IN THE HIGH COURT OF JUSTICE
CHANCERY DIVISION

CH 1996 S No. 3043

ROYAL COURTS OF JUSTICE

BEFORE: THE HON. MR JUSTICE CARNWATH

Between:

STEVENAGE BOROUGH FOOTBALL CLUB LIMITED

Plaintiff

-and-

THE FOOTBALL LEAGUE LIMITED

Defendant

Mr N. Stewart QC appeared on behalf of the Plaintiff

Mr M. Rosen QC, Mr T. Kerr and Miss M Demetriou appeared on behalf of the Defendant.

JUDGMENT

I direct pursuant to RSC Order 68 Rule 1 that no official shorthand note shall be taken of this judgment and that copies of this version as handed down may be treated as authentic.

The Hon Mr Justice Carnwath

DATED: 23rd July 1996

STEVENAGE BOROUGH FOOTBALL CLUB

-V-

THE FOOTBALL LEAGUE

JUDGMENT

In May 1996 Stevenage Borough Football Club finished top of the GM Vauxhall Football Conference, which is the league of semi-professional football clubs immediately below the three divisions forming the Football League. In principle that would entitle them to be promoted to the third division. However, under the rules of the League, promotion depends on them satisfying certain admission criteria. They include requirements relating to ground capacity, which had to be satisfied at the end of December in the previous year, and financial criteria which had to be satisfied in respect of accounts for the current and previous years. Stevenage did not satisfy those criteria at the relevant dates, although, following completion of works currently in train, they expect to be able to satisfy them before the beginning of the new season in August this year. If Stevenage are promoted, the bottom club in the third division, Torquay United, will be relegated.

In these proceedings Stevenage is challenging the validity of the criteria, on grounds that they are in restraint of trade and unreasonable. It is important

for both clubs to know urgently in which league they will be playing in the next season. An order was made for speedy trial. It is a tribute to the co-operation of the parties, and the efficiency of the Court procedures, that the case has been brought ready for full trial within two months of the commencement of the action.

The case as originally pleaded relied not only on the common law doctrine of restraint of trade, but also on breach of the Restrictive Trade Practices Act 1976 and of Articles 85 and 86 of the European Treaty. During the hearing, Mr Stewart, for the Plaintiffs, abandoned any reliance on the 1976 Act. In my view he could usefully have done the same in respect of the European points. It has not been shown that the fortunes of Stevenage Football Club at the present time, or the criteria governing promotion to the third division, have any appreciable effect on competition or trade between member states (see Chitty para 40-286, 298), whatever may be the position in the higher echelons. I shall therefore concentrate, as did most of the argument, on the common law position

The structure of football

Association football in England is played under the control and supervision of the Football Association, founded in 1863. All organised football clubs and local or regional association of clubs belong to the FA, either

directly or indirectly through membership of an association. The FA has no statutory authority, but in practice it exercises comprehensive control over the playing of organised football in this country. The FA Rules assert a wide jurisdiction over clubs and players. At international level similar control is exercised by FIFA, of which the FA is a member. There is also a European football body called UEFA which organises and controls a number of annual competitions between clubs from different European countries, as well as competitions between national teams within Europe.

In this country up to 1992, the Football League was the body responsible for the organisation of the 92 principal clubs divided into four divisions. It was formed in 1888 and incorporated in 1904. In 1992 the clubs in the first division of the Football League broke away to form a new Premier League. The Premier League is owned by a company, The Football Association Premier League Ltd., the shares of which are owned by the members' clubs of the Premier League and the FA. The former second, third and fourth division of the Football League became the first, second and third divisions of the current Football League. It now comprises as members 72 professional football clubs divided into the three divisions. Its only shareholders are its member clubs. Its constitution consists of a memorandum and articles of association, and the regulations made thereunder.

Below the League is the Vauxhall Conference (formerly the Alliance),

which is an unincorporated association of its 22 member clubs. It has its own rules set out in the Conference Handbook. A Liaison Committee, with representatives of the League and the Conference, meets regularly to discuss matters of common interest. The Conference itself forms the top tier in the so-called Pyramid of Football, with two lower tiers being formed respectively by three feeder leagues, and fifteen lower leagues. Their relations are governed by a Pyramid of Football Charter, to which the Conference and all the constituent leagues are parties. Their relations are overseen by a Pyramid Committee of the Football Association.

Mention should also be made of the grants available for ground improvement through the Football Trust. The Trust was formed by an initiative of the pools companies, and its funds come principally from the pools companies by way of Reduction in Pool Betting Duty ("RPBD"), and other contributions from the Pools companies, with smaller contributions from the national football associations. Until 1995, funding was available principally for League clubs. In May 1995, the Trust was instrumental in establishing, with Government support, the Sports Ground Initiative, under which grants were made available to Conference Clubs of up to £250,000 per club for safety or ground improvements. The grants available to third division clubs in the League are up to £750,000 per club.

Promotion and relegation

Promotion and relegation between all levels of the hierarchy are an important and well-established feature of the system. Arrangements between the League and the Premier League are dealt with by a tri-partite agreement between the League, the Premier League and the Football Association. Football League Regulation 29 contains provisions governing promotion and relegation in relation to its own members, and from the Conference into the League. Conference Rule 13 contains corresponding provisions governing promotion and relegation between the Conference and the Football League and between the Conference and the next tier of the Pyramid. There is no formal agreement between the League and the Conference, but since 1987, when the equivalent of Regulation 29 was introduced, the arrangements have been a subject of regular discussion and agreement through the Liaison Committee. (Mr Hunter, Chief Executive of the Conference, gave evidence before me in support of the League's case.)

Football League Regulation 29 and Conference Rule 13 both contain a requirement that the Conference champion club must meet criteria laid down by the League as a qualification for promotion. Article 29 (c) of the Football League Articles of Association reads as follows:

> "At the end of each season the bottom club in the third division shall be replaced by the champion club of the Football Conference subject to:

(a) such champion club meeting the criteria for admission to membership of the League as shall from time to time be laid down by the Board and making application for membership of the League in accordance with Regulation 3(a); and

(b) the Football Conference immediately accepting the retiring club as a full member thereof."

Correspondingly, Rule 13 of the Conference Rules is as follows:

"The champion club shall automatically be eligible for promotion to the third division of the Football League, subject to that club meeting the criteria of the Football League Management Committee. The Football Conference will automatically accept into membership the bottom placed club of the Football League third division provided the Football Conference champion is elected to the Football League."

The admission criteria for the 1995/96 season were issued in May 1995, and were in the same terms as the criteria for the previous year. They are divided into five sections, (a) to (e), dealing respectively with the football club and the ground on which it plays, stadium facilities, playing facilities, financial criteria, and procedure. It is unnecessary to go through them in detail, since the case for the Plaintiffs concentrates on three main points of complaint:

(1) The deadline for compliance by Conference clubs with the ground criteria is unreasonably soon and serves no sufficiently useful purpose.

(2) The capacity of 6,000 required by the ground criteria is unreasonably and unnecessarily high.

(3) The financial criteria achieve nothing or so little that they are not reasonably necessary to protect the legitimate interests of the League and

are liable to shut out clubs whose financial strength is perfectly adequate for all practical purposes.

The following criteria are relevant to those points. Stadium capacity is dealt with by section B para.1, which provides:

> "The stadium must have a minimum capacity of 6,000 as certified by the local authority and a potential to achieve a capacity of 10,000 in the future."

Para.4 provides:

> "the minimum number of seats under cover to be 1,000 or 10% of the certified ground capacity, whichever is the greater."

Financial criteria under section D include the following (para.1):

> "1. Accounts.
>
> The club will be required to submit:-
>
> * Audited accounts for the period to 31st May immediately preceding the current season;
>
> * A balance sheet and a profit and loss account as at 31st December in the current season, certified by the club's auditors;
>
> * A balance sheet and a profit and loss account as at 30th April in the current season, certified by the club's auditors.
>
> The balance sheet in the accounts to 31st May and the balance sheets as at 31st December and 30th April must be prepared on a consistent basis and in accordance with the generally accepted accounting practices and must show a net surplus of all assets including a surplus of current assets over and above current liabilities... .
>
> The profit and loss account in the accounts to 31st May and the profit and loss accounts as at 31st December and 30th April must

show a retained profit in respect of the current financial year...".

Under section E,, application for a ground grading visit by the League must be made before the beginning of the season. Grounds which fully meet the criteria are given an A grade. An A grade may be given conditionally upon specified works being completed by 31st December in the current season. Section E para 2 provides:

> "Deadline for ground improvements.
>
> Any club wishing to be considered for promotion to the Football League at the end of the current season must have completed all works necessary to achieve an A grade by 31st December in the current season."

By para. 3 clubs which have complied with the 31st December deadline are required to submit, by 31st January, audited accounts for the period to 31st May immediately preceding the current season, and a balance sheet and profit and loss account as at 31st December, certified by the club's auditors. Provision is made for visits by the Football League, before the end of February, to clubs who are nominated by the Conference as being in contention for the Conference championship, to confirm the A grading. At the inspection the club is required to provide its current safety certificate, confirmation from the authority of the capacity, a copy of a freehold or leasehold agreement, and a floodlighting test certificate.

Once the identity of the champion club is established, it may apply for membership of the Football League. Procedure for that is governed by

paragraph 5 which provides:

> "As soon as it secures the championship of the Football Conference, the champion club shall apply for membership of the Football League providing such club has had its A grading confirmed by the Football League and has fulfilled the requirements of Clause 3 of this section (submission of acceptable accounts) and as otherwise required by these admission criteria. ..."

The Football League are then required to make an offer of membership to the champion club, subject to receiving certain additional documentation before 21st May, including a balance sheet and profit and loss account as at 30th April in the current season, certified by the club's auditors, which meets the requirements laid down in Clause 1 of the financial criteria. No Football Conference club other than the champion club is allowed to apply for membership of the Football League.

It will be seen that many of the criteria have to be complied with well before a club knows whether it will in fact be in a position to apply as a champion club. If its ground is not up to the standard of the criteria, and it wishes to be considered for promotion, it will have to spend substantial sums on improving the ground by 31st December in the current year, even though this work may not in fact be needed if it does not become champion club. This is in fact the third season in a row that the champion club of the Conference has been refused permission for failure to meet the admission criteria. The previous two winners, Kidderminster and Macclesfield, both failed because their

ground was not up to the required standard by the stipulated deadline.

Existing members of the League are subject to a separate set of criteria, called the Divisional Criteria. These are laid down by the League Board under Regulation 4, the criteria for the year 1995/96 having been fixed on 2nd June 1995. The provisions on ground capacity and seating require a capacity of 6,000 and 2,000 seats. Existing members of the League are given until 31st May 1998 to meet the ground and stadium requirements. The sanction for failure to comply is expulsion from the League. There are no financial criteria applicable to existing members of the Football League, other than an obligation on every League club to supply its latest accounts to the League not later than nine months from the end of the club's financial year (under League Regulation 40(2)). Most clubs have a financial year ending 31st May. The evidence shows that even this limited requirement is not strictly enforced.

It is to be noted that the admission criteria developed by the League are not directly related to the statutory provisions governing safety of sports grounds. As is well known, these controls were considerably strengthened following the Hillsborough disaster in April 1989, and Lord Justice Taylor's report (final report January 1990). Within Hertfordshire responsibility for the licensing of sports grounds under the relevant legislation is exercised by the County Council. Mr Brown who is a solicitor with the Council responsible for this work, gave unchallenged evidence explaining the system of safety control.

As he says, licensing of sports grounds has two controls, one for designated sports grounds in the Football League or Premier League with a capacity over 5000; the other for sports grounds with stadia providing covered accommodation for more than 500 people. If Stevenage is permitted to join the League then it will be subject to control under the former head. It will in any event be subject to the latter control on the completion of its present works which will produce a stadium with accommodation for more than 500 people. The Council has a safety advisory group, on which Mr Brown acts as Chairman, and which includes representatives of the Fire Service, the Police and other emergency services and the Building Control Authority. The advisory group has been closely involved in the current works to the ground and Mr Brown sees no insurmountable problems in the club achieving a Safety Certificate and the conclusion of the works. Other than one very minor incident there have been no safety problems at the stadium. Although the Football League are of course properly concerned about safety at grounds, the case for the criteria now under attack does not depend on safety considerations. Parliament has provided a comprehensive system of controls to ensure that safety is maintained at public football grounds.

Development of the criteria

Up until 1986/87 the system for promotion between the Conference

(formerly the Alliance) and the League was that the bottom three clubs in the League applied for re-election. If any club was not re-elected it would be replaced by a club from the Conference, again by election. No Conference club had been promoted since 1978. With effect from the following season, the regulations were changed to provide for automatic interchange between the bottom club of the League and the champion club of the Conference, but subject to the champion club of the Conference meeting criteria for admission to the League laid down by the League Board.

The criteria have been changed from time to time after discussion at a joint Liaison Committee containing representatives of the League and the Conference. As I have said, the current criteria were established in May 1994 and re-confirmed in 1995. The Conference has a similar system of criteria applying to those wishing to join the Conference from lower levels of the pyramid. Provision for Divisional Criteria was first introduced into the regulations in June 1992 following the breakaway and formation of the Premier League. The criteria themselves were formally adopted in June 1995.

Ground capacity The criteria initially introduced within the 1986/87 season required that each ground should have a "potential" capacity for 10,000 spectators, with a minimum seating capacity for 500. The term "potential" was generously interpreted in practice as being satisfied if there were merely the space to expand in the future by the addition of further stands. It therefore was

not a serious obstacle. The present requirement for a minimum capacity of 6,000 spectators, including a minimum of 1,000 seats, was introduced with effect from the 1990/91 season. The matter was discussed at a meeting of the Liaison Committee on 12th October 1989, on the basis of a paper presented by the League representatives. The papers proposed a minimum licence capacity of 8,000. The Conference representatives thought that too high and proposed 5,000 as a more reasonable figure. The figure of 6,000 was arrived at by a process, which Mr Hunter, one of the Conference representatives, described as "horse trading". This aspect of the criteria has not changed since that decision, although changes in relation to the quality of facilities and safety requirements have meant that the cost of achieving the 6,000 licensed capacity has increased.

As has been seen, the same figure of 6,000 capacity was included in the Divisional Criteria adopted in June 1995 for existing League clubs, although the seat requirement was more stringent at 2,000 instead of 1,000. Existing members however were given until 31st May 1998 to meet the requirement. Most of the clubs in the League already comply with this requirement, but three have yet to comply and are in the process of carrying out the necessary arrangements.

Proposals to introduce higher capacity requirements for the first and second division were not pursued in 1995, after opposition from League members and outside bodies including the Department of National Heritage,

who were concerned about requiring investment above that justified by regular attendances. As a result the 6,000 minimum applies throughout the League, although in practice most clubs in the higher divisions require and provide capacities substantially in excess of this. There is no evidence that lack of higher prescribed requirements for these divisions has caused problems in practice.

The Conference itself applies a minimum capacity requirement of 3,000 for entry into the Conference.

Deadline for ground capacity. When the new admission criteria were adopted, it was envisaged that the necessary ground improvements would be carried out during the close season, i.e. between May and August, so as to be ready at the commencement of the first season in the League. The criteria required that detailed drawings would be submitted by March in the season before the application for promotion, and a performance bond lodged for the value of the works. The works had to be completed by 31st July, immediately before the start of the new season.

In October 1992 a paper was presented to the League board proposing a revision to the timetable. (The author, Mr Whalley, has been the head of community affairs at the League since 1987, and has been closely involved in the evolution and application of the criteria.) The paper commented as follows:

"Clubs tend to leave themselves with a lot of ground improvements to

> cary out during the summer. Plans have to be submitted in April. For the Football League to turn a club down at that stage would doubtless cause emotions to run high. If the club chose to litigate, the following season's fixture list might be put in jeopardy. The League would be better served by the Conference clubs having to meet the ground criteria at the start of the season."

It proposed a procedure whereby Conference clubs would be graded A, B, or C against criteria laid down by the League, grade A being that applicable to clubs deemed to meet the Football League criteria. Clubs would be inspected in February to confirm the grading, thus enabling the champion club to be admitted to the League immediately following the end of the season.

Revised criteria to reflect this new approach were considered by the Liaison Committee at a meeting in March 1993. The criteria envisaged that clubs would be required to have their grounds up to standard by the commencement of the season in which they hoped to qualify for promotion. However, the Conference representative thought that this would be unduly harsh for that year since the new criteria would not be issued until May. Following discussion it was agreed that, for the first year, clubs not graded A in August could be given until 31st December to meet the ground criteria provided that appropriate plans were in place by August. The revised criteria were issued in May 1993.

By February 1994 the Liaison Committee was having to deal with the problems which this new deadline was causing. It was noted that of the six

clubs who had submitted plans for ground improvements only two had carried out the work by the December deadline. In particular, Kidderminster who were eventually to win the championship, had failed to complete their ground improvements by that date. They requested an extension, but the Liaison Committee, including the Conference representatives, decided that the provisions in the criteria must be applied. No doubt anticipating the likely public reaction, the Liaison Committee in April issued a joint news release from the Conference and the League reaffirming the existing criteria and confirming that the club would be promoted from the Conference to the League only if it had met the membership criteria presently in force.

Mr Whalley prepared a further paper on the subject which was presented to the League board on 5th May 1994. He set out the considerations which he regarded as relevant as follows:

> "1. The reason for moving away from allowing the promoted club to carry our ground works during the summer was to avoid the possibility that the works would not be finished by the start of the season. Football League grounds now have to meet higher safety standards, as a result of which a greater number of Conference clubs have to undertake substantial improvements to bring their grounds up to League standard, thus increasing the likelihood of a club not completing the work before the start of the next season.
>
> 2. If it is accepted that the promoted club should not be allowed the summer months to undertake ground improvements - it should be noted that Conference clubs do not allow the clubs promoted from the feeder leagues to carry out work during the summer - then it would appear that there are three options for a cut-off date: 31st August (the League's original proposal), 31st December (the compromise solution for the first

year) or 30th April (the Conference proposal and their deadline for feeder league clubs).

3. One of the reasons for the League proposing a 31st August deadline was that once the season gets under way, it becomes an emotional issue if a club at the top of the Conference table is told that its ground does not meet the League's criteria. The later the deadline, the more emotional the issue could become.

4. It is however recognised that the three clubs promoted into the Conference from the feeder leagues in May each year could face a tight timetable to plan and carry out further ground improvements to meet the League's 31st August deadline. There is an argument for allowing these clubs until 31st December to get their grounds up to League standard. In this event, in order to be consistent, perhaps the same flexibility should be considered for any Football League club relegated to the Conference."

He suggested a 31st December deadline for all clubs.

The League board, on 12th May 1994, considered this proposal and agreed the proposed deadline of 31st December. The same meeting was pressed with a request by representatives of Kidderminster to be admitted to the League, but this was defeated by six votes to one.

Similar problems arose in the 1994/95 season in relation to Macclesfield, which eventually won the championship. Macclesfield received a grant from the Football Trust towards its improvement works, and was subject to a grading visit in August, when it was noted that further work was required to achieve an A grade. By November the League was expressing concern as to whether adequate progress was being made towards the 31st December deadline. On 9th December Mr Hunter, for the Conference, wrote to the League board

suggesting that if Macclesfield became champions, they could be offered membership of the League subject to entering into a ground-sharing agreement with Cheshire for a one year period, that being on the basis that they had a plan for ground development which was expected to be completed during the 1995/96 season. This proposal was rejected on the basis that it represented a departure from the criteria. On 30th December Macclesfield wrote saying that they would be unable to meet the deadline and asked for reconsideration of the ground-sharing proposal, but this again was rejected.

As the prospects of Macclesfield winning the championship became more assured, public interest in this issue began to increase. On 30th March Mr Sproat, Under-Secretary of State at the Department of National Heritage, wrote to the League expressing concern. His understanding was that Macclesfield had intended to complete the necessary works by the timescale but they had been unexpectedly and unavoidably delayed because of damage caused by the contractors. He said that if Macclesfield won the Conference, it would in his view be -

> "seriously damaging to football, if what might seem to some an overly bureaucratic interpretation of self-imposed regulations were to prevent justice being done. I would like to see the League's energies devoted positively and successfully to finding a way in which GMVC title winners can go into the Football League. I regard it as extremely important, for the health of football, and the public's confidence in the administration of the game that a way, consistent of course with safety be found."

He asked the League to review Macclesfield's case if they could establish the

facts as stated in his letter.

In fact it does not seem that Macclesfield ever really had any serious prospect of achieving the 31st December deadline, and accordingly the League did not consider that there were any special circumstances justifying a departure from their criteria. This position was confirmed at a meeting of the Liaison Committee on 22nd June 1995. At the same meeting it was agreed that there should be no changes to the criteria for the 1995/96 season. Indeed, the Conference representatives indicated that they intended to bring forward their own deadline for ground improvements from May to 31st March for the 1995/96 season, and 31st December for the 1996/97 season onwards.

Financial criteria The "current liquidity" test goes back to a paper prepared by Arthur Anderson in 1988. This paper refers to discussions between the Alliance, as it then was, and the Football League on proposed financial criteria for entry into the League. The paper refers to the financial problems of football clubs. The author says:-

> "There are a number of indicators as to any organisation's financial health; these generally being accepted as stability as shown in the balance sheet, viability as shown in the profit and loss account and liquidity as shown by the availability of the realisable assets to meet short term liabilities. Historically the last indicator has been the most important to professional football clubs. Indeed the downfall of many clubs has been caused by the absence of liquidity and in particular the lack of cash to meet short term commitments. It is suggested that an appropriate test should be based on liquidity."

The proposed criterion is then explained:

"A test based on liquidity on should have the greatest chance of ensuring that if met, the recurring financial problems of football clubs do not arise. Whilst a combination of all three indicators of stability, viability and liquidity could be used this would not meet the requirement of both parties that the criteria to be applied should not be complex, should be relatively certain in their application and should be responsive to the management needs of football clubs. An easy way of measuring liquidity at any point in time is to compare the extent to which clubs have sufficient realisable assets, i.e. current assets to meet their obligations in the short run, i.e. current liabilities. Thus at its simplest, a member should be admitted to the FL if it can demonstrate that its current assets exceed its current liabilities based on its latest audited balance sheet... It is suggested that the proposed test meets the criteria of simplicity and certainty and concentrates the attention of the management of member clubs where it should be directed. The benefit of adopting such a test is that all clubs would be encouraged to look at their liquidity and indeed to regularly review cash projections. .....".

It is not entirely clear to me from the evidence when precisely the current financial criteria, based on this advice, were adopted. The discussion of the matter had started in 1987. It appears from a note of a meeting of 5th March 1987 that it was the Alliance (as the Conference was then called) which suggested that the emphasis should be on cash liquidity rather than share capital. Following that discussion that Arthur Andersen were invited to analyse accounts of clubs in the Alliance and to put forward proposals. Certainly by 1989 the current liquidity test proposed by Arthur Andersen had been accepted by both the League and Conference. The criteria approved by the Liaison Committee in October 1989 included a requirement for a balance sheet as at 30th April (in the current season) to be produced with a certificate from the club's auditors that there was a net surplus or assets, including a surplus of

current assets over and above current liabilities.

The present financial criteria, including the requirement for evidence of the position in the preceding year, were proposed by Mr Whalley in his paper in October 1992. He commented:-

> "On the financial side, the clubs gaining promotion in recent years from the Football Conference appear to have found it difficult to cope with the additional demands that Football League status brings. Maidstone United have come and gone within three years; Barnet are not without their own financial problems. There is no benefit to the Football League in admitting a club to membership, only to see that club struggle to survive. The financial criteria in place at the moment simply require the club to show a balance sheet that is in credit at 30th April. Perhaps we should be requiring more than this - we need to establish that the club is able to trade properly for at least its first year in the Football League."

His proposals were adopted.

Stevenage's Progress

The aspirations of Stevenage Borough Football Club to League status are of relatively recent origin. The fortunes of the Club were dramatically improved by its new trainer Mr Fairclough, who arrived in 1990. He oversaw its rapid progress up the Pyramid. In late 1993, a local businessman, Mr Victor Green, became Chairman, and offered the Club active financial and management support, with the backing of the Stevenage Borough Council, to carry the Club forward. The club was then in the Diadora Premier Division, immediately below the Conference. The Council undertook to fund the

improvements to bring the stadium up to the Vauxhall Conference standard by the then deadline at the beginning of May 1994. The Club duly came top of the Diadora division in that season, and having complied with the other criteria, it was promoted to the Conference for the year 1994/95.

In August 1994 it turned its attention to the requirements for entry to the League. It received a ground grading visit from the League in August 1994, and was able to appraise the improvements necessary qualify for the League. By June 1995 it was seriously considering seeking an A grading, with the benefit of the enhanced grants now available to Conference clubs under the Sports Grant Initiative. In July Stevenage returned their grading application form to the League, which included a signed declaration that they understood they would only be eligible for promotion if the ground obtained A grading by 31st December that year.

The club began to make preparations for the necessary work with the advice of their architect, Mr Kain. However, it was not until November that, as a result of the continuing success of the club, the Council were persuaded to divert £500,000 previously intended for a social club to ground improvements. Mr Green thereupon attempted to put in place other finance, including application for a grant, and to complete negotiations with the architect and other contractors in order to meet the December deadline. On 6th November he telephoned Mr Whalley to enquire whether there was any chance of an

extension of time and was told that there would be none. Notwithstanding that, on 13th November Mr Green telephoned again to confirm that he had been given the go-ahead for the improvement works to proceed and that he intended to meet the deadline. However, he quickly realised that it was an impossible target and the project was cancelled. Mr Whalley heard from the Football Trust on 21st November that Stevenage had withdrawn their application and would not be proceeding with the improvement works at that time.

Subsequently, the club was able to conclude arrangements for upgrading works necessary to meet the League criteria, which it is intended to complete in time for the beginning of the new season on 15th August. They will increase the capacity from 3,752, to 6,500. The cost will exceed £1m, of which £760,000 will be borne by the Borough Council, £250,000 by the Sports Ground Initiative and any surplus by the club. There was some investigation, in evidence and cross-examination, as to the extent to which the 15th August is likely to be met. Insofar as this is relevant, I shall refer to it later in connection with the question of remedies.

In the event, Stevenage won the Conference in May 1996, but as it had not complied with the criteria at the relevant time it was not admitted to the League. As it happens, the second club, Woking, had complied with the criteria, so that if it had won it would have been promoted. Once again, there was adverse reaction in the press and elsewhere to the fact that, for the third

year in succession, the criteria had prevented the promotion of the leading club from the Conference.

Restraint of Trade - Legal principles

The classic statement of the principle of restraint of trade is to be found in the speech of Lord Macnaghten in Nordenfelt -v- Maxim Nordenfelt Guns and Ammunition Co. Ltd. [1894] AC 535, 565:

> "The public have an interest in every person carrying on his trade freely: so has the individual. All interference with the individual liberty of action in trading, and all restraints of trade of themselves, if there is nothing more, are contrary to public policy, and therefore void. That is the general rule but there are exceptions: restraints of trade and interference with individual liberty of action may be justified by the special circumstances of a particular case. It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable - 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 it is imposed, while at the same time it is in no way injurious to the public."

Although the principle is stated in general terms, the case was concerned specifically with a restraint imposed by contract in a business relationship. It is in that context that the principle has been most fully developed (see Esso Petroleum Co. Ltd. -v- Harper's Garage Ltd. [1968] AC 269, 295). In such cases, the Court is concerned to balance the interests of two private parties. The person imposing the restraint has the burden of satisfying the Court that it is no more than reasonably necessary to protect his legitimate commercial interest.

However, the principle is not confined to contract. Thus, in Pharmaceutical Society of Great Britain -v- Dickson [1970] AC 403, the principle was applied to rules of professional conduct adopted by the Pharmaceutical Society for registered pharmacists. Lord Wilberforce said (p.440):

> "It is of no materiality that members are not contractually bound to observe the rule... The 'doctrine' of restraint of trade had never been limited to contractual arrangements..."

The principle has been applied in a number of cases concerned with the regulation of sport. In Eastham -v- Newcastle United Football Club Ltd. [1964] 1 Ch 413 the principle was held (by Wilberforce J) to render void and unenforceable a rule of the Football Association which had the effect of preventing a player from transferring to another club was held to be void. The same conclusion was reached, in Greig -v- Insole [1978] 1 WLR 302, in relation to rules of the bodies governing cricket, designed to prevent cricketers contracted to Mr Kerry Packer from playing Test and County cricket. Slade J said (p.345):

> "It is common ground that the rules of an association, which seek substantially to restrict the area in which a person may earn his living in the capacity in which he is qualified to do so, are in restraint of trade. Likewise it is common ground that, subject to any statutory defence that may be open to the defendants, the new rules are prima face void as being contrary to public policy, and can be justified as valid rules only if each of the restrictions which they respectively embody is, to quote the words of Lord Macnaghten:

> '...reasonable...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 it is imposed, while at the same time it is in no way injurious to the public'".

He held that, although the governing bodies, at international and national level, had a legitimate interest in ensuring that cricket was properly administered and organised, they had failed to discharge the onus of showing that the bans were reasonable in the circumstances.

The same approach was followed last year Blackburne J, in Newport Association Football Club Ltd. -v- Football Association of Wales Ltd. 12th April 1995, unreported. He was concerned with the rules of the Football Association of Wales, designed to promote a Welsh Football League, by restricting the right of clubs who were members of the English leagues to play their games from grounds within Wales. He held that the defendant had not:

> "discharged the onus on it of showing that the restraint on their freedom to continue playing in the English pyramid from their home grounds in Wales, which resulted from the implementation of the November resolution was no more than was reasonably necessary to protect the FAW's legitimate interest."

These judgments have not found it necessary to direct attention at the distinction between the private and public aspects of the test as expounded in Nordenfelt. That distinction has been more significant in cases where (as in the present case) the plaintiff has had no direct contractual or other legal relationship with the body against which complaint was made, since in such

cases there is no obvious legal basis for the intervention of the Court. In Nagle -v- Feilden [1966] 2 QB 633, the Court of Appeal refused to strike out a claim by a lady who had been refused a trainer's licence by the Jockey Club, pursuant to their practice of awarding such licences only to men. They held that, although there was no contractual relationship between the parties, she had an arguable case for claiming relief on the ground that the policy was void as contrary to public policy. Lord Denning MR agreed that if this were a purely social club there would be no contractual basis for the claim. But he continued:

> "But we are not considering a social club, we are considering an association which exercises a virtual monopoly in an important field of human activity. By refusing or withdrawing a licence, the stewards can put a man out of business". (p.644).

He went on to say:

> "The common law of England has for centuries recognised that a man has a right to work at his trade or profession without being unjustly excluded from it. He is not to be shut out from it at the whim of those having the governance of it. If they make a rule which enables them to reject his application arbitrarily or capriciously, not reasonably, that rule is bad. it is against public policy."

Danckwerts LJ said:

> "The Courts have the right to protect the right of a person to work when he is being prevented by the dictatorial exercise of powers by a body which holds a monopoly". (p.650D).

Salmon LJ said:

> "If it can be shown from the reasons which they may give or from other sources that a candidate has been capriciously and unreasonably refused admission, it is certainly arguable that the law will intervene to protect

him". (p.653).

That case has been variously interpreted. In Enderby Town Football Club -v- Football Association [1971] Ch 591, Lord Denning saw the role of the Jockey Club as analogous to that of a legislative body. He said:

> "The rules of a body like this are often said to be a contract. So they are in legal theory. But it is a fiction. ...Putting the fiction aside the truth is that the rules are nothing more nor less than a legislative code - a set of regulations laid down by the governing body to be observed by all who are, or become, members of the association. Such regulations, though said to be a contract, are subject to the control of the Courts. If they are unreasonable restraint of trade they are invalid: see Dickson -v- Pharmaceutical Society. ...If they unreasonably shut out a man from his right to work, they are invalid... see Nagle -v- Feilden...." (p.606).

The application for a declaration failed on the facts.

Similarly, in Breen -v- Amalgamated Engineering Union [1971] 2 QB 175, Lord Denning MR expressed the view that similar principles should apply to associations exercising regulatory powers as to statutory bodies. Having referred to the principles of administrative law affecting the exercise of statutory powers he continued:

> "Does all this apply also to a domestic body? I think it does, at any rate when it is a body set up by one of the powerful associations which we see nowadays. Instances are readily to be found in the books, notably the Stock Exchange, the Jockey Club, The Football Association, and in numerable trade unions. All these delegate power to committees. These committees are domestic bodies which control the destinies of thousands. They have quite as much power as the statutory bodies of which I have been speaking, they can make or mar a man by their decisions, not only by expelling him from membership but also by refusing to admit him as a member: or it may be by a refusal to grant a licence or to give their approval ....The rules are in reality more than a contract they are a

legislative code laid down by the council of the union to be obeyed by the members. This code should be subject to control by the Courts just as much as a code laid down by Parliament itself. ..."

In this Division, however, Nagle v Feilden has continued to be treated as a restraint of trade case. Thus, in Watson -v- Prager [1991] 1 WLR 726, a case concerning the rules of the British Boxing Board of Control, Scott J said:

"Nagle -v- Feilden established in my judgment that where the rules or regulations of a body with power to control professional sport are restrictive of the ability of professionals within that sport to earn their living from the sport, the doctrine of restraint of trade applies. The restrictive rules or regulations must be franked by passing through the reasonableness gateway."

However, it has been accepted that the ordinary principles required some modification to reflect the fact that the plaintiff had no existing legal relationship with the defendant, and also to recognise the public interest in the regulatory system. McInnes -v- Onslow-Fane [1978] 1 WLR 1520, a case involving the British Boxing Board of Control, Megarry VC followed Nagle, but found some difficulty with the jurisprudential nature of the "right to work" referred to by Lord Denning. He preferred Salmon LJ's formulation as:

"a man's right not to be capriciously and unreasonably prevented from earning his living as he will".

He also saw a distinction of principle between expulsion cases, in which someone was being deprived of a status previously enjoyed, and application cases, where -

"Nothing has been taken away... Instead there is a far wider and less

> defined question of the general suitability to the applicant for membership or a licence... I am not at all sure how far the "right to work" can be said to include the 'right' to begin a new career of the worker's choice, as distinct from continuing with an existing mode of employment".(p.1529, 1535)

Finally, he made a general comment:

> "I think that the courts must be slow to allow any implied obligation to be fair to be used as a means of bringing before the Courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the Courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. Concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens, bodies such as the board which promote a public interest by seeking to maintain a high stance in a field of activity which otherwise might easily become degraded or corrupt ought not to be hampered in their work without good cause. Such bodies should not be tempted or coerced into granting licences that otherwise they would refuse by reason of the Courts having imposed on them procedure for refusal which facilitates litigation against them. ...The individual must indeed be protected against impropriety; but any claim of this or anything more must be balanced against what the public interest requires". (p.1535).

There is of course the further important distinction between expulsion and admission cases that in the former the person affected has an existing contractual relationship with the association, which provides a ready legal foundation for an injunctive remedy, whereas in the latter there is no such relationship. This was a problem which concerned Jacob J when dealing with an application for an interim injunction in the Welsh Football case at [1995] 2 All ER 87. The clubs in question had resigned from the Welsh Football Association, which was the defendant in the action, and therefore had no

continuing contractual relationship with it. He held that the well established right to seek a declaration in such cases was a sufficient "cause of action" to give him jurisdiction to grant ancillary injunctive relief under section 37 of the Supreme Court Act 1981. In this he gained powerful support from the judgment of the High Court of Australia in Buckley -v- Tutty (1971) 125 CLR 353 (see especially pp 380-2), which clearly recognised the jurisdiction to grant declaratory or injunctive relief, notwithstanding the lack of any contractual underpinning. Thus Jacob J felt able to distinguish the Siskina [1979] AC 210, where the House of Lords restated the general principle that grant of an interlocutory injunction is dependent on there being a pre-existing cause of action arising out of an invasion, actual or threatened of a legal or equitable right of the plaintiff (per Lord Diplock at p.256).

Long before these cases, the distinction between the public and private aspects has been held to be significant in relation to the burden of proof. In the Esso case Lord Hodson (p.319E) referred to the statements in Herbert Morris Ltd. -v- Saxelby [1916] 1 AC 688 as establishing that:

> "the onus of establishing that an agreement is reasonable as between the parties is upon the person who puts forward the agreement, while the onus of establishing that it is contrary to the public interest, being reasonable between the parties is on the person so alleging."

He continued:

> "The reason for the distinction may be obscure, but it will seldom arise since once the agreement is before the Court it is open to the scrutiny of

the Court in all its surrounding circumstances as a question of law."

The distinction can in fact be traced (through the speech of Lord Parker in Herbert Morris) to AG of Australia -v- Adelaide Steamship Co. [1913] AC 781, in which he had related the public interest test to the common law principles affecting monopolies (p. 795-6). He said:

> "Although therefore the whole subject may some day have to be reconsidered, there is at present ground for assuming that a contract in restraint of trade, though reasonable in the interests of the parties, may be unreasonable in the interests of the public if calculated to produce that state of things which is referred to (in the judgments below) as a pernicious monopoly, that is to say, a monopoly calculated to enhance prices to an unreasonable extent. ....It is however in their Lordships' opinion, clear that the onus of showing that any contract is calculated to produce a monopoly or enhance prices to an unreasonable extent will lie on the party alleging it, and that if once the Court is satisfied that the restraint is reasonable as between the parties this onus will be no light one."

Such an approach to the onus of proof is consistent with that of the Court of Appeal in Nagle v Feilden, where it was implied that, to succeed, the plaintiff would need to show that the rule was "arbitrary or capricious". It also invites comparison with the principles of judicial review, where a similar approach would be applied. Since 1987 it has been recognised that the principles of judicial review are not confined to bodies deriving their powers from statute, but also extend to other bodies exercising analogous systems of control or regulation in the public interest (see R -v- Takeover Panel Ex Parte Datafin plc [1987] QB 815). In R -v- Jockey Club Ex Parte RAM Racecourses

[1993] 2 All ER 225, the Court held, following previous authority, that judicial review did was not available. However, Simon Brown J referred to cases such as Nagle v Feilden and Breen, and commented (p 247-8):

> "(Such cases) had they arisen today and not some years ago would have found a natural home in judicial review proceedings. As it was, considerations of public policy force the Courts to devise a new private law creature: a right in certain circumstances to declaratory judgments without any underlying cause of action... I for my part would judge it preferable to develop these principles in future in a public law context than by further distorting private law principles. Nagle -v- Feilden was never in my judgment a restraint of trade case properly so called; rather it brought into play clear considerations of public law."

In R -v- Jockey club Ex Parte Aga Khan [1993] 1 WLR 909, however, the Court of Appeal affirmed that the Jockey Club was not susceptible to judicial review, because its functions were "in no sense governmental" (p.923h per Sir Thomas Bingham MR). In the same judgment the Master of the Rolls approved the decision of Rose J in R -v- Football Association Ltd. Ex Parte Football League Ltd. Times 22nd August 1991, that the Football Association was not susceptible to judicial review. He said:

> "Despite its virtually monopolistic powers and the importance of its decisions to many members of the public who are not contractually bound to it, it is, in my judgment, a domestic body whose powers arise from and duties exist in private law only. ...To apply to the governing body of football, on the basis that it is a public body, principles honed for the control of abuse of power by Government and its creatures would involve what, in today's fashionable parlance would be called a quantum leap. It would also, in my view, for what it is worth, be a mis-application of increasingly scarce resources."

Hoffmann LJ did not accept Simon Brown J's approach to Nagle v Feilden; he

said (p.933):

> "It may be that in some cases the remedies available in private law are inadequate. For example, in cases in which power is exercised unfairly against persons who have no contractual relationship with a private decision making body, the Court may not find it easy to fashion a cause of action to provide a remedy. In Nagle -v- Feilden [1966] 2 QB 633 for example this Court had to consider the Jockey Club's refusal on grounds of sex to grant a Trainer's Licence to a woman. She had no contract with the Jockey Club or (at that time) any other recognised cause of action, but this Court said that is was arguable that she could still obtain a declaration and injunction. There is an improvisatory air about this solution and the possibility of obtaining an injunction has probably not survived the Siskina case [1979] AC 210....
> I do not think that one should try to patch up the remedies available against domestic bodies by pretending that they are organs of Government.'"

Similar doubts are expressed in Wade Administrative Law 7th Edition (p.665-7) (which also draws attention to the differences between the approach of English and Scottish law.) However, neither Hoffmann LJ nor Wade refers to Buckley -v- Tutty (see above). Wade earlier mentions (p 698) the classes of case where the Courts have, as an exception to the ordinary rule, granted injunctions to parties with a special interest but no specific legal right. If Jacob J is correct, restraint of trade may be another example.

Even if a case in principle is established, the question of remedies poses difficulties in an application case. No case has been cited in which the Court has forced a private organisation to admit a member against its will, even where the organisation controls the member's right to work. Thus, in Lee -v- The Showmens' Guild of Great Britain [1952] 2 QB 329, in which the Court of

Appeal declared invalid a decision of the Guild to expel a member with the result that he was deprived of his right to earn his living on fairgrounds in the United Kingdom, Denning LJ drew a distinction between such cases and admission cases. He said:

> "The jurisdiction of a domestic tribunal, such as the committee of the Showmen's Guild, must be founded on a contract, express or implied... The power of this Court to intervene is founded on its jurisdiction to protect rights of contract. If a member is expelled by a committee in breach of contract, this Court will grant a declaration that their action i ultra vires. It will also grant an injunction to prevent his expulsion if that is necessary to protect a proprietary right of his; or to protect him in his right to earn his livelihood... but it will not grant an injunction to give a member the right to enter a social club, unless there are proprietary rights attached to it, because it is too personal to be specifically enforced...." (p.341-2).

In Faramus -v- Film Artistes' Association [1964] AC 925, Lord Evershed said:

> "I am unaware of any case in which the principles of unreasonable restraint of trade have been held to be applicable to the rules made by any institution or association laying down the qualifications of persons to become members of the institution or association...." (p.942).

Lord Hodson (p.944) and Lord Pearce (p.947-8) appeared to contemplate that a rule relating to admission might be held invalid at common law as an unreasonable restraint of trade, but it was unnecessary to decide that issue because of the protective provisions of the Trade Union Act of 1871.

Conclusion on legal aspects

This is clearly not the time to attempt a reconciliation of these various

strands of authority. As Lord Wilberforce said in the Esso case (p.331):

> "The common law has often (if sometimes unconsciously) thrived on ambiguity and it would be mistaken, even if it were possible, to try to crystallise the rules of this, or any, aspect of public policy into neat propositions. A doctrine of restraint of trade is one to applied to factual situations with a broad and flexible rule of reason."

Certainly, the dividing line between "governmental" and "non-governmental" functions in such cases is not an easy one to draw, or justify. In a recent article in the Cambridge Law Journal 1996 CLJ 122, Christopher Forsyth (co-author of Wade) suggests that the extension of judicial review to non-statutory bodies (as in Datafin) has a "common law root" in cases dealing with the exercise of monopoly powers. He refers to Alnutt -v- Inglis [1810] 12 East 527, in which it was held that the London Dock Company which owned the only warehouses in which wine importers could bond their wine had a correlative duty to charge only reasonable hire. He draws a parallel with cases such as Nagle -v- Feilden, in which the Jockey Club was subject to control because it exercised "a virtual monopoly in an important field of human activity". If that is right, then there are clear parallels with the earlier cases on restraint of trade.

Furthermore, the procedural distinctions are not obviously justifiable. Rose J's concern that extension of judicial review to such bodies as the Football Association, would result in excessive pressure on judicial time, is not borne out by the evidence of the present case. In spite of the efforts of the parties,

and the economy of presentation, the writ procedure, with pleadings, discovery, and oral evidence, inevitably is more elaborate, time consuming and expensive than judicial review. Most of the facts in the present case were uncontentious, and little emerged in the process of oral evidence which could not have been adequately dealt with by affidavit and examination of documents. Under the judicial review procedure, if properly conducted, the case for each party can generally be set out in one main affidavit on each side, supported only by relevant documents; rather than, as in this case, in some sixteen witness statements, fifteen files of documents, and transcripts of five days of oral evidence.

However, the authorities to which I have referred show the importance of the public interest element in this area of the law, whether the proceedings are by writ or by judicial review. They also show, in my view, that the test as formulated in Greig -v- Insole, and adopted in the Welsh Football case, may be misleading, in that it gives insufficient weight to the distinction between the private and the public aspect. It is clear that, as between the parties, the onus of showing that a restraint is reasonable lies upon the party seeking to impose it. That is clearly apt for the ordinary contractual situation where the purpose of the restriction is to protect a private commercial interest, and it is appropriate to require the person asserting that interest to demonstrate the need for that restriction, set against the general desirability of freedom to work.

However, where the restraint is part of a system of control imposed by a body exercising regulatory powers in the public interest, different considerations in my view arise. Such control may be attacked as a "pernicious monopoly" (in the words of the old cases), or in more modern language as "arbitrary or capricious", but where the system of control itself can be seen as in the public interest, then in my view the onus lies on those seeking to challenge it to show that the particular rules under attack are unreasonable in that narrow sense. I also find it difficult to see any reason in principle why the tests applied to the exercise of discretion by such regulatory bodies, acting in good faith, should be materially different to those applied to bodies subject to judicial review. I respectfully adopt the approach of Megarry VC in McInnes -v- Onslow in the passage cited above.

In the present case, the distinction between the private and the public aspect is important from both parties' point of view. As between the football club and the League, viewed as purely private bodies, there is no legal nexus, and nothing unreasonable about the position adopted by the League. The club is simply an applicant for membership of the League. The League is a company owned by its member clubs, who are themselves private trading organisations. The question of justifying the restraint does not arise, since it offends no legal principle binding on the League. Nor is the club prevented from pursuing its business of playing football. It can do so within the

Conference or any other group of clubs which is prepared to have it as a member.

However when one looks at the matter more generally, different considerations arise. The League is not simply an independent body. It is an important part of the elaborate structure established for the control of professional football in the interests of the participants and the public generally. This includes the Premier League, the League itself, the Conference and the other groups comprising the so called "pyramid of football".

In an arbitration award relating to a similar complaint last year by Enfield Town Football Club, relating to their unsuccessful application to join the Vauxhall Conference, the Tribunal (chaired by Sir Michael Kerr and comprising two senior Queen's Counsel) thought that such considerations took Enfield's case out of the simple "application" category referred to by Megarry VC in McInnes -v- Onslow-Fane. They said:

> "Although in different leagues, Enfield and the Conference are both affiliated to the Football Association and comprised within the structural framework of the pyramid of Football Charter ...In our view therefore Enfield are entitled to contend as they do that they had a legitimate expectation that the relevant criteria, including the financial criteria, would be applied to it fairly and in accordance with the rules of justice, to which we have compendiously referred to as the duty of fairness and that we have a jurisdiction to determine whether or not there has been a breach of that duty."

I would respectfully agree with this approach as applied to the position of a member of the Conference seeking admission to the League.

It is true that the Tribunal treated the doctrine of restraint of trade somewhat briefly, saying:

> "Criteria which define the conditions for eligibility to an organisation which necessarily has restricted membership are not, in general, in restraint of trade. Criteria might be irrational or they might be poorly adapted to ensure that the best interest of the organisation was served but where they involved the selection of a fixed number of persons or organisations from a larger number of candidates, it is difficult to see how, in general, they can be said to operate in restraint of trade".

However, it is clear that they were treating "restraint of trade" in a narrow sense, since they had previously held that cases such as Nagle -v- Feilden and McInnes -v- Onslow-Fane were applicable as part of the duty of fairness. As I have already said the precise legal analysis is less important than the substance of the principles applied. The Nagle -v- Feilden principle establishes, in my view, that if admission criteria are shown to the arbitrary or capricious in effect, whether because the way in which they are formulated or in the way in which they are applied, they are in my view open to challenge. But the onus is on those who make the challenge to establish their case, and the Court will give due weight to the judgment of the responsible bodies.

Grounds of challenge

Ground capacity

Mr Stewart attacked the 6,000 criterion as being unnecessary and excessive; considerations of ground size could be left to the market, since it

was in the interest of clubs to provide facilities sufficient for those who wish to come. In any event the figure of 6,000 was too high. Mr Stewart pointed to evidence of actual attendances at League matches in the third division in 1994/95. Rather than looking at average attendances over the year, it is probably better to look at the table of the highest six League attendances, which apparently are used by the Football Trust when considering grant applications. This shows that of the 22 clubs listed, only four had average attendances for their six most popular matches in excess of 6,000. The majority had attendances well below 6,000, and in many cases less than half that figure.

However, I do not think that these figures are the only consideration. The capacity of any ground is not just of concern to the club which owns it, but is also of interest to those clubs which have to play there. Existing members are entitled to expect that new members will provide them with venues of a minimum standard both for playing and for their supporters. Account also needs to be taken of the requirement in the League for supporters from away clubs to be segregated. As I have said, the figure of 6,000 was accepted by the Conference in 1989, although Mr Hunter, their representative, regards it as "slightly too high". There is no evidence that it is regarded as unreasonable by clubs within the League. Mr Green, the Chairman of Stevenage, expects to exceed 6,000 if he is allowed into the League during his first season. He disclaimed any suggestion that he regarded that figure as over capacity in

relation to his own plans. Eight clubs in the Conference already comply, and others are seeking to do so, although this is driven by the requirements of the League rather than business considerations.

This aspect illustrates the importance of formulating the legal test in a way which respects the judgment of those responsible for the management of the game. If one asks whether it has been shown by the League that the requirement is no more than necessary for the protection of their interests, it might be difficult to say why the figure has to be 6,000 rather than say 5,000. However, in my view, that is not the correct approach. I start from the presumption that the League and the Conference are better able than the Court to judge what is appropriate. It is for Stevenage to show why the approach adopted by them is unreasonable. In my view, they were entitled to take the view that some capacity requirement is appropriate for clubs playing in the League, and that 6,000 is a reasonable figure, balancing the various considerations which are relevant.

Deadline for ground improvements

Mr Stewart submits that the deadline for compliance with the ground criteria is "unreasonable to the point of absurdity" for a number of reasons:-

(1) It requires Conference clubs as a condition of eligibility for promotion to make a substantial investment in a level of facilities which

may never be needed and could easily be a complete waste of money. He relies on figures for attendances at Conference matches in 1994/95. These show that in the vat majority of cases attendances are well below even the Conference capacity requirement of 3,000. Only Kidderminster is shown as exceeding that figure on one occasion with an attendance of 4,347. Many of the clubs have attendances in the hundreds rather than thousands. Thus says Mr Stewart, even accepting that the 6,000 figure can be justified for clubs in the League itself, it is clearly excessive as a requirement for clubs which may never be promoted.

(2) This is not simply a question of private resources. There is a public interest in ensuring that money available for the game is used sensibly particularly as much of it for the investment comes (as in this case) from public or semi-public sources, such as the Borough Council or the Football Trust. Money used for unnecessary increases in ground capacity is money diverted from other uses, such as safety, spectator comforts, and the funding of players.

(3) There is no practical reason why a club promoted into the third division from the Conference should not be given some period, after promotion, to bring the ground up to whatever standard is reasonably required. This is accepted for existing members of the League, who have been given until 1998 to bring their clubs up to 6,000 capacity. At the

other end of the League the tri-partite agreement between the Football Association, the Premier League and the League, which provides for promotion from the League to the Premier League, allows three years for the promoted club to satisfy any criteria laid down for membership (agreement 15th December 1992, clause 4(2)(e)(iii)).

(4) It is much easier for a club to finance the improvements to its ground after achieving promotion. Not only will it have the benefit of improved attendances and sponsorship, but in addition the grants available from the Football Trust are much greater - currently £750,000 per club as compared to £250,000 per club in the Conference.

(5) The 31st December deadline was adopted supposedly because of the difficulties clubs would face in doing the necessary ground improvements during the close season before the start of their first season in the League. This rests on the false assumption that it is necessary for the work to be completed by that date, even though it is not considered necessary for clubs within the League. Indeed, application of the criteria could have the effect of keeping in the third division a club whose ground was even further from complying with the criteria than the club seeking to be promoted.

(6) There is no evidence that allowing a period after promotion to comply with the standards would cause any serious problems in practice.

Commercial considerations would be likely in any event to ensure that the club did everything possible to increase its capacity to the needs of the League. In practice, as the figures show, normal attendances in the third division often fall well below the capacity requirement. Given a reasonable period the promoted club would be able to make the improvements while playing as a member of the League. Such improvements have in any event to be planned around the football season and the close season so as to minimise disruption to fixtures.

(7) If a club failed to comply with the deadlines, then it could be made subject to the same sanctions as would apply to existing clubs who fail to comply to the 1998 deadline. Ultimately, this could include expulsion from the League, but in practice competent monitoring and the threat of expulsion would be sufficient to ensure concurrence.

These are formidable arguments to my mind. In addition, it is striking that the board has never given any serious attention to the cost and waste of resources liable to be caused by the current criteria, nor to the possibility of allowing a period after promotion, along the lines of that allowed to existing clubs. As Mr Whalley's papers show, the requirement to bring the ground up to capacity by the commencement of the first season in the third division has been treated as a fixed factor, and the only argument has been as to how far ahead of that compliance should be required.

It that were a fixed factor, then I can readily see that the precise deadline is a difficult question of judgment. A number of factors could come into play: the need to allow enough time for the proper planning of the works; the need to allow for grant applications; the need for inspections by the Football League; the desirability of clubs being able to make a reasonable assessment of their prospects of winning the championship, and so on. Although Mr Stewart urged me to say that there was no good reason for choosing the December deadline rather than, the end of May, it seems that this sort of choice is very much a matter for the League and the Conference to settle having balanced the various considerations. It is clear from the papers that they have done so.

In closing submissions Mr Rosen, for the League, says that to allow a period for compliance after admission would mean the League and its members would not know if the club would indeed comply. Expulsion of an existing member for non-compliance with his promises, he says, would create different and uncertain questions and effects. He gave two examples of clubs being admitted and then failing to meet deadlines, the first being Stevenage itself on entering the Conference and the second being Barnet on entering the League.

As to the former, he referred to correspondence between Mr Green and the Conference in which they were threatening penalties for failure to complete the works by the required deadline, and he was undertaking to complete the work by 31st July 1994. While this may show that they works were not fully

completed by the original deadline at the beginning of May, it does not show that this caused any significant problems, nor that the Conference's powers to secure compliance were inadequate - rather the contrary. As to Barnet, it entered the League in 1991 and again there were some delays in securing compliance with the then admission criteria. However, compliance was in due course secured. Barnet in fact now has problems of a different order, since as a result of changes to the safety requirements, its licensed capacity has been reduced to only 4,000. In order to meet the Divisional Criteria by 1998, it is proposing to build a completely new ground on a new site. Again, that example does not assist the League's argument. It shows that a club can operate satisfactorily within the League with a capacity of less than 6,000, and that the League is able to impose more stringent criteria which it expects to be complied with.

The sanctions which would be available to ensure compliance by Barnet are precisely the same as those which could be imposed on a club which had been newly admitted to the League. All other things being equal, no doubt it is convenient if clubs are brought up to the required standards before they join the League, and unsatisfactory to have to use the threat of expulsion. But that has to be balanced against the effect on the Conference clubs of requiring them to expend scarce resources on facilities which may never be needed. As I have said, there is no evidence that that balancing exercise has ever been carried out

by the League.

If the onus is on the Football League to show that the deadline for ground capacity is no more than is required to protect their legitimate interests, they have failed to do so. The considerations relied on by Mr Stewart points strongly to allowing such works to be delayed until the club knows whether it is going to be promoted. No substantial consideration has been put on the other side of the balance. Whether that conclusion justifies the intervention of the Court is a matter to which I shall return, having considered the last area of contention, that is the financial criteria.

Financial criteria

The challenge to the financial criteria is directed principally to the reasonableness of the test based on a comparison of current assets and current liabilities, and the fact that no similar criteria are applied to existing clubs. The deadlines are less directly an issue. The same general point is made as to the need for compliance before a club knows whether it is to be promoted. On the other hand, if, as the League claims, the test could be justified as a reasonable test of financial stability, then it is understandable that it should be applied over a period rather than as a snapshot. It does not require major capital works.

As to the current liquidity test, I have not heard any expert evidence which would undermine the conclusion reached by the author of the 1988

report, given the objective he was set, namely to come up with a simple test which would meet the problems as they were then perceived. Equally, I see no reason to question the view that the Football League has a legitimate interest in the financial stability of its members, since failure by a club during the season will have an adverse effect not only on its ability to complete its existing programme, but also on the image of the League generally.

This was the view also of the tribunal in the Enfield case who considered:

> "that each club within a League, as well as the organisers of the League, has an interest in every other club being financially secure enough to meet its commitments".

The Conference applies a similar test based on current liquidity. As to that the tribunal said:-

> "The requirement that certain financial criteria be met is unobjectionable in principle. The actual criteria are also unobjectionable. They are rational criteria properly adapted to the protection of the Conference's interest in the financial stability of new members. It is of course true that a positive net current asset balance on two particular dates is no guarantee that a club will continue to trade in the future, but nor is anything else. Consideration of net current assets is as likely as anything else to indicate the ability of an organisation to continue to trade for the time being. ...We think that the Conference was entitled to stipulate ... that a straightforward and objectively verifiable criterion, such as a net current assets, be met."

On the evidence before me I could not disagree with this view. If the criteria were applied equally to existing clubs and aspiring clubs, I can see no possible basis for challenge.

Nor in practice would they have provided a serious obstacle to Stevenage.

There was some discussion in cross-examination as to the extent to which Stevenage should be treated as having complied. They did not in fact do so, if only because they did not submit audited accounts up to May and December 1995. But it seems likely that they could have complied if they had decided to do so. Thus, in April 1996, by which time Mr Green was anxious to establish the right to promotion, he made a pledge to the company of £66,000, which was designed to ensure that a favourable current balance was achieved as at 30th April. The club accountant, Mr Lewis, considered, in view of his knowledge of Mr Green's personal financial position, that this could properly be treated as an accrual under standard accounting practice. This was questioned by the League, and I have some doubt whether by normal accountancy standards such treatment would be acceptable. But it illustrates the fact that, where a club is backed by a person of sufficient financial standing, there is no serious difficulty of complying with rules such as this. Furthermore, the evidence shows that in practice, some flexibility was allowed by the League in applying the financial deadline in particular cases.

The only real issue which arises under this head stems from the different treatment of new clubs to those currently with the League. Mr Stewart produced a table derived from the accounts of the clubs within the third division, which showed that comparing current assets to current liabilities only one club achieved a ratio of more than one (as the admission criteria would

imply) and only two achieved a ratio of more than .5. In many cases the ratios are as low as .1 or .2. Unfortunately, these figures cannot be taken at face value in applying the criteria, since they include a special provision for the value of a player under 30 for whom the club has paid a transfer fee to be taken into account, even though not included in the balance sheet.

The only club in respect of which any evidence was available on this latter point was Lincoln, whose chairman, Mr Reames, was called as witness in his capacity as chairman of the Conference Liaison Committee. Lincoln's accounts for 1995 show current assets of £237,000 and current liabilities of £1,019,000. Mr Reames thought the transfer value of his players might be about £400,000, which would still leave current assets well below current liabilities. However, there was also some disagreement as to whether for the purposes of criteria it was possible to include other assets which would normally be regarded as fixed. Mr Reames confirmed that in the case of Lincoln, as in the case of Stevenage, the survival of the club depends on the support of a committed financial backer (in that case himself) and that if he were to withdraw his support without someone else filling the gap, then Lincoln City would be on the verge of disappearing. He also confirmed that is the position with a large number of football clubs.

It is impossible to draw any firm conclusion on the figures presented, and I would not wish to do so without some expert accounting assistance. What is

clear however, is that the criteria which were adopted on the basis of Arthur Anderson's advice, have never been thought suitable for application to existing clubs. Nor has any real thought been given as to whether they are, in the light of experience, a necessary or suitable test. One can understand that when the criteria were first introduced, it might have been thought reasonable not to apply them immediately to existing clubs, and to allow some leeway for them to be brought in. However, if it were really thought to be a necessary objective that clubs in the third division should conform to some standard of financial stability, there is no logical reason for not imposing similar requirements on existing clubs. If existing clubs are entitled to expect a newcomer to comply with such standards, it is difficult to see why the newcomer is not entitled to expect the same of existing clubs.

A similar complaint was made in the Enfield case and it clearly troubled the tribunal. Having commented on the suitability of the criteria in general, they said:

> "... this still leaves the fact that the vast majority of existing member clubs share the same defect as Enfield. Is it justifiable to a apply different criteria to new applicants for membership than existing members? If so, is it justifiable to do so when the criteria applied to the new applicants would be failed by such a large proportion of the existing members? This question has given us some concern."

They went on, in reliance on McInnes -v- Onslow-Fane, to accept that applicants for membership stand in a different position from existing members

because loss of membership for an existing member involves a form of forfeiture and is likely to be more difficult to bear and more damaging to settle expectations and the denial of hopeful promotion. They continued:

> "In our view the Conference's insistence on Enfield meeting certain financial criteria, when most of its existing members fail to do so, was not unfair. This may be hard on Enfield, and it is easy to see why they might feel a sense of grievance but once it is accepted that existing members stand in a different position from new members, it follows that different criteria may be applied to each group. This does not mean that any degree or extent of difference of treatment between the two groups, however extreme, is justifiable nor does it follow that a high degree of differentiation sustained over many years could always be justified. But where an organisation attempts to improve its standards over time to apply the new requirements to new applicants, difficulties are bound to arise."

They noted that the Conference's requirement for a net current surplus was only four years old; a different view might be taken if it had operated for ten to fifteen years and throughout that period the vast majority of existing members continued to fail to meet the criteria. They concluded:-

> "Although the Conference is obviously entitled to seek to improve the standards of financial stability and reliability amongst its members, this interest must apply equally to existing members. If no observable improvement in the financial standing of its members were achieved after a sustained period of time one would begin to question whether any rational purpose was served by the application of criteria to new applicants for membership. However, that is not, or at any rate not yet, the position of the existing football pyramid....".

Like the tribunal in the Enfield case, I find the logic of applying this test to new clubs and not to existing clubs difficult to understand. However, I do not see it as a sufficient answer to say that the system has not had time to prove

itself. The point is not that more time is needed to see whether there is any observable improvement in financial standing of existing members, in response to attempts by the League "to improve its standards over time". The point is that there has never been any suggestion that a similar standard should be applied to existing members. There has never been any proposal that existing clubs should seek to improve their financial stability by reference to this or any other criteria. There is no reason to think that, simply by the lapse of further time, the position is likely to change. What the evidence suggests is that existing clubs within the League are able to trade successfully without meeting the liquidity standards implied by the criteria. It would only be if the League introduced a similar criteria for those members, that they would need to ensure that their accounts met that standard, and one could then see to what extent they were able to do so. Furthermore, the lack of any similar standard for existing League members has removed any incentive for the serious review of the suitability of this test in practice.

Some new clubs, like Maidstone and Barnet, may have got into difficulties, but that is a risk which applies to existing clubs as much as new clubs. There is no evidence to suggest that existing clubs, merely by the fact of having been members of the League for a longer period of time, have acquired some immunity from financial disaster. As Mr Reames' evidence shows, much may depend on the support available from particular individuals

at particular times. The Football League's records show that, apart from Barnet and Maidstone, five other League clubs entered into some form of insolvency arrangement between 1992 and 1995. Happily only one of those, Aldershot, had to terminate its membership. Prior to that, the worst period of insolvencies was in the 1986/87 season when four clubs entered some form of insolvency arrangement. The experience of that season no doubt was very much in the mind of Arthur Andersons when they produced their paper in 1988. It did not however lead the League to consider that any special financial requirements should be applied to existing clubs. As has been seen, even the requirements that they should submit their accounts has not been strictly enforced in practice. Faced with the evidence relating to the submission of accounts, it was put to Mr Reames as a Football League board member, that -

> "the board does not make any serious effort whatever to monitor the financial position of its existing members."

To which he replied:

> "Certainly, looking at that information, I would find it difficult to disagree with you."

If the test is whether the League have demonstrated that this requirement is reasonably necessary, its treatment of its own members shows that it is not. It may be a reasonable standard in itself, but it is unfairly discriminatory in practice.

Remedies

I have found two elements of the criteria open to objection on grounds of restraint of trade:-

1. The requirement to carry out ground improvements to achieve a capacity of 6,000 before it is known whether the club is going to be able to qualify for promotion.

2. The imposition of financial criteria on entrance to the third division without any corresponding criteria imposed upon existing clubs.

There remains the question whether these objections are such as to entitle the Plaintiff to relief, having regard to the legal considerations I have outlined. I doubt, however, whether the objections are so serious as to justify the terms "arbitrary or capricious", if that is the right test (see Nagle -v- Feilden, above). However, I regard the question of discretion as critical.

Mr Rosen, for the Football League, accepts that I have jurisdiction to give declaratory relief (assuming the principles of restraint of trade apply) and that the League would treat a declaration as binding without the need for any further coercive order. However, he invites me, in the exercise of my discretion, to refuse any relief to which the Plaintiff would otherwise be entitled on three grounds: first, delay; secondly, prejudice to third parties; and thirdly, the uncertainty regarding Stevenage ground improvement programme.

I do not regard the last matter as a significant issue. There was some

discussion in evidence of the extent to which Stevenage will be able to complete all the works required for A grading by the beginning of the new season. However, having heard the architect Mr Kain, and having seen the evidence from the Borough Council and the licensing authority, I see no reason to doubt that the ground will be sufficiently ready for the club to be able to play fixtures within the third division, complying with all necessary safety standards. Even if some areas of the work are not complete there are temporary arrangements which can be made which would be adequate for a short period. No doubt if the club were to qualify for the third division as a result of this litigation, there would be considerable interest in its first matches, and Mr Green's expectation of large crowds would probably be realised. Equally however, there would be real incentive for the club and the authorities involved to ensure that the arrangements were satisfactory. I would not therefore refuse relief on this ground.

I am however more concerned by the issues of delay and prejudice to third parties. Mr Stewart says that it would have been unreasonable to expect Stevenage to commence expensive legal proceedings until they knew that they had won the competition. This may seem fair from their point of view, but it is not in my view fair to all the other clubs and people involved. Stevenage like all the other clubs in the Conference and in the League have been aware of the current criteria since May 1995. They have been able to make their

arrangements and order their finances with those criteria in mind. Metaphors such as "level playing fields" and "moving the goalposts" are familiar in legal expositions of principles of fairness, but they are particularly apt in this case. It would have been open to Stevenage, together with any other clubs in the Conference who thought they might be affected, to challenge the rules at the beginning of the season. This of course involved the commercial risk that they might not in the end benefit from successful litigation, but the fact that there is such a risk does not make it unreasonable to expect them to have done so. The advantage of that would have been that the validity of the criteria could have been tested well before the expiry of the December deadline, and the League and Conference would have had an opportunity to make alternative arrangements.

I attach particular importance to the need, emphasised by representatives of both the League and the Conference, for the arrangements to be fixed and administered in an orderly way. The Conference is an association of all the member clubs of the Conference, and it can properly claim to represent the interests of those members. Its support for the current arrangements is an important factor. Although discontent has been expressed at times by other members of the Conference, notably Kidderminster and Macclesfield in the previous two years, there is no evidence that any of them actively support the present proceedings by Stevenage. Nor is this a case where an individual club

is left wholly at the mercy of the body to which it is seeking access. Stevenage could have attempted to advance its case through the Conference itself, or through the Football Association. Access to the Court should be a last resort.

The position of Torquay is of special relevance. They are the club which will be relegated if Stevenage is promoted. Although they could not complain of that, provided they were given adequate notice, the scheme of the rules of both the League and Conference entitle them to be notified of that shortly after the end of the season, so that they can make their arrangements. The change from the League to the Conference necessarily affects sponsorship, players' contracts and the planning of the season. It is unfair to them that they should be left in certainty until very shortly before the new season. The mere fact that they were made aware at an early stage of this litigation, and indeed even made parties to it at one stage, did not give them any certainty as to the outcome. Mr Bateson, chairman of Torquay, gave evidence of the arrangements which have been made, including negotiations with the 18 members of the first team who have been signed to play third division football, the pricing of season tickets, and contracts of commercial sponsorship including the catering franchise.

In this context, I should note an exchange which took place between Mr Bateson and Mr Green of Stevenage in March of this year. Mr Green drew attention to the fact that, as was then understood, Stevenage would not qualify for promotion even if they won the championship, whereas their next rival

Woking would, since they had completed the ground improvements in time. He suggested that Mr Bateson might like to help Stevenage to ensure victory, thereby indirectly securing Torquay's place in the third division. The specific suggestion was that Torquay would offer a sum of £20,000 (or possibly £30,000) to persuade Mr Green to retain his best player, for whom apparently he had been offered a transfer fee of £100,000. A similar conversation was held between the managers of the two clubs in which it was suggested that Torquay would give £20,000 to be used as an incentive for the Stevenage players if they won. These exchanges were not denied by Mr Green, and indeed some of them were recorded. Mr Green accepted that it was misleading to have made this proposal when he was already contemplating a legal challenge. In the event, the proposal was not accepted by Torquay.

It is not necessary for me to comment on the morality of this proposal. Of more importance is the fact that as late as March this year, the possibility of litigation was, in Mr Green's mind, simply one of a number of commercial cards he had to play. If his approach to Torquay had been successful, there would presumably have been no question of a legal challenge to the decision to refuse promotion.

Conclusion

I have drawn attention to features of the current arrangements which in

my view do require reconsideration if they are to resist challenges on restraint of trade principles in the future. The proper forum for that is within the structures established by the Football Association and the other responsible bodies. Although the Court has jurisdiction, in an extreme case, to set aside such rules, the current criteria were accepted for the 1995/6 season not only by Stevenage itself, but by the representative bodies at all levels of the hierarchy, including the Association of which Stevenage is a member. The present challenge has come too late. I therefore dismiss the claim.