APPEALS TRIBUNAL OF FOOTBALL NEW SOUTH WALES

DETERMINATION IN THE FOLLOWING MATTER:

Player/Official/Member/Association Member/Participant/Club	Sydney United 58 FC v Football NSW; Rockdale City Suns FC
Decision Appealed	Appeal from the decision of the General Purposes Tribunal of Football NSW
Date of Decision	24 July 2018
The basis upon which the matter is before the Appeals Tribunal	Sections 9.2 & 10.2(d) of the Football NSW Grievance and Disciplinary Regulations, 2018
Ground(s) of Appeal	Section 10.3(a), (b), (d) & (e)(iii) of the Football NSW Grievance and Disciplinary Regulations, 2018
Date of Hearing	25 October 2018
Date of Determination	29 October 2018
Appeals Tribunal Members	Anthony Lo Surdo SC, Chair Graham Turnbull SC, Deputy Chair David Stanton, Member

I. INTRODUCTION

1. The Appeals Tribunal (**AT**) has been established in accordance with section 10.1 of the Football NSW Grievance and Disciplinary Regulations, 2018 (**FNSW Regulations**) to determine appeals from the Chief Executive Officer of Football NSW or his or her nominee (**Executive**), the Disciplinary Committee (**DC**), the General Purposes Tribunal (**GPT**) and the Member Appeals Committee (**MAC**).

2. The sole grounds of appeal prescribed by section 10.3 of the FNSW Regulations are as follows:

   (a) a party was not afforded a reasonable opportunity to present its case;

   (b) lack or excess of jurisdiction;

   (c) the decision was affected by actual bias;

   (d) the decision was one that was not reasonably open having regard to the evidence before the decision-maker; and

   (e) severity, but only where the decision imposed a sanction of at least:

      i. a Fixture Suspension of 6 or more Fixtures; or

      ii. a Time Suspension of 3 or more months; or

      iii. a fine of $3,000 or more; or

      iv. a loss of 6 Competition points; or

      v. expulsion from a competition.

3. Upon the hearing of an appeal, the AT may:

   (a) dismiss, allow in whole or part, or vary (whether by way of reduction or increase) any decision including any sanction or penalty; and

   (b) subject to any applicable Minimum Suspension/Sanction and Maximum Suspension, impose any sanction, measure or make any order it thinks fit or a decision that either the DC, the GPT or the MAC could have imposed or made under these Regulations, or its regulations, as the case may be;

   (c) conduct a fresh hearing of the matter; or

   (d) remit the matter to the DC, GPT or the MAC from which the appeal originated, or to the tribunal (or similar) that dealt with the matter at first instance, for rehearing and issue any directions or orders in relation to the rehearing of the matter that the AT deems appropriate.

   (s 10.3(b) of the FNSW Regulations)

II. ADMISSIBILITY AND JURISDICTION

4. This appeal arises from a determination of the GPT dated 24 July 2018 (**GPT Determination**). It has been brought pursuant to section 10.2(d) of the FNSW

Regulations. Section 9.6(b) of the FNSW Regulations requires that such an appeal be brought within 7 working days of the issuing of the determination that is ultimately the subject of the appeal. In this case, the appeal was therefore required to be brought by 3 August 2018.

5. The notice of appeal in this procedure was filed on 2 August 2018. The AT is accordingly satisfied that the appeal is both admissible and that it has jurisdiction to hear the appeal. Further, neither party raised any objection to either admissibility or jurisdiction.

III. BACKGROUND FACTS

6. The background facts are relatively uncontroversial. The summary that follows is derived primarily from the findings of fact contained in the GPT Determination which are not the subject of appeal.

7. On 16 May 2018, Sydney United 58 FC (**SU**) played an FFA Cup fixture against Rockdale City Suns FC (**RCS**) at the latter's home ground, Illinden Sports Centre (**Ground**).

8. One of the SU's supporters ignited a flare and threw it onto a cloth shade sail causing significant damage to it. SU supporters also caused damage to: the plastic spectator seats located under the shade sail by the application of graffiti paint and stickers; a bathroom at the ground; and to the external metal and mesh perimeter fence surrounding the ground causing a significant section of it to collapse.

9. By Notice of Charge dated 18 June 2018 issued by FNSW pursuant to sections 9.2 and 16.4 of the FNSW Regulations, SU was charged with two offences relating to the conduct of its supporters at the Ground on 16 May 2018 (**Notice of Charge**). The first of the charges alleged that the igniting of the flare was in breach of section 16.4(d) and Schedule 3, Table C, Offence Code 25-02 of the FNSW Regulations. The second charge alleged that the conduct of throwing the ignited flare onto the cloth shade sail causing damage to it and the damage caused by SU supporters to the spectator seats, a bathroom and to the perimeter fence was conduct in breach of section 16.4(d) and Schedule 3, Table C, Offence Code 18-02 of the FNSW Regulations.

10. Attached to the Notice of Charge were photos of some of the damage that was caused together with, relevantly, quotes provided obtained by RCS from third party suppliers for the cost of the replacement of the shade sail burned by the flare in the amount of $12,903 and for the repair and replacement of the perimeter fence in the amount of $6,450.

11. Section 19(f) of the FNSW Regulations imposes upon a club strict responsibility and liability for the conduct and behaviour of its supporters, whether at home or at away matches. Further, under section 19(h), an away club is liable for the improper conduct among its own group of supporters. The section further deems that supporters who occupy the away section of a stadium, ground or centre are regarded as the away club's supporters, unless proven to the contrary by the away club.

12. Under the Notice of Charge, SU was given until 10 am, Monday, 25 June 2018, to either accept the charges contained in the Notice of Charge and the proposed sanction or to elect to refer the matter to the GPT for hearing in accordance with section 9.2 of the Regulations. As no response was received by FNSW by the required time, SU was deemed to have accepted the proposed sanction and forfeited its rights of having the charges heard by the GPT.

13. A Notice of Determination was issued by FNSW to SU on 27 June 2018 in which SU was deemed to have pleaded guilty to each of the charges and to the sanctions proposed in the Notice of Charge. Further, SU was directed to pay for the costs of the repair/replacement work to the Ground as set out in the Notice of Determination.

14. Subsequent to the issue of the Notice of Determination, a question arose as to whether the parties had, in fact, reached agreement as to the cost, scope of and responsibility for the repairs to the Ground. In these circumstances, FNSW deemed that there were exceptional circumstances justifying an extension of time under section 9.2(k) of the FNSW Regulations for SU to refer the Notice of Charge to the GPT for hearing.

15. However, the extension of time was limited to a referral of the question of the cost of the replacement or repairs to the damaged cloth shade sail and the perimeter fence. The deemed pleas of guilty to each of the charges remained in place.

IV. THE HEARING BEFORE THE GPT

16. The matter was thus listed for hearing before the GPT on 23 July 2018 with the sole issue being the amount that SU was required to pay RCS to enable the damage caused to the cloth shade sail and to the perimeter fencing at the Ground to be remedied.

17. It is common ground that the only evidence that was before the GPT in relation to the cost of the replacement of the damaged cloth shade sail and the cost of the repairs to the perimeter fence were those provided by RCS and which accompanied the Notice of Charge provided to SU by FNSW on 18 June 2018. Specifically, that evidence consisted of a quotation from "Elite Shade and Sales" dated 23 May 2018 in the amount of $12,903 for the replacement of the damaged cloth shade sail and associated works (Annexure H to the Notice of Charge) and a quotation from "Steve's Fencing" dated 23 May 2018, in the amount of $6,450 to supply and erect approximately 30m of chain wire fence and associated works to the perimeter of the Ground (Annexure I to the Notice of Charge). The parties also confirmed that there was an additional document in evidence before the GPT being a letter from Elite Shade and Sails to "Ilinden Sports Centre" dated 17 July 2018.

18. At the hearing before the GPT, SU submitted that it had insufficient time to obtain quotes of its own and that its ability to do so had been hampered by RCS's alleged failure to provide information that would have enabled it to secure quotes in relation to the repair or replacement of the damaged cloth shade sail and perimeter fence.

19. Both RCS and FNSW submitted to the GPT that SU had had more than sufficient time since 18 June 2018 (when the Notice of Charge with accompanying quotes had been provided to SU) to secure quotes.

20. The GPT rendered its written reasons for determination on 24 July 2018 (**GPT Determination**). In dismissing SU's claims, the GPT found that SU had sufficient time

to secure quotes and had failed to do so. It further found that RCS was entitled to require the original supplier, "Elite Shade and Sales" to undertake the relevant work, and that even if alternative quotes had been in evidence, it would not have affected the findings of the GPT in this regard.

V. THE GROUNDS OF APPEAL

21. By Notice of Appeal filed on 2 August 2018, SU appeals the GPT Determination on each of the grounds stipulated in section 10.3(a), (b), (d) & (e)(iii) of the FNSW Regulations.

22. During the AT hearing, the parties informed the AT that they had reached an agreement in relation to the repairs to the perimeter fence. SU informed the AT that it no longer pressed its appeal in relation to the GPT Determination in so far as it related to the sanction requiring SU to compensate RCS for the cost of repairs to the perimeter fence.

23. SU was informed by the AT that the consequence of not pressing that part of the appeal was that the GPT Determination in relation to that issue would stand. SU representatives indicated to the AT that they understood those consequences. Accordingly, the AT proceeded to consider the grounds of appeal limited to the sanction requiring SU to compensate RCS for the cost of replacing the shade sail cloth.

24. The grounds of appeal may be summarised as follows:

    (a) SU had not been afforded a reasonable opportunity to present its case because it had insufficient time to obtain quotations for the required work and the GPT had therefore unreasonably denied a request for an additional 5 days to enable it to obtain those quotes (s 10.3 (a));

    (b) the GPT did not have jurisdiction to, in effect, order SU to pay a sum of money for the cost to repair or to replace based upon a quotation from a third-party supplier and that the GPT "*could not rule in favour of one quote over another*" (s 10.3(b));

(c) the GPT Determination was one that was not reasonably open to it on the evidence before it (s 10.3(d)); and

(d) the amount the GPT adjudged SU as being liable to pay was too severe (s 10.3(e)(iii)).

25. The AT notes that whilst paragraph 24 summarises the grounds as articulated in the Notice of Appeal, SU's written submissions only directly address grounds 10.3(a) and 10.3(b) although some of the facts which may arguably support grounds 10.3(a) and 10.3(b) may also justify an appeal ground based on s 10.3(c). We have proceeded to consider the appeal grounds in this manner.

VI. THE HEARING

26. The AT heard the appeal on the evening of 25 October 2018.

27. At the hearing, SU was represented by its President, Mr Mark Ivancic and by Mr Sam Krslovic (each appearing by telephone), FNSW was represented by Mr Lorenzo Crepaldi, Head of Legal & Governance, FNSW and Mr Michael Napoli, Legal Counsel, FNSW, and RCS was represented by Mr Dennis Loether.

28. The parties to the appeal and RCS each provided the AT with the following written submissions:

(a) SU, dated 15 August 2018;

(b) RCS, dated 24 August 2018; and

(c) FNSW, 3 September 2018.

29. The parties and RCS were each afforded the opportunity to supplement their written submissions orally during the course of the hearing and the AT heard from each of them.

VII. THE PARTIES' SUBMISSIONS

30. What follows is a summary of the parties' submissions. To the extent that the summary omits any contentions, the AT notes that it has considered all of the evidence and the arguments submitted by the parties.

SU'S SUBMISSIONS

31. SU submits that the GPT erred in finding that it had had ample time to obtain quotes. It asserts that access to the Ground was requested by SU from RCS officials on a number of occasions from 25 June 2018 to approximately 9 July 2018. It was only after SU appealed to Mr Stuart Hodge, the CEO of FNSW, that on 17 July 2018 RCS granted permission to SU to access the Ground for the purpose of obtaining quotes.

32. SU further submits that the GPT denied its reasonable request for what it claims was an extra 48 to 72 hours to obtain necessary quotes. SU, in fact, received a quotation from "Homelife furnishings" on or about 24 July 2018 to replace the cloth shade sail in the amount of $3,628.

33. SU sought leave to rely upon the "Homelife furnishings" received by it on 24 July 2018 at the hearing. We return to this issue below.

34. SU also contended that it was not issued with a monetary penalty or fine by the GPT but rather was required by the GPT Determination to pay "damages". SU asserts that the GPT did not have jurisdiction to order the payment of damages and that, as a corollary, it was not entitled to consider quotes which supported a claim for damages from a third-party supplier. It submitted that the FNSW Regulations do not permit or facilitate this and that Table C of Schedule 3 of the FNSW Regulations does not specify or cater for such an occurrence.

RSC's SUBMISSIONS

35. RSC first, denies that there were repeated requests made by SU to unnamed RCS officials from 25 June 2018 to approximately 9 July 2018 for access to the Ground for the purpose of obtaining quotes.

36. RSC contends that SU had sufficient time since receipt of the Notice of Charge on 18 June 2018 (which document included the quotations upon which RSC relied at the hearing before the GPT) until the date of the hearing on 24 July 2018 to obtain quotes. SU was afforded every opportunity to present its case and accordingly there was no denial of procedural fairness.

37. The submission by SU that the GPT did not have jurisdiction to require SU to compensate RCS for damage caused to the Ground and, in doing so, to consider and if thought appropriate to accept a quotation from a third party relevant to that purpose, is without foundation and is not supported by any reference to such a limitation in the FNSW Regulations. The types of decisions that the GPT may issue are set out in Schedule 3, Table D.

38. Assuming the AT found against RCS on the procedural fairness argument, it was nonetheless open to the GPT to conclude, as it did at paragraph 38 of its findings, that RCS was perfectly within its rights to require the original supplier to do the relevant work, so far as the cloth shade sail is concerned, because it was the only way that it could protect and extend its existing warranty and that even if alternative quotes had been available and adduced in evidence, it would not change the finding of the GPT. The findings of the GPT were, on the balance of the evidence before it, clearly open to be made and were reasonable.

FNSW SUBMISSIONS

39. FNSW submitted that SU had from the date of issue of the Notice of Charge on 18 June 2018 to the date of the GPT hearing on 23 July 2018 to obtain quotes to counter the quantum of the quotes provided by RCS and that it failed to do so. It was not until

18 July 2018, some 30 days after being issued with the Notice of Charge, that SU first sought to obtain a quotation.

40. During the GPT hearing, SU sought a further extension of five days within which to obtain quotes. After having considered SU's submissions, the GPT determined that SU had had ample time to obtain other quotes and failed to do so. It accordingly denied SU's request for additional time to source quotes.

41. In these circumstances, FNSW submitted that SU had been afforded a reasonable opportunity to present its case.

42. As to whether the GPT had jurisdiction to require SU to compensate RCS for the damage caused to the Ground, FNSW contends that as SU did not challenge the jurisdiction of the GPT to deal with any aspect of this matter in its Notice of Response, section 13.15(a) of the FNSW Regulations deems SU to have accepted that the GPT did have the necessary jurisdiction.

43. Further, FNSW submitted that Schedule 3, Table C, Offence Code 18-01 of the FNSW Regulations empowers the GPT to require a "Member" to meet the cost of repairs/replacement where property or equipment has been damaged by, relevantly in this case, conduct by a Club's supporters in contravention of section 19 of the FNSW Regulations. Accordingly, FNSW contended that the GPT had jurisdiction to make the findings and impose the sanction in the form that it did.

44. FNSW submitted that the decision of the GPT was reasonably open to it having regard to the evidence. In particular, FNSW relies upon the following matters:

    (a) RCS provided a quote for the repairs to the cloth shade sail;

    (b) that quote was from the original installer of the cloth shade sail;

    (c) there was evidence that using the original installer was the only way for RCS to protect and extend its warranty in respect of the whole of the cloth shade sail installation;

(d) the GPT found that even if alternative quotes "*were available in evidence, this would not change this finding of the Tribunal"* and that having regard to the evidence referred to in the preceding sub-paragraph*,* it was a finding that was reasonably open to the GPT to make;

(e) the GPT found that there was no requirement on RCS to provide additional quotes for the repair of the cloth shade sail and that full replacement was to be preferred;

(f) SU failed to provide a quote to counter those provided by RCS; and

(g) SU failed to demonstrate by the production of any evidence, that the quotes provided by RCS were excessive.

45. As to the severity ground of appeal, FNSW submitted that a distinction should be drawn for the purposes of section 10.3(e)(iii) of the FNSW Regulations between a "fine" which may be reviewed on the grounds of severity and a Club sanction for "costs", in this case for the replacement of the cloth shade sail and to repair the damage to the perimeter fence, which is not amenable to appeal on the grounds of severity.

VIII. THE APPLICABLE LAW

46. Section 13.11(c) of the FNSW Regulations requires the GPT and the AT to afford parties natural justice.

47. The real issue is as to the substance of the obligations imposed by these requirements. To employ the words of Mason J in *Kioa v West* (1985) 159 CLR 550 (at 585):

> "*The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case*?"

48. The so-called "twin-planks" of natural justice are *"nemo judex in causa sua and audi alteram partem...;"* that is, that a party be given a fair hearing and the opportunity to present its case.

49. Procedural fairness requires that a decision maker "…*act fairly…in the making of…decisions which affect rights, interests and legitimate expectations, subject only to the clear manifestation of the contrary intention*…": *Kiora v West* (1985) 159 CLR 550 at 584 per Mason J.

50. Natural justice involves a duty to act judicially, to deal with the matter for decision without bias, that a person be given a fair hearing, the opportunity to present one's case and to have a decision based on logically probative evidence (see, eg, *Salemi v MacKellar (No. 2)* (1977) 137 CLR 396).

51. Generally, denying a party the right to call admissible evidence which that person wishes to call to rebut a claim or charge is a denial of natural justice: *HG v R* (1997) CLR 414 at [97] per McHugh J.

52. Where a denial of natural justice deprives a party from making submissions on an issue of fact and the denial deprived the party of the possibility of a successful outcome, an appeal should be allowed unless a properly conducted trial would not have produced a different result: *Stead v State Government Insurance Commission* (1986) 161 CLR 141 at 147.

53. A person found guilty of an offence should be given an opportunity to be heard on the penalty before sanctions are imposed: *Malone v Marr* [1981] 2 NSWLR 982.

54. The standard of proof applicable in determinations by a "Body" as defined in the FNSW Regulations which include the GPT, is on the balance of probabilities (FNSW Regulations, s 13.16). A fact is proved on the balance of probabilities if its existence is more probable than not (see, for example, *Reifek v McElroy* (1965) 112 CLR 517).

55. An appeal involves the consideration of whether the decision under consideration is affected by legal, factual or discretionary error (see, for example, *Allesch v Maunz* (2000) 203 CLR 172). The question as to whether there is any evidence of a

particular fact is a question of law. Likewise, the question as to whether a particular inference can be drawn from facts found or agreed is also a question of law (see, for example, *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321 at 355 per Mason CJ).

56. However, in considering an appeal regard must be had to the comparative advantages available to the tribunal at first instance of having experienced the whole course of the proceedings including having heard and observed all of the witnesses and having considered the totality of all of the other evidence (see, for example, *Fox v Percy* (2003) 214 CLR 118).

57. A decision is not reasonably open to a tribunal having regard to the evidence before it (and is thus affected by error) if that evidence in its totality preponderates so strongly against the conclusion found by the tribunal that it can be said that the conclusion was not one that a reasonable tribunal member could reach (see, for example, *Calin v The Greater Union Organisation Pty Ltd* (1991) 173 CLR 33 and *Mainteck Services Pty Limited v Stein Heurtey SA* [2013] NSWSC 266).

58. Further, the AT will only intervene to set aside a determination on the ground that it is unreasonable if "*there was no information available to the tribunal on which reasonable and honest minds could possibly reach the conclusion* (see the decision of the Appeal Committee of the Football Federation of Australia in the *matter of Roy O'Donovan,* 25 January 2016 at [16] and the cases there referred to).

59. For the purposes of an appeal generally, it will be necessary to demonstrate legal error, not merely an erroneous ruling, and the error must be material to or likely to affect the outcome of the decision appealed from; that is, the decision must be one which is vitiated by error (see, for example, *Hamod v Suncorp Metway Insurance Ltd* [2006] NSWCA 243 at [11], *Yates Property Corp Pty Ltd (in liq) v Darling Harbour Authority* (1991) 24 NSWLR 156 at 177).

IX. CONSIDERATION AND DETERMINATION

Has SU been denied natural justice?

60. There are conflicting submissions on one critical point in the time-line. SU contends that from 25 June 2018 to 9 July 2018 it made repeated requests to an unidentified RCS official to obtain access to the Ground for the purpose of securing quotes. RCS denies that assertion in its submissions. There is no evidence that these submissions were made before the GPT and, more importantly, that any facts supporting that submission was adduced before the GPT. It certainly does not form part of the GPT's consideration. Further, the parties agreed at the outset that the only documentary evidence before the GPT was the Notice of Charge together with the documents annexed to that notice. None of those documents relate to or otherwise support the conflicting submissions referred to earlier.

61. The AT is of the view that this is critical because, if true, it would have provided a reasonable explanation as to why SU did not obtain quotations in a timely fashion and well prior to the hearing before the GPT. It would also have been a factor which the GPT, acting reasonably, would have taken into consideration in its determination as to whether to grant SU an indulgence of further time to obtain those quotations.

62. The undeniable facts are that:

    (a) SU had the quotes upon which RSC relied at the GPT hearing since 18 June 2018 when it was issued with the Notice of Charge by FNSW;

    (b) SU had until 25 June 2018 to either accept the charges or refer the matter to the GPT for hearing in accordance with section 9.2 of the FNSW Regulations. One of the matters which, it is reasonable to assume SU would or should have taken into consideration as to whether to make an election for a hearing is the quotations attached to the Notice of Charge;

    (c) SU did not make an election and on 27 June 2018 the Notice of Determination was issued;

(d) on 10 July 2018, FNSW informed SU that it had until 12 July 2018 to advise FNSW as to whether it wished to refer the issue of the cost of the repairs to the GPT for hearing;

(e) on 12 July 2018, SU notified FNSW of its intention to refer the issue of the cost of the repairs to the GPT for hearing;

(f) on 12 July 2018, FNSW informed SU that it had until Friday, 20 July 2018 to formally refer the matter in accordance with section 9.2(g) of the FNSW to the GPT for hearing;

(g) on 18 July 2018, SU sought to obtain quotes; and

(h) on or about 20 July 2018, SU informed FNSW that it would not be able to obtain the quotes by that day. FNSW subsequently granted SU an extension until 23 July 2018 to secure any quotes upon which it intended to rely at the hearing on 24 July 2018. SU did not obtain any quotes by the date of the hearing before the GPT.

63. The AT is of the view that these incontrovertible facts establish that SU had been afforded every reasonable opportunity from 18 June 2018 to 23 July 2018 to both consider the quotations that had been annexed to the Notice of Charge and to adduce evidence of any quotations upon which it would seek to rely at the hearing. For reasons best known to SU, it did not seek those quotations until 18 July 2018.

64. Further, given these facts, we are of the view that the GPT did not, in refusing SU, in effect, an adjournment to adduce evidence of the quotes, act in a manner that could be considered a denial of natural justice.

65. In any event, and for the reasons that follow, we are of the view that had the GPT afforded SU the opportunity of adducing the quote from “Homelife Furnishings” which it received after the GPT hearing on 24 July 2018 that it would have made no difference to the outcome of the hearing. Therefore if, contrary to our conclusions, the GPT had denied SU procedural fairness by refusing it an opportunity to provide the “Homelife Furnishings” quote, the appeal would not be allowed on the denial of

natural justice ground because a properly conducted trial would not have produced a different result (see *Stead v State Government Insurance Commission,* above).

Did the GPT have jurisdiction to impose the Club Sanction?

66. The gravamen of SU's complaint seems to be that the FNSW Regulations do not permit or facilitate the GPT to make a finding in the nature of damages based upon the acceptance of a quote from a third party and that Table C of Schedule 3 of the FNSW Regulations does not specify or cater for such an occurrence.

67. First, the AT accepts the submission made on behalf of FNSW that as SU did not challenge the jurisdiction of the GPT to deal with any aspect of this matter in its Notice of Response, section 13.15(a) of the FNSW Regulations deems SU to have accepted that the GPT did have the necessary jurisdiction.

68. Secondly, and more fundamentally, the submission is predicated upon a wholly erroneous understanding of the powers exercised by the GPT in this instance. Section 19 of the FNSW Regulations provides that FNSW and Tribunals (which is defined to mean the GPT and AT) have jurisdiction to determine matters involving Spectators and to issue sanctions against, inter-alia, Clubs, in respect of the behaviour of any Spectator.

69. Section 19(f) imposes upon a Club strict liability for the conduct and behaviour of its supporters. Schedule 3, Table C prescribes sanctions which can be imposed upon a "Member" which includes a Club for any breach of the FNSW Regulations including section 19. Relevantly, where there has been damage caused to property or equipment, a Club Sanction of "cost of repair/replace property & equipment" may be imposed by "Tribunals" including the GPT assuming, of course, that there is probative evidence adduced to support the making of such a sanction.

70. As regards the issue as to whether the GPT was entitled to have regard to the quotes adduced by RCS; a Tribunal is entitled to admit into evidence any material which is reasonably probative of a fact in issue. That said, a Tribunal is not bound by the rules of evidence. Therefore, in the exercise of its function under section 19 of the FNSW

Regulations, the GPT in this instance, was entitled to consider the evidence of the quotations adduced by RCS. Indeed, its duties and obligations would be stymied if it could not take into consideration evidence of this nature.

Was the decision one that was reasonably open to the GPT having regard to the evidence before it?

71. At the commencement of the hearing before the AT, the Chair sought confirmation from the parties as to the evidence that was before the GPT. The parties each confirmed that the only evidence was in documentary form and consisted of the Notice of Charge and the documents referred to in that notice as annexures. The parties also confirmed that there was an additional document in evidence before the GPT being a letter from Elite Shade and Sails to "Ilinden Sports Centre". That letter is referred to in paragraph 23(c) of the GPT Determination.

72. Relevantly, the only evidence before the GPT of the cost of repairs to the cloth shade sale was that adduced on behalf of RCS. In these circumstances, the GPT Determination was not only reasonably open to it but was the only conclusion available to it on the evidence.

73. SU sought to have admitted into evidence before the AT a quotation which it received from "Homelife furnishings" on or about 24 July 2018 to replace the cloth shade sail in the amount of $3,628. The AT indicated during the course of the hearing that it would receive that quote but reserved the question as to its admissibility and, if admissible, as to its relevance and weight. The parties and RCS indicated that they were each content with that course.

74. The AT has determined not to admit the quote sought to be relied upon by SU into evidence because it is not persuaded that exceptional circumstances had been shown to warrant its admission pursuant to section 13.11(k) of the FNSW Regulations. This is especially so in circumstances where the incontrovertible facts establish that SU had since 18 June 2018 to obtain any quotes upon which it intended to rely.

75. In any event, the AT is of the view that the evidence, had it been admitted, would not have assisted SU because:

    (a) the quote for the replacement of the cloth shade sail obtained from "Homelife Furnishings" does not appear, on its face, to be a comparative quotation. The quotation from "Elite Shade and Sails" upon which SU relies, relates to the removal of the damaged cloth shade sail and the supply and installation of a replacement. The quotation from "Homelife Furnishings" upon which SU sought to rely is, on its face, limited to supplying a "replacement skin". It says nothing about the removal of the damaged shade sail or the installation of the replacement sale; and

    (b) Further, the AT agrees with the observation made by the GPT that RCS should not have been compelled to accept a product which is different to that which was damaged and which would, upon the evidence before the GPT (the letter from Elite Shade and Sails, dated 17 July 2018), have affected the warranty in respect of the balance of the cloth shade sails supplied by Elite Shade and Sails and which were not damaged.

Severity

76. The severity ground of appeal suffers from a misconception as to the nature of the sanction in issue and how that sanction relates to the severity ground of appeal.

77. The severity ground is only engaged where one of the circumstances set out in section 10.3(e) is satisfied. Relevantly, a severity appeal may arise where the sanction is greater than the Minimum Sanction/Suspension applicable to the relevant Offence and involves a fine of $3,000 or more.

78. FNSW Regulations Schedule 3, Table C prescribes, relevantly, sanctions which can be imposed upon a "Member" which includes a Club for any breach of the FNSW Regulations including section 19. A distinction is made in Table C, between "Fines" and "Other".

79. The GPT Determination in respect of the Club Sanction does not constitute a "Fine". It falls into the "Other" category. As the GPT Determination requiring SU to compensate RCS for the damage caused to the Ground as a consequence of a breach of section 19 of the FNSW Regulations is not a fine, there is no foundation for the engagement of the severity ground of appeal.

X. RELIEF

80. The appeal is dismissed with the consequence that the GPT Determination is confirmed.

A P Lo Surdo SC
Chair
Appeals Tribunal
Football NSW