

IN THE MATTER OF A FOOTBALL ASSOCIATION
INDEPENDENT REGULATORY COMMISSION

BETWEEN:

THE FOOTBALL ASSOCIATION

The Association

- and -

(1) ARSENAL FOOTBALL CLUB
(2) ALAN MIDDLETON

The Participants

DECISION AND WRITTEN REASONS OF THE
INDEPENDENT REGULATORY COMMISSION
FOR THE IMPOSITION OF SANCTIONS AND COSTS

1. BACKGROUND

1.1 The Independent Regulatory Commission has previously ruled on the issue of liability in respect of the charges against both Participants. Reference should be made to the Decision and Written Reasons, dated 2nd October 2015, for the background to the charges and our findings. The Commission has subsequently received submissions in writing from the Parties on the issues of sanctions and costs. The Commission is grateful to Counsel for their concise and helpful submissions, and their assistance throughout the proceedings.

1.2 A Regulatory Commission has a wide range of penalties at its disposal, as set out in Regulation 8.1 of The FA's Disciplinary Procedures for the season 2014-15, which provides as follows:

"The Regulatory Commission shall have the power to impose any one or more of the following penalties on the Participant Charged:

- (a) *a reprimand and/or warning as to future conduct;*
- (b) *a fine;*
- (b) *suspension from all or any specified football activity from a date that the Regulatory Commission shall order, permanently or for a stated period or number of matches;*
- (d) *the closure of a ground permanently or for a stated period;*
- (e) *the playing or a match or matches without spectators being present and/or at a specific ground;*
- (f) *any order which may be made under the rules and regulations of a Competition in which the Participant Charged participates, or is associated, which shall be deemed to include the deduction of points and removal from a Competition at any stage of a Playing Season;*
- (g) *expulsion from a Competition;*
- (h) *expulsion from a membership of The Association or an Affiliated Association;*
- (i) *such further or other penalty or order as it considers appropriate."*

1.3 We have been referred to two previous cases, namely:

The Football Association -v- Kleinman, Levack, Rahnama and Brighton & Hove Albion Football Club; and

The Football Association v Mahfuz and Sunderland Athletic Football Club

1.4 In both those cases, the AG1 Form was signed off by a Licensed Agent who played no other part in the Transaction and where information was deliberately concealed from The FA. Further, the Regulatory Commission in the *Brighton* case identified serious aggravating features that took place after the event and which were designed to mislead The FA in its investigation of the transaction. In our view those cases can properly be characterised as examples of 'classic' fronting, in the sense that the Agency Activity was carried out "*in whole*" by an Unauthorised Agent, as contemplated by Regulation H12.

1.5 The Commission further notes that in the *Brighton* case all four Respondents pleaded guilty to the various charges against them, but the credit to which they were entitled for such pleas was limited by the strength of the case against them. In the *Sunderland* case, the club pleaded guilty to one element of the charges against it, but denied another. It did not seek a personal hearing. The other respondent denied the charges against him, but was found liable.

2. RELEVANT FACTORS

2.1 The Commission makes the following preliminary observations:

- (i) The objective that underpins the relevant Agents' Regulations is to require transparency in transfer transactions. This enables The FA to regulate, investigate and, if necessary, prosecute those who do not comply. The proper exercise of The FA's regulatory powers is heavily dependent upon full and frank voluntary disclosure by the parties to a transaction of all relevant facts and matters. If the information that it receives is incomplete, The FA is unable to adequately 'police' transfer and agency activity. That is so irrespective of whether a failure to provide relevant facts and matters is deliberate, negligent (as in this case), or inadvertent.

- (ii) The Commission has found that both the Club and AM were negligent in their dealings that gave rise to the respective charges against them and which they have either pleaded guilty to (in the Club's case), or been found guilty of (in both cases). In our judgment, their conduct went beyond mere inadvertence, but that there was no intention on the part of either the Club or AM to mislead or misrepresent the true position to The FA, either at the time of the Transaction or subsequently.

- (iii) In contrast to the *Brighton* and *Sunderland* cases, we have found that AM was not 'parachuted in' as a Licensed Agent simply to sign off paperwork, and to play no further part in the Transaction. He undertook substantial Agency Activity in connection with it, as did PE. Nevertheless, the definition of 'Fronting' in Regulation H12 is still satisfied on the ground that Agency Activity was carried out "in part" by an Unauthorised Agent.
- (iv) The breaches in this case were serious. They were committed in the context of a high value and high profile transfer, generating significant transfer and agency fees. Such transfers are conducted in the full glare of the media and attract greater attention and scrutiny. Ultimately, though, the most significant factor for us to take into account when considering the sanctions to be imposed for a breach of the Regulations is the seriousness of the breaches and degree of culpability of the Participants, together with any other relevant aggravating and/or mitigating factors.

3. THE CLUB

3.1 The Club pleaded guilty to the first limb of the charge under Regulation J1 (the so-called "Use" allegation). The charge against it under the other limb of that particular Regulation (the "Payment" allegation) has not been proven to the satisfaction of the Commission. The Club has been found guilty by the Commission of a breach of Regulation C2 (the "Arranging" allegation).

(i) Aggravating factors

- (a) The Club failed to carry out any or any adequate checks to establish whether Philip Ercolano ("PE") was both the Player's Agent and a Licensed Agent, which at all material times it believed him to be. Had the Club done so, PE's true status as an unlicensed and Unauthorised Agent would have been revealed.

- (b) With the knowledge and acquiescence of the Club, PE conducted significant Agency Activity in relation to the transfer of the Player when, at all material times, PE was not a Licensed Agent.
- (c) When it completed the AG1 Form, the Club failed to record the fact that Agency Activity had been carried out by PE, whatever the Club may have believed his status to be at the time.
- (d) At the material time, the Club adopted and operated a procedure/system in relation to the declaration on Form AG1 that was flawed and apt to mislead and/or misrepresent the true level of agency involvement in transactions. Although this was done unintentionally, it had the same (adverse) effect on The FA's ability to monitor Agency Activity as a deliberate course of conduct.
- (e) The agency fees payable by the Club would have been no different even if PE's Agency Activity had been declared. PE's involvement did, though, expedite a process that enabled the Club to secure the services of a highly regarded and sought-after Player.

(ii) **Mitigating factors**

- (a) The Club has a 'clean' disciplinary record.
- (b) At all material times, the Club acted in good faith. It has also co-operated with The FA throughout its investigation, and during the course of the hearing before the Commission. Richard Law ("RL") gave what we found to be frank and truthful evidence on behalf of the Club. What he said in the two interviews of him substantially formed the basis of The FA's case against the Club and AM. This, together with the evidence that he gave during the hearing, was central to our findings.

- (c) The Club pleaded guilty to the “Use” charge, although the patently honest evidence that RL gave when he was interviewed meant that a ‘not guilty’ plea to that limb of Regulation J1 would have been unsustainable.
 - (d) The Club successfully defended the charge under the second limb of Regulation J1.
 - (e) The Dual Representation Agreement that the Club entered into with AM was genuine and transparent. It also had the effect of distracting RL’s attention away from PE’s role in the Transaction. RL was working under pressure, although his customary practice at the time suggests that the AG1 Form would have been completed in the same way even if the Transaction had been conducted at a leisurely pace.
 - (f) We are told that the Club has taken steps to improve its systems and procedures in relation to transfer activity. The practice that gave rise to its difficulties in relation to completing AG1 Forms requires urgent attention, if that has not already happened since our decision on the charges.
 - (g) The Club’s culpability falls some way below the findings that were made in the *Brighton* and *Sunderland* cases, where immediate fines of £90,000 and £100,000 respectively were imposed on the clubs, together with warnings as to their future conduct. In the *Sunderland* case, the club was charged with, and found guilty of, the same three allegations as are made against the Club (Arsenal) in the present case, including the “Payment” allegation.
- (iii) Sanctions**
- (a) The financial penalty that we impose reflects the Commission’s view of the Club’s overall level of culpability in connection with the Transaction.

- (b) Both charges that fall for consideration arise out of the same course of conduct and we do not therefore impose a separate sanction in respect of each charge. For the sake of completeness, had we done so, we would have imposed a fine of £60,000 for one charge and imposed no additional penalty for the other.
- (c) Accordingly, taking into account of all the relevant factors, the Commission imposes the following sanctions on the Club:
 - (aa) An immediate fine of £60,000; and
 - (bb) A warning as to its future conduct.

4. ALAN MIDDLETON

4.1 AM denied, but has been found guilty by the Commission of, both of the charges against him under Regulations C2 and H12.

(i) Aggravating factors

- (a) At all material times, AM knew that PE was not a Licensed Agent.
- (b) PE, as an Unauthorised Agent, carried out significant Agency Activity in relation to the Transaction, contrary to AM's denial.
- (c) The Transaction enabled both AM and the Company in which PE had a major interest, to secure a very substantial financial benefit. We were told that under an *ex-post facto* (after-the-event) agreement with Cassius Sports, AM was to receive fees totalling £30,000 by yearly instalments. He has so far received £10,000. We were also told that Cassius will not receive any further agency fees over and above the £150,000 that it has already received from the Club, but where the balance of the £480,000 will go was not explained. Cassius and PE are outwith The FA's jurisdiction.

(d) AM is and was a very experienced and senior Solicitor. He is a registered FA Lawyer and Intermediary. He has held a senior position in a League Two Club. He also trains prospective agents to be licensed by The FA. Despite the mitigating factors set out below, we find that he fell short by some distance of the high standards to be reasonably expected of him in his dealings in connection with the Transaction.

(ii) Mitigating factors

(a) AM has a 'clean' disciplinary record;

(b) He had only conducted one transfer prior to that of the Player and, despite his seniority, had little practical experience of such matters.

(c) He found himself in a fast-moving situation within a very short space of time, although he himself fairly volunteered that that was an occupational hazard of being a Solicitor. We are also inclined to accept that the Dual Representation Agreement had a similar effect on AM as it did the Club, and distracted his attention away somewhat from PE's involvement and the need to record it.

(d) Although we preferred the evidence of RL where they differed, we found that AM gave his evidence in a straightforward way and sought to assist the Commission.

(e) In a personal letter to the Commission, AM has expressed his regret for what happened, and acknowledged that he allowed "*the lines to be blurred*" by PE's participation in the contract negotiations. He says that he "*greatly respects*" the role of The FA in the governance of football and will not allow such a situation to happen again. The disciplinary proceedings have caused him worry and concern, time, and financial cost.

(f) As with the Club, we find that aspects of AM's dealings in connection with the Transaction went beyond mere inadvertence and that he failed to take adequate care. He did not deliberately intend to mislead The FA, or to misrepresent the true position in terms of the Agency Activity that took place in connection with the Transaction.

(iii) Sanctions

- (a) The Commission was invited to merely warn AM as to his future conduct. In view of the serious nature of the breaches, we are unable to accede to that submission. A significant financial penalty is indicated, together with a suspension of AM's FA Registered Intermediary status, albeit one that does not have immediate effect unless he commits a further breach of Agents'/Intermediaries' Rules and Regulations within a specified period.
- (b) The financial penalty reflects the benefit which, on his own evidence, AM agreed with Cassius Sports that he would receive for his agency services in connection with the Transaction. In the absence of any verification or contradiction of the figure of £30,000, we take what AM told us about it face value.
- (c) As far as the suspension of his FA Registered Intermediary status is concerned, the sanction reflects the lower level of culpability on AM's part than was found in the *Brighton* and *Sunderland* cases, where substantial immediate suspensions of Agents' Licences were imposed. The references in the sanction that we impose reflect the changes to The FA's Rules and Regulations relating to Agents/Intermediaries that took effect on 1st April 2015 (*i.e.* after the breaches in question were committed).
- (d) The Commission therefore imposes the following sanctions on AM:

- (aa) An immediate fine of £30,000;
- (bb) A suspension from all Agency/Intermediary Activity for a period of 3 months, which period of suspension is suspended in its entirety for a period of 18 months with effect from 23rd October 2015 unless he commits an offence contrary to The FA's Agents' Regulations or the FIFA Regulations on working with Intermediaries; and
- (cc) A warning as to his future conduct.

5. COSTS

5.1 The Commission has no power to make an order for costs as between the Parties. The only costs that fall for consideration are those of the Commission itself. We do so with the following facts and matters in mind:

- (i) AM made an unsuccessful application to vacate the substantive hearing. He should bear the costs of the Commission associated with the application.
- (ii) The FA has proved both of the charges against AM and one of the two disputed charges against the Club (in addition to the one that it admitted).
- (iii) In terms of the time taken by the Commission considering the charges against the Club on the one hand, and AM on the other, there was no discernible difference overall. Consideration of the "Payment" allegation did not add to the costs of the hearing itself; they would have been incurred in any event. Following the hearing, the Commission spent time considering the "Payment" allegation and then giving reasons for its decision on that issue. Again, though, it did not materially add to the overall costs associated with the production of the Written Reasons. We do not therefore make any reduction in the costs of the Commission to reflect the Club's successful defence of the "Payment" charge.

5.2 Accordingly, we make the following orders in respect of costs:

- (i) AM shall pay the costs of the Regulatory Commission of his application to vacate the substantive hearing;
- (ii) Subject to the costs' order under sub-paragraph (i), the Club and AM shall contribute equally towards the costs of the Regulatory Commission; and
- (iii) The fees paid by each of the Participants with their requests for a personal hearing shall be retained by The FA.

6. TIME FOR APPEAL

6.1 The time for any Party to appeal against any aspect of the decision of the Regulatory Commission (breach, sanctions and costs) shall be counted from mid-day on Monday 26th October 2015.

22nd October 2015

Craig Moore

Chairman of the Independent Regulatory Commission

Appearances

The Independent 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