

**BEFORE THE LEAGUE ARBITRATION PANEL IN THE MATTER OF AN ARBITRATION
UNDER SECTION 9 OF THE EFL REGULATIONS AND 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

IN THE MFC APPEAL

BETWEEN:

MIDDLESBROUGH FOOTBALL & ATHLETIC CLUB LIMITED (“MFC”) Appellant
and
DERBY COUNTY FOOTBALL CLUB LIMITED (“DCFC”) First Respondent
and
THE FOOTBALL LEAGUE LIMITED (“The EFL”) Second Respondent

AND IN THE EFL APPEAL

BETWEEN:

THE EFL Appellant
and
DCFC Respondent
and
MFC Applicant Intervener

DECISION

1. This is our ruling in relation to Middlesbrough Football Club (“MFC”) in two matters where we have been appointed as a League Arbitration Panel:
 - a. An arbitration dated 7 September 2020 brought by MFC against Derby County Football Club Ltd (“DCFC”) and the English Football League (“EFL”). (“the MFC arbitration”)
 - b. An arbitration commenced by EFL also on 7 September 2020 against DCFC by way of appeal against a Disciplinary Commission Decision (“the EFL Arbitration”).
2. We held an oral remote hearing on 22 October 2020. Paul Harris QC and Daniel Cashman appeared for MFC. Nick De Marco QC and Tom Richards appeared for DCFC. Mark Gay appeared for EFL, which took a neutral position. We are grateful for the detailed written and oral submissions which were of very high quality. We received witness evidence from Mr Neil Bausor on behalf of MFC.

Factual background

3. MFC complained to the EFL as to DCFC’s accounting in relation to the 2017/18 year. In particular they complained as to the treatment given in the accounts for the sale of DCFC’s stadium Pride Park, which they claimed had improperly been treated as giving rise to a £40m profit in the accounts. The consequence, according to MFC, was that DCFC had marginally avoided breach of the Upper Loss Threshold in the EFL’s Profit and Sustainability (“P&S”) Rules. Had this been properly accounted, according to MFC, the breach of the P&S Rules would have meant that DCFC would have been restricted by EFL Rules in their new player spend for the season, and would not have been able to acquire the players that they did for the 2018/19 season. That gave DCFC an unfair advantage. Among the players in question was [REDACTED]. In the event, DCFC finished one point ahead of MFC and thus reached the end-of-season playoffs whereas MFC did not. Thus, runs the argument, DCFC’s improper accounting has led to MFC missing the playoffs and the opportunity to challenge for a place in the coveted Premier League.

4. On 6 September 2019 MFC commenced arbitration proceedings against EFL contending that EFL had failed to take timely disciplinary action against DCFC. On 29 November 2019 MFC and EFL agreed that this arbitration would be stayed and EFL would commence disciplinary proceedings against DCFC. MFC indicated that if EFL started such disciplinary proceedings, MFC would seek compensation from DCFC pursuant to EFL Reg 92.2.5. In other words, they would apply for compensation on the back of a finding of breach by DCFC.
5. On 16 January 2020, EFL commenced disciplinary proceedings against DCFC. The first charge alleged that the reported consideration for Pride Park was not at fair market value ("Charge 1"). The second charge was that DCFC's approach to the amortisation of player registrations was not in accordance with financial reporting standards ("Charge 2"). A Disciplinary Commission was appointed to hear these charges ("the Disciplinary Commission").
6. After an exchange between MFC and the Disciplinary Commission, MFC made clear they wished to intervene only if EFL's complaint was upheld, for the purpose of seeking compensation from DCFC.
7. The Disciplinary Commission delivered a decision on 24 August 2020 after a five day hearing. They dismissed Charge 1 and found against DCFC only on one of five elements of Charge 2, namely that DCFC had failed adequately to disclose changes to its accounting policies.
8. EFL served Notice of Arbitration on 7 September 2020 to appeal the Disciplinary Commission decision on Charge 2 only.
9. MFC served Notice of Arbitration on 7 September 2020 also to appeal the Disciplinary Commission decision both as to Charge 1 and Charge 2.
10. An issue arose as to whether there was jurisdiction for MFC to start its own arbitration in this way or to intervene in the EFL Arbitration. In the event, in order that all jurisdictional issues could be raised for determination, MFC also applied to intervene in the EFL Arbitration and the same League Arbitration Panel (i.e. this panel) was appointed both to hear the EFL Arbitration and the MFC Arbitration.

11. The result of this somewhat impenetrable procedural position is that the issues before us are as follows:
- a. Is there jurisdiction for MFC to commence the MFC Arbitration?
 - b. Is there jurisdiction for MFC to intervene in the EFL Arbitration?
 - c. If the answer to b is yes, should we grant MFC standing to intervene in the EFL Arbitration?

MFC Arbitration: Jurisdiction

12. Although they were not parties to the Disciplinary Commission proceedings, MFC contend that under the EFL Regulations they are entitled to commence an arbitration themselves to appeal the Disciplinary Commission decision. By doing this (as opposed to intervening in the EFL Arbitration which is only concerned with Charge 2), they will not merely be able to appeal Charge 2 but also Charge 1 (which EFL do not appeal). They will also seek to have a de novo rehearing and if successful on that issue the effect of the MFC Arbitration will be to effect a rehearing of the two Charges. This all seems somewhat counter-intuitive. Can this really be permitted by EFL Regulations?
13. It is accepted by both MFC and DCFC that it remains permissible in principle for MFC to bring a separate claim by way of arbitration for compensation against DCFC. The EFL Regulations constitute a multi-party agreement between (among others) the EFL and the clubs. If MFC are able to make good a claim for breach of the Regulations by DCFC the effect of which has caused them loss, they can bring such a claim and no estoppel will arise as a result of the Disciplinary Commission decision.

EFL Regulations

14. EFL Regulations provide:

83.1 *The League shall have power to initiate and prosecute disciplinary proceedings against any person subject to these Regulations for breach of these Regulations...*

84.1 *The League has the power to bring disciplinary proceedings for misconduct against any Club, Official, Player and/or any other individual subject to these Regulations...*

90.1 *...the parties to proceedings before a Disciplinary Commission shall be:*

90.1.1 *The League (“the Claimant”) and*

90.1.2 *the Club, Official, Player or other individual...allegedly in breach of these Regulations (“the Respondent”)*

These provisions provide that it is the EFL that will prosecute disciplinary matters. This is as one would expect. The EFL is the obviously appropriate prosecutor.

15. Arbitrations such as the present are dealt with at Reg 95-96 which are part of Section 9 of the EFL Regulations:

95.1 *Membership of The League shall constitute an agreement in writing between The League and Clubs and between each Club for the purposes of section 5 of the Arbitration Act:*

95.1.1 *to submit those disputes described out in Regulation 95.2 to final and binding arbitration in accordance with the provisions of the Arbitration Act and this Section of these Regulations*

...95.2 *The following disputes fall to be resolved under this Section of the Regulations:*

...95.2.2 *Disciplinary Appeals; ...”.*

16. The reference to “Disciplinary Appeals” in Regulation 95.2.2 is, in turn, a reference to Regulation 94 in Section 8 of the EFL Regulations:

Disciplinary Appeals

94.1 *A party to a Disciplinary Commission may appeal against a final order of the Disciplinary Commission...”;*

17. Regulation 94.2 provides

A Disciplinary Appeal shall be heard by the League Arbitration Panel in accordance with the provisions of Section 9 of these Regulations, supplemented by the provisions of this Regulation. In the event of any conflict between Section 9 and this Regulation, this Regulation shall prevail.

18. And Regulation 96:

Standing

96.1 *A person who is not a party to a dispute (which may, for the avoidance of doubt, include the League itself) may not invoke these arbitration provisions in respect of such a dispute, unless that party can show that they are sufficiently affected by the outcome of the dispute that it is right and proper for them to have standing before the League Arbitration Panel..*

19. We should also refer to Appendix 2 which sets out procedural rules and at 4.1 (k) give the Arbitration Panel power to:

Give such other lawful directions as it shall deem necessary to ensure the just, expeditious, economical and final determination of the dispute

The MFL Arbitration: Discussion

20. Reg 95.2.2 includes Disciplinary Appeals on the list of disputes which fall to be resolved by arbitration under Section 9. That is read together with Reg 94.1 to entitle a party to the Disciplinary Commission proceedings to bring a Disciplinary Appeal. The types of disputes which will be resolved by arbitration include a mix of different forms of appeals and decision reviews.

21. According to Reg 94.1, it is a *party* to the Disciplinary Commission that can bring an arbitration by way of Disciplinary Appeal under Reg 94.1. Any party wishing to appeal must comply with Reg 94.3. Reg 94.2 provides that an appeal shall be heard in accordance with the provisions of Section 9. Reg 94.2 provides that Reg 94.2 prevails in the event of any conflict between Section 9 and Reg 94.2
22. MFC are not a party to the Disciplinary Commission proceedings, and by virtue of Reg 90.1 could not be. On the face of it, therefore, MFC do not fall within Reg 94.1.
23. MFC contend that Reg 94.1 does not restrict the persons who can bring a Disciplinary Appeal; it does not say that it is *only* a party that can bring a Disciplinary Appeal. But that is not good enough: they need to identify a power for them to commence an arbitration and bring such a Disciplinary Appeal. Reg 94.1 does not provide such a power for someone who is not a party to the Disciplinary Commission proceedings.
24. MFC rely on Reg 96.1. This provision recognises that there will be occasions where a *non-party to a dispute* may have standing to invoke these provisions in such dispute. This requires identification of the "dispute". In other words, someone who is not a party to a dispute can intervene in that dispute. So what is the dispute here? The only extant dispute is the dispute between EFL and DCFC which is being resolved under the EFL Arbitration. Thus this provision provides a *jurisdiction* for MFC to intervene in the EFL Arbitration if we were satisfied that the preconditions in Reg 96.1 were satisfied. It does not provide a basis for MFC to commence an arbitration of their own.
25. To construe Reg 96.1 as giving a non-party the right to appeal would be to expand the scope of Reg 94.1. Clear language would have been needed if the parties had intended that different appeal provisions were to apply to non-parties. For example, Reg 94.1 could have said that it was "subject to 96.1". Secondly, Reg 96 is subject to important conditions which do not appear in Reg 94: this makes it inherently unlikely that it was intended that Reg 94 should provide for an appeal by a non-party. Thirdly, the idea of a non-party to a decision being able to appeal it is unusual. This is another reason why clear words would be needed to give MFC the right to such an appeal. Fourthly the language of Reg 96 is more appropriate for intervention in an extant appeal by a party than for a free-standing

right of appeal by a non-party, The language of "standing", being "sufficiently affected" and "right and proper" reflect the jurisprudence of interventions in judicial review cases.

26. We therefore conclude that there is no power for MFC to commence the MFC Arbitration.

The EFL Arbitration

27. The next question is whether there is jurisdiction for MFC to join in the EFL Arbitration by virtue of Reg 96.1. DCFC accept that there is jurisdiction so to order (for the reasons given above), but submit that we should decline to permit such intervention.

28. It seems to us that it would be an unusual case where the League Arbitration Panel would permit a club to invoke Reg 96.1 on a Disciplinary Appeal. The club would need to show that they were *sufficiently affected by the outcome of the dispute* that it is *right and proper* for them to be able to participate. It is thus not merely whether they are sufficiently affected by the outcome, it must also be shown that it is right and proper for them to have standing before the Appeal Tribunal.

29. It seems to us that Reg 96.1 contemplates a relatively unusual or exceptional case and it is for the non-party to satisfy the Appeal Tribunal that they fall within the provision. We do not consider MFC have shown that.

30. Firstly, the determination by the Appeal Tribunal will not prejudice MFC in bringing a claim against DCFC if they are minded to do so. As explained above, there is no estoppel.

31. Secondly, this is an appeal in relation to EFL's prosecution of DCFC. MFC say they could add a club perspective to the issues on the appeal. In our view EFL with all its experience and the resources available to it is well able to make all the points. They were not party to the Disciplinary Commission below and, as counsel made clear have not seen the material before the Disciplinary Commission. In any event, it would not be expected that a club would be involved in a prosecution, as opposed to the EFL.

32. Thirdly, at least the primary focus of MFC's complaint has been the accounting treatment of Pride Park. That will not be in issue in EFL's appeal. All that the appeal concerns is the

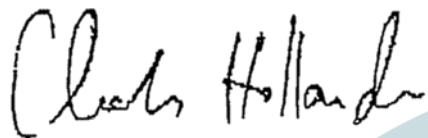
amortisation of player registrations. Mr Bausor's evidence led on behalf of MFC says little about the player amortisation issue and it is difficult to see how far a successful appeal by EFL on this issue would affect MFC and their compensation claim. It seems to us that the result of the Disciplinary Appeal may well not affect one way or other either MFC's position or whether MFC decides to commence further proceedings against DCFC.

33. Fourthly, there are obviously cases where it follows or is likely to follow that the result of an appeal directly and immediately affects another club, such as where a decision whether to uphold a points deduction will affect whether another club is relegated instead. This is simply not such a case, or anywhere close, and we do not consider that MFC have discharged the burden of satisfying us that we should permit them to have standing under Reg 96.1
34. We concluded above that there was no jurisdiction for MFC to commence the MFC Arbitration. If we were wrong on that, and Reg 96.1 was there applicable, and we had a discretion, we would still not have permitted them to commence arbitration under that provision. Although the third reason given above would not have been applicable in that event, we would not have been satisfied for the other reasons given above that it was appropriate for them to rely on Reg 96.1.
35. Finally, reference was made to the case management powers under Appendix 2. We do not consider those provisions would give us any jurisdiction we did not otherwise have.

Disposition

36. We did not hear submissions on costs, and we reserve those. We invite the parties to seek to agree costs, but if they are unable to do so we would expect they could be dealt with by brief written submissions.
37. We find there is no jurisdiction for the MFC Arbitration.

38. We refuse MFC's application under Reg 96.1 in relation to the EFL Arbitration.



Charles Hollander

Charles Hollander QC

For and on behalf of the League Arbitration Panel

26 October 2020

1 Salisbury Square London EC4Y 8AE resolve@sportresolutions.co.uk 020 7036 1966

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www.sportresolutions.co.uk



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