Rugby Professional Game Board Minimum Standards Criteria: Analysis in the context of the London Welsh Case

Luke Clark | August 2012

Background

The English sports fan expects promotion of clubs up through the league structure to be based on success on the pitch rather than off it. However, the recent case of London Welsh and their battle for promotion to rugby’s Aviva Premiership has illustrated the importance, on occasion, of a club’s legal team in achieving success.

Hours before the first leg of the Rugby Football Union’s ("RFU") 2011-2012 Championship play-off final kicked off, London Welsh were informed that they did not meet the minimum standards criteria specified for promotion to the Aviva Premiership (the “Criteria”). Unsurprisingly, perhaps, the team was fired by a perceived sense of injustice and emerged as comfortable winners over the two legs. An appeal was swiftly lodged and, on 29 June 2012, an independent panel upheld the appeal: London Welsh have been promoted to the Aviva Premiership for the 2012-2013 season at the expense of Newcastle Falcons. Furthermore, the RFU have promised to instigate a full review of the Criteria in light of the panel's findings.

The first obvious question is: how did it come to this? The simplest answer may be that, while minimum standards criteria are not uncommon in professional team sports, in comparison to their football counterparts rugby clubs are in a weaker position – both in terms of existing facilities and finances generated – to meet these criteria. This article looks to introduce the Criteria in the context of the London Welsh case, highlight the issues which ambitious clubs will need to look at before they even consider promotion and consider which areas may be affected by the RFU’s review.

The Audit Process

The Criteria were put in place with the intention of encouraging high standards across the Aviva Premiership, thus increasing levels of spectator attendance and enjoyment, sponsorship and television revenue. They are produced and administered by the Professional Game Board ("PGB"), a body made up of representatives from the RFU, Premiership Rugby Limited ("PRL"), RFU Championship clubs and the Rugby Players' Association.

Compliance with the Criteria is assessed through an annual independent audit of existing Aviva Premiership and those Championship clubs which have requested the audit. The first stage in this process for Championship clubs is that they must notify the RFU at the start of the season of the ground or grounds at which they intend to play home games in the following season. Following this, questionnaires concerning the clubs' management and facilities must be completed and returned, with further investigatory powers being reserved for the PGB (including spot checks and a final audit) in order to identify any shortfalls in meeting the Criteria. At the end of the process the auditors will present their report on each club and, after consideration of that report by both the PGB and the RFU Management Board, the ultimate decision as to whether the Criteria have been satisfied lies with the RFU Management Board.

As in the London Welsh case, clubs may appeal against a decision to an independent panel (appointed by the RFU disciplinary manager in the case of Championship clubs) within fourteen days of notification. The panel's decision is final and binding, with no further right of appeal.

The Criteria are reviewed on an annual basis and this article is based upon the Criteria produced for the 2012-2013 season.
The Minimum Standards Criteria

Each Criterion is graded with one of three separate categories (A, B and C) in order to assess their relative importance and the level of sanction for non-compliance. The categories effectively represent a sliding scale, with Criteria graded A being given the greater weight. If the audit report confirms that the winner of the Championship play-off has met the A and B Criteria (or addressed any issues to the RFU's satisfaction) then automatic promotion will result. On the other hand, and while the application of any sanction must be proportionate to the case in hand, a club may be denied promotion to the Aviva Premiership or face a points deduction as a result of non-compliance with the more serious of the Criteria.

The actual Criteria themselves are grouped into separate sections, including:

(a) **Administration and Management**: this section had previously covered the mandatory business organisational structure for Premiership clubs, together with the minimum qualifications required for the club's commercial and rugby-related officers and managers. The Criteria for the 2012-2013 season now reduce this section to a simple requirement for each club to be a limited liability company, together with provisions regarding the monitoring and evaluation of the clubs' community development programmes.

(b) **Ground Tenure and Ground Moves**: this concerns the ability of the clubs to use their home ground or grounds in order to meet the requirements of the fixture list and broadcasters, rather than the actual facilities required at those grounds (which are discussed in the next two sections). Central to this section is the concept of "Primacy of Tenure", which means that each club must be able to: (i) demonstrate that it can schedule home matches on weekends or bank holidays during the season at any time specified during fixed windows, and (ii) comply with the requirements of PRL’s broadcast partner in televising home games. In order to prove Primacy of Tenure, a legally binding agreement to occupy the club's home ground or grounds must be in place for the following season, with the only pre-condition to the agreement being the securing of promotion.

The Criteria acknowledge that three current Aviva Premiership clubs (London Irish, London Wasps and Saracens) do not have Primacy of Tenure, but that no action will be taken for these breaches. Primacy of Tenure does not mean that the club must be the main tenant at its home ground; while this was formerly the case, this requirement was overturned in 2003 by the Office of Fair Trading (OFT) following the blocking of Rotherham's promotion by PRL. This is important because financial realities dictate that, in many cases, a ground sharing arrangement with another sports club may be the only realistic choice for ambitious rugby clubs.

The OFT also ordered that clubs may use two stadia to meet the Primacy of Tenure requirements if necessary and so, while a club is expected to meet these requirements in relation to a nominated "Principal Home Ground" for the season, they may also nominate a "Standby Ground". Use of a Standby Ground requires prior approval from the PGB and, crucially, it must be located within thirty miles of the club's Principal Home Ground. Clubs may also nominate a "Temporary Ground" for one-off games – an example being the use of Twickenham Stadium by Harlequins for their annual "Big Game".

(c) **Facilities**: in addition to enjoying Primacy of Tenure, rather obviously any nominated ground must also provide suitable facilities for the benefit of spectators, the media and players. The Facilities Criteria, together with the separate Medical and Safety Criteria, are perhaps the most detailed of the Criteria, covering areas such as the provision of adequate public toilets and media and playing facilities. In particular, any nominated ground must provide a minimum licensed capacity of 10,000, with at least 4,200 seats, although a temporary amnesty may be available where ground developments are needed in order to increase capacity.

The Facilities Criteria are not comprehensive, referring as they do to other guidelines such as the Guide to Safety at Sports Grounds ("the Green Guide") and the requirements of local authorities. This mirrors the position under the equivalent criteria for football's Barclays Premiership. The Green Guide in particular is a key document as, while it has no statutory force in its own right, many of its recommendations are given force of law through inclusion in the statutory safety certificates issued for individual grounds.

(d) **Medical and Safety**: a formal assessment process is set out, which seeks to minimise the risks to each club as a business entity and to provide suitable care and treatment for players, officials and spectators. As well as specific requirements regarding facilities and equipment, there are also detailed requirements regarding
medical personnel and their qualifications. A great deal of reliance is placed upon regulation by the relevant medical professional bodies.

(e) Commercial and contractual undertakings: these Criteria cover requirements relating to sponsors, the salary cap and television facilities in order to ensure that each Aviva Premiership club can meet their various commercial and contractual obligations. The Criteria for the 2012-2013 season, unlike those for the previous season, do not contain specific requirements regarding the provision of "clean stadia". While this may at first glance appear a little surprising, there does remain a general requirement for all clubs to comply with PRL sponsorship agreements. The onus would therefore be on the relevant sponsors to ensure that each club is obliged to provide clean stadia.

The London Welsh Case

It was satisfaction of the Primacy of Tenure requirements which was central to the London Welsh case. London Welsh initially felt that they had satisfied the requirements, with a binding agreement in place - pre-conditional only on promotion - to use the Kassam Stadium in Oxford as their Principal Home Ground. However, while the audit report cited several failings in London Welsh's application for promotion, the key area in which they fell short was in nominating Griffin Park in Brentford as their Standby Ground. This ground, like the Kassam Stadium, would appear to satisfy the various facilities criteria: crucially, however, and despite being located within thirty miles of London Welsh's "spiritual home" of Old Deer Park in Richmond, Griffin Park is located some fifty miles away from the Kassam Stadium. This resulted in a failure by London Welsh to meet the Primacy of Tenure requirements for their Standby Ground.

By the time of the appeal London Welsh had accepted that this was the case. What the appeal panel went on to consider, however, was whether or not the Primacy of Tenure requirements were compatible with competition law. While the RFU argued that the Primacy of Tenure requirements were essential to their ability as a governing body to schedule fixtures and meet their broadcasting obligations, the appeal panel found two major holes in this argument. Firstly, it transpired that PRL, the PGB, the RFU and a majority of the Premiership clubs had agreed in 2011 to increase the number of clubs exempted from the Primacy of Tenure requirements from three to five in time for the 2013-2014 season: according to the PRL Board, "at this number the PRL can still manage the issues on freedom of fixture scheduling which flow from the TV contracts". Secondly, it became clear that a fourth, unnamed, Premiership club had previously been in breach of the Primacy of Tenure requirements for a period of nearly two seasons – to make matters worse, there were also suggestions that a fifth club had been in breach.

Both of these factors, commercial in nature, rather undermined the RFU's argument that a strict reading of the Primacy of Tenure requirements was necessary from a sporting perspective. Furthermore, the panel felt that it had been clear for some time before 2011 that the requirements were unduly restrictive, and so the RFU should have reviewed the position well before then – they could not rely on what amounted to a nine year old OFT blessing following the Rotherham case, not least because all other aspects of the Criteria had been reviewed on an annual basis since then. The panel therefore considered the Primacy of Tenure requirements to be in breach of competition law and, as a result, unenforceable. The RFU's decision to refuse London Welsh's promotion was overturned and, inevitably, the Primacy of Tenure requirements will need to be revised.

Conclusions and Possible Changes

It is difficult to avoid the initial conclusion that London Welsh simply misread the wording of the Criteria by nominating a Standby Ground (Griffin Park) outside of the thirty mile radius of their nominated Principal Home Ground (the Kassam Stadium). One can have a large degree of sympathy, as it would appear that there are a limited number of suitable stadia close enough to the Kassam Stadium, with the best option perhaps being the County Ground in Swindon - located some seventy miles away from London Welsh's Richmond heartland. Indeed, and as an aside, it is interesting that the Criteria do not require proximity to a club's traditional locality – as illustrated in London Irish playing their home games in Reading and London Wasps in High Wycombe. This is in contrast to the stated position for all tiers of league football. Whatever the revised Primacy of Tenure requirements look like, a lesson to be drawn here is that professional rugby clubs should be prepared to look outside their own localities if needs be.

On a broader note, the Criteria – and in particular the requirement for Primacy of Tenure - have been controversial for some time and, indeed, of the four clubs contesting the Championship's end of season play-offs in 2012, only two (London Welsh and Bristol Rugby) even asked to be audited for promotion purposes. So why did no club challenge
the legality of the Criteria before now? The likeliest answer is probably that London Welsh were the first non-compliant club to win the Championship since 2003: quite simply, no club was willing to foot the bill for challenging the Criteria without the assurance of guaranteed promotion should the challenge prove successful.

The RFU’s review of the Criteria will clearly have to deal with Primacy of Tenure. It is unlikely that the requirements will be abolished outright – after all, even the appeal panel accepted the underlying rationale for them – but what form they will take is not clear. The most obvious starting point is the amendments proposed in 2011, namely that the number of exempted clubs be increased to five in total, with a simple requirement for “non-Primacy” clubs seeking promotion to merely show that they at least have a lease of their ground in place for a minimum term of five years.

It may be however that the RFU decide to go further in their review, as these amendments would of course need the "anti-competitive" current Primacy of Tenure requirements to otherwise stay in place. They could perhaps follow the example of Rugby League, where fourteen clubs are awarded a licence, based on minimum standards criteria, to compete in the Super League on a three yearly basis. This would seem unlikely, as it would involve a wider review of the concept of promotion and relegation.

A more palatable alternative may be the suggestion of long-term Cornish Pirates backer Dickie Evans, namely that Primacy of Tenure be scrapped and promoted clubs be able to play Premiership rugby at their own grounds for several years while they procure suitable facilities. Indeed, while the likes of London Welsh and Cornish Pirates may be advised to look at the example of Exeter Chiefs, who spent several years in advance of promotion in creating a viable business and stadium infrastructure, under the current system any work to satisfy the Criteria and produce a suitable business model for profitable Premiership rugby must be carried out, effectively, in blind hope. The small margin between success and failure can be seen in that Exeter Chiefs scraped into the Aviva Premiership in 2010 by victory in the Championship play-offs, having finished second in the league that season. Given the tight finances existing outside of the Premiership, is it reasonable to expect major investment without any guarantee of promotion? Ultimately, this is the inherent problem with the business of sport: a sound business model and forward planning must also be allied to success on the pitch.

If you require further information on anything covered in this briefing please contact Luke Clark (luke.clark@farrer.co.uk) or your usual contact at the firm on 020 3375 7000.

This note is intended as a general summary of the law. It should not replace legal advice tailored to your specific circumstances.

© Farrer & Co LLP, August 2012