Arbitration CAS 2005/A/896 Fulham FC (1987) Ltd. v. FC Metz, award of 16 January 2006

Panel: Mr Kaj Hober (Sweden), President; Mr Alan Harris (USA); Mr Olivier Carrard (Switzerland)

Football
"Sell-on clause" defined in a transfer agreement
Choice of the applicable law
Absence of agreement on the meaning of the sell-on clause
Determination of the amount of the sell-on fee

1. **In the absence of a specific agreement by the parties, the applicable law of arbitration can also be chosen by referring to specific arbitration rules which themselves contain rules on the applicable law. In the case at hand, such specific rules are provided by the FIFA Statutes (in particular Art. 59), which expressly prescribe that the rules and regulations of FIFA apply primarily and Swiss law subsidiarily.**

2. **In the absence of agreement of the parties on the meaning of the sell-on clause and in order to determine their intent or the intent which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, even if the words or the conduct appear to give a clear answer to the question, due consideration is to be given to all relevant circumstances of the case in order to go beyond the apparent meaning of the words or the conduct of the parties. This include the negotiations and any subsequent conduct of the parties.**

3. **The words *"net fee"* found in the sell-on clause can only refer to the net transfer fee paid for the acquisition of the player after deduction of the costs in direct connection with the transfer, namely the agents' costs. In no case can all the costs and expenses associated with the employment of the player – namely the player's wages, bonuses, insurance and the fixed amount paid pursuant to the transfer agreement – be taken into consideration to ascertain the *"net fee"*.**

Fulham Football Club (1987) Limited ("the Appellant") is a football club with its registered office in London, England. It is a member of the Football Association (FA), which has been affiliated with the Fédération Internationale de Football Association (FIFA) since 1905.

FC Metz ("the Respondent") is a football club with its registered office in Metz, France. It is a member of the Fédération Française de Football (FFF), which has been affiliated with FIFA since 1904.

L. was registered as a professional player with the Respondent at the time the parties were negotiating his transfer to the Appellant.

On 31 May 2000 and on behalf of the Appellant, Mr Michael Fiddy, Managing Director, addressed the following offer to Mr Charles Molinari, President of the Respondent:

> *"Following your conversation with Jean Tigana Fulham Football Club would like to offer the following payment and terms for the transfer of L. (the player) from Football Club de Metz to Fulham Football Club:-*
>
> - *10,000,000 FF (ten million French Francs) to be paid within 30 days of the completion of the transfer;*
> - *10,300,000 FF (ten million three hundred thousand French Francs) payable exactly one year following completion of the transfer;*
> - *Should L. subsequently be transferred from Fulham Football Club for a fee then Football Club de Metz will receive a "one-off" payment, being 15% (fifteen per cent) of any net transfer fee received over and above monies already paid to Football Club de Metz (i.e. 20,300,000 FF). Should the player then be transferred again at any time in the future no further payments to Football Club de Metz will be made;*
> - *Fulham Football Club will be responsible for the 5% levy payable to the Football League Limited.*
>
> *The above is subject to the approval of the Chairman of Fulham Football Club, the player passing a medical examination to the satisfaction of Fulham Football Club and the club agreeing personal terms with the player.*
>
> *I would be grateful if you could contact me (…) to confirm that you agree with the above offer and that I may now contact the player to finalise personal terms and arrange for a medical to be undertaken".*

On 2 June 2000, the Respondent sent to the Appellant the following fax:

> *"Further to your letter dated the 31st May 2000, we are happy to inform you that the terms of the transfer conditions concerning the player L. found our approval except the following details:*
>
> *10,100,00 FF (ten million one hundred thousand French Francs) to be paid on the 15th July 2000*
>
> *and*
>
> *10,000,000 FF (ten million French Francs)*
>
> *(…)*
>
> *As far as the other terms are concerned we completely agree to them.*
>
> *Would it be possible for you to transmit us the new financial agreement by fax as soon as possible".*

On 2 June 2000 and on behalf of the Appellant, Mr Lee Hoos, Deputy Managing Director, wrote to the Respondent the following letter:

> *"Re L.*
>
> *Michael Fiddy is currently in Barcelona and has asked me to act as signatory for arrangements regarding the above player. Following your fax that we received today I would like to clarify the details:-*
>
> - *10,100,000 FF (ten million one hundred thousands French Francs) to be paid on 15th July 2000;*
> - *10,000,000 FF (ten million French Francs) to be paid on 15th July 2001;*
>
> *The above is obviously still subject the player passing a medical examination to the satisfaction of Fulham Football Club and the club agreeing personal terms with the player.*
>
> *I would be grateful if you could fax me (…) or call me (…) to confirm that I have understood your fax correctly".*

L.'s transfer agreement between the parties was typed on the Appellant's letterhead and provides the following:

> *"An agreement made this day the 5th of June 2000 between FULHAM FOOTBALL CLUB (1987) LTD and FOOTBALL CLUB DE METZ, whereby it is mutually agreed that the registration of the player L. be transferred from FOOTBALL CLUB DE METZ to FULHAM FOOTBALL CLUB (1987) LTD for a transfer fee of 20,100,000 FF (twenty million and one hundred thousand French Francs).*
>
> *The transfer fee shall be paid as follows:-*
>
> 1. *10,100,000 FF (ten million one hundred thousand French Francs on 15 July 2000.*
>
>   *10,000,000 FF (ten million French Francs on 15 July 2001.*
>
> 2. *If during the period of the contract the player is transferred, then Football Club de Metz shall receive, as a once only payment, a sum equivalent to 15% of any net fee received by Fulham Football Club (1987) Ltd over and above the sum of 20,100,00 FF (twenty million and one hundred thousand French Francs). This Clause shall only be valid for the first transfer and no fee shall be payable for subsequent transfers.*
> 3. *Fulham Football Club (1987) Ltd will be responsible for the 5% levy payable to the Football League Ltd.*
>
> *The above is subject to the player agreeing to personal terms with Fulham Football Club (1987) Ltd, and the player passing a medical examination to the satisfaction of Fulham Football Club (1987) Ltd)".*

The said transfer agreement was signed by Mr Lee Hoos for the Appellant and by Mr Patrick Razurel, General Director, for the Respondent.

L. successfully passed the required medical examination and entered into a first employment contract with the Appellant on 26 June 2000.

According to the contract dated 26 June 2000, L.'s employment with the Appellant began on 26 June 2000 and was meant to remain in force until 30 June 2004 *"unless it shall have previously been terminated by substitution of a revised agreement or as hereinafter provided"* ("the first employment contract").

On 2 May 2001, L. signed another employment agreement with the Appellant ("the second employment contract"), which provides in relevant parts:

> *"1. This Agreement shall remain in force until the 30th day of June 2006 unless it shall have previously been terminated by substitution of a revised agreement or as hereinafter provided (…)*
>
> *28. All previous agreements between the Club and Player are hereby cancelled. (…)*
>
> *SCHEDULE*
>
> *(a) The Player's employment with the Club began on the* ***1st July 2000****".*

Under the second employment contract, the term of L.'s employment with the Appellant was extended and his wages, bonuses and accommodation allowance were significantly increased.

On 23 January 2004, the Appellant transferred L. to Manchester United Football Club Limited. It received a transfer fee amounting to GBP 11,500,000.

On 8 March 2004, the Respondent informed the Appellant of its intention to claim the payment pursuant to clause 2 ("the sell-on clause") as defined in the transfer agreement dated 5 June 2000. According to the Respondent, it was entitled to the payment of the sum of EUR 3,064,225.25. It requested from the Appellant the indication of the exact price paid by Manchester United Football Club Limited for L.'s acquisition.

On 25 March 2004 and on behalf of the Appellant, Mr Lee Hoos raised the issue of the possible solidarity payment resulting from L.'s transfer to Manchester United Football Club Limited and the impact of such a payment on the amount due to the Respondent. Furthermore, he required the Respondent to advise how it calculated the claimed sell-on fee.

On 1 April 2004, the Respondent sent to the Appellant the following invoice:

> *"Profit-sharing on the increment value of the transfer of the player L. pursuant to our agreement on June 6, 2000 (…)*
>
> *Transfer fee*
>
> *(transfer from FULHAM FC towards MANCHESTER UNITED)*
>
> *11.500.000,00 £. → 16.623.250,00 €*
>
> *Increment value realized by FULHAM FC*
>
> *16.623.250,00 € - 3.201.430,00 € = 13.421.820,00 €*
>
> *Amount fixed by contract and due to FC METZ*
>
> *13.421.820,00 € x 15% = 2.013.273,00 €*
>
> ***Amount to be paid to FC METZ 2.013.273,00 €***
>
> *INVOICE TO BE PAID FOR APRIL 15, 2004*
>
> *Date of change: 27/01/2004 (transfer realized on 23rd January 2004)".*

The said invoice was left unanswered by the Appellant until 12 August 2004. At that date, the latter confirmed to the Respondent that it did not intend to pay the claimed sale-on fee before a certain number of issues were addressed and clarified. In particular, the Appellant was referring to:

- investigations involving Mr Jean Tigana and transfers arranged by him while he was the manager of the Appellant;
- the circumstances surrounding L.'s transfer to the Appellant, including the involvement of agents in the transfer and any payments made to third parties;
- the impact of the rules regarding the solidarity mechanism on the determination of the sell-on fee. As far as this matter is concerned, the Appellant stated that *"At present, it is not possible to be certain that a solidarity payment does apply to the L. transfer to Manchester United but, assuming it does, it could clearly affect the amount payable to Metz. For instance, we would need to know whether that 5% payment should be deducted from the net transfer fee prior to calculating Metz's 15% sell on fee or whether the 5% should be deducted from the 15% sell on fee itself (leaving 10% for Metz). We would also need to understand how the 5% should be divided between the different clubs who have contributed to L.'s development"*.

On several occasions, the English Football Association informed the Appellant that it considered that solidarity payments were due in relation with L.'s transfer to Manchester United Football Club Limited.

On 21 October 2004, FIFA wrote to the English Football Association indicating that it had received a complaint from the Fédération Française de Football, which was acting on behalf of the Respondent, regarding the dispute in connection with the transfer agreement dated 5 June 2000. FIFA invited the English Football Association to intervene by contacting the Appellant and informing it that it had until 1 November 2004 either to pay the requested amount of EUR 2,013,273 or to provide FIFA the reasons for not doing so.

On 1 November 2004, the Appellant wrote directly to the Respondent asking the latter to answer the questions it raised in its letter dated 12 August 2004.

On the same day, the Appellant wrote to the English Football Association confirming that it did not agree to make any payment to the Respondent in relation to L.'s transfer as long as the issues raised in its letter dated 12 August 2004 remained unanswered and unresolved. It asked the English Football Association to pass to FIFA its letters dated 1 November and 12 August 2004.

On 15 November 2005, FIFA informed the Fédération Française de Football that the dispute would be presented to the Single Judge of the Players' Status Committee.

On 22 November 2004, the Respondent made its submission to FIFA's disciplinary body. It claimed an amount of EUR 2,013,273, plus interest of 7% starting from 1 April 2004. In addition, it also sought compensation in the amount of EUR 100,000 as supplementary damages in connection with the Appellant's alleged reproachable attitude.

The Appellant did not make any submissions to the Single Judge of the Players' Status Committee.

On 24 December 2004, the Appellant received notification from the English FA that solidarity payments were not applicable to domestic transfers.

On 13 April 2005, the Single Judge of the FIFA Players' Status Committee issued a decision, which can be summarized as follows:

- The contract signed between the parties on June 2000 regarding L.'s transfer is valid. The Appellant has no legitimate reasons for not complying with its contractual obligations towards the Respondent.
- The Respondent cannot be liable for the allegedly unlawful behaviour of the Appellant's former manager, Mr Jean Tigana. The proceedings against him cannot affect in anyway the validity of the said transfer contract.
- Furthermore, the Respondent cannot be required to disclose any information relating to L.'s transfer to the Appellant.
- According to the jurisprudence of the Players' Status Committee, an interest rate of 5% per year shall apply on the awarded amount starting on 1 April 2004 until the effective date of payment.
- The Respondent did not substantiate its claim of EUR 100,000 in supplementary damages, which must therefore be rejected.

For the above-mentioned reasons, the Single Judge of the FIFA Players' Status Committee decided the following:

> *"1. The claim of the Claimant, FC Metz, is partially accepted.*
>
> *2. The Respondent, Fulham FC, has to pay the amount of EUR 2,013,273 plus 5% interest p.a. starting on 1 April 2004 to FC Metz.*
>
> *3. Any further claims lodged by FC Metz are rejected.*
>
> *4. The amount due to FC Metz has to be paid by Fulham FC* ***within the next 30 days*** *as from the date of notification of this decision.*
>
> *5. FC Metz is directed to inform Fulham FC immediately of the account number to which the remittance is to be made and to notify the Single Judge of the Players' Status Committee of every payment received.*
>
> 6. *If the relevant sum is not paid within the aforementioned deadline, the present matter shall be submitted to FIFA's Disciplinary Committee, so that the necessary disciplinary sanctions may be imposed.*
>
> 7. *According to art. 60 par. 1 of the FIFA Statutes, this decision may be appealed before the Court of Arbitration for Sport (CAS). The statement of appeal must be sent to the CAS directly within 10 days of receiving notification of this decision and has to contain all elements in accordance with point 2 of the directives issued by the CAS".*

On 18 May 2005, the Appellant was notified of the decision issued by the Single Judge of the FIFA Players' Status Committee ("the Decision").

On 27 May 2005, the Appellant filed a statement of appeal with the Court of Arbitration for Sport (CAS). On 7 June 2005, the Appellant filed its appeal brief, which contains a statement of the facts and legal arguments accompanied by supporting documents and experts' opinions.

On 20 July 2005, the Respondent submitted its answer to the CAS.

A hearing was held on 29 November 2005 at the CAS premises in Lausanne.

LAW

CAS Jurisdiction

1. The jurisdiction of the CAS, which is not disputed, derives from Art. 59 ff. of the FIFA Statutes and Art. R47 of the Code of Sport-related arbitration (the "Code"). It is further confirmed by the order of procedure duly signed by the parties.

2. It follows that the CAS has jurisdiction to decide on the present dispute.

3. Under Art. R57 of the Code, the Panel has the full power to review the facts and the law. The Panel did not therefore examine only the formal aspects of the appealed decision but held a trial *de novo*, evaluating all facts and legal issues involved in the dispute.

Applicable law

4. It is generally accepted in Swiss legal doctrine and case law that the choice of the place of arbitration also determines the law to be applied to arbitration proceedings. The Swiss Code of Private International Law (CPIL) is the relevant arbitration law (DUTOIT B., Droit international privé Suisse, Commentaire de la Loi fédérale du 18 décembre 1987, Bâle 2005, N. 1 on Art. 176 CPIL). Art. 176 par. 1 CPIL provides that the provisions of Chapter 12 of the CPIL regarding international arbitration shall apply to any arbitration if the seat of the arbitral tribunal is in Switzerland and if, at the time the arbitration agreement was entered into, at least one of the parties had neither its domicile nor its usual residence in Switzerland.

5. In its judgments of 15 March 1993 and 27 May 2003, the Swiss Federal Tribunal recognised the CAS as a true court of Arbitration. The CAS has its seat in Switzerland. Chapter 12 of the CPIL shall therefore apply, all the parties in the present matter having neither their domicile nor their usual residence in Switzerland.

6. Pursuant to Art. 176 par. 2 CPIL, the provisions of Chapter 12 do not apply where the parties have excluded its application in writing and agreed to the exclusive application of the procedural

provisions of cantonal law regarding arbitration. There is no such agreement in this case. Therefore, Art. 176 ff. CPIL are applicable.

7. Art. 187 CPIL is of particular relevance. It provides that the arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection.

8. The Appellant is of the opinion that a choice of law ascribed by international conflict of laws principles is to be treated as an implied choice of law by the parties and must be applied by the Panel.

9. The election of governing law by tacit agreement is possible. For instance, by their behaviour, the parties could have clearly given their assent to the application of a specific law, namely to international conflict of laws principles as submitted by the Appellant. Nevertheless, to admit this, it must undoubtedly emerge through the parties conclusive acts, that they agreed on the applicable law when they entered into the disputed contractual relationship. The hypothetical intention of the parties is insufficient (DUTOIT B., Droit international privé Suisse, Commentaire de la Loi fédérale du 18 décembre 1987, Bâle 2005, N. 3 on Art. 187 CPIL).

10. In the case at hand, the Panel observes that the parties have not explicitly agreed upon a specific law to be applicable in case of a dispute arising out of their agreement of 5 June 2000. On the contrary, during the hearing, the Respondent contested the application of international conflict of laws principles. Should those rules be considered applicable, the Respondent was of the opinion that French law was to be taken into consideration and not English law as argued by the Appellant.

11. The dominant trend in Swiss legal doctrine is of the view that the applicable law of arbitration can, in the absence of a specific agreement by the Parties, also be chosen by referring to specific arbitration rules which themselves contain rules on the applicable law (see KARRER P., Basler Kommentar zum Internationalen Privatrecht, Basel 1996, N. 92 and 96 on Art. 187 CPIL; CAS 2004/A/574).

12. Art. 59 par. 2 of the FIFA Statutes provides *"The CAS Code of Sports-Related Arbitration governs the arbitration proceedings. With regard to substance, CAS applies the various regulations of FIFA or, if applicable, of the Confederations, Members, Leagues and clubs and, additionally, Swiss law".*

13. Art. 60 par. 1 of the FIFA Statutes provides that in case of a dispute the CAS alone is empowered to deal with appeals against decisions and disciplinary sanctions of the last instance of appeal within FIFA.

14. Art. R58 of the Code provides the following:

"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".

15. Both parties are football clubs and members of their respective federations, themselves members of FIFA. It has been recognised by the Swiss Tribunal Federal that regulations of an association like FIFA also apply to indirect members, *i.e.* to clubs, when statutes of the federations refer to the regulations of the "governing" association, *i.e.* FIFA (ATF 119 II 271 et seq., 276; see also RIEMER H. M., Berner Kommentar on Art. 60- 79 Swiss Civil Code, .N. 511 and 515 Systematischer Teil; CAS 2004/A/574).

16. From the above it follows that the FIFA Statutes (and in particular Art. 59) determine the applicable law in the case at hand. By submitting themselves to the rules and regulations of FIFA, in the absence of an express choice of law in their agreement of 5 June 2000, the rules and regulations of FIFA shall apply primarily and Swiss law shall apply subsidiarily.

17. It also follows from the foregoing that the Panel finds that there is no reason to apply the last part of the first sentence of Art. R58 of the Code referring to *"the rules of law, the application of which the Panel deems appropriate"*.

Admissibility

18. The appeal was filed within the deadline provided by Art. 60 of the FIFA Statutes and stated in the appealed Decision, that is within 10 days after notification of such decision.

19. It follows that the appeal is admissible.

Main Issues

20. The main issues to be resolved by the Panel are:

    a) Does clause 2 of the transfer agreement dated 5 June 2005 apply to the sale of L. to Manchester United Football Club Limited?

    b) If the answer is yes, what does the sell-on fee amount to?

    c) Are there any reasons to adjust the sell-on fee?

    d) Is the Respondent entitled to be awarded EUR 200,000 in supplementary damages?

    e) Default interest

A. Does clause 2 of the transfer agreement dated 5 June 2005 apply to the sale of L. to Manchester United Football Club Limited?

21. The parties do not agree on the meaning of clause 2 of the transfer agreement dated 5 June 2005, which provides *"If during the period of the contract the player is transferred, then Football Club de Metz shall receive, as a once only payment, a sum equivalent to 15% of any net fee received by Fulham Football*

Club (1987) Ltd over and above the sum of 20,100,000 FF (twenty million and one hundred thousand French Francs). This Clause shall only be valid for the first transfer and no fee shall be payable for subsequent transfers".

22. Pursuant to Art. 1 of the Swiss Code of Obligations, a contract requires the mutual agreement of the parties. Such agreement may be either express or implied.

23. When the interpretation of a contractual clause is in dispute, the judge seeks the true and mutually agreed upon intention of the parties, without regard to incorrect statements or manner of expressions used by the parties by mistake or in order to conceal the true nature of the contract (Art. 18 par. 1 of the Swiss Code of Obligations). When the mutually agreed real intention of the parties cannot be established, the contract must be interpreted according to the requirements of good faith (ATF 129 III 664; 128 III 419 consid. 2.2 p. 422). The judge has to seek to determine how a declaration or an external manifestation by a party could have been reasonably understood depending on the individual circumstances of the case (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

24. The requirements of good faith tend to give the preference to a more objective approach. The emphasis is not so much on what a party may have meant but on how a reasonable man would have understood his declaration (ATF 129 III 118 consid. 2.5 p. 122; 128 III 419 consid. 2.2 p. 422).

25. The members of the Panel regret that during the hearing neither party has presented fact witnesses, who had a direct knowledge of the events in dispute. It could have helped them to understand the context of the negotiations. It leaves the Panel with the difficult task to determine the intent of the contracting parties with very little documentary evidence and factual elements.

26. In determining the intent of a party or the intent which a reasonable person would have had in the same circumstances, it is necessary to look first to the words actually used or the conduct engaged in. However, the investigation is not to be limited to those words or the conduct even if they appear to give a clear answer to the question. In order to go beyond the apparent meaning of the words or the conduct of the parties, due consideration is to be given to all relevant circumstances of the case. This includes the negotiations and any subsequent conduct of the parties.

a) The negotiations

27. In its offer made on 31 May 2000, the Appellant expressly divided L.'s transfer fee in two parts. One part was a fixed amount of FRF 20,300,000 payable in two instalments and the other part was an *"additional amount"*. Regarding the method of calculation of the *"additional amount"*, the offer provided that, in case of a subsequent transfer of the player from the Appellant, the Respondent would receive a "one-off" payment of 15% of any net transfer fee received over and above the monies already paid. This provision does not contain any limit in time, the sell-on fee being triggered at a subsequent transfer of the player from the Appellant. The offer was

expressly subject to the approval of the Chairman of the Appellant, the player satisfactorily passing a medical examination and the Appellant agreeing personal terms with L.

28. In a fax dated 2 June 2000, the Respondent confirmed its acceptance of all the terms of the offer, on one condition: the first instalment of the fixed amount was to be FRF 100,000 higher than the first instalment mentioned in the offer. In response thereto, the Respondent proposed to reduce the second instalment of FRF 300,000. The Respondent did not indicate the date of payment of the second instalment.

29. In response thereto, and on the same day, the Appellant wrote to the Respondent to make sure that the second instalment was due on 15 July 2001, which coincides with the dates mentioned in its initial offer as well as in the disputed transfer agreement. The validity of the contract was, then, only conditioned on L. satisfactorily passing a medical examination and the club agreeing personal terms with the player. The agreement was not subject to the approval of the Chairman of the Appellant anymore. The Appellant can therefore be considered as having endorsed the transfer contract as presented on 2 June 2000 by the Respondent.

30. In the correspondence between the parties on 2 June 2000, there was no sign of divergence regarding the *"additional amount"*. The parties were only trying to reach a consensus on a minor element of the contract. The Respondent was asking for FRF 100,000 more than the offered sum for the first instalment. That is one percent of the said first instalment. The Respondent proposed to lower the second instalment by up to FRF 300,000.

31. It appears that with its letter dated 2 June 2000, the Appellant had agreed on:

- the fixed amount of FRF 20,100,000;
- the dates of the payment of the two instalments;
- the *"additional amount"* and its method of calculation.

32. Under those circumstances, the Panel does not see how one can reasonably suggest that between 2 June and 6 June 2000, the parties renegotiated the terms of the transfer agreement, only in regard to the "*additional amount",* which did not generate any comment until then.

33. As explained here-above, the Appellant agreed on all the essential terms of the transfer agreement. In suggesting that there were new discussions of the terms and conditions of the *"additional amount"* between 2 June and 5 June 2000, the Appellant implies that the Respondent initiated the renegotiations, which is not likely. The Panel cannot find any plausible reason for the Respondent to request a time limit after which no *"additional amount"* were due in case of a subsequent transfer of the player, since there was no such deadline mentioned previously.

34. The Panel does not agree with the submissions of the Appellant according to which the words *"the contract"* intend to refer to the transfer agreement itself. The Appellant put forward that the said agreement came to an end at the time of the payment of the second instalment made on 15 July 2001. Accordingly, in the view of the Appellant, the Respondent was entitled to a

payment pursuant to the sell-on clause only if the player had been transferred prior to 15 July 2001.

35. As a matter of fact, the Panel finds it difficult to believe that the Respondent accepted to reduce to one year the previously unlimited period of time during which the sell-on clause was in force without any kind of compensation. It clearly could not have been the parties' intention at the time of the signature of the transfer agreement. This is corroborated by the fact that, at the time of the payment of the second instalment on 15 July 2001, the Appellant had not tried to confirm to the Respondent that it considered its contractual obligations as fully performed.

36. For the same reasons, the Panel cannot agree with the submission of the Appellant according to which, on the assumption that the sell-on clause was referring to the employment contract between the Appellant and L., it is to be understood as meaning the first employment contract dated 26 June 2000 and not any subsequent contract entered into. It is not very likely and a reasonable person would not have accepted that this was the real intention of the parties at the date of the signature of the transfer agreement. It is very unlikely that, as submitted by the Appellant, it was in the Respondent's intention to leave it up to the Appellant to decide when and how to terminate the first employment contract, and, accordingly, its rights regarding the *"additional amount"*. We may add in this respect that the Respondent was not informed of the negotiation, conclusion, or existence of the second employment contract.

37. Furthermore, if the Appellant was of the opinion that his obligations under the sell-on clause were terminated by the signature of the second employment contract, it would have been reasonable to expect from it to have so informed the Respondent.

38. Under those circumstances, the Panel finds that, during negotiations, the parties agreed that, in case of a subsequent transfer of the player from the Appellant, the Respondent would receive a "one-off" payment of 15% of any net transfer fee received over and above the monies already paid.

b) The subsequent conduct of the parties

39. It is only during the proceedings before the CAS that the Appellant presented a submission dominated by a very literal, word-oriented approach. It did not set forth any interpretation of the terms *"the contract"* until its letter dated 12 August 2004. Even in that letter, the Appellant did not put forward the position which was most strongly argued before the CAS, *i.e.* that the terms *"the contract"* can only refer to the transfer agreement itself.

40. The Panel observes that the positions of both parties were very consistent until FIFA passed its decision dated 13 April 2005.

41. On the one hand, the Respondent promptly reacted to L.'s transfer to Manchester United Football Club Limited by sending an invoice. On several occasions it requested the payment of the sell-on fee from the Appellant.

42. On the other hand, the Appellant did not, until the proceedings before the CAS, challenge nor contest the principle of the payment due to the Respondent on the basis of the sell-on clause. Mr Lee Hoos, Deputy Managing Director of the Appellant, was involved during the entire process, from the drafting and the signing of the transfer agreement, to the discussions with the Respondent following the transfer of L. to Manchester United Football Club Limited. The argument according to which the terms *"the contract"* can only refer to the transfer agreement itself was advanced for the first time before the CAS by the Appellant's legal representatives, who expressly submitted the following:

"The arguments which Fulham advances in this appeal brief were not advanced before FIFA, nor were they considered by FIFA. As will be apparent from the correspondence referred to later in this appeal brief, Fulham has dealt with the matter internally up until this stage of the proceeding. Fulham, having now had the advantage of being legally advised and represented, wishes to advance additional arguments. Fulham no longer seeks to advance any arguments in relation to Metz' failure to answer certain questions regarding the transfer of L.".

43. In connection with this submission, the Panel notes the following:

- The Appellant had already received advice from an external legal counsel well before the CAS proceedings. In its letter dated 12 August 2004, the Respondent states *"We apologise for the fact that we have not been able to write to you more fully previously, but there has been need to consult with our external legal advisors".*
- Furthermore, this submission is, in fact, an admission that the arguments advanced by the Appellant for not complying with the payment of the claimed sell-on fee were not relevant.

44. Based on the foregoing, the Panel is of the opinion that the Appellant knew from the beginning that it had a contractual obligation to pay the sell-on fee to the Respondent due to the sale of L. to Manchester United Football Club Limited.

c) Conclusion

45. It follows from all the above-mentioned reasons, that the parties intended that clause 2 of the transfer agreement would apply to L.'s employment with the Appellant, which began on 1 July 2000, as stated under letter (a) of the schedule of the second employment contract.

46. The Panel does not need to resolve the question of whether or not clause 2 could have applied to all the successive contracts between L. and the Appellant, without any limit in time.

47. In the case at hand, at the moment of the signature of the transfer agreement, the parties did not know and could not have known the contractual provisions of the employment agreement entered into between L. and the Appellant. As a matter of fact the transfer agreement was subject to *"the player agreeing to personal terms with Fulham football Club (1987) Ltd"*. The said *"personal terms"* have never been communicated to the Respondent. Under those circumstances, the Respondent was entitled to infer that the sell-on clause would apply to the period during which

the first employment contract was intended to have existed. Given the significant transfer fee of FRF 20,100,000 paid by the Appellant for L.'s acquisition, it was also reasonable for the Respondent to expect the first employment contract to be longer than a year.

B. If the answer is yes, what does the sell-on fee amount to?

48. Pursuant to clause 2 of the transfer agreement, the Respondent *"shall receive, as a once only payment, a sum equivalent to 15% of any net fee received by Fulham Football Club (1987) Ltd over and above the sum of 20,100,00 FF (twenty million and one hundred thousand French Francs)".*

49. The words *"net fee"* are not defined by the agreement. To interpret these words, the Appellant relies on the Respondent's submission to FIFA, which could be understood such that the latter admits to be entitled to 15% of the net profit realized by the Appellant from L.'s transfer. According to the Appellant, in order to ascertain the profit made on L.'s transfer, it would be necessary to take into account all of the costs and expenses associated with the employment of L., namely agent fees, the player's wages, bonuses, insurance and the fixed amount paid by the Appellant to the Respondent pursuant to clause 1 of the transfer agreement dated 5 June 2000.

50. Obviously the wording used by the Respondent was inadequate and is not consistent with its actions and its submissions as explained below:

- With its invoice dated 1 April 2004, the Respondent requested the payment of EUR 2,013,273.
- The Respondent explained that, from L.'s transfer fee, GBP 11,500,000 were directly paid to the Appellant, GBP 575,000 to FA Premier League and GBP 750,000 to agents.
- The Respondent alleged that the correct calculation of the additional amount due is the following one:

  "11.500.000,00 £ → 16.623.250,00 €
  Increment value realized by FULHAM FC
  16.623.250,00 € - 3.201.430,00 € = 13.421.820,00 €
  Amount fixed by contract and due to FC METZ
  13.421.820,00 € x 15% = 2.013.273,00 €
  Amount to be paid to FC METZ 2.013.273,00 €".

51. The words "net fee" speak for themselves. They can only refer to the net transfer fee paid by Manchester United Football Club Limited for L.'s acquisition after deduction of the costs in direct connection with the transfer of the player, namely the agents' costs.

52. In the view of the Panel, it is excluded that all the expenses associated with the employment of L. must be taken into consideration to ascertain the *"net fee".*

53. It is undisputed that, in regard to L.'s transfer from the Appellant, the latter received GBP 11,500,000, GBP 575,000 were paid to FA Premier League and GBP 750,000 to agents.

54. The method of calculation of the sell-on fee as set forth by the Respondent in its invoice dated 1 April 2004 is undisputed per se. It is therefore accepted by the Panel.

55. Accordingly, the amount of GBP 11,500,000 must be considered the "net fee" as referred to in the transfer agreement dated 5 June 2005.

C. Are there any reasons to adjust the sell-on fee?

56. L. was transferred to Manchester United Football Club Limited on January 2004, that is 6 months before the first employment contract between the player and the Appellant was intended to have come to an end. The Appellant submits that if it had not entered into a second employment contract with the player, the sell-on fee would have been much lower since the player's value was determined in part by the length of time the second employment contract still had to run. Accordingly, and as a matter of equity, the Respondent should not, in the view of the Appellant, be entitled to benefit from the full value of the sale to Manchester United Football Club Limited.

57. On the one hand, the Panel accepts the idea that the extension of L.'s employment contract with the Appellant could help to negotiate the player's transfer at a better price. On the other hand, it is not possible to know in how big a need Manchester United Football Club Limited was for a player such as L. and what it was willing to pay for his acquisition. In particular, the Panel has not been informed of whether other clubs lined up to buy the said player. The Appellant did not substantiate his position by relying, for example, on reports from experts specialised in the economics of transfer of players.

58. Under those circumstances, the Panel considers it too speculative to determine how the transfer of the player from the Appellant was influenced by the length of the remaining time of the second employment contract. Therefore, the Panel does not find reason to adjust the sell-on fee as determined under the transfer agreement dated 5 June 2000.

D. Is the Respondent entitled to be awarded EUR 200,000 in supplementary damages?

59. The Respondent requested the Panel to *"ORDER FC FULHAM to pay €200,000 in damages in order to indemnify the loss sustained by FC METZ because of FC FULHAM's reckless resistance"*.

60. According to the Respondent, the Appellant's conduct is reproachable and "*must*, *as a matter of principle, lead to the payment of damages for unfair and dilatory proceedings"*.

61. On this sole basis, the Respondent is seeking the payment of an additional sum of EUR 200,000.

62. As regards the burden of proof, it is the Respondent's duty to objectively demonstrate the existence of its rights (Art. 8 of the Swiss Civil Code, ATF 123 III 60 consid. 3a) ATF 130 III

417 consid. 3.1.). It is not sufficient for it to simply assert the mere existence of a violation of its interests for a tribunal to consider the matter without further substantiating its claim.

63. The Respondent has not proven nor made plausible the existence of the alleged damage it suffered because of the so-called reproachable attitude of the Appellant.

64. Under those circumstances, the Respondent cannot be awarded any compensation for supplementary damages.

E. Default interest

65. When a contract does not contain a specific date of performance, an obligation must be executed, or its execution can be required, immediately (Art. 75 of the Swiss Code of obligations). In such a case, the debtor will be considered in default when there is a subsequent notice by a creditor demanding performance (Art. 102 par. 1 of the Swiss Code of Obligations). If the default concerns a payment of money, the debtor must pay interest on arrears at the rate of 5% per annum if not a higher rate is stipulated in the contract (Art. 104 of the Swiss Code of Obligations).

66. There is no specific date of performance in clause 2 of the transfer agreement dated 5 June 2005. According to the invoice dated 1 April 2004 sent by the Respondent to the Appellant, the transfer fee was to be paid on 15 April 2005. This document constitutes a formal notice as defined under Art. 102 par. 1 of the Swiss Code of Obligations.

67. Under those circumstances, default interest of 5 % per annum must be paid as from 16 April 2004.

Conclusion

68. Based on the foregoing, the Panel finds that the compensation, related to the sell-on fee, to be awarded to the Respondent shall thus amount to EUR 2,013,273 plus interest at 5% as from 16 April 2004.

The Court of Arbitration for Sport rules that:

1. The appeal of Fulham Football Club (1987) Limited against the decision issued on 13 April 2005 by the Single Judge of the FIFA Players' Status Committee is denied.

2. The decision issued on 13 April 2005 by the Single Judge of the FIFA Players' Status Committee is confirmed, except for the default interest, which shall start running from 16 April 2004.

3. Fulham Football Club (1987) Limited is ordered to pay to FC Metz the amount of EUR 2,013,273 (two million thirteen thousand two hundred and seventy-three Euros), plus interest at 5% (five percent) per annum as from 16 April 2004.

4. All other claims and counterclaims are denied.

(…)