

IN THE PREMIER LEAGUE MANAGER'S ARBITRATION TRIBUNAL

**PHILIP HAVERS QC (CHAIRMAN)
LORD PANNICK QC
KENNETH MERRETT**

B E T W E E N :

KEVIN KEEGAN

Claimant

and

NEWCASTLE UNITED FOOTBALL CLUB LTD

Respondent

AWARD

We declare that Kevin Keegan was constructively dismissed by Newcastle United Football Club Ltd for which Newcastle United Football Club Ltd must pay to Kevin Keegan damages in the sum of £2million plus interest to be assessed if not agreed.¹

REASONS FOR THE DECISION

The Tribunal's reasons for arriving at the Award set out above are as follows:-

1. **Introduction**

In these proceedings, Kevin Keegan claims damages for what he says was his constructive dismissal by Newcastle United Football Club Ltd (the Club) in early September 2008. He contends that when he was appointed as the Manager of the Club on 16 January 2008 (until 30 June 2011) it was a term of his Contract or

¹ The payment of this sum is subject to argument as to whether there should be any discount for early receipt or any deduction for sums earned since Mr Keegan was constructively dismissed.

otherwise agreed that he would have the final say as to transfers of players into the Club (“the final say”). He says that on 31 August 2008, the Club breached that term by signing a Uruguayan player, Ignacio Gonzalez, expressly against his wishes, that this breach amounted to a repudiation of his Contract and that he was therefore entitled to resign which he did on 4 September 2008. As a result, he claims that he has not only lost the salary and other benefits which he would otherwise have received under the Contract, amounting in total, he says, to £8,607,534 but he also claims “stigma damages” on the basis that as a further consequence, he has found it and will continue to find it difficult, if not impossible, to obtain work again as a top flight manager as a result of which he will lose up to a further £16.5m representing the income which he would otherwise reasonably have expected to receive up to his 65th birthday.

2. The Club denies that it was a term of his Contract that he would have the final say on transfers of players into the Club. The Club further denies that he was justified in resigning. The Club contends that he chose voluntarily to resign and that he is thus entitled to no compensation. Indeed, the Club counterclaims as against Mr Keegan the sum of £2m which it contends is payable to him under the Contract.

3. **Background**

Mr Keegan was appointed the Manager of the Club (for the second time) under a written Contract signed and dated 16 January 2008. He had been approached about the position a few days before by Chris Mort, then the Chairman of the Club, and he had asked to meet Mike Ashley (the owner) before deciding whether to take up the appointment. (He was then running his Soccer Circus business in Glasgow). A

meeting was therefore arranged to take place in London on 16 January 2008. It was attended by Mr Keegan, Mike Ashley, Mr Mort and Tony Jimenez who was shortly to be appointed Vice President (Player Recruitment). After lengthy discussions and negotiations, the Contract was signed and Mr Keegan was appointed the Manager of the Club at an initial salary of £3million pa.

4. Mr Keegan's primary case is that under the terms of the contract, he was to have the final say and that he would never have agreed to accept the appointment as Manager on any other basis. Whether this is what the Contract provides is the subject matter of the first of the issues which we address below. He also contends that at this meeting, he was expressly assured by Messrs Ashley, Mort and Jimenez that he would have the final say. This represents his alternative case and we address it below under Issue 2.
5. The Club's case is that nothing was said expressly at the meeting as to whether Mr Keegan should have the final say but that it was implicit from the discussions, in particular from the structure of the Club as it was explained to Mr Keegan and from a number of scenarios which were discussed, that he would not have the final say. The structure to which they refer and which they say was explained to him was what has been described as the Continental model under which the Club proposed to appoint a Director of Football, who would have a seat on the Board and to whom the Manager would report. The Club's case is that Mr Keegan was told that it was likely that Dennis Wise, then the Manager of Leeds, would be appointed to this post. The Club's case was that under this structure, the Director of Football and Tony Jimenez would be responsible for player recruitment and they, and not Mr Keegan, would have the final say.

6. Although we heard a considerable amount of evidence as to events which took place in the months which followed Mr Keegan's appointment, in view of our conclusions, we can proceed at once to the events which culminated in Mr Keegan's resignation on 4 September 2008. On 30 August 2008, almost at the end of the transfer window (the final day of which was 1 September 2008) Mr Wise telephoned Mr Keegan and told him that he had a great player for the Club to sign, namely Ignacio Gonzalez, and that he should look him up. Mr Keegan tried to locate him on the internet but could find no reference to him. Mr Wise told him that he had been on loan at Monaco but having checked out the details, Mr Keegan was unimpressed and told Mr Wise that he did not think the player was good enough. Mr Wise then told him that the player was on "You Tube" and that Mr Keegan could look him up there but he found that the clips were of poor quality and provided no proper basis for signing a player to a Premier League Club. Moreover, no one at the Club had ever seen him play. However, notwithstanding that he made it clear not only to Mr Wise but also to Mr Jimenez and to Mr Ashley that he very strongly objected to the signing of Mr Gonzalez (he was to be signed on loan with an option to purchase), the Club proceeded with the deal and the transfer was concluded the following day, on 31 August 2008. The Club did so, according to its witnesses who gave evidence before us, because it was in the Club's commercial interests to do so. It was what the Club described as a "commercial deal" by which the Club meant a deal which was in the commercial interests of the Club. The "commercial interests", according to the Club, were that the signing of the player on loan would be a "favour" to two influential South American agents who would look favourably on the Club in the future. The loan deal cost the Club nearly £1m in wages for a player who was not

expected to play for the first team but no payment was made by the Club to the agents in respect of the deal.

7. Although it is clear that Mr Keegan also had concerns about the nature of this deal, his primary objection to it was that it breached what he described as “the golden rule”, i.e. the term of his contract by which he, the Manager, would have the final say and that notwithstanding that he had strongly objected to the proposed transfer, the Club nonetheless had proceeded with it.
8. The upshot was that despite several attempts by both sides to find a way forward, Mr Keegan concluded that he had no option but to leave the Club because, to use the language of the law, in breaching what he maintained was a fundamental term of the Contract, the Club had thereby repudiated it as a result of which he was entitled to resign. Hence this claim.

9. **The Hearing**

During the course of the Hearing, which lasted for nearly two weeks, we read the statements of and heard oral evidence from the following witnesses:- Mr Keegan, Mr Ashley, Mr Mort, Mr Jimenez, Mr Wise, Mr Lee Charnley (the Secretary of the Club), Derek Llambias (who succeeded Mr Mort as Chairman in June 2008) and Jeff Vetere (who joined the Club in January 2008 as its Technical Co-ordinator having previously been a scout at Real Madrid, Charlton Athletic and West Ham). We were also provided with a considerable amount of documentary material which included, of course, most importantly the Contract and we were referred to a considerable number of legal authorities which we have carefully considered. The

Hearing was held in private as is the custom and practice in arbitration proceedings such as these but we were asked by both parties to allow our decision to be made public, indeed we were invited ourselves to take appropriate steps to publish it. We are satisfied that we have power to do so and we agree with the parties that in the circumstances of this case, it is desirable that our decision should be made public. Accordingly, we propose to give certain directions as to the publication of our decision which are set out at the end of this Judgment.

10. **The Key Issues**

At the end of the evidence we identified what seemed to us to be the seven principal issues in the case and invited the parties to focus their closing submissions on those issues. We did not understand the parties to disagree that these were the key issues and thus we propose to set out our reasons for making our Award by reference to each of those issues in turn.

11. **The First Issue:**

What were the duties usually associated with the position of a Manager of a Premier League Football Team in January 2008, in particular as to having the final say/final approval as to transfers into the Club?

Clause 3.1.1 of Mr Keegan's Contract provided as follows:-

“During the continuance of his employment, Kevin Keegan will ... perform such duties as may be usually associated with the position of a Manager of a Premier League Football Team (including but not limited to those specific duties set out in Schedule 1) together with such other duties as may from time to time be reasonably assigned to him by the Board”.

12. Paragraph 1 of Schedule 1 provided:

“Kevin Keegan will be responsible for the training, coaching, selection and motivation of the Team”.
13. The first question which arises, therefore, for our determination is as to what were, at the time that the Contract was signed, *“the duties as may be usually associated with the position of a Manager of a Premier League Football Team”.*
14. The Club does not contend that Mr Keegan was expressly told at the meeting on 16 January 2008 that he would not have the final say. As we have pointed out above, the Club’s case, ultimately, was that this was implicit (Mr Ashley said *“blindingly obvious”*) in what Mr Keegan was told at the meeting on 16 January 2008 about the structure of the Club (the model being used) and the various scenarios which were explained to him, that the words in the Contract must be construed against this specific background and this specific structure/model and thus that the *“duties usually associated with the position of a Manager of a Premier League Football Team”* as used in this Contract did not include the Manager having the final say. For the reasons set out below, we reject the Club’s case on this issue.
15. We readily accept that at the meeting, Messrs Ashley, Mort and Jimenez told Mr Keegan about Mr Ashley’s plans and vision for the Club, in particular his plan to find and bring in younger players some of whom might later be sold on at a profit and we accept that Mr Keegan was told something of the proposed structure of the Club, in particular that there would be a Director of Football who was likely to be

Dennis Wise. (Mr Keegan's evidence was that Mr Wise was one of the names mentioned in connection with this post). We also accept that these discussions may have included reference to a number of scenarios. However, we do not accept that it was implicit from these discussions that Mr Keegan would not have the final say.

16. First, we do not consider that it was implicit in the proposed structure of the Club, or the model being used (the Continental model) as it was explained to Mr Keegan and as it was explained to us, that Mr Keegan would not have the final say. On the contrary, we note that Mr Keegan's successor, Joe Kinnear, asked for and was given the final say yet the structure and the model remained the same and Mr Wise continued in his position as Director of Football without any change to the terms of his contract. Moreover, the evidence which we heard shows that the Director of Football and his responsibilities can come in many guises and those responsibilities may differ from one club to another.
17. Secondly, none of the Club's witnesses were able to identify any of the scenarios relied upon, let alone identify a scenario from which it would have been implicit that Mr Keegan would not have the final say.
18. Thirdly, we do not believe that Mr Keegan would have accepted the job as Manager if it had been implicit in what he was told that he would not have the final say and we unhesitatingly accept his evidence on this point. Indeed, it seems to us to be inconceivable that he would have done so having been told, according to the Club's witnesses, that it was likely that Dennis Wise would be appointed as Director of

Football given his inexperience as top flight manager. (Mr Keegan had picked him as a player in the England team when he was its Manager).

19. Finally, the Club's own witnesses themselves seemed to be unclear as to what was the position as to who would have the final say and we had, and continue to have, real difficulty in understanding the Club's position on this point. The Club repeatedly stated that Mr Keegan did not have the final say but in the letter dated 4 September 2008 from Mr Llambias to Mr Keegan setting out the Club's proposals for trying to dissuade Mr Keegan from resigning, Mr Llambias stated:-

"It will continue to be the position that no player will be bought for the first team without your approval, save of course for commercial deals (which we refer to as financials) which will remain within the sole discretion of the Board".

20. This was repeated by some of the Club's witnesses (i.e. that the position was that Mr Keegan had the final say save for financial or commercial deals) but some of those same witnesses then asserted later in their evidence that Mr Keegan never had the final say and Mr Wise was not prepared to accept that Mr Keegan ever had the final say, even apart from financial and commercial deals. This lack of clarity, indeed confusion, in the understanding of the Club's own representatives as to this critical issue makes it, in our view, even less likely that it would and should have been clear to Mr Keegan from what he was told at the meeting on 16 January 2008 that he would not have the final say.

21. We turn, therefore, to consider what were the duties usually associated with the position of a Manager of a Premier League Football Team. On this issue, the

evidence was effectively all one way. Mr Keegan's own evidence was that these duties included controlling the players that come into (and out of) the Club (subject, of course, to the financial restraints set by the Board) and significantly he was not cross-examined on this evidence (in other words, it was not suggested to him that he was wrong about this). Evidence to the same effect was given by three of the Club's witnesses, Mr Mort, Mr Charnley and Mr Vetere. We heard no evidence to the contrary effect. This also accords with both the understanding and long experience of the non-lawyer member of the Tribunal, Mr Merrett, and, for what it is worth, the understanding of the two lawyer members. Accordingly, we have concluded that the duties usually associated with the position of a Premier League Manager included the right, indeed duty, to have the final say as to transfers into the Club and thus that was the position under this Contract.

22. We should add that very late in the day the Club sought to rely on the definition of "*Manager*" set out in paragraph 1 of Section A of the Rules of the Premier League under which "*Manager*" is defined as meaning "*the Official of a Club responsible for selecting the Club's first team*". However, in our view this takes the Club nowhere. True it is that paragraph 1 of Schedule 1 stated that he would be responsible for the training, coaching, selection and motivation of the Team but Clause 3.1.1 expressly provided that his duties would include but not be limited to the specific duties set out in Schedule 1. It follows that the definition of "*Manager*" to be found in the Premier League Rules does not assist in the proper interpretation of the Contract.
23. As it happens, this was also what the Club itself and its representatives (and Mr Keegan) were saying to the public in various interviews and press statements

beginning soon after Mr Keegan's appointment. In a report in the Times of 29 January 2008, which Mr Charnley confirmed as having been accurate, it was stated that "*Wise and Vetere will make the initial assessment before calling in Jimenez to do the deal, though Newcastle insist that Keegan will have the final say*". Two days later, on 31 January 2008, Mr Wise gave an interview in the Chairman's office at the Club which was intended to be and was published on the Club's website (and reported in the national Press) on the following day. In the course of that interview he stated:

"I'm not here to be involved in the first team. I am not here to manage. I am here to help Kevin as much as possible in bringing young players through and also recommending certain players to him and he'll say yes and no. He has the final word and then no one else. I'm not gonna do things like bring players in behind his back. I'm not into that and everything that happens will be run past him and he'll say yes, as I say, or he'll say no".

24. Two days later, in the Club programme for 3 February 2008, the website interview was included with the headline:

"Dennis Wise

"I'm here to help Kevin – he has the final word"

25. On 23 February 2008, Mr Mort gave an interview with "*The Mag*" (published independently by the Club's supporters) in which he stated:

"Everything that sits below Kevin, everything associated with the first team is his responsibility ... Dennis and Jeff will help identify players and Kevin will then say yes or no".

26. The Club's explanation for these statements, which, on their case, were simply untrue, was that they were nothing more than an exercise in public relations carried out so as not to undermine Mr Keegan's position and made necessary, in the first place, by statements made by Mr Keegan himself to the press. We found this explanation to be profoundly unsatisfactory.
27. First, the Club did not, we find, explain in any way to Mr Keegan that they felt compelled to make these statements notwithstanding that they were untrue or to clarify and confirm with him that despite what the Club was saying publicly in these statements, he did not have the final say. Nor did the Club speak to him in advance and explain to him what they were proposing to do and the reasons for it. If the Club's explanation were true, we fail to understand why they did not do so.
28. Secondly, we do not understand why the Club could not set out publicly and truthfully what they maintain was the true position. After all, Mr Ashley's vision for the Club involved a change to a Continental structure and it is clear from the evidence that there are managers of some Continental clubs who do not have the final say. We do not understand why the Club felt unable to make this clear publicly from the outset, regardless of what Mr Keegan himself may have said.
29. Thirdly, for the Club to have made these statements, when they were, according to the Club, untrue, was, in our view, simply to store up trouble for the future.
30. Finally, we do not accept that these statements were made as a result of anything that Mr Keegan himself had already stated publicly.

31. **The Second Issue:**

What was said and agreed at the meeting on 16 January 2008, if anything, as to whether Mr Keegan would have the final say/final approval as to transfers into the Club?

As we have noted in paragraph 4 above, Mr Keegan's alternative case is that at the meeting on 16 January 2008 he was expressly assured by Messrs Ashley, Mort and Jimenez that he would have the final say. This was denied by all three in their evidence. In view of our conclusion on Issue 1, it is unnecessary for us conclusively to determine this issue but we consider that it is probable that although when he left the meeting Mr Keegan reasonably and genuinely inferred that he would have the final say since the Contract provided that he should perform the usual duties of a Premier League Manager, nothing was said expressly to that effect by the Club's representatives.

32. **The Third Issue:**

Why did Mr Keegan leave the Club?

We are satisfied that Mr Keegan left the Club (i.e. resigned) because the Club sought to impose upon him a player, namely Gonzalez, whom he did not want, in breach of the term in his Contract which we have found entitled and required him to have the final say. This was his evidence, which we accept, and it is supported by the timing of his resignation.

33. True it is that he was plainly unhappy with some aspects at the Club, in particular the small size of the squad and the lack of signings which he believed were required to

bolster its size, both of which were making him frustrated, and true it is that he plainly had a difficult relationship with Mr Wise and Mr Jimenez but we are satisfied that what triggered his resignation was the Club's signing of Gonzalez notwithstanding Mr Keegan's strong opposition to it. Both at the time and to us he described the Gonzalez signing as the final straw and the evidence shows that the Club appreciated that proceeding with it against this wishes might well lead to his resignation.

34. It follows that we do not accept the Club's case which is that Mr Keegan resigned because he could not continue to operate within the structure of the Club and that the Gonzalez deal may have represented a convenient excuse for him to do so. First, he told us, and we accept, that he wanted to stay at the Club. Secondly, there were very good reasons for him to want to do so. He had a valuable Contract worth £3m for the first year, £3.2m for year two and £3.4m for year three, plus benefits and he was managing a Club about which he clearly felt passionately and whose fans supported him no less passionately. Thirdly, the Club had had an encouraging start to the new season: in the Premiership, they had drawn away to Manchester United and then won at home to Bolton and in the Carling Cup they had since won away at Coventry. True it is that they had just lost away at Arsenal but that cannot have come as any great surprise. And the atmosphere in the dressing room was described as excellent. Finally, as we set out in more detail below, he was being told by the Club that they wanted him to stay.

35. **The Fourth Issue:**

Was Mr Keegan justified in leaving the Club?

We have concluded that he was for the following reasons.

36. First, it is settled law that if one party to a contract is in fundamental breach of that contract, for example, by breaching one of its fundamental terms, that breach can amount to a repudiation of the contract entitling the other party to resign. This is what is known as constructive dismissal. In the present case, we have no hesitation in accepting that the Club's breach of contract in signing Gonzalez contrary to Mr Keegan's wishes amounted to a fundamental breach of his Contract. We have no difficulty in understanding how, in a case where he has been given the final say, a Manager's position, for example, his authority over the players, would be undermined if a player whom he did not want was brought in by the Club over his head.
37. Secondly, as Mr Wise accepted in his evidence, Mr Keegan had made it clear how strongly he opposed the signing of Gonzalez, yet the Club nonetheless went ahead with the deal.
38. Thirdly, we do not accept that, as the Club has argued, "*the taking of a minor player on loan (without a fee) for the purposes of cementing commercial ties with agents was not a repudiatory breach*". Not only was this inconsistent with the emphasis which the Club placed upon the fact that Gonzalez was a Uruguayan international, but it also misses the point. Gonzalez was a signing which Mr Keegan had opposed, in breach of what we consider to have been a key term of his contract.
39. Fourthly, the Club also argued that he should have discussed the matter further with it and "*taken up the olive branch which was offered*" but the difficulty with this

submission is that what the Club were offering was not what had been agreed under the Contract.

40. Finally, we do not accept that Mr Keegan either waived the Club's breach of contract or affirmed it by confirming on 1 and 2 September that he had not resigned and releasing a statement to the press on 3 September to the same effect. His willingness to see if the position could be resolved could not, in our judgment, involve any waiver on his part. In any event, it is clear that the "*final final straw*" occurred on 4 September when the Club handed to him the letter to which we have referred above in which it made it clear that were he to remain at the Club he would still not have the final say.

41. In view of our conclusion on this issue, we do not need to address Mr Keegan's case as to the propriety or otherwise of the Gonzalez transfer and we do not propose to do so save to note that although it was suggested on Mr Keegan's behalf that the arrangement was improper and irregular, it was not suggested that it was in breach of any of the Rules of the Premier League or any other applicable or relevant rules.

42. **The Fifth Issue:**

Would the Club have been entitled, at the time when Mr Keegan left it in September 2008, to dismiss him if he had not resigned? If so, on what grounds?

The Club raised a number of grounds upon which they submitted they would have been entitled to dismiss Mr Keegan had he not resigned on 4 September 2008. We reject them all. Moreover, it is clear on the evidence that the Club had no intention of dismissing Mr Keegan either then or in the foreseeable future. On the contrary, they

wanted him to stay, they believed that he was doing a good job and, as was recorded in the letter of 4 September 2008 and in evidence by Mr Llambias, they believed that he was crucial to the future of the Club. We consider that the grounds relied upon should never have been raised and it does the Club no credit for having chosen to do so.

43. For these reasons, we have concluded the Mr Keegan was constructively dismissed by the Club. We turn, therefore, to assess the compensation to which he is entitled. The Club contended that under the Contract, specifically Clause 14.8.1, Mr Keegan's damages are limited to £2m. Mr Keegan contends that this clause does not apply, alternatively that it is unenforceable, with the result that he is entitled to damages assessed on the basis and in the sums which we have set out in paragraph 1 above. It follows that we need, first, to determine the issues which arise in relation to Clause 14.8.1 of the Contract.

44. **The Sixth Issue:**

Is Clause 14.8.1 applicable to the circumstances of this case and, if so, is it enforceable?

Clause 14.8.1 provided as follows:-

"In the event that the Club terminates this Agreement or requires Kevin Keegan to cease being the Manager of the Club at any time during the Term, other than where the Club has grounds to dismiss Kevin Keegan pursuant to Clause 14.1, the Club shall pay to Kevin Keegan pursuant to Clause 14.8.4 a sum of £2million ... ("Payment in Lieu")".

45. It is also necessary to set out Clauses 14.8.3 and 14.9:

“14.8.3 The parties agree and declare that the Payment in Lieu is a genuine pre-estimate of the damages that Kevin Keegan may suffer as a result of the Club terminating this Agreement and takes into account the provisions of Clause 14.9 hereof and shall be in full and final settlement of all claims in respect of such early termination...

14.9 If this Agreement is terminated by the Club other than pursuant to Clause 14.1 and Kevin Keegan receives the payment specified in Clause 14.8 then, in consideration of such payment, Kevin Keegan agrees and warrants he will not work nor be employed in any capacity for any other United Kingdom Premier League Football Club for a period of six months from the Date of Termination.”

46. Mr Keegan contended that Clause 14.8.1 did not apply because he left the Club not because the Club had terminated the Agreement but because he had been constructively dismissed. We reject that argument. We consider that, properly interpreted, Clause 14.8.1 is wide enough, and was intended by the parties to be wide enough, to include constructive dismissal. We do not consider that the parties intended that in the event that as a result of a dispute such as this Mr Keegan left the Club the financial circumstances would depend on whether he was constructively dismissed or whether the Club terminated his Contract. Nor do we consider that the parties intended that he should be in a better position financially were he to be constructively dismissed by the Club than were the Club to have terminated the Agreement which, we note, the Club would have been entitled to do either for a bad

reason or for no reason at all. Indeed, we can see no good reason why the parties should have so intended.

47. We also reject the argument that the clause does not apply because the Club has not, in fact, paid to Mr Keegan the agreed sum of £2m. In our judgment, the effect of this part of Clause 14.8.1 is merely that that sum is now owing to Mr Keegan thereby creating a debt which he is entitled to recover.
48. Next, Mr Keegan contended that Clause 14.9 was unenforceable on the basis that it was an unlawful restraint of trade and that because the two were inextricably linked, Clause 14.8.1 was unenforceable also. Specifically, Mr Keegan argued that the restriction in Clause 14.9 on Mr Keegan working or being employed for any other United Kingdom Premier League Football Club for a period of six months following the termination of the Contract, was unreasonably wide because it would prevent him from working or being employed for such a Club in any capacity, for example, it would prevent him from carrying out any journalistic, administrative or corporate hospitality work for any such Club. In our judgment, there are two answers to this contention. First, we consider the prospect of Mr Keegan accepting work for another Premier League Club in such a capacity (rather than as the Manager, Coach or Director of Football) to be more theoretical than real but, secondly, we do not consider such a restriction to be unreasonable. We can well understand that Mr Keegan may have been of value to another Premier League Club to the detriment of Newcastle United in some capacity other than as Manager, Coach or Director of Football and he would have taken with him, of course, his knowledge of the Club, its players, their salaries, details of their contracts and their position at the Club (for

example, whether they were unsettled there or not) all of which might have been of value to the other club. Even his association in some capacity with another club may have given that club a boost which might be reflected by the performance of its team on the pitch.

49. We also note that the restriction applied only to working for or being employed by any other United Kingdom Premier League Football Club (and thus excluded foreign clubs and international teams and, of course, Championship clubs) and that it applied for only six months. Moreover, the restriction did not prevent Mr Keegan from looking for another job as a United Kingdom Premier League Club Manager during those six months, only from taking up such employment. Accordingly, he would have been fully entitled to enter into negotiations to take up such a position provided that his employment with such other club did not begin until after the six months had expired.

50. Finally, Mr Keegan contended that the sum of £2m to be paid under Clause 14.8.1 was unenforceable because it was a penalty in that it was not a “*genuine pre-estimate*” of loss, notwithstanding that by Clause 14.8.3 the parties had agreed and declared that it was. We reject this argument also. In our judgment, it would have been impossible to provide anything remotely approaching a precise pre-estimate of loss in this case. For example, Mr Keegan might have begun employment with another club immediately after the expiry of the six month period but he might not have done so for, say, a further year or two in which event his loss would be very different. However, on analysis, what the parties in substance agreed was that in the event that Clause 14.8.1 applies, Mr Keegan would receive the

equivalent of six months' salary (i.e. £1.5m at least in year one) plus a further £500,000 to provide a cushion in the event that he did not take up other employment as soon as the six month period expired. In our view, the parties were entitled to assume that, if he wanted to, Mr Keegan would be likely to find further employment, if not immediately after the expiry of this period, then within a reasonable time thereafter, given his experience. In view of the near impossibility of estimating precisely what his loss would be, we consider such an approach to be reasonable and to represent a reasonable pre-estimate of his loss to the extent that it was possible to carry out this exercise at all. It follows that, in our judgment, Clause 14.8.1 does not amount to a penalty clause. We note, although we do not base our conclusion on this, that when cross-examined, Mr Keegan very fairly accepted that Clause 14.8.1 was fair and reasonable.

51. We conclude, therefore, that Clause 14.8.1 applies and is enforceable and thus Mr Keegan is entitled to damages in the sum provided for in this clause, namely £2m.

52. **The Seventh Issue:**

Is Mr Keegan entitled to any further damages, that is to say, over and above Clause 14.8.1 and, if so, why?

In view of our conclusion on the Sixth Issue, it follows, as was accepted on behalf of Mr Keegan, that he is entitled to no further damages. However, if we had had to address this issue, we would have decided that the publication of a finding by us that Mr Keegan had resigned because he had been constructively dismissed by the Club and not because he had decided to walk away, would restore his reputation and in evidence he agreed with that proposition. Moreover, he also accepted that he did not

know whether or not anything that happened at the Club was going to stop him getting a job. Thus, even if he had been entitled to seek further damages (i.e. stigma damages), which we have found he is not, they would have amounted to very little.

53. An eighth issue would have arisen as to the Club's counterclaim for damages against Mr Keegan but this issue does not arise given our finding that he was constructively dismissed.

54. **Conclusion**

As recorded in the award, we, therefore, assess Mr Keegan's damages for his constructive dismissal by the Club at £2m subject to determining whether there should be any discount for early receipt or for earnings received since Mr Keegan's constructive dismissal about which we have yet to receive the submissions of the parties. To this must be added interest which we will assess if it cannot be agreed by the parties. It has been agreed that we will determine the question of costs once the parties have been notified of our award and have had an opportunity to make written submissions about costs to us. We will also determine the questions whether there should be a discount for early receipt and/or any deduction for earnings received since Mr Keegan's constructive dismissal once we have received written submissions on these issues.

55. **Publication**

As indicated at the outset, we agree that both our Award and the reasons for it should be made public. To that end, we direct that both the Premier League and the Club should publish both on their respective websites. It also follows that the parties are at

liberty themselves further to disclose and publish the Award and our reasons for it as they choose.

PHILIP HAVERS QC (CHAIRMAN)
LORD PANNICK QC
KENNETH MERRETT

1 October 2009