BEFORE THE FOOTBALL ASSOCIATION PREMIER LEAGUE ARBITRAL TRIBUNAL

BETWEEN

FULHAM FOOTBALL CLUB

Claimant

- and -

WEST HAM UNITED FOOTBALL CLUB

Defendant

DETERMINATION

Introduction

1. This Determination addresses the preliminary issue which we identified should be determined by way of a preliminary issue, namely:-

   "Whether the Award and Reasons of the FA Tribunal in *Sheffield United v West Ham* is admissible in these proceedings."[1]

Background

2. Fulham Football Club ("Fulham") claims damages against West Ham United Football Club ("West Ham") for breach of contract arising out of the terms on which West Ham contracted with two first team players, Carlos Tevez and Javier Mascherano, to play for its team and the way in which it procured the players' registration with the Premier League.

[1] For these purposes "admissible" means admissible as evidence of the truth of the facts found by the Award and Reasons in that arbitration.

3. Fulham's case is that during the 2006-2007 season, Tevez was only able to play for West Ham because of West Ham's breaches of the Rules of the Premier League which constituted a contract between member clubs such as Fulham and West Ham and that Tevez' participation in the West Ham team was an effective cause of West Ham winning at least three more points than they would otherwise have won.

4. Fulham contend that precisely the same issues have already been determined under the rules of the Football Association (FA) by an FA Arbitral Tribunal in a claim brought by Sheffield United ("Sheffield") against West Ham. (The claim was brought under the FA Rules because by the time that the claim was instituted, Sheffield were no longer in the Premier League having been relegated at the end of the 2006-2007 season to the Championship). Fulham contend that in its Interim Award, the FA Tribunal found that:-

   (1) West Ham had breached its contract with Sheffield by the terms on which they had contracted with Tevez and Mascherano and the way in which they procured their registration.

   (2) Tevez was only able to play for West Ham because of West Ham's breaches of the Rules.

   (3) Tevez's participation in the West Ham team was an effective cause of West Ham winning at least three more points than they would otherwise have won.

   (4) Had West Ham not won those additional three points they would have been relegated instead of Sheffield and West Ham were, therefore, liable to Sheffield for its losses arising from relegation.

5. Having had the opportunity to read the Interim Award, we agree that this is, indeed, what the FA Tribunal found.

6. It is in those circumstances that Fulham therefore seek to rely on the Interim Award in the present proceedings.

Fulham's Submissions

7. Fulham's first submission is that the relevant Football Association Premier League (FAPL) Rules provide this Tribunal with a large measure of discretion as to the admissibility of evidence and, in particular, provide that this Tribunal is not obliged to apply strict rules of evidence. Specifically, Fulham relies upon Rule 21.3 in Section S which provides that the Chairman of the Tribunal or, rather, in the present case, the Tribunal itself, shall decide all procedural and evidential matters and that directions given by the Tribunal in connection with such matters "shall include without limitation:

   whether strict rules of evidence will apply and how the admissibility, relevance or weight of any material submitted by the parties on matters of fact or opinion shall be determined".

   Thus, Fulham submits, we have power to admit the Interim Award.

8. Fulham's second submission is that on the facts of the present case we should do so for these reasons:

   (1) The Interim Award is, in fact, available and any confidentiality in the Award that there may have been has long since been lost;

(2) The Interim Award is directly relevant to the issues which we have to determine in the present proceedings;

(3) It would be just and convenient to admit the Interim Award.

The Tribunal's Conclusions[2]

9. We agree with Fulham that, under the FAPL Rules, we have power to admit the Interim Award if we were to choose to do so. We also see the force of Fulham's submission that it would be just and, in particular, convenient for us to do so in the present case. As we explain at the end of this Determination, we are frankly troubled by the prospect of the parties calling much of the same evidence before us as was called before the FA Tribunal and the time which will be taken up and the costs which will be incurred, perhaps unnecessarily, as a result. We are also, unsurprisingly, as Mr Beloff QC for Fulham suggested we should be, instinctively reluctant to re-tread ground covered, at least in part, by a previous Tribunal. However, we have come to the clear conclusion that it would be contrary to principle for us to admit the Interim Award in the present case. And we are unconvinced that there are considerations of justice and convenience which favour admitting the Interim Award and are sufficient to override the desirability of adhering to established principle, either generally, or in this particular case.

10. It is of course a well-established principle of the English law of evidence that the findings of a court in proceedings between two parties are inadmissible in evidence in proceedings between either of those parties and a third person, (to the extent that it is sought to rely on them to prove the truth of the facts

[2] It was accepted that there is no longer any confidentiality in the content of the Interim Award, which has been widely publicised.

found): *Hollington v F Hewthorn & Co Ltd* [1943] KB 587, CA. This rule, though long controversial in academic and some judicial circules, has been quite recently reaffirmed and applied by the House of Lords in *Three Rivers District Council v Bank of England* [2003] 2 AC 1 and the Court of Appeal in *Secretary of State for Trade and Industry v Bairstow* [2004] Ch 1. The argument before us was not, however, focused on this principle. Rather, West Ham's argument relied on the separate principles which apply to findings of the kind on which Fulham seek to rely: findings arrived at by a private arbitral tribunal. Arbitration is, in contrast to litigation, a consensual private affair between the particular parties to a particular arbitration agreement in which the arbitrators are appointed to decide the particular dispute which has arisen between the parties to that arbitration. It follows that the award made in such proceedings remains private to those parties and may not subsequently be used in other proceedings without the parties' consent. This is the principle on which we rely in the determination of the preliminary issue in this case and it was recently restated and reaffirmed by the Court of Appeal in *Sun Life Assurance and Ors v Lincoln National Life Insurance Co* [2004] EWCA Civ 1660, [2005] 1Lloyds' Rep 606.

11. For the purposes of this Determination, we need not rehearse the facts of *Sun Life* (which will be well known to the parties and their legal advisers). Suffice it to say that one of the issues which the Court of Appeal had to determine was whether Sun/Phoenix (the Appellants) were bound in current arbitration proceedings between Sun/Phoenix and Lincoln (the Respondents) by a decision in earlier arbitral proceedings between Sun/Phoenix and Cigna to which Lincoln had not been a party but upon which Lincoln wished to rely.

The Court of Appeal held that Sun/Phoenix were not bound by the decision in the earlier Cigna arbitration.

12. We do not propose to set out in this Determination all the relevant passages in the Judgments in the Court of Appeal since to do so would add greatly to the length of this Determination. However, we can indicate that the passages which we found to be of most significance were paragraphs 53, 63 and 66-69 of the Judgment of Mance LJ, paragraph 84 of the Judgment of Longmore LJ and paragraphs 86-88 of the Judgment of Jacob LJ. However, we do propose to set out in full paragraph 68 of the Judgment of Mance LJ because this seems to us not only to set out in clear terms the principle upon which we rely but also to explain its rationale. In paragraph 68, Mance LJ stated as follows:

"*Fifthly, and more fundamentally, the solution for which Mr Hunter contends appears to me to overlook or obscure important differences between arbitration and litigation. In the context of litigation, problems of potentially conflicting Judgments arrived at between different parties to the same overall complex of disputes are met by provisions for joinder of parties or proceedings or for trial together, if necessary on a mandatory basis using the Court's compulsive powers. Even in circumstances in which there has been no such joinder, and where neither res judicata nor issue estoppel has any application, the Court may intervene to prevent abuse of its process, as stated in paragraph 63 and 65 above. All this is facilitated by the public nature of litigation, the public interest in the efficient administration of justice and the Court's coercive powers. Considerations of general justice of the sort to which Mr Justice Toulson referred thus have relevance and can be given effect in the context of litigation. Arbitration is in contrast a consensual, private*

affair between the particular parties to a particular arbitration agreement. The resulting inability to enforce the solutions of joinder of parties or proceedings in arbitration, or to try connected arbitrations together other than by consent, is well-recognised – though the popularity of arbitration may indicate that this inability is not often inconvenient or that perceived advantages of arbitration, including confidentiality and privacy are seen as outweighing any inconvenience. Different arbitrations on closely inter-linked issues may as a result lead to different results, even where, as in the present case, the evidence before one tribunal is very largely the same as that before the other. The arbitrators in each arbitration are appointed to decide the disputes in that arbitration between the particular parties to that arbitration. The privacy and confidentiality attaching to arbitration underline this; and, even if they do not lead to non-parties remaining ignorant of an earlier arbitration award, they are calculated to lead to difficulties in obtaining access, and about the scope of any access, to material relating to that award".

13. It is to be noted that Mance LJ, with whose reasoning and conclusion Longmore and Jacob LJJ agreed, acknowledged the consequences which may arise from the application of this principle in the event of later and separate arbitral proceedings in which the same or similar issues may arise, consequences which may include those identified by Mr Beloff in the present proceedings such as the risk that the later Tribunal may come to different conclusions on such issues to those arrived at by the earlier Tribunal. It is clear, however, that the principle applies, notwithstanding such possible consequences.

14. We do not believe that we can properly decline to apply that principle to the present case. On the contrary, it seems to us that unless we can detect some compelling reason for departing from it, to do so would be inconsistent not only with the principle itself but also with the rationale which underpins it. We can detect no such reason for doing so. In reaching this conclusion we have borne in mind that it is undesirable for an arbitral tribunal granted power to depart from the strict rules of evidence to do so on a case-by-case basis, adopting an unprincipled approach to the exercise of such a power. To do so would tend to create legal uncertainty. We have also concluded, in assessing the considerations of justice and convenience relied on by Fulham, that admitting the Interim Award as evidence of the facts found by the previous tribunal would be unlikely to achieve a significant saving in time and cost. It appeared to us, at the conclusion of the argument, that Fulham would be likely in any event to lead, or prepare to lead, other evidence to establish its case, adopting a belt-and-braces approach. The main significance of the Interim Award for the present arbitration may, we suspect, lie less in its evidential value than in its status as an independent opinion about the conclusions to be drawn from the evidence which was led before the distinguished Panel that adjudicated in the previous arbitration.

15. Mr Beloff sought to distinguish *Sun Life* on two grounds. First, he submitted that whereas in *Sun Life*, Lincoln were plainly strangers to the award between Sun/Phoenix and Cigna, in the present case Fulham are not properly to be characterised as strangers to the award between Sheffield and West Ham because the FAPL Rules constitute a binding obligation owed by each member of the Premier League to each other. Fulham's case is based on the same

contract and the same terms and were it not for the happenstance that Sheffield were relegated, they would have taken proceedings under the same (FAPL) Rules and not (as they were compelled to) under the FA Rules.

16. We do not accept this submission. It is clear that what the Court of Appeal meant by "strangers" in *Sun Life* was "strangers to the earlier arbitration proceedings". This is clear from a number of passages in the Judgments. For present purposes, one example will suffice, namely the concluding part of paragraph 53 of the Judgment of Mance LJ:

"But there is nothing to give a civil judgment, still less an arbitral award, evidential value in establishing facts needed to be proved in separate proceedings against a stranger to the original proceedings."

17. Secondly, Mr Beloff submitted that whereas in *Sun Life* the arbitration proceedings could properly be regarded as "consensual" and whereas it is clear from the Court of Appeal's reasoning that they relied upon the "consensual" nature of arbitration proceedings in rejecting Lincoln's attempt to rely upon the earlier award (see paragraph 68 of the Judgment of Mance LJ set out above), it would be inapt to describe the present arbitration agreement as consensual because referring a dispute between members of the Premier League to arbitration is a duty imposed on members by the Rules.

18. We do not accept this submission either. In our view, the fact that the Rules provide that disputes between members of the Premier League must be referred to arbitration, does not make the present proceedings any less consensual. These are the Rules agreed between the clubs and it is open to

them to amend the rules if they wish to do so, as they do, we were told, from time to time. It was not suggested to us that either Fulham or West Ham or, indeed, any other Premier League Club has ever sought to change the rule as to arbitration. This seems to us to be unsurprising as the privacy and, usually, confidentiality attached to arbitration are likely to be very attractive to Premier League Clubs when engaged in disputes with each other.

19. For those reasons we have concluded that the Interim Award and Reasons is not admissible in these proceedings to prove the propositions for which Fulham wish to rely on it. We should add that the fact that the confidentiality of the Interim Award has since been lost, for reasons which we do not need to explore, does not lead us to any different conclusion. First, as Sir Ken Macdonald QC for West Ham pointed out, in *Sun Life*, Lincoln had obtained a copy of the earlier award, with the consent of the parties, but that fact was irrelevant to the Court of Appeal's analysis of both the principle and its rationale. Secondly, to make the admissibility of the earlier award dependent upon the happenstance that it had become available, perhaps, as is contended here, in breach of some duty of confidence, would, it seems to us, result in a wholly arbitrary and potentially unfair application or otherwise of the principle to which we have referred above and may serve to encourage the parties to the later arbitration proceedings themselves to breach or to encourage or procure others to breach the duty of confidence which would apply in respect of the earlier arbitral award.

Confidentiality of these proceedings

20. In the course of his submissions, in particular in his Reply, Mr Beloff argued that proceedings before this Tribunal (and, therefore, proceedings before any Premier League Arbitral Tribunal) were not, in fact, confidential at all, in other words there is no confidentiality in such proceedings. This struck us as a somewhat startling proposition which, if correct, would have far reaching consequences and thus we invited the parties to provide us with written submissions on the point since it was one which had not surfaced earlier. Such written submissions have now been provided to us.

21. Fulham have indicated, in paragraph 2 of their written submissions, that the question of the confidentiality of these proceedings "does not directly impact upon Fulham's arguments in these proceedings". We believe this is correct, not least because the Interim Award which is the subject of the preliminary issue was conducted under the FA rules, which contain an express stipulation for confidentiality. It follows that this issue is not one which we need to determine as part of our determination of the preliminary issue. However, the issue has been raised in, and has some importance for the further conduct of, the present arbitration. It is also a question of obvious wider importance. We have received detailed submissions on the point. For these reasons, we propose to set out here our conclusions upon it.

22. We have come to the clear conclusion that these proceedings, like all other FAPL arbitration proceedings, are confidential unless the Tribunal directs otherwise. That is because we are satisfied that there is an implied term in arbitration agreements that the arbitration proceedings are confidential and to be held in private. In our view, the existence of such an implied term is now

well-established on the basis of the authorities. We refer, in particular, to the following.

23. First, in *The Eastern Saga* [1984] 3All ER835, Legatt J held that:

"*It seems to me that, as is graven on the heart of any commercial lawyer, arbitrators in the position of these arbitrators enjoy no power to order concurrent hearings, or anything of that nature, without the consent of the parties. The concept of private arbitrations derives simply from the fact that the parties have agreed to submit to arbitration particular disputes arising between them and only between them. It is implicit in this that strangers shall be excluded from the hearing …".*

24. Secondly, in *Dolling-Baker v Merrett* [1990] 1WLR 1205, Parker LJ, with whose judgment Ralph Gibson and Fox LJJ agreed, held as follows:

"*As between parties to an arbitration, although the proceedings are consensual and may thus be regarded as wholly voluntary, their very nature is such that there must, in my judgment, be some implied obligation on both parties not to disclose or use for any other purpose any documents prepared for and used in the arbitration, or disclosed or produced in the course of the arbitration, or transcripts or notes of the evidence in the arbitration or the award, and indeed not to disclose in any other way what evidence had been given by any witness in the arbitration, save with the consent of the other party, or pursuant to an order or leave of the Court …*

But that the obligation exists in some form appears to me to be abundantly apparent. It is not a question of immunity or public interest. It is a question of an implied obligation arising out of the nature of arbitration itself."

25. Thirdly, in *Ali Shipping Corporation v Shipyard Trogir* [1999] 1WLR 314, the Court of Appeal held that a term imposing an obligation of confidentiality was to be implied into arbitration agreements as a matter of law since it was an essential corollary of the privacy of arbitration proceedings and thus a term which the nature of the agreement implicitly required. Potter LJ, with whose judgment Brooke and Beldam LJJ agreed, stated:

"*I consider that the implied term ought properly to be regarded as attaching as a matter of law. It seems to me that, in holding as a matter of principle that the obligation of confidentiality, whatever its precise limits, arises as an essential corollary of the privacy of arbitration proceedings, the Court is propounding a term which arises 'as the nature of the contract itself implicitly requires:'* see *per* Lord Wilberforce in *Liverpool City Council v Irwin* [1977] AC 239, 254F and *Lister v Romford Ice and Cold Storage Co Ltd* [1957] 555, 576-577, *per* Viscount Simonds. As Lord Bridge of Harwich observed in *Scally v Southern Health and Social Services Board* [1992] 1AC 294, 307, a clear distinction is to be drawn:

"*…between the search for an implied term necessary to give business efficacy to a particular contract and the search, based on wider considerations, for a term which the law will imply as a necessary incident of a definable category of contractual relationship."*

"*In my view an arbitration clause is a good example of the latter type of implied term."*

26. Finally, and most recently, in *AEGIS v European Re* [2003] UKPC 11, [2003] 1WLR 1041, Lord Hobhouse stated:

"Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain."

27. In their written submissions, Fulham sought to distinguish each of these cases on the basis that they concern private commercial arbitrations based on a contract between A and B whereas FAPL arbitrations are sports arbitrations, not commercial arbitrations, and are based on what Fulham describes as a "multi-party" contract between the Premier League on the one hand and all the member clubs of the Premier League on the other hand. We address below the detailed points of distinction contended for by Fulham on a case by case basis but, as to the general point of distinction, we are unpersuaded that whatever distinction there may be between a commercial arbitration on the one hand and a "sports" arbitration on the other hand, it in any way impacts upon the application of the implied term as to confidentiality to which we have referred. On the contrary, it seems to us that there may well be reasons why members of the Premier League should wish to litigate their disputes in private which are no less compelling than those which underpin the built in confidentiality of commercial arbitration proceedings. Moreover, although the FAPL contract may be described as multi-party, where a dispute arises, it arises between individual member clubs.

28. As to the authorities to which we have referred above, Fulham sought to distinguish *The Eastern Saga* from arbitrations brought under the FAPL Rules on the basis that *The Eastern Saga* involved an arbitration agreement contained within a charter party between the owners and the charterers whereas the present proceedings arise from a multi-party contract between all

FAPL members and FAPL itself. However, it is, in our view, clear that the passage which we have cited above is, and was intended to be, of general application to arbitrations. That was plainly the basis upon which Legatt J approached the Plaintiff's submission that there was an implied term of the arbitration agreement between the owners and the charterers that the arbitration between them would be private because, having recorded that submission, he went on:

"*It would appear to follow from that submission that an arbitration agreement is ordinarily to be construed as containing such an implied term, at any rate unless there are express conflicting provisions*".

29. We also note the terms on which the case is reported in the headnote, which suggests, in our view rightly, that the decision was of general application:

"*Since arbitration is a private procedure, it is an implied term of an arbitration agreement that strangers to the agreement are excluded from the hearing and conduct of an arbitration under the agreement.*"

30. As to *Dolling-Baker v Merrett*, Fulham suggests that the comments of Parker LJ about the implied obligation of confidentiality arising out of the nature of arbitration itself "*are clearly made within the context of private commercial arbitrations between two parties to a contract*". We do not agree. In our view, Parker LJ was plainly addressing arbitrations generally and we agree with West Ham that the fact that the contract in that case was a two-party contract, rather than a multi-party contract, was irrelevant to his analysis of the private nature of arbitration proceedings.

31. As to *Ali Shipping Corporation v Shipyard Trogir*, again, we consider that Potter LJ was addressing the confidentiality of arbitration proceedings generally and not simply commercial arbitration proceedings. Moreover, although in *AEGIS v European Re*, Lord Hobhouse indicated that the Privy Council had some reservations about the desirability or merit of adopting the approach of Potter LJ in *Ali Shipping*, those reservations were not addressed to the correctness or otherwise of the underlying principle that arbitrations are private proceedings, not least since Lord Hobhouse went on to state, as we have pointed out in paragraph 26 above, that:

"*Commercial arbitrations are essentially private proceedings and unlike litigation in public courts do not place anything in the public domain."*

32. It follows that we do not accept Fulham's submission that in *AEGIS*, the Privy Council *"appear to reject the implied term of confidentiality approach generally and certainly with respect to arbitration awards in particular."* We note, in particular, that the question which arose was whether an earlier award in a private arbitration could legitimately be used in a later private arbitration between the same parties and it was on that basis, and that basis alone, that *Ali Shipping* was distinguished.

33. In addition to seeking to distinguish the case law, Fulham also submitted that these proceedings are not confidential on the following further grounds, each of which we address in turn.

34. First, Fulham submitted that different concerns and principles arise in sports' arbitrations generally, and the arbitration regime contained within Section S of

the FAPL Rules in particular, such that it would be erroneous simply to apply what works for private commercial arbitrations to FAPL arbitrations without further consideration. We have already explained why we consider that the implied term as to confidentiality applies to arbitrations generally, whether they be commercial or sports arbitrations, and we do not accept that different principles apply to sports' arbitrations from those which apply to other arbitrations. We acknowledge, however, that a decision in one arbitration may have a material effect on another member club or may have importance for other member clubs generally. However, we consider that this consideration can readily be addressed by the power of a FAPL Tribunal to direct that its award, or part of it, should be published as we know to have been the case in relation to at least two recent awards in other arbitration proceedings. However, this consideration should not be deployed so as to undermine what we consider to be the presumption of confidentiality in FAPL arbitration proceedings which will apply absent any such direction.

35. Secondly, Fulham contend that the FAPL Rules do not require Rule S arbitrations to be confidential nor is the Tribunal required to exercise its discretion so as to read into the rules an implied term that may arise in private commercial arbitrations. We have, in effect, already addressed this ground above. FAPL arbitrations are impliedly to be conducted in private.

36. Thirdly, Fulham submits that a party to Section S of the FAPL Rules cannot be said to have waived its Article 6 Convention right to a public hearing or the publication of the award in the absence of an unequivocal waiver of such a right by the means of the incorporation of the express confidentiality clause.

In support of this ground, Fulham rely on the recent decision of the Court of Appeal in *Stretford v Football Association Ltd* [2007] EWCA Civ 238, a case in which Mr Stretford, a football player's agent, argued that Rule K of the Football Association Rules, which provides for the confidentiality of FA arbitration proceedings, was in breach of his rights under Article 6 of the European Convention on Human Rights, specifically, his right of access to a court and to a public hearing. Fulham rely on the following passage in the Judgment of the Court of Appeal, when reviewing the relevant Strasbourg jurisprudence:

"54 *Equally, there is in our judgment no question here of Rule K running counter to any important public interest. As has been seen, the Strasbourg jurisprudence encourages arbitration; it certainly does not discourage it. An arbitration agreement thus naturally waives a right to a tribunal established by law, if such a tribunal would otherwise have to be a court. As to the right to a public hearing, the European Court has recognised that a party may readily waive it, provided of course that the waiver is unequivocal. This can be seen from Schuler-Zgraggen v Switzerland (1993) 16 EHRR 405, where the issue was whether the applicant had waived her right to a public hearing of a social security dispute.*

55 In paragraph 58 of its Judgment in that case, the Court first emphasised the importance of the public character of court hearings. It said:

'The Court reiterates that the public character of court hearings constitutes a fundamental principle enshrined in Article 6(1). Admittedly, neither the letter nor the spirit of this provision prevents a

person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public, but any such waiver must be made in an unequivocal manner and must not run counter to any important public interest.' "

37. Fulham contends that although, by accepting Section S of the FAPL Rules, it has waived its right to a public court hearing, it cannot be said that it has unequivocally waived its right to a public hearing of its dispute before the Tribunal or for the Tribunal's Award to be published and thus to read into the arbitration agreement between the parties an implied term as to confidentiality would interfere with Fulham's Article 6 rights.

38. It seems to us that, on analysis, this submission is, in fact, contrary to the reasoning of the Court of Appeal in *Stretford*. In paragraph 43 of its Judgment, the Court held, first, that as a matter of English law, by agreeing to arbitrate, the parties had waived their rights to a public hearing under Article 6 since the very fact of the agreement to arbitrate was inconsistent with any suggestion both that the hearing must be before a Court and that the hearing must be in public. The question which the court then identified was whether there was any principle adopted by the European Court in Strasbourg which leads to any other conclusion and the Court answered this question in the negative. Indeed, at paragraph 45, the Court stated that:

"*In our judgment the cases support the general proposition that, where parties have voluntarily or, as some of the cases put it, freely entered into an arbitration agreement, they are to be treated as waiving their rights under Article 6".*

39. Moreover, the Court held that there was no question of Rule K "*running counter to any important public interest*" as the Court explained in paragraph 54 of its Judgment in the passage relied upon by Fulham and set out in paragraph 35 above. In the result, at paragraph 66, the Court of Appeal concluded:

"*In all these circumstances, we see no basis upon which the Court could properly hold that Rule K or any arbitration held under it, which would be subject to the detailed provisions of the 1996 Act* [i.e. the Arbitration Act 1996], *will or might give rise to an infringement of Mr Stretford's rights under Article 6 … In agreeing to Rule K both parties waived their right to a hearing before the Courts (except in accordance with the 1996 Act). They also waived their right to a public hearing.*"

Publication of this Determination

40. Because of the general importance of the issues raised by the preliminary issue, namely the issue of admissibility itself and, as it turned out, the separate issue as to the confidentiality of these proceedings, we have decided that our Determination should be published.

Directions

41. We are very anxious to avoid, as much as we can, the parties, without good reason, calling the same evidence as was called in the previous proceedings between Sheffield United and West Ham and we will expect the parties to adopt the same approach. Accordingly, we invite them now to consider how they can best avoid doing so (for example, by the use of admissions) and how

this approach might be translated into appropriate directions. We therefore invite the parties to suggest to us what directions we should give for the future management of these proceedings. We hope and expect that this can be done by way of written submissions whereupon we will distribute our directions in writing unless we are persuaded that there is some good reason why we should hold a directions/case management hearing.

Costs

42. Our provisional view is that we should reserve the costs of the preliminary issue but if either party should wish to invite us to make some other order, we would ask for written submissions from them on this issue. We also wish to make it clear that if it transpires at the substantive hearing that time has been wasted and costs have been incurred unnecessarily as a result of the parties without good reason calling, again, the same evidence from the same witnesses as were called in the previous proceedings we will not hesitate to make appropriate orders as to costs thereby "thrown away" including, if appropriate, costs on an indemnity basis. Our determination of the preliminary issue means that West Ham are entitled to require Fulham to prove their case independently of the findings contained in the Interim Award of the FA tribunal in the *Sheffield United* arbitration. This does not absolve West Ham (or for that matter Fulham) from the ordinary responsibility to identify and seek to narrow the issues, and to act reasonably and proportionately in preparing and conducting their case.

PHILIP HAVERS QC
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19 April 2010