



Arbitration CAS 2012/A/2871 Southend United FC v. UJ Lombard FC, award of 19 February 2013

Panel: Mr Lars Halgreen (Denmark), Sole Arbitrator

Football

Transfer

Interpretation of a contractual clause in line with CAS case law

Disputes arising from the interpretation of a contractual clause

Interpretation of an agreement according to Swiss law

1. **When interpreting a contractual clause, a CAS panel must first consider the words of the relevant provision. If the meaning of those words is clear, it is not permissible for the parties to adduce evidence of their intentions.**
2. **Any case in which the dispute solely arises from the interpretation of a contractual clause leads to the assumption that the wording of such clause is ambiguous as to its meaning. If it was so “clear” then no room for different interpretations of the clause would be likely to exist. There are doubts as to the “clarity” of an agreement if such agreement does not refer to the contract duration, to the performance of the player, to possible injuries, etc.**
3. **The interpretation of a contractual provision in accordance with the Swiss Code of Obligations aims at assessing the true common intentions (consensus) the parties had when they concluded the contract. If a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into consideration the wording, the context and all circumstances.**

I. BACKGROUND

A. The Parties

1. Southend United FC (the “Appellant”) is an English football club, located in Southend-on-Sea, Essex, which plays in Football League Two.
2. ÚJ Lombard FC, official name Lombard Pápa Termál FC (the “Respondent”) is a Hungarian football club, with seat at Pápa, Hungary, which plays in the OTP Bank Liga.

B. The Relevant Facts Relating to the Dispute

3. On 25 July 2007, the Parties signed a transfer agreement (the “Agreement”) for the transfer of the player Zoltan Liptak (the “Player”) from ÚJ Lombard FC to Southend United FC for the amount of GBP 50,000.
4. The Agreement stipulates that the transfer fee has to be paid as follows:
 - *“£50,000 to be transferred within ten days after the date of signing the contract.*
 - *A further £30,000 to be paid after the player has achieved 25 starting appearances in First Team official games.*
 - *A further £30,000 to be paid after the player has achieved 50 starting appearances in First Team official games.*
 - *A further £30,000 to be paid after the player has achieved 75 starting appearances in First Team official games.*

For the avoidance of doubt, payments will be made as following:

- *25 starting appearances - £30,000*
- *50 starting appearances - £30,000*
- *75 starting appearances - £30,000*

In the event of the player going on loan to another club then any First Team starting appearances made for the loanee club will be included.

In the event of the player being sold and transferred to another club for before the player has made the relevant number of starting appearances then it is agreed that any appearance payment that has not yet fallen due will be paid within ten days of the date of the transfer”.

5. On 30 May 2008, the Player was transferred from the Appellant to the Hungarian club Újpest FC for a transfer fee of GBP 60,000.
6. On 16 September 2008, the Respondent lodged a claim with FIFA against the Appellant for allegedly having failed to respect the terms of the Agreement. The Respondent specifically claimed the payment of the additional considerations related to the starting appearances in a total amount of GBP 90,000 plus default interest starting from the 10th day of the transfer, as well as procedural costs.
7. The Respondent provided a letter from the Appellant dated 20 August 2008 in which the latter stated that it did not have to pay further amounts since the Player “*made nowhere near the requisite number of appearances*”.
8. In response to the claim lodged by the Respondent, the Appellant held that the Agreement indicated that the total transfer fee was GBP 50,000 and that no further amounts were due except if certain conditions were met. In order to support his defense, the Appellant

provided a form titled *“Declaration of Payments in respect of the International Transfer of a Player to a Club of the Football Association Form”*.

9. Said document signed by the Parties indicates that *“the compensation fee agreed between the Clubs is GBP 50,000, less solidarity payment”*. Equally, this form states that the undersigned confirm that *“no payments other than those specified below will be made in respect of this transfer and that any amendments to the transfer agreement must be signed by both clubs, the player, and must be notified to the Football Association for approval”*.
10. The Appellant held that only if the Player had made 75 starting appearances in First Team official matches would the contingency payments be due and subsequently the amount of GBP 90,000 would be owed to the Respondent.
11. The Appellant justified that such clauses in contracts are only made to assess the ability of players and, in this case, the Player was never of sufficient caliber to play in the First Team, hence he only made five (5) appearances on the team sheet as a non-playing substitute.
12. The Appellant confirmed as well that the Player was loaned to a non-League team, Stevenage Borough, and only made four (4) appearances during the loan period, from 22 November 2007 to 1 January 2008.
13. On 21 November 2011, the Single Judge of the FIFA Players’ Status Committee ruled in favor of the Respondent.
14. After an examination of the Agreement, the Single Judge came to the conclusion that the wording of the clause was clear and left no scope for interpretation and that in case of a definitive transfer of the Player to a third club, the Appellant had a payment obligation irrespective of whether the Player had actually played or not. Thus, he ruled the following:

“The parties had agreed that any appearance payment that had not yet fallen due will be paid within ten days of the date of the transfer.

The payments on the starting appearances became due irrespectively of whether the player had reached the requested number of starting appearances, but in view of the fact that he was definitively transferred to Újpest”.
15. Consequently, the Single Judge decided that the Appellant had to pay GBP 90,000 plus default interest at a rate of 5% as from 10 June 2008. He also found that according to Article 18 par. 1 of the Procedural Rules of the FIFA Players’ Status Committee and the Dispute Resolution Chamber, the Appellant had to bear the procedural costs of CHF 6,000 (4,000 to be paid to the Respondent for advancement of costs and 2,000 to FIFA). All of these payments were to be made within 30 days from the date of notification of the decision.
16. The decision from the Single Judge of the FIFA Players’ Status Committee was issued on 21 November 2011 and was notified to the Parties on 4 July 2012.

II. THE ARBITRAL PROCEEDINGS

A. The CAS Proceedings

17. On 25 July 2012 the Appellant filed a Statement of Appeal with the CAS against the decision issued by the Single Judge of the FIFA Player's Status Committee pursuant to Articles R47 *et seq.* of the Code of Sports-related Arbitration (the "CAS Code"). In its Statement of Appeal, the Appellant made the following prayers for relief:
 - 1) *The Appellant requests that the Award of FIFA in this matter is quashed.*
 - 2) (...).
18. On 3 August 2012, the Appellant filed its Appeal Brief pursuant to Article R51 of the CAS Code. It must be noted that the Appellant did not include annexes 1 and 2 when filing its Appeal Brief.
19. On 23 August 2012, the Parties were advised that the appeal was submitted to a Sole Arbitrator pursuant to Article R50 of the CAS Code.
20. On 14 September 2012, the Appellant forwarded Annexes 1 and 2 to its Appeal.
21. On 19 September 2012, the Parties were advised that Mr Lars Halgreen, attorney-at-law in Copenhagen, Denmark, was appointed as Sole Arbitrator in this matter.
22. The Sole Arbitrator decided to admit Annexes 1 and 2 to the Appellant's Appeal Brief.
23. On 20 September 2012, the Respondent filed its Answer, and informed the CAS Court Office that it accepted the appointment of Mr Lars Halgreen as Sole Arbitrator.
24. The Respondent asked for the following prayers for relief:
 - 1) *That CAS dismisses the appeal of the Appellant, as well as upholds the decision of the FIFA Players' Status Committee.*
 - 2) *That the Appellant pays all the costs of the CAS procedures, including fees paid by the Respondent, as well as the fee of the Respondent's legal representative which amass the sum of CHF 3,000.*
25. The Parties failed to inform the CAS Court Office whether they preferred a hearing to be held or not within the prescribed time limit to do so.
26. On 5 October 2012, the CAS Court Office informed the Parties that the Sole Arbitrator was sufficiently informed and would render an award based on the written submissions.

27. On 21 November 2012, the CAS Court Office sent an Order of Procedure, which was signed by both Parties without any objections. In particular, the Parties confirmed that their right to be heard has been respected.

B. The Parties' Submissions

1. Southend United FC

28. The Appellant submits that the interpretation of the Agreement by the Single Judge was wrong for the following reasons:
- 1) The Agreement must be read as a whole. It stipulates that the transfer fee is GBP 50,000 and any contingent obligations based on appearances do not form part of the transfer fee. The FIFA decision would mean that the transfer fee is GBP 140,000, contrary to the express words of the Agreement.
 - 2) The payments are payable upon a condition being met. According to the express words of the transfer Agreement, Southend is not liable to make the payments if the Player does not make the required number of appearances.
 - 3) The clause regarding the required number of appearances makes no sense when interpreted in the FIFA decision. If it were correct, there would be no reason to link the payments to a specified number of appearances.
 - 4) An appearance payment is a payment which depends on a specified number of appearances by the Player. The clause just determines the due date for appearance payments for which Southend is already liable.
 - 5) The FA Declaration Form records that the total transfer fee paid to ÚJ Lombard is GBP 50,000 and makes no reference to guaranteed appearance payments that Southend was liable for regardless of such effective appearances. The Form is signed by representatives of both Parties and the Player, which evidences that the Parties understood at that time that their agreement was for a transfer fee of GBP 50,000 only, and any further monies were entirely contingent upon the happening of certain events and were not guaranteed.
 - 6) The interpretations by ÚJ Lombard and FIFA do not only contradict the express terms of the Agreement as a whole, but also make no commercial sense. The clause is merely to protect the selling club if the Player were to be of a greater value than that of the transfer fee by remunerating it for the first team appearances by the Player. Well-recognized principles of contractual interpretation look to what the parties must have intended in making the agreement, the custom and practical nature. Also the agreement must be efficient from a business point of view.

2. *ÚJ Lombard FC*

29. The Respondent upholds all previous declarations alleged before the FIFA Players' Status Committee and states that the decision made by the Single Judge was the correct interpretation of the Agreement in accordance with the rules and regulations; the appeal is therefore totally unfounded. The Respondent further submits the following:
- 1) The Single Judge fully discovered and investigated all the facts of the case, properly and completely evaluated the Agreement between the Parties, therefore his conclusions were also correct.
 - 2) The Appellant was obliged to pay a fixed transfer fee in accordance with the Agreement; the Appellant had the obligation to pay an additional fee for a determined Player's appearances on the pitch. It was also conditionally burdened with a payment obligation in case it sells the beneficial use of the Player's right to play. Such obligation has not been fulfilled.
 - 3) The correct interpretation must be that if the Player makes certain appearances, it will become eligible for additional remuneration. If the Appellant sells the beneficial use of the Player's right to play before the contract expires, prior to reaching the 75 appearances, it shall be considered as the Player completed all appearance requirements, so that all amounts relating to this, that have not yet been paid by the Appellant, shall be due within 10 days.
 - 4) It has not been disputed by the Parties that the Appellant did not pay the Respondent for any appearances of the Player, thus, the obliged amount to be paid would be the full GBP 90,000.
 - 5) The Agreement between the Parties ensures a guarantee to the Respondent that it will be entitled to the appearance remuneration not yet paid since the sale of the Player would make it impossible for him to enter the pitch while playing for the Appellant.
 - 6) The FA Declaration Form referred to by the Appellant, which was for GBP 50,000, does not annul the conditional payment obligation, from which the Appellant would have been released in the case that he did not resell the Player, it would have let the Player free or the Player would have met the conditional 75 appearance mark, which would have made the payments due and any resale after that would be outside of the scope of the Agreement. The fact that the Appellant transferred the Player for an amount less than that owed to the Respondent was its own mistake.

III. LEGAL ANALYSIS

A. Jurisdiction

30. Article R47 of the CAS Code provides as follows:

“An appeal against the decision of a federation, association or sports-related body may be filed with the CAS insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports-related body”.

31. According to Article 63 para. 1 of the FIFA Statutes (ed. 2008), the decision rendered by the Single Judge of the FIFA Players’ Status Committee may be appealed against before the CAS.

“Appeals against final decisions passed by FIFA’s legal bodies and against decisions passed by Confederations, Members or Leagues shall be lodged with CAS within 21 days of notification of the decision in question”.

32. Article 63 para. 2 of the FIFA Statutes (ed. 2008) complements the previous sentence by stating that:

“Recourse may only be made to CAS after all other internal channels have been exhausted”.

33. Since that the appeal was lodged pursuant to CAS and FIFA Regulations, after exhausting internal remedies before FIFA and without any objections from the Parties, it is the Sole Arbitrator’s decision that CAS has jurisdiction to resolve this dispute. Neither have the Parties contested that CAS has jurisdiction in this matter.

B. Admissibility Of The Appeal

34. Pursuant to Article R49 of the CAS Code, and Article 63 of FIFA Statutes (ed. 2008), any appeal must be lodged before CAS within 21 days from the receipt of the decision appealed against.

35. The decision by the Single Judge of the FIFA Player’s Status Committee was taken on 21 November 2011 and notified to the Parties on 4 July 2012. The Statement of Appeal was subsequently filed on 25 July 2012. Accordingly, the Sole Arbitrator comes to the conclusion that the Appeal has been filed within the prescribed deadline set forth by FIFA and CAS, and is therefore admissible.

C. Applicable Law

36. Article R58 of the CAS Code provides as follows:

“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”.

37. As a result hereof, the Sole Arbitrator considers that the FIFA Statutes and regulations are applicable to the current dispute. Since FIFA is domiciled in Switzerland, Swiss law shall apply subsidiarily.
38. The relevant FIFA regulations will be the 2008 FIFA Regulations on the Status and Transfer of Players.

D. Scope of the Sole Arbitrator’s Review and Admissibility of the Late Exhibits Submitted by the Appellant

39. According to Article R57 of the CAS Code, the Sole Arbitrator shall have full power to review the facts and the law. He may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance.
40. Regarding the issue of the admissibility of the late exhibits submitted by the Appellant on 14 September 2012, the Sole Arbitrator notes that the exhibits in question consist of the following:
 - 1) Annex 1 – The Financial Agreement between Southend United FC and ÚJ Lombard FC for the acquisition of Zoltan Liptak.
 - 2) Annex 2 – The FA Declaration of Payment in Respect of the International Transfer of a Player to a Club of the Football Association.
41. These exhibits consist of the Agreement, which is the source of the current dispute, and the intention of the Parties towards such Agreement. Furthermore, no objection was raised by the Respondent against the late submission of the exhibits within the time limit set by the CAS Court Office.
42. Considering that these documents were listed in the Appeal Brief submitted by the Appellant on 3 August 2012, and recognized in the Respondent’s Answer to the Appeal Brief, the Sole Arbitrator decided to admit the said exhibits in accordance with Article R56 of the CAS Code.

E. The Merits

43. After having reviewed the file, the Sole Arbitrator shall resolve the following crucial issue:

- 1) Should the contractual clause be interpreted in such a way that the full amount of GBP 90,000 should have been paid by the Appellant to the Respondent when the Player was transferred, regardless of the fact that the Player only appeared in a few games during his time with the Appellant?
44. In the case CAS 2004/A/642, the CAS Panel stated the following:

“As with all issues of construction, the Panel must first consider the words of the relevant provision. If the meaning of those words is clear, it is not permissible for the parties to adduce evidence of their intentions...”
45. Considering the above, in order to resolve the issue at hand, the Sole Arbitrator must first consider whether the wording of the relevant clause is in fact clear, or whether it leaves any margin for different interpretations.
46. The relevant clause in dispute provides that: *“In the event of the player being sold and transferred to another club for before the player has made the relevant number of stating appearances then it is agreed that any appearance payment that has not yet fallen due will be paid within ten days of the date of the transfer”*.
47. Each party has a different interpretation as to the meaning of the phrase *“not yet fallen due”*. The Respondent sustains the decision taken by the Single Judge of the FIFA Players’ Status Committee and emphasizes the fact that any payment not yet completed counts as *“not yet fallen due”*, which would mean the full amount of GBP 90,000 for the 75 appearance mark. On the other hand, the Appellant supports that the phrase *“not yet fallen due”* can only refer to payments that were triggered once the Player would reach one of the designated marks established in the Agreement. Furthermore, the Appellant claims that since the Player did not reach any of the marks, no payment must be made.
48. The Single Judge considered that the wording of the clause was clear and left no scope for interpretation and, in the case of a definitive transfer of the Player to another club, the Appellant had a payment obligation, irrespective of the fact if the Player actually played or not.
49. Any case in which the dispute solely arises from the interpretation of a contractual clause leads to the assumption that the wording of such clause is ambiguous as to its meaning. If it was so “clear” then no room for different interpretations of the clause would be likely to exist.
50. In this matter, the Agreement does not refer to the contract duration, to the performance of the Player, to possible injuries, etc., which raises doubts as to the “clarity” of the Agreement as a whole.
51. Thus, it is the Sole Arbitrator’s opinion that the wording of the clause is ambiguous, which means that the intentions of the Parties must be taken into account when interpreting the terms of the Agreement.

52. With regards to the interpretation of the Agreement, Article 18 para. 1 of the Swiss Code of Obligations (SCO) provides the following: *“when assessing the forms and terms of a contract, the true and common intention of the parties must be ascertained without dwelling on any inexact expressions or designations they may have used either in error or by way of disguising the true nature of the agreement”*.
53. In CAS 2010/A/2098 the CAS dealt with the issue of contractual interpretation. The Panel stated the following:

“The interpretation of a contractual provision in accordance with article 18 SCO aims at assessing the intention the parties had when they concluded the contract. On this basis, Swiss scholars (WIEGAND W., in Basler Kommentar, No. 7 et seq., ad Art. 18 CO) and case law (decisions of the Federal Tribunal of 28 September 1999, ATF 125 III 435, and of 6 March 2000, ATF 126 III 119) have indicated that the primary goal of interpretation is to ascertain the true common intentions (consensus) of the parties. Where a factual consensus cannot be proven, the declarations of the parties must be interpreted pursuant to the principle of good faith in the sense in which they could and should have been understood, taking into account the wording, the context, as well as all circumstances”.
54. Considering the provisions of the CO and the relevant CAS jurisprudence, the Sole Arbitrator has to decide, pursuant to the principle of good faith, what the real intention of the Parties was at the moment of signing the Agreement in order to determine the true meaning of the clause in dispute, beyond the literal meaning of the words.
55. When signing the Agreement, the Parties agreed on a price for the transfer of the Player and installments to be paid upon the condition that the Player made a certain number of appearances for each payment to become due. If the Player did not reach the required number of appearances for the stipulated payment, then the Appellant would not have to pay the Respondent.
56. However, according to the clause in dispute, upon the definite transfer of the Player before meeting the relevant number of appearances, the Appellant becomes liable for any appearance payment *“that has not yet fallen due”*. This sentence has to be interpreted according to the above-mentioned jurisprudence.
57. The Appellant submits that according to the Agreement, it is not liable to make any payments because the Player never made the relevant number of starting appearances; hence, the condition was never fulfilled. On the other hand, the Respondent states that the Appellant made the condition impossible to be met from the moment they transferred the Player, thus selling the beneficial use of the Player’s right to play.
58. It is in the Sole Arbitrator’s opinion that both interpretations are correct in part, but at the same time they fail to interpret what, in his opinion, is the true meaning of the Agreement.
59. The Single Judge pointed out the key words for the true interpretation in his analysis when he broke down the clause and made reference to the phrase *“before the player has made the*

relevant number of starting appearances”, which he interpreted as having reached 25, 50, or 75 appearances respectively.

60. What was the “relevant number” of starting appearances that the Player was unable to meet, when the Appellant eventually transferred him?
61. As mentioned before, no reference was made in the Agreement as to the duration of the Agreement. According to the English Football League 2 website, the season contained 56 matches. The Sole Arbitrator can only consider what would be the reasonable Agreement duration vis-à-vis appearances, and build an analysis on that.
62. If it were to be a 3-year contract and it was expected that the Player would participate in 25 matches per year (considering the Agreement and how it was divided in 25 match segments), it could then be reasonable to infer that in three (3) years, the Player would have reached the total of 75 matches and the Appellant would be liable to pay GBP 90,000.
63. However, at the moment of the transfer, the Player had made only five (5) appearances as a non-playing substitute and four (4) appearances while he was loaned to Stevenage, for a total of nine (9) appearances over the course of one season. This would mean that it would be highly unreasonable to believe that the Player would ever have met the requested 75 appearances during his time with the Appellant. The Sole Arbitrator would like to point out that even though the appearance conditions in the Agreement refer to “starting appearances”, since all appearances were acknowledged by the Appellant in the proceedings before FIFA, and considering the fact it does not change the outcome of this case, all First Team appearances will be considered as “starting” for the purpose of this case.
64. As stated before, the appearances payments can be better understood if looked at as a type of “installment”; each made payable after meeting the stipulated number of appearances, which at the same time are organized in three different “sets”.
65. Emphasizing on the word “relevant”, the correct assessment would be to consider that all appearances within the first “set” 1-25 appearances’ period fall within the relevant category for the first “installment” of GBP 30,000, and so on with the rest.
66. Considering the above, it is in the Sole Arbitrator’s opinion that the clause in dispute should mean that at the moment of the transfer, the installments that had “*not yet fallen due*”, based on the relevant number of starting appearances, must be made within the first 10 days after the transfer.
67. This means that since the Player only appeared nine (9) times on the pitch, the relevant installment that “*had no yet fallen due*” was the first 25 games set in the Agreement. Therefore, and based on such rationale, Southend is liable to Lombard for GBP 30,000.
68. If the clause were to be interpreted as the Respondent and the Single Judge held, then it would mean that a type of “penalty” was intended if the Player was to be transferred and the

real value of the initial transfer would amass GBP 140,000. As the Appellant submitted, the Sole Arbitrator agrees that, if that was the intention of the Agreement, then it would have never signed it.

69. The idea behind including such condition in the Agreement was to reward the selling club in the event that the Player would yield a greater value than that of the transfer fee.
70. When the Player was transferred to Újpest, it was for the sum of GBP 60,000, which amounts to a total profit of GBP 10,000.
71. The Sole Arbitrator cannot uphold in good faith that the Appellant would be “penalized” with the amount of GBP 90,000 when its true intention was to transfer the Player because he was not meeting the needs of the club, not to sell him in order to make a profit and avoid making the previously set appearance payments condition in the Agreement.
72. It is based on good faith as well that the Sole Arbitrator cannot fully uphold the submissions of the Appellant since it did sign the Agreement and consented to make any payments that “*had not yet fallen due*” to the Respondent if it were to transfer the Player.
73. For the same reasons, the submission by the Appellant about the appearance requirements not being mentioned in the FA Declaration Form is irrelevant because based on well-recognized principles of contractual interpretations, what the Parties intended when submitting this form was to register the Player before the Football Association and the true Agreement meant for the appearance payments to be part of it.
74. In light of the above, the Sole Arbitrator rules that the appeal filed by Southend United FC be partially upheld as to the objection towards the payment of the GBP 90,000, but that the club pays an amount of GBP 30,000 for appearances “*not yet fallen due*” in the first “bracket” of matches, plus default interest at a rate of 5% as from 10 June 2008.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by Southend United FC on 25 July 2012 is partially upheld;
2. The decision rendered by the Single Judge of the FIFA Players’ Status Committee on 21 November 2011 is set aside;
3. Southend United FC is ordered to pay to ÚJ Lombard FC the amount of GBP 30,000, plus default interest at a rate of 5% as from 10 June 2008;

4. (...).
5. (...).
6. All other requests, motions or prayers for relief are dismissed.