



Neutral Citation [2020] EWHC 1838 (Ch)

Case No: BL-2020-CDF-00007

**IN THE HIGH COURT OF JUSTICE  
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES  
BUSINESS LIST (ChD)**

**AND IN THE MATTER OF AN ARBITRATION  
ARBITRATION ACT 1996**

Sitting remotely at:  
The Cardiff Civil Justice Centre  
2 Park Street  
Cardiff CF10 1ET

Date: 13 July 2020

**Before:**

**THE HONOURABLE MR JUSTICE MARCUS SMITH**

BETWEEN:

**THE NEW SAINTS FC LIMITED**

Claimant

-and-

**(1) THE FOOTBALL ASSOCIATION OF WALES LIMITED  
(2) CONNAHS QUAY NOMADS FC LIMITED**

Defendants

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**Mr Hugh Sims, QC and Mr John Churchill** (instructed by **Harrison Clark Rickerbys Ltd**)  
for the Claimant.

**Ms Kate Gallafent, QC and Ms Celia Rooney** (instructed by **Loosemores Solicitors**) for the  
First Defendant.

The Second Defendant was unrepresented at the hearing on 8 July 2020.

Hearing date: 8 July 2020

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**Approved Judgment and Award**

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

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**Mr Justice Marcus Smith:**

**A. INTRODUCTION**

1. These are urgent proceedings brought by the Claimant, The New Saints FC Limited (**New Saints**<sup>1</sup>), against The Football Association of Wales Limited (**FA Wales**) and Connahs Quay Nomads FC Limited (**Nomads**).
2. The proceedings are urgent because they relate to a decision by FA Wales that Nomads should rank first, and New Saints second, in the football league in which both of these football clubs play, which is the **Cymru Premier League**. Winning this league (or ranking as highly as possible) is, of itself, a matter of importance for the clubs participating in it, but the ranking of the clubs has a greater significance than this. The winner of the Cymru Premier League is eligible to be nominated by FA Wales for the UEFA<sup>2</sup> Champions League; the runner up is eligible to be nominated by FA Wales for the (lesser) UEFA Europa League.
3. In the ordinary course, the ranking of clubs is determined by the performance of the various sides in football matches that take place over the season. I shall refer to an outcome determined in this way as a **sporting process**. Normally, this statement would be so trite as not to require saying. However, the COVID-19 pandemic has not exempted football from its effects, and FA Wales has decided that it is not possible to conclude the 2019/2020 season in the usual way. That decision is not under challenge in these proceedings. What is under challenge is the manner in which FA Wales has determined the ranking of clubs participating in (amongst other leagues) the Cymru Premier League given that the ordinary sporting process by way of which rankings would ordinarily be determined will not be followed.
4. It will be necessary to explain the operation of the Cymru Premier League, the decisions of FA Wales regarding the conclusion of the 2019/2020 season and the manner in which those decisions are challenged in greater detail in this Judgment. For present purposes, it is sufficient to understand that essentially what is in issue is the extent to which FA Wales has acted properly in substituting for a sporting process a **non-sporting process**, whereby a ranking based on criteria other than the results of the matches remaining to be played in the 2019/2020 season has been introduced.
5. The interest of New Saints is that, according to the decisions made by FA Wales, New Saints rank second in the Cymru Premier League for 2019/2020 when (as is not seriously under dispute), had different decisions been made, New Saints would either have ranked first or would have had a chance (even now, as will become clear) of ranking first. The interest of FA Wales is obviously as that of the (defendant) decision-maker. Nomads' interest is that, according to the decisions made by FA Wales, Nomads rank first in the Cymru Premier League, when, had different decisions been made by FA, they might not have done. For that reason – although Nomads' position was that

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<sup>1</sup> Annex 1 to this Judgment lists the **bolded** terms and abbreviations used in this Judgment, together with the paragraphs where such terms/abbreviations are first defined or used.

<sup>2</sup> I.e., the Union of European Football Associations.

they supported the decisions of FA Wales, and did not intend to take a particularly active part in these proceedings – I nevertheless ensured that Nomads were joined to the proceedings at an early stage. In the event, Nomads have assisted extremely constructively in these proceedings: they have submitted evidence<sup>3</sup> but did not see any reason in participating in the hearing before me on 8 July 2020, recognising that FA Wales bore the burden of defending its decisions and that they (Nomads) had really only been joined to ensure they were bound by the result if FA Wales’ defence should fail.

6. Through the good offices of FA Wales, other interested clubs have been notified of these proceedings. I have made clear that:
  - (1) I would join into the proceedings any interested club or other person expressing a desire to participate.
  - (2) I would not join clubs (or other persons) not expressing such a desire, even if it could be said that they had an interest in the outcome.<sup>4</sup> It seemed to me that this would only serve to increase the cost and complexity of the proceedings, to no practical benefit given the invitation described in paragraph 6(1) above.
  - (3) I would be prepared to consider any “informal” submissions from clubs or other persons having an interest. In the event, I have received, and have taken into account, submissions from a number of other clubs involved in Welsh football (not limited to clubs participating in the Cymru Premier League).
7. The urgency of these proceedings arises out of the fact that the nominations to UEFA that FA Wales must make must be made (at the latest) by 3 August 2020. If FA Wales’ decisions are not susceptible of challenge, then no time pressure arises and no urgency exists. The rankings of the clubs in the Cymru Premier League have, on the basis of these decisions, already been determined; and the nominations to UEFA could be made at once. However, if FA Wales’ decisions are, as a matter of law, impeachable, such that in order to be lawful additional football matches need to be played,<sup>5</sup> then timing does become an issue. The clubs in the Cymru Premier League – or at least some of them – would need to commence a process of training in order for their players to regain match fitness, and time would have to be found in order to enable these additional matches to be played.
8. Since it was obviously not possible to anticipate the outcome of these proceedings, I was concerned to ensure that the trial of these proceedings came on as quickly as possible, consistent with the overriding objective of fairness. I am grateful to both New

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<sup>3</sup> In particular, the evidence of Mr Jay Catton (**Catton 1**).

<sup>4</sup> Depending on how “interest” is defined, it is possible to say that a large number of other clubs had an interest or that the interest in FA Wales’ decisions was actually limited to New Saints and Nomads.

<sup>5</sup> This statement itself hides a number of complexities. Assuming, for the moment, that this were a judicial review (which, in form at least, it is not), then the most I could do would be to quash the decisions of FA Wales and remit the matter back to FA Wales for further consideration, which would be a matter for FA Wales. Given the time pressures and urgency that I have described, it would be necessary for FA Wales to move extremely quickly. As I made clear during the course of argument, it would be most unfortunate if, having expedited proceedings and put all under considerable pressure of time, FA Wales’ decisions were impeached but the outcome was that it was “too late” to change those decisions.

Saints and FA Wales, and their legal teams, for their very considerable efforts in enabling the trial to take place, as it did, on 8 July 2020.

9. The final point that needs to be made before proceeding to the substance of the dispute between the parties relates to jurisdiction. As framed in its Claim Form and Particulars of Claim, it was common ground between the parties that at least some of the matters raised by New Saints fell within the scope of the jurisdiction of the High Court of England and Wales. However, FA Wales contended (but this was not accepted by New Saints) that other matters raised by New Saints fell within the scope of an arbitration clause that was binding on FA Wales and on the clubs participating in the Cymru Premier League. FA Wales did not consider that it could (as the regulator for all of football in Wales) properly waive this arbitration clause, if applicable. For a time it looked as if a preliminary issue to determine the scope of my jurisdiction was inevitable. However, the parties agreed to nominate me (to the extent necessary) as arbitrator of any issues or disputes (if any) falling within the scope of any arbitration clause applicable to issues arising out of these proceedings, and the Chancellor of the High Court (having had the power delegated to him for this purpose by the Lord Chief Justice of England and Wales) confirmed (pursuant to section 93 of the Arbitration Act 1996) that I might make myself available to act as an arbitrator to the extent necessary for the purposes of resolving issues arising out of these proceedings.<sup>6</sup> I have done so, and the parties have, under an *ad hoc* arbitration agreement, appointed me as arbitrator for these purposes.
10. Nothing in this Judgment is to be taken as ruling on the extent or scope of any arbitration clause; nor do I say anything about whether any particular issue or issues falls within or without any arbitration clause. It may be that such questions will fall to be resolved at a later date: but I certainly do not deal with them in this Judgment.
11. The hearing took place over one (extended) day on 8 July 2020, with extensive written submissions beforehand. Although provision was made for the cross-examination of witnesses, as necessary, neither party availed themselves of this opportunity, and the witness statements filed by the parties all stand as evidence in the case. Additionally, there was a large amount of documentary material before me, including (but not limited to) the various rules and regulations prevailing and/or relevant to the issues before me. I shall, in the course of this Judgment, refer to many aspects of this material; however, the fact that I do not do so, should not be taken as an indication that I have not taken that material into account. I have: but this Judgment – particularly given the time frame in which it had to be completed – necessarily focuses on the evidence that was directly material to the facts and matters in issue before me.
12. Conversely, there were three areas raised from time-to-time by New Saints and FA Wales which I found less helpful and which I have tended to discount in this Judgment:
  - (1) The first such area related to the conduct of other football leagues in response to the COVID-19 pandemic. From time-to-time, the parties made reference to such conduct, in support of their arguments. Whilst, of course, the effects of COVID-19 have been felt worldwide and have affected many football leagues, those effects have been different; differently felt; and the reactions of the authorities (by

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<sup>6</sup> See the Chancellor's letter to me dated 26 June 2020.

which I mean the organs of government) different also. Moreover, the organisation, funding and rule structure of these other leagues is also different. For these reasons – whilst I am sure that there would be much to be learned from the experiences of others – for the purpose of these proceedings, I can derive little to no weight from the course of conduct adopted by a football league (or, indeed, other sporting organisation) in another jurisdiction.

- (2) The second such area relates to comments made by agents or employees of New Saints regarding the decisions made by FA Wales, relied upon by FA Wales as suggesting that their decisions (that is, the decisions of FA Wales) were (in the eyes of New Saints) reasonable or rational or both. It seems to me that these questions of reasonableness/rationality are questions for me. Whilst I am, inevitably, dependent on the factual assertions of all the parties (indeed, this Judgment can only be based on such evidence) the same does not go for expressions of opinion as to the rightness or wrongness of FA Wales' conduct. Those are matters for me.
  - (3) The third such area relates to speculation as to the motives behind certain conduct of FA Wales occurring after the decisions here under consideration were made. Thus, for instance, it was suggested that certain actions regarding access to training facilities were made, less with a view to furthering football in Wales and more as a reaction to this litigation. Even if true – as to which I express no view – I would not be assisted by such points.
13. The hearing on 8 July 2020 was in public: all parties were keen to stress that the arbitration element to these proceedings, described in paragraph 9 above, did not make it any less so.

## **B. ORGANISATION OF ASSOCIATION FOOTBALL IN WALES<sup>7</sup>**

14. FA Wales is a private limited company incorporated in Wales. It is, and at all material times was, the governing body of association football in Wales and responsible for overseeing all aspects of the amateur and professional game in its territory. It will be necessary, in due course, to consider the precise legal relations between FA Wales and its members. However, the ordinary operation of the football overseen by FA Wales was uncontentious, and the following description represents what was common ground between the parties.
15. As in most footballing territories, FA Wales operates a “pyramid” scheme which comprises multiple leagues. These leagues include members of the football community at all levels, from professional players who are paid salaries or wages to participants in grassroots football who compete for recreational purposes only.
16. This structure – which I shall refer to as the **Pyramid League Scheme** – comprises eleven different tiers of men's football, in which a total of over 800 clubs compete. There is a similar, multi-tiered, structure for women's football. The following

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<sup>7</sup> There are rules and regulations determining how the various leagues operate. This Section is intended as an uncontroversial statement as how they do, by way of background. I have not referenced the relevant rules and regulations.



description focusses on the top-tiers of the men's game. That is because these proceedings specifically relate to the top-tier in the men's game, the Cymru Premier League. However, I should stress from the outset that I am conscious that the decisions of FA Wales under challenge in these proceedings needed appropriately to take account of (i) the women's game and (ii) the lower-tiers of the men's game. The fact that, purely for the sake of brevity, I set out in more granular detail specific parts of the Pyramid League Scheme does not mean that I have left these other parts of the Pyramid League Scheme out of account. As is apparent from this judgment, they have formed a part of my consideration.

17. Turning, then, to the top-tiers of the men's game, the structure of the pyramid is as follows:

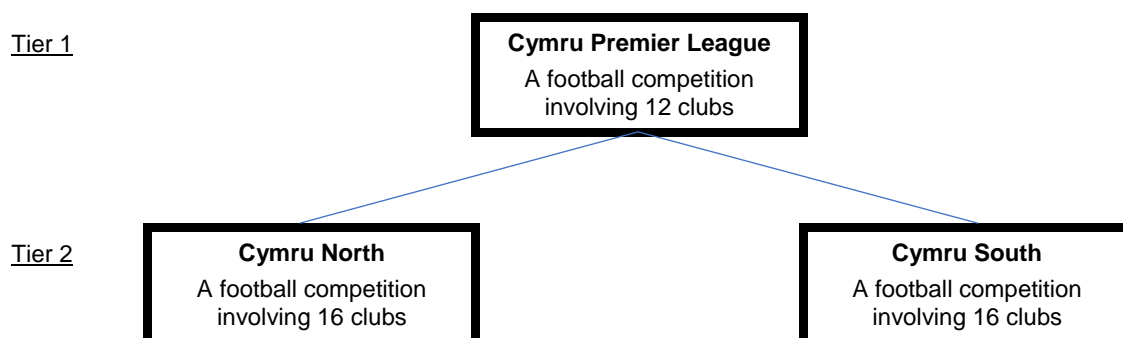


Table 1: Tiers 1 and 2 of the Pyramid League Scheme

18. There are a number of tiers below Tiers 1 and 2. There is a similar – albeit numerically smaller – tiered scheme for the women's game. Between competitions and leagues there are rules for the promotion and relegation of clubs.
19. Turning to the Cymru Premier League more specifically, the 12 clubs participating in the 2019/2020 season were:
- (1) The Claimant, New Saints.
  - (2) The Second Defendant, Nomads.
  - (3) **Aberystwyth** Town.
  - (4) Airbus UK **Broughton**.
  - (5) **Bala** Town.
  - (6) **Barry** Town United.
  - (7) **Caernarfon** Town.
  - (8) **Cardiff Met** University.
  - (9) **Carmarthen** Town.
  - (10) **Cefn Druids**.

- (11) **Newtown.**
- (12) **Penybont.**
20. The Cymru Premier League season operates in the following way, around a season split into two “phases”:
- (1) In **Phase 1**, ordinarily running from August to mid-January, 22 matches are played, with each team playing every other side twice (once at home and once away). For each game, points are awarded – three for a win, one for a draw, none for a loss.
  - (2) At the end of Phase 1, the league splits into two. The top six clubs form the **Championship Conference** and the bottom six the **Playoff Conference**.
  - (3) **Phase 2** ordinarily begins at the start of February and runs to the end of April. Each side plays the other five clubs in their particular conference, again once home and once away. The points scored during the course of Phase 1 are brought forward into Phase 2.
21. In the course of an ordinary season, each club in the Cymru Premier League will have played 32 matches, 22 in Phase 1 and 10 in Phase 2. The rationale for two phases – according to the Chief Executive Officer of FA Wales, Mr Jonathan Ford<sup>8</sup> – “is to provide stronger competition for the best six clubs more frequently, which better prepares them for European competition”.
22. At the end of the season:
- (1) The side finishing at the top of the Championship Conference will be eligible to be nominated by FA Wales for the UEFA Champions League.
  - (2) The side finishing in second place in the Championship Conference will be eligible to be nominated by FA Wales for the UEFA Europa League.
  - (3) The clubs finishing in third to seventh place (i.e., the bottom four clubs in the Championship Conference and the winner of the Playoff Conference) compete in end of season play-offs for a further place in the UEFA Europa League.<sup>9</sup>

It must be noted that performance does not guarantee a place in either the UEFA Champions League or the UEFA Europa League. There are various other requirements – notably the need to have a UEFA Club competition licence – which have to be satisfied. Satisfaction of these requirements is by no means a foregone conclusion. For instance, because of the stringent criteria and associated costs of compliance, not all clubs choose to obtain, or will obtain if they seek it, a UEFA Club competition licence.<sup>10</sup>

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<sup>8</sup> Mr Ford gave one witness statement in these proceedings, dated 29 June 2020 (**Ford 1**). This explanation is at Ford 1/§14.

<sup>9</sup> There is a further place for the club winning a knockout tournament in Wales.

<sup>10</sup> Ford 1/§16.

- (4) The bottom two clubs in the Playoff Conference will be relegated, and replaced (in the next season) by the top club from Cymru North and the top club from Cymru South.<sup>11</sup>

### C. THE DECISIONS TO CURTAIL THE 2019/2020 SEASON

23. In response to the COVID-19 pandemic, FA Wales made the following decisions:

- (1) On 13 March 2020, FA Wales decided to suspend all football activity in its territory that was subject to its jurisdiction. To be clear, that involved suspending from 13 March 2020 all games played under the Pyramid League Scheme, including (but not limited to) those in the Cymru Premier League.
- (2) On 19 May 2020, FA Wales decided that it was unable to complete the 2019/2020 season. To be clear, this decision was essentially a negative one. It involved a decision – taking account, amongst other things, the continued suspension of football – that the 2019/2020 season could not be completed in accordance with the processes that would ordinarily apply. Put another way, the decision involved a positive decision to resolve the footballing issues arising out of the COVID-19 pandemic and associated suspension of games by way of extraordinary means. The timing of this decision – as I shall explain – was informed by the need to tell UEFA of FA Wales’ plans for the conclusion of the 2019/2020 season.
- (3) Also on 19 May 2020, and really as part of the same process, FA Wales decided:
- (a) That it was not feasible to re-start the Cymru Premier League season in another, alternative, format. To be clear, this involved a decision not to attempt to complete the season by playing a number of football matches during the remainder of the season, albeit not those matches that would ordinarily be played, the results of which would determine (some or all of) the rankings within the Cymru Premier League and (some or all of) the end of season outcomes described in paragraph 22 above.
- (b) That it was appropriate to adopt an “unweighted points-per-match” solution in order to produce final standings for the Cymru Premier League. Essentially, this solution involved taking the number of points accumulated by each club in the league (including Phase 1 matches) and dividing those points by the number of matches played. This would result in an average – the number of points won by each club per game (the “points per game” or **PPG**) –, which average would determine the ranking of the club. The outcome of this decision was:

Position	Club	Conference	Matches played	Goal difference	Points	PPG
1	Nomads	Championship	26	28	56	2.15
2	New Saints	Championship	26	42	52	2.00
3	Bala Town	Championship	26	30	49	1.88

<sup>11</sup> Again, eligibility for promotion depends also on other regulatory requirements.

4	Barry Town	Championship	25	6	42	1.68
5	Caernarfon Town	Championship	26	-2	38	1.46
6	Newtown	Championship	25	-5	35	1.40
7	Cardiff Met	Playoff	25	1	35	1.40
8	Cefn Druids	Playoff	25	-2	35	1.40
9	Aberystwyth Town	Playoff	26	-19	27	1.04
10	Penybont	Playoff	25	-19	21	0.84
11	Carmarthen Town	Playoff	25	-21	18	0.72
12	Broughton	Playoff	26	-39	17	0.65

Table 2: Ranking of clubs in the Cymru Premier League for the 2019/2020 season according to the PPG system

Two points, by way of explanation, should be made:

- (i) Where the PPG is the same, ranking is determined by goal difference (which is the difference between aggregate goals scored and aggregate goals conceded). It was goal difference that determined the rankings of Cardiff Met (at number 7, with a goal difference of 1) and Cefn Druids (at number 8, with a goal difference of -2), who have the same PPG of 1.40.
- (ii) It is significant whether a club is playing in the Championship Conference or the Playoff Conference. Even under ordinary conditions, no side in the Playoff Conference can finish higher than seventh place, even if it obtains more points, at the end of Phase 1 and Phase 2 combined, than club(s) in the Championship Conference. Thus, even though Cardiff Met (at number 7) has the same PPG and a better goal difference than Newtown (at number 6), because Newtown is in the Championship Conference and Cardiff Met in the Playoff Conference, Newtown ranks higher.

24. On the basis of these decisions:

- (1) Nomads would be eligible to be nominated by FA Wales for the UEFA Champions League.
- (2) New Saints would be eligible to be nominated by FA Wales for the UEFA Europa League.
- (3) Bala Town would be eligible to be nominated by FA Wales for the UEFA Europa League. This would be because one effect of the PPG approach would be to determine the outcome of the play-offs referred to in paragraph 22(3) above also.

- (4) Carmarthen and Broughton would be relegated.<sup>12</sup>
25. On 24 April 2020, UEFA published *Guidelines on eligibility principles for 2020/21 UEFA Club Competitions – COVID 19* (the **UEFA COVID Guidelines**). These guidelines sought to provide guidance as to how to reconcile one of UEFA’s core principles – namely that participation in its competitions be on “sporting merit” – with the disruption to the 2019/2020 footballing season across Europe caused by the COVID 19 pandemic. These guidelines obliged national football associations like FA Wales to communicate to UEFA their plans regarding the remainder of the 2019/2020 season by 25 May 2020.
26. It will be necessary to consider the UEFA COVID Guidelines in greater detail below. Clearly, however, the UEFA COVID Guidelines provided an important framework within which the Decisions were reached and explains why those Decisions were made on 19 May 2020, shortly before the 25 May 2020 deadline set by the guidelines.
27. FA Wales’ response – signed by Mr Ford – was dated 25 May 2020. It is necessary to set out the terms of this letter (the **FA Wales Response to UEFA**) quite fully:

“I write further to [the UEFA COVID Guidelines], which was sent to National Associations on 24 April 2020.

Football in Wales was suspended by [FA Wales] on Friday 13 March 2020 and it has been suspended since this date. The United Kingdom went into lockdown on Monday 23 March and although some restrictions in England have been lifted, Wales remains in a lockdown period and full-team football training and matches have remained forbidden since then.

A written statement from Dafydd Elis Thomas, the Deputy Minister for Culture, Sport and Tourism in Wales was released on 21 May 2020 stating:

“The Welsh coronavirus restrictions require everyone to work from home where possible; and where that is not possible, employers must take all reasonable measures to comply with the physical distancing duty. In a professional sporting context, this means that training for our professional sportspeople can continue provided the clubs – as employers – can take all reasonable measures to maintain physical distancing in the workplace, whether that’s at a training ground or at a stadium.”

The statement specifically refers to Cardiff City and Swansea City Football Clubs, which are located in Wales, but participate in the English second division – known as The Championship and administered by the English Football League (The EFL).

The EFL has provided guidance to clubs to support their return to training from 25 May 2020. This guidance provides that football clubs should make a phased return to first team training when it is safe to do so, based on medical and scientific advice and includes COVID-19 testing twice per week at the cost of £10,500 per week per club. The EFL has produced a series of uniform operating procedures, applicable to all clubs, to ensure players and staff are returning to first team training in as safe an environment as possible.

We provide this new information to you in order to be transparent about the latest Welsh Government statement, but we do not believe it to be relevant in respect of the recent decisions

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<sup>12</sup> Although I do not understand a decision to this effect to have been taken, at least at the meetings I have described.

made by [FA Wales] **Board of Directors** two days earlier [i.e. a reference to the meeting on 19 May 2020, at which the Decisions were made], which I shall now advise upon.

[FA Wales] consulted with its relevant clubs and there was very little appetite in continuing with the remaining 39 Cymru Premier League matches or 15 Welsh Premier Women's League matches. Importantly, no club committed to paying any of the significant additional costs which were highly likely to be incurred in taking new Health and Safety measures in order to comply with Government restrictions, medical and scientific advice and the return to training and play protocols being developed by [FA Wales].

Furthermore, 100% of League Clubs expressed financial concerns regarding cash-flow or their long-term financial stability if the remaining League matches had to be played "behind closed doors". An estimated average net loss of £48,000 per Cymru Premier Club was disclosed to [FA Wales] for the remainder of the season and this figure was without factoring in any additional costs in taking new Health and Safety measures.

Acknowledging the significant costs to complete the season and without additional COVID-19 budget to pay for the additional operational costs required to comply with medical and scientific advice, the...Board of Directors, which met on Tuesday 19 May 2020, were unanimous in their decision that there are specific economic and financial justifications, including those set out above, which would make continuing the season to its conclusion financially imprudent or which could put at risk the long-term financial stability of the Clubs and/or the relevant National Leagues.

Furthermore, the...Board of Directors discussed that the Welsh Government lockdown measures, which currently prohibit Cymru Premier League and Welsh Premier Women's League Clubs (which utilise a mix of professional and amateur players) from returning to full training and/or playing matches, were also justification to prematurely terminate the season.

The Board noted that the [FA Wales] Head of Medical Services was of the opinion that team training and conditioning time should be six weeks for such a condensed fixture schedule, although the Clubs indicated that this could be no less than three weeks. When reviewing the calendar based upon this information, the Board of Directors were unanimous in their decision that there was an existence of an official order prohibiting sports events, so that the Cymru Premier League and Welsh Premier Women's League would be highly unlikely to be completed before the 20 July UEFA deadline and that consequently, it would no longer be practical to wait for a final position from the Welsh Government and that public health considerations mean that the Cymru Premier League and Welsh Premier Women's League were both at high risk of not being completed.

Decisions: On Tuesday 19 May 2020, [the] Board of Directors made the following decisions;

- The [Cymru Premier League] is to be prematurely terminated with immediate effect as the current Welsh Government lockdown measures make it highly unlikely to be completed before a date that would make it possible to complete the current season before the UEFA deadline. Furthermore, there are specific economic and financial justifications which would make continuing the season to its conclusion financially imprudent or which could put at risk the long-term financial stability of the domestic competition and its clubs.
- The end of season Play-Off matches are to be prematurely terminated for the same reasons. (Please note that in Wales, the winner of the Play-Off matches normally receives the N3 UEFA Club Competition nomination in accordance with the UEFA Europa Regulation 3.03.)

- The Board reviewed all alternative options but agreed that there was no suitable alternative format available and that the same challenges for completing 39 games were applicable in any other alternative format.
- All other men's and women's adult Leagues in Wales are to be prematurely terminated for the same reasons.
- Having considered various options, it was agreed that an unweighted points per game (PPG) method would be applied to determine the final standings of all National Leagues (Men's Tiers 1-4 and Welsh Premier Women's League).
- The League's UEFA club competition places were thus determined in accordance with the final League tables...and the relevant UEFA Club Competition Regulations as follows:
  - UEFA Champions League: N1 Connah's Quay Nomads
  - UEFA Europa League: N2 The New Saints
  - UEFA Europa League: N3 Bala Town
  - UEFA Women's Champions League: Swansea City Ladies
- The Board reserved the right to further consider promotion and relegation matters and no commitments were made in this regard.

...

The FAW Board of Directors made these decisions whilst fully taking into account the [UEFA COVID Guidelines]. The [Board of Director's] method for selecting clubs for the UEFA club competitions 2020/21 was based on sporting merit in the 2019/20 domestic competitions and the procedure was objective, transparent and non-discriminatory principles, having regard to the specific circumstances of each competition.

In addition, the [Board of Directors] made these decisions as they are the relevant competent body at domestic level and have broad relevant powers under [FA Wales'] Articles of Association and Rules.

Finally, I should stress that the [Board of Directors] shared UEFA's view that the health of players and others involved in football should remain the primary concern at this time.

If you require any further details or have any questions, please do not hesitate to contact me."

## **D. THE CHALLENGE TO THE DECISIONS BY NEW SAINTS**

### **(1) The decisions under review**

28. By these proceedings, New Saints seek to challenge two decisions of FA Wales. These have been referred to by New Saints as **Decision 2** and **Decision 3**. Specifically:
- (1) Decision 2 concerns the decision – described in paragraph 23(3)(a) above – not to re-start the Cymru Premier League season in another, alternative, format.
  - (2) Decision 3 concerns the decision – described in paragraph 23(3)(b) above – to use the PPG system to determine rankings.
29. What New Saints call **Decision 1** – the decision referred to in paragraph 23(2) above – that the season could not be completed in accordance with the processes that would

ordinarily apply was and is not challenged by New Saints. Also not challenged is what I shall term **Decision 0**, namely the decision (described in paragraph 23(1) above), to suspend the season. (Actually, there were a series of such decisions, but nothing turns on this.)

30. I adopt these terms for the purposes of this Judgment, but with the following *caveat*. It seems to me that I must view Decision 2 and Decision 3 in their proper context, which context includes Decision 0 and Decision 1. Thus, for instance, had Decision 0 and Decision 1 never been made, and the season was progressing unimpaired, it would (I strongly suspect) be impossible for FA Wales to justify Decision 2 and/or Decision 3. But, equally, it seems to me that I must proceed on the basis (given that they have not been challenged) that Decision 0 and Decision 1 were properly made and cannot be revisited by the back door in these proceedings. They represent, in the most fundamental sense, the backdrop against which Decision 2 and Decision 3 were made and against which those decisions must be assessed.
31. Furthermore, there a nexus between Decision 2 and Decision 3. Were it the case that it would have been easily possible to complete all outstanding matches of the season within a compressed timetable, then not only is this relevant to the lawfulness of Decision 2, but also to Decision 3. It is difficult to see how Decision 3 could be defended, if Decision 2 were unlawful because the 2019/2020 season could – without material detriment – be completed by way of a sporting process. On the other hand, even if Decision 2 were unimpeachable, Decision 3 might be attacked on the basis that the PPG system was in material respects inferior to other (non-sporting process based) forms of ranking.
32. The last decision that I should mention is **Decision 2A**. Decision 2A<sup>13</sup> is essentially negative in nature. It concerns FA Wales’ failure to review Decision 2 and Decision 3 in light of changed circumstances or a likely change in circumstance. I consider that it is appropriate to deal with Decision 2A in this Judgment, albeit that I consider that (for reasons that I articulate in Section K below) I need to proceed with a high degree of caution when considering this particular challenge to FA Wales’ decision making.

## (2) The basis for the challenge to the decisions

33. Against this background, Decision 2, Decision 3 and Decision 2A are challenged by New Saints. It was FA Wales’ position that principles of public law and judicial review could be read across into this case as the basis for determining matters at issue between the parties. Paragraph 7 of FA Wales’ Points of Defence states:

“[FA Wales] accepts that it is required, in relation to its decision-making pursuant to its regulatory functions under the Rules, to act lawfully in accordance with those Rules; to act fairly in a procedural sense (and in accordance with natural justice); on the basis of only relevant considerations, on a sound basis in fact, and in accordance with legitimate expectations; and reasonably (in the sense of rationally, rather than perversely, arbitrarily or capriciously). It denies that insofar as such a duty is implied into the contract between [FA Wales] and its Members (including [New Saints]) that it owes an obligation in contract, sounding in damages, that its actions will take a particular form or meet a particular standard.”

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<sup>13</sup> Which was inserted by amendment into New Saints Amended Points of Claim at paragraph 91.



34. It was FA Wales’ position that the rules of a judicial review arose out of the essentially contractual nature of the relations between FA Wales and its Members.<sup>14</sup>

35. Although New Saints accepted that public law was relevant for the purposes of determining this dispute, there was an essential disagreement between the parties as to the interplay between public and private law, and the extent to which public law contained the entirety of the principles that I should use in determining this dispute. Paragraph 3.3 of New Saints’ Points of Reply states:

“Whilst [FA Wales] seeks to characterise the dispute as solely a public law challenge..., this ignores the fact that whilst public law considerations will fall to be relevant in assessing the exercise of discretion within contractual powers: (i) the terms of “the Rules” as a contract will fall to be considered first, in determining the existence and scope of the contractual discretion; (ii) breaches of contract may be established which do not turn on the exercise of contractual discretion or any public law principle; and (iii) this is not solely a challenge to be measured by reference to JR principles, though that forms part of it.”

36. In other words, New Saints contended that any principles of public law that might be read across into or by implication out of the contractual relations between FA Wales and its Members must give way to any more specific form of agreement as to how the 2019/2020 season of the Cymru Football League was to end. More specifically, in their written submissions, New Saints contended that:

- (1) Generally speaking, the starting point was what the parties had agreed in the contract subsisting between them. Although (as will be seen) the “contract” between FA Wales and its members is about as far from a bilateral contract as it is possible to be – comprising the articles of association of a company<sup>15</sup> and various tiered rules and regulations made pursuant to those articles – that was the starting point in this case too.<sup>16</sup> In short, it was the court’s duty to construe and apply the contract, and this was a “hard-edged matter of law”.<sup>17</sup>
- (2) Absent such a “hard-edged matter of law”, there was the duty of a contractual association to act fairly, reasonably and rationally in accordance with its rules, implied as a matter of law<sup>18</sup> As New Saints rightly note, this implied term comes

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<sup>14</sup> It may be that these rules arise not merely out of the contract, but in some extra-contractual way also: see the discussion in Beloff, Kerr, Demetriou and Beloff, *Sports Law*, 2<sup>nd</sup> ed (2012) at [2.72] to [2.76]. In paragraph 6 of FA Wales’ Points of Defence, FA Wales referred to this as “the Court’s inherent supervisory jurisdiction to review the actions of a sports governing body on the grounds which would be applied to public bodies”. It will be necessary to touch upon this “inherent supervisory jurisdiction” later on in this Judgment.

<sup>15</sup> The articles of association of a company constitute a contract between the company and its members: see, now, section 33(1) of the Companies Act 2006, which reflects prior provisions in earlier Companies Acts and the common law. Strictly speaking, neither New Saints nor Nomads were party to this contract because they were not shareholders.

<sup>16</sup> Paragraph 12 of New Saints’ written submissions.

<sup>17</sup> To quote from paragraph 12 of New Saints’ written submissions.

<sup>18</sup> *Bradley v. The Jockey Club*, [2005] EWCA Civ 1056; *Park Promotion Ltd trading as Pontypool Rugby Football Club v. The Welsh Rugby Union Ltd*, [2012] EWHC 1919 (QB). See also paragraph 13 of New Saints’ written submissions.

very close to public law tests of rationality and proportionality.<sup>19</sup> The test for rationality that New Saints invited me to apply was this:<sup>20</sup>

“A test of rationality applies a minimum objective standard to the relevant person’s mental processes. It imports a requirement of good faith, a requirement that there should be some logical connection between the evidence and the ostensible reasons for the decision, and (which will usually amount to the same thing) an absence of arbitrariness, of capriciousness or of reasoning so outrageous in its defiance of logic as to be perverse.”

37. New Saints invited me to consider the law as it applied in this case on two levels: “level 1”, the hard-edged, strict contractual approach described in paragraph 36(1) above; and “level 2”, the more “public law” oriented principles considered in paragraph 36(2) above.
38. It seems to me that this approach must be the correct one and – although I shall try to eschew the labels “level 1” and “level 2” – that is the approach I will essentially follow. The reason why I am unwilling to adopt these terms is because (as it seems to me) they are too unspecific to be properly helpful. It seems to me to be more appropriate to articulate the grounds of New Saints’ challenge to Decisions 2 and 3 more specifically by reference to the points taken in the pleadings and in the written submissions.<sup>21</sup> I do so in the next section (Section D(3) below).

### (3) Approach and grounds of challenge

39. The contractual provisions on which New Saints relied were contained in the specific rules governing the operation of the 2019/2020 Cymru Premier League Season. Clearly, it will be necessary to consider them, but they cannot be considered without being set in the context of the (hierarchically higher) rules pursuant to which they were made. Obviously, when construing a contract or a contractual provision, the entire contract must be considered. This is done, in fairly abstract terms, in Section E below.
40. Thereafter, the contentions advanced by New Saints are considered under five broad heads, as follows:
- (1) *Specific contractual provision.* If and to the extent that this case falls within and/or is governed by specific contractual terms that inform or lead to a particular outcome, then those terms must be given effect to. It follows that these provisions must be considered first. These terms are considered in Section F below. This first head is explicitly a “level 1” case, to use New Saints’ terminology.

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<sup>19</sup> See paragraphs 15 and 16 of New Saints’ written submissions.

<sup>20</sup> Paragraph 16 of New Saints’ written submissions, relying upon *Hayes v. Willoughby*, [2013] UKSC 17 at [14] and *Braganza v. BP Shipping Ltd*, [2015] UKSC 17 at [23].

<sup>21</sup> This is absolutely not a criticism, but it seemed to me that there was – over the short period in which this case was commenced and heard – a shift in emphasis on the part of New Saints. The original Points of Claim seem to me to take a much more “public law” oriented approach than the Points of Reply or the written submissions, which place more emphasis on contractual arguments. Given the pressure under which both legal teams were working, such evolution in argument is scarcely surprising. However, none of the points originally articulated by New Saints were abandoned (and again, no criticism is made) and I consider it necessary to deal with all points raised by New Saints, even if some of them were taking a “back seat” by the time of the hearing.

- (2) *Ultra vires*. This second head – *ultra vires* – is harder to classify. New Saints contended that this point was a “level 1” case of a clear contractual limitation on FA Wales’ powers, whereas FA Wales submitted that the point was more akin to an error of law (as understood in a public law sense). For reasons that will become clear, I consider this to be a case best described as a case of *vires* – where FA Wales were acting outwith their powers. These powers were, however, not public law powers but limitations arising out of the “contract” between FA Wales and its members. That renders the point much more a “level 1” point, in that FA Wales were constrained by the “contract” from doing certain things. Subject to the foregoing explanation, I intend to use the term *ultra vires* to describe this point.

It was contended by New Saints that both Decision 2 and Decision 3 were *ultra vires* FA Wales. Essentially, this was because – according to New Saints – there was a failure on the part of FA Wales to comply with UEFA’s rules, and specifically the UEFA COVID Guidance that I have already referred to. This issue requires consideration of the structure and organisation of FA Wales and the scope of its decision-making power, both as regards the rules constituting it and as regards its relationship with UEFA itself. I shall refer to this legal material compendiously as the **Rules**. The nature of the Rules and the question of *vires* are considered in Section G below.

- (3) *Procedural irregularity and abdication of decision-making responsibility*. Here the contention appeared to be that, in respect of Decision 2, the board of FA Wales had failed to consider the “alternative format” proposed by New Saints and had instead simply endorsed or ratified the decision of another body within the FA Wales organisation. This point was termed the “rubber stamp” point by FA Wales, which New Saints contended was a misdescription of the (limited) point that they were in fact making. As will be described, the Decisions were considered at two levels within FA Wales on 18 and 19 May 2020. New Saints’ point was simply that, at whichever meeting the Decisions were reached, they were flawed and that there was no prospect of rectifying through the later meeting a deficiency in the earlier one. I shall, of course, consider the point in this light, but it inevitably involves considering the process by which Decision 2 was reached as a matter of FA Wales’ internal organisation, including the questions of “rubber stamping” that New Saints said they were eschewing. This head is considered in Section H below.
- (4) *Irrational and lacking in transparency*. That Decisions 2 and 3 were “irrational and lacking in transparency” and/or were otherwise unreasonable. Apart from the question of transparency, which appears on its face to be a question of procedural irregularity, this is a “merits” challenge to Decisions 2 and 3. Where a decision of a public body is under review, merits challenges are only permissible within defined parameters, and the reviewing court must be astute to respect the role of the public body actually making the decision.<sup>22</sup> As was uncontentious between the parties, a similar approach applies to bodies like FA Wales, which carries out functions that might be said to be analogous to public law functions in terms of

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<sup>22</sup> See Fordham, *Judicial Review Handbook*, 6<sup>th</sup> ed (2012) at P15 (**Fordham**) (“The forbidden method”).

their regulatory purpose and effect. These questions are considered further in Section I below.

- (5) *Breach of legitimate expectations.* Under this head falls the contention that Decisions 2 and 3 were “contrary to the legitimate expectations of [New Saints]”.<sup>23</sup> This is considered further in Section J below.
- (6) *Failure to revisit decisions made in light of changed circumstance.* This is the challenge to what is referred to as Decision 2A.<sup>24</sup> It is considered in Section K below.

Heads 3, 4 and 5 thus fall squarely into New Saints’ “level 2” and have a distinct public law flavour. Indeed, as regards these points, I have drawn substantially on the “public law” analysis of the points being taken by New Saints put forward by FA Wales.<sup>25</sup> Having considered the submissions of both parties, both oral and written, I am satisfied that this framework best enables me to resolve the many points put forward by the parties.

## **E. THE CONTRACTUAL FRAMEWORK**

### **(1) The relevant provisions**

41. The relevant powers of FA Wales and its organisational structure are set out in the following documents and provisions.

#### **(a) *The Articles of Association***

42. As a private limited company incorporated in Wales, the rules governing FA Wales’ internal affairs are detailed in its Articles of Association (the **Articles**). As I have noted,<sup>26</sup> these constitute a contract between the company and its shareholders, but this was a contract to which neither New Saints nor Nomads were a party.

#### **(b) *The Board of Directors***

43. I have tended to refer to the directors acting *qua* directors as the Board of Directors, but this is not actually a term used in the Articles. Article 4 of the Articles provides as follows:

“4.1 The directors are responsible for the management of the Association’s business, for which purpose they may exercise all the powers of the Association.

4.2 The directors shall act upon the Rules so far as the same are consistent with these Articles. If any conflict or ambiguity arises between these Articles and the Rules, these Articles shall prevail.”

44. Article 2.1 of the Articles contains various defined terms. In particular:

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<sup>23</sup> New Saints’ Amended Particulars of Claim at paragraph 93.

<sup>24</sup> See paragraph 32 above.

<sup>25</sup> I have drawn substantially on FA Wales’ analysis in paragraph 84 of its Points of Defence.

<sup>26</sup> See footnote 15 above.

- (1) “**director**” is defined as “a director of [FA Wales], and includes any person occupying the position of director, by whatever name called”. As the material times, the directors of FA Wales were:<sup>27</sup>
- (a) Mr Ford.
  - (b) A Mr Steve Dalton.
  - (c) A Mr Tim Naylor.
  - (d) A Dr Carol Bell.
  - (e) A Mr Kieran O’Connor.
  - (f) A Mr Steve Williams.
  - (g) A Mr Mike Jones.
  - (h) A Mr Phil Woosnam.
  - (i) A Mr David Cole.
  - (j) A Mr David Hinton Jones.
  - (k) A Mr Will Williams.
- (2) “Rules” is defined as “the rules of [FA Wales] as exist from time to time made by the Members of the Council and those area associations, leagues and clubs admitted into (non-shareholding) membership of the Association by the Council”. I shall refer to these Rules as the **FA Wales Rules**.

(c) *The FA Wales Rules*

45. I am unclear as to exactly how the FA Wales Rules actually came into being, since there is a circularity in the Articles: the FA Wales Rules are made by the “Members of the Council and those area associations, leagues and clubs admitted into (non-shareholding) membership of the Association by the Council”; yet “Members of the Council” is defined in Article 2.1 as “those persons elected, nominated or appointed to the Council from time to time in accordance with the Rules”, and “Council” is itself defined (again in Article 2.1) as “the shareholders of the Association and being the council of the Association for the time being as constituted in accordance with the Rules”.<sup>28</sup>
46. The Articles thus refer to the FA Wales Rules and the FA Wales Rules refer back to the Articles without the question actually being resolved. I suspect that the answer is that the original version of the FA Wales Rules was originally promulgated by the original shareholders, and then amended from time to time according to its own provisions or

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<sup>27</sup> See Ford 1/§47.

<sup>28</sup> There is no other provision in the Articles dealing with the promulgation of the FA Wales Rules.

the provisions of the Articles then in force.<sup>29</sup> New Saints took no point in relation to the validity of the FA Wales Rules themselves, and I proceed on the basis that the FA Wales Rules in their present form were properly and validly made.

**(d) *Directors’ powers to make decisions and to delegate***

47. I was not shown FA Wales’ memorandum of association, if a such a document exists. It is extremely difficult, from the Articles themselves, to discern what, exactly, the powers of the directors or the Board of Directors actually are. Article 4.1 simple states that “[t]he directors are responsible for the management of [FA Wales’] business, for which purpose they may exercise all the powers of [FA Wales]”. What those powers might be is nowhere stated.

48. Articles 8ff of the Articles deal with the directors’ powers to make decisions, i.e. the manner in which decisions must be made. Decisions must be made collectively and “be either a majority decision at a meeting or a decision taken in accordance with Article 9”.<sup>30</sup> Article 9, in turn, provides for a decision to be made other than at a meeting, where there is unanimity.

49. Under Article 6 of the Articles, the directors are given a broad power to delegate. Thus Article 6 provides:

“6.1 The directors may delegate any of the powers which are conferred on them under the Articles –

6.1.1 to such person, committee or other body;

6.1.2 by such means (including by power of attorney);

6.1.3 to such extent;

6.1.4 in relation to such matters or territories; and

6.1.5 on such terms and conditions as they think fit.

6.2 If the directors so specify, any such delegation may authorise further delegation of the directors’ powers by any person to whom they are delegated.

6.3 The directors may revoke any delegation in whole or part, or alter its terms and conditions.”

50. Article 7 provides (under “committee”):

“7.1 Any person, committee or other body to whom the directors delegate any of their powers must follow procedures which are based as far as they are applicable on those provisions of, or made pursuant to, these Articles which govern the taking of decisions by directors.

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<sup>29</sup> The Articles were only adopted on 19 October 2011 (and thereafter amended twice). There is no reference to earlier articles of association, yet these must have existed, since FA Wales has been in existence since 1876 (Ford 1/§44) and the Articles themselves give the date of incorporation as 22 April 1926.

<sup>30</sup> Article 8 of the Articles.

7.2 The directors may make Standing Orders or other rules of procedure for themselves and any person, committee or other body to whom they delegate any of their powers. These Articles shall prevail over Standing Orders or other rules of procedure if they are not consistent with these Articles.”

(e) *The National League Board*

51. Standing Order 9 (made under Article 7.2 of the Articles<sup>31</sup>) details various committees established by the directors. One of these is the National League Board.

52. Standing Order 22 provides in relation to the National League Board:

“i. Chaired by an Officer, appointed by the Council, together with a minimum of six (6) and a maximum of eight (8) other members of the Council, also (subject to Standing Order 18) appointed by the Council.

ii. Responsibility for:-

- National Leagues and Qualifying Clubs in men’s Tiers 1-4 of the FAW Pyramid until the end of playing season 2019/20 and then Tiers 1-3 from playing season 2020/21 onwards;”

Pausing there, the reason for the reduction in the number of national leagues from 4 to 3 is immaterial. What is material is that the National League Board obviously has responsibility for “Tier 1”, that is the Cymru Premier League. Resuming with Standing Order 22:

- ...
- The business of the Leagues...;
- Administration of the Leagues...;
- Management and enforcement of Leagues’ Rules and Regulations...;
- Academies; and
- Player registrations.”

(f) *The Cymru Premier League Rules*

53. Rule 28 of the FA Wales Rules provides:

“All Members, being Qualifying Clubs, National Leagues or Area Associations and their Subordinates shall draft their respective own rules or regulations (in whatever form) to be consistent with these Rules and the Regulations. Where a conflict occurs between such rules or regulations and these Rules or the Regulations (as the case may be) these Rules or the Regulations shall prevail.”

54. Rules for the 2019/2020 season of the Cymru Premier League (the **Cymru Premier League Rules**) have been promulgated. The Cymru Premier League Rules contain the following provisions:

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<sup>31</sup> See paragraph 50 above.

(1) A **Club** is defined to mean “an association football club which is for the time being a member of the [Cymru Premier League] or (where the context requires) a prospective member or a former member of the League”.<sup>32</sup>

(2) The Cymru Premier League Rules constitute a contract between the Clubs and FA Wales. Rule 2.2 provides:

“Acceptance of membership of the League shall constitute an agreement between the Club concerned and [FA Wales], to be bound by and comply with these Rules, such agreement to be effective from the date of the Club’s admission to the League and to terminate from the date a Club ceases to be a member of the League.”

(3) In addition to the Cymru Premier League Rules, Clubs are bound by – amongst other rules – the FA Wales Rules, which prevail in the event of conflict.<sup>33</sup>

## (2) A hierarchy of rules

55. There is, thus, a multiplicity of rules in play, and these have a strict hierarchy: powers delegated under the Articles must be consistent with and must be exercised consistently with the Articles.

56. The Wales FA is, itself, part of a wider structure. Thus, Rule 1 of the Articles provides:

“The [FA Wales Rules] shall at all times be read and constructed in conjunction with the FIFA Rules and the UEFA Rules and in the case of conflict between these Rules and the FIFA Rules or UEFA Rules, the FIFA Rules or UEFA Rules shall prevail, and in the case of conflict between the FIFA Rules and UEFA Rules, the FIFA Rules shall prevail.”

57. This is, self-evidently, an important provision, for New Saints relied upon these “higher order” rules in support of their contentions.

## F. SPECIFIC CONTRACTUAL PROVISION

### (1) Framing the argument

58. As I have noted, the Cymru Premier League Rules constitute an agreement between FA Wales and the participating Clubs,<sup>34</sup> but are subject to the hierarchically superior rules of FA Wales.<sup>35</sup> They state (in Rule 2.1) that they have been prepared in accordance with Rule 28 of the FA Wales Rules,<sup>36</sup> which also makes this hierarchy clear.

59. The Cymru Premier League Rules stipulate the League’s format as I have described it in Section B above. There are – perhaps unsurprisingly – no provisions dealing with the general suspension of football across the jurisdictional territory of FA Wales.

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<sup>32</sup> Rule 1.1.4 of the Cymru Premier League Rules.

<sup>33</sup> Rule 2.3 of the Cymru Premier League Rules.

<sup>34</sup> Rule 2.2 of the Cymru Premier League Rules.

<sup>35</sup> Rule 2.3 of the Cymru Premier League Rules.

<sup>36</sup> Quoted in paragraph 53 above.



60. New Saints contended that Rule 17.9 of the Cymru Premier League Rules set out what FA Wales was obliged to do in this case. Rule 17.9 provides as follows:

“A Club which for any reason ceases to operate at any time during Phase 1 shall have its playing record expunged. If the Club ceases to operate during Phase 2 before it completes its Matches, all of its playing record in Phase 2 shall be expunged but its results in Phase 1 shall stand. Any monies due to it from the [FA Wales] funds shall be withheld and from the date of the withdrawal no further payments shall become due to it.”

“Matches” bears the definition of “any association football match played in the League including (where the context requires) the Play-Offs.”<sup>37</sup>

61. It was New Saints’ case that the effect of the suspension announced by FA Wales caused each and every club in the Cymru Premier League to “cease to operate” within the meaning of Rule 17.9, with the result that the Phase 2 playing record of each side was expunged, whilst the playing record in Phase 1 continued to stand. Since, according to the Phase 1 playing record, which is set out more specifically in Table 4 in paragraph 98 below, New Saints topped the League, they were entitled to be declared League champion club pursuant to Rule 17.4, which materially provides:

“...At the end of each season’s League competition (comprising Phase 1 and Phase 2 but excluding the Play-Offs referred to in Rule 18 below), the Club from the Championship Conference scoring the largest number of total points shall be declared the League champion Club for that season.”

62. Although, of course, the subjective views of an individual expressed after the event can have no bearing on the construction of an agreement, Mr Michael Harris, the chairman of New Saints, put forward this construction in his second statement (**Harris 2**).<sup>38</sup>

“17 Upon the cessation of operation by the clubs, Rule 17.9 should have been applied by [FA Wales], expunging all results from Phase 2 and awarding the league to the winner of Phase 1, namely [New Saints]. I believe, therefore, [FA Wales] failed properly to apply their own Rules, which [the Articles] provide should be applied to all decisions made by [FA Wales’] directors. Further, I must add that during the meeting on 15 May 2020,<sup>39</sup> at no point were the clubs made aware of the existence of Rule 17.9...Reference to such a rule was also not made in the club surveys (as an alternative option to determining the league) that were circulated to the clubs following this meeting. If [FA Wales] had concluded, properly, that none of the clubs could carry on playing and no alternative formats were to be considered, the application of Rule 17.9 should have been applied by [FA Wales]. Arguably, no further consultation to the clubs was required to ascertain the favoured options of determining the league.”

There is a hedging in this assertion of the effect of this provision (see the portions I have underlined) which I cannot subscribe to. Either the contractual position compels a certain course, or it does not. Given the nature of the point, there can be no middle

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<sup>37</sup> Rule 1.1.15 of the Cymru Premier League Rules.

<sup>38</sup> Emphasis added.

<sup>39</sup> On this date, there was a video-conferenced meeting between the clubs in the Cymru Premier League and FA Wales to discuss the COVID-19 situation as it affected football in Wales in general, and the Cymru Premier League in particular.

ground. The same temporising can be seen in paragraph 1 of New Saints’ written submissions:

“[New Saints] started the 2019/0220 season with the objective of winning the [Cymru Premier League], by its performance on the pitch. It remains resolute in its determination to do so, which it considers is in the best interests of association football in Wales, even if that means it is at risk of losing a certain win by application of a mathematical model. After all, that is sporting merit.”

The reference to a “certain win” can only be a reference to the alleged effect of Rule 17.9, since otherwise the “certain win” goes to Nomads, who are the beneficiary of the PPG system, which is the mathematical model adopted and applied by FA Wales.

63. It is not open to me to choose the extent to which Rule 17.9 can or should be applied. If, as New Saints contend, this Rule provides for the ranking of Clubs in the present circumstances, then I must apply the provision according to its terms. If, on the other hand, New Saints’ contention is not well-founded, I must move on to the other arguments. It is to the question of construction that I now turn.

## (2) The meaning of Rule 17.9

64. In my judgment Rule 17.9 has no application in the present case. I have reached this conclusion for the following reasons:

- (1) The primary way in which a Club becomes a member of the Cymru Premier League and ceases to be a member of the League is through promotion and relegation. Although the Cymru Premier League Rules determine the ranking of Clubs at the end of the 2019/2020 season through the playing of football matches,<sup>40</sup> promotion to and relegation from the League – whilst based upon these rankings – is actually governed by other rules concerning the general operation of the Pyramid League Scheme.<sup>41</sup> That is not surprising, for promotion and relegation are operations that inevitably involve two leagues (the league a club is leaving and the league that club is going to): promotion and relegation cannot be provided for in the rules of a single league in the Pyramid.
- (2) Clearly, promotion and relegation is determined by “sporting merit”,<sup>42</sup> which in this case means the outcome or ranking derived through the playing of association football in the format described in Section B above. However, there are instances where a Club may leave the Cymru Premier League for reasons that do not involve demotion because of a (lack of) sporting merit. Thus, Rule 27 of the Cymru Premier League Rules sets out the terms on which a Club may “withdraw” from the League by resigning from it. That is a voluntary act, which has nothing to do with “sporting merit”, which can only be exercised under the conditions specified in Rule 27.

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<sup>40</sup> See, generally, Rule 17 of the Cymru Premier League Rules.

<sup>41</sup> See Rule 17.7 of the Cymru Premier League Rules.

<sup>42</sup> One of UEFA’s core principles: see paragraph 25 above.

- (3) Moreover, there are limited circumstances expressed in the Cymru Premier League Rules whereby a Club may leave the League (*i*) involuntarily and (*ii*) not through (a lack of) sporting merit. The circumstances in which this may occur are expressed in Rules 17.8 and 17.9, which directly follow the rule concerning promotion and relegation (Rule 17.7) and which directly precede the rule which determines what happens if a Club enters into administration (Rule 17.10). These Rules provide as follows:

“17.8 If any Club ceases to operate between the Annual General Meeting and the commencement of the following season, no adjustments to the number of Clubs in membership of the League will be made. The remaining Clubs shall constitute the members of the League for that season.

17.9 A Club which for any reason ceases to operate at any time during Phase 1 shall have its playing record expunged. If the Club ceases to operate during Phase 2 before it completes its Matches, all of its playing record in Phase 2 shall be expunged but its results in Phase 1 shall stand. Any monies due to it from the [FA Wales] funds shall be withheld and from the date of the withdrawal no further payments shall become due to it.

17.10 A Club that enters into administration at any time during the playing season shall have ten (10) points deducted from its record, and any monies due to it from [FA Wales] shall be withheld. A Club that enters into administration outside of the playing season shall have ten (10) points deducted from its record in the season following the date on which it entered administration, and any monies due to it from [FA Wales] funds shall be withheld unless and until the Club exits administration on a solvent basis.”

- (4) It is obvious that these provisions are dealing with the circumstances in which a Club in financial difficulty may participate in the Cymru Premier League. The position is as follows:

(a) The overarching principal is that a Club leaves the League because it has been relegated. In other words, a Club’s fate is determined by “sporting merit”.

(b) Of course, a Club may choose to leave the League, and it may do so for whatever reason, provided the provisions of Rule 27 are abided by. The critical point about Rule 27 is that Clubs leave between seasons and only after completing all of the matches in the season. The reason for this is plain: were a Club to depart mid-season (the **Leaving Club**), that would deprive the other Clubs of earning points in playing the Leaving Club in matches due to take place during the remainder of the season. That inability to earn points by winning (or drawing) football matches would directly impact rankings and so “sporting merit”.

(c) Thus, no matter how keen a Club might be to avoid the expenditure of continuing to participate in the League, it must incur that expenditure until the season has ended and the fixture list is complete. The restriction on leaving the League is, as I see it, fundamental to providing an outcome and standings that are based on “sporting merit”.

- (d) Rules 17.8 to 17.10 constitute limited derogations from this fundamental approach. I begin with Rule 17.10. Since the whole point of an administration is that the insolvent entity carries on trading, Rule 17.10 does not (and probably cannot) expel the insolvent Club.<sup>43</sup> Rule 17.10 affects, in a manner entirely devoid of “sporting merit”, the ranking of a Club in administration by deducting points for reasons other than “sporting merit”. The reason for this is, I infer, to preserve the financial health of the League. Viewed in this light, the derogation from “sporting merit” is understandable, provided it is narrowly construed.
- (e) Rules 17.8 and 17.9 must be read in a similar way. Their effect is to cause the Club in question involuntarily to leave the League, whatever its ranking in the League. Thus, were even the League champion to “cease to operate” between seasons, the effect of Rule 17.8 would be to cause that Club to be expelled and for the remaining Clubs to constitute the members of the League for the next season.
- (f) Rule 17.8 deals with the easier case, where the Leaving Club ceases to operate between seasons. By definition, the rankings for the season just ended will have been fixed according to “sporting merit”, and there will be no further football matches to be played. Rule 17.9 deals with the harder case, where the Leaving Club ceases to operate *in media res*, in the middle of the season. In such a case, provision must be made for the outcomes of games played and to be played by the Leaving Club and – as can be seen from the terms of Rule 17.9 – that is what the first two sentences of Rule 17.9 do. However, there can be no doubt that – at whatever point in the season the Leaving Club ceases to operate – the consequence is expulsion. That is clear from the last sentence in Rule 17.9, given its reference to “the withdrawal” of the Club that has ceased to operate.
- (5) Both Rule 17.8 and Rule 17.9 are contingent upon the Club in question ceasing to operate. It is obvious that this is a reference to a Club going into liquidation. It may be that the drafter of this provision wanted to retain some flexibility to provide for circumstances where a Club “ceased to operate” without entering into liquidation, but I cannot actually envisage what those circumstances might be. Certainly, it seems to me (given the general operation and purpose of the Rules set out in paragraph 64(4) above) that where a Club is able (even if unwilling) to pay its debts, it does not cease to operate within the meaning of Rules 17.8 and 17.9.
65. It follows that Rule 17.9 of the Cymru Premier League Rules can have no application in this case. In this case, the clubs participating in the Cymru Premier League continue in operation, but subject to the regime imposed upon them by the governments of the United Kingdom and of Wales in regard to COVID-19 and by FA Wales (in terms of suspending play of football in Wales). There is a clear distinction, inherent in the Rules, between the suspension of football matches – which means that a club that could otherwise field a team, has no football match to attend – and circumstances (like

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<sup>43</sup> There are various criteria that must be satisfied in order for an administration to take place, but one of them will be some kind of insolvency situation.

liquidation) which prevent a club from fielding a team at a match which is scheduled to occur.

66. What is more, it is quite obvious from the last sentence of Rule 17.9 (“...from the date of the withdrawal...”) that the consequence of a club ceasing to operate is its withdrawal from the Cymru Premier League. New Saints contention regarding Rule 17.9 proves too much, for the inevitable consequence of their construction would be that all twelve Clubs in the Cymru Premier League would be expelled from the League. It would be perverse for the consequence of COVID-19, and the suspension of football in Wales for all clubs in the Cymru Premier League for reasons of health and safety and the public good, to cause the cessation of the League, requiring its re-constitution *de novo*.<sup>44</sup>

### (3) **Basis for the suspension of football and the Decisions**

67. In order to determine the legality or otherwise of FA Wales’ conduct, it is necessary to identify the basis (or purported basis) for the Decisions. The basis for the decisions is not the Cymru Premier League Rules. They contain no provision dealing with the present case; more to the point, the decisions made by FA Wales concerned more than just the Cymru Premier League, but football in Wales generally. It would, therefore, be surprising if the relevant provision were to be found in the Cymru Premier League Rules.
68. It is, therefore, necessary to look higher up and elsewhere in the hierarchy of rules that I described in Section E above. In my judgment, the power to make the Decisions vested, in the first instance, in the Board of Directors, pursuant to Article 4.1 of the Articles.<sup>45</sup> I say “in the first instance”, because (as I have described) the Articles confer on the Board of Directors wide powers of delegation, which have been exercised, in particular in the delegation to the National League Board.<sup>46</sup> Whether these powers have lawfully been exercised is the subject of the next Sections.

## **G. *ULTRA VIRES***

### (1) **The decisions in issue and their context**

69. I described the relevant decisions here under consideration in Section C above. It is now necessary to set them in greater context, which I do in the form of the chronology below:

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<sup>44</sup> Quite how that would occur is difficult to say. The same might very well be true of the other leagues in Welsh football, with the result that the Pyramid League Scheme would suddenly be denuded of clubs.

<sup>45</sup> See paragraphs 43 and 47 above.

<sup>46</sup> See paragraphs 51 to 52 above.

Event No	Date	Event
1	13 March 2020	An emergency decision is made by FA Wales to postpone all football fixtures in Wales with immediate effect until 4 April 2020.
2	20 March 2020	The directors of FA Wales continue the suspension of football activity in Wales.
3	23 March 2020	The Prime Minister announces the UK-wide lockdown due to the COVID-19 pandemic.
4	9 April 2020	The directors of FA Wales continue the suspension of football activity in Wales.
5	17 April 2020	The directors of FA Wales continue the suspension of football activity in Wales.
6	24 April 2020	UEFA writes to all national football associations – including FA Wales – regarding the COVID-19 pandemic, enclosing the UEFA COVID Guidelines.
7	30 April 2020	First meeting of the COVID-19 working group (the <b>Working Group</b> ) established by FA Wales.
8	1 May 2020	FA Wales emails the Cymru Premier League clubs updating them on the position in the UEFA COVID Guidelines, and inviting the clubs to a meeting on 15 May 2020 to discuss the decision as to whether – and if so, how – to restart the 2019/2020 season.
9	5 May 2020	A meeting of the National League Board takes place. This was a regular monthly meeting, conducted via video-conference. It was agreed that there would be a further (extraordinary) meeting of the National League Board later on in the month (and this took place on 18 May 2020).
10	14 May 2020	A meeting of the Working Group takes place.
11	15 May 2020	As arranged by FA Wales' emails of 1 May 2020 (see No 8 above), a video conference takes place between FA Wales and the clubs of the Cymru Premier League to discuss the situation. At the end of the meeting, the clubs were told that they would receive a questionnaire (the <b>Club Surveys</b> ) on which they could record their views, this to be returned by midday on 17 May 2020.
12	17 May 2020	The Club Surveys are returned to FA Wales.
13	18 May 2020	The extraordinary meeting of the National League Board takes place. At this meeting, the National League Board decided: (1) To terminate the 2019/2020 season from the national leagues it was responsible for, including the Cymru Premier League. (2) To reject all alternative formats for concluding the season. (3) To adopt a system of ranking based upon the PPG system. (4) To nominate – based upon these decisions – (i) Nomads to the UEFA Champions league and (ii) New Saints and Bala Town to the UEFA Europa League.
14	19 May 2020	The directors of FA Wales vote to bring the 2019/20 season to an end for, <i>inter alios</i> , the Cymru Premier League. The directors took, essentially, the same decisions as the National League Board.
15	25 May	FA Wales writes to UEFA in response to the UEFA COVID 19 Guidelines.

Table 3: Chronology of events regarding the Decisions

**(2) New Saints' contentions**

70. In their Amended Points of Claim, New Saints contended that:<sup>47</sup>

“...the [UEFA COVID Guidelines] were misinterpreted and misapplied by [FA Wales], as a result of which it failed to apply and/or adhere to Rules 2.5 and 7.1 of the [FA Wales Rules], which incorporated the requirement to adhere to the UEFA Rules, in relation to [Decision 2 and Decision 3]. As a result, [FA Wales] failed to act in accordance with Article 4.2 of the Articles when making its decisions, so far as the [Cymru Premier League] was concerned.”

71. It is appropriate to set out here the provisions in the Articles and the FA Wales Rules relied upon by New Saints:

(1) Article 4.2 of the Articles provides:

“The directors shall act upon the Rules so far as the same are consistent with these Articles. If any conflict or ambiguity arises between these Articles and the [FA Wales Rules], these Articles shall prevail.”

(2) Rule 2.5 of the FA Wales Rules provides:

“The objectives of the Association are:-

...

2.5 to comply with and prevent any infringement of the FIFA Rules and UEFA Rules and all decisions of FIFA, UEFA and [FA Wales] as well as the Laws of the Game and ensure compliance with these by its Members...”

Both “FIFA Rules” and “UEFA Rules” are terms defined in the FA Wales Rules:

(a) “FIFA Rules” means “the statutes of FIFA as amended from time to time and all rules, regulations, orders and other directives issued by FIFA from time to time”;

(b) “UEFA Rules” means “the statutes of UEFA as amended from time to time and all rules, regulations, orders and other directives issued by UEFA from time to time”.

(3) Rule 7.1 of the FA Wales Rules provides:

“Qualifying Clubs, National Leagues and Area Associations shall have the following obligations:-

7.1 to comply fully with the FIFA Rules and the Rules and Regulations at all times and to ensure that these are also complied with fully by its Subordinates.”

72. The substance of New Saints' contention was that:

(1) The UEFA COVID Guidelines were “UEFA Rules” within the meaning of the provisions set out above, such that FA Wales was obliged to comply with them.

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<sup>47</sup> At paragraph 93.

- (2) The UEFA COVID Guidelines were so clear in their terms that they should not merely have informed FA Wales in making Decision 2 and Decision 3, but that they rendered Decision 2 and Decision 3 outside what had been permitted by those Guidelines.

The first point was not resisted by FA Wales. The second point was contentious.

**(3) The nature of New Saints' contention**

73. As I noted in paragraph 40(2) above, there was no common ground between the parties as to the nature of New Saints' contention. I have concluded that the point is best regarded as one of *vires* and in this Section I briefly explain why. I begin with the foundations of judicial review, which all agreed informed (at least by analogy) the legal position between FA Wales and the Clubs in the Cymru Premier League.

74. At its broadest, the concept of *ultra vires* can be used to refer to any decision that is successfully judicially reviewed. Thus, in *R v. Hull University Visitor, ex parte Page*, Lord Browne-Wilkinson noted:<sup>48</sup>

“If the decision maker exercises his powers outside the jurisdiction conferred, in a manner which is procedurally irregular or is *Wednesbury* unreasonable, he is acting *ultra vires* his powers and therefore unlawfully.”

Similarly, in *Boddington v. British Transport Police*:<sup>49</sup>

“I adhere to my view that the juristic basis of judicial review is the doctrine of *ultra vires*.”

75. In this case, the notion of *ultra vires* is being used in the narrower but closely related sense so as to refer to the case where a body exceeds its received powers. As Fordham notes,<sup>50</sup> “[u]ltra vires in its purest sense means action incompatible with the limits imposed by the instrument which conferred the power being exercised”.

76. Of course, FA Wales is not a public body and does not have public powers conferred on it, the scope of which can be construed by the courts. That does not, however, mean that the powers of FA Wales or its directors are unlimited or uncircumscribed:

- (1) FA Wales is a legal person, having the powers accorded to such a person by the laws of England and Wales.
- (2) Within FA Wales, and subject always to any question of delegation, such powers are exercised by the Board.<sup>51</sup>
- (3) There does not appear to be any memorandum of association detailing the objectives of FA Wales, but FA Wales' objectives are set out in Rule 2 of the FA Wales' Rules. In my judgment, FA Wales, including its directors, must exercise the powers of FA Wales in furtherance of these objectives. Whilst there may very

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<sup>48</sup> [1993] AC 682 at 701.

<sup>49</sup> [1999] 2 AC 143 at 164.

<sup>50</sup> See *Fordham* at [46.1].

<sup>51</sup> See, generally, Section E above.



well be considerable latitude in how FA Wales seeks to use its powers to further its objectives, the objectives of FA Wales, as set out in the FA Wales Rules, constitute a hard limit on the powers that FA Wales has.

- (4) If FA Wales were to act not in furtherance of its objectives, it would be acting *ultra vires* and that limit on its powers would be enforceable against it as a matter of contract law and in a manner analogous to the principles of judicial review.<sup>52</sup> In short, the *ultra vires* decision could be set aside. In this case, the limit that FA Wales is said to have exceeded is contained in Rule 2.5 of the FA Wales Rules, set out in paragraph 71(2) above.
- (5) Of course, it can be said that New Saints are not party to the Articles, and that would be right. However, New Saints are party to the Cymru Premier League Rules and have certain rights in terms of the operation of the League by virtue of that fact. As I have described, the Cymru Premier League has been suspended and an outcome, in terms of ranking, imposed pursuant to powers that find no expression in the Cymru Premier League Rules themselves. That is because the Cymru Premier League Rules are part of a far broader network of legal relations, probably best expressed as the Pyramid League Scheme. By virtue of that Scheme, FA Wales has certain powers over, amongst other matters, the Cymru Premier League, which are implied or read into the Cymru Premier League Rules. But, conversely, the Clubs who participate in the League pursuant to the Cymru Premier League Rules have, implied or read into those provisions, protections and controls in respect of FA Wales' exercise of its powers. Those protections and controls are, as I have said, are closely analogous to those of judicial review.
- (6) Accordingly, in this case, I find that New Saints' ability to contend that FA Wales has acted *ultra vires* derives from contract. I was invited by the parties to proceed on the basis that the court had an "inherent" jurisdiction also. I am afraid that I consider such descriptions to be meaningless and, if used to justify a jurisdiction that cannot otherwise be justified, liable to lead to arbitrariness. By this I do not mean to say that there are no non-contractual means of controlling the conduct of sporting regulatory bodies: competition law provides an excellent example of an outsider to a contract or analogous arrangement being able to challenge such arrangements in tort, rather than in contract. But the basis for the court's supervisory jurisdiction over sporting bodies in a given case should be intelligibly articulated before it is exercised; and here, as I say, it is contractual.

#### (4) Analysis and resolution

77. I do not consider that this is a case where FA Wales has acted *ultra vires* its powers. This ground of challenge to both Decision 2 and Decision 3 must, therefore, fail. It is my firm view that – whatever the rights and wrongs of these decisions (and these are matters to which I will be coming) – FA Wales had the *vires* or power to make them. I reach this conclusion for the following reasons:

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<sup>52</sup> *Bradley v. The Jockey Club*, [2005] EWCA Civ 1056 at [38]. See also Lewis and Taylor (eds), *Sport: Law and Practice*, 3<sup>rd</sup> ed (2014) at Chapter D2.

- (1) The UEFA COVID Guidelines are explicitly guidelines not rules. They were adopted on 23 April 2020 by the UEFA Executive Committee under the regulations for the various competitions operated by UEFA. In such circumstances, the starting point (as it seems to me) is that the guidelines are intended to inform a decision-making process rather than to set hard-edged limits as to the *vires* of member associations like FA Wales.
- (2) That is made all the more clear when the substance of the UEFA COVID Guidelines is considered. The guidelines fall into two parts: the first part (Part A) entitled “Background”; and the second part (Part B) entitled “Guidelines on Eligibility Principles”.
- (3) Beginning with Part A:
  - (a) The guidelines stress that one of the core principles applicable to UEFA club competitions is that eligibility to participate derives from qualification on “sporting merit”.<sup>53</sup> In other words, the clubs nominated by FA Wales should be nominated after a sporting process.
  - (b) The guidelines recognised the “unforeseen and unprecedented situation caused by COVID-19”,<sup>54</sup> and stressed:
    - (i) UEFA’s duty to guarantee the integrity of its competitions and the importance of qualifying on sporting merit;<sup>55</sup> and
    - (ii) The “primary concern” of the health of players, spectators and all those involved in football as well as the public at large.<sup>56</sup>
  - (c) In terms of dealing with the COVID-19 pandemic, UEFA said this:<sup>57</sup>

“...the ideal scenario, should the pandemic situation permit it, is to have the currently suspended domestic competitions completed enabling football clubs to qualify for UEFA club competitions on sporting merit in their original format. Should this outcome not be possible, in particular due to calendar issues (e.g., not sufficient time to play the remaining matches of the national competitions, i.e., the league and cup) it would be preferable that suspended domestic competitions would restart with a different format in a manner which would still facilitate clubs to qualify on sporting merit based on completion of those competitions under the different format. The fallback option would be to have the currently suspended domestic competitions based on sporting merit to the extent that is possible in these exceptional circumstances.”
- (4) Turning, then, to Part B:

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<sup>53</sup> Paragraph A1 of the UEFA COVID Guidelines.

<sup>54</sup> Paragraph A2 of the UEFA COVID Guidelines.

<sup>55</sup> Paragraph A2 of the UEFA COVID Guidelines.

<sup>56</sup> Paragraph A2 of the UEFA COVID Guidelines.

<sup>57</sup> Paragraph A4 of the UEFA COVID Guidelines.

- (a) The guidelines reiterate that “[a]dmissions to the UEFA club competitions is based on sporting merit. For this reason, UEFA urges National Associations and Leagues to explore all possible options to bring all top domestic competitions giving access to UEFA club competitions to their natural end”.<sup>58</sup>
- (b) The guidelines – as I have noted – requested responses from the national associations as to their plans by 25 May 2020,<sup>59</sup> and noted that there might be “legitimate reasons to prematurely terminate...domestic competitions”.<sup>60</sup> Instances of what amount to legitimate reasons were the existence of an official order prohibiting the completion of the competition in question and the economic and financial effects of continued with the competition.<sup>61</sup>
- (5) It is noteworthy that UEFA does not, in paragraph B3 list public health considerations as a reason for terminating competition irregularly. That, of course, is not because such considerations are irrelevant – they are not, they are the “primary concern”<sup>62</sup> – but because they so obviously underlie the entirety of the guidelines (and, indeed, all public bodies’ responses to the COVID 19 pandemic). This is clear – if it needed to be made clear – from paragraph B5(a) of the guidelines, which states that UEFA would not be prepared to accept the outcome of a prematurely terminated domestic competition where “the domestic competitions have not been prematurely terminated on the basis of the reasons given in these UEFA guidelines or on the basis of any other legitimate public health reasons”.<sup>63</sup>
- (6) It is absolutely clear that the UEFA COVID Guidelines are seeking to structure the manner in which national associations like FA Wales should approach the problems presented by the COVID-19 pandemic. In other words, the guidance is doing exactly what one would anticipate: informing a decision-making process and not setting hard-edged limits as to the *vires* of member associations like FA Wales.<sup>64</sup> The approach – as laid down in the guidelines – should be as follows:
- (a) If possible, conclude the 2019/2020 season as normal (the “ideal” scenario).
- (b) If not possible, it is preferable resume the season in a different format that would allow clubs to qualify on sporting merit. In other words, adopt a sporting process for the rest of the season, albeit not the process that would normally have been followed.

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<sup>58</sup> Paragraph B1 of the UEFA COVID Guidelines.

<sup>59</sup> E.g. paragraph B2 of the UEFA COVID Guidelines.

<sup>60</sup> Paragraph B3 of the UEFA COVID Guidelines.

<sup>61</sup> See paragraphs B3(a) and (b) of the UEFA COVID Guidelines.

<sup>62</sup> Quoting from paragraph A2 of the UEFA COVID Guidelines.

<sup>63</sup> Emphasis added.

<sup>64</sup> To quote from paragraph 76(3) above.

- (c) If this cannot be done, terminate the season without further games, but determine eligibility on sporting merit to the extent possible.
- (7) It is quite clear from the manner in which UEFA has framed its UEFA COVID Guidelines that this is an essentially discretionary approach. Indeed, the manner in which I have sought to frame UEFA’s guidance in paragraph 77(6) above is probably a little too “hard-edged” in the way articulates FA Wales’ discretion.<sup>65</sup> It is nevertheless helpful to do so, because what is clear beyond doubt is that the course that FA Wales have taken (viz, to terminate the season and determine eligibility by reference to criteria other than a continuation of the sporting process by other means) is expressly envisaged as permissible by UEFA.
78. I conclude that the UEFA COVID 19 Guidance does nothing to limit FA Wales’ *vires*. If anything, the guidance confirms that the course adopted by FA Wales in the decisions that I have described is – subject to FA Wales’ own internal rules – one that UEFA regards as legally permissible. Of course, that says nothing about the proper exercise of a discretion, which is equally capable of review in this case, and to which I turn in Section I below.
- H. “RUBBER STAMPING”: THE DIRECTORS DID NOT APPLY THEIR MIND TO DECISIONS 2 AND 3, BUT SIMPLY ADOPTED THE DECISION OF THE NATIONAL LEAGUE BOARD<sup>66</sup>**
79. New Saints contend that the directors failed to consider their proposed “alternative format”<sup>67</sup> and/or “simply endorsed and ratified what the National League Board resolved”.<sup>68</sup> The contention appears to be that the relevant decision-making body – the Board of Directors – failed to apply its collective mind to the decision it was taking and so acted as a “rubber stamp”<sup>69</sup> and in derogation of its obligations to reach its own decision on the question before it.<sup>70</sup>
80. I refer to the chronology at Table 3 in paragraph 69 above. As can be seen, the same questions were considered by the National league Board on 18 May 2020 (Event No 13) and by the Board of Directors on 19 May 2020 (Event No 14).

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<sup>65</sup> To be clear, I am not here seeking to set out now FA Wales’ discretion should or should not be exercised. I am seeking to determine whether the UEFA COVID Guidance contains sufficiently hard-edged limits within it so as to render the Decisions outside the scope of what UEFA would consider permissible.

<sup>66</sup> In oral submissions before me, New Saints indicated they were not in fact contending that the Board of Directors had blindly endorsed the decision of the National League Board. Rather, New Saints were seeking to close out the possibility that a defective decision by the National League Board might have been rectified by different consideration, based on different materials, by the Board of Directors. I am satisfied that there was no such different material – and FA Wales did not contend otherwise. Nevertheless, it seems to me that the “rubber stamp” point was clearly taken in the pleadings and that it is better that I deal with it, so that my understanding of the decision-making processes of FA Wales is set out.

<sup>67</sup> To quote from paragraph 93(1) of New Saints’ Amended Points of Claim.

<sup>68</sup> To quote from paragraph 93(1)(x) of New Saints’ Amended Points of Claim.

<sup>69</sup> These are not the words used by New Saints, but they do capture the essence of the allegation: a failure to reach a decision applying an independent mind.

<sup>70</sup> See, for example, *Fordham* at [50.2.2].

81. In this Section, I am not going to consider the substance of the decisions made by the National League Board or the board of directors. This “merits” review – to the extent I am permitted to carry it out – is conducted in Section I below.
82. My review draws upon both the evidence of Mr Ford (who was present at the relevant meetings) and the minutes of those meetings. The final version of the minutes of both meetings<sup>71</sup> were exhibited to Mr Ford’s statement. There were – unsurprisingly – draft versions of the minutes, which were produced by FA Wales on disclosure. These contain details that were omitted from the final drafts. I should say that I find nothing suspicious in this – minutes are generally intended to record outcomes, not discussion, and the paring back of fuller notes is common. Nevertheless, that means that the detail in the drafts of the minutes can be instructive, provided it is recalled that they are drafts. I have reviewed the minutes (both final and draft) in this light.
83. I do not consider that Decision 2 and Decision 3 can be impugned on this ground for the following reasons:
- (1) As I have described, the board has substantial powers of delegation,<sup>72</sup> which it has exercised in the form of the delegation of significant authority to the National League Board pursuant to Standing Order 22.<sup>73</sup> That delegation is sufficiently wide to embrace the competence to make Decisions 2 and 3.
  - (2) I turn to the National League Board meeting on 18 May 2020. Mr Ford was present at that meeting, and he describes it in Ford 1/§§68 and 94ff. There were also minutes kept. Unsurprisingly, Mr Ford’s evidence and the record of the minutes (which are exhibited to Ford 1) dovetail closely. It would be pointless to set out verbatim what was discussed in this meeting. The following points emerge from the evidence regarding this meeting:
    - (a) The consideration given to the questions before the National League Board was careful and full. The Board was, obviously, conscious that it was being called upon to make some very significant decisions as regards (amongst other things) the Cymru Premier League. Indeed, the meeting was, as I have noted, an extraordinary one, intended specifically to deal with the implications of the on-going COVID-19 pandemic.
    - (b) In particular, the meeting was given a detailed presentation from Mr Andrew Howard, Head of Competitions at FA Wales:<sup>74</sup>

“During the course of the meeting, Andrew Howard (Head of Competitions) delivered a presentation to Members entitled “Completing or Curtailing the 2019/20 Season and nominations for UEFA Club Competitions 2020/21” (the **Presentation**)<sup>75</sup>...As well as summarising the feedback that [FA Wales] had

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<sup>71</sup> I.e., Items Nos 13 and 14 in the chronology at Table 3 in paragraph 69.

<sup>72</sup> See paragraphs 47 to 50 above.

<sup>73</sup> See paragraph 52 above.

<sup>74</sup> Ford 1/§96.

<sup>75</sup> A copy of this presentation was exhibited to Ford 1. The presentation is referred to in Item 037 of the minutes of this meeting.

received from clubs, during the consultation process, Mr Howard detailed the various alternative formats that had been suggested by clubs to complete the season. In addition, Mr Howard gave further details that had been identified as key considerations and risks around any return to football which included the following...”

- (c) There was then a discussion<sup>76</sup> after which a series of decisions were proposed and voted upon. It is appropriate to set out this part of the minutes verbatim:

*“Decision 1:* It was proposed by Mr D James and seconded by Mr Griffiths that the [Cymru Premier League] should be prematurely terminated with immediate effect as the current Welsh Government lockdown measures make it highly unlikely to be completed before a date that would make it possible to complete the current season before the UEFA deadline (20 July 2020)<sup>77</sup>. Furthermore, there are specific economic and financial justifications which would make continuing the season to its conclusion financially imprudent or which could put at risk the long-term financial stability of the domestic competition and its clubs. This was carried unanimously.

*Decision 2:* It was proposed by Mr D James and seconded by Mr Griffiths that the [Cymru Premier League] Play-Offs should be prematurely terminated with immediate effect for the same reasons as Decision 1. This was carried unanimously.

*Decision 3:* The Board reviewed all alternative options but unanimously agreed that there was no suitable alternative format available and that the same challenges for completing 39 games were applicable in any other alternative format.

*Decision 4:* It was proposed by Mr D James and seconded by Mr Griffiths that all other men’s and women’s adult National Leagues in Wales are to be prematurely terminated for the same reasons. This was carried unanimously.

*Decision 5:* After a further discussion where all options were considered and the Club feedback was reviewed again, it was proposed by Mr D James and seconded by Mr Edwards that the two options for prematurely terminating the Cymru Premier League, that were only relevant for the Cymru Premier League (“Null and Void Phase 2” and “Replicate Phase 1 Results”),<sup>78</sup> should not be considered

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<sup>76</sup> The minutes record at Item 037:

“The Chairman thanked Mr Howard for the detailed presentation and opened up to Members for questions and discussion. All Members were afforded time for discussion and questions were answered to Members satisfaction.

The Chairman then asked Members to give careful consideration to all decisions that now needed to be made.”

<sup>77</sup> This date has subsequently been extended to 3 August 2020.

<sup>78</sup> These options are more specifically described and considered below. In essence, “Null and Void Phase 2” would involve expunging the sporting record for Phase 2 of the 2019/2020 season, with rankings being based on the playing records as they stood at the end of Phase 1: see FA Wales’ Points of Defence at paragraph 62.3. The “Phase 1 Replication Option” (see paragraph 62.6 of FA Wales’ Points of Defence) would result in the Phase 2 results being drawn from the results of Phase 1, in order to produce final standings. It is not clear to me whether this would involve expunging the sporting record for Phase 2 (insofar it existed) or only “replicating” the results in Phase 2 to the extent that those matches would not be played. I do not consider this uncertainty to be material to this Judgment.

further as they were not a preferred format, they didn't reflect sporting merit over all games played and the decision-making should be consistent. This was carried unanimously.

It was subsequently proposed by Mr Rowland and seconded by Mr Griffiths to use the unweighted Points Per Game (PPG) method of premature termination for all National Leagues (Tiers 1-4) in Wales. Mr D James submitted an amendment to use the Points Per Game (Home and Away) method of premature termination. The amendment was not seconded. The proposal was voted upon and carried unanimously.

*Decision 6:* Members referred back to the UEFA Club Competition places and the Leagues UEFA club competition places were thus determined in accordance with the relevant competition Regulations as follows:

- UEFA Champions League – N1 (National 1<sup>st</sup> place) – [Nomads]
- UEFA Europa League – N2 (National 2<sup>nd</sup> place) – [New Saints]
- UEFA Europa League N3 (National 3<sup>rd</sup> place) – [Bala]
  
- UEFA Women's Champions League – N1 (National 1<sup>st</sup> place) – Swansea City Ladies

*Decision 7:* It was proposed by Mr Griffiths and seconded by Mr Edwards that the prize money for the [Cymru Premier League], Orchard Welsh premier Women's League, [Cymru South] and [Cymru North] be paid out according to the PPG position, should this be legally acceptable. This was carried unanimously.

*Decision 8:* The Board reserved the right to further consider promotion and relegation matters and no commitments were made in this regard."

- (3) Although Mr Ford sought to characterise these decisions as "recommendations",<sup>79</sup> I do not consider that this correctly states what the National League Board, at least, thought it was doing. It was making decisions, and – as I have noted<sup>80</sup> – these were decisions within its delegated competence.
  
- (4) On the next day, the same matter came before the Board of Directors. This meeting was, I understand, a regular meeting of the board, and the question of what to do about the 2019/2020 season was only one question (albeit an extremely important one) before the board. Again, Mr Ford was present at the meeting, which he describes in Ford 1/§§59, 68 and 110ff, as well as exhibiting the minutes. Again, I move to describe what this meeting considered and decided without setting out the verbatim record:
  - (a) The meeting was conducted (as had the National League Board meeting) remotely. Mr Ford says that the relevant part of the meeting was to

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<sup>79</sup> Ford 1/§97: "As the minutes of the [National League] Board meeting record, the [National League] Board was asked to make recommendations on a number of issues...". That is not what the minutes say: these were expressed to be "decisions" and they were formally put, seconded and voted upon.

<sup>80</sup> See paragraph 68 above.

“consider the proposals of the [National League Board]”,<sup>81</sup> and it is true to say the the minutes refer to the “decisions” of the National League Board as “recommendations”.

- (b) There was considerable discussion of the options, including a further presentation by Mr Howard. At the conclusion of this, the minutes record:

“Members were advised that the National League Board were unanimous in making the following recommendation...”

The decisions set out in paragraph 83(2)(c) above were then recited. The minutes then continue:

“Following evaluation of the recommendations and alternative options, it was proposed by Mr O’Connor, seconded by Mr Williams and approved unanimously to ratify all eight recommendations.”<sup>82</sup>

- (5) It is said that this was to do no more than “rubber stamp” the decisions of the National League Board, and that the decisions made by the Board of Directors – specifically Decision 2 and Decision 3 must be set aside. That, as it seems to me, would be to mistake what was actually happening:

- (a) As I have found, the decisions made by the National League Board were validly made in the sense that they fell within the scope of the authority delegated to the National League Board.

- (b) Standing Order 14 provides:

“Each Committee<sup>83</sup> shall have full powers to make decisions within their own remit and budget, as set by the Directors from time to time, but nothing in this provision shall limit or restrict the right of the Directors lawfully to change or alter (in whole or in part) a decision of the Committee.”

- (c) In my judgment, the Board of Directors could – perfectly properly – have left the decisions of the National League Board unreviewed, unconsidered by it and as stating the final position of FA Wales. Of course, given the magnitude of the decision, that was a course that the Board of Directors was unlikely to take. But the Board could not simply treat the decision of a body to which it had properly delegated powers as something “writ in water”. Whilst Standing Order 14 gives the directors a very broad right to re-visit decisions of committees, that right cannot be an absolute one entitling the Board of Directors arbitrarily to disregard the decisions of the National League Board. More to the point, whilst the Board of Directors has retained to itself the right to re-make a decision of a committee in its entirety (effectively to start again), that is not a course the Board of Directors is obliged to take whenever the Board chooses to intervene. It is perfectly proper for the Board of Directors to consider the decisions of the

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<sup>81</sup> Ford 1/§110.

<sup>82</sup> Emphasis added.

<sup>83</sup> The National League Board is a “Committee”: see Standing Order 9(3) and paragraph 51 above.



committee to has delegated to, and to change or alter those decisions in whole or in part, provided that that decision to change or alter the delegated decisions can itself withstand a judicial review.

- (d) In this case, the Board of Directors clearly considered and informed itself in relation to the matters that had been before the National League Board and – having done so – decided to affirm the decisions that had been made by the National League Board. This was not “rubber stamping”, but a perfectly proper course for the Board of Directors to take.

## **I. DECISIONS 2 AND 3 WERE IRRATIONAL AND LACKING IN TRANSPARENCY AND/OR WERE OTHERWISE UNREASONABLE**

### **(1) New Saints’ contentions**

84. This challenge appears to be both a procedural challenge to Decisions 2 and 3 and a “merits” challenge.<sup>84</sup> The contention that the procedures of FA Wales were lacking in transparency is clearly a process challenge, suggesting that the rules of natural justice were not followed. By contrast, the suggestion that Decisions 2 and 3 were irrational or unreasonable is a challenge to the merits of the decision.

85. It is necessary, therefore, to consider these two distinct contentions separately.

### **(2) The process challenge: failure to follow the rules of natural justice**

#### ***(a) Introduction***

86. New Saints’ contentions in this regard were not especially clearly framed, and certainly not with any degree of specificity. I do not consider that it is appropriate for me – simply because there has been a suggestion of a lack of transparency in FA Wales’ processes – to traverse the entire decision-making process of FA Wales with a view to identifying such a deficiency.

87. Rather, what I propose to do is:

- (1) Set out the standard that ought to applied in a case such as this; and
- (2) Consider whether the processes of FA Wales have fallen short of that standard.

#### ***(b) The rules of natural justice***

88. It is clear law that a body that is susceptible of judicial review in its decisions must act in a procedurally fair way. What is procedurally fair is, however, a matter of context: the process that a formal, adversarially-based tribunal ought to follow will be very different from the procedures of (say) an investigative administrative body. In this case, I am very conscious that FA Wales was not even investigating a specific case: rather FA Wales was seeking to ascertain how, in light of peculiarly challenging circumstances, the 2019/2020 football season in Wales might appropriately be

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<sup>84</sup> See paragraph 93 of New Saints’ Amended Points of Claim.

concluded. In other words, the decision or decisions that FA Wales was making were policy decisions.

89. Because the outcome of that decision-making process would have effect on particular individuals or bodies – for example, the clubs affected by the end-of-season decisions described in paragraph 22 above – who would have clear expectations, perhaps even rights, as to how the season ought, in ordinary circumstances, to be conducted, I consider that it is appropriate not to apply the standards that would pertain to a pure question of future policy, but rather standards of the sort that would apply to an administrative investigation, although I am conscious of the differences, and of the overriding fact that the meaning of “fairness” and a fair process is context driven.
90. The law in this regard was comprehensively set out in *Group Eurotunnel SA v. Competition Commission*.<sup>85</sup> Conscious as I am that this case concerned an investigation by the Competition Commission, as opposed to a question (substantially of policy) as to how to deal with the COVID-19 pandemic as it affected Welsh football, which is the question that confronted FA Wales, I nevertheless consider the Competition Appeal Tribunal’s summary of the law to be of assistance:

“167 We consider the following propositions to emerge from these authorities:

- (a) There is a general duty on administrative bodies to act in a procedurally fair way.
- (b) What is “fair” is something that is not immutable: it may develop over time in order to adapt to or take account of changing circumstances. It is certainly context sensitive. Above all else, it is a standard that is flexible. By this, we do not mean that the standard of fairness can be sacrificed: in that respect, the rule is much closer to an absolute. However, what is, or is not, “fair” in a given case depends on all of the circumstances. What can be said with confidence is that one standard does not fit all cases.
- (c) The standard of fairness has many aspects, one of which – and this is the aspect with which we are principally concerned at the moment – is that a person affected by a decision is entitled to have an opportunity to make representations. That, in turn, means that such a person must know the case against him or her.
- (d) As, no doubt, is the case with all aspects of natural justice, this right to make representations is coloured by many factors. These, without seeking to be exclusive, include:
  - (i) The statutory framework within which the tribunal operates. Of course, some tribunals (albeit not the Commission) do not operate within a statutory framework at all, and are governed only by the common law. However, the important point to note is that statutory frameworks can be supplemented, and are to be read in the light of, the common law. As was noted in *Lloyd v. McMahon* [1987] 1 AC 625 at 702-703, “it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only

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<sup>85</sup> [2013] CAT 30 at [158]ff.

require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness”.

- (ii) Other aspects of context, including in particular the nature of the investigation.
- (iii) The significance of any individual item of information in the context of the investigation.

168 There remains the question of how issues of procedural fairness are to be determined. What constitutes a fair process is one for the court (or, here, the Tribunal) as a matter of law. That said, the process taken by the administrative tribunal is entitled to great weight. It is the administrative decision-maker, and not the reviewing court, that stands in the front line when assessing what is procedurally fair, and (to descend to the specific) the Tribunal should be slow to second-guess decisions of the Commission in terms of what needs to be shown to an affected party, how confidential certain material is, and how best to protect the confidentiality in that material. We have well in mind the statement of Lloyd LJ in *R v. Panel on Take-Overs and Mergers, ex parte Guinness plc* [1990] 1 QB 146 at 184:

“Mr Buckley argued that the correct test is Wednesbury unreasonableness, because there could, he said, be no criticism of the way in which the panel reached its decision on 25 August. It is the substance of that decision, viz., the decision not to adjourn the hearing fixed for 2 September, which is in issue. I cannot accept that argument. It confuses substance and procedure. If a tribunal adopts a procedure which is unfair, then the court may, in the exercise of its discretion, seldom withheld, quash the resulting decision by applying the rules of natural justice. The test cannot be different, just because the tribunal decides to adopt a procedure which is unfair. Of course the court will give great weight to the tribunal’s own view of what is fair, and will not lightly decide that a tribunal has adopted a procedure which is unfair, especially so distinguished and experienced a tribunal as the panel. But in the last resort the court is the arbiter of what is fair. I would therefore agree with Mr Oliver that the decision to hold the hearing on 2 September is not to be tested by whether it was one which no reasonable tribunal could have reached.”

In short, whilst it is for the Tribunal to decide what is and what is not fair, the Commission’s approach should be given “great weight”. We consider this is reflected in the case-law, which repeatedly emphasises that, when considering what is procedurally fair, one size does not fit all.”

**(c) *The procedure in this case***

91. Considered in this light, I have no doubt that the decision of FA Wales was procedurally fair and – to the extent this represents a different standard – transparent.<sup>86</sup> As to this:

- (1) I bear in mind that whilst the decisions that FA Wales had to make had implications for parties that would have (but for COVID-19) clear expectations as

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<sup>86</sup> My view is that transparency is an aspect of procedural fairness: but given New Saints’ emphasis on this aspect it is a matter to which I have paid particular regard.

to how the 2019/2020 season would unfold in terms of ranking, such that it is appropriate to apply the standard I have described in paragraph 90 above, this was nevertheless a policy decision and not an investigation. In particular:

- (a) There were actually few, if any, “facts” to investigate or determine. Really, this was a question of how – in these exceptional circumstances – to end the season in the fairest way to all concerned, but above all with regard to the paramount concern of health and safety.
- (b) No-one – certainly not FA Wales – was putting forward their proposed solution as the “best, in this, the best of all possible worlds”. The solution was a “patch”, given the (unchallenged) decision to end the season. The question was, really, which solution of the several that offered themselves was the best solution in these particular circumstances. The answer to that question implies not investigation but an assessment of the circumstances in which the various clubs participating in football in Wales found themselves. In short, what mattered was an understanding of the operation of the football and the football leagues under FA Wales’ jurisdiction. That of course is a matter within FA Wales’ specialist expertise.
- (c) I also bear in mind that FA Wales was operating in a fast-changing environment and under time-pressure. It is unnecessary, in this Judgment, to recount the developing history of the COVID-19 pandemic as it affected the United Kingdom in general, and Wales in particular. But I take judicial notice of the fact that FA Wales had to take on board almost daily regulations and announcements which (and I say this with all respect) were focussed on much more life-and-death decisions than football. FA Wales’ primary role was to do its part in maximising the health and safety of people involved in football generally, and as a secondary question minimising the disruption to the football under its jurisdiction. I consider that the priorities were clearly stated in the UEFA COVID Guidelines described in paragraph 77 above: health and safety was the “primary concern”, and rightly so.
- (d) In this case, there was an on-going process of consultation, impressively conducted by FA Wales, involving the key participants. Thus, as the chronology in Table 3 shows, clubs were consulted and surveyed, and their views taken into account. The various options – which I will consider later on in this Judgment – were articulated and canvassed. I agree with the statement in paragraph 108 of FA Wales’ Points of Defence:

“...[FA Wales’] decisions, however, were made following consultation of every club in the [Cymru Premier League], WPWL and men’s Tier 2 and were promptly announced to clubs once made. Clubs moreover had extensive insight as to the matters on which the [National League Board] and [FA Wales board] would be briefed (the clubs having received a presentation on almost identical terms to the boards themselves).”

92. Obviously – as this case demonstrates – different clubs have (quite legitimately) got different interests and so different views as to how the 2019/2020 season ought to be concluded in the present circumstances. At the end of the day – as between these

competing interests – someone has to hold the ring and actually make a decision. In this case, that was FA Wales. I do not regard the contention of procedural unfairness as seriously arguable.

**(3) Irrational or unreasonable**

**(a) *The general approach***

93. I turn, then, to the question of the merits of FA Wales’ decisions. It is trite that a court reviewing the decisions of another body must act with great caution. There must be no second guessing. The question is not “Has the body being reviewed got the decision right?”, but rather “Is the decision so far out of the range of reasonable decisions open to the body being reviewed so as to amount to an error of jurisdiction, such that the reviewing court ought to intervene and quash the decision?”

94. There are many *dicta* in the cases that compel this approach. In paragraph 97 of its Points of Defence, FA Wales put the point this way:

“A regulatory decision will only be irrational and/or otherwise unreasonable insofar as it is beyond the “range of reasonable decisions open to a decision maker”: *Boddington v. British Transport Police*, [1999] 2 AC 143, *per* Lord Steyn at 175. Whether assessed under the principles of rationality or proportionality, the Courts should be slow to interfere with a decision of a governing body, such as [FA Wales].”

I regard this test as identical to the one articulated by New Saints and set out by me in paragraph 36(2) above.

**(b) *Specific matters to bear in mind in this case and my approach***

95. There are a number of points specific to this case that need to be borne in mind and that I do bear in mind:

(1) First, that there were a number of decisions being taken by FA Wales, of which only two are presently under review. This is best illustrated by reference to the minutes of the meeting of the National League Board, where no less than eight decisions are recorded.<sup>87</sup> The “Decisions” referred to by New Saints and described in paragraphs 28 and 29 above form part of these eight.

(2) Secondly, there is a relationship between the decisions taken by FA Wales and, indeed, the decisions selected for challenge by New Saints (i.e., Decision 1 and Decision 2). Thus, to adopt New Saints’ terminology, Decision 1 (the decision to abandon the season) cannot be justified without Decision 0 being right (the decision to suspend games), and Decision 2 cannot be justified without Decision 1 (the decision to abandon the season) being right. That is the context in which Decision 2 must be viewed. Equally – as I have described<sup>88</sup> – Decision 3 really does not arise for consideration until the status of Decision 2 has been determined. By way of example, if I were to conclude that Decision 2 was irrational or unreasonable in its failure to allow for a sporting process to determine ranking,

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<sup>87</sup> See paragraph 83(2)(c) above.

<sup>88</sup> See paragraph 31 above.

then it follows that the decision to rank according to the PPG system was also irrational or unreasonable.<sup>89</sup>

- (3) Thirdly, there are other leagues, other than the Cymru Premier League, under consideration. It is quite plain from the decisions of the National League Board that it had the position of these other leagues well in mind (see decision 4), and that the position of these other leagues actually affected what the National League Board chose to do about the 2019/2020 Cymru Premier League season (see decision 5). I should be clear that I am not suggesting – at this stage – that such an approach was either right or wrong: what I am saying is that it would be an error to view Decisions 2 and 3 completely in isolation.
- (4) Fourthly, it is quite clear that there were a number of possible solutions to the COVID-19 problems that FA Wales was facing. That is clear, for example, from the various options that were put to both the National League Board and the directors, and which I describe in greater detail below. Choosing between those solutions involved the exercise of judgement of a high order. More specifically:
  - (a) It is common ground that the outcome everyone wanted and expected – a sporting process run according to the rules that would ordinarily apply – was not possible and that the decision to abandon this process (Decision 1) was lawfully taken.
  - (b) Inevitably, given the circumstances in which Decision 1 was taken, any alternative could only ever hope to approximate the abandoned process: no alternative could ever, perfectly, replicate what was to be.
  - (c) This is important when considering the various solutions to the problem and New Saints’ contentions as to the lawfulness of Decisions 2 and 3. FA Wales clearly has a margin of appreciation within which to exercise its discretion as to what would be the most appropriate solution, that decision only to be set aside if it lies outside the range of reasonable decisions open to it. It is not enough for New Saints to say that another, different, solution could have been adopted. The preference of one (reasonable) solution over another (reasonable) solution is not, in itself, unreasonable. Either New Saints must show that the solution in fact adopted was not a reasonable one (i.e., it was, viewed on its own terms, a bad solution outside the range of reasonable decisions) or New Saints must show that a different solution would (taking all relevant factors into account) be so clearly and distinctly better so as to make a choice of one of the alternatives (each reasonable on their own terms) an indefensible choice.
  - (d) For this reason, I invited New Saints – during the course of one of the interlocutory hearings that preceded the trial in this matter – to consider what their version of a clearly and distinctly better solution might be. It seems to me that an exercise comparing and contrasting New Saints’ proposed solution with that in fact adopted by FA Wales will provide

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<sup>89</sup> As I have noted, the converse does not hold good. If Decision 2 is lawful, then Decision 3 can still be unreasonable/irrational.

considerable insight into the reasonableness and/or rationality of FA Wales' decisions in this regard.

**(c) *New Saints' suggested solution and the lawfulness of FA Wales' solution***

**(i) *A solution using a sporting process: Decision 2***

96. In Schedule 3 to its Amended Points of Claim, New Saints set out an “alternative” reasonable model or option for resolving the rankings in the Cymru Premier League using a sporting process. FA Wales, of course, concluded that such a process was not feasible and it adopted – as I have described – a non-sporting process for determining rankings. In this regard, New Saints' suggested solution is actually the only solution, and the issue is really why no sporting process solution was adopted by FA Wales.

97. New Saints' alternative was as follows:

- “1) ...a play-off game between [New Saints] and [Nomads] should be played in order to determine the Champion Club and accordingly who should be nominated for the UEFA Champions League.
- 2) This game can be played as a one-off game or a two-leg tie in order to provide fairness on both sides.
- 3) Even before the extension to 20 July 2020, this provided sufficient time for such a format to be played, and having regard to an extension being sought and granted to other national associations, it was likely that one would be granted to [FA Wales].
- 4) Due to UEFA confirming an extended deadline for all clubs to confirm their nominations for UEFA Club Competitions (i.e., UEFA Champions League and the UEFA Europa League) moving to 3 August 2020, this will give more than sufficient time for the above format/s to be applied.
- 5) [New Saints] is not aware of any appetite for an extended play-off format..., namely that those clubs who finished in third and fourth place of the [Cymru Premier League] at the time it was curtailed, who had a mathematical possibility of winning the [Cymru Premier League], would also wish to participate, but if they do and [FA Wales] reasonably considers that it should be offered then [New Saints] has no objection to the same, and again a play-off format (along the lines of 1<sup>st</sup> v 4<sup>th</sup> and 2<sup>nd</sup> v 3<sup>rd</sup> and then the winner of those playing for Champion and second paly and the losers playing for third and fourth place) could be played and there was and is sufficient time for such alternative formats.
- 6) More generally, [New Saints] has no objection to and would invite [FA Wales] to suggest an extended format if other clubs within the [Cymru Premier League] wished to participate and [FA Wales] considered it ought reasonably to consider such alternative formats.”

98. The first issue that arises is how the Clubs who are to participate in the play-offs envisaged in this proposal are to be selected. The top four Clubs – according to the PPG scheme in fact adopted by FA Wales – were (in this order) Nomads, New Saints, Bala and Barry.<sup>90</sup> Of course, that is an outcome determined by a non-sporting process. It is

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<sup>90</sup> See paragraph 23(3)(b) above.

not clear from New Saints' description of its proposal how the top four or top two teams that would participate in the play-offs would be selected. An alternative to the PPG scheme would be to take the ranking as it stood at the end of Phase 1. The position was as follows:

Position	Club (ranking according to PPG in brackets, where different)	Conference allocated to	Matches played	Won-lost-drawn	Goal difference	Points
1	New Saints (Nomads)	Championship	22	16-2-4	44	50
2	Nomads (New Saints)	Championship	26	13-7-2	22	46
3	Bala Town	Championship	26	13-2-7	28	41
4	Barry Town	Championship	25	12-4-6	7	40
5	Caernarfon Town	Championship	26	10-4-8	1	34
6	Newtown	Championship	25	9-5-8	-3	32
7	Cardiff Met	Playoff	25	8-7-7	1	31
8	Cefn Druids	Playoff	25	9-4-9	-2	31
9	Aberystwyth Town	Playoff	26	6-5-11	-18	23
10	Penybont	Playoff	25	3-6-13	-21	15
11	Carmarthen Town (Broughton)	Playoff	25	3-4-15	-38	13
12	Broughton (Carmarthen Town)	Playoff	26	2-6-14	-21	12

**Table 4:** Ranking of clubs in the Cymru Premier League for the 2019/2020 season at the end of Phase 1

Use of the end of Phase 1 rankings would, in contrast to the PPG scheme rankings, result in a different order of the same Clubs, with positions 1 and 2 being inverted.

99. More to the point, however, is the fact that, whichever system is used, a non-sporting process is being used to determine the Clubs participating in the play-offs, whether those play-offs include two or four or more clubs. That is because, considering the possible rankings were all remaining matches to be played in the ordinary course, the top four (or top two) clubs might be very different. As to this:

- (1) Clearly, for the reasons given in paragraph 23(3)(b)(ii) above, a Club allocated to the Playoff Conference cannot in terms of ranking finish higher than seventh (i.e., at the top of the Playoff Conference). Thus, when considering the unplayed Phase 2 games, it is (with one exception, which I will come to) only the games between the six Championship Conference Clubs that matter.
- (2) The top two Championship Conference Clubs are nominated to the UEFA Champions League and to the UEFA Europa League.
- (3) However, the second UEFA Europa League place goes to the winner of the play-offs between the Clubs ranked third to seventh in the Cymru Premier League. The Club ranked seventh is, of course, the winner of the Playoff Conference and (unless the season is completed as it ordinarily would) a non-sporting process would have to be used to determine the identity of that club.



100. The problem with New Saints’ proposal is that the more limited the playoffs envisaged, the greater the significance of a non-sporting process in determining who participates in these playoffs. This is not a theoretical concern:
- (1) As Mr Ford explains, taking the rankings as determined by the PPG scheme, any Club of the six in the Championship Conference could either have won the Cymru Premier League title or come second.<sup>91</sup>
  - (2) The same is true if the rankings at the end of Phase 1 are adopted. Thirty matches are played in Phase 2, each Club playing ten matches, with a maximum of 30 points to gain.
101. Thus, to adopt a two-team playoff, between (whichever process of selection was adopted) New Saints and Nomads would involve setting at nil the chances of any other Club in the Championship Conference achieving first or second place. That is very much not a sporting process.
102. The problem is even more acute if a four-team playoff were to be adopted. New Saints’ alternative does not say how these four teams would be selected, but presumably the selection would be based on the top four teams ranked according to whatever non-sporting process was adopted (i.e., New Saints, Nomads, Bala and Barry). This would involve setting at nil the chances of any other Club apart from these four attaining the second UEFA Europa League place:
- (1) As has been described,<sup>92</sup> this spot is allocated after playoffs between the Clubs ranked third to seventh at the end of the season.
  - (2) Thus, Caernarfon and Newtown – who would, by virtue of their participation in the Championship Conference, have been guaranteed a place in the playoffs, would have their chance of winning these playoffs set at nil.
  - (3) The Clubs in the Playoff Conference would have their chances of participating in these playoffs set at nil.
103. Thus, the difference between the New Saints’ proposal and the solution actually adopted by FA Wales is not that the New Saints’ proposal involves an entirely sporting process to determine end-of-season rankings. Rather, New Saints’ proposal involves adopting a non-sporting process (of exactly the type or kind decided upon by FA Wales), but with a sporting process “bolted on” at the end as between the teams not winnowed out by the non-sporting process.
104. Seen in this light, it cannot possibly be said that New Saints’ proposal is so markedly better as to render FA Wales’ rejection of it and the adoption of an alternative unreasonable or irrational. Nor can it be said that the actual decisions made by FA Wales are on their face, and viewed on their own merits, unreasonable or irrational. FA Wales’ decision – looking simply at the alternative processes in the abstract – seems to

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<sup>91</sup> See Ford 1/§§21ff.

<sup>92</sup> See paragraph 22(3) above.

me to be an eminently reasonable one. Thus, taking both of the broadbrush tests for unreasonableness and irrationality articulated above:

- (1) It cannot be said that Decision 2, viewed on its own terms, is either unreasonable or irrational. To the contrary, it seems an eminently reasonable one, as I have said.
- (2) It cannot be said that Decision 2, reasonable on its own terms, is so markedly inferior to another decision that could have been made, such that the adopting of an admittedly reasonable course of action (viz: Decision 2) could, for that reason, be regarded as unreasonable or irrational. In saying this, I am not saying that the proposals of New Saints – or other alternative courses of action – are themselves unreasonable or irrational. To the contrary: they seem perfectly reasonable. But what I cannot do is say that any of them are better or worse than the decision – Decision 2 – in fact adopted. And that, as it seems to me, is the essence of the distinction between a judicial review and an “on the merits” review. In the former case, which this is, the decision between alternative courses of action, all proper, lies with the decision-maker, and I cannot and should not interfere.

I consider that (for this reason alone) FA Wales’ decision prematurely to terminate the 2019/2020 Cymru Premier League season without putting in place an alternative format involving elements of a sporting process was neither irrational nor unreasonable, and that accordingly the challenge to Decision 2 must fail.

105. In the course of submissions – both written and oral – New Saints identified a number of factors which, it was suggested, rendered the conclusion I have just expressed wrong. I do not consider that these factors affect the conclusion that I have expressed, but it is important that I deal with these various factors, which I do in the following paragraphs:

- (1) Clearly, it was important that FA Wales have regard to the UEFA COVID Guidelines, and I find that FA Wales did so have regard. In paragraph 77(6) above I set out a somewhat “hard-edged” description of the process UEFA seemed to envisage in its guidance, and it might be said that the second stage of that process (as I have described it) was given insufficient weight by FA Wales, in that FA Wales jumped straight to the third stage as I have described it (terminating the season with the playing of further games). I do not consider this to be either a fair or a soundly based criticism. As the foregoing analysis has shown, it is actually not possible to adopt a different format for concluding the season using a sporting process without first using a non-sporting process to cut back the number of games to be played. That is the hallmark of both the solution adopted by FA Wales in Decision 2 and New Saints’ alternative proposal. I shall, later on in this paragraph, explain why this is the case by reference to the particular circumstances of the Cymru Premier League. The only point that I seek to make here is that it seems to me – viewing, as I do, UEFA’s guidance as just that, guidance (albeit extremely important guidance) – that FA Wales did follow that guidance.
- (2) The UEFA COVID Guidance placed, as I have noted, great stress on the importance of “sporting merit”. In normal circumstances, “sporting merit” bears a highly specific, albeit league specific, meaning. It means qualification by

reference to the rules of the particular league in question. Here, as I have described in Section B above, the Cymru Premier League identifies the three Clubs that will be put forward for places in UEFA club competitions by way of a relatively complex, two phase, league competition. Many other leagues – because they are bigger – would not have a Phase 2. These differences in process are immaterial. Provided the rules for a given league meet UEFA’s requirements, the outcome dictated by those rules is the outcome based on “sporting merit”. The problem for the 2019/2020 season is that this has proved not to be possible, and derogations from the rules that would ordinarily apply have had to be framed.

- (3) Viewing Decision 2 as against New Saints’ rival proposal, Decision 2 is, as it seems to me, more consistent with UEFA’s desire for qualification on “sporting merit”. The fullest sporting results (i.e., the results as they stand at the moment of the abandonment of the season) are deployed in the determination of end-of-season rankings, without further embroidery. For those results (or earlier results, such as the Phase 1 rankings) to be deployed to feed into or inform a “superimposed” sporting process, that might bear little or no resemblance to the actual outcome as it would have been had the season concluded normally, creates no more than a “sporting merit” patina or veneer, then the true driver of the rankings is in fact a non-sporting process. FA Wales’ solution at least has the virtue of wearing on its sleeve the unsatisfactory (albeit entirely justifiable) end to the season that the COVID-19 pandemic has occasioned.<sup>93</sup>
- (4) The UEFA COVID Guidelines rightly emphasise that the process of selection on “sporting merit” adopted in these extraordinary times be “objective, transparent and non-discriminatory”. FA Wales made much of the suggestion that New Saints’ proposal was discriminatory. I consider that a curious and unjustifiable contention: New Saints’ proposal involves a process not unlike the Phase 1/Phase 2 approach normally used by the Cymru Premier League: there is an initial filter (Phase 1 in the ordinary course; and the non-sporting process in New Saints’ proposal) followed by a second round which is determinative of which Clubs are nominated to the various UEFA competition places (Phase 2 plus the play-offs in the ordinary course; and the play-offs only in New Saints’ proposal). In other words, I do not consider that Decision 2 can be justified on the basis that the alternatives – including in particular that proposed by New Saints – would not (in theory at least) have worked as well as the solution actually adopted.
- (5) It is important, however, to have regard to the practical aspects of the Cymru Premier League’s operation also, and here there are two factors that militate against the playing of further games and point in favour of the purely mathematical non-sporting process driven solution adopted by FA Wales. These two factors are:

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<sup>93</sup> The point is put in paragraph 102.1 of FA Wales’ Points of Defence: “...[FA Wales] proceeded on the basis that an alternative format involving play-offs would only be acceptable where is allowed all clubs still in contention for a UEFA position to compete...That was plainly a permissible approach to the “sporting merit” criterion; indeed, had [FA Wales] refused to allow such clubs to compete in play-offs, its decision may well have fallen foul of UEFA’s non-discrimination requirement.”

- (a) The economic cost of playing additional matches in the 2019/2020 season in the present environment.
- (b) The fact that the Cymru Premier League is not a completely professional league.

Neither of these are factors that conclusively militate against the playing of further football matches in order to conclude the season. But they are factors that tell against this kind of solution, and in favour of the sort of mathematical solution that is Decision 2. The greater the number of games envisaged in order to conclude the season, the more material and the more adverse these two factors are. I describe their nature in the following paragraphs.

- (6) I begin with the economic cost of playing additional matches in the 2019/2020 season in the present environment. The minutes of the National League Board meeting of 18 May 2020 note in respect of decision 1 (using the board’s numbering, and recording the decision to end the playing season) that there are “specific economic and financial justifications which would make continuing the season to its conclusion financially imprudent or which could put at risk the long term financial stability of the domestic competition and its clubs”.<sup>94</sup> As to this:
  - (a) It is, of course, true that the costs and difficulty of playing additional matches is more-or-less directly related to the number of those additional matches. I very much doubt – and, to be clear, FA Wales did not seek to contend – that the number of play-off matches proposed by New Saints (particularly given the participants) would occasion very much difficulty.
  - (b) But I have already described the “bolt-on” nature of very limited playoffs as the essential reason for the reasonableness of FA Wales’ decision. Of course, the unsatisfactory nature of New Saints’ proposals can be ameliorated by the playing of additional matches. This, however, brings into play precisely the difficulties articulated by FA Wales.
  - (c) These are explained in Ford 1:
    - (i) Self-evidently, carrying on football matches – assuming that to be lawful – in a COVID-19 environment entails costs. As Mr Ford noted,<sup>95</sup> and as no-one disputed, “[h]ealth risk to players, staff and officials, operational staff – health and wellbeing of stakeholders, of course, should be paramount”. Putting in place an appropriately safe regime in which to train and conduct matches involves significant costs in terms of testing and quarantine regimes.
    - (ii) These costs become detrimental to the financial well-being of some – by no means all – of the clubs participating in the Cymru Premier League. No-one suggested that play-off matches could be played other than in a closed-door environment. That would mean

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<sup>94</sup> See the quotation at paragraph 83(2)(c) above.

<sup>95</sup> Ford 1/§96(a).

expenditure without any corresponding income. Thus, the costs of playing football would be incurred – at an increased level, given the need to take COVID-19 precautions<sup>96</sup> – without any off-setting income:

“No matchday income if played behind closed doors – This was a key subject matter raised by clubs in emails...and in the feedback forms. Playing behind closed doors does not only affect the moderate income from the admittance charges, but the secondary spend on food, drink, raffle, etc are all essential income streams for our clubs.”

- (7) I turn, then, to the second factor, which is the amateur/professional nature of the Cymru Premier League. As to this:
- (a) A professional player is a player who is rewarded for his footballing services by a reward that goes beyond his expenses. More colloquially, it may be said that such a player earns his or her living from the sport.
  - (b) The Clubs participating in the Cymru Premier League use a mix of professional and amateur players in their squads. The mix differs, but none – so far as I can tell – would be able to field a completely professional squad (that is, 25 players) for a match.
  - (c) Why does this amateur/professional distinction matter? The reason it mattered is because the Health Protection (Coronavirus Restrictions)(Wales) Regulations 2020,<sup>97</sup> which were in force at the time of the Decisions, provided that due to the COVID-19 pandemic:
    - (i) Professional footballers were entitled to go to their place of work (i.e. a stadium to play football or a training ground at which to train) provided that it was not reasonably practicable for them to do that work from the place where they are living.<sup>98</sup>
    - (ii) It was conceded by FA Wales that if there were football matches taking place, professional footballers would have to attend their place of work (the training ground and the stadium).
    - (iii) In this sense, amateur players – by definition not working – would have to remain at home, or at least would not be able to rely on these provisions to attend the training ground and the stadium.

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<sup>96</sup> These are described in Ford 1/§§96(b) and (c).

<sup>97</sup> 2020 No 353 (W 80).

<sup>98</sup> Regulation 8A.

- (iv) However, amateur players might be able to justify such attendance because they were providing voluntary or charitable services or (perhaps) as elite athletes.<sup>99</sup>
- (d) Because the Regulations differentiate between amateur and professional players, I was given detailed submissions as to the meaning and operation of the Regulations and both parties made submissions as to the ability of amateur players to attend training and football matches consistently with the Regulations.
- (e) After due consideration, I find the Regulations to be entirely irrelevant to the issues before me. What matters is the anterior question of whether football matches should take place at all – irrespective of whether the players are professional or amateur. Let me say at once that I proceed on the basis that there was no reason in law not to hold further matches, but equally every reason to consider whether – in light of the COVID-19 pandemic – such matches should be played, given the public health considerations. Clearly, any such matches could not be played in the usual way. They would have to be played behind closed doors. But even then, there would be COVID-19 related risks to the many people necessary to enable a match to take place (well in excess of 50). The essential question faced by FA Wales – and I consider it is this question, and not the interpretation of the Regulations that both the National League Board and the Board of Directors were considering – was whether, in these circumstances, additional matches should take place. If those matches should take place, then it seems to me that all players, professional or amateur, could and should participate. But, equally, if those matches should not take place, the need for any footballer (professional or amateur) to attend the training ground or the match stadium vanishes. It is for this reason that I find the focus on the Regulations substantially to miss the point.
- (f) The fundamental point – which, as I have noted, underpins the UEFA COVID Guidelines<sup>100</sup> – is the question of public health and safety. What FA Wales needed to ask itself – and what, I think, it did ask itself<sup>101</sup> – was whether the playing of additional matches was so important as to override these health and safety risks. Given, as I have found, that there was a perfectly reasonable way of concluding 2019/2020 season without playing such matches, it seems to me that FA Wales was quite right in considering

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<sup>99</sup> Regulations 8(1) and 8(2)(g) and (ga). Regulation 8(2)(ga) was introduced by amendment and the definition of “elite” athlete may be too narrow to embrace all amateur players. Certainly, New Saints placed little reliance on this provision.

<sup>100</sup> See paragraph 77(5) above.

<sup>101</sup> My sense is that as the litigation developed, this essential point was lost sight of by both parties. Both became enmeshed in the question of whether it was legally possible to play additional games. Whilst I accept that the law sets out the minimum standard, it does not follow that even if it is technically lawful to play football matches, they should be played. The law, after all, does not guarantee the non-spreading of COVID-19. It puts in place a framework so as to enable everyone to conduct themselves in a manner that will minimise infection. That conduct must be informed by all the circumstances, and the mere fact that someone can lawfully do something does not mean that that person should do that thing.

the general risks of COVID-19 to weigh against playing those additional matches, and in doing so it was acting well within the scope of its discretion.

(ii) *A solution using a non-sporting process: Decision 3*

106. I have concluded that Decision 2 is not impeachable. I turn, then, to the rationality and/or reasonableness of the non-sporting process adopted by FA Wales in order to determine rankings for all leagues under its jurisdiction.

107. Unsurprisingly, there are many options to draw from, given that the complexities of playing additional matches do not arise in this case. The options in relation to which FA Wales consulted with (in particular) the clubs in the Cymru Premier League were as follows:<sup>102</sup>

(1) *Option 1 – freezing and adopting the standings as at the date of suspension:* To freeze the standings in the league tables as they stood at the time of suspension. Thus, ranking would be determined by reference to the points accumulated by each club as at 13 March 2020, with any clubs having equal points being differentiated by the goal difference then prevailing.

(2) *Option 2 – voiding the results of the season, save to the extent of using them for making nominations to UEFA:* In the words of Mr Ford, this option worked as follows:<sup>103</sup>

“...[FA Wales] considered whether to void the 2019/2020 season, making UEFA nominations on the basis of the league standings at the time of that decision and expunging all results (save for any disciplinary record)...Unlike [Option 1], [this option] does not preserve the sporting record for that season. It also removes any standings upon which promotion and relegation might be determined.”

(3) *Option 3 – voiding Phase 2 of the season:* This is similar to Option 2, save that only the results for the Phase 2 part of the season would be expunged, and standings would be based on the 22 matches played as part of Phase 1.

(4) *Option 4 – the PPG scheme option:* As has been described, this was the option ultimately selected by FA Wales. Rankings are determined by the points per game earned by each club.

(5) *Option 5 – a weighted PPG scheme:* This is similar to Option 4, save that a weighted average is applied according as to whether games were played home or way.

(6) *Option 6 – replication of Phase 1 results:* As regards any unplayed games in Phase 2, the results from the corresponding Phase 1 fixture would be replicated in order to produce final rankings.

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<sup>102</sup> Descriptions of the various options can be found throughout the documents that were before me. They did not appear to me to be materially different. I have derived these descriptions from Ford 1/§78.

<sup>103</sup> Ford 1/§78.2.

108. New Saints did not suggest that FA Wales had failed to consider an option not listed above that it ought to have considered when making Decision 3. Rather, New Saints contended that Option 4 should not have been adopted, and that instead either Option 3 or Option 6 should have been chosen instead.<sup>104</sup>
109. I can deal with this contention very quickly:
- (1) There can be no suggestion – for the reasons that I have given in Section F above – that the choice between options was in some way contractually dictated by – for instance – a provision like Rule 17.9 of the Cymru Premier League Rules.
  - (2) This was, in short, a matter of discretion and everything that I have said in this Judgment about courts not interfering with the decisions of sports regulators unless they are unreasonable or irrational stands with particular force in this context. The fact is that all of the different options are reasonable ways of resolving the basic difficulty of ending the 2019/2020 season without playing additional matches.
  - (3) In these circumstances, I cannot possibly substitute my view on the merits (whatever that might be) for the considered judgement of FA Wales. It was suggested by New Saints that insufficient weight had been placed, by FA Wales, on the fact that the Cymru Premier League operates in the two Phases that I have described. New Saints contended that FA Wales placed too high a premium on consistency between different leagues, not all of which operate a two-Phase season. I do not consider that FA Wales placed too high a premium on this factor and if and to the extent that New Saints were contending that this was an irrelevant factor, I reject that submission as misconceived and wrong. Consistency is obviously a relevant factor, but not a decisive one. The question is whether one should take advantage of the fact that Phase 1 of the Cymru Premier League involves each Club playing all other Clubs home and away, with the result that the end of Phase 1 represents the end of the season for most other leagues. Of course, FA Wales considered this factor: the importance of Phase 1 underlies Options 3 and 6, and FA Wales obviously considered these options. But the price of Options 3 and 6 is that the actual sporting record of Phase 2 is disregarded. That is a material problem in the case of Options 3 and 6. It does not render those Options unreasonable: but, equally, it explains why a regulator might select another, different, Option, like Option 4.
110. I can find nothing unlawful in FA Wales’ adoption of Decision 3.

## **J. LEGITIMATE EXPECTATION**

111. New Saints contend that Decisions 2 and 3 were “contrary to the legitimate expectations of [New Saints]”.<sup>105</sup> I do not understand New Saints to have been advancing a legitimate expectation going beyond or different to the due process that I have described at length in this Judgment. There is no additional matter for me to

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<sup>104</sup> See Schedule 3 to New Saints’ Amended Points of Claim.

<sup>105</sup> New Saint’s Amended Particulars of Claim at paragraph 93.



consider under this head and so – for the reasons that I have already given – this ground of challenge must fail.

#### **K. DECISION 2A: FAILURE TO REVISIT EARLIER DECISIONS MADE**

112. When courts review the decisions of public bodies – and, as I have noted, the present case is materially no different to such reviews – what is in issue is the lawfulness of that decision. The public body will generally be obliged to justify that decision by reference to the processes actually followed in light of the facts as they stood at the time. In essence, that is because the courts are concerned less with the correctness of the decision and more with the question of whether the decision was reached in a lawful way.
113. It follows that the mere fact that there has been a subsequent change of circumstance does not necessarily mean that a decision made, and lawfully made, must be re-visited. Indeed, there is much to be said for a certain degree of finality in decision-making, otherwise the the process of public bodies turns into a “hamster-wheel” of constant review of decisions which, even when made, are without consequence because they are reviewed again and again. Of course, some decisions are, by their nature, so long-term that they ought to be re-visited, reviewed and (as necessary) re-calibrated or re-made on a regular basis. But the Decisions in this case were not long-term decisions: they were “one-offs”, intended to resolve, once and for all, the problem of bringing the 2019/2020 Cymru Football League season to a proper conclusion.
114. For all these reasons, there was, I consider, a legitimate expectation in the Clubs apart from New Saints that the Decisions would stand unless there was a proper justification to re-make those Decisions.
115. I do not consider such a justification to exist in this case. Given the “once and for all” nature of the Decisions, I consider that only a subsequent change in circumstance that would render reconsideration not merely desirable but essential could justify re-opening the Decisions. What one would be looking for would be some circumstance or circumstances that would render the continued implementation of the Decisions unreasonable or incapable of justification. No such change of circumstance can be shown in this case; and I do not consider any such to exist.

#### **L. DISPOSITION**

116. For all these reasons, the claim brought by New Saints fails. I am circulating a draft of this Judgment to the parties on Sunday, 12 July 2020 and will formally hand it down on Monday, 13 July 2020, when I will hear submissions as to what consequential orders I should make.
117. I want to express my thanks to the parties and their legal teams for their very considerable efforts in bringing this matter to trial so quickly and so capably. I can well understand the disappointment all supporters of football in Wales must feel in seeing the 2019/2020 Cymru Premier League season come to so unsatisfactory an end. I can only hope that this Judgment provides some explanation as to why the conclusion of the season in this way is justified and justifiable given the extraordinary events of this year.

## M. POSTSCRIPT

118. During the course of the hearing on 8 July 2020, it became apparent that there was a deadline (albeit, on the face of it, a soft deadline) for the nomination of Clubs by FA Wales to UEFA. That deadline was Monday 13 July 2020.
119. Given the terms of this Judgment, that deadline would appear no longer to present any issues. But at the time of the hearing, I had yet to decide the issues that were before me, and so I invited FA Wales to approach UEFA with a view to obtaining an extension, in the event that the Decisions needed to be revisited.
120. FA Wales did so, in a letter by Mr Ford dated 10 July 2020. That letter, unfortunately, went well beyond merely identifying the fact of a dispute between New Saints and FA Wales which might require an extension of the 13 July 2020 deadline. The letter contained a statement of New Saints' "position" in the proceedings before me (which statement New Saints does not accept as accurate), and a request that UEFA not only extend the deadline but provide its views/guidance on certain questions should FA Wales be obliged, by my (anticipated) Judgment, to re-consider the Decisions.
121. Entirely unsurprisingly, and quite rightly, New Saints have expressed a degree of concern about this letter, regarding it as an illicit way of putting before the court further material in relation to this dispute. With admirable promptitude, UEFA responded by indicating that there was more time, if needed, for FA Wales to revisit the Decisions. Entirely understandably, given the terms of FA Wales' letter, UEFA was also inveigled into responding to FA Wales' request for views/guidance.
122. I have read this correspondence (it was sent to me by the parties, and I read it in the early hours of Saturday morning) with a measure of concern. It seems to me that there was no justification in Mr Ford going beyond requesting more time from UEFA, with a neutral explanation as to why the time was needed. All that needed to be said was that the Decisions were being judicially reviewed and that an outcome was expected which, if adverse to FA Wales, might require more time so as to enable FA Wales to re-visit the Decisions.
123. There was no possible justification in seeking, in this correspondence, UEFA's guidance in the event the Decisions needed to be reconsidered. That is because, quite simply, any reconsideration and any guidance would only be meaningful in the light of my Judgment, which at the time of this correspondence was unknown and unpublished to the parties.
124. New Saints have requested that I not take the request for guidance and – more particularly – the "guidance" provided by UEFA in response to that request into account in this Judgment. I confirm that I have not done so. For reasons that I hope are clear, such guidance would be and was altogether irrelevant to the matters under consideration before me; and it may be some measure of assurance to New Saints that the structure of my Judgment, including its outcome, was mapped out in the period after the conclusion of the hearing and before I had sight of this correspondence.
125. Nevertheless, Mr Ford's letter is a good example of a regulator under judicial review losing sight of the essential nature of the judicial review process, and as a result putting

all parties, including the court, in a difficult position. The letter should never have been sent to UEFA in the terms in which it was framed.

**ANNEX 1**

**TERMS AND ABBREVIATIONS USED IN THE JUDGMENT**

(footnote 1)

<b>TERM/ABBREVIATION</b>	<b>FIRST REFERENCE IN JUDGMENT</b>
Aberystwyth	§19(3)
Articles	§42
Bala	§19(5)
Barry	§19(6)
Board of Directors	§27 in quotation
Broughton	§19(4)
Caernarfon	§19(7)
Cardiff Met	§19(8)
Carmarthen	§19(9)
Cefn Druids	§19(10)
Catton 1	§5 fn 3
Championship Conference	§20(2)
Club	§54(1)
Club Surveys	§69 table 3
Cymru North	§17 table 1
Cymru Premier League	§2
Cymru Premier League Rules	§54
Cymru South	§17 table 1
Decision 0	§29
Decision 1	§29
Decision 2	§28
Decision 2A	§32
Decision 3	§28
Director	§44(1)
FA Wales	§1
FA Wales Response to UEFA	§27
FA Wales Rules	§44
Ford 1	§21 fn 8
<i>Fordham</i>	§40(4) fn 22
Harris 2	§62
Leaving Club	§64(4)(b)

New Saints	§1
Newtown	§19(11)
Nomads	§1
non-sporting process	§4
Penybont	§19(12)
Phase 1	§20(1)
Phase 2	§20(3)
Playoff Conference	§20(2)
PPG	§23(3)(b)
Presentation	§83(2)(b)
Pyramid League Scheme	§16
Rules	§40(2)
sporting process	§3
UEFA COVID Guidelines	§25
Working Group	§69 table 3