SPORT RESOLUTIONS

SR/372/2019

IN THE MATTER OF AN EFL DISCIPLINARY COMMISSION

Before:

Sir David Foskett
Mr Geoff Mesher FCA
Mr Jim Sturman QC

BETWEEN: -

THE ENGLISH FOOTBALL LEAGUE ("the EFL")

Claimant

-and-

SHEFFIELD WEDNESDAY FOOTBALL CLUB (the "Club")

Respondent

DECISION ON SANCTION

Introduction

1. The Commission's decision on the charges brought by the EFL against the Club was sent to the parties on 16 July 2020.

2. We found Charge 1 proved, but we dismissed Charge 2.

3. We do not repeat the circumstances save as may be necessary to elucidate our decision on the sanction to be imposed in respect of the breach of the EFL Regulations reflected in Charge 1.

4. A virtual hearing for one half-day at which oral submissions on sanction could be made was convened on Thursday, 30 July 2020. We had received extensive written submissions, including references to other cases, on behalf of the EFL and the Club prior to that hearing and we heard from Mr James Segan QC on behalf of the EFL and from Mr John Randall QC and Mr Nick De Marco QC on behalf of the Club.

5. At the conclusion of the hearing, we indicated that we wanted to reflect on the submissions and, if possible, would relay our decision to the parties the following day with our written reasons to follow.

6. We were able to achieve that objective and the parties were told on 31 July 2020 that the Club would be made subject to a points deduction of 12 points to be effective in the 2020-2021 season.

7. This ruling indicates the reasons for that decision.

The submissions

8. As we have indicated, there were extensive written submissions available to us prior to the hearing on 30 July and also extensive oral submissions that day. We are grateful to all Counsel for their assistance. We intend no discourtesy by not setting out in full the submissions for each side. We will summarise the effect of the contentions and explain briefly why we reached the decision to which we have referred. Merely because we do not make specific reference to a particular argument does not mean that we have not considered it. Our reasons reflect what, in our view, are the significant points to be made on each side.

9. The EFL contended that the Commission should impose upon the Club a points deduction of 12 league points, effective immediately, and thus within the extended 2019-2020 season. That argument was made by reference to the Sanctioning Guidelines (see below), the *Birmingham City* decision (also see below) and “all the circumstances of the case”.

10. The Club’s primary submission was that no sporting sanction in the form of a points deduction should be made at all and that all that was required was “a modest financial

penalty". Alternatively, if a points deduction was to be made then, if made in the 2019-2020 season, any immediate deduction should not exceed 7 points because any immediate sanction involving a deduction of 8 points or more would result in the Club's relegation and the Commission should suspend all or part of any sporting sanction to apply in the 2020/21 season on the occurrence of any further breach of the P&S rules.

Our reasons

11. A great deal of the argument advanced on the Club's behalf was addressed to matters that occurred after 31 July 2018 (ultimately the final date of the 14-month accounting period taken for the purpose of the P&S Rules). However, we broadly accept Mr Segan's contention that what happened after midnight on 31 July 2018 "cannot logically mitigate (or aggravate) the conduct comprising" Charge 1. The short point is that as of that date the Club had failed to meet the requirements of the P&S Rules which is the essence of that Charge. We are not, of course, blind to what occurred subsequently, but it seems to us that we ought to focus principally on the essential thrust of the charge rather than re-examining for sanction purposes all the suggested nuances of what occurred subsequently.

12. The Commission is aware that there is some controversy concerning the appropriateness of the sale of a club's stadium to enable the P&S requirements to be met. This case has nothing to do with that controversy. The EFL accepted, in principle, that this was an acceptable practice and the Club does not, of course, stand alone as a club that has sought to utilise such a mechanism. That it failed to do so effectively is the reason why its breach of the Rules could not be remedied so as to result in effective compliance.

Points Deduction?

13. As we observed in our decision on the merits (see paragraph 46), the relevant Sanctioning Guidelines were not available in July/August 2018. It was not until 17 September 2018 that the board of the EFL approved the Sanctioning Guidelines for P&S cases. Their non-availability at the time of the breach by the Club was unfortunate (and indeed this was the situation in the *Birmingham City* case referred to below), but it does not diminish their

relevance to the extent that they are relevant to our decision. We return to that below, but we record here the Guidelines as promulgated:

> "The penalty for breach of the 3 season P&S reporting rules is a deduction of **12** points to commence in the season following the breach i.e. 2018/19 for the 3 season period ending in 2018.
>
> The following number of points shall be deducted from the 12 points.
>
> Quantum of the Breach
>
> - 9 points if less than £2.0m
> - 8 points if between £2.0m - £4.0m
> - 7 points if between £4.0m - £6.0m
> - 6 points if between £6.0m - £8.0m
> - 5 points if between £8.0m - £10.0m
> - 4 points if between £10.0m - £12.5m
> - 3 points if between £12.5m - £15.0m
> - No deduction if breach is greater than £15.0m
>
> Then the balance shall be further reduced if the loss in the final season is less than the season(s) before."

14. The Guidelines go on to show that a diminishing trend in spending may then be taken into account as demonstrating an intention to comply with the Rules. Aggravating and mitigating factors are then available for consideration.

15. It is common ground that the Guidelines do not bind the Commission, but may be taken into account: see, e.g., *EFL v Birmingham City FC*, paragraphs 29-33.

16. In the *Birmingham City* case, the club accepted that a sporting sanction by way of a points deduction was appropriate and that the Guidelines properly reflected the policy that lies behind the P&S Rules. However, in this case the Club does not accept that a sporting

sanction is appropriate, one of the reasons relied upon being that the Club is said to have gained no sporting advantage from the breach which, of course, reflects an overspend over the 3-year period.

17. In relation to that argument, we respectfully agree with the analysis of the Commission in the *Birmingham City* case at paragraphs 27 and 28 which, in the interests of brevity, we do not reproduce here. We agree with the Commission also that -

> "The sanctioning guidelines properly reflect the objectives of the P&S Rules, and should be taken into account as guidance in deciding what points deduction should be applied …."

18. Mr Segan referred to a number of other cases, including *UEFA v Dynamo Moscow* (AC-02/2015), which supported this general proposition. We do not think it can seriously be disputed.

19. There is also a general need for consistency in sanctions subject, of course, to individual factors in individual cases. We return to consistency below when we deal with the EFL's stance in the case of Derby County, where a final decision is awaited.

20. The Club exceeded the Upper Loss Threshold over the 3-year period by £18 million. That would, according to the Guidelines, justify a 12-point deduction subject to aggravating and mitigating factors. The EFL has not contended for any aggravating factors and, of course, the Club cannot rely upon an admission of the breach as a mitigating factor. We do not accept the argument that the Club had to contest Charge 1 because of the seriousness of Charge 2 (which, of course, it was entitled to contest and, on our findings, right to do so). No specific reliance was placed on any other mitigating factor other than the Club's previous good record. Given the overall level by which the Upper Loss Threshold was exceeded, we can see every justification for adopting the guideline deduction of 12 points, none of which should be suspended.

<u>When?</u>

21. That being so, the issue arises as to whether it should be imposed immediately and thus within the 2019-2020 season, a season which has of course been extended for some months because of the Covid-19 pandemic.

22. The general position was stated accurately in the *Birmingham City* case at paragraph 32:

> "The points deduction is to be applied in the season following the conclusion of the relevant 3 year monitoring period. It is only at the end of that period that any loss in excess of the aggregated threshold can be finally determined, so that the following season is the earliest point at which a points deduction can be applied. However it is clearly desirable that any points deduction should be decided and imposed as early as possible in the relevant season, so that all clubs participating in the Championship understand where they stand in the league. For relegation or promotion outcomes potentially to be affected by a points deduction only announced in the last few weeks of the season is far from ideal …."

23. We agree with those observations. It follows that, ideally, the breach proceedings in this case should have taken place before the end of the 2018-2019 season and the penalty imposed in that season (as happened to Birmingham City FC). As it is, the proceedings took place towards the end of the extended 2019-2020 season for reasons to which we will turn shortly.

24. As a matter of historical fact, if a 12-point deduction had been applied in the 2018-2019 season, the Club would not have been relegated. We will return to this below.

25. We have already mentioned that the Club is not alone in having attempted to use the sale of its stadium as a means of complying with the P&S Rules. Another club to have pursued this course is Derby County FC. It is public knowledge that the EFL has brought disciplinary proceedings against that club for breach of the P&S Rules. The public statement made by the EFL at the time the charges were laid in January 2020 was as follows:

> "Following a review of Derby County's Profitability and Sustainability (P&S) submissions, the EFL has charged the Club for recording losses in excess of the permitted amounts provided for in EFL Regulations for the three-year period ending 30 June 2018."

26. The precise details of the background do not matter for this purpose, but it is to be noted that the charge relates to effectively the same 3-year period as that with which Charge 1

in the present case is concerned. [redacted] Although proceedings of this nature are private, the Club and Derby County agreed to share information about the proceedings brought against each other. We say nothing about the appropriateness of such an arrangement, but the result is that it has become clear from an interchange between the Chair of the Commission in the Derby County case and Leading Counsel for the EFL (Mr Mark Phillips QC) that, if the charge against Derby County is established, the EFL will not be inviting the Disciplinary Commission to impose any points deduction in the present, extended season. This, according to Mr Phillips, is on the basis that "looking at the position of Derby in the League at the moment, anything that this Commission does is unlikely to affect the composition of the Championship next year." (It is, incidentally, to be noted that any points deduction that might be imposed on Derby County if the charge is established would also not have had any impact on that club in terms of relegation if it had been imposed in the 2018-2019 season.)

27. Mr De Marco, not unnaturally, draws attention to what he submits is the inconsistency between the position taken by the EFL in that case and the position taken in this case, namely, that two clubs facing very similar allegations for a breach of the P&S Rules for the same period should be treated differently because in one case the outcome could have no impact on the "composition of the Championship next year".

28. Mr Segan argues that the position taken by the EFL in that case is merely a function of the delays that have occurred in getting a final hearing date and that nothing should detract from the general proposition that a sanction should be imposed irrespective of where a team happens to have finished in the league.

29. We will revert to this issue when we draw together the three strands of thinking that has led to our decision to impose the points deduction in the 2020-2021 season.

30. As with the Derby County case, the proceedings in the present case did not come to a final hearing until well into what turned out to be a very extended season because of the impact of the Covid-19 pandemic. The Charges were not brought until November 2019. The EFL will doubtless say that this was because the alleged breaches did not come to

light until after it began its investigations in June 2019. That may be so, but our conclusions about Charge 2 (particularly paragraphs 100-127) do suggest to us that the EFL could have pursued earlier and more vigorously in the 2018-2019 season the issue of whether the sale of the stadium to Mr Chansiri had been completed. There were probably faults on both sides during that period, but it would be wrong to ascribe the whole of the blame to the Club.

31. However, be that as it may, the situation in November 2019 is that Charge 1 and Charge 2 were preferred against the Club – and indeed the separate charges against the individuals, to which we referred in our decision, were also preferred. Whilst some points, which we have found had little intrinsic merit, were taken on the Club's behalf in the initial stages (leading to the arbitration that was eventually shelved), which would have prolonged the proceedings, it was abundantly plain to us that Charge 2 was the charge which substantially extended the proceedings. In the 4 days we heard evidence, the bulk of that period was spent dealing with issues thrown up by Charge 2 rather than the accountancy and financial issues reflected in Charge 1. Whilst we do not say that Charge 2 was an unreasonable charge to bring on the *prima facie* evidence available, we expressed our concerns about the investigation (or, more accurately, the lack of investigation) into these serious allegations before the charge was preferred. It is at least possible that had those fuller investigations been carried out the charge would not have been pursued.

32. At the directions hearing on 30 March, Mr Phillips QC had been asking us to set aside 2 days for the substantive hearing, suggesting that the issue was simple. Our view at that stage was that the evidence on Charge 1 would not be extensive, whatever the outcome on that charge might have been, but we could see that Charge 2 would involve significant evidence as indeed proved to be the case. That is why we set aside 4 days for the hearing of the evidence.

33. The short point for present purposes is that we are quite satisfied that, had the Commission been required to deal only with Charge 1, the substantive hearing could have been dealt with significantly earlier than it was and that, in the absence of Charge 2, some of the earlier procedural issues would have cleared the path for a yet earlier hearing also.

34. Against that background we consider that, in the absence of Charge 2, it is at least possible that a hearing considering Charge 1 alone would have taken place well before the end of the 2019-2020 season as it was intended to be until the Covid-19 issue arose. That season would have ended on 2 May subject to play-offs.

35. If that is so and a 12-point deduction had been imposed during the 2019-2020 season at a very much earlier stage, the Club would have had the opportunity to improve its league position by performance on the field of play. Because of the delayed hearing, it will have been deprived of that opportunity. As stated in the Birmingham City decision (see above at paragraph 22), it is "far from ideal" that relegation or promotion outcomes that are potentially to be affected by a points deduction that are announced only in the last few weeks of the season and it is indeed "far from ideal", in all of the circumstances of this case, that the Club will have been denied the opportunity to which we have referred if the points deduction is imposed now, namely, within the last few days of the extended 2019-2020 season.

36. If we were wrong in the assessment set out in paragraph 34 above and, but for the Covid-19 pandemic, the disciplinary process against the Club would still not have been concluded prior to the end of the extended 2019-2020 season (which resumed on 20 June 2020 and was finally completed on 22 July 2020), the evidence put before us indicates that the Club resumed with a reduced squad as some players would not play beyond 30 June, leading to the final 7 fixtures being played with an under-strength team. The unavailable players included some of the Club's leading players. It is, of course, impossible to know what might have been the position had those players been available, but this, in our view, is another factor to be borne in mind in assessing the fairness and proportionality of imposing the points deduction in what is now the season 2019-2020.

Conclusion

37. These are very unusual times and what may seem appropriate at this precise moment may not necessarily be so in similar circumstances at other times, but our conclusion was that the combination of (i) the fact that had the 12-point deduction been imposed when, according to the general approach, it should have been (during the 2018-2019 season),

the Club would not have faced relegation, (ii) the actual or perceived inconsistency of the EFL's approach in the Derby County case and (iii) the potential effects of the delays caused by the bringing of the eventually dismissed Charge 2, makes it inappropriate to impose the deduction in the current extended season, but to postpone its effect until next season when the onus will be on the Club to redeem its position on the playing field.

38. These are the reasons which led us to the decision announced on 31 July.

Sir David Foskett
For and on behalf of the Disciplinary Commission
4 August 2020