

What are clubs legal remedies if leagues are extended or decided against their wishes?

In this article, John Mehrzad QC, Head of Littleton Chambers' Sports Law Group, John Shea, Senior Associate in Lewis Silkin's Sport Business Sector Team and Doug Harmer, Partner at Oakwell Sports Advisory give their expert legal and loss quantification opinions about legal remedies available to Premier League and English Football League ("EFL") clubs adversely affected by the range of decisions that could be taken to conclude the 2019/20 season such as extending the season beyond 1st June, playing matches at neutral venues, terminating the season early and/or determining league positions based on new formulas such as a points per game basis.

This article will, first, set out the applicable corporate framework governing the Premier League's and EFL's ability to make decisions regarding the conclusion of the season; secondly, consider legal causes of action available to disgruntled clubs; thirdly, the legal remedies including the extent of damages potentially available to those clubs; and, finally, the forum where such disputes would be determined.

The governing corporate framework of the Premier League

The Football Association Premier League Limited

The "Premier League" (the "PL") is a private limited company owned by its 20 member clubs who make up that league at any one time.¹

Together with the Football Association (the "FA"), which holds a "Special Share" as "Special Shareholder", each PL club from time-to-time is a shareholder of that PL company, the Football Association Premier League Limited (company number 0271699).

The Premier League Articles of Association

The Premier League's latest Articles of Association (the "PL Articles"), passed by Special Resolution on 5 June 2019, sets out its governing corporate framework.²

As a Special Shareholder, the FA has special rights under the PL Articles and changes to specific matters such as the obligation to

adhere to the FA rules³, promotion to and relegation from the PL and any rules common to the PL⁴ and the EFL⁵ shall only be effective with the FA's written consent.⁶

The FA Board agreed back in March to indefinitely extend the season beyond 1st June and to suspend the season until no earlier than 30th April⁷, but any further proposals such as playing matches at neutral venues, terminating the season early or removing promotion and relegation will be subject to the FA's consent and, according to latest reports⁸, the FA will block any attempt to avoid relegation or to declare the season null and void.

The PL Rules

Section C of the Premier League Rules (the "PL Rules") sets out the framework for the PL league season.⁹

That section must be amended in order for the season to be extended under the proposed "Project Restart"¹⁰, which envisages the remaining fixtures being played at neutral venues, since Rule C.1 currently provides that each club shall play two league matches against each other club each Season at home and away.

Similarly, amendments to Section C of the PL Rules are likely to be necessary in order for the season to be terminated early such as the definition of "Season" which is currently defined in the PL Rules as "the period commencing on the date of the first League Match on the fixture list of the League's first team competition and ending on the date of the last".¹¹

Further amendments would also be required in order to determine league standings in a different way, such as on a points per game basis. Rule C.4, for instance, states that "The position of Clubs in the table shall be determined by the number of points scored in that Season, the Club having scored the highest number of points being at the top of the table and the Club having scored the lowest number of points being at the bottom."

3 Article 7.2.1(g)

4 Article 7.2.4(b)

5 Article 7.2.4(g)

6 Article 7.2.

7 <https://www.premierleague.com/news/1646728>

8 <https://www.thetimes.co.uk/article/fa-would-block-premier-league-attempt-to-abandon-relegation-tcb5vztbh>

9 The Premier League Handbook 2019-20: <https://resources.premierleague.com/premierleague/document/2020/04/17/049a315f-f4a8-4706-bcec-75ec9ddf7f73/2019-20-PL-Handbook-170420.pdf>

10 *The Times*, 25 April 2020: <https://www.thetimes.co.uk/article/premier-league-plan-for-project-restart-in-bid-to-resume-season-k18lzzvqx>

11 Rule A.1.169 of the PL Rules.

1 Premier League website [10 May 2020]: <https://www.premierleague.com/about>

2 Companies House website [10 May 2020]: <https://beta.companieshouse.gov.uk/company/02719699/filing-history>

Corporate procedure to extend or terminate the current Premier League season

The PL has discretion under Article 16.1 of the Articles to amend by “Resolution” its own PL Rules for the purposes of the organisation and management of that league.

A “Resolution” is defined in the Articles as a resolution which has been passed at a General Meeting by a majority of members under Article 17 or by a resolution of Members under Article 27.

A “Member” is defined as an Association Football club the name of which is entered in the register of Members as the holding of an ordinary share. Those are the current clubs in the PL, each of which has one vote under Article 34.

Article 17 sets out the rules relating to a “General Meeting” and also the time-period for notice to be given to Members in writing of a General Meeting depending on the number of Members who have requisitioned such a meeting.

Article 18.1.4 makes clear that at least twenty-one clear days’ notice must be given for any meeting at which it is proposed to amend the PL Rules.

That particular article means that it would now be practically impossible to reconvene a further meeting to extend the current PL season before 1st June if a “Resolution” is not passed in favour of “Project Restart” before then.

Article 27 provides that the same two-thirds of Members who are present or who vote by their Representative or by proxy at a General Meeting of which notice is duly given shall be required for the passing of all resolutions of the PL.

It follows from the corporate framework above that the various decisions that could be taken to conclude the PL season can only occur if the following procedural steps take place in order:

- The FA provides written consent.
- A meeting of the PL’s 20 clubs must then be convened to consider a Resolution.
- At that meeting, 14 out of the 20 clubs in the PL must then agree with that Resolution to that effect to be passed under the Articles.

The governing corporate framework of the EFL

The corporate framework of the EFL is very similar to the PL in that a general meeting between all member clubs must take place in order to consider any decision to conclude the EFL season and at that meeting a majority of member clubs must then agree in order for the changes to take effect.¹²

Causes of action

In broad terms, there are two routes for a PL club, EFL Club or group of clubs, disgruntled as a result of any decision taken to conclude the current season.

¹² Article 13 of the Articles of Association of the Football League Limited (The) <https://beta.companieshouse.gov.uk/company/00080612/filing-history/MzI0MDY4NDQyNWFKaXF6a2N4/document?format=pdf&download=0>

Breach of contract

First, there is a potential cause of action in contract.

Rule B.15 of the PL Rules provides that membership of the PL is an agreement between the PL and a club and between each club, including but not limited to the Articles, the FA Rules and the PL Rules.¹³

The clubs are, therefore, parties to a contract with the PL and each other. As such, if the PL does not follow its corporate framework in passing a Resolution, it will be in breach of contract.

There are very similar provisions contained within the EFL Regulations at Regulation 3.1.¹⁴

Further, PL Rule B.16 provides that in all matters the clubs and the PL shall behave towards each other with “*utmost good faith*”. It follows that any club which votes for or against a Resolution in a manner that is inconsistent with “*utmost good faith*” would also be in breach of contract.

Within a shareholder context (as applicable to the PL), “*utmost good faith*” means there is a fiduciary relationship between the parties.¹⁵ In other words, PL clubs are under an express duty to act in the PL’s best interests in terms of the PL Rules, or amendments to them, rather than their own interest.

For example, if clubs vote against determining league standings on a points per game basis in order to merely avoid relegation and its financial consequences, that reason would arguably be in breach of the “*utmost good faith*” duty, entitling other clubs to take action against them.

Once again, there is a very similar provision within the EFL Regulations at Regulation 3.4.¹⁶

Unfair prejudice

Secondly, disgruntled clubs have a potential cause of action as minority shareholders under s.994 of the Companies Act 2006.

A club, as a shareholder member of the PL or EFL, can object legally if the PL or EFL is operated in a way which is unfairly prejudicial to its interests.

Prejudicial conduct would be relatively easy to demonstrate if, for example, neutral venues are imposed and then clubs are relegated. Some, such as Brighton, Watford and Aston Villa (who are all threatened by relegation), have already publicly opposed the use of neutral venues since they view home advantage for fixtures (which is currently provided for in the PL Rules) as being part of fair competition to a PL season.¹⁷ Another example of prejudicial conduct would be if PL clubs are relegated or an EFL club is not promoted as a result of league standings being determined on a points per game basis.

¹³ Premier League Handbook 2019-20: <https://resources.premierleague.com/premierleague/document/2020/04/17/049a315f-f4a8-4706-bcec-75ec9ddf7f73/2019-20-PL-Handbook-170420.pdf>

¹⁴ <https://www.efl.com/-more/governance/efl-rules--regulations/section-2---membership/>

¹⁵ *F&C Alternative Investment Holdings Ltd v. Barthelemy* [2012] Ch 613 per Sales J (as he then was) at 255-259.

¹⁶ <https://www.efl.com/-more/governance/efl-rules--regulations/section-3---the-league/>

¹⁷ BBC Sport website [9 May 2020]: <https://www.bbc.co.uk/sport/football/52598311>

The key practical legal issue is whether the specific decision taken in the current Covid-19 crisis is unfair. The applicable test is an objective one – i.e. one that takes into account all the circumstances.

If the Articles have not been followed properly, unfairness will be readily established. However, a procedural oversight is probably unlikely given the current spotlight shone on the PL's and EFL's every move.

In the context of extending the season, more likely are arguments that clubs do not currently have fit and healthy playing squads, clubs and players have not agreed to extend playing contracts beyond 30th June so squads are not the same now compared to when pre-Covid-19 matches were played¹⁸ or compulsory insurance covering the risk of Covid-19 injury or death is now impossible to source at a cost-effective premium. If, on the other hand, leagues are ultimately terminated and final standings determined based on new formulas, the obvious arguments for clubs who suffer relegation or fail to achieve promotion as a result is that it is unfair to determine league positions in that fashion when some clubs would have played fewer games and each club would not have played each other twice.

Remedies

Injunction

In most cases, clubs disadvantaged by a decision to conclude the season will want it stopped in its tracks before it can take effect. In order to do so, interim injunctive relief is available to clubs as an equitable remedy for both an action for breach of contract or unfair prejudice.

To succeed with an interim injunction application, clubs would need to demonstrate¹⁹: there is a serious question to be tried (a very low threshold test demonstrating that its arguments are more than fanciful only), the balance of convenience is in their favour (such as that any prejudice they face outweighs that faced by other clubs), and damages are not an adequate remedy (which should be relatively straightforward since future losses for the applicant clubs would at that interim stage be hard to quantify²⁰).

There is a sting in the tale though. As part of an interim injunction application, applicant clubs must provide a cross-undertaking as to damages that the PL, EFL or other clubs may face if an injunction is granted. Given the PL has indicated that it (and, in practice, its clubs) may have to repay £762 million in broadcasting rights fees if the season is not completed²¹, any injunction that has that effect (or risk of that effect) would necessitate a cross-undertaking in the high, hundreds of millions of pounds. Not many clubs, even collectively, would be able to produce evidence of such sums being available.²²

Typically, an interim application will result in the end of the action since, if granted, the impugned actions are likely to be reconsidered and, if possible, remedied at a reconvened PL or EFL meeting at which an amended Resolution would be presented. Conversely,

18 Littleton Comment, "The Legal Realities of an Extension to the Football Season" [3 April 2020]: <https://littletonchambers.com/articles-webinars/john-mehrzad-qc-and-joe-bryan-on-the-legal-realities-of-an-extension-to-the-football-season/>

19 *American Cyanamid Co. v. Ethicon Ltd.*, [1975] AC 396 (HL)

20 See, for example, *Jones v. Welsh Rugby Union*, The Times, 6 March 1997

21 The Telegraph, 16 April 2020: <https://www.telegraph.co.uk/football/2020/04/16/premier-league-clubs-confident-will-not-have-repay-sky-sports/>

22 An ability to provide evidence for a cross-undertaking was a reason why an interim injunction was refused in *Phoenix v. FIA and FOM* [2002] EWHC 1028 (Ch).

if it is rejected, the applicant club may receive an indication that its argument does not give rise to a serious question in the first place.

Damages

In addition to, or instead of, an injunction application, a club may seek damages in a sum to be assessed. Whilst sporting integrity, fair competition and health and safety concerns have been raised as valid reasons why some clubs are against the "Project Restart" proposals, there is also a significant amount at stake financially, particularly for clubs at risk of relegation from the PL as the financial repercussions of relegation would be devastating.

In 2007, Sheffield United instigated a Premier League arbitration against West Ham for losses arising from West Ham's breach of the then PL Rules regarding third-party ownership of Carlos Tevez. Sheffield United claimed losses of over £30 million for loss of PL status, loss of the opportunity to remain in the PL (given the PL had found Tevez to be worth the equivalent to 3-points, which meant West Ham would have been relegated without him); reduced transfer fees, season ticket sales, merchandising and lost business opportunities.²³ That action settled for apparent an eight-figure sum.²⁴

Thirteen years on, relegation from the PL would be more financially devastating to a club. Expert analysis by Oakwell Sports Advisory – which would almost certainly be necessary to prove losses – indicates that a relegated club could see incremental revenue falls of around £75 million in the first year of relegation. The loss of broadcast receipts accounts for the largest majority of this, with a lower table, non-relegated PL club receiving approximately £105 million of total media revenues. This compares to total Championship distributions (including parachute payments) of something over £40 million in the first year of relegation. On top of this, however, an average PL club might generate an additional £30 million in other commercial and match day income. Oakwell's analysis indicates that a relegated club would expect to see this income fall by around a third, as crowds reduce and commercial partners retrench. Whilst there are a limited number of PL clubs that would be considered a safe bet to avoid relegation, over a three year period (the maximum timeframe for which a relegated club might continue to receive parachute payments), aggregate incremental losses stemming from relegation could exceed £250 million.²⁵ Importantly, however, these figures only represent a club's income losses. Relegated clubs are also likely to see considerable reductions in the value of their playing squads as they look to offload players in order to mitigate high wage costs no longer supported by revenues, conflating the financial pain of relegation.

Forum

So far, fans would be forgiven for thinking that they are more likely to see the theatre of the courtroom before any action being resumed in the so-called Theatre of Dreams. Unfortunately, legal dramas will take place behind closed doors in private, rather than in public.

23 For more on loss of chance, see Littleton Comment and Sheridans Backpage, "Claims by clubs in the event of a cancelled season" [7 May 2020]: <https://littletonchambers.com/articles-webinars/claims-by-clubs-in-the-event-of-a-cancelled-season/>

24 The settlement figure was apparently up to £20 million according to The Guardian [16 March 2009]: <https://www.theguardian.com/football/2009/mar/16/sheffield-united-west-ham-carlos-tevez>

25 Oakwell analysis / Companies House

Rule X.2.1 of the PL Rules provides that any dispute between clubs or a club and the PL shall be submitted to final and binding arbitration under those Rules, including a dispute by a relegated club provided the cause of action accrued whilst it was a member of the PL (which would be case in the present situation).

Rule X.25 makes clear that proceedings are confidential and any hearing shall be in private.

It is the forum of Premier League arbitration which would determine either a breach of contract or unfair prejudice petition. In 2010, Fulham presented an unfair prejudice petition in the High Court. At both first instance and on appeal, it was held that Fulham had entered into an arbitration agreement under the PL shareholders' agreement and an unfair prejudice petition brought in the civil courts would be stayed in favour of PL arbitration.²⁶

The position under the EFL Regulations is exactly the same.²⁷

Final Thoughts

There is still lots of uncertainty as to how the 2019/20 season will end up being concluded but it is certain that no matter what the outcome will be, there are going to be winners and losers potentially both on the football field and in an arbitration tribunal.

²⁶ *Fulham Football Club (1987) Ltd. v. Richards and the FA Premier League Limited*
[2012] 1WLR 1008.

²⁷ Regulation 95.

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