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CHAMBERS

The Premier League and The Law:
The Curious Case of Everton Football Club

Preamble

1. On 17 November 2023, a Premier League Commission published its written decision in the case of The Premier League against Everton Football Club. By which an immediate deduction of 10 points was sanctioned for an admitted breach of the Profitability and Sustainability Rules ("PSR") found within Rules E.47 – E.52 of the Rules of the Premier League ("the Rules"). It is the first of its kind.

2. That decision and the intimated appeal has understandably piqued the curiosity of lawyers and non-lawyers alike. None more so than the writer whose interests (quite sadly, some might say) lie both in the law and in Everton Football Club.

3. This article considers both that 41-page decision and, perhaps more importantly, what *could*[1] come of any such appeal. It does so with the aim of dispelling some myths and conspiracies whilst offering clarity from a legal perspective. In doing so, it seeks to answer the following four questions: -

   (a) What was the case about?

   (b) How was it determined?

   (c) Why was the points deduction imposed?

   (d) What next?

4. Before turning to do so, an honourable mention is given to fellow-Evertonians, Dr. Mike Gow (Assistant Professor at Edge Hill University) and Gareth Farrelly (former player turned Senior Associate in Sports Law at Glaisyers ETL), who kindly gave their time to discuss the case.

5. References to paragraph numbers below correspond with the like-numbered paragraphs of the decision unless otherwise stated.

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1. At the time of writing, the appeal has not been submitted so its grounds remain unknown. The date of this articles coincides with the 14-day deadline for the appeal under Rule W.67 (1 December 2023).

What was the case about?

6. By a complaint commenced on 24 March 2023, the Premier League alleged that Everton had breached PSR. Although Rule E.51 permits clubs to incur losses of up to £105 million before disciplinary proceedings are then required to commence, it was alleged that a true and proper calculation of Everton's audited accounts for season 2021/22 showed its losses to be £124.5 million thereby exceeding that threshold by some £19.5 million (paragraphs 35).

7. In its initial answer to the complaint, Everton denied the alleged breach and maintained that its accounts fell well comfortably below that loss threshold with adjusted losses of *only* £87.1 million. In doing so, it sought to exclude, among other things, alleged losses in respect of i. interest charges payable on loans arising out of its new stadium development; ii. a transfer levy paid to the Premier League in respect of youth development; iii. its choosing not to sue a former player for breach of his employment contract ("Player X") and iv. its inability to sell players in consequence of the Covid pandemic (paragraph 36).

8. Further and in the event a breach was made out, Everton sought to rely upon significant mitigating factors namely i. the new stadium project; ii. the Player X losses; iii. the impact of Covid and iv. its transparent co-operation with the Premier League.

9. Interestingly, Everton proceeded with that defence and maintained its denial of breach until just ten days before the four-day trial listed on 16 – 20 October 2023. At a pre-trial review on 6 October 2023, it amended its answer to abandon a number of what it acknowledged to be "novel" exclusions it had initially sought to rely upon and in so doing admitted, for the first time, that it had breached PSR. What Everton was left with was mitigation alongside an argument that, because it maintained an entitlement to exclude pre-planning stadium interest and the transfer levy payment, its breach of the PSR threshold stood at £7.9 million and not the £19.5 million alleged (paragraph 37).

10. It is interesting because the sceptics among us (particularly those supporting the likes of Leeds United, Leicester City et al) would no doubt point to the chronology leading up to that late change of position and all that happened in-between.

11. That is, had Everton chosen to admit the PSR breach in late March or early April 2023 shortly after the complaint commenced, then the proceedings would have been much more straightforward. Whether they would have been so straightforward to be capable of determination before the end of the season on 28 May 2023 is unknown but that would no doubt have been more likely. In turn, with an early admission would have been an increased risk of a points deduction being imposed to take effect before the end of season 2022/23. Any such deduction in that season would have inevitably relegated Everton who, at the time the complaint commenced, sat just two points above the relegation zone and, come the end of the season, survived by that same margin and just one place above the relegation zone.

12. Instead, Everton chose at that time to rely upon the self-confessed "novel" (those same sceptics might argue "hopeless") points to deny breach which we now know were abandoned on a date following the conclusion of the season. It naturally raises the question as to whether that delay-approach was a tactic that is not uncommon in litigation (in fact, it is one which Manchester City are said to be currently employing in its like-case against the Premier League) or whether the chronology is a mere coincidence. If the former then it certainly worked at the time albeit it came back to bite Everton on the backside further down the line when the Commission seemingly took a dim view with Everton raising novel points in its initial calculations before abandoning the same shortly before trial (paragraph 131).

13. Indeed, it is notable on the point that in the intervening period the Premier League had applied to the Commission to expedite the proceedings to conclude the same before the end of the season. Needless to say, Everton objected and the Commission agreed by finding that it would run the risk of procedural unfairness (paragraph 38).

14. So, in answer to the question set out in the heading above, strictly speaking and so far as the Premier League was concerned, the case was about a breach of PSR. But, to Everton and those other clubs in and around the relegation zone and their fans, it was, and is, about an awful lot more.

How was it determined?

15. With Everton having amended its case and admitted a breach of PSR, the parties were left contesting i. the extent of the breach and the amount by which Everton

had exceeded the £105 million threshold (£7.9 million or £19.5 million) and ii. those aggravating and mitigating factors upon which they each relied for the purposes of persuading the Commission as to the appropriate sanction for the breach.

16. Everton was unsuccessful in its first argument that it was entitled to exclude from PSR the sum of £7.6 million comprising a proportion of a 4% transfer levy it had paid to the Premier League which, in part, had been passed on to youth development. It relied upon the right of clubs under Rule A1.11(c) to exclude expenditure directly attributable to youth development under Rule A1.11(c). The Commission preferred the Premier League's argument that the expenditure by Everton was of the transfer levy and not in respect of youth development (paragraphs 64 – 70).

17. Everton was likewise unsuccessful in its second argument that any loan interest attributable to expenditure on its stadium development should be excluded from PSR. It reduced that figure at trial from £4.1 to £2.2 million. In doing so, it said that had the stadium not been constructed then its owner Mr. Moshiri would either have repaid the loans or the loans would never have been entered into in the first place. It also relied upon the fact that the Premier League had earlier conceded that such interest could be deducted before changing its position (paragraphs 71 – 73).

18. The Premier League stated that that prior concession was based upon Everton providing misleading information that the stadium was being funded by commercial loans when, in fact, it had been funded by interest free loans from Mr. Moshiri. It argued that the loans were taken out not for the stadium development but, as per the loan documents signed by Everton, for working capital (paragraphs 74 – 76).

19. Although the Commission found itself unable to find on the evidence that had it not been for the stadium development the loan interest would not have been incurred, it found that it mattered not because the loans were advanced for the specific purpose of working capital and as such were not excludable in any event (paragraphs 80 – 82).

20. It followed that the extent of the breach was determined in favour of the Premier League. That is to say, the sanction fell to be determined in the face of a breach of the PSR threshold by £19.5 million.

Why was the points deduction imposed?

21. The starting point in answering the question has to be Rules W51.1 – 51.10 and the extremely wide sanctioning powers of the Commission once the breach was proved. Upon considering any mitigating factors, the Commission had the power at one end of the scale to impose a non-sporting sanction by way of a fine and, at the other, a sporting sanction by way of a transfer ban or points deduction. The wide scope of its powers is best underlined by the catch-all provision found in Rule 51.10 by which it could make "any other order" it deemed fit. Notably, the Commission also had the power to order a combination of those sanctions and, even more notably under Rule 51.8, had the power to suspend any sanctions on terms it deemed fit (paragraph 85).

22. So, in exercising those wide powers, the Commission had to decide i. the nature of the sanction; ii. the size of the sanction and, strictly speaking iii. whether it should be immediate or suspended.

23. The Premier League's position was clear in that only a sporting sanction by way of a points deduction would do. It was successful in relying upon a principle identified in the case of *Sheffield Wednesday FC v The Football League Ltd* to the effect that a sporting advantage is to be inferred from any breach of PSR (paragraph 133).

24. Contrary to popular belief, it was unsuccessful in seeking to persuade the Commission that guidelines it had proposed akin to those in place in the Football League should be adopted in quantifying any deduction. It had argued for a starting point of 6 points plus one point for every £5 million by which the PSR threshold had been exceeded. While sceptical Evertonians will understandably point to the fact that the maths of the 10-point deduction which was ultimately ordered coincides with that formula, the Commission (no doubt wary of an appeal) rejected the same on the basis that it would be inconsistent with the wide powers set out in the Rules above (paragraphs 84 – 90).

25. Everton argued that a non-sporting sanction by way of a fine would meet the justice of the case and its fall-back position was that, if the Commission disagreed and a sporting sanction was to be imposed, it should be by way of a transfer ban as

opposed to a points deduction. It does not appear – from the decision at least – that Everton argued for a suspension of any such sanction (paragraph 134).

26. It relied upon six mitigating factors in support of that argument, of which only one was accepted and, even so, to a limited extent. Those factors were: -

(a) Post-planning stadium interest – the Commission rejected the argument that Everton could, but chose not to, capitalise interest so as to exclude it from PSR. It did so in reliance upon its findings set out above as to pre-planning interest which could not be capitalised and the fact that Everton chose not to do so in its accounts in any event (paragraphs 113 – 116).

(b) Positive trend – the Commission accepted in mitigation that Everton's PSR calculations show a downward trend for losses albeit made it clear that only limited weight would be given to that fact (paragraphs 117 – 119).

(c) Player X – the Commission rejected Everton's unusual argument that it should be credited for choosing not to pursue an otherwise valid claim worth c£10 million which it had been legally advised it had against the player for breach of contract. The Commission found that the choice not to pursue, based on the impact upon the player's mental health, was not borne out because there was no evidence as to the player's health when the decision was made. Likewise, there was no evidence of the player's ability to pay what was described as a "speculative" figure of c£10 million (paragraphs 120 – 122).

(d) Ukraine – the Commission rejected Everton's argument that it could rely in mitigation upon the impact of the Russian war which, it said, frustrated negotiations for a £10 million per year naming rights agreement with a Russian-backed company, USM Services Limited. It did so on the basis that the agreement remained uncertain and the loss of an agreement is a usual business event. For that same reason, it also refused the argument that Everton could rely upon the fact that the war had caused costs to increase on the stadium development (paragraphs 123 – 125).

(e) Covid – having considered the expert evidence put forward, the Commission rejected Everton's reliance upon the impact it said the pandemic had had on the

sale of c£80 million worth of players it had intended to sell in the summer 2020 transfer window. It accepted the Premier League's counter-argument that the pandemic had had "little impact" upon its transfer market and that Everton's inability to sell players at that time, based upon its own aspirational prices, was more likely to have been because there was no "market appetite" for those players at those prices. In layman's terms, that finding could possibly be construed as saying "no clubs wanted to sign Everton's players because they were not good enough to sell at those prices" which, coincidentally, is likely to be the only part of the decision upon which most frustrated Evertonians would agree (paragraphs 126 – 130).

(f) Transparency and Co-operation – the Commission found that, while Everton had "engaged extensively" with the Premier League in relation to PSR, it had not acted in good faith in respect of some of those dealings so far as the stadium development was concerned (itself an aggravating factor). It found that Everton's co-operation was not of such an "exceptional nature" that it should stand as mitigation (paragraphs 131 – 132).

27. On the other hand, the Premier League relied upon four aggravating factors, of which, again, only one was accepted. Those factors were: -

(a) Reckless Overspends – the Commission refused to consider the Premier League's assertion that Everton acted recklessly by continuing to sign players in the face of clear PSR warnings. Although it found Everton's decision to be poor by placing hope on the sale of players to ensure PSR compliance, it also found that there was no exceptional conduct such as a deliberate breach for this to constitute an aggravating factor (paragraphs 102 – 104).

(b) Extent of Breach – the Commission also refused to consider the extent of the breach at £19.5 million as a specific aggravating factor because, to do so, would amount to its double-counting as it was already a factor when looking at culpability (paragraph 105).

(c) Misleading the Premier League (Stadium Interest) – the Commission stopped short of finding that Everton had acted dishonestly but found that it had breached Rule B.15 and its obligation to act in utmost good faith with the

Premier League when entering into a PSR agreement dated 13 August 2021 by which Everton were permitted to exclude c£39 million of stadium expenditure that would not otherwise be permitted by the Rules. Specifically, it found that Everton had asserted that its loan to the stadium development company bore financing costs by way of interest and arrangement fees which was not the case. In doing so, the Commission noted its particular disproval to Everton's accounting evidence to the effect that, like it is a tax accountant's job to reduce a client's tax liabilities, it was their job to "interpret PSR rules to the benefit" of their employer (paragraphs 106 – 108).

(d) Misleading the Premier League (Player Sale) – the Commission declined an invitation to find that Everton had also misled the Premier League as to its intention to sell a player, "Player Y", to help comply with PSR in circumstances where it had initially listed the player for sale before removing him and agreeing a new contract. It accepted Everton's counter-argument that it remained willing to sell if an appropriate offer was made (paragraphs 109 – 111).

28. Against that backdrop and in considering those principles alongside those single aggravating and mitigating factors, the Commission: -

(a) Found, on the nature of the sanction, that only a sporting sanction by way of a points deduction was appropriate because a sporting advantage was to be inferred. In doing so, it dismissed Everton's submission that a non-sporting sanction by way of a fine was sufficient on the basis that a financial penalty is not appropriate for a club who has a wealthy owner (paragraphs 133 – 135);

and

(b) Found, on the size of the sanction, that, even absent a formula, an immediate 10-point deduction was necessary to reflect that it was a serious breach of Everton's own making and mismanagement in the circumstances where it had taken risks and overspent on new players, including to replace a "non-existent" midfield as Mr. Moshiri said in evidence (a phrase which, again, most frustrated Evertonians would have to agree with) (paragraphs 136 – 139).

What next?

29. In the immediate future, the appeal. A matter which will likely be determined in the new year after directions are set and a final hearing convened; but almost certainly before the end of the current 2023/24 season.

30. As to that appeal, it is important to understand that, like with any appeal, it takes the form of a review of the Commission's decision by a new panel with the burden of proof now being on Everton. It is not a re-hearing of the case. As such, and again like with any appeal, Everton are prohibited by Rule W.71 from relying upon any evidence not put before the Commission unless it can show that any such evidence is "new" in that it was not available at the time of the hearing on 16 – 20 October 2023 and could not have been obtained by it using reasonable diligence at that time. So, in short, the starting point is that Everton are stuck with that which they put before the Commission (much of which is largely unknown due to the private nature of the proceedings).

31. Without wishing to spread any further doom and gloom on fellow-Evertonians, from a legal perspective, most appellate lawyers would agree that Everton is likely to face an uphill struggle on appeal because, in short, it is appealing against the exercise of a discretion. Not only that, it is an extremely wide and unfettered discretion. As such, any conventional challenge by Everton will have to show that, in exercising that discretion, the Commission either: -

    (a) Made an error in principle;

    (b) Took into account irrelevant factors;

    (c) Failed to take into account relevant factors;

    (d) Otherwise acted irrationally or perversely by exceeding the generous ambit afforded by the discretion; and/or

    (e) There was some other procedural irregularity which rendered the proceedings unfair.

32. In an attempt to offer some hope, having read and re-read the decision, the following arguments *could*, on their face, feature in the appeal in respect of each of those five grounds namely: -

(a) First and foremost and in the context of PSR in the Premier League, there arguably remains an inherent problem with the blanket adoption of an EFL and UEFA principle to the effect that a sporting advantage is to be inferred from each and every breach of PSR. That problem is three-fold:

i. Firstly, by the Rules, clubs have a leeway and are permitted a loss of up to £105 million before a breach is made out and sanction imposed. So, there exists an arbitrary line in the sand by which the Rules, by their very nature, permit a sporting advantage without any sanction up to, but not a penny over, that figure. This strikes as odd if in each and every case where that line is crossed a sporting sanction will then inevitably follow. The Premier League would no doubt argue that, even if the PSR threshold was £0, there remains such a line. That might be so but no permitted sporting advantage can then be said to arise;

ii. Secondly and that point aside, so far as any expenditure which forms the basis of the PSR breach related to the stadium development and not, for example, player transfers, can that properly be said to comprise a "sporting advantage"? Or is it, more accurately, a commercial advantage? To counter, the Premier League would no doubt point to the generous PSR leeway and argue that, in the knowledge of stadium expenditure, it was on the club to then curtail its player expenditure; and

iii. Thirdly, speaking more as an Evertonian than a lawyer and to take the point to the extreme, should a sporting advantage be inferred in the face of seemingly clear evidence of no such advantage as per Everton's performances both in the transfer market and on the field? This is perhaps more of a facetious point to vent frustrations as opposed to an arguable ground of appeal.

(b) Secondly and so far as the taking into account of irrelevant factors are concerned, Everton face the fundamental difficulty in that the serious aggravating factor of misleading the Premier League which was considered by the Commission was based upon findings of fact it made having had the benefit

of seeing and hearing from all of the witnesses. An appellate tribunal, without that same benefit, is unlikely to interfere with those findings. Further and again contrary to popular belief, it is to be re-iterated that it will not be open to Everton to argue that the Commission wrongly took into account the formula proposed by the Premier League because, as set out above, it expressly declined an invitation to do so. The only point of note here – albeit one which is unlikely to find favour on appeal given the other factors – is the Commission's refusal to consider a financial penalty because of the wealth of Everton's owner, Mr. Moshiri. This is of note not only because of the financial sanction agreed with the much wealthier owners of the five clubs who, in breach of the Rules, sought to form the infamous European Super League. But also because, in the context of the Premier League generally where each and every owner has wealth in abundance, it begs the question; if fines are not appropriate due to wealth, what is the point in the Rules providing for such a power?

(c) Thirdly and, in the writer's view, one of Everton's better points should it be put forward is the Commission's arguable failure to take into account two relevant factors in the decision (while Everton will no doubt argue that more of its mitigating factors should have been considered, they will be met with the same difficulty set out above and the factual findings upon which the Commission's rejections were based). An analogy can be drawn here from the aforementioned *Sheffield Wednesday* case where, on appeal, a deduction was reduced from 12 to 6 points because there had been a failure to take into account the fact that the club sold its stadium very shortly after the relevant accounting deadline and, if before, it would not have breached PSR. Those two factors are as follows:

i. Firstly and despite accepting as a fact that Everton had "engaged extensively" with the Premier League, the Commision refused to take the same into account for the purposes of mitigation on the basis that its dealings were not of an "exceptional nature" (paragraphs 131 – 132). This apparent need for "exceptionality" which was read into the decision arguably sets the bar too high. It was not incumbent upon Everton to prove that. Rather, it was for Everton to prove, on balance, that it so engaged and that that engagement was relevant to mitigation. To be appeal-proof, the Commission's finding should perhaps have

stated, like with the one mitigating factor it accepted, that Everton had engaged but limited weight had been given. Instead, it flatly refused to consider the same;

and

ii. Secondly and as noted above, after determining both the nature and size of the sanction, the Commission had the power under Rule 51.8 to suspend any such sanction on terms it deemed fit rather than order it immediately. So, it could, for example, have suspended the 10 point deduction in whole or in part upon Everton's future compliance with PSR and/or indeed even upon a sale of the club by a set date. It is public knowledge that Everton is, or certainly was, on the brink of a sale to the US based investment firm, 777 Partners and the latter term of suspension would have the attractive effect of ensuring that those found responsible for mismanaging Everton in the decision are not involved in the future running of the club. There is one very important caveat to this which is that it appears that Everton did not argue for the Commission to exercise its power of suspension. If not and for the reasons set out at paragraph 30 above, it will find it difficult to raise the point on appeal unless some new evidence is available relevant to the same (perhaps stadium or 777-related), or unless it succeeds in one of its other arguments so the Appeal Board is forced to re-exercise the sanction discretion.[2]

(d) Fourthly, it is open to Everton to argue that the Commission exercised its sanction discretion perversely. It is an extremely high threshold and one which requires a finding that it was simply not open to the Commission, on the evidence before it, to impose such a sanction. In the face of a wide discretion and impenetrable and damning findings of risky expenditure and misleading the Premier League, this is likely to be difficult, if not impossible. Everton's best point here would appear to be to draw an analogy with the only part of the Rules which imposes an automatic points deduction of 9 points in the event of insolvency (Rule E.35). The question being; is Everton's financial mismanagement causing it to breach rules designed to prevent insolvency

2. Although unlikely (one hopes), the Appeal Board has the power, strictly speaking, under Rule W.78.3 to vary the sanction both upwards as well as downwards.

worthy of a greater punishment than a case of financial mismanagement which actually causes insolvency?

(e) Fifthly and finally, it is also open to Everton to argue that the proceedings were procedurally unfair. Again, it is a high bar. That said, the only point of note is a possible allegation of unfairness arising from the Commissions failure to give reasons on certain issues. In addition to the suspension point set out above and also the want of specific reasoning as to why Everton's proposed sporting sanction of a transfer ban was dismissed in favour of a points deduction, it remains somewhat of a mystery as to how, absent any formula or guidelines, the figure of 10-points was reached.

33. Ultimately, whatever the basis of Everton's appeal, here's to hoping that that mystery is somehow resolved in its favour by the Appeal Board whether by a reduction and/or suspension in the sanction.

34. Looking further down the line and subject to the outcome of the appeal, it is likely that the focus will be on other clubs with vested interests as well as an intervention by Parliament by way of independent regulation.

35. As to the former, like with Everton's post-decision press release making it clear that it will be keeping a watchful eye on any sanctions imposed on other clubs who are alleged to have breached PSR (Manchester City, Chelsea et al), those same clubs will no doubt be keeping a watchful eye on the final outcome. Likewise, those clubs mentioned at paragraph 10 above who have already intimated an intention to pursue an order for compensation against Everton under Rule W.51.5 if the decision is upheld. Indeed, they were given the greenlight to do so by an interim decision made by the Commission on the 9th May 2023 who directed those clubs to notify the Commission of any intention to pursue claims within 28 days of its decision (15th December 2023). The murky waters of causation of loss and whether those claims hold any merit are, for now at least, concerns for another day.

36. As to the latter, there is a theory (not only among Evertonians) that the hard-line approach adopted by the Premier League was, at least in part, an attempt to avoid independent regulation. Those same theorists have since taken the view that that

approach has backfired to the extent that it has caused an outcome so severe that independent regulation is needed now more than ever. Whether that theory proves to be correct, only time will tell.

References

The Decision, Interim Decision and the Rules referred to above can be found via the following links: -

https://resources.premierleague.com/premierleague/document/2023/11/17/49989e4e-01a2-44f9-a012-c3a31ae5536b/2023-11-17-Premier-League-v-Everton-FC-Decision-for-Publication.pdf

https://resources.premierleague.com/premierleague/document/2023/11/17/55576b2a-6ab5-4676-95a4-a02dbe7b16ff/PLR-Day-1-Approved-Ruling.pdf

https://resources.premierleague.com/premierleague/document/2023/08/31/132475d9-6ce7-48f3-b168-0d9f234c995a/PL_Handbook_2023-24_DIGITAL_29.08.23.pdf

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