

**IN THE MATTER OF A SPORTING SANCTIONS APPEAL PURSUANT TO REGULATION
12.3.10 OF THE EFL REGULATIONS**

**AND IN THE MATTER OF THE SPORTING SANCTION IMPOSED BY THE EFL ON 3
JULY 2020**

BEFORE:

*William Norris QC
Edwin Glasgow QC
Richard Liddell QC*

BETWEEN:

Wigan Athletic AFC LTD (In Administration)

Appellant

and

The English Football League Limited

Respondent

DECISION OF THE LEAGUE ARBITRATION PANEL

Introduction and Summary

1. This appeal arises out of a series of events beginning with the sale of the Appellant company (hereafter referred to as 'Wigan' or 'the Club'), in November 2018, to an overseas investment company (International Investment Company – IEC) owned by a Dr

Stanley Choi. IEC proceeded to support the Club by a series of loans until it sold the Club to another overseas company (Next Leader Fund – NLF, with some common shareholdings¹), a deal completed in late May 2020, some two and a half months after the Covid-19 pandemic had caused the Championship season to be suspended.

2. Mr Au Yeung Wai Kay (generally referred to as Mr Kay but sometimes as Ken Ay) was the owner of a company called Next Leader Ltd (NLL) which in turn was, or became, the general partner of NLF, a company of which Dr Choi and Mr Kay were (respectively 51%/49%) shareholders. In due course, on 24th June 2020, Mr Kay apparently agreed to pay just over £20m for Dr Choi's 51% interest which then gave him 100% of the shares in NLF and made him, in effect if not in law², the sole owner of the Club. It also placed him in effective control.
3. It may seem extraordinary that, notwithstanding the deal which was to be completed the following day which resulted in him becoming, in effect, the sole owner of the Club, Mr Kay had, on 23rd June 2020, already contacted Begbies Traynor (BT) regarding putting the Club into administration³. He seeks to explain that deal⁴ as an acquisition which gave him 'greater room for manoeuvre' in the events which followed.
4. On 30th June 2020, the Club Directors voted to place the Club into administration, a decision confirmed by the High Court on 1st July 2020. Messrs Stanley, Krasner and Watson of BT were appointed Joint Administrators.
5. That resulted in an automatic deduction of 12 points as a 'sporting sanction' in accordance with EFL Regulation 12.3.1. In practice, unless this appeal succeeds, that means the difference between Wigan's relegation to League One and continuing in the Championship. Whatever the outcome, however, the administrators are trying to find a buyer for a well-supported club which in the last forty or so years was built up into a good

¹ There is a Chronology and List of Agreed Facts which the parties have helpfully prepared and which is included as an annex to this Decision. The original shareholding arrangements are to be found against the entry for 18th November 2019. The EFL skeleton for this hearing (at para 2.4) draws attention to the fact that in late 2019 the Wigan Board was told that IEC no longer had the resources to continue its funding.

² Para 8 of the Club's Reply states, correctly, that as a matter of law it is NLF which is the owner of the Club rather than Mr Kay. However, because of Mr Kay's shareholding in NLF, he was referred to as the 'owner' as indeed he was for practical purposes.

³ He was also interested in liquidation but administration was that which BT advised.

⁴ In paragraph 3.3 of his witness statement.

and popular football club and community asset which was successful enough to have competed in the Premier League between 2005 and 2013.

6. The only basis on which this appeal could succeed so that such points deduction might be overturned would be if the administration was the result⁵ of an unavoidable and unforeseeable failure by the owners to meet their contractual obligations (or at least their assurances⁶) which failure could properly be characterised as a 'Force Majeure' event as defined in EFL Regulation 12.3 rather than the result of what is referred to in the Regulations as a 'normal business risk'.
7. Even if the Club, which acknowledges it has the burden of proof on this appeal, were to satisfy us on that issue (that is, that the cause of the relevant Insolvency Event arose solely as a result of a Force Majeure), a second issue arises, in respect of which the Club again has the burden of proof. Pursuant to Regulation 12.3.11, it would have to demonstrate that the relevant Force Majeure event was one "*over which the Club and/or Group Undertaking (as the case may be) could not reasonably be expected to have control and its Officials had used all due diligence to avoid the happening of that event*".
8. It is on that basis that the Club filed a Notice of Appeal on 10th July 2020, which appeal was heard by video link on Friday, 31st July 2020.
9. Despite our great sympathy for those who have played or worked for Wigan, those who have loyally supported the Club for many years and those whom we shall call the 'English directors' who have, as we explain further below, done their best to run the Club in an efficient and responsible way (which includes doing all they reasonably could to prevent it being put into administration), we consider we are bound to dismiss the appeal. We do so for two reasons.
10. First, we are satisfied on the evidence we have seen that the Insolvency Event arose because Mr Kay, the effective owner, made a commercial decision to choose to go back on promises of continued support and stopped putting money into the Club. That cannot be regarded as a 'Force Majeure' event. In circumstances in which it is by no means

⁵ 'The wording (which we quote further below) is '*but only on the ground that the relevant Insolvency Event(s) arose solely as a result of a **Force Majeure** event.*'

⁶ There is an issue of legal construction as to whether the assurances given were legally binding.

uncommon in football generally and in the Championship in particular for a Club to depend on external support from its ultimate owners to bridge the gap between income and expenditure (at least without disposing of assets such as the playing staff), it is, we consider, a normal business risk that an owner will lose interest or run out of money and/or choose to deploy its resources elsewhere. That is what happened here.

11. Second, although we accept that the English directors of Wigan's Board did exercise due diligence to avoid the event which is characterised as 'Force Majeure', the same plainly cannot be said of Mr Kay and perhaps also his nominated new directors (who appear to have been based in Hong Kong⁷ but from whom we have no direct evidence). The wording of the Regulation is such that the appeal must therefore fail on that additional basis.

Procedure

12. In accordance with the provisions of Regulation 12.3 (set out below), the appeal had to be heard within 21 days and, as we say, the hearing took place by video-link on 31st July 2020. It is a testament to the exemplary co-operation of the parties and to the efficiency of the Sport Resolutions secretariat that we were able to hear the case with the benefit of written submissions, a very substantial volume of documentary evidence, with witness statements and oral evidence and with a most helpful report from a jointly instructed forensic accountant, Doug Hall of Smith and Williamson.
13. One point of note is that, in advance of the hearing, we were notified by solicitors acting for Barnsley FC ('Barnsley') that we were invited to exercise our powers under Regulation 96.1 and Rule 4.1 (l) of Appendix 2 of the EFL Regulations to allow Barnsley standing in respect of the Appeal. They also sought consequential directions under Rule 4.1 (k) of Appendix 2. Barnsley, of course⁸, would be relegated instead of Wigan if the present appeal were to succeed.

⁷ Mr Krasner in para 2.13 of his witness statement refers to them as the 'Hong Kong based directors'. We shall refer to them as the 'new directors'.

⁸ Unless there were a successful challenge to the recent decision in the Sheffield Wednesday case.

14. Unlike in the forthcoming Macclesfield Town case⁹, which is a review of a Commission's decision rather than a *de novo* hearing and where (we understand) the EFL was neutral as to the participation of Stevenage FC, the EFL was here supportive of Barnsley's attendance¹⁰, albeit not to the extent Barnsley had sought.
15. Our decision on Barnsley's application was that it should be permitted to place submissions before us. We had the benefit of reading two written submissions drafted by Leading Counsel and the witness statement of Dane Murphy (CEO of Barnsley). We also directed that Barnsley should be permitted to attend the hearing (which it did through Simon Pritchard of Counsel) and to see a limited volume of material such as the Notice of Appeal, Replies and Skeleton Arguments and that it would be permitted to respond to any query directed at it in the course of the hearing¹¹.
16. Mr Pritchard did not apply to make any additional submissions, but he did seek an order for Barnsley's costs of such attendance. We indicated (and here confirm) that we refused that application (which had not been intimated in either of the two Barnsley skeletons). The reason is that we did not treat Barnsley as a party in the sense used in Regulation 12.3.19 below but, rather, as a volunteer and observer. In any case, we would not have wished, or considered it appropriate, to add further to the financial burden on the Club as it goes through administration, given that it has (by virtue of the Regulations) to bear all the costs reasonably associated with its appeal, and took no step in its appeal which would reasonably be regarded as inviting or provoking the intervention of any other interested party.
17. A further matter of procedure which was canvassed in advance of the hearing was whether it should be held in public – or at least with public access. In the event, after consideration of the relevant provisions, Wigan's suggestion to that effect was (quite rightly) not pursued.

⁹ The hearing of that appeal will be on 11th August: the chairman of the present Panel also sits as a wing member on the Macclesfield case.

¹⁰ See an email from Mr Taylor QC on behalf of the EFL, dated 27th July

¹¹ We also directed that any application by Barnsley to take a more active role would need a further application at the hearing itself.

The hearing and evidence

18. We began the hearing at 0900 on 31st July 2020 and concluded at 1800 when we said we would give our decision by 1600 on Tuesday 4th August, perhaps with our full written reasons to follow.
19. We should like to pay tribute to everyone involved with the hearing of the appeal for the clarity and diligence of their preparation and presentation and for the courtesy and co-operation which was such a conspicuous feature of the hearing itself and of the process of preparing for it.
20. At the hearing, Wigan, as Appellant, was represented by David Phillips QC and Kira King, instructed by Walker Morris. The EFL's case was presented by Jonathan Taylor QC and Sam Beer (both of Bird and Bird).
21. Given that, as Appellant, Wigan acknowledged that it had the burden of proof, Mr Phillips QC opened the case (to which Mr Taylor QC responded) following which we heard from the jointly instructed forensic accountancy expert, Doug Hall. We should like to single Mr Hall out for particular praise: in a very short time he had been able to familiarise himself with a very complex case, produce a most helpful report (with appendices) in what one might call record time and then gave us considerable assistance through his oral evidence.
22. We then heard from Jonathan Jackson and Darren Royle, both of whom were Directors¹² at all material times, and from two of the administrators, Paul Stanley and Gerald Krasner (the last named summarising an interview he had recently had with Mr Kay). All four of those witnesses had given witness statements and were asked questions by the parties and by the Panel.
23. Mr Kay's witness statement was put before us¹³ but he was not called to give oral evidence and he did not seek to give evidence on his own account. We shall attach weight to that

¹² We shall refer to them as the 'English directors'. Mr Royle was also the chairman until suspended (in effect, by Mr Kay) on 17th June. Thereafter, Mr Kay acted as chairman.

¹³ As per an email from Mr Beer of 29th July, EFL, having (like Walker Morris) been provided with that statement, they 'put it into the record'. We reject Mr Phillips QC's suggestion that, because this is an adversarial process, the EFL is 'bound by' what he says and it is to be noted, in particular, that his account of events differs from that of Mr Krasner (whose account we accept).

statement only where we think it right to do so but we say straight away that he has given no satisfactory explanation for the fact that (amongst many things):

23.1 He was not open with the Club's directors who approved the updated Loan Agreement¹⁴ on 17th June 2020, six days before his legal representatives contacted BT on 23rd June about putting the Club into administration. He then presided over a Board meeting the following day in which he announced that the Loan Agreement had been signed and announced that he was buying Dr Choi's share so that he would become 100% owner. He made no mention of the then probable (or even possible) administration.

23.2 On 24th June 2020 he completed his acquisition of Dr Choi's shares.

23.3 On 26th and 29th June 2020 he gave assurances as to future funding which were either false or at least knowingly misleading.

23.4 He claimed on 28th June 2020 that the financial difficulties had only recently and suddenly arisen when a business partner (or partners) were unable to settle invoices because the effects of the pandemic¹⁵.

24. We note Mr Kay's suggestion that he acquired the totality of the relevant shareholding to give him better control. On what little we know of the actual intentions and motivation of Mr Kay and his associates, we do not consider that likely: it would, to say the least, be a very strange thing to do if, as appears to be the suggestion, the cost of that control (of a business that would imminently be placed in administration) was (as is also suggested) £20,330,283.

25. Our attention was drawn to a suggestion¹⁶ that the whole process of putting the Club into administration might have been in relation to the gambling interests of Mr Kay and/or Dr Choi. Given the way in which international betting markets operate, we recognise that this

¹⁴ See further below in our chronological discussion of the facts

¹⁵ If it really did come as a surprise to Mr Kay in late June 2020 that other businesses might be in difficulties as a result of the pandemic, particularly given the sectors in which they operated, he must surely stand alone in his innocent optimism

¹⁶ In the Press and referred to, perhaps unwisely, by Rick Parry, EFL Chief Executive, in a conversation with a Wigan fan which was covertly recorded.

is not impossible, but it is wholly unsubstantiated as an explanation for what happened here. Accordingly, we discount that suggestion on the evidence we have.

26. Lastly, we heard from Nick Craig, in-house solicitor at the EFL, a position he has held since 2001. Objection was taken by the Club to section B of Mr Craig's written evidence (in which he seeks to explain the background to the Sporting Sanction Regulations) on the basis that attempts to explain the subjective purpose or intent of the Regulations were not admissible, Mr Phillips QC relying on the well-known words of Lord Hoffman in Investors Compensation Scheme v West Bromwich [1997] UKHL 896. In particular, Mr Phillips QC objects to Mr Craig's reliance on what the EFL (on advice) intended, and other explanatory material leading up to the introduction of the Sporting Sanction Regulations.
27. We have a wide and unfettered discretion as to what evidence under the Regulations¹⁷ we may receive and as to what weight, if any, we might attach to it. Nevertheless, we consider it fair and appropriate in all the circumstances to adopt Mr Phillips QC's approach and to look at the natural meaning of Regulation 12.3 according to the terms in which it is expressed. We do not regard examples of what was considered – in advance of the introduction of those Regulations – might or might not constitute Force Majeure as decisive or even particularly persuasive as regards our interpretation of the provision as voted on and enacted¹⁸.
28. With the exception of Mr Kay, who did not provide oral evidence but who, had he done so, would at the very least have had much to explain, we record that we thought all witnesses were entirely truthful and did their very best to assist the Panel.
29. We record our gratitude to them with the additional rider that, in the case of Messrs Jackson and Royle, we consider they acted with a commendable sense of responsibility towards the Club. As we have said already and as we shall explain further below, we reject the suggestion by the EFL that they could and should have done more to prevent the Club being put into administration.

¹⁷ See Appendix 2, para 6.

¹⁸ At an EGM of the EFL in September 2003.

30. On the contrary, we consider that the Club and they as the Club's English directors, did whatever could reasonably have been expected of them up until they were, in effect, presented with a *fait accompli*. We consider that they were, in effect, let down by the Club's effective owner who failed to support the Club as he had said he would, whether as a result of altered economic conditions or because of changing personal preferences and who, as Mr Stanley explained so vividly, told BT (through his solicitors) from at least 24 June 2020 that he was not 'putting another penny' into it.

The relevant Regulations

31. For completeness, we shall quote the provisions of the relevant Regulations in full

12.3 *Sporting Sanctions*

Introduction

The following Regulation provides for how sporting sanctions will be applied to Clubs when the Club, or any Group Undertaking, becomes subject to or suffers an Insolvency Event, and also makes provision for an appeals mechanism, but only on the grounds of 'Force Majeure'.

By way of clarification the following are identified as circumstances which it is intended would be embraced under the category of 'Force Majeure'. It is intended that this appeals process should be limited to circumstances which are deemed unforeseeable and unavoidable. In all these examples, each case would have to be considered on its own merits:

Club Income: *In the event that a club suffers material adverse effects upon the loss of anticipated income streams which mean that it is unable to meet its liabilities as and when they fall due. This could only be grounds for appeal, however, if the loss occurs during the currency of a binding agreement (i.e. not upon expiry).*

Default by another Club: *In circumstances where an insolvency event is caused by the default of another football club. Once again, however, for this to*

constitute legitimate grounds for appeal, the outstanding payments must be significant enough to have had a material and adverse effect upon the Club.

12.3.1 If any Club becomes subject to or suffers an Insolvency Event, that Club shall be deducted 12 points.

12.3.2 If a Group Undertaking of a Club becomes subject to or suffers an Insolvency Event, then the Board shall have the power to impose upon the Club a deduction of 12 points scored or to be scored in the League Competition. In exercising this power the Board shall have regard to all the circumstances of the case and to:

(a) such of the provisions of the Insolvency Act, the Competition Act 1998 and the Enterprise Act 2002 as are relevant and then in force;

(b) the need to protect the integrity and continuity of the League Competition;

(c) the reputation of The League and the need to promote the game of association football generally; and

(d) the relationship between the Club and the Group Undertaking.

12.3.3 Subject to the provisions of Regulation 12.3.4 below, where the Club becomes subject to or suffers an Insolvency Event, or the Board impose a deduction in accordance with Regulation 12.3.2:

(a) during the Normal Playing Season but prior to 5.00pm on the fourth Thursday in March, the points deduction shall apply immediately;

(b) during the Normal Playing Season but after 5.00pm on the fourth Thursday in March, Regulation 12.3.4 shall apply; and

(c) outside the Normal Playing Season, the points deduction shall apply in respect of the following Season such that the Club starts that Season on minus 12 points (including in the National League if appropriate).

12.3.4 *Where the circumstances set out in Regulation 12.3.3(b) apply and at the end of that Season, having regard to the number of championship points awarded (ignoring any potential deduction):*

(a) the Club would be relegated in accordance with Regulation 10.1.2(b) or 7.7, the points deduction will apply in the next following Season (including in the National League if appropriate); or

(b) the Club would not be relegated as aforesaid, the points deduction will apply in that Season and Regulation 10.1.2(b) or 7.7 will then apply (if appropriate) following imposition of the points deduction.

12.3.5 *For the avoidance of doubt, where a Club and/or Group Undertaking is subject to more than one of the procedures in Regulation 12.3.1 above during a process of compromising creditors (for example Administration followed by a Company Voluntary Arrangement), the Club shall only be deducted one set of 12 points, such deduction to apply with effect from the first Insolvency Event.*

12.3.6 *If:*

*(a) any club relegated to The League from The Premier League (in accordance with the rules of The Premier League) (a '**Relegated Club**') whilst it was a member of The Premier League became subject to or suffered an Insolvency Event at any time following the end of the season (as defined in the rules of The Premier League) but before the Relegated Club becomes a member of The League, then that Relegated Club, upon being accepted as a member of The League in accordance with Regulations 7.8 and 10.1 shall suffer a deduction of 12 points in the League Competition, such points deduction to apply in respect of the following Season such that the Club starts that Season in The Championship on minus 12 points;*

(b) any Group Undertaking of a Relegated Club, whilst the Relegated Club was a member of The Premier League, became subject to or suffered an Insolvency Event at any time following the end of the season (season being as defined in the rules of The Premier League) but before the Relegated Club becomes a member of The League,

then the Board shall have the power to impose upon that Relegated Club, upon being accepted as a member of The League in accordance with Regulations 7.8 and 10.1, a deduction of 12 points in the League Competition. In exercising this power the Board shall have regard to all the circumstances of the case and the matters set out in Regulation 12.3.2. Where the Board impose a deduction in accordance with this Regulation, the Relegated Club shall suffer a deduction of 12 points in the League Competition, such points deduction to apply in respect of the following Season such that the Club starts that Season in The Championship on minus 12 points.

12.3.7 If:

(a) any club promoted to The League from the National League (in accordance with the rules of the National League and these Regulations) (a '**Promoted Club**') became subject to or suffered an Insolvency Event whilst it was a member of the National League and the circumstances set out in rule 14A.2.3 of the rules of the National League apply then that Promoted Club, on becoming a Club, shall suffer a deduction of 12 points in respect of that Club's first Season in The League such that the Club starts the Season in League Two on minus 12 points;

(b) any Group Undertaking of a Promoted Club, whilst the Promoted Club was a member of The National League, became subject to or suffered an Insolvency Event whilst it was a member of the National League and the circumstances set out in rule 14A.2.3 of the rules of the National League apply, but before the Promoted Club becomes a member of The League, then the Board shall have the power to impose upon that Promoted Club, upon being accepted as a member of The League in accordance with Regulations 7.8 and 10.1, a deduction of 12 points scored or to be scored in the League Competition. In exercising this power the Board shall have regard to all the circumstances of the case and the matters set out in Regulation 12.3.2. Where the Board imposes a deduction in accordance with this Regulation, the Promoted Club shall suffer a deduction of 12 points in the League Competition in respect of that Club's first Season in The

League such that the Club starts the Season in League Two on minus 12 points.

12.3.8 For the purpose of this Regulation 12.3:

(a) where an Insolvency Event is taken or suffered other than on a Business Day (as defined by the Insolvency Rules 1986 as amended from time to time) then for the purposes of determining the timing of any points deduction only the Insolvency Event will be deemed to have occurred on the immediately preceding Business Day; and

(b) if a Company Voluntary Arrangement is approved, then approval of that Company Voluntary Arrangement shall be deemed to have been given at the date of the first meeting of creditors called to consider that Company Voluntary Arrangement, and not the date of any adjourned meeting of creditors or the meeting of shareholders.

*12.3.9 The League shall serve the Club with written notice of the points deduction (the **'Notice'**). Article 50 shall apply as to the timing of receipt of such Notice.*

12.3.10 A Club may appeal:

(a) against a decision of the Board to impose a points deduction arising from an Insolvency Event of a Group Undertaking under Regulation 12.3.2; and/or

(b) against an automatic deduction of points imposed where a Club, Premier League club or National League Club suffers an Insolvency Event under Regulations 12.3.1, 12.3.6 or 12.3.7 respectively,

*but only on the ground that the relevant Insolvency Event(s) arose solely as a result of a **Force Majeure** event (**'Sporting Sanctions Appeal'**).*

12.3.11 For the purposes of this Regulation 12.3, a 'Force Majeure' event shall be an event that, having regard to all of the circumstances, was caused by and resulted directly from circumstances, other than normal business risks, over which the Club and/or Group Undertaking (as the

case may be) could not reasonably be expected to have control and its Officials had used all due diligence to avoid the happening of that event.

12.3.12 Any Sporting Sanctions Appeal must be in writing and be received by The League at its registered office no later than seven days after The League serves the Notice. The Sporting Sanctions Appeal must contain a statement setting out the grounds of appeal and provide copies of any documentation upon which the Club intends to rely in support of the Sporting Sanctions Appeal.

12.3.13 The Club must also lodge with The League, at the same time as the Sporting Sanctions Appeal, a deposit of £5,000 in respect of the costs of the Sporting Sanctions Appeal.

12.3.14 Upon receipt of the Sporting Sanctions Appeal The League shall refer the matter to the League Arbitration Panel in accordance with the provisions of Section 9 of these Regulations, supplemented by the provisions of this Regulation 12.3, and in the event of any conflict between Section 9 and this Regulation, this Regulation shall prevail.

12.3.15 The League shall, immediately upon receipt of the Sporting Sanctions Appeal, instruct a firm of independent accountants to carry out a review of the activities of the Club and/or any Group Undertaking for the purposes of preparing an independent report into the circumstances surrounding and leading up to the relevant Insolvency Event(s). The Club shall meet the costs of preparation of that report in any event. The report shall be provided to the Club, the League Arbitration Panel and The League. The League Arbitration Panel shall take into account the contents of that report when determining whether the insolvency proceedings arose solely as a result of a Force Majeure event.

12.3.16 The League Arbitration Panel shall hear any Sporting Sanctions Appeal within 21 days of the lodgement of the Sporting Sanctions Appeal.

12.3.17 The Club shall bear the burden of proof in relation to the matters set out in the Sporting Sanctions Appeal on the balance of probabilities.

12.3.18 The League Arbitration Panel shall have the power to:

(a) confirm the deduction of 12 points; or

(b) set aside the deduction of 12 points and substitute a deduction of such lower number of points as it shall deem appropriate; or

(c) order that there shall be no sanction at all.

12.3.19 Any costs incurred by any party in proceedings brought before the League Arbitration Panel shall be met by the Club in any event and shall be considered as a sum due to The League for the purposes of Article 48.

The factual context in more detail

32. Most of the important facts in the case were helpfully agreed by the parties (and are recorded in the annexed Chronology and List of Agreed Facts) and/or are established by documents which cannot be (and are not) disputed. As to any other facts, we indicate below those which we have found having heard the evidence.
33. In November 2018 the Whelan family sold the Club¹⁹ to International Entertainment Corporation (IEC), an investment company incorporated in the Cayman Islands and listed on the Hong Kong Stock Exchange, for £15.9m²⁰. The controlling shareholder of that company (with 55.82% of the issued share capital) was Dr Choi Chu Fai Stanley ('Dr Choi')²¹.

¹⁹ There is also a Core Bundle (references shown as CB/page). The precise structure of the various Wigan entities (that is, Club related companies) is not material and it is 'the Club' which the parties have agreed was sold. More technically, the sale may have been of the company, Wigan Athletic Holdings Limited (CB/1 and para 1.6 of the witness statement of a director, Mr Jackson) rather than Wigan Athletic AFC Ltd, the Appellant in this case as is said in the Notice of Appeal (at page 3).

²⁰ Page 3 of the Notice of Appeal.

²¹ Jonathan Jackson, an English director and then Chief Executive, was told that IEC intended to invest £80m into the Club over 3 years – see para 2.9 of his witness statement.

34. Prior to that date, when negotiations between the parties were ongoing, IEC wrote²² on 2nd March 2018 agreeing to ‘use reasonable endeavours’ to ‘invest or expense (sic)’ an amount of £35m over 36 months following the SPA (Sale and Purchase Agreement).
35. Between November 2018 and 9th March 2020, IEC advanced the Club £24,237,103 which covered the shortfall between trading income and expenditure. This was done by way of a loan.
36. In October 2019 IEC indicated to the Club’s directors that it was no longer able to continue its support and negotiations to sell were commenced.
37. The following month, there began a series of complex transactions which are best explained by a quotation from the Agreed Facts²³:
- 37.1 (On 18th November 2019) *“IEC announced to the Hong Kong Stock Exchange that it had signed a memorandum of understanding with Next Leader Limited (NLL) for the possible sale of the Club to NLL, subject to due diligence [link here]. In January 2020, Mr Au Yeung Wai Kay (Mr Kay or K)²⁴, the owner of NLL, established Next Leader Fund L.P. (NLF), a limited partnership incorporated in the Cayman Islands. The general partner of NLF was NLL. NLL holds 1% of the shares in NLF. The rest of the shares in NLF were initially held by its two limited partners: 51% by Head and Shoulders Direct Investment (owned 100% by Dr Choi); and 48% by Widespread Success Limited (owned 100% by Mr Kay). In short, Mr Choi owned 51% of NLF and Mr Kay owned the remaining 49%.*
- 37.2 (On 14th February 2020) *“IEC agreed to sell its shares in the Club to NLF for £17.5 million, subject to (inter alia) (i) EFL approval; and (ii) the Club’s board approving a loan agreement with IEC for £28.77m (incorporating the existing £24.3 Million Loan and £4.41m in working capital advanced by the previous owner), such sums to be repayable in 12 months with 8% interest (on the terms*

²² CB/1.

²³ The references in that Chronology/List of Agreed Facts appear in the full text in the annex.

²⁴ According to paragraphs 2.1.-2.3 of his witness statement, Mr Kay was introduced to Dr Choi in ‘around July 2019’.

attached as Schedule 4 of the share purchase agreement) (IEC Loan Agreement)”.

38. On 17th February 2020 [CB/3] IEC wrote to Wigan Athletic Holdings Ltd a letter assuring ‘Continued financial support for the Wigan Group’. The letter used the following words (which are different from the language of the letter of 2nd March 2018):

“This letter is to confirm that we, International Entertainment Corporation (“IEC”), as the sole shareholder of IEC Sports Management Limited which is, in turn, the sole shareholder of IEC Wigan Athletic Holdings Limited (the “Company”), have reviewed the forecasts prepared for the board of directors of (i) IEC Wigan Athletic Holdings Limited and (ii) its subsidiaries, Wigan Athletic A.F.C. Limited and Wigan Football Company Limited, and (iii) IEC Sports Management Limited, and (iv) IEC Wigan Property Holdings Limited (all of the Company and the aforesaid companies mentioned in (i) to (iv) are, collectively, the “Wigan Group”) in respect of the period ending 30 June 2021, copies of which are enclosed with this letter for reference (the “Forecasts”). In consideration of the Company agreeing to enter into financial commitments as outlined in the Forecasts, we confirm that whilst and for so long as IEC shall remain as the sole owner of the Wigan Group, IEC intend to, and will, support the Wigan Group by making available sufficient funds to enable the Wigan Group to meet the financing requirements as set out in the Forecasts, and continue to fulfill all of its obligations until at least 30 June 2021. We acknowledge that the current Forecasts contain a number of assumptions in relation to revenue and cost variances. We confirm that should these assumptions not be realised, in line with the above paragraph, we will provide additional financial support to the Wigan Group. We also undertake that we will not demand from the Wigan Group the repayment of the loan monies outstanding during the forecast period ending 30 June 2021 or until such time as the Wigan Group is in a position to repay any of the outstanding loan monies. Furthermore, we acknowledge that IEC has announced the potential disposal of the Wigan Group. We confirm that we will continue to provide funding to the Wigan Group until any such disposal may occur and that IEC would not dispose the Wigan Group to a party unless we reasonably believe that such party would have funding to provide future ongoing support to the Wigan Group”.

39. On 18th February 2020, the Club submitted a new group structure to the English Football League (EFL) with forms in respect of the Owners and Directors test on 18th February 2020 (the EFL confirming that none of the three directors identified was subject to disqualifying conditions on 11th May 2020).
40. On 12th March 2020²⁵, Mr Jackson submitted all relevant information he had received from IEC as regards the change of ownership to the EFL.
41. On 13th March 2020, the EFL announced the suspension of the Championship. On 2nd April 2020, the Club submitted Future Financial Information (FFI) to the EFL with an assertion that the IEC loan agreement²⁶ would be repaid in June 2021 and giving the assurance that NLF would cover future financing requirement whether 'through cash or equity injection'.
42. On 23rd April 2020, NLL wrote²⁷ (this time to Wigan Athletic AFC Ltd) with a further assurance of continued support in similar terms to the letter of 17th February 2020 from IEC. We quote from CB/13, again headed 'Continued financial support.'

"...we have reviewed the forecasts.... In consideration of the Club agreeing to enter into financial commitments as outlined in the Forecasts, we confirm we intend to, and will, support the Club and its subsidiaries by making available sufficient funds to enable the Club to meet the financing requirements as set out in the Forecasts and to continue to trade and fulfil all of its fixtures and other obligations owed to the Football League and/or Football Association until at least 30th June 2022. We acknowledge that the current Forecasts contain a number of assumptions.... should these not be realised, in line with the above paragraph, we will provide additional support to the Club. We also undertake that we will not demand from the Club the repayment of the loan monies outstanding as at 23 April 2020 during the forecast period ending 30th June 2022 or until such time as the Club is in a position to repay any of the outstanding loan monies".

²⁵ Para 3.13 of Mr Jackson's witness statement.

²⁶ Of which the English directors had earlier been unaware – see Darren Royle's email of 18th February 2020.

²⁷ The legal effect of these letters and/or the relevance to the issue of Force Majeure is an issue to which we shall return below.

43. On 5th May 2020, IEC issued a circular on the Hong Kong Stock Exchange stating that it had entered into a new agreement with NLF (supplemental to the SPA), pursuant to which they had agreed (among other things) to: “*extend the Long Stop Date from 14 May 2020 to 14 August 2020 in order to allow additional time for the conditions precedent to be fulfilled*”
44. On 8th May 2020, following assurances given by Mr Kay to the EFL²⁸, Mr Royle circulated in draft the EFL’s confirmation of its agreement to the change of ownership. Mr Jackson proceeded to provide information as regard future funding which was consistent with the information submitted to the EFL in March 2020²⁹.
45. On 15th May 2020, the EFL confirmed that the three new directors (Mr Kay, Man Szeto and Chun Kit Chan) were not subject to disqualifying conditions and, on 22nd May, in the course of a meeting held remotely, Mr Kay ‘committed to fund the Club for the next two years and stated his ambition to reach the Premier League’³⁰.
46. On 28th May 2020, IEC advised the Club that a new loan agreement³¹ would be put in place between the Club and NLF. The English directors were concerned about this proposed loan agreement and sought advice about potential breaches of the Leagues Profit and Sustainability (P & S) Rules and of Directors’ duties.
47. A day later, on 29th May 2020, NLF completed its purchase of 100% of the share capital of the Club from IEC. Mr Kay, Man Szeto and Chun Kit Chan replaced the IEC directors and thereafter the Club’s board comprised Darren Royle (as chair), Jonathan Jackson, Joe Royle and Thomas Chan and the three replacement directors. That same day, according to paragraph 2.8 of Mr Kay’s witness statement and paragraph 25 of the List of Agreed Facts, IEC entered into a loan agreement with the Club for £28.3m and agreed to fund the Club’s need for general funding and working capital within 12 months but at an interest rate of 8%.

²⁸ See paragraph 3.2.13 of the witness statement of Mr Krasner; Mr Jackson remembers the letter being circulated on 15th May - see para 3.25 of his witness statement.

²⁹ Paragraph 3.21 of Mr Jackson’s witness statement

³⁰ Paragraph 3.26 of Mr Jackson’s witness statement.

³¹ See para 22 of the List of Agreed Facts.

48. On 31st May the EFL announced that the Championship season would, provisionally, resume from 20th June 2020. At least on the face of things, however, negotiations between the English directors and Mr Kay as to the terms of the NLF loan agreement proceeded until 17th June without any direct indication that there was any fundamental issue with continued funding³². Nevertheless, at a Board Meeting on 11th June and in an email to Mr Jackson on 12th June³³, Mr Kay said that he disagreed with the EFL's decision to complete the season.
49. On 17th June 2020, Mr Kay announced that Mr Royle was henceforth suspended as Chairman and proposed himself as Chairman instead. Another Board meeting approved the terms of the updated NLF Loan Agreement and confirmed Mr Royle's suspension. The previous day, there had been a reference to other potential investors coming in and on 22nd June Mr Kay asked Mr Jackson to look at a 'new investor project' with Mr Szeto³⁴.
50. Also, on 22nd June 2020, IEC's Faye Feng was asked by Mr Jackson which corporate entity would be paying the July funding³⁵. The following day, 23rd June, Mr Kay announced to the Board that Dr Choi wanted to sell,³⁶ on the same day as Mr Kay approached BT (via his legal representatives) with a view to putting the Club into administration or liquidation³⁷.
51. Mr Krasner explains in his witness statement (at paragraph 2.7) that the Club needed £6m to get through to the following season or it would have to enter administration³⁸ but Mr Kay later made it clear in his interview with Mr Krasner that, although he had had that money available, his other business took priority and so it was not available to Wigan (noting that he had previously made it clear through his solicitors that he was not going to put in 'another penny'). Mr Krasner told us that Mr Kay showed no interest in pursuing

³² See paragraphs 27-32 of List of Agreed Facts.

³³ See pp 107-111 and 481 of Wigan's disclosure.

³⁴ See para 30 of the List of Agreed Facts and Wigan's disclosure at p137-8.

³⁵ Wigan disclosure, pp 1-2.

³⁶ Wigan Reply bundle, p 280.

³⁷ Mr Stanley said that the solicitors who made that contact told him that the owners were not prepared to put any more money into the Club and wanted to put it into administration and walk away.

³⁸ Mr Krasner and Mr Stanley also told us they would only have accepted instructions to deal with an administration: apart from the owner's unwillingness to continue financial support, the Club was otherwise well run and in reasonable financial shape.

what he called the 'solvent option'³⁹. Accordingly, BT's advice was that, with wages soon due and various other financial commitments that would have to be met in the near future, administration was the only realistic option.

52. We accept that Mr Krasner is correct to say, as he does at paragraph 4.1 of his witness statement, that Mr Kay's unwillingness to continue funding the Club was the effective cause of the administration. We also accept that Mr Kay's decision was a sudden one as far as Wigan's English directors were concerned: but whether it should have been unexpected in all the circumstances may be a moot point.
53. Mr Kay instructed BT not to disclose his dealings with them to the other directors. On 24th June, his solicitors instructed BT to proceed with the process of putting the Club into administration. Mr Kay even chaired a Board meeting at which he still did not disclose his true intentions⁴⁰. Instead, he announced the change in ownership which, following his acquisition of Dr Choi's 51% shareholding in NLF, meant that NLF was owned at 100% by Mr Kay so that he was, in practice, the sole owner and in effective control of the Club.
54. Two days later, on 26th June 2020, Mr Kay assured the Board by phone that he would provide the July funding that was needed⁴¹ but then, on 29th June, proposed a payment by instalments⁴². That same day (29th June) the new directors agreed to appoint administrators⁴³.
55. On 30th June 2020, the EFL Finance Director, Jim Karran, emailed all Championship clubs with the news that the Premier League would advance solidarity payments with the effect that each Championship Club would receive £2,324,500 on 17th July⁴⁴. That same day, Wigan's directors confirmed the decision to place the Club into administration at a further

³⁹ Mr Stanley was approached first on 23rd June and he brought Mr Krasner to join him the following day (24th June). Mr Stanley felt that a solvent option was realistic: when he first went to the Club after Mr Kay's representatives had contacted him, he had the clear sense that it was a viable business.

⁴⁰ Mr Jackson told us that the first rumour he heard was on 27th June 2020 – see pp 126, 287 of the Reply bundle. He emailed Mr Kay (Wigan disclosure bundle p157) making the point that the Club needed £3m for salaries and that payment was needed by 1st July.

⁴¹ Mr Krasner told us that the June wages needed to be paid but that, although there was money in the Bank, that money would not be released because of the debts owed as regards repaying holders of season tickets. The Club's net monthly wages bill was approximately £800k.

⁴² Paras 36 to 39 of the List of Agreed Facts.

⁴³ Para 2.13 of Mr Krasner's witness statement.

⁴⁴ Para 40 of the List of Issues.

Board meeting notwithstanding a challenge to the legitimacy of the process by Mr Royle⁴⁵. Indeed, he, Mr Jackson and Mr Joe Royle (the English directors) refused to vote.

56. Thus the vote was carried and there has been no challenge in this arbitration to the validity of the process, wholly unsatisfactory though it may have been. The following day, 1st July 2020, and despite Mr Jackson's frantic but last-minute efforts early that morning, the High Court approved the administration and Mr Krasner, Mr Stanley and their colleague Mr Watson were appointed joint administrators.

The Issues in summary

57. As we have already observed, the Notice of Appeal identifies a single Ground of Appeal, namely, that the 'insolvency event... arose solely as a result of a Force Majeure event'. That, as Regulation 12.3.11 provides (see above) means "*an event that, having regard to all of the circumstances, was caused by and resulted directly from circumstances, other than normal business risks, over which the Club and/or Group Undertaking (as the case may be) could not reasonably be expected to have control and its Officials had used all due diligence to avoid the happening of that event*".

58. The issues, then, are, threefold. First, what caused the insolvency? Second, can those circumstances be characterised as a 'Force Majeure event' (as opposed to being the result of a normal business risk)? Third, could the Club (including its Officials) have exercised due diligence to the extent that such event could have been avoided?

Issue One: what caused the insolvency event?

59. The short answer to this, in our view, is uncontroversial. Whatever may have been the reason for the decision of Mr Kay to stop funding the Club as he had promised he would,

⁴⁵ There were in fact 5 Board meetings which dealt with all 5 of the Wigan-related companies - see p 72, 79, 86, 93 and 100 of Wigan's Reply bundle.

it was that decision which was the effective cause of the Club being placed in administration.

60. As we have seen, Regulation 12.3.10 is framed in terms of the '*relevant Insolvency Event(s) arose solely as a result of a Force Majeure event*'.
61. We consider that this provision must be interpreted purposively in the sense that the relevant insolvency event (the Club being put into administration) must be shown to have a 'Force Majeure' event as its dominant and effective cause. There may, obviously, be minor and incidental or indirect subsidiary causes: but we consider this test of causation would be satisfied if we accepted that Mr Kay's withdrawal of support (and the reasons for that withdrawal) could be characterised as constituting or resulting from circumstances other than normal business risks.
62. We reject the submission of Mr Taylor QC that there were other, also effective, causes, including the significant increase in the Club's players' wages and on transfers. That these made the Club increasingly dependent on the owner's continuing support is clearly true. But so long as that support continued, the ship would have stayed afloat. It was only when the owner pulled the plug that it sank.
63. We also reject the suggestion that there was any realistic prospect of staving off administration absent such support (a point which also arises on officials' due diligence below) for reasons explained by Messrs Jackson, Royle, Stanley and Krasner, which we have no hesitation in accepting. Even with the solidarity payment to come, that would probably not have been in time to keep the Club going for long enough to avoid administration⁴⁶.

Issue Two: can that properly be characterised as a Force Majeure event?

64. Before we look at this by reference to the terms of the Regulation, an issue arose between the parties as to the relevance and admissibility of the explanatory material referred to within and annexed to Mr Craig's witness statement. We have referred to that material

⁴⁶ The announcement of the £2,325,000 that each club would receive was only made on 30th June 2020.

already. For the reasons we have given, we have chosen not to attach any weight to that part of the evidence he has provided. It seems to the Panel that whatever may have been the intentions and expectations of those who voted to introduce this Regulation, the starting point – at least in the absence of any lack of clarity in the wording – should be the Regulation itself and the Introductory Text⁴⁷.

65. The next point that we have to consider is whether the owner's failure to fund is the same as or sufficiently close to a loss of Club income. Again, for convenience, we remind ourselves of the definition of 'Club Income' which is offered in the Introduction as an example⁴⁸ of a Force Majeure event:

***Club Income:** In the event that a club suffers material adverse effects upon the loss of anticipated income streams which mean that it is unable to meet its liabilities as and when they fall due. This could only be grounds for appeal, however, if the loss occurs during the currency of a binding agreement (i.e. not upon expiry).*

66. Funds (other than donations) provided by an owner are certainly not the same as income, for reasons explained by Doug Hall. As he said, a loan would not appear as income in the Club's accounts. If a loan facility were drawn down, it would appear as a cash inflow into the bank balance and as a liability (that would need to be repaid). Nor would share capital be treated as income if that were to be injected: it would simply have the effect of increasing the net assets and would appear in the capital account.
67. In those circumstances, we consider that the example given in the Introduction is a reference to income in the true (that is, accounting) sense. Injections of loan monies from an external source – such as the Club's eventual owner - are very different.
68. Nor do we consider it is sufficiently similar to income to be treated in the same way. A source of income, as in the example given in the introduction to Regulation 12.3, is something that is truly external to the Club. An owner's, or a substantial owner's, willingness (or otherwise) to provide funds by way of a loan is an internal matter.

⁴⁷ The wording of the Regulation being paramount.

⁴⁸ Default by another Club is a further example included. But it is also made clear that each case would have to be considered on its own merits.

69. No other interpretation would be realistic or fair to other Clubs in the Championship. It would make no sense for the Regulation to be drafted in such a way as would allow an owner, whether for reasons of caprice or economic misfortune, to be able to place his Club in administration as a result of being unwilling or unable to support it in the knowledge that there would be no such sanction as has been imposed here.
70. Mr Phillips QC also relied on the fact that IEC, on 17th February 2020⁴⁹, and NLL, on 23rd April 2020⁵⁰, had given what he submitted were legally enforceable commitments to support the Club - hence akin to a loss resulting from a binding agreement.
71. It is, we consider, a moot point whether those were in fact binding commitments. It may be the case that the auditors and directors (in the financial statement for the year ending 2019) regarded them as not legally binding and as nothing more than expressions of intent for the purposes of the audit and perhaps, the EFL's rules governing Profit and Sustainability. Their understanding would not, of course, decide the proper construction of those letters as a matter of law although that might be some basis for suggesting that, in the provision of such letters, there was no intent to create legal relations or no sufficient certainty and clarity such as to establish a binding agreement.
72. We do not need to resolve the issue of whether those letters are enforceable as a matter of law and, as such, constitute a 'binding agreement' which is the wording of the introductory provision about 'Club income'. Even if we assume that they are for the purposes of the issue in question, we must ask ourselves whether that makes any difference. In our view, it does not. That a claim might successfully be pursued against IEC and/or NLF and/or Mr Kay⁵¹, and even that a judgment once obtained might be satisfied in some way, does not mean that such external support by way of the provision of capital from the Club's owners is, or can be equated with, the unexpected loss of a source of income.
73. Mr Taylor QC drew our attention to the ordinary principles of English law in relation to 'Force Majeure'⁵² as explained in, for example, Fyffes Group v Reefer Express Lines

⁴⁹ Letter signed by Chan Chun Yiu Thomas, Executive Director

⁵⁰ Letter signed by Mr Kay as Director

⁵¹ Mr Phillips QC also explained how what Mr Kay has done might amount to inducing a breach of contract.

⁵² See also the decision of Hamblen J in Tandrin Aviation v Aero Toy [2010] EWHC 40 (Comm).

[1996] 2 LI Rep 171. However, we do not think we need to look at authority to establish the meaning of a concept which necessarily depends on the factual circumstances and context and is here specifically defined and explained within the Regulations themselves.

74. Looking at the wording of the Regulation, we consider the owner's withdrawal of support is, in the context of football club ownership, now a normal business risk and that this is determinative of the second issue. A club that is dependent on its owner or some other external funder for its prosperity/advancement and/or to bridge the gap between income and expenditure must inevitably run the risk that the funder will cease to be willing or able (whether lawfully or not) to continue to fund. That is especially true in circumstances in which that owner/external funder has no obvious connection to English football in general or Wigan in particular. If an investor comes into club ownership because he sees it as an investment, and if the EFL Regulations allow that (as they do), then the failure of those ventures is eminently foreseeable by all concerned and falls well within the range of what is 'normal'.
75. There is nothing unfair about this. Those clubs with more reliable funding and clubs which do not run the business risks arising out of there being a large gap between income and expenditure are the clubs which this Regulation is designed to protect.
76. In short, and in summary, the Force Majeure provision is there, as Mr Taylor QC submits, to prevent a Club being sanctioned for an insolvency resulting from an event or events that are entirely external to the ordinary funding of the Club⁵³.
77. Mr Taylor QC makes the additional point that the Club can only pray in aid of this exception if it can demonstrate that it could not reasonably have been expected to control such event – in this context, Mr Kay's decision not to continue funding.
78. We accept this is an additional hurdle the Club must cross and that the question of the due diligence on the part of the Club's officials (Issue Three next) is, as the Regulation is drafted, a separate matter.

⁵³ He gives the example of a broadcast partner becoming insolvent with a consequential effect on central distribution: that would be unavoidable and unforeseeable as far as a club would be concerned.

79. In context here, however, unless one equates the owner with the Club (which we do not), we do not consider that the Club could have realistically done anything more to prevent NLF from stopping its funding or try and force it to continue or find a way to secure that funding within a reasonable timescale.
80. In our judgment, and for the sake of completeness, we add (though, strictly, it may not be relevant to the issue arising under the Regulation) that we consider that the English directors could have done nothing more to prevent the administration when first they realised it was a possibility. We consider there were no sufficient warnings signs that would have prepared them to resist the eventual move to administration effectively until it was too late. We find that it was probably not until 17th June 2020 that there were reasons to become concerned about the Club's future in the light of events as recorded above and we accept Mr Jackson's evidence⁵⁴ that it was only at about that time that he became very concerned about the Club's future.
81. We reject as unrealistic the suggestion that by that stage (or even earlier) there might have been time to enforce (or find security for) the undertakings made on 17th February and 23rd April 2020 or to seek other sources of funding. To the contrary: we consider that, by the time the decision to force the Club into administration was taken by the Board on 30th June 2020, it was simply far too late for the English directors to do anything effective. We certainly cannot imagine that they could have had any reasonable prospect of stopping the administration process on the morning of 1st July 2020.
82. Whether the fact that the new directors and Mr Kay as owner were, in any case, "Officials" for the purposes of Regulation 12.3.11 and, if so, what significance that may have, is a separate matter to which we now turn.

Issue Three: Officials/Due diligence

83. We have made it clear that we see no basis for criticising the English directors for failing to prevent the process of administration or because they were unable to secure the

⁵⁴ See para 5.1 of his first witness statement

owner's continuing funding. Notwithstanding EFL's arguments about what steps they might have taken to avoid administration, we think they are erroneous.

84. By the same token, it seems equally clear that other Club Officials, including the new directors, made no effort (at least no effort of which we are aware) to resist the administration. Indeed, Mr Kay, as chairman, director and (effectively) the owner, actively brought it about when he failed to provide funds and in circumstances where his alleged shortage of funds and decision was actively concealed from his fellow (at least from the English) directors until very late in the day.
85. Mr Kay's lack of due diligence is therefore clear and there is nothing to suggest the new directors did anything other than to implement his instructions.
86. In those circumstances, Mr Taylor QC on behalf of the EFL says that alone means the appeal must fail because they controlled the operation of the Club and fall within the definition of 'Official', as referred to in Regulations 12.3.11.
87. EFL Regulation 1.1 provides that an 'Official' is 'any Relevant Person, employee (other than a Player) or duly authorised (express or implied) agent'. The term 'relevant person' is defined in paragraph 1.1 of *Appendix 3*.

"Relevant Person" means in respect of any Club any individual Person (and not any Entity) operating the powers that are usually associated with the powers of a director of a company incorporated under the 2006 Act (as a Company limited by shares or by guarantee). Further, and without prejudice to the generality of the foregoing, the following individuals shall in any event be deemed to qualify as a Relevant Person Relevant Person:

(a) a director as defined by Section 250 of the 2006 Act;

(b) a shadow director as defined by Section 251 of the 2006 Act;

(c) a person registered as a director or secretary of the Club with the Registrar of Companies;

(d) a person for whom a Form AP01 (to be filed with the Registrar of Companies) has been completed in relation to the Club;

(e) a person who has been elected to become a director of the Club at a meeting of the board of directors of the Club;

(f) a person who has been elected to become a director of the Club at a meeting of the members of the Club;

(g) a person in accordance with whose directions or instructions the persons constituting the management of the Club are accustomed to act;

(h) any Authorised Signatory;

(i) any duly appointed signatory (as that term is utilised in Regulation 46.1);

(j) any 'chief executive' officer, 'general manager', 'chief operating officer' or any other person undertaking any duties which would objectively be considered to be equivalent to those roles;

(k) any person appointed by those with Control over the Club to represent their interests in the management of the Club; and

(l) a person who has Control over the affairs of the Club,

but the definition of 'Relevant Person' expressly excludes any external legal, financial or other professional advisers where they are acting in a capacity regulated by a professional regulatory body and do not hold any interest (in excess of a 5% shareholding) in the Club".

88. In a nutshell, then, must the appeal fail, given that, at least Mr Kay himself and perhaps also the other new directors, have, we find, not used due diligence and fall within this definition of relevant persons/Officials?
89. Mr Phillips QC reminds us that not every wrongdoing on the part of a director will be attributed to the company – Jetivia v Bilta [2015] UKSC 23. He reasons, therefore, that the misconduct of *some* directors of the Club and of the person (Mr Kay) who controlled the legal owner (NLF) need not necessarily be attributed to the Club.

90. In circumstances where Mr Kay (at least by 24th June 2020) owned 100% of the shares of NLF and that company in turn owned 100% of the issued share capital in Wigan⁵⁵ so that, for all practical purposes, he was the Club's owner as well as its chairman and exercised apparently complete control. It is impossible to regard him as other than an 'Official' for the purposes of the Force Majeure exception.
91. The same is probably also true of the new directors and, in those circumstances, we consider it impossible to regard their conduct as anything other than closely connected to the Club's operations. As a consequence, even (contrary to our decision) if what happened was the result of an abnormal business risk as explained above, the Club cannot rely on Force Majeure because, far from acting with due diligence to avoid the happening of that event, at least one of the Officials of the Club – that is, Mr Kay – actively brought it about.

Conclusion

92. It follows that we are unanimous in concluding that we must dismiss the appeal and we order that, in accordance with Regulation 12.3.19, the Club must bear the costs associated with that appeal. In doing so, we express our thanks to the parties and their legal advisers, to the witnesses for their assistance and to Mr Phillips QC and Mr Taylor QC for the care and clarity with which they presented their respective cases. We assure them that, whilst we may not have made express reference to all the evidence material and submission they put before us, we have nevertheless taken it into account.
93. We cannot, however, end without repeating our expression of sympathy for all who have loyally supported the Club for so long. It is a tragedy that they have been let down by those who appear to have seen the Club and English football as an opportunity for investment and profit and no more and who may, for whatever reasons, have decided to leave the Club to its fate when their interest changed or faded. We therefore conclude by

⁵⁵ See para 8 of Wigan's Reply and para 36 of the List of Agreed Facts

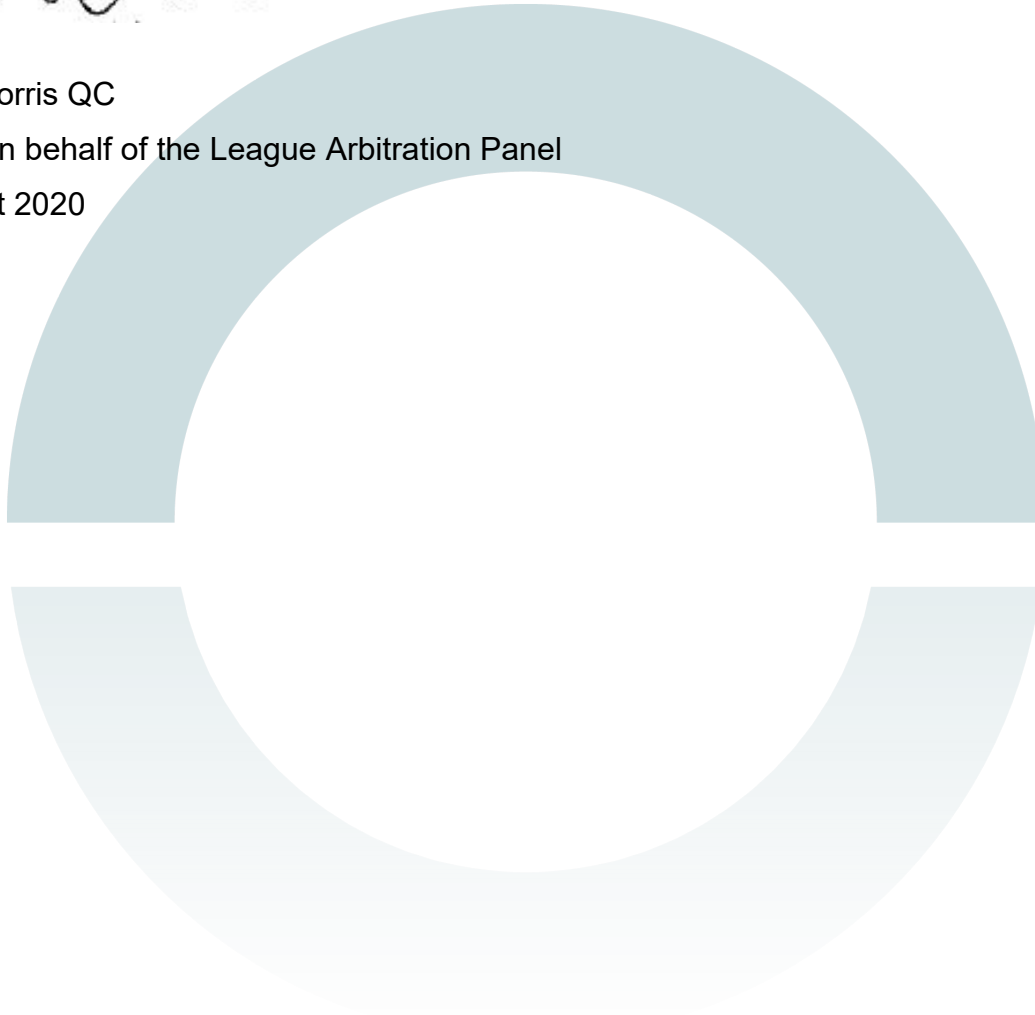
wishing the Club well next season in its attempt to secure an immediate return to the Championship⁵⁶.



William Norris QC

For and on behalf of the League Arbitration Panel

04 August 2020



⁵⁶ A place it very nearly managed to secure on the pitch by an excellent run of form after the season restarted but which, in the end, did not produce quite enough points to make a 12 point deduction irrelevant to relegation.

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ANNEX 1



**IN THE MATTER OF A SPORTING SANCTIONS APPEAL PURSUANT TO REGULATION
12.3.10 OF THE EFL REGULATIONS**

WIGAN ATHLETIC AFC LTD (IN ADMINISTRATION)

Appellant

v.

THE FOOTBALL LEAGUE LIMITED

Respondent

**CHRONOLOGY AND
LIST OF AGREED FACTS**

For expediency, in so far as possible, references in the form A__ are to the documents accompanying the Notice of Appeal; references in the form C__ are to the Club's first disclosure bundle; references in the form E__ are to the EFL's disclosure bundle; references in the form F__ are to the Club's second bundle of evidence; references in the form N__ are the bundle of documents accompanying the witness statement of Nick Craig.

No.	Date	Agreed Facts
1	07/2017 – 06/2018	The Club spent £2.3m on player purchases and £5.65m on player wages; while receiving £6.2m from player sales [E13].
2	07/2017	Darren Royle (DR) (then not involved with the Club in any capacity) introduced International Entertainment Corporation (IEC) to David Whelan, at the time, the owner of the Club [F113].
3	7/11/2018	The Club was sold by David Whelan to IEC, a company majority-owned by Dr Stanley Choi, for £15.9 million.
4	7/11/2018 – 9/03/2020	IEC advanced the Club £24,347,103 (the £24.3 Million Loan) to cover the shortfall between trading income and expenditure [A1-2] based on monthly requests typically submitted by Richard Bramwell [e.g., C11-16].

No.	Date	Agreed Facts
5	2/3/2018	The Club received a written assurance from IEC that it (or a subsidiary of IEC) would use reasonable endeavours, to invest or expense into the Company and/or its subsidiaries an amount of £35,000,000 within 36 months after completion of the SPA [A21].
6	07/2018 – 06/2019	The Club spent £5.3m on player purchases and £8.3m on player wages; while receiving £6.2m from player sales [A71].
7	18/03/2019	The Club received assurance from IEC (IEC Letter of Support) (also submitted to the EFL) promising: (i) <i>“to make available sufficient funds to enable the Club to meet the financing requirements as set out in the Forecasts and continue to trade and fulfil all of its fixture and other obligations owed to the Football League Limited and/or the Football Association until at least 30 June 2020”</i> ; (ii) to meet any additional funding requirements arising during that period; and (iii) not to <i>“demand from the Club the repayment of the loan monies outstanding as at 13 March 2020 during the forecast period ending 30th June 2020”</i> [E16].
8	30/10/2019	Thomas Chan (TC) of IEC informed Club directors, Jonathan Jackson (JJ) and DR, that IEC no longer had the resources to fund the Club and had commenced negotiations to sell the Club [F117].
9	18/11/2019	IEC announced to the Hong Kong Stock Exchange that it had signed a memorandum of understanding with Next Leader Limited (NLL) for the possible sale of the Club to NLL, subject to due diligence [link here]. In January 2020, Mr Au Yeung Wai Kay (Mr Kay or K), the owner of NLL, established Next Leader Fund L.P. (NLF), a limited partnership incorporated in the Cayman Islands [C455]. The general partner of NLF was NLL. NLL holds 1% of the shares in NLF. The rest of the shares in NLF were initially held by its two limited partners: 51% by Head and Shoulders Direct Investment (owned 100% by Dr Choi) [C466]; and 48% by Widespread Success Limited (owned 100% by Mr Kay) [C455]. In short, Mr Choi owned 51% of NLF and Mr Kay owned the remaining 49% [E21].
10	14/02/2020	IEC agreed to sell its shares in the Club to NLF for £17.5 million, subject to (inter alia) (i) EFL approval; and (ii) the Club’s board approving a loan agreement with IEC for £28.77m (incorporating the existing £24.3 Million Loan and £4.41m in working capital advanced by the previous owner), such sums to be repayable in 12 months with 8% interest (on the terms attached as Schedule 4 of the share purchase agreement) (IEC Loan Agreement) [C413-452].

No.	Date	Agreed Facts
11	17/02/2020	The Club received assurance from IEC (IEC Letter of Support 2) (also submitted to the EFL) promising: (i) <i>sufficient funds to enable the Wigan Group to meet the financing requirements as set out in the Forecasts and continue to fulfil all of its obligations until at least 30 June 2021</i> " [F223].
12	18/02/2020	DR emailed TC stating that he (and the other directors of the Club) had previously been unaware of the IEC Loan Agreement [F293].
13	18/02/2020	The Club submitted a new group structure and OADT forms to the EFL [F228].
14	20/02/2020	Board statement and figures concluding that the Club's adjusted earnings for the 2018/19 season exceeded the Lower Loss Threshold but were under the Upper Loss Threshold under the EFL's Profitability and Sustainability Rules (P&S Rules) [E77-85].
15	13/03/2020	EFL announces the suspension of the Sky Bet Championship due to COVID-19 [https://www.efl.com/news/2020/march/efl-statement-coronavirus-update3/].
16	02/04/2020	The Club submitted Future Financial Information forecasts to the EFL up to 30 June 2022 (the April Forecasts) [A63-71], with an assertion that the IEC Loan Agreement would be repaid in June 2021 and that NLF " <i>will cover any financing requirements through cash or equity injection</i> ".
17	23/04/2020	NLF signed a letter of support to the Club (NLF Letter of Support) (also submitted to the EFL) in near identical terms to the IEC Letter of Support save with updated dates (due to the fact that the wording of the letters was prescribed by the EFL) promising (inter alia): (i) " <i>to make available sufficient funds to enable the Club to meet the financing requirements as set out in the Forecasts and continue to trade and fulfil all of its fixture and other obligations owed to the EFL and FA until at least 30 June 2022</i> "; (ii) to meet any additional funding requirements arising during that period; and (iii) not to " <i>demand from the Club the repayment of the loan monies outstanding as at 23 April 2020 during the forecast period ending 30th June 2022</i> " [A62].
18	05/05/2020	IEC issued a circular on the Hong Kong Stock Exchange stating that it had entered into a new agreement with NLF (supplemental to the SPA), pursuant to which they had agreed (among other things) to: " <i>extend the Long Stop Date from 14 May 2020 to 14 August 2020 in order to allow additional time for the conditions precedent to be fulfilled</i> " [N41].
19	07/05/2020	The EFL circulated to the Club a draft sign-off letter for review and comment [F271].

No.	Date	Agreed Facts
20	11/05/2020	The Club prepared internal cash flow forecasts showing that total cash payments of £6.7m would be required in July 2020 [C165].
21	15/05/2020	The EFL confirmed that, based on the information available to it at the time, none of Mr Kay, Man Szeto and Chun Kit Chan (three new proposed directors of the Club) were subject to disqualifying conditions under the Owners' and Directors' Test. In addition, based on the NLF Letter of Support, the April Forecasts [A63-71], and the share purchase agreement, as well as <i>'evidence as to the source and sufficiency of the funding necessary to both acquire and trade the Club for the period to 30.06.22'</i> (including bank statements for NLL [C399] and Mr Kay [C400]), the EFL approved the change of control of the Club from IEC to NLF [A72-73]. In doing so, the EFL flagged that the Club's losses were below the Lower Loss Threshold of the P&S Rules and that the Club <i>"will be required to submit to a number of measures in accordance with Rule 2 of the P&S Rules including Secure Owner Funding"</i> and that the EFL would follow up on these measures in due course.
22	28/05/2020	IEC advised the Club that NLF would repay the Club's debts to IEC and a new loan agreement would be put in place between NLF and the Club. IEC attached a draft loan agreement from NLF to the Club for £24.37m, repayable by 30 June 2021 with 5% interest (NLF Loan Agreement) [C313-326; C207-218]. Club director JJ obtained legal advice on both the NLF Loan Agreement and the IEC Loan Agreement from Centrefield that flagged potential breaches of directors' duties and breaches of the P&S Rules if the agreements were executed [C386-391].
23	29/05/2020	NLF completed its purchase of 100% of the issued share capital of the Club from IEC [A102], and Mr Kay, Man Szeto (S) and Chun Kit Chan (KE) replaced IEC's directors on the Club's board, joining DR (chair), JJ, Joe Royle (JR), and TC [E21].
24	29/05/2020	JJ emailed DR to discuss an upcoming introductory meeting with K. JJ noted that the Future Financial Information: <i>"will need immediate refinement / update. Are the new owners/board aware of the detailed information and funding requirement. What is the funding model? How will the business satisfy funding requirements as highlighted in the above budget? Short term cash requirement of £1m on 3rd June and a further £9m forecasted cash shortfall July-September"</i> [C18].

No.	Date	Agreed Facts
25	29/05/2020	As agreed in the sale purchase agreement, IEC entered into the IEC Loan Agreement with the Club for £28.77m, incorporating the existing £24.3 Million Loan and agreeing to fund the balance to meet the Club's general funding and working capital requirements, with the entire sum being repayable within 12 months at an 8% interest rate [A2-20]. The EFL understands that the additional £4.43m actually related to money put into the Club by the former owner, David Whelan, which the board argued was not a loan but equity infusion, and therefore did not have to be repaid to IEC [C198, 201-2]. Apparently this was accepted by IEC [C313]. NLF immediately repaid the entire £24.3 Million Loan to IEC [A102], on the basis that the Club would then sign the NLF Loan Agreement setting out terms for the Club's repayment of that £24.3m to NLF.
26	31/05/2020	EFL announces that matches in the Sky Bet Championship will provisionally resume from 20 June 2020 https://www.efl.com/news/2020/may/efl-statement-coronavirus-update-championship/ .
27	06/06/2020	DR emailed Mr Kay and the rest of the Club's board, raising concerns with the terms of the proposed NLF Loan Agreement (based on the legal advice provided to JJ on 28 May 2020) [C224].
28	10/06/2020	Mr Kay circulated an updated draft of the NLF Loan Agreement. It was still repayable within 12 months but with 2% interest rather than 5% interest [C229-237]. DR objected on the basis that the Club had understood the IEC loans were only repayable on promotion to the Premier League, and the Club would not have the funds to repay the loan (instead it is forecasted to need £21m of owner funding in the next 12m); and on the basis the Future Financial Information provided by the Club to the EFL had stated that the IEC loans would be paid from owner funding that would not be repayable before June 2022; and on the basis the liability to pay interest would reduce the Club's existing headroom under the P&S Rules [C122-23].

No.	Date	Agreed Facts
29	11/06/2020	<p>Club board meeting was held by videocon, discussing (<i>inter alia</i>) the terms of the updated NLF Loan Agreement and the Club's budget [C487-489]. "K said that as an owner to pay a huge amount of money to purchase the club and to now be told that he could [not] receive this signed document was not acceptable. K said that he would consider this outside of the meeting..." [C480]. Mr Kay also raised concerns about "who will pay the bill" for the EFL's decision to restart the Championship season [C482]. The following day, Mr Kay and JJ exchanged emails regarding a letter to the EFL [C120] expressing concerns over the decision to restart the Championship. Mr Kay was particularly concerned about "the extra medical expenses, closed door game expenses, no matchday revenue ..." [C116].</p>
30	16/06/2020	<p>Mr Kay circulated to the Club board an updated version of the NLF Loan Agreement (now repayable in June 2022 and with no interest) [C263-277]. There was a board meeting by telephone, at which K sought agreement that the Club would sign the updated NFL Loan Agreement. "K explained the urgency for him to resolve this today. K said that firstly the agreement was needed for the owner's protection as he had detailed previously. Secondly, as all the board were aware, the football industry was in a very tough situation around the world and, as he said at the last board meeting, he was not happy with football coming back. As the owner and investor this was difficult. K said that he had the job to identify any potential investors to assist with the funding and the club. K said that he had contact with a potential investor already. He needed this agreed to enable him to introduce a new investor to the club. K said that this was blocking development and he hoped that everyone was bearing in mind that the club was facing a tough situation. K said that the club needed to attract a new investor to ensure the club had sufficient funding to invest and buy new players. ... JJ said that he understood that K was looking for a new investor and asked K whether there were sufficient funds to operate the club within the financial model for the next two years in line with the financial forecast provided to the EFL. K said that any new potential investor would not only bring investment but would also bring more professional expertise into the business and he wanted to bring in more football experience. DR clarified with K that the EFL had been advised that the owner had sufficient funds to operate the club as had been detailed to the EFL. K said that he would support the operations of the club and that there were no problems with this." [A75-76].</p>

No.	Date	Agreed Facts
31	16/06/2020	DR emailed the Club board requesting the details of what had been agreed in respect of the NLF Loan Agreement and by whom [F307].
32	17/06/2020	DR emailed the Club board offering further comments on the NLF Loan Agreement [F310].
33	17/06/2020	Another Club board meeting was held: (i) approving the terms of the updated NLF Loan Agreement; and (ii) suspending DR as chairman of the board. This appears to have been because Mr Kay <i>“felt that DR had a big conflict about the cooperation and decision making”</i> [C501-04].
34	22/06/2020	Richard Bramwell emailed S to request that NLF provide cash funding of £5.08m for the month of July [C10-11] (July Funding Request), attaching a breakdown of his request [C16]. In his email he noted: <i>“The forecast is based on information know at this point in time, which I am sure that you can appreciate is changing regularly.”</i>
35	23/06/2020	Lawyers representing Mr Kay contacted Begbies Traynor regarding putting the Club into administration [F14].
36	24/06/2020	Club board meeting held by telephone. Mr Kay said he was taking over as chair and confirmed that the NLF Loan Agreement had been signed. He also explained that IEC was applying for a gambling licence and therefore Dr Choi had to sell his 51% ownership interest in NFL to avoid any conflict of interest, and so Mr Kay was buying it and would become 100% owner of NLF [A80-83]. The same day, Mr Kay reported the change in ownership to the EFL [C152]. S confirmed that the July Funding Request was being processed.
37	26/06/2020	Club board meeting held by telephone. Mr Kay confirmed he would provide the funds for the July Funding Request before 1 July 2020 [A87].
38	29/06/2020	As of 29 June 2020, requests for owner funding were still being made to and processed by Faye Feng of IEC [C154]. In response to a chaser from JJ, Mr Kay stated: <i>‘Regarding the July payment requested, it is obviously a burden in the present environment. I would be wonder if it should be having a better financial arrangement such as in several instalments. I do believe it is the same situation which other clubs are facing and handling. Please discuss with finance if we would have a better solution’</i> [C172].
39	29/06/2020	JJ emailed Nick Craig requesting a meeting regarding <i>“a matter of urgency”</i> at the Club [E110]. No meeting occurred only a brief telephone call in which news reports regarding the Club entering administration were discussed.

No.	Date	Agreed Facts
40	30/06/2020	EFL's finance director Jim Karran, emailed all the chief executives and finance directors of the EFL's member clubs, including the Club, to announce that to assist clubs with their immediate cash requirements, the Premier League had agreed to advance the payment of the first tranche of 2020/21 solidarity payments from August to July 2020, so that Championship clubs would receive £2.325,000 in July 2020 [N148].
41	30/06/2020	Meeting of Wigan's board of directors took place in which it was confirmed the Club would be put into administration [A93-94] .
42	01/07/2020	The Club entered administration. Paul Stanley, Dean Watson and Gerald Krasner of Begbies Traynor were appointed the joint administrators of the Club.
43	02/07/2020	The EFL applied the 12-point sporting sanction in accordance with EFL Regulation 12.3.1.
44	10/07/2020	The Club filed the instant appeal against that sanction.