

BEFORE A REGULATORY COMMISSION
OF THE FOOTBALL ASSOCIATION

IN THE MATTER OF:

THE FOOTBALL ASSOCIATION

The Association

- and -

(1) MR. PHIL SMITH
(2) WYCOMBE WANDERERS FOOTBALL CLUB

The Participants

WRITTEN REASONS FOR THE SANCTIONS IMPOSED
BY THE REGULATORY COMMISSION
FOLLOWING THE HEARING ON
20TH MAY 2014

1. SANCTIONS

- 1.1 On 20th May 2014, the Regulatory Commission reconvened for the purposes of considering the imposition of sanctions against both the Club and Mr. Smith. Mr. Baines addressed us on behalf of The FA, before we heard mitigation from Mr. Woodward for the Club and Mr. De Marco on behalf of Mr. Smith. We were provided with a table setting out the sanctions that had been imposed in previous disciplinary cases involving agents since 2008. Helpful written submissions were also presented to us by both the Participants.
- 1.2 After hearing submissions and considering the previous cases, the Commission concluded that all three charges arose out of the same course of conduct/dealings and that a 'global' sanctions order was appropriate, and should be made against both the Participants. The following order was made:

(i) The Club

- (1) The Club shall pay a fine of £10,000.
- (2) The Club is warned as to its future conduct relating to its activities in connection with agents.

(ii) Mr. Smith

- (1) Mr. Smith's football agents' licence shall be suspended with immediate effect for a period of 2 years, 18 months of which shall be suspended. The suspended element shall be invoked in full in the event of a further breach of The FA's Football Agents' Regulations.
- (2) There shall be no additional financial penalty against Mr. Smith.
- (3) Mr. Smith is warned as to his future conduct as a football agent.

(iii) Costs

- (1) There shall be no order as to costs on Mr. Smith's application for disclosure of the Club's Reply to the charges.
- (2) The Participants shall each make an equal contribution towards the costs of the Commission relating to the sanctions hearing.
- (3) Subject to the costs' orders at paragraphs (1) and (2) above, Mr. Smith shall pay the costs of the Commission relating to the proceedings.

2. REASONS FOR SANCTIONS

2.1 Mr. De Marco submitted that there should be parity of treatment between his Client and the Club. Both faced the same charges. Both are responsible for the agreement that provided Mr. Smith with an interest in the onward sale of the player which underpins all three charges. Both had previously unblemished disciplinary records. On basic principles of fairness and justice that submission is undoubtedly right in principle, provided that all other things are equal.

- 2.2 The range of sanctions at our disposal as against the Participants were not identical. The sanction of last resort against the Club was a points' deduction. As against Mr. Smith, the ultimate sanction was an actual suspension of his agent's licence for a period of time.
- 2.3 Of the three charges, the most serious is the breach of Regulation C2 as this involved the concealment from The FA of an agreement that was not only prohibited by the Regulations, but which The FA had explicitly advised the Participants was not permissible under the relevant Agents' Regulations when the 1st RC was submitted for approval. The 2nd RC that was submitted then misrepresented the true nature of the agreement that had been reached by failing to identify the verbal agreement and the continued existence of the 1st RC. This was a significant aggravating feature of the case.
- 2.4 Mr. De Marco submitted that there was no financial victim as a consequence of what happened. That is so, but in defiance of an injunction against Mr. Smith having an interest in the sell-on of the Player, the 'victim' was the authority of The FA. It is difficult to conceive of a more serious challenge to that authority when participants are told that they cannot do something by their governing body and shortly afterwards proceed to do just that.
- 2.5 Notwithstanding the extremely serious nature of the breach of Regulation C2, there are a number of reasons why the Commission concluded that there should be a material difference in the sanctions to be imposed on the Club on the one hand, and Mr. Smith on the other.

The Club

- 2.6 The mitigating factors in favour of the Club are as follows. The first two matters represent exceptional circumstances, in our judgment:

- (i) Firstly, although the offences were committed in the name of the Club, at all material times it has acted through its owner for the time being and/or its officers. The verbal agreement was made between Mr. Hayes on behalf of the Club and Mr. Smith. The Supporters' Trust headed by Mr. Woodward conducted due diligence and bought the Club in good faith. When they did so, they knew nothing of the agreement that has placed the Club in breach of the charges. There is no suggestion that this was a contrived change of ownership on their part that was designed to avoid a present or future liability. In the Club's case, when one lifts the corporate veil the reality is that its liabilities arising out of these proceedings will have to be met by those who are innocent of any wrongdoing.
- (ii) Secondly, the facts and matters that gave rise to The FA's investigation and subsequent disciplinary proceedings came to light as a consequence of Mr. Woodward reporting them. Although Mr. Ireland indicated in correspondence that he would do so, it is questionable whether The FA would ever have known about the offending agreement that gave Mr. Smith an interest in the sell-on of the Player. The disciplinary process should encourage transparency and frankness in the activities and dealings of those who are subject to FA Rules and Regulations, particularly where to do so might potentially expose the whistleblower to disciplinary proceedings being taken against it. The imposition of draconian penalties in such cases is likely to have precisely the opposite effect. The Club is accordingly entitled to very significant credit for alerting The FA to relevant matters in this case.
- (iii) Thirdly, the Club pleaded guilty at the first available opportunity.

(iv) Fourthly, the Club has co-operated fully with the investigation carried out by The FA and given evidence to the Commission in a manner that we found to be honest and straightforward.

(v) Finally, the Club had no relevant antecedents.

2.7 For those reasons, the Commission concluded that notwithstanding the seriousness of the offences, a financial penalty would be the appropriate sanction to impose upon the Club, rather than a points' deduction.

2.8 In determining what the appropriate level of fine should be, the Commission derived no assistance from the previous disciplinary cases. Each one is fact-sensitive. There is no tariff or guidance, no doubt for the latter reason. To use the total sum of £525,000 which the Club received in fees for the Player as a yardstick against which to measure the fine would be inappropriate for reasons that appear below. Alternatively, the seven-figure sum to which the Club would have been entitled following the sale of the Player to QPR, had it not relinquished that right by selling it to Blackpool, did not in fact happen (although Mr. Smith may well have held out hopes that it would).

2.9 Instead of plucking an arbitrary figure out of the air, we approached the assessment of the appropriate level of the fine by using a reference point that is both capable of being ascertained and which at least has some relevance to the interest that Mr. Smith retained in the onward sale of the Player. It is this. The present owners of the Club received the sum of £200,000 from Blackpool for relinquishing the Club's (legitimate) sell-on interest in the Player. If that sum had instead represented a payment that the Club received from Blackpool following an onward transfer of the Player, Mr. Smith would have been entitled to £20,000 (*i.e.* 10% of £200,000) pursuant to the verbal agreement/1st RC (albeit in breach of FA Agents' Regulations).

2.10 On that analysis, it follows that of the global sum of £525,000 which the Club received from its dealings relating to the Player, only the sum of £20,000 would have been tainted by the prohibition against agents retaining an interest in the onward sale of a player. In reality, the entire sum of £200,000 was paid by the new owners to Mr. Hayes in order to reduce their indebtedness to him by a commensurate amount. But if one attributes the notionally tainted sum of £20,000 equally between the previous and present owners, their liability would be £10,000 each.

2.11 We were told that finances at the Club are “tight”, that it will lose £300,000 this year but expects to break even the following year. Taking into account all of the mitigating factors, including the exceptional features, we concluded that a fine of £10,000 represents the most reasoned assessment of an appropriate and proportionate financial sanction to be imposed on the Club. It is a liability that will have to be met by the blameless current owners, rather than those who were responsible for creating the liability. In all of the circumstances, including that one, we have decided not to add a punitive or deterrent element to the fine.

Mr. Smith

2.12 It was argued on behalf of Mr. Smith that he was “induced” by the Club into entering the agreement containing the prohibited provision. The Club had benefitted to the tune of £525,000 as a result of the work that he had done as a result of the inducement, but he had received nothing. His primary submission was that he should be the subject of a modest fine of up to £4,000, alternatively that any suspension of his agent’s licence should itself be wholly suspended.

- 2.13 We do not accept that the Club induced Mr. Smith into doing anything that was causative of the breaches that he has committed. In particular, we reject any contention that the verbal agreement he reached with Mr. Hayes to abide by the 1st RC was made other than of his own free will. Both of them were capable of exercising an informed and unfettered judgment.
- 2.14 Instead, Mr. Smith was self-induced by the lure of a potentially significant financial reward. As has been earlier observed, he had already done the work in connection with the transfer of the Player by the time The FA explicitly informed him and the Club that clause 5 of the 1st RC fell foul of the Regulations, and the verbal agreement was made. He cannot therefore have been induced by the Club to enter into the verbal agreement.
- 2.15 Mr. Smith may well have carried out the work based on an expectation of remuneration pursuant to clause 5 on the basis of the 1st RC, but neither the transfer income of £325,000 that he secured for the Club, nor the subsequent sum of £200,000 that the present owners of the Club agreed to accept in consideration for relinquishing its entitlement to 25% of the sell-on fee of the Player offended any of the FA's Rules or Regulations.
- 2.16 The Player was clearly generating interest around the time of his transfer from the Club. It seems reasonable to assume that the Player would have been transferred for the same or a similar fee, whether to Blackpool or some other club, irrespective of who had represented the Club in transfer negotiations. Nevertheless, there is no dispute that Mr. Smith provided a valuable service to the Club, particularly in his negotiation of a sell-on fee for its benefit. He has received no remuneration for his efforts which have simply exposed him to disciplinary proceedings, adverse findings and sanctions.

2.17 Ultimately, though, Mr. Smith made a commercial decision to structure the agreement he reached with Mr. Hayes in such a way that he would only receive remuneration for his services if and when the Player was sold on by Blackpool for a higher transfer fee than the Club received. It therefore ill-behoves him to complain about the outcome when he negotiated the terms of his remuneration. He took the long view on a player whose value he correctly concluded would go only one way.

2.18 In contrast to the Club, Mr. Smith is unable to avail himself of any exceptional circumstances. In addition:

- (i) He fought the charges. That was his prerogative, but it follows that he has lost the credit to which he would have been entitled had he pleaded guilty. He has no doubt incurred considerable expense in contesting his liability, but that was his decision having regard to the litigation risks. It is not a point that he can then rely upon in mitigation of sanctions.
- (ii) The Commission rejected Mr. Smith's evidence as being unreliable and contradictory. He allowed the 2nd RC to be submitted to The FA as if it represented the totality of his entitlement to remuneration arising out of the transfer of the Player when it clearly did not. The true position was withheld from The FA.
- (iii) The Commission deplores the aggressive manner in which Mr. Smith then proceeded to pursue payment from the new owners of the Club to which he knew he was not entitled. This serves to further aggravate what was already an extremely serious contravention of the Agents' Regulations. His conduct is impossible to reconcile with the assertion that he holds himself out as a supporter of the greater regulation of agents in order to promote transparency and integrity.

(iv) Mr. Smith is entitled to point to his previously unblemished record. It is tempered though by the fact that his lengthy experience as a football agent ought to have told him that the 1st RC would be objected to by The FA. Moreover, he could have been left in no doubt as to that objection following The FA's response to clause 5.

2.19 It was argued that an actual suspension of Mr. Smith's agents' licence would not be appropriate. In only one disciplinary case has that happened (*Stapleton*), and there the Agent in question had previously been found guilty of a very serious offence of misconduct (albeit unrelated to the subsequent offence relating directly to his agency activities).

2.20 In our judgment, the aggravating features in the present case are so serious that a suspension of Mr. Smith's agent's licence for a substantial period should follow. That period is two years, but a substantial proportion of it, namely 18 months, should itself be suspended to reflect the mitigating factors. In other words, the actual period of suspension will be one of six months. The suspended element will be invoked in full in the event of a further breach of Agents' Regulations by Mr. Smith during the period of suspension.

2.21 The actual suspension of his licence for six months is likely to have an adverse effect on Mr. Smith's business and income. Additionally, although he negotiated the manner in which he would be remunerated, as a matter of fact he has not received any money from the deal that has placed him in breach of the Regulations. Within the disciplinary proceedings themselves, he has made a successful application for disclosure and incurred costs that are irrecoverable on an inter-partes basis. For all of those reasons, we decided that an additional financial penalty was not justified.

Craig Moore

Chairman of the Regulatory Commission

23rd May 2014