SR/206/2020

BEFORE THE LEAGUE ARBITRATION PANEL IN THE MATTER OF A DISCIPLINARY APPEAL FROM AN EFL DISCIPLINARY COMMISSION (SR/017/2020) UNDER SECTION 8 OF THE EFL REGULATIONS

Before:

Charles Hollander QC (Chair)
Rt. Hon. Lord Dyson
David Phillips QC

BETWEEN:

THE FOOTBALL LEAGUE LIMITED ("The EFL")

Appellant

and

DERBY COUNTY FOOTBALL CLUB LIMITED ("DCFC")

Respondent

DECISION: DE NOVO HEARING

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1. This is our decision in relation to EFL's application that we hear this appeal by way of a de novo hearing.

2. On 24 August 2020 the EFL Disciplinary Commission (Graeme McPherson QC (Chair), Robert Englehart QC, James Stanbury) ("the DC"), delivered a decision after a five day hearing on two charges brought by EFL against DCFC arising from criticisms of DCFC's annual accounts. The first charge related to the treatment of the sale of Pride Park,

DCFC's stadium in the 2017/18 accounts. The DC dismissed that charge and there is no appeal by EFL against that conclusion. The second charge concerned the approach to amortisation of the capital costs of player registrations adopted by DCFC in the 2015/16, 2016/17 and 2017/18 accounts, which EFL contended was contrary to FRS 102. The DC also dismissed this charge save that it upheld a complaint under s10 of FRS 102 that DCFC had failed fairly to disclose changes in its accounting policy in its accounts. The second charge involved consideration of accounting principles and conventions. EFL appeal to this tribunal against the dismissal of the second charge.

3. We were thus appointed as members of a League Arbitration Panel in an arbitration commenced by EFL on 7 September 2020 against DCFC by way of appeal against a Disciplinary Commission Decision ("the EFL Arbitration").

4. EFL's Notice and Grounds of Appeal dated 7 September 2020 contains a request for a De Novo hearing. In support of that application EFL served witness statements from Richard Parry and James Karran dated 17 November 2020. DCFC said that they had not been forewarned as to this evidence and were taken by surprise. In the event they did not object to the evidence being relied upon in support of this application but made it clear that they would object to it being admitted on the substantive appeal and may wish to respond. We have therefore read and considered that evidence for the purpose of this decision.

5. We held an oral remote hearing on 30 November 2020. James Segan QC appeared for EFL. Nick de Marco QC and Tom Richards appeared for DCFC.

6. The relevant provision is EFL Regulation 95.4:

> *"95.4.1 where required in order to do justice (for example to cure procedural errors in the proceedings before the Disciplinary Commission), the Disciplinary Appeal shall take the form of a re-hearing de novo of the issues raised in the proceedings i.e. the League Arbitration Panel shall hear the matter over again, from the beginning, without being bound in any way by the decision being appealed.*
>
> *95.4.2 in all other cases, the Appeal shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being*

appealed was in error and the burden of establishing the decision was in error shall rest with the appellant"

7. In relation to the composition of the DC, Appendix 5 of the EFL Rules (Part 2 Championship Profitability and Sustainability Rules) provides:

> *"6.4 Any Disciplinary Commission convened pursuant to or otherwise in relation to any matter covered by these Rules shall include at least one member who holds a nationally recognised qualification as an accountant or auditor…"*

That provision does not apply to the composition of the League Arbitration Panel.

8. EFL says it has taken the exceptional course of making an application under EFL Regulation 95.4.1 because it considers that a de novo hearing is required in order to do justice in relation to the appeal. As explained in the evidence of EFL's Chairman (Mr Rick Parry) and Finance Director (Mr Jim Karran), the EFL says it has reached this view because of:

   a. the wider importance of the decision to the 44 clubs at the two highest levels of professional football in England;

   b. the unsatisfactory and unsafe circumstances and manner in which the DC reached its decision on the Amortisation Charge;

   c. the desirability of the appeal panel itself hearing the factual and expert evidence on the accountancy issues; and

   d. the emergence the day after the DC's decision, long after the relevant deadline had expired in March 2020, of DCFCs draft accounts for 2018/19 which place the second charge in an entirely different light, in view of an impairment of £22.2m in relation to the value of its squad.

9. Mr Segan submitted that whilst individually he recognised that these four reasons might not justify a de novo hearing, cumulatively they did so. He submitted that the correct question for us was to consider: what mode of hearing would enable EFL most efficiently to advance its grounds of appeal. He pointed out that the Court of Arbitration for Sport had a mandatory rehearing entitlement and whilst the wording of Reg 95.4.1 differs from that,

the express rehearing power is in effect a half-way house between the CAS provision and the power to order a new trial which obtains under the CPR.

10. We reject these submissions as to the effect of Reg 95.4.1. The test is whether a de novo hearing is *required* in order to do justice*,* not whether a de novo hearing would be more efficient or more satisfactory. The test of necessity is a high one. There has already been a five day hearing with oral factual and expert evidence before the DC. The decision runs to 121 pages. Very significant time and expense has been expended already. The existence of this serious charge inevitably has had an adverse effect on DCFC and its business. An important part of doing justice is the principle of finality. To start again and hold a rehearing on this second charge in such circumstances would require very cogent and specific justification. It would in our view require genuinely exceptional circumstances before a party who had lost would be permitted to rerun the DC hearing de novo. Anything else would be entirely unfair to DCFC.

11. No party has appointed an accountant to this Arbitration Panel. If a de novo hearing occurred, we would effectively be circumventing the spirit of Reg 6.4 of Appendix 5 Part 2, in that we would be making a primary determination without the specialist expertise of an accountant panel member. Whilst that goes to discretion rather than jurisdiction, it emphasises the unsatisfactory nature of a de novo hearing before the Arbitration Panel in this case. We note the express reference in Reg 95.4.1 to curing procedural errors. That is stated as "*for example*" and we would not wish to define or limit the circumstances in which a de novo hearing might be required. However in our view Reg 95.4.2 is intended primarily to deal with the situation where there has been a procedural or similar mishap at the DC hearing which involves a breach of natural justice or similar problem.

12. We do not consider that the grounds put forward by EFL come remotely close (individually or cumulatively) to satisfying us that a de novo hearing is necessary or justified.

13. Given that there is a significant overlap between the reasons put forward by EFL for a de novo appeal and the grounds of appeal themselves, it would be inappropriate in this decision to say too much about the individual grounds put forward lest our comments are seen to prejudge the appeal. We should simply say:

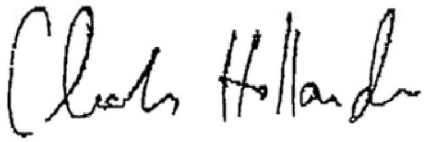
a. EFL has made clear that it will make an application to lead fresh evidence on the appeal in relation to the DCFC's 2018/19 accounts. DCFC recognise that this Panel will need to determine that application. That is in our view the appropriate means of dealing with that issue.

b. What is stated by EFL to be the desirability of the Panel itself hearing the factual and expert evidence arises because EFL is dissatisfied with the decision of the DC. We recognise that EFL is unhappy with the DC decision and its view is that DC's decision was in error. But that is the position of many parties who wish to appeal a first instance decision and cannot of itself justify a rehearing de novo.

c. EFL makes criticisms of the circumstances in which the DC reached its decision, both in relation to the rejection of EFL's expert evidence and the circumstances in which it says it was faced at the last minute with a different case from that it believed it had come to meet. But it did not seek an adjournment, was permitted by the DC notwithstanding DCFC's objections to put in a further report from its accountant expert at a late stage to deal with what it said was a different case they were required to meet, and there is no complaint about any particular procedural decision or ruling of the DC.

d. Whether or not the decision of the DC has implications for other clubs does not justify a de novo hearing.

14. We therefore dismiss the application. We would invite the parties to discuss directions for EFL's application to lead fresh evidence on the appeal, and to consider whether we can determine that matters on the papers or whether one or both parties would request an oral hearing.



Charles Hollander QC

For and on behalf of the League Arbitration Panel

3 December 2020

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