

**IN THE MATTER OF AN ARBITRATION UNDER ARTICLE 3 OF THE ARTICLES OF
ASSOCIATION OF THE IRISH FOOTBALL ASSOCIATION**

Before: Nicholas Randall QC

B E T W E E N:

WARRENPOINT TOWN FOOTBALL CLUB

Applicant

and

THE IRISH FOOTBALL ASSOCIATION

Respondent

PARTIAL AWARD

Introduction

1. This Arbitration is commenced by the Applicant pursuant to Article 3 of the Articles of Association of the Irish Football Association ('IFA').
2. I wish to pay tribute at the outset to the high quality, charm and eloquence of the submissions that have been made to me both orally and in writing by Mr Boyle BL for the Applicant and Mr Shaw QC for the Respondent. I would also like to pay tribute to the parties for the way in which they have co-operated to bring this dispute before me in such an efficient and speedy manner.

The Background Facts

3. The background facts are not in dispute. By way of short summary this dispute arises from a decision of the Disciplinary Committee of the IFA which was made on Thursday 19th May 2016. The Disciplinary Committee had to consider a charge against Carrick Rangers FC ('Carrick') under Article 23.1 of the Disciplinary Code. The basis of the charge was that Carrick's Manager, Gary Haveron, was present in the technical area during a fixture with Dungannon Swifts. His presence in the technical area was significant because it was said that he should have been serving a suspension on that day. The Disciplinary Committee found a charge of misconduct against Carrick to have been proved. Notwithstanding this finding, the Disciplinary Committee declined to impose any sanction. The relevant disciplinary letter states as follows:

However, the Committee took into account the points made on behalf of the club and decided to exercise its discretion under the overriding objective as outlined in Articles 1.6 and 1.7 of the Disciplinary Code and found that no sanction should be applied.

In applying its discretion it took into account the following:

What it found to be the honest intention of the club to serve a suspension;

The fact that 3 matches had been served;

Points made regarding possible confusion in the way in which the suspension was to be implemented.

The Committee was mindful of the positions of other parties potentially affected by this decision but found that the interests of justice were best served by not imposing a sanction in all the circumstances.

4. The final passage referred to above was no doubt a reference to other Clubs in the League who were likely to suffer a detriment from the decision of the Disciplinary Committee not to deduct 3 points from Carrick. Indeed, as matters turned out, these 3 points have been crucial in determining which Clubs are to be relegated at

the end of the season. In particular the Applicant now finds itself in a relegation position because of what it views as the failure of the Disciplinary Committee to impose the 3 point deduction that the Applicant says it was obliged to or should have done under the Rules.

5. The Applicant sought to appeal the decision of the Disciplinary Committee to the Irish Football Association Appeals Committee. The Applicant's challenge was rejected on jurisdictional grounds. The Chairman provided written reasons on 26th May 2016. In short the Chairman considered that in order to have standing to bring the Appeal the Applicant had to show that there was a decision of the Disciplinary Committee that had been *imposed upon him or it*. Although it was accepted by the Chairman that the Applicant and others were affected by the decision that was insufficient. In his own words he said that he construed the relevant words "narrowly" and said that third party appeals were not within the jurisdiction of the Appeals Committee.
6. The Applicant says that the matter is now before me in the form of a free standing Arbitration under Article 3. Time is obviously of the essence as my Award will have a significant impact on the final positions in the League Table.

Relevant Material

7. A number of provisions of the Disciplinary Code are of relevance. Article 23.1 is central. It provides as follows:

23.1 Any player or official who participates in a match whilst being suspended or breaches the terms of his suspension will be sanctioned with a minimum fine of £350 imposed on the club for which he is participating. Additionally, the Club will forfeit the match by the score 3-0.

8. As set out above the Disciplinary Committee proceeded on the basis that it retained a discretion as to sanction notwithstanding the mandatory terms in which Article 23.1 was drafted. It relied upon Articles 1.6 and 1.7. They are drafted as follows:

1.6 *The overriding objective of the Code is to maintain and promote fair play, protect the health and welfare of Players (and others involved in the Game), ensure that acts of indiscipline (on and off the field of play) or breaches of this code are dealt with expeditiously and fairly and that the image and reputation of association football and the Irish Football Association are not adversely affected.*

1.7 *Disciplinary hearings shall be conducted in a fair and just manner and in accordance with the fundamental principles of natural justice. Procedural and technical considerations shall take second place to the overriding objective of being just and fair to the parties. Proceedings, findings or decisions of the Committee shall not be invalidated by reason of any procedural defect, irregularity, omission or technicality unless such defect, irregularity, omission or technicality raises a material doubt as to the reliability of the proceedings, findings or decisions.*

9. It is now necessary to set out the terms of Article 3 of the Articles of Association which contains the relevant terms of the Arbitration Agreement between the parties. Insofar as relevant it is drafted as follows:

In the event that there shall arise a dispute or difference between two or more members of the Association (which shall include for the purposes of this article the Association) including but not limited to a dispute arising out of or in connection with (including any question regarding the existence or validity of):

- (i) These Articles*
- (ii) The rules and regulations of an affiliated association*
- (iii) The rules and regulations of a Competition which is organised by the Association or in which only members of the Association can participate*
- (iv) The statutes and regulations of FIFA and UEFA*
- (v) The Laws of the Game*

Shall be referred to and finally resolved by arbitration under these Articles without the right to any further appeal and to the exclusion of the jurisdiction of any court of law unless such is contrary to the laws of Northern Ireland.

10. Before considering the heart of the dispute I can dispose of one issue shortly. In my view it is clear that the Chairman of the Appeals Committee was entirely correct in his construction of the Articles and was right to say that the Applicant had no standing with respect to the appeal process. Indeed I do not consider that the Chairman necessarily adopted a "narrow" interpretation of the Articles as he said. In my view he gave the relevant words their ordinary and natural meaning in their context. Mr Boyle BL quite properly conceded this point at the hearing on behalf of the Applicant.

Decision

11. It is first necessary to consider the nature of the legal challenge that the Applicant seeks to make. Mr Boyle BL accepts that the nature of any such challenge is limited. In short he contends that it is implied into the contract of each member of the Association that the Articles will be complied with and that any decisions will be made by relevant bodies within lawful limits. He says that the nature of the challenge is similar to that of the Court on judicial review. In the circumstances of this case Mr Boyle BL says that it leads to the consideration of two questions, namely: (a) whether as a matter of proper construction of the Disciplinary Code the Disciplinary Committee enjoyed a discretion as to the sanction it could impose on Carrick ('the construction issue'); and (b) if the Committee did have such a discretion whether or not it exercised that discretion in a lawful manner (ie in a way which was not illogical or perverse)('the perversity issue').
12. It follows from the above that the nature of the challenge is limited. Mr Boyle BL accepts that I could not substitute my view of the facts or the evidence for that of the Disciplinary Committee. Furthermore, I would add that it is regularly accepted that, in the sporting context, particularly high respect must be paid to the decisions of relevant bodies appointed to perform a task such as imposing discipline. This is an area which is fraught with difficulties and controversy. It is

also relevant that very strong opinions can be held by different people on what sanctions are appropriate. That does not mean to say that a different opinion necessarily falls outside of the band of reasonableness.

13. It follows that Mr Boyle BL concedes that he is not advancing an appeal in the wider sense of that term. He is not asking me or anyone else to consider the matter afresh.
14. The next plank in Mr Boyle BL's argument is that, once the nature of the legal challenge is identified, it must amount to a dispute or difference within Article 3. He says that it falls expressly within categories (ii), (iii) and (v) of the sub clauses of Article 3 but, if he is wrong about that, the list is clearly intended to be non-exhaustive in any event. He relies on the phrase "including but not limited to" in the Article.
15. Mr Shaw QC contends that Mr Boyle BL's approach is simply wrong. In essence he says that it is clear that the parties have agreed not to have third party appeals. There are sound policy reasons for this. He then contends that once this is appreciated the Applicant's argument collapses, since it could not be implied into the contract of membership of the Association that such third party appeals should be given by the back door. He also says that it is clear that such a dispute does not fall within the categories identified in Article 3.
16. In my view the debate on the construction of Article 3 is academic in the sense that the starting point is to identify whether a cause of action exists. If such a cause of action does exist, I am satisfied that the purpose, intent and proper construction of Article 3 is that it will be covered by the Arbitration clause. This is because I consider that the list within Article 3 is non-exhaustive. The purpose of the clause is to cover all disputes and differences between the relevant participants. I consider this to be the ordinary and natural meaning of the words used. I also consider that this construction makes commercial sense and is in keeping with the general requirement of FIFA that football related disputes are subject to arbitration and not the ordinary Courts.

17. It follows that I consider that the jurisdictional question in this matter is effectively determined by answering the question as to whether or not the Applicant has a potential cause of action which is capable of determination. I therefore need to analyse whether the Applicant has a cause of action in this case.
18. Mr Boyle BL relies upon the existence of an implied term in the contract of membership. As Mr Shaw QC properly points out the test for the implication of terms is a high one. Mr Boyle BL has to effectively show that such a term will be implied because it is obvious or necessary to make the contractual arrangements work. Mr Shaw QC says that I cannot imply a term which effectively grants a third party appeal when this has not been granted by the Articles themselves on policy grounds. I agree with him.
19. It follows that I must consider the structure and content of Article 14 of the Articles of Association which deals with the jurisdiction of the Appeals Committee. I note that the Appeals Committee will not normally conduct the case as a re-hearing unless the appeal board hearing and determining the appeal decides to the contrary. Furthermore the Appeals Committee has a wide discretion to take any step that it considers appropriate in order to deal justly with the case in question.
20. In my view the nature of the Appeals Committee's jurisdiction is instructive in that it provides for a similar type of factual jurisdiction that Mr Boyle BL urges should be accorded to the Applicant through implication in this case. I am persuaded by Mr Shaw QC that the structure of the Articles and the refusal to provide for third party appeals means that Mr Boyle BL's argument must fail to the extent that they relate to the perversity challenge.
21. However that is not an end of the matter since I also have to consider whether the cause of action in relation to the proper construction of Article 23.1 is similarly blocked. I deal with that below. However before moving on to that stage of the argument I should add at this stage that I do not consider that my conclusion set out at paragraph 20 above would ultimately alter the final result on the perversity challenge. This is because I am not persuaded that the arguments regarding perversity raised by the Applicant are sufficient to persuade me to interfere with

the exercise of the discretion in any event. In my view the key aspect of the Disciplinary Committee's decision is that they considered that Carrick had acted honestly and genuinely throughout and that it was always their intention to serve the sanction. It seems to me that once this is noted the other challenges made by Mr Boyle BL are insufficient to suggest that the end result would have been any different. I do not consider that it would be appropriate to refer the matter back for reconsideration on this basis. It follows that even if I had found that the perversity cause of action existed I would not have granted relief to the Applicant on this basis.

22. I now turn to what can be termed the construction issue. It is a pure question of law, namely whether the Disciplinary Committee had the power which they exercised to override the mandatory provisions of Article 23.1.
23. This issue is not straightforward and I am far from having reached any concluded view on it. However it seems to me that it is, at the very least, reasonably arguable that the Disciplinary Committee did not have the power to override the mandatory provisions of Article 23.1. It can be argued with conviction that Article 1.7 deals only with procedural matters and is entirely irrelevant to the substantive issue of sanction. Furthermore, it can also be argued that Article 1.6 cannot be construed in a manner which removes the mandatory effect of Article 23.1.
24. Not only have I not reached a concluded view on the construction of Article 23.1 but I also consider that it would be inappropriate for me to have done so until I have given Mr Boyle BL the opportunity to develop his argument on that question and to provide both Mr Shaw QC and Carrick (if they wish to do so) with the opportunity to make submissions on it.
25. However the fact that I consider that there is an arguable case available to the Applicant that the Disciplinary Committee erred in law in failing to properly construe the nature of their discretion and acted in breach of the Code means that I now have to consider whether or not this avenue of redress is potentially available to the Applicant as a matter of jurisdiction.

26. In my view this question is substantively different to one which relates to the substance of a decision. As I have set out above it is a pure question of law and relates to the legal terms which govern the complex relationships between participants. It is clear that each Club is in a contractual relationship as set out in the Articles and the Disciplinary Code. It follows that they have a legal right to ensure that the terms of the contract are observed and performed. In my view this is a matter which passes both the necessity test and the business efficacy test for the implication of terms. I agree with Mr Boyle BL that it would be absurd if a Club was left with no remedy in a case in which a body was operating in breach of contract.
27. I also consider that there is a world of difference between a claim which seeks to control the fact finding of a body on the one hand and one which seeks to uphold the proper construction of the Articles and Disciplinary Code on the other. Furthermore an Arbitration under Article 3 is the most obvious and best route by which such a claim can be advanced: it is a legal question and not a factual or evidential one.
28. It follows that I consider that the Applicant has a valid cause of action in contract to enforce the proper construction of the Disciplinary Code. This amounts to a dispute or difference within Article 3 and I have jurisdiction to consider the issue.
29. It follows that I consider that the Applicant is entitled to run the argument that the Disciplinary Committee erred in law in considering that it had a discretion to override the mandatory sanction provided for in Article 23.1.
30. As I indicated during the hearing and as was rightly conceded by Mr Boyle BL I should not determine this issue without hearing submissions from Mr Shaw QC and giving Carrick (if they wish to do so) the opportunity to make relevant submissions on the construction issue also.

Partial Award

31. It follows that I make a Partial Award to the effect that I have jurisdiction to consider the argument that on a proper construction of the Disciplinary Code the Disciplinary Committee had no discretion not to impose the sanction provided for in Article 23.1.
32. I direct that the parties should jointly make contact with Carrick and inform them of this Partial Award. I would then ask the parties to see if they can agree an appropriate procedure if Carrick wish to participate or whether they are content that the Respondent will advance all relevant arguments on construction on their behalf.
33. As this is an issue of law I am prepared and willing to receive written submissions and determine this question on paper without the need for a further oral hearing. In the alternative I have good availability next week for any hearing.
34. I reserve the issue of costs.

NICHOLAS RANDALL Q.C.

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