GRIEVANCE COMMITTEE OF THE FOOTBALL FEDERATION OF AUSTRALIA

FINAL DETERMINATION

Player	Peter Perchtold
Club	Gold Coast United
Description of Grievance	Alleged breach of contract
Basis of the matter being currently before the Grievance Committee	Final Determination of Contract Issue and Assessment of Damages
Date of Hearing	8 November 2011
Date of Determination	28 November 2011
Grievance Arbitrator	Shaun McCarthy

REASONS

Introduction

1. By resubmitted Amended National Dispute Resolution Chamber ("NDRC") grievance dated 25 July 2011 ("the Grievance"), Peter Perchtold ("the Player"), alleges that Gold Coast United ("the Club") breached its contract with him. The Player claims damages with respect to the alleged breach. This dispute has been referred to the National Dispute Resolution Chamber. Prior to my appointment, I was informed that the Player had waived his right to a three member panel and that he was content to have the matter determined by a single arbitrator. This was discussed in telephone conferences in which representatives of the Club participated and I note that the Club did not demur. I therefore determine this grievance in my capacity as the National Dispute Resolution Chamber, sitting as a single arbitrator. Further, within this capacity I sit as a 'judicial body' as defined in the Grievance Resolution Regulations.

- 2. The Player is a German citizen. As I understand it, in 2010, he trialled with the Club and played some games as a guest player. On 13 January 2011 both he and a representative of the Club signed a Standard Player Contract ("the Contract") in the sum of \$200,000.00 per year exclusive of superannuation. The duration of the Contract was specified as being between 1 April 2011 and 31 March 2013. The 'start date' of the Contract was a date shortly after the finalisation of the 2010/2011 A-League season and presumably, close to the commencement of pre-season training.
- In a form which I will set out below, the Player was subsequently told that the Club had changed its mind about giving the Player a two year contract and would then only offer him a one year contract. The Player found this unacceptable. He did not return to play for the Club. The Player claims damages for breach of Contract.

The ex-parte nature of this hearing

- 4. For much of 2011, this dispute has been case managed by myself. I presided over a number of telephone conferences with Ms Sigal of the Professional Footballers Australian ("PFA") and various representatives from the Club. During most of this time, the Club contributed meaningfully to the process and did not raise any jurisdictional issues.
- 5. On 3 November 2011, the Club, via its general counsel, Mr Geoff Smith, wrote to PFA stating 'this letter confirms that CGU will not be attending the hearing on 8 November 2011 and refers to previous submissions'. The letter went on to list 11 matters which in essence complained that the NDRC had no jurisdiction to hear this particular grievance. The letter suggested that I should refer to the matter to a 'court of law'. The Club set out its position that the Contract was 'illegal and unenforceable' and 'void ab initio'. At the conclusion of the letter the Club stated 'because CGU is taking the point of jurisdiction it cannot participate in a process which it is challenging'.
- 6. As a consequence of the decision of the Club not to participate in the hearing, the matter proceeded on an ex-parte basis. It was submitted that the power to hear the matter in the absence of a party exists under clause 10.7 of the

Grievance Resolution Regulations. It was also submitted that section 25(1)(c) of the New South Wales Commercial Arbitration Act 2010 provides similar authority. I am satisfied that section 10.7 of the Grievance Resolution Regulations allows me to hear the matter in the absence of a party. I have been taken to ample evidence to demonstrate that the Club was on notice of the hearing. It is most regrettable that the Club chose not to participate in the hearing.

The Contract

7. As stated, the Contract was signed by the Club and the Player on 13 January 2011. While, at page 12 of the Contract, there is provision for the head of the A-League to also sign the Contract, it did not bear the signature of the head of the A-League or any other person employed by FFA. In some of the early telephone conferences convened in this matter, the Club sought to challenge the validity of the Contract by reference to the absence of a signature from the FFA. Although the Club did not appear at the hearing to develop this submission, out of fairness I will deal with it as being a submission advanced in the course of the grievance. In my opinion, the submission that the Contract is not valid because it was not signed by a representative of FFA should be rejected. Clause 11.1 of the Contract states:

'This contract is effective from the date it is signed by you and the Club and operates for the Term unless it is terminated earlier in accordance with clause 11.'

- 8. The relevance of the FFA signing the Contract is with respect to 'registration'. That is, clause 11.1 goes on to stipulate that the Player will only become registered with the Club when the FFA signs the Contract. It has been submitted on the behalf of the Player, and I accept, that the Contract was effective prior to the registration of the Player. This, in a football context, is not unusual as there are often delays with registration after the signing of a Contract while issues with visas and other paperwork are sorted out.
- 9. For these reasons, I determine that the Contract was not invalid by reason of the absence of a signature of FFA representative.

10. The Contract is in standard form. There is nothing defective about its form. The terms and conditions of the Contract are detailed and are set out clearly. The fundamental terms of the Contract, the remuneration and the duration of the Contract are clearly set out and are as stated in paragraph 2 above.

Events following the entering into of the Contract

- 11. At the hearing, I received a statutory declaration of the Claimant dated 25 October 2011 which went to, in part, the circumstances surrounding the formation of the Contract. In some of the preliminary teleconferences, the Club gave notice that it intended to cross-examine the Player and specifically, to put his in credit in issue. For those reasons, a Skype link was set up to enable the Club to cross-examine the Player and his witness but because the Club did not appear, this facility went unused. The second consequence of the Club's decision was that the evidence of the Player, given in statutory declaration form, went in unchallenged. There being no reason advanced as to why I should not accept the evidence of the Player, I do accept his evidence. His statutory declaration included a number of emails which I refer to below.
- 12. On 6 April 2011, the Player received an email from the head coach/football director of the Club, Mr Miron Bleiberg.
- 13. The email of Mr Bleiberg stated (in part) 'Clive (presumably Clive Palmer, the owner of the Club) has decided that he doesn't want to commit to more than one year and that includes everyone, includes me and you. No exceptions!! ... I know you have contract for two years and legally you are right, but however, I am trying to achieve a situation that you will come back to play for us next year and to prevent a situation that Clive will say: "tell him to take me to court" ...'
- 14. There are a number of other emails annexed to the statutory declaration including an email from Mr Bleiberg dated 6 May 2011 in which reference was again made to discussions Mr Bleiberg had with Mr Palmer. The email states in part:

'He [Palmer] made a decision that he is signing players for 1 YEAR only. If they perform he will offer them the next year and if not – they will go to another Club.

No me and not Clive Mensink can change it ...

Peter, there are two options for you – to sign for one year, get your money from April 1st, getting paid every two weeks, start train with us, play well, get an offer for the next year from us, Sydney, Melbourne or Asia and enjoy it. There are other options to do whatever you decide to do but you will not be able to play for us. ...'

15. There are other documents attached to the Players statement but the situation has, thereafter, remained relevantly unchanged. The Player refused to accept the offer of the Club for a one year contract and the Club has refused to honour the Contract with the Player for a two year contract.

The Player's Argument

16. The Player's argument is simple. He had a valid Contract with a base value of \$400,000.00 over two years and he has not been paid any of the consideration. Thus he says, the Club has breached his Contract and he is entitled to damages.

The Club's Argument

- 17. The Club's Argument is difficult to discern because it made a deliberate decision not to appear at the hearing. I have already mentioned the jurisdictional point which it took in correspondence. Further, in earlier telephone conferences, the Club had taken issue with the extent to which the Player had mitigated his loss, complaining that the Player was playing in the German 4th division for a modest salary when, on the Club's argument, he could have been doing much better. However, the Club adduced no evidence to support this allegation.
- 18. Finally, in a letter dated 11 October 2011, the Club, in indicating that it did not accept the jurisdiction of the NDRC stated that the 'subject matter of the

alleged grievance is void and not enforceable and has breached section 235 of the Migration Act. The letter goes on to state:

'The Contract provided for a term of two years and at the time the Contract was signed the Player did not hold a visa entitling him to be employed as a Player and further did not hold a visa for the term of the proposed term of the Contract.'

- 19. The Club referred to the decision of the Full Court of the Supreme Court of Queensland in *Australian Meat Holdings Pty Ltd v Kazi* [2004] QCA 147. I have taken this argument into consideration. I have considered the decision of the Full Court. The facts of *Australian Meat Holdings* involved a 'worker' suffering injury and claiming compensation in circumstances where he did not hold a valid visa to reside in Australia. This case can clearly be distinguished for any number of reasons but most fundamentally on the basis that the player does not assert that he performed any relevant work in Australia and had no intention of doing so until his visa came through. Section 235 of the *Migration Act*, nor any other instrument prevents a non-visa holder entering into a contract with an Australian entity. If it did, international trade would soon grind to a halt.
- 20. In the present case, the Player had signed the Contract but was not permitted to play (work) until he was registered. Registration could not have occurred until his visa came through and it was not until that point that he would be able to play (work). The timing of the Players registration was irrelevant to the validity of the contract.
- 21. As the Club did not appear at the hearing, I did not have the opportunity to discover how this argument was to be furthered developed, beyond the Club's letter dated 11 October 2011. It is not for me (even in an ex-parte setting) to argue the case of the absent Club. If the Club had better arguments to advance with respect to the Contract, it did not advance them. I reject the Club's argument as contained within its letter dated 11 October 2011. I find that section 235 of the *Migration Act* has no application to this grievance.

Resolution of the Contract Claim

- 22. I find that, at all material times the parties to this grievance were also parties to a valid and enforceable Contract. The fundamental terms of the Contract were that the Club pay the Player the sum of \$200,000 per annum plus superannuation for a two year period commencing on 1 April 2011. The Club plainly reneged on the Agreement. In doing so the Club breached the Contract. The Player was blameless. In my opinion the conduct of the Club was highhanded to say the least.
- 23. As a consequence, the Player has suffered very significant financial loss and, it is submitted on behalf of the Player, also suffered other, less tangible forms of damage.
- 24. The Player, having established breach and having not been challenged as to his claims of loss, has established an entitlement to damages which I assess below.

Damages

- 25. I accept the evidence as to mitigation provided by both the player and his agent. The Player went to extreme lengths went to secure the most favourable contract available but in the end he had to settle for what he could get.
- Being satisfied that the contract with the Club was breached and the Club, having failed to discharge its onus of proof with respect to any failure to mitigate, the task in assessing damages is to calculate the amount the Player would have earned if his contract had been honoured less any actual earnings received during that period. I have received written submissions as to the calculation of damages in the form of a letter from PFA dated 14 November 2011. At my direction, this letter was forwarded to the Club but I have received no submissions in reply from the Club. In those circumstances, I accept the basic calculations and underlying assumptions as asserted by the Player. Those are:

- (a) The Player was uncontracted between 1 April 2011 and 10 July 2011 (101 days);
- (b) His contracted salary including superannuation for this period was at a per annum rate of \$218,000.00 or \$597.26 per day. I assess the Player's loss for this period at \$60,323.29;
- (c) On 11 July 2011, the Player signed a 2 year contract with a German fourth division club ("**Mainz**"). The duration of this contract was 11 July 2011 to 31 March 2013. I am informed that the Player is currently still playing under this contract;
- (d) The contract with Mainz provides for a salary of EUR€5,300.00 monthly or EUR€63,600.00 per annum. As of the date of the hearing, the exchange rate was AUD\$1.33 = EUR€1. Set in Australian dollars, the Mainz contract has a value of AUD\$84,836.04 per annum or AUD\$232.43 per day. The differential between the two contracts is AUD\$364.83 per day. Had it not been for the breach of contract, the Player would have been contracted for the Club for an overlapping period of 630 days. 630 multiplied by the Players daily loss of AUD\$364.83 renders a loss for this period of AUD\$229,844.64, an amount which I find to be the players loss for this period;
- (e) Combining the 2 periods, I find that the base loss stemming from the breach of contract to be AUD\$290,167.93.

Interest

27. Interest on past losses is claimed at a rate of 5% per annum which I find to be reasonable. It is submitted that this rate has been used in previous FIFA DRC cases. This submission was uncontested by the Club. I accept the Player's calculation of interest as being AUD\$423.36.

Specificity of Sport

28. I was directed to article 17 of the FIFA Regulations which relates to the status and transfer of players and which sets out a number of considerations which I

must take into account when assessing damages for breach of contract 'without cause'. It was submitted that I should take particular account of 'specificity of sport'. I was provided by the Court of Arbitration of Sport Authority CAS 2010/A2146 Morgan De Nancit v Udinese Calcio S.p.A in which it was said that the specificity of sport damages are a mechanism to compensate parties for the 'intangible damages' that are specific to the termination of sporting contract.

- 29. In the current case it is specifically put that 'the player went through a difficult period' after the Club breached its contract, 'causing him to accept a much lower salary in a less prestigious league'. It seems to me that this somewhat understates the situation. Security of employment, particularly in a football context and particularly in the current sporting economy, is a valued commodity. To be offered 2 years of secure employment with the associated lifestyle benefits of living in Australia was obviously important to the Player. Instead of flying to Australia to resettle, enjoying a long preseason and then playing in a competition respected for its growing international prestige, the Player was suddenly unemployed.
- 30. It is fair to infer that this caused him distress and probably affected his reputation within the depressed playing market, a subject which I have previously commented on in my interlocutory decision dated 5 October 2011. In effect, through no fault of his own, the Player found himself scrambling for any contract he could attract before eventually accepting a contract in a low tier of German football. The *German Fußball-Regionalliga* is, with respect to that competition, hardly a lucrative shop window for a professional football player.
- 31. This is to be contrasted with the A-League which is televised nationally and internationally and in which the players (subject to the success of their club) have a chance to play in the Asian Club Championship, thus providing them with very significant exposure, particularly in the Asian region. All those opportunities together with other intangible opportunities have been denied to the Player.

I find that the contract was terminated without cause. The Player submits that I should award the sum of AUD\$100,000.00 with respect to specificity of sport damages. The determination of this claim involves an exercise of discretion as there is no way the calculate a liquidated amount. In all the circumstances, I am satisfied that an amount of AUD\$50,000.00 is an adequate sum to redress the Player's intangible losses and I award that amount.

Sporting sanctions

- 33. It is submitted that, in addition to, and quite separate from the determinations I have made above, that I should impose sporting sanctions upon the Club. It was submitted that this power should be exercised in circumstances where the breach of contract was 'particularly egregious'.
- 34. Pursuant to 12.1 of the FFA Grievance Resolution Regulations, sporting sanction options available include fines, deductions of competition points or a ban on registration or transfer of players.
- 35. I accept the Player's submission that the conduct of the Club was 'particularly egregious'. The Club, or specifically, the person responsible for this decision, clearly acted dishonourably, showing utter contempt for the principles underpinning the law of contract. Notions of fairness appear to have played no part in the decision making process of the Club. It is relevant that no cogent reasons have been given by the Club for the breach of contract. While insights can be gleaned from the emails passing between Mr Bleiberg to the Player, these documents only demonstrate that there was no reason at law, and in fact, no reason other than the Club's financial self interest, for breaching the contract. This appears to be a case of the Club attempting to bully the Player into compromising his clear legal rights and entitlements. It seems to me that the Club sought to exploit the perceived vulnerability of the Player by flexing its superior bargaining muscle in the hope that the Player's inferior financial position would influence him to bow to the Club's unconscionable pressure.
- 36. Therefore, prima face there is a strong case for the imposition of sporting sanctions. This is because it is reasonable to put in place a clear, public

deterrent to restrain others who might act in a similar way. The international player market is, in many ways, close knit. Players and agents are keenly aware of the status of international leagues and the conditions under which the Players are exposed. It would be hoped that the A-League would enjoy a good reputation amongst players and agents internationally. Maverick actions of the kind clearly demonstrated by the Club in this case soon become known and the image of the A-League can be easily tarnished by the actions of a few. The effect of this can lead to a reluctance of high calibre international players, coaches and officials making the decision to participate in the A-League. In many ways, a strong statement demonstrating intolerance of the Club's actions is appropriate.

- 37. On the other hand, the imposition of sporting sanctions in the form of a deduction of competition points or a ban of registration or transfer of players would necessarily make collateral victims of the blameless majority associated with the Club. Firstly, I reject the submission that a fine is appropriate in these circumstances because:
 - (a) Given the well known financial resources underpinning the Club, a fine will have no deterrent value; and
 - (b) It is inappropriate in any event given my determination with respect to specificity of sport.
- 38. Deducting competition points or banning the registration of players will cause injury to classes of people including the players, the physical exertions of whom earned the points which the Club has accumulated. The supporters also, are undeserving of such penalties. There is also the coaching staff who do their best to prepare the team to play each week. I particularly note the efforts of Mr Bleiberg to openly communicate with the Player with respect to the changed circumstances at the Club. In my view, it is clear from the correspondence passing between Mr Bleiberg and the Player, that Mr Bleiberg acted honourably in doing his best to facilitate a practical compromise in the very difficult circumstances in which he had been placed.

39. Weighing all these factors, I have come to the view that I should not impose sporting sanctions on the Club. Having said that, should the Club be found, in the future, to have acted in a similar manner, in my view the findings I have made in this case should be considered by any future decision maker confronted with a similar claim.

Costs

40. Pursuant to clause 15.2, I have a limited discretion to award costs in favour of a successful party. In the circumstances, I invite both parties, upon receipt of this award, to forward to me written submissions as to the issues of costs within 14 days. In the meantime I reserve the question of costs.

<u>AWARD</u>

41. For the reasons I have given, I find the grievance proved and enter an award for the Player against the Club in the following terms:

Damages for Breach of Contract	AUD\$290,167.93
Interest	AUD\$423.36
Damages for Specificity of Sport	AUD\$50,000.00
Total	AUD\$340,591.29

42. I direct the Club to pay this amount to the Player within 21 days.

Dated: 28 November 2011

Shaun McCarthy, Barrister

Arbitrator