SR/017/2020

**IN THE MATTER OF AN EFL DISCIPLINARY COMMISSION**

**BEFORE:**

*Graeme McPherson QC*
*Robert Englehart QC*
*James Stanbury*

**BETWEEN:**

**The English Football League Limited**

**Claimant**

**and**

**Derby County Football Club Limited**

**Respondent**

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# DECISION

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| **Dates:** | 14-17 & 21 July 2020 |
| **Venue:** | Remotely, by Zoom |
| **Appearances:** | For the EFL<br>Mark Phillips QC, James Segan QC and Andrew Shaw<br>Instructed by Solesbury Gay<br>For the Club<br>Nick De Marco QC and Tom Richards<br>Instructed by Geldards |

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## (A) Introduction

1) The Football League Limited ('***the EFL***') brings 2 charges against Derby County Football Club Limited ('***the Club***'). Each Charge is brought under the Championship Profitability and Sustainability Rules ('***the P&S Rules***').

*i) Summary of the First Charge*

2) The First Charge arises from the sale by the Club of Pride Park Stadium ('***Pride Park***') on 28 June 2018 at a price of £81.1million to Gellaw Newco 202 Limited ('***Gellaw***'), a company ultimately owned and controlled by the Club's owner and Chairman, Mel Morris. The sale at that price generated a substantial profit for the Club.

3) The sale of Pride Park
   a) Was reflected (albeit at a figure of only £74.4million, for reasons which we set out below) in the estimated profit and loss account and balance sheet submitted by the Club to the EFL in 2018 for the purpose of complying with the P&S Rules, and
   b) Was reflected at that sale price in the Club's Annual Accounts for the year ended 30 June 2018 that were submitted by the Club to the EFL in early 2019 (by then at £81.1m) for the purpose of complying with the P&S Rules.

4) The profit generated from the sale of Pride Park at that price meant that the Club's aggregate Adjusted Earnings Before Tax (losses) for the 3 year periods
   a) 2015/16, 2016/17 and 2017/18, and
   b) 2016/17, 2017/18 and 2018/19

   *prima facie* fell below the Upper Loss Threshold permitted under the P&S Rules.

5) On 6 January 2020 the EFL Executive determined
   a) That the Fair Market Value (as defined in the P&S Rules) of Pride Park had been only £50million as at the date of its sale,
   b) That the sale price of Pride Park had taken place at a figure significantly in excess of its Fair Market Value, and so
   c) That the consideration included in the Club's Earnings Before Tax arising from the sale of Pride Park should be restated from £81.1m to £50m.

6) The consequence of that determination, the EFL contends, was to place the Club in breach of the Upper Loss Threshold in the P&S Rules

a) By a figure in excess of £13million for the 3 year reporting period ending with the 2017/2018 year, and
b) By a figure in excess of £26m for the 3 year reporting period ending with the 2018/19 year.

It is that state of affairs that underlies the First Charge.

7) The Club denies the First Charge. It does so on various bases:
   a) It denies that the sale of Pride Park was other than at Fair Market Value or that the consideration included in the Club's Earnings Before Tax arising from the sale of Pride Park should be restated from £81.1m to £50m (or any other figure);
   b) It raises numerous objections to the EFL's entitlement to bring the First Charge against it. We refer to those defences below as '***the Procedural Defences to the First Charge***'.

*ii) Summary of the Second Charge*

8) The Financial Reporting Council ('***FRC'***) sets UK accounting standards. To that end it publishes Financial Reporting Standards. One such Financial Reporting Standard is Financial Reporting Standard 102 ('***FRS 102***'). FRS 102 applies to all financial statements that are intended to give a true and fair view of a reporting entity's financial position and profit and loss (or income and expenditure) for a period.

9) Section 18 of FRS 102 applies to accounting for intangible assets other than goodwill. Player registrations fall within the scope of 'intangible assets'.

10) Sections 18.8 & 18.9-18.24 of FRS 102 set out
   a) How an entity is to measure intangible assets after 'initial recognition', and
   b) How an entity may permissibly approach the amortisation of intangible assets.

11) The Second 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. In essence the EFL contends:
   a) That the approach to amortisation of capitalised costs of player registrations adopted by the Club in those financial statements did not comply with FRS 102;
   b) That as a result, the 'Annual Accounts' submitted by the Club for those years were not (as is required by 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.

12) The Club denies the Second Charge. It does so on various bases:

a) It denies that the policy adopted towards amortisation of player registrations does not comply with FRS 102;

b) It raises numerous objections to the EFL's entitlement to bring the Second Charge. We refer to those defences below as '***the Procedural Defences to the Second Charge***'.

*iii) The hearing*

13) We heard evidence and submissions on the First and Second Charges over a 5 day period between 14 July and 21 July 2020. We were also provided with:

a) A bundle of documents running to more than 7,000 pages, although only a fraction of the documents in the bundle were in fact referred to during the hearing,

b) Approximately 200 pages of written opening and submissions, and

c) In the region of 30 authorities.

We also had the benefit of receiving a transcript of the evidence that was given and the submissions that were made.

14) At the conclusion of the hearing we informed the parties that we intended to reserve our Decision and to provide our Decision with Written Reasons[1] in due course. This is now our Decision and Written Reasons. Before setting them out, we confirm that prior to reaching our Decision and in the course of preparing these Written Reasons we considered with great care the entirety of the materials, the written and oral evidence and the submissions that each party put before us. If we do not explicitly refer to a particular document, piece of evidence or submission below, it should not be inferred that we have overlooked or ignored it; as we say, we have considered the entirety of the materials put before us.

*iv) Introductory observations about the documents before us*

15) As we have said, we were provided with a considerable amount of documentation, the vast majority of which was never referenced by anyone before or during the hearing. Despite that however, each party contended that the disclosure given by the other was deficient in various respects and invited us to draw inferences adverse to the 'disclosing party' from such alleged deficiencies.

[1] While each party provided observations on sanction in its Opening Written Submissions, it became common ground during the hearing that we should initially determine only (1) the substance of each Charge, and (2) the Procedural Defences to each Charge raised by the Club - sanction would be left to be dealt with thereafter if necessary. This Decision and Written Reasons therefore address only (1) the substantive questions of whether Charges 1 and 2 have been proved, and (2) the Procedural Defences to each Charge raised by the Club.

16) While it is correct that the absence of certain documents or categories of documents was surprising, we reject any suggestion that we should draw inferences against either party from the fact that documents were ‘missing’:

a) During the course of the proceedings the EFL made a Disclosure Application against the Club. An Order was made for the Club to provide certain documentation and to provide witness statements confirming the searches that had been made for relevant documentation and that all documentation relevant to certain issues located by such searches had been provided. The Club provided such documents and witness statements and we are satisfied that, where relevant documents exist, the Club disclosed them;

b) In correspondence during the course of the proceedings, and during the course of the hearing, the Club made complaint about the adequacy of the EFL’s disclosure. However, despite the remedy for any perceived inadequacies in the EFL’s disclosure being in its own hands, the Club chose not to make any form of Disclosure Application of its own against the EFL (despite threatening to do so) at any stage during the proceedings. Consequently we say no more about the EFL’s disclosure.

17) In any event, taken in the round we were satisfied that the contemporaneous documents available to us enabled us:

a) To form a clear and accurate picture of the relevant events that underlie each Charge, and
b) To determine the Charges.

18) The Club also suggested on various occasions that the EFL was claiming privilege in certain documents where privilege did not exist. One additional document emerged as a result of the Club’s contentions in such regard.

*v) Introductory remarks about the factual witnesses*

19) We heard factual evidence on behalf of the EFL from:

a) Shaun Harvey. Mr Harvey had been the Chief Executive of the EFL at times relevant to the First and Second Charges, although he ceased to hold that position (for practical purposes) on 31 May 2019, and so had no involvement in relevant events which occurred in late 2019 and in early 2020. His evidence predominantly related to the sale of Pride Park and the discussions between the EFL in 2018 and early 2019 relating to that sale;

b) James Karran. At the material times Mr Karran was the EFL's Financial Controller. He is now the EFL's Finance Director. In his evidence he dealt with the subject matter of both the First Charge and the Second Charge;

c) Nick Craig. Mr Craig is currently Governance and Legal Director at the EFL. His evidence related principally to the EFL's review in 2019 of the Club's P&S submissions;

d) Paul Rawnsley. Mr Rawnsley is a Director in the Sports Business Group at Deloitte LLP. He had no involvement in any of the events underlying the First Charge or the Second Charge. His evidence was in essence an analysis of the practical consequences of the Club having adopted an approach to amortisation from 2015 that (on the EFL's case) did not comply with FRS 102.

20) We heard factual evidence on behalf of the Club by:

a) Mel Morris. Mr Morris has throughout the relevant period been the owner and Chairman of the Club. He gave evidence about his purchase of Pride Park from the Club and the background to that sale. His witness statement also contained a considerable amount of evidence about the Club's wider relationship with the EFL – a relationship which he characterises as
   i) Involving '*dislike'* of him and the Club by the EFL
   ii) Him being an '*enemy of the EFL state*', and
   iii) The EFL having an '*axe to grind against [him] personally*'

b) Stephen Pearce. Mr Pearce has throughout the relevant time between the Chief Executive Officer of the Club. His evidence covered the sale of the stadium and the adoption, implementation and operation of the Club's approach to amortisation of the capitalised costs of player registrations

c) Andrew Delve. Mr Delve was (until 2016) Managing Partner and (until 2018) Group Chairman of Smith Cooper, a firm of accountants and auditors. His evidence related to the adoption, implementation and operation of the Club's approach to amortisation of the capitalised costs of player registrations.

21) Given
a) The numerous suggestions made in Mr Morris' witness statements about the EFL (and in particular Mr Harvey and Mr Craig) having some sort of 'agenda' against the Club and/or him,
b) The manner in which certain witnesses were cross-examined, and

c) The suggestions made in the Club's closing submission about aspects of the FA's factual evidence

we make it clear at the outset that we considered that each of the factual witnesses called by the EFL from whom we heard gave their evidence honestly and were doing their best to help us on the relevant issues. Regardless of how Mr Morris might perceive the way that he and the Club are viewed by the EFL, we reject any suggestion that the EFL's factual evidence was in any way tainted by animosity or dislike (and, for the avoidance of doubt, reject any suggestion that such animosity or dislike was established on the evidence before us), or that the EFL's factual evidence was in any way unreliable as a result.

22) Although we return below to address the Club's suggestion that the EFL has been motivated to bring these Charges against the Club by some improper stimulus, we also make it clear at the outset that we reject that suggestion. The evidence that we heard and the documentary evidence before us simply did not bear out such an assertion.

23) We found the Club's factual witnesses to be similarly honest and straightforward in the manner in which they gave their evidence. As with the EFL's factual witnesses, we were helped by their evidence.

24) Before leaving this section of the Decision we record that each party made observations about 'failures' on the part of the other to call evidence from individuals who, it was said, had potentially relevant evidence to give. We paid no heed to any such criticisms. The evidence presented before us was comprehensive, and we do not see that the 'missing' witnesses would have added much, if anything, to our understanding of matters.[2] We reached our conclusions on the basis of the evidence that we did hear, not on the basis of what others might have said had they given evidence and been cross-examined.

*vi) Introductory remarks about the expert evidence*

25) Three experts gave evidence before us:

a) The EFL called expert evidence from

[2] By way of example, the Club complained that the EFL did not call evidence from Tad Detko, the EFL's Finance Director at the material times. It contended that '*it is difficult to resist the conclusion that the EFL has not called Mr Detko because Mr Detko thinks, as he informed Mr Pearce, that the charges are "a load of rubbish"*'. However, Mr Detko's views on the merits or otherwise of the Charges – whatever they might be - are neither here nor there; it is for us to determine the merits or otherwise of the Charges on the basis of the factual and expert evidence before us.

i) Roger Messenger. Mr Messenger is the senior partner of Wilks Head and Eve, Chartered Surveyors (‘***WHE***’). Mr Messenger gave evidence about the fair market value of Pride Park as at June 2018
ii) Professor Peter Pope. Professor Pope is Professor of Accounting at Bocconi University, Milan and Emeritus Professor of Accounting at the London School of Economics and Political Science. Professor Pope gave evidence about FRS 102 and the Club’s approach to amortisation

b) The Club called expert evidence from Christopher Honeywill. Mr Honeywill is a Director of Lambert Smith Hampton, Consultant Surveyors (‘***LSH***’). Mr Honeywill gave evidence about the fair market value of Pride Park as at June 2018.

26) While each expert was cross-examined at length on the substantive issues that they had been instructed to consider, the EFL’s experts were also cross-examined by the Club more widely about matters such as their experience and independence as experts. Having heard that evidence we concluded that there was no basis for us
a) To doubt the independence of any expert, or
b) To conclude that any expert lacked the experience or expertise to give evidence on the issues on which he had been instructed.

27) We do however make 2 broad observation at this stage about the quality of the expert evidence:

a) First, each of Mr Messenger and Mr Honeywill (to whom we refer collectively as ‘***the Expert Valuers***’) made extensive reference in their evidence to information and sources of information (predominantly on build costs and ‘qualities’ of the stadia)
i) Which was not contained in, annexed to or referenced in their reports
ii) Which they appeared not to have discussed with or provided to their opposite number
iii) Which was not provided to us (or to the parties).
It would have been more helpful had each expert adopted a more ‘cards on the table’ approach to presenting the factual evidence which underpinned their respective opinions. That way, each would have been better able to consider and address the material on which the other relied to support his opinion

b) Secondly, while we have no doubt that Professor Pope was at all times giving his genuinely-held opinion on the issues that he was asked to address, it became clear in his cross-examination that he was unfamiliar with the role and duties of an individual in his position tasked with giving

expert to a Disciplinary Commission or other tribunal. By way of example, he was unaware that (1) where a range of views existed on an issue on which he was opining, and (2) there were views in that range that differed from his own, his duties required him to recognise that. While we ultimately concluded that that did not materially impact the substance of his evidence in any adverse way, experts instructed to prepare a report for the purpose of disciplinary charges or to give evidence before a Disciplinary Commission must take care to familiarise themselves with their duties, and to ensure that they take the steps necessary to comply with those duties.

28) Before we leave this section, we record that the Club did not serve a report from or call evidence from an expert accountant, despite having been granted permission to do so on 13 February 2020. It took the decision not to call any such expert evidence having seen the factual evidence served by the EFL, and it stood by that decision even after the EFL served Professor Pope's report. However

a) Shortly before the hearing was due to begin the EFL applied for permission to serve a supplemental expert report from Professor Pope. That supplemental expert report
   i) Sought to address certain matters contained in the Club's factual witness statements. Those witness statements had only been served by the Club shortly before Professor Pope's report had been due to be served and, Professor Pope explained, he had not had time to reflect those matters in his report, and in particular
   ii) Sought to address 2 specific matters relevant to the wider question of whether the Club's approach to amortisation of capitalised costs of player registrations (as explained in the Club's factual witness statements) did or did not comply with FRS 102, namely
      (1) Whether the Club's approach allocated the depreciable amount on a systematic basis over the intangible asset's useful life, and
      (2) Whether the Club's approach reflected the expected consumption of the economic benefits of the assets

b) The Club opposed that application on various grounds

c) At a hearing on 8 July 2020 the EFL was granted permission to rely on the supplemental report of Professor Pope. The Club was given permission
   i) To adduce expert evidence in response to that supplemental report, and/or
   ii) To seek an adjournment of the hearing of the Second Charge

   if so advised

d) The Club chose to take neither course for reasons set out in a '*Club's Update on the Second Charge*' provided shortly before the start of the hearing. It did however expressly maintain a position that it had been prejudiced by the EFL being granted permission to adduce Professor Pope's supplemental report so soon before the start of the hearing

e) Having heard Professor Pope's evidence and his cross-examination by Mr Richards (including on the 2 specific matters addressed in his supplemental report), we concluded that, despite the reservation of its position in its '*Update on the Second Charge'*, the Club had plainly not suffered any relevant prejudice by the service shortly before the hearing of Professor Pope's supplemental report:

   i) As regards the first issue addressed in Professor Pope's supplemental report - whether the Club's approach allocated the depreciable amount on a systematic basis over the intangible asset's useful life – it became all too apparent (and we find) that whether or not the Club's approach was '*systematic*' was not a matter for expert evidence. There was no suggestion that that term was a 'term of art' for accounting purposes, or had any particular recognised meaning for the purposes of FRS 102, or should be understood as having a meaning other than its normal English usage. There was thus no requirement for expert evidence on how we should interpret that word in FRS 102

   ii) As regards the second issue addressed in Professor Pope's supplemental report - whether the Club's approach to the amortisation of capitalised costs of player registrations reflected the expected consumption of the economic benefits of the assets – that matter

      (1) Was already in issue (by virtue of paragraph 2.5.2 of the Charge Letter) at the time that the Club made its decision not to call any expert accountancy evidence,

      (2) Was already addressed (at some length) in Professor Pope's original report, as he himself recognised in his supplemental report, and

      (3) Was a matter which would have been addressed in oral evidence before us in any event.

      It was thus not a 'new' matter raised for the first time in Professor Pope's supplemental report, and there was no basis for the Club contending that the inclusion in Professor Pope's supplemental report of further expert evidence on that narrow issue had caused it prejudice.

**(B) The P&S Rules**

29) A proper understanding of the Charges is impossible without an understanding of the P&S Rules. It is therefore with the P&S Rules that we begin.

30) For many years European football has used Financial Fair Play ('***FFP'***) rules in an attempt to improve the financial stability of clubs. The objectives of those rules include the introduction of more discipline and rationality in club football finances, the encouragement of clubs to operate on the basis of their own revenues, and the protection of the long-term viability and sustainability of club football. As it was put in a Joint Statement of UEFA and the European Commission in March 2012:

> '*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 football finances and in so doing help protect the wider interests of football'*.

31) The principle of FFP was first implemented by the EFL in 2011 by the adoption of a new Regulation 18 of the EFL Regulations. Regulation 18
   a) Enabled FFP Regulations to be set for each division of the EFL by those divisions themselves for the purpose of promoting financial fair play within the League, and
   b) Identified the objectives underlying the introduction of such FFP Regulations.

32) In 2012 the Championship adopted its own set of FFP Rules for the first time ('***the original FFP Rules***'). The original FFP Rules were applied in the 2012/13, 2013/14, 2014/15 and 2015/16 seasons. Stripped to their basics, the FFP Rules
   a) Imposed a financial limit on the losses that a club could permissibly make, and
   b) Provided for sanctions to be imposed on clubs that overspent.

33) In November 2014 the Championship clubs voted in favour of adopting the P&S Rules in place of the original FFP Rules for the 2016/17 season onwards. Unlike the original FFP Rules – which provided for the relevant assessment of a club's profits and losses to be done on a single season basis – the P&S Rules provide for an assessment of a club's profits and losses, and so for assessment of compliance with the P&S Rules, to be done over a rolling period of 3 seasons. We summarise the mechanism by which the P&S Rules operate as follows:

a) Clubs (or Groups of which Clubs form part) are required to prepare Annual Accounts. Those Annual Accounts must be prepared and audited in accordance with all legal and regulatory requirements applicable to accounts prepared pursuant to section 394 of the Companies Act 2006

b) The P&S Rules require those Annual Accounts to be prepared for a 12 month period to an accounting reference date falling between 31 May and 31 July inclusive

c) P&S Rule 2.2 requires that by 1 March of a season each club must submit to the Executive[3]
   i) Its *estimated* profit and loss account and balance sheet for that financial year (i.e. the financial year that will end between 31 May and 31 July inclusive) – which year is defined as '***T***': P&S Rule 2.2.2 (emphasis added). Those estimates
      (1) Must be prepared in all material respects in a format similar to the club's Annual Accounts, and
      (2) Must be based on the latest information available to the club and be, to the best of the club's knowledge and belief, an accurate estimate as at the time of preparation of future financial performance[4]
   ii) Its Annual Accounts for
      (1) Year T-1 (defined as the club's Accounting Reference Period immediately preceding T), and
      (2) Year T-2 (defined as the club's Accounting Reference Period immediately preceding T-1)

d) In addition,
   i) P&S Rule 2.5 provides that if the aggregation of the Cub's Adjusted Earnings Before Tax[5] for T-1 and T-2 results in a loss (after adjustment of any consideration from Related Party Transactions – see below), the club must also submit to the Secretary a calculation of its Adjusted Earnings Before Tax for each of T, T-1 and T-2, and

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[3] Defined as '*all or any of the Chief Executive of the League and the officers of the League. The Board decides which of the League's employees are deemed to be officers for this purpose*'

[4] The Guidance to P&S Rule 2.2 explains that '*the Executive will in due course consider the Annual Accounts for the Accounting Reference Period in respect of which information pursuant to P&S Rule 2.2.2 is submitted …*' In practice, that consideration takes place after the relevant financial year end, once the club's Annual Accounts have been finalised and signed off by the Club's board of directors.

[5] Defined as '*Earnings Before Tax [profit or loss before tax, as shown in the Annual Accounts], adjusted to exclude costs (or estimated costs as the case may be) in respect of [certain identified matters and expenditure]*'

ii) P&S Rule 2.2.3 provides that, if P&S Rule 2.5 applies to the club, the club must also provide a calculation of its aggregated Adjusted Earnings Before Tax for T, T-1 and T-2 in the form set out in P&S Rules Appendix 1. In this Decision we refer to that as '***the P&S Appendix 1 Form***'.

34) P&S Rule 2 makes particular provision for '*Related Party Transactions*'[6] that impact on a club's financial performance. P&S Rule 2.3 requires the Executive to

'*… determine whether consideration included in the Club's Earnings Before Tax arising from a Related Party Transaction [as defined] is recorded in the Club's Annual Accounts at a Fair Market Value.*'[7]

P&S Rule 2.3 then goes on

'*If it is not, the Executive shall restate it to Fair Market Value*'

although P&S Rule 2.4 provides that

*'The Executive shall not exercise its power set out in Rule 2.3 without having first given the Club reasonable opportunity to make submissions as to*

*2.4.1 whether the said consideration should be restated; and/or*

*2.4.2 what constitutes Fair Market Value'.*

35) P&S Rules 2.6 & 2.7, 2.8 and 2.9 set out the consequences that follow if the aggregation of the Cub's Adjusted Earnings Before Tax for T, T-1 and T-2 results in a loss:

a) P&S Rules 2.6 & 2.7: If the aggregation of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2 results in a loss of up to the Lower Loss Threshold ('***LLT***') (calculated in accordance with P&S Rule 3[8]), then

i) The Executive shall determine whether the Club will, until the end of T+1, be able to fulfil its obligations in EFL Regulations 16 and 19(a), (b) & (c), and

ii) If the Executive determines, in its reasonable opinion and having considered any information provided to it by the club, that the Club may not be able to fulfil its obligations in EFL Regulations 16 and 19(a), (b) & (c), the Executive has the powers set out in EFL Regulation 16.20 *inter alia*

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[6] Defined as '*transactions (a) disclosed in a Club's Annual Accounts as a related party transaction, or (b) which would have been disclosed as such except for an exemption under the accounting standards …'*

[7] Defined as '*… the amount for which an asset could be sold, licensed or exchanged, or a liability settled, or a service provided, between knowledgeable, willing parties in an arm's length transaction*'

[8] For present purposes, since the Club has throughout the relevant time been a Championship Club, the Annual Lower Loss Threshold has been £5million

(1) to require the club to submit, agree and adhere to a budget which shall include (but not be limited to) Transfer Fees, Compensation Fees, Loan Fees

(2) to refuse any application by the club to register any Player or new contract of an existing Player of the club

b) P&S Rule 2.8: If the aggregation of the Cub's Adjusted Earnings Before Tax for T, T-1 and T-2 results in a loss which exceeds the LLT, then *inter alia*

i) The Club becomes obliged by 31 March in the relevant season to provide Future Financial Information to cover the period commencing from its last accounting reference date until the end of T+2 and a calculation of estimated aggregated Adjusted Earnings Before Tax until the end of T+2 based on that Future Financial Information

ii) The Club becomes obliged to provide such evidence of Secure Funding as the Executive considers sufficient (and absent such evidence, the Executive has the powers set out in EFL Regulation 16.20)

c) P&S Rule 2.9: If the aggregation of the Cub's Adjusted Earnings Before Tax for T, T-1 and T-2 results in a loss which exceeds the Upper Loss Threshold ('***ULT***') (calculated in accordance with P&S Rule 3) then

i) the Executive is permitted to exercise its powers set out in EFL Regulation 16.20, and

ii) the Club '*shall be treated as being in breach of these Rules and accordingly the League shall refer the breach to the Disciplinary Commission in accordance with section 8 of the [EFL] Regulations*'.

36) For present purposes, since the Club was throughout the relevant period a Championship Club

a) the Annual ULT was £13million, and so

b) the aggregate 3 season ULT was £39million:

see P&S Rule 3.1.

**(C) FRS 102**

37) It is similarly helpful to consider the principles that underlie FRS 102 in order to put in context the facts that underlie the Second Charge.

38) As we have said above, the FRC sets UK accounting standards and for that purpose publishes Financial Reporting Standards, including FRS 102.

39) FRS 102 is divided up into various sections. Those sections most relevant for present purposes are
   a) Section 2 '*Concepts and Pervasive Principles*'
   b) Section 10 '*Accounting Policies, Estimates and Errors*'
   c) Section 18 '*Intangible Assets other than Goodwill*'
   d) Appendix 1 '*Glossary*'.

40) Section 2 sets out (amongst other things) the objectives of financial statements within the scope of FRS 102 and the qualities that make the information in the financial statements of entities within the scope of FRS 102 useful:

   a) Section 2.2 (under the heading '*Objectives of financial statements*') explains that the objective of financial statements is to provide information about financial position, performance and cash flows of any entity that is useful for economic decision making by a broad range of users who are not in a position to demand reports tailored to meet their particular information needs

   b) Section 2.7 (under the heading '*Qualitative characteristics of information in financial statements – Reliability*') explains that information provided in financial statements must be reliable

   c) Section 2.8 (under the heading '*Qualitative characteristics of information in financial statements – Substance over form*') explains that, in order to enhance the reliability of financial statements, transactions and other events and conditions should be accounted for and presented in accordance with their substance and not merely their legal form.

41) Section 18.1 applies to accounting for all intangible assets other than goodwill:

a) ‘*Asset*’ is defined in the Glossary as ‘*A resource controlled by the entity as a result of past events and from which future economic benefits are expected to flow to the entity*’[9]

b) ‘*Intangible asset*’ is defined in the Glossary and in section 18.2 as ‘*An identifiable non-monetary asset without physical substance. Such an asset is identifiable when (a) it is separable i.e. capable of being separated or divided from the entity and sold, transferred, licensed or rented or exchanged, either individually or together with a related contract, asset or liability, or (b) it arises from contractual or other legal rights, regardless of whether those rights are transferable or separable from the entity or from other rights and obligations*’.

42) Section 18.4 sets out the ‘*General principle for recognising intangible assets*’[10]. That section provides

‘*An entity shall apply the recognition criteria in paragraph 2.27 in determining whether to recognise an intangible asset*’

a) Section 2.27 provides

‘Recognition is the process of incorporating in the statement of financial position or statement of comprehensive income an item that meets the definition of an asset, liability, equity, income or expense and satisfies the following criteria:

(a) it is probable that any future economic benefit associated with the item will flow to or from the entity

(b) the item has a cost or value that can be measured reliably’[11]

Section 18.4 continues

‘… the entity shall recognise an intangible asset as an asset if, and only if

(a) it is probable that any future economic benefit associated with the item will flow to or from the entity

(b) the item has a cost or value that can be measured reliably’

b) As regards the first of those recognition criteria (i.e. section 2.27(a)/section 18.4(a))

i) ‘*Probable’* is defined in the Glossary as ‘*more likely than not*’

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[9] Cf a ‘*Contingent Asset*’ which is defined 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*’.

[10] There are separate sections – *section 18.8A et seq* – relating to the Recognition of internally generated assets. While those sections have the potential to be relevant to clubs, they are not of relevance in these proceedings and we say no more about them

[11] See also section 2.37 which requires an entity to recognise an asset in the statement of financial position when ‘*it is probable that the future economic benefits will flow to the entity and the asset has a cost or value that can be measured reliably*’

ii) Section 2.17 provides that

'The future economic benefit of an asset its potential to contribute, directly or indirectly, to the flow of cash and cash equivalents (as defined) to the entity. Those cash flows may come from using the asset or from disposing of it'

iii) Section 18.5 obliges an entity to

'assess the probability of expected future economic benefits using reasonable and supportable assumptions that represent management's best estimate of the economic conditions that will exist over the useful life of the asset'

iv) Section 18.6 specifies that an entity

'uses judgment to assess the degree of certainty attached to the flow of future economic benefits that are attributable to the use of the asset on the basis of the evidence available at the time of initial recognition, giving greater weight to eternal evidence'

v) Section 18.7 provides that

'the probability recognition criterion in paragraph 18.4(a) is always considered satisfied for intangible assets that are separately acquired'

vi) Section 2.29 (under the sub-heading '*The probability of future economic benefit'*) provides

'The concept of probability is used in the first recognition criterion to refer to the degree of uncertainty that the future economic benefits associated with the item will flow to or from the entity. 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 prepared. Those assessments are made individually for individually significant items and for a group for a large population of individually insignificant items'

c) As regards the second of those recognition criteria (i.e. section 2.27(b)/section 18.4(b)), section 2.30 provides:

'The second criterion for the recognition of an item is that it possess a cost or value that can be measured with reliability. 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. When a reasonable estimate cannot be made, the item is not recognised in the financial statements'

43) Sections 18.9 *et seq* deal with '*Initial measurement*' of Intangible Assets

a) Section 18.9 states '*an entity shall measure an intangible asset initially at cost*'

b) Section 18.10 sets out what the '*cost*' of a separately acquired intangible asset[12] comprises.

44) Section 18.18 et seq deals with '*Measurement after initial recognition*' (emphasis added):

a) Section 18.18 provides

'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 18.8B to 18.8H). 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'

b) Section 18.18A ('*Cost model*') provides

'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'

c) Sections 18.18B to 18.18F relate to intangible assets measured after initial recognition using the revaluation model. Since that model was not used in this case, we say nothing more about those sections

d) Sections 18.19 to 18.24 (all under the heading '*Amortisation over useful life*') are as follows:

i) Section 18.19: '*For the purpose of this FRS all intangible assets shall be considered to have a finite useful life. The useful life of an intangible asset that arises from contractual or other legal rights shall not exceed the period of the contractual or other legal rights, but may be shorter depending on the period over which the entity expects to use the asset. If the contractual or other legal rights are conveyed for a limited term that can be renewed, the useful life of the intangible asset shall include the renewal period(s) only if there is evidence to support renewal by the entity without significant cost*'

ii) Sections 18.21 & 18.22 (under the sub-heading '*Amortisation period and amortisation method*'):

[12] Section 18.10A deals with internally generated intangible assets, but once again we need not consider those sections for the purpose of these proceedings.

(1) '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 and loss unless another section of this FRS requires the cost to be recognised as part of the cost of an asset'

'Useful life' is defined in the Glossary as 'The period over which an asset is expected to be available for use by an entity …'

(2) 'Amortisation begins when the intangible asset is available for use i.e. when it is in the location and condition necessary for it to be useable in the manner intended by management. Amortisation ceases when the asset is derecognised.[13] The entity shall choose an amortisation 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'

iii) Section 18.23 (under the sub-heading '*Residual value*'):

'An entity shall assume the residual value of an intangible asset is zero unless

(a) there is a commitment by a third party to purchase the asset at the end of its useful life; or

(b) there is an active market for the asset and (i) residual value can be determined by reference to that market, and (ii) it is probable that such a market will exist at the end of the asset's useful life'

where '*residual value*' is defined in the Glossary as

'the estimated amount that an entity would currently obtain from disposal of an asset, after deducting the estimated costs of disposal, if the asset were already of the age and in the condition expected at the end of its useful life'.

[13] As regards Derecognition, section 18.26 (under the heading '*Retirements and disposals*') provides '*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*'.

## (D) Factual background and findings

*i) The Club's approach to the amortisation of player registrations prior to the year ended 30 June 2016*

45) Until 2015 the approach taken by the Club to amortisation of player registrations was – like the vast majority of other clubs – to amortise the amount paid for a player registration (including associated costs such as Football League levies and commissions) on a straight line basis over the period of that player's contract. Thus, prior to 2015, if the Club incurred costs of say £2million in acquiring the registration of a player signed on a 4 year contract, those capitalised costs would be amortised on a straight line basis at a rate of £500,000 per annum over that 4 year period.

46) 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.'

*ii) The Club's approach to the amortisation of player registrations in the year ended 30 June 2016 and thereafter*

47) In 2015 the Group of which the Club is a part was restructured. 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[14] 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

[14] As the Club's financial statements for the year ended 30 June 2016 record (at Note 24), that year was the first year in which the Club presented its results under FRS 102.

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.

49) Following those discussions the Club decided to adopt a different approach to amortisation of the capitalised cost of player registrations. That 'different approach' – which we consider in greater detail below – was implemented by the Club in each of the financial years to which the Second Charge relates, namely the financial years ended 30 June 2016, 30 June 2017 and 30 June 2018.

50) Perhaps surprisingly there is said to be no written record (contemporaneous or otherwise)

a) Of the discussions that took place in 2015 between the Club and Smith Cooper
b) Of the Club's internal deliberations in 2015 over whether to alter its approach to amortisation to capitalised costs of player registrations
c) Of the Club's decision to adopt an altered approach, or
d) Of the Club's implementation of that approach.

As a result, the majority of the evidence that we heard on such matters was entirely oral, given by Mr Pearce and Mr Delve. There were however documents (such as the Club's annual financial statements, player schedules and Draft Audit Findings Reports) before us which corroborated the existence of the 'changed approach' and, at least to some extent, the substance of that changed approach.

51) Before we turn to consider that evidence, we start with how the Club recorded its revised approach to the amortisation of intangible assets – and in particular, to the capitalised costs of player registrations - in the Notes to its financial statements

a) The Notes to the financial statements for the year to 30 June 2016 record

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'

b) The Notes to the financial statements for the year to 30 June 2017 record

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'

c) The Notes to the financial statements for the year to 30 June 2018 record

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.'

52) Until the Club served its factual evidence in these proceedings the EFL understood those Notes to the financial statements to describe an amortisation policy which

a) Allocated a '*residual value*' to a player registration that was, or at least could be, a value greater than zero at the end of the term of a player's contract, and
b) Amortised the capitalised cost of the player registration down to that residual value over the entire duration of the relevant player's contract.

Thus taking the example in paragraph 55 below, the EFL's understanding was that (1) if the Club incurred costs of say £2million in acquiring the registration of a player signed on a 4 year contract, and (2) if the Club allocated a residual value of £1m to that player at the end his contract, those capitalised costs would be amortised on a straight line at a rate of £250,000 per annum over that 4 year period

53) The EFL's view was that an amortisation policy that allocated a positive residual value (i.e. a value greater than zero) to a player's registration at the end of the player's contract simply could not comply with FRS 102 since, following *Bosman*

a) A player at the end of his contract would be a free agent, able to sign for a new club without that new club having to pay anything to the old club to secure that player's registration,
b) Neither of the exceptions to section 18.23 of FRS 102 could apply, and so

c) There could be no basis for disapplying the assumption set out in section 18.23 of FRS 102 that the residual value of the player's registration should be zero as at the end of his contract.

54) However, very late in these proceedings the Club explained that the EFL's interpretation of the Notes did not in fact reflect the realities of the approach to amortisation of the capitalised costs of player registrations that it had adopted and applied in the financial years ended 30 June 2016, 30 June 2017 and 30 June 2018; the actual amortisation policy applied by the Club in those financial years was different. The policy in fact applied ('***the Club's amortisation policy***') was, it was explained in the witness statements of Mr Pearce and Mr Delve served on behalf of the Club and confirmed in their oral evidence, 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 <u>not</u> 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 6 monthly 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.

55) Examples help an understanding of the Club's amortisation policy:

a) Example 1: 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

b) Example 2: 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

c) 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

56) Why, one might ask, does it matter how a club amortises the capital costs of a player's registration? The answer to that becomes apparent when one considers profit on disposal. Using Example 2 above, and assuming that the player was in fact sold at the end of Year 3 for £2.2m

   a) If a club applies straight line amortisation across the 4 year period of that player's contract, at the end Year 3 – when the player's registration is sold (and the player is transferred)

      i) the player's net book value at the point of sale would (on the above example) be £600k, and so

      ii) the profit on disposal would be £2.2m - £600k = £1.6m

   b) Applying the Club's amortisation policy

      i) the player's net book value at the point of sale would (on the above example) be £2m, and so

      ii) the profit on disposal would be £2.2m - £2m = £200k.

*iii) Did the policy described above in fact represent the amortisation policy in fact operated by the Club in and after the year ended 30 June 2016?*

57) As we have already said above, there are few documents (contemporaneous or otherwise) describing

   a) The discussions that took place in 2015 in relation to amortisation between the Club and Smith Cooper

   b) The Club's internal deliberations in 2015 over whether to alter its approach to amortisation of capitalised costs of player registrations

   c) The Club's decision to adopt an altered approach as its amortisation policy, or

   d) The Club's implementation of that altered policy.

58) Furthermore

a) The amortisation policy described by the Club is not easily discernible from the descriptions set out in the Notes to the Club's financial statements:

i)We can readily see why the EFL understood the Notes to the Club's financial statements in the way that it did. That interpretation of the Notes is an entirely reasonable one - indeed, we would go so far as to say that it reflects the most natural reading of these Notes

ii) Out of fairness to the Club we record that it did not seriously contend otherwise. In their witness statements prepared for these proceedings Mr Pearce and Mr Delve described the Notes in the Club's financial statements as

(1) Being '*… arguably ambiguous and could lead a reader to interpret the Club's policy in an incorrect way*' (Mr Delve), and

(2) Using '*possibly slightly misleading terminology …*' (Mr Pearce)

b) Documents relied on by the Club as evidencing the existence and application of the described amortisation policy were on occasion similarly unclear. For example, the Draft Audit Findings Reports

i) State '*Amounts paid to third parties for players' registrations, Football League levies, agents' commission and compensation for management and coaching staff are capitalised as 'intangible assets'. Amortisation is provided on a straight line basis taking into account residual values at the end of their useful lives*'. The use of '*residual values*' fails to distinguish between

(1) ERVs, and

(2) 'true' residual values at the end of a player's contract, which will always be zero

ii) Contained various queries about the operation of the policy to which answers were not readily identifiable.

Likewise, 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.

59) For completeness, we record that there was discussion about the Club's approach to amortisation between the Club and the EFL in April and May 2019:

a) In April 2019, as part of the process of reviewing the Club's 2019 P&S Submission, the EFL wrote to the Club with various queries. Question 17 was in the following terms:

‘*Can you please explain the variances in Player related amortisation charges from £6.5m in 2017/18 down to £4.6m in 2018/19 up to £25.1m in 2019/20? As part of this, please explain how the charge reduces from £3.3m in the 6 months to December 2018 down to £1.2m in the 6 months to June 2019?*

b) The Club responded on 17 April 2019. As regards Question 17, the Club
   i) provided an ‘*Amortisation reconciliation*’ showing amortisation by player for each of the years 2017/18, 2018/19 and 2019/20, and
   ii) explained the drop in the first half of the year to the second half of the year in 2018/19 as being due to a miscalculation in the first half of the year.

c) The EFL responded on 30 April 2019. Amongst the various queries that it still wished the Club to address, it stated

‘My understanding from other Club accounts and from the accounting policy note included in the [Parent Co] accounts is that Player amortisation is the spread of the cost of acquiring a Player’s registration over the respective contract length, with the provision that this can then be revised if a contract is renegotiated (extended). Please explain the amortisation charges for the following players as I can’t understand why there are significant changes in 2019/20 as against the charges in 2018/19’.

The letter identified 9 such players

d) The Club suggested that the outstanding issues might be best addressed at a meeting. The EFL agreed. That meeting took place on 13 May 2019. Although there are no contemporaneous notes of that meeting, a good flavour of what was discussed can be derived
   i) From the Club’s internal email dated 14 May 2019 summarising what had been discussed. Mr Pearce recorded:

   ‘This was more about [the EFL] wanting an understanding of the process, as they accept that there is nothing they can question on it as it is an acceptable accounting policy under accounting standards. We discussed this with them and they are now comfortable with the treatment’

   ii) From an email that Mr Karran sent to himself on 14 May 2019, again summarising what had been discussed. Mr Karran recorded:

   ‘Player Amortisation

   The Club; amortisation charge is expected to vary …

As part of the queries sent to the Club [the EFL] obviously queried these charges. The Club explained that it was due to the fact that the Club used residual values when assessing each Player's amortisation charge, which often resulted in very small charges initially and potentially a large charge when the player has one season to go on his contract, A breakdown by player was provided.

[The EFL] explained that [it] had not seen this approach before

The policy was in line with that disclosed in the Club's accounts

[The EFL] highlighted that the Club's accounting policy resulted in it being at risk of making significant losses on disposal or large impairment charges in future years or even as an impairment as part of the audit if a player was sold post year end. [The Club] accepted this position. [The EFL] made it clear that the Club would not be able to use one of these large impairment or losses on disposal as an unforeseen charge if it exceeded the P&S Requirement as a result of them based on a review of actual numbers given the Club was fully aware of the risk it was taking. [The Club] accepted this'.

This section of Mr Karran's email to himself concluded '*Note – [Mr Karran] re-iterated this position to [the Club] during a phone call on 14 May 2019*'.

e) From those documents it is clear that there was discussion about the Club' treatment of how it amortised players – which Mr Pearce described as '*putting a residual value on them*'.

60) In light of such matters, and in light of the matters raised by the EFL with the relevant witnesses in cross-examination, we considered carefully whether the policy described by the Club in its evidence and that we have summarised above was in fact a policy
   a) That the Club had devised and implemented in 2015, and
   b) That the Club had applied (or at least endeavoured to apply) since that date.

61) Having considered all of the evidence, we concluded that what we have summarised at paragraph 54 above did indeed represent the Club's amortisation policy for the financial years to which the Second Charge related:
   a) As well as finding that we could accept as accurate the evidence of Mr Pearce and Mr Delve
      i) We placed weight on the fact that the Club's financial statements referenced a change in the amortisation policy that Smith Cooper had considered and had concluded was being applied by the Club

ii) We placed weight on the fact that the Draft Audit Findings Reports also confirmed that Smith Cooper had '*no issues with the application of [the Club's amortisation policy]*'

iii) We placed weight on the records of the description of the Club's amortisation policy given to the EFL in April/May 2019. While that description might not have been fully understood by the EFL at that time, the contemporaneous emails are consistent with the Club having endeavoured to communicate to the EFL that it was applying an amortisation policy

(1) That applied an ERV to players

(2) That amortised capitalised costs of players registrations down to that ERV over a period reflecting all but 1 season of the player's contract

(3) That then amortised values down to zero over the course of the final year of the player's contract

b) As set out in its written Closing Submissions, the EFL did not strenuously contend otherwise.

*iv) Did the Club in fact apply that amortisation policy in practice?*

62) Once again, the evidence on this issue was principally to be found in the witness statements and oral evidence of Mr Pearce and Mr Delve; each confirmed that, once the revised amortisation policy had been devised and implemented, it was thereafter applied by the Club – in particular

a) The exercise described at paragraph 54 above was carried out for each player in the squad, save for what Mr Pearce described as '*internally generated assets*' – in essence, players that are the product of the Club's academy

b) The exercise was carried out regularly, at six-monthly intervals.

63) Some corroboration for that evidence can also be found in the Draft Audit Findings Reports. Those reports reference

a) The '*application*' of the policy having been considered by Smith Cooper (emphasis added),

b) The Club having assigned ERVs to particular players at particular points in time, and

c) Those ERVs having been considered and their values tested by Smith Cooper.

Similarly, some corroboration is also to be found in the example 'player schedule' that was in evidence.

64) We were therefore satisfied that the amortisation policy devised and implemented by the Club was in fact applied by the Club in the years under scrutiny.

65) It is against the background of those factual findings that we turn below to consider whether the Club's amortisation policy in the relevant financial years did or did not comply with FRS 102. However, before we do so, we return to the factual chronology.

*v) Events leading up to the sale of Pride Park*

66) In early 2018 Mr Morris began to consider how increased revenue might be generated from Pride Park. He concluded that there could be significant financial benefit to be derived from developing Pride Park into a multi-use, covered stadium, and began to explore the availability of funding for such a project. However, potential funders were reluctant to consider investing in such a project while Pride Park was owned by the Club; they were only prepared to consider investing if Pride Park was 'extracted' from the Club, and developed as a stand-alone venture.

67) At around the same time, in spring 2018, the Club provided financial information to the EFL in accordance with the P&S Rules ('***the Club's P&S Information***') for the 36 month reporting period to 30 June 2018. The Club's P&S Appendix 1 Form, provided as part of the Club's P&S Information, recorded

a) A loss before tax for T-2 (year to 30 June 2016) of £14,725,000[15] with Adjusted Earnings Before Tax of (-£9,019,000)

b) A loss before tax for T-1 (year to 30 June 2017) of £7,873,000[16] with Adjusted Earnings Before Tax of (-£4,686,000)

c) A forecast loss before tax for T (year to 30 June 2018) of £27,445,000 with Adjusted Earnings Before Tax of (-£23,970,000)

68) The Club's actual/forecast aggregated loss before tax for T, T-1 and T-2 was thus £50,043,000 and its actual/forecast Adjusted Earnings Before Tax for T, T-1 and T-2 was thus (-£37,675,000). That aggregate figure for Adjusted Earnings Before Tax was in excess of the LLT and very close to the ULT.

69) On 12 April 2018 the EFL wrote to the Club raising various queries about the Club's P&S Information. The Club responded on 25 April 2018, enclosing a revised P&S Appendix 1 Form That revised P&S Appendix 1 Form recorded

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[15] The Club's Annual Report and Financial Statements for the year ended 30 June 2016 had been signed on 29 November 2016. That loss was thus an 'actual' loss by the time of the Club's P&S submission in spring 2018

[16] The Club's Annual Report and Financial Statements for the year ended 30 June 2017 had been signed on 28 February 2018. That loss was thus an 'actual' loss by the time of the Club's P&S submission in spring 2018

a) A loss before tax for T-2 (year to 30 June 2016) of £14,725,000 with Adjusted Earnings Before Tax of (-£15,271,000)[17]
b) A loss before tax for T-1 (year to 30 June 2017) of £7,873,000 with Adjusted Earnings Before Tax of (-£4,686,000)
c) A forecast loss before tax for T (year to 30 June 2018) of £27,445,000 with Adjusted Earnings Before Tax of (-£23,970,000)

The Club's actual/forecast aggregated loss before tax for T, T-1 and T-2 was thus still £50,043,000, but its actual/forecast Adjusted Earnings Before Tax for T, T-1 and T-2 had become (-£43,927,000). That aggregate figure for Adjusted Earnings Before Tax had thus become a figure in excess of the LLT and the ULT.

70) On 4 May 2018 the EFL wrote to the Club
a) With further queries about its P&S Information, and
b) To advise that, since the revised P&S Appendix 1 Form showed a breach of the P&S Requirement (because the aggregate figure for Adjusted Earnings Before Tax exceeded the ULT), the Club would be placed under a registration embargo pursuant to EFL Regulation 16.20.

71) The Club continued to address the EFL's queries. It also began to consider what steps it might take before the end of the year ended 30 June 2018 (i.e. T) to avoid breaching the aggregate ULT for T, T-1 and T-2. The steps that it took comprised 2 strands:
a) It began to negotiate to sell players to other clubs
b) It decided in principle to sell Pride Park to Mr Morris. As we have set above, Mr Morris was by that time already interested in developing Pride Park as a 'stand-alone' venture.

72) The evidence before us – which we accept – was that (for their own separate reasons) each of the Club and Mr Morris wished the sale of Pride Park to take place at a 'fair price' i.e. at a price which fairly reflected its value. However, neither had an up to date valuation of Pride Park. Accordingly, in May 2018 the Club approached Jones Lang Lasalle ('***JLL***') to value Pride Park. Negotiations for JLL to prepare a valuation were progressed, information was provided to JLL by the Club and, as we set out below, in late June 2018 JLL did indeed provide a valuation of Pride Park:
a) JLL assessed the Fair Value of Pride Park on a Profits basis at £81,100,000
b) JLL assessed the Fair Value of Pride Park on a Depreciated Replacement Cost ('***DRC***') basis at £74,400,000, and

[17] The figure had been revised to remove an impermissible 'add back' that reflected a Transaction with a Related Party

c) JLL assessed the Market Rent of Pride Park on the basis of a sale and leaseback agreement at £4,160,000 per annum.

73) At the same time the Club also approached the EFL to discuss

a) Whether in principle funds generated from a sale of Pride Park could be used by the Club for the purposes of complying with the P&S Rules, and

b) How the Club might structure such a sale to ensure that it complied with the P&S Rules.

74) The EFL's position in 2018, as it remains today, was that in principle profits generated by a club from the sale of its stadium could be used by the club for the purpose of complying with the P&S Rules. Accordingly on 4 June 2018 the EFL sent a detailed email to the Club setting out 5 scenarios involving the sale of Pride Park by the Club, and how the EFL might approach each scenario. The EFL made it clear however that its '*ultimate approach*' would be determined by the precise nature of any transaction that the Club undertook.

75) Scenario 2 was described in that email as follows:

'*Club sells stadium to a Company outside of the Football Group but still owned by the Club's Owner*

- *The transaction would be deemed as a Related Party Transaction in accordance with the P&S Rules and the onus would be on the Club to support the Fair Market Value of the Transaction. The simplest way to do this would be through an independent external valuation of the fixed asset*
- *Depending on the structure of the group or the other assets of the purchasing company, the Club might still be caught by [P&S Rule 1.1.9] …*
- *If the purchasing Company is deemed to be a separate operation to the Club Group and the fixed asset can be proven to have been purchased at Fair Market Value, the profit on the sale of the fixed asset would be included in the Club's P&S Calculation*'

76) On 22 June 2018 the Club met with EFL and provided information about JLL's valuation (which was at that time limited to information that had been provided to the Club by JLL orally and by email – see below). Based on that valuation the Club anticipated

a) That a sale of Pride Park would generate '*circa £40m profit*', and

b) That it would consequently have '*circa £15 of headroom*' for P&S purposes following the sale of Pride Park.

Subject to certain caveats the EFL confirmed that, on confirmation that the sale had taken place before the year end (30 June 2018), it would lift the registration embargo that remained in place.

77) On 26 June 2018 the Club

a) Forwarded to the EFL an email that purported to have been sent to the Club by JLL at 18.01 on 21 June 2018 in which JLL

i) Explained that it (JLL) had '*calculated a [DRC] of £74.4m*' for Pride Park, based on a cost of £3,000 per seat, based on a total number of 33,455 seats, assuming an economic life of 60 years and based on an underlying land value of £4.1m

ii) Explained that it (JLL) assessed the Fair Value of Pride Park on a Profits basis at £81.1m.

We set out below why we say '*… <u>purported</u> to have been sent to the Club by JLL …*'

b) Forwarded 2 calculations that purported to have been attached to JLL's 18.01 21 June 2018 email setting out '*JLL's workings*':

i) The first calculation set out how JLL had come to assess the Fair Value of Pride Park at £81.1m on a Profits basis

ii) The second calculation set out how JLL had come to assess the Fair Value of Pride Park at £74.4m on a DRC basis

Again, we set out below why we say '*… <u>purported</u> to have been attached …*'

c) Forwarded an extract from a valuation of Pride Park that JLL had undertaken for the Club in 2013

d) Informed the EFL that as and when it received further information from JLL (including a summary report), it would forward the same to the EFL.

78) On 26 June 2018 the EFL emailed the Club confirming that '*if the final report is an official signed report by JLL and includes the information in the emails and the calculations then I would have thought this would be reasonable to support a sales price*'.

79) On the same day

a) JLL provided a valuation letter to the Club confirming

i) Its assessment of Fair Value on a Profits basis at £81.1m, and

ii) Its assessment of Fair Value on a DRC basis at £74.4m

JLL also confirmed a market rent for Pride Park of £4.16m on a sale and leaseback of Pride Park to the Club on reasonable terms

b) The Club provided that valuation letter to the EFL. In its covering email the Club explained that it had concluded that it was intending to use JLL's market rental valuation as a basis for calculating the annual rent payable by the Club after sale – in particular, annual rent would be £1m per annum on the basis that the Club would have access to Pride Park for approximately 100 days a year and would incur associated running costs.

80) The following day

a) The EFL responded '*The report is fine and I think your comments regarding rental on the face of it are also OK from our perspective*'

b) The Club acknowledged that response and confirmed that it would provide a revised P&S submission to the EFL

81) On 28 June 2018 the Club did indeed sent a further revised P&S Appendix 1 form together with various other P&S Information. That further revised P&S Appendix 1

a) Continued to record a loss before tax for T-2 (year to 30 June 2016) of £14,725,000 with Adjusted Earnings Before Tax of (-£15,271,000)

b) Recorded a loss before tax for T-1 (year to 30 June 2017) of £20,575,000 with Adjusted Earnings Before Tax of (-£13,948,000)

c) Recorded a forecast loss before tax for T (year to 30 June 2018) of £55,724,000, but recorded Adjusted Earnings Before Tax for T of +£6,737,000.

The Club's actual/forecast aggregated loss before tax for T, T-1 and T-2 was thus £91,024,000 and its actual/forecast Adjusted Earnings Before Tax for T, T-1 and T-2 was thus (-£22,482,000). That aggregate figure for Adjusted Earnings Before Tax was thus in excess of the LLT but below the ULT.

82) On the same day the Club

a) Entered into a contract to sell Pride Park to Gellaw at a price of £81.1m. The TR1 records that the sale was also completed on 28 June 2018

b) Entered into a leaseback of Pride Park at a rent of £1,139,726 per annum, albeit without there being any restriction on the number of days for which the Club would have access to Pride Park for football purposes.

83) On 30 June 2018 JLL provided a formal '*Valuation Advisory*' of Pride Park. That document was reviewed by the Club and on 3 July 2018 the Club provided certain comments and corrections. JLL appears to have accepted those comments and corrections, and later that same day provided its 'final' valuation report to the Club ('***the 2018 JLL report***'). We return to consider that report in greater detail below – it suffices for the time being to say that JLL

a) Continued to value Pride Park on a Profits basis at £81.1m
b) Continued to value Pride Park on a DRC basis at £74.4m
c) Continued to assess the market rent of Pride Park on the basis of a sale and leaseback agreement at £4.16m

84) Before we leave the 2018 JLL report we return to the exchanges that took place between JLL and the Club, and the Club and the EFL, in late June 2018:

a) As we have said above, on 26 June 2018 Mr Holt of the Club sent an email to Mr Karran confirming 'stadium valuations [by JLL] of £81.1m using a profits method and £74.4m using a DRC method'. Mr Holt's email
   i)Began '*As discussed yesterday, please see the email below from JLL and attached workings*' which were said to confirm such valuation
   ii) Set out below his text an email that purported to have been sent by JLL to the Club at 18.01 on 21 June 2018 titled '*JLL – Pride Park Draft*' and which stated (under the heading '<u>*Fair value on basis of Depreciated Replacement Cost*</u>'
      (1) '*Having reviewed evidence we have adopted a cost of £3,000 per seat for Pride Park, based on a total number of 33,435 at the venue*'
      (2) '*We have assumed an economic life of 60 years*'
      (3) '*In total we have calculated a [DRC] pf £74.4m*'
   iii) Attached *inter alia* a document titled '*JLL – Derby County – Pride Park – Valuation Model 1 – 21 June 2018.pdf*' which comprised the calculation by which JLL had arrived at its DRC valuation of £74.4m

b) In the documents disclosed by the Club there was indeed an email sent by JLL to the Club at 18.01 on 21 June 2018, to which a document titled '*JLL – Derby County – Pride Park – Valuation Model 1 – 21 June 2018.pdf*' was attached. However
   i)That email stated (under the heading '<u>*Fair value on basis of Depreciated Replacement Cost*'</u>)
      (1) '*Having reviewed evidence we have adopted a cost of £3,000 per seat for Pride Park, based on a total number of 33,435 at the venue*'
      (2) '*We have assumed an economic life of 50 years*' (not 60 years)
      (3) '*In total we have calculated a [DRC] pf £57.8m*' (not £74.4m)
   ii) The attachment comprised the calculation by which JLL had arrived at a DRC valuation of £57.8m (not £74.4m). That calculation
      (1) Used a cost per seat of £3,000
      (2) Used a capacity of 33,455

(3) Assumed economic life for the stadium of 50 years, giving an adjusted remaining economic life of 28 years

(4) Assessed depreciation at 44% and functional obsolescence at 5%

c) In the Club's disclosure there was a further email sent by JLL to the Club at 15.17 on 25 June 2018, to which a document titled '*JLL – Derby County – Pride Park Valuation Model – Cost v2 – 25 June 2018.pdf*' was attached:

i) The email (in response to a query from Mr Holt at the Club '*How are you getting on with the revised DRC workings? Is it possible these could be sent across ahead of my 4.30pm meeting*') read '*… as discussed, we are comfortable revising this as discussed this morning. See attached*'

ii) The attachment comprised the calculation by which JLL had arrived at a DRC valuation of £74.4m. That calculation

(1) Still used a cost per seat of £3,000

(2) Still used a capacity of 33,455

(3) Assumed an economic life for the stadium of 60 years, applied a maintenance adjustment of a further 5 years '*due to good cap-ex*', and so assumed an adjusted remaining economic life of 43 years

(4) Assessed depreciation at 28.3% and functional obsolescence at 5%.

85) Without hearing from Mr Holt it is impossible to be certain exactly

a) How the 'JLL email' sent to the EFL on 26 June 2018 came to be sent as it was, or

b) How the attachment sent to the EFL on 26 June 2018 came to be labelled as it was.

The strong suspicion is however that (1) the wording of/figures in JLL's 21 June 2018 email to the Club was changed by Mr Holt before he forwarded the same to the EFL, (2) the attachment to JLL's 25 June 2018 email was relabelled by Mr Holt to make its nomenclature consistent with the other attachments sent by JLL on 21 June 2018, and (3) Mr Holt replaced the actual attachment to JLL's 21 June 2018 email with that 'renamed' attachment; it is difficult to conceive of any other sensible explanation.

86) The question then becomes – so what? We consider below whether that conduct has any consequence for any of the Club's procedural defences. However, that matter aside, our view is that the manipulation described above, if that is what it was, is irrelevant. The Club was perfectly entitled to discuss with JLL, and challenge JLL on, the initial figures that JLL provided on 21 June 2018. JLL was perfectly entitled to reconsider its initial figures in the light of such discussions. That is in all probability what happened, and what caused JLL to provide a revised DRC valuation figure to the

Club on 25 June 2018. There is certainly no criticism to be made of JLL for providing that revised figure as it did. While it was unwise of Mr Holt to have manipulated JLL's email – if that is what he did – it is unlikely in our view that the 'manipulated email' actually contained any view that JLL had not by then expressed to the Club, or that the 'manipulated email' was in fact misleading. Certainly the 'manipulated email' reflected the views set out in the 2018 JLL report.

*vi) Events after the sale of Pride Park*

87) We therefore return to the chronology. On 3 July 2018 Jim Karran of the EFL raised a number of further queries with the Club relating to '*P&S, FFI and sale of the stadium*'. *Inter alia* Mr Karran asked

a) '*For the purpose of getting the Club through this process as soon as possible, are you happy for me to adjust the profit on sale of the stadium (for the purpose of P&S only) down to using the Depreciable Cost method (i.e. the £74.4m valuation) ? We can obviously discuss this in future if you wish to further justify the profit figures that were used in determining that valuation method of £81.1m*'

b) About the £1m rental valuation that the Club was purporting to apply – in particular, Mr Karran asked for a '*numerical reconciliation of how the £4.1m reduces to £1m*'.

88) The Club responded almost immediately:

a) As regards the use of the DRC basis of valuing Pride Park the Club responded '*Yes, happy for you to do that at this stage. If you have any questions regarding the £81.1m valuation please send these through at a later date*'

b) As regards the rental valuation, the Club provided additional information and calculations.

89) At 16.45 Mr Karran acknowledged receipt of the additional information and informed the Club

'*Based on this [the information provided by the Club] I will be asking Shaun [Harvey] to review and sign off the Club's P&S result in the morning. As a result, the Club's P&S embargo has now been lifted*'.

The email concluded:

'*As previously discussed the result is based on the new stadium not operating a material part of the group's operations and therefore not being consolidated into the P&S Result … I'm aware the Club may wish to review the £74.4m stadium sale price that the EFL has chosen to use for the purposes of the P&S Calculation and increase it to £81.1m for P&S submissions in future years*'.

90) We were shown a '*P&S Summary for Tad Detko, Director of Finance*' dated 3 July 2018

a) That had been prepared by Mr Karran following an initial review by him of the Club's P&S Information (including his exchanges with the Club on 3 July 2018 above)

b) That was signed as having been '*reviewed and agreed by Tad Detko*' on 3 July 2018.

That Summary recorded

i) '*Club happy for the EFL to use £74.4 at this stage*'

ii) '*Club has provided justification for £1m renal valuation based on days usage. This is not an issue for 2017/18 as no rental has been charged in this period. No further queries raised but clarified with the Club (Todd Holt on call on 3 July 2018) it may be revisited next year*'

iii) '*Signed TR1 attached*'

iv) '*Final P&S result £(29,491)k*'

v) '*Club has fulfilled the P&S Requirement*'.

91) At 10.20 on 4 July 2018 the EFL emailed to the Club a letter dated 3 July 2018 signed by Shaun Harvey, the Chief Executive of the EFL. That letter read

'*Thank you for the additional information you have provided to substantiate your P&S submission. Following our review we can confirm that the Club has fulfilled the P&S Requirement for the 2017/18 Reporting Period. A copy of the Club's agreed P&S Calculation is attached as an appendix.*'

That Appendix

a) Recorded a loss before tax for T-2 (year to 30 June 2016) of £14,725,000 with Adjusted Earnings Before Tax of (-£15,271,000)

b) Recorded a loss before tax for T-1 (year to 30 June 2017) of £20,575,000 with Adjusted Earnings Before Tax of (-£13,948,000)

c) Recorded a forecast loss before tax for T (year to 30 June 2018) of £55,724,000 with Adjusted Earnings Before Tax for T of (-£272,000).

The Club's actual/forecast aggregated loss before tax for T, T-1 and T-2 was thus £91,024,000 and its actual/forecast Adjusted Earnings Before Tax for T, T-1 and T-2 was thus (-£29,491,000). That aggregate figure for Adjusted Earnings Before Tax was thus in excess of the LLT but below the ULT.

92) On 24 December 2018 the Club emailed the EFL. The subject line of that email was '*DCFC Stadium Valuation*' and it began

'Following on from our P&S Submission for 2017/18 and our correspondence in June/July, we would like to revisit the issue of our stadium valuation please …'

The email continued:

> 'As you may recall on 28 June 2018 we submitted a revised P&S calculation following the stadium sale which was based on the sale price of £81.1m. We considered this Fair Market Value and it was supported by an independent external valuation prepared by [JLL] … To confirm, the valuation reached by JLL was £81.1m based on the profits method.
>
> Following your email on 3 July 2018 we agreed to you adjusting the profit on sale down (for P&S purposes) based on the DRC valuation (i.e. £74.4m). This was done due to impending deadlines and the fact that even using the DRC valuation the Club's result was below the [ULT]. You agreed however to leave the issue open so we could discuss this further and justify the valuation used.
>
> Following on from this therefore we maintain that the valuation of £81.1m based on the profits method is appropriate and fair in the circumstances. This was supported by the independent external valuation of JLL. Importantly it was also the valuation, based on our Counsel's advice, that HMRC would insist on for SDLT, and it followed from this that £81.1m was the value included on all documentation pertaining to the stadium sale, including the TR1 …
> Based on the above, if you could please confirm that this is the value that we can use when calculating the profit on the sale of the stadium for our future P&S calculations, that would be greatly appreciated.
>
> We look forward to hearing from you and reserve the right to make further submissions if needed'

93) The EFL responded substantively on 16 January 2019:

> 'Obviously we want to resolve this matter as quickly as possible, but the [P&S] Rules require me to confirm that the amounts are stated as Fair Market Value. As per the Rules (Rule 2.4) the Club is to be given a reasonable opportunity to make submissions as to what constitutes the Fair Market Value to prevent me restating any result.
>
> To satisfy our requirements, please can you provide justification and documentary support that the two rental amounts for Stadia and Club DCFC are a fair market value as per the [P&S] Rules?'

94) On 28 January 2019 the Club provided a '*paper outlining our main lines of argument which will hopefully help you in justifying to the Exec that the Profits valuation method should be used in our P&S calculation …*'. That paper

a) Addressed certain specific issues, and
b) Included the following section headed '*Professional Advice*':

> '*As part of the sales process we sought our Counsel's advice to determine what the appropriate value to use for the sale transaction of the stadium. In a number of ways it would have been beneficial to the Club to use the lower valuation per the DRC valuation … The*

*professional advice that we were given was that we would have little option other than to use the higher valuation as this represented Fair Market Value, and HMRC would insist on the higher price to be used as this represents genuine commercial value between related parties. We therefore proceeded to use the £81.1m valuation as shown by the documentation provided previously …*

*In light of the above we have used the £81.1m valuation in our 2017/18 financial statements that have been audited and signed off without adjustment'.*

95) In addition, at the request of the EFL on 8 February 2019 the Club provided additional information and documents to the EFL.

96) The EFL considered the Club's request in mid-February 2019:

a) On 15 February 2019 Mr Karran emailed Mr Detko
   i) Setting out certain background. The email recorded '*Due to the Club's desire [in June 2018] to close off the 2017/18 process in advance of the transfer window opening, the EFL proposed that the DRC method was used for the 2017/18 Calculation and revisited in 2018/19 …*'
   ii) Recording that, following the Club's approach in December 2018 to '*follow up on the profit figure used in the P&S calculation requesting that the amount was uplifted to the profit based on the £81.1m sales price … the EFL has reviewed the figures used in the independent valuation and challenged the Club on the Fair Value of the internally generated Licence Fees that resulted in the £81.1m valuation*'
   iii) Recording that the EFL could however '*gain comfort on the £81.1m sale value*' from the fact that the JLL valuation report performed the DRC valuation (£74.4m) based on a mid-point construction cost per seat of £3,000. '*If JLL had based their DRC calculation on the high-point construction cost per seat of £3,500 instead of £3,000, the valuation would come out at approximately £86.1m … A valuation of £81.1m would equate to a construction cost per seat of circa £3,290 and therefore comfortably within the range provided by JLL*'
   iv) Concluded that '*This provides the EFL with comfort that the sales price of £81.1m is not a materially unreasonable price to have used*'.

   Mr Karran proposed that

   'based on the above … we go back to the Club accepting that the 2017/18 P&S Result can be adjusted to reflect the £81.1m sales price. We will emphasise that this is on the basis of the acceptable range within the DRC valuation method that proved that the £81.1m is not an unreasonable sales price rather

than the Profits valuation method that was gained utilising the inter-company revenue that could not be supported at fair value'

b) Mr Detko forwarded that email to Mr Harvey:
   i) He explained '*At the time we (and Derby) were content to utilise a sales value of £74.4m rather than £81.1 as they passed the 3 year assessment with the lower value*'
   ii) He explained '*We agreed that we would review as part of the 2018/19 submission and based on our review we are content to use the higher £81.1m value … The effect of this will be to restate their 2017/18 numbers …*
   iii) He asked '*Are you happy for us to confirm this to Derby ?*'

c) Mr Harvey responded '*I have reviewed the papers and believe that your suggested approach is the correct one*'.

97) On 18 February 2019 the EFL emailed the Club:

> 'Thank you for you're the additional submissions you have made in relation to the profit on the sale of the Club's stadium figure that is to be used in the Club's 2017/18 P&S Calculation.
>
> In summary we accept that the 2017/18 P&S Result can be adjusted to reflect the £81.1m sales price.
>
> As you know we have struggled to gain sufficient evidence to support the licence fees that were used in order to prepare the Profits Method valuation included in the JLL report … However we have gained comfort on the £81.1m sale value from the fact that the independent JLL report performed the DRC valuation (£74.4m) based on a mid-point construction cost per seat of £3,000. If JLL had based their DRC calculation on the high-point construction cost per seat of £3,500 instead of £3,000 the valuation would come out at approximately £86.1m instead of the £74.4m. A valuation of £81.1m would equate to a construction cost per seat of circa £3,290 and therefore comfortably within the range provided by JLL.
>
> From a review of the Club's 2017/18 P&S Result the amendment to a sales price of £81.1 would result in 2017/18's (T) adjusted profit being £6.428m (prior to final figures being submitted).
>
> Please let me know if this is consistent with your calculations'.

98) Thomas Bonser, Head of Finance at the Club, provided such confirmation the following day.

99) On 26 February 2019 the Club emailed Mr Karran to ask whether he would be able to '*talk through a couple of items*' on the Club's planned P&S Submission. That conversation took place on 27 February 2019, shortly before the Club's 2019 P&S Submission was due.

100) The Club did not in fact provide its 2019 P&S Submission by the 1 March deadline provided for in the P&S Rules, and on 6 March 2019 the Club was placed under embargo because of that non-provision.

101) On 29 March 2019 – the date on which the Annual Report and Financial Statements of the Club and its parent for the year ended 30 June 2018 - the Club provided its 2019 P&S Submissions to the EFL. The P&S Appendix 1 form provided with the 2019 Submissions

a) Recorded a loss before tax for T-2 (year to 30 June 2017) of £20,575,000 with Adjusted Earnings Before Tax of (-£13,407,000)

b) Recorded a loss before tax for T-1 (year to 30 June 2018) of £1,146,000 with Adjusted Earnings Before Tax of £7,207,000

c) Recorded a forecast loss before tax for T (year to 30 June 2019) of £38,727,000 with Adjusted Earnings Before Tax for T of (-£31,517,000).

The Club's actual/forecast aggregated loss before tax for T, T-1 and T-2 was thus £60,448,000 and its actual/forecast Adjusted Earnings Before Tax for T, T-1 and T-2 was (-£37,717,000). That aggregate figure for Adjusted Earnings Before Tax was accordingly in excess of the LLT but below the ULT.

102) The embargo that had been placed on the Club due to non-provision/late provision of the 2019 Submission was lifted. However, an embargo remained in place to reflect the proximity of the aggregate figure for the Club's Adjusted Earnings Before Tax to the ULT.

103) A very short time later Middlesbrough Football Club ('***MFC***') wrote to the EFL in connection with the Club's sale and leaseback of Pride Park:

a) MFC drew the EFL's attention to the following wording in the Club's (and Parent's) Annual Report and Financial Statements of for the year ended 30 June 2018:

> 'The Company recorded a profit of £[ ] … as a result of selling and leasing back Pride Park which created a gain of £39.9m. The Company and its Board took the difficult decision to fully realise the market value of the stadium from its balance sheet after consideration of the Club's P&S position for the forthcoming years'

b) MFC queried, in forceful terms, the legitimacy of such a sale and leaseback arrangement, particularly when the transaction had occurred for the express purpose of '*manipulating the P&S Rules …*'.

104) MFC was not the first club to have queried the legitimacy of including the profits from the sale of fixed assets (such as a stadium) within a P&S Calculation; a number of Clubs had previously done so, individually and collectively. The EFL's response was that

> 'As it currently stands the sale of a Stadium is not prohibited by the [P&S Rules], even if it is to a related party, as long as there is an independent valuation to support the transaction value (Rule 2.3) and the transaction is not caught by the requirements of Rule 1.1.3(b) – group reporting'.

105) The EFL proceeded to review the Club's 2019 P&S Submission and on 15 April 2019[18] wrote to the Club with various queries. None of those queries related to the sale or value of Pride Park; as we have said above, the only relevant query (for our purposes) in that letter related to amortisation.

106) Further queries – including what the parties described as '*the stadium valuation question*' – continued to be addressed in correspondence during April, May and June 2019. All the while the embargo remained in place. On 11 July 2019 the EFL wrote to the Club

a) Acknowledging that, in light of the receipt by the Club of substantial compensation following the departure of its first team manager and staff to Chelsea, the Club's 3 year aggregate figure for Adjusted Earnings Before Tax was '*circa £37.1m*'

b) Explaining that even though that figure involved a £3.1m '*sensitivity in relation to stadium rent for the 2018/19 season that the EFL and Club are still in ongoing discussions over*', even with that sensitivity the Club's forecast result fell within the ULT

c) Warning though
   i) That '*there is an ongoing review of the Club's 2017/18 actual financial results against its P&S Calculation'*
   ii) That the EFL would also perform a view of the Club's actual results for the 2018/19 financial period against the P&S Calculation
   iii) That if either of those resulted in the Club exceeded the ULT, it would be referred to a Disciplinary Commission

[18] There is a similar, but not identical, letter from the EFL to the Club dated 12 April 2019. Nothing turns on any difference between those letters

d) Concluding as follows: '*Based on the information provided to date the EFL is lifting the embargo but the rights of the EFL to raise further queries in respect of the 2017/18 and 2018/19 P&S Submissions is reserved*.'

*vii) The EFL reviews the consideration paid for Pride Park*

107) As part of the 'ongoing review' the EFL instructed a firm of valuers, WHE, to consider the JLL valuation and assess the market value of Pride Park as at the date of its sale by the Club. In September 2019 WHE raised certain queries and requested certain information to enable it to '*fully understand how the values prescribed within the JLL report were arrived at*':

a) Those queries were sent to the Club. The Club responded on 16 September 2019 giving the information that was known to it

b) On 20 September 2019 the EFL explained to the Club that '*the EFL needs WHE's questions to be answered directly by JLL so we and WHE can fully understand the assumptions JLL have made as part of their valuation of Pride Park*' and asked the Club to ask JLL to '*answer the questions and forward their answers [to the EFL] directly*'. The EFL purported to rely on P&S Rule 4.2 to compel the Club '*to provide the requested answers from JLL within 5 working days*'

c) No such answers were apparently provided by JLL; indeed, we do not even know whether JLL were asked by the Club to provide answers.

108) On 2 December 2019 the EFL wrote to the Club

a) Reminding it of the ongoing investigation into the Club's disposal of Pride Park and the instruction of WHE for the purpose of producing '*a new valuation report of Pride Park*'

b) Enclosing a copy of a valuation report that WHE had provided. In this Decision we refer to that (undated) report as '***the 2019 WHE Report'***. We consider the 2019 WHE Report in greater detail below, but in summary WHE concluded

i) That there was a range of values for Pride Park dependent on the valuation methodology adopted,

ii) That it considered that the Fair Market Value for Pride Park Stadium was '*in the range of £42,000,000 to £50,000,000*'

iii) That the '*true Fair Market Value as a distinct figure is likely to be within this range. It may be at the lower or higher end of the range. Whilst we consider that reasonable professional opinion could disagree as to where Fair Market Value is within this range, we do not think that Fair Market Value is outwith this range*'

c) Explaining that the 2019 WHE Report had calculated Pride Park's Fair Market Value at a value lower than that which had been included in the Club's P&S Results for the 2017/18 and 2018/19 seasons

d) Explaining that, in accordance with P&S Rule 2.3 '*the EFL must now consider whether it wishes to restate the Fair Market Value of Pride Park Stadium*'

e) Explaining that P&S Rule 2.4 required it to provide the Club with the reasonable opportunity to '*make submissions regarding this new valuation*' before the EFL exercised its power in P&S Rule 2.3

f) Requesting that the Club, should it wish to do, provide '*submissions on the [2019 WHE Report] pursuant to [P&S] Rule 2.4 within seven days of the date of this letter i.e. by 9 December 2019*'.

109) The Club – by its solicitors – responded on 6 December 2019. It declined to provide any substantive submissions or comments on the 2019 WHE Report. Instead, the Club

a) Contended that the EFL had no power under P&S Rule 2.3 to consider whether to restate the Fair Market Value of Pride Park '*in circumstances were the EFL has already accepted that valuation*'

b) Summarised the chronology of events that had taken place in June 2018 and asserted that the EFL had

> 'approved the FMV [and] determined the consideration was recorded at a FMV pursuant to P&S Rule 2.3 and did not use its powers under the second sentence of [P&S] Rule 2.3 … That, and the entirety of the Club's obligations pursuant to its P&S Requirement for the 2017/18 Reporting Period (i.e. the period in which the Stadium transaction occurred and the FMV was approved) was agreed and signed off by Shaun Harvey, then Chief Executive of the EFL, by letter dated 3 July 2018'

c) Drew attention to the revisiting of the value of Pride Park in early 2019 and asserted

> '… while the EFL determined the FMV for the stadium sale was £74.4m on 3 July 2018, with the proviso this may be adjusted to £81.1m later, on 18 February 2019, having exercised its powers under [P&S] Rule 2.3 it confirmed that it accepted the FMV for the stadium sale was £81.1m'

d) Stated its position as being

'P&S Rule 2.3 does not entitle the EFL, having reached such a final determination and informed the Club of the same, to at a later date change its mind and seek to restate the FMV. The EFL has already exercised its powers under P&S Rule 2.3 and approved the FMV. The rule does not provide the EFL with a power to review or re-open the decision it has already made (presumably on the EFL's case, at any time and on however many occasions it chooses to do so). Such a construction of the rules would be absurd. Nor is there any other Rule which now allows the EFL to do so … As such any attempt now to restate the FMV having already determined the transaction was at FMV would be wholly ultra vires the Rules as well as being flagrantly in breach of principles of fairness and legal certainty'

e) Concluded its letter

'It follows from the fact that as the EFL does not have power to reopen a determination already made pursuant to [P&S] Rule 2.3, [P&S] Rule 2.4 does not come into play. If contrary to the above the EFL is able to satisfy the Club and/or an independent arbitral tribunal that it has the legal power to restate the FMV then **at that point only** shall [P&S Rule 2.4] apply and the Club must be given a 'reasonable opportunity;' to respond to the WHE survey. So far as that is concerned, and without prejudice to the Club's contention that the EFL does not have the power to invoke the second sentence of [P&S] Rule 2.3 in any event, we note that WHE took a period of over 3 months to provide [the 2019 WHE Report] and that any reasonable opportunity afforded to the Club to respond to the same (which would likely include responses from those surveyors it instructed) would have to allow the Club a period of at least 2 months to make its observations.'

110) The EFL responded on 10 December 2019. It did not engage with the substance of the Club's 6 December 2019 letter; instead, it extended the 7 day period that it had originally given the Club to respond to the 2019 WHE Report by 10 days (to 19 December 2019). The EFL explained

'We consider this is more than enough time bearing in mind the fact that the Club has already appointed surveyors, being JLL, and it has already been put on notice of the concerns raised by WHE with the JLL valuation, which concerns are reflected in the much lower valuation attributed to [Pride Park] by WHE'.

111) The Club's response – dated 18 December 2019 – was to refer the EFL back to the substance of its 6 December 2019 letter.

*viii) The 6 January 2020 meeting of the EFL Executive*

112) On 6 January 2020 a meeting of the EFL Executive – designated by the Board as comprising Nick Craig, Tad Detko and Jim Karran for the purpose of that meeting - took place. The purpose of that meeting was stated as being '*to consider P&S Rule 2.3 in the context of the Club's sale of Pride Park*'. The EFL's Note of that meeting records that the Executive acted as follows:

a) It considered the annual accounts of Sevco 5112 Limited ('***Sevco'***) (by then the parent company of the group of which the Club had become part) for the financial year ended 30 June 2018 and noted under the heading '*Related Party Transactions*' that Pride Park had been sold to a related party for consideration of £81m

b) It noted that under P&S Rule 2.3 it was required to determine whether the sale of Pride Park was recorded at Fair Market Value

c) It considered the correspondence that had passed between the EFL and the Club in relation to the Club's 2017/18 and 2018/18 P&S Submissions – in particular, the communications that had taken place in June 2018

d) It considered the 2018 JLL report and noted that JLL had primarily undertaken a DRC assessment

e) It concluded that, in light of advice from Leading Counsel, '*on their own*' neither the DRC method or the Profits method used by JLL was capable of satisfying the definition of Fair Market Value in the P&S Rules

f) It noted that, while the DRC method had previously been accepted, it now considered that the DRC method alone was not a valuation method satisfying the definition of Fair Market Value in the P&S Rules – and that for that reason, the Executive had commissioned the WHE 2019 Report

g) It considered the WHE 2019 Report and noted
   i) That WHE considered the Profits method of valuing Pride Park to be too unreliable
   ii) That while WHE considered the DRC method to be a 'fall back' method of valuing Pride Park, it was '*not one which can necessarily reflect disposal on the open market*'

h) It noted differences in the inputs used by JLL and WHE for their DRC valuations – in particular
   i) That JLL had based its valuation on a cost of £3,000 per seat while WHE had based its valuation on a cost of £1,600 - £1,950 per seat
   ii) That JLL had based its valuation on the actual capacity of Pride Park while WHE had based its valuation on capacity '*adjusted … to reflect utilisation*'
   iii) That JLL had based its valuation on a land value of £4.1m while WHE had based its valuation on a land value of £3.32m

i) It noted that in September 2019 questions about the 2018 JLL report had been posed by WHE and that, while the Club had provided responses, JLL had not

j) It noted that although the Club had challenged the right of the EFL to reconsider P&S Rule 2.3, it had not (despite invitation) provided any submissions on the WHE 2019 Report

k) It concluded that, while the Club's refusal to provide submissions was '*regrettable*'. A decision whether or not to restate the sale of Pride Park to Fair Market Value was not a decision that could or should be delayed; the Club could challenge the decision of the EFL Executive under P&S Rule 6 if it chose to do so

l) It determined that '*the valuation is within a range of £42m - £50m, and on the basis that £50m is the top end of the range it has to be considered as the maximum potential Fair Market Value*'

m) It accordingly resolved '*to restate the Fair Market Value of the sale of Pride Park Stadium to £50m, subject only to WHE confirming that errors noted [by the EFL in the 2019 WHE Report] did not impact on the final valuation figure*'

n) It asked Mr Karran to re-calculate the Club's P&S Results for 2017/18 and 2018/19 to reflect the restatement of value to the figure of £50m.

113) On 10 January 2020 Mr Craig provided a Board Update to the EFL's Board. The update recorded '*The Executive has formally determined that the Fair Market Value to be attributed to the sale of Pride Park should be restated to £50m in line with the opinion of Roger Messenger [WHE]*'.

114) On 16 January 2020 the EFL wrote to the Club charging it with the 2 breaches of the P&S Rules that we are tasked with determining.

*ix) A discrete factual matter: the MFC proceedings*

115) We have already referred above to the fact that in spring 2019 MFC complained to the EFL about the fact that the Club had been allowed to utilise profits made from the sale of Pride Park for the purpose of its P&S Submissions.

116) On 24 May 2019 solicitors acting for MFC sent a Letter Before Claim to the Club. In essence MFC contended

a) First, that the inclusion of profits from the Club's sale of Pride Park in the Club's Adjusted Earning Before Tax had *per se* been impermissible. MFC complained that the inclusion of such profits had caused the Club's P&S Submissions to satisfy the P&S Requirements when, had those profits been deducted (as MFC contended ought to have been the case), the Club would have exceeded the ULT and thereby breached the P&S Rules

b) Secondly, that the sale had in any event not been '*carried out at arm's length*', that the sale was unlikely to represent Fair Market Value for Pride Park, and that the profit from the sale of Pride Park contained in the Club's Accounts was likely to have been overstated.

On the same day MFC's solicitors also wrote to the EFL asking for information and documentation relating to the sale of Pride Park and to the EFL's scrutiny of that sale.

117) On 19 June 2019 solicitors acting for the EFL responded to MFC's solicitors. They informed MFC that

> 'as part of [the EFL's] normal review process regarding filed accounts it is undertaking a review of some specific items within [the Club's] accounts in the context of the P&S Rules for the 2017/18 Reporting Period. On completion of that process the EFL will consider what if any further action it is proposing to take. This may include the taking of disciplinary action against [the Club] if the outcome of the review so justifies it …'

118) Also on 19 June 2019 the EFL wrote to the Club. That letter

a) Referenced the letters from MFC that each had received, and

b) Explained that '*following the EFL's review of the annual filed accounts, the EFL has some follow up questions and in this regard has asked for a review of some specific items within the Club's financial results in the context of the P&S Rules for the 2017/18 Reporting Period*'.

The EFL explained that the process would be commenced by review of existing documents and correspondence received from the Club, but reserved the right to seek further information.

119) MFC was not satisfied by the EFL's response to its complaints:

a) On 21 June 2019 its solicitors wrote to the EFL demanding an immediate explanation of the outcome of the EFL's response into the Club and what, if any, action was being taken against the Club

b) On 9 July 2019 MFC's solicitors wrote to the EFL asserting that the sale of Pride Park had not been at Fair Market Value, and that '*a sale price of £22,794,520 (i.e. £58,305,480 below the sale price paid)*' was '*more realistic*'

c) On 30 July 2019 MFC's solicitors confirmed that they had been instructed to prepare proceedings against the EFL and the Club, and would continue to do so unless MFC received confirmation (i) that the EFL had initiated disciplinary proceedings against the Club, or (ii) of the date by which the EFL's investigation into the Club would be completed

d) On 12 August 2019 MFC sent a draft Notice of Arbitration to the EFL

e) On 16 August 2019 the EFL informed MFC
   i)that an independent valuation of Pride Park had been commissioned, but not yet received
   ii) that once it had been received, the EFL would '*exercise its discretion to determine whether the valuation included in [the Club's] P&S returns was at a Fair Market Value and if not, what adjustments need to be made in assessing [the Club']s compliance with the* <u>*P&S Rules*</u>'
   iii) that its threat to commence proceedings against the EFL was thus premature, and if MFC did commence proceedings against it before the EFL's investigation into the Club was complete, the EFL would apply to have such proceedings stayed pending the outcome of that investigation

f) On 22 August 2019 MFC agreed to defer commencing proceedings '*for the time being*'

g) On 6 September 2019 MFC served Notice of Arbitration on the EFL. The Notice of Arbitration
   i)Challenged the permissibility (for the purpose of the <u>P&S Rules</u>) of including a profit generated from the sale of a fixed asset (such as a stadium) within a club's Adjusted Earnings Before Tax, and
   ii) (In the alternative to its primary case) contended that the EFL (1) had failed to determine, timeously or at all, that the consideration paid to the Club for the purchase of Pride Park had not been recorded at Fair Market Value, and (2) had failed to restate that consideration to Fair Market Value.

   We refer to those arbitral proceedings as '***the MFC proceedings***'.

120) Following service of the Notice of Arbitration MFC and the EFL agreed to the MFC proceedings being stayed

a) Initially for periods to 8 November 2019 and then 29 November 2019, and

b) Subsequently (on 29 November 2019) beyond 29 November 2019 on the following terms:

‘UPON the EFL stating that, subject to Conditions (defined below) being met, it will commence disciplinary proceedings against [the Club] in respect of a potential breach of the [P&S Rules] in (at least) the 2017/18 season

The Conditions are
(i)The EFL complying with paragraphs 2.3 and 2.4 of the P&S Rules, and
(ii) Following the EFL’s compliance with P&S Rules 2.3 and 2.4, the aggregation of [the Club’s] Adjusted Earnings Before Tax in 2017/18 and/or any other season resulting in a loss that exceeds the [ULT] in accordance with P&S Rule 2.9

AND UPON MFC confirming irrevocably that, in the event that the EFL commences disciplinary proceedings against [the Club] in respect of breach of the P&S Rules in (at least) the 2017/18 season, it will not pursue in the Arbitration Proceedings any claim that the inclusion of profit or less from the sale of fixed assets is automatically precluded by the P&S Rules, nor a claim that inclusion of such profit or loss is necessarily a breach of the duty of good faith thereunder

AND UPON MFC indicating that, in the event that the EFL commences disciplinary proceedings against [the Club] in respect of a breach of the P&S Rules in (at least) the 2017/18 season, it intends to seek compensation as against (And only against) [the Club] and not the EFL pursuant to Regulation 92.2.5 of the EFL Regulations in such disciplinary proceedings (or any appeal therefrom)

AND UPON the parties recognising that in those circumstances it is not desirable for the Arbitration Proceedings to run concurrently with such disciplinary proceedings

The parties have now agreed to a further stay on the following terms:

The Arbitration Proceedings be stayed until 7 days following final resolution or abandonment of the disciplinary proceedings against the [Club] or, if earlier, 15 days’ notice of the lifting of the stay being given in writing by either party’.

121) We consider the relevance of the above events below.

**(E) The First Charge: the question for us to determine**

122) P&S Rule 2.9.2

a) Records that a club is to be treated as being in breach of the P&S Rules, and

b) Obliges the EFL to refer such breach to a Disciplinary Commission in accordance with section 8 of the Regulations

if – but only if - '*the aggregation of a Club's Adjusted Earnings Before Tax for T, T-1 and T-2 results in a loss that exceeds the Upper Threshold (calculated in accordance with Rule 3)*'.

123) As set out above

a) '*Adjusted Earnings Before Tax*' is defined as Earnings Before Tax adjusted to exclude costs in respect of certain matters, and

b) '*Earnings Before Tax*' is defined as '*profit or loss before tax, as shown in the Annual Accounts*'

124) The wrinkle in this case of course relates to P&S Rule 2.3, which

a) Obliges the Executive to determine whether consideration included in a club's Earnings Before Tax arising from a Related Party Transaction is recorded in the club's Annual Accounts at a Fair Market Value, and

b) If it is not, obliges the Executive to restate the same to Fair Market Value

125) Here, the Executive determined (or purported to determine) on 6 January 2020 that the consideration of £81.1m included in the Club's Earnings Before Tax sale of Pride Park was not recorded in the Club's Annual Accounts for the year ended 30 June 2018 '*at a Fair Market Value*':

a) Having reached that conclusion, it restated the consideration for the sale of Pride Park to £50m

b) The consequence of that restatement of the consideration for the sale of Pride Park from £81.1m to £50m meant that the aggregation of the Club's Adjusted Earnings Before Tax for

i) The years ended 30 June 2018, 30 June 2017 and 30 June 2016 (i.e. T, T-1 and T-2 when 30 June 2018 was T) resulted in a loss which exceeded the ULT, and

ii) The years ended 30 June 2019, 30 June 2018 and 30 June 2017 (i.e. T, T-1 and T-2 when 30 June 2019 was T) also resulted in a loss which exceeded the ULT

and that as a result (1) the Club '*shall be treated*' as being in breach of the P&S Rules, and (2) the EFL must refer the breach to the Disciplinary Commission.

126) That is the route by which the First Charge comes before us.

127) At the heart of the First Charge lies an issue over the Fair Market Value of Pride Park as at June 2018. There is however a fundamental dispute between the parties as to how we should go about considering that issue in the context of determining the First Charge:

a) The Club's position is

   i) That it not the function of this Commission to '*perform its own valuation of [Pride Park]*', and

   ii) That instead the question that we should ask ourselves is whether the consideration of £81.1m paid to the Club for the Pride Park '*falls outside a reasonable range of fair market valuations*'.[19] If we conclude that it does not, the Club contends

      (1) The EFL has no power to restate the consideration, and so

      (2) The question of whether there should be a restatement of Fair Market Value to £50m does not arise

   The Club therefore contends that the question for us is whether the consideration of £81.1m paid for Pride Park falls within whatever we might conclude represents the range of Fair Market Values for Pride Park as at June 2018

b) The EFL adopts a very different position. Its position is

   i) That where a club's Earnings Before Tax contain consideration arising from a Related Party Transaction, P&S Rule 2.3 obliges the Executive to determine whether that consideration is stated in the club's annual accounts at a Fair Market Value. Since here it is common ground that the sale of Pride Park was a Related Party Transaction, the Executive was thus obliged to determine whether the consideration of £81.1m stated in the Club's financial statements was '*a Fair Market Value*'

   ii) That having determined that the consideration of £81.1m stated in the Club's financial statements was not '*a Fair Market Value*' for the sale of Pride Park, P&S Rule 2.3 obliged the Executive to restate that consideration to '*Fair Market Value*' i.e. to the sum that the Executive concluded represented Fair Market Value

   iii) That the only routes by which a Club might subsequently challenge

      (1) A determination by the Executive that the consideration of £81.1m stated in the Club's financial statements was not '*a Fair Market Value*' for the sale of Pride Park, and/or

      (2) A determination by the Executive of what in fact constitutes Fair Market Value for the sale of Pride Park

   are as set out in P&S Rule 6 and EFL Regulation 95.2

   iv) That the Club has not advanced any challenge under EFL Regulation 95.2

[19] With the legal and evidential burden falling on the EFL to prove that £81.1million falls outside that range

v) That the Club should therefore be treated in these proceedings as 'challenging' the determinations of the Executive

(1) that the consideration of £81.1m stated in the Club's financial statements was not '*a Fair Market Value*' for the sale of Pride Park, and/or

(2) that Fair Market Value for the sale of Pride Park was in fact £50m

by the route permitted by P&S Rule 6

vi) That

(1) Since P&S Rule 6.1 provides as a mechanism for such challenge, namely a right to make an application to '*have such decision reviewed by the Disciplinary Commission*' provided that such application is presented within 14 days of the date of the decision to be reviewed, and

(2) Since P&S Rule 6.2 permits a club to present an application for such a review only on the limited bases listed in that P&S Rule 6.2

the burden falls on the Club in these proceedings to demonstrate that the determinations that it wishes the Disciplinary Commission to review

(a) Were reached outside the jurisdiction of the Executive, or

(b) Could not properly have been reached by any reasonable Executive which had applied its mind properly to the issues to be decided, or

(c) Were reached as a result of fraud, malice or bad faith, or

(d) Were contrary to English law

and in each case, directly and foreseeably prejudiced the interests of the Club

vii) That as a result (as it was put in the EFL's written Closing Submissions) '*the relevant question [for the Disciplinary Commission] is not whether the decision to restate the FMV of [Pride Park] to £50million on the advice of WHE was right or wrong, but rather whether doing so at that figure was rational (i.e. within the range of reasonable decisions open to the EFL on the basis of the material before it)*'.

128) For the following principal reasons we reject the approach that the EFL invites us to take:

a) First, what is before us is plainly not an application by the Club to challenge either of the determinations made by the EFL on 6 January 2020

i)That the consideration of £81.1m stated in the Club's financial statements for the financial year to 30 June 2018 was not '*a Fair Market Value*' for the sale of Pride Park

ii) To restate that Fair Market Value to £50m.

As paragraph 1 of the Charge letter dated 16 January 2020 makes clear, what is before us is a '*formal charge against the Club … submitted in accordance with the EFL Regulations*'. It is to be noted that that reference is to the EFL Regulations, not the P&S Rules. Thus at their outset the

EFL plainly considered these proceedings to be Disciplinary Commission Proceedings brought pursuant to section 8 of the EFL Regulations, not an application to the Disciplinary Commission for a review of the determinations made by EFL's Executive on 6 January 2020

b) Secondly, when one considers the Charge Letter – which is what is described as the '*complaint*' in EFL Regulation 89.1, it is clear that '*the complaint*' is that the Club has breached the P&S Rules for the relevant aggregated periods because its relevant Adjusted Earnings Before Tax have resulted in a loss exceeding the ULT. It is for the EFL to prove that complaint in the usual way and to the usual standard. We return to below to what 'proving the complaint' requires

c) Thirdly, the EFL gave the Club no opportunity to have the 6 January 2020 determinations by the Executive reviewed by a Disciplinary Commission pursuant to P&S Rule 6. Having made those determinations on 6 January 2020 the EFL did not communicate the fact of those determinations to the Club prior to charging the Club.

d) Fourthly, both the EFL and the Club have consistently treated these proceedings as proceedings pursuant to section 8 of the EFL Regulations, not as 'review proceedings' under P&S Rule 6.2. By way of example

   i) On 30 January 2020 the Club served a '*summary response*' pursuant to EFL Regulation 89.3. That summary response made it clear that the complaint was not admitted, thus triggering the referral to a Disciplinary Commission '*for it conduct a full hearing in respect of the complaint*' in accordance with EFL Regulation 91.4

   ii) The proceedings have been conducted in accordance with Appendix 2 to the EFL Regulations

e) Fifthly, it appears to us that the approach contended for by the EFL has the potential to result in outcomes that are unfair, if not actually perverse. Consider the following hypothetical scenario, whose underlying facts are not dissimilar to those underlying this case

   i) Annual Accounts of a club include a stadium sale – which is a Related Party Transaction - at consideration of £50m

   ii) Because that Related Party Transaction is included in the Annual Accounts at that consideration, the aggregation of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2 show a loss that is significantly *below* the ULT

   iii) The Executive – as it must do under P&S Rule 2.3 - considers whether the consideration recorded for the Related Party Transaction represents a Fair Market Value

iv) The Executive determines – on the basis of the evidence available to it, in good faith, in accordance with English law and after following an appropriate procedure – that

(1) The consideration of £50m was not at a Fair Market Value

(2) As a result it should restate that consideration to Fair Market Value

(3) That £30m constitutes Fair Market Value

v) Because of the restatement of that consideration to Fair Market Value of £30m, the aggregation of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2 results in a loss that marginally exceeds the ULT – say by £1m

vi) Because the aggregation of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2 results in a loss that exceeds the ULT (albeit marginally)

(1) The Club is treated as being in breach of the P&S Rules, and

(2) That breach – as P&S Rule 2.9 requires – is referred to the Disciplinary Commission in accordance with section 8 of the EFL Regulations

vii) During the course of the proceedings

(1) the valuation experts instructed by the Club and the EFL agree that the range in which the Fair Market Value of the stadium fell was £30-35m, and that the actual Fair Market Value of the stadium was £32m, and thus

(2) it is established that the aggregation of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2, reflecting that agreed Fair Market, results in a loss that is marginally below the ULT.

In such circumstances, on the EFL's approach (1) it would be impossible for the Club to contend that the determination by the Executive fell within any of the grounds in P&S Rule 6.2, and so (2) on the EFL's approach the Disciplinary Commission would be bound to find the 'deemed breach' of the P&S Rules (i.e. deemed by reason of the practical consequence of the 'unchallengeable' determinations by the Executive) proven even though the agreed evidence demonstrated compliance by the club with, not breach by the club of, the P&S Rules by the Club. An interpretation of the P&S Rules and the Regulations that has the potential to result in such an outcome cannot sensibly have been intended.

129) It seems to us that the flaw in the EFL's position arises from it equating

a) The determinations by the Executive – which trigger (albeit indirectly, via the 'deeming mechanism' in P&S Rule 2.3 & 2.9.2) the referral of the 'deemed breach' of the P&S Rules to the Disciplinary Commission for consideration, and

b) What the Disciplinary Commission must determine, namely whether the Club is in fact in breach of the P&S Rules for breaching the ULT as charged by the EFL.

P&S Rule 2.4 (Club to have opportunity to make submissions before the Executive makes its determinations) and P&S Rule 6 (Club to have opportunity to challenge the determinations *per se*, albeit on limited grounds) apply only to the 'determination' process itself. They cease to have relevance once that process has been completed and the time for any P&S Rule 6 challenge has expired.

130) The point can be further demonstrated as follows:

a) If the Executive is minded to consider whether consideration included in that club's Earnings Before Tax arising from a Related Party Transaction has been recorded in the club's Annual Accounts at a Fair Market Value, or whether that consideration should be restated P&S Rule 2.4 gives a club the opportunity to make submissions to the Executive before it does so

b) If the Executive makes a determination under P&S Rule 2 – for example, to restate consideration recorded in Annual Accounts to a different figure that reflects the Executive's view of Fair Market Value - P&S Rule 6.1 gives the affected club the right to have that decision reviewed by a Disciplinary Commission on the limited grounds set out in P&S Rule 6.2

c) If such a review is not made, or is made and fails, then the determination made by the Executive will stand. In the above example, the 'challenged' restatement of the consideration recorded in Annual Accounts to a different figure that reflects the Executive's view of Fair Market Value would stand

d) At that point consideration would be given to the consequence of that determination 'standing'. In the above example
   i) There would be a consideration of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2, with appropriate adjustment having been made to reflect the restatement of the consideration recorded in Annual Accounts to a different figure that reflects the Executive's view of Fair Market Value,
   ii) There would be a consideration of whether the aggregation of those Adjusted Earnings Before Tax for T, T-1 and T-2 resulted in a loss exceeding the ULT, and
   iii) If that consideration led to a conclusion that the ULT had been exceeded, the *prima facie* breach of the P&S Rules would be referred to the Disciplinary Commission for consideration

e) It is then for the Disciplinary Commission to decide whether the club is in fact in breach of the P&S Rules i.e. whether the aggregation of the club's Adjusted Earnings Before Tax for T, T-1

and T-2 do in fact result in a loss exceeding the ULT. The task for the Disciplinary Commission at that stage is not to consider the correctness, rationality or propriety of the Executive's determination; matters have by that time moved on.

131) That then begs the question – how should we approach a determination of whether the Club is in fact in breach of the P&S Rules as alleged in the First Charge? What is the correct approach for us to take when deciding whether the First Charge is made out? The answer to that can be readily ascertained once one returns to first principles:

a) By the First Charge the EFL has charged the Club with breaching the P&S Rules because, the EFL contends, the aggregation of the Club's Earnings Before Tax for years T, T-1 and T-2, adjusted to reflect the Fair Market Value of Pride Park at the date of its sale, exceeds the ULT

b) In the usual way, it is for the EFL to prove that charge on the balance of probabilities

c) Fundamental to proving that charge is a requirement that the EFL proves that the aggregation of the Club's Earnings Before Tax for years T, T-1 and T-2, adjusted to reflect the Fair Market Value of Pride Park, do in fact exceed the ULT

d) It is thus for the EFL to satisfy us, on a balance of probabilities, that the Fair Market Value of Pride Park as at June 2018 was such that, when that Fair Market Value is used in those aggregated Club's Earnings Before Tax for years T, T-1 and T-2 in place of the actual consideration paid to the Club for Pride Park, the ULT is exceeded.

e) In order to determine whether the EFL has succeeded in that task it is necessary for us
   i) To decide whether the EFL has satisfied us that the Fair Market Value of Pride Park was a figure other than £81.1m as at June 2018, and if so, what figure, and
   ii) To consider whether, using that Fair Market View in the Club's aggregated Earnings Before Tax for years T, T-1 and T-2, the ULT is in fact exceeded.

132) The limited grounds of 'challenge' in P&S Rule 6.2 are thus irrelevant for our purposes.

**(F) The First Charge: the Club's Procedural Defences**

133) The logical place to turn next might be thought to be the valuation evidence. However, the Club urges us to consider first the various Procedural Defences to the First Charge pleaded by it in its Response and developed in its written and oral submissions. We consider each such Procedural Defence in turn:

*i) Procedural Defence 1: EFL had already determined Fair Market Value prior to January 2020*

134) The determination of Fair Market Value which underlies this charge was that made by the Executive on 6 January 2020. However, the Club contends

a) That the EFL had already made a determination of Fair Market Value

i) In June/July 2018, and/or

ii) In February 2019, and

b) That it was not entitled to 'revisit' such earlier determinations in January 2020; those earlier determinations should be considered 'final'.

135) We have no hesitation in rejecting that argument for the reasons advanced by the EFL:

a) There is nothing in the P&S Rules to prevent the EFL from revisiting an assessment of Fair Market Value reached in year 'T' when that year has become T-1 or T-2, or to limit the EFL to doing so only in '*exceptional cases*' such as the discovery of a new fact. Indeed, the very structure of the P&S Rules mean

i) That the Executive's first consideration of whether a Related Party Transaction has or has not been at Fair Market Value will come

(1) Before such transaction has been included in the Club's Annual Accounts, and so

(2) Before the Executive even knows '*the consideration … included in the Annual Accounts*' for a Related Party Transaction

ii) That what the Executive is considering in year 'T' is not what is included in a club's Annual Accounts for that year, but what is included in the club's estimated profit and loss account and balance sheet for year T

b) P&S Rule 2.3 required the Executive to consider and determine whether consideration '*in the Club's Earnings Before Tax*' arising from the sale of Pride Park was recorded in the Annual Accounts at Fair Market Value

i) '*Earnings Before Tax*' is defined by reference to '*Annual Accounts*', which is a defined term for the purpose of the P&S Rules

ii) Annual Accounts for Year T (i.e. the year ended 30 June 2018) were not prepared and finalised until 29 March 2019. What the EFL had before that time were (as the P&S Rules require) estimates

iii) It would therefore have been impossible for the Executive to make a determination of the matters in P&S Rule 2.3 prior to that date

iv) The Club's submission that the Executive had somehow reached a 'final' determination pursuant to P&S Rule 2.3 in June/July 2018 or February 2019 cannot be correct

c) As the EFL's evidence demonstrated, a P&S Appendix 1 Form submitted by a club is what determines whether that club initially 'passes' or 'fails' for P&S purposes at the time that the Appendix 1 Form is submitted. When a P&S Appendix 1 Form is submitted, the information available to the EFL by which to assess the correctness of the figures contained therein will be limited. In practice therefore the EFL is heavily dependent in the first instance

i) On clubs submitting figures that are complete and accurate. As the Club accepts, there is an obligation of utmost good faith in that regard

ii) On whatever supporting information might be submitted by a club in support of the submitted figures

d) There is nothing unusual or objectionable about the EFL

i) 'passing' a club's P&S submission based on figures and information provided by that club, and then

ii) subsequently carrying out an assessment of that P&S submission following whatever investigations it considers appropriate and in light of any further information provided or obtained.

Indeed, it is impossible to see how things could work in any other way.

136) What the EFL did in June/July 2018 was consider whether, at that stage, the information provided to it by the Club (including the JLL valuation) was on the face of it a 'pass' – and so sufficient for it to lift the P&S embargo that would otherwise have remained in place on the Club in the summer of 2018. We accept Mr Karran's evidence in that regard. Nothing done by the EFL at that stage

a) Amounted to a 'final' determination of whether the sale of the stadium had or had not been at Fair Market Value, or

b) Prevented the EFL from addressing that issue once Annual Accounts recording the consideration paid for Pride Park had been prepared and finalised.

As the facts of this demonstrate (and as the EFL set out in detail in its written closing submissions) much can and does change between the provision of estimated profit and loss accounts and balance sheets, and the finalisation of Annual Accounts many months later.

137) The position was no different in February 2019 i.e. very shortly before the Club's 2019 P&S Submission was due. Discussions about using a figure of £81.1m in place of £74.4m for the value of Pride Park were simply a continuation of the discussions that had gone on the previous summer:

a) The fact that the Club understood the EFL to be willing to engage in such discussions in February 2019 demonstrates clearly that it did not understand the EFL to have made any sort of 'final determination' for the purposes of the P&S Rules the previous summer

b) There was nothing in the February 2019 communications that amounted to, or could reasonably have been understood by the Club to amount to, a 'determination' of the Fair Market Value of Pride Park.

138) That conclusion is further reinforced by the fact that the P&S Rules operate on a 3 year rolling basis, which means that the EFL is obliged to consider a club's P&S submission for a particular year on 3 separate occasions

a) When that year is T (and when the available financial information is to be found in an estimated profit and loss account and balance sheet)

b) When that year is T-1 (by which time the available financial information should be found in Annual Accounts)

c) When that year is T-2.

There is nothing in the P&S Rules to suggest that the EFL is prevented from 'revisiting' a year during that rolling process if there is reason to do so; it would be surprising if there was *per se* any such prohibition on the EFL doing so given the purpose for which the P&S Rules exist.

139) Even had we concluded that what the EFL had done in June/July 2018 and/or February 2019 did amount to a 'determination' for the purposes of P&S Rule 2.3, we would have accepted the EFL's argument that, absent good reason, it would as a matter of law nonetheless have been permitted to revisit that 'determination' and reach a different determination if that earlier determination was found to have been reached on the basis of fundamental mistake: *Chaudhuri v GMC* [2016] ACD 9 @ para 47.

*ii) Procedural Defence 2: the First Charge is ultra vires*

140) There is a degree of overlap between this Procedural Defence 2 and the above Procedural Defence 1; both have at their heart a contention that

a) The EFL made a 'final determination' of Fair Market Value of Pride Park before January 2020 to the effect that £81.1m was a Fair Market Value (and thus that the Club's P&S Submission did not breach the ULT), and

b) The EFL should be permitted to revisit and reverse that determination.

141) As we have said, the EFL did not make a 'final determination' of Fair Market Value of Pride Park for the purpose of the P&S Rules before January 2020, and certainly did not in any way reach a final determination for all purposes as to whether or not the Club's P&S Submission did or did not breach the ULT. Arguments advanced by the Club to the effect that

a) Principles of legal certainty now require the EFL to be held to one or other of the earlier 'determinations'

b) Its financial planning after June 2018 reflected a belief that the EFL had made a 'final determination' for P&S Rules purposes

therefore fail.

142) There is one further point to be made. P&S Rule 2.3 permits the Executive to restate consideration included in a club's Earnings Before Tax arising from a Related Party Transaction if, but only if, that consideration is recorded other than at a Fair Market Value; if that consideration *is* recorded at a Fair Market Value, then the Executive has no power to restate the consideration. To the extent therefore that the Club might have any *ultra vires* defence, it is a defence that is bound up with its substantive issue; it is not a 'stand-alone' defence.

*iii) A further Procedural Defence relying on Ultra Vires: the 14 day period*

143) Although not pleaded, the Club (after cross-examination of Mr Craig) confirmed an intention to rely on the fact that, despite the terms of P&S 6.3 the EFL failed to allow 14 days to elapse from 6 January 2020 before bringing the Charges against it as a further basis for contending that the Charges are *ultra vires*.

144) For the reasons given by the EFL, that submission has no merit:

a) As we have said above, what is before us is the Charges, not a review of the 6 January 2020 determination. In any event, the Club has chosen not to review that determination

b) To have any force the Club would have to persuade us

i) That until 14 days had elapsed, the EFL could not bring charges arising out of a restatement of Fair Market Value causing a club to *prima facie* breach the ULT, and

ii) That any charges brought prior to that time would be a nullity.

That is just not the case in our view.

*iv) Procedural Defence 3: Contractual Estoppel*

145) In its Response the Club

a) Identifies 7 Representations on which (it is said) the Club relied, and

b) Contends that the EFL is now estopped from asserting to the contrary.

146) The Club fails to make out that Procedural Defence:

a) First, and fundamentally, we reject the suggestion that estoppel principles deriving from private law are applicable without modification to 'cramp' (as the EFL put it)

   i) The exercise by a regulator of its obligations under Rules and Regulations which form a framework governing relations not just between it and one club, but between it and all clubs and between clubs *inter se*. Our view is that the principle described in *Rootkin v Kent* [1981] 1 WLR 1186 @ 1195, and referenced in *Wade & Forsyth* (10th ed) to the effect that the doctrine of estoppel cannot be used against a public body for the purpose of preventing it from exercising a power or authority conferred on it is equally applicable in a situation such as the present. If the EFL has a power to 'revisit' (sic) its assessment of the Fair Market Value of Pride Park in January 2020 (as we have found that it has), then estoppel cannot be used to prevent it from doing so

   ii) The proper legal basis for any complaint to the effect that a body such as the EFL should not be permitted to 'go back on' anything said or done is, as the EFL contends, legitimate expectation: see *Reprotech Pebsham v East Sussex County Council* [2003] 1 WLR 348, cited by the Supreme Court in *Re Finucane* [2019] UKSC 7 @ para 159

b) Secondly, we reject the Club's contentions that the EFL made unequivocal representations of fact in the terms alleged in the Response. To be clear, we of course accept the contents of emails and the like relied on by the Club. However, to suggest (as the Club does) that such emails and statements amounted to '*unequivocal promises and/or representations*' to the effect pleaded goes far too far and ignore the context in which email exchanges and communications took place, including (1) the Club's own desire at the relevant time for the P&S Submission to be 'pushed through' so that the embargo that had been placed upon it could be lifted (2) the structure of the P&S Rules and the manner in which compliance (or otherwise) with the P&S Rules is assessed and determined on an ongoing, rolling basis, (3) the fact that, as Mr Harvey explained, at the time that a club makes a P&S submission, the question of whether or not that submission is a 'fail' or a 'pass' (i) will depend on the club's Appendix 1 form, and (ii) will be heavily, if not entirely, dependent on the figures and information provided by the club. The EFL

will not at that time have had any opportunity to verify (or very often even assess adequately) the correctness and completeness of figures submitted or information provided in support of such figures; that opportunity comes later;  and (4) the fact that the EFL was obliged to consider the Club's financial position, within the framework of the P&S Rules, for the purpose of successive P&S Submissions. The emails and communications relied on by the Club cannot reasonably be read as providing the immutable assurances that the Club now contends

c) Dealing briefly in turn with each Representation relied on by the Club in its Response:

  i) Representation 1 does not take the Club anywhere. That representation did nothing more than confirm the position under the P&S Rules, as interpreted by the EFL (i.e. that profits from the sale of a stadium at Fair Market Value could be included for the purposes of satisfying the P&S Rules)

  ii) Representation 2 was not absolute in the terms suggested by the Club. The EFL at no time represented that, provided the Club provided an '*independent valuation*' of the Stadium, it (the EFL) would accept for all time and for all purposes whatever figure was stated therein as being Fair Market Value

  iii) Representation 3 was similarly not in the absolute terms alleged. The EFL never made a representation to the effect that the 2018 JLL valuation had been '*accepted by the EFL as satisfactory*' for all purposes, or that 'it' (whatever 'it' might have been) was a Fair Market Value

  iv) Representation 4 was indeed an assurance by Mr Karran that the EFL would permit the Club to contend subsequently that the Fair Market Value of Pride Park was £81.1m. It was not however any form of assurance that the EFL was accepting that the Fair Market Value of Pride Park was at least £74.4 for all purposes; as Mr Karran made clear, the EFL was using that figure at that time only for the purpose of '*getting the Club through the process*' that was at that time going on

  v) We reach the same conclusion in relation to Representation 5. Mr Karran's email cannot sensibly be interpreted (and nor do we find it was interpreted by the Club) as an unequivocal promise or representation that the EFL accepted for all purposes and for all time that the Fair Market Value of Pride Park as at June 2018 was at least £74.4

vi) Representation 6 was not an unequivocal promise or representation that the Club '*had complied with the <u>P&S Rules</u> for the 2017/18 Period …*' for all purposes, such that the EFL could not 'go back on' the same. As the Club well appreciated, consideration of P&S Submissions was (and would be) an ongoing process

vii) Representation 7 was not an unequivocal promise or representation

(1) That the EFL was accepting that the Fair Market Value of Pride Park could be irrevocably adjusted upwards to £81.1m, or

(2) That the EFL had determined that £81.1m was an appropriate Fair Market Value for Pride Park.

Representation 7 went no further than confirmation that the EFL was prepared to accept the replacement of the figure of £74.4 with a figure of £81.1m for the purposes of the Club's 2017/18 P&S Appendix 1 Form; it did not in way provide confirmation that the EFL accepted the correctness of that figure as representing Fair Market Value.

147) The Club's Contractual Estoppel Defence thus fails both on the law and on the facts.

*<u>v) Procedural Defence 4: Estoppel by Convention</u>*

148) An estoppel by convention can arise

a) Where contractual parties act on the basis of a shared understanding, communicated between them, and

b) It is unconscionable to permit a party to deny the truth of that shared understanding, typically because the other party has been materially influenced by the shared understanding.

149) Just as Contractual Estoppel is not as a matter of law available to the Club as a defence to the First Charge, so (and for the same reasons) a defence of Estoppel by Convention is not available.

150) In any event:

a) We accept that both the Club and the EFL were aware that JLL had valued Pride Park at £74.4m (on the DRC basis) and £81.1m on the Profits basis. However, it goes too far to say that there was a 'shared understanding' that those figures represented the Fair Market Value of Pride Park. The simple fact is that the EFL did not have any understanding of what the Fair Market Value of Pride Park was; it simply knew what JLL's opinion was

b) There was (and is) nothing unconscionable in the EFL subsequently 'denying' that the JLL valuation represented the Fair Market Value of Pride Park:

i)As above, the EFL retained the ability (and indeed the obligation) to consider the Fair Market Value of Pride Park after June/July 2018 and February 2019

ii) Fairness requires the EFL to be able to 'deny' that the 2018 JLL report represented the Fair Market Value of Pride Park in this case. We return to that in the context of the Club's Legitimate Expectation defence below.

*vi) Procedural Defence 5: Legitimate Expectation*

151) It was common ground between the parties that as the P&S Regulator of the Championship, the EFL is subject to the well-established principles of legitimate expectation. Where the parties differed was whether the 7 Representations relied on by the Club in its Response (to which we have already referred above) individually and/or collectively gave rise to an enforceable legitimate expectation that the EFL '*would accept £74.4m as a Fair Market Value [for Pride Park] and/or that the EFL would accept £81.1m*'.

152) The starting point is a consideration of whether the Representations relied on by the Club are '*clear, unambiguous and devoid of relevant qualification*': *R v IRC ex p MFK Underwriting Agents Ltd* [1990] 1 WLR 1545 @ 1569G-H; *Re Finucane* (supra) @ para 55.

153) We have already addressed above the various Representations relied on by the Club in this regard. In our view none satisfy the relevant test, whether considered individually or collectively. As we have said above, each Representation needs to be understood against the background of the context in which it was made; it is artificial for the Club to pick sentences or passages out of emails or communications and invite the conclusion that, considered objectively by a club in the position of the Club,[20] such words should be reasonably interpreted as amounting to unambiguous representations that the EFL

a) Would accept for all time and for all purposes the contents of the 2018 JLL report, and

b) Would never, for any purpose, revisit the question of the Fair Market Value of Pride Park, and so

c) Would in effect 'disapply' the obligations and powers granted to it by the P&S Rules in relation to the sale of Pride Park and the consideration of whether the sale price reflected Fair Market Value.

The Representations fell well short in our view of satisfying that description.

[20] See *Paponette v AG of Trinidad and Tobago* [2012] 1 AC 1 @ para 30

154) Furthermore, as the EFL contends, the Representations were made against the background of the P&S Rules – in particular, the fact that

a) Any determination of Fair Market Value would not/could not take place until Annual Accounts were prepared and finalised

b) Even then, consideration could *prima facie* be given to the question on more than 1 occasion given the 3 year rolling nature of the P&S Rules.

No club in the Club's position could reasonably have understood anything said or done by the EFL – whether in June/July 2018, a matter of days after receiving the JLL valuation or in February 2019 when Annual Accounts were still awaited and P&S issues continued to be debated – to be fettering the EFL from revisiting the question of the Fair Market Value of Pride Park either when the 2017/18 financial year was year T or when that financial year was T-1 or T-2. To create any sort of legitimate expectation that that would not happen – either at all, or only in certain circumstances – would have required a representation to such effect in the very clearest of terms. There simply was not such representation here.

155) In any event, even had we found that Representations relied on by the Club had given rise to a legitimate expectation on its part, we would have concluded that it was fair in the circumstances of this case to permit the EFL to depart from the same, even if the consequence of that would have been to frustrate a legitimate expectation on the part of the Club. The principal reasons for that are as follows:

a) Under the P&S Rules all Clubs are subject to the same requirements and should be treated equally. That is to ensure that no club should gain a competitive advantage over any other club by virtue of being able to spend excessively in comparison to that's club revenue. While the Club seeks to characterise the primary objective of the P&S Rules as being '*financial stability*', those are, in reality, two sides of the same coin:

i)'*Equality*' does not mean that all clubs have the same spending power at all times

ii) '*Equality*' means that all clubs are required to stay within the ULT over the rolling 3 year period. Whether a club does so will depend not only on that club's expenditure, but also its income

iii) '*Equality*' in this context thus means

(1) That all clubs should operate within the same parameters of financial stability (or perhaps more accurately, financial instability), and

(2) That no club should be permitted to gain a competitive advantage over any other by exposing itself to losses that exceed the ULT

b) On the facts of this case, where the EFL

i)Came to consider the Fair Market Value of Pride Park in 2019/2020, and

ii) Concluded, based on the 2019 WHE Report, that the Fair Market Value needed to be restated from £81.1m

it would in our view have been fair for the EFL to do so even given the representations on which the Club relies in its Response. Fairness requires a consideration not just of the relationship between the EFL and the Club, but also the relationship between the EFL and the other Championship clubs as well as the relationships between the Championship clubs *inter se*. To have required the EFL to be stuck with using a Fair Market Value – even in subsequent years, when the 2017/18 financial year had become T-1 and T-2 – that it considered to be wrong in light of the information then before it, and so to be permitting the Club to continue to benefit from an unjustified competitive advantage resulting from it having spending 'headroom' to which it was *prima facie* not entitled – would offend such principles of equality and fairness, and would have justified a departure from any legitimate expectation that the Club might otherwise have had.

156) The EFL relied on one final (unpleaded) ground to defeat the Club's pleaded legitimate expectation defence, namely the fact that the Club had not 'placed all its cards on the table' at the time of the Representations relied on by the Club: *R v IRC ex parte Matric Securities* [1994] 1 WLR 334. In that regard it relied on the fact that the Club had (or may well have) manipulated the 21 June 2018 that it had received from JLL before forwarding that email (and an attachment) on to the EFL as we have described above.

157) Had we considered that the Club's legitimate expectation defence had any merit, we would not have concluded that such matters defeated it. The email as forwarded to the EFL did not (contrary to the EFL's submission) '*give the misleading impression that JLL's first DRV valuation was £74.4 million, which was simply not true*'. While that email

a) Gave an incorrect impression that JLL's DRC valuation of Pride Park had been £74.4m as at 21 June 2019 (which it had not been), and

b) Gave no hint that JLL had revised its DRC valuation of Pride Park upwards to £74.4 following discussion with the Club

the Club's failure to 'put those cards on the table' would not have sufficed to defeat an otherwise sound legitimate expectation defence. As we have found, the email in fact sent to the EFL enclosing the manipulated 21 June 2019 JLL email (if that is what it was) did not misrepresent the views of JLL at the time that that email was sent to the EFL; instead, it accurately reflect those views. Had

the EFL cared about whether JLL had previously expressed any other view, it would no doubt have asked.

*vii) Procedural Defence 6: No Annual Accounts*

158) This Procedural Defence depends on a finding – necessary, the Club says, if the Second Charge is to succeed -

a) That because the financial statements filed by the Club do not (on the EFL's case) comply with FRS 102 and so do not comply with '*all legal and regulatory requirements applicable to accounts pursuant to section 394 of the Companies Act 2006'*, they are not 'Annual Accounts' for the purpose of the P&S Rules

b) The Club has accordingly not filed any Annual Accounts for the purposes of the P&S Rules for the years under scrutiny.

159) The Club's argument is to the effect that

a) Because the Club has filed no Annual Accounts, there cannot have been any (or at least, any valid) restatement by the EFL of any '*consideration … recorded in the Club's Annual Accounts*' arising from a Related Party Transaction to Fair Market Value for the purposes of the P&S Rules, and so

b) There cannot have been any effective aggregation of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2 for the years under scrutiny to a level which amounts to a loss in excess of the ULT, and so

c) The First Charge cannot succeed.

160) The EFL's description of that position is 'arid and technical' is in our view a correct one. It is also a position that has no merit. Even if we were to conclude that, because they failed to comply with FRS 102, the Club's Annual Accounts did not comply with the relevant legal and regulatory requirements, that would not mean

a) That the Club had failed to submit Annual Accounts *per se*. It would simply mean that the Club had failed to submit compliant Annual Accounts

b) That the EFL was somehow prevented from considering the submitted documents for the purpose of

i)Assessing whether the ULT had been exceeded by the Club for the years under scrutiny or

ii) Considering whether Related Party Transactions recorded therein were or were not recorded at Fair Market Value.

*viii) Procedural Defence 7: Abuse of Process*

161) At the heart of this defence is a belief on the part of the Club that the First Charge has been brought against it because the EFL

a) Has improperly succumbed to pressure from MFC (and other clubs), and
b) Has brought the Charge solely or principally to prevent MFC from pursuing the MFC proceedings against it.

162) It is uncontroversial

a) That civil proceedings pursued for an improper ulterior purpose are an abuse of process and liable to be struck out: *Goldsmith v Sperrings* [1977] 1 WLR 478 @ p503
b) That abuse of power by a prosecutor can justify criminal proceedings being stayed: *R v Beckford* [1996] 1 Cr App R 94 @ p100-101
c) That a decision to prosecute a criminal charge dictated by '*some irrelevant consideration*' is vulnerable to challenge: *The Cheng Poh v Public Prosecutor of Malaysia* [1980] AC 458 @ 475.

163) We accept that similar principles would apply in disciplinary or regulatory proceedings. Charges brought against an entity

a) Because the prosecuting authority had been improperly influenced to do so by an irrelevant consideration, or
b) For an improper purpose

would be liable to be dismissed as being abusive.

164) Having carefully considered the evidence – both the contemporaneous documentation and the oral evidence given by the EFL's witnesses – we had no hesitation in rejecting the Club's analysis/suggested interpretation of the evidence contained in its written Closing Submissions and concluding that the Club failed to make out this defence on the facts:

a) It is correct, as the EFL has always accepted, that complaints from MFC (and other clubs) about
   i) the EFL's willingness *per se* to allow clubs to include profits from the sale of stadia for the purpose of P&S submissions, and
   ii) the sale of Pride Park having taken place at a price of £81.1m

   prompted it in 2019 to consider both matters

b) There is nothing inappropriate or improper about that. Investigations are frequently begun as a result of complaints by third parties

c) Those investigations included the appointment of WHE. While there was much cross-examination about

i) The precise purpose for which that appointment was made, and

ii) What occurred at a presentation given by WHE in October 2019

that cross-examination got the Club nowhere. There was nothing inappropriate in the instruction of WHE or the role played by WHE

d) Having decided to consider both matters, the EFL's own investigations (primarily the commissioning of the 2019 WHE report) led it to conclude

i)That the Fair Market Value of Pride Park had been significantly less than £74.4m/£81.1m as at June 2018

ii) That the consideration recorded in the Club's Annual Accounts for the sale of Pride Park should accordingly be restated

iii) That by virtue of such restatement the Club had exceeded the ULT for each of the 3 year periods when the 2017/18 Annual Accounts were T and T-1

e) Having reached that conclusion, the proper application of the P&S Rules (in particular P&S Rule 2.9) leads inevitably to a referral to a Disciplinary Commission in accordance with section 8 of the Regulations i.e. to the initiation and prosecuting of disciplinary proceedings.

165) It is of course true that in parallel with those investigations

a) MFC commenced the MFC proceedings (despite the EFL's best efforts to persuade it not to do so, particularly while the EFL's investigations were ongoing), and

b) The Club and MFC reached the agreement to stay the MFC proceedings recorded in the 29 November 2019 letter.

166) However, we reject the suggestion that such matters in any way improperly influenced the EFL into initiating or pursuing the First Charge against the Club when it would not otherwise have done so:

a) As at 29 November 2019 the EFL's investigations into the Fair Market Value of Pride Park were ongoing. The 2019 WHE Report was imminent - it was dated 2 December 2019, the next working day after 29 November 2019 – and is inconceivable that as at 29 November 2019 the EFL was unaware that the 2019 WHE Report would not support a Fair Market Value of £81.1m. Mr Craig effectively accepted as much in cross-examination. It was thus inevitable that the EFL would, in light of that, need to undertake the restatement process required by the P&S Rules

b) We see nothing objectionable in the EFL having agreed a stay of the MFC proceedings while that was undertaken. Indeed, there would have been nothing objectionable in the EFL agreeing a stay of the MFC proceedings *per se* even had the investigations been at a much earlier stage and the EFL been unaware whether there might be any need for it to embark on a restatement process pursuant to the P&S Rules

c) The 29 November 2019 agreement did not oblige the EFL to pursue a charge against the Club. It simply made the stay of the MFC proceedings conditional on the EFL doing so – in other words, it provided that if the EFL did not pursue disciplinary proceedings against the Club, MFC would be free to reactivate and pursue the MFC proceedings against the EFL

d) The EFL did not irrevocably commit to charging or prosecuting the Club; it simply confirmed that it would do so if, having complied with P&S Rules 2.3 & 2.4, the aggregation of the Club's Adjusted Earnings Before Tax in 2017/18 and/or any other season resulted in a loss that exceeded the ULT in accordance with P&S Rule 2.9. In other words, the confirmation given by the EFL in the 29 November 2019 was nothing more than confirmation that

   i) It would comply with P&S Rules 2.3 and 2.4 – something that it was obliged to do in any event

   ii) If that process resulted in Rule 2.9 of the P&S Rules being triggered, it would commence disciplinary proceedings against the Club – again, something that was a mandatory consequence of a finding that the aggregation of the Club's Adjusted Earnings Before Tax in 2017/18 and/or any other season resulted in a loss that exceeded the ULT: P&S Rule 2.9.2.

167) Put simply, we reject the Club's contention that the First Charge was brought against it by the EFL to 'buy off' the MFC proceedings, or to secure some form of actual or perceived benefit vis a vis MFC, or because of pressure from MFC. We reject the suggestion that the terms on which the MFC proceedings were stayed represented '*an extraordinary bargain*' by the EFL, or that it created '*stark conflicts of interest*' as the Club has contended. That was not, we find, the case:

a) The motivation for the EFL agreeing to stay the MFC proceedings as it did was, we find, to potentially avoid having 2 sets of proceedings addressing the same subject matter running parallel to one another. That was sensible; indeed, the 29 November 2019 agreement records the desirability of avoiding that outcome

b) The spectre of the MFC proceedings played no part, or certainly no material part, in the EFL's decision to bring the First Charge against the Club:

i) The EFL investigated the Fair Market Value of Pride Park without influence or interference from MFC

ii) Having done that, the EFL considered its obligations under the P&S Rules without influence or interference from MFC. It did so at the 6 January 2020 meeting to which we have referred above, and it did so without any mention of MFC or the MFC proceedings being made

iii) Having done that, the EFL concluded that the ULT had been exceeded for the relevant 3 year periods (with the 2017/18 year as T and T-1)

iv) Having reached that conclusion, a referral to the Disciplinary Commission – the initiation and pursuit of a charge – was mandatory under the P&S Rules.

168) We therefore find that the Club did not establish that the bringing of the First Charge was an abuse of process.

*ix) Conclusions on the Procedural Defences to the First Charge*

169) We dismiss each of the Procedural Defences to the First Charge raised by the Club.

170) Having done so, we can finally turn to the substantive issue of the Fair Market Value[21] of Pride Park as at June 2018 that lies at the heart of the First Charge.

[21] The terms 'Fair Market Value', 'Fair Value', 'Market Value' and a valuation pursuant to RICS Valuation – Global Standards 2017 were used by various individuals in various different contexts. It was however accepted that for our purposes there is no material difference between those terms.

## (G) The substance of the First Charge

*i) Background information about Pride Park*

171) Pride Park was opened on 18 July 1997, and thus had been operational for almost 21 years as at June 2018. It is an all-seater stadium with a capacity of 33,455. It is a 'bowl' structure:

a) Construction has been completed all around the pitch (and not simply along the touchlines and across each end, leaving corners 'empty')

b) Much of the structural steel work forms a cantilevered roof support on the exterior of the stadium, providing uninterrupted views of the pitch from all parts of the stadium.

172) The stadium includes all facilities that one might expect from a modern stadium – changing rooms, extensive hospitality and banqueting facilities including executive boxes, and extensive 'back of house' facilities including kitchens, offices, storage and the like. There is also a Club shop, a restaurant, and a shop let to a food retailer.

173) In addition

a) When built, Pride Park was constructed using strengthened steel foundations. That was done to allow capacity to be expanded to 44,000 (by additional tiers) if that was desired or needed in the future

b) Since construction a considerable sum has been spent on Pride Park; we were told that since 2016 alone some £9m had been spent on capital expenditure. Some of that expenditure is what one would expect to see at any stadium to maintain and preserve it, particularly as it ages. However, some expenditure reflects 'upgrades' to the stadium that have been funded to provide it with facilities that one would expect to find in a stadium built more recently than 1997 (i.e. a more 'modern' stadium). Examples include

   i) A SISGrass hybrid pitch with undersoil heating
   ii) Hospitality area upgrades
   iii) Hard wiring for SKY TV
   iv) LED advertising boards around the playing pitch
   v) Multiple media rooms and camera positions
   vi) Upgraded floodlights to provide enhanced luminosity levels.

   In the Club's eyes, such upgrades mean that the facilities at Pride Park are (and were as at June 2018) at '*almost Premier League standard*'.

174) Each of the experts expressed views on the 'quality' of Pride Park and the facilities provided. However, while Mr Honeywill of LSH had inspected Pride Park for the purpose of these proceedings, Mr Messenger of WHE had not:

a) He had inspected Pride Park '*a number of years ago*' for an entirely different purpose
b) A colleague at WHE had inspected Pride Park in September 2019, presumably to assist with the preparation of the WHE 2019 Report.

In those circumstances we preferred Mr Honeywill's assessment of the quality of Pride Park to Mr Messenger's view that Pride Park is '*bog standard*'; that in our view is too dismissive of Pride Park. We accept that its facilities are '*almost at Premier League standard*'.

*ii) Some further words about the valuation experts generally*

175) We have already indicated above that we found no basis

a) To doubt the independence of either expert, or
b) To conclude that either expert lacked the experience or expertise to give evidence on the issues on which he had been instructed.

We therefore reject those criticisms made by the Club of Mr Messenger.

176) However, there were aspects of Mr Messenger's evidence that caused us to treat his evidence generally with care, and on more than occasion to prefer the views expressed by Mr Honeywill to the views expressed by Mr Messenger:

a) His experience of valuing stadia is not extensive. That is not a criticism *per se* – stadium valuation is very much a niche practice given the paucity of such properties and the relative infrequency with which they might need valuing. However, we reached the firm impression
   i) That the description in his report about his (and WHE's) experience of stadium valuation could have been better worded:
      (1) The 'valuations' described therein were in fact a mix of stadium valuations and rateable valuations
      (2) He had only 'led' on 2 of those stadium valuations, and been involved in a few others
   ii) That even then the nature of certain of those 'stadium valuations' was over-stated. The claimed valuation conducted for Chelsea FC was an example of this. Mr Messenger's report implied that this had been a stadium valuation. His oral evidence was that this had been a stadium valuation. When cross-examined it emerged that WHE's involvement had in fact been in relation to a consideration of '*capital values of hotel sites*' at Chelsea.

   We therefore concluded that Mr Messenger's experience of stadium valuation was certainly less extensive than that of Mr Honeywill. We return to the relevance of this below

b) Much of the information Mr Messenger relied on for the purpose of his assessment of value was what might properly be described (and was described by him) as '*market intelligence*' gleaned from sources which (even after his evidence) were often unclear. Despite that, Mr Messenger was often unwilling to accept the possibility that such 'intelligence' might be unreliable without objective corroboration. That is to be contrasted with Mr Honeywill, who was far more open about the sources of his information (and, where appropriate, any 'risks' or uncertainties inherent in using information from those sources) and who was also able to call on first-hand experience to support his information

c) Mr Messenger was frequently defensive about stadia said by him to be comparable, even when (as we describe further below) the evidence demonstrated clear differences between Pride Park and those stadia. In a similar vein he was frequently dismissive of views expressed by others – both JLL and Mr Honeywill – when, at the very least, their views merited greater considered thought on his part and often, in our view, were well justified. There were a number of examples in the evidence. Perhaps the starkest was The Globe Stadium at Morecambe:
   i) Mr Messenger's report identified that stadium as being one of the stadia '*most applicable to Pride Park*' for the purpose of carrying out a DRC valuation (see paragraphs 3.9.5 and 3.9.7 of the 2019 WHE Report, confirmed by Mr Messenger in his evidence). That stadium – completed in 2010 at a cost of £12,000,000 – was said by Mr Messenger
      (1) To have a capacity of 6,476, and so
      (2) To give a cost per seat of £1,853 as at 2010, which (adjusted for TPI) equated to either £2,927.73 or £3,020.38 as at June 2018 – each paragraph of the 2019 WHE Report gave a different figure
   ii) However, it emerged that
      (1) The Globe comprises a single seated stand; the other 'stands' are covered terracing
      (2) The seated capacity of The Globe is only 2,200; the balance of its capacity is standing
      (3) The Globe is on any view inferior to Pride Park in its qualities and facilities
   iii) Despite that, Mr Messenger refused to countenance any criticism of his reliance on The Globe Stadium

d) Even allowing for the pressures of giving evidence (and doing so remotely) we were concerned that Mr Messenger made so fundamental a mistake in relation BCIS data, upon which he relied to support his assessment of market value. He confirmed in his oral evidence that the figure of '*£2444*' in the 2019 WHE Report was a 'price per seat' figure, and he relied on that to support his own analysis of 'cost per seat' in this case. However, it was subsequently explained by the EFL (after his evidence had been concluded) that he had made a mistake in that regard; the

figure of £2,444 was in fact a cost ‘per square metre’. That was a fairly fundamental matter, and no explanation was offered as to how the mistake came to be made or what impact it had on his views

e) We were also concerned in relation to Mr Messenger’s production during his evidence of a page from the RICS isurv website titled ‘*Depreciated replacement cost: worked examples – Football stadium: over-specified*’ and his reliance on that page to support on his position on the appropriate multiplier to be applied to the ‘cost per seat’ when preparing a DRC valuation (see below):
   i) The Index set out on that page listed (immediately above the reference to the page that he produced) a further page on the RICS isurv website titled ‘*Depreciated replacement cost: worked examples – Football stadium: purpose built*’
   ii) Mr Messenger did not voluntarily produce that further page; we had to ask for a copy
   iii) That further page was plainly relevant to the task that he was performing and on any view had the capacity to undermine his evidence on the appropriate multiplier
   iv) Our concern therefore was not the late production of the ‘*Football stadium: over-specified*’ page, but his non-production at the same time of the ‘*Football stadium: purpose-built*’ page. Either he had not looked at that page, despite its obvious potential relevance based on its description in the Index, or he had looked at it and decided not to provide it despite its obvious relevance. That could only have been because he considered it did not support his position.

   Out of fairness to Mr Messenger we record that none of the above was put to him and so he had no opportunity to provide an explanation for his failure to provide both pages at the same time. However, that was primarily because of the fact that the second page was only produced after he had concluded his evidence

f) While we accept (as we explain below) that having conducted a valuation on a particular basis it is desirable to ‘stand back’ and consider whether that valuation ‘fits’ with other available information, we were concerned by Mr Messenger’s reliance on information relating to the sales of comparable stadia for this purpose:
   i) The sales upon which he relied covered the period 1989 to 2019
   ii) Each sale price was recorded in his report as ‘*unconfirmed*’; some were simply derived from press reports
   iii) While he acknowledged that the use of known transactions was ‘*potentially problematic*‘ given the significant risk that transactions might be at less than arms-length, there was no attempt by him to analyse any of the stadium sales on which he relied to assess whether

they had in fact been at arms-length. In fact, many of those relied on by him were not arms-length sales

iv) There was no attempt by him to identify the terms on which such sales had taken place. A stark example of this emerged in cross-examination:

(1) Mr Messenger had relied on the sale of the Ricoh Arena as a sale of a comparable stadium

(2) The issues surrounding that sale are well-known, yet Mr Messenger made no reference to them

(3) It was only in cross-examination that he agreed that the terms of that sale were 'complicated'

v) There was no attempt by him to compare or contrast the various stadia or make any adjustment to reflect similarities or differences with Pride Park.

Our conclusion was that Mr Messenger's use of sales information to 'sense check' his DRC valuation in reality gave false comfort to his DRC valuation; the information on which he relied in that regard was in our view so unreliable that it could not provide the comfort that he sought, and we were surprised in the circumstances that he relied on it to corroborate his DRC valuation

g) Mr Messenger was also on occasion reluctant to answer questions directly, and on occasion used his answers as an opportunity to criticise JLL and/or advocate the EFL's case. While that did not detract from the substance of his evidence unduly, it did cause us to be concerned that he might be losing sight of his duties as an independent expert.

*iii) The valuation history of Pride Park*

177) As well as the reports prepared for these proceedings by Mr Messenger and Mr Honeywill, we were also provided with a number of valuation reports that had been prepared for the Club in recent years:

a) In December 2007 Peter Clarke of King Sturge valued Pride Park. He did so on various bases, including the DRC method. The King Sturge report

i)Recorded (as one of '*two particular features of the structure*' of Pride Park) that '*construction has been completed all around the pitch including the corners which are areas where construction costs per seat are at the maximum*' (emphasis added)

ii) Estimated (as at December 2007) that the current replacement of the stadium and its facilities amounted to a little over £77million. The report noted '*In making this assessment we have consulted with our building surveyors who have in turn used the various building cost indices to arrive at this overall figure. In addition to this we have added professional fees for the*

*construction and an appropriate allowance for finance during the construction period to arrive at an overall replacement cost*'

iii) Depreciated that sum by 10% for functional obsolescence, and further adjusted that sum to reflect the fact that Pride Park was by then 10 years old, out of an estimated overall lifespan of 60 years

iv) Concluded that the value of Pride Park on a DRC basis was £70,000,000, which equated to £2,029 per seat. In carrying out that calculation King Sturge used the stadium's actual capacity of 33,455 as the multiplicand

v) Gave lower valuations for Pride Park on other bases (including a profits basis)

b) In May 2013 Mr Clarke – by then of JLL – valued Pride Park again. He again did so on various bases, including the DRC method, as at 31 December 2011 and 31 December 2012. The 2013 JLL report

i)Adopted a build cost of £2,750 for the year 2012 and £2,800 per seat for 2011. The 2013 JLL report recorded that '*Generally the cost of stadiums has increased in the past few years … We are however now noting a stabilisation or even reduction in some cases of build costs for this type of specialist property, particularly for sub-40,000 capacity stadia*'

ii) Estimated '*re-build costs*' of £93,500,000 for 2012 and £92,000,000 for 2011. That figure was thus up from £77m in the 2007 King Sturge Report

iii) Depreciated those sums by 23% for physical depreciation and a further 15% for functional depreciation – a total of 38% - before adding professional fees and finance costs, and a sum to reflect land value (at £350,000 per acre)

iv) Estimated the value of the stadium at £69,500,000 (as at 31 December 2011) or £66,500,000 (as at 31 December 2012) on a DRC basis, equivalent to £2,077/£1987 per seat

v) Gave lower valuations for Pride Park on other bases (including a profits basis).

178) We have already made reference above to the June 2018 JLL report, prepared on that occasion by Mr Drury of JLL. The 2018 JLL report

a) Remarked on the nature of the stadium (as King Sturge had done), and also noted that the '*construction to the corners … typically involves the highest construction costs*'

b) Considered the value of the stadium on various bases including a DRC basis and (in light of substantial financial information that had been made available to JLL by the Club) a profits basis

c) Concluded that, by reference to comparable stadia constructed between 1997 and 2018 and having consulted with its internal building cost team, '*a rate of £3,000 per seat is appropriate for construction of a modern equivalent of Pride Park stadium as at June 2018*', giving an estimated rebuild cost as at June 2018 of just over £100m. The calculations at Appendix 6 of the JLL report also 'bracketed' that figure with

   i) A '*Min rate*' of £2,500 as cost per seat (equating to a minimum build cost for a modern equivalent of Pride Park of £83.6m), and

   ii) A '*Max rate*' of £3,500 as cost per seat (equating to a minimum build cost for a modern equivalent of Pride Park of £117.1m)

d) Depreciated that sum by 28.3% for physical depreciation ('*due to good Cap-ex*') and a further 5% for functional obsolescence – a total of 33.3% before adding professional fees and finance costs, and a sum to reflect land value (at £500,000 per acre)

e) Estimated the value of the stadium at £74,400,000, on a DRC basis, equivalent to £2,224 per seat

f) Gave a higher valuation (£81.1m) for Pride Park on a profits basis.

<u>*iv) The expert reports in the proceedings: the starting point*</u>

179) Each of Mr Messenger and Mr Honeywill produced detailed reports setting out their views on the market value of Pride Park as at June 2018. They also produced a Statement of Agreed Issues and Issues Not Agreed. It is convenient to start with that document:

a) <u>Agreed Issues:</u>

   i) That the primary method of valuation most appropriate to a valuation of a football ground is that of DRC. DRC is defined in the relevant RICS Professional Standard and Guidance as '*The current cost of replacing an asset with its modern equivalent asset ['**MEA**'] less deductions for physical deterioration and all relevant forms of obsolescence and optimisation*' and describes the MEA as a '*hypothetical substitute*' for the asset being valued. It goes on '*The technique involves assessing all the costs of providing a [MEA] using pricing at the valuation date*':

      (1) Using the DRC method to value an asset such as a stadium thus requires the valuer to (i) estimate the rebuild cost of a new equivalent stadium as at the valuation date, (ii) discount that figure to account for matters such as obsolescence and depreciation, and (iii) adjust the discounted figure to reflect finance costs and land value

(2) It was common ground between the experts

(a) that a DRC valuation involves subjective exercises of judgment, and

(b) that changes to the assumptions used – even relatively minor changes – can lead to significantly different resulting valuation figures

ii) That a Profits method of valuation is unreliable as a primary method of valuing a football ground

iii) That Mr Messenger also placed a degree of reliance on the Rentals/Comparison method (particularly, comparison with prices generated from sales of other stadia) as a cross-check on the application of DRC

b) <u>Issues Not Agreed:</u>

i)DRC – Build Cost;

(1) Both experts utilise a 'cost per seat' approach as a short form to analyse and value stadia

(2) Build costs as at June 2018 are not agreed:

(a) Mr Messenger applies a range of £1,600 - £1,900 per seat plus 15% fees (and so a range of £1,840 - £2,185 inclusive of fees)

(b) Mr Honeywill applies a figure of £3,500 per seat inclusive of fees

ii) DRC – Capacity to Adopt:

(1) Mr Honeywill applies a multiplicand of 33,455 to his 'cost per seat' i.e. the actual capacity of Pride Park

(2) Mr Messenger a multiplicand of 28,000 to his cost per seat i.e. the average attendance at Pride Park in the past 3 seasons.

*<u>v) The expert reports: approach to valuation</u>*

180) As above, both experts agreed that the DRC method was the most appropriate to apply to the valuation of Pride Park in this case. Both also agreed that it was advisable to 'stand back' after a DRC valuation in order to sense-check the figure arrived at. As was explained in the 2019 WHE Report (at paragraph 3.9.15), that is because

> '… the DRC method is considered a 'fall back' approach to determining value and is not one which can necessarily reflect disposal on the open market. The valuation itself is extremely sensitive and the inputs any valuer uses will impact upon the overall value and is very much driven by supporting evidence and valuer judgment'.

181) The EFL is critical of the fact that Mr Honeywill did not include such a 'sense check' in his report, and only sought to do so orally. We reject that as a criticism of any substance – it was clear to us that Mr Honeywill had indeed done such an exercise prior to being asked about in cross-

examination, and that he was content that his DRC valuation did indeed stand up to such ‘sense check’. He had done so using his experience of stadium valuation and his knowledge of the cost of recent stadium construction projects in order to ‘stand back’ and ask whether a build cost of £3,500 per seat was or was not reflective of reality. He had also done that exercise to consider whether the much lower build costs put forward by Mr Messenger were realistic.

182) Conversely, as we have set out above, while Mr Messenger plainly had attempted to ‘sense check’ his assessment of value on a DRC basis by reference to comparable sales, his failure to analyse those sales with sufficient care in our view led him to find comfort for his DRC valuation when he should have found none. He failed to ‘stand back’ and ask whether his range of £1,840 - £2,185 per seat really was reflective of what a stadium akin to Pride Park could have been built for in June 2018. He lacked the experience of Mr Honeywill to be able to perform that task effectively.

*vi) The first principal issue between the experts – actual capacity v average attendance*

183) It was common ground between the experts

a) That the actual capacity of Pride Park is 33,455, and
b) That the average attendance at Pride Park for home league matches in the 3 seasons 2016/17, 2017/18 and 2018/19 was just under 83%, in the region of 27,800.

184) Mr Messenger’s view was that in order to value Pride Park on a DRC basis, the cost per seat should be multiplied by that average capacity, and not by the actual capacity of Pride Park. His reasoning, in a nutshell, was that

a) Valuing an asset on a DRC basis does not require the valuer to assume that the replacement asset would be in all respects ‘like for like’ with the asset being valued; it requires the valuer to consider what asset a hypothetical buyer ‘*would ideally require at the valuation date in order to provide the same level of productive output or an equivalent service*’ to the asset being valued, and to determine (as part of the DRC valuation process) the cost of building that hypothetical replacement asset

b) A hypothetical buyer in June 2018 would not have required a stadium the size of Pride Park in order to provide the same level of productive output or equivalent service; a hypothetical buyer would have required a stadium of a size sufficient to seat the average home attendance enjoyed by the Club in recent years, and no more.

185) We had no hesitation in rejecting that for the following principal reasons:

a) First, it is an approach that Mr Messenger alone appears to take:

   i) In his many years of valuing stadia that was not an approach that Mr Honeywill had ever seen taken by any other valuer. He did not regard it as appropriate, save perhaps in an extreme case – one example was given of a stadium that appeared to have been built as a vanity project with a capacity of 25,000-odd despite average attendances of the club being only a tiny fraction of that figure

   ii) It was not the approach taken in the King Sturge report or 2013 JLL report

   iii) It was not the approach taken in the 2018 JLL report

b) Secondly, despite Mr Messenger's opinion to the contrary, it is not in our view the view advocated in section 8 of the RICS Guidance on '*Depreciated replacement cost method of valuation for financial reporting*' ('***the RICS DRC Guidance***'). While that section does indeed make clear that a valuer should consider whether the modern equivalent asset would be of the same size as the actual asset under scrutiny, that is to ensure that efficiencies inherent in modern construction are not overlooked; the examples given of 'open plan space' or 'clear span space' providing the same accommodation over a smaller footprint in comparison to an older building offering fragmented accommodation makes that clear. Here, 'smaller' is not to be equated with 'fewer seats'

c) Thirdly, Mr Messenger's reliance – referred to for the first time in his oral evidence – on the RICS isurv Worked Example '*Football stadium: over-specified*' to which we have referred above to support his interpretation of section 8 of the RICS DRC Guidance was misplaced. That worked example is said to relate to '*a 20 year old purpose built football stadium with 30,000 seats. The football club has been relegated <u>and they **never** managed to more than half-fill the stadium</u>*' (emphasis added). We can well understand why in those circumstances – where a club has never managed to attract a crowd over 15,000, and is most unlikely to do so in the future having been relegated – a valuer would not value on a DRC method by assuming a hypothetical MEA with a capacity of 30,000. However, that is not the case here; over the period on which Mr Messenger focussed

   i) The Club regularly attracted crowds <u>above</u> the figure of 28,000 proposed by Mr Messenger for a MEA,[22] and

   ii) Attendance never fell below 23,000 i.e. approximately 70% of actual capacity

[22] In 16 of 23 home matches during 2016/17, 6 of 24 home matches in 2017/18 and 8 of 24 home matches in 2018/19.

d) The more helpful illustration appeared to us to be given in the RICS isurv Worked Example '*Football stadium: purpose-built'* where a DRC valuation which used <u>actual</u> capacity was set out. As we have said

   i) Mr Messenger did not volunteer that further example as part of his evidence, and we had to ask for a copy

   ii) That he did not do so was surprising, given its obvious relevance

e) Fourthly Mr Messenger also paid no heed to the fact that

   i) Due to crowd control issues a Club can rarely, if ever, achieve full capacity any more. Home and away fans are kept apart, and seats left empty as a result. It is therefore artificial to suggest that any recorded attendance less than 33,455 automatically meant that Pride Park was not 'sold out' or that there was unused capacity at a particular match

   ii) Away teams receive a seat allocation for all matches. That fact again undermines any suggestion that an attendance less than 33,455 meant that there was still capacity at Pride Park for home fans, or that 'supply' regularly outstripped 'demand' from home fans for seats during the relevant period

f) Fifthly, Mr Messenger's approach focussed on size/seating capacity alone, while the RICS DRC Guidance requires a valuer to focus on '*service potential*' when considering equivalence. A modern equivalent stadium with a capacity of 28,000 could provide an equivalent service if that attendance was never reached, or was only rarely reached. However, a modern equivalent stadium with a capacity of 28,000 would not in our view provide an equivalent '*service potential*' to Pride Park given

   i) The actual attendances achieved at Pride Park, and

   ii) The reductions from that figure of 28,000 that would inevitably have to be made to accommodate away fans, ensure adequate crowd separation and so forth

g) Sixthly, Mr Messenger's approach lacks any sort of commercial logic. A modern equivalent stadium with a capacity of 28,000 would mean that the Club

   i) Would be turning away supporters for a good proportion of its home games, and

   ii) Would potentially be turning away tens of thousands of supporters over the course of a season.

   Such a stadium would not in our view '*provide the same level of productive output or equivalent service*' as is currently provided by Pride Park; it would not be a modern equivalent asset.

h) Seventhly, Mr Messenger's approach would, taken to its logical extreme, mean that stadia would be built ever-smaller since self-evidently no club would ever enjoy 100% attendance for every match.

186) As a result, we rejected this element of Mr Messenger's approach and preferred the approach adopted by Mr Honeywill. The correct multiplier to adopt is, in our view, 33,455.

*<u>vii) The second principal issue between the experts – build cost per seat as at June 2018</u>*

***a) The first question – cost to build what?***

187) Valuation using the DRC method requires one to assess the cost of constructing a modern replacement asset.

188) It is important to appreciate that that does not necessarily mean the cost of replacing 'like with like'. As the section 8 of the RICS DRC Guidance makes clear, the actual or estimated cost of reproducing the actual asset *may* be relevant in the assessment

a) That will only be the case if it represents the modern equivalent, and
b) There will be many cases, especially with old or obsolete assets, where that information will require careful review.

That section explains (with our emphasis added) '*The general principle is that the costs reflect those of a modern equivalent asset that offers an equivalent service <u>potential</u> to the actual asset*'.

189) The RICS DRC Guidance continues:

> 'In order to assess the cost of a [MEA] the valuer needs first to establish with the entity the size and specification that the hypothetical buyer would ideally require at the valuation date in order to provide the same level or productive output or an equivalent service. The size required might be the same as the existing building but, particularly where the actual building is old, it may be the case that the modern equivalent building could be smaller yet still provide the same level of service. For example, a modern building will often be able to offer more efficient space, as it can provide open plan or clear span areas that have a greater capacity than an older building with fragmented accommodation … Having established the size of the modern equivalent to be costed, the valuer may need to determine with the entity an appropriate specification for the building that would deliver the same economic service potential. It cannot be assumed that this would be the same as the actual building, especially if it is not new. The design and construction of a modern equivalent may differ from the existing building because features of the latter are now unsuitable or just irrelevant for the needs of the entity … Care has to be taken to consider the service that is being provided within the building and to price for a specification that would be compatible with the service potential of the subject building'.

190) During the oral evidence it emerged that (subject to one wrinkle, namely capacity) there was in fact relatively little between the experts as to what this meant in practice. The experts agreed

a) That large, state of the art stadia (such as those occupied by Manchester City, Arsenal and Tottenham Hotspur) should be ignored, on the basis that those stadia provide facilities far in excess of those that would be offered by a modern equivalent to Pride Park, and

b) That very basic stadia should similarly be ignored, on the basis that the facilities provided by those stadia would be far inferior to those that would be offered by a modern equivalent to Pride Park.

They agreed – and we would have found in any event – that what is needed at the outset when assessing a Modern Equivalent Asset is a consideration of the qualities and facilities offered by the subject stadium; once that exercise has been carried out, (1) the qualities and facilities required of the hypothetical equivalent in order to offer an equivalent level and quality of service can be identified, and (2) an assessment of the cost of constructing that hypothetical equivalent can take place.

191) Where the experts differed however was

a) Where within the 'middle of the range' Pride Park falls. As summarised above, Mr Messenger described Pride Park as '*bog standard*' while Mr Honeywill identified

   i) A number of original features which in his view elevated Pride Park above that level from the very outset (such as the 'built' corners/bowl-type nature of the stadium and the strengthened construction to enable future expansion), and

   ii) Recent capital expenditure which further elevated Pride Park above that level, and so

b) To what stadia Pride Park might be most comparable for the purpose of assessing construction cost.

192) We preferred Mr Honeywill's evidence in this regard over the evidence given by Mr Messenger. It is in our view wrong to describe Pride Park as '*bog standard*'. The facilities offered by Pride Park, and the qualities of Pride Park, are above (and we conclude, well above) that level when considered by reference to the wide range of stadia to which reference was made. That applies not simply to the original construction of Pride Park but also to the more recent capital expenditure to modernise those facilities and qualities. While it is correct that its facilities and qualities are a good way short of the state of the state of the art stadia that both experts agreed should be ignored for the purposes of a DRC valuation, it is also correct we find that its facilities and qualities are significantly above many of the stadia that Mr Messenger contended offered 'similar' facilities and qualities.

***b) Second question – what is the appropriate cost per seat as at June 2018 to build a stadium comparable to Pride Park?***

193) We heard evidence from both experts as to

a) What it had apparently cost to build an array of other stadia at various points in time over the past 30-odd years

b) What the 'build cost per seat' of such stadia had been (reached by dividing build cost by capacity)

c) What TPI adjustment to be applied to such figures for 'cost per seat' to make them reflective of the position as at June 2018 i.e. to bring them up to date.

194) As to (a)

a) There was a paucity of reliable evidence as to what particular stadia had cost to build. 'Evidence' relied on by both experts included reports in local and other newspapers, extracts from contractors' websites and other second-hand sources

b) Furthermore, even where there was evidence of build costs – rather than simply 'market intelligence' to use Mr Messenger's term – it was frequently unclear what those build costs had 'bought'. A number of stadia referred to in evidence were part of wider complexes and construction had included hotels, leisure facilities, petrol stations and in some cases infrastructure for the surrounding area: for example, AFC Fylde's stadium and the AMEX Stadium in Brighton. The extent to which, if any, such additional costs were included in or excluded from the figures available for the cost of constructing 'the stadium' was something that both parties explored in evidence, but which ultimately remained most unclear.

195) Ultimately consideration of (a) requires a consideration of the individual stadia relied on by the experts. We return to that below.

196) As to (b), the principle issue between the experts was what should be done when a stadium was not all-seater, and so 'capacity' included terraced standing as well as seating:

a) Mr Messenger's approach – as demonstrated by The Globe Stadium at Morecambe (above) and 2 rugby league stadia at St Helens and Castleford (below) was simply to divide 'build cost' by 'capacity' to arrive at a '*price per seat*' (sic), regardless of the division between seating and standing in the stadium

b) Mr Honeywill's approach was to reflect the difference in the 2 elements of 'capacity' for such stadia, by attempting to 'weight' the 'cost per seat' and 'cost per standing spectator' to reflect
   i) The fact that it is more expensive to build seated accommodation than standing accommodation
   ii) The mix of seated and standing accommodation in particular stadia
   iii) The fact that a stadium offering standing accommodation – particularly a significant proportion of standing accommodation – is unlikely to be of the same quality or offer the same facilities *per se* as one would find at an all-seater stadium

197) We concluded that the approach of Mr Honeywill was to be preferred in this regard to that of Mr Messenger:
   a) A Modern Equivalent Asset to Pride Park would not have any element of standing accommodation; it would be all seater
   b) Where a comparator was not all seater, not only is the construction cost likely to be skewed downwards in comparison to an all-seater stadium, but such a stadium is unlikely to be of a standard and to have wider qualities comparable to Pride Park. It is far more likely to be at the '*bog standard*' end of the spectrum described by Mr Messenger
   c) We therefore treated the construction costs of stadia with mixed seating/standing accommodation with care.

198) There was nothing material between the experts as to (c).

***c) Considering the stadia relied on by the experts***

199) Between them, the experts referred to well over 20 stadia built in the past 30 years or so and as to their understanding of what those stadia had cost to build. From that substantial cohort each identified a smaller number (Mr Messenger identified 8, Mr Honeywill identified 5) that they considered provided the best indication of construction costs for a stadium equivalent to Pride Park:

   a) Mr Messenger's chosen stadia were
      i) The Globe stadium in Morecambe (capacity 6,476; opened 2010; cost - £12m; £/seat - £1,853; TPI adjusted £/seat - £2,927)
      ii) The Proact Stadium in Chesterfield (capacity 10,504; opened 2010; cost - £13m; £/seat - £1,237; TPI adjusted £/seat - £1,955)
      iii) The Jobserve Community Stadium in Colchester (capacity 10,105; opened 2008; cost - £14.2m; £/seat - £1,408; TPI adjusted £/seat - £1,830)

iv) The MK Stadium in Milton Keynes (capacity 22,000; opened 2007; cost - £32m; £/seat - £1,454; TPI adjusted £/seat - £2,007)

v) The Keepmoat Stadium in Doncaster (capacity 15,200; opened 2007; cost - £21m; £/seat - £1,377; TPI adjusted £/seat - £1,900)

vi) The Montgomery Waters Meady stadium in Shrewsbury (capacity 9,875; opened 2005; cost - £11.2m; £/seat - £1,134; TPI adjusted £/seat - £1,565)

vii) The Liberty Stadium in Swansea (capacity 20,500; opened 2005; cost - £27m; £/seat - £1,317; TPI adjusted £/seat - £2,186)

viii) The Pirelli Stadium at Burton Albion (capacity 6,912; opened 2005; cost - £7.2m; £/seat - £1,041; TPI adjusted £/seat - £1,729).

Mr Messenger’s figures for £/seat were exclusive of the 15% fees that he concluded should be added;

b) Mr Honeywill’s chosen stadia were

i)Brentford FC (capacity 17,250; opened 2018; £/seat - £4,058; TPI adjusted £/seat - £4,058

ii) AFC Fylde (capacity 6,000; opened 2015; £/seat - £3,000; TPI adjusted £/seat - £3,330

iii) Brighton FC (capacity 30,750; opened 2011; £/seat - £3,024; TPI adjusted £/seat - £4,626

iv) AFC Wimbledon (capacity 9,000; not yet opened ; £/seat - £3,500; TPI adjusted £/seat - £3,500

v) Southend United (capacity 22,000; not yet opened; £/seat - £3,500; TPI adjusted £/seat - £3,500.

Mr Honeywill’s figures for £/seat were inclusive of fees.

200) Each party sought to undermine the appropriateness of the comparables relied on by the other’s expert.

201) It will be immediately apparent that Mr Messenger’s comparables all pre-date 2010 while all of Mr Honeywill’s post-date 2011. There was no particular magic in their respective cut-off dates - Mr Messenger took the view that the construction costs of older stadia remained useful, since those costs could be updated by a TPI adjustment to reflect 2018 figures, while Mr Honeywill considered that more recent projects provided a more reliable indicator of actual modern build cost. However ultimately each agreed that what mattered was the extent to which the comparator stadium was truly comparable to Pride Park, regardless of when it had been built, since a TPI adjustment would ‘update’ historic costs to a modern day equivalent To put it another way

a) A stadium very similar to Pride Park did not cease to be a good comparator simply because it was built before 2010

b) Just because a stadium had been built very recently did not necessarily make it a good comparator.

202) That said however we did, as we explain below, conclude that the views of each expert as to value based on 'cost per seat' could be properly tested by considering whether, in recent years, a modern stadium equivalent to Pride Park

a) Really could be built as cheaply as Mr Messenger's assessment of 'price per seat' suggested it could be, or

b) Really would cost as much as Mr Honeywill's assessment of 'price per seat' suggested it would.

That exercise was akin to the step of 'standing back and taking stock' that each expert took.

203) In reaching our Decision and preparing these Written Reasons we reflected long and hard on the evidence given by the experts other stadia and about the parties' respective submissions on that evidence. Those reflections led us to make the following findings:

a) While neither party called expert evidence from quantity or building surveyors on construction cost, there was some evidence – albeit historic and obviously untested in cross-examination – in the 2007 King Sturge Report that bore on that question. At section 12.4 of that report King Sturge recorded that, having '*consulted with [its] building surveyors who have in turn used the various building cost indices to arrive an [an] overall figure*', it was of the view that the then current cost of rebuilding Pride Park (including fees) was £77,625,000. That figure equated to £2,320 per seat as at 2007. Applying a TPI Adjustment, the figure becomes £3,200 as at June 2018

b) The equivalent figures in the 2013 JLL report (by the same author) were
   i) £2,800/£2,750 per seat in 2011/2012, equivalent to
   ii) Over £4,000 per seat as at June 2018 adjusted for TPI

c) The 2018 JLL report also recorded (at section 6.2.2) that JLL had '*consulted our internal building cost management team at arriving at our assumptions*' when calculating *inter alia* construction cost per seat (at £3,000 per seat)

d) Even within the experts' shortlists there were a number of stadia that were plainly poor comparators since those stadia plainly lacked the qualities of Pride Park; they were far more '*bog standard*' than Pride Park

e) The majority of the comparables relied on by Mr Messenger were not 'equivalent to' Pride Park in quality or facilities. To be clear, that is not *per se* because those stadia are smaller or occupied by clubs from lower leagues; it is simply because the information available about those stadia demonstrated in our view that the qualities and facilities offered by Pride Park were superior to those offered by Mr Messenger's comparables, while the 'comparator' stadia were more basic. As a result
   i) Costs of constructing those stadia were thus only of very limited assistance when considering the cost of constructing a modern equivalent to Pride Park
   ii) Mr Messenger's reliance on the construction costs of those stadia resulted in him understating the cost of replacing Pride Park

f) Where certain stadia were part of larger developments, or had involved development or construction that took them out of the ordinary, considerable care needed to be taken to ensure
   i)That the reported construction costs did not include those extraordinary costs, and
   ii) That the construction costs used to calculate 'cost per seat' were only those costs incurred in building something equivalent to Pride Park.

   In that regard we noted that both experts lacked information about certain stadia to say what was and was not included in reported build costs

g) We considered that considerable weight could and should be placed on the realities of building a stadium in recent years. Mr Honeywill had first-hand experience of this – he has had (and continues to have) recent involvement in a number of projects, and was able to give evidence about what Clubs are actually paying to build stadia. Mr Messenger does not have that first-hand experience. We therefore placed considerable weight on the evidence given by Mr Honeywill about the stadia/proposed stadia at Brentford, Wimbledon and Southend. We saw no reason to reject Mr Honeywill's evidence about those construction projects and we found the factual information that he was able to give about the costs involved in the construction of those stadia to be extremely useful. That information demonstrated that a benchmark in the region of £3,500 per seat (inclusive of fees) is a realistic construction cost nowadays for stadia such as those, albeit that (as we describe below) certain of those projects may well also include elements over and above the construction of the stadium itself

h) In answer to a question by us (as to whether he was aware of any stadium being built in the last 10 years for as little as he was assessing the cost per seat of building an equivalent to Pride Park, in particular, at a cost of less than £2,000 - £3,000 per seat) Mr Messenger was initially

unable to think of any such stadia. He did however subsequently produce a note identifying 3 such stadia:

i)The first was Ashton Gate, Bristol. The information that he gave about that was as follows:

> 'Re-development of stadium
>
> Capacity – 27,000
>
> Cost – reported between £40,000,000 - £45,000,000
>
> Price per seat - £1,666.67
>
> Comments – on going redevelopment of stadium. Began 2014. Did include full demolition and rebuild of stands with executive boxes. Extension of existing Dolman stand and movement of pitch 5m to allow extension works. Full stadium improvement works.
>
> Completed for 2016-17 season'.

However, in response to that note Mr Honeywill explained that that Ashton Gate was not a fair comparator. The project was one of partial 'replacement' and 'refurbishment', not the construction of a new stadium, and that when the true nature of the project was reflected, Ashton Gate supported a cost per seat of £2,840, not £1,666.67

ii) The second and third were Rugby League stadia - the Totally Wicked Stadium, St Helens and the Five Towns Stadium, Castleford

(1) The St Helens stadium has a capacity of 18,000 (10,089 seated, the remainder standing) and cost £25,000,000 to build. Mr Messenger quantified the '*price per seat*' (sic) at £1,388,900 as at 2011/12. With a TPI Adjustment, that equates to about £2,200 as at 2018

(2) The Castleford stadium will have a capacity of 10,245 ('*part terraced, part seats*'). The estimated cost is £15,000,000, giving an estimated '*price per seat*' (sic) of £1,464.

Mr Honeywill took issue with Mr Messenger's analyses:

(a) Neither ground is of the same standard as Pride Park; the facilities of each are far more basic

(b) Arriving at a '*price per seat*' by dividing 'build cost' by 'capacity' when a large proportion of each stadium is terracing for standing spectators is inappropriate, since terracing is considerably cheaper to build 'per person' than seating. If that is reflected, the St Helens stadium cost £2,000 per seat to build in 2011/2012/£3,000 per seat adjusted for TPI to 2018

(c) The lack of information in relation to the Castleford stadium left him unable to comment further about that stadium, although self-evidently a re-weighting of

construction costs to reflect the part-seated/part-terraced nature of the stadium would increase the cost per seat about £1,464

i) Mr Honeywill's criticisms of Mr Messenger's reliance on those 3 stadia were valid. What in our view those 3 stadia demonstrated was that in recent years constructing a stadium at a cost of less than £3,000 per seat buys a club only a relatively basic stadium

j) While the fact that a stadium has not yet been completed or built – in the case of AFC Wimbledon and Southend United – means that actual build costs are obviously not available for those stadia, business plans and appraisals quantifying anticipated build costs are still a valuable source of evidence of likely/expected build costs.

204) In light of those findings we concluded

a) That – as both experts accepted – it is not possible to identify a definitive figure for the cost per seat of constructing a modern equivalent of Pride Park. The appropriate approach is to identify a range of figures

b) That Mr Messenger's view that a modern stadium, equivalent to Pride Park, could be constructed as at 2018 for a price of £1,840 - £2,185 inclusive of fees was unrealistic. That view just did not reflect the realities of building a comparable stadium in 2018; even materially inferior all-seater stadia could not be built for that cost in 2018

c) That the cost per seat of building a stadium equivalent to Pride Park in 2018 would have been not less than £3,000 per seat inclusive of fees. That is therefore the bottom end of the range of figures representing the cost of being a modern equivalent to Pride Park. That view is borne out not only an analysis of those stadia that have been built in recent years, adjusted to reflect their similarities with and differences from Pride Park, but also by stadia that are in the process of being built/on the verge of being built (again with similar adjustments). We note in passing that that was in fact the figure at which JLL assessed the cost of constructing a modern equivalent of Pride Park in the 2018 JLL report

d) That the top end of the range suggested by Mr Honeywill - £4,000 inclusive of fees – appeared excessive. The comparables whose construction costs exceeded £4,000 per seat comprised

i) Brentford FC. We accept the EFL's point that those construction costs are likely to be higher than might be expected for a modern equivalent of Pride Park, even accounting for (1) any differences between the 2 stadia, and (2) the 'overall package' that was built at Brentford
ii) Brighton FC. Given the unique features of the construction that took place at the Amex stadium and the uncertainties over how those were reflected in the reported cost, we felt that we could not place significant weight on that stadium
iii) The 'state of the art' stadia that both experts agreed should be disregarded

e) That £3,500 inclusive of fees appeared to represent a more realistic upper end of the range.

205) Accordingly we concluded that the cost per seat of constructing a modern equivalent asset to Pride Park as at June 2018 was in the range £3,000 - £3,500 per seat.

*viii) Working through a DRC valuation of Pride Park using appropriate inputs*

206) Subject to certain minor wrinkles, the experts were agreed as to how a DRC calculation should be carried out once the inputs had been identified:[23]

a) '*Replacement Cost*' is calculated by multiplying the cost per seat of constructing a modern equivalent asset to Pride Park by the appropriate number of seats:
i) We have found that the former figure should be £3,000 - £3,500
ii) We have found that the latter figure should be 33,455
iii) 'Replacement cost' is therefore £100,365,000 to £117,092,500

b) '*Finance costs*' are then[24] added. Both experts used a figure of 5% for finance costs

c) A discount is then applied to reflect Age/Depreciation and Obsolescence:
i) Mr Messenger applied a combined discount of 27.5%
ii) Mr Honeywill applied a combined discount of 30.5%
iii) Neither expert sought to challenge or criticise the percentages used by the other, or even to justify why their figure should be preferred over the figure used by the other

[23] The agreed method matches that shown in the RICS isurv Worked Examples.
[24] Different valuers added in finance costs at different points in the calculation – for example, JLL and Mr Honeywill added in finance costs *before* applying the discount for depreciation and obsolescence. That was also the approach adopted in the RICS isurv Worked Examples. Mr Messenger added in finance costs *after* applying that discount. The order does in fact make a difference to the 'bottom line', albeit one that is not material in the context of our Decision. However, had we had to decide which approach was to be adopted, we would have preferred that adopted by JLL and Mr Honeywill and used in the RICS isurv Worked Examples.

iv) Given that we generally found Mr Honeywill's views to be more reliable than Mr Messenger, and given that he had actually inspected Pride Park (and so was in a better position to assess its condition/obsolescence and remaining useful life) we adopt his figure of 30.5%

v) In passing we note that that figure falls between Mr Messenger's figure of 27.5% and the combined figure (of 33.3%) used by JLL in the 2018 JLL Report

d) Land value is then added:

i)Mr Messenger used a land value of £3,320,000

ii) Mr Honeywill used a land value of £4,100,000 (at £500,000 per acre)

iii) Once again, we heard no evidence or argument on whose figure should be preferred, or why. However, we note that JLL used a figure of £4,100,000

iv) We see no reason not to use a land value of £4,100,000

207) Doing the above calculation gives a valuation of Pride Park using the DRC basis of valuation

a) Using a 'replacement cost' of £100,365,000, the DRC valuation of Pride Park as at June 2018 is £77.4m

b) Using a 'replacement cost' of £100,365,000, the DRC valuation of Pride Park as at June 2018 is £89.5m.

The midpoint of the range of £77.4m - £89.5m is £83.45m.

208) Having carried out that exercise we did as both experts said they would do, namely stand back and carry out a 'sense test'. Having done so we were of the view that that range satisfied that test; we certainly could not say from the evidence that that range looked obviously wrong or inconsistent with other reliable evidence relevant to value that was before us.

*ix) What that means for the First Charge*

209) Rather than making a definitive finding that the figure of £83.45m (or indeed any figure) was the Fair Market Value of Pride Park at the time of sale, we consider it is more appropriate for us

a) To determine simply that the consideration of £81.1m recorded in the Club's Annual Accounts as the consideration paid for Pride Park fell squarely within the range of figures representing the Fair Market Value of Pride Park as at June 2018

b) To declare that the consideration of £81.1m recorded in the Club's Annual Accounts as arising from the sale of Pride Park in June 2018 represented a Fair Market Value for Pride Park

c) To record that the EFL has not satisfied us

   i)that the consideration included in the Club's Earnings Before Tax arising from the sale of Pride Park was not recorded at a Fair Market Value, or

   ii) that it was justified in purporting to restate that consideration to the figure of £50million (or any figure below £81.1m) in January 2020

d) To declare that the Club was (and is) entitled to use the consideration of £81.1m

   i)That it received from the sale of Pride Park, and

   ii) That is recorded in its Annual Accounts for the financial year ended 30 June 2018

   for the purposes of the P&S Rules and in its 2018, 2019 and 2020 P&S Submissions for the purpose of the P&S Rules (when the financial year ended 30 June 2018 was/is T, T-1 and T-2 respectively).

210) As a result, and on the assumption that there are no other criticisms to be made of the figures used by the Club in its 2018 P&S Submission and 2019 P&S Submission

a) The aggregation of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2 (when T was the financial year ended 30 June 2018) did not result in a loss that exceeded the ULT

b) The aggregation of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2 (when T was the financial year ended 30 June 2019) did not result in a loss that exceeded the ULT.

211) The First Charge therefore fails and is dismissed.

**<u>(H) The Second Charge: the Club's Procedural Defences</u>**

212) As with the First Charge, the Club invited us to consider its Procedural Defences to the Second Charge before considering the substance of the Second Charge.

*<u>i) Procedural Defence 1: there is no breach of any substantive P&S Rule even on the EFL's case</u>*

213) In the Charge Letter the EFL introduces the Second Charge by asserting in paragraph 2.2 that '*one particular accounting treatment constitutes a separate, distinct and serious breach of the <u>P&S Rules</u>*':

a) That 'accounting treatment' is the Club's approach to the amortisation of player registrations

b) Having set out (in paragraphs 2.3 to 2.5)

   i) The EFL's position that <u>Rule 1.1.3 of the P&S Rules</u> provides that the Annual Accounts must be prepared and audited in accordance with all legal and regulatory requirements applicable to accounts prepared pursuant to section 394 of the Companies Act 2006, including – given the basis upon which the Club's financial statements had been prepared – <u>FRS 102</u>

   ii) The EFL's then understanding of the approach to the amortisation of player registrations that the Club had applied in the financial years ended 30 June 2016, 30 June 2017 and 30 June 2018

   iii) An assertion that approach was '*contrary to the requirements of <u>FRS 102</u>*' (and given particulars of its case as to why that was so)

   paragraph 2.6 of the Charge Letter continues '*… this accounting practice means that the Club is also in breach of <u>Rule 1.1.3 of the P&S Rules</u> and has been since the 2015/16 season*'

c) Paragraphs 4.1 and 4.2 of the Charge Letter (under the heading '*Second Breach'*) then states as follows:

   '*4.1 The <u>P&S Rules</u> require, at <u>Rule 2.2</u>, that each Club "shall by 1st March in each Season submit to the Executive … copies of its Annual Accounts"*

   *4.2 The Club is hereby charged with a breach of <u>Rule 2.2 and 1.1.3</u> in respect of each of Seasons 2015/16, 2016/17 and 2017/18 for having filed accounts that could not meet the definition of Annual Accounts for the reasons set out in paragraphs 2.2 – 2.5 above*'

214) In response, the Club takes issue with the suggestion that the innocent[25] submission of 'Annual Accounts' that do not meet the definition of Annual Accounts in Rule 1.1.3 of the P&S Rules can of itself amount to a breach of the P&S Rules, particularly if those Annual Accounts are only non-compliant in an immaterial respect:

a) Rule 1.1.3 of the P&S Rules, it is said, is simply a 'definitions' provision

b) Rule 2.2 of the P&S Rules, it is said, is concerned with the timing and completeness of a Club's P&S submission

c) Neither Rule which the Club has been charged with breaching in fact gives the EFL any right of action in respect of such breach.

215) As a starting point, we record

a) That it appears to us that the materiality or otherwise of any non-compliance with the definition of Annual Accounts is irrelevant. To put it another way, there is no reason to conclude

i) That an immaterial failure to comply with all legal and regulatory requirements applicable to accounts prepared pursuant to section 394 of the Companies Act 2006 cannot be a breach of the P&S Rules,

ii) While a material failure to comply with all legal and regulatory requirements applicable to accounts prepared pursuant to section 394 of the Companies Act 2006 can be

b) That whether any non-compliance with legal or regulatory requirements applicable to accounts prepared pursuant to section 394 of the Companies Act 2006 was 'innocent' or otherwise is likewise irrelevant. There is no reason to conclude that an 'innocent' failure to file compliant Accounts is a breach of the P&S Rules would not be a breach of the P&S Rules but (for example) a negligent or deliberate failure would be; *mens rea* is not a feature of any breach that might arise from a failure to file compliant Annual Accounts.

216) Our view is that a failure to file Annual Accounts that comply with all legal and regulatory requirements applicable to accounts prepared pursuant to section 394 of the Companies Act 2006 is *prima facie* a breach of the P&S Rules. The Club's position, while superficially attractive, is premised on an incomplete and incorrect interpretation of the P&S Rules and the Regulations:

[25] i.e. submission other than with a view to misleading the EFL. The Club accepts that the submission of non-compliant Annual Accounts with a view to misleading the EFL would be a breach of the duty of utmost good faith under P&S Rule 4.4

a) Regulation 80 gives the EFL power to initiate and prosecute disciplinary proceedings against any person subject to the Regulations (which the Club obviously is) for '*breach of these Regulations*'

b) '*Regulations*' are defined in Regulation 1 as '*… the regulations of the League from time to time (and any rules made thereunder)*'

c) Regulation 18 ('*Financial Fair Play*') permits any Division to propose '*Divisional Fair Play Rules*' and, subject to the approval of the Board, to adopt Divisional Fair Play Rules. That is how the P&S Rules came to be adopted

d) Regulation 18.5 provides that adopted Divisional Fair Play Rules will take effect as a Regulation for the following Seasons and shall be binding upon clubs in the Division

e) Regulation 18.7 provides that the Divisional Fair Play Rules applicable to each Division are set out in Appendix 5 to the Regulations

f) Appendix 5 comprises
   i)(as Part 1) Championship Fair Play Rules which (the Introduction to those FFP Rules explains) '*continue to apply for the purposes of reporting in respect of the Season 2015/16 and the consequences arising from those reports*', and
   ii) (as Part 2) The P&S Rules which (the Introduction to those Rules explains) are applicable to the Season 2016/17 onwards

g) The P&S Rules expressly confirm that they are '*supplemental to the Regulations*'

h) A failure to comply with an obligation that a club is required by the P&S Rules to fulfil is thus *prima facie* a breach of the P&S Rules, in respect of which the EFL has power to initiate and prosecute disciplinary proceedings

i) Since there is an obligation on each club to submit '*Annual Accounts*', as defined, by the specified date, a failure to do so – for example
   i)By failing to submit any accounts at all by the specified date, or
   ii) By submitting accounts which do not meet the criteria required (i.e. the criteria specified by the definition of Annual Accounts)

- is thus *prima facie* a breach of the P&S Rules, in respect of which the EFL has power to initiate and prosecute disciplinary proceedings.

217) That does leave one outstanding matter – does the fact that Annual Accounts have not been prepared and audited in accordance with FRS 102 mean that those Annual Accounts have not been prepared and audited in accordance with '*all legal and regulatory requirements applicable to accounts prepared pursuant to section 394 of the 2006 Act*'? If not, the fact that the Annual Accounts which are under scrutiny in the Second Charge were not prepared and audited in accordance with FRS 102 would not of itself prevent them from being '*Annual Accounts*' within the definition provided in the P&S Rules.

218) There is nothing to assist the Club in that point:

a) For the reasons submitted by the EFL, compliance with FRS 102 is a legal/regulatory requirement applicable to Annual Accounts prepared by Clubs and submitted to the EFL under the P&S Rules

b) If those Annual Accounts do not comply with FRS 102, they will *prima facie* not have been prepared and audited in accordance with '*all legal and regulatory requirements applicable to accounts prepared pursuant to section 394 of the 2006 Act*'

c) If those Annual Accounts do not comply with FRS 102 they will *prima facie* not be Annual Accounts within the meaning of the P&S Rules, and their submission to the Executive will not satisfy the obligation on clubs set out in P&S Rule 2.2.

*ii) Procedural Defence 2: Ultra Vires for previous determination*

219) We have already considered above and rejected the Club's submission that the Executive has already determined that the Club met its P&S obligations under the P&S Rules in respect of each season to which the Second Charge relates. For those same reasons this Procedural Defence fails in respect of the Second Charge also; the EFL has not previously determined (in the Club's favour) the 'validity' of the Club's amortisation policy.

*iii) Procedural Defence 3: Inconsistency of the Charges*

220) In essence the Club contends that

a) The First Charge depends on the EFL satisfying us that the Club has submitted Annual Accounts, while

b) The Second Charge depends on the EFL satisfying us that the Club has not submitted Annual Accounts.

221) We have already rejected the correctness of that analysis above in relation to the First Charge and need not repeat such matters again. The Procedural Defence fails.

*iv) Procedural Defence 4: Legitimate Expectation – previous determination*

222) Save to say that we accept that a course of conduct *may* give rise to an implied representation for the purposes of a legitimate expectation defence, we do not repeat the legal principles applicable to this Procedural Defence; they are as set out above.

223) The Defence however fails on the facts:

a) There was no representation by the EFL – express or implied, by words or conduct – that the Club's Annual Accounts '*were compliant with all the requirements of the P&S Rules*'. Nor could the Club have possibly believed that the EFL was making a representation in such terms simply by acting as it did. The Club therefore fails to clear the first hurdle for establishing any legitimate expectation defence in respect of the Second Charge

b) In any event, as the EFL contends, and as the Club accepts, its financial statements did not in reality accurately record or explain the Club's amortisation policy. Even had we concluded that there had been clear and unequivocal representations to the effect alleged by the Club that were sufficient to give rise to a legitimate expectation, there would have been nothing unfair in the EFL departing from the same.

*v) Procedural Defence 5: Legitimate Expectation – Sanctioning Guidelines*

224) The Club also contends that a further legitimate expectation on its part arose out of the Sanctioning Guidelines issued as '*a statement of the maximum sanction the EFL Executive will seek in cases of breach of the P&S Rules*'. In essence the Club's case is that

a) The Sanctioning Guidelines provide only for the EFL Executive to seek sanctions where a club's Adjusted Earnings Before Tax exceed the ULT, and make no provision for the EFL Executive to seek sanctions for an alleged breach of P&S Rule 2.2

b) The Sanctioning Guidelines are thus a representation, meeting the *MFK* test, that the EFL will not seek sanctions otherwise than where a club's Adjusted Earnings Before Tax exceed the ULT

c) Fairness requires the EFL to be kept that representation.

225) We dismiss that argument:

a) The Sanctioning Guidelines say nothing about when the EFL might or might not charge a club with a breach of the P&S Rules. We cannot therefore see how the Sanctioning Guidelines could be said to give rise to any sort of legitimate expectation that the only breach of the P&S Rules that would result in a charge is one arising from club's Adjusted Earnings Before Tax exceeding the ULT

b) The Sanctioning Guidelines clearly do not purport to be an exhaustive record of the circumstances in which the EFL will seek a sanction for a breach of the P&S Rules:

   i) The P&S Rules contain numerous obligations over and above the requirement that a club's aggregated Adjusted Earnings Before Tax for T, T-1 and T-2 must not exceed the ULT

   ii) The Sanctioning Guidelines make no reference to those either

c) It cannot sensibly be suggested that any club that is subject to the P&S Rules has a legitimate expectation, in light of the Sanctioning Guidelines alone,

   i) That the only breach of the P&S Rules in respect of which a charge might ever be initiated and pursued is if a club's aggregated Adjusted Earnings Before Tax for T, T-1 and T-2 exceed the ULT, and

   ii) That no other instance of non-compliance with the P&S Rules could or would attract a charge.

   Were that so, it would drive a coach and horses through the web of obligations set out in the P&S Rules with which clubs must comply;

d) It is a *non sequitur* to suggest that the fact that the Sanctioning Guidelines set out the EFL Executive's view as to what sanction one particular type of breach of the P&S Rules should attract means

   i) That the EFL Executive will not seek any sanction for any other breach, or

   ii) That the EFL will not even charge a club with any other breach

*vi) Procedural Defence 6: Abuse of Process*

226) The Club contends that the manner in which the EFL has prosecuted the Second Charge – without, it is said, making any attempt

a) To clarify the Club's amortisation policy or seek to derive a clear understanding of it

b) To forewarn the Club that it (the EFL) had concerns about the Club's amortisation policy and whether or complied with FRS 102

c) To invite the Club to address it on such matters

makes these proceedings an abuse of process. Such matters[26], it is said, demonstrate that the real purpose behind the Second Charge was as a fishing expedition, to investigate whether there *might* be grounds for

i) Requiring the Club to restate its Annual Accounts for the financial years under scrutiny

ii) Further challenging the Club's various P&S submissions (which had of course been prepared on the basis of the figures in the Annual Accounts, which had in turn been prepared using the Club's amortisation policy)

iii) Asserting that, applying an 'acceptable' amortisation policy, the Club's aggregated Adjusted Earnings Before Tax for T, T-1 and T-2 for the relevant seasons exceeded the ULT irrespective of the issue relating to the sale of Pride Park

iv) Initiating disciplinary proceedings against the Club for a further breach of P&S Rule 2.9.

227) It is, certainly with hindsight, regrettable that the EFL pursued the Second Charge in the way that it did, since as we have described above

a) It initiated and pursued the Second Charge until very shortly before the hearing under the misapprehension that the Club's amortisation policy either did or at least could utilise a positive residual value at the end of a player's contract, when (on its case) such residual value should always be zero

b) It was only very shortly before the hearing that the true factual picture about the Club's amortisation policy emerged.

That factual confusion could have been avoided had the EFL sought information and clarification about the Club's amortisation policy before issuing the Second Charge.

228) Equally however the Club could have clarified the position much earlier than it did:

a) As the Club accepted, the publicly available documents that described the Club's amortisation policy – its Annual Accounts – were ambiguous and unclear

b) The Club's Response to the Charge Letter did not set out any detail of what the Club's amortisation policy was; all that was said was that '*the Club included a residual value in its*

[26] Together with the fact that during these proceedings the EFL sought pursuant to P&S Rule 4.1 to ask for information about the Club's treatment of amortisation of player registrations in its accounts

*amortisation of Player Registrations in the early years of players' contracts*' (and similar) without giving any explanation of the true scope of the Club's amortisation policy or how it was implemented and operated by the Club

c) The Club refused to answer requests by the EFL for clarification about its amortisation policy following the commencement of these proceedings

d) The Club disclosed no documents from which the realities of its amortisation policy – either its terms or its operation – were apparent. The only documents that even touched on it were the email record of the meeting on 13 May 2019 and the amortisation schedule to which we have referred above

e) It was only when the Club served its witness statements that it became clear
   i) That the manner in which the amortisation policy was recorded in the Club's annual financial statements was (at best) ambiguous and (in reality) incomplete and inaccurate
   ii) What the Club's amortisation policy in fact was.

229) Regardless of the above however, the Club's allegations:

a) That the manner in which the EFL has pursued the Second Charge is an abuse of process, or
b) That the true purpose of the Second Charge is not to establish whether or not the Club's amortisation policy means that the submission of the Club's annual financial statements does or does not contravene P&S Rule 1.1.3 & 2.2 but rather is an ulterior one akin to 'information gathering' so as to enable it to bring a further charge against the Club

are not made out. The EFL was entitled to bring the Second Charge against the Club as it did.

*vii) Conclusions on the Procedural Defences to the Second Charge*

230) We dismiss each of the Procedural Defences to the Second Charge raised by the Club.

231) Having done so, we turn to the substantive issues that lie at the heart of the Second Charge.

## (I) The substance of the Second Charge

*i) The precise terms of the Second Charge*

232) Paragraph 2.5 of the Charge Letter identified 5 respects in which, it was said by the EFL, the Club's approach to amortisation is 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*'.

233) We refer to those sub-paragraphs as '***the Particulars of the Second Charge***'.

234) The EFL accepts that, in light of the Club's explanation that it did not assume a non-zero residual value for any player's registration as at the end of his contract, the first Particular of the Second Charge falls away.

235) The Club contends that, for the same reason, the fourth and fifth Particulars of the Second Charge should similarly fall away, on the basis that

a) Each of those Particulars also depends on the EFL proving that the Club's amortisation policy involved the utilisation of non-zero figures for 'residual value' at the end of a player's contract, and
b) It is now common ground that the Club does not do so.

236) That suggestion in our view goes too far. Although the fourth and fifth Particulars of the Second Charge do use the term 'residual value' rather than ERV

a) Until the Club served its witness statements on 29 June 2020, the term 'residual value' was not used in these proceedings as a term of art as defined in FRS 102. That term was instead used by both parties to describe

i) Figures that truly are 'residual values' as defined within FRS 102 itself (i.e. the '*estimated about that an entity would currently obtain from disposal of an asset, after deducting the estimated costs of disposal, if the asset were already of the age and in the condition expected at the end of its useful life* (i.e. in this context, at the end of a player's contract), and

ii) What the parties have since termed ERVs:

see for example paragraphs 37, 38 & 40 of the Club's Response and paragraph 43 of the EFL's Reply.

b) Likewise, the Club's own financial statements used the term 'residual value' in a manner other than that term's strict FRS 102 meaning; those financial statements referred to 'residual values' when they meant ERVs

c) In those circumstances we are of the view that it would be overly technical to interpret the fourth and fifth Particulars of the Second Charge in the strict way now contended for by the Club. Once the Club had explained (1) its amortisation policy, and (2) that 'true' residual values were always zero, it was always understood by the Club that the criticisms maintained by the EFL were of its use of ERVs, and certainly no prejudice has been used from the use of the words '*residual values*' rather than ERVs in those Particulars.

*ii) Consideration of the Club's approach to amortisation*

237) It was common ground at the hearing

a) That the capitalised costs of a player registration fall within the description of an intangible asset for the purpose of FRS 102

b) That application of the 'recognition criteria' in 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. The Club did so; the issue is whether it did so correctly

c) That the 'initial measurement' provisions of section 18 of FRS 102 required the Club to measure the capitalised costs of a player registration initially at cost. The Club did so

d) That insofar as the Club measured player registrations after initial recognition using the Cost model (which is the model that the Club was purporting to use)

   i) The Club was obliged to measure player registrations at cost less accumulated amortisation and any accumulated impairment losses, and

   ii) The Club was required to adopt an approach to amortisation that complied with the requirements set out in sections 18.19 to 18.24 of FRS 102.

238) The key issue between the parties was whether the approach to amortisation in fact adopted by the Club in the financial years ended 30 June 2016, 30 June 2017 and 30 June 2018 did comply with the requirements set out in those section of FRS 102. It is to that issue that we turn. In order to determine that issue it is necessary to work through the relevant requirements of FRS 102 with care.

*iii) A preliminary matter*

239) It was common ground between the parties that the approach to amortisation adopted by the Club is not the same as the approach adopted by other clubs; indeed, in the EFL's experience it is unique:

a) The vast majority of other clubs approached amortisation of player registrations on a straight line basis i.e. as set out in paragraph 55(a) above

b) As emerged in cross-examination of Professor Pope by reference to various academic articles, some clubs do adopt (or appear to adopt, based on information available from sources such as filed financial statements) approaches other than the straight line approach, although none adopt the approach used by the Club.

240) However, that is of little relevance. What matters is whether the Club's approach to the amortisation of capitalised costs of player registrations, novel though it might be, does or does not meet the requirements of FRS 102.

*iv) The starting point*

241) Section 18.21 of FRS 102 requires an entity to allocate the depreciable amount of an intangible asset on a systematic basis over its useful life:

a) Section 18.19 of FRS 102 requires that

   i) every intangible asset should be considered to have a finite useful life, and

ii) 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

b) Section 18.19 of FRS 102 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*'.

242) The Club's approach to amortisation

a) Did assume that player registrations had a finite useful life

b) Did allocate the depreciable amount of the player registration over that useful life.

The key question is whether it did so on a systematic basis.

*v) Was the Club's approach 'systematic'?*

243) Before we address that point, the Club takes the point

a) That nowhere in the Particulars of the Second Charge is there any suggestion that the Club's approach to amortisation is open to criticism for failing to allocate the depreciable amounts of player registrations on a systematic basis across their useful lives, and

b) That despite the matter being raised (both before and at the hearing), the EFL made no application to amend the Second Charge or add a Particular to the effect that the Club's amortisation policy also failed to comply with FRS 102 because it does not allocate the depreciable amount of player registrations on a basis that is 'systematic'.

244) That is correct and, had we not reached the conclusions set out below to the effect that the Club's approach to amortisation did involve the allocation of the depreciable amount of players registrations on a basis which was systematic, we would have had some sympathy with a submission that a failure to comply that provision alone would of itself not have justified a finding that the Second Charge was proven. However, given the substantive findings that we make, we need not determine that.

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[27] 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

[27] Professor Pope did also (1) identify a number of methods of depreciation and amortisation that are generally considered '*acceptable*', and (2) explain that since those methods are considered acceptable, they must be '*systematic*'. However, that took matters nowhere.

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. <u>FRS 102</u> 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 <u>was</u> (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 <u>FRS 102</u>

   to be straightforward and reliable. Unlike Professor Pope, his focus – as it should be under <u>FRS 102</u> – 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.

*<u>vi) Consideration of section 18.22 of FRS 102</u>*

250) It is not sufficient for the purposes of FRS 102 that an amortisation method is merely systematic; the approach to amortisation adopted and operated by an entity must also

> 'reflect the pattern in which [the entity] expects to consume the asset's future economic benefits'

in order to comply with FRS 102.

251) In addition, section 18.22 of FRS 102 mandates that, if that pattern cannot be determined reliably, the entity '*shall use the straight line method*'.

***a) 'Future Economic Benefits' of an asset***

252) In order to address the questions of

a) Whether it was possible for the Club to determine reliably the pattern in which it expected to consume the future economic benefit of a player's registration in the financial years under scrutiny, and;

b) Whether the Club's approach did in fact reflect such pattern,

it is first necessary to consider what is meant by the '*future economic benefits*' of an asset. That was the subject of much debate before us. At the heart of that debate was whether '*future economic benefits*' were limited to benefits derived while the player was contracted to the Club (and so playing for/providing services to the Club etc) or whether they could also include proceeds that the Club might receive from disposing of the player's registration to another club by selling the player's registration to another club before the expiry of the player's contract.

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*[28] *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

[28] Contingent on (1) an acceptable bid coming from another club, and (2) the player agreeing to be transferred to that other club of the terms offered.

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.

***b) Could the Club reliably determine the pattern of expected consumption of future economic benefits from players' registrations?***

255) Having concluded that the Club's approach of reflecting a pattern of expected consumption of the economic benefits of its players' registration which references both

a) 'Use' of the player's registration while the player provides services to the Club, and
b) 'Disposal' of the player's registration in the future before the expiry of his contract to provide services to the Club

does not *per se* offend against section 18.22 of FRS 102 the next question becomes – can the Club determine that pattern '*reliably*' (since if it cannot, 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 June 2019 (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.

*vii) Conclusions*

258) Given our findings that:

a) The Club allocated the depreciable amount of the capitalised costs of player registrations over their useful lives on a systematic basis, and

b) The Club's amortisation policy reflected the pattern in which it expected to consume the future economic benefits of those players registrations, and

c) The Club was able to determine that pattern reliably

it follows that in our view the Club's amortisation policy is not contrary to the requirements of FRS 102.

*viii) Returning to the Particulars of the Second Charge*

259) We therefore find as follows in relation to each Particular of the Second Charge contained in paragraph 2.5 of the Charge Letter:

a) First Particular of the Second Charge – not pursued by the EFL

b) Second Particular of the Second Charge -

   i) the fact that the Club's amortisation policy during the relevant financial years did not amortise on straight line basis is not contrary to FRS 102

   ii) the amortisation schedule does reflect the Club's expected pattern of consumption of future economic benefits from players' registrations

c) Third Particular of the Second Charge – the fact that the Club's amortisation policy anticipated an economic benefit (in the form of proceeds from the disposal of a player's registration to another club prior to the expiry of the relevant player's contract with the Club) that the Club does not fully control did not make the Club's amortisation policy contrary to FRS 102

d) Fourth Particular of the Second Charge – ERVs of player registrations could be reliably estimated by the Club when reassessing such ERVs during the relevant financial years. The Club's approach was not contrary to FRS 102 due to any unreliability in the estimation of ERVs in such regard.

260) That leaves the <u>fifth Particular of the Second Charge</u>. That fifth Particular is in our view well founded;

a) <u>Section 10 of FRS 102</u> requires an entity to disclose changes in accounting policy and changes in accounting estimates. That section sets out what such disclosure(s) must comprise/contain

b) While the Club did purport to disclose the change in its approach to the amortisation of player registrations in the Notes to its Financial Statements for the years after the financial year ended 30 June 2015, the disclosures made were, as we have found, at the very least ambiguous and in reality incomplete and inaccurate; they did not reflect the realities or substance of what we have found to be the true nature and extent of the Club's changed amortisation policy. The Club effectively accepted as much – Mr Delve accepted that, had he picked up the (accepted) ambiguity in the Notes, he would have required the Club to change the Notes to explicitly refer to the changes and the new approach. He thus accepted that the Notes in the financial statements for the years to which the Second Charge relates were inadequate

c) Because of that, we find that the Club failed to comply with <u>section 10 of FRS 102</u>

d) To that extent therefore the fifth Particular of Second Charge is made out.

## (J) Summary of Findings

261) The First Charge is dismissed.

262) As regards the Second Charge:

a) We make no finding on the first Particular of Charge 1 since that Particular was withdrawn
b) The second Particular of the Second Charge is dismissed
c) The third Particular of the Second Charge is dismissed
d) The fourth Particular of the Second is dismissed
e) The fifth Particular of the Second Charge is 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 to adequately disclose those changes to its accounting policies and/or estimates as required by section 10 of FRS 102.

Graeme McPherson QC (Chairperson)

For and on behalf of the Disciplinary Commission
24 August 2020
London, UK