SR/206/2020

BEFORE THE LEAGUE ARBITRATION PANEL
ON APPEAL FROM A DISCIPLINARY COMMISSION

Before:

Charles Hollander QC (Chair)
Rt. Hon. Lord Dyson
David Phillips QC

BETWEEN:

THE FOOTBALL LEAGUE LIMITED (the "EFL")

Appellant

and

DERBY COUNTY FOOTBALL CLUB LIMITED (the "Club")

Respondent

DECISION OF THE LEAGUE ARBITRATION PANEL

A. This appeal

1. On 24 August 2020 an EFL Disciplinary Commission (Graeme McPherson QC, Robert Englehart QC, James Stanbury) ("the DC") gave judgment after a five day hearing on two disciplinary charges brought by the EFL against the Club. One charge related to the accounting treatment in relation to the sale and leaseback of the Club's stadium Pride Park, where the DC found the charge not proved and no appeal has been brought in relation to that charge. The other charge, which is the subject of this appeal, related to the amortisation of player registrations in the 2015/16, 2016/17 and 2017/18 accounts ("the

Accounts"). Thus the amortisation charge is referred to for convenience as "the Charge."

2. The Charge relates to the approach to amortisation of the capitalised costs of player registrations adopted by the Club in its financial statements for the years ended 30 June 2016, 30 June 2017 and 30 June 2018. The EFL contended:

   a) That the approach to amortisation of capitalised costs of player registrations adopted by the Club in those financial statements did not comply with Accounting Standard FRS 102;

   b) That as a result, the Annual Accounts submitted by the Club for those years were not (as is required by the Profit & Sustainability Rules ("the P&S Rules")) '*prepared ... in accordance with all legal and regulatory requirements applicable to accounts prepared pursuant to section 394 of [the Companies Act 2006]*', and

   c) That the consequent submission by the Club of non-compliant Annual Accounts for those years placed the Club in breach of the P&S Rules.

3. Paragraph 2.5 of the Charge Letter identified five respects in which, it was contended by the EFL, the Club's approach to amortisation was contrary to the requirements of FRS 102:

   a) First, because the approach *'assumes non-zero residual values when amortising registration rights and transfer fee levies where residual values cannot be reliably determined'*

   b) Secondly, because the approach *'does not amortise on a straight line basis nor does the amortisation schedule reflect the expected pattern of consumption of future economic benefits from the intangible asset'*

   c) Thirdly, because the approach '*anticipates an economic benefit that the Club does not fully control arising from the sale of an intangible asset'*

   d) Fourthly, because the approach '*reassesses the estimated residual values of intangible assets where the residual values cannot be reliably estimated'*

   e) Fifthly, because the Club did not *'adequately disclose in its financial statements the*

nature and/or the effect of the changes in its residual value estimates'.

4. These five points were the particulars of the Charge. The first particular was not ultimately pursued before the DC. The DC dismissed the charges based on the second, third and fourth particulars but found the fifth particular of the Charge proven on the basis that, following the change to the Club's approach to amortisation of the capitalised costs of player registrations at the end of the financial year ended 30 June 2015, the Club's annual financial statements for the years ended 30 June 2016, 30 June 2017 and 30 June 2018 failed adequately to disclose those changes to its accounting policies and/or estimates as required by section 10 of FRS 102. The Club does not appeal from that decision.

5. EFL appealed against the rejection of the remainder of the second charge by Notice of Appeal dated 7 September 2020, and we were appointed as the League Arbitration Panel ("LAP") to hear that appeal. This has led to a number of hearings. We heard an initial application by Middlesbrough FC to intervene in support of EFL's appeal, which we dismissed. We also heard an application by EFL that we should hear this appeal by way of a de novo hearing, which we rejected on 3 December 2020, and further ruled on an application by EFL to lead new evidence not before the DC, which we rejected on 22 January 2021.

6. We had originally hoped to conclude this matter somewhat earlier than has proved to be the case, as it was obviously important for all parties for the matter to reach a conclusion as soon as possible. Unfortunately, the need to cater for the availability of a number of very busy people, and the need (as matters turned out) to provide for directions and rulings on three preliminary issues, two of which required oral hearings, and which required separate hearings, made this impossible despite the best efforts of the LAP to deal with the appeal as speedily as possible. Indeed, in the event we made ourselves available to sit over a weekend, and heard the substantive appeal over the weekend of 20/21 March, sitting on a Saturday and Sunday, because it became apparent that it would otherwise have been impossible to hear the appeal before July 2021 and we regarded that as an unacceptable delay.

7. After we sent to the parties our substantive decision on the appeal, we asked for and received further written submissions as to the appropriate manner of disposal of this

appeal, and the consequential orders we should be making. This gave rise to significantly different positions being taken by the parties. We considered it was more convenient to deal with those matters in this decision letter, which we do at the end.

8. EFL were represented by James Segan QC, instructed by Mark Gay of Solesbury Gay. The Club were represented by Nick de Marco QC and Tom Richards, instructed by Jonathan Butler of Geldards. We are grateful for the assistance we received from all those involved in the appeal. We should pay tribute to the quality of the advocacy, which was outstanding on both sides.

9. The decision of the DC ran to 123 pages. It represents an enormously impressive and diligent piece of work to which we pay tribute.

B. The P&S Rules

10. The Charge was brought under the Profit & Sustainability ("P&S") Rules, which implement the Financial Fair Play ("FFP") principles in the Championship. The central principle behind FFP was described by UEFA and the European Commission as follows:

> *"The central principle of FFP (namely, that clubs should "live within their own means" or "break even") is based on the notion that football related income should at least match football related expenditure. No business can lay solid foundations for the future by continually spending more than it earns, or could reasonably expect to earn. Thus, the "break even" rule reflects a sound economic principle that will encourage greater rationality and discipline in club finances and, in so doing, help to protect the wider interests of football."*

11. The aim of the FFP principles and the P&S Rules is therefore to encourage "*…responsible spending for the long-term benefit of football"* (EFL Regulation 18.1.6) and thereby to discourage short-term overspending by football clubs. The ultimate purpose of the P&S Rules includes "*…introducing more discipline and rationality in Club football finances"* and *"…protecting the long-term viability and sustainability of League football"* (EFL Regulations 18.1.4 and 18.1.7).

12. In pursuance of those objectives, the P&S Rules require Championship clubs not to

exceed an "Upper Loss Threshold" (which was £39 million during the period covered by the Accounts) over a rolling three-year period comprising the current season ("T"), the previous season ("T-1") and the season before that ("T-2"). The "Upper Loss Threshold" is calculated by reference to a club's "Adjusted Earnings Before Tax", which are in turn derived ultimately from the club's statutory accounts. The "Annual Accounts" of a club are specifically required by P&S Rule 1.1.3 to be:

> *"…prepared and audited in accordance with all legal and regulatory requirements applicable to accounts prepared pursuant to Section 394 of the 2006 Act."*

13. The largest item of expenditure for most football clubs, and therefore the most important item for the purpose of ensuring compliance with the P&S Rules, is expenditure on players. Such expenditure consists not just of players' wages, but also other associated costs such as transfer fees and agents' fees. Clubs are specifically required to include in their calculations of "Adjusted Earnings Before Tax" all "*…costs … in respect of … amortisation … of the costs of players' registrations"* (P&S Rule 1.1.2).

C. FRS 102: overview

14. The Club's accounts were required, by section 393 of the Companies Act 2006, to give a "*true and fair view*". The accounting standards applicable to the Club's accounts in that regard are the UK standards contained within FRS 102.

15. The purpose of FRS 102 is to set out an accounting standard for those types of accounts which are required by law to give a "*true and fair view"*. To that end, FRS 102 lays down a series of "c*oncepts and pervasive principles underlying financial statements*" (see FRS 102, 2.1).

16. The capitalised costs of a player registration fall within the description of an intangible asset for the purpose of FRS 102. FRS 102 required the Club to recognise the capitalised costs of a player registration as an asset in its financial statements in each of the financial years under scrutiny.

17. An example would be the following. A club purchases the intangible asset, the player's registration, from another club. That club enters into a five year contract with the player. The club will usually have to pay the player's previous club a fee for their agreement to transfer the player's registration, as well as agreeing terms with the player. That will involve ancillary costs as well, such as agents' fees, Football League levies and commissions. Assume that the total cost of the acquisition of the registration and other fees is £5m. Those costs will be written down over the five year period of the contract. The usual practice of clubs is to write down those costs in a straight line over the five year period, amortising them at £1m per year. This is because at the end of the five year period, the asset is worthless because the player has a legal right to leave under the *Bosman* ruling. It may be that in fact the club sells on the player to another club during the course of the contract, and if the player has been successful, the club may recoup part of its initial expenditure, or make a profit. The usual practice of clubs is to ignore that possibility in its amortisation treatment.

D. Accounting treatment utilised by the Club

18. Until 2015 the Club amortised capital costs of player registration on a straight line basis over the period of the player's contract. Such approach was reflected in the Notes to the Club's annual financial statements for each of the years up to and including the year ended 30 June 2015 in the following terms:

> *"Principal accounting policies – Transfer costs*
>
> *Amounts paid to third parties for player registrations, Football League levies, agents' commissions and compensation for management and coaching staff are capitalised as intangible assets and amortised on a straight line basis over the period of the players' or other employees' contracts."*

19. The DC found that in 2015 the Group of which the Club is a part was restructured. They held at [47-48]:

> *"During the course of that restructuring the Club had discussions with its auditors – Smith Cooper, and in particular Andrew Delve – about the treatment of*

intangible assets in the Club's financial statements. Those discussions were part of wider discussions that took place at that time about the transition to FRS 102 and the consequences of that transition for the Club.

48) The background to that discussion – if not its actual trigger – was a belief on the part of Mr Pearce

a) that the Club's business model, like that of many clubs, was largely predicated on and reliant on player trading, meaning that players were in reality assets to be "traded in and out" and "utilised as seen fit". As he put it in his witness statement, the Club's "transfer and business strategy was to develop players, whilst hopefully gaining on field success, and sell the players for a profit part way through their contract, in order to re-invest and begin the cycle again". We accept that evidence; buying, developing and selling players, hopefully for profit, is well-established as a part of many clubs' financial model; and

b) that a straight line basis of amortising the capitalised costs of a player's registration over the period of a player's contract might not necessarily be the methodology that most appropriately reflected the pattern in which the Club in fact consumed (at least in Mr Pearce's eyes) the economic benefits of such intangible assets."

20. Thus the Club adopted a different approach to amortisation of the capitalised cost of player registrations.

21. The DC found at [54] that the approach adopted by the Club was as follows:

"a) The Club recognised the capitalised costs of player registrations as intangible assets and initially measured the same at 'the cost of bringing the asset to the Club' i.e. the capitalised cost of the transfer fee payable to the transferor club, transfer levies and agent commission payments

b) When measuring the capitalised costs of player registrations after initial recognition the Club used the Cost model under FRS 102

c) Subsequently, at 6 monthly intervals, the Club

i) *Would consider how the Club expected to "consume the asset's future economic benefits [i.e. the future economic benefits of the player's registration] having regard to external factors" over the remainder of the player's contract – in particular*

   (1) *For how long the Club might benefit from the use of the player's registration and so from the provision of services to it by the player – for example, by reason of the player playing matches for the Club*

   (2) *Whether it was expected that the player's registration would be disposed of (i.e. sold) to another club before the expiry of the player's contract (and if so, when)*

ii) *Would consider what sum, if any, each player in its squad could be expected to generate if that player's registration was 'disposed of' i.e. if the player's registration was to be sold by the Club at a time before the expiry of the player's contract with the Club, and so before he became a Bosman free-agent able to join a new club without that new club having to pay anything to the Club for his player registration:*

   (1) *That sum was assessed by reference to a variety of factors, including the player's age, his availability, his form, his injury status, his favourability with the manager and his perceived value in the transfer market. The assessment reflected the Club's own view of such matters, consultation by the Club with agents and agencies and by a consideration (from online databases on websites such as TransferMarkt.de and Kicker.de) of transfer prices being achieved in the market for comparable/similar players*

   (2) *That sum came to be referred to during the hearing as the Expected Recoverable Value, or 'ERV', of a player*

   (3) *For players not expected to generate an economic benefit for the Club on disposal the ERV would be zero*

iii) *Would calculate amortisation for each player based on such matters, and in particular*

   (1) *Would amortise the difference between (1) the capitalised costs of*

the player registration as initially measured, and (2) the ERV (if a player had a positive ERV)

(a) Over the period between initial recognition and the date on which the Club anticipated disposing of the player registration for that ERV. That date would be no later than the beginning of the final year of the player's contract, and

(b) On a straight line basis over that period, but

(2) Would always apply a residual value of zero at the end of a player's contract (i.e. when that player could leave as a Bosman free-agent), and so

(3) Would for the final year of a player's contract amortise the difference between the ERV and zero on a straight line basis for that 1 year period

d) As an aside, the considerations and decisions described in the previous sub-paragraph plainly involve subjective judgments being made on the part of a Club. However, the evidence from Mr Pearce and Mr Delve was that those judgments are made in the light of carefully researched, objectively justifiable information. We accept that evidence

e) Alterations over time in the Club' perception (i.e. at subsequent 6 monthly meetings)

i) Of how it expected to consume the future economic benefits of owning a player's registration, and/or

ii) Of the ERV of a player would result in the Club's amortisation calculations for that player being altered following that 6monthly meeting

f) Insofar as at any time the Club concluded that a player was expected to have no ERV – in other words

i) that the Club did not expect to derive any future economic benefit from disposal of the player's registration (for example, if the player was at

the end of his career, or was badly injured, or was expected to leave as a free agent at the end of his contract without his player registration being sold by the Club in the meantime, or simply had no ascertainable value), and

ii) that the Club expected to derive future economic benefit from owning the player's registration only from its 'use' of the player while the player remained contracted to the Club

- then (1) no ERV would be applied – or more accurately, an ERV of zero would be applied, and (2) amortisation would be calculated on a straight line basis for whatever period remained on the player's contract down to zero."

22. The DC gave examples at [55] to explain the Club's amortisation policy:

<u>Example 1</u>: the Club buys the player registration for a 35 year old player for a capitalised cost of £2.4m, who it employs on a 4 year contract:

i) The only economic benefit that the Club expects to derive from ownership of that player registration is from the player playing matches. The Club does not expect to derive any economic benefit from disposing of the player's registration given his age. The Club therefore does not consider the player to have any ERV

ii) The Club therefore

(1) Initially measures the capitalised costs of the player's registration at £2.4m

(2) Amortises the sum of £2.4m across the 4 year period of the player's contract in equal amounts at £600k per annum to a zero residual value

<u>Example 2:</u> the Club buys the player registration for a 21 year old player for a capitalised cost of £2.4m, who it employs on a 4 year contract. That player fits the description of one that the Club intends/hopes to buy, develop and sell-on:

i) The Club expects to derive economic benefit from ownership of that

player's registration

(1) From the player playing matches, and

(2) From disposing of that player's player registration before the expiry of the player's contract

ii) The Club

(1) Anticipates disposing of the player's registration 3 years into the player's 4 contract at a figure of not less than £2m, but

(2) Recognises that if it does not do so, and the player leaves for a new club at the end of his contract, it will receive nothing from 'disposing of' the player's registration, so that the player will have a zero residual value at that time

iii) The Club therefore

(1) Initially measures the capitalised costs of the player's registration at £2.4m

(2) Amortises the difference between that sum and the ERV of £2m (i.e. £400k) across a 3 year period in equal amounts at £133,333 per annum

(3) Amortises the difference between the ERV and the zero residual value (i.e. £2m) across the final year of the player's 4 year contract

Example 3: as per Example 2, but after 1 year the player suffers a long-term injury, meaning that the Club no longer expects to derive any economic benefit from disposing of the player's player registration before the expiry of his contract:

i) The player's ERV is reduced to zero

ii) The 'measured value' of that player is then amortised across the remaining 3 year period of the player's contract in equal amounts to a zero residual value at the of his contract

E. Explanations in the Accounts

23. That explanation reflected the Club's case, which was accepted by DC and the findings not challenged by EFL before us, was not reflected in the explanation of the treatment given in the Club's accounts.

24. The Accounts gave the following explanations:

Notes to the financial statements for the year to 30 June 2016

i) Under the heading '*Significant judgments and estimates - Amortisation and residual values on intangible assets*"

'Intangible assets are amortised on a straight line basis over their useful life after consideration of their residual values. Those intangible assets capitalised in relation to amounts paid to third parties for players' registrations, EFL levies, agents' commissions and compensation are allocated a residual value and amortised over the life of the asset down to the residual value. This value will be reviewed continuously for its appropriateness and any indications the value might be impaired. The directors believe that the current residual values are appropriate based on market values'

ii) Under the heading *'Principal accounting policies - Transfer costs*"

'Amounts paid to third parties for players' registrations, EFL levies, agents' commissions and compensation for management and coaching staff are capitalised as intangible assets and amortised on a straight line basis over the period of the players' or other employees' contracts. Players' registrations are written down for impairment when the carrying amount exceeds the amount recoverable through use or sale'

Notes to the financial statements for the year to 30 June 2017

i) Under the heading *'Accounting policies – Intangible assets: Player registrations, levies and associated costs*'

'The costs associated with acquiring players' registration, inclusive of EFL levies, or extending their contracts, including agents' fees, are capitalised

and amortised over the period of the respective players' contracts after consideration of their residual values.

Where a contract is renegotiated, the unamortised costs together with the new costs relating to the contract extension, are amortised over the terms of the new contract. Residual values are reviewed by the board on an ongoing basis over the course of the season by reference to active market values'

ii) Under the heading *'Judgments in applying accounting policies and key sources of estimation uncertainty – Residual values and amortisation of intangible assets'*

'Intangible assets are amortised on a straight line basis over their useful life after consideration of active market residual values. Those intangible assets capitalised in relation to amounts paid to third parties for players' registrations, EFL levies, agents' commissions and compensation are allocated a residual value and amortised over the life of the asset down to the residual value. Net book values are reviewed continuously for their appropriateness and any indications the value might be impaired'

Notes to the financial statements for the year to 30 June 2018

i) Under the heading '*Accounting policies – Intangible assets: - Player registrations, levies and associated costs'*

'*The costs associated with acquiring players' registration, inclusive of EFL levies, or extending their contracts, including agents' fees, are capitalised and amortised over the period of the respective players' contracts after consideration of their residual values.*

Where a contract is renegotiated, the unamortised costs together with the new costs relating to the contract extension, are amortised over the terms of the new contract. Residual values are reviewed by the board on an ongoing basis over the course of the season by reference to active market values'

ii) Under the heading *'Judgments in applying accounting policies and key sources of estimation uncertainty – Residual values and amortisation of*

intangible assets'

'Intangible assets are amortised on a straight line basis over their useful life after consideration of active market residual values. Those intangible assets capitalised in relation to amounts paid to third parties for players' registrations, EFL levies, agents' commissions and compensation are allocated a residual value and amortised over the life of the asset down to the residual value. Net book values are reviewed continuously for their appropriateness and any indications the value might be impaired.'

25. These explanations were at best confusing and at worst seriously misleading. As appears below, they misstated the principles relating to 'residual values' (which were always nil at the end of the period of the player contract) (see DC decision [52][58][223b] and [228a]) and wrongly stated that they assumed an 'active market', which they did not do. It was because the explanations in the accounts did not reflect the treatment which the Club contended, and the DC accepted, was in fact adopted, the DC found the charge proved as to the fifth particular. Indeed, the erroneous explanation of the treatment in the accounts mirrored that in the Draft Audit Findings Report of the auditors for each of the relevant years, which were also incorrect and misleading.

F. These proceedings

26. At the outset of these proceedings, EFL's understanding of the treatment which the Club say they adopted was incorrect. The DC was critical of EFL in this regard, although it thought there was some blame on both sides: see DC decision [227-228]. This was because a meeting took place on 13 May 2019 at which Mr Pearce and Mr Delve on behalf of the Club explained to Mr Karran and Mr Detko of EFL the treatment which in fact had been adopted by the Club. However, the note of the meeting records that the policy was said by the Club to be "*in line with that disclosed in the Club's accounts"* (which was quite wrong) and records the explanation that "*the Club used residual values when assessing each Player's amortisation charge"* (which was also quite wrong). Given the confusion, which was at least largely the fault of the Club, the criticism of EFL by DC seems remarkably harsh, but the consequence was that until the Club served witness statements

on 29 June 2020, 9 working days before the commencement of the oral hearing before the DC, EFL did not correctly understand the treatment which had in fact been adopted by the Club. This led to something of a false start because it became apparent EFL in consequence had instructed its accounting expert, Professor Pope, on a false basis, and had to obtain permission from the DC to serve a last-minute supplemental report from Professor Pope.

27. In the event, the DC heard factual evidence from Mr Pearce, the Club's Chief Executive, who was an accountant himself, and Mr Delve of Smith Cooper, who had been the Club's auditor at the relevant time. Both gave factual evidence and were cross-examined. The Club did not lead expert evidence, although they had the opportunity to do so and indeed had initially indicated that they expected to do so. The only expert before the DC was Professor Peter Pope, who is a Professor of Accounting at Bocconi University in Milan, and an Emeritus Professor at the LSE, called by EFL. Professor Pope was cross-examined but his evidence was not accepted by the DC. The DC accepted the evidence of Mr Pearce and Mr Delve. One of the complaints of EFL is that they say the DC treated them effectively as experts although they were called as factual witnesses.

28. The DC made disclosure orders in relation to documents in the Club's control relevant to the accounting treatment. However, the Club did not produce a single document evidencing or relating to the accounting treatment adopted and confirmed that none existed.

G. <u>The effect of the Club's accounting treatment</u>

29. The effect of the accounting treatment adopted by the Club was dramatic. We declined to permit EFL to adduce evidence of the draft 2019 accounts which were delivered to EFL the day after the DC decision, and the very substantial impairment in relation to player amortisation costs which they showed. It was unnecessary to admit that evidence as it had been apparent to the DC as a result of cross-examination by EFL of the Club's factual witnesses that the following year accounts would show a substantial impairment in relation to player cost amortisation. As the Club itself put it in their submissions opposing the admission of this fresh evidence:

"*The EFL was thus well aware prior to the hearing before the Disciplinary Commission: (i) that the Club's auditors had suggested that between £11.7 million (re.* [redacted] *) and £19 million (adding* [redacted] *) of player-related impairments needed to be made in the Club's accounts for the 2018/19 year; and (ii) of the significance of such impairments, on the EFL's case, to the issue of the reliability of the Club's approach to amortisation."*

30. EFL showed us on this appeal statistics comparing the effect of the Club's amortisation treatment with that of other Championship clubs. The effect has been that by the treatment adopted, the Club significantly reduced its costs in the years in question compared to other Championship clubs, which had the effect that, because of the FFP restrictions, they were potentially able to increase their spend on player purchases in those years compared to what would have occurred had they adopted the straight-line treatment which other clubs adopt, yet, in the event, that has led to a significant subsequent year impairment when the expected values have in the event turned out to be overstated.

H. FRS 102: detailed analysis

31. Section 18 of FRS 102 is concerned with the accounting for all intangible assets other than goodwill. It provides for two stages, recognition and measurement of an intangible asset. The right to a player registration falls within the definition at 18.2 of "intangible asset". The asset must be *recognised* in the accounts if, according to 18.4:

> *(a) it is probable that the expected future economic benefits that are attributable to the asset will flow to the entity; and*
>
> *(b) the cost or value of the asset can be measured reliably.*

32. If an asset can be recognised, the next issue relates to its *measurement.* This is dealt with under 18.18:

> *18.18 An entity shall measure intangible assets after initial recognition using the cost model (in accordance with paragraph 18.18A) or the revaluation model (in accordance with paragraphs 18.18B to 18.18H).*

Where the revaluation model is selected, this shall be applied to all intangible assets in the same class. If an intangible asset in a class of revalued intangible assets cannot be revalued because there is no active market for this asset, the asset shall be carried at its cost less any accumulated amortisation and impairment losses.

Cost model

18.18A Under the cost model, an entity shall measure its assets at cost less any accumulated amortisation and any accumulated impairment losses. The requirements for amortisation are set out in paragraphs 18.19 to 18.24.

Revaluation model

18.18B Under the revaluation model, an intangible asset shall be carried at a revalued amount, being its fair value at the date of revaluation less any subsequent accumulated amortisation and subsequent accumulated impairment losses, provided that the fair value can be determined by reference to an active market. The requirements for amortisation are set out in paragraphs 18.19 to 18.24.

"Active market" is defined in the Glossary as follows;

"A market in which all the following conditions exist:

(a) the items traded in the market are homogeneous;

(b) willing buyers and sellers can normally be found at any time; and

(c) prices are available to the public."

33. If the Revaluation Model was used, all players would have had to be valued on that basis, and the model could only apply where there was an "active market" which was not the case in relation to the Championship, so it was common ground that model was not appropriate. Thus the Club used, as did all Championship clubs, the Cost Model. The Cost Model obliged the Club to amortise its players on the basis of cost less subsequent accumulated impairment losses.

34. That involved 18.21 and 18.22:

> *"Amortisation period and amortisation method*
>
> *18.21 An entity shall allocate the depreciable amount of an intangible asset on a systematic basis over its useful life. The amortisation charge for each period shall be recognised in profit or loss, unless another section of this FRS requires the cost to be recognised as part of the cost of an asset. For example, the amortisation of an intangible asset may be included in the costs of inventories or property, plant and equipment.*
>
> *18.22 Amortisation begins when the intangible asset is available for use, ie when it is in the location and condition necessary for it to be usable in the manner intended by management. Amortisation ceases when the asset is derecognised. The entity shall choose an amortisation method that reflects the pattern in which it expects to consume the asset's future economic benefits. If the entity cannot determine that pattern reliably, it shall use the straight-line method."*

35. That involves three requirements relevant to the present:

    a. Allocation of the depreciable amount of an intangible asset on a *systematic* basis over its useful life

    b. an amortisation method that reflects the pattern in which it expects to *consume the asset's future economic benefits*

    c. If the entity cannot determine that pattern *reliably*, it shall use the straight-line method.

36. 18.19 requires that every intangible asset should be considered to have a finite useful life, and that if the intangible asset arises from contractual or other legal rights, its useful life must not exceed the period of the contractual or other legal rights from which it arises. 18.19 does however make clear that an entity can consider an intangible asset to have a finite useful life that is shorter than the period of the contractual or other legal rights from which the intangible asset arise depending on the period over which the entity expects to use the asset. The Club's approach to amortisation did assume that player registrations

had a finite useful life and did allocate the depreciable amount of the player registration over that useful life.

37. Other relevant parts of FRS 102 are as follows;

> *Retirements and disposals*
>
> *18.26 An entity shall derecognise an intangible asset, and shall recognise a gain or loss in profit or loss:*
>
> *(a) on disposal; or*
>
> *(b) when no future economic benefits are expected from its use or disposal.*
>
> *Reliability*
>
> *2.7 The information provided in financial statements must be reliable. Information is reliable when it is free from material error and bias and represents faithfully that which it either purports to represent or could reasonably be expected to represent. Financial statements are not free from bias (ie not neutral) if, by the selection or presentation of information, they are intended to influence the making of a decision or judgement in order to achieve a predetermined result or outcome.*
>
> *Assets*
>
> *2.17 The future economic benefit of an asset is its potential to contribute, directly or indirectly, to the flow of cash and cash equivalents to the entity. Those cash flows may come from using the asset or from disposing of it.*

I. <u>Grounds of appeal</u>

38. The requirements of 18.21 and 18.22 are picked up in EFL's Notice of Appeal ("NOA"). EFL contends that the DC erred in its rejection of the Charge on four grounds (see 3-6 of the NOA):

a. *The "future economic benefits" ground*: The DC was wrong to find that the Club's amortisation method, which alters the shape of amortisation charges to reflect a hoped-for transfer fee at some point during the life of the playing contract, "*reflects the pattern in which it expects to consume the asset's future economic benefits*", particularly in view of the precise nature of the asset under consideration, i.e. a time-limited exclusive playing contract with the Club

b. *The "reliability" ground*: The DC's finding that the Club could avoid straight line amortisation because the Club could reliably determine the pattern of consumption of the future economic benefits involved a fundamental misunderstanding of the Draft Audit Findings Reports upon which it relied and was not otherwise justified by the evidence, which consisted materially of uncorroborated oral evidence about the website "Transfermarkt", unevidenced discussions with unnamed agents and the "Club's own view".

c. *The "systematic" ground*: The DC adopted the wrong approach to, and reached the wrong conclusion in respect of, the "systematic" requirement, particularly given (a) the subjectivity of the exercise inherent in the approach that the Club states it adopted and (b) the absence of any contemporaneous documentary record of what the policy was or how it was applied, still less what "system" was created.

d. *The expert evidence ground*: The DC had no proper or sufficient basis for rejecting the evidence of an expert such as Professor Pope, which was the only independent expert accountancy evidence before the DC, and which was in important respects not evidence on which he would have expected reasonable experts to disagree.

J. <u>Professor Pope's evidence</u>

39. As EFL's appeal was largely based on the way DC dealt with Professor Pope's evidence, it is necessary to analyse his evidence in some detail. In his first written expert report he said as follows:

a. the future economic benefits that will be consumed, or enjoyed, are attached to the asset being accounted for. This is the Registration Rights intangible asset; not the

option to sell a player – which is a contingent asset. (1/3.4.26); The asset acquired by a buying club is the player registration rights. It is an intangible asset because the economic benefits derive from legal rights. (1/3.6.2)

b. The player signs a contract establishing a “right of use” of the player for the buying club. The right of use exists for the duration of the contract. (1/3.6.3); From the player’s side, the contract signed with the buying club establishes the obligation for the player to work for the acquiring club for the duration of the contract. The player does not have a right to cancel a contract unilaterally before maturity. (1/3.6.4) At the same time, the contract between the acquiring club and a player also generally establishes a right for the player to work for the club until the end of the contract. The economic value of the contract at the end of the contract (1/3.6.5)

c. The economic substance for the buying club owning player registration rights implies a terminal condition: the registration rights have zero residual value on the final day of the contract. On the final day of the contract, the player becomes a free agent under the *Bosman* ruling and the club has no rights to further economic benefits. No rational club would pay a club for a player’s registration rights on the day a player becomes a free agent, even if the player agreed.(1/3.6.6). Assuming that early contract termination options do not affect the substance of the main economic relationship between the acquiring club and the player in a material way, a club acquires a player’s registration rights for a fixed period. It has no rights to receive economic benefits after that period. Therefore, the expired registration rights have no value at the end of the contract. (1/3.6.7)

d. the sale of a player requires not only the selling club to agree terms with a new buying club, but also for the departing player to agree the transfer with both clubs. (1/3.6.10); Hence, a club owning a player’s registration rights does not own an unconditional legal right to sell (or otherwise transfer) a player before the end of the player’s contract, even if a willing buyer is found and a price agreed. (1/3.6.11). As a consequence, the possible future economic benefits from a player sale are not an entitlement to a club resulting from ownership of the registration rights of a player. (1/3.6.12)

e. 18.22 of FRS 102 requires that if the Club is to deviate from straight-line amortisation, the amortisation schedule should reflect the expected pattern of consumption of future economic benefits from the intangible asset. (1/4.2.2). The intangible asset is the player registration rights and the expected economic benefits are the expected player's services to the Club (1/4.2.3).

f. Because the Club does not normally have an unconditional right to sell players, resale proceeds are not an economic benefit associated with the Registration Rights controlled by the Club. (1/4.2.4). Hence deviation from straight line amortisation should be justified by the Club on the basis of the economic benefits resulting from a player playing at the Club. (1/4.2.5). Straight line amortisation over the full life of a contract implies a "benchmark" assumption that benefits are enjoyed evenly over the life of the contract. (1/4.2.6)

g. By incorrectly treating possible proceeds from reselling players as an economic benefit affecting residual values, the Club establishes an amortisation schedule for each player so treated that both deviate from the default straight-line amortisation with zero residual value, and which is highly unlikely to capture time variation in the actual economic benefits the Club is entitled to receive from owning the player's registration rights. (1/4.2.7). The club would need to justify an uneven pattern of economic benefits from holding the registration rights, keeping in mind that the economic benefits controlled via the registration rights derive from the player working for the Club - they do not include any possible benefits from the option to sell a player. (1/4.2.8)

40. At the time of his first report, Professor Pope had not been instructed to opine on the basis of the methodology in fact used by the Club in carrying out the amortisation treatment: he could not derive that from the statements in the Accounts as they did not state it accurately, and as explained above, EFL had not at that time correctly understood what the Club were saying its methodology was. By the time of his supplemental report Professor Pope had seen the witness statements of Mr Delve and Mr Pearce. He opined that the amortisation method described by Mr Pearce should not depend on the "*expected recoverable values"* of players for three reasons:

a. First, Mr Pearce described the “expected recoverable value” as being “more akin to a sales value” the Club could generate if a player is sold. Sales prices are evidence of economic benefits created by the Club in managing, developing and eventually selling players with the players’ consent. They are not economic benefits the Club is entitled to consume as a result of owning players’ contracts. The economic benefits consumed from owning players’ contracts are the players’ services provided to the Club over the contract period. (2/1.13.1)

b. Second, the pattern of amortisation obtained as a result of using “expected recoverable values” leads to anomalous amortisation patterns. Amortisation is heavily skewed towards the final year of a player’s contract – the higher the assumed “expected recoverable value” the more skewed the outcome. For example, in extremis if the “expected recoverable value” is greater than or equal to the initial cost, amortisation charges in years before the final year of the player’s contract would be zero followed by amortisation equal to 100% total initial cost in the final contract year. In such a case the amortisation is to a residual value of zero over the life of the player’s contract. But it is a trivial allocation of the cost to just one period (the final year). No serious accountant would deem it to be an acceptable amortisation approach based on the consumption of economic benefits, unless perhaps it was further known that the player was placed into cryogenic suspension and not “used” until the final contract year! (2/1.13.2)

c. Third, a player sale requires the player’s consent. Therefore, the Club does not have an unconditional legal right or control over future player sales. Until the Club has a firm agreement with another club and with the player, it is not entitled to recognise the expected recoverable value. Indeed, such agreements might never materialise. Therefore it is inconsistent with FRS 102 for anticipation of “expected recoverable values” to affect the measurement of amortisation and hence in the recognised carrying values of assets on the balance sheet and the timing of recognition of profits. (2/1.13.4)

41. Professor Pope went on to say that the description of the expected recoverable values element of the amortisation methodology appeared to be consistent with a wide range of potential values being selected by the Club. The apparent subjectivity in measurement of

expected recoverable values was inconsistent with reliable measurement, as defined in 2.7 of FRS 102. It was also inconsistent with the Club using a systematic approach to amortisation that reliably captures the expected pattern of consumption of economic benefits. (2/4.13.11). The lack of evidence of a systematic methodology to defining expected recoverable values also cast doubt on whether the Clubs' amortisation approach is systematic. (2/4.13.12).

42. We set out in full the passage in Professor Pope's supplemental report principally relied upon by EFL, which they say was unchallenged:

> *"4.21.1 The properties Mr Delve associates with straight line amortisation are the direct consequences of applying the cost model in accounting measurement. Changes in circumstances affecting the economic values of players will not be recognised under the cost model unless they make an impairment charge necessary. Similarly increases in the economic values of assets are not reflected in financial statements when accounting for assets under the cost model.*
>
> *4.21.2 It might be unattractive to the Club to have higher amortisation (and hence lower profits) in the early years of a player's contract, and higher profits on disposal if/when players are sold. But these are fundamental properties of amortisation and income measurement under the cost model, when straight line amortisation is compared with the Club's inappropriate amortisation approach. …*
>
> *…4.22.1 The financial reporting objective when reporting under the cost model is not to recognise assets on the balance sheet at values close to their economic values. The objective is to allocate the initial cost of the asset against profits to the periods in which the economic benefits from the assets are consumed by the entity.*
>
> *4.22.2 As a consequence of using the cost model, carrying values of assets will often deviate dramatically from possible future disposal values. This is true for many businesses, not just football clubs. This is just the way that the amortised cost model works in accounting.*
>
> *4.22.3 If assets are subsequently sold during their useful lives, entities may*

often recognise large profits on disposal, especially in times when asset values are rising generally. Again, this is just the way that the amortised cost model works in accounting.

4.22.4 Should entities wish to recognise assets on the balance sheet at values close to economic value, FRS 102 may allow them to do so by using the revaluation model as an alternative to the cost model used by the Club. Note that if the revaluation model is used then amortisation is based on potentially higher revalued amounts and may therefore be higher.

4.22.5 While the FRS 102 allows the use of the revaluation model for intangible assets in general, it is only permissible to do so if the fair values of intangible assets can be determined by reference to an active market [paragraph 18.18B, FRS 102].

4.22.6 I set out reasons in my first report why there is not an active market for specific football player registration rights/player contracts [PP1. 3.6.15-3.6.21]. Therefore it is not possible to use the revaluation model for player contract intangible assets."

43. Thus Professor Pope concluded (2/4.23-24) that the Club's amortisation approach failed to reflect the expected consumption of future economic benefits from the intangible assets held by the Club, and that the amortisation method described by Mr Pearce should not depend on the "expected recoverable values" of players. He opined that possible sales prices are not economic benefits the Club is entitled to consume (or use up) as a result of owning players' contracts. The economic benefits consumed from owning players' contracts are the players' services provided to the Club over the contract period. Moreover, the Club does not have an unconditional right to sell a player. The "expected recoverable values" are not expected economic benefits controlled unconditionally by the Club, rather the benefits associated with options to sell players which are contingent assets. Therefore expected recoverable values should not be associated with the accounting for the ownership of player registrations.

44. The Club's case was that it used the Cost Model, and that there was no "Active Market". It accepted that it was obliged to amortise the intangible asset, namely the right to the player's registration over the period of the player contract, because at the end of the player

contract the right to the player's registration had no residual value.

45. It can be seen from this that the way in which the treatment was explained in the accounts was misleading and wrong, and thus the DC found the fifth particular of the Charge proved.

K. First ground of appeal: consumption of the economic benefits of the asset

46. It was fundamental to EFL's case, based on Professor Pope's evidence, that it was not open to the Club to amortise with reference to the expected sale value of the asset. This was because, in summary:

    a. Amortisation involved "*the expected consumption of future economic benefits*" which was limited to the benefits to the Club from the right to the player registration during the period of the player contract;

    b. It was not permissible to take into account possible benefits on transfer of the player registration because they involved acquisition of a separate asset (the sale profit);

    c. The transfer of a player registration required the consent of a third party, namely the player, which might or might not be forthcoming;

    d. Regular revaluation was a feature only of the revaluation model, not part of the cost model, and could not be done under the cost model.

47. The DC rejected this. The relevant passage is as follows:

> *253) We see no reason to interpret the 'future economic benefits' to a club of a player's registration as being limited only to benefits enjoyed by a club from its own 'use' of that registration i.e. while the player remains under contract to the club and so providing services to the club/playing for the club:*
>
> *a) First, section 18.26 of the FRS 102 (relating to the derecognition of intangible assets/the recognition of a gain or loss in profit or loss) is framed by reference to the date when 'no future economic benefits are expected from its use or disposal' (emphasis added). That wording is*

entirely consistent with an asset being able to provide economic benefit to an entity

i) From its use, and

ii) From its disposal

b) Secondly, section 2.17 of FRS 102 specifies that 'the future economic benefit of an asset is its potential to contribute, directly or indirectly, to the flow of cash and cash equivalents to the entity. Those cash flows may come from using the asset or disposing it' (emphasis added). Once again, that wording is consistent with an asset being potentially able to provide economic benefit to an entity from its use and from its disposal

c) Thirdly, common sense suggests that, absent a clear instruction to the contrary in FRS 102, it would be artificial to limit the economic benefit to an entity which owns an asset to use of that asset when that entity's business also involves, as a fundamental element, disposal of that asset. When one steps back and asks 'what future economic benefits' can a club derive from having bought a player's registration, we find the answer to be

i) Economic benefits from holding the player's registration e.g. from the player playing for the club, and

ii) Economic benefits from selling the player's registration to another club before the player becomes a free agent at the end of his contract with the Club.

254) The EFL sought to demonstrate otherwise on a number of bases. None persuaded us:

a) Professor Pope's view was that 'consumption' of future economic benefits could only be consistent with 'use', and could not be consistent with their 'disposal'. That however appeared to us to

i) Not to reflect section 18.26 of FRS 102 (of which he made no mention),

ii) Not to reflect section 2.17 of FRS 102

iii) To be artificial, and to fall into the trap of preferring form over

substance – something against which FRS 102 cautions

b) *The EFL suggested, on the basis of Professor Pope's evidence, that the fact that the Club was not solely in control of when, and on what terms, it might be able to dispose of a player's registration meant that (1) a club has 'no right [entitlement] to sell a player at all, only a (highly)contingent option' (emphasis added), and (2) because a club had no right/entitlement to sell, economic benefits from selling the player's registration to another club therefore had to be disregarded. The EFL suggested the example of a player who simply refused to move to another club/agree personal terms with that club, making his registration unsaleable:*

   i) *Section 18.22 of FRS 102 refers to a club's expectation of how it will consume the future economic benefits of its assets. It does not refer (as Professor Pope repeatedly does in his report) to or require there to be an absolute 'entitlement' to consume those future economic benefits, whether in a particular way or at all*

   ii) *That does not require the club to be certain that it will be able to extract an economic benefit in the future from selling the player's registration to another club, only that it expects (and reasonably expects) to be able to do so. Uncertainty is not a bar to section 18.22 of FRS 102 being satisfied*

   iii) *Likewise section 2.17 of FRS 102 does not link 'future economic benefit' with what an asset will contribute to an entity; it links 'future economic benefit' with what the asset has the 'potential' to contribute, either from use or sale. Once again, uncertainty is not a bar*

   iv) *Section 2.29 of FRS 102 also recognises that uncertainty is not a bar to the first recognition criterion for 'future economic benefit' (see section 2.27 of FRS 102) being satisfied: 'Assessments of the degree of uncertainty attaching to the flow of future economic benefits are made on the basis of the evidence relating to conditions at the end of the reporting period available when the financial statements are made. Those assessments are made individually for individually significant items, and for a group for a large population*

of individually insignificant items'

v) *Given that instances of sales of players' registrations are far, far greater than instances where the desired or intended sale of a player registrations is derailed by the conduct of a third party (such as a player himself), we see nothing wrong in the default position of the Club being an expectation (1) that it will be able to sell a player's registration at a point in time that in the future, and so (2) that the player's registration has the potential to contribute to cash flow etc from use or from disposing of it. That said, of course if a particular player was to make it clear that he would frustrate any sale, and was intending to sit out his contract, that would necessitate the Club considering whether or not that player did in fact have an ERV*

vi) *Professor Pope's suggestion that a 'right' of disposal of a player's registration was more akin to a contingent asset was unrealistic:*

(1) *A contingent asset is defined in FRS 102 as*

'a possible asset that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity':

(2) *That is not apt to describe 'the asset' in this case; 'the asset' (the player registration) is not a 'possible asset', it is an actual asset*

(3) *What is uncertain is not whether or not 'the asset' will come into existence, but whether the asset (1) can be disposed of by the club that owns it, and so (2) generate an economic benefit for that asset from disposal*

(4) *That 'uncertainty' does not result in the possibility of that economic benefit being ignored; rather as above it requires a consideration of whether the economic benefit is one that can properly be said to be 'expected'*

c) *The EFL also suggested that the Club's approach is undermined by the fact that 'by paying a transfer fee a buying club is not even paying for the same thing that the selling club is relinquishing' – and gave the example of a club who is buying a player with one year left on his*

existing contract at a price that reflects the fact that that player is agreeing to sign a long term contract with the buying club. While factually that is so, it is in our view no more than a further iteration of the EFL's first argument above:

i) The selling club will have no control over what a buying club might be willing to pay to purchase a particular player's contract registration. Obviously a buying club with whom that player is willing to sign a long term contract will be likely to pay more to the selling club for that registration than a buying club which is considering signing the player only on a short term contract

ii) However, the fact that the selling club does not solely control the terms on which it is able to dispose of the player's registration does not prevent the selling club from having an expectation:

(1) That it will be able to dispose of (and will dispose of) the player's registration in the future, and

(2) That it will enjoy an economic benefit from that disposal. In reality, although the sale of a player registration requires the co-operation and agreement of three parties (the buying club, the selling club and the player) the position is little different from any bipartite contract for the sale of an intangible asset – the owner of the asset will form a view as to the likelihood of him being able to sell, and in fact selling, an asset in the future and at what price. Time may prove him right or it may prove him wrong. However, that uncertainty does not prevent him from being able legitimately to have an 'expectation' about the pattern in which he expects to consume the future economic benefits of that asset.

L. <u>Second ground of appeal; reliability</u>

48. EFL submitted that even if it were permissible to amortise using the cost model other than using a straight line write-down, the Club's treatment was not "reliable". The concept of reliability under FRS 102 is defined as the "*quality of information that makes it free from*

material error and bias and represents faithfully that which it either purports to represent or could reasonably be expected to represent".

49. EFL submitted before the DC that even if FRS 102 had permitted the Club in principle to use an ERV as part of its amortisation method for certain players, the Club had not begun to demonstrate that it could measure such ERVs reliably within the meaning of FRS 102. The EFL submitted on this appeal that neither (a) the oral evidence nor (b) the Draft Audit Findings Reports could reasonably be regarded as establishing the reliability of the Club's determinations.

50. The DC considered whether the Club could determine that pattern 'reliably' (since if it could not, it must use the straight line method to amortise the capitalised costs of player registrations):

> *256) Although the provision relates to the Recognition of Assets, some assistance as to what is required under FRS 102 for something to be able to be done 'reliably' can be found in section 2.30 of FRS 102:*
>
> *'In many cases the cost or value of an item is known. In other cases it must be estimated. The use of reasonable estimates is an essential part of the preparation of financial statements and does not undermine their reliability'.*
>
> *257) We heard relatively little evidence on the reliability of the Club's approach. However, such evidence as we did hear – principally in the form of oral evidence from Mr Pearce and Mr Delve and the Draft Audit Findings Reports - was consistent with the Club having been able to determine the pattern of its consumption of future economic benefits from its ownership of player registrations 'reliably', and we are satisfied that the Club was able to do so in the financial years in question:*
>
> *a) Aside from certain possible anomalies in the Audit Findings Report for the year ended 30 June2019 (which is not a year to which the Second Charge relates) over how the contracts of 3 players with significant net book values (and so presumably positive ERVs) had ended without transfer fees being received, that evidence did not demonstrate*

i) that the Club's approach had proved unreliable, or

ii) that the realities of

(1) when a Club disposed of players' registrations, and/or

(2) the economic benefits derived by the Club from the disposal of players' registrations differed markedly from the pattern that the Club had 'expected' when setting ERVs, applying its amortisation policy to individual player registrations and so forth

b) The fact that the draft Audit Findings Reports did not identify for the financial years to which the Second Charge relates

i) a significant number of instances where 'reality' had diverged from 'expectation, or

ii) instances where "reality" had diverged from "expectation" significantly would also suggest that the Club's approach was not proving unreliable.

c) The fact that Smith Cooper was willing to provide unqualified Audit Reports to the shareholders of the Club confirming compliance with FRS 102 would also suggest that Smith Cooper (Mr Delve) was satisfied that the Club's approach was sufficiently reliable to meet the requirements of section 18.22 of FRS 102

d) The fact that Smith Cooper's audit file for a financial year since the change in amortisation policy has occurred has been picked for review by the ICAEW and approved as compliant.

M. Third ground of appeal: systematic

51. EFL also contended that the treatment by the Club could not be described as "systematic". EFL complained that the DC had found that this was simply a word in the English language and they were not assisted by expert evidence, yet took into account the views of Mr Pearce and Mr Delve and thus had failed properly to consider whether the treatment was systematic. The DC rejected this as follows:

245) *Whether or not the Club's allocation of the depreciable amount of the capitalised cost of player registrations was 'systematic' was considered by Professor Pope in his supplemental report and explored with him in cross-examination. However, given that*

a) *FRS 102 does not define "systematic" or give any assistance as to what might be required for allocation of the depreciable amount of the intangible asset on a 'systematic basis'*

b) *Professor Pope was unaware of those words being defined in any other system of accounting standards*

c) *Professor Pope was unaware of those words being defined in any other 'possible authoritative source in football'*

d) *Professor Pope did not suggest that that term had any particular recognised meaning for accounting or auditing purposes*

e) *Professor Pope's analysis in the end amounted to nothing more than*

   i) *Setting out a definition of "systematic" from the Oxford English Dictionary, and*

   ii) *Asking himself whether he considered that dictionary definition was met by the Club's amortisation policy in this case*

we did not find his views at all helpful. In light of the above, consideration of whether the Club's approach was 'systematic' according to the ordinary meaning of that word is something for us as the Disciplinary Commission, not for Professor Pope as an expert.

246) *The OED defines "systematic" as*

"Arranged or conducted according to a system, plan or organised method; involving or observing a system; (of a person) acting according to system regular and methodical".

That, we find, is an apt description of how the Club approached the allocation of the depreciable amount of capitalised costs of player registrations over the useful lives of those registrations:

a) *The Club had a system or organised method for considering how the depreciable amount of capitalised costs of player registrations should be allocated across the useful life of the asset. We have described that above*

b) *That system was regular and methodical*

c) *The Club observed that system.*

247) *In his Supplemental Report Professor Pope suggested that the Club's approach could not be 'systematic' because*

a) *It applied positive ERVs to some players as at some point during the period of their contract with the Club, before amortizing to a residual value of zero at the end of their contractual period. The approach to amortisation of the capitalised costs of those players' registrations was thus on the basis exemplified in paragraph 55(b) above over the period of those players' contracts, while*

b) *For other players the Club did not apply an ERV, and for those players the approach remained to amortise the capitalised costs those players' registrations on a straight line basis over the period of those players' contracts as exemplified in paragraph 55(a) above.*

However, that misunderstands the Club's approach. The Club approaches amortisation for all players on a consistent and methodical basis – it asks itself the same questions, with the same regularity, and takes the same steps to answer those questions. Simply because the same questions, addressed in the same way, gives different answers for different players does not render the Club's approach 'unsystematic'.

248) *Professor Pope also identified 3 further matters that, in his view, meant that the Club's amortisation policy was not systematic:*

a) *First, that the Club's approach does not define 'precisely the period within a player's contract over which the initial amortisation stage occurs' e.g. to the start of the final year of the player's contract, or some other date. That in our view does not prevent the Club's approach from being 'systematic':*

i) *Amortisation occurs over the useful life of the asset; that is what is required*

ii) *'Systematic' does not mean treating every asset that is under consideration identically; it means approaching the amortisation of the capitalised costs of each player registration in a regular, consistent and methodical way. That is what the Club did. There is no reason why, applying that regular and methodical approach, it cannot arrive at different periods for different players; indeed, it is almost inevitable that it will do so given that no 2 player registrations are identical*

b) *Secondly, that the Club's approach does not define clearly which player registrations are and are not to be allocated an ERV. Again, that is not something that prevents the Club's approach from being 'systematic':*

i) *We have set out above how the Club in fact considered on a regular basis what, if any, ERV was to be applied to a particular player's registration*

ii) *There is nothing inherently objectionable about the fact that the Club had no rigid criteria for deciding which players would and would not be allocated and ERV, or that the Club's approach involves a degree of subjective judgment. What matters is that the Club asked itself the relevant question – should we allocate an ERV to this player? - regularly and as part of a systematic approach to allocation of the depreciable amount of capitalised costs of player registration, and methodically considered factors relevant to each player (age, injury status, form etc) in the course of operating that system. The fact that different factors would apply (and would be given different weight) for different players does not prevent what the Club was doing from being 'systematic'*

c) *Thirdly, that the Club's approach does not define clearly how ERVs are to be identified and measured reliably? Once again, that is not something that prevents the Club's approach from being 'systematic':*

i) *We have set out above how the Club in fact considered and determined what, if any, ERV was to be applied in respect of an*

individual player

ii) There is nothing inherently objectionable about how the Club approached that exercise. While (as was accepted) it involves a considerable degree of subjective judgment on the part of the Club to interpret and weigh up the information ascertained by it for that purpose, that does not prevent the allocation exercise carried out from being a 'systematic' one. FRS 102 makes clear that the use of estimates and subjective judgment is an essential part of the preparation of financial statements

iii) What matters once again is that the Club asked itself the relevant question – what, if any, ERV should we allocate to this player? - regularly and as part of a systematic approach to allocation of the depreciable amount of the capitalised costs of player registrations, and then methodically considered factors relevant to each player in the course of operating *that system. Once again, the fact that different factors would apply (and would be given different weight) for different players does not prevent what the Club was doing from being 'systematic'.*

249) Given that we have referenced Professor Pope's views on this issue, we should also record that the Club's factual witnesses – including Mr Delve, of Smith Cooper – were of the view that the Club's approach was (and is) systematic. While we agree, we again considered that their views on the matter were ultimately of little relevance. What we would however say is that we considered Mr Delve's evidence generally on

a) The Club's approach to amortisation, and

b) Why he considered it to meet the requirements of FRS 102 to be straightforward and reliable. Unlike Professor Pope, his focus – as it should be under FRS 102 – was very much on substance over form. That difference between them is likely to have been a consequence of the fact that Professor Pope's background is firmly in academia, which Mr Delve's background is as a practising chartered accountant and auditor.

N. Fourth ground of appeal: treatment of expert evidence

52. The EFL submits that the DC had no proper or sufficient basis for rejecting the evidence of Professor Pope, which was the only independent expert accountancy evidence before the DC, and which was in important respects not evidence on which he would have expected reasonable experts to disagree.

53. We have referred above to the principal passages in which the DC dealt with the evidence of Professor Pope.

O. Our powers

54. We will need to review our powers in detail when we deal below with the disposal of this appeal. However for present purposes we note that pursuant to 2020/2021 EFL Regulation 95.5.2, the EFL's appeal

> *'shall be limited to a consideration of whether the decision being appealed was in error and the burden of establishing the decision was in error shall rest with the appellant'.*

55. An appeal tribunal such as ourselves is obliged to have in mind that we did not have the advantage of hearing the witnesses and must have in mind the restrictions on appellate tribunals overturning tribunals of fact. This is particularly the case where what is in issue is the decision of a specialist tribunal.

56. The relevant authorities and principles were conveniently summarised in the context of CPR Part 52 by Coulson LJ in *Wheeldon Bros Waste Ltd v Millennium Insurance Co Ltd*[1], which sets out at [7]-[11] the limited circumstances in which appellate tribunals are at liberty to set aside findings of fact of first instance tribunals. Thus an appeal on a question of fact can only succeed where the first-instance tribunal (i) has made some fundamental error of principle (e.g. an error of law) or (ii) has reached a conclusion that no reasonable tribunal could have reached: [7]-[10].

[1] [2018] EWCA Civ 2403, [2019] 4 WLR 56:

57. The reasons for this approach include:

i. The expertise of the first-instance tribunal.

ii. The fact that *'[t]he trial is not a dress rehearsal. It is the first and last night of the show'.*

iii. The disproportionality of attempting to duplicate the role of the first-instance tribunal on appeal.

iv. The impossibility of duplicating that role. The first-instance tribunal '*will have regard to the whole sea of evidence'*, whereas the appellate tribunal *'will only be island hopping'*; and transcripts are an inadequate substitute for live evidence.

v. Similar caution must be applied on appeal to expert evidence as to the evidence of factual witnesses: [11].

vi. There is even greater reluctance to unpick on appeal the conclusions of a specialist tribunal on the basis of technical expert evidence: [12]-[18].

58. In relation to the composition of the DC, Appendix 5 of the 2020/2021 EFL Regulations (Part 1 Championship Profitability and Sustainability Rules) provides:

> *"6.4 Any Disciplinary Commission convened pursuant to or otherwise in relation to any matter covered by these Rules shall include at least one member who holds a nationally recognised qualification as an accountant or auditor…"*

That provision does not apply to the composition of the LAP.

59. As will be apparent, this appeal is concerned with the application of detailed and complex accounting principles. As was required by the Rules, the DC had the benefit of an accountant member of the DC, Mr James Stanbury, who is a partner of Baker Tilly of many years experience. Neither party appointed an accountant to this appeal panel and thus we must have in mind that the LAP is being asked as a panel without accountancy expertise, to overturn a DC on matters of accounting practice where the DC did have, and was obliged to have an accountant member.

P. Fact and law: accounting principles

60. The issue also arose as to whether the proper interpretation of FRS 102 is a question of fact or law. This question was decided in a recent decision of the Upper Tribunal (Tax and Chancery Chamber), *Ball UK Holdings Ltd v Revenue Customs Commissioners*[2]. Falk J, sitting with Judge Canaan, posed the question at [30]:

> *"At the heart of this appeal is the question whether the correct interpretation of accounting standards, and specifically FRS 23, can be characterised as a matter of law or fact. If it is a question of law then this Tribunal may consider the question afresh. If it is a question of fact then, since an appeal may only be made on a point of law, the role of this Tribunal is limited to determining whether the FTT's conclusions were unsupported (or not sufficiently supported) by the evidence, such that the findings were not ones that it was entitled to make."*

She continued at [37]:

> *"Accounting standards are not legal documents. They are not statutes or contracts. This is also not a case where public law concepts, such as the doctrine of legitimate expectation, are engaged in a way that means that the document in question may form the basis of a legal right …. So it is not necessary to construe them to determine any legal effect to be given to them. They are documents written by accountants for accountants, and are intended to identify proper accounting practice, not law. No accountant would consider turning to a lawyer for assistance in their interpretation, and nor should they. Where appropriate, interpretations are provided by the relevant accounting standards board itself, not only in notes, the "Basis of Conclusions" and other accompanying material published with standards, but also via committees whose function is to provide interpretations…."*

She concluded at [40-41]

> *"In our view the question of what is generally accepted accounting practice, as well as the question whether a particular set of accounts are prepared in accordance with it, is a question of fact to be determined with the assistance of expert evidence. Professional accountants are best placed to understand*

[2] 2018 UKUT 407 (TCC).

accounting statements in their context, and in particular their "spirit and reasoning"

…. What is a matter for a court or tribunal, however, is the proper assessment of expert evidence. Clearly a judge may prefer the evidence of one expert to that of another, but this should be fully reasoned and the judge should not simply "develop his own theory"…"

61. Both parties accepted that this decision accurately reflected the law.

Q. Approach to expert evidence

62. As Bingham LJ observed in *Eckersley v. Binnie*[3]:

"In resolving conflicts of expert evidence, the judge remains the judge; he is not obliged to accept evidence simply because it comes from an illustrious source; he can take account of demonstrated partisanship and lack of objectivity. But, save where an expert is guilty of a deliberate attempt to mislead (as happens only very rarely), a coherent reasoned opinion expressed by a suitably qualified expert should be the subject of a coherent reasoned rebuttal, unless it can be discounted for other good reasons."

63. In *Re G (Children) (Fact-Finding Hearing)* [4] Wall LJ said it was:

"…axiomatic that judges are entitled to disagree with an expert witness. But this proposition also has an equally obvious corollary. There must be material upon which the judge in question can safely found his or her disagreement, and he or she must fully explain the reasons for rejecting the expert's evidence."

64. We should also note, as submitted by the Club, in proceedings before a DC, any rules against the admission of opinion evidence are expressly disapplied by Rule 6.2 of the Procedural Rules in Appendix 2 which provides that a DC:

[3] (1988) 18 Con.L.R. 1, 77–78
[4] [2009] 1 F.L.R. 1145 at ¶ 17

"shall have the power to decide on the admissibility, relevance and weight of any evidence (including the testimony of any fact or expert witness) and shall not be bound by any judicial or evidential rules in relation to such matters."

65. However, the DC had given separate directions as to factual and expert witnesses and the Club specifically called Mr Delve and Mr Pearce as factual not expert witnesses and declined to lead expert evidence. Had the position been otherwise, Mr Pearce and Mr Delve would no doubt have been examined about not only their qualifications and experience but also (for example) their impartiality. Thus, having given directions as they did, the DC were obliged to maintain a distinction between expert and factual witnesses. In any event, the DC never suggested that they were adopting any different rule from the usual as to the role of expert evidence.

R. Consumption of economic benefits of an asset

66. EFL's first ground of appeal is that the DC erred in their interpretation of FRS 102 in relation to the consumption of economic benefits of an asset.

67. Professor Pope's evidence on this point, set out in detail above, can be summarised as follows:

    a. The relevant asset for this purpose is the right to the player's registration

    b. FRS 102 provides that this asset can be measured on two alternative models, cost or revaluation; the Club could not use the revaluation model, thus used the cost model

    c. That involved measurement at cost less accumulated amortisation and impairment losses under 18.18A, 18.21 and 18.22

    d. 18.22 required the Club to choose an amortisation method that reflects the pattern in which it expects to *consume the asset's future economic benefits;* if it cannot determine that pattern reliably it must use the straight-line method

    e. The cost model is concerned with *consumption* of the asset; it has nothing to do with

the possible sale of the asset which does not involve consumption. The right to sell does not involve consumption; the proceeds of sale involves a contingent asset which is subject to the separate rules on contingent assets

f. In any event, a further reason why 18.22 cannot be interpreted in the way the Club has done is that the Club has no unconditional right to sell the player's registration; this is a further difference from (say) selling a car as it requires the player's consent which may be not forthcoming

g. The regular revaluation of player contracts by means of expected resale value is fundamentally inconsistent with the use of the cost model as opposed to the revaluation model.

68. In preparing this Decision, we reviewed carefully the cross-examination of Professor Pope before the DC on this issue (day 4/166-186). Professor Pope reiterated the two fundamental reasons why in his opinion the treatment under the cost model did not permit taking into account potential resale proceeds. He was challenged about his view that it was impermissible because the sale of the player's registration required the player's consent, which might or might not be forthcoming. As for the other point, that the cost model was concerned with consumption of benefits which precluded taking into account resale, he gave the following example (day 4/170):

> *"If I buy a house to live in as my main residence and set a 40-year horizon, if I live that long, and if I pay 1 million, then the consumption of the economic benefits is the value I derive from living in the house. And a straight - line method would take 1 million and divide it by 40 and that would be the depreciation on this tangible asset. Of course I can sell this house whenever I choose and the price at which I could sell the house may go up or may go down and in fact I may have a prior [unclear] on the fact it will go up. I may know, for example, that, you know, a school next-door is going to receive an excellent Ofsted rating. I don't take that into account in depreciating the value of the asset in use, the consumption value remains the same. It's the fraction -- 1/40th in my example -- of the amount I paid for the asset."*

69. He further went on:

"When an entity sells an asset, it is not consuming the benefits, it is obtaining benefits from sale. The consumption is about using the assets." [5]

"Those economic benefits are associated with the asset, but they are not associated with consumption of the asset's economic benefits" [6]

The possible profit on the sale of my house is not relevant "in depreciating the value of the asset in use because the consumption value remains the same; there is a difference between consumption of economic benefits and the receipt of economic benefits from the result of the sale." [7]

70. We have considered whether there was any challenge to Professor Pope's evidence on this issue. It is true that it was suggested his evidence was unrealistic, or contrary to common sense, but he had explained the structure and accounting logic to the treatment in his report and made clear that in consequence it was irrelevant that the amortised value was lower than the actual anticipated disposal value*:*

There is nothing surprising about this treatment, or the fact that the amortised value is lower than the actual disposal value; "that is true of virtually every business that I study."[8]

Otherwise, there was no challenge to Professor Pope's evidence as to this accounting principle.

71. Professor Pope thus gave expert evidence as to the proper interpretation of FRS 102 under the cost method. This was the only expert evidence before the DC as to the interpretation of the standard. We turn to consider the reasons given by the DC for rejecting Professor Pope's opinions.

72. Their first and second reasons given by DC ([253][254]) were by reference to 18.26 and 2.17. Neither of these provisions is relevant to Professor Pope's analysis. Neither is concerned with the cost model of amortisation or uses the word 'consumes'. It was not suggested that the value of an asset can *never* include disposal proceeds.

---

[5] Day 4/168/12-14
[6] Day 4/170/1-3
[7] Day 4/170/5-21, 4/184/11-13
[8] Day 4/185/19-21

73. The third reason was an appeal to common sense ([253]). But the issue concerned the construction of an accountancy standard, which was a technical question on which expert evidence from an accountant was fundamental. An appeal to common sense in such circumstances is perilous unless one engages directly with the reasoning of the expert accountant. This related to the treatment under the cost model only. For example "common sense" might suggest that where a player's resale value had doubled during the course of his contract with the Club, that additional value should be reflected by an uplift value in the accounting treatment; but it was common ground that the cost model simply involved depreciating from the cost and did not allow for such uplifts. Professor Pope made clear in the passage cited above that application of the cost model would almost always yield a result that differed from actual disposal value.

74. The DC said it was "artificial" to treat "consumption" of future economic benefits as consistent with "use" only and not disposal at [254(a)] and again referred to 18.26 and 2.17. But this point is in reality simply an appeal to "common sense" again.

75. The Club point out that DC refer to Professor Pope's acceptance ([239(b)] that it was not necessary for a club to amortise on a straight line basis under the cost model. We do not see how Professor Pope could have done otherwise, given the wording of 18.22. However, that point does not engage with his analysis as to why what the Club did was impermissible.

76. At [254 (b)(c)] the DC consider the other fundamental reason given by Professor Pope, namely that the Club has no right to sell a player's registration, merely an expectation contingent on (i) an acceptable bid coming from another club and (ii) the player agreeing to be transferred to that other club on the terms offered. The DC took the view that, given that FRS 102 did not require certainty, the Club was entitled to rely on their expectation so long as they could do so systematically and reliably. It does not seem entirely clear to us whether Professor Pope was opining that the imposition of the conditionality (the player's consent) meant that that was a bar in principle (so that the treatment could never be utilised however justified the assumption that the player's consent would be forthcoming), or that it simply presented a likely bar on the facts. In any event, the point assumed something which (as already explained) Professor Pope said could not be done, namely use of the resale value under the cost method. We do not think it is possible to

say that the DC's conclusion on this particular point was clearly wrong.

77. EFL submit that this particular finding was premised on an assertion by DC that "*instances of sales of players' registrations are far, far greater than instances where the desired or intended sale of a player registrations is derailed by the conduct of a third party (such as a player himself)" [254(b)(v)]* which was a finding made without evidence, but that does not seem to us to involve an error of law or principle; in any event it reflects the factual judgments made by the Club.

78. The remainder of [254(b)] is concerned with the issue as to whether the fact that the Club does not have an unconditional right to sell the registration is fatal to the use of the treatment adopted by the Club. As stated above, we do not consider this involves an error of law. [254(c)] is concerned with the same point.

79. We are therefore left in the position that Professor Pope gave the unqualified and coherently reasoned opinion that it was impermissible to take into account the possible transfer of the registration under the cost model because that model was (unlike the revaluation model) concerned with the *consumption* of the future economic benefits of the asset represented by the player registration. We simply do not see any answer to that point and none was given by the DC. We are not impressed with the appeals to "common sense" and the only other ground relied upon by the DC on this point was to refer to other sections of FRS 102 which do not assist on the point. The analysis had nothing to do with the workings of the football market or experience as an auditor or whether or not it produced 'realistic' results: it was a point of principle based on the expert's understanding of accounting principles as to what was and what was not permissible in accordance with the cost model.

80. This was the point which Professor Pope emphasised at 4.21 and 4.22 of his supplemental report. In this passage from his supplemental report Professor Pope provided a high level and principled explanation as an expert as to the structure and purpose in accounting terms of the cost model in amortising intangible assets. Mr Segan submitted in his oral reply submissions that these paragraphs were never challenged.

81. We have considered above the cross-examination on Professor Pope's evidence. The fact that this point was not challenged (other by reference to appeals to common sense

or unreality) is significant and provides further support for our conclusion that the DC failed to provide cogent reasons for rejecting his evidence on this central issue. The fact that his evidence was not substantially challenged made it all the more important that the DC had convincing reasons for rejecting it. Having reviewed with care the reasons given by the DC for rejecting Professor Pope's evidence on this point, we are, with the greatest respect to the DC who approached the questions before them with care and diligence, unable to find any reason for rejecting Professor Pope's evidence on this key issue which survive scrutiny and conclude that the rejection of this part of the evidence by the DC involved an error of law within the test set out by Bingham LJ in *Eckersley v Binnie*.

82. It follows that we have concluded that the DC did err in law in rejecting the evidence of Professor Pope that it was impermissible in principle under the cost model for the Club to take into account possible resale values of players. We should make the following points:

    a. Firstly, we should make clear that we have reached this conclusion after anxious consideration, given that (i) there is no accountant on our panel (ii) we are differing from a DC which included and was required to include an accountant member (iii) we are differing from a specialist tribunal on an issue of construction of accountancy standards which are to be treated as questions of fact, and we have directed ourselves on this issue in accordance with the principles set out above

    b. However, the DC was faced with expert evidence from a distinguished academic accountant, and this was the *only* expert evidence which was led before them. The DC was entitled to reject that evidence, but on grounds which are capable of withstanding criticism or challenge in law. We do not consider that the grounds put forward by DC for rejecting that evidence are supportable in law.

    c. The DC took into account in the weight they gave to Professor Pope's evidence the fact that he was an academic, not a chartered accountant, had never audited accounts, and had no expertise in football club accounts. But what we consider to be the critical point was an issue of accounting principles, and was not in any way dependent on expertise in football or auditing.

    d. No other club has ever adopted the treatment utilised by the Club for amortisation or anything similar. Whilst that does not of itself indicate that the treatment adopted by

the Club was wrong, it is a very striking feature of this case that the Club were seeking to do something no one else seems *ever* to have considered permissible.

S. Reliable and systematic

83. In the light of our conclusions on this first ground, we can deal with the other grounds relatively shortly. We noted above that on this appeal EFL do not challenge the factual finding as to the methodology utilised by the Club described at [54]. In our view issues as to whether the methodology adopted was 'reliable' and 'systematic' were questions of fact for the DC and raise no issue of principle or law and we would not have allowed this appeal on either of those grounds.

84. That said, we would not wish it to be taken that we would have necessarily reached the same conclusions as the DC on these matters. On the contrary, it seems to us that EFL had strong grounds for contending that the treatment adopted by the Club was neither systematic nor reliable. We would point out the following:

    a. The approach that was adopted was operated, on the Club's own evidence, so informally and with such a lack of evidential basis that it generated, in the course of three whole accounting years in operation, not a single document indicating how or on what basis the Club had determined for each player whether to allocate an ERV at all, at what point in time during the contract it hoped to sell the player and how much it hoped to receive by way of a transfer fee.

    b. The only document from which it could be inferred that these determinations had even taken place was a very brief set of 'Amortisation Schedules' produced by the Club after the EFL's specific disclosure application [see DC decision 16(a)] and [58]. But as the DC acknowledged,

> "…*although the (sole) amortisation schedule provided by the Club referenced, on a player by player basis, the figures applied by the Club to those players on a year by year basis, the mechanics or "maths" behind those figures was not readily discernible from that schedule.*"

In fact the Amortisation Schedules offered no way in which to work out how the Club might have gone about making the determinations required by its amortisation method at all.

c. Mr Pearce said that the Club's determination of the *'expected recoverable values'* reflected

> *"the Club's own view of such matters, consultation by the Club with agents and agencies and by a consideration (from online databases on websites such as TransferMarkt.de and Kicker.de) of transfer prices being achieved in the market for comparable/similar players"* [54].

This evidence makes it all the more surprising that no documents exist evidencing the process.

d. Comparison between the values provided by the Club and online websites such as *www.transfermarkt.com* does not enable one to understand the process utilised by the Club in any way; on the contrary, the values utilised by the Club seem to have been consistently in excess of the values placed by such websites.

85. If this issue had arisen before us de novo, we might well have had sympathy with the contention that the Club's methodology was so subjective that it was neither reliable nor systematic. However, we do not consider the point raises an issue of principle and, as we have said, we would not have allowed the appeal on that ground.

86. We should also note that, on the findings of the DC not challenged before us, the Club had misstated in each of the Accounts the treatment which had been adopted by the Club in relation to amortisation. That seemed to us to raise questions as to how far the Club's auditors had fully understood the accounting treatment they were adopting and its basis. However, this was not a matter canvassed before us on the appeal and it would be wrong for us to draw conclusions on it.

T. <u>Approach to expert evidence</u>

87. That leaves the final ground of appeal, the expert evidence ground. EFL submitted that

the DC did not maintain a clear distinction between the expert evidence (Professor Pope) and the factual evidence (Mr Pearce and Mr Delve). That is tied up with the first ground of appeal on which we have allowed the appeal. The DC were well aware that they were obliged to treat Professor Pope as an expert and Mr Pearce and Mr Delve as factual witnesses. EFL submitted that the DC treated their evidence at times as though it was of equal weight as to the construction of FRS 102. It is correct that some of the wording of [249] suggests a blurring of the distinction between the two types of evidence. However, there is no need for us to make further comment on this and we would not allow the appeal on this ground.

U. Disposition: our powers

88. In light of our conclusions, we invited submissions as to disposition. This provoked a significant dispute both as to the scope of our powers and as to the disposition of this appeal.

89. Our powers are as follows:

> ***EFL Regulations Section 8***
>
> ***94 Disciplinary Appeals***
>
> *94.1 A party to a Disciplinary Commission may appeal against a final order of the Disciplinary Commission (a 'Disciplinary Appeal'). A preliminary or procedural ruling by a Disciplinary Commission shall not be subject to a Disciplinary Appeal unless:*
>
> *94.1.1 such ruling is dispositive (i.e. it amounts to a final resolution of the matter); or*
>
> *94.1.2 such ruling, though not dispositive of itself, is subsequently incorporated into a final decision.*
>
> *94.2 A Disciplinary Appeal shall be heard by the League Arbitration Panel in accordance with the provisions of Section 9 of these Regulations, supplemented by the provisions of this Regulation. In the event of any*

conflict between Section 9 and this Regulation, this Regulation shall prevail…

…94.7 Following a Disciplinary Appeal, the League Arbitration Tribunal shall have the power to:

94.7.1 confirm the decision; or

94.7.2 set aside the decision in whole or in part and substitute a new decision; or

94.7.3 order a rehearing before a differently constituted Disciplinary Commission.

EFL Regulations Section 9

95 Agreement to Arbitrate

95.1 Membership of The League shall constitute an agreement in writing between The League and Clubs and between each Club for the purposes of section 5 of the Arbitration Act:

95.1.1 to submit those disputes described out in Regulation 95.2 to final and binding arbitration in accordance with the provisions of the Arbitration Act and this Section of these Regulations…

…95.2 The following disputes fall to be resolved under this Section of the Regulations:

…95.2.2 Disciplinary Appeals…

…95.5 In the case of a Disciplinary Appeal, the League Arbitration Panel sits as an appeal body and the standard of review is:

95.5.1 where required in order to do justice (for example to cure procedural errors in the proceedings before the Disciplinary Commission), the Disciplinary Appeal shall take the form of a re-hearing de novo of the issues raised in the proceedings i.e. the League Arbitration Panel shall hear the matter over again, from

the beginning, without being bound in any way by the decision being appealed;

95.5.2 in all other cases, the Appeal shall not take the form of a de novo hearing but instead shall be limited to a consideration of whether the decision being appealed was in error and the burden of establishing the decision was in error shall rest with the appellant; and

95.5.3 in the case of appeal against sanction, the grounds are that the original sanction was too severe or too lenient having regard to all the circumstances…

…100 Remedies

100.1 The League Arbitration Panel shall have power to:

100.1.1 determine any question of law or fact arising in the course of the arbitration;

100.1.2 determine any question as to its own jurisdiction;

100.1.3 make a declaration as to any matter to be determined in the proceedings;

100.1.4 order the payment of a sum of money;

100.1.5 award simple or compound interest;

100.1.6 order a party to do or refrain from doing anything;

100.1.7 order specific performance of a contract (other than a contract relating to land);

100.1.8 order the rectification, setting aside or cancellation of a deed or other document.

V. Disposition: the arguments of the parties

90. The Club submitted as follows:

a. The LAP was entitled to conclude that the DC erred in law in rejecting Prof Pope's evidence. But it can do no more than that. The LAP cannot, and should not, uphold any part of the second charge against the Club because:

i. This would deprive the Club of its right to have allegations of breach of the P&S Rules determined by a panel including an accountant which is a requirement for the DC (see rule 6.4 of the P&S Rules in Appendix 5 of the Regulations).

ii. It would deprive the Club of its right to an appeal on the issue of liability. Had the DC upheld the charge on the basis of Professor Pope's evidence, the Club might have wished to appeal on the grounds that the hearing proceeded in a manner which was procedurally unfair (with the late admission of Pope 2) or that the DC erred in law in rejecting the Club's procedural defences. There was no opportunity for the Club to advance these matters on the EFL's appeal, since they fell outside the scope of the reference to arbitration.

b. The LAP has no power to impose a sanction because the power to grant relief under Regulation 100 does not include any reference to penalties.

c. The LAP's power in Regulation 94.7.2 to *'set aside the decision in whole or in part and substitute a new decision'* cannot permit the LAP, in the unusual case where the EFL is the appellant, to deprive a club of its rights to have a charge of breach of the P&S Rules determined by a DC including an accountant and to appeal any adverse determination.

d. The LAP's function is limited by Regulation 95.5.2 to "*consideration of whether the decision being appealed was in error"*. Since the DC has made no decision on sanction, there is nothing for the LAP to consider.

e. The power under Regulation 94.7.2 to "*set aside the decision in whole or in part and substitute a new decision"* can only extend to the decision that has actually been made by the DC. The LAP cannot make any declarations for the same reason.

f. The only scope for an LAP to make a decision on sanction is if it is satisfied that a sanction imposed by a DC is too severe or too lenient: Regulation 95.5.3.

g. In any event, if the LAP imposed a sanction, it would mean that neither party had a right of appeal against an excessive or lenient sanction which is not what is provided by the rules.

h. In any event, any question of sanction for the fifth particular of the second charge can only be considered by the existing DC. The DC has reserved this to itself.

i. Any question of whether any other particular of the charge should be upheld or any sanction imposed in relation thereto can only be considered on a rehearing before a DC (which must, pursuant to Regulation 94.7.3, be differently constituted, unless the parties agree otherwise).

j. The costs on the second charge will be a matter for the (separate) DC reaching a decision on sanction and not for the LAP.

k. An order for consequential disclosure to enable the restatement of the accounts is outside the jurisdiction of the LAP.

l. Once the LAP has fulfilled its function, it will be *functus* and can make no further order.

91. EFL submitted as follows:

a. It is quite wrong to suggest the powers of the LAP are fettered in the way suggested by the Club; the powers of the LAP following a Disciplinary Appeal explicitly include the power to *"set aside the decision in whole or in part and substitute a new decision"* by Regulation 94.7.2. The LAP therefore has all the powers of the first instance body. The LAP also has additional powers, including (i) to *"make a declaration as to any matter to be determined in the proceedings"*, (ii) to *"order a party to do or refrain from doing anything"*, as well as (iii) to *"determine any question as to its own jurisdiction"* (Regulation 100.1).

b. It would be unfair, unjust and disproportionate for the EFL and the Club to be

required, as the Club (now) suggests, to start again with the bulk of the second Charge being remitted for a rehearing before a differently constituted DC; it would cause delay and serve no useful purpose and would be unfair to the EFL. Such a process appears to be designed to lead to as much delay as possible and deprive the EFL of its success in respect of the second particular of the second charge and deprive the LAP of its proper function as an appellate body.

c. The LAP had well in mind the fact that the DC included a qualified accountant. This fact does not justify giving Regulation 94.7.2 anything other than its plain and obvious meaning.

d. The Club submits that Regulation 94.7.2 *"can only extend to the decision that has actually been made by the DC"*. But the DC made a decision in the present case on a single charge i.e. the amortisation charge; the LAP has made a decision on the same single charge; and the LAP has extensive powers to make orders consequential upon the decision that it has reached.

e. The Club's interpretation of the Regulations would be contrary to the *"Overriding Objective"* embodied in the Procedural Rules at Appendix 2 to the Regulations.

f. The powers of the LAP under Regulations 94.7 and 100.1 give the LAP power to deal with all *"matters which are consequential to a successful appeal and which are necessary in order for the court to do justice in the appeal which is before it"*[9].

W. Disposition: discussion

92. It follows from the above that the reference to the LAP constitutes proceedings to which the 1996 Arbitration Act applies.

93. A decision was supplied to the parties by us previously on the substantive issues on this appeal which expressed our provisional views on disposition issues. However, we made clear there that we wished to hear submissions from the parties on disposition. In the

[9] See SP v BH 2020 1 WLR 2175 at [34]

event, a large number of issues have arisen as to our jurisdiction and we have reconsidered our provisional views in the light of the extensive submissions on disposition that we sought and received from the parties and have considered in detail.

94. Whilst it is important to consider the terms of the Regulations carefully as the source of our powers, we consider that the construction placed on them by the Club involves a multi-layered, complicated and commercially unrealistic process which we would be reluctant to adopt unless we were driven to such a conclusion by the words of the Regulations. That said, we do not consider that the Overriding Objective can give us a jurisdiction which we would not otherwise have.

95. The starting point is: what is the scope of this arbitration? The EFL brought two charges against the Club. This arbitration is concerned with the second only. By its Notice of Appeal the EFL appealed against the dismissal by the DC of the second, third and fourth particular of the second charge. So the subject-matter of this arbitration must be the appeal by the EFL against the dismissal of those parts of the second charge by DC.

96. It follows that if the Club had wished to argue that the dismissal of any of those particulars by the DC should have been upheld on additional grounds, those additional grounds would have been matters within the scope of this arbitration. As to the Club's submission that it was not open to them to raise points such as the admissibility of Professor Pope's second report before us (or that they were not obliged to do so), we disagree:

    a. If the Club had wanted to rely on these additional grounds in the appeal, they could and should have done so;

    b. This appeal was premised on the admissibility of Professor Pope's second report; it would make no sense for us to hear the appeal if there was any issue as to the admissibility of his second report and any issue on that would necessarily have fallen within the scope of this appeal.

97. The next question relates to our powers on this appeal. The Club suggest that they are limited to determining whether an error of law has occurred in relation to Professor Pope's evidence. Again, we disagree:

    a. We have explained that we consider this was an appeal against the dismissal of the

second, third and fourth particulars of the second charge. It follows from the conclusions above that we can and should allow the appeal against the dismissal of the second particular and find the second particular proved.

b. That is borne out by Regulation 94.7.2, which must be read together with Regulation 95.5 and Regulation 100.1.

c. We do not consider our jurisdiction is restricted by Regulation 95.5.2 as the Club suggest; that provision is concerned with form of review and standard of proof.

d. As for the Club's point that there is no accountant on our panel, the Regulations provide that there must be an accountant on the DC in proceedings of this nature, but the composition of the LAP is set out differently in the Regulations. Our powers as LAP are derived from examination of rules setting out our powers, which include the power set out at 94.7.2.

e. The Club places great weight on the fact that, if the LAP does not have the power to uphold the second charge, the Club would be deprived of its "right" (i) to have the allegations determined by a panel including an accountant and (ii) to an appeal on the issue of liability. But the Club has no "rights" other than those given by the Regulations; and we do not consider that these consequences are so surprising as to require us to give a strained interpretation to Regulation 94.7.2. The plain and obvious meaning of that provision is that we have the power not only to set aside the DC's decision, but also to substitute a new one. This has the two consequences to which the Club takes exception.

98. We note that (perhaps surprisingly) there is no power to remit to the DC, only to a differently constituted DC.

99. It seems to us that, given the analysis above as to our powers, our jurisdiction does not extend to dealing with the fifth particular, because that was not in issue in this appeal and was not a matter referred to us in this arbitration, and in the absence of consent we cannot order any sanction in respect thereof. That is a matter for the DC.

100. Similarly, we do not consider that consequential disclosure is a matter within our powers. As the arbitration before us was an appeal in relation to the dismissal of the second, third

and fourth particulars of the second charge, our powers relate only to those matters, and the substitution of our decision in relation to those matters for that of the DC.

101. We do not see any need to grant declarations in relation thereto.

102. We have considered whether our jurisdiction extends to ordering a sanction. The EFL submit it does, the Club submits this is outside our powers. We recognise that, if the EFL are right, neither party has any right of appeal against an overly lenient or stringent sanction. But that is the effect of the Regulations. In our view the wide wording of Regulation 94.7.2 plainly gives us power to impose a sanction by way of substitution for the decision of the DC which will enable us to "substitute a new decision" on the second particular for that of the DC. Indeed, given our finding on the second particular, we consider we are obliged to do so. The fact that the DC imposed no sanction was simply a consequence of their finding that the second particular was not proved. It is a consequence of our decision that, in the absence of agreement between the parties to a different course, we must impose a sanction.

103. We should, however, say that it would be more sensible for the DC to determine a sanction on both the second and the fifth particulars, albeit that would require consent. It is very unsatisfactory that different tribunals determine different parts of the overall sanction, albeit in the present circumstances we regard that as the effect of the rules. We invite the EFL to consider agreeing that the DC should determine the sanction on both particulars. We hope that such agreement will be forthcoming.

104. For the avoidance of doubt, we do not and cannot ourselves remit matters to the DC; their jurisdiction continues subject to the matters determined by the LAP.

105. Thus we have concluded that our jurisdiction extends as follows:

    a. We allow the appeal in relation to the second particular and dismiss it in relation to the third and fourth particulars.

    b. We will proceed to determine a sanction on the second particular in order to substitute our decision for that of the DC unless the parties agree that that sanction should be determined by the DC.

c. We will determine the costs of the appeal and the costs of those parts of the hearing before the DC which were referable to the second particular of the second charge, again in order to substitute our decision for that of the DC.

d. We have no jurisdiction over the sanction on the fifth particular which is a matter for the DC.

e. We do not have jurisdiction to order consequential disclosure for the purpose of the restatement of the accounts, which is again a matter for the DC.

f. All other matters are for the DC, not us.

X. Disposition: conclusion

106. In the event we allow the appeal on the sole ground that it was impermissible in amortising under the cost model for the Club to take into account possible resale values of players and in consequence we find the second charge proved in relation to the second but not the third or fourth particular in relation to each of the 2015/16, 2016/17 and 2017/18 accounts.

107. We therefore substitute our own decision to allow the appeal on the second particular, finding that part of the second charge proved.

108. The order we make is therefore:

a. The appeal of the EFL is allowed and we substitute our decision on the second particular for that of the DC, namely that the charge is proved on the second particular of the second charge on the sole ground that it was impermissible in amortising under the cost model in relation to the accounts for 2015/16, 2016/17 and 2017/18 for the Club to take into account possible resale values of players.

b. The appeal against the dismissal of the charge on the third and fourth particulars is dismissed.

c. We will hear further submissions on sanction on the second particular and costs

as set out above.

Charles Hollander QC

For and on behalf of the League Arbitration Panel

London, England

7 May 2021