SR/372/2019

IN THE MATTER OF AN EFL DISCIPLINARY COMMISSION

Before:

Sir David Foskett
Mr Geoff Mesher FCA
Mr Jim Sturman QC

BETWEEN: -

THE ENGLISH FOOTBALL LEAGUE ("the EFL")

Claimant

-and-

SHEFFIELD WEDNESDAY FOOTBALL CLUB (the "Club")

Respondent

DECISION

Introduction

1. In August 2018 Sheffield Wednesday Football Club ('the Club') entered into an arrangement, much debated in these proceedings, whereby the Club's Chairman, Mr Dejphon Chansiri ('DC'), agreed to purchase Hillsborough Stadium from the Club with the purpose of ensuring that the Club was not in breach of the Profit and Sustainability ('P&S') Rules for the 3-year period ending on 31 July 2018.

2. The material discussions leading up to this arrangement were conducted over a very short timeframe in early August 2018. Various senior personnel within the English Football League ('EFL') and the Club were involved in those discussions. It is absolutely plain that the EFL's representatives involved at that stage were anxious to help the Club achieve a satisfactory position such that it would avoid breaching the P&S Rules. That, we understand, was the EFL's position so far as all Clubs in the Championship were concerned during 2018.

3. Everyone walked away from those discussions believing that a solution had been found and that in the period of 10 days or so thereafter an acceptable arrangement had been put in place, reflected in some Heads of Terms put together in that period. The arrangement was such that the Club's auditors were content for the sale proceeds of the stadium to be included within the income of the Club for the accounting period ending 31 July 2018, thus saving the Club's position vis-à-vis the P&S Rules.

4. Sadly, some 10 months or so later, issues arose about whether the arrangement was intrinsically valid. The EFL ultimately decided that it was not and instituted the present disciplinary proceedings against the Club. Ever since the two charges faced by the Club (see paragraphs 6 and below) were formulated in November 2019 and pursued thereafter, there have been mutual recriminations by each side involved in the discussions, with allegations of dishonesty, bad faith and deception.

5. Whatever the outcome of these proceedings, there are some lessons to be learned from this very unhappy scenario.

The charges

6. As indicated above, the arrangement made concerning the sale of the Hillsborough Stadium was such that the Club's auditors felt entitled to treat it as having occurred before 31 July 2018. On further investigation during 2019, the EFL formed the view that this was an erroneous position to have taken, that the sale should not have been included within that accounting period and, accordingly, the Club had breached the P&S Rules. Charge 1 is to that effect.

7. Charge 2 asserts that the Club "sought to deliberately conceal from the EFL that the Heads of Terms had been backdated." Its foundation is the duty of good faith owed by Clubs to the EFL which is encapsulated in P&S Rule 4.4:

> "Each Club shall, at all times and in all matters within the scope of these Rules, behave with the utmost good faith both towards The League and the other Clubs (provided always that only The League shall have the right to bring any action whatsoever for any alleged breach of this requirement). Without prejudice to the generality of the foregoing, Clubs shall not manage their affairs or submit information which is intended to seek to or take any unfair advantage in relation to the assessment of fulfilment (or non-fulfilment) of the requirements of the Rules."

8. It is the case, as a matter of fact, that the Heads of Terms were not created until after 31 July, but referred to an apparent agreement for the sale of the stadium before that date.

9. Both charges have been contested vigorously. In relation to Charge 2, the central issue is whether there was a deliberate intention to mislead and whether anyone acting on behalf of the EFL at that time was in fact misled.

10. This decision, to which each member of the Commission has contributed, is a unanimous decision.

The proceedings

11. Following a "virtual" Directions hearing on 30 March 2020, a 4-day "virtual" hearing was set for 22 - 25 June during which the evidence would be heard, with the final submissions to be heard on 30 June.

12. We heard oral evidence from the following witnesses:

<u>EFL witnesses</u>

- James ('Jim') Karran, Financial Controller ('JK')

- Nicholas ('Nick') Craig, Governance and Legal Director ('NC')
- Shaun Harvey, CEO at the material time ('SH'). He left the EFL's employment on 31 May 2019.
- Professor Peter Pope, expert witness on accountancy and auditing matters ('PP')

Club witnesses

- John Roddison, a Chartered Accountant and Managing Director of Brown McLeod Ltd
- John Warner, Senior Partner of BHP Chartered Accountants LLP ('BHP'), the Club's auditors ('JW')
- David Elsom, an Associate with BHP ('DE')
- John Redgate, Financial Director ('JR')
- Katrien Meire, CEO during the material period ('KM'). She left the Club's employment in February 2019.
- Dejphon Chansiri, the Club's owner ('DC')
- John Pryor, expert witness on accountancy and auditing matters ('JP')

13. Given the nature of Charge 2, the Commission merely expresses regret that, under current circumstances, it was not possible to hear the witnesses other than virtually. Where credibility issues arise, there are some positive advantages in the hearing taking place in the circumstances with which all parties are more accustomed. However, the opportunity for the Commission to see and hear the witnesses in the more traditional fashion was not available.

14. No discourtesy is intended to any of the witnesses, but it will be easier and quicker to refer to each of them by their initials throughout the remainder of this decision.

15. DC is Thai by birth and gave his evidence from Thailand. He had the assistance of an interpreter. He does speak some English and indeed can understand a number of things said to him, but it seemed to us that he did need some assistance, particularly when issues became more complex or confused. We can at the outset say that we do not accept the contention of the EFL that he gave evidence in a manner "apparently deliberately designed to make it difficult to follow or to assess his credibility". Nor do we accept that "he appeared to exaggerate his difficulty in speaking English." He was plainly, in our view, at a disadvantage when dealing with lengthy, complicated questions and endeavouring to articulate an answer. His written English, to be deduced from various emails we have seen, is not always easy to understand.

16. KM is Belgian by birth. English is not her first language, but she was sufficiently fluent in English to be able to communicate her evidence clearly. She is now COO of Club Brugge in Belgium and gave evidence from Belgium.

17. At the conclusion of the 4-day hearing, having been invited by the parties to indicate our view, we decided that we would prefer to hear submissions confined to the merits of the charges rather than to hear provisional submissions on the issue of sanction should such an issue arise. That is what took place on 30 June.

18. We had indicated at the Directions hearing that we wanted to complete hearing the evidence in the time provided and that we saw no need for opening submissions. Understandably, in those circumstances, the Skeleton Arguments on each side were lengthy, running in total to over 90 pages. The Hearing Bundle, which included the witness statements, ran to nearly 4000 pages and the Authorities Bundles contain 36 authorities, 5 extracts from legal textbooks and 3 statutory references, all running to over 1000 pages.

19. We make no complaints about this: the case is important to both sides. However, we have been asked to reach a decision quickly so that, if possible, any consequences that might arise might be felt within the current (extended) season. Whether that can be achieved may now be open to doubt, but given the seriousness of Charge 2 we have inevitably had to give it very careful consideration. As it is, we have been able to achieve a reasonably rapid conclusion only by producing a reasoned decision that, whilst quite

lengthy, may well be measurably shorter than might otherwise have been the case given the material with which we have been presented. As it is, our assessment is that the real issues do come within a relatively narrow compass and some of the finer details of the chronology and argument can be omitted in the interests of expediency. Merely because something is not mentioned does not mean we have not considered it.

20. We will begin by making brief reference to the P&S Rules.

The P&S Rules

21. The P&S Rules came into operation (in replacement of the Financial Fair Play Regulations) for the season 2016/17 onwards, but their impact falls to be assessed by reference to the three seasons beginning with the 2015/16 season.

22. We do not understand the following summary, taken from the Charge Letter dated 14 November 2019, to be in any way inaccurate or in dispute:

> "The P&S Rules adopt a rolling three-year monitoring period ('Monitoring Period') based on Adjusted Earnings Before Tax, being the Earnings Before Tax as set out in the Annual Accounts adjusted to exclude costs relating to:
>
> (a) depreciation and/or impairment of tangible fixed assets, amortisation of goodwill and other intangible assets (other than the costs of player registrations); and
>
> (b) Women's Football Expenditure, Youth Development Expenditure and Community Development Expenditure.
>
> A tiered approach applies under the P&S Rules in that:
>
> (a) clubs generating profits across the Monitoring Period have no additional requirements imposed on them;
>
> (b) clubs with an Adjusted Earnings Before Tax which results in a loss not exceeding the Lower Loss Threshold (£15m) in aggregate across the Monitoring Period will have to demonstrate their ability to meet future

payments to football creditors as well as meet their obligations to the EFL for the following season. Traditionally this has required a comfort letter of funding from Owners;

(c) clubs with an Adjusted Earnings Before Tax which results in a loss exceeding the Lower Loss Threshold (£15m) but not exceeding the Upper Loss Threshold (£39m) in aggregate across the Monitoring Period will be required to not only submit a business plan for future trading to the EFL for a period of 2 years, but provide evidence that the club's 'Cash Losses' will be covered by new equity injections over that same period. The EFL reserves the right to have future funding promises secured; and

(d) any club with an Adjusted Earnings Before Tax which results in a loss exceeding the Upper Loss Threshold (£39m) in aggregate across the Monitoring Period will, in addition to the measures in paragraph (c) above, be subject to disciplinary proceedings.

The Upper Loss Threshold can vary from club to club, as it is dependent on whether a club is a member of the EFL or Premier League in any Season of the applicable Monitoring Period. The Annual Upper Loss Threshold for a Club in the EFL is £13m, but is £35m for a club in the Premier League, meaning the aggregate Upper Loss Threshold can be between £39m and £105m."

The Club's position concerning the P&S Rules in 2018

23. Until the events to which we will refer below, the Club's annual accounting period ran from 1 June until 31 May the following year. It is not in dispute that had the year ending 31 May 2018 finished as anticipated in the period running up to that date, the Club would have sustained an aggregate loss across that season (T) and the previous two seasons (T-1 and T-2) in excess of the Upper Loss Threshold of £39 million. The Club's estimate was that it would be exceeded by some £12-13 million or thereabouts.

24. In the season 2017/18, Clubs in the Championship were required under the P&S Rules to submit to the EFL by 31 March 2018 certain documents including a Profit and Sustainability Calculation and the Club's Future Financial Information. The Club did not

do this and was consequently placed under a player registration embargo pursuant to P&S Rule 4.3. This was not made public, but the Club was informed.

25. On 25 April the Club submitted the required documents including the Club's Future Financial Information which contained as one of the Principal Assumptions that "The Plan assumes Sale of the Hillsborough Stadium for not less than £40m by 31st May 2018." As a result, the estimated Adjusted Earnings Before Tax for the 2017/18 Season amounted to a loss of about £8 million, but the Adjusted Earnings Before Tax for the three-year reporting period ending in 2017/18 were said to amount to a loss of approximately £33 million and thus within the £39 million limit. The Club's registration embargo was lifted initially, but re-imposed when it was realised that fulfilling the P&S requirement was reliant on the sale of the stadium, but the sale had not yet taken place.

26. The EFL, through JK, reviewed the information supplied and raised certain queries, including queries about the proposed stadium sale. These were as follows:

    "a. Can you please provide any external valuation you have received prior to setting the sale price?

    b. Who is purchasing the Stadium? Is it a third party not connected with the Club?

    c. When is the sale expected to be completed? As this forecasted profit is not completed, we are minded only to accept these profits within the P&S calculation on completion of the deal to confirm it will be in the Club's accounts within this financial year end.

    d. Please provide any documentation in relation to the sale on its completion.

    e. Can you please explain how the sale is reflected within the cash flow forecast? There looks to be an issue of shares of £40m rather than receipt of land sale. This then seems to be used immediately to pay working capital loans."

27. JR replied, saying that (a), (b) and (d) would be dealt with in due course, but said this in respect of the other matters:

    "c) The sale of the Stadium is expected to be completed by our year end date of 31st May 2018, however, I do want to know because sometimes there can be last minute

delays that if completion occurs at the beginning of June what position the EFL will take.

I presume a signed heads of terms provided that this is dated before 31st May will be sufficient?

…

e) In order to make the modelling of this easier I worked on the assumption the owner would buy the Club and deducted from his Loan until it was clearer how the transaction was to be finalised."

28. JK replied in relation to (c) that "at the present time" he "would have thought that the EFL would take the same position as your auditor would take on the timing of the recognition of the profit on sale." That was indeed the policy of the EFL. He also asked for the provision of an external valuation to support the price that would be paid for the stadium given that the sale would be to the owner.

29. JR said that this exchange demonstrated that the EFL was prepared to entertain a stadium sale as a means by which the P&S Rules could be met, something about which the Club was unsure at the outset.

30. JK's reply was on 15 May and there were further exchanges over the following week or so during which the Club raised the possibility of extending its year end accounting date to 30 June. On 22 May JR confirmed that the Club would be extending its year end accounting date to 30 June. A few days later the Club asked for the EFL's proposed approach to various stadium sale scenarios and JK, having discussed the position with Mr Tad Detko ('TD'), the EFL's Finance Director, sent an email to the Club on 30 May setting out five scenarios. They are set out in Annex 1 to this decision.

31. The evidence indicates that the Club at this stage was focusing principally on obtaining a suitable valuation, the precise basis for which being uncertain. There were, it seems, other discussions in which the Chairman was involved at this time that might have led to the purchase of the stadium by some other party. Overall, not much happened as between the Club and the EFL during June although there were exchanges about the possibility of extending the end date for the Club's accounting period to 31 July and the

implications of how the two extra months would be dealt with in the context of the P&S Rules calculations. JK indicated in an email dated 13 June how the EFL saw these issues.

32. It appears that there were some, effectively last-minute, discussions towards the end of June to see if the sale could go ahead. On 27 June JR sent an email to DC at 12.09 UK time which included the following:

> "Chairman — I have just spoken to the auditors as to the evidence they would require for the sale of the Stadium to be recognised in the accounts for year ending 30th June 2018.
>
> The Auditors would require a signed contract by both parties saying that the sale is unconditional as at 30th June 2018.
>
> The contract would need to be of sufficient legal standing that the auditors would be able to form an opinion and count on that document stating that it was unconditional at that date.
>
> The lawyers will understand that and produce suitable wording.
>
> A more detailed contract can then be worked on after 30th June as long as the sale date is on or before 30th June."

33. DC responded to JR with the question "What it mean unconditional?". JR's response was - "The sale will definitely happen there are no get out clauses". DC replied to JR "What it mean get out. No buy or what?". The reply was - "That the transaction will definitely happen – there is no clause that would mean the buyer or seller does not complete".

34. A short while later JR spoke to TD and reported the conversation shortly afterwards to DC. He told DC that TD had said the EFL would want to see "the signed contract for the sale", a "letter from the auditors that they were happy to include the sale in our accounts to the year ended 30th June 2018" and details of "the amount of rent to be paid".

35. A decision must have been made by the Club shortly after this not to try to arrange the sale to be included in an accounting period ending 30 June because on 28 June the Club informed the EFL that it was extending its year end date to 31 July. During July

further steps were taken potentially to advance the sale and to achieve some flexibility with regard to the sale price. On 19 July JR emailed DC to say that he had spoken to the auditors and that they had said that –

> "… if we were to sell the stadium there is a form of words that would be acceptable which would say … for a minimum consideration of £40m. That way if the figure is higher we can use the final agreed figure once know (sic)"

36. In response to a telephone request from JR, on 23 July JW emailed him with a note from the BHP Technical Committee on the accounting treatment of a stadium sale. In short it emphasised the need for there to be a binding contract which was not capable of being rescinded by the purchaser for a reason set out in the contract or at the purchaser's discretion. Although it did not refer expressly to the requirements of Financial Reporting Standard 102, section 23.10, those requirements were set out in the note. In terms of how they might be met in practice, it was said that they included (i) title to the property did not have to pass by the accounting year end, but the contract had to be binding, (ii) certain steps (e.g. transferring insurance cover) were necessary to show that the risks and rewards had been transferred and (iii) that an appropriate valuation could be obtained.

37. It follows that only a week before the 31 July, active consideration was still being given to the potential sale and purchase of the stadium. The only other way in which it appeared at that stage that breaching the P&S Rules could have been avoided was through the sale of players.

38. The discussions continued through 30 and 31 July. On 30 July in the afternoon there was a 4-party telephone call between JR, SH, TD and NC. NC made some notes that demonstrated that player sales were discussed, as was the question of whether breaching the P&S Rules would lead to a transfer embargo. One note read "If don't sell players by midnight tomorrow then likely we will fail", which would appear to be something that JR would have said. From the note, it does not appear that the possible sale of the stadium was discussed although it was still under consideration. After the meeting JR e-mailed the EFL representatives and thanked them for their time on the call. He concluded the email thus:

> "As discussed I will call [TD] in the morning at 9:00am to hopefully find a solution. In the meantime if you think of any other possible solutions please let me know."

39. Although the deadline was approaching rapidly, it would seem that there was no finally agreed solution. JR was in email contact with DC in the early evening of 30 July and, having told him he was due to have a telephone call with TD the following morning, said this:

> "It was confirmed on my call this afternoon that Aston Villa are not under embargo we are going to review the Villa accounts and the SWFC accounts to see if SWFC can take advantage of any financial allowances that Villa have been able to use to see if we can satisfy P&S other than by assets and player sales."

40. He spoke to TD on the morning of 31 July and reported back to DC immediately. In short, he said this:

> "Unless we sold players today or say tomorrow with the transfer backdated to 31st July then we will breach P&S."

41. There was no reference to the possible stadium sale at that point.

42. A few minutes later, JR emailed TD, NC and SH giving details of one of the player contracts the Club was seeking to extend. No reference to the stadium sale was made.

43. Indeed nothing was done to put in place any kind of agreement for the sale of the stadium by midnight on 31 July. In her witness statement, KM said that she remembered "going home at the end of the day on 31 July 2018 thinking that we had breached P&S, with no solution in sight." She said that the "possibility of some sort of post-deadline stadium sale was simply not in my mind at the time."

44. The contemporaneous documents to which we have referred confirm the thrust of this evidence.

45. Indeed, as it seems to us, the only sensible construction to be placed on the situation as at the end of July 2018 is that the Club had breached the P&S Rules and that unless some retrospective action could be taken to undo that situation, there was no answer to an allegation of breach.

46. We should say that the Club had been complaining, with some justification, in our view, that since no decision had been taken by the EFL as to any guidance about sanction in the event of a breach, the Club (and indeed other clubs in a similar situation) could not weigh up the consequences of simply allowing the breach to occur and taking the disciplinary consequences or of straining to find a financial solution. Indeed, SH wrote a letter to all Championship clubs on 2 August 2018 acknowledging that this had been causing concern and confusion. It was not until 17 September 2018 (and thus after the conclusion of the matters to which we must turn below) that the sanctioning guidelines were issued.

47. We will deal later (see paragraphs 66-70) with the legal arguments advanced on behalf of the Club concerning the validity of the arrangements made, but it is clear on the evidence, whether looked at simply objectively overall or by reference to the subjective states of mind of DC and the officers of the Club (JR and KM), that there had been no concluded agreement of sale in relation to the Stadium, oral (which, in law, was not permissible) or written, before 31 July. Whatever arrangement was made thereafter had to have retrospective effect if it was to be effective for the purposes of the P&S Rules.

What happened after 31 July 2018?

48. On 1 and 2 August JK emailed JR asking when the Club's updated P&S calculation would be available.

49. On 2 August DC asked JR to arrange a meeting with the EFL. Such a meeting was arranged for the following day, Friday, 3 August. The meeting took place at 17.00 at the EFL's Preston Offices. DC, KM and JR attended on behalf of the Club. SH and NC attended on behalf of the EFL. The meeting lasted in the region of two hours. What was said (or not said) during the meeting lies at the heart of the issues in these proceedings, most particularly those underlying Charge 2.

50. We will return to that meeting and its relatively immediate aftermath below in the context of Charge 2 (see paragraphs 91-131 below). On the basis of the view we have formed about the potential defences to Charge 1 advanced on the Club's behalf (see

paragraphs 57-70 below), we do not consider that what was discussed at the meeting has any, or any significant, relevance to Charge 1.

51. For present purposes, all that needs to be recorded is that draft Heads of Terms purporting to evidence an agreement arrived at before 31 July were produced on 6 August. We will deal with the circumstances in which these draft Heads of Terms were created below (see paragraphs 122-125 below). The following is the text:

> "**HEADS OF TERMS**
>
> Between
>
> **Sheffield Wednesday Football Club Limited** …
>
> Sheffield, United Kingdom (hereinafter referred to as "Seller")
>
> And
>
> **Dejphon Chansiri,** [address]
>
> Bangkok …, Thailand (hereinafter referred to as "Buyer")
>
> Dated 1st of July 2018
>
> Seller and Buyer hereinafter together referred to as "*Parties*" or individually as "*Party*".
>
> **Transaction**
>
> The Seller desires to sell and the Buyer desires to purchase the freehold associated with the land and buildings of Hillsborough Stadium, S6 1SW, Sheffield.
>
> **Purchase Price**
>
> The Purchase Price will be a minimum of £40 million (forty million pounds) for the sale and transfer of the freehold of the land and building. The details of the payment terms will be stipulated in the sales and purchase agreement.
>
> **Commitment**
>
> Both Parties agree that the terms of this letter are binding and irrevocable."

52. These draft Heads of Terms were never executed.

53. In circumstances to which we will refer later, BHP had indicated that it would be prepared to regard Heads of Terms in this form as sufficient to treat the sale as having taken place before 31 July and, accordingly, the sale could be included in the accounts for the period ending 31 July 2018 subject to obtaining a satisfactory valuation.

54. There was a considerable amount of communication between the Club and the EFL and the Club and potential valuers during the period from 6 to 15 August which is arguably more relevant to Charge 2 than Charge 1, but the ultimate position so far as the Heads of Terms were concerned was that a fresh document was prepared on 15 August on the same terms as the above draft save that the purchase price was given as a minimum of £37.5 million. This document was signed in the Club's offices that day by DC on his own behalf and by KM on the Club's behalf, JR witnessing the signatures. The signatures were dated 15 July 2018. As will emerge (see paragraph 101 below), this document was sent to the EFL on 15 August.

55. It was necessary thereafter to alter the minimum purchase price from £37.5 million to £42 million and, accordingly, another version of the Heads of Terms, substituting that latter figure, was executed on 16 August. The signatures were as before and dated 15 July. These replacement Heads of Terms were sent to the EFL by KM on 17 August. Those were the Heads of Terms that were treated by the EFL (and indeed by the Club) as governing the position so far as the sale was concerned until the EFL investigations instigated the following year.

56. Subject only to the defences raised by the Club (referred more particularly in paragraphs 73-90 below), the only issue in respect of Charge 1 is whether the transaction reflected in the final version of the Heads of Terms could properly be included in the accounts for the period ending on 31 July 2018. If it could not, Charge 1 is made out.

Charge 1

57. Simply to put matters in a chronological perspective, the proposed sale to DC personally was not completed as might have been anticipated, namely, within 2-3 months of 16

August 2018. The sale, by way of a Sale and Leaseback Agreement, in fact took place to a company called Sheffield 3 Ltd (a corporate vehicle of DC) which was incorporated on 21 June 2019. Completion of the sale at £60 million took place on 28 June 2019. The Stadium was then immediately leased back to the Club under a 30-year lease with a commencement date on that day.

58. The Club had failed to supply all the relevant documentation in accordance with the P&S Rules by 1 March 2019 (the relevant date in 2019 as notified to the Club on 20 December 2018). It had continued to fail to provide this documentation by 19 June 2019 other than draft accounts with the director's report and the auditor's report unsigned. As a result, the EFL began a formal investigation into the Club's affairs. (We deal with the suggestion that this was prompted by irrelevant considerations in paragraph 88-90 below). Whether it was or was not the case, all the appearances are that DC only moved quickly on the issue of the sale when the Club was pressed by the EFL for documentation that it should have provided within the P&S Rules.

59. This charge, which resulted from these investigations, was as set out in paragraph 6 above.

60. The conclusion in relation to this charge is dependent upon three interdependent factors: the factual matrix as to the Heads of Terms and its production, the legal interpretation of those facts and that document and the appropriate accounting treatment to apply in light of the foregoing.

61. The factual matrix is dealt with elsewhere in this Decision. The essential fact is that the Heads of Terms were not signed until after the year end (see paragraph 54). No agreement for the sale of the stadium had been concluded prior to the year end. It is common ground, as a matter of law, that under English law an oral contract for the sale of land is void.

62. PP and JP were agreed that if the Heads of Terms had no effect as at 31 July 2018, then the Club and its auditors should not have recognised the disposal of the stadium as having taken place on or before 31 July 2018 and would similarly have been incorrect to have recognised any profit arising from that disposal in the financial statements for the period ending on 31 July 2018. (JW and DE agreed that if the Heads of Terms were

not legally binding, the transaction should not have been recognised in the 2017/2018 accounts.)

63. JP was given the Instructed Assumption that the Heads of Terms created "a legally binding contract" (see Annex 2). Whilst he abided loyally by that assumption in giving his opinion, he did not disguise the fact that he found it a difficult assumption to accept. The Commission found JP to be an impressive witness who approached his task objectively and clearly. In essence, his position was that the only circumstances under which the stadium sale might be included in the 2017-18 financial statements would be in the circumstances set out in the Instructed Assumption. PP accepted, albeit perhaps reluctantly, that if the Instructed Assumption was correct, it would have been permissible (or at least not unreasonable) to recognise the stadium sale in the 2017-18 financial statements.

64. JW was clear that he was under the impression that the Heads of Terms recorded and reflected a pre-existing oral agreement reached on 15 July 2018. DE's evidence was to the same effect. Neither went so far as to say that they had been told this specifically by anyone at the Club and neither was aware that an oral agreement for the sale of land was void.

65. JW was also clear that had he known that no legally binding agreement existed as at the year end, as auditor he would not have accepted the inclusion of the stadium sale in the 2017-18 financial statements. He was not asked what his view would be based on the Instructed Assumption and the matters underlying that assumption.

66. We will turn to the Instructed Assumption shortly, but one matter of fact is abundantly clear: neither the Club nor the auditors took any informed legal advice about how an agreement for sale of the stadium to DC that was legally binding and effective as from before 31 July 2018 could be fashioned (if it were legally possible) after 31 July 2018. The only lawyers who got anywhere near the issue, DC's lawyers in Thailand and KM in England, were not qualified to give such advice and the timescale in which decisions had to be made (see paragraph 119) was such that the obtaining of advice from those who did have the expertise was probably impracticable.

67. The evidence does not indicate whether, had the Club and/or the auditors taken advice at the time from, say, an experienced property solicitor, advice along the lines of the basis for the Instructed Assumption would have been given. Mr Randall QC and Mr Grant have made submissions, relying upon some well-known and some not so well-known authorities, to support the propositions underlying the Instructed Assumption. Whilst the Commission cannot say, given the time it has had to consider all these submissions along with the rest of the material in these proceedings, that the arguments are completely untenable, our inclination is to say that they are sufficiently remote from main-stream property law thinking as not to have reflected the advice the Club or the auditors would probably have received if it was sought at the time the Heads of Terms were formulated.

68. We accept that a valid open contract for the sale of land or an interest in land is possible (see, e.g., *Kuznetsov v Camden LBC* [2019] EWHC 805 (Ch)), but it is impossible to see how the Heads of Terms could properly be understood to constitute such a contract. One major problem is that the consideration for the purchase is not set out with sufficient certainty to comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989.

69. However, as we see it, the principal problem with this suggested legal construct of the Heads of Terms is that it does not reflect the reality of what occurred. The legal construct does require as at the date of the Heads of Terms that a specifically enforceable contract came into existence. In other words, the stadium would have become DC's "in equity". One consequence of that is that the risk of damage or destruction to the stadium would have passed to DC immediately upon the formation of the contract. The evidence demonstrates that no steps were taken, for example, to make appropriate insurance arrangements. We might add that the failure of DC to follow through with the Heads of Terms in the timescale envisaged at the time, and ultimately not proceeding with the purchase in his personal capacity, does throw into doubt whether he ever had the intention of proceeding exactly as the Heads of Terms contemplated.

70. However, be that as it may, we are unpersuaded that the legal construct reflected in the Instructed Assumption can realistically be relied upon by the Club and, accordingly, we consider that the Heads of Terms did not represent a legally binding contract of sale of

the stadium and thus should not have been recognised in the 2017/2018 accounts of the Club.

71. In our view, subject only to the other defences raised by the Club, Charge 1 is made out.

Other defences raised to Charge 1

72. These defences only arise if Charge 1 is otherwise made out which, as indicated, in our view, it plainly is. We will deal with each in turn.

Legitimate expectation

73. The issue is encapsulated in this passage in the notice of arbitration instituted by the Club soon after the two Charges were promulgated in November 2019:

> "… between 6-21 August 2018 (inclusive) the EFL, through its officers, made a clear and unambiguous representation or series of representations that so long as the Club's proposed transaction with respect to its stadium (the "Stadium Transaction") was accepted by the Club's Auditors in the 2017/18 accounts then the EFL would accept the accounts and accept that the Club had met its P&S requirements for the 2017/18 season."

74. This was said to be the unambiguous representation upon which the Club relied for the purposes of this argument.

75. We express no views on some of the arguments deployed by Mr Segan in response to this contention, but there are three which we found compelling and which we consider demonstrate that the Club's contention is without merit.

76. First, as it stands, and taken literally, the Club's argument would mean that the EFL would be bound to accept an auditing decision taken by a club's auditors as conclusive on the question of compliance with the P&S Rules, even if it was demonstrably erroneous. Whilst the EFL could theoretically take such a position, it would be absurd for it to do so and indeed the P&S Rules prevent it. In two places in the EFL Regulations it is provided expressly that a club's annual accounts are to be "prepared and audited

in accordance with applicable legal and regulatory requirements." Regulation 16.3, for example, is in these terms:

> "For the purposes of this Regulation 16, Annual Accounts means the annual accounts in respect of the Club's most recent financial year (such accounts to be prepared and audited in accordance with applicable legal and regulatory requirements) together with a copy of the directors' report for that year and a copy of the auditor's report (if any) on those accounts."

77. P&S Rule 1.1.3 provides that –

> "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 2006 Act."

78. The legal and regulatory requirements include Financial Reporting Standard 102.

79. Second, and allied to that first consideration, officers of the EFL would have no power or standing to waive that requirement and nothing occurred in the situation with which this case is concerned that clothed any of the officers with ostensible authority to do so.

80. Third, Mr Segan was plainly justified in submitting that the P&S rules have a far wider dimension and importance than just the bilateral relationship between the EFL and the Club and exist to protect all of the Championship clubs. It is, he argued, of the essence of the fairness of the competition that those rules are enforced when they are breached. We do not think there can be any answer to that.

81. For those reasons, briefly expressed, we do not consider that the legitimate expectation argument can constitute a defence to Charge 1.

<u>Prematurity</u>

82. We may not do justice to the articulation of this argument by Mr Randall and Mr Grant on behalf of the Club in these few sentences, but in the interests of brevity we will try to summarise.

83. In essence, what is said is that if (which is the case, as we have found) the Annual Accounts for the Club for the 14 months to 31 July 2018 were not in accordance with the Financial Reporting Standards, then they are not "Annual Accounts" as defined in the Regulations and thus no compliant "Annual Accounts" have been submitted. It is contended by the Club that the EFL's right to refer the Club to a Disciplinary Commission does not arise under the rules (P&S Rules 2.9.2) unless and until compliant Annual Accounts have been lodged showing Adjusted Earnings before Tax that exceed the relevant upper loss threshold. That, it is said, has not occurred yet and thus Charge 1 is premature.

84. Mr Segan's response is that this appears to contemplate the need for a two-stage process under which the Club is charged for a breach of rule 1.1.3 (see paragraph 63 above) and then a restated set of accounts would need to be prepared demonstrating a loss in excess of upper loss threshold before a charge could be brought on that basis. He submits that this is not a sensible, workable construction to be placed on the Regulations.

85. He drew attention to *South Shields Football Club v The FA* (5 June 2020), a decision of a Rule K FA Arbitral Tribunal presided over by Lord Dyson. The Tribunal said this:

> "We bear in mind the principle that Articles of Association are to be treated as a "business document" and should therefore be "construed so as to make them workable": see *per* Arden LJ in *Jones v BWE International Ltd* [2004] 1 BCLC 406 at [22]. The same approach should be applied to rules made pursuant to delegated authority in the Articles of a company, such as the FA Rules."

86. Mr Segan submitted that the same logic applies to the Regulations and to the P&S rules which, are made under delegated authority in the Articles of Association of the EFL. He suggested that the rules are intended to be a practical set of rules "capable of meaningful enforcement within a reasonable period".

87. We consider that argument to be compelling and it provides an answer to what, at best, is a highly technical point. We do not consider that any defence is provided to the Club by virtue of the argument summarised above.

Irrelevant considerations

88. It was at one stage it was argued that the charges had been brought on the basis of irrelevant considerations, namely, "pressure from other Championship clubs, including public criticism of the EFL and the threatened bringing of a claim against it by Middlesbrough FC for permitting the Club (and other clubs, thought to include Derby County FC, Aston Villa FC and Reading FC) to sell and leaseback their stadia as a means (amongst other things) of complying with P&S rules" (as articulated in the Club's opening Skeleton Argument.

89. NC was cross-examined about this and Mr Randall suggested that the bringing of charges against the Club was all part of trying to relieve the pressure on the EFL and its Executive from other Championship clubs. He asserted that these matters had nothing to do with the decision to bring charges.

90. The matter was not pursued further and we can see no basis at all for concluding that the charges were instituted for some irrelevant or wrongful reason. The Club brought on the investigation in the first place by failing to comply with the P&S Rules for the second year running.

Charge 2

91. We have identified the basis for Charge 2 above (see paragraph 7). Before we turn to the substance of the argument, there are one or two preliminary matters we would mention.

92. In the Charge Letter, under what was headed "Issue 3", the EFL asserted that it "is concerned that the Club sought to deliberately conceal from the EFL that the Heads of Terms had been backdated" and then gave a narrative version of what, in other contexts, would be the particulars of a positive allegation that the Club did deliberately seek to conceal from the EFL that the Heads of Terms had been backdated. The assertion was also made that "the Club appears to have misled the EFL into thinking that the Heads of Terms were actually executed on 15 July 2018, within the Club's extended 2017/18 accounting period, when they were not" (our emphasis).

93. We will turn to those particulars below, but we do observe that a serious allegation such as deliberate deception made by anyone, but not least in respect of someone who is professionally qualified or otherwise occupies a public profile, is not one to be made lightly. If it is to be made, it needs to be made expressly and clearly with convincing *prima facie* evidence to support it. An expression that the EFL is "concerned" that it occurred is equivocal and is not a fair or satisfactory way of articulating such an allegation.

94. We have referred to the need for there to be "convincing *prima facie* evidence to support" an allegation of dishonesty. Whether that is so at the charging stage will be a matter of judgment for those engaged in the process. It would always be as well for those in that position to remember what has been said about the quality of the evidence needed to sustain such an allegation even though it needs only to be established on the balance of probabilities. In *In re H* [1996] AC 563, Lord Nicholls of Birkenhead said this:

> "When assessing the probabilities the court will have in mind as a factor, to whatever extent is appropriate in the particular case, that the more serious the allegation the less likely it is that the event occurred and, hence, the stronger should be the evidence before the court concludes that the allegation is established on the balance of probability. Fraud is usually less likely than negligence. Deliberate physical injury is usually less likely than accidental physical injury. A stepfather is usually less likely to have repeatedly raped and had non-consensual oral sex with his under-age stepdaughter than on some occasion to have lost his temper and slapped her. Built into the preponderance of probability standard is a generous degree of flexibility in respect of the seriousness of the allegation. Although the result is much the same, this does not mean that where a serious allegation is in issue the standard of proof required is higher. It means only that the inherent probability or improbability of an event is itself a matter to be taken into account when weighing the probabilities and deciding whether, on balance, the event occurred. The more improbable the event, the stronger must be the evidence that it did occur before, on the balance of probability, its occurrence will be established … No doubt it is this feeling which prompts judicial comment from time to time that grave issues call for proof to a standard higher than the preponderance of probability."

95. In *R (N) v Mental Health Review Tribunal (Northern Region)* [2006] QB 468, Richards LJ said this:

> "Although there is a single civil standard of proof on the balance of probabilities, it is flexible in its application. In particular, the more serious the allegation or the more serious the consequences if the allegation is proved, the stronger must be the evidence before a court will find the allegation proved on the balance of probabilities. Thus the flexibility of the standard lies not in any adjustment to the degree of probability required for an allegation to be proved (such that a more serious allegation has to be proved to a higher degree of probability), but in the strength or quality of the evidence that will in practice be required for an allegation to be proved on the balance of probabilities."

96. We will return to those considerations shortly.

97. Whilst it is true that the allegation, as framed, was against "the Club", there are always identifiable individuals who will allegedly have been responsible for the deception and the relevant care and caution to which we have referred needs to be shown before any such allegation is made. In this case, the three individuals who would have been potential parties to the deception, Mr Chansiri, Ms Meire and Mr Redgate, were made the subject of an allegation to this effect in their personal capacities. The disciplinary proceedings arising from that allegation were withdrawn by the EFL on 19 March 2020, but the letter withdrawing them asserted that the EFL did "not resile from its initial decision to bring charges against the individuals concerned". That decision was, of course, made when the existence of the additional evidence referred to below was known. Nonetheless, it is to be noted that in the EFL's opening Skeleton Argument, the first paragraph states that "Mr Chansiri, Mr Redgate and Ms Meire set about producing backdated documents that gave the false impression that there was a binding contract for the disposal of the Stadium on 15 July 2018."

98. It is even more unfortunate, in our view, that the EFL did not offer the opportunity to any of the three individuals concerned to explain their position in relation to the suggestion of deliberate deception before the charges were preferred. We will return to this later (paragraphs 136-137).

99. On any view, these proceedings will determine whether any or all of those individuals did engage in the deliberate deception of the EFL. Equally, on any view, for that allegation to be sustained, three people, two of whom were professionally qualified, would have to be found to have put their heads together and conceived a plan deliberately to deceive several EFL officers with whom those two, in particular, had had a good and open working relationship over several months previously and, so far as JR was concerned, over a much longer period. Whilst, of course, nothing is impossible, the starting-point must be that this was inherently improbable.

100. At the time of the Charge Letter, a piece of evidence that has figured significantly in the proceedings before the Commission had not emerged. It was first injected into the picture on 29 January 2020 when it was disclosed by the EFL. It was Mr Craig's note of the meeting on 3 August 2018. We will return also to that shortly, but for present purposes we will return to the particulars of the deliberate deception allegation made in the Charge Letter.

101. In essence what was alleged was that the Heads of Terms were, unknown to the EFL, back-dated to a date before 31 July 2018 and that the email from JR to BHP on 6 August 2018 (referred to in paragraph 129 below) had been deliberately concealed from the EFL when the version of the Heads of Terms signed on 15 August (see paragraph 54 above) was sent to the EFL on that day. That email would, it is said, have revealed that the Heads of Terms had been signed after 31 July.

102. The documents that revealed those facts were included in the extensive disclosure of documents provided to the EFL by the Club in July 2019. By 19 July 2019 NC was able to draw attention to the first of these matters in a letter he wrote to the Club's solicitors of that date. In one paragraph he said this:

> "The Heads of Terms document as submitted to the EFL and dated 15 July 2018 was not in fact created until a date on or around 6 August 2018 i.e. outside the financial year for which the stadium sale has been reported."

103. This was, of course, nearly a year after the meeting on 3 August 2018. His letter did not make reference to that meeting or what was said about the sale of the stadium at that meeting (see paragraph 105 below) although his evidence to the Commission was that

he “always had the recollection” that they had been told that an “irrevocable term sheet” relating to the sale of the stadium had already been signed.

104. Further review of the disclosure revealed the second matter which was then referred to in the charge letter of 19 November 2019. Again, that letter made no reference to the meeting of 3 August 2018 and what has subsequently been said to be a lie told by someone on behalf of the Club (to which the other two Club representatives must have been willing parties) that an “irrevocable term sheet” for the sale had already been signed by the date of that meeting. That allegation only emerged when NC’s handwritten notes of that meeting were discovered in January 2020.

105. The notes are fairly brief for a meeting that lasted two hours, but although the Club’s witnesses have suggested that those parts of the note that appear after the words “to discuss on Monday” (see below) must have been composed subsequently because that is how the meeting ended, we think it more likely, and in accordance with NC’s evidence, that the notes were made contemporaneously. It is possible that the final page containing two lines might relate to something else, but those two lines are immaterial for present purposes. The notes indicate amongst other things that there were discussions about the embargo on player sales, the inability of the Club to get “a business valuation of the stadium”, there was reference to a stadium value of £40 million and to an annual rent of £3 million and to the EFL “to discuss Monday”. The significant entry for the purposes of Charge 2 (which, it is to be noted, appears after the entry relating to the EFL’s proposed discussion on “Monday”) is as follows. The quotation marks are as they appear in the original.

> “irrevocable term sheet signed between the parties, longform to follow completion on x date” 2/3 month window.
>
> Then not worried.

106. The quotation marks suggest that NC was recording what someone said. He says that the note confirmed his recollection that someone from the Club, who he could not identify, said specifically that an “irrevocable term sheet” had already been signed and that certain formalities would follow in a 2-3 month window. SH also said in his witness statement that at the meeting “we were told that the sale of the stadium had been

irrevocably agreed." Unfortunately, he had been shown NC's note before he made that witness statement. It should be noted that he had left his post as Chief Executive of the EFL in May 2019 and so the first time he would have been asked to cast his mind back to the meeting of 3 August 2018 would have been 16 months later in January 2020 when he made his first witness statement.

107. Just as the first time SH and NC reflected on what was said at that meeting since it occurred was in early 2020, for DC, JR and KM they too had to look back about 18 months to the content and circumstances of that meeting. Anyone who has been involved in either the giving or receiving of evidence will know that memories can easily become distorted with the passage of time even for wholly honest witnesses. This is the more so when there has been no particular need to focus on an event until some while later and many things have occurred in the meantime. As we observed at the outset of this Decision, all the parties involved in the discussions that started at this meeting and concluded about 14 days later thought that everything had been resolved. This meeting would not of itself have figured greatly in anyone's thoughts thereafter: NC made no mention of it until he found his notes. Resurrecting entirely accurate memories of what was said and by whom will have been difficult for everyone. There is a great deal of temptation to begin with the assumption that something would or would not have been said or done and then persuading oneself that it was or was not indeed said or done.

108. Furthermore, as we will indicate below, everything starting with that meeting was conducted in very great haste both on the Monday following the meeting (6 August) and in the 10 days or so thereafter, with some people going on holiday. This was a fertile environment for misunderstandings to arise.

109. Any tribunal that has to make decisions about these matters will usually be guided by the contemporaneous documentation and by the inherent probabilities rather than by the apparent persuasiveness of a witness.

110. The Club's witnesses are adamant that nothing was said by any of them to the effect that some agreement concerning the sale of the stadium, however described, had been signed by the date of the meeting. It was not true that any such agreement had been concluded. It follows that each of them would have known that any such statement by

one of their number was either a deliberate untruth or would have represented a complete misrepresentation of what had happened to date. We find it very difficult to accept that matters would simply have been left uncorrected if such a statement was made in the way suggested.

111. That general context is important. There is no evidence at all that anything had been said by anyone on behalf of the Club to the EFL prior to 31 July that the sale had finally been agreed upon or had been reflected in some written agreement. The EFL knew that a valuation was a vital ingredient of any such arrangement and yet even NC's note indicates that the Club had not been able to obtain one. The whole tenor of his note up until the entry referred to above was of uncertainty about what to do, the beginning of the meeting being dominated by the player embargo, the stadium sale arising subsequently. Indeed, the whole purpose of the meeting was to see what, if anything, could be done to rescue the position. That being so, a categoric assertion that an agreement had been concluded when it had not seems entirely out of place. Given that it seems to be common ground that the EFL would get back to the Club on the Monday with its further thoughts on the situation, it is odd that something so categoric as a "binding agreement" should have been mentioned at the meeting. KM's email to NC and SH at just before 09.00 on the Monday morning, referring to the meeting, was in these terms:

> "As discussed, we would like to understand at what point today you will be able to communicate the possibility of the club selling the stadium to the club's owner. I have attached [JK's] last email which outlines the different scenarios. We would be talking about scenario 2 or 3 and our question is whether the Fair Market Value can be based on the value of our insurance for the stadium. As discussed on Friday, we don't agree with the idea of third party valuation report that uses a depreciated replacement cost."

112. The "possibility of the club selling the stadium to the club's owner" is hardly an expression connoting something that had already been achieved in a binding fashion.

113. We will return to what the witnesses say about their recollections of the meeting shortly, but does the strength and quality of the contemporaneous documentation positively support NC and SH's recollection of what was said? Whilst we recognise that it is important not to interpret hastily written documents as if they were part of a contract or

a statute that needs to be interpreted, we do not think that it does. In the first place, the words recorded in NC's note, assuming the record to be verbatim, does not necessarily indicate a past signing of an agreement. It could equally, and given the context we consider more likely, represent a suggestion of a step that might be taken to which someone answered that if it could be achieved, he (or she) would not then be "worried". It could even represent an amalgam of what several people contributed to the discussion. NC says that it confirms what he "took away" from the meeting, namely, that a binding agreement had already been signed. We do not doubt the genuineness of his belief to that effect, but it involves a reading of the words recorded in a way that supports that belief rather than a reading that suggests something different. Again, we do not doubt that SH now genuinely believes that something like this was said, but it would be more persuasive if he had given his recollection untainted by knowledge of NC's note.

114. SH recorded on the morning of Sunday (5 August) some matters arising from the meeting on 3 August in an email he sent to his colleagues NC, TD and JK. The part concerning the sale of the stadium was in these terms:

> "Sale of Stadium
>
> I appreciate that this matter has been discussed for some time. Putting the (sic) all this to one side, we need to establish a very clear position that meets our rules, as to what form the sale of Hillsborough could take to Mr. Chansiri, so as to be eligible as part of their P&S calculation and what documents we require to support this.
>
> IT IS THE CLUBS CHALLENGE TO CREATE A CONTRACT THAT SATISFIES THEIR AUDITORS THAT IT CAN BE INCLUDED IN THEIR 2018 ACCOUNTS.
>
> Can I suggest that we look at what we found acceptable when AVFC[1] sold some of their fixed assets and base our approach around that.
>
> Our objective is to try and get the Club to a position that it is not in breach but at all times within the Rules.
>
> Your prompt attention to this would be appreciated."

[1] Aston Villa FC.

115. Reminding ourselves again of the need not to construe such an obviously hastily composed email like a statute or contract, the use of expressions like “as to what form the sale of Hillsborough could take to Mr. Chansiri” and “to create a contract” (our emphasis) do not suggest that the author was talking about an existing binding agreement for the sale, but of something yet to be put in place.

116. Another email sent during the Sunday of that weekend was from KM to DC giving her weekly update. It contained this paragraph:

> “**EFL**
>
> This will be priority in the next two days after our meeting Friday.
>
> Chairman, I only will say that I don't feel comfortable signing a document of a transaction that is backdated.
>
> I understand it's to help the club but I think it's quite risky with so many people that will have known that this is not what has happened.”

117. This has been seized upon by the EFL as indicative of some kind of conspiracy to produce false documents. In the first place, it does indicate that KM’s perception was that something with retrospective effect was going to be required for the P&S Rules to be met. If it was plain to everyone at the meeting (whatever their subsequent beliefs about what was said) that there was no binding agreement of sale in place, then it was equally plain to everyone present that something with retroactive effect would be required to fill that gap. Second, KM’s discomfort was, she explained credibly, primarily that she was concerned about the perception that back-dating any agreement would create for those who would be interested in what the Club had done, particularly representatives of other clubs.

118. No-one present at the meeting will say that back-dating an agreement of sale was discussed, but it seems clear to us that there must have been at least an unspoken assumption that this would be the case, the proviso being that it would need to satisfy the Club’s auditors for inclusion in the accounts to 31 July 2018. Mr Redgate was pressed hard by Mr Phillips about whether back-dating had ever been mentioned at the meeting or over the weekend before the further communications with the EFL. His

evidence was that it was not. He was confronted with KM's email, but repeated that, so far as he was concerned, no-one had specifically mentioned back-dating prior to the Monday. (KM and DC attended a Club match on the Saturday. JR did not.) In the EFL's Closing Submissions, JR is accused of lying about this, although the assertion was not put expressly to him. We do not accept that. There was no basis for thinking that he had any part in any conversations between KM and DC over the weekend. He was wrong when he said that it was not until the Club heard from the EFL on Monday that back-dating was first raised because he had, about an hour before the EFL email was received, suggested to KM, following an unsuccessful request made to DC's lawyers in Thailand to draft a sale agreement, that she should prepare something and date it 31 July. We do not know what, if any, advice was given by the Thai lawyers or whether JR simply assumed that the contract would have to be dated no later than 31 July, but we reject the suggestion that his answer was a deliberate lie. In one sense, as we have said already, back-dating was an inevitable consequence of where the Club was on the Monday morning following the Friday meeting.

119. Returning to KM's expressed discomfort for the reasons given, in our view, this was what SH's internal email on the Sunday was about. He too was concerned about the perceptions of others. In an email sent to KM in the evening of 6 August the following sentence appeared:

> "You need to move very quickly for this transaction to look credible - we are in your hands."

120. Although NC and KM, both lawyers, were involved in the discussions, neither would be able to advise on the requirements necessary for the kind of sale agreement that would need to be put in place. NC is a qualified solicitor, but he has not been in private practice for nearly 20 years and KM, a relatively recently qualified Belgian lawyer, had no expertise in UK property matters. In an ideal world, the Club would have gone to some experienced solicitors to find out whether, as may be the case according to some submissions made by Mr Randall, an agreement could have been concluded that had the desired effect, or whether it was not possible (see paragraph 67 above). That might have spared all the problems that have ensued. However, as SH's email indicates, moving quickly was required and indeed that is what had been happening during the Monday.

121. We will return to that shortly, but we interpose here a brief reference to the evidence about the expression "term sheet". In the experience of the members of the Commission, it is not an expression in regular use in the UK. NC says he was not familiar with it and the disclosure given on the EFL's side contains no other reference to it. Neither JR nor KM were familiar with it and the disclosure on the Club's side does not reveal its use in any of the internal (or indeed external) messaging or documentation. DC said that he was not familiar with the expression. He was familiar with the word "unconditional". It was not clear to us whether SH was familiar with the expression, but it was not referred to in his internal email of 5 August. We are not able to say, on the evidence, who used the expression at the meeting on 3 August save to conclude that someone must have done. Because, in our view, the full note does not lead inexorably to the conclusion that the agreement had already been signed, making a finding about who did say it is not necessary.

122. Returning to Monday, 6 August, KM reluctantly prepared what she described as "very basic" Heads of Terms (as set out in paragraph 51 above) which JR then sent to BHP. Before doing so he had spoken to JW at BHP. JR's subsequent email to KM was in these terms:

> "I have just spoken to auditors.
>
> They are ok with what's proposed as long as the sale document is dated 31st July so once we have a draft I will send them a copy to review.
>
> As to the independent professional valuation we will need this to be yield based on the rent of (sic) the repairing responsibility being with the Club."

123. It is at this point, given all the haste, that one misunderstanding arose. JW has said subsequently that what he said to JR was that he would be content with what was proposed concerning recognition of the sale within the 2017/18 accounts "as long as the agreement had been made within the accounting period", rather than referring to when the document was "dated", the agreement being "irrevocable".

124. However, based on JR's email to her, KM produced the Heads of Terms which JR then sent to JW saying –

> "Please have a look at the attached draft - let me have any comments as we want to get signed later this afternoon".

125. Having discussed it with JW, DE replied as follows:

> "Just to confirm we would be happy, on basis of the above, to include the sale in the accounts to 31st July 2018 subject to obtaining a satisfactory valuation"

126. We have seen a great number of communications that day and in the 10 days or so thereafter concerning the precise terms of the final Heads of Terms (see paragraph 55 above), the financial arrangements consequent upon them and about the basis for a valuation of the stadium. All those communications are consistent with the final Heads of Terms being concluded after 31 July, but by reference to a contractual document that everyone assumed (in hindsight, wrongly) was sufficient to meet the relevant accounting standards.

127. Whilst SH and NC, in particular, have said that they had assumed that the Heads of Terms were signed before 31 July, we think that, had they applied their minds fully to the situation at the time, it was obvious that this was not so. However, both were either on holiday or going on holiday at crucial moments following a busy period and it is possible to see how the documentation was not given the kind of scrutiny that it has subsequently received.

128. We have already concluded that the Club saw no reason for keeping from the EFL the fact that the material documents were signed after 31 July. On that basis, there could be no motive for trying to conceal that fact in any further communications. A great deal has been made of an email sent by KM to the EFL on 15 August containing as attachments the then Heads of Terms (see paragraph 101 above), a Stadium Valuation letter (dated 15 August, but referring to the valuation "as at July 2018"), a P&S calculation and the email received from BHP on 6 August (see paragraph 125 above). What was omitted from the last of those four documents was JR's email to JW saying that "we want to get [it] signed later this afternoon". The suggestion is made that this was deliberately omitted so that the EFL would not know that the documents were signed after 31 July even though the dates of the signatures were 15 July.

129. The suggestion that this was done by KM was not really pursued. We should say that we thought KM was a particularly frank and open witness and we consider it unlikely in the extreme that she would have done such a thing. As we have said, from her perspective, there would have been no motivation to do this. Her account, which we accept, is that she thought that the sale of the Stadium was out of the picture by 3 August and it was only at the meeting with NC and SH did that re-emerge as a possibility and, as she said, it would have been obvious to everyone that an agreement with retrospective effect would be required.

130. The suggestion that JR, who sent the various attachments to KM for onward transmission, was the guilty party in this regard was still maintained during the hearing. He was, in some respects, closer to the precise arrangements made on 6 August, but he too had no motivation for concealing this information from the EFL given everything that had been discussed at the meeting of 3 August and thereafter. We consider that the omission was entirely innocent.

Conclusion on Charge 2

131. In our view, the allegations set out in Charge 2 have not been made out and, accordingly, Charge 2 is dismissed.

General conclusion

132. As will be clear, Charge 1 is established, Charge 2 is not.

133. We will need to consider submissions about sanction in relation to Charge 1. We appreciate that there are considerations about costs in relation to Charge 2. Given the timescale, we will receive submissions about sanction first.

134. We referred at the outset of this decision that some lessons could be learned from what has happened in this case. We venture to suggest two.

135. In the first place, Club owners, in particular, need to understand that timetables set by the EFL for compliance with the P&S Rules are not simply broad targets in a negotiating process: they are set with the interests of all Clubs in mind and it is unfair on other Clubs for clearly established deadlines to expire and then for *ex post facto* efforts made to rescue the position. If ever there was a case which demonstrates that hastily considered "rescue attempts" can lead to misunderstandings, misconceptions and mistakes, this case does. In this case, it led to the back-dating of a document which, in the particular circumstances, was not dishonest, but which could all to easily lead to suggestions that it was.

136. Second, we have expressed some concerns about the handling of the allegations of effective dishonesty in this case. No interviews were conducted of DC, JR and KM who were targets of these allegations. At one stage it appeared to be said that the EFL did not have extensive powers of investigation. However, the EFL Regulations 2018/19 (at Section 8) set out rules that relate to Investigations and Disciplinary Proceedings. As well as having the power to initiate and prosecute disciplinary proceedings against any person subject to the EFL's Regulations, the League has the power under rule 82.2[2] to investigate any suspected breach of the regulations and/or any complaint allegation or suspicion of financial or other irregularity and/or misconduct by any Club, Official or Player. The three individuals we have identified were, therefore, subject to investigation by the EFL.

137. By rule 82.3[3], the League is given the power to "require any Club, Player or Official to … provide such specific or general information on League affairs as The League may request in writing … attend any inquiry, hearing or proceedings to answer questions … produce documents within their power, possession, custody and / or control, as The League may direct." Under rule 82.4[4], the League may instruct such advisers as they wish for the purposes of carrying out such investigations, inquiry, hearing or proceedings. Any failure to co-operate with any request for disclosure under Regulation 82 can be treated as a separate breach of the Regulations. If the League had chosen to do so, it could, for example, have appointed a lawyer to conduct an inquiry, during

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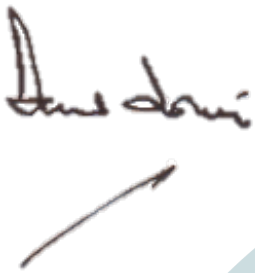
2 Rule 83.2 in 2019/20 Regulations.
3 Rule 83.3 in 2019/20 Regulations.
4 Rule 83.4 in 2019/20 Regulations.

which the various individuals would have been obliged to attend and explain the documents relied upon in these proceedings. This would, in our view, have been a fairer approach than simply to bring the allegations without further investigation.



Sir David Foskett
For and on behalf of the Disciplinary Commission
16 July 2020

ANNEX 1

The 5 scenarios set out in JK's email to the Club on 30 May 2020

Scenario 1 - Club sells the stadium to a Company within the Football Club Group (e.g. to SWFC Holdings Limited)

- The Executive would propose that the Club's stadium is a material aspect of the football operations. Thus, if the stadium was simply sold to a Group Company within the Football Club structure, the Executive would want the purchasing company to be included within the consolidated results for the purposes of P&S in accordance with Rule 1.1.9 (referenced below).

- The profit on the sale of the stadium would therefore be adjusted out of the results on consolidation.

- If the exclusion of the profit resulted in the Club submitting a P&S result in excess of the Upper Threshold, it would be treated as being in breach of the P&S Rules in accordance with Rule 2.9 and the League would refer the breach to a Disciplinary Commission in accordance with Section 8 of the Regulations.

Scenario 2 – Club sells the 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/operations of the purchasing company, the Club might still be caught by Rule 1.1.9 of the P&S Rules. Such a circumstance would be if the 'Newco' on purchasing the stadium carried out the match day and non-match day catering and hospitality operations. The purchasing company would be consolidated for the purposes of the P&S Rules resulting in the profit on the sale of the stadium being adjusted out of the results.

- 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.

Scenario 3 - Club sells the stadium to the Owner as an Individual

- The assumption within this scenario is that the Stadium is purchased by Mr Chansiri as an individual not as a corporate entity.
- The Owner, is at the top of the Football Club Group, however, as he is not a corporate entity the transaction would not be caught by Rule 1.1.9 of the P&S Rules with reference to Section 1161 of the Companies Act (in references below).
- 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.
- If the value of the sale is proven to be at Fair Market Value, the profit would be allowable for the purposes of the P&S Rules.
- Dependent on the level of profit generated, the Club would fulfil the P&S requirement and the current embargo would be lifted.
- Please note, if the Owner purchases the stadium through a new corporate entity rather than as an individual, it would be captured within Scenario 1.

Scenario 4 - Club sells the stadium to a 3rd party not connected to the Owner or the Club

- If the purchasing entity is deemed not to be a Related Party in accordance with the P&S Rules (reference below) to either the Owner or the Football Club, then the transaction will be deemed as a sale of the stadium to a third party.
- The profit on the sale of the fixed asset would be accounted for in the Club's 2017/18 financial year end.

- Dependent on the level of profit generated, the Club would fulfil the P&S requirement and the current embargo would be lifted.

Scenario 5 - The Stadium is sold after the Club's new financial year end (30th June 2018) to any party

- The sale of the stadium would be accounted for post year end.
- The Club's results for the 2017/18 financial period would not include the profit on the sale of the stadium.
- If the exclusion of the profit resulted in the Club submitting a P&S result in excess of the Upper Threshold, it would be treated as being in breach of the P&S Rules in accordance with Rule 2.9 and the League would refer the breach to the Disciplinary Commission in accordance with Section 8 of the Regulations.

ANNEX 2

I have been instructed to assume that the Heads of Terms created "a legally binding contract", and furthermore I should assume the following (together, my "Instructed Assumption"):

a) Open contracts

- A legally binding contract for the sale and purchase of land can be concluded, even if no other conditions are specified, provided that it is in writing, and agreement is reached as to 1) the parties, 2) the property in question, and 3) the price. This is known as an 'open contract'. Absent contrary indication, the time for completion of an open contract is not 'of the essence'.

b) The legal effect of an open contract

- As land is always treated as being of unique value, the remedy of specific performance is available to the purchaser as a matter of course. Under the trust that arises from a specifically enforceable contract, the property at once belongs to the purchaser in equity, through what is known as the doctrine of conversion. In consequence the risk of damage or destruction to the property passes to the purchaser immediately upon entry into the contract. The purchaser's equitable (or 'beneficial') ownership is a proprietary interest, enforceable against third parties. Until the price is paid in full (usually on completion), the vendor has a lien (a security interest) over the property for the unpaid element of the price.

c) Heads of Terms dated 15 July 2018 with minimum price of £37.5 million

- With regard to the Heads of Terms dated 15 July 2018 which stated a purchase price of "a minimum of £37.5 million" and were sent to the EFL on 15 August 2018, although no agreement for a stadium sale had been concluded until this date, you are instructed to assume:

    - as a matter of fact, that this agreement for the Stadium Sale was intended by the parties to be effective from 15 July 2018 in order that it could be included in the Club's 2017/18 audited accounts and assist the Club in meeting its P&S requirements;

and as a matter of law:

- that the parties to a sale can agree that it shall be effective from an earlier date; and

- that this Heads of Terms was effective to create a legally binding open contract for the sale and purchase of the stadium effective from 15 July 2018.

d) Replacement Heads of Terms dated 15 July 2018 with minimum price of £42 million

- With regard to the replacement Heads of Terms also dated 15 July 2018 which stated a purchase price of "a minimum of £42 million" and were sent to the EFL on 17 August 2018, you are again instructed to assume:

  - as a matter of fact, that this agreement for the Stadium Sale was again intended by the parties to be effective from 15 July 2018 in order that it could be included in the Club's 2017/18 audited accounts and assist the Club in meeting its P&S requirements;

    and as a matter of law:

  - that the parties to a sale can agree that it shall be effective from an earlier date; and

  - that this Heads of Terms was effective to create a legally binding replacement open contract for the sale and purchase of the stadium effective from 15 July 2018.