

IN THE MATTER OF AN ARBITRATION
UNDER THE RULES OF THE FOOTBALL ASSOCIATION

Before a Rule K Arbitral Tribunal:

The Rt Hon Lord Dyson (Chair)

Mr Charles Flint QC

Mr Andrew Green QC

B E T W E E N:

SOUTH SHIELDS FOOTBALL CLUB 1888 LIMITED

Claimant

-and-

THE FOOTBALL ASSOCIATION LIMITED

Respondent

AWARD

INTRODUCTION

1. On 9 April 2020 the Council of the Respondent (“The FA”) decided, as regards all leagues at Steps 3-7 of the National League System (“NLS”), to “[b]ring the 19/20 season to an immediate end, remove the requirement for promotion and relegation between Steps for this season and expunge all results” (“The Council Decision”). The NLS is a system of senior men’s football leagues controlled and managed by The FA which operate below League Two of the English Football League and above “grassroots” football. It is a pyramid of football that allows structured progression from “grassroots” to the professional game.
2. The NLS comprises seven “Steps”, each of which represents a different level of competition. The Steps are interlinked, in that a club may be promoted to or relegated from one to another, and together comprise one system of competitions. FA Rule B.2 provides:

“NATIONAL LEAGUE SYSTEM

- 2(a) There shall be a National League System comprising participating Competitions between which relegation and promotion links shall operate on such basis as shall be determined by Council from time to time.*
- (b) The Competitions and the Clubs participating in the National League System shall be bound by relevant regulations of The Association from time to time in force.*
- (c) The Competitions participating in the national League System shall be determined by the Council from time to time.”*

3. The Council Decision was the result of a process of deliberation by (a) the relevant leagues operating at Steps 3-7 of the NLS; (b) the Committees of the Council responsible for controlling and managing football at those Steps; (c) The FA’s Board and Executive; and finally (d) the Council. The Decision responded to the need of almost 1,600 clubs in the 95 divisions of Steps 3-7 to be able to arrange their affairs in consequence of Covid-19, an extraordinary global pandemic which had rendered football impossible from mid-March 2020 onwards and for a substantial and unknown period of time thereafter. The effect of the Council Decision was to bring the 2019/20 season for Steps 3-7 to an end without any club participating in those competitions being eligible for relegation or promotion.
4. Step 3, in which a maximum of 88 clubs may compete, comprises of four divisions from three leagues or “*Competitions*”: (1) the Premier Division of the Northern Premier League (“NPL”); (2) the Premier Central Division and (3) the Premier South Divisions of the Southern League; and (4) the Premier Division of the Isthmian League.
5. On 16 March 2020, the UK Prime Minister announced that all non-essential contact, unnecessary travel and mass gatherings should be stopped immediately. By this time:
 - The Club had played 33 out of 42 games planned at the outset for the NPL’s 2019/20 season;
 - It had earned 69 points through its on-pitch performances and was at the top of the NPL (Premier Division) league table; and
 - The second-placed club, FC United of Manchester, had 57 points having played one fewer game than the Club.
6. The Claimant “South Shields” seeks declarations that (i) the Council Decision was invalid and of no legal effect and (ii) it is entitled to have the NLS and NPL regulations and rules relating to promotion (and relegation) in Step 3 of the NLS which applied

during the 2019/20 season applied at the end of that season and that, on the application of those regulations and rules, South Shields is entitled to be promoted to Step 2 for the 2020/21 season.

7. It advances three grounds of challenge to the Council Decision. These are that the Council Decision (i) was not empowered by Rule B2(a) of the FA Rules; (ii) was taken without “*relevant consultation*” as was required by Standing Order 62; and (iii) unlawfully deprived South Shields of an accrued right to the application of the existing system of promotion and relegation for the season 2019/20.
8. It also challenges (on similar grounds) the lawfulness of the earlier decision taken by the Board of the FA on 26 March 2020 (“the Board Decision”) to end the 2019/20 season and expunge all the results of matches played during the season.
9. There is no challenge to the substance or merits of either decision, for example, on the grounds of irrationality.
10. South Shields is a football club in the North East of England. Its home ground is in the town, at Mariners Park. The ultimate owner of the Club, Mr Geoffrey Thompson, supported the club as a boy and ultimately acquired it for nominal consideration, in order to bring it back to South Shields for the benefit of the local community. He has invested significant sums in the club in order to restore it to its local community, to improve its facilities and to develop it and its role in its local community. South Shields has a business plan and the ambition to reach the English Football League, and ultimately to become a supporter-owned club.

THE FACTS LEADING TO THE BOARD DECISION AND THE COUNCIL DECISION

Initial Consideration by the FA

11. In anticipation of an imminent full lockdown, the Chairman of the Alliance Leagues Committee (“ALC”), Mr Jack Pearce, decided to schedule regular conference calls to discuss the impact of the pandemic. The ALC is responsible for controlling and managing football at Steps 1 to 4 of the NLS.
12. On Friday 20 March 2020, Mr Laurence Jones, the Head of the NLS, sent an email to representatives of the various leagues at Steps 1-4, informing them that there would be such a conference call at 6 pm on Monday 23 March, and that Mr Pearce had “...*asked that you seek the opinion of your Boards and Clubs over the weekend in regards how season should end and the options available to us for deciding promotion and relegation or declaring the season void*”, so as to allow for an “*informed discussion on Monday*”.

13. As Mr Ambler (a member of the FA’s Senior Management Team) explains at para 50 of his witness statement: *“The reason for the urgency was that, by this stage, we were receiving repeated requests from clubs seeking clarity on what decision was going to be made in respect of the 2019/20 season. As I understood from Laurence [Jones] and other members of the Executive, as well as from my interactions with members of the Alliance Leagues Committee, the general message from clubs, particularly in the lower Steps of the NLS, was that they needed some certainty (or at least an indication of the [sic] what was most likely) in order to plan their football and financial affairs accordingly”*.

14. At 6pm on Monday 23 March 2020, a sub-committee of the ALC met via Microsoft Teams. The sub-committee was chaired by Mr Pearce who is a member of the FA Board as well as the chairman of the ALC. The sub-committee comprised representatives of the National League (which operates at Steps 1 and 2 of the NLS) and the three Step 3 Leagues, namely NPL, the Southern League and the Isthmian League. At this meeting, Mr Pearce gave an overview on behalf of the National League and said that its Board had not made a final decision. The Isthmian League representative (Mr Robinson) said that the Isthmian League was in favour of ending the season and declaring it null and void. The NPL representative (Mr Harris) said that the Board of the NPL was in favour of ending the season with immediate effect. As recorded in the minutes of the meeting, he confirmed that *“average points per game was the favoured outcome but his Board would support null and void if that was the consensus view of Step 3 and 4 Leagues.....his Board were looking for a quick decision to be made as this was the overall wish of their member clubs”*. The Southern League representative (Mr Hughes) confirmed that the Board of the Southern League was *“also unanimous in ending season immediately”*; was in favour of a points per game solution to ending the season; and that the *“clubs were looking for a quick decision”*. The minutes also record that *“If the Sub-Committee were in favour of null and void, then A Hughes would go back to the League’s Board for approval (**Note: this subsequently happened and the Southern League Board approved a null and void completion)”*.

15. The minutes record that three options for ending the season were discussed:
 - (i) Restarting the 2019/20 season at a later date (“the suspension option”);
 - (ii) Ending the 2019/20 season and adopting a points per match approach to produce final standings for each league/division at Steps 3 and 4 from which promotion, relegation and play-off qualification would be determined (“the PPG option”); and
 - (iii) Declaring the 2019/20 season as null and void, ending the 2019/20 season for each league/division at Steps 3 and 4 and removing the requirement for promotion and relegation and expunging all results (“the null and void option”).

16. The Sub-Committee decided to adjourn further discussion until the following day.

17. At 6 pm on Tuesday 24 March 2020, the sub-committee met again via Microsoft Teams as planned. The Isthmian League, Southern League and NPL all indicated that they now supported ending the season immediately and adopting the null and void option. Mr Hughes confirmed that the Southern League Board had reconsidered their position and now favoured the null and void option “*in order to be consistent*”. Mr Harris said that the NPL now supported the null and void option “*in order that all leagues at step three and four adopted a single and consistent approach to ending the season*”. Mr Ambler confirms at para 64 of his witness statement that the Boards of the NPL and Southern League were content to change their position in order to achieve a consensus.
18. The members of the sub-committee agreed that it was in the best interests of all the clubs at Steps 3 and 4 that the season for all the Step 3 and 4 leagues should end immediately and that the season be declared null and void. They rejected the PPG option saying that:

“...the points per game solution would only work if all clubs had played the same number of games, and across all leagues there was a significant discrepancy in the number of fixtures played by clubs. Applying the points per game solution would be inconsistent and an unfair method to confirm promotion and relegation.”

The Board Decision of 26 March 2020

19. Following the ALC’s decision (by its sub-committee) to support ending the season immediately and to adopt the null and void option, the approval of The FA’s Board to this course was sought. The significance of the issue at stake was such that, although the management of the NLS is reserved to the Council, the FA’s Executive considered it appropriate to put the issue before the Board before it was put to the Council.
20. On Wednesday 25 March 2020, Polly Handford, Director of Legal and Governance, sent members of the Board a Note asking them to approve the conclusion reached by the ALC. The note stated:

“There is an urgency to send clarity to the game and therefore it will not be possible to get approval from the Council in advance. The proposal is that once the Board has approved this, an announcement will be sent out around midday tomorrow and we will seek Council’s retrospective ratification of the decisions.”
21. Over the course of that evening and the next morning, eight of the ten Board members emailed their approval and the other two indicated their approval orally.
22. On Thursday 26 March 2020, The FA sent a letter to NLS bodies informing them that The FA and the leagues at Steps 3-6 had reached a consensus that the season would be ended immediately and all results expunged. On the same day, the FA issued a statement on its website announcing *inter alia* its decisions and indicating that “[w]here

appropriate, the above decisions will be put to The FA Council for ratification” The reason for issuing this statement is explained by Mr Ambler at para 77 of his witness statement as follows:

“The purpose of the statement was to give clubs and players a clear indication of the proposed approach to ending the season. As I have already described, there was mounting pressure from a range of football participants, including many of the clubs in Steps 3 and 4, to get clarity and certainty.”

23. Thereafter, The FA received a number of representations from clubs. Some were positive and welcomed the fact that The FA was keeping clubs up to date with developments in respect of the 2019/20 season, insofar as that was possible. Others, however, were unhappy with the statement, particularly those who lay in promotion spots or might have hoped to do so if the PPG option were adopted. Mr Ambler says at paras 81 and 82 of his witness statement that the FA Executive decided to put the matter back before the ALC so that it could consider the issue further in the light of the representations that had been received.

The ALC meeting of 1 April 2020

24. The ALC accordingly convened a meeting to consider the matter further. At 12.04 pm on 1 April 2020, Mr Matt Edkins, the NLS Manager at The FA, circulated papers for an ALC meeting to be held at 1.30 pm the same day.
25. The papers were detailed and included (i) a paper discussing the three options to which we have referred at para 15 above; (ii) the minutes of the two ALC sub-committee meetings; (iii) all correspondence received from clubs and other interested parties, including South Shields; and (iv) the relevant league tables, with an illustration of how they would look if the season were predicted on a PPG basis, including the NPL Premier Division in which South Shields was competing.
26. The principal paper placed before the ALC described the three options and included the following:

“A concern raised by a number of ... Clubs is a belief that Clubs have not been sufficiently consulted with by their respective League as to their views with regards to how best to deal with the 2019/20 season at Steps 3 to 7 as a result of the COVID-19 pandemic.

Due to the unprecedented nature of the present circumstances, a decision has been taken to give further consideration to the issue at stake, particularly with regards to the correspondence received from Clubs, before the Alliance Committee makes a final decision to be put before FA Council for ratification.”

27. Under the heading “C. AGENDA”, the paper stated that the ALC was:

“asked to make a final determination as to how to proceed in relation to the 2019/20 season taking into account:

- *The options available as set out in this paper;*
- *The correspondence received from Clubs to date (see Appendix 2);*
- *The feedback already received from member Clubs by the relevant leagues/decisions at Steps 3 to 4.*

In making its decision, the [ALC] should ensure that it is sufficiently satisfied that an adequate consultation has taken place for it to make a decision to recommend to FA Council.”

28. The ALC meeting began at 1.30 pm on 1 April and was held by Microsoft Teams. After more than an hour of discussion the Committee “...were unanimous in supporting the decision to end the 2019-20 season for Step 3 and 4 Leagues with immediate effect and to expunge all records in relation to the playing season”. The ALC’s decision to recommend declaring the 2019/20 season null and void was then put forward to the Council for ratification.

The Council Decision

29. On Thursday 2 April 2020 Mr Greg Clarke, the chairman of The FA, wrote to the members of the Council informing them that there would be a conference call at 2 pm on 7 April 2020. His letter noted that the Council faced a “*pivotal decision which is also unprecedented*”; that the proposal had been unanimously recommended by the Board; but that “...*this decision is not a fait accompli. It is for Council to decide.*”
30. At 7.30 pm on Friday 3 April, The FA circulated to the members of the Council a Council Information Pack which exceeded 300 pages and comprised:
- (i) A detailed Covering Report which set out the three options in detail;
 - (ii) Minutes of the meetings of the ALC, the ALC Sub-Committee, the Leagues Committee and Step 5/6 Leagues Forum, together with briefings considered by those Committees;
 - (iii) League tables for all of the relevant leagues together with an indication of what the results would be on a PPG basis, including the NPL Premier Division; and
 - (iv) Approximately 200 pages of responses received from clubs and other interested parties, including a long and detailed letter dated 3 April from solicitors Walker Morris written on behalf of South Shields and two other clubs.

31. Council members were then given nearly a week to consider these substantial materials.
32. At 2pm on 7 April 2020, the Council met by Webex to discuss the issues. 23 written questions pertinent to the issues to be discussed had been submitted in advance of the meeting by Council members. These questions and The FA's written responses to them were circulated in tabular form to the Council members on 8 April.
33. The Council then voted on the three options. Of the 95 votes cast, 90 were in favour of ratifying the recommendations of the ALC and the Leagues Committee that the 2019/20 season be ended and the null and void option be adopted; and 5 were against it. The Council instructed The FA Executive to prepare the necessary amendments to the Rules and the NLS Regulations to give effect to its decision. The Council's Decision was announced on 9 April 2020.
34. On 21 May, Bryan Faulkner, Head of Legal (Football Regulation & Litigation) circulated to the Council "*Transitional Provisions for Season 2019/2020*". The paper stated that on 9 April the FA Council had ratified the recommendation to bring an end to the season across Steps 3 to 7 of the National League System and directed that any consequential amendments to FA Rules and Regulations should be made following its decision. The paper set out in tabular form the consequential changes to the NLS Regulations and Standardised Rules, saying that they had been approved by the Football Regulatory Authority.

GROUND 1: THE VIRES CHALLENGE

35. South Shields' principal argument is that The FA did not have the power to make the Board Decision of 26 March 2020 or the Council Decision of 9 April 2020. It submits that neither decision was permitted by Rule B2(a). There has been debate between the parties as to whether what we have referred to as the Board Decision was a decision or (to use the words of Mr Ambler at para 77 of his witness statement) no more than a "*statement to give clubs and players a clear indication of the proposed approach to ending the season*".
36. The paper put to the Board set out a proposal for bringing an immediate end to the 2019/20 season across Steps 3 to 6 of the NL and that having reached a consensus the season would be cancelled and there would be no promotion or relegation of clubs between Steps 3 to 6, and no promotion to Step 2. The Board was not asked to make any formal resolution but to signify its approval to this approach as there was an urgency to send clarity to the game. It should be noted that Board had no power to make changes to the Regulations applying to the NLS. It was recognised that the FA Council would have to ratify the decision. Following the Board meeting a public statement was made that The FA and NLS had reached consensus that the 2019-20 season should be brought to an end, and there would be no promotion or relegation of clubs between NLS Steps 3 to 6, and

no promotion to NLS Step 2. Having made that announcement, The FA received responses from a substantial number of clubs which persuaded The FA that the policy should be further considered by the ALC.

37. South Shields rightly does not submit that, if the Board Decision was indeed a decision, it was not open to The FA to reconsider it. Accordingly, nothing is to be gained by further considering whether The FA had the power to make the Board Decision. Accordingly, in what follows we shall focus exclusively on the Council Decision (which, in fact, is the only decision in respect of which relief is sought in the Notice of Arbitration and Points of Claim).
38. The Council Decision purported to bring the 2019/20 season to an immediate end, remove the requirement for promotion and relegation between Steps for this season and expunge all results. The question is whether the Council was empowered to make such a decision.
39. The Council's delegated powers are contained in Article 147 of The FA's Articles of Association, and include power:
- (a) to manage all matters relating to:*
 - ...
 - (ii) the control and management of the National League System and the leagues beneath the National League System;*
 - ...
 - (iv) the sanction of competitions and matches in England and overseas and the status and registration of players;*
 - ...
 - (c) to approve and recommend to the Shareholders proposed amendments to the Articles and the Rules (subject to the approval of the Board and the provisions of the 2006 Act (as applicable));*
 - (d) to make or alter such regulations as are deemed necessary to provide for matters arising from or to implement the Rules in so far as any such regulation is not in conflict with any Rule;*
 - ...
 - (f) to amend and/or make Standing Orders regulating the conduct of the business of Council (subject to the approval of the Board);*
 - ...

PROVIDED THAT Council shall not have the power to make any decision (including any decision which purports to be binding on the Company) in relation to any financial or commercial matter or other business matter or which has any financial or commercial or other business effect unless specifically authorised to do so by the Board in accordance with these Articles.”

40. Article 166 provides:

“All Shareholders, Directors, Members of Council and any body appointing the same under these Articles, are bound by and subject to and shall act in accordance with the Rules and any regulations, standing orders, decisions, rulings or other findings, penalties or orders of any nature made pursuant to the Rules under Article 169.”

41. Article 167 makes provision for the determination of Rules by the Shareholders and for the amendment of Rules by Shareholders or by the Board (with the approval of the Council).

42. It was clearly contemplated that, in order to give legal effect to the Council Decision, it would be necessary for the Council subsequently to exercise its power under Article 147 (d) to alter the Regulations relating to promotion and relegation in the 2019/20 season. As set out at paragraph 34 above the Council has been requested to make those alterations to the Regulations.

43. We accept the submission of Mr Segan QC on behalf of the FA that the Decision lies fairly and squarely within the Council’s Article 147 (a) power to “*manage all matters relating to....control and management of the National League System*”. The only issue is whether there is some other provision which cuts down that power. Article 166 required the Council Decision to comply with the Rules. South Shields submits that it did not comply with Rule B2(a). The question of whether this submission is well-founded lies at the heart of the first ground of challenge.

44. Although we have set out Rule B2(a) above, we shall repeat it here:

“There shall be a National League System comprising participating Competitions between which relegation and promotion links shall operate on such basis as shall be determined by Council from time to time.”

45. On a literal interpretation, we consider that the language of this provision is plainly wide enough to authorise a decision to bring the season to an end and propose that there should be no promotion or relegation based on the results in the 2019/20 season. Rule B2 (a) provides (i) for a NLS comprising participating Competitions, (ii) between which relegation and promotion links shall exist, (iii) on such basis as shall be determined by Council from time to time.

46. As a matter of ordinary language, the Council's Decision did not purport to abolish or fundamentally change the nature of the NLS. Nor was it a decision to get rid of relegation and promotion links between participating Competitions altogether: the existence and operation of promotion and relegation links would continue in future seasons unaffected by the Council Decision in respect of a single and part-completed football season.
47. The power conferred by the Rule on the Council to determine from time to time the basis on which the links shall exist is expressed in very broad terms and without any express limitation, and empowered the Council to make the decision it did. The power must, of course, be exercised in accordance with public law principles. For example, it would be unlawful for the Council to operate the relegation and promotion links between participating Competitions irrationally. We interpolate that there has been no such challenge made of the Council Decision in these proceedings.
48. Mr Mill QC submits, however, that there is an implicit limitation on the Rule B2(a) power. He says that it is a fundamental and essential element of participating Competitions that they are open competitions and that promotion and relegation links operate between them *every season*. It follows that the Council cannot, in any circumstances, exercise the Rule B2(a) power so as to render a season null and void and expunge its results.
49. Mr Mill says that the purpose and effect of Rule B2(a) for which he contends is reflected in provisions in the subsidiary NLS Regulations. In particular, he points to Regulation 2 which provides that the aims and objectives of the NLS are to provide *inter alia* the "seasonal movement of Clubs" and Regulation 4 which provides that the ALC "shall provide for the seasonal promotion, relegation or lateral movement of Clubs". He also submits that The FA's proposal dated 21 May 2020 to introduce amendments to the NLS Regulations in order to give effect to the Council Decision is an admission that the decision is contrary to those regulations.
50. We cannot accept Mr Mill's submissions. It is impermissible to interpret the Rules by reference to the subsidiary NLS Regulations. The true meaning and effect of Rule 2B(a) must be determined according to its terms. If it had been intended that the apparently unlimited power to operate the relegation and promotion links should be restricted so as to preclude the voiding of the whole or part of a season, we would have expected the drafters of Rule B2(a) to have so provided expressly.
51. We see no reason for reading such a limitation into the apparently unrestricted scope of the power. We bear in mind the principle that Articles of Association are to be treated as a "*business document*" and should therefore be "*construed so as to make them workable*": see per Arden LJ in *Jones v BWE International Ltd* [2004] 1 BCLC 406 at

[22]. The same approach should be applied to rules made pursuant to delegated authority in the Articles of a company, such as the FA Rules.

52. As Mr Segan has pointed out, if the Rule B2(a) power were subject to the limitation for which Mr Mill contends, it would lead to unworkable and absurd consequences. The “*Playing Season*” is defined in Regulation 1 of the NLS Regulations as “*the period between the date on which the first competitive fixture in the League is played each year until the date on which the last competitive fixture in the League is played*”. Only two football matches (not per team, but just two matches) are, therefore, required for there to have been a “*Playing Season*”.
53. It follows that, if South Shields’ argument were correct, even if a particular season had comprised just two matches at the time of some supervening emergency preventing any further play, the reference to “*promotion and relegation links*” in Rule B2(a) would require The FA to ensure the promotion and relegation of whichever teams happened to sit in the relevant league table positions, even if those teams had not even played a fixture. The Council would have no power to “*determine*” a different basis for operating the links between the participating Competitions. This would be irrational and unfair, but it would be the inevitable consequence of the interpretation of Rule B2(a) for which South Shields contends.
54. On the other hand, the FA’s interpretation is not unworkable and does not lead to potentially absurd consequences. Indeed, there may be circumstances where The FA reasonably concludes that it is *necessary* to void the whole or part of a season. The Covid-19 pandemic is a good example. As we have said, there is no legal challenge to the merits or substance of the Council Decision in these proceedings. An event like the outbreak of WW2 is another example. When Britain joined WW2 on 3 September 1939, the 1939/40 season which had begun in August 1939 was abandoned. Such circumstances are likely to be extremely rare. But when they occur, Rule B2(a) empowers the Council to act as it did in the present case.
55. Mr Mill also submits, however, that the Council Decision was not empowered by reason of the proviso to Article 147. He says that it had a “*financial or commercial or other business effect*” within the meaning of the proviso to Article 147 which required it to be, but was not, specifically authorised by the Board. But we accept Mr Segan’s submission that the words of the proviso refer to decisions having financial or commercial implications for *The FA itself*, hence the reservation to the Board for authorisation. These words do not require the Council to seek Board authority every time the Council makes any decision which has financial or commercial consequences for a third party such as a club. Such an interpretation would make no business sense. It is difficult to see why the drafters of the Articles would have intended the Board to become involved in the financial or commercial consequences to a third party of every decision that the Council wishes to make. Accordingly, the proviso to Article 147 has no application to the Council

Decision. In any event we accept the alternative submission made by Mr Segan that the Council had been clearly authorised by the FA Board to take the Decision in terms which had been recommended by the relevant committees and approved by the FA Board.

56. For all these reasons, we reject the first ground of challenge. The Council Decision was not *ultra vires*.

GROUND 2: THE CONSULTATION CHALLENGE

57. Standing Order 62 empowers the ALC *inter alia*:

“To propose changes to Rules and Regulations which affect Steps 1 to 4 of the National League System, after relevant consultation, including periodic reviews of the Standardised rules (in conjunction with the Leagues Committee” (emphasis added).

58. South Shields’ case under Ground 2 is as follows: (1) as pleaded in the Notice of Arbitration and Points of Claim, the ALC failed to comply with Standing Order 62 and such non-compliance vitiated or otherwise rendered null and void the subsequent Council Decision on 9 April 2020 (“Council Decision: no relevant consultation”); and/or (2) as pleaded in the Points of Reply (para 29), any consultation by the ALC and the Council after the Board Decision on 26 March 2020 “*was irrelevant and/or ineffective in circumstances where the relevant decision had been taken and announced to the world by 26 March 2020*” i.e. there was no “*relevant consultation*” by the ALC prior to the Board Decision (“Board Decision: no relevant consultation”).
59. Mr Mill submits that relevant consultation in the context of Standing Order 62 necessarily included, at a minimum: (a) seeking the views of the leagues and clubs potentially affected by the proposed change to the Rules or Regulations which apply to Steps 1-4, including providing them with sufficient information to understand the proposal and identifying the relevant power to make the change proposed; (b) affording those leagues and clubs reasonably sufficient time to consider and comment on the proposal; and (c) due consideration of the comments and views received from them prior to making the decision to make any recommendation.
60. He also submits that the express obligation in Standing Order 62 is *sui generis* and not directly analogous to the general public law duty of due consultation on public authorities. We can accept this as a matter of strict legal analysis, but we consider that the true meaning of the Standing Order 62 obligation is informed by well-established public law principles as to what due consultation requires.
61. There is much jurisprudence on these principles. In *R (Moseley) v London Borough of Haringey* [2014] UKSC 56, Lord Wilson (with whom three other members of the

Supreme Court agreed) said at [25] that the time had come to endorse the so-called “*Sedley criteria*” in the following terms:

“...these basic requirements are essential if the consultation process is to have a sensible content. First, that consultation must be at a time when proposals are still at a formative stage. Second, that the proposer must give sufficient reasons for any proposal to permit of intelligent consideration and response. Third, ... that adequate time must be given for consideration and response and, finally, fourth, that the product of consultation must be conscientiously taken into account in finalising any statutory proposals.”

62. In *R (Hutchison 3G UK Ltd) v Telefonica UK Ltd* [2017] EWHC 3376 (Admin) at [238], Green J said:

“In my judgment, the Sedley criteria are not hard and fast rules that can be mechanistically applied so as to lead to a right and certain result. They are lodestars guiding the overall assessment that must be made of the facts to see whether addressees of a consultation had, in a real and practical sense, been accorded a fair opportunity to express their views and opinions. ... The ultimate litmus test is simply fairness; so how the application of the criteria play out in a particular case will depend upon all of the surrounding circumstances.”

63. We consider that Green J has neatly encapsulated the right approach. The Sedley criteria are a valuable tool for assessing the fairness or otherwise of the process of a consultation as a whole. As Lord Phillips said in *R (Hoffmann) v Commissioner of Inquiry* [2012] UKPC 17 at [38], “*the requirements of fairness must be tailored in a manner that has regard to all the circumstances*”. In our view, these will include the urgency of the situation and considerations of practicability.

Board Decision: no relevant consultation

64. Given that the Board Decision came first in time, we deal first with South Shields’ argument that the ALC failed to conduct relevant or proper consultation prior to the Board Decision. In our view, the Board Decision did not disable the Council from subsequently reconsidering the matter in the light of all responses which had been received from clubs. There is nothing in The FA’s legislative instruments which purports to have that effect. The Council is the body on which Article 147(a)(ii) confers the power to manage all matters relating to the control and management of the NLS and the leagues beneath the NLS. It would be extraordinary if the Council were prevented from reconsidering an issue which is within the scope of its control and management powers that has already been decided by the Board. New circumstances might come to light which The FA might reasonably consider justified looking at the issue again. That is what happened in this case. The Board Decision provoked much opposition and complaints *inter alia* that the Clubs had not been sufficiently consulted.

65. Thus it was that The FA Executive decided that the ALC should reconsider the matter. In our view, the submission that the reconsideration by the ALC which led to the Council Decision was irrelevant or ineffective is misconceived.
66. In these circumstances, we do not need to consider whether the Board Decision was made without relevant or proper consultation. We turn, therefore, to the issue of whether the ALC decision of 1 April 2020 was made without relevant or proper consultation.

Council Decision: no relevant consultation

67. We have set out the facts relating to the ALC's decision at its 1 April meeting at paras 24 to 28 above. Mr Mill submits that there was no relevant consultation by the ALC prior to this decision. Rather, he says, it was simply provided with letters and emails submitted by member clubs of their own motion in response to The FA's decision of 26 March. There was no attempt to set out for the clubs the issues, the relevant powers, the options and any preliminary views of the ALC and invite comments on them. He says that considering representations made by affected parties of their own motion does not constitute due or relevant consultation. He also makes the point that, if the attention of the members of the ALC had been drawn to the terms of Standing Order 62, the view of the minority of the committee who favoured further consultation with the clubs might have prevailed. In summary, the decision taken by the ALC to support the null and void option and recommend its approval to the Council was taken with undue haste and without relevant consultation.
68. We do not agree. The ALC was well aware of the Clubs' opposition to the Board Decision and the reasons on which it was based. One of the documents that was placed before the ALC was a joint letter to The FA dated 30 March signed by representatives of 66 clubs. This three page letter contained a closely argued plea that The FA slow the process down and give the Clubs an opportunity to vote on the issues. It is clear from the letter that the Clubs were well aware of the issues and able to make a powerful and detailed case against the void option. They also made specific reference to the PPM option and the suspension option.
69. A decision was required as a matter of urgency. At the ALC subcommittee meeting of 23 March, Mr Harris had confirmed that the NPL Board "*were looking for a quick decision to be made as this was the overall wish of their member clubs*". Mr Hughes had made the same point on behalf of the Southern League. On 24 March, Mr Robinson wrote to the members of the Isthmian League saying: "*The Step 3 & 4 Leagues share Clubs' frustration that it is taking so long to determine whether the 2019/20 season is to end now, and if so on what basis*".
70. In our view, the fact that the Clubs' representations were made of their own motion and not in response to an invitation by the ALC to comment is immaterial to the overall

fairness of the process. It is difficult to see what difference it would have made to the Clubs' representations if they had been made in response to an invitation by the ALC. Nor did fairness require that the Clubs be told about the ALC's obligation to undertake a "relevant consultation". What matters is whether there was a proper consultation. Further, the fact that the members of the ALC were not told about Standing Order 62 does not undermine the fairness of the process either. The committee was well aware that it had to be "sufficiently satisfied that an adequate consultation has taken place for it to make a decision to recommend to the FA Council". Fairness did not require a reference to the source of that requirement.

71. We are satisfied that the ALC conducted a fair and proper consultation prior to its meeting on 1 April.
72. As regards the Council Decision, Mr Mill submits that this was simply a retrospective ratification of the Board Decision: the Council was constrained by that decision. He also says that the Council's consultation was flawed for the same reasons as the consultation undertaken by the ALC (this argument cannot be based on Standing Order 62 which deals with the ALC's decision-making process and not that of the Council, but we accept that public law required the Council to conduct a proper consultation process).
73. We reject these submissions. First, there is no evidence that the Council was constrained to rubber stamp the Board's earlier decision or indeed to adopt the recommendation of the ALC. We have referred at para 29 above to Mr Greg Clarke's letter to the Council dated 2 April in which he stated that, although the proposal for the void option had been unanimously recommended by the Board, "*this decision is not a fait accompli. It is for Council to decide.*" There is no reason to suppose that the members of the Council did not conscientiously approach their task in this way, giving fresh and independent consideration to the issues that they had to decide.
74. Secondly, the consultation for the specific purposes of the Council meeting on 7 April was even more extensive than that which had been undertaken for the ALC meeting on 1 April. It follows that the reasons that have led us to conclude that the consultation by the ALC was sufficient apply with even greater force to the consultation undertaken prior to the Council Decision.
75. For all these reasons, we reject the second ground of challenge.

GROUND 3: THE ACQUIRED RIGHTS CHALLENGE

76. It is common ground that The FA's Rules and Regulations take effect as a multilateral contract between The FA and the Clubs pursuant to which the NLS is to be operated by The FA fairly and in accordance with its Rules and Regulations. Mr Mill submits that there was no power to amend Rule B2(a) or any of the Regulations so as to give effect to

the Council Decision because such amendments would impermissibly deprive the affected clubs of their accrued rights to promotion and relegation based on their performance during the current playing season.

77. In view of our decision on Ground 1, the question of an amendment to Rule B2(a) does not arise. The FA does not need to amend Rule B2(a) and has no intention of doing so.
78. The focus of the third ground of challenge, therefore, is on whether The FA may lawfully amend the NLS Regulations (and the Standardised Rules) so as to give effect to the Council Decision. Mr Mill submits that it may not lawfully do so.
79. The terms of the multilateral contract include express powers for The FA to amend the Rules and Regulations. Thus Article 147(d) of the Articles of Association empowers the Council:

“to make or alter such regulations as are deemed necessary to provide for matters arising from or to implement the Rules in so far as any such regulation is not in conflict with any Rule”.
80. Rule J1(c)(i) gives the same power (expressed identical terms) to The FA.
81. It is South Shields’ case that (i) the fundamental basis of participation in Competitions (to which we referred at para 46 above when dealing with Ground 1) is that each league is an open league in respect of which there will be promotion and relegation at the end of every playing season; (ii) the power to alter Rules and Regulations may not be exercised retrospectively to alter this fundamental basis for participation during a current season; and for that reason (iii) The FA may not alter the Regulations and the Standardised Rules to give effect to the Council Decision.
82. Mr Mill puts this case in various ways. He says that it is implicit in the multilateral contract that the power to amend the Rules and Regulations is circumscribed in this way. He also says that amending the NLS Regulations and the Standardised Rules in order to give effect to the Council Decision would breach other applicable legal doctrines, namely (i) the doctrine of legitimate expectation; (ii) the principle against retroactivity; and (iii) the law of estoppel. We shall take these in turn.

Contract

83. Mr Mill submits that South Shields has an accrued contractual right to benefit from the NPL rules for promotion to Step 2 as at the beginning of the 2019/20 season on the basis of which it participated and performed in the NPL throughout that season. He says that this accrued right prevents an amendment to the Rules and Regulations to remove promotion and relegation except in relation to a future season. Any power of amendment

should be construed as limited to amending the basis for promotion and relegation during a *current* season and does not extend to removing promotion and relegation altogether (except in relation to a future season in respect of which a club can elect whether to participate).

84. Mr Mill relies on the presumption against the retrospective operation of legislation and the retrospective exercise of statutory powers and submits that this presumption should be applied by analogy to the powers of a regulatory authority such as The FA.
85. In *Wilson v First County Trust Ltd (No 2)* [2004] AC 816, the House of Lords considered this presumption in relation to the question of whether the Human Rights Act 1998 was intended to operate retrospectively. At [19]. Lord Nicholls approved the following statement of Staughton LJ in *Secretary of State for Social Security v Tunncliffe* [1991] 2 All ER 712, 724:

“the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree—the greater the unfairness, the more it is to be expected that Parliament will make it clear if that is intended.”

86. At [98], Lord Hope said that the presumption is based on concepts of fairness and legal certainty and that these concepts carry much greater weight when it is being suggested that rights which were acquired before the enactment came into force should be altered retrospectively. At [196], Lord Rodger agreed that the basis of the presumption was no more than “*simple fairness*.”
87. Mr Mill relies on *Doyle v White City Stadium* (1935) 11 KB 110. In that case, the plaintiff boxer claimed £3,000 for participating in a fight at a time when, under the rules then applicable to him, he was entitled to the money. But the rules were then altered during the currency of his licence. The effect of the altered rules was that he was no longer entitled to the money. Lord Hamworth MR said at p 120:

*“It will be observed however that the terms of the application for the licence gave plain leave to alter the rules or promulgate further rules. When these rules as altered are still for the purpose of carrying out the original purpose of the society or body of persons, the altered rules are made binding on the plaintiff. If there was an attempt fundamentally to alter the purpose for which the rules had been originally drawn up, the prospective agreement to adhere to fresh rules, or any alteration in the rules, would not apply. It is quite plain from the decision in *Theellusson v Viscount Valentia* that if and so long as the rules are akin to the purpose for which a society exists, there is no inherent objection to an alteration of those rules or to further rules being made for such limited purpose. If, for example, the alterations had been made to turn a society*

connected with British boxing into a society for conducting horse-racing, the position might have been far different”.

88. In our view, this passage provides no assistance to Mr Mill. In that case, as here, the instrument contained no apparent restriction on the power to alter the rules. In that case, as here, the person affected had acquired a right to a benefit which was purportedly removed by an alteration in the rules. In that case, the benefit was the right to be paid £3,000. In the present case, the benefit was the right to compete for the prize of promotion after a club had carried out its performance of the contract by participating in all the fixtures of the playing season. Lord Hamworth was saying that there was an implied restriction on the power to amend the rules, namely that it could not be exercised to alter fundamentally the purpose for which they had been originally drawn up. But, subject to that limitation, it could be exercised to make changes even if their effect was to deprive a person of a benefit which he had acquired and would be able to retain under the rules before they were amended.
89. In our judgment, the same reasoning should be applied to the proper construction of Article 147(d) and Rule J1(c)(i). These provisions are in extremely wide terms. The only express limitation on the power they confer is that the alterations should be “*deemed necessary to provide for matters arising from or to implement the Rules in so far as such regulation (sic) is not in conflict with any Rule*”. We accept that, despite the apparent width of this wording, it would not permit the making of an alteration which has nothing to do with football, since that could not be deemed necessary to provide for matters arising from or to implement the Rules. But the amendments to give effect to the Council Decision do not alter fundamentally the purpose for which the Rules and Regulations were originally drawn up.
90. We do not consider that the presumption against retrospectivity requires us to construe Article 147(d) and Rule J1(c)(i) as only applying to future playing seasons and as precluding the Council from voiding a current playing season. The suspension of football in March 2020 in consequence of the pandemic required The FA to decide what to do about the 2019/20 season. It could not reasonably decide to do nothing. It considered the three options. Each of them would to some extent have defeated the expectations that the Clubs had at the start of the playing season and the basis on which they participated in the season’s fixtures. In that sense, it might be said that a degree of unfairness to some clubs was inevitable whatever solution was adopted.
91. As Mr Segan points out, if The FA were contractually prohibited from amending its Rules and Regulations during the course of a season, that would also have prevented the adoption of the PPG option (or any variant thereon) which is espoused by South Shields. Such a solution would be inconsistent with, and require amendment of, Rule 12 of the FA’s Standardised Rules, as incorporated by Regulation 5.2 of the NLS Regulations. Rule 12 requires that “*Three points will be awarded for a win at home or away and one*

point for a drawn match at home or away” and that the league table must be compiled for each club accordingly (see Rule 12.1 to 12.2). There could hardly be an aspect of the competition more “fundamental” than this. These provisions would have had to be changed to give effect to the PPG option. But on the South Shields argument, this solution would have been unlawful and therefore impossible. South Shields has not suggested a solution to the problem with which The FA was confronted in March and April 2020 that would not have required an amendment to the provisions on promotion and relegation.

92. Mr Mill did not engage with these difficulties, which in our view pose insuperable obstacles to his submission that The FA was contractually barred from altering the Regulations and Standardised Rules to give effect to the Council Decision. Article 147(d) and Rule J1(c)(i) should be given their natural and ordinary meaning. There is no justification for reading into these provisions a restriction on the exercise of the powers that they confer such as that for which Mr Mill contends.
93. That is not to say that The FA can exercise these powers within a season free from all constraints (other than that the amendments are deemed necessary to provide for matters arising from or to implement the Rules). In exercising its powers, The FA must act rationally, non-capriciously and otherwise comply with public law principles. This obligation arises both because of the supervisory jurisdiction over sport governing bodies (see e.g. *Bradley v Jockey Club* [2007] LLR 543 at [33] to [47] per Richards J) and because the power being exercised is a unilateral power to amend the terms of a contract (see e.g. *Paragon Finance v Nash* [2002] 1 WLR 685, at [30] and [32] per Dyson LJ; *Braganza v BP Shipping Ltd* [2015] 1 WLR 1661 at [30] per Baroness Hale; *No 1 West India Quay (Residential) Ltd v East Tower Apartments Ltd* [2018] 1 WLR 5682 at [37] per Lewison LJ).

Legitimate expectation

94. Mr Mill submits that, as a monopoly governing body for the sport of football in England, The FA is precluded from acting so as to defeat South Shields’ substantive legitimate expectation that the Rules and Regulations applying to competition in the NPL at the commencement of the 2019/20 season would remain in force until the end of the season. He contends that Rule B2(a), NLS Regulations 2.3, 4 and 5.2, Standardised Rule 12 and the mandated reflection of these rules in several of the NPL’s Rules and Regulations gave rise to a clear and unambiguous implied representation that there would be promotion from Step 3 to Step 2 at the end of the 2019/20 playing season on the basis of sporting performance. He says that all participants in the relevant leagues unambiguously understood from the language of these instruments and from habitual practice that the 2019/20 playing season would culminate in promotion and relegation.

95. Mr Mill submits that it would not be fair to allow The FA to depart from this representation in circumstances where South Shields and other clubs acted in reliance on it by participating in the 2019/20 season. To change the basis for participation in the 2019/20 season so fundamentally as to cancel promotion (and relegation) is such a new and different course as to amount to an abuse of power. It is conspicuously unfair and not justified by any sufficient countervailing public interest.
96. Mr Mill also invokes the doctrine of procedural legitimate expectation to make two further points. First, The FA was required to bear in mind its previous policy and the representation and give these weight, rather than merely act as if it had a general discretion to determine the basis for ending the 2019/20 playing season irrespective of the mandatory requirements under the extant governing instruments. Secondly, there was an obligation at common law, irrespective of the Standing Order 62 requirements, to consult South Shields and other affected clubs before purporting to take make the Council Decision.
97. We do not accept these submissions. We take the case of substantive legitimate expectation first. We accept that, if the Rules and NLS Regulations did not give The FA the power to amend the Rules and Regulations, the basis for a legitimate expectation argument would exist. In that event, Ground 1 would have succeeded and South Shields would not have not needed to have recourse to the doctrine of legitimate expectation. But the power to amend does exist and we have held that Rule B2(a) gives The FA the power to void a playing season and expunge its results during its course. In these circumstances, all participating clubs must be taken to have understood that The FA had the power to make the Council Decision and to make such consequential amendments to the NLS Regulations and Standardised Rules as were necessary to give effect to that decision. It is true that nobody (including The FA itself) would have contemplated this as a realistic possibility at the start of the 2019/20 season). That is because nobody could have foreseen that a cataclysmic event such as the Covid-19 pandemic would occur during the 2019/20 season. But that is not material to the question of whether The FA did not give a clear and unambiguous implied representation (or any kind of representation) that it would never exercise its power to amend so as to annul the 2019/20 season (or any other season) before it had been completed. The only legitimate expectation that any club could have had was that, if The FA exercised its power to amend the Rules or Regulations, it would do so in accordance with the Rules.
98. In our opinion, the substantive legitimate expectation argument fails at the first hurdle. There was no such clear and unambiguous representation as that for which Mr Mill contends. If that is wrong, and a clear representation was made, the substantive legitimate expectation argument would still fail. That is because the unprecedented circumstances arising out of the pandemic gave rise to a wider interest which overrode the legitimate expectation: see, for example, *United Policyholders Group v AG of Trinidad and Tobago* [2016] 1 WLR 3383 at [38] and [107] to [108].

99. As the governing body of football, The FA has a responsibility to consider and balance the interests of the football community as a whole. This can involve making difficult decisions which will please some and displease others. Taking such difficult decisions is one of the reasons why governing bodies exist. The importance of such a balancing process is vividly demonstrated by the facts of this case. If The FA had adopted the suspension option or the PPG option, there would presumably have been play offs in which some at least of the teams in Steps 3 to 7 would have been unable to compete. That is because, as Mr Ambler explains, their player contracts commonly are for a single playing season and do not extend over the summer period. If, contrary to our view, South Shields had the alleged legitimate expectation, it was outweighed and overridden by the void option, which had the merit of being workable and providing certainty and clarity.
100. As regards the procedural dimension of legitimate expectation, we reject the submissions that we have summarised at para 93 above. The first has nothing to do with procedural fairness (which lies at the heart of the procedural dimension of legitimate expectation). We reject the second for the same reasons as those we have given at paras 65 to 71 above for concluding that the ALC and the Council conducted fair and proper consultations before making their respective decisions.

Principle against retroactivity

101. Although this has been advanced by Mr Mill as a free-standing argument, in substance it is not distinct from the contractual arguments that we have considered at paras 80 to 90 above. We reject this argument for the same reasons as we have rejected the contractual arguments.

Estoppel

102. South Shields' submissions are as follows. First, Rule B2(a), NLS Regulations 2.3,4 and 5.2, Standardised Rule 12 and the mandated reflection of these rules in the NPL's regulations and rules, taken together and/or individually or in combination give rise to a clear and unequivocal representation that there would be promotion from Step 3 to Step 2 at the end of the 2019/20 season on the basis of sporting performance. Secondly, the Council Decision contradicts the substance of this representation. Thirdly, the representation was of a nature to induce South Shields and other participating clubs to alter their position on the faith of it and to their detriment, *inter alia* by incurring expenditure in order to participate in the 2019/20 playing season. Fourthly, there is no inequity in enforcing the estoppel claimed. On the contrary, equity and the public interest require that such a fundamental change to the basis for participation in a playing season should not be allowed to stand.

103. The estoppel argument fails at the first hurdle. For the reasons stated at para 94 above, the provisions relied on do not give rise to the alleged representation. All of them were subject to the possibility that they might be amended.

OVERALL CONCLUSION

104. For the reasons that we have given, we reject the various ways in which South Shields has sought to impugn the lawfulness of the Council Decision and the amendments of the NLS Regulations and the Standardised Rules which have been proposed in order to give effect to it. The suspension of football in March 2020 required The FA to do something about the 2019/20 playing season in relation to each of the leagues. In view of the differing composition of the leagues, The FA reasonably decided that there was no single solution that was suitable for all of them. In relation to Steps 3 to 7 of the NLS, it has not been suggested in these proceedings that it should have considered any options other than the three that it did consider. The FA was acutely conscious that, whatever it decided to do, it was bound to upset some of the Clubs affected by its decision. It chose the void option after careful consideration of the alternatives, particularly the PPG option and after due and proper consultation of the Clubs.

105. It is impossible not to feel sympathy for South Shields. It is a club that is being well managed under the leadership of Mr Geoffrey Thompson, its Executive Chairman, who has ambitions to steer the Club to promotion to the English Football League. He has invested heavily in the Club and has seen it promoted in three successive years and significant increases in match attendances. He has done much else besides, including making positive contributions to the local community through the Club's charitable foundation. At the date of the Council Decision, it was well placed to be promoted to Step 2.

106. But we must decide South Shields' claim by applying correct legal principles to the undisputed facts of the case. So doing, we are in no doubt that the claim must be dismissed.

107. We reserve the question of costs on which we have received no submissions from the parties. We invite them within 14 days to send to Sport Resolutions their submissions on how we should deal with costs.

Rt Hon Lord Dyson



Mr Charles Flint QC



Mr Andrew Green QC



05 June 2020