

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

Preamble

1. On 1 December 2023, Everton Football Club issued an appeal against the decision of a Premier League Commission dated 17 November 2023 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”).
2. On the same date, the writer (both a long-suffering Evertonian and practising barrister) published a well-received article, “The Premier League and The Law: The Curious Case of Everton Football Club”, with the principal aim of dispelling some myths and conspiracies surrounding the case. It also sought to offer some objective clarity from a legal perspective and, as best it could on the limited material available, second-guess how the appeal might look. That article can be found via the following link: -

https://www.cobden.co.uk/latest/latest_news/the_premier_league_a/

3. A conclusion was reached in the following terms on what was, in reality, always going to be at the heart of the appeal: -

“...it remains somewhat of a mystery as to how, absent any formula or guidelines, the figure of 10-points was reached...here’s to hoping that that mystery is somehow resolved in [Everton’s] favour by the Appeal Board whether by a reduction and/or suspension in the sanction.”

4. Thankfully and after what seemed a lifetime’s wait for Evertonians, that mystery was (at least in part) resolved in Everton’s favour by the Appeal Board who, on 26 February 2024, published a 61-page decision which granted that appeal in part and reduced the points deduction from 10 to six.
5. Interestingly, that decision was known to the Club on 19 February 2024 when it was confidentially disclosed before publication one week later in accordance with

an agreed timeline. So, unfortunately, it cannot serve as an excuse for Everton's laboured performance against a weakened Crystal Palace team that very same evening (although frustratingly, had it also been known to the fans at that time, it could have served as an incentive to galvanise a similarly laboured performance on their part that particular evening; the writer included).

6. With those flippant points aside and with the same aims as its predecessor, this follow-on article considers both the appeal decision and also what could come of the second PSR case commenced by the Premier League against Everton in the interim on 15 January 2024.
7. In doing so, it seeks to answer the following four questions: -
 - i. What was the basis of the appeal?
 - ii. How was it determined?
 - iii. Why was the points deduction reduced?
 - iv. What next – The Premier League v Everton (No.2)?
8. References to paragraph numbers below correspond with the like-numbered paragraphs of the appeal decision unless otherwise stated.

What was the basis of the appeal?

9. In line with the principles identified at paragraphs 30 and 31 of the first article, the Appeal Board made it abundantly clear that the appeal was a review of the decision of the Commission and not a re-hearing of the case. As such, it was incumbent upon Everton to impugn that decision by demonstrating an error of law or some procedural unfairness. In respect of the former, “errors of law” include taking something into account which was not relevant or failing to take something into account which was relevant (paragraphs 70 and 71).
10. To that end, Everton's case on appeal was nine-fold and in many respects coincided with those points identified at paragraphs 32(a) – (e) of that first article (paragraph 76): -

- i. The decision was procedurally unfair because the Commission made a finding that the Club had failed to act in the utmost good faith that it was not entitled to make and was wrong to take that finding into account as an aggravating factor when assessing the points deduction imposed;
 - ii. The Commission was wrong in principle as to its assessment of aggravating and mitigating factors in circumstances where, rather than giving due weight to factors, it simply excluded or included them;
 - iii. It failed to treat the Club’s cooperation with the Premier League as mitigation;
 - iv. It failed to treat the costs of the new stadium project as mitigation;
 - v. It failed to treat the impact of the sanction on the Club as mitigation;
 - vi. There was an error in approach to overspending;
 - vii. There was a failure to take into account existing and relevant benchmarks as to points deductions;
 - viii. There was an error in approach to sporting advantage; and/or
 - ix. There was a failure to consider lesser alternative sanctions.
11. In short, Everton argued that the Commission’s decision was flawed on conventional appeal grounds to the effect that, in exercising its discretion to impose a sanction, relevant factors were overlooked and irrelevant factors were considered meaning that procedural unfairness resulted in what it described as a sanction which was *“flawed, unduly harsh, disproportionate in all the circumstances and lay outside the range of reasonable sanctions”* (paragraph 75).
12. So, contrary to popular belief, Everton did not seek to challenge the breach itself, the integrity or independence of the Commission nor indeed the Premier League’s now infamous (albeit wildly overstated) calculation formula it – via its CEO, Richard Masters – had proposed to the Commission (paragraph 186).
13. Indeed, the fact that the Premier League found themselves proposing such a formula ‘after the event’ only served to help Everton on appeal in respect of Ground vii

above because it vividly highlighted the almost impossible task with which the Commission was faced: calculating a points deduction on a case which was the first of its kind without any formula in the Rules. This is made clear by the decision in which the Appeal Board express sympathy with the task with which the Commission was faced in those circumstances (paragraph 188).

How was it determined?

14. Despite that sympathy, the Appeal Board allowed Everton’s appeal in respect of Grounds i and vii above. The remaining 7 grounds were each rejected. This article does not seek to dwell on those grounds save other than to express disappointment in respect of the linked Grounds ii and iii for the reasons summarised at paragraph 32(c) of the first article.
15. In respect of the former and Ground i, the Appeal Board found that the Commission was wrong to both find and then consider as an aggravating factor that Everton had been “less than frank” and had breached its duty of utmost good faith contrary to Rule B.15 in respect of the source of its stadium funding and its stadium interest calculations. In turn, by wrongly taking those into account as aggravating factors, the Commission had imposed a higher points deduction than what would otherwise have been the case.
16. The Appeal Board did so because, as was openly conceded by the Premier League before the Appeal Board, the particular allegation was never part of its pleaded complaint against Everton. Nor was it the subject of any cross-examination before the Commission of the Club’s officials, whether Mr. Moshiri or otherwise. It was therefore procedurally unfair on Everton to be left with a serious finding against it which it had not been asked to answer to and which appeared for the first time in the Commission’s written decision. Moreover, in taking those findings into account as aggravating factors when calculating its sanction, the Commission had fallen foul of the principles identified at paragraph 9 above (paragraphs 163 – 181).
17. Turning to the latter and Ground vii, the Appeal Board agreed with Everton that the Commission made an error in quantifying the points deduction because it failed to take into account relevant factors namely other benchmarks or comparators from

when such deductions are imposed. In turn, had the Commission taken account of those, the points deduction would have been lower.

18. Specifically, Everton relied upon two particular benchmarks with which the Appeal Board agreed. Firstly and as identified at paragraph 32(d) of the first article, the Rules themselves expressly provide only a 9-point deduction in the event of insolvency under Rule E.35. A deduction in excess of that figure for a breach of PSR which is designed to avoid insolvency is therefore at odds with that particular rule. Secondly and whilst not strictly binding, the like-rules for breaches of PSR in the English Football League which adopt a “top-down” system starting with a maximum 12-point deduction also offer helpful guidance in the circumstances (paragraphs 182 – 192).

Why was the points deduction reduced?

19. Against that backdrop, the Appeal Board set-aside the Commission’s immediate 10-point deduction and proceeded to exercise the wide sanction discretion afresh, albeit excluding the above-mentioned aggravating factors and including the above-mentioned benchmarks (paragraph 193).

20. In doing so and of particular note for clubs in future cases (including not only Everton but also the likes of Nottingham Forest, Manchester City et al), in imposing an immediate 6-point deduction the Appeal Board’s decision records that: -

- (a) The sanction must be proportionate and not exceed what is reasonably required to meet the aims of PSR (paragraphs 192 – 195);
- (b) The aims of PSR are to give effect to UEFA FFP principles, including, among others, to encourage responsible spending and protect long-term sustainability (paragraphs 17 – 25);
- (c) The aims of the sanction for a breach of PSR is not simply punishment which is less important than maintaining the integrity of the game, with deterrence being an important overlapping aim (paragraphs 196 – 200);
- (d) Any breach of PSR, subject only to “powerful” mitigating factors, warrants a “significant” points deduction to achieve those aims and nothing less than a

point deduction because it creates a presumption of a sporting advantage (paragraphs 201 – 206); and

- (e) The minimum points deduction reasonably required to achieve those aims, taking into account the benchmarks above, is a six-point deduction whilst a suspension of that sanction would not help to achieve those aims (paragraphs 207 – 229).

What next – The Premier League v Everton (No.2)?

- 21. Having fought one fire, there remains a second one burning away in the background at Everton (indeed, there is a third if one also considers the compensation claims intimated by its relegation-competitors). On 15 January 2024, The Premier League confirmed in a press release that, alongside Nottingham Forest, Everton had been referred for further breaches of PSR for the three-year period ending in season 2022/23. Notably, that same press release records that both Everton and Nottingham Forest “*have each confirmed that they are in breach*” of PSR meaning that separate Commissions will be appointed to “*determine sanction*”.
- 22. That is notable because Everton’s public response was to highlight that the second case, unlike that under the EFL Rules, relates to a period which covers the same accounting period for which it had already received a points deduction meaning “*The Club must now defend another Premier League complaint which includes the very same financial periods for which it has already been sanctioned...The Club takes the view that this results from a clear deficiency in the Premier League’s rules.*”
- 23. In accordance with an agreed timetable, that second case and its inevitable appeal is optimistically scheduled to be determined by 24th May 2024; a week after the 2023/24 season concludes. With that procedural oddity aside and all that comes with it, on the limited information available from the parties respective press releases the question now being asked is what could come of that second case against Everton?
- 24. Contrary to what the Premier League says, it is unlikely to be a simple case of determining sanction. Rather, there is likely to be some very interesting arguments

as to whether any sanction can lawfully be imposed in the circumstances where a sanction has already been imposed for part of the same PSR accounting period.

25. Not only are those arguments likely to be interesting, they are now all the more important in the circumstances set out at paragraphs 20 (a) – (e) above and the principle of a starting point of an immediate 6-point deduction and a ceiling of 9 for a PSR breach. Naturally, a second breach will of itself amount to an aggravating factor and, on its face, push that sanction towards the upper end of the scale.
26. One myth to dispel is the suggestion that the principle of “double jeopardy” (or *autofois convict*) applies so as to afford Everton a complete defence to the second case. That is a principle confined to the criminal law and while an awful lot is at stake in these proceedings, they are not criminal in nature. That said, there is some reprieve because analogous civil law principles of *res judicata* and abuse of process do apply to successive regulatory or disciplinary proceedings. The most senior court in the land, the Supreme Court, answered that very question in the affirmative in its judgment in *R (on the application of Coke-Wallis) v Institute of Chartered Accountants in England and Wales [2011] UKSC 1*.
27. So, those deep-rooted natural justice principles upholding the maxim *nemo debet bis vexari pro una et eadem causa* (nobody should be vexed twice in respect of one and the same cause), alongside that which has gone before and a deficient rulebook, potentially open the door for Everton to argue that it cannot lawfully be sanctioned for PSR breaches for periods during which it has already been sanctioned by a competent tribunal, namely the Appeal Board.
28. At best, they could afford a complete defence to Everton and, at worst, they surely go some way – alongside the upward trend in Everton’s accounts and the principle of proportionality – to providing the “powerful” mitigation identified by the Appeal Board to avoid an otherwise immediate 6-point deduction. Either way, like with the first case which (at least in part) fell short because of the deficiency in the Rules for calculating point deductions, it is very possible that a further deficiency in the Rules for determining PSR accounting periods comes to Everton’s rescue yet again.

29. Ultimately, whatever the basis of Everton's defence to the second case, once again here's to hoping that it is successful to the extent that it helps to secure its Premier League status for season 2024/25; its final season at Goodison Park.

References

The Appeal Board Decision, Supreme Court judgment and the Rules referred to above can be found via the following links: -

<https://resources.premierleague.com/premierleague/document/2024/02/26/b1c920abc053-4414-913a-c529efd27d18/Everton-FC-and-Premier-League-appeal-decision-260224.pdf>

<https://www.supremecourt.uk/cases/uksc-2009-0175.html>

https://resources.premierleague.com/premierleague/document/2024/01/04/21175cfd-faa3-4b01-bbad-65894fead686/PL_Handbook_2023-24_DIGITAL_04.01.24-final_.pdf

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28February 2024

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