the monopoly supplier of pre-race data (information provided in advance of horse races). Attheraces Limited ("Attheraces") purchased the information and sold it on to bookmakers and other customers. According to Attheraces, BHB prices were excessively high and did not reflect the cost to BHB of producing the data plus a reasonable profit margin. BHB argued, inter alia, that the price was not excessive since the economic value of supplying the data included consideration of the intrinsic attractiveness of the product in question and a broad range of costs (including indirect costs). The Court of Appeal agreed. It concluded that BHB prices were not excessively high since the price reflected the economic value of the pre-race data (which included an amount representing the revenue-earning potential of the data for Attheraces).[828]

A similar approach applies when determining whether a price is unfairly low. In *Eurofirma*[829] the Commission concluded that the largest European buyer of railway rolling stock (train carriages) abused a dominant position when it included in its terms of tender for supply, a term that the successful bidder provide Eurofirma with an unrestricted right to use the designs, documents, patents and other proprietary rights

---

[826] *Scandlines* (n 823) para 287.
[827] [2007] ECC 7 (CA).
[828] Ibid para 218.
[829] *Eurofirma* (Commission (EC) Third Report on Competition Policy) [1973] CMLR D217.

arising under the contract free of charge. The term applied to the benefit of the buyer who could then use the license obtained to requisition further stock or maintenance work from other manufacturers without making an additional payment to the supplier.

The Commission stated that: the term amounted to an abuse of a dominant position that was not objectively justified; the successful contractor was to be compensated for a licence granted to other railway companies; and the compensation was not to be quantified in advance for inclusion in the overall price of the contract but negotiated subsequently as the need arose.[830]

The commercial value of intellectual property differs between players who participate in the Super League competition. Some high profile players have a commercial value considerably higher than other less, experienced or skilled players. However, the economic value of a professional player's intellectual property will always be more than £0 because of: the revenue-earning potential of the property for the club; the opportunity cost for the player; and the value of a player's consent to the publication of his image in various mediums. These factors are discussed in turn.

---

[830] Ibid para 69. See also *Comite des Industries Cinematographiques* (n 819) a case in which the European Commission considered whether the license fees paid for the right to broadcast films were excessively low and an abuse of a dominant position. The Commission concluded in the context of that case that the fees charged were not excessively low: ibid para 22.

8.4.2.1 Revenue-Earning Potential

A club uses a professional player's intellectual property to derive commercial benefit in a number of markets related to the Super League competition. The player's image is used by the club: to retail merchandise; to sell tickets; to promote the club; and to earn sponsorship, advertising or broadcasting revenue. In some cases the goodwill generated by a player's attendance at a sponsor or community function may also commercially benefit the club through increased sponsorship revenue or indirectly through raising the profile of the club. Thus, the economic value of a player's intellectual property is considerably higher when the revenue-earning potential of the property for the club is taken into account.

8.4.2.2 Opportunity Cost

The economic value of a player's intellectual property also includes the opportunity cost for the player of providing his intellectual property - for the exclusive benefit of the club and its sponsors - defined in terms of the loss of other endorsement and promotional opportunities. The price paid for the player's intellectual property does not reasonably compensate for the restraint of trade imposed on a player's capacity to supply his intellectual property to other firms.

8.4.2.3 The Value of A Player's Consent

Of considerable commercial importance to the club is the player's consent to being filmed and photographed during a match. Every player has as Warren and Brandeis termed *'an inalienable right of privacy'*[831] which is given limited protection in common law by application of Article 8 of the European Convention of Human Rights and the doctrine of breach of confidence. Pursuant to Article 8, a player has the right to respect for his private and family life, his home and his correspondence. The concept of private life extends to aspects relating to personal identity such as: the player's name or his picture;[832] or his physical or psychological integrity.[833] Publishing the player's image through a variety of mediums in the absence of the player's consent may breach Article 8 and consequently result in liability for the television broadcaster, the photographer and/or the club. The player's consent is extremely valuable to the club and is a factor that may be included in an assessment of the economic value of a player's intellectual property. In conclusion, applying the case authorities described above, the price for a paid for the acquisition of a player's intellectual property is excessively low and unfair.

---

[831] 'The Right to Privacy' (1890) 4 Harv L Rev 193.
[832] *Hannover* (n 787) para 71.
[833] *Hannover* (n 787) para 50. See generally N A Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination' [2008] EHRLR 44.

8.4.3 Commercial Necessity

Thirdly, the terms upon which the player's intellectual property is supplied go further than are necessary to protect the commercial interests of the club. A dominant entity is entitled to protect its commercial interests provided the steps taken do not go beyond what is necessary to protect those interests.[834] The players' contract includes a term which prohibits a player from entering into an endorsement contract with a competitor of a club sponsor. Certain limitations on a player's capacity to supply his intellectual property at will are justifiable since the player derives financial benefit through the club's commercial contracts. In addition, a firm is still able to access the Super League platform through a contract with the club, SLE, or another player at a different club. The issue at hand involves a balancing of interests: the club's interest of protecting its commercial revenue streams; the player's interest of benefiting financially from his intellectual property; and the interest of those sponsors who may desire access to the Super League platform in order to advertise a product.

---

[834] *United Brands* (n 818) para 189. See also *Re GEMA* (Case IV/26.760) Commission Decision 71/224/EEC [1971] OJ L134/15; and Case 127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR 313. The latter case concerned the scope of an exclusive assignment of copyright provided by a musician to a copyright society. The European Court of Justice concluded that: in order to determine whether the subject contractual provisions were an abuse, the Society's object as an association formed for the purpose of protecting the rights and interests of its members against major exploiters and distributors of musical material needed to be taken into account; in order for the Society to undertake its object effectively it required an assignment of copyright; and the contractual clauses pertaining to the assignment were to go no further than was absolutely necessary for the attainment of the Society's object when balanced against the interest of the individual musician in retaining a freedom to dispose of his or her work for payment: ibid paras 9 – 11.

The players' contract is an agreement between the club and the player (although it may be that the RFL is also a party to the contract).[835] The club's commercial interests include the contracts it enters into with a sponsor, and extends to the contracts SLE enters into as well since SLE acts in commercial dealings as an agent of the clubs. Terms in the players' contract which protect the commercial interests of the club are therefore justified.

If the RFL is considered a party to the players' contract, then terms that prohibit a player supplying his intellectual property to a direct competitor of an RFL sponsor may also be justified. The RFL requires a player's intellectual property for its commercial benefit and the benefit of sponsors of the Challenge Cup competition. If the RFL is a party to the contract, then arguments concerning the amount paid for the supply of the intellectual property apply equally to the RFL.

If the RFL is not viewed as a party to the contract and the club is not in a direct contractual relationship with a sponsor of the RFL, then restrictions on a player's capacity to enter into an endorsement contract with a competitor of an RFL sponsor go further than are necessary to protect the commercial interests of the club and are not justifiable.

8.5 Conclusion

For the reasons set out above tying the supply of a player's intellectual property to the players' contract is an abuse of a collectively dominant position in the market for playing

[835] See discussion at chapter four of this thesis.

services and infringes Article 82 (EC). The terms upon which the clubs require the players' to provide the intellectual property also infringe Article 82 (EC) in the market for the supply of a player's intellectual property.

The agreement concerning the commercial use of a player's intellectual property:

- must not be incorporated into the players' contract but be the subject of separate negotiation between the player and the club;
- the terms should go no further than reasonably necessary to fulfil the club's commercial interests; and
- the terms must adequately compensate the player for the economic value of the property provided.

If the RFL is not considered a party to the players' contract, then a separate agreement insofar as the acquisition of the player's intellectual property for the benefit of the RFL and its sponsors is also required.

The effect for consumers is an important consideration when determining alleged infringements of Article 82 (EC),[836] and tying can benefit consumer welfare. Assuming the lower price is passed on, consumers in the downstream markets may benefit through lower merchandise sales and ticket prices (although this does not always arise in a monopolistic market situation). Pricing data in the downstream markets is, therefore, required to confirm whether consumers benefit

[836] Commission Guidance (Article 82 Enforcement) (n 811) para 5.

from the tying conduct in the Super League competition before an assessment of the conduct's beneficial effects is able to be made.

It is not unusual for a professional player to negotiate a separate license agreement for the use of his or her intellectual property. Some high profile professional footballers such as, for example, David Beckham or Cristiano Ronaldo negotiate license agreements separate to an employment contract; and the Scottish Rugby Union enters into a separate image rights agreement with high profile players and players from overseas in addition to an employment contract.[837]

Individual negotiation of the supply of a player's intellectual property may not be in the best interests of all rugby league players because of the conditions of contract negotiation and the market power of the clubs. Instead, organising collectively may enable the players to withstand the market power of the clubs insofar as the supply of intellectual property is concerned. Sharing the proceeds of revenue generated by players in the Super League competition between the clubs and the players may: operate as an incentive reward for players; improve the quality of the entertainment product; improve efficiency; and improve player productivity. The following section considers the legality of the "club trained rule" under European competition law.

---

[837] Personal correspondence with the Scottish Rugby Union dated 15 September 2008.

CHAPTER 9: REGULATING AGAINST "PLAYER DRIFT" IN THE SUPER LEAGUE COMPETITION: "THE CLUB-TRAINED RULE"

Question: Are you in favour of the "club trained rule"?

Answer: 'No. I'm not... What we are trying to achieve, in my opinion, is out of everybody's squad of 25, 20 of them should be eligible to play for Great Britain. Don't stop overseas players because there are some great players and the British rugby fans like overseas players... We are trying to achieve a situation whereby 20 are eligible for Great Britain. Now if an Australian has a Scottish or a Welsh passport and he comes over to ply his trade, he is eligible to play for Great Britain. If the central body choose not to pick him, that's their priority but he's eligible to be picked. What they are doing with this [club trained] rule is creating such a bloody anomaly of a rule and a difficult one to understand, a difficult one to work with that we are in danger of reducing the quality of the competition to be frank... I'm all for investing more in the academies which this club will be doing so now that relegation is gone, which we haven't done so in the past, but I am not a fan of the [club trained] rule in its format.[838]

Answer: 'Yes. I think it will be good for the development of English Rugby League. All clubs are going to have to start developing their own players whereas I think some did and some didn't. I think we have developed our share. Some clubs have developed more than their share and we will be trying to develop as many as we can. I think the better the game will be the more British players or the more English players are playing the game.[839]

Answer: 'No... every club is at a different development stage and I don't think that forcing clubs to have a certain number of home grown

---

[838] Interview with Club H, 16 October 2007.
[839] Interview with Championship Club A, 19 November 2007.

players is necessarily going to produce players for Great Britain. Who do you want to play for Great Britain? The elite or the mediocre? Because at the moment you are forcing clubs to sign mediocre players instead of other players because of this rule...The problem is we don't have enough top quality players in this country. There needs to be something done to develop players for Great Britain, I agree with that but I don't think this is the right tool... I think you are diluting the competition of quality players by saying well, "I'm going to sign him. He's not as good as these other two but he's home grown. I'm going to keep him."[840]

9.0 Introduction

In recent years the number of foreign players[841] participating in the Super League competition has increased. According to the RFL, in 2007, at least 45% of Super League players were ineligible to play for the Great Britain international representative team.[842] In a match between Wakefield Trinity Wildcats and Castleford Tigers in 2006 only three of Wakefield Trinity Wildcats seventeen member team were British-born players.[843]

As one of only two full time professional rugby league competitions in the world, it is likely that foreign players will take up employment in the Super League competition at

---

[840] Interview with Club D, 13 November 2007.
[841] In this chapter the term "foreign player" refers to a player who is a national of a non-European Union country.
[842] Interview with the RFL, 29 October 2007, England. Note: Prior to 2008, the international representative team for whom the RFL had responsibility was comprised of players from throughout the United Kingdom and was known as the "Great Britain team". In 2008, the Great Britain team was divided into four representative teams: Wales, Scotland, England and Ireland. The RFL is now responsible for the selection and organisation of the England international representative rugby league team.
[843] Interview with Wakefield Trinity Wildcats, 2007, England.

some stage during a professional career. A foreign player of dual nationality with (one nationality being that of a Member State) is able to provide playing services to a Super League club without immigration constraints. Some foreign players participating in the competition, however, require immigration approval to work as a professional rugby league player in the United Kingdom (or France). The requirements for a professional rugby league player to work in the United Kingdom are determined by the United Kingdom Border Agency following consultation with the Rugby Football League ("RFL") and the Rugby League Players' Association ("RLPA").[844] A player must satisfy certain criteria in order to obtain a professional sportsperson's work permit.[845] Overall, the immigration procedures for employing a foreign player in the Super League competition are similar to those which apply to other industries in which foreign labour is employed.

In addition to national immigration rules, there is a secondary tier of immigration control adopted by the RFL and which applies to a foreign player when seeking employment in the Super League competition. The Super League competition operates under an "overseas quota rule" which limits to five the number of overseas players that a Super League club may register in its first team.[846] In addition, a club's first team must comprise of a prescribed number of

---

[844] Personal correspondence with the United Kingdom Border Agency dated 17 September 2008. Consultations usually take the form of meetings and/or written correspondence: ibid. The criteria are renewed annually and the criteria in place for 2008/2009 were agreed by correspondence: ibid.

[845] The criteria for a permit to work as a professional rugby league player may be found on the official website of the United Kingdom Border Agency: <http://www.homeoffice.gov.uk>.

[846] RFL Operational Rules 2009, C1:4:2.

players who fulfil the definition of "club trained", "federation trained" and "academy junior" ("the club trained rule").[847]

This chapter considers the legality of the "club trained rule" as a measure for regulating against "player drift" to the Super League competition. It discusses the concept of "player drift" and describes: the pathways for players into a professional rugby league career in the United Kingdom; the investment in junior development made by clubs; the factors which influence Super League club demand for overseas players; and the benefits of overseas players participating in the Super League competition. It examines the rule's effect in the market for playing services and the justifications advanced in favour of the rule. Finally, it concludes that the rule infringes Articles 81 (EC) and 82 (EC) and the Treaty provisions pertaining to free movement of workers.

9.1 "Player Drift"

"Player drift" refers to the movement of professional sportspeople between countries in order to take up

---

[847] RFL Operational Rules 2009, B1:11A. The "club trained rule" is similar to UEFA's "Homegrown Player Rule". The European Commission has confirmed that the "Homegrown Player Rule" complies with European law: Commission (EC), "UEFA Rule on 'Home-grown Players': Compatibility With the Principle of Free Movement" (Press Release) 28 May 2008, IP/08/807 <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/807> accessed 12 May 2009. For a discussion of the legality of UEFA's "Homegrown Player Rule", see Stephen Weatherill, 'Discrimination on Grounds of Nationality in Sport' in S Weatherill *European Sports Law: Collected Papers* (TMC Asser Press, The Hague 2007) 15; and Samuli Miettinen and Richard Parrish 'Nationality Discrimination in Community Law: an Assessment of UEFA Regulations for European Club Competitions (The Home-Grown Player Rule) 5 (2) [2007] ESLJ <http://go.warwick.ac.uk/eslj/issues/volume5/number2/>. See, generally, Robin C A White 'Free Movement of Persons and Sport' in Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds) *The Regulation of Sport in the European Union* (Edward Elgar Publishing Ltd, Cheltenham 2007) 33.

employment in a sporting competition. Factors such as: high remuneration; a high standard of living; limited employment opportunities in the player's country of origin; the opportunity to travel and extend social horizons; the challenge of participating in a competition based in a foreign country; and the opportunity to work under a particular coach, are all reasons why a player may choose to move between sporting competitions. A perception that a particular competition is of a higher standard (or a lower standard) than another competition may also be a contributory factor.[848]

"Player drift" also includes the movement of players between the rugby codes. In recent years several Australian rugby league players have moved to play professional rugby union in France, whilst a number of Super League players have accepted employment at English rugby union clubs.[849] There are a number of factors which contribute to players moving between the rugby codes, including: the higher level of remuneration paid in rugby union; the challenge of playing rugby union professionally; the opportunity to play rugby union at an international level; and the less physical nature

---

[848] In professional rugby union, the global trend is for players to migrate to the wealthier European professional competitions. Many Pacific Island nations do not have a professional domestic rugby union competition. Therefore, players move to competitions in New Zealand, Australia or Europe. Rugby union in Argentina remains an amateur sport, thus, players wishing to pursue a career turn to the European competitions for employment opportunities. In Scotland there are only two professional rugby union teams, and with limited job opportunities for the Scottish players who wish to pursue a full time professional rugby union career, Scottish players move to clubs in other European countries.

[849] Recent high profile code changes include: Mr Sonny Bill Williams (Canterbury Bulldogs Rugby League Club to Toulon Rugby Union club 2008); Mr Mark Gasnier (St George Illawarra Dragons to Stade de France Rugby Union Club 2008). See footnote 488 of this thesis for a list of former Super League players who moved to professional rugby union clubs in England, Ireland and Wales between 2000 and 2008.

of rugby union when compared to the high impact sport of rugby league.[850]

Since the early 1900s, British rugby league clubs have drawn upon the skills of Australian and New Zealand rugby league players. The influence of foreign players (and administrators) for the development of rugby league in the United Kingdom manifests through, for example, the naming of two performance trophies awarded during the Challenge Cup and the Super League competition. The man-of-the-match award presented at the end of the Challenge Cup final is named after Mr Lance Todd, a New Zealander, who was a member of the inaugural "All Golds" professional All Black team that toured the United Kingdom in 1907.[851] The Harry Sunderland trophy which is awarded to the best player in the Super League Grand final is named after a former Australian rugby league administrator.[852] Many of the foreign players who play in the Super League are originally from Australia,

---

[850] Eight rugby league players interviewed had never played rugby union professionally. Factors which would persuade those players interviewed to take up professional rugby union were: money; media exposure; the opportunity to play international rugby union matches and to play in the Rugby Union World Cup; an inability to play professional rugby league; and a loss of interest in rugby league. The technical nature of rugby union when compared to rugby league, particularly in the "forward positions", was described by some players as an obstacle to moving between the codes. Two players interviewed had played professional rugby union previously. One of those players had played for a professional rugby union club academy team but had never played professionally for a rugby union first team. The player chose rugby league as a full time professional career because he enjoyed playing the sport more than rugby union. The other player played professional rugby union temporarily during a Super League off-season and whilst still employed at a Super League club. The player decided against pursuing a full time career in rugby union because of his familiarity with rugby league (he had been immersed in the sport's culture from a young age); his enjoyment of rugby league; his desire for playing success in the sport; and an emotional tie to his rugby league club.

[851] Rugby League Hall of Fame, 'Lance Todd' <http://rlhalloffame.org.uk/todd.htm> accessed 15 September 2008.

[852] Rugby League Hall of Fame, 'Harry Sunderland Award' <http://rlhalloffame.org.uk/sundtrop.htm> accessed 15 September 2008.

New Zealand or the Pacific Islands. Some of those players are dual nationals (with one nationality being that of a Member State); or are nationals of a country with whom the European Union has an association agreement.

Before considering the legality of the "club trained rule" it is pertinent to consider: the pathways for players into a career in the Super League competition; the recruitment policies of Super League clubs; the factors which influence employer demand for foreign players; the factors which influence a Super League club's investment in the development of junior players; and the effects of foreign players participating in the Super League competition. The information set out below was extrapolated from interviews conducted with stakeholders in 2007 (and prior to the introduction of the "club trained rule" in February 2008).

9.2. Principal Pathway Into a Professional Rugby League Career in the United Kingdom

In 2007 the principal pathway for players into a full time professional career with a Super League club was through participation in rugby league at school or an amateur club. The RFL - then as now - divides the country geographically into service areas which are based on metropolitan council boundaries (for example, the Leeds service area, the Wakefield service area etc). Talented junior players are selected to play "service area" rugby. The service area competitions are divided into age levels (for example, under-15, under-14, etc). Players who participate in service area competitions are also likely to attend regional and national rugby league training camps.

Running in conjunction with the service area competitions, amateur and/or school competitions, is a scholarship scheme. Pursuant to the scheme a professional club, including those clubs in the Championship competition divisions, can provide an annual scholarship to a player aged under 16 years. The RFL Scholarship Scheme Rules regulate the scheme.[853] Clubs are permitted a maximum of twelve scholarship players at each age level from under-13 up to (and including) under-16.[854] Scholarship players usually reside in the club's respective service area, although a club is permitted a maximum of twelve "outside registrations" (being scholarship players who reside outside the club's service area).[855] The Scheme Rules specify the duration of the scholarship; and provide a process for a club to register an interest in a scholarship player.[856]

At sixteen years, a player is eligible for employment in a Super League club academy team, and from the academy may obtain a contract as a full time professional player with a Super League club (or a contract as a part time professional player at a Championship or Championship 1 club).

---

[853] RFL Operational Rules 2009, E9.
[854] RFL Operational Rules 2009, E9:1:5.
[855] RFL Operational Rules 2009, E9:1:6. The purpose of limiting the number of "outside registrations" is: to facilitate the development of the game in the club's local community; to prevent young athletes travelling long distances for scholarship training; and to protect smaller clubs which may lose scholarship players to larger clubs and more successful clubs: RFL interview (n 842).
[856] RFL Operational Rules 2009, E9:1:9 and E9:1:13.

9.2.1 Factors Which Influenced Club Investment In the Development of Junior Players

Information extrapolated from the interviews highlighted that a club's financial circumstances and its history of participation in the Super League competition had influenced the level of investment made by a club in its academy. Generally, those more affluent clubs with a history of playing in the Super League competition had well established academies, and academy players were recruited to: the club's first team; another Super League club; or a club in the Championship competition divisions. Some clubs interviewed commented that investment in junior development was not a priority when the club was seeking promotion or avoiding relegation.

Overall, in 2007 the number of players and coaching staff employed in a Super League club academy; and the quality of facilities varied between clubs. Super League clubs received financial payments from the RFL for: rugby league scholarships; the employment of a player performance manager; and the development of a player who was selected to the England (formerly Great Britain) international representative team.[857]

---

[857] In 2007 the RFL paid £5,000 to a club that employed a player who made his first appearance for the England (formerly Great Britain) international representative team. For every additional international appearance the player made during the season, the club received £1,000: RFL interview (n 842). Some clubs stated that the payments were passed to the player under the terms of the player's contract as a bonus for gaining selection to the international representative team.

9.2.2 Player Recruitment

Professional players were typically recruited to a Super League club's first team from: the club's academy; other Super League clubs (including academies); the Australian NRL; and Championship clubs. A player was informed of job opportunities by a sports agent or someone who knew of a job opportunity at a club; a meeting was then arranged with representatives of the prospective club (usually the coach and/or senior manager); followed by contract negotiations between a senior manager and the player's agent.

Those clubs interviewed identified the following factors as influential in the decision to recruit a player: the player's skills; the player's contract costs; the salary cap; a player's personal attributes and character; whether the player fitted within the team dynamic; the player's potential off-field contribution to the club; the player's age and experience; the player's public profile, and the player's potential to add-value to the club's brand and generate income for the club's sports business. The effect of a player's recruitment for the development of the England (formerly Great Britain) international representative team was not a consideration for a majority of the British clubs. Eligibility for the France international representative team was a consideration in the recruitment decisions of Catalans Dragons. Of twenty eight players employed at the club in 2007, twenty players were French and eight were non-French players from Australia and New Zealand.

The majority of British clubs interviewed preferred to recruit players residing locally rather than foreign players. However, information extrapolated from interviews suggested that a shortage of skilled professional players existed in the United Kingdom. As one club stated:

> *'...the policy we have is to recruit the best players available to ensure we have the best possible team from whatever origin that is...As an individual club we would rather recruit English players than overseas players but the quality isn't always there in the English players that it is in the overseas players, particularly in the Australian players'.*[858]

The majority of British clubs interviewed commented that it was not cost effective to recruit a foreign player when compared to the cost of investment in an academy or youth development structure. One club stated that it was cost effective in the short term. The cost of recruitment of a foreign player was described as including: the player's salary; transport costs to and from the United Kingdom; accommodation costs; and the costs associated with providing a car. In some cases, it also included the costs of relocating the player's family. The cost of developing a player in the academy was described as the player's salary plus the money invested in youth development. Over time the cost of developing a local player was cheaper than recruiting a foreign player.

9.2.3 Factors That Influenced Club Demand For Foreign Players

The recruitment of a foreign player was described by some British clubs as a "short term" or "easy option" when

---

[858] Interview with Club D, 22 February 2007.

compared to the time taken to develop a junior player. Factors which influenced Super League club demand for foreign players were: the potential for a club to be relegated at the end of the playing season; promotion from the Championship to Super League; a shortage of skilled local players; and the financial benefit provided to the club when employing a foreign player (particularly a high profile player).

9.2.4 Effects of Foreign Players in the Super League Competition

According to those stakeholders interviewed, foreign players participating in the Super League competition benefited the competition, clubs and consumers in a number of ways. First, foreign players brought to the Super League competition: new playing skills; experience of development, training and playing methods used in the Australian NRL; and professional work habits (such as, for example, an awareness of player responsibilities to the club and its sponsors).

Secondly, players acted as role models for less-experienced local players. Thirdly, foreign players shared playing experience and skills which assisted the development of local players. Fourthly, foreign players who also played at an international representative level provided a benchmark against which British and French international representative players could measure their skills. Fifthly, a high profile foreign player potentially contributed positively to the financial position of a Super League club through, for example, increased gate revenue and merchandise sales. Finally, foreign players contributed to improving the standard of rugby league played in the Super League competition.

Some stakeholders commented that competition with foreign players for employment in the Super League competition: limited the development opportunities of some local players; and reduced the selection pool for the England (formerly Great Britain) international representative team. A foreign player generally received higher remuneration and benefits than a local player employed in the same position. A successful international representative team brought benefits for a Super League club's business and the game as a whole by raising the profile of the sport. Three clubs interviewed commented that their respective supporters preferred to see a majority of local players in a team rather than a team comprising mainly of foreign players.

Those British players interviewed did not perceive the presence of foreign players in the Super League competition as an obstacle to gaining employment. Instead players referred to competition with established players generally (whether British or foreign players); greater performance expectations; more strenuous training requirements; and the faster, more physical level of play at first team level when compared to the academy competitions, as obstacles to gaining employment or playing opportunities in a Super League club first team.

Participation in the Super League competition provided some foreign players with the opportunity to gain selection to an international representative team (subject to the selection policy adopted by a sporting code's governing body). One New Zealand rugby league player interviewed commented that playing in Super League had assisted his career

progression through to selection for the New Zealand international representative team.

9.2.5. Case Examples: Wigan Warriors; Castleford Tigers; Hull KR; Catalans Dragons

The factors which influenced the recruitment of foreign players and investment in the development of junior players are further demonstrated by the situations of four Super League clubs (Wigan Warriors, Castleford Tigers, Catalans Dragons and Hull KR) described below.

9.2.5.1 Wigan Warriors

Wigan Warriors is an affluent club with a history of playing success and a tradition of investing in player development. It has participated in the Super League competition since the competition began and has never been relegated (although it has faced the threat of relegation). Wigan Warriors described a business goal as being to facilitate the progression of players into the professional game.[859] The club commented that developing junior players: was a cheaper method of recruitment when compared to paying a transfer fee or recruiting foreign players; made a difference to the team's performance; and was *"the right thing to do in terms of growing the sport"*.[860] The club commented that it was more cost effective in the short term to employ a foreign player rather than to develop an academy team but that over

---

[859] Interview with Wigan Warriors, 2007, England.
[860] Ibid.

time investment in junior development provided benefits to the club.

The club stated that - in the twelve months preceding the interview - nine players had moved from the club's academy into the first team; and in the course of the preceding three years between ten and fifteen players had moved from the club's academy into the first team of another Super League club.[861] A further thirty players had moved from the club's academy to a Championship club.[862]

The club pointed to the "20:25 rule" as a factor which contributed to a number of junior players moving to other clubs. The rule – which was removed in 2008 – prevented a club registering more than twenty players who earned above £25,000. As a junior player improved and requested a salary in excess of £25,000, the club was frequently constrained by application of the "20:25 rule" from retaining the player's services. According to the club, the rule had contributed to some junior players moving from the club when the player had preferred to stay. It had also provided a disincentive for other less affluent Super League clubs to invest in junior development owing to the ease with which junior players could be recruited from Super League clubs with well established academies.

Although an aim of the club was to develop local players, it also recruited foreign players because of the benefits that a foreign player with experience of playing in the Australian NRL brought to the club's sports business. At the end of

---

[861] Wigan interview (n 859).
[862] Ibid.

2006 Wigan faced the threat of relegation and needed to sign:

> *'half a dozen players to make sure we stayed in Super League and at that point it doesn't matter whether they are...English or Australian, you just need to get them...'*[863]

9.2.5.2 Castleford Tigers

In 2004 and 2006 Castleford Tigers was relegated to the Championship (formerly National League 1). Whilst in that competition division, the club recruited only one foreign player (in accordance with the Championship "overseas quota rule"). The club had also made a decision three years previously to develop more junior players. Accordingly, the club's first team squad in 2006 – which subsequently gained promotion to Super League - was made up of 15 players over the age of 21; and the remaining players were junior players from the club's academy.

The club described difficulties with recruiting players following promotion to Super League. The number of foreign players the club employed increased following promotion because:

> *'There aren't very many players around once you get promoted and you look where you can. Most of the quality English players are all signed because generally people would prefer to sign English players rather than overseas players so then you look overseas where there are a lot more players in Australia and New Zealand, particularly in Australia where there are a lot more people playing the game there than what there are here.'*[864]

---

[863] Ibid.
[864] Interview with Castleford Tigers, 2007, England.

According to the club, the threat of relegation and the drive for promotion did not enable some clubs to plan long term. Protection from relegation (as occurred in the case of Catalans Dragons) or the licensing system provided clubs with an opportunity to invest time and finances into developing a club.

9.2.5.3 Catalans Dragons

Catalan Dragons is located in an area of traditional support for rugby league in France. In 2006 the club was admitted to the Super League competition by agreement with the existing Super League clubs and the RFL. The conditions of entry provided the club with an exemption from application of the "overseas quota rule" (the club was limited to recruiting eight foreign players in 2007 and 2008, and six foreign players in 2009). The exemption permitted the club to recruit the desired level of skilled players for a first team to participate in the competition. The foreign players the club recruited were from Australia, New Zealand and the Pacific Islands.

In order to assist the club to remain in the Super League competition, the RFL employed a temporary coach for the club. The club was also protected from relegation for three years. In 2006 the club finished at the bottom of the Super League points table but was exempt from relegation. In 2007 the club finished tenth and in 2008 the club reached the Super League play-offs and finished third. According to the club:

> *'...it would have been a nonsense to accept us and not to give us this three years non-relegation because in one year you cannot compete. It is too*

short. You cannot create a really professional club if at the end of the year, if you are last you go back in the second division.'[865]

A player's nationality was a recruitment consideration for the club owing to its aim of developing the sport in France and its view that club supporters did not wish to see a team that comprised mainly of foreign players. The club invested in youth development through its academy which comprised of a junior team and a reserve grade team. At the time of interview the teams competed in competitions operated under the auspices of the French Rugby League Federation. There were plans for the reserve team to participate in an RFL academy competition from 2009.

9.2.5.4 Hull Kingston Rovers

Hull KR was promoted to the Super League competition at the end of 2006. The club is one of two Super League clubs in Hull (Hull FC has participated in the Super League competition for a longer period of time). Hull KR described difficulties recruiting players following promotion because of the time at which promotion was confirmed; and the stigma which attached to a "newly promoted club". The club, however, benefited from a strategy adopted whilst it participated in the Championship (formerly National League 1). It planned for its promotion by engaging the majority of players on two-year contracts. When promoted, the club retained most of its squad members, which provided team stability, and it employed the maximum number of overseas players permitted (at that time three players), two players of dual Australian and British nationality and three British

[865] Interview with Catalans Dragons, 2007, France.

players. The club avoided relegation during its first season in Super League.

Owing to: the ten-year period in which the club was in the Championship; competition with another Super League club for junior players during the time the club was in the Championship; and the financial investment required for the club to be promoted, Hull KR's academy was not as well established as other Super League club academies. Whilst in the Championship, most of its financial resources were spent securing promotion to Super League rather than junior development. Since the club was promoted to Super League, it has developed its academy structure and provided a pathway for junior players to progress into a career in Super League. The club anticipated that it would be three to five years before its investment in junior player development was fully realised.

9.2.6 Conclusion

The synopsis of interviews above illustrates the factors which influenced a Super League club's recruitment of foreign players and its investment in junior player development in 2007. Factors which influenced demand for foreign playing skills were: the means of entry into the Super League competition for the respective club; a skills shortage; and the financial benefit to a club's sports business (whether expressed in terms of the cost of avoiding relegation, or the increased revenue which resulted from recruitment of a high-profile player). The level of investment in junior development was influenced by: the club's financial position overall; the length of time over which the club had

participated in the competition; and the rule of "relegation and promotion". The application of the application of the "20:25 rule" may also have been an influencing factor.

Based on the information set out above, the next section considers whether the "club trained rule" infringes Article 81 (EC); and whether the justifications advanced for the rule's introduction are valid.

9.3 "Club Trained Rule" and "Overseas Quota Rule"

Pursuant to the "club trained rule" a Super League club's first team must comprise of: a maximum of five players who satisfy none of the definitions of "club trained player", "federation trained player" or "academy junior"; and a minimum of eight club trained players or academy juniors. The remainder of the team must comprise of federation trained players or academy juniors.[866]

"Club trained player" is defined as, *'a player who has been on the Club's register for any 3 full Seasons before the end of the Season in which he ceases to be eligible by age for Academy rugby league.'*[867] "Federation trained player" is *'a player who, for any 3 full seasons before the end of the season in which he ceases to be eligible by age for Academy rugby league has been on one of the Club's registers or the register of another Club being a member of the same rugby league federation'*.[868] An "academy junior" is a player *'who is*

---

[866] RFL Operational Rules 2009, B1:11A. The rule was implemented in 2008 and takes full effect from 2010.
[867] RFL Operational Rules 2009, B1:11B(a).
[868] RFL Operational Rules 2009, B1:11B(b). "Federation" is defined as *'a governing body for a country recognised by the RLIF'* – RFL Operational Rules 2009, 1(x). "Club" means *'any member which is a Rugby League*

eligible by age for Academy rugby league and who is on the club's register'.[869] A player ceases to be eligible by age for academy rugby league at 21 years old.

The RFL may declare that a player who does not comply with the rule's requirements is nonetheless "federation trained" or "club trained" provided the player demonstrates that he *'satisfies the spirit of the definition'*.[870] Failure to comply with the "club trained rule" is an act of misconduct.[871] Penalties imposed against a club for an infringement of the rule include: a fine; the deduction of competition points; or the requirement that a club play its games behind closed doors (amongst others).[872]

The rule was drafted by the RFL and approved by the clubs following a vote at a meeting of Super League (Europe) Limited ("SLE") in June 2007.[873] It was implemented in February 2008. The extent of consultation undertaken with the RLPA and individual players is unknown. Amendments were made to the rule in August and September 2008. As a consequence of the amendments, a player registered with the RFL prior to 1 February 2008 who had *'made a career in the game before they were aware of the possibility of club trained rules'* qualified as a federation trained player, provided the player applied in writing to the RFL for the

---

Club and any other Rugby League Football club or other body which may be invited to join the RFL from time to time' - RFL Operational Rules 2009, 1(k).

[869] RFL Operational Rules 2009, B1:11B(c).

[870] RFL Operational Rules 2009, B1:15.

[871] RFL Operational Rules 2009, D1:10(r).

[872] RFL Operational Rules 2009, D1:12.

[873] RFL interview (n 842).

exemption '*at the end of his current contract*'.[874] The "club trained rule" does not prevent a club recruiting a player but influences which players the club recruits. A club is unlikely to employ for its first team, a player who does not satisfy the terms of the "club trained rule" and is thus ineligible to play for the club.

The "club trained rule" is complemented by a limit on the number of overseas players that a club is permitted to register ("the overseas quota rule"). Pursuant to the rule, a Super League club is permitted to register a maximum of five overseas players.[875] A club that exceeds the permitted quota of overseas players is guilty of misconduct, and if a breach arises, the RFL Board may remove an overseas player from the club's register.[876] Similar penalties to those imposed in relation to a breach of the "club trained rule" also apply to a breach of the "overseas quota rule."[877]

The RFL's Operational Rules provide the RFL Board with discretion to grant an exemption from application of the "overseas quota rule".[878] Previous exemptions were provided to London Broncos (now Harlequins RL) and Catalans Dragons when those clubs were permitted entry into the Super League competition. At the time of entry both clubs did not have established club academies from which sufficient skilled players could be recruited. The following

---

[874] RFL Official Website, 'Super League Clubs Agree Extension' (undated) <http://www.therfl.co.uk/~therflc/superleague/news_item.php?id=12114> accessed 30 January 2009.
[875] RFL Operational Rules 2009, C1:4:2. The term "overseas player" is defined in RFL Operational Rules 2009, C1:4:1.
[876] RFL Operational Rules 2009, C1:4:2 and C1:4:6.
[877] RFL Operational Rules 2009, D1:12.
[878] RFL Operational Rules 2009, C1:4:2.

section considers the effects of the "club trained rule" in the market for playing services ("the relevant market").

9.4 The Rule's Effects

For the purposes of Article 81 (EC) the "club trained rule" forms an agreement between undertakings and/or a decision of an association of undertakings.[879] The rule distorts, restricts and prevents competition between the clubs for playing services. In the absence of the "club trained rule", a Super League club would be able to recruit whomever it pleased from anywhere in the world (subject only to national immigration rules and financial constraints). Instead, a club must now recruit players who satisfy the definitional requirements of the "rule". The different size of each respective club's academy may, in the short term, disadvantage some clubs when complying with the minimum-recruitment numbers for "club trained players" and "academy juniors".

In effect, the rule introduces a "service qualification" for players. In order to maximise employment opportunities in the Super League competition, a player must be registered with an RFL member club for three full seasons prior to the age of 21. Players who do not satisfy the rule's definitional requirements are placed at a disadvantage when compared to those players who do satisfy the rule's requirements. The capacity of a player without the qualification to compete for a playing contract is reduced when compared to those players with the qualification. Access to the Super League competition is limited for those players who do not satisfy

[879] See discussion in chapter five of this thesis.

the rule's definitional requirements. Additional effects of the rule are described below.

9.4.1 Age-Related Discrimination

The rule as initially implemented in February 2008 had an age-related discriminatory effect.[880] Irrespective of nationality, those players aged over 21 who did not enter a career in professional rugby league through the principal pathway were unable to satisfy the rule's requirements owing to age.

By way of example, in 2007, the author interviewed ten professional rugby league players. All players were aged over 21 at the time of interview. Of those interviewed: eight players were British; one player was a dual national (Australian/British); and one player was a New Zealander with British residency. All players interviewed qualified under Rugby League International Federation Rules for selection to the England (formerly Great Britain) international representative rugby league team.[881]

Six players interviewed were not affected by the "club trained rule". Those players had entered a career in professional rugby league through a Super League club academy and satisfied the rule's requirements. However, four players interviewed had not entered the competition through the principal pathway and were unable to comply with the rule's requirements due to age.

---

[880] For a discussion of the rule's implementation from an administrative law perspective, see Leanne O'Leary 'The RFL's Club Trained Rule: A Case For Judicial Review' [2009] 2 ISLR 15.
[881] Rugby League International Federation Rules (January 2001), 3.1.

One player of dual Australian/British nationality undertook his development training at a club in the Australian NRL and did not qualify as "club-trained", "federation trained" or an "academy junior". A New Zealand player with British residency was employed by a Super League club from New Zealand whilst a teenager. The player was likely registered as an "overseas player" in the period prior to his 21st birthday and it was unclear whether he satisfied the rule's requirements on the basis of his prior registration as an "overseas player".

One British player had attended a tertiary institution and played for a Super League club academy team during the holidays. At the end of his studies, the player obtained employment at a Championship club before obtaining a contract to play for a Super League club first team. It was unclear whether the period of time registered with a club academy whilst pursuing a tertiary education, enabled the player to satisfy the requirements of the "club trained rule". Finally, a British player who attended a tertiary institution and played professional rugby union before turning to professional rugby league at age 20, was unlikely to satisfy the rule's requirements owing to the length of time spent registered with an RFL member club.

The disadvantage that players aged over 21 encountered was also demonstrated by the circumstances of Mr Stanley Gene. Mr Gene was employed at Hull KR under a contract that expired at the end of the 2008 playing season. Owing to his age (34 years) and the fact that Mr Gene (a Papua New Guinean) had never trained at a Super League academy before the age of 21, his employer, Hull KR, was unable to

offer a new employment contract without breaching the "club-trained rule". Another player, Mr Julian Rinaldi, who was employed at Harlequins RL, was released by that club for similar reasons, and a dual national player (British/Australian), Mr Andrew Henderson, was released by his club Castleford Tigers as a consequence of the application of the "club trained rule".[882] Mr James Evans (a British/Australian) dual national was also released by his club Bradford Bulls even though the club stated its desire to retain his services.[883] Amendments to the rule made subsequently in August and September 2008 reduced the age-related discriminatory effect (although the timing of the rule changes still disadvantaged some players).[884]

9.4.2 Loss of "Club Trained Player" Status

A player loses his status as a "club trained player" when he moves from the club at which he undertook his development training. Instead the player falls into the category of "federation trained player". Owing to the minimum

---

[882] Andrew Henderson, 'Ready to Rumble With Thunder' *BBC Sport* (London, 3 March 2009) <http://news.bbc.co.uk/sport1/hi/rugby_league/7916963.stm> accessed 12 May 2009; 'Bradford Snap Up Hooker Rinaldi' *BBC Sport* (London, 17 April 2009) <http://news.bbc.co.uk/sport1/hi/rugby_league/super_league/bradford/8003686.stm> accessed 12 May 2009.

[883] See 'Bulls Chief Slams RFL Dispensation' *Rugby Leaguer & League Express* (Brighouse, 1 September 2008) 5.

[884] See: 'Bulls Chief Slams RFL Dispensation' *Rugby Leaguer & League Express,* (Brighouse, 1 September 2008) 5; 'RFL U-Turn Gives Career Lifeline to Non-Brit Players" *League Weekly* (Dewsbury, 1 September 2008) 2; and 'Thunder Land Tigers Hooker' *League Weekly* (Dewsbury, 29 September 2008) 10. Mr Gene benefited from the rule changes and was re-employed by Hull KR.
Note: Council Directive (EC), 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in enjoyment and occupation [2000] OJ L303/16; Case C-144/04 *Mangold v Helm* [2005] ECR I-9981; and Case C-427/06 *Bartsch v Bosch und Siemens Hausgerate (BSH) Altersfursorge GmbH* [2009] All ER (EC) 113.

recruitment requirements for "club trained players" and "academy juniors", the capacity of a "federation trained player" to find employment is reduced. The more "club trained players" or "academy juniors" a Super League club employs, the fewer positions available for a "federation trained player". Over time a first team may potentially comprise of up to 25 "academy juniors" and "club trained players" and zero "federation trained players".

The loss of "club trained player" status may provide an incentive for a player to remain at a club with whom he trained or to return to that club in the future. Over time the "club trained rule" may contribute to less player movement throughout the competition thereby harming competitive balance.

9.4.3 Professional Rugby Union Players

A professional rugby union player who undertakes his development training at a professional rugby union club will not satisfy the rule's requirements. The employment opportunities for a professional rugby union player in professional rugby league are therefore reduced (unless the player moves to rugby league at an age whereby he can gain the service qualification).

9.4.4 Access to Employment

The "club trained rule" affects access to employment for Member State nationals and therefore infringes Article 39

(EC).[885] Article 39 (EC) applies to secure the right of free movement for Member State nationals. It prohibits '*any discrimination based on nationality between workers of the Member States as regards employment, remuneration and other conditions of work and employment*'.[886] Once employed in another Member State, a right of equal treatment applies to all aspects of the employment relationship.[887] The right of free movement extends also to the citizens of a non-European Union country where the Government of that country has signed an association or co operation agreement with the European Union provided the citizen of the non-European Union country is lawfully employed in the Member State.[888]

Measures which are prohibited under Article 39 (EC) may be directly discriminatory (for example, a measure which precludes a Member State national from taking up employment because of his or her nationality);[889] or

---

[885] See Articles 12, 18 and 39 (EC).

[886] Article 39(2) (EC). For a discussion concerning the provisions relating to free movement generally, see Joanna Apap, *Freedom of Movement of Persons: A Practitioner's Handbook* (Kluwer Law International, London 2002); Massimo Condinanzi, Allessandra Lang and Bruno Nascimbene, *Citizenship of the Union and Free Movement of Persons* (Martinus Nijhoff Publishers, The Netherlands 2008); and Catherine Barnard, *EC Employment Law* (3ed Oxford University Press, Oxford 2006) 171 – 294.

[887] Articles 12, 39 (EC) and Council Regulation (EEC), 1612/68 of 15 October 1968 on the freedom of movement of workers within the community [1968] OJ L 257/2 ("Regulation 1612/68"); See, for example, Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153; and Case 15/69 *Wurttembergische Milchverwertung-Sudmilch AG v Ugliola* [1970] ECR 363.

[888] Case C-438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECR I-4135; and Case C-265/03 *Simutenkov v Ministerio de Educacion y Cultura and Anor* [2005] ECR I-2579.

[889] For example, Case 167/73 *Commission v France* [1974] ECR 359 in which the European Court of Justice stated that a French law which reserved a certain number of positions on French-registered ships to French nationals was incompatible with the Treaty of Rome: ibid paras 41 – 48; Case C-283/99 *Commission v Italy* [2001] ECR I-4363 in which an Italian law which required private security work to be undertaken by Italian firms only and for private security guards to be of Italian nationality was held to contravene the free movement provisions of the

indirectly discriminatory (for example, a measure which applies irrespective of nationality but the measure's exclusive or principal aim or effect is to exclude nationals of other Member States from employment).[890] In addition, Article 39 (EC) may be infringed by a non-discriminatory measure that prevents or limits a Member State national from exercising the right of free movement,[891] or which *'is liable to hamper or render less attractive'* the exercise of the right of free movement.[892] In order for a measure to infringe the provisions pertaining to free movement it is sufficient for that measure to be "intrinsically liable" to affect migrant workers rather than to have that precise effect.[893]

Measures which discriminate directly are justifiable only on the grounds of express derogations provided in the Treaty

---

Treaty: ibid para 28; and Case C-415/93 *Union Royale Belge des Societes de Football Association v Bosman* [1995] ECR I-4921 in which the European Court of Justice considered UEFA's "three+two rule" to contravene the provisions concerning free movement: ibid para 137.

[890] Regulation 1612/68, art 3; and Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139.

[891] *Bosman* (n 889) para 96; Case 18/95 *Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345 para 41; Case C-232/01 *Van Lent* [2003] ECR I-11525 paras 15 - 16; Case C-109/04 *Kranemann* [2005] ECR I-2421 para 26; Case C-224/01 *Kobler v Republik Osterreich* [2003] 3 CMLR 28 paras 119 – 124; and Case C-385/00 *De Groot v Staatssecretaris Van Financien* [2002] ECR I-11819 para 78. See also *Angonese* (n 890) in which the European Court of Justice confirmed that a job application process which was conditional upon an applicant possessing a specific certificate; and which did not accept any other equivalent evidence could be justified only if it were based on *'objective factors not related to the nationality of the persons concerned and if it were in proportion to the aim legitimately pursued':* ibid para 42. See also Case C-237/94 *John O'Flynn v Adjudication Officer* [1996] ECR I-2617 para 18.

[892] Case C-19/92 *Kraus v Land Baden-Wurttemberg* [1993] ECR I-1663 para 32; and Case C-55/94 *Reinhard Gebhard v Consiglio Dell'Ordine degli Avvocati E Procuratori di Milano* [1995] ECR I-4165 paras 35 - 38 The European Court of Justice has also described the free movement provisions as applicable to measures which *'might place Community citizens at a disadvantage when they wish to pursue an economic activity in the territory of another Member State'*: *Bosman* (n 889) para 94; and Case 143/87 *Stanton v INASTI* [1988] ECR 3877 para 13; Case C-40/05 *Lyyski v Umea Universitet* [2007] 2 CMLR 3; [2007] All ER(D) 21 (Jan) para 35.

[893] *O'Flynn* (n 891).

(namely, public policy, public health or public security).[894] Measures which are indirectly discriminatory or which provide an obstacle to the free movement of workers may be justified on the basis of express derogations contained in the Treaty and secondary legislation, or on the basis of objective factors which are not related to the nationality of the person concerned and which are in proportion to the aim legitimately pursued.[895] In that regard the justifications advanced in respect of an alleged infringement of European competition law are relevant to an alleged infringement of the provisions pertaining to free movement.

The activity of a professional rugby league player may be described as "economic activity" which takes the form of gainful employment.[896] The right of free movement therefore applies to professional rugby league players. Furthermore, it is not necessary for an employment relationship to exist in order for Article 39 (EC) to apply; an intention to create an employment relationship will suffice.[897] Article 39 (EC) has horizontal direct effect. As a consequence, rules applied by a private sporting code's governing body (such as "the club trained rule") which impede access to employment are subject to Article 39 (EC).[898]

---

[894] Articles 39(3) and (4) (EC). See also Council Directive (EC) 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77, arts 27 and 29.
[895] *Angonese* (n 890) para 42.
[896] Case 43/76 *Dona v Mantero* [1976] ECR 1333 paras 12 - 16 and 19; and *Bosman* (n 889) para 73.
[897] *Bosman* (n 887) para 74.
[898] Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale* [1974] ECR 1405 paras 17 - 18; *Dona* (n 896) para 17; *Bosman* (n 889) paras 83 - 84; *Angonese* (n 890) para 31; Case C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577 para 120; Case C 341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet and Others* [2008] All

The "club trained rule" applies equally to all rugby league players irrespective of nationality. It may affect a player's opportunities of finding employment and impede access to employment. The circumstances of Mr Julian Rinaldi, Mr Stanley Gene and Mr Andrew Henderson described above demonstrate the disadvantages of the rule. However, whether Article 39 (EC) applies depends upon the rule's effect, or potential effect, for cross border movement.

The rule is intrinsically liable to affect cross-border movement in the following ways. First, a professional rugby union player may be discouraged from taking up employment as a professional rugby league player in the United Kingdom or France. A rugby union player does not satisfy the service requirements of the "club trained rule" owing to training received in a different sporting code. Rugby union is played in many more Member State countries than the United Kingdom and France, therefore a potential cross-border effect may arise.

Secondly, some foreign players with experience of the Australian NRL are dual nationals (with one nationality being that of a Member State). Dual national players may find

---

ER (EC) 166 para 98; and Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, Ou Viking Line Eesti* [2008] All ER (EC) 127 para 33. In the latter case the principle was expressed as follows: *'Articles 39 EC, 43 EC and 49 EC do not apply only to the actions of public authorities but extend also to rules of any other nature aimed at regulating in a collective manner gainful employment, self-employment and the provision of services'*: ibid. According to the European Court of Justice: *'the abolition of obstacles to free movement of persons and to freedom to provide services, which are fundamental objectives of the Community contained in Article 3(c) of the Community, would be compromised if the abolition of barriers of national origin could be neutralised by obstacles resulting from the exercise of their legal autonomy by associations or organisations which do not come under public law' – Walrave and Koch* (n 898) para 18. A contractual clause or policy that is contrary to Article 39 (EC) may be declared void and/or an obligation to pay damages may arise.

access to employment in the Super League competition impeded by the requirements of the "club trained rule". Dual national players who undertake development training in the Australian NRL and/or accrue playing experience in that competition are less likely to have complied with the requirements of the "club trained rule" owing to residency in Australia or New Zealand. A player's residency in a non-European Union country or nationality of a non-European Union country is irrelevant to a consideration of whether the right of free movement is infringed.[899] The non-recognition of occupational qualifications has frequently been considered a barrier to free movement.[900] For those dual national players with development training obtained in the Australian NRL and/or professional experience of playing in that competition, the principle of mutual recognition may apply.[901]

An anomaly arises in respect of a dual-national foreign player (with one nationality being British) who wishes to access employment at a British club. Mr Andrew Henderson and Mr James Evans are examples of British/Australian nationals

---

[899] European Union citizenship depends upon holding national citizenship of a Member State; and Member States' retain exclusive competence to define the requirements of national citizenship. Provided the player satisfies the requirements of national citizenship of a Member State, he is entitled to benefit from the right of free movement and from equal treatment in relation to his terms and conditions of employment: see the provisions concerning citizenship contained in Articles 17-22 (EC); and Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239.

[900] See for example Case 71/76 *Thieffrey* [1977] ECR 765; and Case C-340/89 *Vlassopoulou v Ministerium fur Justiz, Bundes-und Europaangelegenheiten Baden-Wurttemberg* [1991] ECR I-2357. Insofar as a case concerns the non-recognition of qualifications, the same principles apply under Articles 39 or 43 (EC): Case C-313/01 *Morgenbesser v Consiglio dell'Ordine degli Avvocati di Genova* [2003] ECR I-13467 para 61.

[901] *Vlassopoulou* (n 900); Case C-238/98 *Hugo Fernando Hocsman v Ministre de l'Emploi et de la Solidarite* [2000] ECR I-6623 para 40; Case C-319/92 *Haim v Kassenzahnarztliche Vereinigung Nordrhein* [1994] ECR I-425; Case C-234/97 *Bobadilla v Museo Nacional del Prado* [1999] ECR I-4773; and *Angonese* (n 890).

who undertook development training in the Australian NRL and who were denied re-employment at a British club on the basis of the rule's application. Those circumstances may represent a "wholly internal situation" to which European law does not apply.[902] However, both players face reduced opportunities for finding employment at the French club, Catalans Dragons, owing to the rule's application. A similar "wholly internal situation" arises in respect of a dual national foreign player (with one nationality being French) who seeks employment at Catalans Dragons.

Thirdly, the "club trained rule" hampers or renders less attractive movement by a French amateur player to the United Kingdom in order to pursue a professional career in the Super League competition. Whereas amateur clubs in the United Kingdom are members of the RFL, French amateur clubs are not and development training undertaken at an amateur rugby league club in France will not qualify a player for employment at a Super League club in the United Kingdom.

Finally, the rule's application to those players who do obtain the service qualification may nonetheless affect a player's opportunities for finding employment in another Member State country. By way of example, a French player who undertakes development training at Catalans Dragons loses his club trained status when he moves to the United Kingdom. Due to the rule's requirements that a club recruit a minimum number of club trained players and academy juniors, a federation trained player may face reduced

---

[902] Case 175/78 *Regina v Saunders* [1979] ECR 1129 para 11.

employment opportunities as a consequence. An infringement of Article 39 (EC), therefore, arises.

The RFL is not prevented from introducing a service qualification for professional rugby league players. However, the qualification must not constitute a barrier to the effective exercise of free movement or deny access to employment for Member State nationals. The "club trained rule" applies equally to all professional rugby league players irrespective of nationality, however, it impedes access to employment for some players with consequent detrimental effects for movement between Member States. Unless objectively justified and proportionate, the "club trained rule" is prohibited under Article 39 (EC). (The justifications advanced in respect of the rule are discussed below).

9.4.5 Conclusion

From a competition law perspective, the "club trained rule" results in an inefficient allocation of resources. A club may not be able to recruit a desired player; a player may be unable to access employment at a club; and overall, players face reduced employment opportunities as a result of the rule's application. From a consumer perspective, the rule may lead to a Super League club recruiting players based on the criteria of the "club trained rule" rather than recruiting on the basis of playing skill. This in turn may reduce the quality of the entertainment product on display.

The "club trained rule" has an appreciable effect on trade because of the presence of Catalans Dragons in the market for playing services and the rule's application to that club.

Prima facie, the rule restricts, distorts and prevents competition in the market for playing services. The issue that falls for consideration is whether the rule is a proportionate means of achieving a legitimate aim taking into account the specificity of sport.[903]

9.5 Justifications

The RFL Operational Rules describe the rationale for the "club trained player rule" as two-fold:

> *'The purpose behind the 'Club Trained Player' Rule is to encourage clubs to develop and better develop their own players so that there are more players coming into the game and so that the standard improves. A further purpose is to afford an opportunity to junior players to play in top level competitive matches in order to aid their development and ensure the development of the sport.'*[904]

The interviews with stakeholders highlighted additional purposes of the rule as being: to increase the selection pool for the England (formerly Great Britain) international representative team; and to decrease the number of foreign players participating in the competition. Each of these objectives will be discussed in turn as well as arguments concerning the application of the rule as a means of: reducing Super League club demand for foreign players; increasing supporter interest in the competition; and protecting the health and safety of players. The application to the Super League competition of the findings of a recent study concerning UEFA's "Home-grown Player Rule" will also be addressed.

---

[903] Case C-519/04 *Meca-Medina and Majcen v Commission* [2006] ECR I-6991.
[904] RFL Operational Rules 2009, B1:8.

9.5.1 To Encourage Investment in the Development of Junior Players

The European Commission has acknowledged that a rule which encourages the training of junior athletes is a legitimate objective for a professional sports organisation to pursue.[905] In *Bosman* the European Court of Justice accepted, inter alia, that in view of the considerable social importance of sporting activities, the aim of encouraging the recruitment and training of junior players was legitimate.[906] Since the aim is accepted as legitimate, the question is whether the "club trained rule" is a proportionate means of pursuing that objective.

Those clubs interviewed acknowledged investing in junior development although the level of club investment depended upon: the length of time a club had participated in the Super League competition; the effect of rules such as the "20:25 rule" (which may have operated as a disincentive for some Super League clubs to invest in junior development); and the rule of "relegation and promotion". The latter two rules no longer apply in the Super League competition thereby removing regulatory factors which discouraged club investment in junior development.

Pursuant to B7:4 of the RFL Operational Rules 2009, a Super League club is contractually required to operate teams in the

---

[905] Commission (EC), 'White Paper on Sport' COM (2007) 391 final, 11 July 2007, 68.
[906] *Bosman* (n 889) para 106.

academy reserve competition and the U18 competition.[907] Failure to do so amounts to misconduct and penalties apply.[908] In addition, a successful application for a Super League license requires a club to demonstrate investment in junior development. Those clubs already participating in the competition are likely to focus on compliance with the licensing criteria. Those clubs not in the Super League competition who wish to apply for a license in the future will also likely maintain or improve club investment in junior development. Over time the licensing system will encourage further investment by clubs in junior players. With the simultaneous introduction of the "club trained rule" and the licensing regime the opportunity to measure the effect of the latter as a mechanism for encouraging club investment in junior development was lost.

Three clubs interviewed described the benefits of fielding a team that comprised mainly of local players, as opposed to a team that comprised mainly of foreign players, as follows: increased revenue from the local community in the form of gate receipts, sponsorship and the sale of corporate boxes; and increased interest from supporters and local sponsors. Since including local players in a team is financially beneficial for a sports business, a club may be more inclined to invest in junior player development.

For these reasons, the "club trained rule" is not a proportionate means of encouraging Super League clubs to invest in player development. The regulatory framework

---

[907] Section B7:4 of the RFL Operational Rules 2009 provides that: *'It is compulsory for Super League clubs to comply with the regulations and to run teams in both the Reserve and Academy (U18) competitions which are fit for purpose and meet the entry criteria specific to the competitions'.*

[908] Ibid.

already promotes investment in a way that is non-restrictive and non-discriminatory. Overall, the "club trained rule" was unnecessary in light of other changes made to the regulatory framework between 2007 and 2009. Increasing the financial incentives paid to clubs by the RFL may also be a less restrictive means of encouraging investment.[909]

9.5.2 To Provide Junior Players With the Opportunity To Play At an Elite Level and to Aid Their Development and the Development of the Sport.

Any opportunity for a junior player to play in a Super League club's first team enables the player: to gain experience; to improve fitness levels; to build a curriculum vitae; and to display his skills to future employers (including a sporting code's governing body for selection to an international representative team). Without experience of playing in Super League, it may be difficult for a junior player to obtain a contract in a Super League club first team and some players may be lost from the game at an academy level as a result. A measure which provides a junior player with the opportunity to play at an elite level, therefore, satisfies a legitimate objective of a professional sports business and/or regulatory body.[910]

The interviews with stakeholders demonstrated that a club's objective of avoiding relegation may have limited the

---

[909] See, for example, the incentives provided by the Rugby Football Union to England's elite rugby union clubs for developing players who are subsequently selected to the England international representative team: 'RFU Ends Pursuit of League Stars' *BBC Sport* (London, 29 August 2008) <http://news.bbc.co.uk/sport1/hi/rugby_union/7586836.stm> accessed 29 September 2008.

[910] *Bosman* (n 889).

opportunities for a junior player to break into a club's first team. In order to avoid relegation, a club generally preferred to recruit or field experienced players (including experienced foreign players) rather than provide a junior player with the opportunity to play. Those players interviewed reported a number of obstacles to obtaining employment in a first team including competition with experienced players. Thus, insofar as a regulatory rule designates a number of first team positions for junior players, then the rule may satisfy the *Meca Medina* test (provided a reasonable number of positions are selected).[911] On this basis, the "club trained rule's" requirement for a Super League club to include a minimum number of academy junior players in its first team may be a proportionate measure to adopt.

However, the "club trained rule" applies to all players who wish to participate in Super League (such as, academy players, experienced Super League players, players with experience of employment in the Australian NRL or rugby union players who wish to switch codes) so its restrictive effects are more wide ranging. Whilst it may afford junior players with a greater opportunity to be included in a Super League club's first team squad, it does so in a manner which is disproportionate, discriminatory and restrictive.

---

[911] See generally Ruben Conzelmann, 'Models for the Promotion of Home Grown Players For The Protection of National Representative Teams' [2008] 3-4 ISLJ 26.

9.5.3 To Increase the Pool of Players Eligible For Selection to the England International Representative Team

A successful international representative team assists the RFL with its constitutional objective of developing the sport of rugby league. The international representative team raises the profile of the sport which in turn benefits individual Super League club businesses, the Super League competition and the sport overall. The more players eligible for selection to the England international representative team, the more depth in squad positions available to selectors, and the playing strength of the international representative team may improve as a result.

In *Bosman* the European Court of Justice considered whether a rule which limited the number of foreign players that a football club could select for its team was precluded under Article 39 (EC). UEFA argued, inter alia, that the rule was required to promote a large pool of playing talent for selection to the international representative team of the country in which the club was located. Advocate General Lenz rejected UEFA's argument on the basis that:[912]

- a professional football club benefited from the success of an international representative team. An incentive, therefore, existed for a club to recruit local players without the necessity for the rule at issue;

---

[912] *Bosman* (n 889) para 146.

- in countries where a football competition was played in which the number of foreign players a club could recruit was not limited, the governing body still had sufficient players for an international representative team; and

- the selection pool for an international representative team frequently included players who were employed at clubs abroad.

The European Court of Justice also disagreed with UEFA's arguments (albeit on different grounds to those advanced by Advocate General Lenz). According to the European Court of Justice:

> *'Whilst national teams must be made up of players having the nationality of the relevant country, those players need not necessarily be registered to play for clubs in that country. Indeed, under the rules of the sporting associations, foreign players must be allowed to play for their country's national team in certain matches. Furthermore, although freedom of movement for workers, by opening up the employment market in one Member State to nationals of the other Member States, has the effect of reducing workers' chances of finding employment within the Member State of which they are nationals, it also, by the same token, offers them new prospects of employment in other Member States. Such considerations obviously also apply to professional footballers.'*[913]

Since the argument was rejected in the context of a claim brought under Article 39 (EC) it is likely that such an argument may also be rejected in the context of a claim under Article 81 (EC). The "club trained rule" as a means of increasing the number of players available for selection to

---

[913] *Bosman* (n 889) para 133 – 134.

the England international representative team will likely not satisfy the *Meca Medina* test.[914]

Some foreign players may qualify for selection to the England international representative team on the basis of nationality or residency. Maurie Fa'asavalu, a former Samoan rugby union player, is an example of a player who qualified on the basis of residency for selection to the England international team.[915] Additionally, the rule may decrease the number of players eligible for selection to the England international representative team (at least in the short term). All players interviewed were eligible under Rugby League International Federation Rules for selection to the England international representative team. Four of the ten players interviewed potentially faced reduced employment opportunities in the Super League competition, with a consequential detrimental effect for selection to the England international representative team.

9.5.4 To Reduce Super League Club Demand For Overseas Players

Interviews with Super League clubs demonstrated that demand for overseas players increased when: a club faced relegation from Super League; a club was promoted to the competition; or a skills shortage existed in the local labour market. In those circumstances, a club was more likely to favour recruiting experienced overseas players (despite the

---

[914] For a summary of the principles applied in *Meca Medina,* see chapter one of this thesis.

[915] 'Maurie Fa'asavalu Demonstrates He Is True Brit' *Telegraph* (London, 29 October 2007) <http://www.telegraph.co.uk/sport/rugbyleague/2324431/Maurie-Fa'asavalu-demonstrates-he-is-true-Brit.html> accessed 6 October 2008.

increased cost of employing an overseas player). The cost of employing an overseas player was balanced against the cost of relegation from Super League. The removal of relegation and promotion as a means of entry into the competition has removed a key factor which influenced demand for overseas players.

Some stakeholders interviewed reported a shortage of skilled talented players in the United Kingdom; and an excess supply of talented players in Australia. In times of a skills shortage, the industry requires more not less skilled foreign players to fill positions. The increase in the number of teams participating in the Super League competition from twelve to fourteen in 2009 is likely to compound any existing skills shortage. The "club trained rule" may in turn exacerbate the skills shortage and/or lead to a reduction in the quality of the entertainment product on offer to consumers. The rule also places those clubs with smaller academies at a disadvantage.

According to those people interviewed, foreign players in Super League: benefited some Super League clubs financially through increased ticket sales and sales of merchandise; improved the skills of local players (thereby assisting to remedy a skills shortage); and improved the standard of play in the Super League competition (thereby enhancing the entertainment spectacle for consumers). The benefits provided to the competition, the development of local players and consumers outweigh the introduction of a discriminatory rule that restricts competition in the relevant market.

9.5.5 To Protect the Health and Safety of Players

In principle a requirement that a rugby league player satisfy a period of development training may be justified on health and safety grounds. The health and safety of all players in the Super League competition may be protected by a requirement of three years training at an RLIF-affiliated club prior to the age of 21 (especially if training standards differ between clubs or between competitions). Those stakeholders interviewed did not refer to the health and safety of players in the Super League competition as a justification for the rule, and further evidence of the rule's necessity on these grounds is required.

9.5.6 To Increase Supporter Interest

In *Bosman* the European Court of Justice expressly rejected the "club identity rationale" as a legitimate aim of a sporting rule.[916] According to the Advocate General,

> *'[T]he great majority of a club's supporters are much more interested in the success of their club than in the composition of the team. Nor does the participation of foreign players prevent a team's supporters from identifying with the team. Quite on the contrary, it is not uncommon for those players to attract the admiration and affection of football fans to a special degree.'*[917]

The notion that supporter interest is greater when a team comprises mainly of local players rather than foreign players is called into question by Super League attendance records.

---

[916] *Bosman* (n 889) para 131.
[917] Bosman (n 889) para 143 (Advocate General Lenz).

Attendance data collated by the RFL demonstrates that average weekly attendance at a Super League match has increased annually between 2001 and 2008.[918] The number of foreign players participating in the competition has increased over the latter part of that period. On this basis, it may be argued that the number of foreign players in a team does not influence supporter interest. Sociological research suggests that a supporter identifies with a club through a range of factors not only the club's players.[919] Supporters may identify with a club because of its geographical location (as being in close proximity to a supporter's residence or the place where a supporter grew up) rather than the team composition.

9.5.7 Inuem Consulting Study into UEFA's "Home-grown Player Rule"[920]

In the context of professional football, the European Commission has accepted that UEFA's "home grown player rule" (the rule upon which the "club trained rule" is premised) *'seems to comply with the principle of free movement of workers whilst promoting the training of young European players'*.[921] A study which considered the legality of UEFA's "home grown player rule" concluded that the rule

---

[918] Rugby Football League, *Super League Attendance Data 2000-2008* (as at 4 September 2008).

[919] D Ranc 'Vectors of Identification and Markets of Identity in Contemporary European Football' XIth International CESH Congress, Vienna (2006) cited in Miettinen and Parrish (n 847).

[920] Inuem Consulting, *Study on Training of Young Sportsmen and Women in Europe: The Homegrown Player Rule* (April 2008). An independent study financed by the European Commission.

[921] Commission Press Release (n 847). In *Bosman* the European Court of Justice was swift to point out that the European Commission is unable to guarantee the compatibility of practices with the Treaty and *'in no circumstances does it have the power to authorise practises which are contrary to the Treaty'*: *Bosman* (n 889) para 136.

indirectly discriminated on the basis of nationality,[922] but that the discrimination was justified on the basis that the rule:[923]

- Only applied to a limited number of professional football competitions and professional clubs;

- Balanced the distribution of players between clubs thereby preserving uncertainty of outcome;

- Supported the training of young sports men which was a legitimate objective accepted by the European Court of Justice in *Bosman*;

- Obliged more affluent clubs to maintain an academy, develop training programmes and to provide junior players with the opportunity to play; and

- Enabled a young player to pursue educational opportunities and football training simultaneously in his country of origin.[924]

The study's findings do not apply to the Super League competition for a number of reasons. First, the organisation and administration of the Super League competition is different to that of football. UEFA's competitions are organised as open competitions and not closed competitions (as is the case of the Super League competition with its licensing regime). Additionally, there are other regulatory rules which compel a Super League club to invest in junior development which may not exist in football.

---

[922] Inuem study (n 920) 40 - 46.
[923] Ibid.
[924] Cf: Miettinen and Parrish (n 847) in which the authors conclude that the rule is not a proportionate means of achieving a legitimate aim.

Secondly, the Super League competition has previously operated under regulatory rules which have no equivalent in the organisation of professional football, and which have influenced the level of club investment in player development (for example, the "20:25 rule"). Thirdly, UEFA's "Home-grown Player rule" applies to only two European professional football competitions. There are many more professional football competitions in Europe to which the rule does not apply and for which a professional player's capacity to earn a living is not affected. The Super League competition is the only full time professional rugby league competition in Europe. The rule affects the composition of a Super League club's first team and applies irrespective of the competition in which the club participates. Unless a player satisfies the rule's requirements, access to employment as a rugby league player in Europe may be reduced.

Fourthly, UEFA was of the view that affluent football clubs were following a practice of not investing in the development of junior players but recruiting players from abroad instead. That is not the case in professional rugby league. The affluent clubs have well established academies and some clubs interviewed indicated a preference for recruiting locally trained players. In rugby league the necessity to recruit abroad has arisen principally from a skills shortage in the northern hemisphere which may not necessarily arise in a popular sport like football.

Finally, a benefit of the "home grown player rule" was that it enabled a junior player to pursue educational opportunities and football training in his country of origin. One rugby league player interviewed demonstrated that the "club

trained rule" may interfere with a player's education. The player attended university rather than enter a full time career in professional rugby league and owing to his later entry into the profession, was potentially disadvantaged by the "club trained rule". Also, a second player interviewed did not start playing rugby league until he was at university as the school he attended did not offer rugby league to pupils. He too is now potentially disadvantaged by the rule's application.

The RFL's advertising slogan states that, "*Rugby league. It's a whole different ballgame*".[925] A rule which applies in football may not be applicable (or necessary) in rugby league owing to: rugby league's regulatory framework and regulatory history; the Super League competition's organisational structure; player pathways into a professional rugby league career; and the number of participants playing the sport at an elite level.

9.6 Conclusion

The "club trained rule" is anti-competitive, discriminatory and unable to be justified. For the reasons set out above, the "club trained rule" does not satisfy the *Meca Medina* test and is void under Article 81(2). Furthermore, it is unlikely that the rule satisfies the conditions of Article 81(3). It is difficult to ascertain whether the "club trained rule" improves production of playing services or promotes technical or economic progress because of its simultaneous introduction with the licensing system; and the removal of a "rule of relegation and promotion".

---

[925] RFL Official Guide 2009, front cover.

The regulatory framework already encourages a Super League club to develop junior players. Over time, changes in the regulatory framework made between 2007 and 2009 will likely result in an increased number of skilled local players participating in the Super League competition. The "club trained rule" was not required as a mechanism for encouraging club development of junior players or increasing the selection pool for the England international representative team. The rule focuses a club's recruitment decisions on a qualification defined by a length of service rather than playing skills and talent. It may dilute the competition of talented players to the detriment of the entertainment product and ultimately consumers.

The RFL cannot protect the local labour market from competition by other Member State nationals (a factor in common with other British employers). A player of Member State nationality is entitled to reside in the United Kingdom and France and work as a professional rugby league player. If the RFL wishes to reduce the number of foreign players in the Super League competition, it can use the consultation process with the United Kingdom Border Agency to strengthen the criteria for a professional rugby league player's work permit. In that way it may legitimately influence the number of foreign players entering the competition. It may also through its affiliation with the French Rugby League Federation encourage that organisation to lobby the French Government in respect of work permit requirements for foreign players to work in France.

Finally, the "club trained rule" which was agreed by the clubs and the RFL may abuse a collectively dominant position in

the market for playing services. The RFL and the clubs collectively agreed to the "club trained rule" which determines whether, and in what circumstances, a player may access the market. A purpose of the rule is to increase the selection pool for the England international representative team. The England international representative team is managed by the RFL. A successful international representative team provides financial benefits for the RFL through participation in international representative matches; and indirectly benefits the clubs by increasing spectator interest in the sport. The rule is implemented and enforced by the RFL. By exercising its regulatory authority, the RFL was able to restrict access to the relevant market for some players thereby benefiting its own commercial interests and those of the clubs.[926] The following chapter summarises the key points raised throughout this thesis and recommends changes for the industry.

---

[926] Case C-49/07 *Motosykletistiki Omospondia Ellados NPID v Elliniko Dimosio* [2008] 5 CMLR 11.

CHAPTER 10: CONCLUSION

A rugby competition is a partnership between three entities, namely the sporting code's governing body, the clubs and the players. The competition:

> *'offers athletes the opportunity of engaging in their sporting activity in competition with others and at the same time, the athletes by participating in the competition, enable the organiser to put on a sports event which the public may attend, which television broadcasters may transmit and which may be of interest to advertisers and sponsors'.*[927]

As an amateur code, the regulators of rugby union provided players with the opportunity to participate in matches from which the clubs and the rugby unions benefited financially. Between 1871 and 1995 the regulatory framework for rugby union fostered the commercial interests of the regulators and the clubs. Player wage payments were not permitted and from 1895, those players who participated in rugby league were banned from rugby union altogether. There was no internal or external pressure for the self-regulating code to organise in a way that benefited the players or consumers.

In 1987 competitive pressure in the market for the organisation of international rugby union matches led to product innovation in the form of the Rugby Union World Cup. The innovation benefited consumers and the sport's popularity grew with resultant financial gains for the clubs and the sporting code's governing bodies. Yet, the regulatory framework prevented the players from sharing in the financial success of a sport in which they were an integral

---

[927] Cases C-51/96 and 191/97 *Deliege v Ligue Francophone de Judo et Disciplines Associees ASBL* [2000] ECR I-2549 paras 56 - 57.

part. It was a further twelve years before external pressure in the form of: competition in the market for the organisation of rugby union matches; proposed government intervention in the administration of rugby union; and competition for rugby playing services, compelled rugby union's administrators to amend the regulatory framework in favour of players. Permitting player wage payments provided a player with the opportunity of sharing in the financial wealth of the game through participation as a full time professional athlete. External pressures on a grand scale resulted in important regulatory change which benefited the players. But, crucially, some rugby unions did not incorporate the players in the game's decision-making processes.

In times of "war" voluntary internal regulatory change that benefited the interests of rugby union players occurred, but only on the terms provided by the regulators and the clubs.[928] In New Zealand, the collective organisation of rugby union players, several years after the regulatory change occurred, provided players in that country with a right of participation in NZRU decision-making processes on issues that affect a player's employment.

When the northern rugby union clubs withdrew from the Rugby Football Union in 1895 and formed the Northern Rugby Football Union ("NRFU"), the clubs continued operating under a similar regulatory structure (namely, as a private collective association of rugby clubs). Players

---

[928] The reference to "war" refers to World Wars 1 and 2 when players of both codes in the Armed Forces were permitted to play in matches against each another (outside periods of warfare the rules of amateur rugby union forbade rugby league players from playing rugby union); and also to the title of the book written by Peter FitzSimons that describes the events of 1995 in both rugby codes (see Peter FitzSimons, *The Rugby War* (Harper Collins Publishers Pty Limited, Sydney 2003).

benefited through the receipt of wage payments but only on the terms provided by the NRFU and its member clubs. NRFU players were not included in decision-making processes at a regulatory level. That situation has continued throughout the history of British rugby league; except for one occasion (of which the author is aware).

In 1907 a professional New Zealand rugby union team known as the "All Golds" toured the United Kingdom. The regulatory framework and player rules for the tour were encapsulated in a single agreement between all entities involved in the sporting competition (namely, the NRFU; the NRFU clubs; and the "All Gold" players). The terms of the agreement provided players with a share of the gate receipts for each match in which the "All Golds" participated.

In 2009 the primary employment relationship in the Super League competition is between a player and a Super League club. An employment contract is a type of contract under which special obligations are owed that may not arise in the context of a commercial relationship. Understanding the nature of the contract between a Super League club and a professional player is pivotal to understanding the way regulatory power may be exercised in the industry.

Ordinarily regulation of the employment relationship falls to the Government, a trade union and the employer, all of whom owe an obligation of consultation to an employee. However, in the circumstances of the Super League competition, the employment relationship is also regulated by: Super League (Europe) Limited, the Rugby Football League ("RFL") and the Rugby League International Federation ("RLIF"). The decision-making processes of these

private entities do not involve the players; and rules promulgated by these entities can directly or indirectly affect a player's employment interests.

Each Super League club is a member of Super League (Europe) Ltd ("SLE") and an employer. In its capacity as a member of SLE, the club may make decisions which benefit its own financial interests, the collective financial interests of the clubs and the financial interests of the competition as a whole, but which bring the club into conflict with duties owed under an employment contract with a player. A club is entitled to look after its own financial interests but only to the extent that it does not breach the term of trust and confidence implied in the player's contract.[929] The RFL may also be an employer of Super League players, although the construction of the players' contract is ambiguous. The implied term of trust and confidence may constrain the decision-making power exercised at a regulatory level by a party to a player's employment contract.

Reliance upon employment law as an external constraining influence on the exercise of regulatory power in the Super League competition is problematic for a number of reasons. First, the application of common law principles to the organisation of professional sport through the implied term of trust and confidence is uncertain. It also requires a private legal challenge brought by a player which can be costly. A player's primary focus is to play the sport and challenging unfair and unreasonable employment practices may not necessarily be a priority of the player.

---

[929] *Imperial Group Pension Trust Limited v Imperial Tobacco Ltd* [1991] 1 WLR 589 (ChD); and *Malik v Bank of Credit and Commerce International SA (in compulsory liquidation)* [1998] AC 20 (HL).

Secondly, private contractual relations enable changes to be made by a party to the contract. Ambiguities in the construction of a contract may be resolved privately in favour of the RFL thereby removing the RFL from the scope of employment law. A sporting code's governing body is not subject to judicial review in England.

Private contractual relations, however, are not immune to the application of European law. Articles 81 and 82 (EC) are concerned with competition in the common market. In circumstances where a contractual clause or a regulatory measure adopted by a sporting code's governing body detrimentally affects competition in the common market, European competition law may step in and declare the measure void. In circumstances where a measure restricts the right of free movement between Member States, European law may declare the measure invalid. On this basis European law exerts an external constraint on the exercise of private regulatory power that affects the employment of professional rugby league players in the Super League competition.

The "club-trained rule", the salary cap, the regulatory and contractual provisions which foreclose access to a player's services, and the situation of Messrs Leuluai and Webb are examples of the clubs and the RFL exercising regulatory power in a manner which favours their own commercial interests and detrimentally affects the interests of players in the Super League competition. The concentration of regulatory power and purchasing power under the umbrella of SLE does not benefit players or consumers. Furthermore, as with the situation of amateur rugby union between 1871

and 1995, there is an absence of internal pressure (and currently an absence of external pressure) that would compel voluntary changes in the regulatory framework in favour of the players.

External regulation of the employment relationship in the Super League competition is therefore required. The regulation may take the form of legislation which specifically protects the employment of professional rugby league players or legislation which breaks the monopoly of the RFL and the clubs in the market for the organisation of professional rugby league competitions in the United Kingdom.[930]

Alternatively, the application of European competition law to the market for playing services could restrain the exercise of regulatory power by:

- Compelling voluntary change in the administration of the Super League competition; or

- Ordering changes to the competition's regulatory framework.

An example of a situation in which the proposed intervention of European competition law compelled voluntary change arises in the context of Formula 1 motor racing. In 2001,

---

[930] See, Stephen F Ross, 'Break Up the Sports League Monopolies' in Paul D Staudohar and James A Mangan (eds) *The Business of Professional Sports* (University of Illinois Press, Chicago 1991) 152. Ross asserts that legislating for competition in a market monopolised by a sports league: provides less incentive for the sports league to adopt measures which result in the inefficient allocation of playing resources; increases players' salaries to a competitive level; and leads to internal rules which create exciting sporting competitions – ibid 167.

following a European Commission investigation into alleged market abuses, the regulatory function and the commercial function of the Federation Internationale de l'Automobile ("FIA"), the sporting code's governing body for motor racing, were separated.[931]

The Commission objected to FIA using its regulatory powers to prevent the organisation of races which competed with events promoted and organised by FIA. Examples of FIA's abusive conduct included: incorporating clauses that prevented circuits used for Formula 1 motor racing being used by a competitor for a period of ten years, into contracts completed by FIA with promoters and Formula 1 participants; and controlling all factors of production (such as drivers or motor racing circuits) through an unduly restrictive licensing system.

The matter was resolved without the necessity for a formal hearing when FIA voluntarily agreed to separate the commercial and regulatory functions of Formula 1 motor racing. In particular, FIA agreed that: it would not enforce its regulations in a manner that impeded or prevented competition in the relevant market; it would exercise its regulations only in the interest of maintaining safety standards; it would enforce licensing and disciplinary rules in the interests of health and safety at motor sport events only;

---

[931] Commission (EC), 'Notice Published Pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163 – Notification of FIA Regulations -, COMP/36.638 – Notification by FIA/FOA of Agreements Relating to the FIA Formula One World Championship - and COMP/36.776 – GTR/FIA and Others' [2001] OJ C-169/03. See also, Adam Cygan, 'Competition and Free Movement Issues in the Regulation of Formula One Motor Racing' Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds) in *The Regulation of Sport in the European Union* (Edward Elgar Publishing Limited, Cheltenham 2007) 74.

and it would improve transparency of decision-making and appeals procedures.[932]

An example of a situation in which European competition law was used to intervene in the regulation of a sport arose in *Motosykletiski Omospondia Ellados Npid v Ellinik Dimosio.*[933] The case concerned the Automobile and Touring Club of Greece ("ELPA") (the official Greek representative of the International Motorcycling Federation) which was responsible under national law for authorising the organisation of motorcycling events in Greece. The ELPA also organised motorcycling events for its own commercial gain. The ELPA refused an application by Motosykletistiki Omospondia Ellados ("MOTOE") for authorisation to hold a motorcycling event which potentially competed with events organised by ELPA.

The European Court of Justice concluded that exercising its regulatory function placed the ELPA in a position whereby it could prefer its own commercial interests ahead of those of other competing organisers of motorcycle events. Its regulatory function enabled it to determine whether and in what conditions other undertakings had access to the market and engaged in activities on that market. Accordingly, by exercising its regulatory function and refusing MOTOE's application, ELPA infringed Article 82 (EC).[934]

---

[932] Commission Notice (FIA) (n 931) para 5. According to the Commission, the changes agreed by FIA introduced structural remedies which minimised the risk of future abuse and set the basis for '*a healthy competitive environment in economic activities related to motor sport…The reformed rules appear to provide satisfactory guarantees for a new regulatory environment where FIA's licensing powers and the code's sporting and technical rules will be applied in an objective, non-discriminatory and transparent manner*' – ibid para 6.

[933] Case C-49/07 [2008] 5 CMLR 11.

[934] Ibid para 51.

The Commission investigation into FIA and the European Court of Justice decision in *MOTOE* have implications for the regulation of the employment relationship in the Super League competition. The organisation of the clubs and the RFL under SLE creates a collectively dominant entity in the market for playing services. In circumstances where a collectively dominant entity abuses a dominant position, the Commission may investigate to prevent the abuse arising in the future. It may compel the separation of regulatory and commercial functions; and require more transparency and consultation in decision-making procedures. The application of European competition law to the labour market for the Super League competition may, therefore, bring about regulatory change which benefits the employment of professional players.[935]

External pressure alone will not constrain the exercise of private regulatory power. The history of rugby union and rugby league demonstrates that the interests of all parties involved in a professional rugby competition are best served when there is strong external regulation and internal pressure in the form of the collective organisation of players. In that regard only when agreement exists between the RFL, the clubs and the players, which provides players with an involvement in the decision-making processes that affect a player's employment, will the exercise of private regulatory power be effectively constrained. Any agreement would have to include all the player rules that directly or indirectly affect a player's employment; and provide a consultation process

---

[935] See, Stephen F Ross and Robert B Lucke, 'Why Highly Paid Athletes Deserve More Anti-trust Protection that Ordinary Unionized Workers' [1997] 33 Antitrust Bulletin 641.

whereby the clubs and the RFL may seek the agreement of the players to changes in the regulatory or competition framework which directly or indirectly affect the employment interests of players.

It would benefit the interests of all stakeholders in the sport if the agreement took the form of a collective bargaining agreement. A collective bargaining agreement concluded in the course of negotiations between management and labour that contains measures aimed at improving conditions of work and employment falls outside the scope of the competition law provisions of the Treaty.[936] Many of the restrictive labour practices which apply in the Super League competition assume a different character if incorporated in a collective bargaining agreement.

For example, a salary cap implemented unilaterally by horizontal competitors is a price-fixing mechanism of considerable restrictive effect in the market for playing services. A player wage payment model agreed through a process of collective negotiation and incorporated into a collective bargaining agreement may, however, withstand European competition law scrutiny. Remuneration is a permissible subject for agreement between labour and management. It is not uncommon for some collective bargaining agreements to set wage scales or maximum and

---

[936] Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751 para 60: *'It is beyond question that certain restrictions of competition are inherent in collective agreements between organisations representing employers and workers. However, the social policy objectives pursued by such agreements would be seriously undermined if management and labour were subject to Article 85(1) [now Article 81] of the Treaty'* – ibid. The social policy objectives of the Treaty lie alongside the competition policy objectives: see for example, Articles 3, 136-138 (EC) and the European Charter.

minimum remuneration levels. A player wage payment model along those lines has beneficial distributive effects for players. It may keep the range of salaries between the highest paid player and a junior player low; and ensure a fairer distribution of wage payments amongst all players in the industry. The model can provide for annual increases in the wage scales.

A rule that regulates access to employment is also a permissible subject for incorporation into a collective bargaining agreement.[937] However, the terms of a collective bargaining agreement are not excluded from the scope of the Treaty provisions pertaining to free movement and the rule must comply with Article 39 (EC).[938] Owing to its potential detrimental effect for free movement, the "club trained rule" in its current form could not be included in a collective bargaining agreement. However, a rule that regulates entry and is based on health and safety considerations may be included; similarly a rule that "ring fences" a reasonable number of first team squad positions for academy players may also be included. The latter rule promotes player development and assists a junior player with the transition from an academy team into a first team.

A collective bargaining agreement can also contain the standard terms of a player's contract. It can include a revenue-sharing arrangement between the clubs and players in respect of the supply and acquisition of a player's intellectual property. Sharing the proceeds of all revenue

---

[937] Case C-234/97 *Bobadilla v Museo Nacional del Prado* [1999] ECR I-4773 paras 18 - 19.
[938] Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, Ou Viking Line Eesti* [2008] All ER (EC) 127 paras 43 - 54.

generated by players in the Super League competition between the clubs and the players may: operate as an incentive reward for players; improve player productivity; improve the quality of the entertainment product; and improve efficiency.

The provisions of a collective bargaining agreement could create more flexible contractual relations thereby promoting competition in the market for playing services. The payment of guaranteed retainers in return for a reasonable restraint of trade may have the effect of reducing the duration of contracts agreed between a player and a club. A restraint of trade clause which restricts player movement post-termination of the employment contract would be permissible if limited in effect by a reasonable period of time such as, for example, three months (such a restraint would be in keeping with the common law approach to restraint of trade clauses contained in the terms of a professional sportsperson's contract).[939] A reasonable restraint of trade clause supported by adequate consideration would balance the interests of players and clubs.

Extending the period over which a club may approach a player without the permission of the employing club (for example, to the final year of a contract); and providing a guaranteed pathway of access for players into employment in an international representative match would also minimise

---

[939] *Lumley v Wagner* (1852) 1 De GM & G 604; and *Warner Bros Pictures Inc v Nelson* [1937] 1 KB 209 (KBD). In both cases the defendants were restrained for a short duration not exceeding three months. Cf: with the approach in *Page One Records Ltd v Britton* [1968] 1 WLR 157 (ChD); and *A Schroeder Music Publishing Ltd v Macaulay* [1974] 1 WLR 1308; *Nichols Advanced Systems Inc v de Angelis* (unreported, 21 December 1979 ChD); *Subaru Technica International Inc, Prodrive Ltd v Burns and Ors* (unreported, 12 December 2001, HC01C05152, ChD); and *Warren v Mendy* [1989] 1 WLR 853 (CA).

anti-competitive foreclosure. A registration system that does not operate as a barrier to the supply of playing services would promote access to employment for players; and access to playing services for clubs alike. A system that provides for a player's registration (with minimal restrictions) yet still enables the RFL to record information for insurance purposes and to monitor disciplinary matters would balance the interests of the RFL and players. It is preferable that the registration contract comes to an end upon termination of the employment contract.

Finally, it is important that all future expansion of the Super League competition be undertaken in a way that promotes the interests of players. The admission of Catalans Dragons into the competition created jobs in France for French players but did not create employment opportunities for British players owing to the recruitment policy adopted by the club.[940] Any future expansion of the Super League competition must be undertaken in consultation with the players and in a manner that serves the interests of *all* players. It is, therefore, vital that included in the collective bargaining agreement is a procedure whereby the clubs and the RFL can obtain the agreement of the players to any changes in the competition that directly or indirectly affect the employment interests of players.

Drawing upon an analysis of the regulatory framework, the players' contract, contracting practices and interviews with participants in the industry, the following recommendations are made.

---

[940] In 2007 Catalans Dragons recruited French players and players from the Southern Hemisphere. It did not recruit British players: interview with Catalans Dragons, 2007, France.

1. That the RFL and the Super League clubs voluntarily amend the structure and regulation of the Super League competition in order to comply with European competition law and, where relevant, the Treaty provisions pertaining to free movement;

2. That in the absence of the RFL and the clubs voluntarily amending the structure and regulation of the Super League competition, the European Commission investigate: the salary cap; "the club trained rule"; the supply of a player's registration; the acquisition of a player's intellectual property; and the terms of the players' contract and relevant RFL Operational Rules that contribute to anti-competitive foreclosure in the market for playing services; and

3. That professional rugby league players organise collectively to negotiate employment terms and conditions with the clubs. Effective collective organisation will provide players with an involvement in the decision-making processes at a regulatory level. It will also protect employment rights; and counterbalance the monopsony created by the clubs in the market for playing services.[941]

---

[941] In Case C-250/92 *Gottrup-Klim e.a.Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA* [1994] ECR I-5641, the European Court of Justice observed that *'in a market where product prices vary according to the volume of orders, the activities of co operative purchasing associations may, depending on the size of their membership, constitute a significant counterweight to the contractual power of large producers and make way for more effective competition'* – ibid para 32. By analogy, the collective organisation of the players on issues such as the supply of a player's intellectual property to the Super League competition, the salary cap and the release of players for international matches may constitute a significant counterweight to the contractual power of the clubs.

In conclusion, the exercise of regulatory power by a sporting code's governing body which impinges upon the employment of professional players may be limited or restrained through European competition law. Restraining the regulatory actions of SLE, the RFL and the RLIF will benefit the free movement of professional players throughout Europe and between competitions worldwide.

BIBLIOGRAPHY

1. Legislation

United Kingdom

Sports (Discrimination) Bill (HC) [1993-1994] 129

Copyright Designs and Patents Act 1988, s 2
Data Protection Act 1988
Trademarks Act 1994, s 1(1)
Employment Rights Act 1996, s 230
Human Rights Act 1998, s 6
Competition Act 1998

Civil Procedure Rules, Part 54.1(2)

New Zealand

Judicature Amendment Act 1972, s 3
Employment Relations Act 2000, s 40

France

French Code of Sport, Articles L132-1 and L132-2

Europe

The Treaty of Amsterdam 1997, Declaration on Sport, Declaration No 29

Presidency Conclusions of the December 1998 Vienna European Council

Presidency Conclusions of Santa Maria da Feira June 2000

European Council, Declaration on the Specific Characteristics of Sport and Its Social Function in Europe, of Which Account Should be Taken in Implementing Common Policies annexed to the Treaty of Nice 2000 ("The Nice Declaration")

Draft Treaty on European Union and the Treaty Establishing the European Community as Modified by the Treaty of Lisbon, Title XII, Article 16A

Council Regulation (EEC), 1612/68 of 15 October 1968 on the freedom of movement of workers within the community [1968] OJ L 257/2

Council Regulation (EC), 139/2004 on the Control of Concentrations Between Undertakings (the EC Merger Regulation) [2004] OJ L24/1

Council Directive (EC), 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in enjoyment and occupation [2000] OJ L303/16

Council Directive (EC), 2004/38/EC of 29 April 2004 on the right of citizens of the Union and their family members to move and reside freely within the territory of the Member States [2004] OJ L 158/77

European Commission Documents

Commission (EC), *Third Report on Competition Policy* May 1974, Brussels

Commission (EC), 'The Helsinki Report on Sport' COM (1990) 644 final, 10 December 1999

Commission (EC), 'Definition of the Relevant Market for the Purposes of Community Competition Law' (Notice) [1997] OJ C372/5

Commission (EC), 'Notice Published Pursuant to Article 19(3) of Council Regulation No 17 concerning Cases COMP/35.163 – Notification of FIA Regulations - COMP/36.638 – Notification by FIA/FOA of Agreements Relating to the FIA Formula One World Championship - and COMP/36.776 – GTR/FIA and Others' [2001] OJ C169/05

Commission (EC), 'Guidelines on the Effect of Trade Concept Contained in Article 81 and 82 of the Treaty' (Notice) [2004] OJ C101/81

Commission (EC), 'Guidelines on the Application of Article 81(3) of the Treaty' (Notice) [2004] OJ C101/97

Partnership Agreement ACP-EC signed in Cotonou on 23 June 2000, revised in Luxembourg on 25 June 2005 (EC De-132 September 2006) ("Cotonou Agreement")

Commission (EC), 'White Paper on Sport' COM (2007) 391 final, 11 July 2007

Commission (EC), "UEFA Rule on 'Home-grown Players': Compatibility With the Principle of Free Movement" (Press Release) 28 May 2008, IP/08/807

Commission (EC), 'Guidance on the Commission's Enforcement Priorities in Applying Article 82 (EC) to Abusive Exclusionary Conduct by Dominant Undertakings' (Communication) COM (2009) 864 final, 9 February 2009

International Treaties and Conventions

European Convention of Human Rights, art 8

Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe

2. Sporting Regulations

Rugby League

Rugby Football League Operational Rules 2005
Rugby Football League Operational Rules 2009

Rugby League International Federation Rules (2 January 2001)

Rugby Union

Rugby Football Union Regulations Relating to Amateurism (April 1993), reg 4

Cricket

English and Wales Cricket Board, *First Class Regulations and Playing Conditions 2008 – Regulations Governing the Qualification and Registration of Cricketers*

3. Cases

United Kingdom

A Schroeder Music Publishing Ltd v Macaulay [1974] 1 WLR 1308 (HL)

Airfix Footware Ltd v Cope [1978] ICR 1210 (EAT)

Aston Cantlow and Wilmcote with Billiesley Parochial Church Council v Wallbank and Another [2004] 1 AC 546 (HL)

Attheraces Ltd v The British Horseracing Board Limited and Another [2007] ECC 7 (CA)

Bank voor Handel en Scheepvaart NV v Slatford and Anor [1953] 1 QB 248 (CA)

Bauman v Hulton Press Ltd [1952] 2 All ER 1121 (QB)

Bower v Stevens and Another [2004] ICR 1582 (CA)

Bradley v Jockey Club [2005] EWCA Civ 1056 (CA)

British Gas v O'Brien [2001] IRLR 496 (EAT)

Brook Street Bureau (UK) Ltd v Dacas [2004] IRLR 358 (CA)

Byrne Brothers (Formwork) Ltd v Baird [2002] ICR 667 (EAT)

Cable & Wireless plc v Muscat [2006] ICR 975 (CA)

Cairns v Visteon UK Ltd [2007] ICR 616 (EAT)

Campbell v Mirror Group Newspapers Ltd [2004] 2 AC 457 (HL)

Cantor Fitzgerald International v Callaghan [1999] IRLR 235 (CA)

Carlill v Carbolic Smoke Ball Company [1893] 1 QB 256 (CA)

Carmichael v National Power plc [2000] IRLR 43 (HL)
CH Giles & Co Ltd v Morris [1972] 1 WLR 307 (ChD)
Chambers v British Olympic Association [2008] EWHC 2028; [2008] 4 ISLR SLR-115 (QB)
Clark v Oxfordshire Health Authority [1998] IRLR 125 (CA)
Collier v Sunday Referee Publishing Co Ltd [1940] 2 KB 647 (KB)
Cornwall County Council v Prater [2006] IRLR 362 (CA)
Cowell v Quilter Goodison & Co Ltd [1989] IRLR 392 (CA)
Dacas v Brook Street Bureau (UK) Ltd [2003] IRLR 190 (CA)
Denham v Midland Employers Mutual Assurance Limited [1955] 2 QB 437 (CA)
Devonald v Rosser & Sons [1906] 2 KB 728 (CA)
Douglas and Others v Hello! Ltd and Others (No 3) [2008] 1 AC 1 (HL)
Douglas and Others v Hello! Ltd and Others (No 3) [2006] QB 125 (CA)
Eastham v Newcastle United Football Club [1964] 3 All ER 139 (ChD)
Elvis Presley Trademarks [1999] RPC 567 (CA)
Esso Petroleum Co Ltd v Harper's Garage (Stourport) Ltd [1968] AC 269 (HL)
English Welsh and Scottish Railway Ltd v EON UK plc [2007] EWHC 599 (Comm); [2007] UKCLR 1653 (QB)
Express and Echo Publications Ltd v Tanton [1999] ICR 693 (CA)
Ferguson v John Dawson & Partners (Contractors) Ltd [1976] IRLR 346 (CA)
Flaherty v National Greyhound Racing Club Limited [2005] EWCA Civ 1117 (CA)
Gasser v Stinson and Anor (unreported, 15 June 1988, QB)
Gibb v United Steel Companies Ltd [1957] 2 All ER 110 (Carlisle Assizes)

Global Plant Ltd v Secretary of State for Health and Social Services [1972] 1 QB 139 (QB)

Grieg v Insole [1978] 1 WLR 302 (ChD)

Hall (Inspector of Taxes) v Lorimar [1994] 1 WLR 209; [1994] ICR 218 (CA)

Harold Fielding Ltd v Mansi [1974] 1 All ER 1035 (NIRC)

Hawley v Luminar Leisure Limited [2006] EWCA Civ 18; [2006] IRLR 817 (CA)

Hendry and Others v The World Professional Billiards and Snooker Association Ltd [2002] UKCLR 5 (ChD)

Herbert Clayton and Jack Waller Ltd v Oliver [1930] AC 209 (HL)

Herbert Morris Ltd v Saxelby [1915] 2 Ch 57 (CA)

Hewlett Packard Ltd v O'Murphy [2002] IRLR 4 (EAT)

Hill v C A Parsons and Co Ltd [1972] Ch 305 (CA)

Horkulak v Cantor Fitzgerald International [2005] ICR 402 (CA)

Ibekwe v London General Transport Services [2003] EWCA Civ 1075 (CA)

Imperial Trust Pension Group Ltd v Imperial Tobacco Ltd [1991] 1 WLR 589, 599 (ChD)

In The Matter Of An Application For Judicial Review By Patrick Wylie [2005] NI 359 (QB)

Irani v Southhampton and South West Hampshire Health Authority [1985] IRLR 203 (ChD)

Irvine v Talksport Ltd [2002] 1 WLR 2355 (ChD)

Irvine v Talksport Ltd (Damages) [2003] EMLR 26 (CA)

James v London Borough of Greenwich [2007] ICR 577 (EAT)

James v London Borough of Greenwich [2008] IRLR 302 (CA)

Jeetle v Elster [1985] ICR 389 (EAT)

Johnston v Cliftonville Football and Athletic Club [1984] 2 NI 9 (ChD)

Johnson v Unisys Ltd [2003] 1 AC 518 (HL)

Kaye v Robertson [1991] FSR 62 (CA)

Keeley v Fosroc International Ltd [2006] IRLR 691 (CA)

*Kirk v Salford Football Club (1914) Limited (*Manchester Employment Tribunal, 1 September 2005, Case No 2400724/05)

Langston v Amalgamated Union of Engineering Workers (No 2) [1974] ICR 510 (NIRC)

Law v National Greyhound Racing Club Ltd [1983] 3 All ER 300 (CA)

Leeds Rugby Limited v Iestyn Harris and Bradford Bulls Holdings Limited [2005] EWHC 1591 (QB)

Lewis v Motorworld Garages Ltd [1986] ICR 157 (CA)

Lumley v Wagner (1852) 1 De GM & G 604 (Court of Queen's Bench)

McFarlane v Glasgow City Council [2001] IRLR 7 (EAT)

Malik and Anor v Bank of Credit and Commerce International (SA) (in liquidation) [1997] IRLR 462 (HL)

Marbe v George Edwardes (Daly's Theatre) Ltd [1928] 1 KB 269 (CA)

Market Investigations Ltd v Minister of Social Security [1969] 2 QB 173 (QB)

Max Mosly v News Group Newspapers Ltd [200] EWHC 1777; [2008] EMLR 20 (QB)

McKennitt v Ash [2008] QB 73 (CA)

Mersey Docks and Harbour Board v Coggins & Griffith (Liverpool) Limited [1947] AC 1 (HL)

Miles v Wakefield Metropolitan Borough Council [1987] AC 539 (HL)

Mineral Water Bottle Exchange and Trade Protection Society v Booth (1887) 36 Ch 465 (CA)

Modahl v The British Athletics Federation Ltd [2002] 1 WLR 1192 (CA)

Morren v Swinton and Pendlebury Borough Council [1965] 1 WLR 576 (QB)

Morrow v Safeway Stores [2002] IRLR 9 (EAT)

Mullins v McFarlane [2006] EWHC 986 (QB)

Murray v Big Pictures (UK) Limited [2008] ECDR 12 (CA)

Nagle v Fielden [1966] 2 QB 633 (CA)

Nethermere (St. Neots) Limited v Taverna and Gardiner [1984] ICR 612 (CA)

Nichols Advanced Vehicle Systems Inc v De Angelis (unreported, 21 December 1979, ChD)

Nordenfelt v Maxim Nordenfelt Guns and Ammunition Co Ltd [1894] AC 535, 565 (HL)

O'Kelly and Others v Trusthouse Forte plc [1983] IRLR 369 (CA)

Outcome of Appeal by the Number (UK) Ltd regarding complaint by David Bedford Oftcom Advertising Complaints Bulletin, 27 January 2004

Page One Records Ltd v Britton [1968] 1 WLR 157 (ChD)

Pharmaceutical Society of Great Britain v Dickson [1970] AC 403 (HL)

Powell v London Borough of Brent [1987] IRLR 466 (CA)

Premier Rugby Ltd and Ors v Rugby Football Union and Ors [2006] EWHC 2068 (Comm) (QB)

Provident Financial Group plc and Another v Hayward [1989] ICR 160 (CA)

R (on the Application of Mullins) v Jockey Club Appeal Board (No 1) [2005] EWHC 2197 (QB)

R v Disciplinary Committee of the Jockey Club, ex p Aga Khan [1993] 2 All ER 853 (CA)

R v Disciplinary Committee of the Jockey Club ex p Massingberd-Mundy [1993] 2 All ER 207 (DC)

R v Football Association Ltd ex p Football League Ltd [1993] 2 All ER 833 (QB)

R v The Jockey Club ex p RAM Racecourses Ltd [1993] 2 All ER 225 (QB)

R v Panel on Takeovers and Mergers ex parte Datafin plc [1987] QB 815 (CA)

Re Televising Premier League Football Matches [2000] EMLR 78 (Restrictive Practises Court)

Ready Mixed Concrete (South East) Limited v Minister of Pensions and National Insurance [1968] 2 QB 497 (QB)

Rigby v Ferodo Ltd [1988] ICR 29 (HL)

Robb v London Borough of Hammersmith and Fulham [1991] IRLR 72 (QB)

Scally v Southern Health and Social Services Board [1991] 3 WLR 778 (HL)

Scully UK Ltd v Lee [1998] IRLR 259 (CA)

SG and R Valuation Service Co v Boudrais and Others [2008] EWHC 1340 (QB)

Shanklin Pier LD v Detel Products LD [1951] 2 KB 854 (KB)

Short v J & W Henderson Ltd (1946) 79 Lloyds L Rep (HL)

Sid Shaw Elvisly Yours v Elvis Presley Enterprises [1997] RPC 567 (ChD)

Sports and General Press Agency Ltd v 'Our Dogs' Publishing Co Ltd [1917] KB 125 (CA)

Sports Club plc v Inspector of Taxes [2000] STC (SCD) 443 (Special Commissioners)

Stevedoring & Haulage Services Ltd [2001] IRLR 627 (CA)

Stevenage Borough Football Club Ltd v Football League Ltd, The Times 9 August 1996 (CA)

Stevenson Jordan and Harrison Ltd v McDonnell and Evans [1952] 1 TLR 101 (CA)

Subaru Technica International Inc and Prodrive Ltd v Burns and Ors (unreported, 10 December 2001, HC01C01 C05152, ChD)

Theakston v MGN Ltd [2002] EMLR 22 (QB)

Tolley v Fry [1931] AC 333 (HL)

Turner v Goldsmith [1891] 1 QB 544 (CA)

Turner v Sawdon and Co [1901] 2 KB 653 (CA)

Viasystems (Tyneside) Ltd v Thermal Transfer (Northern) Limited and Ors [2005] EWCA Civ 1151 (CA)

Walker v Crystal Palace Football Club [1910] 1 KB 87 (CA)

Warner Bros Pictures Inc v Nelson [1937] 1 KB 209 (KBD)

Warren v Mendy and Anor [1989] 1 WLR 853 (CA)

Western Excavating Ltd v Sharp [1978] QB 761 (CA)

Whitwood Chemical Co v Hardman [1891] 2 Ch 416 (CA)

Whittaker v Minister of Pensions and National Insurance [1967] 1 QB 156 (CA)

William Hill Organisation Ltd v Tucker [1999] ICR 291 (CA)

Woods v WM Car Services (Peterborough) Ltd [1981] ICR 666 (CA)

Yewens v Noakes (1880-1881) LR 6 QBD 530 (CA)

Young and Woods Ltd v West [1980] IRLR 201 (CA)

YL v Birmingham City Council [2007] 3 WLR 112 (HL)

European Court of Justice: Numerical Order

Case 56/65 *Societe La Technique Miniere v Maschinenbau Ulm GmbH* [1966] ECR 235

Case 23/67 *Brasserie de Haecht SA v Wilkin (No 1)* [1967] ECR 407

Case 15/69 *Wurttembergische Milchverwertung-Sudmilch AG v Ugliola* [1970] ECR 363

Cases 48/69 etc *ICI v Commission* [1972] ECR 619

Case 22/71 *Beguelin Import v GL Import Export* [1971] ECR 949

Case 6/72 *Europemballage Corporation and Continental Can Co Inc v Commission* [1973] ECR 215

Joined Cases 40-48/73 etc *Cooperative Vereniging 'Suiker Unie' UA and Others v Commission* [1975] ECR 1663

Case 127/73 *Belgische Radio en Televisie v SV SABAM and NV Fonior* [1974] ECR 313

Case 152/73 *Sotgiu v Deutsche Bundespost* [1974] ECR 153

Case 167/73 *Commission v France* [1974] ECR 359

Case 15/74 *Centrafarm BV v Sterling Drug Inc* [1974] ECR 1147

Case 36/74 *Walrave and Koch v Association Union Cycliste Internationale and Others* [1974] ECR 1405

Case 13/76 *Dona v Mantero* [1976] ECR 1333

Case 27/76 *United Brands Co v Commission* [1978] ECR 207

Case 71/76 *Thieffrey* [1977] ECR 765

Case 85/76 *Hoffman la Roche v Commission* [1979] ECR 461

Case 19/77 *Miller International Schallpatten GmbH v Commission* [1978] ECR 131

Case 22/78 *Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission* [1979] ECR 1869

Case 175/78 *Regina v Saunders* [1979] ECR 1129

Cases 209-215 and 218/78 *Van Landewyck and Others v Commission* [1980] ECR 3125

Case 172/80 *Zuchner v Bayerische Vereinsbank AG* [1981] ECR 2021

Case 322/81 *NV Nederlandsche Banden Industrie Michelin v Commission* [1983] ECR 3461

Case 107/82 *AEG – Telefunken AG v Commission* [1983] ECR 3151

Case 123/83 *Bureau National Interprofessionnel du Cognac v Guy Clair* [1985] ECR 391

Case 170/83 *Hydrotherm v Compact* [1984] ECR 2999

Case 298/83 *Comite des Industries Cinematographiques des Communautes Europeennes v Commission* [1985] ECR 1105

Case 42/84 *Remia BV v Commission* [1985] ECR 2545

Case 226/84 *British Leyland plc v Commission* [1986] ECR 3263

Cases 114/85 etc *A Ahlstrom Oy v Commission* [1988] ECR 5193

Case 62/86 *AKZO v Commission* [1991] ECR I–3359

Case 246/86 *Re Roofing Felt Cartel: BELASCO v Commission* [1989] ECR 2117

Case 30/87 *Corinne Bodson v Pombes Funebres de Regions Liberees SA* [1988] ECR 2479

Case 143/87 *Stanton v INASTI* [1988] ECR 3877

Case 395/87 *Ministere Public v Tournier* [1989] ECR 2521

Case C-234/89 *Delimitis v Henninger Brau AG* [1991] ECR I-935

Case C-340/89 *Vlassopoulou v Ministerium fur Justiz, Bundes-und Europaangelegenheiten Baden-Wurttemberg* [1991] ECR I-2357

Case C-41/90 *Hofner and Elser v Macroton GmbH* [1991] ECR I-1979

Case C-179/90 *Merci Convenzionale Porto di Genova* [1991] ECR I-5889

Case C-369/90 *Micheletti v Delegacion del Gobierno en Cantabria* [1992] ECR I-4239

Case C-241/91 *Radio Telefis Eireann and Independent Television Publications Limited v Commission* [1995] ECR I-743

Case C-19/92 *Kraus v Land Baden-Wurttemberg* [1993] ECR I-1663

Case C-49/92 P *Commission v Anic Partecipazoni SpA* [1999] ECR I-4125

Case 53/92 P *Hilti v Commission* [1994] ECR I-667

Case C-250/92 *Gottrup-Klim Grovvareforeninger and Others v Dansk Landbrugs Grovvareselskab* [1994] ECR I-5641

Case C-319/92 *Haim v Kassenzahnarztliche Vereinigung Nordrhein* [1994] ECR I-425

Case C-393/92 *Municipality of Alemo v NV Energiebedrijf Ijsselmij* [1994] ECR I-1477

Case C-415/93 *Union Royale Belge des Societes de Football Association v Bosman* [1995] ECR I-4921

Cases C-430 and 431/93 *Van Schijndel and van Veen v SPF* [1995] ECR I-4705

Case C-55/94 *Reinhard Gebhard v Consiglio Dell'Ordine degli Avvocati E Procuratori di Milano* [1995] ECR I-4165

Joined Cases C-68/94 and C-50/95 *France and Others v EC Commission* [1998] ECR I-1375

Case C-237/94 *O'Flynn v Adjudication Officer* [1996] ECR I-2617

Case C-334/94 P *Tetra Pak v Commission* [1996] ECR I-5951

Case 18/95 *Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland* [1999] ECR I-345

Case C-73/95 P *Viho Europe BV v Commission* [1996] ECR I-5457

Case C-35/96 *Commission v Italy* [1998] ECR I-3851

Cases C-51/96 and 191/97 *Deliege v Ligue Francophone de Judo et Disciplines Associees ASBL* [2000] ECR I-2549

Case C-67/96 *Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie* [1999] ECR I-5751

Case C-176/96 *Lehtonen and Another v Federation Royale Belge des Societes de Basket-Ball ASBL* [1995] ECR I-4921

Case C-306/96 *Javico v Yves St Laurent* [1998] ECR I-1983

Joined Cases C-395/96P and C-396/96 P *Compagnie Maritime Belge Transports and Others v Commission* [2000] ECR I-1365

Case C-7/97 *Oscar Bronner GmbH & Co v Mediaprint Zeitungs* [1998] ECR I-7791

Case C-234/97 *Bobadilla v Museo Nacional del Prado* [1999] ECR I-4773

Case C-22/98 *Criminal Proceedings Against Becu* [1999] ECR I-5665

Case C-180 - 184/98 *Pavlov v Stichting Pensioenfonds Medische Specialisten* [2000] ECR I-6451

Case C-238/98 *Hugo Fernando Hocsman v Ministre de l'Emploi et de la Solidarite* [2000] ECR I-6623

Case C-281/98 *Angonese v Cassa di Risparmio di Bolzano SpA* [2000] ECR I-4139

Case C-286/98 P *Stora Kopparbergs Bergslags v Commission* [2000] ECR I-9925

Case C-283/99 *Commission v Italy* [2001] ECR I-4363

Case C-309/99 *Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten* [2002] ECR I-1577

Case C-385/00 *De Groot v Staatssecretaris Van Financien* [2002] ECR I-11819

Case C-438/00 *Deutscher Handballbund eV v Kolpak* [2003] ECR I-4135

Case C-206/01 *Arsenal Football Club v Mathew Reed* [2003] 3 All ER 865

Case C-224/01 *Kobler v Republik Osterreich* [2003] ECR I-10239

Case C-232/01 *Van Lent* [2003] ECR I-11525

Case C-313/01 *Morgenbesser v Consiglio dell'Ordine degli Avvocati di Genova* [2003] ECR I-13467

Case C-359/01 P *British Sugar v Commission* [2004] ECR I-4933

Case C-418/01 *IMS Health GmbH and Co OHG v NDC Health GmbH and Co KG* [2004] 4 ECR I-5039

Case C-265/03 *Simutenkov v Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol* [2005] ECR I-2579

Case 552/03 P *Unilever Bestfoods (Ireland) Ltd (formerly Van Den Bergh Foods Ltd previously named HB Icecream Ltd) v Commission* [2006] ECR I-9091

C-95/04 P *British Airways v Commission* [2007] 4 CMLR 982

Case C-109/04 *Kranemann* [2005] ECR I-2421

Case C-144/04 *Mangold v Helm* [2005 ECR I-9981

Case C-519/04 *Meca-Medina and Majcen v Commission* [2006] ECR I-6991

Case C-40/05 *Lyyski v Umea Universitet* [2007] 2 CMLR 3; [2007] All ER (D) 21 (Jan)

Case C-217/05 *Confederacion Espanola De Empresarios De Estaciones De Servico v Compania Espanola De Petroleos SA* [2007] CEC 143

Case C 341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet and Others* [2008] All ER (EC) 166

Case C-438/05 *International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, Ou Viking Line Eesti* [2008] All ER (EC) 127

Case C-427/06 *Bartsch v Bosch und Siemens Hausgerate (BSH) Altersfursorge GmbH* [2009] All ER (EC) 113

Case C-49/07 *Motosykletiski Omospondia Ellados Npid v Ellinik Dimosio* [2008] 5 CMLR 11

Joined Cases C-101/07 P and C-110/07 P *Co op de France Betail et Viande v Commission* [2009] 4 CMLR 15

Case C-209/07 *Competition Authority v Beef Industry Development Society Ltd and Anor* [2009] 4 CMLR 6

Case C-325/08 *Olympique Lyonnais v Olivier Bernard and Newcastle United* (currently under consideration by the European Court of Justice)

European Court of Justice: Alphabetical Order

A Ahlstrom Oy v Commission (Cases 114/85 etc) [1988] ECR 5193

AEG – Telefunken AG v Commission (Case 107/82) [1983] ECR 3151

AKZO v Commission (Case 62/86) [1991] ECR I–3359

Albany International BV v Stichting Bedrijfspensioenfonds Textielindustrie (Case C-67/96) [1999] ECR I-5751

Angonese v Cassa di Risparmio di Bolzano SpA (Case C-281/98) [2000] ECR I-4139

Arsenal Football Club v Mathew Reed (Case C-206/01) [2003] 3 All ER 865

Bartsch v Bosch und Siemens Hausgerate (BSH) Altersfursorge GmbH (Case C-427/06) [2009] All ER (EC) 113

Beguelin Import v GL Import Export (Case 22/71) [1971] ECR 949

Belgische Radio en Televisie v SV SABAM and NV Fonior (Case 127/73) [1974] ECR 313

Bobadilla v Museo Nacional del Prado (Case C-234/97) [1999] ECR I-4773

Brasserie de Haecht SA v Wilkin (No 1) (Case 23/67) [1967] ECR 407

British Airways v Commission (C-95/04 P) [2007] 4 CMLR 982

British Leyland plc v Commission (Case 226/84) [1986] ECR 3263

British Sugar v Commission (Case C-359/01 P) [2004] ECR I-4933

Bureau National Interprofessionnel du Cognac v Guy Clair (Case 123/83) [1985] ECR 391

Centrafarm BV v Sterling Drug Inc (Case 15/74) [1974] ECR 1147

Comite des Industries Cinematographiques des Communautes Europeennes v Commission (Case 298/83) [1985] ECR 1105

Commercial Solvents v Commission (Cases 6/73 & 7/73) [1974] ECR 223

Compagnie Maritime Belge Transports and Others v Commission (Joined Cases C-395/96P and C-396/96 P) [2000] ECR I-1365

Competition Authority v Beef Industry Development Society Ltd and Anor (Case C-209/07) [2009] 4 CMLR 6

Commission v Anic Partecipazoni SpA (Case C-49/92 P) [1999] ECR I-4125

Commission v France (Case 167/73) [1974] ECR 359

Commission v Italy (Case C-35/96) [1998] ECR I-3851

Commission v Italy (Case C-283/99) [2001] ECR I-4363

Co op de France Betail et Viande v Commission (Joined Cases C-101/07 P and C-110/07 P) [2009] 4 CMLR 15

Cooperative Vereniging 'Suiker Unie' UA and Others v Commission (Joined Cases 40-48/73 etc) [1975] ECR 1663

Confederacion Espanola De Empresarios De Estaciones De Servico v Compania Espanola De Petroleos SA (Case C-217/05) [2007] CEC 143

Corinne Bodson v Pombes Funebres de Regions Liberees SA (Case 30/87) [1988] ECR 2479

Criminal Proceedings Against Becu (Case C-22/98) [1999] ECR I-5665

De Groot v Staatssecretaris Van Financien (Case C-385/00) [2002] ECR I-11819

Deliege v Ligue Francophone de Judo et Disciplines Associees ASBL (Cases C-51/96 and 191/97) [2000] ECR I-2549

Delimitis v Henninger Brau AG (Case C-234/89) [1991] ECR I-935

Deutscher Handballbund eV v Kolpak (Case C-438/00) [2003] ECR I-4135

Dona v Mantero (Case 13/76) [1976] ECR 1333

Europemballage Corporation and Continental Can Co Inc v Commission (Case 6/72) [1973] ECR 215

France and Others v EC Commission (Joined Cases C-68/94 and C-50/95) [1998] ECR I-1375

Gottrup-Klim e.a.Grovvareforeninger v Dansk Landbrugs Grovvareselskab AmbA (Case C-250/92) [1994] ECR I-5641

Haim v Kassenzahnarztliche Vereinigung Nordrhein (Case C-319/92) [1994] ECR I-425

Hilti v Commission (Case 53/92 P) [1994] ECR I-667

Hugo Fernando Hocsman v Ministre de l'Emploi et de la Solidarite (Case C-238/98) [2000] ECR I-6623

Hoffman la Roche v Commission (Case 85/76) [1979] ECR 461

Hofner and Elser v Macroton GmbH (Case C-41/90) [1991] ECR I-1979

Hugin Kassaregister AB and Hugin Cash Registers Ltd v Commission (Case 22/78) [1979] ECR 1869

Hydrotherm v Compact (Case 170/83) [1984] ECR 2999

ICI v Commission (Cases 48/69 etc) [1972] ECR 619

IMS Health GmbH and Co OHG v NDC Health GmbH and Co KG (Case C-418/01) [2004] 4 ECR I-5039

Istituto Chemioterapico Italiano SpA and Commercial Solvents Corporation v Commission (Cases 6 and 7/73) [1974] ECR 223

International Transport Workers' Federation, Finnish Seamen's Union v Viking Line ABP, Ou Viking Line Eesti (Case C-438/05) [2008] All ER (EC) 127

Javico v Yves St Laurent (Case C-306/96) [1998] ECR I-1983

Kobler v Republik Osterreich (Case C-224/01) [2003] ECR I-10239

Kranemann (Case C-109/04) [2005] ECR I-2421

Kraus v Land Baden-Wurttemberg (Case C-19/92) [1993] ECR I-1663

Laval un Partneri Ltd v Svenska Byggnadsarbetareforbundet and Others (Case C 341/05) [2008] All ER (EC) 166

Lehtonen and Another v Federation Royale Belge des Societes de Basket-Ball ASBL (Case C-176/96) [1995] ECR I-4921

Lyyski v Umea Universitet (Case C-40/05) [2007] 2 CMLR 3; [2007] All ER (D) 21 (Jan)

Mangold v Helm (Case C-144/04) [2005] ECR I-9981

Meca-Medina and Majcen v Commission (Case C-519/04) [2006] ECR I-6991

Merci Convenzionale Porto di Genova (Case C-179/90) [1991] ECR I-5889

Micheletti v Delegacion del Gobierno en Cantabria (Case C-369/90) [1992] ECR I-4239

Miller International Schallpatten GmbH v Commission (Case 19/77) [1978] ECR 131

Ministere Public v Tournier (Case 395/87) [1989] ECR 2521

Morgenbesser v Consiglio dell'Ordine degli Avvocati di Genova (Case C-313/01) [2003] ECR I-13467

Motosykletiski Omospondia Ellados Npid v Ellinik Dimosio (Case C-49/07) [2008] 5 CMLR 11

Municipality of Alemo v NV Energiebedrijf Ijsselmij (Case C-393/92) [1994] ECR I-1477

NV Nederlandsche Banden Industrie Michelin v Commission (Case 322/81) [1983] ECR 3461

John O'Flynn v Adjudication Officer (Case C-237/94) [1996] ECR I-2617

Olympique Lyonnais v Olivier Bernard and Newcastle United (Case C-325/08) (currently under consideration by the European Court of Justice)

Oscar Bronner GmbH & Co v Mediaprint Zeitungs (Case C-7/97) [1998] ECR I-7791

Pavlov v Stichting Pensioenfonds Medische Specialisten (Case C-180 - 184/98) [2000] ECR I-6451

Radio Telefis Eireann and Independent Television Publications Limited v Commission (Case C-241/91) [1995] ECR I-743

Re Roofing Felt Cartel: BELASCO v Commission (Case 246/86) [1989] ECR 2117

Regina v Saunders (Case 175/78) [1979] ECR 1129

Reinhard Gebhard v Consiglio Dell'Ordine degli Avvocati E Procuratori di Milano (Case C-55/94) [1995] ECR I-4165

Remia BV v Commission (Case 42/84) [1985] ECR 2545

Simutenkov v Ministerio de Educacion y Cultura, Real Federacion Espanola de Futbol (Case C-265/03) [2005] ECR I-2579

Societe La Technique Miniere v Maschinenbau Ulm GmbH (Case 56/65) [1966] ECR 235

Sotgiu v Deutsche Bundespost (Case 152/73) [1974] ECR 153

Stanton v INASTI (Case 143/87) [1988] ECR 3877

Stora Kopparbergs Bergslags v Commission (Case C-286/98 P) [2000] ECR I-9925.

Terhoeve v Inspecteur van de Belastingdienst Particulieren/Ondernemingen Buitenland (Case 18/95) [1999] ECR I-345

Tetra Pak v Commission (Case C-334/94 P) [1996] ECR I-5951

Thieffrey (Case 71/76) [1977] ECR 765

Unilever Bestfoods (Ireland) Ltd (formerly Van Den Bergh Foods Ltd previously named HB Icecream Ltd) v Commission (Case 552/03 P) [2006] ECR I-9091

Union Royale Belge des Societes de Football Association v Bosman (Case C-415/93) [1995] ECR I-4921

United Brands Co v Commission (Case 27/76) [1978] ECR 207

Van Landewyck and Others v Commission (Cases 209-215 and 218/78) [1980] ECR 3125

Van Lent (Case C-232/01) [2004] 3 CMLR 23

Van Schijndel and Van Veen v SPF (Cases C-430 and 431/93) [1995] ECR I-4705

Viho Europe BV v Commission (Case C-73/95 P) [1996] ECR I-5457

Vlassopoulou v Ministerium fur Justiz, Bundes-und Europaangelegenheiten Baden-Wurttemberg (Case C-340/89) [1991] ECR I-2357

Walrave and Koch v Association Union Cycliste Internationale and Others (Case 36/74) [1974] ECR 1405

Wouters and Others v Algemene Raad van de Nederlandse Orde van Advocaten (Case C-309/99) [2002] ECR I-1577

Wurttembergische Milchverwertung-Sudmilch AG v Ugliola (Case 15/69) [1970] ECR 363

Zuchner v Bayerische Vereinsbank AG (Case 172/80) [1981] ECR 2021

Court of First Instance: Numerical Order

Case T-30/89 *Hilti v Commission* [1991] ECR II-1439

Case T-51/89 *Tetra Pak Rausing SA v Commission* [1990] ECR II-309

Joined Cases T-68, 77 and 78/89 *Societa Italiana Vetro* [1993] ECR II-1403

Case T-83/91 *Tetra Pak International SA v Commission ("Tetra Pak II")* [1994] ECR II-755

Case T-513/93 *Consiglio Nationale degli Spedizionieri Doganali* [2000] ECR II-1807

Case T-528/93 *Eurovision I* [1996] ECR II-649

Case T-102/96 *Gencor v Commission* [1999] 4 CMLR 971

Case T-228/97 *Irish Sugar plc v Commission* [1999] ECR II-2969

Case T-65/98 *Van den Bergh Foods Ltd (formerly HB Ice Cream Ltd) v Commission* [2003] ECR II-4653

Case T-191/98 *Atlantic Container Line v Commission* [2003] ECR II-3275

Case T-342/99 *Airtours plc v Commission* [2002] ECR II-2585

Case T-185/00 *Eurovision II* [2002] ECR II-3805

Case T-325/01 *Daimler Chrysler v Commission* [2005] ECR II-3319

Case T-193/02 *Piau v Commission* [2005] ECR II-209

Joined Cases T-259-264/02 etc *Re Austrian Banks Cartel ("Lombard Club"): Raiffeisen Zentralbank Osterreich AG and Others v Commission* [2007] 5 CMLR 13

Case T-313/02 *Meca-Medina and Majcen v Commission* [2004] ECR II-3291

Case T-210/01 *General Electric Company v Commission* [2005] ECR II-5575

Joined Cases T-217/03 and T-245/03 *Federation Nationale de la Cooperation Betail and Viande and Another v Commission* [2008] 5 CMLR 5

Case T-99/04 *AC-Treuhand AG v Commission* [2008] 5 CMLR 13; [2008] IP & T 197

Case T-201/04 *Microsoft Corp v Commission* [2007] 5 CMLR 11.

Case T-306/05 *Scippacercola and Another v Commission* [2008] 4 CMLR 20; [2008] All ER (D) 36 (Jan)

Court of First Instance: Alphabetical Order

AC-Treuhand AG v Commission (Case T-99/04) [2008] 5 CMLR 13

Airtours plc v Commission (Case T-342/99) [2002] ECR II-2585

Atlantic Container Line v Commission (Case T-191/98) [2003] ECR II-3275

Consiglio Nationale degli Spedizionieri Doganali (Case T-513/93) [2000] ECR II-1807

Daimler Chrysler v Commission (Case T-325/01) [2005] ECR II-3319

Eurovision I (Case T-528/93) [1996] ECR II-649

Eurovision II (Case T-185/00) [2002] ECR II-3805

Federation Nationale de la Cooperation Betail and Viande and v Commission (Joined Cases T-217/03 and T-245/03) [2006] ECR II-4987

Gencor v Commission (Case T-102/96) [1999] 4 CMLR 971

General Electric Company v Commission (Case T-210/01) [2005] ECR II-5575

Hilti v Commission (Case T-30/89) [1991] ECR II-1439

Irish Sugar plc v Commission (Case T-228/97) [1999] ECR II-2969

Meca-Medina and Majcen v Commission (Case T-313/02) [2004] ECR II-3291

Microsoft Corp v Commission (Case T-201/04) [2007] ECR II-000; [2007] 5 CMLR 846

Piau v Commission (Case T-193/02) [2005] ECR II-209

Re Austrian Banks Cartel ("Lombard Club"): Raiffeisen Zentralbank Osterreich AG and Others v Commission (Joined Cases T-259-264/02 etc) [2007] 5 CMLR 13

Scippacercola and Another v Commission (Case T-306/05) [2008] 4 CMLR 20

Societa Italiana Vetro (Joined Cases T-68, 77 and 78/89) [1993] ECR II-1403

Tetra Pak Rausing SA v Commission (Case T-51/89) [1990] ECR II-309

Tetra Pak International SA v Commission ("Tetra Pak II") (Case T-83/91) [1994] ECR II-755

Van den Bergh Foods Ltd (formerly HB Ice Cream Ltd) v Commission (Case T-65/98) [2003] ECR II-4653

European Commission Competition Decisions

ABG Oil Companies operating in the Netherlands (Case IV/28.841) Commission Decision 77/327/EEC [1977] OJ L117/1

BBI/Boosey & Hawkes: Interim Measures (Case IV/32.279) Commission Decision 87/500/EEC [1987] OJ L 286/36

British Midland/Aer Lingus (Case IV/33.544) Commission Decision 92/213/EEC [1992] OJ L96/34

CU de Lille/UEFA (Mouscron) (Case COMP/36851) IP/99/965 9 December 1999 (unpublished)

Distribution of Package Tours During the World Cup (Cases COMP/33384 and 33378) Commission Decision 92/521/EEC [1992] OJ L326/31

Eurofirma (Commission (EC) Third Report on Competition Policy); [1973] CMLR D217

Football World Cup 1998 (Case COMP/36888) Commission Decision 2000/12/EC [2000] OJ L5/55

Formula 1 Motor Racing (Case COMP/35.163) Commission Notice [2001] OJ C-169/5

French Beef (Case COMP/38.299) Commission Decision 2003/600/EC [2003] OJ L209/12

Ijsselcentrale (Case IV/32.732) Commission Decision 91/50/EEC [1991] OJ L28/32

Italian Raw Tobacco (Case COMP/38.281) Commission Decision 2006/901/EC [2006] OJ L353/45

Joint Selling of the Commercial Rights of the UEFA Champions (Case COMP/37398) Commission Decision 2003/778/EC [2003] OJ L291/25

Raw Tobacco Spain (Case COMP/38.238) Commission Decision 2007/236/EC [2007] OJ L102/14

Re GEMA (Case IV/26.760) Commission Decision 71/224/EEC [1971] OJ L134/15

Rai/Unitel (Case IV/29.559) Commission Decision 78/516/EEC [1978] OJ L157/39

Reuter/BASF AG (Case IV/28.996) Commission Decision 76/743/EEC [1976] OJ L254/40

Scandlines Sverige AB v Port of Helsingborg (Case COMP/36.568 and COMP/36.570) 23 July 2004, [2006] 4 CMLR 1224

Sea Containers/Stena Sealink: Interim Measures (Case IV/34.689) Commission Decision 94/19/EC [1994] OJ L15/8

Van den Bergh Ltd Foods (Cases IV/34.073, IV/34.395 and IV 35.436) Commission Decision 98/531/EC [1998] OJ L246/1

Vimpoltu (Case COMP IV/30.174) Commission Decision 83/361/EEC [1983] OJ L200/44

Visa International/Multilateral Interchange Fee (Case COMP/29.373) Commission Decision 2002/914/EC [2002] OJ L318/17

Zinc Producer Group (Case COMP.30.350) Commission Decision 84/405/EEC [1984] OJ L220/27

European Court of Human Rights

Sciacca v Italy (2005) 43 EHRR 20
Von Hannover v Germany [2004] EMLR 21

New Zealand

Blackler v New Zealand Rugby Football League (Inc) [1968] NZLR 547 (CA)
Brady v New Zealand Kennel Club (unreported High Court, Christchurch, CP 143/00, 6 March 2001, Panckhurst J)
Finnigan v New Zealand Rugby Football Union Inc [1985] 2 NZLR 159 (CA)
Finnigan v New Zealand Rugby Football Union Inc (No 2) [1985] 2 NZLR 181
Finnigan v New Zealand Rugby Football Union Inc (No 3) [1985] 2 NZLR 190
Kemp v New Zealand Rugby Football Inc [1989] 3 NZLR 463
Stininato v Auckland Boxing Association Inc [1978] 1 NZLR 1 (CA)

Australia

Buckly v Tutty (1971) 125 CLR 353 (HCA)
News Limited and Ors v Australian Rugby Football League Ltd and Ors (1996) 139 ALR 193 (HCA)
Victoria Park Racing and Recreation Grounds Co Ltd v Taylor and Others [1937] 58 CLR 479 (HCA)

United States of America

Cardtoons LC v Major League Baseball Players Association F 3d 959 (CA 10 Okl 1996, August 27 1996)

Carson v Here's Jonny Portable Toilets Inc 698 F 2d 831 (1983)

Chicago Professional Sports Ltd v National Basketball Association 95 F.3d 593 (7th Cir 1996)

Copperweld Corp v Independence Tube Corp 467 US 752, 104 S Ct 2731, 81 L.Ed.2d 628 (1984)

Fraser v Major League Soccer 284 F 3d 47 (2002) (CA1 Mass)

Haelan Labs v Tops Chewing Gum 2002 F 2d 866 (2nd Cir 1953)

Levin v National Basketball Association 385 F Supp. 149 (SDNY 1974)

NFL v National American Soccer League 459 US 1074 S Ct 499 (1982)

San Francisco Seals Ltd v NHL 379 F Supp 966 (CD Cal 1974)

4. Books

Joanna Apap, *Freedom of Movement of Persons: A Practitioner's Handbook* (2002) Kluwer Law International, London

Anthony Arnull, Alan Dashwood etc (eds) *Wyatt & Dashwood's European Union Law* (2006) 5ed Sweet & Maxwell Ltd, London

Catherine Barnard, *EC Employment Law* (2006) 3ed Oxford University Press, Oxford

Bellamy and Child, *European Community Law of Competition* (2008) 6ed Oxford University Press, Oxford

S Bishop and M Walker, *Economics of EC Competition Law* (2002) Sweet and Maxwell Ltd, London

Ian Blackshaw and Robert CR Siekmann (eds) *Sport Image Rights in Europe* (2005) TMC Asser Press, The Netherlands

Douglas Brodie, *The Employment Contract: Legal Principles, Drafting, and Interpretation* (2005) Oxford University Press, Oxford

Tony Collins, *Rugby's Great Split: Class, Culture and the Origins of Rugby League Football* (2006) 2ed Routledge, London

Tony Collins, *Rugby League in Twentieth Century Britain: A Social and Cultural History* (2006) Routledge, Abingdon, Oxfordshire

Massimo Condinanzi, Allessandra Lang and Bruno Nascimbene, *Citizenship of the Union and Free Movement of Persons* (2008) Martinus Nijhoff Publishers, The Netherlands

N Cox and A Schuster, *Sport and the Law* (2004) First Law Limited, Dublin, Ireland

S Deakin and G, Morris, *Labour Law* (2005) 4ed Hart Publishing Oxford

Jonathan Faull and Ali Nikpay, *The EC Law of Competition* (2007) 2ed Oxford University Press, Oxford

Peter FitzSimons, *The Rugby War* (2003) Harper Collins Publishers Pty Limited Sydney, Australia

M Freedland, *The Personal Employment Contract* (2003) Oxford University Press, Oxford

W Freedman, *Professional Sports and Antitrust* (1987) Quorum Books, Connecticut, United States of America

Simon Gardiner and Others (eds) *Sports Law* (2006) 3ed Cavendish Publishing, London

John Haynes, *From The All Blacks To The All Golds* (1996) Ryan and Haynes, New Zealand

David Hinchcliffe (MP), *Rugby's Class War: Bans, Boot Money and Parliamentary Battles* (2000) London League Publications Ltd, London

S Honeyball, *Textbook on Labour Law* (2006) 9ed Oxford University Press, Oxford

Inuem Consulting, *Study on Training of Young Sportsmen and Women in Europe: The Home-grown Player Rule* (April 2008)

Gareth Jones and William Goodhart, *Specific Performance* (1996) 2ed Butterworths, London

Alison Jones and Brenda Sufrin, *EC Competition Law* (2008) 3ed Oxford University Press, Oxford

Stefan Kesenne, *The Economic Theory of Professional Teams Sports* (2007) Edward Elgar Publishing Ltd, Cheltenham, England

Keith Macklin, *The History of Rugby League Football* (1974) Stanley Paul and Co, London

Mintel, *Report on Cricket and Rugby* (February 2006)

Geoffrey Moorhouse, *At the George and Other Essays on Rugby League* (1989) Hodder and Stoughton Ltd, Kent

K Oliphant (ed) *The Law of Tort* (2007) 2ed, LexisNexis Butterworths, London

O'Sullivan, Sheffrin and Perez, 'Economics: Principles, Applications and Tools' (2008) 5ed Pearson Education Inc, New Jersey

Nikpay and Faull, *The EC Law of Competition* (2007) 2ed Oxford University Press, Oxford

Edwin Peel, *Treitel: The Law of Contract* (2007) 12ed, Sweet & Maxwell Ltd, London

James Quirk and Rodney Fort, *Pay Dirt* (1997) Princeton University Press, New Jersey, United States of America

Huw Richards, *A Game for Hooligans: The History of Rugby Union* (2006) Mainstream Publishing Company Ltd, Edinburgh

Paul Samuelson and William Nordhaus, *Economics* (1998) 16ed McGraw-Hill Companies Inc, United States of America

N M Selwyn, *Law of Employment* (2006) 14ed Oxford University Press, Oxford

I Smith and G Thomas, *Smith & Wood's on Employment Law* (2008) 9ed Oxford University Press, Oxford

David Storey, *This Sporting Life* (1960) Vintage, Random House, London

R Verow, *Sports Business: Law, Practice and Precedents* (2005) 2ed Jordans, Bristol

Wade & Forsyth, *Administrative Law* (2004) 9ed Oxford University Press, Oxford

E Watts Moses, *A History of the Proceedings of the International Rugby Board, 1886 – 1960* (1961) Walker and Co Printers Ltd, London

Richard Whish, *Competition Law* (2009) 6ed Oxford University Press, Oxford

G Williams, P Lush and D Hinchcliffe, *Rugby's Berlin Wall: League and Union From 1895 to Today* (2005) London League Publications Ltd, London

Contributions to Books

H Beale and N Pittam, 'The Impact of the Human Rights Act 1998 on English Tort and Contract Law' in D Friedmann and D Barak-Erez (eds) *Human Rights in Private Law* (2001) Hart Publishing, Oxford 131

J Caldwell, "Judicial Review of Sports Bodies in New Zealand" in Toomey, E (ed) *Keeping the Score: Essays in Law and Sport* (2005) University of Canterbury, Christchurch, New Zealand 43

Adam Cygan, 'Competition and Free Movement Issues in the Regulation of Formula One Motor Racing' Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds) in *The Regulation of Sport in the European Union* (2007) Edward Elgar Publishing Limited, Cheltenham 74

P Davies and M Freedland, 'Employees, Workers, and the Autonomy of Labour Law' in Collins et al (eds) *Legal Regulation of the Employment Relationship (*2000) Kluwer Law International, The Hague 267

Jennifer Davis, 'Fame and it Exploitation: The Legal Protection of Celebrity in the United Kingdom' in Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds) *The Regulation of Sport in the European Union* (2007) Edward Elgar Publishing Ltd, Cheltenham, United Kingdom 181

Iain Higgins, Stephen Boyd and Richard Hawkins, "Image Rights" in Lewis and Taylor (eds) *Sport: Law and Practice*

(2008) 2ed Tottel Publishing Ltd, Haywards Heath, England, G1

Tim Kerr, 'Disciplinary Regulation of Sport: A Different Strand of Public Law' in Barbara Bogusz (ed) *The Regulation of Sport in the European Union* (2007) Edward Elgar Publishing Ltd, Cheltenham, United Kingdom 97

Stefan Kesenne, 'The Objective Function of a Team' in Wladimir Andreff and Stefan Szymanski *Handbook on the Economics of Sport* (2006) Edgar Elgar Publishing Limited, Cheltenham 601

Roger Noll, 'Professional Basketball: Economic and Business Perspectives' in Staudohar and Mangan (eds) *The Business of Professional Sports* (1991) University of Illinois Press, Chicago 18

Stephen F Ross, 'Break Up the Sports League Monopolies' in Staudohar and Mangan (eds) *The Business of Professional Sports* (1991) University of Illinois Press, Chicago 152

Sir S Sedely, 'Public Power and Private Power' in C Forsyth (ed) *Judicial Review and the Constitution* (2000) Hart Publishing, Oxford 291

Robert Siekmann, 'Is Sport 'Special' in EU Law and Policy' in roger Blanpain (ed) *The Future of Sports Law in the European Union: Beyond the EU Reform Treaty and the White Paper* (2008) Kluwer Law International, The Netherlands 37

Stefan Szymanski, 'Uncertainty of Outcome, Competitive Balance And the Theory Of Team Sports' in Wladimir Andreff and S Szymanski *Handbook on the Economics of Sport* (2006) Edgar Elgar Publishing Limited, Cheltenham 597

Erika Szyszczak, 'Is Sport Special?' in Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds) *The Regulation of Sport in the European Union* (2007) Edward Elgar Publishing Ltd, Cheltenham, United Kingdom 3

Stephen Weatherill, 'Anti-Doping Revisited – The Demise of the Rule of 'Purely Sporting Interest' in S Weatherill, *European Sports Law Collected Papers* (2007) TMC Asser Press, The Netherlands 335.

Stephen Weatherill, 'Sport as Culture in EC Law' in S Weatherill, *European Sports Law Collected Papers* (2007) TMC Asser Press, The Netherlands 215

Stephen Weatherill, 'Discrimination on Grounds of Nationality in Sport' in S Weatherill *European Sports Law: Collected Papers* (2007) TMC Asser Press, The Hague, The Netherlands 15

Robin C A White, 'Free Movement of Persons and Sport' in Barbara Bogusz, Adam Cygan and Erika Szyszczak (eds) *The Regulation of Sport in the European Union* (2007) Edward Elgar Publishing Ltd, Cheltenham, United Kingdom 33

5. Articles

Jack Anderson, 'An Accident of History: Why the Decisions of Sports Governing Bodies are Not Amenable to Judicial Review' [2006] 35 Comm L World Rev 173

J Bauer and Michael S Jacobs, 'Professional Sports Leagues, Antitrust, and the Single-Entity Theory: A Defense of the Status Quo' [1991] 67 Ind L J 25

Michael J Beloff QC, 'Who, Whom? Unresolved Issues in Judicial Review' [2008] Denning LJ 35

Michael J Beloff QC, 'Watching Out For The Googly: Judicial Review in the World of Sport' [2009] JR 136

Tim Bezbatchenko, 'Bend it For Beckham: A Look at Major League Soccer and its Single Entity Defence to Antitrust Liability After the Designated Player Rule' (2008) 76 University of Cincinnati Law Review 611

Ian Blackshaw, 'Protecting and Exploiting Sports Image Rights' 3-4 [2005] ISLJ 42

Stephen Boyd and Rosemary Jay, 'Image Rights and the Effect of the Data Protection Act 1998' 15(5) [2004] Ent L R 159

D Brodie, 'Recent Cases, Commentary, The Heart of the Matter: Mutual Trust and Confidence' (1996) 25 ILJ 121

Richard Brunley, 'Interstate Trade Revisited – the Jurisdictional Criterion for Articles 81 and 82 EC' [2002] ECLR 217

O Cherednychenko, 'Towards the Control of Private Acts by the European Court of Human Rights' (2006) 13(2) MJ 195

O Cherednychenko, 'Fundamental Rights and Contract Law' (2006) 2(4) ERCL 489

Pablo Ibanez Colomo, 'The Application of EC Treaty Rules to Sport: the Approach of the European Court of First Instance in the Meca Medina and Piau cases' [2006] (2)3 ESLJ <http://www2.warwick.ac.uk/fac/soc/law/elj/eslj/issues/volume3/number2/colomo>

Ruben Conzelmann, 'Models for the Promotion of Home Grown Players For the Protection of National Representative Teams' [2008] 3-4 ISLJ 26

G Davidov, 'Who is a Worker' (2005) 34 ILJ 57

Dominic Farnsworth, 'Does English Law Lack Personality' 3(AUG) [2001] ISLR 210

M Flynn and R Gilbert, 'The Analysis of Professional Sports Leagues as Joint Ventures' (2001) 111 Econ J F27

L Goldman, 'Sports Anti-trust and the Single Entity Theory' [1989] 63 Tul L Rev 751

Nathaniel Grow, 'There's No 'I' in League: Professional Sports Leagues and the Single Entity Defense' [2006] 105 Mich L Rev 183

Stephen Hall, Stephen Szymanski and Andrew Zimbalist, 'Testing Causality Between Team Performance and Payroll' [2002] Journal of Sports Economics 3(2) 149

Paul Harris, 'Abusive Sports Governing Bodies: Hendry and Others v The World Professional Billiards and Snooker Association Ltd' [2002] Comp Law 101

T Kennedy, 'Will America's Pastime Be a Part of America's Future?: An Antitrust Analysis That Enables Sports Leagues to Compete Effectively in the Entertainment Market' (1998) 46 UCLA L Rev 577

I Kokkoris, 'Purchase Price-Fixing: A Per Se Infringement?' [2007] ECLR 473

Mary Catherine Lucey, 'Regulating Post-Employment Relationships: The Restraint of Trade Doctrine Versus the Competition Act 2002' [2003] 25 DULJ 124

Edward Mathias, 'Big League Perestroika? The Implications of Fraser v Major League Soccer' (1999) 148 U Pa L Rev 203

Samuli Miettinen and Richard Parrish 'Nationality Discrimination in Community Law: an Assessment of UEFA Regulations for European Club Competitions (The Home-Grown Player Rule) 5 (2) [2007] ESLJ <http://go.warwick.ac.uk/eslj/issues/volume5/number2>

Giorgio Monti, 'The Scope of Collective Dominance Under Articles 82 EC' [2001] 38 CML Rev 131

N A Moreham, 'The Right to Respect for Private Life in the European Convention on Human Rights: A Re-examination [2008] EHRLR 44

Walter Neale, 'The Peculiar Economics of Professional Sports' (1964) 78 QJ Econ 1

Paolisa Nebbia, 'Standard Form Contracts Between Unfair Terms Control and Competition Law' [2006] EL Rev 102

Leanne O'Leary, 'The RFL's "Club Trained Rule": The Case For Judicial Review' [2009] 2 ISLR 15

Dawn Oliver, 'The Human Rights Act and Public/Private Law Divides' [2000] 4 EHRLR 343

P D Owen, 'Professionalisation of New Zealand Rugby Union: Historical Background, Structural Changes and Competitive Balance' University of Otago Economics Discussion Papers No 0214 (December 2002)

Richard Parrish and David McArdle, 'Beyond Bosman: The European Union's Influence Upon Professional Athletes' Freedom of Movement' [2004] 7(3) Sport in Society 403

F Reynold, 'The Status of Agency Workers: A Question of Legal Principle' (2006) 35 ILJ 320

Gary Roberts, 'Sports Leagues and the Sherman Act: The Use and Abuse of Section 1 to Regulate Restraints on Intraleague Rivalry' (1984) 32 UCLA L Rev 219

T Rosenbaum, 'The Anti-Trust Implications of Professional Sports Leagues Revisited: Emerging Trends in the Modern Era' (1987) 41 University of Miami Law Review 729

Stephen Ross, 'The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws [1997] 2 University of Illinois Law Review 519

Stephen Ross, 'Competition as a Constraint on Monopolistic Exploitation by Sports Leagues and Clubs' [2003] 19 Oxford Review of Economic Policy 569

Stephen Ross, 'Player Restraints and Competition Law Throughout the World' [2004-2005] 15 Marq Sports L Rev 49

Stephen F Ross and Robert B Lucke, 'Why Highly Paid Athletes Deserve More Anti-trust Protection that Ordinary Unionized Workers' [1997] 33 Antitrust Bulletin 641

Stephen F Ross and Stefan Szymanski, 'Anti-trust and Inefficient Joint Ventures: Why Sports Leagues Should Look More Like McDonald's and Less Like the United Nations' [2006] 16 Marq Sports L Rev 213

S Rottenberg, 'The Baseball Players' Labor Market' [1956] 64 Journal of Political Economy 242

Allen Sanderson, 'The Many Dimensions of Competitive Balance' [2002] 3(2) Journal of Sports Economics 204

Alex Schuster, 'The Interface Between Competition Law and Sport' [2009] Pennsylvania State Law Review (forthcoming)

P J Sloane, 'The Economics of Professional Football: The Football Club as a Utility Maximiser' (1971) 18 Scot J Poli Econ 121

P J Sloane, 'Sporting Equality: Labour Market versus Product Market Control – A Comment' [1976] 18(1) Journal of Industrial Relations 79

S Szymanski, 'Economic Design of Sporting Contests' [2003] 41(4) Journal of Economic Literature 1137

S Szymanski, 'Tilting the Playing Field: Why a Sports League Planner Would Choose Less, not More, Competitive Balance' (Tanaka Business School Discussion Papers: TBS/DP05/35, Tanaka Business School, London, October 2004)

S Szymanski, 'The Champions League and the Coase Theorem' [2007] 54(3) Scottish Journal of Political Economy 355

Erika Szyszczak, 'Competition and Sport' [2007] ELR 95

D Thomas, 'The Rugby Revolution: New Horizons or a False Dawn?' Institute of Economic Affairs, September 1997, 20

P Turner-Kerr and A Bell, 'The Place of Sport Within the Rules of Community Law: Clarification From the ECJ? The Deliege and Lehtonen Cases' [2002] 23(5) ECLR 256

Cento G Veljanovski, 'Markets in Professional Sports: Hendry v WPSBA and the Importance of Functional Markets' [2002] 23(6) ECLR 273

Warren and Brandeis, 'The Right to Privacy' (1890) 4 Harv L Rev 193

John Vrooman, 'A General Theory of Professional Sports Leagues' [1995] Southern Economic Journal 61(4) [1995] 971

S Weatherill, 'Fair Play Please!: Recent Developments in the Application of EC Law to Sport' (2003) 40 CMLR 51

S Weatherill, 'Article 82 and Sporting 'Conflict Of Interest': The Judgment in MOTOE' [2008] 3/4 ISLJ special addendum

J Weistart, 'League Control of Market Opportunities: A Perspective on Competition and Cooperation in the Sports Industry' (1984) Duke L J 1013

Wouter PJ Wils, 'The Undertaking as Subject of EC Competition Law and the Imputation of Infringements to Natural or Legal Persons' (2000) 25 EL Rev 99

P Williams, 'Battle Lines on Three Fronts: The RFU and the Lost War Against Professionalism' (2002) 19 The International Journal of the History of Sport 114

Lord Woolf, 'Droit Public-English Style (1994) Public Law 57

M Wynn and P Leighton, 'Will the Real Employer Please Stand Up? Agencies, Client Companies and the Employment Status of the Temporary Agency Worker' (2006) 35 ILJ 301

6. Command Papers and Parliamentary Reports

The Hillsborough Soccer Stadium Disaster (Final Report) Cm 962, 1990 (The Taylor Report)

House of Commons National Heritage Select Committee Third Report, 'Relations Between Rugby Union and Rugby League' HC (1994 – 1995) 276

Evidence of Mr Dudley Wood provided to the National Heritage Committee Inquiry into Relations Between Rugby Union and Rugby League (23 March 1995) HC (1994 – 1995) 276

Memorandum submitted by the Rugby Football League to the National Heritage Select Committee Inquiry into Relations Between Rugby Union and Rugby League (March 1995) HC (1994 – 1995) 276

Second Report From the Culture, Media and Sport Committee: 'The Future of Professional Rugby' HC (1999 – 2000) 99

Memorandum submitted by Super League (Europe) Limited to the Culture Media and Sport Committee Inquiry into the Future of Professional Rugby (June 1999) HC (1999 – 2000) 99

Culture, Media and Sport Committee, 'The Future of Professional Rugby: Government Response to the Second Report From the Culture, Media and Sport Committee' HC (1999 – 2000) 268

7. Media Articles

'Anzac Test Cash Worth Fighting For' *The New Zealand Herald* (Auckland, 4 May 2008) <http://www.nzherald.co.nz/section/4/story.cfm?c_id=4&objectid=10507808> accessed 28 July 2008

Simon Briggs, 'ECB Play Hardball over Indian Cricket League' *Telegraph* (London, 28 February 2008) <http://www.telegraph.co.uk/sport/cricket/2292956/ECB-play-hardball-over-Indian-Cricket-League.html> accessed 21 April 2009

'Bradford Snap Up Hooker Rinaldi' *BBC Sport* (London, 17 April 2009) <http://news.bbc.co.uk/sport1/hi/rugby_league/super_league/bradford/8003686.stm> accessed 12 May 2009

'Bulls Chief Slams RFL Dispensation' *Rugby Leaguer & League Express,* (Brighouse, 1 September 2008) 5

'Chambers Not Wanted by Castleford' *BBC Sport* (London, 6 May 2008) <http://news.bbc.co.uk/sport1/hi/rugby_league/super_league/castleford7385928.stm> accessed 25 June 2008

'Chambers Secures Castleford Trial' *BBC Sport* (London, 31 March 2008)

<http://news.bbc.co.uk/sport1/hi/rugby_league/super_league/castleford/7321908.stm> accessed 25 June 2008

'Cooke Suspended Over Hull KR Move' *BBC Sport* (London, 14 November 2007) <http://news.bbc.co.uk/sport2/hi/rugby_league/super_league/hull_kr/6976654> accessed 10 January 2009

'ECB Reject Player Applications' *BBC Sport* (London, 20 March 2008) <http://news.bbc.co.uk/sport1/hi/cricket/england/7307591.stm> accessed 8 May 2008

'English Club-v-Country Row Ended' *BBC Sport* (London, 2 November 2007) <http://news.bbc.co.uk/sport2/hi/rugby_union/7074681.stm> accessed 21 January 2009

Evan Fanning, "'Walking Junkie' Chambers Reveals Full Extent of Drug Use" *The Guardian* (London, 2 March 2009) <http://www.guardian.co.uk/sport/2009/mar/02/drugs-in-sport-athletics> accessed 18 May 2009

Andrew Henderson, 'Ready to Rumble With Thunder' *BBC Sport* (London, 3 March 2009) <http://news.bbc.co.uk/sport1/hi/rugby_league/7916963.stm> accessed 12 May 2009

'Indian Cricket Bonanza is Massive Hit' *BBC Sport* (London, 2 June 2008) <http//:news.bbc.co.uk/1/hi/world/south_asia/7430529.stm> accessed 1 July 2008

'IRB Seeks to Settle Scotland Row' *BBC Sport* (London, 23 September 2008) <http://news.bbc.co.uk/sport2/hi/rugby_union/scottish/7629463.stm> accessed 21 January 2009

'Leeds and Wigan to Lose Kiwi Pair' *BBC Sport* (London, 2 May 2008) <http://news.bbc.co.uk/sport1/hi/rugby_league/7375188.stm> accessed 28 July 2008

'Maurie Fa'asavalu Demonstrates He Is True Brit' *Telegraph* (London, 29 October 2007) <http://www.telegraph.co.uk/sport/rugbyleague/2324431/Maurie-Fa'asavalu-demonstrates-he-is-true-Brit.html> accessed 6 October 2008

'Player Release Move Upsets Scots' *BBC Sport* (London, 26 November 2008) <http://news.bbc.co.uk/sport2/hi/rugby_union/scottish/7750215.stm> accessed 21 January 2009

'RFL U-Turn Gives Career Lifeline to Non-Brit Players' *League Weekly* (Dewsbury, 1 September 2008) 2

'RFL Backing Rhinos and Wigan' *Skysports* (London, 30 April 2008) <http://www.skysports.com/story/0,19528,12196_3500086,00.html> accessed 29 July 2008

'RFU Ends Pursuit of League Stars' *BBC Sport* (London, 29 August 2008) <http://news.bbc.co.uk/sport1/hi/rugby_union/7586836.stm> accessed 17 April 2009

'RU High Court Player-Row Win' *BBC Sport* (London, 24 October 2008) <http://news.bbc.co.uk/sport2/hi/rugby_union/welsh/7687755.stm> accessed 21 January 2009

'Tansey Set For Move to Australia' *BBC Sport* (London, 1 October 2008) <http://news.bbc.co.uk/sport1/hi/rugby_league/leeds/7646053.stm> accessed 17 October 2008

'Thunder Land Tigers Hooker' *League Weekly* (Dewsbury, 29 September 2008) 10

'World Body Has Say Over Kiwis' *The New Zealand Herald* (Auckland, 2 May 2008) <http://www.nzherald.co.nz/section/4/story.cfm?c_id=4&objectid=10507423> accessed 28 July 2008

8. Websites

International Rugby Board Official Website, 'RWC Confirmed as Record-Breaker' 18 February 2008 <http://www.irb.com/newsmedia/mediazone/pressrelease/newsid=2022301.html> accessed 15 July 2008

Leeds Rhinos Official Website, 'Rhinos Agree New Deal With Tansey' *LeedsRugby.com* 1 October 2008 <http://www.leedsrugby.com/> accessed 17 October 2008

Rugby Football League Official Website, 'Super League Clubs Agree Extension'

<http://www.therfl.co.uk~therflc/superleague/news_item.php?id=12114> accessed 30 January 2009.

Rugby League Hall of Fame Official Website, 'Lance Todd' <http://rlhalloffame.org.uk/todd.htm> accessed 15 September 2008

Rugby League Hall of Fame Official Website, 'Harry Sunderland Award' <http://rlhalloffame.org.uk/sundtrop.htm> accessed 15 September 2008

The National Rugby League Official Website, 'History', <http://www.nrl.com/NRLHistory/tabid/270/Default.aspx> accessed 20 July 2006

Wigan Warriors Official Website, 'Honours' <http://www.wiganwarriors.com/MidContent.asp?cid=8> accessed 14 July 2008

9. Interviews

(Transcripts of all interviews are held by the author in accordance with the research guidelines applicable at the time the interviews were conducted.)

Rugby League

Interview with Player A, 7 August 2007, England
Interview with Player B, 28 November 2007, England
Interview with Player C, 12 September 2007, England
Interview with Player D, 11 September 2007, England
Interview with Player E, 13 November 2007, England

Interview with Player F, 6 November 2007, England
Interview with Player G, 30 October 2007, England
Interview with Player H, 8 August 2007, England
Interview with Player I, 18 July 2007, England
Interview with Player J, 4 December 2007, England

Interview with Club A, 5 June 2007
Email correspondence with Club A dated 12 October 2007
Interview with Club B, November 2007 (includes a response to supplementary questions)
Interview with Club C, 28 February 2007
Interview with Club D, 22 February 2007
Interview with Club E, 16 August 2007
Interview with Club F, 29 May 2007
Interview with Club G, 15 February 2007
Interview with Club H, 16 October 2007
Interview with Club I, 27 July 2007
Interview with Club J, 24 July 2007

Interview with Championship Club A, 19 November 2007
Interview with Championship Club B, 21 September 2007

Interview with Sports Agent A1, 8 October 2007, England
Interview with Sports Agent A2, 15 October 2007, England
Interview with Sports Agent A3, 30 October 2007, England

Interview with Sponsor 1, 26 November 2007, England

Interview with the RFL, 29 October 2007, England

Interview with a BARLA Administrator (former), 24 July 2008, Huddersfield, England

Interview with the RLPA, 12 November 2007, Wakefield, England

Interview with Australian NRL Club A, February 2008

New Zealand Rugby Union

Interview with an NZRU Administrator (former), 6 January 2006, New Zealand
Interview with NZRU, 8 April 2007, New Zealand

Interview with Provincial Union A, February 2008, New Zealand
Interview with Provincial Union B, 11 April 2007

Interview with the NZRPA, February 2008, Auckland, New Zealand

10. Other Sources

Minutes of IRB Meetings

(Copies of the IRB Minutes are held at the Rugby Union Museum, Twickenham, London)

Minutes of the IRB Meeting held on 5 December 1887, Manchester, England

IRB Manifesto adopted 29 September 1888 (recorded in the IRB Minutes for that year)

Award by Arbitrators, Lord Kingsburgh and Major F A Marindin, who met in April 1890 which Defines the

Regulations of the International Rugby Football Board (recorded in the IRB Minutes for that year)

Minutes of the IRB Meeting held on 8 February 1892, (Manchester, England)

Minutes of the IRB Meeting held on 4 March 1893 (Leeds, England)

Minutes of the IRB Meeting held on 4 January 1895 (Swansea, Cardiff)

Minutes of the IRB Meeting held on 20 March 1896 (London, England)

Minutes of the IRB Meeting held on 25 January 1897 (London, England)

Minutes of the Meeting of the IRB held on 20 February 1897

Minutes of the IRB Meeting held on 25 January 1898 (Crewe, England)

Minutes of RFU Meetings

(Copies of the RFU minutes are held at the Rugby Union Museum, Twickenham, London)

Minutes of the Meeting of the Rugby Football Union held on 19 September 1895

Minutes of NRFU Meetings

(Copies of the Minutes of NRFU meetings are held at the Rugby League Heritage Museum, The George Hotel, Huddersfield, England)

Minutes of the Joint Meeting of Northern Union Sub-Committee and New Zealand Executive Held at the Grand Central Hotel, Leeds 1907

RFL Documents

Undated Articles of Association of RFL (Governing Body) Ltd, cl 2.1

Undated Memorandum of Association for RFL (Governing Body) Limited, cl 3

Rugby Football League, Full Time Player's Contract of Employment (FTC/08/05)

Rugby Football League, *Annual Report 2007*

Rugby Football League, Supplemental Clause Bank (August 2007)

Rugby Football League, Professional Registration Form (June 2008)

Rugby Football League, *Record of Super League Attendance 2000-2008* (as at 4 September 2008)

Rugby Football League, Official Guide 2009 (which contains the RFL Operational Rules 2009 and other Codes of Conduct)

RFU Documents

Rugby Football Union, *Final Report of the Working Party on Illegal Payments*, R A G Rogers (Chairman), 1 April 1993 (held at the Rugby Union Museum, Twickenham, England)

IRB Documents

The Report of the International Rugby Board's Amateurism Working Party, Mr V Pugh QC (Chairman), February 1995 (held at the Rugby Union Museum, Twickenham, England)

Press statement given by the (then) Chairman of the International Rugby Board, Mr Vernon Pugh, Paris, 27 August 1995 (held at the Rugby Union Museum, Twickenham, England)

Personal Correspondence

Personal correspondence with the RFL dated 3 September 2008

Personal correspondence with the Scottish Rugby Union dated 15 September 2008

Personal correspondence with the United Kingdom Border Agency dated 17 September 2008

Contracts

Players' employment contract with Keighley Rugby League Club 1909 (held at the rugby League Heritage Museum, The George Hotel, Huddersfield, England)

APPENDIX 1: RFL SUPPLEMENTAL CLAUSE BANK (AUGUST 2007)

Document provided by the Rugby Football League.

THE RUGBY FOOTBALL LEAGUE

SUPPLEMENTAL CLAUSE BANK
(to be read in conjunction with the Rugby League Full or Part Time Player's Contract ("the Agreement"))

1 Confidentiality

1.1 Both you and the Club agreed to keep the terms of the Agreement strictly confidential and agreed not to disclose, communicate or otherwise make public the same to anyone, except for professional advisors, the relevant tax authorities or otherwise maybe required to be disclosed by law.

2 Private medical insurance

2.1 The Club agrees to cover the cost of membership for you [and your spouse and children while aged under 18 years] of an appropriate private medical plan with (specify organisation, for example BUPA) or such other reputable medical expenses insurance scheme as the Club shall decide from time to time, subject always to the rules and terms and conditions of such scheme.

2.2 The Club agrees that in accordance with Clause 17.1 of the Agreement, it shall provide you with a copy of the relevant medical insurance policy as soon as practicable after the date of this Agreement.

2.3 You agree that the Club will advise the Inland Revenue or other relevant department of this benefit and you agree to the Club deducting from your remuneration due to you from the Club any sum payable as personal tax if this benefit is deemed to be a taxable benefit.

3 Accommodation

3.1 The Club agrees to provide you [and your spouse and dependent children] with a reasonable standard of fully furnished accommodation ("the Accommodation") as the Club shall deem suitable for you [together with your spouse and dependent children].

3.2 The Club shall be responsible for all payments in respect of [specify outgoings which are to be paid by the Club] [and you shall be responsible for all payments in respect of (specify outgoings which are to be paid by the Player)].

You shall take reasonable care of the interior of the Accommodation including all fixtures and fittings and shall keep the same clean and tidy and shall make good (or that of the option of the Club) pay compensation for the cost of repair of any damage caused by the wilful act of you [or your spouse or children] or your [or their] visitors but shall not otherwise be required to carry out repairs or decorations to the Accommodation.

3.3 Immediately upon the termination of the Agreement for whatever reason, you [and the your spouse and children resident with you] shall vacate the Accommodation and remove from it all items belonging to you [or your spouse or children]

3.4 You agree that the Club will advise the Inland Revenue or other relevant department of this benefit and you agree to the Club deducting from your

remuneration due to you from the Club any sum payable as personal tax if this benefit is deemed to be a taxable benefit.

4 Car

4.1 The Club shall provide you [and your spouse and your dependent children] with a car [deemed by the Club to be suitable under the Agreement/equivalent to a (specify make and model if known)] in respect of which [the Club will pay all running costs including insurance and maintenance/specify which costs will borne by the Club and which by the Player].

4.2 You shall take good care of the car and ensure that the provisions and conditions of any car policy from time to time in force at the Club, and of any insurance policy relating to the car, are observed.

4.3 You shall return the car in a clean and satisfactory condition together with its keys to the Club at [insert address of Club and/or person to whom the keys should be handed back] immediately upon the termination of the Agreement.

4.4 You agree that the Club will advise the Inland Revenue or other relevant department of this benefit and you agree to the Club deducting from your remuneration due to you from the Club any sum payable as personal tax if this benefit is deemed to be a taxable benefit.

5 Transport costs

5.1 The Club agrees to provide you [and your spouse and your dependent children, if they accompany or join you with the prior written approval of the Club] with (insert number, specify class and destination as appropriate) return airfares [for the duration of the Agreement/at the expiry of the Agreement].

5.2 You agree that the Club will advise the Inland Revenue or other relevant department of this benefit and you agree to the Club deducting from your remuneration due to you from the Club any sum payable as personal tax if this benefit is deemed to be a taxable benefit.

6 Prohibition on arbitrary termination

6.1 The Club and you agree that the Agreement may only be terminated in accordance with the Agreement and for no other reason unless mutually agreed.

7 Transfer fees

7.1 In the event that both you and Club agree to accept a cash offer for you to transfer to another club during the currency of the agreement, the Club and you agree that the cash amount receivable by the Club will be divided such that the Club receives (specify percentage) and you receive (specify percentage).

8 Break Clauses

8.1 Notwithstanding any other provision of the Agreement, either the Club or you may terminate the Agreement should the Club be demoted from the Super League by notice in writing to take effect on 30th November immediately following the Club's demotion from the Super League. In such event, you shall not be entitled to any further payment from the Club except such sums that shall have accrued due at the date when the Agreement is terminated.

Or

8.1a) The (insert year) year of the contract is conditional upon the player having made (insert number of appearances) appearances in the 17 man squad for first team matches in the first (insert number of years) years of the contract.

Both parties agree that in the event that the player has not made (insert number of appearances) such appearances the contract will terminate on 30 November 2 (insert year).

9 Close Season

9.1 Subject to obtaining the prior written consent of the Club, you shall be permitted to [insert relevant permitted activities: e.g "to agree a close season contract with [insert details of Rugby Union side]" during the close season]. For the purpose of this clause [•] a "close season contract" means a contract under which your duties are confined to the period from [•] to [•] in any particular year.

9.2 If you choose to exercise your rights under this clause [•] you agree and accept that you will not be covered by the Club's medical insurance policy in respect of any injuries sustained during the close season.

9.3 In the event that you are unable to perform all or any part of the Agreement with the Club, as a result of an injury sustained during the close season contract, the Club shall be entitled to withhold salary from you until such time as you have fully recovered from the injury.

10 Super League Approach – Option 1 - Fee

10.1 If you receive an approach from a Super League Club [prior to [•]], the Club agrees to enter into negotiations with the Super League Club [after the final competitive game of the season] (on your behalf) in good faith, with a view to reaching an agreement for your release and transfer to such Super League Club. For the avoidance of doubt, you will only be released from your obligations under this Agreement once the negotiated transfer procedure, as set out in Operational Rule C1:22 has been completed.

10.2 In the event that agreement cannot be reached between the Club and the Super League Club, the Club will agree to the matter being determined by the Judiciary Panel in accordance with Operational Rule C1:45.

11 Super League Approach – Option 2 - Free Agent

11.1 If the Club receives an approach from a Super League Club which wishes to enter into a contract with you during the playing season the Club undertakes to inform you immediately. The Club will allow you and the Super League Club to negotiate a contract and should an agreement be reached then on receipt of fourteen days notice in writing the Club agrees to terminate the contract and release you as a free agent under Operational Rule C1:12(d). For the avoidance of doubt you will not be entitled to any further payment from the Club except such sums that shall have accrued due at the date when the Agreement is terminated.

12 Relocation Expenses

12.1 In order properly to perform his duties as a player with the Club, it is a condition of your employment that you live within a reasonable daily commuting distance from your place of work.

12.2 You agree to relocate your residence to within a reasonable daily commuting distance from your place of work within * months from the date of this Agreement or before the Limitation Day, whichever is sooner, and the Club shall reimburse your relocation expenses in accordance with the terms agreed between the Club and you.

12.3 In any case where you could obtain the benefit of income tax relief in respect of any relocation expenses paid to you pursuant to clause 1.2, the

Club shall ensure that such payments are made to you on or before the Limitation Day and reasonably assist you in the provision of any information required in order for you to obtain such relief.

> Limitation Day means in relation to the Player's change of residence, the last day of the tax year after that in which he begins to perform his duties of employment after his relocation pursuant to clause 12.2 or such other later date as directed by the Inland Revenue.

13 Option Clause

13.1 If the Club notifies the player in writing by [date] that the Club wishes to extend the term of the Agreement until [new termination date], the Agreement shall continue until [new termination date] and on the terms set out in the Schedule to this Agreement in relation to such extended period.

14 Schedule – EBT Clause

14.1 The player is member of the (insert name) Employee Benefit Trust and is therefore eligible to receive payments from the Trust at the Trustees discretion. If payments are made they will be made direct to the player.

APPENDIX 2: RFL REGISTRATION FORM (JUNE 2008)

Document provided by the Rugby Football League.

SECTION ONE – TO BE COMPLETED & SIGNED BY THE PLAYER

Full Name		Date of Birth			19	
Address						
		Postcode				
COUNTRY OF BIRTH		PASSPORT HELD i.e. UK / Australian				

Please indicate the country or countries for whom you are eligible for international honours

England		Ireland		Scotland		Wales		Other please state	

ETHNIC MONITORING - Please tick appropriate box	**DISABILITY MONITORIN**
Asian or Asian British Bangladeshi ☐ Indian ☐ Pakistani ☐	Ticking yes will not preclude you from playing
Black or Black British African ☐ Caribbean ☐	RL, do you have any specific requirements
Chinese ☐ **Other** ☐ please specify	that would make it easier to participate?
Dual Heritage White & Black African ☐ White & Asian ☐	
White & Black Caribbean ☐	Disability?
White British ☐ Irish ☐ Other ☐	Yes ☐ No ☐ Prefer

CAREER DETAILS List the clubs previously played, and signed for in date order. All clubs **MUST** be listed, including amateur and professional Rugby League and Rugby Union clubs, both in this country and abroad.

Club (most recent first)	**Country**	**From**	**To**	**Pro/ Amateur**

DECLARATION BY PLAYER		
I apply to be registered as a **professional** player with the RFL. I have completed the form and it is accurate. I have read the notes overleaf and I understand that by signing this form I will be registering as a **professional** player. I understand I will be subject to the RFL Operational Rules including the Rules covering drug testing and misconduct. I have received a copy of the RFL's Anti Doping booklet and Professional Players Guide.		
Signed		Date

SECTION TWO – TO BE COMPLETED & SIGNED BY THE CLUB				
Please indicate the player's Club Trained status (if known)				
Please indicate the player's quota status	Quota		Non Quota	
Where the player has lived or played abroad but holds an EU passport please provide a copy of the passport				
If the player does not hold an EU passport please supply a valid permit to work in the UK				
Where the player's last club was an amateur club please complete to confirm that the amateur club has been informed that the player has registered for the professional club				
Name of official contacted	Date		Time	
I confirm that the details on this form are correct to the best of my knowledge and that the Club below wishes to register this player.				
CLUB	DATE			
SIGNED	POSITION WITH CLUB			

PLEASE NOTE: FORMS MUST BE RECEIVED BY THE RFL WITHIN 48HRS OF SIGNATURE. A PLAYER IS NOT REGISTERED UNTIL AN ACKNOWLEDGEMENT HAS BEEN RECEIVED FROM THE RFL AND IS NOT ENTITLED TO PLAY UNTIL A BASELINE HAS BEEN RECORDED AND FOR FIRST TEAM PLAYERS UNTIL THE PLAYER HAS BEEN INCLUDED IN THE FIRST TEAM SQUAD

Registration form valid from June 2008

NOTES FOR CLUBS & PLAYERS

OPERATIONAL RULES

THE RFL PRODUCES A PROFESSIONAL PLAYERS GUIDE TO THE OPERATIONAL RULES AVAILABLE FROM CLUBS OR THE RFL

PERSONS SUBJECT TO THE OPERATIONAL RULES

A Player shall be registered with the RFL upon submission of an Official Registration Form and shall be bound by the Operational Rules from the date it is received by the RFL. In order to be removed from the Register and to be no longer bound by the Operational Rules a Player must provide written notice of his desire to be removed from the Register. Such de-registration will take effect 12 months from the date the Notice is received by the RFL and the Player agrees to be bound by the Operational Rules until that date. (C1:1). A copy of the Operational Rules is available from the Club, the RFL or can be downloaded from the RFL website www.rfl.uk.com

MISCONDUCT

The following are all offences of Misconduct:-

- Conduct prejudicial to the interests of the Game
- Conviction of a criminal offence
- Failing to comply with a decision of Council, the Board, the Tribunal, the Compliance Manager etc
- A serious or persistent breach of the Operational Rules

- A single breach of the following Operational Rules:
  - Gambling
  - Providing information to third parties
  - Inducing a player to leave a Club prior to the expiry of his contract
  - Offering or receiving inducements to win or lose a match
  - Criticising a Match Official
  - Failing to comply with the RFL Equity Statement/Discrimination
  - Best Efforts
  - Racism, Homophobia, etc
  - Brawling
  - Failing to comply with a RFL Code of Conduct
  - Failing to comply with the RFL's Safeguarding Policy

BREACH OF REGISTRATION RULES

Any of, but not limited to, the following may be considered Misconduct under the Operational Rules:

1 Playing a player who is not correctly registered;

2 Signing more than one form;

3 Providing false information on a Registration form;

4 Registering more players than the total number allowed, or quota allowed

5 Failing to pay Community Game compensation when due;

6 Registering or attempting to register a School age player;

REGISTRATION REQUIREMENTS

In order to register a Player, a Club must submit all the Registration documents required by the RFL from time to time but the Player is not registered until Acknowledgement of Registration has been received from the RFL.

A Club is not allowed to play a Registered Player until baseline testing has been completed satisfactorily and in the case of First Team Players until the Player has been included in the First Team Squad. In all cases it is the Club's responsibility to ensure eligibility for the Player to play in any competition.

APPENDIX 3: RFL FULL TIME PLAYER'S CONTRACT OF EMPLOYMENT (FTC/08/05)

Document provided by the Rugby Football League.

RUGBY LEAGUE FULL TIME PLAYER'S CONTRACT OF EMPLOYMENT

AN AGREEMENT made the *(date of agreement)*

CLUB: *(Club)*; and

PLAYER: *(Name of Player)* of *(home address)*.

This Agreement includes a statement of your main terms and conditions of employment in accordance with the Employment Rights Act 1996. This Agreement is also subject to the League's Regulations.

Definitions

"Club Official" shall mean any of the following properly appointed representatives of the Club: Chairman, Director, Chief Executive, Football Manager or Coach.
"Club Rules" shall mean the rules for players as published by the Club from time to time
"League" shall mean the Rugby Football League (RFL) and/or its wholly owned subsidiaries for the time being situated at Red Hall, Red Hall Lane, Leeds LS17 8NB
"Regulations" shall mean the Constitution and Operational Rules, the Laws of the Game of Rugby League and the Anti-Doping Regulations of the League, in each case in force for the time being.

SECTION ONE – CONDITIONS PRECEDENT

1 The terms of the Agreement (excluding this clause 1) are subject to the following condition(s) precedent:

1.1 The Agreement is conditional upon you passing, to the satisfaction of the Club, an assessment that you are physically and/or mentally fit enough to discharge your obligations under the Agreement. You consent to undergo and fully participate in any of a medical, psychiatric and/or fitness assessment with a minimum of 7 days notice by a qualified medical practitioner appointed by the Club for this purpose; and agree to release and/or consent to the release to the Club of any past medical, psychiatric and/or dental records, which are only to be used for this purpose. The Club will restrict access to any past medical, psychiatric and/or dental records and/or any report or other health record created by the Club's appointed qualified medical practitioner to relevant, senior Club Officials only, and will preserve the confidentiality of such records. For the avoidance of doubt the assessment may consist of a physical examination, psychiatric assessment, fitness tests, x-ray or other scans, and urine and blood samples, but will not consist of any invasive procedure, without your express consent. Any assessment is to take place by the 1 February before the first season to which the Agreement applies or 14 days after the Agreement has been signed, whichever is the latest. If you fail to comply or the Club is not satisfied that you are physically and/or mentally fit enough to discharge your obligations under the Agreement, then the Agreement may be terminated immediately without notice or payment in lieu of notice. If the Club has failed to request an assessment by the dates set out above, then the Club will be deemed to have waived its rights under this paragraph. The Club is required to inform you of the outcome of the assessment within 7 days of the results and you are entitled to disclosure of any report.

1.2 The Agreement is conditional upon you being entitled to be employed in the UK. For the avoidance of doubt, this includes a condition that Work Permits UK issues the Club with a valid work permit for you, where required, for the duration of the Agreement and/or that you hold the relevant immigration documentation including, where necessary, a valid visa to the satisfaction of the Immigration Authorities and/or the RFL. You agree that if, for whatever reason, the Club cannot obtain or continue to hold a valid work permit, or you are no longer legally entitled to be employed in the UK then the Club may terminate the Agreement immediately without notice or payment in lieu of notice.

1.3 You agree that you have full ability to enter into this Agreement and to undertake all of the particular obligations contained in this Agreement and that there is no pre-existing Agreement in place which would prevent you undertaking any or all of the obligations under this Agreement

SECTION TWO – EMPLOYMENT, REMUNERATION AND BENEFITS

2 Employment

2.1 You are engaged by the Club as a professional rugby league player on the terms and conditions of this Agreement and subject to the Regulations.

2.2 This Agreement cancels and supersedes any previous contracts, whether by way of letters of appointment, agreements or arrangements, whether written, oral or implied, relating to your employment, which shall be deemed to have been terminated by mutual consent as from the date of this Agreement and you acknowledge that you have no outstanding claims of any kind against the Club in respect of any such contract. In the event of any discrepancy between the terms set out in this Agreement or any offer letter or previous agreement or document, the terms set out in this Agreement shall prevail.

2.3 You have a duty on signing the Agreement and at all times during the Agreement to inform the Club of any criminal investigation or charges brought against you that relate to an offence punishable by a term of imprisonment.

3 Remuneration

3.1 Your salary shall be paid as set out in Schedule 1 below.

3.2 You shall also be entitled to receive by way of further remuneration any bonus payments calculated in accordance with Schedule 1. If the Club pays you a bonus in any one year, this shall not give rise to a contractual entitlement to a bonus in future years.

3.3 Schedule 1 shall include all remuneration to which you are or may be entitled (save that bonuses may be amended at a later date in writing and by mutual consent). In the event of any dispute the remuneration in the Schedule shall be conclusively deemed to be the full entitlement.

3.4 For the purpose of Part II of the Employment Rights Act 1996, you authorise the Club to deduct from your remuneration any sums due from you to the Club including, without limitation:

3.4.1 any over payments, loans or advances made to you by the Club;

3.4.2 the cost of repairing any damage or loss to the Club's property caused by you;

3.4.3 any fines properly and reasonably imposed by the Club or the League;

3.4.4 any losses suffered by the Club as a result of any negligence or breach of duty by you (including but not limited to any period of suspension or any period of incapacity if self-inflicted);

3.4.5 any sums due under clause 4.4.

4 Holidays

4.1 You are entitled to twenty working days paid holiday each holiday year. This entitlement is subject to the following sub clauses of this clause and shall be taken at times to be agreed with the Club subject to the Club's first team commitments, the RFL representative teams commitments and the requirements of any medical treatment you are undergoing. Such agreement is to be obtained before you have committed yourself to bookings or any other arrangements.

4.2 The holiday year is the calendar year from to *(insert dates)*. You will not be permitted to carry over unused holiday entitlement into a following holiday year except with the express written consent of the Club. You will not be entitled to payment for any unused holiday entitlement.

4.3 You will not normally be permitted to take any holidays during the Club's Playing Season (unless with the prior agreement of the Club). For the purpose of this clause 4.3 only the Playing Season shall start on the first day of pre-season training and end on the day of the Club's last competitive match in any year.

4.4 If you leave your employment with an outstanding holiday entitlement, you will, in addition to any other sums to which you may be entitled, be paid a sum representing salary for the number of days' holiday entitlement outstanding. If you leave your employment having taken more than the accumulated holiday entitlement for the current holiday year then a sum representing salary for the additional holiday taken will be deducted from any final payment to you and the balance will be paid to you.

4.5 The nature of your work means that you will often be required to work on bank and statutory holidays.

4.6 Whilst on holiday you agree not to participate in any professional or dangerous sport or activity as defined by the Club.

SECTION THREE – YOUR OBLIGATIONS

5 Player's obligations

5.1 You agree with the Club that you will:

(a) play, if selected and if deemed by the Club's medical staff to be fit to play, in any game for the Club whether in the UK or abroad;

(b) make yourself available to play, if selected, for Rugby Football League representative teams and/or take part in any tour arranged by the Rugby Football League and will be entitled to be reimbursed by the Rugby Football League within a reasonable time for any reasonable expenses incurred in so doing on production of valid receipts;

(c) attend any game, if not selected, if directed to do so by the Club and will be entitled to be reimbursed for all reasonable expenses incurred in attending away matches on production of valid receipts;

(d) comply with the Regulations including the Anti Doping Regulations (as amended from time to time) at all times all of which shall take precedence over the Club Rules.

(e) acknowledge that to preserve the good name and reputation of the Club and the League that your conduct both on and off the field must be of the highest standard and that the Club may take action against you independent of any action that the League may take against you under the Regulations. If your conduct is such that the reputation of either the Club or the League is, or is likely to be harmed, this could amount to gross misconduct which may lead to summary termination;

(f) attend all training sessions and meetings as arranged by the appropriate Club Official;

(g) play and train to the best of your ability and maintain the highest possible performance and fitness standards;

(h) obey and fulfil every reasonable instruction and direction given by appropriate Club Official(s) or by any person authorised by them;

(i) be available at all reasonable directed times and venues with reasonable notice for match related, social, community, promotional, fundraising or charitable duties;

(j) undertake such other duties and participate in such other activities as are consistent with the performance of your duties under clauses 5.1(a) to (i) above and as are reasonably required of you by the Club;

(k) conduct yourself at all times, both on and off the field in a manner which will uphold the good reputation of the Club and the League;

(l) comply with the provisions of any policy of insurance, whether taken out by the Club or the League, for either your benefit or that of the Club or the League and will not do anything knowingly which will cause to be void or voidable or invoke any exclusion of your cover in any insurance policy maintained for the benefit of the Club or you;

(m) play solely for the Club or as authorised by the Club and as required by the Regulations;

(n) observe the Club Rules to the extent that they do not conflict with or seek to vary the express terms of this Agreement;

(o) submit promptly to such medical and dental examinations as the Club may reasonably require and will undergo at no expense to yourself, save where appropriate as a taxable benefit, such treatment as may be prescribed by the medical or dental advisers of the Club or the Club's insurers;

(p) You shall, if requested by a Club Official, submit to an internal alcohol and/or drug control test as and when required in addition to submitting to any drug control test under the League's Anti-Doping Regulations. You agree to the disclosure of any results from any internal test to the League, UK Sport or other national anti-doping organisation, the World Anti-Doping Agency and/or any other body required by law

(q) wear a mouth guard at all times when playing unless expressly permitted in writing not to do so by the Club;

(r) complete Schedule 2 of this Agreement and, as soon as reasonably practicable, provide the Club with complete and accurate contact details of your agent, and any subsequent agent or representative;

(s) agree on the termination of this Agreement to return to the Club in a reasonable and proper condition any property (including any car) which has been provided or made available to you by the Club in connection with your employment.

5.2 You agree with the Club that you will **not**:

(a) by any act or omission be guilty of conduct which will bring yourself, the Club, the game of rugby league, or the League itself into disrepute;

(b) except in the case of emergency, arrange or undergo any medical treatment without first giving the Club proper details of the proposed treatment and physician/surgeon and requesting the Club's permission which shall not be unreasonably withheld;

(c) engage in any sport, activity or practice that might endanger your fitness, health or ability to comply with your obligations to the Club or the League;

(d) when playing or training wear anything (including jewellery) which could be dangerous to you or any other person;

6 Media, Broadcasting and Advertising

6.1 You agree that you will not without the Club's prior written consent (which shall not be unreasonably withheld):

(a) be accredited or act as a journalist or in any other media capacity for a newspaper or other print media or on the television, on the radio or on any other broadcast or other medium (including websites and information provision by means of wireless communication) at any time during your employment;

(b) provide exclusive interviews or commentaries or enter into any contractual arrangement or understanding under which or as a result of which you agree to provide exclusive interviews with or appearances on any element of the media during the employment.

6.2 You agree to observe and comply with the following provisions:

(a) The Club shall appoint an official spokesman on all matters concerning the team, any matches, the management of the team or fellow team members. The official spokesman may delegate responsibility to any other official of the team;

(b) you may communicate directly with the media (for example immediately after the match) but you do not have to unless you are requested to do so by the Club (as set out in clause 6.2(c) below). Where you do deal with the media you must:

(i) make every effort to project the best possible image of the Club and your own participation as a player of the Club;

(ii) not disclose any information to the media or to any other individual or organisation on any other member or members of the team which may prove damaging, humiliating or defamatory either to that member or those members or to the team or to the Club; and

(iii) not refer to any commercial organisation unless you have obtained the Club's express prior approval.

(c) If so requested by the Club you agree to attend and give at least one press conference or interview:

(i) prior to any match provided that the request is reasonable;

(ii) after any match; and

(iii) at any mutually agreed time;

provided that the Club will on every occasion use its reasonable endeavours to facilitate your attendance at any such interviews or conferences.

6.3 You agree to be filmed, televised, photographed, identified and otherwise recorded during the matches under the conditions and for the purposes determined from time to time by the Club including in relation to the promotion of the matches and the game of Rugby Football League.

6.4 From time to time, the Club may wish to use your name, signature, photographs and/or footage taken of you before, during or after the matches for its own commercial purposes including, but not limited to promoting the Club and/or as part of current or historical records or publications of or concerning the Club. You agree that the Club may use your name, signature and/or likeness free of charge for any such purposes, provided that such use comprises reference to or portrayal of you as a player of the Club.

6.5 You further agree that:

(a) where your name, signature or your image is intended to appear without other names or images of the current or past players of the Club, the Club may not permit a third party to use your name, signature or image for any commercial purpose without first obtaining your express prior written consent not to be unreasonably withheld or delayed;

(b) however, the Club may use your name, signature or image for their own commercial purposes (including the grant of rights to use the same to the Club's sponsors, commercial partners or suppliers (including Super League (Europe) Limited and the Rugby Football League)) without needing to obtain any further consent from you provided always that any such use is limited to you appearing and being portrayed as a member of the Club and shall not be used in such a way as to be construed as individual sponsorship of you by, or endorsement by you of, the Club's sponsors and suppliers and other commercial partners;

(c) if you receive a request to allow your person, name, picture or sports performance (whilst wearing the Club's team strip) to be used for advertising purposes during the employment, you agree to seek the prior consent of the Club. Unless you receive the required consents from the Club you agree that you will not allow your person, name, picture or sports performance to be used (whilst wearing the team strip) for any advertising purpose during the employment.

7 Sponsorship, Community Public Relations & Marketing

7.1 The Club relies on the funds it receives from League contracts and sponsorships and funds it raises itself from sponsorship, merchandising and other commercial licences to fund the substantial expenses incurred in running the Club. The purpose of this clause is to ensure the continued financial viability of the Club.

7.2 You agree:

(a) that you will not enter into a sponsorship or promotional contract without the prior written approval of the Club, such consent not to be unreasonably withheld. You are expressly forbidden from entering into sponsorship or promotional contracts with companies who are direct competitors of existing Club or League sponsors.

(b) to assist and co-operate with the Club and/or the League and comply with all reasonable requests to assist their sponsors and commercial partners to maximise the promotional benefits from their support of, or supply to, the Club and/or the League;

(c) that you have been provided by the Club with suitable and appropriate team uniform and competition apparel and other items of clothing and kit and other gifts and services. You will not give your consent or allow any third parties who are not sponsors or other commercial partners of the Club to use your signature, likeness, name, or performance at any matches, for any commercial purpose relating to your acceptance of any gift or reward unless you receive the prior written approval of the Club which shall not be unreasonably withheld.

8 Team Clothing

8.1 You agree to wear only the outer clothing (excluding playing boots worn whilst training or playing matches which are considered to be tools of the trade) and equipment authorised and/or supplied to you by the Club at all times when you are at match venues, in all matches, pre-match warm ups, award ceremonies, photo sessions, press conferences, interviews, in training or at any other official event or time as determined by the Club or any authorised representative of the Club unless you have the express prior written authority of the Club to wear alternative outer clothing and/or equipment. The Club agrees to provide you with a reasonable sufficient quantity of club clothing in order for you to satisfy your obligations under this Agreement. You may choose your own playing boots.

8.2 You further agree that to the extent you are authorised to wear any outer clothing or footwear or to use any equipment not supplied by the Club, all such items will comply with the Club and League guidelines on trade mark identification or, if instructed otherwise by the Club or League, be unbranded. You agree that you have no rights to use the clothing, footwear and equipment supplied to you by the Club or permit them to be used for any commercial purposes other than as instructed by the Club without the Club's prior written consent.

8.3 You agree not to wear, have tattooed, branded, shaved, cut, applied or affixed to, into or onto your body (including onto or in your hair and/or nails or onto or into your spectacles or contact lenses) any name, logo or design of any commercial entity other than as expressly permitted in this Agreement.

9 Place & Hours of Work

9.1 Your hours of work are such as the Club may from time to time reasonably require of you to carry out your duties and you shall not be entitled to any additional remuneration for work done outside normal working hours.

9.2 Your place of employment shall be at the Club's ground and training venues but the Club shall be entitled to require you to play and undertake your duties hereunder at any other place throughout the world.

9.3 You will be entitled to at least one paid day off per week.

10 Absence

In the event of absence for whatever reason, you should contact a Club Official on the first day of absence to inform them of the reason for your absence.

11 Injury or Illness

11.1 Provided you comply with and satisfy the Club's sick pay requirements and conditions, you will be eligible for sick pay comprising your normal basic salary (which shall include your entitlement to Statutory Sick Pay) for twenty six weeks in total in any 12 month rolling period.

11.2 In the event of you becoming sick, ill or injured howsoever caused, you agree to inform the appropriate Club Official and attend such medical, physical, psychiatric and/or dental examinations as the Club or the Club's medical or dental adviser may reasonably require, and agree to undergo (at no expense to yourself, save where appropriate as a benefit, such treatment, operation or take such other course of action as may be prescribed by the medical, psychiatric or dental adviser (**Prescribed Treatment**).

11.3 You agree that the Club may retain a copy of any medical report produced and discuss it with the medical practitioner who produced it and you authorise the Club to disclose any such medical report to the League at their request.

11.4 The Club will arrange and be responsible for payments arising in connection with the Prescribed Treatment, and will ensure that it is undertaken notwithstanding that this Agreement may have expired at the time of the Prescribed Treatment, but such payments will be included where appropriate as taxable benefits.

11.5 The Club will not be responsible for paying the cost of any medical or dental treatment for injuries caused by your failure to wear a mouth guard, save where the club has expressly consented in writing to the player not wearing a mouth guard.

12 Anti Doping

12.1 You will at all times comply with and observe the Regulations from time to time in force, relating to anti doping.

12.2 Any breach of the Regulations in relation to anti doping will be dealt with by the Club under the Club's disciplinary procedures, and may result in the Club terminating your employment under Clause 21 of this Agreement and this will be in addition to any action taken by the Rugby Football League under the Regulations.

12.3 If you receive a notice relating to any breach of the Regulations in relation to anti doping you must inform the Chief Executive Officer within forty-eight hours of receipt of such notice.

13 Restrictions During Employment

13.1 Restrictions during employment

You will not during the term of the Agreement without the prior written consent of the Club Chairman or Chief Executive (and in this regard no other club official shall be entitled to give such consent):

(a) play rugby league or football of any other code or engage in any other sport or sporting activities for any other club or organisation whether that club or organisation be situated in England or elsewhere in the world. You recognise, accept and acknowledge that damages may not be an adequate remedy for breach of this clause and that the Club shall be entitled to an injunction or other equitable relief for any threatened or actual breach of this clause;

(b) take up any other employment or be engaged or involved in any trade business or occupation or participate professionally in any other sporting or athletic activity provided that this shall not prevent you from making any investment in any business so long as it does not conflict or interfere with your obligations under this Agreement. ;

(c) take up any employment or carry on any trade or business activity or practice which the Club, in its reasonable opinion, deems to be unsuitable;

(d) change your usual place of residence to a place which affects your ability to perform your obligations under this Agreement;

14 Confidential Information

You shall neither during your employment (except in the proper performance of your duties or with the express written consent of the Club) nor at any time (without limit) after the termination of your employment except in compliance with an order of a competent court:

(a) divulge or communicate to any person, company, business entity or other organisation;

(b) use for your own purposes or for any purposes other than those of the Club; or

(c) through any failure to exercise due care and diligence, cause any unauthorised disclosure of any trade secrets or confidential information relating to the Club but so that these restrictions shall cease to apply to any information which shall become available to the public generally, otherwise than through your default. Confidential information shall include but not be limited to all financial information relating to the Club, its players and staff, methods of training, players' injuries and their diagnosis or prognosis.

SECTION FOUR – THE CLUB'S OBLIGATIONS

15 Regulations

15.1 The Club shall observe the Regulations all of which shall take precedence over the Club Rules.

16 Medical Care

16.1 The Club shall promptly arrange appropriate medical and dental examinations and treatment for you at no cost to you save where appropriate as a benefit save where such injury or illness is caused by an activity or practice on your part which breaches clause 5.2 (a) to (d) or which is not related to your employment in which case the Club shall not be obliged to arrange treatment.

17 Insurance

17.1 The Club shall provide you each year with a synopsis of the terms and conditions of any policy of insurance in respect of or in relation to you with which you are expected to comply, but you shall not be entitled to a copy of the full policy.

18 Health & Safety

18.1 The Club shall at all times maintain and observe a proper health and safety policy for your security, safety and physical well being when carrying out your duties under this Agreement.

19 Further Education/Vocational Training

19.1 The Club shall give you every opportunity compatible with your obligations under this Agreement to follow any course of further education or vocational training which you wish to undertake.

SECTION FIVE – DURATION AND TERMINATION

20 Duration

20.1 This Agreement shall remain in force until the date specified in clause S1.2 of Schedule 1 subject to any earlier determination pursuant to the terms of this Agreement.

21 Termination by the Club

21.1 Notwithstanding any other provisions of this Agreement, in any of the following circumstances the Club may terminate this Agreement summarily by serving you with 7 days written notice to that effect. In such event you shall not be entitled to any further payment from the Club except such sums as shall have accrued due at the end of the notice period. The circumstances are if you:

(a) commit any serious breach of this Agreement which for the avoidance of doubt but without limitation shall include serious or persistent breaches of clause 5 or 12 above or are guilty of any serious or persistent misconduct or any wilful neglect in the discharge of your duties;

(b) repeat or continue after written warning any breach of this Agreement;

(c) are guilty of any fraud, dishonesty or conduct tending to bring yourself, the Club, the League or the game of rugby league into disrepute;

(d) are convicted of any criminal offence (other than minor offences under the Road Traffic Acts or the Road Safety Acts for which a fine or non-custodial penalty is imposed) which might reasonably be thought to effect adversely the performance of your duties, or your reputation or that of the Club.

The Club shall at the same time as giving you notice forward a copy of such notice to the League.

21.2 (a) Save where expressly provided for elsewhere in the Agreement, where the Club is of the reasonable opinion that you are no longer capable of performing your duties to the reasonable required standard as measured against objective criteria, the Club shall be entitled to terminate the Agreement before the expiry of the fixed term with a minimum of one month's notice, provided only that the Club has followed the procedure set out in this paragraph below.

(b) If the Club is of the reasonable opinion that you are no longer capable of performing your duties to the reasonable required standard, the Club shall notify you in writing of the deficiencies and provide evidence of those deficiencies and shall arrange a meeting within 7 days of such notice to discuss and agree a plan to remedy any deficiencies.

(c) If after an agreed time, which shall not be less than a month, the Club is still of the reasonable opinion that you are not capable then the Club shall again notify you in writing and shall arrange a further meeting within 7 days of such notice to discuss and agree a further plan to remedy any ongoing deficiencies.

(d) If after an agreed time, which shall not be less than a month, the Club is still of the reasonable opinion that you are not capable then the Club shall be entitled to terminate the Agreement as set out above.

(e) At each stage of the procedure, set out in Clauses 21.2 (b), (c) and (d) you have the right to be accompanied by an official of the RLPA,/fellow player of the Club/Licensed Agent. In addition you have the right to appeal any decision reached at any of the meetings. Any such appeal should be to the Club Chairman.

21.3 If at any time you are physically or mentally unable to play rugby league football and/or train for a period or periods totalling at least 26 weeks in total in any 12 month rolling period, or or if you are declared "Disabled" within the terms of the League's Insurance Scheme, the Club may, notwithstanding the existence of any payments under the League's Personal Accident Policy, in its absolute discretion terminate this Agreement by giving you not less than six months' written notice to that effect. You will be entitled to full pay during this notice period whether or not this period constitutes your period of entitlement to full sick pay under Clause 11.1 of this Agreement. A synopsis of the relevant clauses of the League's Insurance Scheme is available from the Chief Executive. In the event that you are unable to continue playing through medical injury, the Club will obtain at least two medical opinions confirming this before exercising its rights under this clause.

21.4 If the Club exercises its rights under clause 21.1, 21.2 or 21.3, you shall have a right of appeal (exercisable within 7 days of the receipt by you of written notice from the Club). Your appeal must be in writing to the Rugby Football League who will convene an Independent Tribunal. The Tribunal will endeavour to hear your appeal within 28 days of receipt of the notice of appeal by the League.

21.5 Prior to exercising its rights under clauses 21.1 and 21.3 above, the Club will follow the disciplinary procedure set out in Annexure 2 and you will be entitled to an appeal.

22 Termination by You

22.1 If the Club is guilty of serious or persistent breach of the terms and conditions of this Agreement you may terminate this Agreement by serving the Club with 7 days written notice. You shall at the same time as giving notice to the Club forward a copy of such notice to the League. The Club shall have a right of appeal as set out in clause 21.4 with suitable or necessary alternations (exercisable within 7 days of the receipt by the Club of such notice). You may, at your discretion, waive your rights under this clause and take action under the grievance procedure annexed to this Agreement. However, any delay by you in exercising such right of termination shall not constitute a waiver of it

23 Independent Tribunal

23.1 You and the Club acknowledge that the rights and obligations undertaken by you and the Club and the fixed term nature of this Agreement reflects the special relationship and characteristics involved in the employment of rugby league players and the participation of you and the Club in the game of rugby league football pursuant to its Regulations. You and the Club agree that, whilst the jurisdiction of the Courts and tribunals are not excluded, all matters of dispute relating to the rights and obligations of the parties under this Agreement or the Regulations, including termination of this Agreement and any compensation payable in respect of termination or breach, should ordinarily be submitted to the Independent Tribunal and that any appeal should ordinarily be submitted to the Independent Appeals Tribunal. Both parties accept the jurisdiction and determinations of the Independent Tribunal and Independent Appeals Tribunal (members of each of which are drawn from the Judiciary Panel) pursuant to the provisions of and in accordance with the procedures and practices under this Agreement, the Regulations and/or as set by the Board from time to time.

SECTION SIX – GENERAL

24 Regulations relating to Registration with the Rugby Football League

24.1 When this Agreement has been signed the Club will register you as a player with the League in accordance with the Regulations and you undertake to sign any documents required to facilitate this registration.

24.2 Such registration may be transferred by mutual consent of the parties during the currency of this Agreement and this Agreement will be deemed to be terminated by mutual consent but not so as to affect accrued rights on the registration by the League of such transfer.

24.3 The Regulations including but without limitation those Regulations relating to the re-engagement and transfer of players shall apply to the Club and you during the currency and after the expiration of this Agreement and shall continue to apply until such time as you/and or the Club request that you be removed from the register of Players.

25 Expenses

The Club shall reimburse you in respect of any out of pocket expenses reasonably incurred by you in the proper performance of your duties, subject to you receiving approval for the expenditure in advance of incurring it and providing such receipts or other appropriate evidence as the Club may require.

26 Grievance procedures

If you have any grievance relating to your employment, you should apply in writing to the Club Chief Executive. The grievance procedure in relation to your employment is set out in Annexure 1 to this Agreement. The procedure is not contractual.

27 Disciplinary procedures

The disciplinary policy applicable to your employment is set out in Annexure 2 to this Agreement. The disciplinary rules contained in the Misconduct, Anti Doping and Disciplinary Regulations of the Operational Rules form part of your Agreement but the disciplinary procedure annexed to this Agreement is not contractual. If you are dissatisfied with any disciplinary decision relating to you, you should apply in writing to the Club Chairman.

28 Collective Agreements

There are no collective agreements relevant to your employment.

29 Data Protection Act

For the purposes of the Data Protection Act 1998, you consent to the Club's and League's collecting and processing Personal Data including Sensitive Personal Data (both as defined in the said Act) about you. For the avoidance of doubt, this paragraph shall be taken to include your consent to the publication by the Club or the RFL of any failure by

you to comply with the Regulations and/or your inclusion in any list of negative anti-doping samples prepared by the RFL and/or UK Sport.

30 General

30.1 The further particulars of terms of employment not contained in the body of this Agreement which must be given to you in accordance with Part 1 of the Employment Rights Act 1996 are given in Schedule 1.

30.2 The Club agrees to provide you with a copy of this signed Agreement, a copy of the Club's rules and any other documents forming part of the agreed terms and conditions or equipment and upon request the most recent copy of the Regulations and a synopsis of any relevant insurance policy applicable to your employment under this Agreement as soon as reasonably practicable.

30.3 The parties acknowledge that the Agreement is a standard contract of employment supplied by the League and that amendments to the standard clauses are not permitted. However the Club reserves the right to make reasonable minor changes to the non standard clauses and to any other agreed terms and conditions of employment upon reasonable notice to you.

30.4 You and the Club agree to keep the terms of the Agreement strictly confidential and agree not to disclose, communicate or otherwise make public the same to anyone, except for professional advisors, the relevant tax authorities, the League's officers or as otherwise maybe required to be disclosed by law this Agreement or the Regulations.

30.5 None of the terms of this Agreement shall be relied upon or enforceable under the Contracts (Rights of Third Parties) Act 1999 by any third party who is not a party who is not party to this Agreement other than the RFL or Super League (Europe) Limited, each of which shall be entitled to rely upon and enforce any obligation by either party contained in this Agreement, the Regulations or any Participation Agreement. Further this provision will not affect the rights or remedies available to a third party apart from the aforementioned Act.

30.6 The terms of this Agreement are governed by and construed in accordance with English law.

Additional clauses from the Rugby Football League Clause Bank may be inserted below:

SCHEDULE

Supplemental Provisions and Employment Rights Act 1996

The following provisions shall apply to supplement the provisions of this Agreement and the information as set out herein in order to comply with the requirements of Part 1 of the Employments Rights Act 1996.

S1.1 You shall commence your employment with the Club on (*date)* which shall be the date of commencement of your period of continuous employment.

OR *For Existing Players whose contracts have been renewed by the Club without any break in service.*

You shall commence your employment under the terms of this Agreement on (*date*). For the purposes of the Employment Rights Act 1996 your period of continuous employment began on (*date*).

S1.2 Subject to the provisions of this Agreement and the Regulations, you shall continue to be employed by the Club until 30 November (*year*), upon which date your employment under this Agreement will automatically terminate without the need for notice by either party to the other.

S1.3 No employment with a previous employer shall count as part of your continuous period of employment hereunder.

S1.4 S1.4.1 There is a designated stakeholder pension scheme to which you may make personal contributions.

[Or] You will be permitted, as soon as you are eligible, to join the Club's pension scheme (subject to the deed and rules from time to time) full details of which can be obtained from the Chief Executive.

S1.4.2 A contracting-out certificate pursuant to the Pension Schemes Act 1993 is not in force.

S1.5 Remuneration

ALL PAYMENTS AE SUBJECT TO P.A.Y.E AND NATIONAL INSURANCE CONTRIBUTIONS AS IN FORCE AT THE TIME OF PAYMENT

S1.5.1 Salary

Your salary will be paid in equal calendar monthly instalments in arrears by credit transfer to your bank on or about the day of each month as follows:

From to £ per annum From to £ per month

From to £ per annum From to £ per month

From to £ per annum From to £ per month

S1.5.2 Bonuses

S1.5.3 Any other payments

S1.5.4 Any other benefits (if any) to be provided to you during the currency of the Agreement.

S1.5.5 Any insurances

Schedule 2

i) Player's Agent Acknowledgement

Were the services of a Player's Agent used by you? (*Yes/No*)

If yes: I confirm that I acted as Agent to the Player in negotiating and agreeing the terms of this Agreement.

Signed by the Player's Agent: ..... Name (BLOCK CAPITALS)

If no: I confirm that no Player's Agent was used in negotiating and agreeing the terms of this Agreement.

Signed for and on behalf of the Club: .....

Signed by the Player: .....

Dated: .....

Annexure 1 - Grievance Procedure

1 The Club will try to resolve, as quickly as possible, any grievance a Player may have about his employment.

2 **Procedure**

(a) The Player's first step is to raise any grievance with the Head Coach/Football Manager or equivalent person of status within the club who, in most cases, will be best placed to respond to his complaint.

(b) If, however, the matter cannot be satisfactorily resolved the Player should raise the matter with the Club Chief Executive who will try to agree a satisfactory solution and will confirm any decision/proposed action to the Player in writing within 14 days.

(c) If the Player is dissatisfied with the outcome, the Player will have the right to an appeal, exercisable in writing to the Chairman in a final attempt to resolve the grievance. The Player should inform the Chairman within 14 days of the outcome of 2(b) above being communicated to the Player, of his decision to appeal. The Chairman's decision shall be final.

3 At all stages of this procedure, interviews will be held within 14 days of the grievance being raised. A written record of the interview should be agreed between and signed by the interviewer and the Player and recorded on his file. At all stages of the procedure, the Player will have the right to be accompanied by a fellow Club player of his choice/Licensed Agent/RLPA.

Annexure 2 - Disciplinary Procedure

1 Purpose and scope

This procedure is designed to help and encourage all Players to achieve and maintain standards of conduct, performance and attendance. This procedure applies to all Players. The aim is to ensure consistent and fair treatment for all.

2 Principles

2.1 No disciplinary action will be taken against a Player until the case has been fully investigated.

2.2 The Player will be informed of the complaint(s) against him in writing, together with any supporting evidence, and will be given the opportunity to state his case before any decision is made or action is taken.

2.3 At all stages of this procedure, the Player will have the right to be accompanied by an official of the RLPA/fellow player of the Club/Licensed Agent.

2.4 No Player will be dismissed for a first breach of discipline except in the case of gross misconduct where the penalty will be dismissal without notice or payment in lieu of notice.

2.5 All information and documentation collated as part of any disciplinary investigation will be treated as confidential.

2.6 Any Player will have the right to appeal any disciplinary penalty imposed.

2.7 The procedure may be implemented at any stage if the Player's alleged misconduct or poor performance warrants such action.

3 Procedure

Minor faults or offences will be dealt with informally but where the matter is more serious, the following procedure will be used:

(b) **Stage 1 - Oral Warning:** If conduct or performance does not meet acceptable standards the Player will normally be given a formal oral warning. He will be advised of the reason for the warning, that it is the first stage of the disciplinary procedure and of his right of appeal. A brief note of the oral warning will be kept in a Register held by the Club but it will be spent after 6 months, subject to satisfactory conduct and performance.

(c) **Stage 2 - Written Warning:** If the offence is a serious one, or if a further offence occurs, a written warning will be given to the Player by the appropriate Club Official. This will give details of the complaint, the improvement required and the timescale. It will warn that action under stage 3 will be considered if there is no satisfactory improvement and will advise of the right of appeal. A copy of this written warning will be kept in a Register held by the Club but it will be disregarded for disciplinary purposes after 6 months subject to satisfactory conduct and performance.

(d) **Stage 3 - Final Written Warning or Disciplinary Suspension:** If there is still a failure to improve and conduct or performance is still unsatisfactory, or if the misconduct is sufficiently serious to warrant only one written warning but insufficiently serious to justify dismissal (in effect both first and final written warning), a final written warning will normally be given to the Player. This will give details of the complaint, will warn that dismissal will result if there is no satisfactory improvement and will advise of the right of appeal. A copy of this final written warning will be kept in a Register held at the Club but it will be spent after 12 months (in exceptional cases the period may be longer) subject to satisfactory conduct and performance. In addition or alternatively, the Club may impose a penalty of a fine, not exceeding £500 or a sum equivalent to 50% of the Player's monthly remuneration whichever is the higher, and/or suspend the Player without pay for up to a maximum of 14 days. In accordance with Clause 3.4.3, any fine will be deducted from your remuneration but where employment is ongoing will ordinarily be deducted in 3 equal instalments over 3 successive months.

(e) **Stage 4 - Dismissal:** If conduct or performance is still unsatisfactory and the Player still fails to reach the prescribed standards, dismissal will normally result. Only the appropriate Club Official can take the decision to dismiss. The Player will be provided, as soon as reasonably practicable, with written reasons for dismissal, the date on which employment will terminate and the right of appeal.

4 Gross Misconduct

The following list which is not exhaustive provides examples of offences which are normally regarded as gross misconduct:

- theft, fraud, deliberate falsification of records
- fighting, assault on another person
- deliberate damage to Club property
- serious incapability through alcohol or being under the influence of illegal drugs
- serious suspension under the RFL Misconduct Regulations
- any breach of the Anti Doping Regulations
- serious negligence which causes unacceptable loss, damage or injury
- serious act of insubordination.

If you are accused of an act of gross misconduct, you may be suspended on full pay, normally for no more than 14 days, while the Club investigates the alleged offence. If, on completion of the investigation and the full disciplinary procedure, the Club is satisfied that gross misconduct has occurred, the result will normally be summary dismissal without notice or payment in lieu of notice.

5 Appeals

A Player who wishes to appeal against a disciplinary decision should inform the Chairman within 7 days. The Chairman will hear all appeals and his/her decision is final. At the appeal any disciplinary penalty imposed will be reviewed but it cannot be increased.

If you wish to appeal the decision of the Chairman relating to a serious breach of discipline or case of gross misconduct (but not minor faults or offences) you shall have a right of appeal (exercisable within 7 days of notification of the Chairman's decision) to the League. The League will convene an Independent Tribunal. The Chairman of the Tribunal has the discretion whether or not to hear the appeal and if the Chairman decides to do so, the Tribunal will endeavour to hear your appeal within 28 days of receipt of notice of appeal by the League