SR/196/2020

IN THE MATTER OF AN EFL ARBITRATION PURSUANT TO REGULATION 94 AND SECTION 9 OF THE FOOTBALL LEAGUE REGULATIONS 2019/20

AND UNDER THE ARBITRATION ACT 1996

Before:

The Rt. Hon Lord Dyson
Christopher Quinlan QC
Sir Wyn Williams

BETWEEN: -

SHEFFIELD WEDNESDAY FOOTBALL CLUB

Appellant

-and-

THE FOOTBALL LEAGUE LIMITED

Respondent

DECISION

Introduction

1. The EFL Championship Profitability and Sustainability Rules ("the P&S Rules") were adopted by the Championship Clubs for the 2016/17 season onwards. They assess losses over a rolling period of three seasons. In every case where a club has made an

aggregate loss over the preceding two seasons, it must by 1 March provide to the EFL a calculation of its *"aggregated Adjusted Earnings Before Tax"* for the current season (known as "T"), the previous season (known as "T-1") and the season before that (known as "T-2"). If the "*Adjusted Earnings Before Tax*" of a club which has been in the Championship for each of T, T-1 and T-2 exceed the "*Upper Loss Threshold*" of £39 million over that three year period, then P&S Rule 2.9.2 provides that the club shall be treated as being in breach of the P&S Rules and shall be referred by the EFL to a Disciplinary Commission in accordance with section 8 of the EFL Regulations.

2. Leaving out of account the net profit made on the sale of Hillsborough Stadium ("the Stadium"), the actual losses of Sheffield Wednesday Football Club Ltd ("the Club") during the three year accounting period were: Season 2015/16 (T-2) £7,276,000; Season 2016/17 (T-1) £17,996,000; and Season 2017/18 (T) £31,939,000, i.e. £57,211,000 in aggregate. Thus, leaving out of account the Stadium profits, the Club exceeded the Upper Loss Threshold by £18.211 million in the three year period.

3. In early 2018, faced with the fact that its overspending in these three seasons meant that it would breach the P&S Rules, the Club began to explore the possibility of selling the Stadium to Mr Chansiri (who had bought the Club in March 2015) so as to generate an accounting profit.

4. By midnight on 31 July 2018 (the end of the accounting period for 2017/18), the Club had not sold or agreed to sell the Stadium. The Club subsequently decided to explore whether a document with retrospective effect might suffice to satisfy the Club's auditors for inclusion in the accounts to 31 July 2018.

5. On 15 and 17 August 2018, the Club and Mr Chansiri executed Heads of Terms ("HoT"), both backdated so that it appeared that they had been executed and signed on 15 July 2018. Both sets of the HoT stated in three different places "*Dated 15th of July 2018*". In both sets of the document, Ms Meire (the Club's CEO") signed on behalf of the Club and dated her signature "*15/07/2018*"; Mr Chansiri signed on his own behalf and dated his signature "*15-7-18*"; and Mr Redgate (the Club's Finance Director) witnessed both signatures and dated his signature "*15/7/2018*". Both documents stated as follows:

"**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 [ ] 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".

6. The stated minimum price was £37.5 million in the HoT executed on 15 August. This document was sent to EFL on 15 August. It then became necessary to alter the minimum price to £42 million. Accordingly, another version of the HoT substituting the higher figure was executed on 16 August. This was sent to the EFL on 17 August together with the Club's revised P&S return. Save for the minimum price, the second version was identical to the first.

7. In the belief that the second HoT reflected a pre-existing oral agreement concluded prior to 31 July 2018, the Club's auditors accepted the Club including the profits from the Stadium sale in the Club's accounts for 2017/18. The profits were included on the basis of the eventual sale on 28 June 2019 for the sum of £60 million to Sheffield 3 Ltd (a corporate vehicle of Mr Chansiri), rather than the "*minimum*" of £42 million stated in the second HoT.

8. In 2019, after investigations as to what had occurred, the EFL concluded that the sale should not have been included within the 2017/18 accounts and, accordingly, that the Club's Adjusted Earnings Before Tax for the three years had exceeded the Upper Loss Threshold.

9. By letter dated 14 November 2019 ("the Charge Letter"), the EFL informed the Club that it did not consider that the profits on the sale should have been recognised in the 2017/18

accounts. Enclosed with the letter were the Club's P&S Results recalculated by the EFL, with the profits relating to the disposal of the Stadium removed from the income for the 2017/18 season. The letter stated that (i) based on the 21 August 2018 forecast result, adjusted to exclude the £20.2 million forecast profit on the Stadium sale, the Club's Adjusted Earnings Before Tax for the three years were £55.8 million; and (ii) based on the Club's audited financial statements, adjusted to exclude the £38.1 million profit on the sale, the Club's recalculated Adjusted Earnings Before Tax for the three years were £57.211 million. Para 4.2 of the letter stated:

> "In each case, pursuant to P&S Rule 2.9.2, the Club is now treated as being in breach of the P&S Rules and is hereby referred by the EFL to a Disciplinary Commission"

10. This charge of breach of the P&S Rules was Charge 1. Charge 2 was that the Club had acted in breach of the duty of good faith. Both charges were referred to the Disciplinary Commission comprising Sir David Foskett, Mr Geoff Mesher FCA and Mr Jim Sturman QC.

11. In its decision dated 16 July 2020 ("the Decision"), the Disciplinary Commission found that Charge 1 had been proved, but dismissed Charge 2. Following a Sanction hearing on 30 July 2020, the Disciplinary Commission notified the parties of its decision to impose a deduction of 12 points to take effect in the season 2020-21. Written reasons for this decision were given on 4 August 2020.

12. By Notice of Arbitration dated 18 August 2020, the Club gave notice pursuant to Regulations 94.3 and 97.1 of the EFL Regulations of its intention to appeal against (i) the decision that Charge 1 had been proved; and (ii) the decision to impose the sanction of a deduction of 12 points.

13. The Club advances two grounds of appeal in relation to (i). The first is that the Disciplinary Commission was wrong to reject the Club's case that the HoT executed on 17 August 2018, properly construed, created a legally binding contract, effective from 15 July 2018, for the sale and purchase of the Stadium at a minimum price of £42 million. We should say that, for the purposes of the issues raised on this appeal, it is immaterial whether we consider the HoT executed on 15 August or the HoT executed on 17 August. The second

ground of appeal is that, even if the HoT did not create a binding contract of sale effective from 15 July 2018, the Disciplinary Commission was wrong to hold that the EFL had the power to make a referral to a Disciplinary Commission under P&S Rule 2.9.2, since the right to make a referral had not arisen at the time of the purported referral. During the course of the argument, this was referred to as the "*Prematurity Ground*".

The material provisions of the P&S Rules

14. We set out below the material provisions.

> "1. **Definitions**
>
> 1.1.2 **Adjusted Earnings Before Tax** means Earnings Before Tax adjusted to exclude costs (or estimated costs as the case may be) in respect of …..
>
> 1.1.3 **Annual Accounts** means
>
> (a) the accounts which each Club's directors are required to prepare pursuant to section 394 of the 2006 Act; or
>
> (b) …
>
> …
>
> 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…..
>
> 1.1.7 **Earnings Before Tax means** profit or loss before tax, as shown in the Annual Accounts.
>
> 2 **Profitability and Sustainability**
>
> 2.2 Each Club shall by 1 March in each Season submit to the Executive:
>
> 2.2.1 copies of its Annual Accounts for T-1 and T-2….;
>
> 2.2.2 its estimated profit and loss account and balance sheet for T which shall:

(a) be prepared in all material respects in a format similar to the Club's Annual Accounts and

…

2.3 The Executive shall determine whether consideration included in the Club's Earnings Before Tax arising from a Related Party Transaction is recorded in the Club's Annual Accounts at a Fair Market Value. If it is not, the Executive shall restate it to Fair Market Value.

2.9 If the aggregation of a Club's Adjusted Earnings Before Tax for T, T-1 and T-2 results in a loss that exceeds the Upper Loss Threshold (calculated in accordance with Rule 3) then:

2.9.1 the Executive may exercise the powers set out in Regulation 16.20;

2.9.2 the Club shall be treated as being in breach of these Rules and accordingly The League shall refer the breach to the Disciplinary Commission in accordance with section 8 of the Regulations.

3. Loss Thresholds"

[These Rules make provision for the calculation of the Annual Lower Loss Threshold and the Annual Upper Loss Threshold.]

GROUND 1: THE DISCIPLINARY COMMISSION WERE WRONG TO HOLD THAT THE HoT DID NOT CREATE A BINDING CONTRACT FOR THE SALE OF THE STADIUM WITH EFFECT FROM 15 JULY 2018

15. It is not in dispute that the critical question is whether the profits from the sale of the Stadium could properly be recognised as income in the Annual Accounts for year 2017/18 (year T). If they could not be so recognised, then the Club accepted that its losses during the three year accounting period were in excess of the Upper Loss Threshold. As the Disciplinary Commission put it at para 56 of the Decision:

> "Subject to [immaterial] 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 of the period ending on 31 July 2018. If it could not, Charge 1 is made out."

16. The answer to the question of whether the profits from the sale could properly be included in the 2017/18 accounts depended on whether they could properly be recognised in accordance with the accounting principles stated in FRS 102 section 23.10. These required that each of the five following conditions was met, namely that:

    (i) the Club had "*transferred to the buyer the significant risks and rewards of ownership*" of the Stadium by midnight on 31 July 2018;

    (ii) the Club retained "*neither continuing managerial involvement to the degree usually associated with ownership nor effective control over*" the Stadium after midnight on 31 July 2018;

    (iii) "*the amount of revenue*" from the sale of the Stadium could be "*measured reliably*" as at midnight on 31 July 2018;

    (iv) It was "*probable that the economic benefits associated with the transaction*" would "*flow to*" the Club as at midnight on 31 July 2018; and

    (v) The "*costs incurred or to be incurred in respect of the transaction*" could be "*measure reliably*" as at midnight on 31 July 2018.

The Disciplinary Commission's reasoning

17. The Disciplinary Commission's reasoning was as follows. First, the necessary ingredients for an open contract for the sale and purchase of an interest in land are that there is a vendor and purchaser, the subject land is identified and the price is agreed. The HoT could not properly be understood to constitute an open contract for the sale of land, one major problem being that the consideration for the purchase was not set out with sufficient certainty to comply with section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 ("the 1989 Act") (para 68).

18. Secondly, the principal problem with the suggested "*legal construct*" of the HoT was that it did not "*reflect the reality of what occurred*". The "*legal construct*" required that, as at the date of the HoT, a specifically enforceable contract came into existence (para 69). It is clear from para 70 that the "*legal construct*" to which the Disciplinary Commission was referring was that reflected in the "*Instructed Assumption*".

19. The "*Instructed Assumption*" required (i) an assumption to be made that the HoT created a "*legally binding contract*" and (ii) certain other assumptions in relation to the second or replacement HoT including:

> *"- 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."*

20. Section 2 of the 1989 Act provides that a contract for the sale of an interest in land "*can only be made in writing* and *only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each".*

Some preliminary points

21. On behalf of the EFL, Mr Segan QC submits that the Disciplinary Commission was right to hold that the HoT did not satisfy the requirements of the 1989 Act or the requirements of an open contract. He supports the Commission's conclusion on the grounds that (i) the HoT expressed only the "*desire"* of the Club to sell and Mr Chansiri to purchase the freehold of the Stadium; (ii) to do so at a minimum price to be agreed in the future, such price to be embodied in a subsequent "*sales and purchase agreement*", without specifying a mechanism to reach any such agreement; and (iii) the HoT were not a single, or exchanged, signed document containing with sufficient certainty all the necessary terms:

the HoT specifically envisaged that a separate "*sales and purchase agreement*" (not yet agreed) would be necessary to embody the price.

22. On behalf of the Club, Mr Randall QC responds that this part of the Disciplinary Commission's reasoning was erroneous. He submits that the HoT were clearly intended to have contractual effect: he places particular reliance on the closing words of the document under the heading "*Commitment*". He also submits that the purchase price was sufficiently certain: the Club could insist on being paid the agreed minimum price, but no more, and Mr Chansiri was free to pay a higher price if he so chose. The reference to a subsequent sales and purchase agreement does not negate an otherwise clear intention to create a binding contract (or render the HoT void for want of certainty).

23. For reasons that we shall shortly explain, we do not find it necessary to decide these issues. We are prepared to assume that the HoT were intended to have contractual effect, that they were not void for uncertainty and that the requirements of section 2 of the 1989 Act were satisfied.

24. The reason why in our view the appeal on Ground 1 must be dismissed is that the HoT had no effect for any purpose at any time during the accounting period ending on 31 July 2018. If the Instructed Assumption had been correct in law in stating that the HoT were effective to create a legally binding contract for the sale and purchase of the Stadium "*effective from* 15 *July 2018*", then, as we understand the evidence, the profits from the sale would have been properly recognisable in the accounting period ending 31 July 2018. But for the reasons that we now give, we agree with the Disciplinary Commission that the HoT were not effective to create a binding contract for the sale and purchase of the Stadium "*effective from 15 July 2018".*

The Central Issue

25. The key relevant legal authority is *Burgess v BIC UK* [2019] EWCA Civ 806, [2019] ICR 1386. Henderson LJ said:

> "53. …I begin by asking myself what is meant by the concept of exercising a power with retrospective effect. Obviously, the clock cannot be turned back in the real world.

Events which have actually happened cannot be undone, and events which never took place cannot later be turned by magic into events which did in fact happen…

54. On the other hand, there is no reason in principle why parties should not have the freedom to agree to proceed for the future on the basis that historical facts are to be treated in a specific context and for certain purposes, as modified in a particular way which departs from historical reality. So, for example, as a matter of contract…it is normally open to parties to modify or replace the historical record with a different version of past events which will govern their future relationship…..In a contractual context, the question is in principle one of construction of the parties' agreement, to be determined objectively by application of the usual principles of contractual interpretation.

55. I have spoken so far of parties agreeing to depart from historical reality for the future, but in principle it must also be open to them to agree that their past relationship is to be treated as having departed from historical reality in specified respects. A deemed or hypothetical state of affairs can be projected backwards as well as forwards, if that is what the parties intend. But if it projected backwards, the problem has to be confronted of possible conflict between the hypothetical state of affairs and the historical reality of what in fact did or did not happen. Resolution of that conflict is again normally a matter of giving effect, as far as possible, to the parties' intentions, objectively ascertained; but however the conflict is resolved, as between the parties, one thing which cannot be changed is the historical reality of what did, or did not, happen in the past."

26. Mr Randall QC submits as follows. Parties can agree that contracts are to have retrospective effect, and this general principle applies equally to contracts which relate to the disposition of property as to any other contracts. That it is open to parties to do this (and that contracts should be so construed where that is their express or implied intention) is clear from, for example, *Swansea Stadium v Swansea C&CC* [2018] EQWHC 2192 (TCC), [2019] PNLR 4 (O'Farrell J) at paras 41 to 43 and 55. Properly construed, the references to the date of 15 July 2018 in the HoT are to be understood as evincing an intention by the parties to give the transaction effect from that date. The Instructed Assumption correctly asserted that the HoT were effective to create a legally binding open contract for the sale and purchase of the Stadium "*effective from 15 July 2018*".

27. We reject these submissions largely for the reasons given by Mr Segan QC. It is not necessary to do other than apply the principles so clearly expounded by Henderson LJ at paras 53 to 55 of *Burgess.* It is open to parties to agree that their past relationship is to be treated as having departed from historical reality in specified respects if that is what they intend. Para 55 is crucial here. As Henderson LJ said, if a deemed state of affairs is projected backwards (because that is what the parties intend), there may be a problem of possible conflict between the intended state of affairs and the historical reality of what did or did not happen. Resolution of that conflict is *normally* a matter of giving effect, *as far as possible,* to the parties' intentions.

28. But regardless of how the conflict is resolved *as between the parties*, one thing which cannot be changed is the historical reality of what did, or did not, happen in the past. The clock cannot be turned back in the *real* world. In other words, whatever their intentions were (as may be derived from the HoT), the Club and Mr Chansiri could not agree that the HoT had been agreed on 15 July 2018 when as a matter of fact they had not been agreed until after 31 July 2018. If they agreed in August that the HoT would be effective from 15 July, it does not follow that the HoT were in fact effective from that date as respects third parties.

29. Henderson LJ was careful to say at para 55 that resolution of the conflict between the intended state of affairs and the historical reality was *normally* a matter of giving effect *as far as possible* to the parties' intentions. The question, therefore, is whether, even if the intention of the Club and Mr Chansiri was that the HoT should be effective from 15 July 2018, it was possible to give effect to their intention in determining whether the Club had breached the P&S Rules in this case.

30. The critical point is that the effect of the HoT must be determined in the context of the P&S Rules and not in a purely private law contractual context. As Mr Segan QC puts it, the relevant question was one of accounting substance. One of the "*Concepts and Pervasive Principles"* within FRS 102 is that "*Transactions and other events and conditions should be accounted for and presented in accordance with their substance and not merely their legal form"* (FRS 102, Section 2.8). It might have been open to the parties to agree that the HoT would take effect from 15 July 2018, but if such an agreement did not reflect

historical reality, it would not be recognised by the EFL as taking effect from 15 July for the purpose of the application of the P&S Rules.

31. The experts (Mr Pryor for the Club and Professor Pope for EFL) agreed that, if the HoT 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: see item 4 of the experts' Joint Statement and para 62 of the Decision. Professor Pope said at para 4.6 of his first report: "*the events triggering the recognition of a sale according to the criteria set out in section 4.5 [of FRS 102] must have occurred by 31 July 2018*". This was not challenged by the Club. He further explained at para 4.8:

> "…the Heads of Terms were not executed on 15 July 2018 (as the signatures would suggest) but in fact in August 2018, from an accounting viewpoint, the execution of the Heads of Terms in August 2018 cannot trigger the recognition of a sale in the accounting period ending 31 July 2018. For the necessary sales recognition criteria set out in section 4.5 to have been satisfied by 3 July 2018, they would have to be traceable to a triggering event or events completed during the accounting period from 1 June 2017 to 31 July 2018. I am not aware of any such events having occurred."

32. Despite this, the Club defended its position on the basis of the Instructed Assumption given to Mr Pryor that the HoT "*once signed were…effective as at the Club's year-end date of 31 July 2018*" with the consequence that "*the legal position as at 31 July 2018 was that the Club had entered into a legally binding contract entitling it to a receivable and obliging it to sell the Stadium*" (see para 2.1.1 of Mr Pryor's report). Mr Pryor said in his evidence (Day 4 p134 lines 14-16): "…*basically I have an instruction that says: at 15 July there is a legally binding contract*". But he also said in answer to the question "*if Mr Chansiri's evidence is correct, absent the instructed assumption you could not possibly have included the stadium sale in the year end accounts*?": (Day 4 p 127 line 15 to 18):

> "Absent the instructed assumption, not only because of the witness statement but also because I have been informed that it wasn't physically signed until 17 August. It is very difficult, in those circumstances, to see how anyone could argue that a sale has actually happened. So I think that is the same position as Professor Pope is reaching and we both put into our joint statement."

33. In our view, the Disciplinary Commission was right to reject the suggestion that the Instructed Assumption provided a basis for the inclusion of the profits on the sale of the Stadium in the Club's accounts for the period ending 31 July 2018. The Instructed Assumption was wrong because there was no agreement of any kind in existence for the sale of the Stadium as at midnight on 31 July 2018. The Disciplinary Commission was right to hold that the principal problem with the Instructed Assumption was that it did not reflect the reality of what had occurred. Even if the HoT reflected an intention on the part of the Club and Mr Chansiri that the contract of sale should take effect from 15 July, that intention could not bind the EFL to treat it as having that effect when considering whether the criteria for revenue recognition prescribed by FRS 102 were satisfied.

34. In our view, these criteria had not been satisfied. The unchallenged evidence of Professor Pope is critical here. What he describes as the "*triggering event*" (in this case, the execution of the HoT) had to occur during the accounting period. The fact that the HoT were executed after the accounting period is fatal to the Club's case on Ground 1.

35. We should record that Mr Segan QC advances other arguments in support of the Disciplinary Commission's conclusion in relation to the First Charge. The first is that a contract may not function in law so as to create or transfer an equitable or legal interest in property (especially real property) with retrospective effect (i.e. from a date lying in the past when the contract is concluded). He relies on the fact that no authority has been cited by the Club to support the proposition that a contract may have such effect in relation to property. The Club accepts that at all material times prior to the execution of the HoT (including throughout July 2018), it was the legal and equitable owner of the Stadium. We see real conceptual difficulties in holding that, by the simple expedient of dating the HoT 15 July 2018, although they were executed in August 2018, the Club could transfer the ownership of the Stadium to Mr Chansiri with effect from 15 July 2018. As Mr Segan QC points out, there is obvious scope for abuse if parties are able to deem, against the world, a legal or equitable interest in property to have passed at a date in the past before they had entered into any agreement, so as to enable the profits (or losses) on the transaction to be included in previous sets of statutory accounts. We see considerable force in these submissions, but we do not need to decide whether they are correct.

36. Secondly, Mr Segan QC submits that there is no reason to construe the HoT as a form of "*effective date"* agreement anyway. This is not what the HoT said or purported to be. The HoT stated in three places "*Dated 15th July 2018*" and all the three signatories/witnesses dated their signatures "*15/07/17*", "*15-7-18*" and "*15.7/18*". The HoT therefore purported to be an agreement made and signed on 15 July 2018, no more and no less. They said nothing about the date from which they were purporting to take effect. We see the force of these points, but if it were necessary to resolve the issue, we would be inclined to hold that the dating of the HoT as 15 July 2018 when the document was executed in August 2018 showed clearly that the parties intended it to take effect as at 15 July 2018. Looking objectively at the circumstances as at the time of the execution of the document, we incline to the view that there can be no other sensible explanation for the pre-dating. But it is not necessary for us to express a concluded view on this either.

37. For the reasons that we have given, we dismiss Ground 1.

GROUND 2: THE PREMATURITY POINT

38. We have referred to the Charge Letter at para 9 above. The EFL explained in the letter why it found that the Club's Adjusted Earnings Before Tax as shown in its forecast P&S Rule results and as shown in its audited financial statements for the three year accounting period exceeded the Upper Loss Threshold so that the Club was being treated in each case pursuant to P&S Rule 2.9.2 as being in breach of the P&S Rules and was being referred to a Disciplinary Commission.

39. Mr Randall QC submits that, even if by accepting the inclusion of profits from the sale of the Stadium within the Club's 2017/18 accounts, the Club's auditors were not acting "*in accordance with Financial Reporting Standards, which are applicable in the UK"*, the necessary condition for the EFL to exercise its power to make a referral to a Disciplinary Commission under P&S Rule 2.9.2 had not yet arisen.

The Club's Argument

40. We have referred, at para 14 above, to the provisions of the P&S Rules which are material to Ground 2.

41. Mr Randall's argument proceeds as follows. The EFL's only powers to restate or adjust a Club's results under the P&S Rules are contained in Rule 2.3 (restating the consideration received from a "*Related Party Transaction*" to "*Fair Market Value*") and Rule 1.1.2 (adjustments to exclude costs or estimated costs under the four headings there set out).

42. The Charge Letter put the EFL's case that the Club's Adjusted Earnings Before Tax exceeded the Upper Loss Threshold on the basis of:

    (i) the estimated figures for 2017-18 included in the Club's Revised P&S Return; and

    (ii) the actual figures for 2017-18 drawn from the Audited Accounts signed by the Club and the auditors in June 2019.

43. As regards (i), in accordance with P&S Rule 2.2.2 the figures to be taken for year T were those estimated by the Club. The EFL had no power to restate or adjust the estimated results for year T (as it purported to do) by removing from the estimated income the entire net profit (£20.061 million) from the sale of the Stadium. This profit had been included in those estimates in good faith. The EFL did not purport to exercise its power under P&S Rule 2.3 and has not suggested that it could have invoked that power. Accordingly, no ground for treating the Club as being in breach of the P&S Rules triggering Rule 2.9.2 had arisen on the basis of the estimated figures for 2017/18.

44. As regards (ii), the EFL had no power to restate or adjust the Club's audited financial results by removing from the recognised income the entire net profit (£38.061 million) derived from the consideration for the sale of the Stadium which the auditors had included (£60 million).

45. Accordingly, Mr Randall QC submits that the EFL's right to make a referral to a Disciplinary Commission under P&S Rule 2.9.2 had not arisen.

46. Mr Randall QC made this submission to the Disciplinary Commission. It rejected it at paras 82 to 87 of its Decision. The members of the Commission said:

> "84. Mr Segan's response is that this appears to contemplate the need for a two-stage process under which the Club is charged with a breach of rule 1.1.3 …… and then a restated set of accounts would need to be prepared demonstrating a loss in excess of the 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".

47. The Disciplinary Commission then referred to what the Rule K FA Arbitral Tribunal said in *South Shields Football Club v The FA* (5 June 2020), namely:

> "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 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."

48. At para 86, the Disciplinary Commission referred to Mr Segan's submission 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'".

49. At para 87, it said:

> "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."

The EFL's response

50. Mr Segan's argument proceeds as follows. First, if (as we have held) Ground 1 is dismissed, the Club's inclusion of the net profit from the sale of the Stadium in its estimated

figures for 2017-18 and in its Audited Accounts for that year did not comply with FRS 102, one of the relevant legal and regulatory requirements. Secondly, having regard to the definition of "Annual Accounts" in Rule 1.1.3 ("*must be prepared and audited in accordance with all legal requirements applicable to accounts prepared pursuant to Section 394 of the 2006 Act")*, the estimated figures and the accounts submitted by the Club were not "*estimated figures*" or "*Audited Accounts*" within the meaning of the P&S Rules. Thirdly, the Rules must be construed so as to make them workable and achieve the objectives of Financial Fair Play ("FFP") regime. Fourthly, a construction of the Rules which does not give the EFL the right to adjust or restate the accounts so as to make them compliant with the relevant legal and regulatory requirements would make them unworkable and would frustrate the objective of the FFP regime.

51. Mr Segan QC develops this fourth point in the following way. If the Club's argument is correct, then P&S Rule 1.1.3 can only be enforced by way of a two-stage process under which the EFL first brings a charge for breach of P&S Rule 1.1.3, hoping to secure the restatement of the accounts, and then, following a restatement, brings a further charge for a resulting breach of the Rules pursuant to P&S Rule 2.9.2. But, he submits, P&S Rule 1.1.3 would be devoid of meaningful effect if a club's auditors were free to decline to alter the statutory accounts of that club, since the EFL has no power to compel them to do so.

Discussion

52. Mr Randall QC submits that we should reject these submissions for two principal reasons. The first is that, on an application of ordinary principles of construction, the P&S Rules do not give the EFL the power to restate or adjust a club's Adjusted Earnings Before Tax so as to ensure that the Annual Accounts (for T-1 and T-2) and the estimated profit and loss account and balance sheet (for T) submitted by a club under P&S Rule 2.2.1 and 2.2.2 respectively are in accordance with the relevant legal and regulatory requirements. P&S Rule 1.1.7 unequivocally defines the "*Earnings Before Tax*" as meaning the profit or loss before tax "*as shown in the Annual Accounts."* This must be a reference to the profit or loss *actually* shown in the Annual Accounts and not the profit or loss which *would have been shown* in the Annual Accounts if they had been prepared in accordance with the relevant legal and regulatory requirements. The Adjusted Earnings Before Tax are the

Earnings Before Tax (i.e. the sum shown in the Annual Accounts) subject to possible adjustment only in the two specified circumstances viz: (i) to exclude costs in respect of any of the four items set out in P&S Rule 1.1.2 and (ii) by way of a restatement of Fair Market Value under P&S Rule 2.3 in respect of consideration arising from a Related Party Transaction. The fact that the Adjusted Earnings Before Tax can be adjusted or restated in certain specified circumstances points strongly to P&S Rule 2.9.2 being concerned with the figures actually shown in the Annual Accounts, subject only to adjustment in these specified circumstances. If it had been intended that the P&S Rules should confer on the EFL the power to restate or adjust a club's Earnings Before Tax in any other circumstances, they would have been drafted so as to confer such a power expressly.

53. Secondly, Mr Randall QC submits that there is no reason not to give P&S Rule 2.9.2 its plain and natural meaning. In particular, he says that this interpretation does not make the scheme unworkable or so impractical that it cannot have been intended. The EFL Regulations and/or the P&S Rules make ample provision to deal with a club whose submitted documentation includes figures which the EFL believes may not have been prepared or audited in accordance with all relevant legal and regulatory requirements. These include:

(i) If a Club submits estimated accounts which do not comply with P&S Rule 2.2.2(a) or (b), the EFL may decline to accept or act on them (and hence any P&S Return which is based on them);

(ii) If a Club knowingly breaches its obligations under P&S Rule 2.2.(a) or (b), it is at risk of being charged with breach of the obligation to behave with the utmost good faith towards the EFL and the other Clubs as provided by P&S Rule 4.4;

(iii) If a Club submits audited accounts which do not satisfy the definition of Audited Accounts in P&S Rule 1.1.3, it will be in breach of Regulation 16.2 and 16.3 of the EFL Regulations and liable to the exercise by the EFL of the powers accorded to it by Regulation 16.20. These include the power to refuse an application by a Club to register any Player or any new contract of an Existing Player of that Club if the EFL

"*reasonably deems that this is necessary in order to secure that the Championship Club complies with its obligations listed in Regulations 16.19.8(a) to 16.19.8(c)"*; and

(iv) Where a Club is in breach of any requirement of the P&S Rules, P&S Rule 4.3 provides that the EFL may refuse any application by that Club to register any Player or any new contract of an existing Player of that Club.

54. At first sight, there is much force in Mr Randall's submissions. It would have been easy enough to spell out in the P&S Rules that, where the EFL considers that a Club's Annual Accounts (for T-1 and T-2) or its estimated profit and loss account and balance sheet (for T) have not been prepared in accordance with the relevant legal or regulatory requirements, the EFL may recalculate and restate or adjust the stated profit or loss figures so as to make the documents meet those requirements.

55. But the question of whether the EFL has the power to do this must be determined by giving a purposive construction to the P&S Rules as a whole. P&S Rule 2.9.2 is fundamental to achieving the purpose of the Rules and the FFP regime. The definitions to which we have earlier referred show that, leaving aside the items of cost excluded under P&S Rule 1.1.2 and a restatement of Fair Market Value under P&S Rule 2.3, the Adjusted Earnings Before Tax comprise the profit or loss before tax shown in the Annual Accounts. If the definition of Annual Accounts had simply been "*the accounts which each Club's directors are required to prepare pursuant to section 394 of the 2006 Act*", it might have been difficult to resist Mr Randall's argument. But as Mr Segan QC points out, it is also *part of the definition* of Annual Accounts that they "*must be prepared and audited in accordance with all legal and regulatory requirements".*

56. If a Club purports to submit Annual Accounts which the EFL considers do not satisfy the definition, what is to happen? The EFL has no power to compel the Club to resubmit its Annual Accounts. More importantly, it has no power to compel the auditors to revise them. In our view, it cannot have been intended that the powers relied on by Mr Randall QC would be sufficient to make P&S Rule 2.9.2 effective and workable in circumstances where the EFL considers that the estimated accounts or the audited accounts do not meet the P&S Rule 1.1.3 definition. These powers, both individually and in aggregate, fall far

short of providing an effective substitute for a power to restate Annual Accounts so as to render them compliant with the definition in P&S Rule 1.1.3, thereby opening the door to an effective reference to the Disciplinary Commission under P&S Rule 2.9.2. We take the four powers relied on by Mr Randall QC in turn.

57. As for (i), by declining to accept estimated accounts on the grounds that they do not comply with the P&S Rule 1.1.3 definition, the EFL may be able to persuade the Club to resubmit estimated accounts that do comply. The Club may be willing to do so where, for example, it is persuaded that it has made a mistake. But it would be futile for the EFL simply to refuse to accept accounts where there is a real difference of opinion between the Club and/or its auditors and the EFL as to whether the estimated accounts meet the definition. The issue that is the subject of Ground 1 in this appeal graphically illustrates the point. In such a situation, the club would be likely to stand its ground and refuse to resubmit.

58. As for (ii), the possibility of a charge of breach of the duty of good faith cannot seriously be considered to be an effective key to unlocking the door where a club submits estimated accounts which the EFL considers do not comply with the definition. Bad faith is not easy to prove. Many, if not most, cases where there is a dispute as to whether accounts satisfy the definition do not raise issues of bad faith.

59. As regards (iii), the Regulation 16.20 powers are:

> "16.20.1 to require the Championship Club to submit, agree and adhere to a budget…..;
>
> 16.20.2 to require the Championship Club to provide such further information as the League shall determine and for such period as it shall determine;
>
> 16.20.3 to refuse any application by that Championship Club to register any Player or any new contract of an existing Player of that Club if the League reasonably deems that this is necessary…."

60. An exercise of the power in Regulation 16.20.1 could not contribute to making the Annual Accounts meet the relevant legal and regulatory requirements (in this case, satisfying FRS 102). It is difficult to see how exercise of the power in Regulation 16.20.2 would help

either. *Ex hypothesi,* the EFL will already have concluded in the Charge Letter that the Annual Accounts do not meet the requirements. Finally, the power in Regulation 16.20.3 (on which Mr Randall QC places particular reliance) to refuse an application to register a Player can only be exercised under that Regulation if the EFL reasonably deems this to be necessary to secure that the Club complies with its obligations listed in Regulations 16.19.8(a) to 16.19.8(c). These obligations have nothing to do with satisfying the P&S Rules. They are concerned with the Club's inability to (a) pay its liabilities to certain creditors and its employees; (b) fulfil its obligations to play fixtures; and (c) provide rights, facilities and services that are required to enable the EFL to fulfil its commercial and broadcasting contracts. So the power given by Regulation 16.20.3 would not avail the EFL either.

61. As regards (iv), the power to refuse an application to register under P&S Rule 4.3 is exercisable where a Club is in breach of any requirement in the P&S Rules "*relating to the provision of information*". The breach alleged by the EFL in this case is not that the Club failed to provide relevant information. It is that, in the opinion of the EFL, on the basis of the information that it did provide, the Club's estimated figures for T and audited accounts for T-1 and T-2, should have shown a loss which exceeded the Upper Loss Threshold. The conditions for an exercise of the power to refuse to register Players under P&S Rule 4.3 were not established.

62. But let us suppose that we are wrong to reject these submissions of Mr Randall QC and we were satisfied that some or all of the remedies on which he relies were available to the EFL. Even on that hypothesis, these remedies would not make P&S Rule 2.9.2 effective to achieve the evident purpose of the P&S Rules. The present case illustrates the problem only too clearly. One of the key objectives of the P&S Rules is to ensure that a club's Adjusted Earnings Before Tax do not exceed the Upper Loss Threshold. A key element of the scheme is that Annual Accounts (in which Earnings Before Tax are shown) are prepared and audited in accordance with all legal and regulatory requirements. Copies of the Annual Accounts and the estimated profit and loss account and balance sheet are required to be submitted to the EFL. These documents are considered by the EFL and P&S Rule 2.9.2 provides for what is to happen next. It is obvious that the EFL might decide (as occurred in the present case) that the Annual Accounts have not been prepared in

accordance with the relevant legal and regulatory requirements; and that, if they had been so prepared, the aggregation of the Club's Adjusted Earnings Before Tax for T, T-1 and T-2 would have resulted in a loss that exceeded the Upper Loss Threshold. It is also obvious that (as also occurred in the present case) the club might disagree with the EFL. No useful purpose would be served if in these circumstances the EFL (i) were able to *decide* that the Club's Adjusted Earnings Before Tax exceeded the Upper Tax Threshold, but (ii) were unable to give effect to that decision by restating the accounts so as to accord with the definition and (iii) were therefore unable to refer the breach to the Disciplinary Commission.

63. In our view, the Disciplinary Commission reached the correct conclusion. In order to make Rule 2.9.2 effective, it has to be read as giving the EFL the power to restate the figures shown in the estimated profit and loss account and the audited Annual Accounts so as to achieve compliance with the definition in P&S Rule 1.1.3. Otherwise, there is a real possibility of delay and indeed impasse while the Club and the EFL debate the matter. The alternative remedies relied on by Mr Randall are of limited value and do not demonstrably further the clear objective of the P&S Rules generally or P&S Rule 2.9.2 in particular.

64. Mr Randall QC asks rhetorically how this interpretation of P&S Rule 2.9.2 can be derived from the language of the Rule. The answer is that the Rule must be construed in light of the P&S Rules as a whole and their overall objective. In our view, the parties to the Rules must be taken to have agreed that the EFL would have the power to restate a Club's Adjusted Earnings Before Tax in a situation such as occurred in the present case. The P&S Rules would not work if the EFL were required to consider the exercise of its powers under P&S Rule 2.9.1 and 2.9.2 on what it believed to be the false basis that the Annual Accounts complied with the legal and regulatory requirements. That would make no sense. A club's interests are sufficiently protected, following a reference under P&S Rule 2.9.2, by its being able to contend before the Disciplinary Commission that the EFL was wrong. The alternative of a potentially prolonged impasse cannot have been intended. It would certainly not further the aims and objectives of the P&S Rules and the FFP regime.

65. We therefore reject Mr Randall's argument which he developed with great skill. He did not suggest any good reason (or indeed any reason) why, for the purposes of P&S Rule 2.9.2, it should have been intended that the EFL was bound to accept the Club's Adjusted Earnings Before Tax even if it considered that the Annual Accounts did not satisfy the relevant requirements.

66. We should add for completeness that we do not consider that the existence of the express power to restate in P&S Rule 2.3 bears the weight that Mr Randall QC seeks to place on it. That power is exercisable to deal with the specific case of the consideration included in the Clubs' Earnings Before Tax arising from a Related Party Transaction as a Fair Market Value. It is clear that, unless the EFL were given the express power to restate the Fair Market Value, it would have no power to do so. The definition of Annual Accounts would have no bearing on that question. But the definition is central to the question of whether (as we have held) the EFL has the power to restate the figures shown in the documents submitted by a club to make the Annual Accounts satisfy the definition.

67. For all these reasons, we reject Ground 2.

GROUND 3: APPEAL AGAINST SANCTION

The Disciplinary Commission's Decision

68. The Disciplinary Commission's central findings on sanction were as follows:

    (i) The Club's conduct post 31 July 2018 did not mitigate Charge 1;

    (ii) The Sanctioning Guidelines approved by the EFL Board on 6 September 2018 and dated 17 September 2018 ("the Guidelines") were relevant to sanctioning;

    (iii) A deduction of 12 points was the appropriate sanction; and

    (iv) The deduction should not take effect until the 2020/21 season.

69. As to the application of the Guidelines, the Disciplinary Commission proceeded on the basis that it was "*common ground*" that they did "*not bind the Commission, but may be taken into account*". It was by application of the Guidelines that the Disciplinary Commission arrived at a 12 point deduction.

The Club's Case

70. In the Notice of Arbitration and in his written and oral submissions, Mr De Marco QC made the following points:

    (i) The Disciplinary Commission erred in imposing a sporting sanction;

    (ii) The Disciplinary Commission erred in determining that the Guidelines were relevant;

    or

    (iii) If the Disciplinary Commission was entitled to have regard to the Guidelines, it erred in applying the points deduction to the 2020/21 season; and

    (iv) The 12 point deduction failed to have sufficient regard to the Club's circumstances.

71. As regards (i), the Club submits that a sporting sanction should generally be reserved for cases where a club or athlete has achieved a sporting advantage which is best remedied by a sanction proportionate to the advantage. The regulatory breach in this case was what Mr De Marco QC characterised as technical and not material. It was a breach from which the Club derived no material advantage. For that reason alone, it was inappropriate to deduct points.

72. As regards (ii), the Club submits that the Guidelines are no more than a direction to the EFL as to what sanction it should request a Disciplinary Commission to impose. They are not intended to provide guidance to a Disciplinary Commission. It is for this reason, for example, that they do not contain any provision for mitigation. The Disciplinary Commission in this case was mistaken in stating at para 15 of its Decision on Sanction (on the basis of paras 29 to 33 of the Decision in *EFL v Birmingham City FC (No 1)*), that

it was common ground that the Guidelines might be taken into account. The Club had argued the opposite.

73. As for (iii), the Club submits that, if the Disciplinary Commission was entitled to have regard to the Guidelines, it erred in applying the points deduction to the 2020/21 season. The Guidelines provide that "*the penalty for breach of the 3 season P&S reporting rules is a deduction of **12** points to commence in the season following the breach….*". It should, therefore, have applied the deduction to the season following the breach, namely 2018/19. The Club submits that the charges could and should have been brought in the 2018/19 season. It would be unfair to all clubs, and undermine the integrity of the competition, if breaches committed by different clubs in the same reporting period resulted in points deductions being applied in different seasons. And yet, that is what has happened: *Birmingham City FC* breached the P&S Rules in the same three year period as the Club and was subjected to a deduction of points in the season following the breach.

74. Alternatively, the Club submits that any sanction imposed in the 2020/21 season, ought to have been significantly reduced because of the remoteness of that season from the breach. This submission is supported by the need or desire for internal integrity in the competition; but also because any advantage gained by the breach diminishes with the passage of time. A club is most likely to benefit from the signing of players as a result of the breach in the year following the breach and the benefit is likely to reduce in later seasons.

75. As regards (iv), the Club submits that the Disciplinary Commission failed to have proper regard to what was described as either substantial mitigation or the specific circumstances of the case. In particular, it was wrong to conclude at para 11 that what happened after 31 July 2018 was irrelevant and did not mitigate the breach. The sale of the Stadium whose effect, if implemented in time, would have been to avoid the breach altogether was a significant relevant circumstance and mitigating factor which the Disciplinary Commission should have, but failed to, take into account.

The EFL'S Response

76. Mr Segan QC points out that the Disciplinary Commission was empowered by EFL Regulation 91.2 to impose a wide range of sanctions on the Club including expulsion, the imposition of a financial penalty, a points deduction and/or warning. He submits that the proper way to measure the seriousness of a breach of the P&S Rules is to assess the extent of the overspend. The Disciplinary Commission was right to say at para 20 of its Decision on Sanction: "*Given the overall level by which the Upper Loss Threshold was exceeded, we can see every justification for adopting the guideline deduction of 12 points, none of which should be suspended*". Mr Segan QC also relies on the fact that the Club has not attempted to explain the high level of the overspend.

77. The Club overspend exceeded the £39 million Upper Loss Threshold by £18.21 million, which meant that it made losses 46.7% higher than permitted by the Upper Loss Threshold. Moreover, the figures showed a worsening trend of losses over the three seasons. The overspend was almost double the £9.787 million recorded in *Birmingham (No 1)*, which concerned a breach of the Upper Loss Threshold over the same reporting period (i.e. 2015/16, 2016/17 and 2017/18), for which *Birmingham* was deducted 9 points in the 2018/19 season.

78. The EFL submits that the Disciplinary Commission correctly appreciated that, although it was not bound by the Guidelines, they were relevant and could properly be taken into account. By reference to the Guidelines and the approach which has been taken under the UEFA FFP Rules, on the facts of this case a sporting sanction was both appropriate and necessary. In support of this submission, Mr Segan QC relies on *Galatasaray v UEFA* (CAS 2016/A/4492, 3 October 2016)*, KKK Dernegi v UEFA* (CAS 2016/A/4692, 26 January 2017), *AC Milan v UEFA* (CAS 2018/A/5808, 1 October 2018) and *UEFA v Dynamo Moscow* (UEFA Club Financial Control Body Adjudicatory Chamber, 19 June 2015) where clubs were excluded from one or more UEFA competitions for breaches of the break-even requirements.

79. The EFL submits that the Disciplinary Commission was right to apply the points deduction to the season 2020/21. The Club is wrong to suggest that the EFL could have brought the charges in time for them to be resolved during the 2018/19 season. The imposition of the points deduction in the 2020/21 season was in consequence of "*the Club's strenuous (and*

successful) opposition to the imposition of a points deduction in the 2019/20 season": see para 59.6 of the EFL's Finalised Skeleton Argument.

80. In short, the Disciplinary Commission did not err in any material respect and the sanction imposed was not excessively severe.

Decision on Sanction Appeal

The correct approach on appeal

81. EFL Regulation 95.4.3 provides:

> "In the case of appeal against sanction, the grounds are that the original sanction was too severe or too lenient having regard to all the circumstances."

82. The question is not whether the sanction is "*severe*", but rather whether it is "*excessively severe*" having regard to all the circumstances: per Sir Wyn Williams in *EFL v Bolton Wanderers* (27 December 2019) at para 17. In considering that question, the Disciplinary Commission's judgment should be afforded a significant margin of appreciation or discretion: see, for example, para 14 of *EFL v Macclesfield Town* (17 March 2020) and para 24 of *EFL v Macclesfield Town* (17 August 2020). We should not interfere with the decision of the Disciplinary Commission if it was one that was *"reasonably open"* to it: see, for example, *EFL v Bolton Wanderers* at para 15. The test "*too severe*" necessarily involves an exercise of judgement and imports a margin for reasonable disagreement. We accept the submission of Mr Segan QC that a margin of appreciation should be allowed to the judgement of the Disciplinary Commission because it was steeped in the facts of the case in a way in which we of necessity cannot be.

The P&S Rules

83. The P&S Rules took effect for the 2016/17 season. They replaced the FFP Regulations. In the last decade, European football has been using FFP rules in an effort to control the spending of football clubs. The central principle of the FFP regime was described in a Joint Statement of UEFA and the European Commission in March 2012 thus:

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

84. In July 2011 the EFL adopted a new Regulation 18, which enabled FFP Regulations to be set for each of the Divisions of the EFL. Regulation 18 stipulated that the objectives would include "*…introducing more discipline and rationality in Club football finances"* (Reg 18.1.4)*; "…encouraging responsible spending for the long-term benefit of football"* (Reg 18.1.6)*;* and *"…protecting the long-term viability and sustainability of League football*" (Reg 18.1.7). Clubs were consulted upon and supported the imposition of sanctions for breach.

85. The P&S Rules are the successor regulations and share the aim of safeguarding the viability of the league by requiring clubs to spend within their means.

86. That is the context in which to consider the Club's appeal against Sanction. We turn to the individual Grounds of Appeal.

Applicability of the Guidelines

87. A paper on the P&S Rules prepared for the 26 July 2018 Board meeting of the EFL records that "*clubs have requested that sanctions for breaching the P&S requirements are outlined in the Rules*". The Guidelines were adopted by the Board as a result of a request by clubs for greater clarity and consistency in sanctioning for breaches of the P&S Rules and following a process of consultation with the clubs.

88. It is clear from the Guidelines and the accompanying paper dated 17 September 2018 by Shaun Harvey (CEO of the EFL at that point in time) that was placed before the Board that part of their purpose was to specify the sanctions that the EFL should or might seek from a Disciplinary Commission. By way of example only, the Guidelines record that "*the Board at their meeting on the 4th September agreed that for any breach, a sporting sanction in the form of a points deduction, should be sought*".

89. The Guidelines follow a pattern familiar to sanctioning in a regulatory context. They provide for what might be called the appropriate starting point for breach:

> "The penalty for breach of the 3 season P&S reporting rules is a deduction of 12 points to commence in the season following the breach i.e. 2018/19 for the 3 season period ending in 2018.
>
> The following number of points shall be deducted from the 12 points.
>
> Quantum of the Breach
>
> 9 points if less than £2.0m
>
> 8 points if between £2.0m - £4.0m
>
> 7 points if between £4.0m - £6.0m
>
> 6 points if between £6.0m - £8.0m
>
> 5 points if between £8.0m - £10.0m
>
> 4 points if between £10.0m - £12.5m
>
> 3 points if between £12.5m - £15.0m
>
> No deduction if breach is greater than £15.0m
>
> Then the balance shall be further reduced if the loss in the final season is less than the season(s) before."

90. The Guidelines also provide that the Executive can request up to an additional 9 points penalty for any aggravating factors. We agree with the observations at para 31 of *EFL v*

Birmingham (No 1) that there is "*considerable merit … in having clear guidelines which provide some measure of predictability*" in sanctioning for breaches of the P&S Rules. We also agree with the observation at para 33 that the Guidelines "*properly reflect the objectives of the P&S Rules, and should be taken into account as guidance in deciding what points deduction should be applied in the current season*".

91. The Club submits that little weight should be placed on this second observation because, for different reasons, it suited the purposes of both parties in *EFL v Birmingham (No 1)* to rely on the Guidelines. We consider that this underplays the significance of para 33 of the Decision in that case with which we agree.

92. It would have made no sense for the EFL to issue Sanctioning Guidelines to provide guidance as to the sanctions that the EFL should seek from the Disciplinary Commission, but to do so on the basis that the guidance would be irrelevant to the way in which the Disciplinary Commission exercised its powers. It would have made even less sense to do this in circumstances where the clubs had sought the guidance and had been consulted before it was issued. It would be of little use to the clubs to be told of the guidance as to what sanctions the EFL could or should seek from the Disciplinary Commission unless the guidance could be taken into account by the Disciplinary Commission.

93. The Disciplinary Commission understood that the Guidelines were not binding on it, but they could be taken into account. It is true that the Disciplinary Commission mistakenly believed this to be common ground (para 15). But it reached the correct conclusion on the relevance and applicability of the Guidelines. It correctly understood that it retained the power to impose any sanction within Regulation 91.2. Its task was to impose the appropriate sanction having regard to all the relevant circumstances.

94. Finally, we turn to the Club's submission that the Guidelines should not have been applied in the present case because they were not in force at the time of the breach of the Rules. But it is the regulatory status and purpose of the Guidelines which is important. The same point arose in *EFL v Birmingham (No 1).* The Disciplinary Commission in that case proceeded in accordance with the well-established practice of applying the Guidelines in force at the time of sanctioning. We agree with that approach.

95. In our view, the Guidelines were relevant and applicable in this case.

Sporting Sanction

96. We do not accept the Club's submission that a sporting sanction should not have been imposed on the grounds that (it is argued) (i) such sanctions should generally be reserved for cases where a club or athlete has achieved a sporting advantage and (ii) the Club derived no such advantage from its breach of the P&S Rules in this case.

97. As to (i), there are many cases in which a sporting sanction, such as a player suspension or a deduction of points, is the appropriate penalty where there has been no sporting advantage. For example, foul play in rugby or football is likely to result in a suspension regardless of whether it led to any on field advantage.

98. Nor do we accept (ii). There is no evidence to support the submission that the Club derived no sporting advantage from its breach. The Club adduced no evidence before the Disciplinary Commission to explain its overspend. But during the seasons 2015/16, 2016/17 and 2017/18, the Club's wages bill alone (and therefore excluding transfer fees, agents' fees etc.) was as follows:

    (i) In the 12 month accounting period ending 31 May 2016, the Club's staff remuneration was £19.295 million, 87.7% of its turnover that year;

    (ii) In the 12 month accounting period ending 31 May 2017, the Club's staff remuneration was £29.341 million, 125.5% of its turnover that year; and

    (iii) In the 14 month accounting period ending 31 July 2018, the Club's staff remuneration was £42.408 million, 168.1% of its turnover in that period.

99. The obvious inference is that the Club spent these increasing amounts on players in order to improve the Club's performance and position.

100. Further, to sanction on the basis of quantifying benefit from breach is rarely, if ever, possible. The nature and extent of any sporting advantage obtained from a breach may never be known. There are two answers to the Club's argument that the Disciplinary

Commission should have found that that the breach could not realistically have yielded any potential benefit to the Club in this case. First, there is no evidence to support such a conclusion. Secondly, it ignores the principles which underpin the imposition of a sporting sanction for breaches of the P&S Rules and FFP Regulations, to which we turn.

101. In *UEFA v Dynamo Moscow*, the Adjudicatory Chamber excluded the club for participating in the next UEFA club competition for which it qualified in the next four seasons. In doing so it observed at paras 79-80:

> "…It would be unfair for one club to be allowed to compete when it is in serious breach of the monitoring requirements which apply to all.
>
> This principle has even greater force in relation to the Break-even Requirement because a breach of this requirement (for example, because of excessive spending on player acquisitions and employee benefits expenses in order to attract 'star players') may directly affect the competitive position of a club, to the detriment of the vast majority of clubs who comply with the CL & FFP Regulations. So, in general, it would be unfair to allow a club which is in serious breach of the Break-even Requirement to compete in a UEFA club competition. The power to impose disciplinary measures exists not just to encourage compliance with the rules by deterring breaches of the monitoring requirements, but also to protect the integrity of UEFA's club competitions by ensuring that all of the clubs that compete are subject to the same requirements."

102. This passage was cited by the Disciplinary Commission in *EFL v Birmingham (No 1)* which observed at para 27:

> "Excessive spending on players is clearly designed to achieve an enhancement of sporting performance, but whether in practice it does enable a particular club at a particular point in time to achieve better results than it would have achieved if it had complied with the rules is practically impossible to assess. Even more difficult to assess would be the other counter-factual, namely whether competitor clubs would have performed better if they too had been permitted to overspend to the same degree. The principle of fairness and equal treatment can only be applied in this context by measuring the degree of overspending, recognising that any substantial breach may directly affect the competitive position of the offending club, to the detriment of other clubs in the same

competition. Given that the UEFA and EFL financial fair play rules have the same objectives these principles must apply equally to the P&S Rules."

103. We agree with those observations. A club which breaches the Upper Loss Threshold causes unfairness to other clubs competing in the same competition who have stayed within the P&S Rules. In such circumstances a sporting advantage is to be inferred and a sporting sanction is appropriate. A points deduction is not designed to assess and reflect the sporting benefit from the breach, which is likely to be impossible to quantify. Instead, it is to punish and to deter with the wider aim of upholding the integrity of the competition and protecting the interests of the game.

104. The Disciplinary Commission considered and rejected the Club's submissions on this issue at paras 16 to 18 of its Decision on Sanction. We agree with its conclusion that a sporting sanction was appropriate in this case.

Level of the Points Deduction

105. The correct starting point is provided by the Guidelines: the "*penalty for breach of the 3 season P&S reporting rules is a deduction of 12 points…"* It is clear that the primary measure of the seriousness of the breach is the extent by which the loss exceeds the Upper Loss Threshold. Points may be deducted from the 12 points depending upon the extent of the overspend. The Guidelines state: "*no deduction if breach is greater than £15.0m".* The Club exceeded the Upper Loss Threshold by £18.21 million. Accordingly, on an application of the Guidelines, the correct starting point should be a deduction of 12 points in this case.

106. The extent of the overspend is not the only relevant consideration. Trend is also relevant. The Guidelines provide for a further reduction if there is a downward trend in the overspend:

> "Then the balance shall be further reduced if the loss in the final season is less than the season(s) before.
>
> <u>Trend</u>

2 points if T < T-1 < T-2

1 point if T < T-1"

107. The Guidelines continue:

> "Additional notes
>
> It is important that there is a recognition that the quantum of the breach is reflected and that it isn't appropriate to apply a one size fits all bases (see quantum).
>
> It is important that if the trajectory is favourable i.e. losses reduce season by season this is recognised as it shows an intent to comply even if they have fallen short. If that trajectory is achieved over the 3 season period, they should get greater credit than if only over 2 and no intent should see the full penalty (see trend).
>
> The aggravated breach principle is to ensure that all factors can be taken into account."

108. The Club's losses increased season on season over the three year period. The EFL did not suggest there were any aggravating factors justifying an increase (of up to 9 points). The reference to aggravating factors recognises that there are other matters, in addition to the extent of the overspend, relevant to assessing the seriousness of the breach.

109. The breach was serious because the overspend was significant. The trend of the overspending was a worsening one as the Club's losses increased in each of the three seasons of the reporting period. The Club did not file any evidence before the Disciplinary Commission to explain how it came to make losses which hugely exceeded the Upper Loss Threshold, or the trend of such losses during this period. The Club's evidence was that the possibility of selling the Stadium as the solution to the problem was not considered until early 2018. Therefore, the overspending – which is the gravamen of the charge - was largely complete before the possibility of selling the Stadium was raised. Further, the Club was repeatedly warned that it would breach the P&S Rules unless it completed the Stadium sale (or sold players) by its year end, which (after two extensions resulting in a 14-month accounting period for 2018) became midnight on 31 July 2018. Mr Segan QC makes the obvious and good point that the Club would not have needed to sell the Stadium if it had exercised proper control over its spending during the three seasons.

110. The introductory page of the Guidelines states that the "*Club will have the opportunity to make its case to include any mitigation that they want to be considered*". The Club submits that the Disciplinary Commission erred in stating at para 20 of its Decision on Sanction that "*no specific reliance was placed on any other mitigating factor other than the clubs previous good record*". It is apparent from the Club's written submissions on sanction (and not disputed by the EFL) that it relied on a number of factors which it contended mitigated the breach. The most important of these was the sale of the Stadium.

111. The Club was entitled to reduce its spending under P&S Rules by selling the Stadium just as it would have been entitled to do so by selling players. The EFL accepts that it is open to a Club to sell its land or its players whether to ensure that its losses do not exceed the Upper Loss Threshold or for any other lawful purpose.

112. In this case the EFL was on notice from April 2018 that the Club intended to sell the Stadium in order to comply with the P&S Rules. The Club lawfully extended its accounting period to 31 July 2018 in an attempt to comply with the P&S Rules. Had the Club effected the sale before 31 July it would not have overspent and would not have been in breach.

113. With respect, we disagree with the Disciplinary Commission's conclusion (para 11) that what happened after 31 July 2018 is irrelevant. The Club did, as a matter of fact, sell the Stadium. If the sale had been made before 31 July 2018, there would have been no breach and the condition for a reference to the Disciplinary Commission under P&S Rule 2.9.2 would not have been satisfied. It follows from our conclusion on Ground 1 that the HoT executed on 15 and 17 August 2018 did not have retrospective effect and that is why the Club was in breach of the P&S Rules. But the HoT came close in time to saving the Club from exceeding the Upper Loss Threshold and being in breach. In our view, this was a significant mitigating factor which the Disciplinary Commission should have taken into account. The sale of the Stadium so close to the end of the accounting period was clearly relevant to the seriousness of the breach. Since the Disciplinary Commission failed to take into account a factor which was highly material to the assessment of the sanction, we do not feel constrained by its view as to the appropriate sanction. This is not a case where we are required to allow a margin of appreciation to the Disciplinary Commission's decision on sanction.

114. The fact remains that the HoT had not been executed by 31 July 2018 and the Club was therefore in breach. Moreover, it was very substantially in breach on account of the massive overspend. The scale of the overspend was such that in our view a deduction of points was clearly warranted in order to deter egregious overspending by wealthy clubs and to preserve the integrity of the P&S regime. Absent the sale of the Stadium, the appropriate sporting sanction would have been a deduction of 12 points. The EFL does not suggest that there were any aggravating factors to justify an increase above the starting figure of 12 points. The question is whether and, if so, by how much the 12 points should be reduced to reflect the sale of the Stadium. We remind ourselves that we must be satisfied that the sanction of 12 points was "*excessively severe"* before we can interfere with it (see para 82 above). We are satisfied that it was excessively severe because it completely left out of account the sale of the Stadium. In all the circumstances, we consider that the appropriate penalty is a deduction of 6 points.

Timing of the points deduction

115. The Club submits that any sanction imposed in the 2020/21 season ought to have been significantly reduced because of the remoteness of that season from the breach. This submission is said to be supported by (i) the need to uphold the internal integrity of the competition; and (ii) by the fact that any advantage derived from the breach diminishes with the passage of time. A club is most likely to benefit from the signing of players as a result of the breach in the year following the breach and the benefit is likely to reduce in later seasons.

116. As we have already said, the Guidelines state that a points deduction is "*to commence in the season following the breach i.e. 2018/19 for the 3 season period ending in 2018*". It is only at the end of the three season period that it can be determined whether the aggregation of a Club's Earnings Before Tax results in a loss that exceeds the Upper Loss Threshold. It follows that the following season is the earliest season in which a points deduction could be applied. Since the breach was committed in the season 2017/18, *prima facie* the points deduction should have been applied to the 2018/19 season. But the Disciplinary Commission decided that the deduction should be applied to the 2020/21 season. The Club's case is that, if points were to be deducted at all, the deduction should

have been applied to the 2018/19 season although that season had already been completed.

117. The Club rightly accepts that the Disciplinary Commission was not obliged slavishly to follow the Guidelines statement. We emphasise that it provides no more than guidance as to how the EFL should exercise the discretionary power that it is given under Regulation 92.2.7 of the EFL Regulations to order a deduction of points.

118. In considering the reasons that the Disciplinary Commission gave for its decision, it is important to bear in mind that (i) the Charge Letter (in respect of both charges) was not sent to the Club until November 2019; (ii) if a points deduction were to be applied to the 2018/19 season, they would have had no effect on whether the Club was relegated in view of its position in the table in that season; and (iii) if a points deduction of eight points or more had been applied in the 2019/20 season, the Club would have been relegated.

119. At para 30 of its Decision on Sanction, the Disciplinary Commission considered who was responsible for the fact that the Charge Letter was not sent until November 2019. Each party blamed the other for the delay. The Disciplinary Commission said: "*There were probably faults on both sides during that period*, *but it would be wrong to ascribe the whole of the blame to the Club".*

120. We are satisfied that the Club could not have been charged and the proceedings completed before the end of the 2018/19 season. The EFL did not *in fact* discover that the HoT had been backdated until it examined the documents disclosed by the Club after the end of the season in June 2019: see paras 58, 59 and 102 of the Decision. It raised the matter with the Club on 19 July 2019 and the Club was then charged in November 2019. We reject the Club's submission that the EFL alone was to blame for the fact that it did not discover the backdating until June 2019. We have heard detailed submissions from both parties on this issue. We are content to proceed on the basis of the Disciplinary Commission's careful assessment of the point. We agree with its judgment that it would be wrong to ascribe the *whole* of the blame to the Club and its implicit finding that a substantial part of the blame should be ascribed to the Club.

121. We accept the submission of the EFL that, from 14 November 2018 onwards, the Club engaged in a number of steps which would inevitably and foreseeably delay the resolution of the charges yet further, running the risk of the charges not being dealt with during the 2019/20 season. In particular, on 18 December 2019 the Club commenced a separate arbitration before a different panel seeking to have alleged defences to the charges dealt with as separate issues.

122. The Disciplinary Commission explained why it decided to apply the deduction of the 12 points to the season 2020/21 at para 37 of its Decision on Sanction:

> "…our conclusion was that the combination of (i) the fact that had the 12-point deduction been imposed when, according to the general approach, it should have been (during the 2018-2019 season), the Club would not have faced relegation, (ii) the actual or perceived inconsistency of the EFL's approach in the Derby Count case and (iii) the potential effects of the delays caused by the bringing of the eventually dismissed Charge 2, makes it inappropriate to impose the deduction in the current extended season, but to postpone its effect until next season when the onus will be on the Club to redeem its position on the playing field."

123. We can see no error of reasoning or approach here. The Disciplinary Commission was entitled to exercise its discretion in the way that it did and for the reasons that it gave. To apply the points deduction in the 2018/19 season would have been to impose a sanction without meaningful consequence. The Disciplinary Commission was entitled to take the view that to do this would have been futile and would have done nothing to further the objectives of the P&S Rules. We should add that, while it is desirable for breach proceedings generally to be completed in the season following breach, there may be circumstances where this is impossible. The present case is an example of such a case because the Charge Letter was not sent until November 2019 for reasons for which the Club was substantially responsible.

124. We do not accept that, by declining to impose the deduction in the 2018/19 season, the Disciplinary Commission undermined the internal integrity in the Championship. There was a good deal of discussion before the Disciplinary Commission about the position that was taken by the EFL in the disciplinary proceedings that it had brought against Derby

County: see para 26 of the Decision on Sanction. The result of that case was not known by the time of the Sanction hearing in the present case. The Disciplinary Commission took into account the "*actual or perceived inconsistency*" of the EFL's approach in the Derby County case. In our view, it was a relevant factor, but no more than that. It did not mandate the outcome in the present case.

125. The Club argued against the application of a deduction of more than 7 points to the 2019/20 season because such a deduction in that season would have led to its relegation. The Disciplinary Commission accepted this argument and postponed the effect of the deduction of the 12 points to 2020/21 on the basis that the onus would then be on the Club "*to redeem its position on playing field*". Having succeeded on that point, the Club now complains that the Disciplinary Commission erred in postponing the deduction. We reject this complaint. The decision fell well within the ambit of reasonable decisions that were open to the Disciplinary Commission.

126. In answer to the Club's "remoteness" argument, we make two points. First, the integrity of the competition is not undermined by imposing a points deduction in the 2020/21 season. Secondly, to argue that any advantage gained by the breach was by now diminished by the passage of time is to misunderstand the basis upon which the sanction is imposed. It is not by reference to an assessment of the advantage gained but to protect the integrity of the competition.

127. Accordingly, we reject the Club's submission that the points deduction should not have been applied to the 2020/21 season.

OVERALL CONCLUSION

For the reasons that we have given, the appeal on Grounds 1 and 2 is dismissed. The appeal against Sanction is allowed to the extent that the deduction of 12 points in the season 2020/21 is set aside and replaced by a deduction of 6 points in that season.

128. We invite the parties to make submissions in writing within 10 days in relation to costs.

129. We are very grateful to the parties' legal representatives for their comprehensive and careful submissions.

The Rt. Hon Lord Dyson

For and on behalf of the League Arbitration Panel

04 November 2020

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