

## IN THE FOOTBALL ASSOCIATION REGULATORY COMMISSION

3 May 2023  
Mr David Phillips KC FCI Arb  
Mr Phil Rainford  
Mr Matt Wild

BETWEEN –

THE FOOTBALL ASSOCIATION

and

NOTTINGHAM FOREST FOOTBALL CLUB LIMITED

### WRITTEN REASONS

#### **INTRODUCTION**

1. This matter arises out of an incident that occurred at the match played between Nottingham Forest FC and Sheffield United FC at Nottingham Forest's ground on 17 May 2022. Nottingham Forest was playing in the EFL Championship at the time. By its letter dated 4 August 2022 the FA charged Nottingham Forest with a breach of FA Rule E20 (2021/2022). On 26 September 2022 Nottingham Forest denied the charge and requested a personal hearing. However, having considered the matter further, on 13 January 2023 Nottingham Forest admitted the charge and requested a personal hearing. The FA has made written submissions dated 28 October 2022 (when the charge was denied), and 27 January 2023 (after the charge had been admitted). Nottingham Forest has made written submissions dated 13 January 2023, in which the charge was admitted. We sat as a Regulatory Commission on 3 May 2023 and considered the matter by way of a Teams meeting. The FA was represented by Christopher Foulkes, counsel. Nottingham Forest's case was presented by Nicholas Randall KC, Nottingham Forest's Chairman. The FA did not adduce any oral evidence. Alan Bexon (Previous and now retired Nottingham Forest Safety Officer) and Robert Eastwood (EFL – Head of Security & Safety Operations) gave oral evidence on behalf of Nottingham Forest.

#### **FACTS**

2. In the charge letter dated 4 August 2022 the FA put the charge in the following

terms –

**Charge**

You are hereby charged with misconduct for a breach of FA Rule E20 in respect of the above fixture.

It is alleged that following the completion of the fixture Nottingham Forest Football Club failed to ensure that its spectators, and all persons purporting to be its supporters or followers, conducted themselves in an orderly fashion and refrained from using threatening and/or violent behaviour whilst encroaching onto the pitch area.

As is the FA's practice, the charge did not specify the acts/omissions relied on, but the charge letter was accompanied by documents and video footage that revealed the detail of the allegations.

3. This was a high profile match where the likelihood of a pitch incursion was recognised as being great. Nottingham Forest carried out preparations as is set out in greater detail below. Those preparations included 370 stewards – which Mr Bexon described as being a larger number than had ever been used by Nottingham Forest before. The match proceeded to extra time, followed by a penalty shoot out. The video footage shows that by the third penalty Nottingham Forest supporters were moving down the stand towards the line of pitch side stewards. The video footage clearly shows a line of stewards positioned not shoulder-to-shoulder but close to one another. Behind that line there was a group of roving Police officers. Behind the Police officers there was a comparatively spread out line of touch-line stewards. After the final penalty had been taken there was a mass pitch invasion by Nottingham Forest supporters.
  
4. The video footage shows the chaos that ensued. Many (the estimated number is in the thousands) of supporters flooded onto the pitch in an uncontrolled and uncontrollable mass. Smoke devices were ignited and the pitch was full of exultant supporters. The crowd was not wholly good natured. The video footage shows a Nottingham Forest supporter run half the length of the pitch to the Sheffield United technical area, where he head-butted Billy Sharp (Sheffield United's Club captain, who had not been playing but who was standing at the edge of the technical area) knocking him to the ground. The video footage reveals an unprovoked, serious physical assault. That assault was made possible by a failure to protect the tunnel and technical areas with a sufficient cordon of stewards. With exception of the assault on Mr Sharp the nature of the invasion was generally celebratory, but the number of supporters involved was significant and was uncontrolled. The stewards and the Police were unable to clear the crowd

from the pitch for some 15 minutes. On the other hand (and with the exception of the assault on Mr Sharp) the stewards successfully protected the Sheffield United players and supporters.

## **THE ISSUES BEFORE THE COMMISSION**

5. The FA summarised its case into four separate, but related, issues.
  - (1) Insufficient number of stewards.
  - (2) Inappropriate deployment of stewards to prevent the mass pitch invasion.
  - (3) Failure to protect tunnel and technical areas.
  - (4) Failure to screen for pyrotechnics.
  
6. In paragraph 9 of its submissions dated 13 January 2023 Nottingham Forest made clear that its acceptance of the charge related to issue 3 only: the other issues were not accepted. Whilst agreeing that the proceedings should proceed to a determination of sanction, the FA's response dated 27 January 2023 maintained its allegations in relation to issues 1 – 3: it was silent about issue 4. On 30 March 2023 the Commission gave a direction – *If the FA relies upon any acts and omissions beyond those advanced in its Further Submissions dated 27 January 2023 it must serve a list particularising them by 4pm on 30 March 2023.* On 30 March 2023 the FA responded – *The FA does not rely on any further acts or omissions,...*
  
7. At the hearing Mr Foulkes made it clear that the FA intended to proceed on all four issues. Mr Randall accepted that the first three issues were properly before the Commission, but that as issue 4 had not been raised in the FA's 27 January 2023 submissions that issue should not be proceeded with. The Commission agreed with Mr Randall. The question of issue 4 had not been raised in the FA's 27 January 2023 submissions. In light of the FA's response to the Commission's directions it was wholly reasonable for Nottingham Forest to have understood that issue 4 was not being raised. The Commission agreed that it would be unfair to permit it to be pursued.
  
8. Accordingly, only issues 1 – 3 were in issue in the proceedings before the Commission.

## **THE *DUE DILIGENCE* DEFENCE**

9. The *due diligence* defence is provided by Rule E21 (2021/2022) in the following terms –

It shall be a defence in respect of charges against a Club for Misconduct by spectators and all persons purporting to be supporters or followers of the Club, if it can show that all events, incidents or occurrences complained of were the result of circumstances over which it had no control, or for reasons of crowd safety, and that its responsible officers or agents had used all due diligence to ensure that its said responsibility was discharged.

10. The proper application of the *due diligence* defence is as set out in the decision of the Regulatory Commission in FA v West Ham (revised decision 18 January 2019). The relevant paragraphs of that decision (with the typographical error corrected) –

5. It is common ground that the burden of providing the due diligence defence rests on West Ham, and that the standard to which that burden must be discharged is the balance of probabilities. It is also common ground that the two limbs of Rule E21 are conjunctive. To bring itself within the rule West Ham must prove *circumstances over which it had no control* and *all due diligence*. Finally, it is common ground that, as stated in West Ham's Response –

*When determining whether a Club has made out such defence, a Commission's enquiry cannot include a "descent into a counsel of perfection with the luxury of hindsight". A Club is not required to "eliminate the risks" of the events occurring "as that would nullify the due diligence defence".*

47. The burden of establishing the Rule E21 due diligence defence lies on the club. The standard is to the balance of probabilities. The defence involves two conjunctive limbs. First, the club must prove that those responsible for security did not have control over the supporters whose conduct is complained of. Mr de Marco correctly draws a distinction between a club's players and employees (over whom it has control) and its supporters (over whom it does not have control). We agree that neither the club nor those responsible for security had control over the supporters.

48. The relevant question, therefore, is whether the club can show that those responsible for security had exercised all due diligence. The FA emphasises the word all, submitting that its use must have been intended to add to standard. We see the force of that argument. We consider that is sufficiently addressed in the construction advanced by Mr de Marco, which properly reflects what is intended by the provision. We consider that the defence requires the club to show that those responsible for security had taken all reasonable steps to discharge their responsibility. What constitutes reasonable steps is what was known, or should have been known, at the time. It is not to be judged with the benefit of hindsight. Nor does it require perfection. It does, however, require that all reasonable steps should have been taken. What is required is what would have been done by a prudent, conscientious person in the position of those responsible for security, acting on the knowledge and information that was reasonably available to him. ....

11. The burden of proving that it had taken all due diligence lies on Nottingham Forest. The FA, however, elected not to adduce any oral evidence. It is therefore

sensible that we should set out our understanding of the significance of the burden of proof lying on Nottingham Forest.

12. The burden of proof rests with Nottingham Forest throughout. However, if it adduces evidence to establish a prima facie case that it had taken all proper steps it would be for the FA to rebut that evidence. That does not mean that the burden of proof has shifted: it means simply that an evidential burden lies on the FA to rebut the prima facie case that Nottingham Forest will have established. How the FA chooses to do so is a matter for it. It may call evidence, but it is not required to do so. It may, as it has done in this case, rely on cross-examination, submissions and forensic argument. The Commission, as part of its decision making process, will make a finding based on the totality of the evidence, and all the submissions and arguments advanced by both parties.

## **WRITTEN EVIDENCE**

13. Mr Bexon (Nottingham Forest's Head of Operations, and the Safety Officer at the match) provided the FA with a detailed explanation of the planning that had taken place for the match. We quote that letter in full.

I was the duty safety officer for the above fixture, responsible for planning and the management of the day.

Once the fixture was confirmed we held an initial planning meeting with Nottinghamshire Police on Tuesday 10th May, chaired by Superintendent Burrows. All aspects of the game including the fact the second leg was 'result dependent' so the potential for extra time, penalties, and a consideration that a celebratory pitch incursion could happen were discussed. Initial plans were put in place, and it was agreed that a further planning meeting would be held on Monday 16th May after the first leg had been played.

Following the initial meeting site visits were held at the stadium with the Police Bronze Commanders Chief Inspector Walker and Inspector Ringer. Decisions were agreed on the number and location of stewards, security staff and police at the final whistle in relation to the potential for a mass incursion, and the importance of not allowing the visiting supporters onto the playing area but also ensuring staffing was suitable around all sides of the pitch to deter such an incident. An estimated 250 of the 370 stewards and security would be used to prevent incursion and secure the segregation lines plus 4 police PSU's and 6 spotters. A response team of 12 SIA officers were tasked with ensuring match officials and players were returned to the dressing rooms as quickly and safely as possible.

Club plans included the use of Red & White tape around the pitch held by the stewards with security staff and police to form a second cordon behind the stewards. The use of the tape is to create a visual deterrent to anyone wishing to enter the playing area. This approach had worked for the past twenty years with just two exceptions. In addition, the front exits on the main stand were fitted with red and white plastic chains and stewards were allocated to allow fans to pass at a suitable time. Again, a visual deterrent to send out the message that fans were not to surge forward and enter the pitch.

Messages were included on social media regarding keeping off the pitch and not to bring pyrotechnics into the stadium. In addition, the Chairman of the club wrote an open letter to the fans covering the same points. I personally contacted the Forza fan group and asked they share the same message with their members and pointed out that we have a number of supporters on two years bans for celebratory incursions earlier in the season and others serving three-year bans for the use of pyrotechnics.

During the safety briefing to the match officials the possibility of a mass incursion was discussed. It was agreed to carry out the 'toss up' prior to kick off to determine which end the penalties would be taken should it get to that. This would allow both the club and police to utilise the staff to be most effective. This was shared with myself and the police once completed confirming the Bridgford End accommodating both home and away support. Ch Insp Walker and myself agreed this worked in our favour because that was where many of the staff would be anyway.

During the game a number of incidents involving the Sheffield United manager appeared to raise the tensions. When Forest scored the opening goal he kicked an item thought to be a water bottle, into the crowd and a further incident involving Forest's Djed Spence occurred for which he was booked.

With 10 minutes of normal time remaining additional staff were relocated to pitch-side but I decided not to deploy the tape at that time. Ending all square there was a period of Extra Time. As the game entered the final minutes I asked for the red and white tape to be deployed and for the security and police to take up the agreed positions creating a second cordon and to strengthen the area in front of the visiting fans.

Extra Time ended without any further score and the game went to penalties. Up until this point there had been no suggestion of fans moving forward and that a pitch incursion may happen. After the first two Sheffield United penalties were saved it then became evident that some supporters in the Main Stand were moving forward to the wall. Stewards had been moved pitch side of the wall as it allows them a higher position than the fans at that point.

When the Forest goalkeeper saved the final penalty I at first thought that the fans would stay off but a surge from the Main Stand started a rush and once it was clear the numbers could not be contained, phase two of the plan was implemented. The tunnel area was reinforced as was the area in front of the Sheffield United fans.

The response team assisted by the police spotters assisted the players of both teams to leave the pitch safely however we were notified by the dressing room staff that a visiting player had been assaulted and required medical attention.

The match log shows the incursion at 22: 31 and all players and officials in the dressing rooms by 22: 38. Tany messages were put out to the fans to clear the pitch whilst the visiting fans left the stadium without incident. The police and steward cordon in front of the visitors started to 'sweep' across the pitch to clear those fans and other staff were deployed to the car park that accommodated the visiting supporter's coaches.

Once the pitch was clear and the home team had returned and finished the celebratory walk around the investigation into the assault began. By the time I left the ground at approx. 01: 00 photos of the potential suspects had been obtained and put on social media by the police, other details received from the ticket database were shared with the police. Once I returned to work at approx 07: 30 the offender was in police custody and within 48hrs of the offence had been sentenced to 24 weeks in prison.

The Club has issued a life ban to the individual concerned, whose seat was close to the area behind the dugouts.

The match was attended by Rob Fisher from the local authority and Bob Eastwood of the EFL. Both attended the pre match safety briefing to supervisors and were present in the control room and the end of the game.

14. Nottingham Forest's reply documentation was accompanied by a letter from Taymour Roushdi, the club's Head of Football Administration. That letter in part read –

The Club recognises that there was a serious pitch invasion on the night in question. It has co-operated fully with the FA on the investigation relating to those events. As of today's date, the Club is unaware of any independent assessment or body which has suggested that any of the steps which the Club has taken before, during or after the fixture have been inappropriate, incorrect or otherwise unreasonable. Indeed, the exact opposite is the case. The independent report from Robert Fisher after the match (enclosed) makes it clear that the Club made its "best efforts" and took "all reasonable preparations" in relation to the fixture. In addition, he said that there had been "excellent planning and preparation for this fixture." The level of support for the Club is significant and Mr Bob Eastwood of the EFL has also indicated that he is willing to support the Club on this charge. In addition, the Club now also understands that the SGSA Inspector who was at the fixture (Mr Mark Holland) is also willing to support the Club in relation to the charge.

In the circumstances, as this is not a strict liability offence, the Club remains unaware of the basis for which it is to be said that it is Guilty of the charge. The FA has not identified any shortcomings in what the Club did to justify the charge. In those circumstances it is difficult to understand the basis on which a guilty plea could be made. The Club is open to further discussions with the FA on the Not Guilty plea if the FA can identify the specific basis on which it is suggested that the Club fell short in this case. This would also be of direct relevance to any punishment.

15. Nottingham Forest supplied a lengthy email dated 6 October 2022 from Mr Eastwood, the EFL Head of Security and Safety Operations. Mr Eastwood wrote (in part) –

I am employed by the English Football League as Head of Security and Safety Operations. I have been employed into this position since January 2014 and my duties include attending fixtures to observe match day operations.

On the 17 May, 2022 I attended the pre-match briefing, led by Alan Bexon, the NFFC Head of Security. The briefing was also attended by stand and steward supervisors. I also recall speaking with an Inspector from the Local Authority (Rob Fisher) and the Chair of the Safety Advisory Group.

During the briefing I became aware that the fixture was classed as high risk, there were 3 police support units (75 police officers) and a large number of stewards, the majority of which were Security Industry Accredited. I recall Alan saying he had brought in more stewards than he had done previously during his 30 years role with NFFC. Understandably as this was a second leg play off semi-final, with the winning team going to the final at Wembley National Stadium, hoping to win promotion to the Premier League.

NFFC had won the first leg fixture at Bramall Lane 2-1 (14/5/22) There were over 29000 spectators at the match. Previous play off fixtures elsewhere had encountered pitch incursions and physical attacks on players. I had issued a briefing to the Clubs remaining in the play off finals (which included NFFC) to ensure appropriate planning was undertaken, to prevent similar incidents being repeated. I have attached this briefing. Alan referred to my briefing note during his pre match briefing. He also showed me a message sent to fans and through Club media platforms from the Chairman, Nicholas Randall, appealing to fans not to enter the field of play and to maintain high standards of behaviour.

The briefing Alan gave was to a high standard and he demonstrated to me, as he has

done many times in the past, that he is a credible and operationally competent leader. I considered all aspects of what I would have wanted to ensure his team were briefed to do, were delivered in a clear and concise manner. I was confident in his plans that they made clear what the graded risks were and how these were to be mitigated.

The atmosphere within the stadium was as you would have expected and hoped for, from both sets of fans. There was nothing which gave me any cause for concern.

Around 80 minutes into the match, I made my way into the control room and was stood with Alan. The control room was a hive of activity with staff working industriously within their role. The police communications team was in the adjoining room and Alan and the police Silver Commander were in regular dialogue, discussing tactics as it was clear there was a likelihood this fixture could go to extra time. Police and Club steward/security resources were deployed to the perimeter of the pitch and the Club 'pitch runners' were deployed to discrete locations around the goal area, facing the crowd to tackle any intruders onto the pitch. Resources were facing the crowd across all the stands and the stewards were holding tape, in an attempt to give an indication of a barrier onto the pitch.

The match progressed to penalties and I was satisfied the resources from police and Club were in the correct places to deter any incursion onto the playing surface. On the third penalty and for the first time during the fixture, there was crowd movement in the Main and Lower Bridgeford stands to indicate an incursion was likely. I still, at this stage, considered resources were in the right place and there was nothing I had seen to suggest it would have been appropriate or proportionate to take a more physical position with these spectators. When NFFC scored the winning penalty a small number from the corner of the two stands made attempts at gaining entry onto the playing surface. The resources in this area 'grappled' with the spectators they faced however others got past them and were able to get onto the playing surface. Spectators from other parts of the stadium also gained entry, almost simultaneously. I immediately looked over to the SUFC spectators and a police line supported by Stewards dissuaded any spectators from this stand from entering the pitch area. There was then the added problem of NFFC fans confronting SUFC fans, which appeared likely given the numbers of NFFC fans making their way towards them. I saw Alan and his police colleague discuss tactical options and I quickly observed the movement of police and steward resources to effectively prevent any confrontation in this area. All resources worked well together in eventually clearing the pitch of spectators.

I would guess that over 6000 NFFC fans were on the pitch, the vast majority of whom were celebrating their victory, albeit in breach of the laws governing spectators on the field of play.

I left the ground around midnight and was called by Alan around 01:30 to inform me that a SUFC player (Billy Sharpe) had been seriously assaulted by a NFFC supporter whilst stood close to the technical area. He was not on the squad list for this match and had been stood with other players when he was attacked from his 'blind side.'. We discussed the gathering of evidence to support the police investigation and later that morning Alan informed me the Club had provided evidence to the police who had arrested a man for this offence. He was in court the following day and sentenced to a period of imprisonment.

This was a very challenging operation, both during the match and responding to the large-scale pitch incursion. With hindsight, there could have been more resources around the tunnel area and club staff, who had not been playing, should not have been given access to the playing surface. There were many competing demands during this part of the fixture and the priority at the time was to prevent the two sets of spectators from a confrontation, whilst protecting the players and match officials from harm. The club, working alongside the police successfully delivered these aspects, although it was regrettable spectators entered the playing surface. Hindsight alone tells me that there should have been more security, including the police in the tunnel area as, at the time, I considered resources were better deployed elsewhere and I would not have



considered this was an area of significant risk, over and above the resources deployed to the tunnel as standard, at the time.

16. Nottingham Forest also relied on the Local Authority's Match Day Inspection Report written by Robert Fisher, a member of Nottinghamshire County Council's Safety Advisory Group. The report contains details of the events, including the briefing given to stewards by Mr Bexon. Mr Fisher expressed his conclusion in the following terms –

Despite all reasonable preparations (and recent successful experience), the best efforts of safety staff did not deter home supporters from celebrating their team's significant victory with a mass pitch incursion at the end of the game.

This was always going to be challenging fixture due to the circumstances and the passion the supporters had for a win and for qualification for the Championship play-off final. Emotions were exacerbated by a tense period of extra time followed by the high drama of a penalty shoot-out. As the conclusion of the game approached, a line of stewards formed in front of the stands in accordance with pre-planning and instructions from the Control Room. Police and security staff formed a second line in key areas. The procedures had worked successfully in other recent high-profile fixtures, including Nottingham Forest's recent FA Cup victory over Arsenal.

As the penalty shoot out progressed, and a Nottingham Forest victory looked increasing likely, many supporters left the stands to gather at the side of the pitch. At the moment of victory, a large number of supporters surged through the steward's cordons and were followed by an increasing flow of others until the entire pitch was covered. The Police cordon in front of the visiting supporters was strengthened and soon commenced a sweeping operation to slowly clear the pitch from that corner, ushering fans back into the stands. At the same time periodic announcements were made over the PA system asking supporters to clear the pitch.

During this time, reports to the Control Room revealed that a Sheffield United player had been the victim of a serious assault. Also, Police and EMAS representatives in the Control Room directed the response to alerts that an eight year old boy had become separated from his family. Happily he was soon found.

Overall, there had been excellent planning and preparation for this fixture, and the work of all safety staff deserves to be commended. The procedure for the end of the game was unsuccessful on this occasion due to the unique circumstances of this particular fixture and the overwhelming desire of fans to celebrate with a very visible demonstration of their joy.

## **ORAL EVIDENCE**

17. Mr Bexon maintained and expanded the evidence that he had put in writing. Mr Bexon confirmed that 370 security staff had been deployed. That was the largest number in Mr Bexon's many years experience at Nottingham Forest. There had been proper planning meetings with the Police, who had approved not only the number of stewards but also the deployment plans. Those plans were put into effect from the 75<sup>th</sup> minute, when stewards were relocated from all over the stadium to take up pitch-side positions. Those stewards were supplemented by a significant and visible Police presence. Stewards were equipped with a visible

barrier of red and white tape, a strategy that had been successfully deployed on previous occasions. Mr Bexon therefore maintained that in relation to issues 1 & 2 Nottingham Forest had done all that could have been expected of it.

18. Mr Bexon accepted a failing in relation to issue 3. Plans had been made for stewards to secure the tunnel and technical areas. He said *staff knew what was required*. Mr Bexon accepted that those areas had not been properly secured and that the stewards responsible failed to carry out what had been expected of them. He accepted that the attack on Mr Sharp was a consequence of that failure.
19. In cross-examination Mr Bexon agreed that this was a high risk match. He maintained that proper planning had taken place, that a risk assessment had been carried out, and that a proper stewarding plan had been prepared. He agreed that the documentation that had been provided to the Commission by Nottingham Forest did not contain all that could have been produced. He had retired, and had not been consulted in what had been produced. The stewarding plan had been submitted to the local authority. Mr Bexon agreed that if a greater number of stewards had been provided so that they could stand shoulder to shoulder that might have made a pitch incursion less likely, but maintained that that was wisdom born out of hindsight. As seen at the time, a sufficient number had been provided.
20. Mr Eastwood also maintained and amplified his written evidence orally. He explained that his role was to advise the EFL and clubs on all matters affecting safety and security on match days. He attended numerous matches every season and had acquired a wealth of experience. Mr Eastwood considered Nottingham Forest to have acted to a very high standard. His only criticism was the inadequate number of stewards to protect the tunnel and technical areas – which he said should be a sanctuary for players, officials and club personnel.
21. When cross-examined Mr Eastwood confirmed that he had attended the pre-match briefing and said that he had been provided with copies of the risk assessment and match day operational plans which he saw had been specifically prepared for this fixture. Nothing in the briefing gave Mr Eastwood cause for concern – he was satisfied that *they had things in the right place*.

22. In response to specific questions from Mr Foulkes Mr Eastwood stated that he believed that Mr Bexon had sufficient resources and had deployed them appropriately. He was, he said, *convinced that they had things right*. Mr Eastwood drew the distinction between the paramilitary stewarding adopted by some countries and the British approach. Drawing on that observation he rejected the suggestion that a shoulder-to-shoulder line of stewards would have been more effective than the spaced line provided for by Nottingham Forest. Mr Eastwood made the point that Mr Fisher from the SAG had been present at the match and was content with the arrangements that had been made. Mr Eastwood stated that at the time he had considered the plans were sufficient to deal with what Nottingham Forest thought that it had to deal with. He cautioned that the video clips did not show what was taking place at other parts of the ground, and the potential trouble areas were not confined to those shown in the video clips.
23. Mr Eastwood accepted that on 17 May 2022 he had sent clubs an email warning them of increased risks of pitch incursions, but reiterated that he considered that Nottingham Forest had taken all proper precautions. On a number of occasions he drew the distinction between what he and other informed people had considered at the time, and the wisdom that comes with hindsight.

#### **THE FA's CASE**

24. Mr Foulkes reminded us that this was accepted to be a high risk match. Mr Eastwood's email of 17 May 2023 demonstrated the increased risk of pitch incursions. His overarching submission was that Nottingham Forest knew of the risk but failed to respond sufficiently. It is not a matter of hindsight: it is something of which Nottingham Forest had actual knowledge.
25. Mr Foulkes submitted that what took place on the day demonstrated the need for a larger number of stewards. The known risk required that increased number. The lack of proper documentation prevents the Commission from making a finding in favour of Nottingham Forest because it has simply not revealed the extent of its planning.
26. Mr Foulkes made similar submissions in relation to steward deployment. Additional stewards should have been deployed to the potential trouble areas that can be seen on the video clips. They were not. This demonstrates both the

insufficient number of stewards, and the fact that those available were not sent to the required areas. Mr Foulkes reiterated the significance of the lack of sufficient documents.

27. In relation to sanction Mr Foulkes reminded us that we should examine three issues, namely the seriousness of the breach, the degree of culpability, and the harm caused. The breach was not the most serious; culpability was beyond marginal and should be characterised as negligence, but the harm could be seen from the size of the incursion and the physical injury to Mr Sharp.

### **NOTTINGHAM FOREST's CASE**

28. Mr Randall reminded us that this was not a strict liability charge. Nottingham Forest was entitled to the *due diligence* defence. The appropriate standard was akin to negligence, adopting a *Bolam* test. He submitted that Nottingham Forest's behaviour fell within a reasonable range, so that the *due diligence* defence was established.
29. Mr Randall laid great store on the evidence of Mr Eastwood and Mr Fisher, who he described as both independent and informed witnesses. So far as the first issue is concerned, Mr Bexon gave evidence of the planning meetings with the Police, who had agreed the number of stewards. Both Mr Eastwood and Mr Fisher had at the time considered the numbers to be appropriate. So far as the second issue is concerned, the video clips of the corner of the main stand show the large number of stewards and Police arrayed in a line with back up rows. Again, at the time both Mr Eastwood and Mr Fisher had considered those plans to be appropriate.
30. That evidence, Mr Randall submitted, was sufficient to shift the burden of proof onto the FA. The FA had called no evidence to put in issue the evidence given by Mr Eastwood or Mr Fisher. The *due diligence* defence was therefore made out.
31. In relation to sanction Mr Randall did not challenge the principles advanced by Mr Foulkes. He submitted that any sanction had to be fair, and proportionate to the extent of the failings. The Commission, he submitted, should impose a minor fine.

## **ISSUES 1 & 2 – Liability**

32. The Commission considered Mr Bexon to be a reliable witness. He gave evidence in a balanced and credible manner. He was quite willing to make appropriate concessions. His detailed explanation of the decision making process that took place at the time amplified what he had put in writing. The Commission accepts that Mr Bexon carried out the planning, held the meetings, and prepared the match specific documents as he said. We further accept that Mr Bexon is a punctilious professional who was carrying out his duties to the best of his abilities. He was not jeopardising safety to make economies: he was doing what he thought was necessary in the circumstances.
33. The Commission was similarly impressed by the evidence from Mr Eastwood. Mr Eastwood was an independent witness with a depth of experienced specialist knowledge. That knowledge enabled him to express an informed opinion on the relevant issues. Although he did not give oral evidence Mr Fisher is also an independent, experienced witness. There is no reason to question the honesty of what he put in his detailed report, or the independence and reliability of his opinion.
34. We are satisfied that that evidence is sufficient to establish a *prima facie* case that Nottingham Forest has established the *due diligence* defence. As seen at the time, and without the benefit of hindsight, not only Nottingham Forest but also two independent, informed witnesses considered that the planning was sufficient. The effect of this evidence is to shift the evidential burden onto the FA. The FA elected not to call any witness on the issue. There is therefore no direct evidence to challenge that advanced by Nottingham Forest. Despite Mr Foulkes’ skilful cross examination and submissions the evidence called by Nottingham Forest is not rebutted or sufficiently undermined for the FA case to succeed. Accordingly, we find that the case made in relation to issues 1 & 2 fails.

## **THE PROPER APPROACH TO SANCTION**

35. Recent decisions of Regulatory Commissions dealing with the appropriate sanction for breaches of Rules E20 have adopted a consistent approach. That approach involves determining the appropriate sanction by reference to the following criteria –
- (1) The seriousness of the breach committed by the club.

- (2) The culpability of the club.
- (3) The harm caused by the incident.
- (4) The mitigation available to the club.

That is the approach that was advocated by both Mr Foulkes and Mr Randall. It is the one that we have followed in our deliberations.

36. Those recent decisions have also adopted a consistent approach to the question of deterrence. A Regulatory Commission is perfectly entitled to recognise that a sanction will have a deterrent effect but the overriding principle is that the sanction must be proportionate to the facts of an individual case. A sanction cannot be increased beyond a proportionate level in order to achieve the otherwise legitimate aim of deterrence.

## **DISCUSSION**

37. We have set out the relevant facts in some detail above. We do not intend repeating them. We simply set out our conclusions, with an explanation of how we have reached them.
38. The seriousness of the breach requires an overview of all elements – both aggravating features and mitigation. Nottingham Forest is to be credited with considerable advance planning. Its failure was in one limited respect – a failure to implement the plan to secure the sanctuary of the tunnel and technical areas. The aggravating feature is the physical assault on Mr Sharp. In all the circumstances we consider the seriousness of the breach to be relatively minor.
39. The culpability is minor. It is not minimal, but it is at the level of understandable negligence.
40. The harm is more significant. The assault on Mr Sharp was brutal and unprovoked. It was the direct consequence of the failure to secure properly the tunnel and technical area. We consider it to be serious.
41. There is, however, significant mitigation. This is the first occasion that Nottingham Forest has faced such a charge. Mr Bexon's planning was proper and sufficient. We have found that informed opinion at the time believed sufficient numbers of stewards had been supplied, and that their deployment was appropriate. Those arrangements properly secured the safety of players and away

supporters. Although serious the attack on Mr Sharp was an unexpected and isolated incident. We have heard from Mr Randall that Nottingham Forest supporters have raised the sum of £25,000 for a charity favoured by Mr Sharp as a mark of their disapproval and regret for what took place.

## SANCTION

42. We agree with Mr Randall that the sanction must be fair and proportionate. Were it not for the assault on Mr Sharp we would impose a lesser penalty. But the fact of that assault requires a penalty that marks the seriousness of what took place. We consider the appropriate penalty to be a fine of £50,000. However, having regard to the substantial mitigation, we consider it appropriate to suspend one half of that sum so long as Nottingham Forest does not commit any breach of FA Rule E21 (2022/2023) (or any subsequent legislative equivalent) until the conclusion of the 2023/2024 season.

## CONCLUSION

43. The Commission directs that –
- (1) Nottingham Forest is fined the sum of £50,000.
  - (2) Of that sum £25,000 shall be suspended so long as Nottingham Forest does not commit any breach of FA Rule E21 (2022/2023) (or any subsequent legislative equivalent) until the conclusion of the 2023/2024 season.
  - (3) Nottingham Forest shall pay the Regulatory Commission's costs of the proceedings.



David Phillips KC FCI Arb  
Phil Rainford  
Matt Wild

15 May 2023