SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/Adhocsport/253/2019

IN THE MATTER OF AN EFL DISCIPLINARY COMMISSION

Before:

Charles Flint QC

BETWEEN: -

THE ENGLISH FOOTBALL LEAGUE (the EFL)

Claimant

-and-

BIRMINGHAM CITY FOOTBALL CLUB (the Club)

Respondent

DECISION

James Segan, instructed by Solesbury Gay and Nick Craig (Governance and Legal Director) for the EFL

Kendrah Potts and William Harman instructed by Ciara Gallagher (Club Secretary) for the Club

1. By a decision dated 22 March 2019 a Disciplinary Commission, which I chaired, imposed a deduction of 9 points on the Club for its admitted breaches of Rule 2.9 of the Profitability and Sustainability Rules (the **P&S Rules**) by incurring adjusted losses totalling £48.79 million over a monitoring period comprising the seasons 2015/16, 2016/17 and 2017/18. Those losses exceeded the permitted upper loss threshold by £9.79 million.

2. By a letter dated 14 May 2019 the EFL gave notice to the Club of the reference to a Disciplinary Commission of proceedings arising out of the Club's failure to comply with a direction made when the EFL imposed a business plan on the Club by letter dated 1 August 2018, as amended.

3. The proceedings are brought under the EFL Regulations (the **Regulations**) and the P&S Rules. Regulation 1.1 provides that misconduct includes a breach of a requirement or direction of the EFL. P&S Rule 2.9 provides that if a club's earnings result in a loss that exceeds a stipulated threshold, the executive of the EFL may exercise the powers set out in Regulation 16.20. Under Regulation 16.20.1 the EFL may require a Championship Club

> "to submit, agree and adhere to a budget which shall include, but not be limited to, Transfer Fees, Compensation Fees, Loan Fees or subsequent payments which become due under the terms of any transfer, players' remuneration and fees payable to any Intermediary".

4. The EFL has power under Regulation 83 to bring disciplinary proceedings for misconduct against any club by referring the matter to a Disciplinary Commission. The disciplinary proceedings were commenced under Regulation 88 by the complaint set out in the letter dated 14 May 2019. I was subsequently appointed as chairman of the Disciplinary Commission under Regulation 89 and the parties agreed that I should determine the proceedings sitting alone.

5. The Club has filed a Defence dated 29 November 2018. Mutual disclosure of documents took place in November and December 2019. Witness statements from James Karran, the EFL Financial Controller, Xuandong Ren, the Chief Executive Officer of the Club, and Ciara Gallagher, the Club Secretary, were served in January 2020. A witness statement from Tad Detko, the EFL Director of Finance, was served on 11 February 2020. The only witness to be cross-examined at the hearing on 12 February 2020 was Ms Gallagher. During the hearing reference was also made to the witness statements of Shaun Harvey, the former Chief Executive of the EFL, and Ms Gallagher, both made on 8 February 2019 for the purpose of the earlier proceedings.

Background

6. The letter dated 19 May 2019 which commenced these proceedings states:

> "We write to you with notice that the EFL is referring BCFC to a Disciplinary Commission in connection with breaches of the EFL Regulations ... These proceedings arise out of the Club's failure to comply with a direction of the EFL at the time the EFL imposed a business plan on BCFC in accordance with the provisions of the EFL's Profitability and Sustainability Rules … and Regulation 16 by the terms of the EFL's letter dated 1 August 2018, as amended on 2 August 2018 ... This letter serves as formal notification of the breaches …"

7. The direction referred to is at paragraph (2) of the letter dated 1 August 2018:

> "Prior to the 1 February 2019, the Club is required to complete the sale of registered players which after taking into account the costs associated with any registrations permitted by the EFL, generate a cost saving to the Club of not less than £9m to be made up of profit on player sales, a reduction in player wages and/or a reduction in player amortisation charges in the 2018/19 Season. The amount has been determined by reference to not only the Club's current financial results, but also taking into account some of the potential savings identified by the Club itself in its submission of 30 July. The objective of the above cost saving is to put the Club on a trajectory in order to achieve an Adjusted Earnings Before Tax for 2019/20 and beyond that does not exceed the Annual Upper Loss Threshold."

The figure of £9m was adjusted upwards to £10,574,324 on 14 August 2018 to reflect signings which had been made by the Club in accordance with paragraph (1) of the letter.

8. That direction, which I will refer to as condition (2), was stated in the letter dated 1 August 2018 to be made under Regulation 16.20. In the fourth paragraph the letter stated:

> "Accordingly, the EFL has determined that it is appropriate to require the Club to agree and adhere to a number of conditions relating to the Club's budgets, including player related expenditure"

Apart from condition (2) cited above, the other conditions were (1) a permission to

register up to 6 new professional players, on certain conditions, (3) a condition that the cost of signing new players be met by way of equity injections from the owner of the Club, and (4) a requirement to provide certain financial information by 14 February 2019. Towards the end of the letter it was stated:

> "Failure to comply with the conditions 2, 3 and 4 above, having registered some or all of the players as permitted under paragraph (1) above will constitute misconduct and may result in separate disciplinary proceedings not only against the Club but potentially those involved in approving those contracts and/or are responsible for the transfer activity at the Club."

9. By letter dated 1 August 2018 the Club accepted the terms and conditions set out in the letter from the EFL.

10. The Club took some steps to reduce its player expenditure after 1 August 2018. However, by the end of the winter transfer window on 31 January 2019 the Club had only made cost savings of £1.87 million, compared to £10.57 million required. The Club continued its efforts to reduce player expenditure and by the end of the summer transfer window had achieved cost savings of £4.5 million. On [redacted] July 2019 there was a sale of a player for a guaranteed fee of [redacted] which, as is accepted, meant that the Club had achieved cost savings substantially in excess of £10.57 million, albeit five months after the date stipulated.

11. In its defence and written argument the Club submits that there had been no breach of the requirement in condition (2), which was subject to implied terms that in complying with the condition the Club (a) was not required to act to its financial detriment and (b) was only required to use best endeavours to generate the savings required by 1 February 2019. On that basis the Club had complied with the condition by using its best endeavours to do so.

12. On the written and oral arguments put forward the issues are:

    (1) Whether condition (2) was subject to any implied terms;

    (2) Whether the Club complied with condition (2);

    (3) If the Club did not comply with condition (2) what sanction should be applied.

The Regulations

13. The letter from the EFL dated 14 May 2019 stated:

> "The Conditions Letter constituted a requirement, direction or instruction of The League, issued pursuant to the powers granted to it in accordance with Rule 2.9.1 and/or Regulation 16.20."

14. Under Regulation 83.1 the EFL has the power to bring disciplinary proceedings for misconduct against any Club by referring the matter to a Disciplinary Commission. Misconduct is defined at Regulation 1 (c) as meaning *"a breach of an order, requirement, direction or instruction of The League".* In this case the letter dated 1 August 2018 is clear in purporting to impose under condition (2) a requirement on the Club. At the fourth paragraph of the letter it is stated that the EFL had determined that *"it is appropriate to require the Club to agree and adhere to a number of conditions"* and condition (2) commences with the words *"Prior to 1 February, the Club is required to complete the sale of registered players …".*

15. There is no dispute that the Club's earnings for the relevant monitoring period resulted in a loss in excess of a threshold which gave the EFL the power under Rule 2.9 of the P&S Rules to exercise the powers set out in Regulation 16.20. That regulation provides:

> "The powers referred to in (Rule 2.9) are:
>
> 16.20.1 to require the Championship Club to submit, agree and adhere to a budget which shall include, but not be limited to, Transfer Fees, Compensation Fees, Loan Fees or subsequent payments which become due under the terms of any transfer, players' remuneration and fees payable to any Intermediary;
>
> 16.20.2 to require the Championship Club to provide such further information as The League shall determine and for such period as it shall determine;
>
> 16.20.3 to refuse any application by that Championship Club to register any Player or any new contract of an existing Player of that Club if The League reasonably deems that this is necessary in order to secure

that the Championship Club complies with its obligations listed in Regulations 16.19.8(a) to 16.19.8(c)."

16. The EFL submits that the requirement under condition (2) was in substance a requirement under Regulation 16.20.1 to adhere to a budget relating to player remuneration, by generating costs savings of £10.57 million from the sale of registered players by 1 February, and the Club agreed to that budget. The Club does not dispute that the EFL had power to impose on the Club under Regulation 16.20.1 the requirement contained in condition (2).

Implied Terms

17. The Club's argument is that terms are to be implied in the agreement contained in condition (2). The EFL submits that objective financial benchmarks imposed under the P&S Rules cannot be subject to any implied terms such as those asserted by the Club, as that would risk undermining the financial fair play regime by enabling clubs to disregard the objective financial benchmarks imposed by the P&S Rules. However, it is not argued by the Club that any terms are to be implied in any of the P&S Rules or in Regulation 16.20.1. It is clearly correct that the loss thresholds specified by Rule 3.1 constitute absolute requirements, which could not be subject to any implied term as to best endeavours. If a club's earnings calculated in accordance with Rule 2 result in a loss exceeding the specified threshold figures then the club is in breach of the rules. In principle the same is true of a budget submitted and agreed under Regulation 16.20.1. If a club submits and agrees a budget then it must adhere to that budget and, if it does not, it has failed to comply with a requirement lawfully imposed, has committed misconduct and is subject to disciplinary proceedings under Section 8. The requirement to adhere to the agreed budget under regulation 16.20.1 is not in general subject to any qualification as to the financial or commercial capability of the Club. But if particular conditions are attached to an agreed budget as to the means by which the Club is required to manage its income and expenditure so as to adhere to the budget then the position may be different.

18. The argument is that this particular requirement contained in condition (2) must be subject to implied terms, if those are necessary to give the condition business efficacy. In principle I consider the argument for an implied term is open to the Club on the basis that the letter dated 1 August 2018 constitutes a contract agreed between the parties and the regulatory breach alleged is founded on a failure to adhere to condition (2) of that agreement. Whether a term can be implied depends on an analysis of the precise condition agreed and its context. At paragraph 30 of the written submissions for the EFL it was suggested that the general law on implied terms in a contract may have no application in this context, because the business plan acquires its force from Regulation 16.20.1. That argument was not pressed by Mr Segan and I do not consider it to be correct. Only if the Club agreed to the budget did Regulation 16.20.1 apply and the EFL made much of the point that the Club had agreed to the terms of condition (2). That agreement must be interpreted and applied in accordance with the law of contract, and that is the basis on which the case was argued.

19. I have been referred to the familiar recent cases on the implication of terms including *Marks & Spencer v BNP Paribas* [2015] UKSC 72 and *Ali v Petroleum Trinidad & Tobago* [2017] UKPC 2. However, it is difficult to improve on the clarity of the test articulated by Lord Simon in *BP Refinery v Shire* (1977) 180 CLR 266, which was followed, with some commentary, in the *Marks & Spencer* case:

> "for a term to be implied, the following conditions (which may overlap) must be satisfied: (1) it must be reasonable and equitable; (2) it must be necessary to give business efficacy to the contract, so that no term will be implied if the contract is effective without it; (3) it must be so obvious that " it goes without saying"; (4) it must be capable of clear expression; (5) it must not contradict any express term of the contract."

The general principles relevant to this case which I derive from those authorities are firstly that the test is one of necessity not reasonableness, secondly that the fairness of a suggested term is an essential but not a sufficient pre-condition for its implication, thirdly that the implication must either be taken to have been obvious to the parties or as necessary to give the agreement business efficacy, and fourthly in judging obviousness the viewpoint is that of notional reasonable people

in the position of the parties, not that of the parties based on their understanding of the agreement at the time it was made. The third and fourth points are made clear from paragraphs 21 and 72 of the judgments in *Marks & Spencer v BNP Paribas* and in paragraphs 7, 26 and 28 of the judgments in *Ali v Petroleum Trinidad & Tobago*. On that basis the tests of obviousness and business efficacy generally overlap. As Lord Simon said *"no term will be implied if the contract is effective without it".*

20. The distinction between this case and the cases cited above is that the EFL letter dated 1 August 2018 is not a detailed commercial contract, in which the parties may be presumed to have catered for all eventualities, but a concise requirement contained in one sentence at condition (2).

21. I consider there is considerable difficulty in implying a term in condition (2) that the Club was not required, in the course of selling registered players, to act to its financial detriment. The meaning and effect of this implication is neither clear nor obvious. Nor would this term, if implied, solve the problems in the application of condition (2) on which the Club's argument for implied terms is based. I therefore deal below only with the argument that there is an implied term that the Club is required to use its best endeavours to generate the required costs savings from the sale of players by 1 February 2019.

Best Endeavours

22. The EFL argues that condition (2) is an unqualified absolute obligation to sell sufficient players to generate costs savings of £10.57 million by 1 February 2019.

23. The argument for the EFL, as summarised at paragraph 31 of its written argument, was that an implied term of best endeavours was not necessary because (a) it would be inconsistent with the essence of the financial fair play regime (b) it would generate unacceptable scope for clubs to obfuscate and escape from their obligations (c) it would duplicate matters which properly fall for consideration under sanction. None of those points address the legal issue discussed above, namely whether it is necessary as a matter of interpretation of

condition (2) to imply a term to make the requirement effective. The Club's argument is not that a term should be implied in P&S Rules or the Regulations but is to be implied in the obligation imposed under condition (2). It was also submitted that it was open to the Club to have challenged the requirement or sought a variation from the EFL. I do not consider either of those points can have any relevance to the question whether it is necessary that a term should be implied in order to make the agreement effective. The implication of an implied term depends on an analysis of the context and terms of the agreement as made and cannot depend on whether the Club might subsequently have challenged the legal effectiveness of the agreement or sought a concession from the EFL.

24. The EFL's argument does not address the difficulties raised by the application of an absolute obligation. The logic of the argument is that before 1 February 2019 the Club must, regardless of market conditions and whether the prices offered represent fair value, dispose of whatever number of players is necessary to achieve the costs savings prescribed. There is a particular difficulty in aiming to reach a financial target by selling a number of players into a strictly time limited market when bidders may postpone offers until shortly before the window closes. Only in hindsight may it be possible for the Club to know whether the targeted costs savings have been reached.

25. The Club submitted that the implication of the best endeavours term is necessary, for reasons which I summarise as follows:

    (1) compliance with condition (2) depends on the willingness of other clubs to make offers for players who are willing to be transferred;

    (2) there is a tension between an absolute obligation under condition (2) to sell sufficient players to meet the required cost savings, and the Club's responsibility to manage its financial performance so as to comply with the P&S Rules in 2019/20 and subsequent seasons;

    (3) condition (2) required the sales of players to take place during the January transfer window, in circumstances where the market knew that the Club was under compulsion to sell, which would make it difficult to achieve fair value for sales.

For the reasons which are set out below I broadly accept those submissions. I deal firstly with the context of condition (2) and then how I analyse its effect.

26. On 13 July 2018 the EFL notified the Club that the exercise of the power in Regulation 16.20 was under consideration and invited submissions as to what conditions should be imposed. On 30 July Mr Ren emailed the EFL setting out the planned expenditure on new players in the 2018 summer transfer window and some revenue and cost reductions of up to [redacted] which might be achieved in the 2019 summer transfer window. The email acknowledged that the proposed expenditure might seem aggressive but asserted that the business plan would ensure that there would not be a major negative impact on the 2019 and subsequent financial results. The email in response from the EFL enclosed the letter dated 1 August 2018 setting out the terms of the business plan which would be acceptable.

27. The letter stated that the Club's representations went far beyond what could reasonably be expected given the latest financial return under the P&S Rules. The fourth paragraph stated:

> "Accordingly, the EFL has determined that it is appropriate to require the Club to agree and adhere to a number of conditions relating to the Club's budgets, including player related expenditure. Those conditions commence with immediate effect and are intended to help ensure that the Club works towards compliance with P&S Rules through overall cost reductions, principally through player sales but at the same time allowing the Club to secure replacement players albeit at a reduced cost."

28. Condition (1) set out the conditions attached to the permission to register up to six new professional players. Condition (3) required that the costs of those acquisitions be covered by equity injections from the owner of the Club. Condition (4) required financial information to be submitted by 14 February 2019 including forecast P&S Rules results for the 2018/19 and 2019/20 reporting periods.

29. The express purpose of condition (2) was to *"put the Club on a trajectory in order to achieve an Adjusted Earnings before Tax for 2019/20 and beyond that does not exceed the Annual Upper Loss Threshold".* Those are the requirements of Rules 2 and 3 of the P&S Rules applying to the year ending 30 June 2020. It was no part

of the purpose of the condition, as is made clear in the evidence of Mr Harvey in his witness statement at paragraph 44, to impose a disciplinary sanction on the Club. The only purpose of the condition was to improve the financial position of the Club under the P&S Rules. That purpose must rest on an implicit assumption that the sale of players as directed would be beneficial to the Club's financial performance.

30. The requirement imposed under condition (2) is contained in one sentence:

> "Prior to 1 February 2019, the Club is required to complete the sale of registered players which after taking into account the costs associated with any registrations permitted by the EFL, generate a cost saving to the Club of not less than [£10.57m] to be made up of profit on player sales, a reduction in player wages and/or a reduction in player amortisation charges in the 2018/19 season."

31. Ms Potts has not challenged the submission made by Mr Segan that conditions (1) and (2) constitute in substance a budget relating to player expenditure to which the Club was required to adhere under regulation 16.20.1. However, at paragraph 35 of her written submissions Ms Potts argues that in compelling the Club to sell players or terminate their contracts it is critical that the condition be framed in a manner consistent with achieving the objectives of the P&S Rules.

32. The effect of condition (2) is much stricter than an obligation to adhere to an annual budget to achieve compliance with the P&S Rules, covering expenditure and income from both the acquisition and the sale of players, as Regulation 16.20.1 appears to envisage. The condition dictates the only means by which the Club is permitted to bring its player related income and expenditure into line with the financial result required. The effect of condition (2) was to create an obligation to achieve the required costs savings of £10.57 million from the sale of players before 1 February 2019, whether or not the Club was able, by other means, to achieve an overall financial result which did not exceed the specified loss thresholds and thus complied with the P&S Rules. Under the P&S Rules the Club would have been permitted to sell players in the summer transfer window and make the necessary savings by 30 June 2019, but condition (2) ruled out that option. In the event the Club did bring its finances into line with the requirements of the P&S Rules for 2018/19 by selling its stadium in May 2019 to an associated

company and booking a profit of £17 million in its accounts for the year ended 30 June 2019.

33. On 2 August 2018 the EFL sent a letter to all championship club chairmen attaching a media release which stated:

> "Under the P&S rules that are aligned with the Premier League, the Club has agreed, with immediate effect, to adhere to a business plan imposed by the EFL, which indicates a number of financial targets, including controlling player related expenditure, which together have the objective of meeting the requirements of the P&S Regulations moving forward. The objective of the imposed terms of the business plan is to move the Club towards compliance for forthcoming reporting periods."

That press notice sent a clear signal to other clubs that the Club would be required to sell players in the next transfer window. The EFL did not challenge the evidence of Ciara Gallagher at paragraph 9 of her witness statement dated 8 February 2019 which stated:

> "Whilst it was and remains the Club's intention to raise funds through player sales, the reality is that once other clubs become aware that a club is under an embargo and needs to sell players, it becomes very difficult for that club to realise fair value for its players. That is precisely what occurred during this transfer window, as our unsuccessful attempts to sell [redacted] show."

34. Nor did the EFL produce any evidence to contradict the evidence at paragraph 35 of Ms Gallagher's witness dated 24 January 2020 which stated:

> "… I should explain that a large part of the difficulty for the Club was that in January clubs tend to be less inclined to sign players on permanent, lucrative transfers. It is much more common to see loan deals or "stop gap" transfers intended to fill a particular need until the end of the season. I exhibit a table which I have prepared from information available online showing that only 30.9% of transfers involving EFL Championship clubs in the January 2019 transfer window involved a permanent deal."

At the time that condition (2) was imposed it was entirely foreseeable that the Club would be seen as a forced seller in the January 2019 transfer window and that bidders would make offers on that basis.

35. There is in principle no difficulty in implying a term of best endeavours in a contract which appears to impose an absolute obligation, if that is necessary to give the contract business efficacy. The leading case cited, *Anglo-Russian Merchant Traders v Batt* [1917] 2 KB 679, rested on different facts, as without the implication the contract would have required a party to commit a breach of the law. However, the decision was reached by applying the conventional test for implied terms which must be applied to the facts of each particular case (see Lord Reading CJ at page 686).

36. It is clear from the decision in *Jet2.com v Blackpool Airport* [2012] EWCA Civ 417 that best endeavours is in principle a well recognised concept, raising no issue of legal certainty. At paragraph 66 of that decision Longmore LJ said:

> "The phrase 'best endeavours' has, however, a respectable legal history behind it. It has been used in leases of public houses since Napoleonic times in the context of keeping the house open and increasing its trade, a context perhaps not wholly dissimilar to promoting services of an airline",

to which I would add, nor wholly dissimilar to running a football club.

37. In the EFL's written argument at paragraph 32 it is submitted that a best endeavours obligation is an onerous one requiring the obligee to do all in its power to bring about the result and may, depending on the context, require the obligee to subordinate its own interests to the requirement of the contract, citing *Jet2.com v Blackpool Airport*. In that case there was an express clause providing for best endeavours and the issue was solely one of interpretation of the contract. At paragraph 31 Moore-Bick LJ stated:

> "In my view the obligation to use best endeavours to promote Jet2's business obliged (the airport) to do all it reasonably could to enable that business to succeed and grow and I do not think the object of the best endeavours obligation is too uncertain to be capable of giving rise to a legally binding obligation."

I have not been referred to any other caselaw on the meaning of best endeavours, so the test I apply is that a best endeavours obligation required the Club to do all it reasonably could to enable the required cost savings to be generated from player sales by 1 February 2019. That test is consistent with *Rhodia International v Huntsman* [2007] EWHC 292 (Comm) at paragraph 33.

38. More difficult to extract from *Jet2.com v Blackpool Airport* is any general proposition that the obligee must subordinate its financial interests to the need to comply with the condition. The cases cited in the judgment of Lord Justice Moore-Bick at paragraphs 26 and 27, and the analysis at paragraph 32, do not yield any clear general proposition, save that all depends on the context. Not only do I not consider that authority to provide any solid basis for the interpretation of condition (2) as implying an obligation for the Club to act contrary to its financial interests, any such obligation would not make sense in the context of the P&S Rules. The purpose of condition (2), and the implicit assumption underlying it, was that the sale of players would be to the financial advantage of the Club and improve its position under the P&S Rules, both by making profits on player sales and reducing player wages in the future. There should be no conflict between the financial interests of the Club and the obligation to sell players. That is not to say that compliance with the condition might not require the Club to suffer some real detriment, but that detriment would arise from selling players whom the manager might have preferred to retain. In that respect the Club was obliged to subordinate its competitive interests to the requirement set out in condition (2).

39. The letter dated 1 August 2018 stated that it was *"the Club's sole responsibility to manage its financial performance having regard to all obligations to which it is subject under EFL regulations".* It must follow that it was for the directors of the Club to decide which players were to be sold, at what price and by what means. Condition (2) did not lay down how the directors should take those decisions. Provided that the Club made reasonable decisions as to which players were to be sold, at what price and by what means, the obligation of the Club was to do all it reasonably could to comply with condition (2), having regard to the requirement to comply with the P&S Rules in the seasons 2018/19 and 2019/20. It would be inconsistent with the aims of the P&S Rules to impose on the Club an obligation to

sell players at prices which did not in the judgement of the directors represent fair value. Mr Segan did not shrink from the submission that it was misconduct on the part of the Club not to have sold [redacted] on the last day of the January 2019 transfer window at a price [redacted] below the minimum acceptable price which the directors had set. That is the logical effect of the EFL's argument but it is not consistent with the purpose of the P&S Rules or the stated aim of condition (2), nor does it make any sense.

40. The interpretation of a contractual term must be considered at the time of contract, not in hindsight, across the full range of its potential application (see *Jet2.com v Blackpool Airport* at paras 50-51). The ability to sell a player depends on the willingness of another club to bid and the willingness of the player to be transferred, factors which are both outside the Club's control. The circumstances applying in the January 2019 transfer window could not on 1 August 2018 have been predicted with any certainty, save that it was very likely that other clubs would assume that the Club was a forced seller. Even if the Club could arrange the sale of a valuable player at a proper price he could refuse to be transferred, thus disabling the Club from generating the required cost savings. I fail to see how condition (2) could be a reasonable imposition on the Club unless there is an implied term which mitigates the evident potential absurdity of an absolute requirement to sell by 1 February 2019 however many players it took to achieve costs savings of £10.57 million.

41. Taking into account all the points discussed above I accept the submissions of the Club that an implied term of best endeavours is necessary. An implied term that the Club is required within a deadline to exercise best endeavours to sell registered players to achieve the required costs savings, and thus is not subject to an absolute obligation to that effect, is reasonable, obvious, clear and necessary to make condition (2) effective. Without that implied term the condition has the potential to cause serious damage to the Club's financial position by requiring the disposal of player registrations at an undervalue, thus making it more difficult to comply with the P&S Rules in the next season, contrary to the stated objective of the requirement imposed on the Club.

42. Neither Regulation 16.20 nor the sanctions available to a Disciplinary Commission under Regulation 91.2 give express power to direct a club to sell players. Both Regulations do provide a power to refuse registrations or impose an embargo on registrations. Such powers to control expenditure on the acquisition of players do not raise any of the difficulties which are inherent in the requirement that a club should sell players.

Failure to comply with condition (2)

43. On this issue the burden of proof lies on the EFL. There is no evidence and no allegation that the Club deliberately sought to hold back from selling players in order to preserve its competitive position in the last few months of the 2018/19 season. The EFL did not challenge the evidence from Ms Gallagher that the Club was selling into a difficult market, in which potential buyers knew that the Club was being required to sell players.

44. The Club fully set out its positive case that it exercised best endeavours in some detail at paragraphs 19 – 31 of Ms Gallagher's witness statement (as well as at paragraphs 8 to 12 of her earlier witness statement) and in paragraphs 38 to 47 of its written argument. The EFL chose not to provide any evidence to counter the points made by the Club, and its written argument did not seek to address this aspect of this case. Ms Gallagher was cross-examined by Mr Segan for the EFL. The cross-examination focused on what were suggested to be omissions in the diligence exercised by the Club in seeking to make transfers of players.

45. In those circumstances I can deal in summary with the most relevant aspects of the Club's evidence. Those points are:

(1) The most valuable player was [redacted] and he was placed openly on the market through an online platform. That process generated a number of offers, ranging from [redacted] payable in stages to [redacted] payable in stages plus a conditional fee of [redacted], as set out in the table at paragraph 11 of Ms Gallagher's 2019 witness statement. On 20 November 2018 the board of the Club, in preparation for the transfer window, had decided that [redacted] could be sold for [redacted] It is a reasonable inference from the heading of the document recording that decision that the

board did have in mind compliance with the requirements of condition (2). Ms Gallagher's evidence in cross-examination was that the board had agreed to accept a minimum of [redacted] for the player. She did not know the basis of that valuation but knew that the Club's agent had had a number of conversations with the chief executive. Mr Ren's evidence was that he had been given by the chairman a minimum price of [redacted] guaranteed. There is no evidence on which I could reach the conclusion that the board's view as to the minimum acceptable price was unreasonable. In June 2019 [redacted] was sold for [redacted], a price which does not support any suggestion that the board's view on value had been unreasonable.

(2) On the evidence of what occurred up to 31 January 2019 it is clear that unless the Club could sell [redacted] at the minimum price acceptable to the board then the Club would not be able to make sufficient cost savings to meet the required £10.57 million. The evidence from Ms Gallagher was that the net savings from a sale of [redacted] at the best price offered would have been just over [redacted] At 31 January the other transactions had in total yielded only [redacted] so the Club would still have been short by at least [redacted]

(3) The Club did make available a number of other players on the online platform but none of the offers received resulted in any substantial savings. The Club sold three players on permanent transfer and made two loan transfers.

(4) One of the players offered for sale on the online platform was [redacted] No offers were made for him in the transfer window. However on [redacted] May 2019 he was transferred to another club at a transfer fee of [redacted] That also supports the unchallenged evidence of Ms Gallagher that in January 2019 the Club was selling into a market that was not prepared to offer fair value for the Club's players.

(5) The Club was prepared to transfer [redacted] a high earning player, but he declined to be transferred to another club.

46. On that evidence I conclude that the Club did make best endeavours to comply with condition (2). The failure of the Club to make the required cost savings by 1 February 2019 is not proved to have been due a lack of best endeavours. The most obvious explanation is that the Club was seen as a forced seller and the players on offer, apart from [redacted] were not viewed as having significant value in the January transfer window.

47. I set out below the main oral submissions made by Mr Segan on the Club's evidence, with my findings on each point:

(1) If the Club had accepted the last offer for [redacted] that would have met the requirements of the business plan.

The witness statement of Ms Gallagher at paragraph 45 contradicts that point.

(2) The Club made few steps in August 2018 and took no proper steps to plan for the transfer window.

The evidence of Ms Gallagher at paragraphs 19 – 27 does give evidence of the steps taken, and at paragraphs 28 – 33 of the strategy adopted by the Club to meet the requirements of condition (2).

(3) The valuations reached in the board document dated 20 November 2018 are unexplained and unsupported by any evidence as to how they were reached.

Ms Gallagher's evidence on this point was limited but I have no evidence on which I could find that those valuations were unreasonable, in particular in relation to [redacted]

(4) The offers from [redacted] and other clubs were rejected out of hand.

The evidence from Ms Gallagher was that there were conversations with clubs which made offers and the door to further negotiation was not closed. In any event a swift rejection can be a good negotiating

tactic and in this case it did not deter a number of clubs from making further offers for [redacted]

(5) The evidence does not show any proper consideration of the business plan and how it could be complied with.

I note that the EFL does not produce any evidence that there were other steps open to the Club which it ought reasonably to have taken to comply with condition (2) and which would have yielded greater cost savings than those actually achieved.

(6) There is no evidence that players' attitude to a possible transfer was a stumbling block to a transfer.

That point is not correct (see Ms Gallagher's witness statement at paragraph 41) but does not affect my finding on this issue.

(7) There was a suggestion in cross-examination that the Club ought not to have cut out its agent as an intermediary if it wished to meet the requirements of the business plan.

The evidence from Ms Gallagher was that the Club's agent did have conversations about the transfer of [redacted] but for other players the Club sought to make direct contact with interested clubs, in order to avoid agents' fees. That is not an unreasonable approach to have taken.

48. For the reasons set out above I find that the EFL has not discharged the burden of proving that the Club did not use its best endeavours to make sufficient player sales to achieve costs savings of at least £10.57 million by 1 February 2019.

Conclusion

49. For the reasons given above the Disciplinary Commission decides:

(1) The charge of misconduct set out in the letter dated 14 May 2019 is dismissed.

(2) Liability for the legal costs of the parties and the costs of the arbitration, and the assessment of such costs, is reserved.

(3) Each party may make submissions on costs within 14 days of this decision, with a detailed schedule of the costs claimed. If necessary either party may reply to such submissions within 7 days.

(4) Each party may also make submissions within 14 days of this decision as to whether this decision is to be published in accordance with Procedural Rule 20.2 and, if so, what redaction is required to protect the confidentiality of third parties or the Club.

Charles Flint QC

6 March 2020

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