

**THE FOOTBALL ASSOCIATION PREMIER LEAGUE**

**DISCIPLINARY COMMISSION:**

**SIR PHILIP OTTON  
DAVID DENT  
MALCOLM GEORGE**

**IN THE MATTER OF**

**ASHLEY COLE  
CHELSEA FOOTBALL CLUB  
JOSE MOURINHO**

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**DECISION OF THE COMMISSION**

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**Introduction:**

- 1 Football Association Premier League (FAPL) alleges that Ashley Cole, Chelsea Football Club and Jose Mourinho have breached the F.A.P.L. Rules relating to what is colloquially called 'tapping-up'.
- 2 Ashley Cole (AC) plays for Arsenal Football Club (AFC). He has been associated with this Club from a very early age, at the age of 16 he signed as a professional and he has never played for any other Club. Hitherto his loyalty to Arsenal has never been questioned. He plays at international level and is a much respected figure in English football.

Chelsea Football Club (CFC) play in the F.A. Premier League.

Jose Mourinho (JM) is a Portuguese national and is currently manager of CFC. He is proving himself to be one of the most successful managers of the age at every level. He is dedicated to the game of football, he is highly personable with a patent determination to win.

## Background

- 3 It is necessary to deal briefly with the background leading up to the events of January 2005 and the involvement of the persons concerned.
- 4 Jonathan Barnett (JB) is Chairman of the Stellar group of companies who handle various interests in the football industry. He is a highly successful players' agent, he acts for a large number of professional footballers. He is clearly a shrewd, tough and well-informed negotiator. He has been Ashley Cole's agent since the player was 16 and has undoubtedly been a major factor in Ashley Cole's burgeoning career. They are close friends, they trust each other and frequently communicate.
- 5 In June 2002 AC through the offices of JB entered into a Players' Contract with AFC for a period of five years at a fixed weekly salary which was not disclosed to the Commission but which we surmise was in the region of £25K to £30K per week.
- 6 After signing the contract AC played a major part in AFC's subsequent success. In May 2004 AFC formed the view that the player's salary was well behind comparable players and should be reviewed.
- 7 David Dein (DD) is Vice-Chairman of AFC. He has particular responsibility for players' contracts and transfers. He indicated to AC that the club intended to improve his contract. AC was naturally delighted. Shortly afterwards negotiations began between DD and JB. DD's suggestion (with which JB agreed) was to extend the existing contract by two years at an increased salary with immediate effect. There was no urgency in the discussions as the existing contract had still three years to run.
- 8 From an early stage JB indicated that AC and he were looking for £60K per week and that AC would settle for nothing less. This was, on any basis, a very substantial increase on what he was then receiving but AC had formed the opinion that this was what he was worth. Negotiations continued in the

following months but by the autumn they had stalled. JB had not budged from £60K. Moreover JB was insisting that as agent he should continue to receive commission on the old contract as well as on the new contract. This did not find favour with AFC.

- 9 On 20 December DD met JB over breakfast at Claridges. JB's recollection is that he and DD struck a deal on £60K per week, they shook hands on it and exchanged compliments of the season. DD denies that any deal was done, or that he had authority at that time to make such a deal. His recollection is that they were not far apart about AC's salary and the conversation was mainly about the agent's commission. These two accounts are irreconcilable.
- 10 We have concluded that what probably occurred was that DD said that he would go back to the Board and that he and Arsene Wenger would recommend £60K for AC and that the Board would probably approve. JB for his part was confident that the Board would accept such a strong recommendation. He felt he had won the day and on that basis they shook hands. In reaching this conclusion we took account of DD's note of the meeting which records a statement of the parties' respective positions and that they would reconsider. Next day DD wrote to all Board Members informing them that "AFC's latest offer had been refused, but I believe that he would settle for a flat (figure) per annum through to 2009 there is no particular rush, but he indicated that we would revert in the early part of January." It is inherently unlikely that DD would have so expressed himself if he had reached a deal with JB.
- 11 On 13<sup>th</sup> January 2005 DD informed the Board that AC's advisors were insistent that a new contract at £60K per week was their "minimum starting point with agent's fees in addition". The Board gave instructions to try and effect a compromise at a lesser figure

From this we can safely infer that the Board refused to go as far as £60K and that DD was given authority to effect a compromise with what was to be a final offer. It is significant that Arsene Wenger was extremely anxious not to lose AC.

### **The 19<sup>th</sup> January meeting**

- 12 On 19<sup>th</sup> January DD met JB and David Monasseh (also of Stellar) at JB's offices. This proved to be a critical meeting which triggered subsequent events. There is no dispute that DD tabled the offer of £55K "commission on a new contract plus an Executive Box less (figure) %". He made it clear that this was a final "take it or leave it" offer. JB robustly rejected the offer, purported to be disgusted, accused DD of reneging on the Claridge's deal and reiterated that they wanted £60K. DD said he would go back to the Board. JB claimed that other players were telling AC that he was worth more than on offer. He showed DD a text message on JB's mobile phone purportedly from Patrick Vieira, AFC's captain telling AC 'not to accept less than £80K'. JB stated that they could get £80 to £90K per week and that they could sell AC and get £20 million for him. He then gestured to raise the phone saying 'Do you want me to make a phone call, this is take it or leave it time', from which DD inferred (and, as we find, JB intended that he should infer) that there was another Club that was seriously interested in signing Ashley Cole. DD's note of the meeting reads:

"Left the meeting in no doubt that there was a back up offer on the table (assumed Chelsea) as JB's attitude was aggressive, arrogant and intransigent".

- 13 JB recalls that DD observed that AC had nowhere else to go to and said 'I have spoken to Peter (Kenyon?) again and Chelsea are not interested in AC.' If DD did say this and the content of the conversation with Peter was true then it accurately stated CFC's position at that time. But it is unlikely that DD had telephoned CFC to make such an inquiry when the

negotiations were still proceeding and the final offer was about to be made. We do not rule out the possibility that DD might have made such a remark in what was becoming a sophisticated game of bluff.

- 14 At some stage JB telephoned AC in DD's presence and the player indicated that he was gravely disappointed in AFC's attitude and he still wanted £60K. DD spoke to AC (who was driving) and tried to explain the figures and that the offer represented a total increase of £3.5 million and asked AC to meet him so that he could explain in more detail. AC agreed but the meeting never took place as other events overtook them.
- 15 There can be no doubt that this was a bad-tempered and acrimonious meeting which ended in deadlock. On the following day (20<sup>th</sup> January) DD by chance saw David Monasseh at the Landmark Hotel and told him that he thought the meeting had been 'distasteful'.
- 16 On 24<sup>th</sup> January DD wrote in a letter to all Board Members:

"Following our Board meeting last week I had a meeting with Ashley's agents who will not budge and are insisting on the figures that I have reported of £.... per week plus ..% commission on all monies he earns. Arsene and I will be meeting them again this week."

## **The 27<sup>th</sup> January Meeting**

### ***How did it come about?***

- 17 Thereafter events took a dramatic turn. Pini Zahavi (PZ) is an Israeli who engineers worldwide football transfer deals. Whereas JB acts for the player in such transactions PZ acts for the purchasing or selling Club. The two agents had done business together in the past. PZ was approached for a statement for these proceedings but declined. We infer that JB contacted PZ and explained the position and in all probability the two agents

discussed the possibility of a transfer deal for AC to another Club which, if achieved, would have been of considerable advantage to both agents. This can be the only explanation of why on the 25<sup>th</sup> January PZ telephoned Peter Kenyon (PK) the Chief Executive of CFC with particular responsibility for transfer deals. PK told us that PZ had dealt with and on behalf of CFC in various transactions. PK told us (and we accept) that he returned the call on the 26<sup>th</sup> and records show that it lasted about seven minutes. PZ told him that AC wanted to meet Chelsea on the basis that he was going to leave Arsenal. Negotiations with AFC had broken down regarding a new contract and AC wanted a meeting to discuss the opportunity of joining CFC. PK agreed to do so and, we infer, PZ duly informed JB that the meeting was on. On the following day PZ rang PK to tell him that the meeting had been arranged, the venue and the time (3 p.m.).

- 18 PK informed JM about the meeting and asked him to accompany him. The manager had been widely reported that CFC were looking for a Left Back following the departure of Babayaro. As PK later explained when asked by a representative of FAPL:

“I requested Jose come to the meeting. So that was at my request. I think given the circumstances of a high profile player who plays for one of our competitors expressing a desire to join Chelsea, then a key component of that in any discussion is the manager”.

JM was at first reluctant, not because such a meeting might infringe FAPL rules but because the previous day had been his birthday and a match and he was looking forward to a day off at home with his wife and children. An opportunity to meet secretly AC face to face who played at Left Back was too much of a temptation. JM agreed to attend the pre-arranged meeting. At 2.41 pm PK rang PZ to say ‘they’ were on their way. When they arrived PZ, JB and AC were already at the Royal Park Hotel.

- 19 AC’s and JB’s account is that neither knew that a meeting had been arranged. After training that day AC made a routine visit to JB’s office to

sign fan mail and to have a further discussion about his future. By this time his determination to leave Arsenal had hardened and he wanted to explore the possibility of playing for a Spanish or Italian Club at the end of his existing contract. JB suggested that he should meet PZ who was the ideal person with whom to discuss such matters. JB thereupon telephoned PZ who happened to be in London and a meeting was arranged at short notice at the hotel which was very close to Stellar's office. JB and AC went together and met PZ and a discussion took place about AC's prospects and conditions with a foreign club. Without any warning and to AC's and JB's astonishment there was a knock at the door and in walked JM and PK. They both assumed that JM and PK were there for a pre-arranged business meeting with PZ. Introductions were made followed by an inconsequential conversation and after 6-10 minutes AC and JB were uncomfortable to be in the presence of such senior and important men from CFC that they departed leaving JM and PK with PZ. In essence they maintain that there was no 'meeting' in a pre-arranged sense but merely a chance encounter.

- 20 We had grave difficulty in giving credence to AC's and JB's account. If we accept (which we do) PK's evidence of the seven minute phone call from PZ then PZ could only have been in a position to persuade PK to attend a clandestine meeting by conveying to PK what he had already been told by JB concerning the breakdown of AC's contract negotiations, his disenchantment with AFC, his intention to leave Arsenal and his desire to meet CFC face to face. The two agents must have engineered the meeting. It is unlikely that PZ would have arranged the meeting (or CFC would have agreed to attend) unless it was certain that AC would be present. This could only have been assured by JB with AC's consent. It would have been highly embarrassing for PZ and JB if CFC were led on a wild goose chase to the hotel if, as was suggested, AC had decided to go shopping! A small point, but it is not without significance that PZ had already arranged for sandwiches and other refreshment.

- 21 The Commission concluded that it was inconceivable that:
- (1) PZ did not inform JB of the arrangement to meet CFC.
  - (2) That JB did not inform AC and
  - (3) That JB and AC were unaware that PK was about to arrive – but they may not have known that he was to be accompanied by JM.

We accept that PK had no other business with PZ that afternoon and that the sole purpose of PK and JM travelling to the hotel was to meet AC. In summary, we are satisfied that every individual was fully aware that a pre-arranged meeting was to take place and that its purpose was to discuss with Ashley Cole his future.

***What occurred at the meeting of 27<sup>th</sup> January?***

- 22 Our starting point is that we were unable to accept AC's and JB's evidence that the meeting lasted at most for only 10 minutes. We prefer PK's and JM's estimate of 40-50 minutes.
- 23 PK gave evidence that JB did most of the talking and AC did not make a great contribution. At his second interview PK is recorded:

MR KENYON: As I say, it was their meeting. I think it was John Barnett who started off explaining why we were there and the situation with Ashley. We were there, generally, to listen about the situation... .He was concerned that the relationship with the manager was not good, that there was definitely a series of cliques and the team was primarily run by the French boys. So the relationship, to our surprise, he articulated very strongly that he was not happy with it. He then seemed very unhappy about the way that the contract negotiations had taken place, with the distinct impression that

the manager did not support it and that there had been some sort of back-tracking, that he thought they were getting somewhere and for some reason, which he did not go into, there had then been a fairly major turnaround in the negotiations themselves. That is what had led to him and Jonathan Barnett reiterating on numerous occasions during the meeting that he would not be staying at Arsenal after the end of his contract.

He was also concerned that he did not feel that there as a team spirit and it was clear from the outset, obviously from being on England duty with some of our boys, that he felt that there appeared to be a very good team spirit at Chelsea and that was why we were doing so well. He also showed some concern about the lack of investment in the team going forward. Clearly, he was a player who was still young, ambitious and wanted to win things. Those were his primary reasons for being there. I have to say it all came across very genuine and legitimate. He did not come across as somebody who was wanting just to flit around. He was a serious professional who was looking at his career in a pretty structured and organised manner.

...

MR FITZPATRICK: So the clear impression you got from that was that he was interested in coming to Chelsea?

MR KENYON: Correct."

- 24 This leads to the question of what part (if any) CFC played at the meeting? Both PK and JM were adamant that they "only went to listen". They made no response, there was no commercial exchange as to terms and timing of AC's departure from AFC. Moreover CFC had already compiled a 'wish list'

of potential Left Back recruits for the 2005-6 season which did not include AC. JM stated he was only interested in a Left Back if he was at least 1m 80cm tall and AC (who stands at 1m 68cm) did not meet this criterion. He attended because he wanted to gain “intelligence” on the state of relations at Highbury and to assess AC psychologically. He and PK never had any intention or desire to acquire AC for CFC and said so immediately afterwards.

- 25 We had grave difficulty in giving credence to this account. JB could not have talked for 45 minutes or more setting out AC’s position, his grievances and his desire to move to Chelsea. PK found this convincing. Such a meeting at this level and with these participants was, by any standards, unique. AFC were unaware what was about to take place and it gave everyone concerned the one-off opportunity to explore the possible termination of AC’s contract and a transfer to CFC in time for the 2005-6 season. CFC were known to be looking for a top class Left Back. AC is recognised by JM as a “very good player” – not surprisingly as he is probably the best Left Back in England. PZ had a potent commercial interest in such a transfer. At £20 million he might have stood to gain as much as £1 million in commission. JB had a similar interest in a transfer, from the transfer itself and AC’s new contract with the purchasing club.
- 26 We are satisfied on the balance of probabilities that PK and JM were sufficiently interested in the possibility of signing AC for Chelsea that they did not make the journey merely to listen to AC’s grievances. They were both far too important and busy to take time out for that. PK was sufficiently convinced by what PZ had conveyed to him that he agreed to go to a secret meeting with a contracted player. He also concluded that if Ashley Cole was intent on leaving Arsenal and desired to come to Chelsea JM’s presence was imperative so that he could make an assessment as to whether he wanted AC to join the Chelsea squad. It was an opportunity which was unlikely to occur again. If AC was prepared to leave AFC it

would be in CFC's interest to sign him rather than let such a good player go to another club. AC's lack of height was not an insurmountable difficulty, his short stature does not prevent him from performing at the highest international level at Left Back – a fact which must have been obvious to JM.

- 27 We are driven to the conclusion that we must reject the 'we only went along to listen' explanation and we safely infer that there was an active discussion between all those present on the basis that AC was going to be up for sale in the near future, CFC were exploring the prospect of acquiring him and with a view to negotiating a contract with AC and his agent. As Mr David Pannick QC aptly put it 'if a manager and a chief executive meet a player at a secret location without informing the player's club, the only possible defence is that they only went to listen". We reject that defence.
- 28 We were told that after the meeting JM and PK decided that they were not interested in signing AC and PZ and JB were so informed on the following day. However the fact that the parties had been together at The Royal Park Hotel came to the notice of the press. On Saturday 29<sup>th</sup> January AFC played away at Wolverhampton. When driving back to London DD was alerted to the News of the World interest. On the following day the storm broke. DD rang PK who prevaricated even to denying that a meeting had taken place and that the story was rubbish. He assured DD that CFC were not interested in AC. DD also spoke to PZ and JB who also rubbished the story. CFC was obviously embarrassed and maintained a "no comment" strategy. On Monday PK telephoned Richard Scudamore, Chief Executive of FAPL to assure him that CFC were not interested in AC.

### **The Charges**

- 29 Ashley Cole is charged with a breach of Football Association Premier League Rule K5. which states:

“Subject to Rule K6, a Contract Player, either by himself or by any Person on his behalf, shall not either directly or indirectly make any such approach as is referred to in Rule K4 without having obtained the prior written consent of his Club”.

In that:

“On or before 27 January 2005 you directly or indirectly made an approach to a Club (namely, Chelsea Football Club) with a view to negotiating a contract with such Club without having obtained the prior written consent of the Club to which you are contracted, namely Arsenal Football Club”.

- 30 It is not disputed that Ashley Cole is a contracted player, that Arsenal Football Club did not consent and that to his knowledge Jose Mourinho and Peter Kenyon are “Officers” of Chelsea FC.
- 31 On the facts as we have found them and as recorded in the decision which has been handed down, the Disciplinary Commission are satisfied that the case against Ashley Cole is proved. The meeting at the Royal Park Hotel was initiated by Pini Zahavi and Jonathan Barnett. Jonathan Barnett was acting as Ashley Cole’s agent and on his behalf. Ashley Cole knew that the meeting was being held and had been arranged. He attended the meeting. This constituted an “approach”. At the meeting he was present throughout. Jonathan Barnett was acting on his behalf and Ashley Cole himself contributed in some part to the discussion with the officials of Chelsea FC endorsing what Jonathan Barnett had said regarding his discontent with Arsenal FC and his interest in joining Chelsea FC. This was “with a view to negotiating a contract” for his transfer from Arsenal to Chelsea FC for the 2005/6 season and a player’s contract with Chelsea FC.
- 32 Accordingly we find the Charge against Ashley Cole proved.

***The charge against Chelsea FC***

- 33 It is alleged that Chelsea FC breached Rule K3 which provides:

“Any Club which by itself, by any of its officials... makes an approach either directly or indirectly to a Contract Player... shall be in breach of these Rules”.

There is no dispute that Peter Kenyon and Jose Mourinho are “Officers” of Chelsea FC, that Ashley Cole is a Contract Player, Arsenal FC had not approved any approach either by Chelsea FC to Ashley Cole, or vice versa and that these facts were known to those officials.

- 34 As before FAPL must prove on the balance of probabilities:
- (1) that Chelsea FC directly or indirectly made an approach to Ashley Cole
  - (2) with a view to negotiating a contract.
- 35 On the facts as we have found them and recorded in the decision that has been handed down, we are satisfied that the case against Chelsea FC is proved. Although the meeting at the Royal Park Hotel was initiated by Pini Zahavi and Jonathan Barnett, Peter Kenyon and Jose Mourinho agreed to attend the meeting knowing that Ashley Cole was a contracted player and that he would be present. They travelled to the meeting and stayed throughout the meeting and on their own story, listened to Jonathan Barnett and Ashley Cole. This conduct constituted an “approach”. In other words Ashley Cole and Chelsea Football Club approached each other.
- 36 We reject Peter Kenyon’s and Jose Mourinho’s explanation that they merely went to listen. They played an active role in a discussion between all those present on the basis that Ashley Cole was going to be up for sale in the near future and explored the prospect of acquiring him and assessed whether he would be an appropriate player to join their squad. This amounted to an approach with “a view to negotiating a contract”. It was not necessary for negotiations to be completed on that occasion, but with a view to entering into contractual relations at a later date. The Commission

is persuaded that if Chelsea Football Club had decided to carry the matter forward to the next state they would have informed Arsenal Football Club through the proper channels of their interest.

37 Accordingly we find the Charge against Chelsea FC proved.

***The case against Jose Mourinho***

38 It is alleged that Jose Mourinho breached Rule Q.1 which provides:

“Managers shall conduct themselves in accordance with the Code of Conduct for Managers set out in Appendix 6.”

Appendix 6 (relevant parts) provides:

“3. A Manager shall comply with ... the Rules of the FA Premier League...”

and in particular:

“that between 25 and 27 January 2005, contacts were made and a meeting took place between Officers of Chelsea FC and Mr Cole of Arsenal FC which separately or collectively constituted an approach contrary to FAPL Rule K3”.

Again there is no dispute that Jose Mourinho and Peter Kenyon are “Officers”, that Ashley Cole is a “Contract Player” and that this fact was known to Jose Mourinho.

39 On the facts as we have found them in the decision which has been handed down to the parties and by parity of reasoning we are satisfied that Jose Mourinho made an “approach” collectively with Peter Kenyon when he agreed to attend and accompanied Peter Kenyon to the secret meeting with Ashley Cole and his agent Jonathan Barnett. The presence of the Manager was vital (as Peter Kenyon put it ‘a key component in any discussion’). On his own account he took the opportunity to obtain intelligence on the state of

affairs at one of Chelsea FC's major rivals, to assess whether Ashley Cole would be a suitable player to join the Chelsea Squad and to explore whether Ashley Cole genuinely wanted to leave Arsenal FC and join Chelsea. He thus played an active part at the meeting and accordingly he did so "with a view to negotiating a contract". It is immaterial that by the end of the meeting he had decided he was not interested in Ashley Cole and so informed Peter Kenyon.

40 We find the Charge against Jose Mourinho proved.

## RESTRAINT OF TRADE

- 41 Mr David Pannick QC on behalf of AC submitted that even if AC or his agent acted in breach of Rule K5, as a matter of law, the rule is an unlawful restraint of trade and cannot be enforced against AC. He referred the Commission to the well-established principal in ***Nordenfelt v. Maxim Nordenfelt Ganz & Ammunition Co Limited*** 1894 AC 535 which have been applied in a line of cases involving professional bodies, and Chitty on Contracts (2004 29<sup>th</sup> edition). [See also “Sport: Law and Practice” by Lewis & Taylor A3.135 et seq.]
- 42 Leading Counsel submitted that K5 is a restraint of trade in that it prevents AC from talking to another Club about the possibility of making an offer to AFC for his transfer to that other Club. Moreover K5 prevents AC from investigating whether another Club would be interested in employing him after his contract with AFC expires. Thus the rule runs contrary to the policy of the law of promoting the freedom of employees to advance their careers by considering alternative employment opportunities.
- 43 Mr Pannick further submitted that it is not possible to justify the broad restrictions on AC’s freedom to identify other possible employment options. The restriction is unilateral; there is no similar restriction on the freedom of AFC to discuss with other Clubs the possibility of transferring him to another Club, nor is there a restriction on other Clubs to discuss with AFC a possible transfer to that other Club. Moreover there is no equivalent restriction relating to managers (and coaching staff). A manager is free to discuss his future with another Club during the period of his existing contract. He pointed out that in other European football leagues (including France, Spain and Germany) there is no equivalent rule, and those leagues function without such a restriction. Similarly FIFA has no such restriction.

- 44 Mr Mark Gay on behalf of FAPL recognised that K5 (allied to K3) is capable of amounting to restraint of trade. He submitted that the restraint is not absolute but limited in scope. The restrictions rarely, if ever, in practice operate to a player's detriment; a disaffected player can always leave his Club. He accepted that it is for FAPL to prove that the restraint is reasonable, but submitted that when analysed K5 in particular (and K3) are not an unreasonable restraint of trade; on the contrary, they are both fair and reasonable in the interests of the parties and are in the public interest. Moreover they are the minimum necessary to protect the interests of the covenanting parties and the general public.
- 45 Evidence was called on behalf of FAPL and Ashley Cole. John Alexander is the Club Secretary of Tottenham Hotspur FC. In his opinion the rules K5 and K3 are integral to each other and are necessary and readily justifiable in the context of professional football. If they ceased to exist there could be a number of adverse consequences for the game, including the competitive integrity of competitions, increased player instability and damage to the relationship between the Club and their supporters. The rules are not imposed from on high but evolve as a result of consultation between interested parties, including the Professional Footballers Association (PFA) which represents and defends the interests of players. Unsolicited approaches direct to players and can have a devastating effect on squad morale, and increase 'player churn'.
- 46 Michael Foster is Secretary of the FPAL, he gave evidence on a similar vein and provided a long and detailed statement covering:
- (1) The system of player contracts in England
  - (2) The involvement of the PFA and
  - (3) Why K3 and K5 are necessary in which he gave the following reasons:
    - (a) competitive integrity

- (b) contractual stability
- (c) team stability
- (d) competitive balance.

47 In regard to contractual stability he made two telling points:

“Contractual stability, particularly under long term contracts, protects players from the vicissitudes of poor form, injury and poor treatment by clubs. It allows players to plan and to lay down roots in a particular area. Football is already a risky business for players. Hard work is no guarantee of success; injury can ruin even the best laid plans. Above all, a player’s career is much shorter than that of other professions. It is crucial, therefore, that the players can practise their trade in an environment which offers them a healthy balance of stability and freedom. This is what I consider the current system provides.”

and pointed out the consequences if the system did not exist.

“The situation that would exist if there was no long term contractual stability is one which is likely to be highly disadvantageous to players. Players would be subject to relatively short term contracts, the renewal of which would depend upon player’s short term playing form and on the availability of competing alternative players for his position in the squad. Players could be ditched for injuries which, although serious, are not career-threatening.”

48 We decided to place no reliance upon such contributions as were proffered by Arsenal FC, David Dein and Chelsea FC for obvious reasons.

49 Ashley Cole gave evidence as to how the rule affected him and restricted the opportunity to exploit his talent. A witness was then called who caused us to reflect upon the restriction and which graphically illustrated that hardship and unfairness can occur in a particular situation. (Neil) Shaka Hislop currently plays in goal for Portsmouth FC. He is now 36 years of age. He has been playing professional football for 13 years at the highest

level in this country and internationally. During his career he has won numerous awards and accolades, particularly a PFA Special Merit Award for his continued involvement with the "Show Racism The Red Card" campaign.

- 50 He is nearing the end of his career. Because of his age, ability to seek and obtain employment, and in particular, a reasonable contractual term is more limited than that of a young player. His current contract expires on 29<sup>th</sup> June 2005 and at the time of making his statement, Portsmouth had not decided whether they will renew his contract at the end of its term. He has a wife and four children. He stated:

"In a situation such as this, any normal person would undoubtedly be taking steps to source potential alternative employment at the end of his current contractual term. However, due to Rule K5, I am prevented from doing this. The only way I (or my agent) can approach other Clubs to make enquiries is to ask Portsmouth for written consent. This is nonsense and entirely inequitable. I do not see why I should be forced to go "cap in hand" to my current employer in order to ensure that I am still in a position of being able to support my family. To force a player into this position is unseemly."

- 51 As a result he has no alternative but to wait until the third Saturday in May to contact other Clubs and to be left with only 5 weeks to try to find alternative employment in the event that Portsmouth do not renew.
- 52 Mr Gordon Taylor is the Chief Executive of the PFA. He did not give evidence for any party but provided a letter which the parties agreed should perform part of the record. He gave an illuminating history of how the rules had been formulated over the years. He stated:

"Rules K3 and K5 are a section of a number of rules pertaining to members of the PFA and agreed with the Premier League within the collective bargaining agreement to try and achieve a fair balance between the rights of the players, the rights of the clubs as employers and the need to bear in mind special consideration appertaining to sport in order to try to achieve a fair and competitive

balance and in order to protect the image of the game in front of the paying public”

and later:

“The rules speak for themselves with regard to the specificity of sport..... and to try to achieve fair competition and to avoid the biggest, richest clubs looking to destabilise players of rival clubs, for example, and also of course if such events clearly become public without the knowledge of the particular player’s club, this can cause obvious problems and disenchantment of supporters and, of course, it also effects the solidarity and fair competition of the League and this is why we have been prepared to sign up to such rules.”

## **Conclusion**

- 53 The Commission agrees with Mr Pannick’s primary submission that K5 is a restraint of trade. It prevents a player from talking to another club about the possibility of a transfer to that other Club, or employment after his current contract expires. The effect of K5 (in conjunction with K3) is that both players and Clubs are prevented from approaching each other without the consent of the player’s existing Club.
- 54 However we are satisfied that the restraint is not absolute in its terms and is circumscribed by limitations. K5 does not apply to out of contract players or players after the third Saturday in May who will be out of contract on 1<sup>st</sup> July. It is often possible in certain circumstances (such as personal) for a player to seek the consent of the Club to approach another Club or for another Club to approach the player. In practice if a player is determined to leave he cannot be forced to stay and play.
- 55 We also took account of the fact that the restraint is not unilaterally imposed on a player but is common to all players’ contract as a result of collective bargaining. The Players’ Contract is the product of a mechanism whereby an accord is reached between all of the interested parties, namely, FAPAL, Premiership Clubs and players. The PFA is the Player’s Union and is an

integral part of the process conducted by the Professional Football Negotiating and Consultative Committee (PFNCC). Hitherto the PFA have agreed (and do not oppose) the inclusion of K5 in its present form. It is not without significance that the PFA does not suggest that the restraint is unreasonable in Ashley Cole's case where his contract had still 2½ years to run when he chose (with his agent) to approach another Club. It is to be noted that Ashley Cole is the Arsenal PFA representative and in that capacity has never voiced any objection to the restraint before the case was brought against him.

- 56 A key feature of the Players' Contract is that it is for a fixed period, in Ashley Cole's case for five years. Mr Pannick contended that such contracts benefit the Club more than the Player in that it irrevocably binds the Player to the Club throughout the term. However we are persuaded that the benefits to the Player far outweigh the benefit to the Club and, accept Mr Foster's evidence cited above without reservation.

Accordingly we accept Mr Gay's submission that in the context of this unique contractual framework (and we would add, the nature of the employment itself) creating as it does the very significant benefits to players, the limited restraint contained in K5 is not unreasonable between the contracting parties.

- 57 This leaves the undoubted hardship to a player, such as Shaka Hislop, who is coming to the end of his career. He is undoubtedly at a marked disadvantage compared with any other person in the commercial world who is coming to the end of a fixed contract period. Sympathetic as we are to this situation we are unable to declare that Rule K5 is void and unenforceable on this ground alone or when combined with the anomaly of Managers, other nation's rules and the FIFA position. The contractual relationship of managers to the Club is significantly different from that of players; managers do not enjoy the benefits of a long term contract. The

rules of other countries would require closer and more detailed scrutiny than was presented before us in order to establish whether or not the total structure of their relevant Rules and Players' Contracts provide the same level of benefits to players and balance between all interested parties. It is not clear to the Commission whether the FIFA regulation applies to English domestic contracts or whether there is a margin of appreciation.

In so deciding the Commission bore in mind the approach of Megarry VC in ***McInnes v. Onslow Fane & Anor*** 1978 3 AER 211 when dealing with the principles relating to governing bodies in spirit

“There is a more general consideration. I think that the courts must be slow to allow an implied obligation to be fair to be used as a means of bringing before the courts for review honest decisions of bodies exercising jurisdiction over sporting and other activities which those bodies are far better fitted to judge than the courts. This is so even where those bodies are concerned with the means of livelihood of those who take part in those activities. The concepts of natural justice and the duty to be fair must not be allowed to discredit themselves by making unreasonable requirements and imposing undue burdens. Bodies such as the Board which promote a public interest by seeking to maintain high standards in the field of activity which otherwise might easily become degraded and corrupt ought not to be hampered in their work without good cause”.

This approach was also adopted by Scott J in ***Gasser v Stinson & Holt*** (unreported, 15 June 1988). When referring to the above passage he stated:

“The context in which those remarks were made is somewhat different from the restraint of trade context in which the point arises before me. Nonetheless, the approach in that case, namely, that the court should be slow to interfere with the manner in which an association governing a particular branch of sport administers the sport, seems to me to be applicable. I should, in my view, adopt that approach in this case.”

58 Mr Pannick is correct in stating that we must strike down the rule in its entirety or let it stand. We cannot tinker with the rule merely to accommodate the Shaka Hislop situation. It may be that this particular aspect should be considered by the PFNCC in order to alleviate this hardship. It cannot be the function of this Disciplinary Commission to insert into the rule what it considers would be an appropriate means of dealing with this situation.

59 We turn to consider whether K5 can be justified as fair and reasonable in the public interest which requires that Professional Football should be properly organised and administered. In our view it does. The game is the country's most popular spectator sport. The public are aware of the huge amounts of money involved in the game and that it is an industry which requires rigorous and sophisticated control. Rules K3 and K5 undoubtedly provide contract stability and contribute to the stability of the players themselves and the relationship between the players, supporters and the Club. We accept what Mr Alexander succinctly stated:

“If supporters consider that players at the Club are not sufficiently committed, this could potentially impact on the interest of spectators and the level of support for the Club”.

and

“If players were simply seen as mercenaries, supporter interest would diminish”.

If a player is playing against a team with whom he has contracted or is in the process of negotiating a contract supporters on the terrace might perceive (albeit erroneously) that he might be playing ‘within himself’ so as, at least, to avoid injury however ‘focussed’ he is in fact upon the game in progress.

We cannot escape the conclusion that if the restraint were removed, the number of transfers would increase and that the balance between players' agents and the Premiership Clubs would tilt significantly in favour of the agents (and their incomes). We consider that this is a potent consideration.

- 60 We therefore conclude that the FAPL Rules, and in particular K5, are fair and reasonable as between the contracting parties, in the public interest and are the minimum necessary to protect the interests of the covenanting parties (with one exception) and are in the public interest.
- 61 Accordingly the decision that AC is in breach of Rule K5 must stand.

**Sir Philip Otton**

**David Dent**

**Malcolm George**