

IN THE MATTER OF A FOOTBALL ASSOCIATION
INDEPENDENT REGULATORY COMMISSION

BETWEEN:

THE FOOTBALL ASSOCIATION

The Association

- and -

(1) ALAN MIDDLETON

(2) ARSENAL FC

The Participants

DECISION AND WRITTEN REASONS OF THE
INDEPENDENT REGULATORY COMMISSION
FOLLOWING THE HEARING ON
24TH SEPTEMBER 2015

1. Background

- 1.1 These disciplinary proceedings arise out of the transfer of the registration of Calum Chambers ("the Player") from Southampton FC to Arsenal FC ("the Club"), which was completed on 26th July 2014 ("the Transaction").
- 1.2 The following facts are either agreed, not in dispute, or not capable of serious challenge:
- (i) On 20th May 2014, Cassius Sports Company ("CSL") was incorporated. Its founder and Chief Executive is Philip Ercolano ("PE"). The ethos of the business is said to be the equipping of young sporting talent with so-called "*life skills*". Its sales literature lists a variety of services, including transfer and contract negotiations.
 - (ii) PE is and was a director and majority shareholder of CSL and ;

- (iii) Further, at all material times:
 - (a) PE was an Unlicensed Agent who had taken, but failed, The FA's Football Agent's exam; and
 - (b) Steve Moss ("SM") worked for PE at CSL. SM is and was the partner of the mother of the Player.
- (iv) On 30th May 2014, PE met Alan Middleton ("AM"), with a view to the latter becoming involved in CSL. AM is and was a Solicitor of England and Wales and partner in a firm that bears his name. He is also a Registered Lawyer with The FA. AM was attracted to the objectives of the business, but unwilling to become too heavily involved at the time, save for conducting transfer activity. The terms upon which AM would be remunerated were not discussed.
- (v) AM had never acted on behalf of CSL before and, prior to the transfer of the Player that is the subject of these proceedings, had completed only one previous transfer transaction of a professional footballer, in December 2013.
- (vi) PE had known SM and the Player for some considerable time and in June 2013, the Player had attended a training camp which PE had organised and funded. Both Southampton and the Player considered PE to be the Player's Agent.
- (vii) On 12th June 2014, AM sent an e-mail to The FA confirming that he was shortly to join CSL for whom he would carry out "*all agency activity*".
- (viii) Around this time, and at PE's request, AM undertook some drafting work to be used in connection with a second training camp that PE was proposing to set up.

- (ix) During the early summer of 2014 (May/June), the Club was interested in acquiring the registration of the Player. He was aged 19 at the time and playing in the Southampton Reserve Team. Two offers were made by the Club, both of which were rejected by Southampton. The Club maintained its interest in the Player and, by late July 2014, Southampton had become more receptive to the prospect of a transfer.
- (x) The transfer negotiations were conducted on behalf of the Club by Richard Law ("RL"), who has been responsible for the its transfer activities since 2005.

24th July 2014

- (xi) On 24th July 2014, RL contacted PE, believing him to be the Player's Agent based on information that RL had obtained from Southampton. RL informed PE that the Club had made an offer for the Player which had been accepted in principle by Southampton. RL asked PE to attend with the Player for a medical the following day, and a meeting to discuss the Player's personal terms. There are other relevant facts surrounding this discussion which will be returned to later.
- (xii) Following his conversation with RL, PE attempted to contact AM by telephone. AM was on the final day of a holiday in Majorca. PE eventually managed to speak to AM on his mobile phone. PE asked AM if he could attend at the Club's Colney Heath training ground the following day in order to negotiate the transfer of the Player. AM confirmed that he would be able to do so. He flew back to Liverpool from Majorca that evening.

- (xiii) The Player signed the Representation Contract for AM to act as his Authorised Agent, although the pair had never met before.

25th July 2014

- (xiv) The Player, together with PE and SM, were collected by a car that the Club had sent and taken from Hampshire to North London. The Player first attended a hospital for a medical and then went to the Club's training ground where he was introduced to AM by PE. AM then signed the Player Representation Agreement ("the Player Representation Agreement") which was not registered with The FA until after the Transaction was completed.
- (xv) RL arrived at Colney Heath around mid-afternoon, having just flown back from Nice where he had been negotiating another transfer. He was introduced to AM who, having agreed to act as the Payer's Authorised Agent, signed a Dual Representation Agreement to also act on behalf of the Club in the negotiations ("the Dual Representation Agreement").
- (xvi) Discussions then took place in RL's office about the Player's contract and personal terms. This critical aspect of the case will be addressed in more detail in the 'Factual Findings' section of these Reasons. Suffice it to say that personal terms were agreed on behalf of the Player, following a relatively brief meeting that lasted approximately 45 minutes, and at which RL, AM and PE were present.
- (xvii) There came a point during the afternoon when PE told the Player to change into a suit for a photograph. The Player went to a nearby hotel to be with other members of his family who had also made the journey to be with him on what was undoubtedly a momentous day.

(xviii) Although personal terms were agreed, it was not possible to formally complete the transfer of the Player's registration on 25th July as the Representative of Southampton who had authority to sign the necessary paperwork was unavailable.

(xix) RL and AM both signed an Agent Declaration Form, AG1 ("The AG1 Form"), as required by The FA. The AG1 Form contained the following declaration:

"They confirm that no other Agents have been involved in the Transaction or Contract Negotiation"

"The undersigned confirm that they have completed and supplied to The FA the relevant Representation Contract(s) and disclosure documents in relation to the Transaction or Contract negotiation and that no payment to an Agent, other than that specified in the relevant Representation Contract(s), will be made, sought, or accepted by the undersigned in respect of this Transaction."

(xx) The AG1 Form recorded that the Club had used the services of an Authorised Agent, namely AM. No other agent, authorised or not, was identified as having acted in the Transaction.

26th July 2014

(xxi) The transfer of the Player's registration to the Club was formally completed.

Subsequently

(xxii) Within a matter of days, it was brought to The FA's attention that PE had conducted agency activity in connection with the Transaction.

(xxiii) On 1st and 13th October 2014, payments of £30,000 and £120,000 (including VAT) were respectively made by the Club to CSL pursuant to the Dual Representation Agreement. The payments were made via The FA's Clearing House and paid into CSL's bank account.

(xxiv) On an unspecified date, AM agreed with PE that the former would receive the sum of £30,000 for the work that AM performed in connection with the Transaction and that the balance of the agency fees due (some £480,000) would be invested in the development of CSL.

(xxv) On 27th November 2014, AM was appointed as a director of CSL. Shares in the Company were transferred to him on 1st December 2014.

2. THE CHARGES

2.1 On 27th November 2014, AM and DL were each formally (and independently) interviewed by The FA, as was the Player. A second interview of RL was conducted on 11th May 2015. There is, and never has been, any suggestion that the Player acted improperly in any way. On the contrary, the evidence before us was effusive in its praise of him, both as a footballer and a person.

2.2 By letters dated 9th June 2015, The FA charged AM and the Club respectively with alleged breaches of various provisions of The FA's Football Agents Regulations 2009.

2.3 AM was charged with a breach of Regulations C2 and H12, which provide as follows:

C2

"A Club, Player or Authorised Agent must not so arrange matters as to conceal or misrepresent the reality and/or substance of any matters in relation to the Transaction or Contract Negotiation."

H12

"An Authorised Agent must not carry out any Agency Activity in the place of, or on behalf of, or as agent or representative of, any Unauthorised Agent."

- 2.4 In his Reply, AM denied both charges against him, as he did up to and including the hearing before the Commission.
- 2.5 The Club was also charged with a breach of Regulation C2, together with a breach of Regulation J1. Regulation J1 states:

J1

"A Club must not at any time use the services, either directly or indirectly, of an Unauthorised Agent in relation to any Agency Activity. A Club must not directly or indirectly make any payments to any Unauthorised Agent in respect of any Agency Activity."

It is to be noted that Regulation J1 has two limbs.

- 2.6 The Club admitted the charge under the first limb of Regulation J1 ("the Use allegation"), but denied the second limb ("the Payment allegation"). It also denied the charge under Regulation C2 ("the Arrangement allegation").
- 2.7 It is convenient at this juncture to state that "Agency Activity" is defined in the Regulations as follows:

"'Agency Activity' means acting in any way and at any time in the capacity of agent, representative or adviser to a Club or Player, either directly or indirectly, in the negotiation, arrangement, registration, or execution of any Transaction or Contract Negotiation other than as a Lawyer who is solely and exclusively undertaking or providing Permitted Legal Advice."

3. THE EVIDENCE

3.1 The Commission received the following evidence:

- (i) The transcripts of the interviews of RL, AM and the Player;
- (ii) Witness statements of Blake Lewendon (dated 3rd June 2015), RL (dated 30th June 2015), AM (dated 1st July 2015) and PE (dated 1st July 2015);
- (iii) Oral evidence from AM, PE and RL; and
- (iv) Various documents, including the AG1 Form, the Representation Agreements, and others.

3.2 For economies, of scale, it is not proposed to set out in any detail here the evidence, written submissions/skeleton arguments, before us. We set out below the reasons for arriving at our findings and for preferring certain evidence. Suffice it to say that in its Opening Note, The FA asserted this to be a “*classic case of fronting*.” At the hearing, Mr. Day, who represented The FA, characterised it as being “*not the most egregious*” case of fronting.

4. FINDINGS

4.1 The Commission makes the following findings:

- (i) We found RL to be a particularly impressive witness. In particular, his evidence in interview and before the Commission showed him to be frank and straightforward. It demonstrated a willingness to volunteer and concede certain points that he must have known would place him and the Club in some difficulty. We concluded that he was an honest and truthful witness and one whose evidence we could safely rely upon.
- (ii) We also found that AM gave his evidence in a straightforward manner and did his best to assist the Commission. We did, however, prefer the evidence of RL as to the nature and degree of PE’s involvement in negotiations on 25th July.

- (iii) It was clear from his evidence that PE is committed to his business and the objectives that underpin it. He was effusive, to a fault, in his praise of the Player, whom he clearly holds in very high regard. We have no doubt that he had the interests of the Player in the forefront of his mind. At the same time, though, the Player's transfer from Southampton to the Club, presented PE and CSL with a very lucrative opportunity, both from a financial and reputational standpoint. In view of his close relationship with SM and the Player, we have difficulty accepting PE's claim that he was not aware of the Club's interest in the Player until a week or so before the events of 24th/25th July 2014. Despite the instruction of AM to act as the Player's Authorised Agent, PE's enthusiasm allowed him to stray into areas of agency activity which he was not permitted to conduct and which was not disclosed by others. His evidence in relation to one particular aspect of his involvement was unclear and unconvincing, as will be shown.

Agency Activity performed by PE

- (iv) The Commission notes that the definition of 'Agency Activity' is very broad indeed. On the evidence before us, we are satisfied that PE did conduct Agency Activity in relation to the Transaction. He did so in a number of ways:

Presentation

- (v) PE held himself out as acting as the Player's agent or representative. In his first interview, RL said that he *"had the impression that [PE] was the, kind of, active agent"* (see p.49). He was asked further about this (see p.50):
RL: *"The facts in my eyes, I thought he was a licensed agent."*
Q: *"You thought he was a licensed agent?"*
RL: *"Yes"*
Q: *"Was that how he purported himself to you?"*

RL: *"I would say yes."*

Q: *"At that day of the meeting?"*

"On the day of the meeting, yes"

- (vi) We prefer DL's impression of the capacity in which PE was acting, to PE's evidence that he told RL during a phone conversation between them on 24th July 2014 that he (PE) was not a Licensed Agent. We find that during the same or another conversation with RL the same day, reference was made by PE to AM acting as the Player's Solicitor, and that AM would attend at Colney Heath the following day. DL was labouring under the impression throughout the events of 24th and 25th July 2014 that RE was the Player's agent, albeit that on 25th July AM became his Authorised Agent for the purposes of the Transaction.

PE's involvement in negotiations

- (vii) We find that during a discussion by telephone with RL on 24th July 2014, PE was asked by RL what the Player's expectations were in terms of salary. PE gave RL a basic salary figure of £X.
- (viii) In his first interview, RL was asked the question: *"Were any contract negotiations entered (sic) over the phone at that stage, any ballpark figures mentioned?"*, to which he replied: *"No. This was really a case of 'We'd like him to move here, we've got some good news, let's try to get a deal done.'"*
- (ix) In his second interview, however, RL contradicted what he had said in his first interview, but provided answers to questions which were consistent with what he said in his oral evidence to the Commission, albeit without reference to specific figures:

Q: *"Okay, and in terms of coming up with those values, was that based on the conversations that you'd had previously, knowing that the player, kind of, whereabouts his thoughts were in terms of wages and bonuses, and things?"*

A: *"Yes, Ercolano had given me some estimates."*

- (x) RL told the Commission, and we accept, that he had used the basic salary figure of £X that PE had given him on 24th July as a basis for the proposed terms that he then drew up. The latter, which he incorporated into a written document, provided for a lower basic salary of £Y, but included various bonus incentives that gave the Player the potential of achieving the figure that PE had mentioned.
- (xi) It seems to the Commission that the inquiry which RL says he made of PE on 24th July is entirely plausible and likely. Otherwise, the terms which RL would have gone into the meeting with the following day to offer the Player would have been speculative, the only reference point being players of a similar age, experience and promise. From RL's standpoint, the obvious risk associated with the latter course, without first 'sounding out' those acting for the Player, is that the Club might offer more than he would be prepared to accept. To underline this point, the phrase was coined by AM during his evidence that the Player would have been prepared to *"play for a Mars Bar"* in order to join the Club.
- (xii) The basic salary figure of £X, which RL attributed to PE, led to PE being recalled to give further evidence to the Commission and to provide him with an opportunity to respond. We found his evidence on the point to be unclear and unconvincing.

(xiii) Evidence can and does emerge unexpectedly at any stage of contentious proceedings. In this case, the development in question is clearly relevant to the issues that we have to decide since it goes directly to the nature and extent of PE's involvement. Further, RL's evidence on the point is somewhat contrary to the Club's interests as it reinforces his perception that he was dealing with an *"active agent"*, but one whose credentials neither he, nor the Club, checked. For that reason, together with those set out above, the Commission prefers RL's evidence, notwithstanding the discrepancy in the response that he gave when he was asked about it in his first interview.

(xiv) We further find that PE played an active role in contract negotiations at the meeting on 25th July 2014 and that he was representing the Player.

(xv) In his first interview, RL was asked and answered the following questions (see p.49 of the bundle):

Q: *"In terms of the contract negotiations, what was Mr. Middleton's role in those in terms of liaising with Arsenal?"*

A: *"We had made an offer. When we were upstairs dealing with the offer, there was probably just a round table of discussion between the structure of our contract, what the different pieces meant, the values involved, there was some movement on bonuses, there were movements on, not on the base wage, they were really more on the bonus end. We spent, a usual, a fair amount of time discussing the commission and the dual representation nature of it, the timing of payments, things like that."*

Q: *"Who was in on those, sort of round table discussions? Who was present?"*

A: *"Alan, Phil and myself."*

A short while later in the interview, RL said this in response to a question (see p.50):

Q: *"Mr. Ercolano was present during the contract negotiations. Was he speaking with you as part of the three of you there?"*

A: *"Yes."*

And then this (at p.51):

Q: *"But its fair to say [PE and AM] were both involved in the contract negotiations."*

A: *"Yes, its fair to say that."*

(xvi) In his second interview, RL was further questioned about PE's involvement in contract negotiations (see p.59):

Q: *"... Given that Phil Ercolano had an existing relationship with the player, can you just tell us about, and you don't have to be specific, but, kind of, the percentages as it were, of input from Phil and Alan into the negotiations on the day. Were either party more involve in the negotiations than the other?"*

A: *"No, I think both parties took a different role. Ercolano was negotiating the numbers and concepts, and Middleton was acting in his role as a solicitor, and reviewing the drafting, the wording, making sure the concepts matched their expectations."*

Q: *"... Would it be fair to say that things like the structure of the contract, the wording, the kind of, legalities was primarily Alan Middleton's role, whereas the negotiations on wages and bonuses and the values involved was more Phil Ercolano's role?"*

A: *"Yes, I think that is a fair description."*

(xvii) In his oral evidence to the Commission, RL reiterated what he had said in interview, namely to confirm the round-table nature of the negotiations, with himself, PE and AM being present. There was a consensus that the meeting lasted approximately 45 minutes and that the negotiations were straightforward.

- (xviii) In his evidence to us, PE said that he was *"in and out"* of the room and spent approximately 30 minutes together with RL and AM. The reason(s) why he absented himself were not explored in evidence, but during the course of the afternoon he provided reassurance to the Player and, in all probability, advice.
- (xix) The fact that the Club has accepted that it breached the "Use" element of Regulation J1 is indicative, but not conclusive, that PE did engage in Agency Activity. That plea was no doubt based on what RL said in his two interviews, including the excerpts from them set out above. The plea is consistent with our findings.
- (xx) The Commission accepts what RL said in interview, and in his evidence at the hearing, as reliable evidence of PE's involvement. Where his evidence differs with that of AM, we prefer RL's recollection of events. It was also the case that the Player trusted PE, but had never met AM before 25th July (hence the shortness of the Player Representation Agreement). Accordingly, we find on the balance of probabilities that PE played an active and substantial role in the contract negotiations on 25th July, and that he dealt with the financial aspects of the Player's contract, including the bonus elements. Whilst there may have been some discussion about the Player's squad number, we formed the impression that this aspect of the negotiations, and whether he would play for first team, were somewhat overplayed. At the same time, though, we accept that the negotiations were comparatively brief and straightforward, reflecting the respective bargaining positions, together with the Player's desire to play for the Club which AM and PE would not have wanted to jeopardise by engaging in hard bargaining.

4.2 Since the evidence of PE's engagement in Agency Activity emanates from him, the extent of RL's knowledge (to be imputed to the Club) of what PE did and when is self-evident from the above findings. We further find that when RL signed the AG1 Form:

- (i) RL understood PE to be an Agent of the Player, and knew that PE had carried out substantial Agency Activity in connection with the contract negotiations. RL and the Club failed to carry out any checks to see whether PE was in fact a Licensed Agent. If checks had been carried out, he would have discovered that PE was not Licensed;
- (ii) RL was aware that PE had carried out substantial Agency Activity in relation to the contract negotiations, but failed to identify him as an Authorised Agent on the AG1 Form; and
- (iii) RL's custom and practice at the material time, and which he continues to adopt, is that when he deals with transfers involving multiple agents, he only identifies the principal or lead agent on AG1. This is to misunderstand the level of disclosure that the declaration requires. Despite the overhaul of its systems that the Club has put in place, further difficulties in compliance are likely to be encountered in the future unless full disclosure is given. This is the root cause of the Club's difficulties in this case, not any conscious decision to conceal or misrepresent.

4.3 Despite his use of the "*Mars Bar*" analogy, we would be very surprised if AM went into the meeting with RL having no idea, let alone instructions, concerning the Player's salary expectations. Like RL, it seems to the Commission that he would have needed some sort of yardstick by which to measure any offer or counter-offer. The figure that PE had given RL the previous day would buy an extremely large quantity of confectionary. Ultimately, though, there was insufficient evidence for us to conclude on the balance of probabilities that he knew what the Player's expectations were, in terms of figures, or that he had been provided with any such details by PE.

4.4 The Commission finds that when AM signed the AG1 Form:

- (i) He knew that PE was not a Licensed Agent;
- (ii) As a Licensed Agent and Trainer of Agents, AM knew, or ought to have known, that PE had engaged in Agency Activity on 25th July 2014, by reason of the latter's active and substantial participation in contract negotiations, as we have found; and
- (iii) As both a Licensed Agent and a lawyer, the requirements of the declaration in Form AG1 ought to have been clear to AM.

4.5 At the same time:

- (i) We are satisfied that RL and the Club acted throughout in good faith, and that RL has been transparently frank and truthful. The Dual Representation Agreement, appointing AM as the Authorised Agent for both the Player and the Club, caused RL to identify AM as the principal agent on the AG1 Form, in accordance with RL's customary, but mistaken, practice. The Club had nothing to gain by concealing PE's involvement; a substantial agency fee would have been payable in any event, even if PE's Agency Activity had been disclosed. It is also clear that RL was dealing with at least one other transfer simultaneously, involving foreign travel, and was under pressure; and
- (ii) AM found himself propelled into a fast-moving situation from a standing start. As a Solicitor, this will not have been an uncommon occurrence, but he had very limited practical experience of transfer negotiations. We are inclined to accept that this, together with his role as Dual Representative for both Club and Player, led him to erroneously disclose only his name, as Authorised Agent, on the AG1 Form. The fact that AM also played a substantial part in the contract negotiations, in addition to PE, undermines any suggestion that AM was acting purely as 'a front', and simply signing off paperwork for others. The reality, we find, is that PE and AM each played a material role in the contract negotiations.

4.6 For the reasons set out above, the Commission concludes that both the Club's and AM's failure to accurately complete the AG1 Form and to provide adequate disclosure goes beyond mere inadvertence and that each of the Participants was negligent. We find that they failed to take reasonable care in all the circumstances that applied to them, but that neither signed the Form with the intention of concealing or misrepresenting the true position, in terms of PE's involvement in the contract negotiations. Although we had some residual concerns about the timing of his directorship and shareholding, we accepted his evidence that his interest and involvement with CSL went beyond this single transaction.

5. REGULATION C2

5.1 Submissions were made as to the construction and interpretation of Regulation C2. In particular, whether it is a strict liability offence (The FA's position), or whether it requires an intention to conceal or misrepresent (The Club's position). The words that give rise to this debate are "*... must not so arrange matters as to conceal or misrepresent...*"

5.2 On behalf of The FA, Mr. Day made the following submissions:

- (i) The FA relies on the proper adherence to The Football Agent Regulations by Clubs and Agents and for them to act in good faith, including the disclosure of relevant documents and interests. This voluntary disclosure system operates substantially on trust;
- (ii) It would severely limit and undermine the purpose of the Regulation and place The FA at a material disadvantage if it had to prove intention under Regulation C2;
- (iii) Misconduct can take place without intention. There is nothing in the language of the Regulation, or the mischief at which it is aimed, to restrict its application in the way contended for by the Club;

- (iv) The word “*arrange*” is a catch-all provision; no agreement or understanding to conceal or misrepresent is required. A regulatory offence such as this is capable of being committed even if those responsible have acted honestly and in good faith. Alternatively, misconduct can occur as a result of negligence or a culpable oversight;
- (v) The Explanatory Note to the Regulation is instructive. It shows that even the provision of information that is merely inaccurate is capable of amounting to misconduct, and that no deception is required;
- (vi) How a party to such a charge conducted himself goes to the question of sanction, not primary liability; and
- (vii) The AG1 Form in this case had the effect of misrepresenting the transaction that took place, because it failed to disclose the agency activity that PE performed.

5.3 For the Club, Ms. Mulcahy’s main submissions may be summarised thus:

- (i) The offence under Regulation C2 is clearly a serious one that requires more than inadvertence or error to commit;
- (ii) Further or alternatively, if there is doubt as to the meaning of a rule, it must be construed in favour of someone against whom the governing body is seeking to enforce the rule; and
- (iii) Even if the Regulation does constitute a strict liability offence, each of the elements must be established, namely proof of agreement or understanding between RL and PE and/or AM so as to keep information secret or hide it.

5.4 The Commission was referred to the case of *The FA -v- Sunderland AFC and Mahfuz* (21st May 2014), where a Regulatory Commission chaired by Christopher Quinlan QC made the following findings in relation to the construction and interpretation of alleged breaches of both Regulation C2 and Regulation H12:

“As we construed the Regulations, there was no mental component to the commission of the offence contained within those provisions. The offences in question were ones of strict liability” (see para.54, p.12 of the Written Reasons in that case).

5.5 If detailed submissions were made in *Sunderland and Mahfuz* about how the two Regulations in question should be interpreted and applied, they do not appear in the Written Reasons. Similarly, the reason(s) why the Regulatory Commission in that case came to the decision that it did are not particularised. We stress that we make no criticism; we simply do not know how the points were argued before the Commission, or how firmly they were pressed.

5.6 The identical issue and arguments were also considered at first instance in *The FA -v- Queens Park Rangers and Paladini* (May 2011), in the context of what was then Regulation C1 of The Football Agents Regulations. That Commission concluded that the Regulation was capable of being interpreted in two different ways and that the prosecutor (The FA) had to prove its case to the higher standard. In other words, to prove that there had been an intention to conceal or misrepresent, and that negligence or mere inadvertence would not suffice.

The decision of this Regulatory Commission

5.7 We were not referred to any Appeal Board decision on the construction and interpretation of Regulation C2. If there is such an appellate ‘authority’, the members of this Commission are not aware of it.

5.8 As a first instance tribunal, we are not bound to follow the decision in *Mahfuz*, just as it did not follow the earlier case of *Paladini*. We suspect that *Paladini* may not have been cited to the Commission in *Mahfuz*. Whether the outcome would have been any different even if it had been is a matter of pure speculation.

5.9 We must therefore determine this recurring point of construction again. In doing so, we make the following observations:

- (i) In the Oxford English Dictionary (OED), the definition of the word *"arrange"* is *"to put (the parts of a thing) into proper or requisite order; to adjust."*
- (ii) To put things into a proper order or sequence suggests a conscious selection process (e.g. buying a new dress and handbag to match), although it is conceivable that a proper order can also be achieved without any conscious thought or intention to achieve a particular outcome (e.g. following a route that one is so familiar with that it has become second nature, requiring no thought process).
- (iii) The word *"arrange"* is followed by the words *"so as to"* which, in context of the words that precede and follow them, may properly be understood to mean *"with the purpose of"* or *"in order to"* (i.e. part of a deliberate course of dealing). More neutrally, the words *"so as to"* are also capable of being understood to mean *"with the effect or consequence of"*.
- (iv) The word *"conceal"* is defined in the OED as *"to keep (information, intentions, feelings, etc.) from the knowledge of others; to keep secret from others; to refrain from disclosing or divulging."* That sense of conscious withholding something, when read in the context of the words that precede it in Regulation C2, is capable of conveying the sense contended for by the Club, namely to arrange things with the intention of concealing or misrepresenting information.
- (v) The word *"arrange"* in the Regulation is not preceded by *"intentionally"* or some such word, if that had been the draftsman's 'intention'. But neither does it say *"whether intentionally or otherwise"*, or any other form of qualifying words.

(vi) The Explanatory Note that accompanies it is intended to assist in understanding and applying the Regulation. Like the Regulation itself, the Note does not give any express guidance on the question of whether intention is, or is not, required. It does, though, refer to the giving of mere "*inaccurate*" information, which is arguably more consistent with something being done innocently or inadvertently, although not necessarily inconsistent with providing dishonestly inaccurate information.

5.10 Drawing all of the strands together, the preponderance of opinion amongst the members of this Regulatory Commission is that when one reads Regulation C2, together with the Explanatory Note, any ambiguity in the wording of the Regulation itself is sufficiently resolved in favour of it being a strict liability offence. It follows that a breach of Regulation C2 is capable of being committed negligently, and even inadvertently. The question of conduct therefore goes solely to the question of sanction.

5.11 Accordingly, based on the factual and other findings that we have made, the Commission finds that the Charges under Regulation C2 have been proved against both the Club and AM.

6. THE SECOND LIMB OF REGULATION J1

6.1 For the purposes of the second limb of Regulation J1, the FA's case is that the Club paid sums due under the Representation Agreement to CSL and that PE received some or all of those monies, either directly or indirectly, by virtue of the payments that were made to CSL on 1st and 13th October 2014.

- 6.2 The Commission notes that the language of Regulation J1 is materially different to that of Regulation C2. In particular, the words in the latter Regulation, and which have generated so much debate in this case and others, are conspicuous by their absence from the former. There are no words in Regulation J1 that either expressly, or impliedly, import the notion of intention being an essential ingredient of the offence.
- 6.3 The Club argues that if the offence is one of strict liability, then a club could commit it by making a payment in good faith, which is subsequently, and without the club's knowledge, paid to an inappropriate third party. That would constitute an indirect payment and expose a club to a charge and sanction under Regulation J1. A club in such a case may well be powerless to prevent the indirect payment, and have no knowledge of it, and yet still commit a breach.
- 6.4 The points in the preceding paragraph have a superficial attraction, but we consider them to be more theoretical than real. It seems to us that it is highly unlikely that charges would be brought against a club that finds itself in such an invidious position, and even if that did happen there would be little, if any, prospect of a Regulatory Commission imposing any sanction. Moreover, as we conclude, this is a strict liability offence.
- 6.5 There was *prima facie* evidence for The FA to charge the Club under the second limb of Regulation J1, based on the following facts and matters:
- (i) At all material times, PE was the CEO, director, majority shareholder and employee of CSL. The Company was his effective alter ego;
 - (ii) PE was not an Authorised Agent;
 - (iii) PE had undertaken unauthorised Agency Activity in connection with the Transaction;

- (iv) AM had no formal connection with CSL that entitled him to hold himself out as acting on behalf of the Company; and
- (v) Pursuant to the Transaction, the Club made two payments totalling £150,000 to CSL.

6.6 Further, in evidence given by PE to the Commission, it was established that apart from unspecified directors' loans, the only source of business income that CSL had after 26th July 2014 was the agency fees generated by the Transaction.

6.7 Notwithstanding the evidence relied upon by The FA, it is not sufficient in our judgment to say that because PE owns CSL, it automatically follows that the offence under the second limb of Regulation J1 is made out. At paragraphs 25 and 26 of his witness statement, PE sets out in great detail what payments were made by CSL, to whom, why and when, before and after agency fees were received from the Club. CSL's bank statements are exhibited to PE's statement. This aspect of the evidence was not scrutinised during the course of the hearing before the Commission and, in particular, what monies PE himself may have received from July 2014 onwards, or their source. Although the Commission suspects that PE did derive a financial benefit from the substantial payments for Agency Activity that the Club made, ultimately we were not satisfied that The FA has established on the balance of probabilities that PE himself received such payments, either directly or indirectly.

6.8 Even if we had concluded that the Club had breached the second limb of Regulation J1, we would not have imposed any additional sanction for the reasons set out in the Club's written submissions, and in particular, the following facts and matters:

- (i) We accept that the Club had no intention of paying PE. It intended to pay CSL pursuant to the Representation Agreement.

- (ii) The payments made by the Club for agency fees were forwarded to CSL by The FA through its Clearing House after The FA had commenced its investigations into the transfer of the Player. The Commission suspects that the reason why the payments were cleared was due to a lack of internal communication, but on the face of it they were sanctioned.
- (iii) AM warranted in the Representation Agreement with the Club that he would comply with FA Regulations and would not *“directly or indirectly, make any payments of any kind to ... any ... third parties, which results from the provision of services”* (see clause 10(g) of the Agreement at p.80). The FA was not a party to that Agreement and the warranty is not capable of binding it, but the Club was entitled to take some comfort from the warranty that AM provided.

6.9 We therefore dismiss the charge against the Club under this limb of Regulation J1. If we had found it to be proved, we would have proceeded on the basis that it does not materially add to the Club’s overall level of blameworthiness for what happened, and reflected that in the sanctions to be imposed.

7. REGULATION H12

7.1 In view of our findings as to the Agency Activity that PE performed, Regulation H12 is engaged on the ground that AM signed off Transaction documentation where Agency Activity was carried out in part by an Unauthorised Agent. We reject the characterisation of this being a *“classic”* case of fronting. An apposite description would be one of ‘partial’ fronting that occurred as a result of AM’s failure (and that of the Club) to take adequate care when AG1 Form was completed. Nevertheless, Regulation H12 is a strict liability offence and we therefore find that AM is in breach of it.

8. SUMMARY OF DECISION ON THE CHARGES

8.1 The Club

- (i) The Club has previously admitted the so-called “*Use*” offence under the first limb of Regulation J1;
- (ii) We dismiss the “*Payment*” charge against the Club under the second limb of Regulation J1; and
- (iii) The “*Arranging*” charge against the Club under Regulation C2 is proved.

8.2 AM

- (i) The charges against AM under Regulations C2 and H12 are both proved.

9. FURTHER DIRECTIONS

9.1 In view of our decision on the issues of liability, it will be necessary for the Commission to consider the question of sanctions. To that end, the following further directions shall apply:

- (i) By 4pm on Friday 9th October 2015, The FA shall serve on the Participants any written submissions relating to sanctions and costs, including reference to any comparables, that may assist the Regulatory Commission in its determination.
- (ii) By 4pm on Friday 16th October 2015, the Participants shall mutually exchange and serve on The FA any written submissions relating to sanctions and costs, including reference to any comparables upon which they rely.
- (iii) Following receipt of written submissions, the Regulatory Commission will reconvene as soon as it is reasonably practicable to do so for the purposes of considering sanctions and costs. The Regulatory Commission will consider the submissions on paper unless an application is made for an oral hearing by any Party at the same time as they submit their written submissions. If no such application is made, the Regulatory Commission’s decision on sanctions and costs will be communicated to the Parties by way of supplemental written reasons.

- (iv) The time for any Party to appeal against any aspect of the Regulatory Commission's decision on liability shall not run until the written reasons on sanctions have been served on the Parties.

2nd October 2015

Craig Moore

Chairman of the Independent Regulatory Commission

Appearances

The Regulatory Commission

Mr. Craig Moore, Barrister, Independent Chairman.

Mr. Peter Powell, Independent Member of The FA's Judicial Panel.

Mr. Mick Kearns, Independent Member of The FA's Judicial Panel.

For Arsenal FC

Ms. Jane Mulcahy QC of Counsel, instructed by the Club.

For Alan Middleton

Mr. Jonathan Crystal of Counsel, instructed by Middleton Solicitors, Liverpool.

Secretary to the Commission

Mr. Robert Marsh, FA Judicial Services Manager