

## Shifting Power and Control in English Football

John O'Leary \* and Andrew Caiger \*\*

### Introduction

In 1995 the world of professional football in the European Union was disrupted by a little-known footballer Jean-Marc *Bosman* who dared to challenge the transfer rules of the football authorities. *Bosman's* success in the European Court of Justice rendered the current transfer system illegal in the European Union (EU) and has had other repercussions in the game of professional football which will be explored below.

Jean-Marc *Bosman* played for a first division Belgian football club in Liege<sup>1</sup>. The club thought he was past his peak and when he came to the end of his contract offered him a derisory contract that he turned down. *Bosman* then found work with a second division French football club in Dunkirk. Liege placed him on the transfer list. Subsequently the Liege and Dunkirk clubs agreed on a transfer fee. The Belgian club became suspicious that the money promised was not available and instructed the Belgian football authorities not to transfer *Bosman's* registration. As a result the deal fell through.

According to the rules of national football organisations at the time, a transfer fee was payable when a player moves from one club to another irrespective of that player's contractual position with the selling club. This was also the rule of UEFA and FIFA. Without the transfer of registration, clubs could not field players in matches played under the auspices of various national and international bodies.

*Bosman* challenged UEFA, the Belgian authorities and his club in the Belgian Courts. The Belgian Courts referred two questions to the European Court of Justice (ECJ)

\* Lecturer in Law, Anglia Polytechnic University

\*\* Senior Lecturer in Law, Anglia Polytechnic University.

---

<sup>1</sup> Case C-415/93 ASBL Union Royale Belge des Societes de Football Association and others v Jean-Marc Bosman [1995] ECR I-4921; [1996] 1 CMLR 645 For a discussion of this case see *inter alia*: Morris, P. et al., "EC law and professional football: Bosman and its implications" [1996] 59 *MLR* 893; Bitel, N., "After Bosman - they think its all over" *Sport and the Law Journal* [1996] 4(1): 41; Blanpain, R. and Inston, R., *The Bosman Case: The end of the transfer system?* (Leuven, Peeters/Sweet & Maxwell, 1996); O'Keeffe, D. and Osborne, G., "The European Court scores an own goal" [1996] *Int. J Comparative Labour Law and Industrial Relations*, 111.

in terms of Article 234 (previously Article 177) of the Treaty of Rome. The questions put to the court were: "Are Articles 39 (formerly Article 48 - free movement of persons), 81 (85 - law against cartels) and 82 (86 - abuse of a dominant position) of the Treaty of Rome to be interpreted as:

- (i) prohibiting a football club from requiring and receiving payment of a sum of money upon the engagement of one of its players who has come to the end of his contract by a new employing club;
- (ii) Prohibiting the national and international sporting associations or federations from including in their respective regulations provisions restricting access of foreign players from the EU to the competitions which they organise?"

The ECJ avoided the anti-trust aspect and based its decision on Article 39 - the free movement of persons. The ECJ answered both questions in the affirmative.

The various football associations have always justified the transfer fee as a method of distributing funds to clubs in the lower divisions to encourage new talent. The ECJ held this to be a laudable aim but said that the effects of the transfer fees were sporadic and inefficient. In short - the laudable aims were not achieved.

One obvious effect of the decision was to end transfers for players out of contract who move from one club in country A to a club in country B. The decision did not directly affect transfer arrangements between club A and B in the same member state. The decision applies to EU nationals, EEA Nationals (Liechtenstein, Iceland, Norway) and nationals of countries with whom the EU had special treaties.

In particular the *Bosman* rule does not appear to apply to non-EU nationals (except in the cases of Norway, Liechtenstein and Iceland). This means that it is theoretically possible for these third country players to be transferred at the end of their contracts from one club to another. There is yet another difficulty - the EU has signed accords with Turkey, Morocco, Algeria and Tunisia as well as certain Central and East European Countries (Poland, Hungary, The Czech Republic, Slovakia, Romania, Bulgaria and the Baltic states) regarding the equal treatment within the EU of players from these states with regard to employment conditions. Players from these countries may not be able to obtain a free transfer since *Bosman* does not appear to apply to them<sup>2</sup>. This means that the guarantee of equal treatment is defective and inadequate.

---

<sup>2</sup> Wezenbeek-Geuke, M.G., "De gevolgen van het Bosman-arrest voor het transfersysteem" in Siekmann, R., et al., *Sport en Recht*, (De Vrieseborch Haarlem, Netherlands, 1996).

### Post-Bosman: a question of power and control?

Much has been written and said about the *Bosman* case and with good reason<sup>3</sup>. *Bosman* means so many different things for many people in the sports industry and beyond. The effects of the decision have gone far beyond what was initially envisaged – opening up the market for football players in the EU and allowing players at the end of their contract to move freely from one EU member state to another. It has challenged the almost sacrosanct self-regulation of sporting bodies and the power they exercise. The case has had a perceptible effect of shifting power away from sports associations and clubs to players. There have been dire warnings that *Bosman* would cause smaller football clubs to go to the wall. Research suggests that those clubs likely to go out of business were always in a precarious position since they relied on transfer fees as a major source of income. Szymanski concludes that “the effect of *Bosman* may be to drive some of the smaller clubs out of the market, but if that is the case the primary cause will be their inability to finance efficient contracts, rather than the judgment itself”<sup>4</sup>.

*Bosman* was seen as a major intrusion into the way things were run in the sporting world and has been resented, especially by clubs and various football associations. This resentment stems from a firmly held belief by sports enthusiasts that the role of law on the field of sport should be limited as much as possible and should certainly not intrude into the sphere of the management and governance of sport<sup>5</sup>. In fact there is a respectable history of intrusion into sports governance. In 1963 the *Eastham*<sup>6</sup> case represented a significant challenge to the powers of the Football League to control the ability of a football player to play professional football under the transfer and retain system. “Under the ‘retain and transfer’ system a club was given ownership rights over its players’ registrations, without which a player was unable to play for other member clubs”<sup>7</sup>. In fact, the early 1960s saw the first effective challenge by the Professional Footballers’ Association in

---

<sup>3</sup> For a discussion of this case see *inter alia*: Morris, P., et al., “EC law and professional football: *Bosman* and its implications” [1996] 59 *MLR* 893; Bitel, N., “After *Bosman* - they think its all over” *Sport and the Law Journal* [1996] 4(1): 41; Blanpain, R. and Inston, R., *The Bosman Case: The end of the transfer system?* (Leuven, Peeters/Sweet & Maxwell, 1996); O’Keeffe, D. and Osborne, G., “The European Court scores an own goal” [1996] *Int. J Comparative Labour Law and Industrial Relations*, 111. Wezenbeek-Geuke, M.G., “De gevolgen van het *Bosman*-arrest voor het transfersysteem” in Siekmann, R., et al., *Sport en Recht*, (De Vrieseborch Haarlem, Netherlands, 1996).

<sup>4</sup> Stefan Szymanski, *The Market for Soccer Players in England after Bosman: Winners and Losers*, Paper presented at CIES conference on the economic and financial consequences of the transfer system, Neuchatel, Switzerland, 17/18 October 1997.

<sup>5</sup> Gardiner and Felix, *Juridification of the Football Field: Strategies for giving law the elbow*, (1995) 8 *Marquette Sports Law Journal* 189. Cf Grayson, *Sport and the Law*, Butterworths, London: 1994.

<sup>6</sup> *Eastham v Newcastle United Football Club Ltd* [1963] 3 All ER 139, [1964] ch.413.

<sup>7</sup> Note 3 above.

resisting the status quo of fixed wages by threatening a strike. The result of the threatened strike and the *Eastham* case brought about a change to the transfer system – but in essence reinforced the power of the clubs to determine the players' future – and an end of fixed wages. In terms of the new transfer system a club could retain a player if it equalled any other offer made. This system continued until the *Bosman* case.

In a way the *Bosman* case can be seen within a tradition of change which occurred in England in the 1960s. Cases such as *Eastham* asserted, to some extent, the freedom of the individual to be able to pursue a profession without unreasonable let or hindrance. This could be seen as an assertion that while the position of sports associations were in essence not being challenged as a whole – it would be challenged where the rules of such associations offended wider values in society. *Bosman* continues this tradition but also does much more. It has implicitly challenged the very nature of sports governance – in particular the transfer system. Szymanski notes:

A founding principle of the Football League was to prevent footballers themselves making too much money. At its foundation it was a stated aim of the League to control players' freedom of movement through the retain and transfer system (established 1890) and to impose a maximum wage (achieved in 1990)<sup>8</sup>.

The challenge to governance of sports presents both a challenge and opportunity for sports associations to recognize the interest the law has shown in shifting power from these to the individual. Until this is recognized there will be a continued challenge to the role and power exercised by sports associations. It is beyond the scope of this paper to consider the interesting issues concerning self-regulation<sup>9</sup>. The changing nature of business relationships between clubs and players provides an interesting locus in which the shifts of power to players can be observed. Our research was aimed at discovering, inter alia, the nature and extent of changes in players' contracts and what implications this held for football.

Towards the end of 1997 we undertook research into the changing contractual relationships between football players and their clubs. We embarked on a pilot study of professional football clubs in East Anglia and London. London was included because of the lack of Premiership clubs in East Anglia.

The purpose of the project was to conduct a socio-legal mapping exercise to discover to what extent the *Bosman* case<sup>10</sup> had affected the contractual relationships between clubs and players. We thought that there would be an impact on transfer fees within the country

---

<sup>8</sup> Note 3 above.

<sup>9</sup> See Julia Black, *Constituting Self-Regulation*, 59 *MLR* (1996) 24.

<sup>10</sup> Case C-415/93 ASBL Union Royale Belge des Societes de Football Association and others v Jean-Marc Bosman [1996] 1 *CMLR* 645.

even though the *Bosman* ruling was limited to transfer of players between EU Member States. We were also interested in gauging the effect of the changing financial imperatives on football clubs.

We conducted interviews with a few clubs at all levels of the league. Although there had been a lot of reports in the press and "common song sheets" as to the disastrous implications of the *Bosman* ruling we found that the clubs we visited had a variety of responses to particular problems resulting from *Bosman*. The position of a particular club would very much depend on its own financial circumstances. The perceived effects of *Bosman* were in fact quite different in the case of each club's own circumstances. We also interviewed players, agents and the Professional Footballers' Association.

What we did discover - and this was common to most of the interviewees - was the fact that *Bosman* had effects not anticipated. These included the vigorous emergence of new styles of club and player management. New professional people were coming into football and these people saw football as a business. While many of the clubs we visited were affected by economic realities, several of them had a main sponsor who provided some immunity from the realities of the football economy.

The significance of the *Bosman* case extends beyond the parameters of the original decision. It has come to signify a change and shift of power from the old order, where clubs had power, to one where players have more control over their own destinies. *Bosman* provides another example of how the courts are prepared to intervene to break down restrictive practices of sports organization. The shift of power from organizations to players has been an ongoing process in the UK<sup>11</sup>. *Bosman*, while operating primarily at a European Union level, has affected the rules of UEFA that represents all European football nations beyond the EU. Therefore the decision has had an effect outside the EU as well.

### Transfers and the impact of *Bosman*

The transfer system was (and to a lesser extent still is) the cornerstone of control over the careers of football players<sup>12</sup>. The justification of the transfer system has not been questioned in a comprehensive manner. In the *Bosman* case two justifications were provided: firstly, that the transfer system aimed at establishing a semblance of balance or financial equity between the clubs, and secondly, provided an incentive to bring on and train young talent.

---

<sup>11</sup> J. Paul McCutcheon, Negative enforcement of employment contracts in the sports industries, (1997) 17 LS 65. Cf Sharon F. Carton, Damning with fulsome praise: assessing the uniqueness of an artist or performance as a condition to enjoin performance of personal service contracts in Entertainment Law, (1998)5 *Vill. Sports & Ent.LJ* 197.

<sup>12</sup> T. Mason, *Sport in Britain*, London, Faber & Faber. 1988.

The ECJ dismissed the first ground as a justification, but recognized that incentives had to be provided for bringing on young talent. Yet it found that the transfer fee bore no relation to compensating clubs for the costs incurred in bringing on talent. These justifications provided a common "song-sheet" for football authorities for many years and were not challenged. Now that the ECJ has found no basis for the claims made for transfer fees the question arises what justification is there for transfer fees and who benefits from them?

It seems that Szymanski's explanation that transfer fees were a means of club control over the careers of players is justified<sup>13</sup>.

An erstwhile Dutch football player recalling his own experience put it thus:

The football player learns in the street, in the school playground or in the park. There the youngster starts developing his mastery over the ball. There is no youth trainer or club scout present. The future football player with all his qualities and inadequacies is formed there before and after school playing with friends or alone. After developing his technique on the street the young player of 8 - 10 years joins a local amateur club. He pays his club contribution before he plays his first game. It is there that he receives training from a (usually) underpaid youth trainer or voluntary enthusiast.

At the age of 14 - 16 the scouts visit, usually voluntary enthusiasts, who proceed to strip the amateur pitches of talent. These players are then enticed to join some or other famous club's youth training programme. During my time as a professional this is the way in which Ajax recruited Van Basten and Vanenburg, the former at the age of 16 from Elinkwijk and the latter at the age of 15 from Blauw Wit<sup>14</sup>.

Professor Blanpain has described the transfer system as a system perpetuating slavery or the buying and selling of sport persons<sup>15</sup>. He has called for criminal sanctions to stop this practice. The Flemish government<sup>16</sup> has determined that players are entitled to a free transfer when they leave a club in Flanders<sup>17</sup> (when their contracts expire). The law has also prohibited the payment of any transfer fee from a Flemish club to another club outside

---

<sup>13</sup> Note 2 above.

<sup>14</sup> CIM Molenaar, *De nieuwe status van de profvoetballer*, in (1996) *Sport en Recht*, part 4, 71 at 73, Asser Institute, The Hague.

<sup>15</sup> See Professor Blanpain's press conference of 4 December 1998. Also, *De Belgische Voetbalbond, Het Vlaamse Decreet Martens en het Arbitragehof*, Peeters 1998. It is important at this point to distinguish the transfer system which involves the buying and selling of players - under the ruse of their registration - from the contract of employment which involves the buying and selling of the players' skills and services. Cf McCutcheon (note 7 above) who does not draw attention to this important distinction.

<sup>16</sup> The Flemish government (the government of the region of Flanders) is one of the three regional governments in the federal Belgian State. These regional governments have substantial autonomy, especially in the areas of culture and sport.

<sup>17</sup> The Martens Decree 24 July 1996.

Flanders. The constitutionality of this extension of jurisdiction of Flemish competence has been unsuccessfully challenged thus far<sup>18</sup>. Belgian law, for example determines that football agreements cannot exceed a period of five years after which a free transfer is available.

The *Bosman* case did not mean an end of the transfer system. It simply meant that transfer fees could not be demanded when a player at the end of his contract moved to another club in another EU Member State. But this also means that free transfers became a reality in the 15 Member States since the maintenance of transfers within EU Member States would be likely to impede free movement of players between Member States contrary to Article 39.

Our research showed that despite the fact that a number of clubs surveyed had taken advantage of the *Bosman* ruling, the majority of clubs in the region seemed unclear what the impact would be and unsure as to what could be done to maximize benefits or minimize damage. Indeed the principal response was resignation. The former Chief Executive of Leyton Orient concluded, "I don't worry about things I can do nothing about". One of the main reasons for our failure to secure certain interviews was that clubs felt that they were not in possession of enough information on the subject. Football League meetings were planned and until then clubs felt unable to comment. This was at a time when Premiership clubs were fully exploiting the ruling.

The principal beneficiaries in England appear to be major London clubs who are able to lure high profile players by offering high salaries, a realistic chance of success and residence in the capital. The *Bosman* ruling has opened the eyes of Premiership clubs to available talent beyond British shores. Foreign players who, for various reasons, were considered unsuited to British football are now courted with an enthusiasm that suggests a breakdown in racial stereotyping.

A number of the lower division clubs interviewed were relying on an informal agreement reached between the Premiership, the Football League and Professional Footballers Association, that clubs would honour the transfer system for players under 24 even if their contracts had expired. This agreement is based on a similar one introduced in France. The agreement provides compensation for the investment made by the transferors in developing the player. The clubs seemed unaware that such an arrangement could be challenged under the *Bosman* ruling as being a restrictive practice although it may be capable of justification in terms of the EU competition rules. Two agents interviewed expressed a willingness to challenge the agreement and one of them had already sought counsel's advice on the issue.

At the recent Helsinki IGC the Commission presented a report on sport to the Council. In it the Commission acknowledges that the effects of the *Bosman* ruling have affected the income distribution to clubs in the lower divisions. The Commission envisages that certain

---

<sup>18</sup>

The CAO of 12 June 1998.

accommodations can be made by way of exemptions (Article 81(3)) to meet the needs of professional football which can be considered as being consistent with the relevant Treaty provisions on competition and free movement:

The Bosman judgment . . . recognized as legitimate the objectives designed to maintain a balance between clubs, while preserving a degree of equality of opportunity and the uncertainty of the result, and to encourage the recruitment and training of young players. Consequently it is likely that agreements between professional clubs or decisions by their associations that are really designed to achieve these two objectives would be exempted (from the competition rules). The same would be true of a system of transfers or standard contracts based on objectively calculated payments that are related to the costs of training or of an exclusive right, limited in duration and scope, to broadcast sporting events. It goes without saying that the other provisions of the Treaty must also be complied with in this area, especially those that guarantee freedom of movement for professional sportsmen and women<sup>19</sup>.

### The employment status of professional football players

Clubs interviewed appreciated that the days when a successful player would remain with one club throughout his professional career have gone. Increasingly, players today are aware of the implications of their short playing careers. Transfers between countries are now common as players seek to use their careers to sample different cultures as well as taking advantage of higher earnings in foreign leagues. Players in demand are seeking shorter contracts. Leyton Orient<sup>20</sup> contracted with a former England international, Peter Shilton, for three months as the player reached a milestone of professional appearances. Although the club needed the services of a competent goalkeeper, the publicity implications were not lost on them.

The Shilton scenario prompts an interesting issue. If professional football becomes more like any other business and if other industry rules were to be challenged by the law as restrictive, could footballers be contracted on a short term basis to assist a club in its push for promotion or fight against relegation? Relegation from the Premier League is rumoured to have cost Middlesbrough FC £14 millions in lost revenue. If so it may in time be more pertinent to view players as independent contractors than employees. This would certainly be more consistent with other contracts for services in the entertainment industry<sup>21</sup>. None of the clubs surveyed could envisage a time when players would be signed on monthly contracts or for single, important appearances; however it is suggested that there is no logical reason why this should not be so.

---

<sup>19</sup> COM (1999) 644, *The Helsinki Report on Sport*, 1.12.1999, at 8.

<sup>20</sup> A small East London lower division club.

<sup>21</sup> See Osborne and Greenfield *Contract and control in the Entertainment Industry*, Aldershot, Dartmouth Press, 1998.



If players are signed on short contracts it raises interesting issues of loyalty. Under FIFA regulations a player is now allowed to commence negotiations with other clubs six months from the end of a contract. From a player's perspective it seems only reasonable that a player be allowed to negotiate during, what is in effect, his notice period. However players who have already negotiated and signed contracts with rival clubs for the next season are placed in a position where, should the teams meet, a conflict of interest may arise<sup>22</sup>.

There may be a desire on the part of both parties to consider the status of the professional footballer as that of independent contractor. Football clubs would be able to relinquish certain responsibilities, such as that of insuring the player against personal injury, and it may lessen the possibility of liability for negligence. Players may find a change in status attractive, as it would allow them further flexibility, particularly in terms of their tax liabilities, to organise their financial affairs.

The status of professional footballers was tested in English law as long ago as 1910 in *Walker v Crystal Palace Football Club*<sup>23</sup> when an injured footballer claimed for his industrial injury. The Court of Appeal, applying the control test, concluded that the player was an employee. Cozens-Hardy MR emphasised that although the player displayed a high degree of skill he was still under the general control of the club and, specifically during the match, under the control of the team captain: a representative of the employer. Also the club controlled other arrangements related to work such as the player's accommodation, times and places where the work is carried out and leave and other entitlements.

However this particular relation has developed significantly since 1910. Not only in terms of the duties and freedoms of the modern professional footballer but also in terms of the tests now applied in England to establish the nature of the relationship. In *Ready Mixed Concrete (South East) Ltd v Minister For Pensions and National Insurance*<sup>24</sup>, MacKenna J. was able to establish that there was no employment relationship despite the considerable degree of control exercised by the company over the duties undertaken.

*Ready Mixed Concrete* is significant in that the court was clearly persuaded by the consensual relationship that existed. However, the law has often been reluctant to allow the parties to contract out of the employment relation by being swayed by the labels given to the relationship by the parties. The Court of Appeal in *Ferguson v John Dawson & Partners (Contractors) Ltd*<sup>25</sup> were conscious of the inequality in bargaining power that

---

<sup>22</sup> McCutcheon note 7 above at 88 notes that in the US clubs have unsuccessfully challenged such behaviour.

<sup>23</sup> [1910] 1 KB 87 (CA).

<sup>24</sup> [1968] 2 QB497.

<sup>25</sup> [1976] 1 WLR 1213.

dictated many employment relationships. Such a re-evaluation of the status of professional footballers could hardly be questioned on the grounds of public policy. Professional football players enjoy a degree of power and autonomy most employees would envy and many of the clubs surveyed expressed a concern that the pendulum had swung the other way in football contractual bargaining. Recent examples of such player-power include the disputes of Van Hooijdonck with Nottingham Forest and Anelka with Arsenal. In both instances the players threatened strike action in breach of contract i.e. refusing to play for their clubs in order to secure their release<sup>26</sup>.

In *Calder v H Kitson Vickers & Sons (Engineers) Ltd*<sup>27</sup>, Ralph Gibson LJ emphasised that the intentions of the parties remains an important factor in discerning status, particularly when other factors are inconclusive:

Since the law looks to substance and not to form, the fact that the parties honestly intend that between themselves the contract shall be a contract for services and not a contract of service is not conclusive but it is a relevant fact, and when parties do deliberately agree for the man to be self employed it may afford strong evidence that this is their real relationship<sup>28</sup>.

Thus all things being equal there would be no reason why courts could not give effect to the intentions of the parties.

The cynic might argue that the "multiple test" currently in vogue does little to clarify, and even less to assist, certainty. The test appears to be little more than the aggregate of previous tests. However it is evident that along with "control" considerations such as "mutuality of obligations" and "economic reality" can be important. However these other tests suggest that the changes in professional football have thrown into doubt the status of the professional footballer.

It is difficult to argue that the football player remains an integral part of the business of the football club. Clubs increasingly maintain discipline by means of imposing financial penalties similar to penalty clauses imposed on independent contractors. Interviewees recounted stories of players happy to pay fines for non-attendance in order to secure their release from training<sup>29</sup>. Equally, players wilfully ignore contracts, refusing to play for clubs in order to be transferred. In a similar way to others in the entertainment profession

---

<sup>26</sup> See (1998)5 *Sports law & Administration*, 4. The courts in the US have discouraged this type of behaviour because of the abuse of what is termed "contract jumping". Cf. McCutcheon and Carton note 7 above.

<sup>27</sup> [1988] ICR 232.

<sup>28</sup> *ibid* at p.250.

<sup>29</sup> Thus making a mockery of Clause 2 of the Football League contract which states that "The player agrees to play to the best of his ability in all football matches in which he is selected to play for the club and to attend at any reasonable place for the purpose of training."

players are required to attend training (rehearsals) and matches (performances) but outside of these requirements have a degree of freedom not normally associated with employees.

Equally, it is now the norm that players wishing to leave a particular club will get their wish. This is not only because clubs have recognised that an unwilling performer is a liability but also because expectations have changed. Due to the effects of *Bosman*, very few professional footballers will spend an entire career with one club, nor is the relationship one where clubs feel they can exert sufficient control over players to deny them their transfer requests. As a result it is now difficult to identify sufficient mutuality of obligation between player and club if mutuality is represented on the part of the employee as being an obligation to serve.

It is clear that the law does not require an independent contractor to have a business of their own<sup>30</sup>, nor does it require a contractor to derive an income from a number of sources<sup>31</sup>. Now, more than ever before, the status of the professional footballer can be aligned with that of other entertainers.

The importance of the distinction between employees and self employed in professional football is fundamental. It is questionable in any event whether the transfer system can survive; however if professional footballers are classified as independent contractors, their status cannot be reconciled with a system synonymous with the control and trade in servants.

### **Re-negotiating and terminating the employment relationship post-Bosman**

One of the most important changes in the employment relation post-*Bosman* is that employers have found it necessary to re-assess their contract negotiation strategy. A system whereby clubs could effectively retain the services of employees after the contact expired encouraged an air of complacency. The traditional position is given in the English FA Code of Practice and Notes on Contract. These are currently in the process of revision.

The aim of the current rules is to enable a player to leave a club freely at the end of his contract, but to recognise that the club is entitled to *compensation* from the club he joins, provided that this does not seriously hamper the player's moving. It is implicit in the rules that the happy club and player should be able to continue their relationship smoothly. Contracts of any length are possible and a contract can be renegotiated so that it runs for a further or a longer period.

---

<sup>30</sup> *Hall v Lorimer* [1994] IRLR 171.

<sup>31</sup> *Beloff v Pressdram Ltd* [1973] 1 All ER 241. Nor conversely does the law view the fact that income is derived from a number of sources necessarily as an indication that the person is an independent contractor *Lee Ting-Sang v Chung Chi-Keung* [1990] ICR 409.

If, however, a player and club decide to part at the end of the contract then the player is free to look for another club. He may do this even though his club has made him a fresh offer. In three instances there will be no compensation payable:

- a) the club has announced that he is free to move without fee.
- b) the club has made no offer to him.
- c) the club's offer is less favourable than his previous terms.

In reality the club is unlikely to wish to lose an asset by offering terms less favourable than before. Of course, the result of a player continuing to demand a transfer may be that player leaving the club. However by being able to demand a fee the club retains a degree of control over the player.

The position post-*Bosman* has changed dramatically however. At the end of the contract the player is now "free" to contract with any other party and the club has no rights over him. The result is that clubs are developing a far more pro-active approach to re-negotiation.

Before considering these strategies, it is necessary to comment on the nature of the contract under negotiation. The re-regulation of the football industry has resulted in a significant reappraisal of the way in which contracts of employment are renegotiated. The nature of the contract has become more complex in respect of the various sources. It reflects the level at which the game is played and was described by various interviewees as a variety of practices, understandings and fetishes that appear to be encompassed in the club/player relationship.

Although traditionally collective bargaining has not played a significant role, implied terms can be valuable in asserting the right of the player to work and to be treated with respect. It is also a useful way for the club to impose standards of fitness and, to a lesser extent, availability on their players. However it is express terms that will be renegotiated and these come from an intriguing variety of sources. The main document is a standard form contract derived from the FA or Football League handbook which details the relationship between club, player and Association. For example, Clause 5 of the English Football League contract states,

The player agrees to observe the rules of the club at all times. The club and the player shall observe and be subject to the rules and regulations of the Football Association and the Football League. In the case of conflict such rules and regulations shall take precedence over this agreement and the rules of the club.

Further details describing the relationship between the parties can be located in additional documents. This is because the standard form contract is an outline agreement only covering basic terms. Other contractual documents may detail matters such as bonuses and other benefits. One club surveyed engenders team spirit by drafting contractual terms imposing "penalties" such as visits to the opera for poor football performances.

In semi-professional football there may be an additional contract. This provides for a job with the club sponsor or benefactor i.e. a non-football contract. This is a means of providing the player with additional income. The reality of this contract is that players can use this time to pursue other interests such as preparing for a future career outside of football. One of the anticipated impacts of the *Bosman* ruling is that lower division clubs may find it impossible to maintain a full-time playing squad. There are currently 92 professional football clubs in England. With some clubs seeing a move to semi-professional status as being perhaps the only means of survival post-*Bosman* employment contractual issues may become more, rather than less, intricate.

Renegotiation strategies have changed in two principal ways and have the effect of introducing a system of "rolling" contracts into professional football. Contract renegotiation now begins at least a year before the expiry of the contract. If the parties are unable to reach a deal the club will attempt to sell the player prior to its expiry. This practice has been characterised by Professor Blanpain as "getting around the *Bosman* ruling" and is considered legally problematic by the competition authorities in Brussels<sup>32</sup>. Clearly it is in the player's interest to wait until the contract expires. Secondly, clubs are trying to secure their best players on longer contracts, even up to five years for players of international standing. One Chief Executive interviewed noted:

We now negotiate much longer contracts 5 years plus. We try to get as many players as possible on 5 years. We used to have 2/3 years contracts - but if we pay more than £200K for a player we insist on a minimum of four years. The economics don't work on the short-term contracts. Agents may resist but all clubs are going for longer contracts. YTS are on standard 2 year contracts - but will be three years next season.

If players do not sign a new contract within 18 months of the expiry of their own contract we will sell them. We have longer contracts to preserve transfer fees<sup>33</sup>.

Agents acting on behalf of players will often, although by no means always, attempt to negotiate a short contract. This will enable the player to become a free agent in a short period of time. It is evident that by allowing the contract to expire the player achieves a greater control over his destiny.

By signing a player on a long-term contract the club retains the discretion to sell the player whilst still under contract. Premiership clubs interviewed stated that they liked to secure their best players on five-year contracts; lower division clubs were happy with three years. In this way the traditional transfer system is effectively preserved. (This is what Professor Blanpain aptly calls the new transfer system – the trade in slavery in professional

---

<sup>32</sup> Monti Sport and Competition (excerpts from a speech given at a Commission-organised conference on sport) Brussels 17.4.2000.

<sup>33</sup> Interview PS 12 December 1997.

football)<sup>34</sup>. However clubs appeared aware of the possible pitfalls of long-term contracts. Many of the clubs interviewed noted that a player injured shortly after signing a long-term contract could be a considerable financial liability. The clubs seemed unaware of such legal devices as the doctrine of frustration that could be used to resolve such situations. The reason for this lack of awareness may be the fact that ultimately longer term contracts are more efficient but are only possible for the larger more affluent club<sup>35</sup>.

Although many players may welcome the job security afforded by a long contract, the effectiveness of such a deal may be illusory. A player's contract is inextricably linked to that of the manager. If the manager leaves or is removed the new manager may not favour that player. The player may find himself in the invidious position of being a highly paid reserve, or be forced to leave the club. It is unlikely that a player's contract would be paid in full should he leave; yet it would be inaccurate to describe the parting of ways as mutual consent. Indeed, there is more than a suggestion of coercion in many transfers in professional football.

## Agents

No issue raised during the research invoked greater animation than that of agents. The agents interviewed ranged from those who could be described as running a cottage industry with a hand-full of clients to classically educated professionals running management companies representing hundreds of sportsmen and women.

The consensus of opinion amongst the clubs was that players do not need agents. Rather than being "ripped off", clubs stated that players were better advised to use the Professional Footballers Association (PFA): a role for which it was better equipped and could provide at a fraction of the cost.

Why then do footballers feel the need to have agents? One possibility is the status it brings. A former Chief Executive of a surveyed club stated that players "feel undressed without a mobile phone in one hand and an agent in the other"<sup>36</sup>. On further questioning, however, clubs were prepared to concede that not all agent involvement was counterproductive. The reality was that agents were not a problem apart from the fact that "very few are any good". Some clubs attempted to open a rift between the player and the agent by challenging the abilities of an agent during negotiations.

---

<sup>34</sup> Note 11 above.

<sup>35</sup> See Szemanski, note 2 above.

<sup>36</sup> Interview JA, 22 October 1997.

We try to bypass agents. We signed a player. He had his agent present at the negotiation. The agent asked for an impossible salary. The agent wanted £15,000 and £500pw. The player was on £450 per week and was not in the first team. The agent said: My client won't accept the deal. I said to the player - "where did you get this prat from - we want your contract, why don't you tell him to go?" The agent protested. I said to the player: "do you want to sign for us or not?" He said yes and told the agent to leave<sup>37</sup>.

Perhaps the reason for the initial animosity towards agents is not that players should have representatives during negotiations but rather a reflection of their frustration at the changing balance of contractual power and the dissipation of trust between clubs and players.

For the player the agent is the person who manages his football career rather than merely representing him. It is in most cases a personal and intimate relationship extending beyond the impersonal representation of a large association. The rise of the agent is synonymous with the modern football industry.

A few years ago only the elite of British football would have had an agent. The role of the agent was clearly defined. The agent would represent the player during the contract re-negotiation period only and their fees would be a percentage of the contract deal. Agents would also negotiate endorsement contracts such as boot deals and appearance money. With the increased levels of money within the game and the importance to the players of negotiating the right contract, agents are reassessing their role. Rather than agents representing the elite, agents now represent even youth team players in the first and second divisions. With the representation of younger players comes a greater responsibility. Parents help young footballers choose their agent in the same way that they choose their first club: with great care. Agents bid for players' signatures in the same way as clubs. As a consequence the agent who thrives is the professional businessman who can offer a package of services. As well as contract negotiation the agent is now challenging the club as the friend and confidant of the player. The competent agent handles the player's private life, from resolving family disputes to paying bills, as well as his professional life. This total management philosophy of agency, it is suggested, is the type that will thrive in the changing professional football industry. One agent revealed:

Football had a lot of Mickey Mouse agents who were part time. We employ seven people in this business. In other sports - if you were looking after a golfer - he wouldn't accept anyone working from the kitchen sink. Home workers are dying out. It is criminal that some agents only get involved at contract negotiation time. We look after golfers and sports stars. We look after our players. We make sure bills are paid - we make sure that when they retire at 35 they have money<sup>38</sup>.

---

<sup>37</sup> Interview BG, 7 November 1997.

<sup>38</sup> Interview JB, 12 December 1997.

## Conclusion

The *Bosman* case has produced far-reaching results beyond its initial scope<sup>39</sup>. The one thing at which it was aimed was to secure free access to the professional football market. This it attempted to do by prohibiting transfer fees for out-of-contract players. The ruling has efficiently been subverted with transfer activity between football clubs as frequent as ever with significantly higher transfer fees being paid. Professor van Staveren has characterised this as "contract trading"<sup>40</sup>. Yet, for non-EU professional footballers the transfer fee in all its ignominy is still in place.

The usual justification of the transfer fee cannot be sustained, as shown above. What we are left with is the purpose of the transfer fee in the business world of professional football. It still exercises the same role, perhaps diluted somewhat, as it did at the turn of the century - that of control of players. Even the stability it ensures in upholding football contracts is now under threat. It bears no relation to any system of compensation and one should seriously ask whether the registration and transfer system is nothing more than a thinly veiled disguise for perpetuating, what Professor Blanpain calls *mensenhandel* or slavery, or a feudal relationship. FIFA has been compelled by these events to revise its registration and transfer system. The results of this revision are eagerly awaited.

One of the unforeseen consequences of *Bosman* is the impact it has made on the employment relationship. *Bosman* can be seen as a part of the ongoing evolution of business relationships in professional football.

The transfer system lies at the core of the element of control in the business relationship between the player and his club. But does it remain there with all its vigour? The above analysis suggests that it does not. There are new mediating forces engaged; the transfer process and clubs in reality are often unable to resist player demands to move to another club. It appears to us that the contractual element of this relationship between player and club has in fact been weakened.

As a result of this there is a need to re-evaluate the characterization of the contract as being one of employment. Professional football is a form of entertainment and this is reflected in the nature of the contractual relationship. The advent of agents has in our view shifted or mediated the locus of control through the negotiation process. The resulting contract is a product of negotiation in which control is a variable element. There seems to be no practical or theoretical reason why a distinction needs to be drawn between contracts in professional football and contracts in other areas of the entertainment industry.

---

<sup>39</sup> This has been recognised by the Commission: see the Helsinki report op.cit.

<sup>40</sup> Interview with Professor van Staveren on 22 May 2000. Also see H.T. van Staveren, *Arbeidsverhoudingen in de Beroeps (Voetbal) Sport na het Bosman-Arrest* [Employment Relations in Professional Football after the Bosman Ruling] Asser Institute Roundtable Session on International and Comparative Sports Law, 19 March 1999.



The *Bosman* case also continues a long-standing tradition in the relationship between sport and the law. This tradition - as far as the law is concerned - is to push back the regulatory constraints unreasonably erected by the regulatory sports bodies that hamper the sports person in his/her aspirations. In short the legal system responds from time to time to facilitate individual enterprise.

The structures embedded in the practice of sport - in this case professional football - have been challenged by legal process. One of the reasons for this is the failure of these sports bodies to regulate themselves and sportsmen and women effectively and fairly<sup>41</sup>. We are seeing the beginning of what one might call a "metamorphic process". Monopoly rights of the football establishment are being shifted from nominal owners to players.

Other actors have been attracted to the professional football enterprise; to wit agents. Agents, in one way or another, represent a shift of the traditional collective paradigm in football. The maternal/paternal intimacy between the player and the club is no longer the norm. The agent represents the individual and also is representative of a paradigm shift in football which is now forced to acknowledge the space for individuality in the enterprise of professional football.

Even the new management style in some clubs indicates a shift from the colloquial "pork butcher" to professionals whose first love is not necessarily football. The paradigm shift from the "collective" to the "individual" can also be seen in recent challenges to the collective marketing of broadcasting rights<sup>42</sup> in the Premier league.

The law has started its long march towards the re-regulation of professional football. The law may ultimately reconstitute our understanding of sport and enterprise.

---

<sup>41</sup> Morris & Little, *Challenging Sports Bodies' Determinations*, (1998)17 *CJQ* 128.

<sup>42</sup> Eklund, *Following the Rules of the Game? A Competition Law Study of the Collective Sale of Sports Broadcasting Rights*. Law No.99/1 EUI Working Papers. European University Institute 1999.