Sankofa (Osei) & Charlton AFC Ltd v The Football Association [2007] APP.L.R. 01/12

JUDGMENT : MR. JUSTICE SIMON: QBD Commercial Court. 12th January 2007

1. This is an application for an injunction to permit the first claimant, Osei Sankofa, to play in a Premiership match tomorrow. My conclusion is that no injunction should be granted.

2. The background to the application, which is made by Osei Sankofa and Charlton Athletic Football Company Ltd. against the FA, is an event which occurred during a football match played on 2nd January 2007. The first claimant ("the player") was playing for Charlton Athletic and was sent off as a consequence of what the referee regarded as a foul committed by him in the penalty area which had the effect of depriving Arsenal, against whom Charlton were playing, of a scoring opportunity. The consequence of that sending off was that he faced an automatic one match ban under the FA Rules. That would have taken effect in relation to the next match that Charlton Athletic played.

3. On the following day, in accordance with the FA Rules, Charlton and the player brought a claim for what is described in the Rules as "*wrongful dismissal*": that is to say, they asserted that the referee had wrongfully dismissed the player from the field of play and that therefore the one match ban should not take effect.

4. The claim was made by reference to an analysis of the match and evidence, which included a DVD. The disciplinary rules and procedures provide as follows:

   "CLAIMS OF WRONGFUL DISMISSAL
   (a) A Player and his Club may seek to limit the disciplinary consequences of the dismissal of a Player from the Field of Play by demonstrating to The Association that the dismissal was wrongful".

5. The time limits in relation to a claim for wrongful dismissal are strict, as is made clear from the provisions, and, in particular, sub-para.(f). Sub-para.(h) provides as following:

   "Prior to the commencement of the suspension, a Disciplinary Commission will be convened to decide the matter on any relevant documentary and video and/or DVD evidence submitted. The following procedures will be used at a Commission unless the Commission thinks it appropriate to amend them:

   The Commission Secretary will produce:

   I. The Referee's report and reports from any other Match Official and any other evidence supporting the Referee's action.
   (i) All statements and video and other evidence provided in support of the claim, including details of the Player;

   II. After conclusion of the evidence, the Commission will deliberate and reach its decision on the claim;

   III. The decisions available to a Commission are:
   (i) The Claim is rejected and the Player serves the standard punishment set out in the Memorandum (that is to say, the one match ban).
   (ii) The Claim may be rejected if considered frivolous, in which case the Commission will have the discretion to increase the penalty to up to twice the standard penalty".
   (iii) The Claim is successful and the standard punishment set out in the Memorandum is withdrawn and the fee returned".

   IV. The decision will be conveyed to the Commission Secretary who shall prepare minutes of the decision of the Commission and communicate the decision to the Club that day".

   It is to be noted that it is the decision that is to be conveyed. I will turn to the significance of that in the context of the argument on behalf of the defendant, by Mr. Lewis, that this is a quick procedure which is not susceptible to legal interference by the court.

6. Sub-para.(1) reiterates that the decisions available include increasing the penalty, if the Commission believes that the claim for a wrongful dismissal is frivolous or an abuse of process. Then at sub-para.(n): *"The decision of the Disciplinary Commission in relation to a claim of wrongful dismissal is final and binding on all parties and is not subject to appeal".*

   This is another provision on which Mr. Lewis places reliance. In his submission this reinforces the general impression conveyed by the Rules, that this is a disciplinary procedure which is enforced by the body responsible for discipline in the sport, and is not easily susceptible to review by the court.

7. On 4th January the respondent, the Football Association, wrote to Mr. Parkes, the Secretary of Charlton Athletic: *"At a meeting of the Disciplinary Commission held today the members considered your claim for wrongful dismissal in relation to the above player. From the evidence adduced the members ruled that it was not a case of wrongful dismissal. In addition, the members were satisfied that the claim for wrongful dismissal was deemed to be frivolous. Therefore in addition to the one match suspension already imposed the player will be required to serve a further one match suspension".*

   It is implicit that that is a finding within Rule 5(h)III(ii). Mr. McParland, on behalf of the claimants, submits that that decision is both poorly expressed and lacking in reasoning. One question which arises is whether and, if so, to what extent, reasons have to be given for the decision of the Disciplinary Tribunal.

8. On 8th January Charlton Athletic wrote to Jonathan Hall of the FA in the following terms:

"Dear Jonathan,

Following our discussion on Friday [that is to say, 5th January] I write to formally ask you to reconsider the decision to double the ban imposed on our player following his sending off in the Premiership match at Arsenal on 2nd January. Whilst you have explained the criteria on which appeals against sending off need to be made, the fact is that you and officials of the Premier League support our view that the sending off was questionable at a minimum".

It is important to recognise that the views of the FA the Premier League and, indeed, anybody else, were not dispositive of the issue. That was, as a matter of contract, a matter for the Disciplinary Tribunal. I continue with the letter:

"We accept the absolute right and authority of the FA to uphold the referee's decision, but we do not accept that the appeal was frivolous and it cannot be right that we cannot be told on what basis this decision has been reached. I know of no FIFA rules that prevents this. I know you are sympathetic to this point of view, and so are the Premier League, and you have indicated that you intend to propose a change to current practice that would mean disciplinary commissions need to be transparent and formally record the reason for decisions reached. In the interim that does not help our situation and I do hope the matter can be reconsidered".

9. The matter was indeed reconsidered, and a response was given on 10th January. It seems to me that the fact that both sides proceeded on the basis that the matter was going to be reconsidered is a complete answer to one of the arguments advanced by Mr. Lewis, that there has been unreasonable delay in making this application. I should note that the application was in fact made at 2.45 on Friday and, subject to a half an hour break when I had other duties, continued until shortly before I began giving judgment at about 6.05. As I say, the matter was reconsidered and on 10 January a decision was sent by Mr. Hall to Mr. Varney, the Chief Executive of Charlton Athletic. It was a response to his fax of 8`h January and reads as follows:

"Under the FA Rules and Regulations this is a decision of the Disciplinary Commission and I am afraid that the disciplinary procedures are quite clear, in that the decision of the disciplinary commission in relation to such a wrongful dismissal claim is final and binding on all the parties and is not subject to appeal. I am aware that you have written to Alan Wilkes on the same matter and you ought to have received a reply on behalf of Barry Bright, the Chairman of the Commission".

I will come back to that shortly.

"Different people will have a different opinion as to whether or not the sending off itself was justifiable. Whatever those views are, I would agree with you that the FA, through its disciplinary commission, has a right to uphold the referee's decision. As I also explained in our telephone conversation, I am afraid that I do not know why the Disciplinary Commission in this case also felt that the appeal was frivolous. You are right to point out that I am keen to ensure that Disciplinary Commissions need to produce written reasons for the decisions that they reach, including claims for wrongful dismissal and mistaken identity. Whilst I do not believe that any such reasons need to be particularly lengthy, I believe it would be a helpful step towards ensuring that Clubs understand the reasons for the decision whether or not they agree with the decision. This is something which we are hoping to have discussed at the next Disciplinary Committee".

It is, as I have already indicated, a matter of complaint that the reasons for the Disciplinary Commission's decision that the claim for wrongful dismissal was frivolous have never been set out clearly. Whether that is an obligation is a matter to which I will return.

10. It is convenient at this stage to refer to a letter which, so far as Charlton Athletic is concerned, appeared not on the day it appears to have been written (9`h January) but at the hearing today on 12th January. It is referred to in Mr. Hall's letter, as I have already indicated, and appears to have come ultimately from Mr. Bright, who is a vice-chairman of the FA and presided over the Disciplinary Commission. It is in the following terms:

"You will appreciate that Commissions do not give written reasoning with regard to wrongful dismissal claims".

I pause to add that that is clearly right. The Rules do not require that reasons have to be given.

"But I feel in fairness to Charlton Athletic I should comment on both the letter referred to above and the specific claim.

1. The claim was dealt with under disciplinary procedures, claim for wrongful dismissal. I therefore find the reference to 'gain an advantage' confusing as in the timing and circumstances of the game concerned the claim was dealt with prior to the next claim irrespective of future opposition or competition.

2. The written reasons submitted with the DVD refers in the second paragraph to a suggestion of offside as does the subsequent letter. Commissions are under clear instructions, initiated by FIFA, that games cannot be re-refereed and the process of wrongful dismissal claims can only be by virtue of a suggestion where the match referee has made a serious and obviously incorrect decision. Whether a matter is offside or not cannot be considered, hence the Commission did not consider this aspect of the claim.

3. The Commission noted that Charlton Athletic stated, 'although it was a foul and therefore a penalty'.

4. The Commission did not concur with the view of Charlton Athletic that the matter was not a goal scoring opportunity.

5. The Commission concurred with the view of the referee in his official report and believed he was totally correct within Law 12(4) in his actions relating to the dismissal of the player.

6. The Commission gave careful and detailed consideration to the claim, having studied the DVD and accompanying correspondence before reaching its decision. As within 5 above and concluded separately, but unanimously, that the submission was frivolous.

7. I am most surprised at the suggested advice now disclosed as having been given by the match delegate co-ordinator, PGMOB who had not appreciated that such advice was indicating, was part of the remit or duties of such a position and will be requesting my comments be submitted through the appropriate body.

8. The decision to reject the claim and the additional sanction of the full member, including an independent panel member, commission was unanimous".

Paragraph 9 reiterates that the finding in relation to wrongful dismissal is final and binding on all parties and is not subject to appeal.

11. Mr, McParland submitted that this letter was not received and appears not to have been sent at least to the right address. It was not sent by fax and there was not much evidence that it was sent at all. On the other hand there was an indication in the letter of 8th January that a reply was coming from Barry Bright. There is now very recent evidence from Mr. Wilkes that it was sent and that it was appropriately sent to the training ground, whence the original claim for wrongful dismissal came. However, in my view, none of this matters very much because, insofar as reasons were given for the decision, those reasons have now been given to Chariton Athletic and one in evidence.

12. Mr. McParland submits that neither the original decision nor this letter explains why the claim for wrongful dismissal was frivolous. The only significant information, he submits, is that the decision was unanimous. However, that itself may indicate that the tribunal was clear in its view even if in error.

13. I should mention in parenthesis a letter from Mike Foster of the Premiership to Barry Bright, sent on 10th January in which he indicates a view that the concept of *"frivolous claims"* was intended to address the problem of tactical appeals. Whether or not that is right, it seems to me that the views of Mr. Foster are not of great assistance to the decision that I have to reach.

14. Mr. McParland submits, in broad summary, that a decision was made without real thought and without any real consideration of the material facts and the rules; and that on a proper approach the Disciplinary Commission could not have made a finding that the claim was frivolous. He submits that such a finding constituted a breach of the rules. Secondly, he submits that, if there was an automatic doubling of the ban - as to which, I have to say, I have seen no evidence - then that itself breached the rules. From that he develops the argument on which the claim is based, that the arbitration provisions of the rules provide for a way in which breaches of contract can be ventilated. Rule K of the Rules of the Association provides for an agreement to arbitrate. At (c) the Rules read as follows:

"Rule K(1)(a) shall not operate to provide an appeal against the decision of a disciplinary commission or appeal board under the rules of the Association and shall operate only as the forum and procedures for a legal challenge on the grounds of breach of contract to any such decision".

This reinforces the general impression derived from the Rules that decisions of disciplinary tribunals are not susceptible to appeal. However Mr. McParland says that it is open to a party who alleges that there has been a breach of contract by the FA to ventilate that before an arbitration tribunal. From that he goes on to say that the court can intervene by way of injunction to protect an asset pending a decision of an arbitration tribunal. He refers to s.44 of the Arbitration Act 1996:

"(1) Unless otherwise agreed by the parties the court has for the purposes of, in relation to arbitral proceedings, the same power of making orders about the matters listed below as it has for the purpose of and in relation to legal proceedings".

Mr. Lewis draws attention to the phrase "*unless otherwise agreed by the parties*". His argument, to which I will come later, is that the parties have agreed otherwise.

"(2) Those matters are:
(e) The granting of an interim injunction or the appointment of a receiver.

(3) If the case is one of urgency the court may, on the application of a party or proposed party to the arbitrary proceedings, make such orders as it thinks necessary for the purpose of preserving evidence or assets".

Mr. McParland submits that the contractual right which the claimants wish to preserve is an asset which would otherwise be lost, and that this brings into play the power under s.44(2)(e) and 44(3). He relies on the decision of the Court of Appeal in ***Cetelem SA v Roust Holdings*** [2005] 1 WLR 355 and, in particular, the judgment of Lord Justice Clarke. He also relies on the decision of Mrs. Justice Ebsworth in the case of ***Jones & anor. v Welsh Rugby Football Union*** (27 February 1997) although in a slightly different context. He submits that sport nowadays may have huge business implications, and that damages may not be an adequate remedy: for example where the affect of a particular decision or action may result in relegation or the equivalent. He also refers to a footnote in "**Sport Law and Practice**", edited by Mr. Lewis and Jonathan Taylor. The footnote (at para.A3186) deals with interim injunctions and refers to what Mrs. Justice Ebsworth said in the ***Jones*** case: *"There is ... an air of unreality*

about a court sitting down to decide whether a player would have made a difference between his team winning or losing a particular match or whether or not he would have been selected for a particular game. It would also be difficult, if not impossible, for a court to calculate the cause of any demotion of a club if there were a suspension and whether and if so what loss flowed from that".

Mr. McParland submits that losing this player who is, and I accept this for the purposes of this application, an important player in an important match may have considerable downside for both player and Club. It may have a significant impact on the Club's fortunes. It may indeed lead ultimately to relegation. That is, of course, an important consideration, although, for the reasons as set out by Mrs. Justice Ebsworth, it is not easy precisely to calculate the effect of a decision of a particular Disciplinary Tribunal or of refusing an injunction in a particular case. Mr. McParland, however, says that if the injunction is refused the only effective remedy is lost. In these circumstances, he submits, on established principles, that the court should preserve the status quo which involves permitting the player to play in the next match, tomorrow at 3 p.m.

15. He accepts, as he is bound to, that the court must consider the position of third parties. Here it would involve considering the effect of refusing or allowing the injunction on the club against which Charlton is playing tomorrow, Middlesbrough Football Club. However he submits that the effect on third parties is not decisive, particularly since Charlton already have no other means of vindicating a right which might otherwise be vindicated by an award in the arbitration. He submits that damages will not be an adequate remedy and that, in those circumstances, submits the application should be allowed. I have accepted his final point, which is that there has been no objectionable delay in making this application.

16. For the defendants, Mr. Lewis makes three points. First, that the power to grant an injunction under s.41(1) of the Arbitration Act is excluded by agreement. He submits that if one looks at the rules, it is quite clear as a matter of contract that there be no recourse to the court. Under s.41(1) the right to injunction exists *"unless otherwise agreed"*. He submits that the parties have plainly excluded the granting of an injunction, and, in any event, that the right to challenge is not an asset within the meaning of s.44(3) and the ***Steeler*** case.

17. He relies on Rule K(5)(c) of the Rules of the Association in relation to awards, that the parties shall be deemed to have waived irrevocably any right to appeal, review or recourse to a court of law. Mr. McParland submits that this relates only to a right to appeal from an award but it seems to me that the provision reinforces a wider impression that the rights of the parties are to be vindicated within the Rules of the Association and not by recourse to a court of law. He submits that it is perfectly sensible to exclude recourse to the court: the subject matter of these disciplinary tribunals is particularly and peculiarly within the expertise of the regulatory body and the sanction is limited. In those circumstances the court should not be invited to intervene.

18. It seems to me that Mr. Lewis is probably right about this, but I would not wish to be taken to decide that the court will never intervene in this type of case. However, such cases are likely to be wholly exceptional and, for reasons I will come to, this is not a wholly exceptional case.

19. The second submission that he makes is that there is really no prospect of success in the underlying arbitration, which is shorthand for a submission that there is no serious question to be tried. He asks rhetorically how can the decision of the Disciplinary Commission be challenged? He points out that it is clear from the rules that the disciplinary process, and the decision, is final (see Rule 5(n)). He accepts that there is an implied term in the contract between the parties that the governing body will act in a way which is procedurally fair and not arbitrary or unreasonable, but submits that there is no further term upon which the claimant can rely. In support of that submission, he relies on a decision of the Court of Appeal in ***Flaherty v National Greyhound Racing Club Ltd*** [2005] EWCA 117 and the judgment of Lord Justice Baker, in which he said that bodies such as the FA's Disciplinary Commission, should be afforded *"as great a latitude as is consistent with the fundamental requirements of fairness"* and *"it is not in the interest of sport to double guess"*. They *"have unrivalled and practical knowledge of the particular sport that they are required to regulate. They cannot be expected to act in every detail as if they are a court of law. Provided they act lawfully and within the ambit of their powers the courts should allow them to get on with the job that they are required to do"*. He submits that there has been no breach of the rules by the FA and that the contrary cannot be argued by Mr. McParland.

20. Secondly, he submits that there is no procedural unfairness that has occurred in this particular case. The parties have agreed a fast track procedure. They have agreed that everything is in writing and they have agreed that a decision will be communicated but not that reasons will be provided. As he puts it, the rules require a decision not reasons. Furthermore, the decision may be right even if the reasons are unsatisfactory. The parties know that if the challenge fails and the claim is found to be frivolous it may result in an increase in the ban from one to two matches; but that is not an unreasonable outcome from the process: it is one player and it is one match. I accept that submission. I find that it is not within the bounds of serious argument that there has been procedural unfairness here, although it may be said that reasons of some sort might usefully be conveyed.

21. Finally, he submits that this was not an irrational decision. It is not ***Wednesbury***, unreasonable. It cannot be said that the tribunal reached a conclusion which no reasonable tribunal could properly have reached. It was not arbitrary or capricious. He submits that, well reasoned or not, whether consistent with other views or not, it was within a range of decisions reasonably open to the Disciplinary Commission. This decision was peculiarly within the purview of the tribunal. He further submits that there is no indication that irrelevant considerations were taken into

account and that the reasons, although not as clear as they might, do not show a lack of thought. In my view, he is right in that submission too and I find that there is no serious question to be tried.

22. Finally, he submits that if this is a matter susceptible to the court's discretion, there are powerful reasons not to exercise that discretion. He relies on three points: first, the effect on third parties. He submits that if the interim relief is granted the player will play against Middlesbrough tomorrow when, if the Club ultimately fails in its challenge, he ought not to have done. This may cause irreparable harm to the innocent third party. The fact that Charlton has come to court today suggests that it takes the view that the player's presence against Middlesbrough will harm Middlesbrough, although granting an injunction in support of an arbitration claim which may fail might also impact on other third parties. The case of ***Stevenage Borough Football Club v Football League (***1996) shows that the effect on a third party is a strong reason for not granting relief. Secondly, Mr. Lewis relies on the question of delay. For reasons I have already indicated, I do not regard that as significant. Thirdly, he relies on what he describes as the limited extent of the affect on the claimant. As he points out, this is a ban on one player for a single additional match. He goes further and says that the decision of the Tribunal has no significant impact on the financial position of the claimants. I have come to the conclusion that the award of damages would not compensate either party in relation to this.

23. I approach the matter on the basis that damages will not be an adequate remedy to either party, and the matter then revolves upon a balance of convenience. For the reasons I have already indicated, albeit shortly in view o£ the hour, I have come to the conclusion that if there was, contrary to my view, a serious question to be tried, the balance of convenience comes down very firmly in favour of refusal of the order.

Mr M McParland instructed by Vertex Law
Mr A Lewis instructed by Charles Russell