IN THE MATTER OF AN ARBITRATION UNDER SECTION 9 OF THE RULES OF THE ENGLISH FOOTBALL LEAGUE 2019/20

AND THE ARBITRATION ACT 1996

LEAGUE ARBITRATION PANEL: MR NICHOLAS STEWART QC (Chairman), MR EDWIN GLASGOW QC and MR JONATHAN BELLAMY C.Arb

BETWEEN:

BARNSLEY FOOTBALL CLUB LIMITED
(formerly BARNSLEY FOOTBALL CLUB 2002 LIMITED)

Claimant

-and-

HULL CITY TIGERS LIMITED

Respondent

REDACTED FINAL AWARD

Contents

Introduction

1. This arbitration award is the final reasoned decision of this League Arbitration Panel ("the **Panel**") established under the rules of the English Football League ("**EFL**") to determine a dispute between the claimant Barnsley Football Club Limited ("**BFC**") and the respondent Hull City Tigers Limited ("**HCT**"). We issued a Partial Final Award on 11 January 2021, containing our final decision on liability and on the main aspects of financial relief, leaving only subsidiary, though still important, issues to be resolved. We said we should issue a single Final Award which would combine all our decisions and reasoning in the Partial Final Award with our further decisions and rulings following submissions on those remaining issues. Those issues are now covered from paragraph 210 onwards in this Final Award, which supersedes that last part of the Partial Final Award. Apart from this introductory paragraph and a few small corrections of no substance, the first 209 paragraphs of this award, which contain our decision on liability and those main aspects of financial relief, are unchanged from that Partial Final Award.. All three members of the Panel are unanimous on everything in this award, as we were on the Partial Final Award.

2. BFC and HCT are well-known professional football clubs which are members of the EFL and bound by the EFL Regulations ("the **EFL Regulations**") from time to time. BFC currently plays in the EFL Championship and HCT plays one level below in EFL League One. Both have long established and proud reputations.

3. This dispute arises from the transfer of a player Mr Angus MacDonald ("the **Player**") from BFC to HCT on 31 January 2018 for a transfer fee of £600,000 (exc. VAT) payable in three equal instalments. The written transfer contract ("the **Transfer Agreement**") was dated 31 January 2018. BFC received the first two instalments when

due, but now claims the unpaid third instalment of £200,000, plus interest. Under the Transfer Agreement that third and final instalment was due on 31 August 2019.

4. HCT has refused to pay that final instalment. It alleges that, upon the transfer of the Player, BFC had failed to disclose to HCT crucial medical information about the Player and that failure was a breach of contract and of other duties entitling HCT to withhold that final instalment and also to recover some £1.687m against BFC. HCT does not dispute that the final £200,000 was payable to BFC on 31 August 2019 if not eliminated by set-off against HCT's much larger claim against BFC.

5. The key provision in the Transfer Agreement is clause 9(j). Clause 9 ("the **Medical Disclosure Warranty**") stated: "*BFC hereby undertakes, represents and warrants to Hull that:*

. . . . . .

> *(j) it has made a full and honest disclosure to Hull's medical staff of the Player's past and current medical history (including but not limited to all injuries suffered, medical conditions/illnesses (physical and/or psychological), surgical procedures and treatments) that could in any way affect his fitness and/or ability to play professional football for Hull and it has procured the Player's consent to provide copies of his medical records or where applicable, facilitate the release of copies of such records to Hull from any relevant medical professionals.*

6. Clause 10 ("the **Indemnity Clause**" or "**Clause 10**") is then important if BFC has failed to comply with clause 9(j):

> ***IT** is acknowledged that Hull has entered into this Agreement and has agreed to make certain payments to BFC in reliance on the representations and warranties given by BFC hereunder. BFC shall indemnify Hull on demand against all liabilities, costs and expenses, damages and losses (including but not limited to any direct, indirect or consequential losses, loss of profit, penalties and legal costs (calculated on a full indemnity basis) and all other costs and expenses, including professional fees) suffered or incurred by Hull arising out of or in connection with: (a) any breach of the representations and warranties given by BFC hereunder; and/or (b) any claim made against Hull in respect of the Player's registration with Hull.*

7. The outcome of this arbitration turns in the first place on whether or not BFC complied with clause 9(j). HCT says not and that, if BFC had complied, HCT would then not have entered into the Transfer Agreement and is therefore entitled to an indemnity of £1.687m under clause 10.

Background and run-up to the Transfer Agreement

8. The Player had joined BFC from Torquay United FC on 1 August 2016, when he signed a two-year contract with a basic wage of £1,500 a week. He made 50 first team appearances for BFC before his transfer to HCT on 31 January 2018. He was popular and held in high esteem at BFC and was appointed club captain on 3 August 2017. On 16 March 2017 he had signed a new contract with BFC running to 30 June 2019, on a basic weekly wage of £6,000 rising to £6,250 for the year to 30 June 2018 then £6,500 for the last year to 30 June 2019.

9. We can then go right forward to the January 2018 transfer window, which opened on 1 January and closed at 23:00 GMT on 31 January.

10. On Saturday 27 January 2018, the HCT Club Secretary Mr David Beeby ("**DB**") emailed to the BFC Chief Executive Mr Gauthier Ganaye ("**GG**") a first offer of £600,000 for the Player, with £200,000 of that sum being conditional on appearances. GG replied the following day that, while BFC was willing to sell the Player, the offer was too low.

11. On 29 January DB sent GG a second offer. GG responded by email at 18:01 that evening with a counter-offer and DB in turn responded at 20:07 with an improved offer from HCT.

12. GG sent DB an email at 13:58 the following day Tuesday 30 January, stating: "*we officially accept this deal. I will announce our decision to the player and you can now arrange his medical and discuss his personal terms.*" GG's email asked for the paperwork to be sent ASAP to the BFC Club Secretary Ms Sharon Hardware ("**SH**").

13. The agreed deal involved three guaranteed payments of £200,000 each by HCT to BFC. There were also payments of a total £300,000 contingent on HCT's promotion and the Player's starting appearances for the Hull first team, though they are not material in this arbitration.

14. The draft transfer agreement was sent over to GG (copying in SH) by DB at 10:59 the following day 31 January, the last day of the transfer window. DB also wrote in that email that the Player was having part of his HCT medical that morning and that DB would let GG know when it had been successfully completed.

15. The payments in the draft transfer agreement reflected what had been agreed by email between GG and DB, except that the date for the third instalment of £200,000 had moved from 31 January to 31 August 2019.

16. SH sent the draft transfer agreement back to DB at 14:36 on 31 January, signed on behalf of BFC, who had not asked for any changes. The HCT Vice-chairman Mr Ehab Allam ("**EA**") gave his final approval at around 17:00 and DB then signed the agreement on HCT's behalf and emailed it back to SH at 17:22.

17. The day before the Transfer Agreement was signed, and after that deal had been struck by email in the early afternoon of 30 January, the wheels were set in motion that same afternoon for the Player to undergo HCT medical tests. He had a medical assessment at HCT's training ground that afternoon, when blood samples were taken. His full HCT medical took place the following morning and he underwent an MRI scan as well as a CT scan on his ankle. Some information about the Player's medical history was given by BFC's doctors and staff to their opposite numbers at HCT.

18. When all those matters had been dealt with:

    - on Wednesday 31 January 2018, HCT and the Player entered into a playing contract in EFL/Premier League standard form, for the period ending 30 June 2020 and at a basic weekly wage of £7,250 which could be increased on HCT's promotion to the Premier League and would be reduced automatically by 40% on relegation to EFL League One; and

- the normal paperwork was sent to the EFL and The Football Association and the transfer went through before that night's 23:00 deadline.

19. Nothing in that summary is disputed between the parties. Detailed issues concerning the Player's medical history and condition on 31 January 2018 are examined later in this award. That is where the nub of this dispute lies.

20. Although it was common for BFC, when transferring a player, to draft the transfer agreement, GG had accepted HCT's offer to send over the draft transfer agreement. The Transfer Agreement was eventually signed in exactly the form of the draft provided by HCT. The evidence of HCT's Vice-chairman EA was that, given the significant investment involved in signing a player, he would routinely ask a club who was selling a player to HCT to provide various assurances and warranties about the player in the transfer agreement. Those warranties included the selling club promising to HCT that it had disclosed all matters relating to the player's medical history. That was reflected in clause 9(j) and EA's evidence is consistent with our experience that the warranty in clause 9(j) is not a standard term routinely found in transfer agreements for professional footballers. Much of this dispute is explained by those involved at BFC following the same familiar practices and procedures as on any other transfer arranged and completed (as they often are) in a very short time-frame at the end of a transfer window. They did so without considering, or in some cases without even being aware of, clause 9(j) and its potentially significant impact. That impact is at the heart of this case.

Commencement of the arbitration: Claim and Counterclaim

21. On 18 February 2020 BFC served notice of arbitration ("**the Barnsley NOA**") on HCT under regulation 97 of the EFL Regulations 2019/20, claiming the unpaid £200,000 with interest at 8% per annum above Bank of England base rate under the Late Payment of Commercial Debts (Interest) Act 1998 and indemnity costs. The Barnsley NOA proposed that the matter be resolved by a sole arbitrator, who should be Mr Jonathan Bellamy C.Arb. It also attached detailed Points of Claim.

22. On 21 February 2020 HCT served a separate notice of arbitration ("the **Hull NOA**") on BFC, asserting that HCT was entitled to withhold payment of the final instalment of

£200,000 under the Transfer Contract, but also stating that HCT agreed to set off that £200,000 (plus interest) against its claim for loss and damage against BFC for breach of warranties and representations by failure to disclose aspects of the Player's medical history. The loss and damage was not particularised in the Hull NOA but was stated to be in the estimated sum of £1,479,970 (as at 31 January 2020).

23. The Hull NOA proposed a three-member arbitration tribunal, with each party nominating one arbitrator and the appointment of a chairperson to be in the hands of the EFL Board. The Hull NOA nominated Mr Edwin Glasgow QC as HCT's arbitrator.

24. The Hull NOA expressed HCT's dissatisfaction that the Barnsley NOA had been served while HCT was preparing its own NOA and was awaiting a response from BFC to correspondence between the parties' solicitors.

25. Those rival notices of arbitration led to a brief skirmish in correspondence between the parties' solicitors, which was resolved by HCT agreeing in March 2020 to withdraw its NOA on the basis of agreed directions. BFC would be the claimant and HCT would bring its claims by way of counterclaim in this arbitration. That was an obviously sensible solution.

Appointment of the Panel & Applicable Procedure

26. The Panel was appointed in accordance with EFL regulation 98. Mr Bellamy and Mr Glasgow remained as members of the League Arbitration Panel, as nominated by the claimant BFC and the respondent HCT. On 10 April 2020 Mr Nicholas Stewart QC was appointed as the third arbitrator to chair the Panel. His appointment was made by Sport Resolutions (UK), the body tasked by the EFL to make such appointments under EFL regulation 98.4. There has been no challenge to the constitution or jurisdiction of the Panel and we confirm the Panel's jurisdiction to determine all the claims and counterclaims in this arbitration.

27. Under EFL regulation 95, the seat of this arbitration is London and all issues are to be decided in accordance with English law. The arbitration is to be conducted in accordance with the provisions of Arbitration Act 1996 ("the 1996 Act") and Section 9

(Arbitration – containing regulations 95 to 103) of the EFL Regulations. Regulation 99 applies the Procedural Rules set out in Appendix 2 to the EFL Regulations.

Progress of the arbitration: Procedural Directions

28. The parties' agreement to proceed on the basis of the BFC NOA included an agreed pleadings timetable, to conclude with a Reply to Defence to Counterclaim from HCT (if so advised) by 10 June 2020. That timetable was subsequently varied and HCT served its Reply to Defence to Counterclaim on 27 July 2020.

29. On that same day 27 July 2020, the Panel issued the first of a series of written directions, culminating in a directions order dated 7 December 2020 which dealt mainly with the final arrangements for the full hearing starting on 14 December 2020.

30. Procedural Rule 14 (The Tribunal's General Powers) gives the chair of a League Arbitration Panel powers and discretions on a wide range of procedural matters. The chairman of the Panel exercised those powers quite extensively but naturally consulted his Panel colleagues on significant matters.

31. There were two directions hearings, both held remotely and attended by leading counsel on both sides. After a hearing before the whole Panel on 3 September 2020, we issued detailed directions on 9 September 2020 covering disclosure, witness statements, expert evidence, costs management and arrangements for the main hearing to start on Monday 14 December 2020. There had been a large measure of co-operation between the parties, including their agreement that there should be (as there was) a pre-trial review before the chairman alone on Monday 7 December 2020 - the second of those remote hearings.

32. There is no value in going into the detailed procedural history here. Significant non-routine points will be covered below in the relevant sections of this award.

The Parties' pleaded cases

33. BFC's initial case in its Points of Claim could hardly have been simpler. It sought payment of the £200,000 plus interest under the Late Payment of Commercial Debts (Interest) Act 1998.

34. The central dispute was in HCT's Defence to Points of Claim and Counterclaim (more conveniently labelled here "the **Defence and Counterclaim**") served on 8 June 2020.

35. Well over half of the 137 paragraphs of the Defence and Counterclaim set out a detailed account of the Player's medical history and playing career with BFC and HCT. In summary, the essential allegation by HCT was that, in breach of clause 9(j) of the Transfer Agreement, BFC had failed, prior to the Transfer Agreement:

    (1) to make full and honest disclosure of the Player's medical history; and/or
    (2) to provide HCT with copies of the Player's medical records and/or to facilitate the release of copies of those records.

36. We note the words "prior to the Transfer Agreement", expressly used in HCT's counterclaim, as it was unusual to see an allegation of breach of a contractual warranty having occurred before the contract had even been made. But all will become clear.

37. HCT alleged that, in failing to make full and honest disclosure in the terms required by clause 9(j), BFC had also been in breach of the duty of good faith owed to HCT by virtue of EFL Regulation 3, particularly:

    3.1 Membership of The League shall constitute an agreement between The League and each Club to be bound by and comply with . . these Regulations.
    . . .
    3.4 In all matters and transactions relating to the League each Club shall behave towards each other Club and The League with the utmost good faith."

    Paragraph 9 of the Defence pleaded expressly that the duty of utmost good faith applied to all dealings relating to the transfer of the Player, including but not limited to the Transfer Agreement.

38. HCT's case was that the breaches of clause 9(j) and/or the duty of good faith entitled it to invoke the Indemnity Clause and/or had otherwise caused loss and damage.

39. It was clear that the Defence and Counterclaim was alleging dishonesty by BFC. As well as expressly reserving the right to provide further particulars of the breach, HCT made the same reservation in relation to good faith and/or honesty. As it stood, the Defence and Counterclaim gave no particulars of dishonesty. However, it was clear that HCT was alleging that one or more of BFC's officers, employees or medical advisers had deliberately withheld information which they knew was covered by clause 9(j).

40. BFC's Reply and Defence to Counterclaim made the fair point that HCT's Defence and Counterclaim had recited a disproportionately lengthy chronology of the Player's medical history. The Panel agrees that big chunks of the Defence and Counterclaim crossed into the evidential realm, which had the inevitable knock-on effect that BFC's Reply and Defence to Counterclaim went into those matters as well. We shall consider those evidential matters later in this award, so far as relevant.

41. BFC also picked away at a number of pleading points. We do see justification in some of BFC's complaints of lack of clarity and particularity but there is no need to go into all that here. There was no mystery about the essentials of HCT's case, as we have summarised it above. Correspondingly, there was no obscurity about BFC's pleaded response. The essential thrust of that response was:

- There had been no breach of contract or any duty by BFC, which had disclosed and done everything required by clause 9(j).
- Although BFC admitted the duty of utmost good faith and that it applied to the transfer of the Player and the Transfer Agreement (see paragraph 37 above), it denied that the duty differed from the duties already alleged under clause 9(j).
- BFC denied any dishonesty.
- HCT was not entitled to any relief, whether under the Indemnity Clause or as damages. In particular, it was not so entitled where it was unable to demonstrate

HCT's reliance on the representations and warranties under the Transfer Agreement (as to which HCT would be put to strict proof).

- HCT had benefited and continued to benefit from the Player's transfer to HCT. He was a financial asset to HCT, with a value publicly estimated to be higher than the combination of the £400,000 already paid by HCT to BFC with VAT and Intermediary Fees.
- It would "in due course" be averred by BFC that, notwithstanding any alleged breaches of representations and warranties (which were denied), HCT would have signed the Player in any event.

That last bullet point was supplemented by an allegation that HCT only sought to extricate itself from its payment obligations under the Transfer Agreement upon being informed of the Player's cancer diagnosis in August 2019. Throughout the case BFC attached more significance to that point than the Panel could ever see was justified (and in the end we rejected it anyway, as explained below).

42. Generally, the Panel had to work a little harder with the pleadings than we expected, to see the wood for the trees and to identify exactly what was being said on each side. The summaries above reflect our understanding reached at an early stage in the case and we still consider that understanding was correct.

Clause 9(j) Particulars

43. One important and entirely fair point raised by BFC was that, despite HCT's elaborate account of the Player's medical history, its pleading had not identified which aspects of his history fell within the clause 9(j) requirement that they "could in any way affect his fitness and/or ability to play professional football for Hull". Accordingly, the Panel's 27 July 2020 directions required HCT by 12 August 2020 to serve written "**Clause 9(j) Particulars**" stating specifically which of the points in the Player's medical history mentioned in paragraphs 31 to 128 of its Counterclaim could in any way have affected his fitness and/or ability to play professional football for Hull. That direction was confirmed in the further Panel directions given on 3 August 2020. Those Clause 9(j) Particulars were served on 12 August 2020 and are considered when we

come to discuss and decide the issues. Their importance justifies setting them out here in full:

HULL'S CLAUSE 9(j) PARTICULARS

[redacted]

3. *For the avoidance of doubt, the particulars of the Player's medical history which are set out at paragraphs 2(a)-(e) above are intended to include all consultations and/or appointments with, and investigations and/or tests and/or assessments (in particular, the results thereof) conducted by doctors, nurses, consultants and/or other medical professionals in respect of or in connection with the conditions and symptoms pleaded therein.*

HCT's Schedule of Loss

44. HCT's Defence and Counterclaim attached an itemised Respondent's Schedule of Loss, giving figures as at 31 May 2020 and quite properly reserving its right to serve an updated Schedule of Loss. The schedule excluded interest and contained several explanatory footnotes. The total loss at 31 May 2020 was stated as £1,605,645.46.

45. The Panel's 27 July and 3 August 2020 orders directed that by that same 12 August deadline BFC should serve a Counter-schedule stating its position on HCT's Schedule of Loss. That Counter-schedule was served by the deadline. It maintained BFC's position that there was no loss. The only admission was the amount and payment of the first and second instalments of the transfer fee to BFC.

46. The final point in the Counter Schedule of Loss was that HCT's Schedule of Loss took no account of the Player's market value, or the value to HCT of any benefit derived from the Player to date. This is a significant point which is considered fully below.

47. Voluntarily and without objection from BFC, on 23 October 2020 HCT served an Amended Schedule of Loss. Again, it reserved the right to serve a further updated schedule dealing with interest and with an expected adjustment to take account of HCT's use of the UK Government's Coronavirus Job Retention Scheme (the furlough scheme) for the Player. Stated as at 22 October 2020, the total claimed loss was £1,687,751.82. That was an increase of £82,106 from the first Schedule of Loss.

Nutshell of the case on the pleadings

48. Without any prejudgment on fact or law, based on the pleadings the Panel saw the case taking shape (in its essentials) as:

(1) BFC would be entitled to recover £200,000 plus interest unless HCT succeeded on its counterclaim.
(2) HCT could succeed on its counterclaim if (but *only* if) it could prove that at the point the Transfer Agreement was made:
    (i) unknown to HCT:

- there was at least one item covered by clause 9(j) which BFC had failed to disclose to HCT

  or

- BFC had failed to procure the Player's consent in the terms stated in clause 9(j)

AND that

(ii) if HCT had known of such failure, either:

- as a matter of proven fact, it would not have entered into the Transfer Agreement

  or

- if that were not proven as a fact, because of the express acknowledgment of reliance in clause 10, it was to be taken that if HCT had known of such failure it would not have entered into the Transfer Agreement

(3) If HCT succeeded on step (2), its recoverable loss (ignoring interest) would be the difference between:

(A) the amount of money the Player's services had cost HCT; and

(B) the benefit HCT had received from the Player's services, measured as best one can in money terms.

49. While this is a simplified analysis and leaves significant sub-issues (discussed below), this nutshell of the case still appears correct to the Panel. BFC never warranted the Player's medical condition. It gave a contractual warranty that it had done everything that clause 9(j) required, and the alleged breach of that warranty is central to HCT's case. The nub of the counterclaim is that HCT says that if BFC had complied with that warranty HCT would not have entered into the Transfer Agreement and would not have engaged the Player's services. So far as money can do it, HCT therefore claims to be put in the position in which it would have been if it had not made the Transfer Agreement and the Player had not become an HCT player at all. That claim is put primarily as a claim for indemnity under clause 10, alternatively for damages for breach of contract.

Directions and preparations for the hearing

Expert evidence: Medical

50. The Panel's 9 September 2020 directions gave each party permission to rely on one independent medical expert on the question:

> *Whether as at 31 January 2018 the specific aspects of the Player's medical history identified and particularised in paragraphs 2(a)-(e) of the Respondent's Clause 9(j) Particulars dated 11 August 2020, taken individually or in combination with each other, could in any way have affected the Player's fitness and/or ability to play professional football for the Respondent.*

51. BFC engaged Dr Nigel Jones and HCT Dr Mark Gillett. After production of their written reports, each party's expert had been directed to answer questions from the other party, which they did. In accordance with Panel directions, they also produced a statement of the issues on which they agreed or disagreed, with a summary of reasons.

52. At the Pre-Trial Review ("**PTR**") held on 7 December 2020 as mentioned below, BFC objected that Dr Gillett's report had answered a Question 3 which was outside the scope of the question directed by the Panel (set out in paragraph 50 above). Dr Gillett had been asked to assume that before the Player's transfer on 31 January 2018 he would have been provided with both the information which had been disclosed by BFC to HCT and the information which BFC accepted had not been disclosed. Question 3 asked him how he would then have advised HCT on 31 January 2018 in relation to the prospective transfer of the Player, in particular how he would have advised HCT in respect of any particular risks associated with signing the Player as a result of his medical history.

53. The chairman had consulted his Panel colleagues before the PTR. He considered that Question 3, which had been put to Dr Gillett in his letter of instruction from HCT's solicitors, was outside the scope of the question directed by the Panel. Accordingly, he directed deletion of the related parts of Dr Gillett's report, that there should no reference made to, and no reliance upon, his response to Question 3 and that no reference was to be made to that question in the medical experts' joint statement.

Expert evidence: Player valuation

54. The Panel, having considered the Parties' submissions, appointed a single joint expert on the question of "*the market value of the Player and the financial benefit of the Player to the Respondent* [HCT] *as at 31 January 208 and during the period to date.*"

55. The Parties had proposed that each should appoint its own expert on this issue. However, the Panel considered that was unnecessary and disproportionate and that it would be sufficiently helped and guided by a single expert.

56. The parties were given the opportunity of agreeing who that expert should be. As they did not reach agreement, on 1 October 2020 the Panel appointed Mr Samuel John Rush, the Chief Executive Officer of 366 Sports Group Limited. Mr Rush was the candidate proposed by HCT. The Panel's choice of Mr Rush implied no doubt that the candidate proposed by BFC was also well qualified to be the expert on this question. We chose Mr Rush because he appeared to have more practical experience as an agent or intermediary in the player transfer market. Fairness to both parties was ensured by their agreeing the instructions to Mr Rush and each having the right to put written questions to him on his report and oral questions when he gave his evidence to us at the hearing. An irony is that, as discussed below, it was HCT which turned out to be dissatisfied with Mr Rush's evidence, not BFC.

Pre-Trial Review

57. On Monday 7 December 2020, the chairman conducted the PTR remotely. It took just over two hours and both parties were represented by leading counsel. The chairman issued final pre-hearing directions that afternoon. Apart from the direction discussed above relating to Dr Gillett and a number of practical directions for the hearing to start on Monday 14 December 2020, the chairman made directions:

    (1) allowing (as agreed by BFC) a second witness statement of an HCT witness Dr Arindam (Ronnie) Banerjee;

(2) denying an opposed HCT application to rely on a second witness statement of Mr Ehab Allam; and

(3) ordering that the final hearing on Monday 14 December should be conducted by Zoom with all participants attending remotely.

58. On that point (3), HCT had asked that the final hearing be conducted as a hybrid hearing, with the Panel and the legal teams attending in-person at one location with witnesses able to attend in-person if willing. However, while the chairman agreed with HCT's counsel that a fully remote hearing was a second-best (or perhaps more accurately a third-best) to a hybrid hearing, he did not see it as any obstacle to a fair and effective hearing in this case. In the circumstances as known on 7 December, a safety-first approach was to be adopted (and subsequent events in December certainly did not suggest that had been an overly cautious approach).

59. In the chairman's order issued on 7 December 2020, practical directions relating to the final hearing covered trial bundles, skeleton arguments, witness protocols, recording and transcribing of the hearing, the hearing structure and timetable and the agreement and approval of a List of Issues.

The List of Issues

60. The parties, as directed on 9 September 2020, made genuine concerted efforts to agree a list of issues, but by the PTR on 7 December had not completely succeeded. There was considerable overlap between the rival lists and the synthesis directed by the chairman caused no expressed concerns.

61. The final List of Issues**,** annexed to the 7 December 2020 directions order, is:

*1. What is the proper construction of clause 9(j) of the Agreement (the "**Medical Disclosure Warranty**")?*

2. Did BFC breach the Medical Disclosure Warranty? In particular, and with reference to HCT's Clause 9(j) Particulars dated 12 August 2020:

2.1 Did BFC fail to make full and honest disclosure to HCT's medical staff of the Player's past and current medical history (including but not

limited to all injuries suffered, medical conditions/illnesses (physical and/or psychological), surgical procedures and treatments) that could in any way affect his fitness and/or ability to play professional football for HCT?

2.2 Did BFC fail to procure the Player's consent to provide copies of his medical records or where applicable fail to facilitate the release of copies of such records to HCT from any relevant medical professionals?

3. Further or in the alternative, did BFC breach the duty of utmost good faith owed to HCT?

Causation

4. If so, were any and/or all of the alleged breaches of the Medical Disclosure Warranty and/or the duty of utmost good faith the cause of any loss suffered by HCT?

5. Were any and/or all of the alleged breaches of the Medical Disclosure Warranty and/or the duty of utmost good faith the reason why HCT did not pay the final instalment of the Transfer Fee on 31 August 2019?

6. What is the significance and/or effect of the fact that, as expressly acknowledged by the parties in clause 10 of the Transfer Agreement, HCT entered into the Transfer Agreement, and agreed to make certain payments to BFC, in reliance on the Medical Disclosure Warranty?

Loss

7. What loss, if any, has HCT suffered, taking into account:

a. Whether HCT would have signed the Player had (on HCT's case) BFC complied with the Medical Disclosure Warranty and/or the duty of utmost good faith?

b. What "financial benefit", if any, has HCT received from the registration of the Player?

62. Those are the issues we discuss below in that order.

The Hearing

63. The main hearing was held over four days starting on Monday 14 December 2020. It was conducted entirely remotely by Zoom, hosted by the English Football League. We

found ourselves hardly hampered at all by not having an in-person hearing, which is a tribute to the cooperation and efficiency of the teams on both sides of the case and especially to those at the EFL (Mr Nick Craig, Ms Georgina Oldroyd and Ms Laura Oddie) who organised and managed the hearing seamlessly.

64. We had the advantage of a live transcript and swift delivery of a full transcript after the end of each hearing day. It was helpful on two occasions to have slightly extended hearings in order to get through the day's timetable and we especially appreciated the cheerful cooperation of the transcriber Mr Adam Moon.

65. The legal teams at the hearing were:

Claimant Barnsley FC

Counsel: Mr John Mehrzad QC, Mr Ashley Cukier

Solicitors: Brabners LLP

(Mr Andrew McGregor, Ms Catherine Forshaw, Mr Matthew Lavelle

Respondent Hull City Tigers

Counsel: Mr Paul Harris QC, Ms Ciar McAndrew

Solicitors: Centrefield LLP (Mr Stuart Baird, Mr Philip Bonner)

66. The witnesses were:

Claimant Barnsley FC

Mr Gauthier Ganaye – BFC former Chief Executive

Dr John Harban – BFC Club Doctor and an NHS GP

Mr Paul Heckingbottom – BFC former Head Coach

Mr Craig Sedgwick – BFC Head Physiotherapist

Mr Nathan Winder – BFC former Head of Club Sports Science

Expert medical witness: Dr Nigel Jones

Respondent Hull City Tigers

Mr Ehab Allam – HCT Vice-chairman

Dr Arindam (Ronnie) Banerjee – HCT part-time Club Doctor from 1 September 2018 and an NHS GP

Mr David Beeby – HCT Club Secretary
Dr Mark Waller – HCT Club Doctor to June 2018
Mr Rob Price – Physiotherapist, HCT former Head of Medicine and Performance

Expert medical witness: Dr Mark Gillett

Joint expert witness on player valuation
Mr Stephen Rush – Chief Executive of 366 Group Limited; solicitor

67. The timetable for the hearing was set by the chairman after consultation with the other Panel members after the parties had submitted proposed timetables. On the first three days HCT's factual witnesses were called first, then BFC's factual witnesses. The three expert witnesses gave evidence on the fourth day, which then finished with brief oral closing submissions from counsel.

68. All witnesses had made witness statements, as directed by the Panel. Practically no examination-in-chief was needed or allowed. Counsel on each side were allowed equal overall time to cross-examine the other party's witnesses. They were allowed one hour each to cross-examine the other party's medical expert and 45 minutes each to cross-examine the Single Joint Expert Mr Rush. It made our task much easier (or less difficult) that the witness examinations were conducted with skill and good humour by two such stylish counsel, with their distinctly different styles.

The Evidence

69. As well as the written witness statements and the expert witnesses' reports with their follow-up items in response to parties' questions, the hearing bundles contained more than another 2,500 pages. Fortunately, the vast majority of those items were not raised in oral evidence and many did not need scrutiny from the Panel.

70. We are satisfied that all ten of the witnesses of fact (five on each side) were being truthful in their evidence, although there were mistakes – some of them quite careless - which we identify later in this award. As expected in any legal proceedings, those witnesses varied in their ability or inclination to give direct answers to all questions.

Mr Ehab Allam needed reminding that he was only required to answer questions and that others were engaged to argue HCT's case, but we bear in mind that it is his family who have a heavy financial stake in HCT. We found him a straightforward witness.

71. When the time came for BFC's witnesses to be cross-examined, it quickly became apparent that HCT's counsel had properly and astutely judged that they were going to make no headway on the question of dishonesty. That allegation simply faded away and was expressly and rightly abandoned by Mr Harris at the outset of his closing submissions. The evidence had provided no support for a finding of dishonesty against anyone involved at either BFC or HCT.

72. It will not be helpful to set out a detailed witness-by-witness account of the evidence. We have taken all the relevant written and oral evidence into account before reaching our decisions and only set out points needed to explain our conclusions and reasoning.

Findings and Conclusions on the Issues

73. We now turn to the crucial task of deciding each issue from the List of Issues set out in paragraph 61 above.

Issue 1: What is the proper construction of clause 9(j) of the Transfer Agreement (the Medical Disclosure Warranty)?

74. The List of Issues refers to the whole of clause 9(j) as the Medical Disclosure Warranty and, reasonably enough, that is what HCT's counsel have done in their written submissions. However, BFC's opening submission, in paragraph 56, "deconstructed" clause 9(j) into two halves, the first of which is labelled the "Medical Disclosure Warranty" and the second the "Consent Warranty".

75. Both parties approach clause 9(j) as containing two distinct obligations, which it clearly does. In order to follow the structure of clause 9(j), and with consistent terminology in this award, its (unchanged) wording may be conveniently set out, with emphasis added, as:

> *9. BFC hereby undertakes, represents and warrants to Hull that:*
>
> . . . . .

(j) it has made a full and honest disclosure to Hull's medical staff of the Player's past and current medical history (including but not limited to all injuries suffered, medical conditions/illnesses (physical and/or psychological), surgical procedures and treatments) ***that could in any way affect his fitness and/or ability to play professional football for Hull*** [labelled here, though not in the Transfer Agreement, "the **Disclosure Warranty**"]
and
it has procured the Player's consent to

- *provide copies of his medical records*

or where applicable,

- *facilitate the release of copies of such records to Hull from any relevant medical professionals.* [labelled here, though not in the Transfer Agreement, "the **Consent Warranty**"]

76. The words we have underlined in bold are a distinct limitation of the ambit of the required disclosure under the Disclosure Warranty. We shall refer to that limitation as "the **Football Criterion**". The Football Criterion is crucial.

77. It is crystal clear that clause 9(j) imposed obligations *only* on BFC and *not* on the Player. Neither the parties nor any member of the Panel have ever suggested differently. What was required of BFC under the Disclosure Warranty was disclosure – no more, but no *less*. All that was required of BFC under the Consent Warranty was to procure the Player's consent – no less, but no *more*. BFC itself had no obligation under the Consent Warranty to facilitate the release of copies of any records, beyond procuring the Player's consent that *he* would provide or facilitate release of copies of his medical records. So far as HCT wished to contend under Issue 2.2 that BFC *itself* failed to facilitate the release of copies of records, as opposed to failing to procure the Player's consent, it could only have made good that contention by showing that such failure was a breach of the Disclosure Warranty. But that is not the way HCT's case is put.

78. There is no discernible difference between the parties on the principles of interpretation of the Transfer Agreement, including clause 9(j). Naturally, the difference between the parties is on how we should apply those principles. They have helpfully drawn our attention to directions and guidance from the authorities, including the House of Lords case *Investors Compensation Scheme v West Bromwich Building Society* [1998] 1 WLR

896, and the Supreme Court cases *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, *Arnold v Britten* [2015] AC 1619 and *Wood v Capital Insurance Services Limited* [2017] UKSC 24.

79. We take account of all the applicable principles, usefully encapsulated in the passage cited by BFC from the judgment of Asplin LJ in the Court of Appeal decision *Guest Services Worldwide Limited v Shelmerdine* [2020] EWCA Civ 85, at para. 29:

> "*…it is necessary to ascertain the objective meaning of the language used, taking into account the factual and commercial context. The natural and ordinary meaning of the words must be assessed in the light of the clause as a whole, its purpose, other relevant parts of the Shareholders' Agreement and the factual and commercial matrix. Furthermore, whilst commercial common sense is a very important factor to take into account, it is relevant to how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, at the date of the agreement, and should not be applied in retrospect.*"

That case was dealing with a shareholders' agreement but the Transfer Agreement in this case was no less a commercial contract. The principles are the same, as long as the Panel has regard (as we do) to the factual, commercial and *sporting* context.

80. A basic principle of interpretation is that any contractual provision must be construed by reference to the contract as a whole. Here, where there are two distinct limbs of a single clause directed to the Player's medical history and condition, we must work out how they were intended to operate together and in relation to each other (and to any other parts of the Transfer Agreement). Although we set out our analysis and interpretation of the Disclosure Warranty and the Consent Warranty separately, this is a point we have kept carefully in mind.

<u>The proper construction of the Disclosure Warranty</u>

81. Interpretation of the Disclosure Warranty raises the following questions:

- What is the effect, in this context, of the phrase *"full and honest"*? What is meant by "*full*"? What, if anything, is added by the words *"and honest"*?
- Was BFC's disclosure obligation limited to what was already in its knowledge or possession (i.e. the knowledge or possession of its officers, employees or other

agents such as self-employed doctors who provided services to the club)? Or did BFC warrant that it had disclosed *everything* in the Player's medical history which was caught by the Football Criterion, whether or not already in its knowledge or possession?

- What is covered by *"past and current medical history"*? Or probably more usefully, what if anything is *not* covered?
- Was the Football Criterion an objective test? Or was it a subjective test: whether BFC honestly believed that particular aspects of the Player's medical history were caught by or escaped the Football Criterion? Or was it a different subjective test: whether BFC honestly and reasonably believed they were caught by or escaped the Football Criterion?
- To what point in time or what time period did the Football Criterion apply? Was it the date of the transfer? Was it an indefinite period? Was it a reasonable period? If so, what was a reasonable period?

We shall now answer all those questions.

"Full and honest"

82. We accept HCT's submission that the words *"full and honest"* are cumulative, not disjunctive. If the disclosure was honest but not full, then BFC was in breach; and if it was full but not honest, there was also a breach. However, the latter case is a little hard to see as a practical issue, as it would seem to involve inadvertently full disclosure of material which BFC had deliberately meant to withhold – a failed deception. Moreover, since in its closing submissions HCT dropped all allegations of dishonesty on the part of BFC, there is no point in going further into that possibility. In any case, the tribunal finds it hard to see what would have been added by the express obligation of honesty, which would clearly have been implied anyway. We therefore now focus on *"full"*.

Full disclosure

83. The synonyms or near synonyms offered by HCT for the word *"full"* (replete, complete, perfect) do not carry the matter any further. The word *"full"* is plain enough.

The Disclosure Warranty required BFC to have told HCT at least everything it knew or had in its possession about the Player's medical history:

- whenever it occurred (as confirmed by the probably unnecessary words *"past and current"*); and
- as long as it was caught by the Football Criterion.

84. That leads on to the question whether BFC, in order to make full disclosure, was also required to go *beyond* what it already knew or had in its possession, and to take steps to obtain additional information from others about the Player's medical history. The obvious example is the Player's own medical records, which BFC was entitled to obtain under clause 3.1.5 of its contract with the Player dated 1 August 2016. That contract was in the EFL/Premier League standard form and clause 3.1.5 (a standard term) stated the Player's agreement that:

> "*he has given all necessary authorities for the release to* [BFC] *of his medical records and will continue to make the same available as requested by* [BFC] *from time to time during the continuance of this Contract*".

85. If there was information in those medical records which fell within the Football Criterion but had not been requested by BFC, so was not already in its actual knowledge or possession, was that information nonetheless also covered by the Disclosure Warranty? Our conclusion is No. On this point, the timing context of the Transfer Agreement is relevant. Everything happened quickly on 30 and 31 January 2018. There was no realistic possibility that, on those two days and before the Transfer Agreement was signed, BFC could have obtained any significant amount of information it did not already have about the Player's medical condition. We accept HCT's submission that the essential purpose and intention of clause 9(j) was allocation of risk to BFC (discussed further in paragraph 90 below). However, objectively viewed, the parties cannot have intended by clause 9(j) to impose on BFC the risk of a breach of contract because BFC had not disclosed to HCT information in the hands of third parties which BFC had never had and could not possibly have obtained in the extremely limited time known by both parties to have been available on that day.

86. We add that, even if we were wrong on that last point, it could make no difference to the outcome of this arbitration. As will be seen in our discussion of Issue 2 below, that wider construction of clause 9(j) is not needed for there to have been a clear breach. Our decision on this particular point can make no difference at all on that question, or on the relief to be granted to HCT.

Medical history

87. The expression *"medical history"* has a wide ambit. As well as the express list in clause 9(j), it would include tests and appointments (including missed or declined tests or appointments) of a medical nature, unless outside the scope of the Football Criterion. It would not include the occurrence or the results of fitness and performance tests which neither stemmed from nor led to any medical concerns. On the facts of this case, we are not faced with any need to draw a line in practice between medical and non-medical matters. When we come to Issue 2, it will be apparent that there were quite enough non-disclosures of undoubtedly medical matters for it to be unnecessary to go into any borderline items.

Is the Football Criterion an objective test?

88. This is a point which certainly could make a difference, and the Panel has a firm view. HCT submits that the question whether aspects of the Player's medical history *"could in any way affect* [the Player's] *fitness and/or ability to play professional football for Hull"* – the Football Criterion - is an objective test. We agree and we reject BFC's contention that the test is qualified by reference to BFC's honest, or even honest and reasonable, judgment on that question. There is nothing in the wording of clause 9(j) to support BFC's position. The straightforward effect of the wording is that it is a question of fact: in relation to any particular aspect of the Player's medical history, could it affect his fitness or ability to play professional football for Hull? That question was to be answered on 31 January 2018 by reference to the facts on that day. We recognise that to answer that question may not always be easy and may need expert guidance, as in this case where expert evidence has been crucial in enabling us to decide the case fairly.

Temporal application of the Football Criterion

89. The question, raised by BFC, is whether there is any (and if so, what) limit to the period for which the test under the Football Criterion is to be applied. Where clause 9(j) talks of medical history which *"could in any way affect* [the Player's] *fitness and/or ability to play professional football for Hull"*, the question here is "could when"? Does it mean it could have that effect:

- ever in the Player's lifetime?
- only during a reasonable period (and if so, what is that reasonable period here)?
- only during the Player's initial contract with Hull (noting that it is not shown that at the point the Transfer Agreement was made, BFC even knew the length of the Player's contract with HCT)?
- only until HCT had had a reasonable opportunity of fully assessing the Player's medical condition?
- only at the date of the transfer?

On this issue, the Panel does not attach significant weight to the words *"for Hull"*. The import of those words is that the test in the Football Criterion was to be applied in the context known to both parties and therefore by reference to the broad level at which HCT was then playing. The club might make its way back up to the Premier League or it might slip down from the Championship (as it has done), but in broad terms any effect of the Player's medical history was to be tested against his fitness and/or ability to play at the upper levels of English professional football.

90. We do not see any time limit set by clause 9(j) for the application of the Football Criterion. The clause works perfectly well and sensibly without implying any such limit. For example, a degenerative (e.g. arthritic) condition which was not going to have any practical effect until the Player was well into his 50s would not be caught anyway (*pace* the fabled Stanley Matthews, who played in the old Division One when he was 5 days into that decade). At the other end of the spectrum, the Football Criterion was obviously not restricted to the Player's fitness and/or ability to play at the point of his transfer. Objectively viewed, the essential purpose of the Disclosure Warranty was to protect HCT against any potentially detrimental future effects of the Player's medical

condition, as far as ascertainable from his entire medical history up to 31 January 2018. At the point of his transfer, his future might or might not have been as a Hull player for the rest of his career – nobody knew for certain. Moreover, even if he remained a Hull player for only a year or so, the longer-term effects of his medical condition were potentially significant for his transfer value to another club (and the transferee club would in turn have an interest in his potential value on a later transfer). The central point of the Disclosure Warranty – that it was a risk allocation for the protection of HCT, required by HCT and accepted by BFC – would be significantly undermined by grafting on a time limit. There is a spurious attraction to the notion of a reasonable period, but that is only because the word "reasonable" itself always sounds so reasonable. But in the context of this case, the ambit of the Disclosure Warranty is limited only by the word *"could"* and not additionally by any time period.

91. We have now covered all the questions mentioned in paragraph 81 above, so turn to the Consent Warranty.

The proper construction of the Consent Warranty

92. There is no difficulty at all in the interpretation of the Consent Warranty. The obligation on BFC was to procure the Player's consent. If it had obtained that consent before the Transfer Agreement was made, then there was no breach of warranty by BFC. If it had not, then BFC was immediately in breach of warranty and was therefore potentially liable to HCT in the terms of the clause 10 indemnity.

93. We see no reason to apply the Football Criterion to any aspect of the Consent Warranty. That is not what clause 9(j) says, although it easily could have done so if that had been intended, and there is nothing in the context which requires that interpretation. If BFC had complied with the Consent Warranty, the Player's consent would then have ensured that HCT would be able to get hold of *all* his medical records, either directly *("consent to provide….")* or indirectly ("*consent to…..facilitate …"*). In particular, that facilitation was a matter for the Player, not for BFC. Obviously, HCT intended that the Player's consent procured by BFC would be enforceable by HCT, but it would not have been directly enforceable under the Transfer Agreement itself, to which the Player was not a party.

94. It is worth noting that the Consent Warranty could have been satisfied by BFC procuring the Player's consent at any point up to immediately before the signing of the Transfer Agreement. In those circumstances, there would have been no practical use that HCT could make of the Player's procured consent *before* the Transfer Agreement was made. Given the timetable of the negotiation and completion of the Transfer Agreement, all on those two days 30 and 31 January 2018, both parties BFC and HCT understood perfectly well that this was precisely the practical position anyway, however long or short a time before the signing of the Transfer Agreement BFC had been able to procure the Player's consent. It should be remembered here that BFC first received the draft Transfer Agreement only at 10:59 on 31 January.

95. The only useful practical purpose the Consent Warranty could have had for HCT was to enable HCT, *after* the transfer, to obtain information which was either:

- not covered by the Disclosure Warranty (because BFC's obligation was to disclose only what it already knew or had: see paragraph 85 above); or
- *was* covered, but in breach of the Disclosure Warranty, had not actually been disclosed.

In practice, as on the same day, 31 January, HCT was going to enter into a standard form employment contract with the Player, which would include the same standard clause 3.1.5 as mentioned in paragraph 84 above, it had no practical need for the Consent Warranty for the period after the transfer anyway. Although BFC would not have known the detailed terms of the Player's contract with HCT, all parties would have known that it would include that clause.

96. Following from the simple position stated in paragraph 92 above, further discussion of the Consent Warranty falls under the subsequent issues, particularly Issue 2 where we deal with breach. There is no more to be said about the *interpretation* of the Consent Warranty, which is as clear as we have stated.

Issue 2: Did BFC breach the Medical Disclosure Warranty? In particular, and with reference to HCT's Clause 9(j) Particulars dated 12 August 2020.

2.1 Did BFC make full and honest disclosure to HCT's medical staff of the Player's past and current medical history (including but not limited to all injuries suffered, medical conditions/illnesses (physical and/or psychological), surgical procedures and treatments) that could in any way affect his fitness and/or ability to play professional football for HCT?

2.2 Did BFC fail to procure the Player's consent to provide copies of his medical records or where applicable fail to facilitate the release of copies of such records to HCT from any relevant medical professionals?

Issue 2.1 deals with the Disclosure Warranty and clause 2.2 with the Consent Warranty, as analysed and interpreted in paragraphs 81 to 95 above.

97. We note the words *"In particular"*. Nonetheless, as the party alleging breach, it is for HCT to present proper particulars of and to prove breach by evidence directed to those particulars. Accordingly, we consider HCT's case only against the Clause 9(j) Particulars set out in paragraph 43 above.

The Player's medical history

98. In this award we refer to the items in 2(a) to (e) of the Clause 9(j) Particulars as:

[redacted]

99. Despite the wording of the Clause 9(j) Particulars, the probable elimination of [redacted] did not itself affect the Player's fitness and/or his ability to play professional football for HCT. We do however accept HCT's case that, given the other information known to BFC at that time about the Player's symptoms and condition, the probable

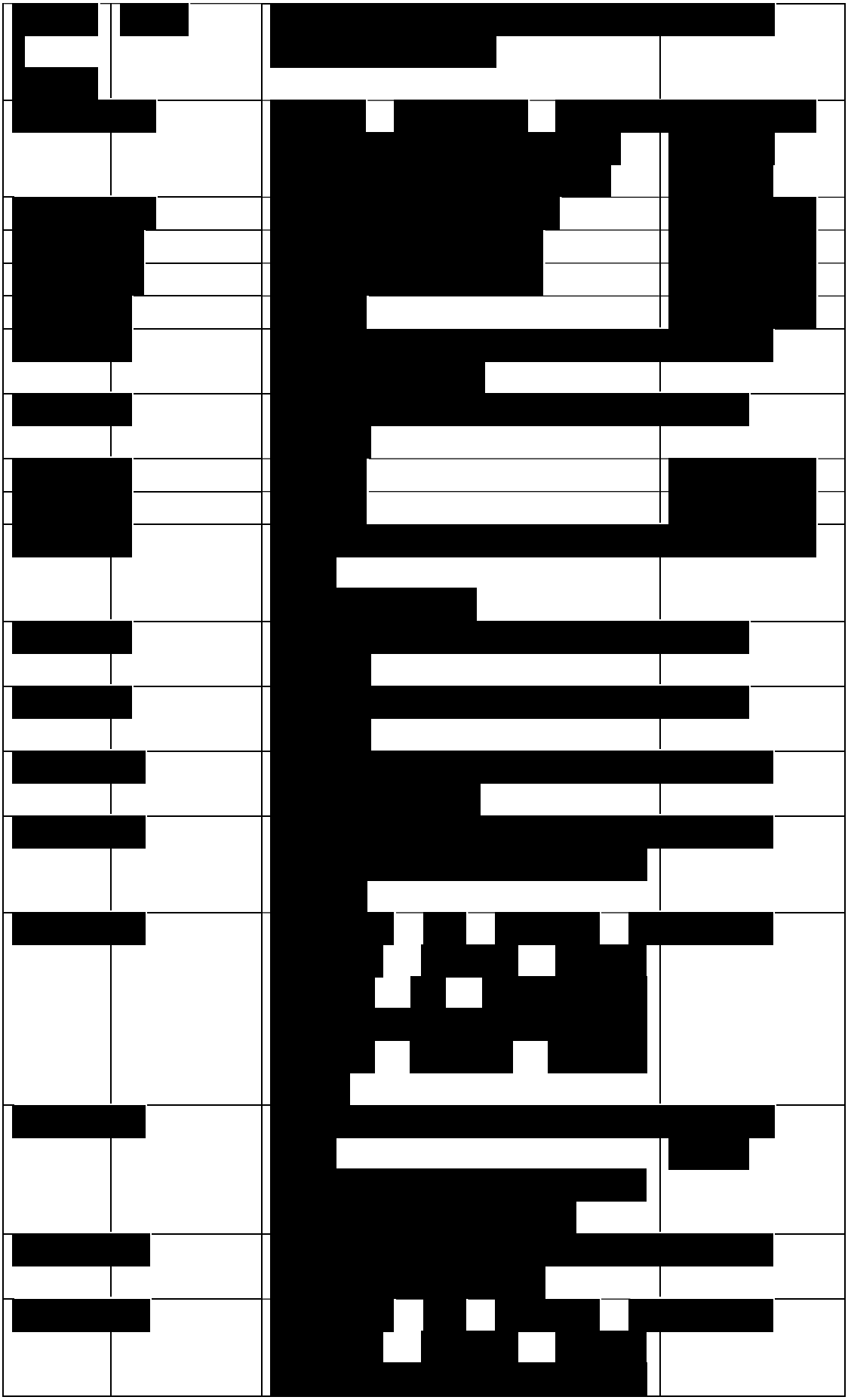
elimination of [redacted] as an explanation of some or all of his symptoms was itself a part of the Player's medical history because it meant that the cause of those symptoms was unknown.

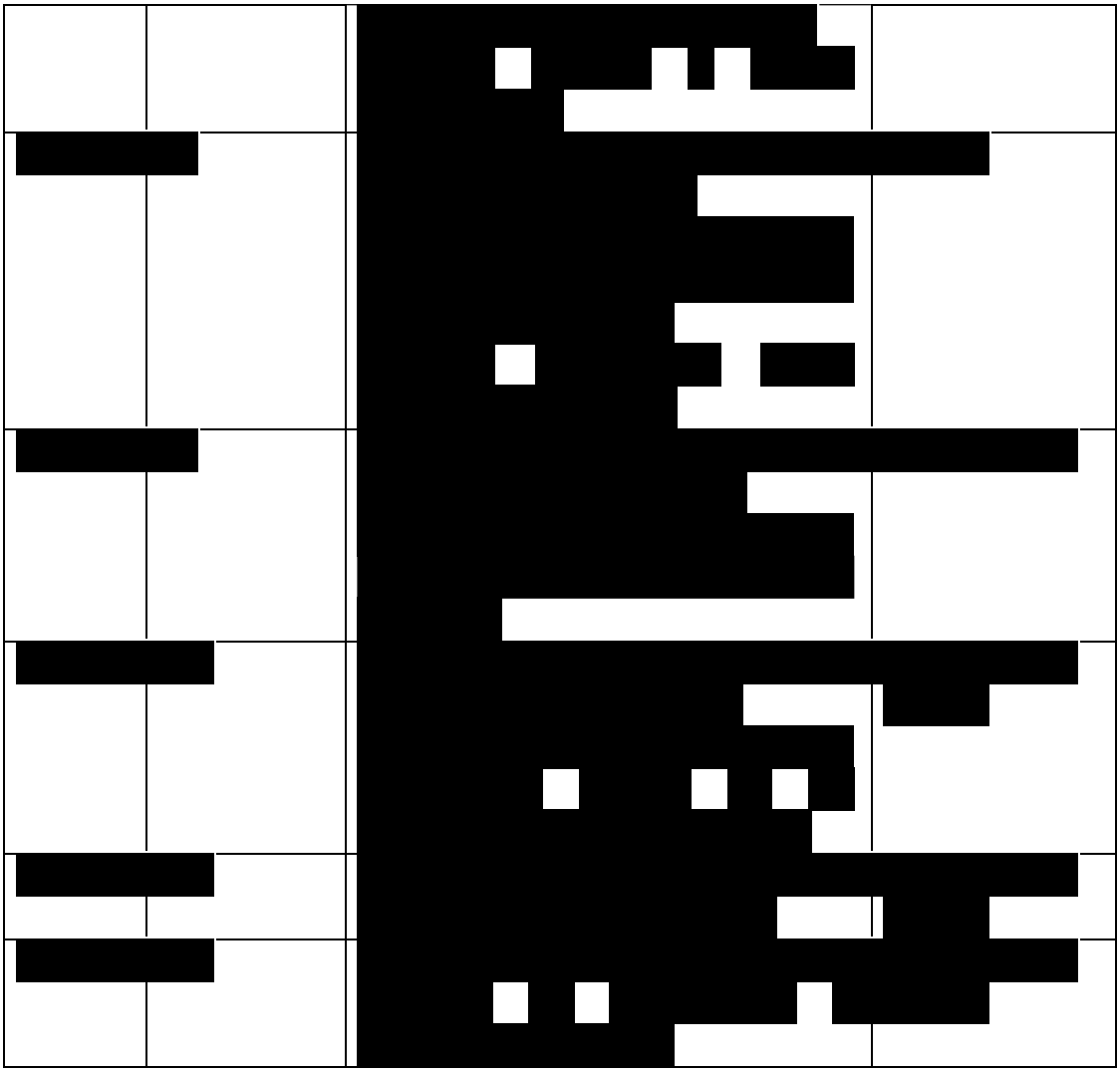
100. There was no evidence before the Panel that permits a finding that the Player authorised the provision or release of, and/or that BFC requested and/or obtained, his medical records from any third party.

101. Our analysis of the Player's medical records does not limit that term to his NHS medical records. It does however include those records. The evidence from BFC's Club Doctor, Dr Harban, was that the Player was first registered as a patient at his NHS practice in Barnsley on 11 January 2018 and that his NHS medical records did not arrive at the practice until 6 March 2018. The Player's NHS records would have been held by BFC's Club Doctor from that date in his independent capacity as the Player's NHS general practitioner.

The Facts

102. The following table ("the **Medical History Table**") sets out the relevant history relating to the Player's medical symptoms and/or conditions as we find it after reading and hearing the evidence. In recognition of HCT's case of breach of warranty, the table sets out the facts under the following categories of the Player's symptoms: [redacted] (items (1), (3), (4) and (5) in paragraph 98 above).





Fitness and/or ability to play professional football for HCT (the Football Criterion)

103. The Panel read and heard independent expert evidence from Dr Mark Gillett BSC (Hons) MSc (Sports Med) FRCS (A+E) instructed on behalf of HCT and Dr Nigel Jones MB ChB instructed on behalf of BFC.

104. Dr Gillett has since December 2018 held the post of Chief Medical Officer of the FA Premier League. From 2014 to 2016 he was the elected chairman of the FA Premier League Doctors' Group. Before taking up his role at the FA Premier League, Dr Gillett worked as first team doctor at Chelsea FC and as Director of Performance at West Bromwich Albion FC and Nottingham Forest FC. During his employment at these clubs, Dr Gillett conducted pre-signing medical examinations on over 50 players in 20 transfer windows.

105. Dr Jones is currently a clinical Consultant in Sport and Exercise Medicine and Head of Medical Services for the Great Britain Cycling Team. From 2014 to 2017 he was engaged as Doctor to the England Senior Rugby Team. Dr Jones has on a consultancy basis undertaken an unspecified number of pre-signing medical examinations of professional footballers for clubs and agents, including at Liverpool FC.

106. Dr Gillett and Dr Jones are both well-qualified in sports medicine. However, we find that Dr Gillett has greater relevant experience of medical issues affecting professional footballers and football player transfers. We find further that Dr Gillett's report and opinion was based on a more careful analysis of the underlying facts, thereby demonstrating his own interrogation of the primary facts. In contrast, the oral examination of Dr Jones demonstrated on several occasions that his opinion was based on him taking at face value factual statements in BFC's written evidence which were shown to be improbable or inaccurate; for example, the number of matches for which the Player was unavailable in October and November 2017, that the Player's symptoms in October 2017 were explicable by him having a cold and that his symptoms in December 2017 were due to a sore throat.

107. More generally, we did not find the conclusion of Dr Jones in his written report dated 30 October 2020 supported by its contents. In the course of his report, Dr Jones placed undue reliance on the question whether or not BFC could or should have been aware of a positive diagnosis of [redacted], as opposed for example to [redacted]. The question for this Panel is not one of clinical negligence on the part of the medical staff at BFC or whether or not the medical staff and their instructed external consultants ought to have joined *"the medical history dots"* to reach a diagnosis of ulcerative colitis, but whether BFC was in possession of facts and matters forming part of the Player's medical history that could have affected the Player's fitness or ability to play professional football for HFC. Although in no way conclusive, it was also unfortunate that Dr Jones materially misstated the question put to him when he concluded his opinion by referring to medical history that *"WOULD NOT"*, rather than *"could not"* affect that ability.

108. In summary, we found Dr Gillett to be a conspicuously experienced and reliable expert witness. We prefer his opinion where it differed from that of Dr Jones. Specifically, we accept his opinion on the following:

(1) The collection of [redacted] symptoms presented by the Player before the transfer, even without a diagnosis of [redacted], could have affected his fitness and ability to play professional football for Hull.

(2) The probable elimination of [redacted] taken on its own would not adversely affect the Player's ability to play professional football. We do however accept Dr Gillett's opinion that, if [redacted] is excluded, *"then other more sinister diagnoses* [such as [redacted]] *need to be excluded."*

(3) Persistent [redacted] symptoms may affect a player's fitness and ability to play professional football, at least until such time as the [redacted] and its underlying causes have been diagnosed and treated. The symptoms presented by the Player before the transfer could have had this negative effect. We accept Dr Gillett's evidence that the results from the Player's [redacted] tests set out in the Medical Disclosure Table demonstrate that his [redacted] was *"significant"*.

(4) In relation to [redacted] symptoms, the Player's early history of pulmonary embolism and the ongoing clinical investigation in January 2018, coupled with the prospect that [redacted] might be required in future, could have affected his ability to play professional football at least until such time as a definitive diagnosis was made. Dr Jones also accepted in oral examination that the fact of a [redacted] indicated an increased risk of a future similar event. We accept Dr Gillett's evidence that, as reflected by the fact that in his more than 20 year career as a sports physician he has not seen a patient with a [redacted], this was *"a highly unusual event of incredible significance"*.

(5) In relation to [redacted] symptoms, taken on its own the presentation of [redacted] was amenable to physical therapy and medication and need not adversely affect the Player's ability to play professional football.

109. We accept Dr Gillett's evidence that the Player had seen a number of medical

consultants in the months immediately preceding the transfer agreement, that this was *"a highly abnormal situation"* and there was *"a pattern here that is very damning"*.

110. We therefore accept Dr Gillett's basic conclusion that: *"When taken in combination with one another these symptoms* [redacted] *could have affected, in at least some way and potentially in a significant way, the Player's fitness and/or ability to play professional football for HCT in any way during the term of his playing contract. Furthermore, these three complaints when taken in combination can be reasonably expected to have affected the Player's fitness and/or ability to play professional football to a greater degree than any of the complaints taken in isolation."*

111. In reaching this conclusion we have been careful to exclude any benefit of hindsight. We note Dr Gillett's opinion that *"the presentation of the Player in the latter half of 2017 and January 2018, together with the diagnostic test results received at that time, are strongly indicative of* [redacted] *which in my opinion should have been the first diagnosis to be considered by any qualified doctor."* However, it is not necessary to decide whether or not the medical staff at BFC, assisted as they were by reputable external specialist consultants, ought to have reached a diagnosis of [redacted] before the date of the transfer agreement. The issue of clinical fault is not relevant to compliance with the terms of the Disclosure Warranty and we make no finding of fault here.

BFC's knowledge of the Player's medical history

112. Dr John Harban held the position of BFC Club Doctor throughout the Player's time at the club. He conducted the Player's medical examination in July 2016 at the time of his transfer from Torquay United FC. Although the Player was not registered as an NHS patient at Dr Harban's practice until 12 January 2018 and his NHS records were not transferred to that practice until after the Transfer Agreement, it was clear from Dr Harban's witness statement and from his answers in his oral examination that he knew material parts of the Player's medical history at the time of the Transfer Agreement. He ordered the various blood tests and specialist medical investigations

undertaken on the Player during his time at BFC and in the months shortly before the transfer. It was Dr Harban who from October 2017 ordered the various investigations, including blood tests, [redacted] tests, undertaken on the Player and referred the Player to a Consultant [redacted], [redacted], a Consultant [redacted], [redacted], and a Consultant [redacted], for investigations that were ongoing and not concluded by the time of the transfer. At the time of the transfer, BFC's Club Doctor therefore knew of the scans and tests undertaken on Consultant's advice, including the [redacted] procedure. In his oral examination Dr Harban, who was aware of the Player's pulmonary embolism in 2008, described the [redacted] test as being *"the gold standard test for detecting* [redacted] *"*. Dr Harban was aware shortly before the transfer that it was improbable that the Player's symptoms were explained by a diagnosis of [redacted].

113. It was clear from the written and oral evidence of BFC's Head of Club Sports Science, Nathan Winder, and BFC's Head of Physiotherapy, Craig Sedgwick, that each of them knew of many aspects of the Player's medical history set out in our Medical History Table above, although they did not claim to understand the medical significance of a number of the tests and the results. It was also clear from their evidence that they were not medically qualified and understandably deferred to the opinion of BFC's Club Doctor.

<u>BFC's knowledge of the Player transfer</u>

114. BFC did not lead evidence from its senior management that its medical staff was informed that the Player was to be transferred at the end of the January 2018 transfer window. Its then Chairman Mr Gaultier Ganaye accepted that he did not inform the club's medical staff about the terms of the Transfer Agreement. His evidence was "*it was business as usual and the staff at Barnsley is an experienced staff on the medical staff, so they know how to handle these kinds of business."*

115. The central part of the evidence from BFC's Club Doctor Dr Harban was that he had not been told, and did not otherwise know, that the Player was to be transferred

from BFC during the January 2018 transfer window. In his oral examination Dr Harban said, after accepting that the Player's medical presentation was complex and included *"anomalies"*, that *"we were starting to get to the bottom of it. And he was just transferred and whisked away, shall we say."*

116. There was no evidence from BFC, including from the Head of Physiotherapy, Mr Craig Sedgwick, that any individual who knew of the proposed transfer informed the Club Doctor of this prospect. It follows that BFC's Club Doctor had not been informed of the scope or even the existence of the Medical Disclosure Warranty. This state of affairs was not apparent from Dr Harban's witness statement but emerged during oral questioning at the hearing. Once given, it was not challenged by HCT.

117. We accept this evidence from the BFC Club Doctor as true, although we are surprised that the state of his knowledge on this central point had not been made clear in his witness statement.

118. Dr Harban also said in his written evidence, which was not subject to challenge, that in his 25-year career at BFC he had *"never requested disclosure of an incoming player's medical history"*.

119. This evidence explains why BFC's Club Doctor made no disclosure to HCT which might be said to have satisfied the Disclosure Warranty. The Club Doctor was focused on the continuing investigations into establishing a medical explanation for the Player's ongoing symptoms and condition. His ignorance of the proposed transfer of the Player, and therefore the Transfer Agreement and specifically the Disclosure Warranty, meant there was no question of any disclosure by him on behalf of BFC.

120. BFC's Head of Sports Science, Nathan Winder, and Head of Physiotherapy, Craig Sedgwick, learned of the Player's transfer on 30 January 2020. Mr Winder recalls that he learned it from BFC's First Team Manager and Mr Sedgwick was informed by the Player himself. Mr Sedgwick's evidence was that he saw the Player on the training ground on 30 January 2018 and he *"told me that he had come to collect his belongings*

and to say his goodbyes because he was moving to Hull City", news that Mr Sedgwick said *"came as real surprise*". His further evidence, which was not subject to challenge, was that the Player asked him *"to send him any information that I had that would assist with his medical at Hull".* Each man accepted in oral examination that he did not know of the terms of the Transfer Agreement and therefore of the Medical Disclosure Warranty. This is unsurprising because terms were only agreed on that day.

121. With data protection concerns in mind, Craig Sedgwick sent the Player Dr [redacted] email dated 11 January 2018 and the pre-signing information held by BFC in relation to his transfer in 2016 from Torquay United FC. Dr [redacted] email was limited to [redacted] symptoms and included his conclusion that the Player had [redacted] The pre-signing information included: the BFC's Medical Screening Questionnaire, Orthopaedic Screening Examination Form, the FA's Youth Trainee Screening report and the radiology report on the MRI of his lumbar spine on 1 August 2016. The Player forwarded this information to HCT's Head of Medicine and Performance, Rob Price. Mr Sedgwick's unchallenged evidence was that, in the transfers in which he had been involved, he had never been provided with documentation relating to a player's full medical history and, in relation to this transfer, he received no request from HCT for any further information relating to the Player.

122. As observed above, there is no evidence that staff at BFC informed its Club Doctor of the proposed transfer. It was not suggested in questioning that this omission was in any way deliberate. Having seen and heard his evidence, we are clear that the omission to inform the Club Doctor of the proposed transfer of the Player was pure inadvertence.

123. It was the absence of communication between the senior management and staff at BFC, who knew of the proposed transfer, and the Club Doctor, who did not, that explains the minimal information relating to the Player's medical history disclosed to HCT.

124. We find that BFC was in breach of the Disclosure Warranty. The answer to

Issue 2.1 is therefore Yes.

125. BFC was in breach in respect of each of the [redacted] symptoms, the [redacted] symptoms and the t[redacted] symptoms set out in the Medical History Table. Each of these categories of symptom could have affected his fitness and ability to play professional football for HCT even if some were more serious than others. For example, while we accept the agreed expert medical evidence that [redacted] is manageable in professional footballers, including EFL Championship players, we conclude that each of these matters is one that could have affected the player's fitness and ability to play professional football for HCT.

126. On the other hand, we find that BFC did not breach the Disclosure Warranty in relation to the respiratory symptoms. BFC disclosed Dr [redacted] email dated 11 January 2018, which referred to the results of the [redacted] Test, Dr [redacted] conclusion of exercise induced asthma and his recommended treatment regime. There was no request from HCT's medical team arising from this disclosure, including no request for the Player's medical records. This position is consistent with the agreed medical evidence that exercise-induced asthma is not unusual in professional footballers.

127. We accept HCT's submission that the position in relation to the facts and matters of the medical history should be considered not only individually but also cumulatively. It is for this reason, for example, that we consider that the history of diarrhoea in 2017, which would not have been material in a player without a complex medical history, was a relevant part of the Player's history caught by the Football Criterion. As we have noted, the complexity and anomalies of the Player's medical presentation, the unexplained cause(s) of his symptoms and the fact the medical investigations were incomplete were all points accepted by Dr Harban in his oral examination.

128. We also accept HCT's submission that the duration, frequency, variety and on occasions severity of the Player's symptoms in a 25-year-old Championship level professional footballer without any established diagnosis, including very shortly before

the Transfer Agreement the probable elimination of [redacted], demonstrate that the omission to disclose the facts and matters set out in the Medical History Table relating to the [redacted] symptoms was a breach of the Disclosure Warranty.

129. We find also that the majority of the information set out in the Medical History Table, and specifically the information from 2017-2018, was known to the BFC's medical staff at the date of the transfer. We do however accept Dr Harban's evidence that BFC's medical staff was unaware of the diagnosis in 2008 of [redacted].

130. We therefore reject the evidence of the witnesses called by BFC, including that from Dr Harban and Dr Jones, to the effect that, although he had not played a First Team match for BFC since 28 November 2017 and was undergoing medical investigations across various medical specialisms, the Player was fit and able to play Championship football at the date of transfer.

The Consent Warranty

131. BFC did not lead evidence that it had obtained the consent of the Player to provide HCT with copies of his medical records. We repeat that BFC's Club Doctor, who would have been the individual to obtain such consent, did not know of the transfer before it took place.

132. We reject the submission that BFC had procured such consent by clause 3.1.5 of the Player's 1 August 2016 contract with BFC. The consent in that clause was limited to production to BFC as his employer. We consider that express words would be required for that standard provision to entitle an employing club to disclose a player's medical records to a third party, including a proposed purchasing club.

133. As already explained in paragraph 77 above, BFC did not warrant by the Consent Warranty that BFC itself had disclosed or provided the Player's medical records to HCT. It warranted that it had procured the Player's consent that *he* would provide copies of his medical records or (where applicable) he himself would facilitate

the release of copies of those records. By the time of the Transfer Agreement, BFC had not procured the Player's consent on either of those points. That was all it had to do under the Consent Warranty but it had not done it. BFC was therefore in breach of the Consent Warranty. In its reference to a *BFC* failure to facilitate that release, Issue 2.2 involves a slight misreading of the second limb of clause 9(j). However, with that qualification the answer to Issue 2.2 is also Yes.

134. In practical terms, BFC's breach of the Consent Warranty has no significance anyway. Its breaches of the Disclosure Warranty provide quite sufficient foundation for HCT's recovery of damages, which are fully considered below. BFC's breach of the Consent Warranty can add nothing to those damages.

Issue 3*:* Further or in the alternative, did BFC breach the duty of utmost good faith owed to HCT?

135. HCT devoted considerable time and energy to the duty of good faith, as did BFC correspondingly in answering HCT's case on this issue. However, in the light of our conclusions on other issues, it is unnecessary for this Panel to decide the application or scope of such a duty in this case, which concerns a player transfer between two clubs. It follows that we also express no view on the question of breach of such a duty.

136. We do accept HCT's submission that the duty of utmost good faith expressed in EFL Regulation 3.4, if applicable, goes wider than a requirement of honesty. However, in the light of our findings on Issue 2 – particularly BFC's breach of the Disclosure Warranty – we cannot see how the existence and breach of a duty of utmost good faith adds anything at all to HCT's case. As will be seen below, the breaches of warranty give a solid foundation for HCT's recovery under clause 10 of the Transfer Agreement. A decision from this Panel on Issue 3 would make no difference at all to the result of this arbitration, not by a single penny either way. Beyond this case, the application of a duty of utmost good faith to transfer negotiations and agreements between EFL clubs could have very significant effects. For example, in the absence of any term on the lines of this clause 9(j), it could give rise to claims for non-disclosure which would not fit comfortably with the often fast-moving and last-minute transfers

seen at the end of a transfer window.

137. Overall we feel it would be wiser to leave these questions to a tribunal in a future arbitration whose minds will be concentrated by answers to this particular question being necessary to their decision.

Issues 4 – 7: Causation and Loss**.**

138. We now consider the issues of causation and loss, in the light of our conclusions on Issues 1 to 3. Although we mainly take those issues in their order in the List of Issues, in deciding Issue 4 we effectively also have to answer Issue 7a. With the deletion of the now superfluous reference to the duty of utmost good faith the question in Issue 7a is: Whether HCT would have signed the Player had BFC complied with the Medical Disclosure Warranty?

139. The answer to that question is central to the question of causation raised by Issue 4. A fundamental point is that BFC never warranted the Player's medical condition. It warranted its disclosure and its procuring of the Player's consent in the terms of clause 9(j), which are something quite different. It follows that, if causation and loss were to be approached on the footing that HCT would in any event have entered into the Transfer Agreement and the simultaneous (as it must have been in practical terms) Player contract, then leaving aside nominal damages of say £2, HCT would fail on its counterclaim and would have no defence to BFC's claim for the outstanding balance of the transfer fee.

Issue 4: If there were any of the alleged breaches by BFC were any and/or all of the alleged breaches of the Medical Disclosure Warranty and/or the duty of utmost good faith the cause of any loss suffered by HCT?

140. In answer to Issue 2, we have held that BFC was in breach of both limbs of the Medical Disclosure Warranty in clause 9(j). Accordingly, Issue 4 does need our decision. However, in the light of what we have said on Issue 3, we disregard the reference to the duty of utmost good faith in Issue 4. The relevant question now is whether the established breaches of clause 9(j) caused loss to HCT.

141. We look first at the position advanced by HCT, because it plainly has the burden of proof on the issue of causation. HCT's submission, as pleaded and as set out in its opening Skeleton Argument, was that: *HCT would not have gone ahead with this transfer, if BFC had complied with its obligations under clause 9(j) so that HCT had been informed of the Player's complete medical history.* Consistent with that approach, in its written closing submissions HCT submits in the light of the evidence that it *"plainly would not have proceeded with the transfer."* This is where Issue 7a must come in as well.

142. In support of those submissions, HCT relies principally on the evidence of Mr Ehab Allam. He told us that, as the Vice-chairman of HCT who ultimately authorised the purchase, he would not have done so had he been made aware at the time of the information which Mr Price subsequently compiled as representing the Player's medical history but not disclosed by the time of the Transfer Agreement. HCT also relies on the evidence on Mr Price and Dr Waller to the effect that they would have produced a markedly different assessment for Mr Allam had they known the Player's full medical history.

143. BFC's response on this issue was ultimately reduced to a submission in its written closing submissions that, in contrast to HCT's pleaded case, HCT "*does not now contend that an alleged breach caused the full extent of the losses set out in its Amended Schedule of Loss".* That, however, is not the question which we are required to address under this Issue 4. We look at the extent and quantification of loss in response to the question expressly posed for us by Issue 7b below.

144. Particularly in Mr Mehrzad's cross-examination of Mr Price and Dr Waller, BFC raised entirely reasonable concerns about the HCT Medical Questionnaire which they volunteered had been produced but which HCT was, for reasons that were not established, unable to produce in this arbitration. Nevertheless, and despite the attacks made on Mr Allam's credibility, BFC did not ultimately submit to us, either orally or in its written closing submissions, that we should reject the unchallenged evidence that he was *"risk averse"* and would not have authorised the acquisition of the Player had he been informed of the full medical history as known to/in the possession of BFC.

145. Having determined, in our answers to Issues 1 and 2, that in breach of its contractual warranty BFC had not made full disclosure of the Player's medical history, we have no hesitation in concluding on all the evidence that, if BFC had given the required disclosure in full compliance with clause 9(j), HCT would not have entered into the Transfer Agreement. It is clear to the Panel that the transfer of this Player turned out not to meet the expectations of HCT and that BFC's breach did as a matter of fact cause substantial loss to HCT. The measure and quantification of that loss are considered under Issue 7 below.

Issue 5: Were any and/or all of the alleged breaches of the Medical Disclosure Warranty and/or the duty of utmost good faith the reason why HCT did not pay the final instalment of the Transfer Fee on 31 August 2019?

146. This issue arises from the assertion made on behalf of BFC, to which we refer in paragraph 41 above, that HCT's refusal to pay the final instalment of the Transfer fee in fact resulted from HCT's becoming aware of the fact that the Player was diagnosed with cancer on 23 August 2109, some seven days before the final payment was due. That assertion having been pleaded on behalf of BFC, Mr Allam emphatically denied in his witness statement the implication as to his motive. The matter was courteously but firmly put to him in cross-examination. He repeated his denial and further emphasised that HCT's Club Secretary Mr Beeby had first written to BFC some five months before the cancer diagnosis, stating HCT's belief that the Player *"may be suffering from a condition which pre-dates his transfer to Hull"* and asking BFC for *"as much information as possible about the tests that were carried out at the time"*.

147. The evidential burden of proof on this allegation is on BFC. In the light of the evidence, it is perhaps not surprising that, in its written closing submissions, the submission is only that the timing of the 30 August 2019 letter by which HCT rejected liability to pay BFC the remaining £200,000 instalment is *"troubling"* and that the circumstances in which it was written give rise to a *"reasonable inference...that Mr Allam believed the player to be worthless once diagnosed with cancer."*

148. In view of the regrettable breakdown of the relationship between the parties and the coincidence between the date of the diagnosis and of that letter, it is not difficult to see how suspicions of bad faith also arose on this point. However, we do not easily

see how the motive behind the refusal to make the final instalment payment is relevant to the question whether or not that instalment was still payable. In any case, we are satisfied that Mr Allam's evidence to us was truthful and that this suspicion of bad faith is unfounded. We do not know whether or not the cancer diagnosis may have been a factor in the timing of the decision to advance the threatened claim against BFC which had been anticipated five months earlier, but that would make no difference anyway. Our assessment of the evidence compels us to the view that we have expressed.

149. We find that HCT's potentially substantial claim for damages for BFC's breach of clause 9(j), as set out above, was the essential reason for its refusal to pay the final instalment of the Transfer Fee on 31 August 2019.

Issue 6: What is the significance and/or effect of the fact that, as expressly acknowledged by the parties in clause 10 of the Transfer Agreement, HCT entered into the Transfer Agreement, and agreed to make certain payments to BFC, in reliance on the Medical Disclosure Warranty?

150. We find that the significance and effect of clause 10 for the purposes of this arbitration is that it acts as a contractual estoppel which prevents BFC from (i) contending that, in entering into the Transfer Agreement, HCT did not rely on the warranty which we have found to have been breached by BFC (and the representation in terms of that warranty); and/or (ii) denying that the remedy for the breach of the warranty by BFC is HCT's entitlement to be indemnified by BFC against all liabilities, costs, expenses, damages and losses, and all other costs and expenses, as defined for the purposes of that clause.

151. While clause 10 contains a wide definition of the items for which HCT is to be indemnified, it is nevertheless clear that the indemnity can only be for HCT's *net* loss. Accordingly, any benefit obtained by HCT from the Player's services, so far as measurable in money, must be deducted from the *gross* outgoings "*suffered or incurred*" by HCT. That is inherent in the basic purpose of clause 10, which is to indemnify HCT for what it has lost as a result of a breach of clause 9(j).

152. No useful purpose would be served by our commenting at length on the argument which has arisen over the pleading of this issue. We note BFC's complaint

that the significance and effect of clause 10 was not specifically set out on behalf of HCT until the Supplementary Submissions were served three days before the hearing and were explained as being: *"in response to paragraph 88 of BFC's skeleton argument, in which BFC sets out – for the first time – its case*... [on clause 10]*"*.

153. We are not especially impressed by either BFC's complaint or HCT's explanation. We had noted much earlier that the clause was set out in full in HCT's Defence and Counterclaim, which also contained as section J: "**The Indemnity Clause and Causation and Damage"**. Section J began with paragraph 133: "*Hull is entitled to, and hereby claims (without seeking double recovery): (i) a full indemnity under the Indemnity Clause; (ii) damages to put Hull in the same position that it would have been in if the said breaches had not been made . . . . . .*". That appears to us to have been quite sufficient to alert BFC to the line of argument put forward by HCT in its closing submissions. In any case, so far as there was room for debate about the meaning and effect of the express words of clause 10, that would have been unaffected by evidence. It would have been a matter for legal argument which we should have felt obliged to consider even if it had not arisen until final submissions. Indeed, in a sports arbitration, in which pleading points take second place to the need for fair resolution of the real issues between the parties, we should ourselves have explored with the parties the question of the effect which we should give to clause 10, even if no one else had referred to it. The parties must always be given a fair opportunity to deal with a new point and must not be unfairly taken by surprise. So far as any points were new, they have had that opportunity anyway.

Issue 7: What loss, if any, has HCT suffered taking into account:
(a) Whether HCT would have signed the Player had (on HCT's case) BFC complied with the Medical Disclosure Warranty and/or the duty of the utmost good faith?
(b) What "financial benefit", if any, has HCT received from the registration of the Player?

154. We have already dealt with Issue 7a when answering Issue 4. If BFC had complied with the Disclosure Warranty, HCT would not, on our finding, have signed the Player (which of course means that it would also not have made the Transfer Agreement). That leaves 7b as a key element of Issue 7.

155. HCT's pleaded case seeks recovery under the clause 10 indemnity, with damages in the alternative. The Schedule of Loss (now the Amended Schedule of Loss) attached to its Defence and Counterclaim is equally applicable to either basis of recovery. Our firm view is that BFC's breaches of contract entitle HCT to an indemnity in the terms of clause 10, so that is the correct basis of recovery. However, the clause 10 indemnity still only entitles HCT's to be indemnified for its *net* loss, just as the alternative basis of damages would only compensate for net loss. The basic measure of that loss is:

(1) HCT's gross expenditure to obtain and retain the services of the Player for the period of his contract with HCT ("**HCT Gross Costs**")

less

(2) The monetary measure of the benefit of the Player's services which HCT actually received during his contract with HCT ("**HCT Actual Benefit**").

HCT's Amended Schedule of Loss deals with (1) but makes no allowance for (2). That is unrealistic, as HCT clearly did receive at least some significant benefit from the Player's services. On the other hand, BFC's approach was unrealistic in treating HCT as having received a benefit at least equivalent to what the Player had cost HCT overall.

156. Before dealing with the detailed submissions, we take note of some more basic points:

- While disputes over the value of the services which players provide for clubs are not uncommon, each dispute must be carefully addressed by reference to its own facts and its own relevant contractual terms.
- Clause 10 is pivotal on the measure of HCT's financial relief against BFC so has been set out in full in paragraph 6 of this award.
- The clearly expressed intention of the parties in clause 10 was that, in the event of breach, reliance was to be deemed and a full indemnity in respect of all loss and expense was to be payable (noting that independently of that deeming provision, we have found actual reliance on the evidence).

157. There has, however, been a fundamental conflict between the parties as to the manner in which we should quantify the counterclaim. Assisted though we are by the parties' submissions, including the written closing submissions, it is important to see the way in which those claims (as distinct from the supporting arguments) are pleaded.

158. Well before HCT's pleaded case, HCT's Notice of Arbitration gave a clear indication of the way its claim was put:

- Paragraph 4 ended: "*By clause 10 of the Transfer Agreement, BFC undertook to indemnify HCT against all liabilities, costs, expenses, damages and losses suffered or incurred by HCT in connection with any breach by BFC of, inter alia, clause 9(j) of the Transfer Agreement."*
- Paragraph 6 stated: "*HCT contends that BFC's breach caused it loss and damage in the estimated sum of £1,479,970 (as at 31 January 2020), and that HCT is entitled to be fully indemnified against that loss and damage pursuant to clause 10 of the Transfer Agreement. Full particulars of the said continuing loss will be provided in the Points of Claim."*

159. Those particulars eventually took the form of the Schedule of Loss annexed to HCT's Defence and Counterclaim. The gross sum was later increased to £1,687,751.82 as mentioned in paragraph 47 above. Although it failed to allow for any deduction for the benefit from the Player's services, it was obvious that HCT was seeking reimbursement of all that it had cost HCT to engage and retain the Player's services over the period he was a Hull player.

160. BFC, in pleading by its Defence to Counterclaim that *"there are no losses, therefore Barnsley's position is that Hull is entitled to £0. . ."*, could not be accused of understating its case.

161. The same goes for HCT, where its Reply to the Defence to Counterclaim *"... denied that Hull has obtained any benefit from the Transfer of the Player.."* and further *"... denied that the Player is of any value to Hull . . ."*.

162. Given that quite remarkable gap between the parties, we have worked from the following basic principles:

(1) Where the written agreement records what the parties have agreed shall happen in the event of breach, it is not open to either of them, or to us, to adopt a different approach – however "realistic" or "sensible" that might appear to any of us, with the benefit of hindsight.

(2) The party deemed to have relied on the material warranty is entitled to be indemnified in respect of the losses which it has sustained as a result of that reliance.

(3) While the sums of money which have been paid by HCT are not difficult to establish, so the calculation of the HCT Gross Costs is fairly straightforward, the HCT Actual Benefit (the benefits which have to be taken into account in order to arrive at the *net* loss) defies precise calculation, as we discuss below.

163. We take just two examples of areas of uncertainty from the facts of this case

(1) while it must be plain that HCT benefited from the Player's participation in those games in which he played, no precise figure can be put on that; and

(2) even where HCT received the financial benefit of remaining in the Championship, to attribute any part of that benefit to any single player would be entirely speculative and impossible to quantify even in percentage terms, let alone money.

164. With those observations, we turn back to the application of the basic measure indicated in paragraph 155 above. With some adjustments to items in the Amended Schedule of Loss, the HCT Gross Costs can be calculated (as shown in paragraph 206 below). The HCT Actual Benefit, however, cannot simply be calculated but (as explained in paragraph 200 below) requires an element of broad judgment by the Panel in the light of the expert evidence of Mr Rush.

165. The question put to Mr Rush (set out in paragraph 54 above) expressly referred to his "*market value*" and "*the financial benefit of the Player to* [HCT]". We remind ourselves of the reason why this is a uniquely difficult part of the job with which the

parties have entrusted us and why we approach it with caution and respect. We all tend to speak glibly of players being "bought and sold" and of their financial value – and even of calculations of the diminution of that value for all sorts of personal reasons which would normally be completely confidential. Players' contracts have value on their clubs' balance sheets and the contractual rights may be bought out and sold off. But the players themselves are not goods or chattels or commodities to be bought and sold. Neither the great slavery abolitionist William Wilberforce in the early 19th century nor his great-great-grandson Mr Justice Wilberforce (later Lord Wilberforce), when he decided the seminal case of *Eastham v Newcastle United* [1964] Ch 413, would have had any truck with such a view, and neither would anyone involved in this arbitration. Accordingly, when we come now to analyse "financial benefit" so as to establish the HCT Actual Benefit, the Panel always bears in mind that we are talking about an individual footballer who emerges from this whole saga with commendable dignity.

166. In assessing the HCT Actual Benefit, we have adopted the methodology employed by Mr Rush. He assumed a base value of the Player's services to HCT on the assumption that on and since 31 January 2018 the Player had no unusual medical issues, so his performance and availability during his contract with HCT would have been subject only to the normal vagaries of injury and illness. From that value ("**the Benchmark Benefit**") Mr Rush then applied discounts for different periods of the Player's HCT contract to reflect the degree to which the Player's performance and availability fell below that normal level. That gives the HCT Actual Benefit – key item (2) in paragraph 155 above. While we have not adopted all Mr Rush's figures for those discounts, we consider his methodology is sound. As we have noted, BFC gave no warranty of the Player's medical condition. However, it is the Player's own medical issues which diminished the value of his services to the HCT. In other words, they created the difference between the Benchmark Benefit and the HCT Actual Benefit.

167. The Benchmark Benefit is not difficult to establish. There is no evidence to suggest that HCT paid too much or too little for this Player on the footing that he was coming to HCT with an ordinary medical history as understood by HCT when it entered into the Transfer Agreement. The Benchmark Benefit of this Player's services (i.e. without any discount for the reasons found in this case) can therefore fairly be taken as

matching the total amounts which HCT was committed to paying or reasonably expected to pay to obtain and retain his services as a player for the whole of his contract as it was extended to 30 July 2020. It would have taken account of the fact that, given the risk of injury and illness, no player is likely to be 100% available for training and matches throughout his contract – a point which we have also borne in mind in assessing the percentage discounts in paragraph 201 below (as had Mr Rush in his evidence). This approach to the Benchmark Benefit is supported by Mr Rush's evidence, including his answers in his oral evidence to questions from the Chairman. Based on this approach, the calculation of the Benchmark Benefit is set out in paragraph 204 below.

168. We now consider each of the key elements in paragraph 155 above: (1) HCT Gross Costs; and (2) HCT Actual Benefit.

HCT Gross Costs

169. The HCT Gross Costs can be calculated from the figures set on HCT's Amended Schedule of Loss. That schedule sets out payments which HCT in fact made.

170. BFC set out, in Schedule 2 attached to its written closing submissions, its position in respect of these payments. We consider below the submissions made by the 4th column of that schedule which, save for the claim relating to the salary which was paid to the Player and which is the subject of specific challenge, attributes ***£0*** as the *"maximum sum to be awarded"*. We do not, however, understand that schedule to deny that each of the payments claimed was in fact made. In making that observation we have not overlooked the comment made under item 5, to the effect that HCT *"has never particularised the basis for such bonus payments"* but that they were payments *"the Player was self-evidently entitled to by virtue of the bonus having been paid"*. So even in this instance it is clear that the dispute is only as to recoverability.

171. The first, and perhaps most controversial item, because it plainly impacts on both claim and counterclaim, is the fee which was paid and became payable in respect of the transfer.

172. HCT's position is that this fee (together with the ancillary elements of VAT and Transfer Levy) is part of the costs and expenses which it incurred and in respect of which it is entitled to the indemnity provided for by clause 10.

173. BFC's position is that it would be *"misguided and inequitable to apportion back part of that transfer fee to HCT...where HCT chose to run down the contract..."* It is then submitted that: *"Had HCT wished to seek damages for the loss of the transfer fee.....it should have terminated the Player's contract during the term for repudiatory breach..."* and that it would be an *"unjustifiable windfall"* for HCT to recover the fee after having retained, and benefited from, the Player's services for the period of his contract.

174. While both positions have a superficial appeal, we do not consider that either is wholly correct.

175. BFC's point about termination of the Player's contract for repudiatory breach can be dismissed in a sentence: The Player had committed no breach so HCT had no possible right to terminate. It follows that any notion of HCT terminating the Transfer Agreement was simply unreal. As to BFC's point that HCT "chose" to run down the Player's contract, even if we leave aside the fact that it would have needed the Player's agreement to end his contract sooner, this is a hopeless point. In substance, it is a contention that HCT had failed to take reasonable steps to mitigate its loss. The evidence does not come within a mile of supporting that contention and we need not examine any further angles on that point.

176. The starting point for what we consider to be the appropriate analysis of the position is that BFC's claim is a contractual one for the unpaid element of an agreed price; and HCT's claim is that clause 10 provides a contractual indemnity against loss and expense which has in fact been incurred as a result of its entering into the Transfer Agreement (and consequentially the Player's HCT contract) in reliance on BFC's compliance with the clause 9(j) warranty which we have found BFC breached.

177. The transfer fee which was paid, and the debt which was incurred in respect of the unpaid element, are part of the liabilities, costs and expenses which are recoverable

pursuant to clause 10. That fee would not have been paid, and that liability would not have been incurred, had BFC complied with the warranty. The question of double or excess recovery or "unjustifiable windfall" could only arise if HCT were to be awarded all of the HCT Gross Costs without giving credit for benefits which it had received (the HCT Actual Benefit). As in all cases of indemnity, whether that entitlement arises by virtue of an express contractual provision, insurance, or some kind of compensation scheme, the sum which is recoverable is the *net* loss – and it is the calculation of that net loss which should protect the paying party from liability for double or excess recovery and prevents the claimant from exploiting a windfall.

178. We test that proposition by looking at two simple but realistic illustrations:

(1) If a buying club paid £1m for a player and discovered, before it had incurred any additional expense or liabilities, that it had been misled, one of the courses open to it would unquestionably be to sell the player for the best price it could achieve. If that price proved to be £600,000, the recoverable loss would be £400,000. It would make no sense to exclude the transfer fee from the computation of the net loss.

(2) If after paying that £1m transfer fee the buying club was unable (or unwilling) to sell the player immediately, but retained him or her at a salary of £1m a year and sold the player for £600,000 at the end of the first season, during which they had been unable to play in any game but had brought sponsorship and advertising revenue to the club which was agreed or determined to be worth £400,000, the net recoverable loss (excluding incidentals, interest etc) would be £1m (the £2m total of the price and salary that it had in fact paid, less the £1m in total benefits it had in fact received). It would again be absurd to ignore the transfer fee (or other revenue) simply because, despite having been unable to derive any of the primary benefit for which it had entered the contract, the club had "broken even" against the player's salary alone.

179. In addition to its contention that recognition of the transfer fee as any part of HCT's loss would result in recovery of a windfall, BFC drew our attention to the

comment which Mr Rush made on this aspect of the calculation and to the evidence which Mr Allam gave. Mr Rush confirmed what we regard as being the uncontroversial opinion that payment of the fee secured the Player as an asset. That, however, does not advance matters very far. In the passage from Mr Allam's evidence on which BFC relies, we also note that he accepted that, if HCT had not paid the transfer fee, the Player would not have played for the club. He could hardly have rationally given a different answer, so that does not advance matters much either.

180. Both those contributions do at least underline the need for us to consider with care the other side of the equation and to look critically at the question of the benefit which HCT obtained as a result of its acquisition of the Player (the HCT Actual Benefit).

181. While the question of whether or not the transfer fee falls to be taken into account is one of law for us to determine, we are reassured to note that Mr Rush's expert view, as set out in his response to a written question asked of him on behalf of HCT, was that: *"The starting point for the assessment of financial benefit is the value provided to a club taking into account any transfer fee paid and the financial package payable to any player."*

182. We are satisfied that the only fair way to give clause 10 the effect which the parties must have intended is to take into account all the costs and liabilities which were incurred and paid, and all of the benefits received, by HCT. There is not the slightest doubt that those costs and liabilities must include the transfer fee. There was no other purpose of the transfer fee than to enable HCT to benefit from the Player's services under a playing contract.

183. The practical problem which remains is to reconcile the quite remarkable differences reflected in these parts of the parties' submissions.

184. We acknowledge, before making any further comment about Mr Rush's evidence, that his expertise in this field is unrivalled. Before reaching our conclusions in the light of Mr Rush's expert evidence, we deal with the submission which was made

on behalf of BFC to the effect that we are bound to accept his evidence as "the" evidence in this arbitration.

185. Our attention was drawn to the decision of Lord Woolf in *MP v Mid Kent Healthcare NHS Trust [2001] EWCA Civ 1703.* Relying on that authority, BFC's submission was that, notwithstanding cross-examination, which we had limited to 45 minutes from each party, *"Mr Rush's report should be the evidence that* [we] *adopt."*

186. While we naturally have the greatest respect for anything said by Lord Woolf, particularly in respect of case management, we do remind ourselves that he was dealing with wholly different circumstances in that case, in which one party had sought to have a private meeting with a court appointed expert on non-medical issues, in a clinical negligence case. We also have regard to the fact that what Lord Woolf had to say was part of his campaign to ensure adoption of his new regime for more efficient procedures for dealing particularly with personal injury litigation. It has limited application to arbitrations where a joint expert's role is to assist arbitrators who will themselves have been selected, at least in part, because of some familiarity with the sporting context and the issues at stake. Finally, it would be both artificial and potentially unfair to the parties if we were to overlook the fact that any apparent concessions made by Mr Rush must be viewed in the light of other evidence which we had heard, but he had not, in the course of this arbitration.

187. While we do not consider it helpful for us to set out all the matters on which Mr Rush assisted us, we do note, if only by way of example, that he displayed both his expertise and his neutrality at several points. He unhesitatingly accepted that a number of facts which had been established as relating to the Player did not apply to those players with whom Mr Rush (and his assistants) had compared him. He agreed that it was *"absolutely"* correct that *"the overriding factor in any benefit that is derived by a football club signing a player is the ability of the player actually to play football".* He also accepted that there was no evidential basis for what he accepted was (in his written report) his subjective assessment of a benefit to the Club of 10-15% of the salary of a player in the Championship (as distinct from the Premier League at the top of the scale and League One at the lower level) being attributable to non-footballing activity, but which he accepted might *"not be far off"* a figure which represented 10%.

HCT Actual Benefit

188. Mr Rush's written report stated his conclusions on the financial benefit obtained by HCT during the 30 months of his contract with HCT (what we have labelled "the HCT Actual Benefit"). He did so by reference to four periods which we shall designate here periods (A) to (D). For each period he stated, as a percentage, how much of the Benchmark Benefit (as we have called it) HCT received, as follows:

Period	**Dates**	**Percentage (%)**
(A)	1 February 2018 – 31 January 2019	100
(B)	1 February 2019 – 4 September 2019	50[1]
(C)	5 September 2019 – 31 January 2020	33
(D)	1 February 2020 – 30 July 2020	100

This is not how Mr Rush displayed these conclusions, but those dates and figures are as in his report (and were his unchanged evidence during his oral examination at the hearing). Mr Rush put together Period (A) and (D) as a combined period of 18 months and presented those conclusions as:

Periods	**Percentage (%)**
(A) + (D)[2]	100
(B)[3]	50
(C)5[4]	33

189. We have no difficulty accepting Mr Rush's conclusion of a nil discount for Period (D), during which there was huge disruption of the entire professional football programme because of the Covid-19 pandemic. The consequent extension of the EFL Championship season was the reason for the Player's contract with HCT being extended to 30 July 2020 (in consideration for the Player's severance pay). The Player had made a remarkable recovery from his medical problems and was in training and available for matches throughout Period (D).

[1] In his main report Mr Rush had applied a 67% discount for the last month of Period (B). His reason for that adjustment was apparently that the Player's contract with HCT then had less than a year to run. We were unconvinced by that reasoning and so have simply worked on the footing of a Rush discount of 50% for the whole seven months of Period (B). Moreover, it must be borne in mind that neither Mr Rush's discounts nor those we reach in paragraph 205 below are *calculations* as opposed to broad judgments.
[2] 18 months
[3] 7 months + 4 days (rounded to 7 months)
[4] 5 months – 4 days (rounded to 5 months)

190. However, we have had real difficulty in following, and therefore in accepting, Mr Rush's explanation to us of the justifications for his percentage valuations of the Player's services during Periods (A), (B) and (C), when for all or part of each of those periods he was not playing at all.

191. One of the written questions which was put on behalf of HCT to Mr Rush in response to his report asked him to explain: *"Precisely how 'financial benefit' has been calculated for the purposes of your Report (in particular, how you have calculated the percentage figures set out in your Report)."*

192. Mr Rush's response in respect of his composite period of 18 months (Period (A) and Period (D)) was that the financial benefit for those periods had been *"calculated as playing time plus such periods of inactivity which were not unusual for a professional footballer sustaining an injury of significant illness"*. We have not seen the way in which that calculation was in fact made, or the number of games and missed games which were taken into account and judged to be *"not unusual"*.

193. A difficulty we have with Mr Rush's conclusion of 100% benefit during that first 12 month Period (A) is that the Player's medical problems led to his being stood down from first team training on 18 September 2018 and being unavailable for matches for slightly more than the last four months of Period (A).

194. In respect of the following two Periods (B) and (C), Mr Rush's explanation of the discounts he applied was expressed in the following terms:

> *"HCT received a reduced value for a period of seven months when the players absence was beyond a reasonable timeframe which this report has valued at 50 per cent. We further recognised that HCT received even less value for the period from 5 September 2019 until 31 January 2020 and for the reasons set out in the report the value has been attributed at 33 per cent."*

195. Our difficulty is particularly stark in relation to Mr Rush's justification for his 33% valuation of the Player during Period (C), when Mr Rush correctly records that he was not playing at all. This is an important matter which seems to us to go to the root

of the assessment which he had made and we therefore set out the relevant part of his answer to our question in full:

> *"Yes, so, I think the facts of this case would have a significant variant if* [the Player] *played, when he played his last League Cup game in 2018, if he didn't return to play. So, the fact that during that period, we concluded that he was not available and he was less available than you would normally expect a player to be should you have him under your employment, but I had to identify a percentage to be appropriate for someone who was still likely or was still seeking to be available to play. So, we elected for 33% because while he was giving no current value from a playing perspective, there still was the anticipation and the likelihood that he would be able to return at some point."*

196. Without any disrespect for Mr Rush and the assistance which he unquestionably gave us, that answer, and indeed a number of others, did underline for us the highly subjective nature of his view on percentages of what HCT would have been entitled to expect in return for its money (particularly bearing in mind that BFC had the burden of proving the financial sums for which credit should be given against the established gross expenses). It reinforced the need for this part of his opinion to be addressed by us with particular caution.

197. While we again acknowledge Mr Rush's experience and expertise in this area, we did not find these answers persuasive. We have re-read the relevant part of his report to see what reasons had been set out. What had been written in the full report in respect of this period was simply: *"From 5 September until 31 January while his market value is zero, we would conclude that his financial benefit to the club would still remain as 33% of his cost. The report sets out examples of players for where market value is zero but the player remains a playing asset for the club. we believe* [the Player] *falls into this category."* Again, we did not find this persuasive.

198. Mr Rush was the last witness and we were left wrestling with the question of precisely where his evidence had left us on the most relevant issue of the financial benefit for which credit needed to be given, once the distraction of notional book values of the Player had been accepted as being irrelevant. Accordingly, we invited the parties to include in their closing submissions statements of their positions on the credit which needed to be given in the light of all the evidence.

199. We were then somewhat disappointed to read from the parties' written closing submissions that:

(1) BFC's maximum total figure for net loss was £180,902.10, being only a part of the basic salary paid by HCT to the Player (a reduction on wages paid of more than 80%); and

(2) HCT proposed a maximum of only 17.9%, or at the very most 24.8%, by way of reduction on its loss of wages claim against its full amount of £1,080,005 for wages (including bonuses and NIC) and its full pleaded claim of £1,687,751.

We felt that both parties had only moved their positions from completely unrealistic to seriously unrealistic. We also note BFC's position that, even that figure of £180,902.10 would then be set off against BFC's own claim for £200,000 plus more than £21,000 interest, so the end result would be a net recovery of just over £40,000 by BFC from HCT.

200. We have to find fair figures or percentages for each of the three periods (A), (B) and (C), during which it is accepted by both parties that different factors were in play, which we then have to take into account in assessing the HCT Actual Benefit to be set against the HCT Gross Costs. This must inevitably be a common sense judgment which reflects the evidential burden on this particular issue being on BFC. It is essentially an evidence-based but necessarily subjective exercise which defies precision and can only be done by an informed broad brush approach. The result will give us the figure for HCT's net loss for which it is to be indemnified under clause 10.

201. Doing the best that we can in the light of all of the evidence, taking into account the expert views of Mr Rush to the extent that we are persuaded by them (and bearing in mind that he was not able, as we were, to take into account all that other evidence), we consider that the Benchmark Benefit falls to be discounted in respect of Period (A) by 25%; Period (B) by 60%; and Period (C) by 80%, so as to reflect the HCT Actual Benefit which HCT received. The discount for Period (D) is nil, as we have said in paragraph 189 above.

202. Those discounts are to be applied to the Benchmark Benefit of the Player's services to HCT over the entire period of his 30 month contract with HCT (as extended to 30 July 2020 for the disrupted 2019/20 football season).

203. The Benchmark Benefit is calculated from actual costs. However, those costs are not the same as the HCT Gross Costs or its gross claimed losses as they are shown on the Amended Schedule of Loss. To strike that Benchmark Benefit correctly requires three adjustments to the figures in HCT's Amended Schedule of Loss:

(1) VAT of £120,000 should be removed. Whatever the technical position on VAT in the light of our award in this arbitration, HCT never expected that VAT on the transfer fee would ever be an actual cost, because it would have been recovered as input tax on its next VAT return (as it was). It is therefore no part of the measure of the Benchmark Benefit.

(2) The final transfer instalment of £200,000 should be added back, for this purpose only. It was part of what HCT committed itself to pay to obtain the Player's services. The fact that it was never actually paid, and under our award it never will be, has no bearing on this point. In accordance with our previous paragraph, it was part of the overall sum reflecting the Benchmark Benefit.

(3) Medical Costs paid by HCT for the Player over the period of his contract were £48,241.93. It is clear that they were significantly higher than the expected costs for a player arriving at HCT with an ordinary medical history. Although we have no direct evidence of those ordinary expected costs, as a sports arbitration panel we are entitled within careful limits to use our own knowledge of the football world. We are entirely confident that those ordinary expected costs would have been no more than £20,000, which is the figure we shall use for this purpose.

204. The Benchmark Benefit is therefore £1,739,510 comprising:

Total transfer fee (exc. VAT)	£600,000
Transfer Levy Payment	£30,000
Basic Salary	£938,113
Bonus Payments	£13,500
Employer's National Insurance	£128,392.24
Club Intermediary Fees	£4,017.86

Player's Intermediary Fees	£5,486.79
Medical Costs	£20,000
TOTAL	**£1,739,510**

205. We allocate that Benchmark Benefit to Periods (A) to (D) on a straight-line proportionate basis. Particularly given that the discounts which we are applying are matters of broad judgment, to do otherwise would be an unnecessary refinement. That allocation comes out as follows, with the figures applying the discounts set out in paragraph 201 above:

Period (30 months)	**Benchmark Benefit (£)**	**Benchmark Benefit (%) (Discount %: para.201)**	**HCT Actual Benefit (£)**
(A):12 months	695,804	75	521,853
(B): 7 months	405,886	40	162,354
(C): 5 months	289,918	20	57,984
(D): 6 months	347,902	100	347,902
Totals:	**1,739,510**		**1,090,093**

206. In accordance with paragraph 155 above, HCT's recovery under the clause 10 indemnity (leaving aside interest and legal costs) is measured by subtracting that total figure of £1,090,093 from the HCT Gross Costs, i.e. the gross costs to HCT of acquiring and retaining the Player's services for that 30 month period. There has eventually been no dispute by BFC that the costs set out in HCT's Amended Schedule of Loss were actually incurred. In calculating HCT's Gross Costs:

- we leave out (as does the Amended Schedule of Loss) the £200,000 final instalment of the transfer fee, as it never will be paid;
- we also leave out the VAT payment of £120,000, as it was recovered by HCT as input tax (but on this VAT point, paragraphs 212-222 below should be noted);
- we include all the Medical Costs of £48,241.93, as they were actually incurred.

With those adjustments, HCT's Gross Cost is **£1,567,752**.

207. We have considered whether any part of the HCT Gross Costs should be adjusted to reflect the different times at which specific costs or expenses were incurred or by allocating the gross cost otherwise than simply on a straight-line basis

proportionately to each of the periods (A) to (D). Again, particularly given that the significant element of discounts is a matter of broad judgment anyway, we consider those would be unnecessary and over-sophisticated refinements. That still leaves room for further submissions on questions of interest, as we direct below.

208. HCT's recoverable loss is therefore:

HCT Gross Costs

£1,567,752.

less HCT Actual Benefit (from the Player's services)

£1,090,093

NET LOSS £477,659

209. BFC's claim for the unpaid £200,000 is extinguished by HCT's counterclaim and is dismissed. We have left that £200,000 out of account in calculating the HCT Gross Costs, as indicated in paragraph 206 above, for the simple reason that HCT has never actually parted with that last £200,000 and now never will. Payment of that last instalment would simply have increased the amount payable by BFC to HCT under the clause 10 indemnity by the equivalent £200,000. Ordering recovery of that £200,000 now under BFC's claim would have exactly the same effect: There would be a circuity of claims, as there would be an exactly equal increase of the amount awarded to HCT on its counterclaim. Accordingly, BFC's claim is dismissed and HCT's net loss to be covered by the clause 10 indemnity remains at £477,659 with no adjustment by set-off. HCT's counterclaim would already have exceeded £200,000 by the time that instalment fell due on 31 August 2019, so BFC's claim for that sum was already extinguished. Subject to further submissions and Panel rulings on the residual issues of interest and legal costs and a possible adjustment relating to VAT, BFC will be ordered to pay HCT the sum of **£477,659** with no adjustment by set-off. That sum is included in in the overall sum payable by BFC to HCT under the Indemnity Clause as stated in paragraph (1)(a) of our order in paragraph 299 below. The procedure for resolving those residual issues is now considered in the following paragraphs.

Residual issues: VAT, interest, costs, fees and expenses and publication of final award

210. Our Partial Final Award included directions for further written submissions on Value Added Tax, interest, costs and publication of the Final Award. Each party provided those submissions on 25 January 2021. We then invited further brief submissions on the interpretation of clause 10 of the Transfer Agreement and on VAT, which each party provided on 2 February 2021. We refer to those submissions as BFC's or HCT's January Submission and BFC's or HCT's February Submission as the case may be.

Value Added Tax

211. HCT's original and Amended Schedule of Loss include in its claim an amount of £120,000 paid as VAT on the transfer fee. We note that this is 20% of the whole fee of £600,000 and not just the £400,000 actually paid. Footnote 1 to that schedule states that £120,000 VAT was paid by HCT to BFC on 1 February 2018 (the date when only the first instalment of £200,000 was due and was paid). We take it that, in accordance with the law, HCT was bound to pay VAT immediately on the whole fee of £600,000, even though £400,000 was not due until later.

212. That same footnote 1 also stated that an equivalent £120,000 had been reclaimed from HMRC on 31 March 2018 (successfully, as confirmed in HCT's January Submission). That is exactly what we would have expected. It was input tax claimed by HCT in its next quarterly VAT return following the payment on 1 February 2018.

213. This Panel has no specific expertise on value added tax, as we made plain in the course of submissions, but when issuing the Partial Final Award it seemed to us that, given the obligation to account to HMRC for VAT received and the opportunity of reclaiming as input tax any VAT paid, we could leave VAT out of account altogether in our award, including the assessment of the amount recoverable by HCT and the set-off in relation to BFC's claim for £200,000 plus interest.

214. However, in case either party considered that we were overlooking any relevant VAT point, we gave the parties an opportunity of making submissions.

215. BFC's January Submission proceeded on the basis that the question of VAT had been agreed between the parties and that, accordingly, no determination was sought from the Panel in respect of VAT and no further order was sought from us in our Final Award.

216. Whilst this appears to have been the case until shortly before the parties filed their January Submissions, HCT does not now accept BFC's position on this issue.

217. The difficulty arises from the fact that of the £120,000 VAT which had been paid, as set out in paragraph 211 above, £40,000 was attributable to the third £200,000 instalment of the transfer fee originally due on 31 August 2019 which will not now be paid (see paragraph 209 above). According to HCT's January Submission, the parties had apparently agreed that BFC would attempt to obtain a refund of that £40,000 from HMRC. If it was obtained by BFC it would be passed on to HCT. HCT would then reverse its 2018 VAT input deduction to the extent of £40,000. The overall result would be neutral for BFC, HCT and HMRC.

218. However, there appears to be some lingering uncertainty about the efficacy of that procedure, or its acceptability to HMRC.

219. By their email dated 2 February 2021 sending the Panel HCT's February Submission, HCT's solicitors requested that our Final Award should order BFC to provide such reasonable assistance and documentation to HCT as it may require to resolve any matters arising out of HMRC's treatment of VAT on the sums paid between the parties in respect of the Transfer and following the issue of the Final Award.

220. The correct VAT treatment will be determined by the law and HMRC practice. The Panel wishes to ensure that our Final Award is final and brings an end to this arbitration. We understand that request by HCT to reflect its concern that, without such assistance and documentation from BFC, HCT might end up out of pocket when all the VAT questions had been sorted out. Whether that is a realistic risk we cannot judge but on the information before us we cannot properly dismiss it.

221. We consider that the best course in this Final Award is to make an order which deals more directly with that concern of HCT. We therefore order BFC to indemnify HCT under clause 10 of the Transfer Agreement for any future loss caused to HCT by the VAT treatment of any payments relating to the Transfer Agreement, including any payments made pursuant to this Final Award. The precise terms of that order are set out in paragraph 299 below.

Interest

222. Neither party included submissions on interest in its opening or closing submissions during the hearing. We make no complaint about that. It would have taken disproportionate and wasteful time and energy to anticipate the various possible outcomes on the claim and counterclaim. In accordance with the Panel's directions in the Partial Final Award, the parties addressed the question of interest in their January Submissions.

223. BFC's first submission is that interest is not an issue properly before the Panel, because HCT had neither (i) pleaded entitlement to interest, nor (ii) sought interest in its Schedule of Loss.

224. BFC is strictly correct on point (ii). Although HCT's Amended Schedule of Loss expressly reserved its right (so far as it had a right) to serve an updated schedule to reflect "any accrued interest", it did not do so. The position is therefore that HCT has not expressly claimed interest under the Indemnity Clause, although in principle it could have done. However, that does not prevent HCT from claiming interest, as it now does, under the Panel's discretionary power in section 49 of the 1996 Act.

225. A claim to interest was made by HCT from the outset of these proceedings. It was expressly claimed in paragraph 8(b) of HCT's Notice of Arbitration dated 21 February 2020 and then in paragraph 136 b. of its Counterclaim. Although in neither case was there a clear statement of the basis of the interest claim, and the Amended Schedule of Loss implied that a claim would be made under the Indemnity Clause, BFC has had a full opportunity of making submissions in relation to section 49 (and itself expressly referred to section 49 in the BFC January Submission). The question of discretionary interest under section 49 is clearly before us for our determination.

226. Section 49(3) of the 1996 Act gives the Panel a wide discretion:

> "*The tribunal may award simple or compound interest from such dates, at such rates and with such rests as it considers meets the justice of the case –*
>
> *(a) on the whole or part of any amount awarded by the tribunal, in respect of any period up to the date of the award.*"

This is closely similar to the discretionary power given to the courts by section 35A of the Senior Courts Act 1981 (though section 49 adds the power to award compound interest). Although section 35A does not apply here, we consider that we should follow the same principles and approach as do the courts under that provision.

227. BFC then submits that, even if section 49 applies (as it does), the Panel should confine any award of interest to the period starting from the date of our Final Award, being "the date at which the awarded sum of £477,659 will formally crystallise".

228. We reject that submission unhesitatingly. Although the statutory power to award interest is discretionary, that approach would fail to achieve its main broad aim, which is to compensate a claimant for being deprived of money which it should have had if it had not suffered the loss or damage which it has successfully established by the award or judgment. Our Final Award definitively establishes and quantifies the claim, which is all that can be meant by BFC's expression "formally crystallise". But that deprivation occurred over the three year period since 31 January 2018.

229. Whether in court proceedings or in an arbitration, the invariable approach to discretionary interest on loss or damages is to award interest from the date when the loss or damages accrued to the date of judgment or award. That is straightforward where the loss or damages accrued on a single date. In the present case, where the loss accrued cumulatively over a period of 30 months, adjustments are needed, as we set out in paragraphs 230 to 235 below. Those paragraphs make clear why we equally unhesitatingly reject HCT's submission that BFC should be required to pay interest on the whole of the net loss of £477,659 from 31 January 2018. HCT did not incur an immediate loss of that full amount on that date. Its loss built up to a peak over the next two years (and then, paradoxically, slightly reduced in the last few months of the

Player's contract). To award HCT full interest on the whole £477,659 from January 2018 would result in an obvious and substantial overcompensation, which would be wrong in principle.

230. Fair treatment of interest in this case does not require a refined or intricate calculation, which is not the correct approach under section 49 of the 1996 Act in an arbitration (or section 35A of the 1981 Act in court cases). We bear in mind also that in reaching the final figure of £477,659 the crucial element of HCT Actual Benefit necessarily involved fairly broad judgments rather than calculation. However, reaching a fair figure for interest in this arbitration must take into account the cumulative build-up of HCT's net loss over the 30 month period of the Player's contract. A degree of analysis and calculation is therefore needed.

231. We do that by reference to the same periods (A) to (D) adopted for our assessment of the HCT Actual Benefit, which reflected Mr Rush's approach: see paragraphs 188-208 above. The first step is to work out HCT's cumulative net loss at the end of each of those four periods. The results are set out in the table in paragraph 232 below, which we have done on the following basis:

(1) Consistently with the approach in paragraphs 206 to 208 above, the net loss for each period is measured by HCT Gross Costs less HCT Actual Benefit for that period only.
(2) The table shows the net loss for each period (A) to (D) and the cumulative loss at the end of each period.
(3) The HCT Gross Costs are for simplicity shown under two headings only: (i) Transfer Costs (comprising Transfer Fee, Transfer Levy Payment, Club Intermediary Fees and Player's Intermediary Fees); and (ii) Player Costs (comprising Basic Salary, Bonus Payments, Employer's NIC and Medical Costs).
(4) Costs figures are taken from HCT's Amended Schedule of Loss (as the figures themselves have not been contested by BFC).
(5) HCT Actual Benefit figures are taken from the last column of the table in paragraph 205 of this award.
(6) Player Costs are assumed for these purposes to have accrued evenly over the 30 months of the Player's contract with HCT (from 1 February 2018 to end July 2020).

(7) All figures are rounded to the nearest thousand pounds.

232. Cumulative loss at end of each period (A), (B), (C) and (D)

Item (£)	**Period (A) 12 months**	**Period (B) 7 months**	**Period (C) 5 months**	**Period (D) 6 months**
Transfer costs	440,000	----	----	----
Player costs	451,000	263,000	188,000	226,000
Total costs	891,000	263,000	188,000	226,000
less Actual Benefit	522,000	162,000	58,000	348,000
Net loss (profit) for period	369,000	101,000	130,000	(122,000)
Cumulative net loss	369,000	470,000	600,000	478,000[5]

233. We have given careful consideration to the breadth of the brush we should apply to this issue. Our conclusion is that we should reflect the cumulative nature of HCT's Net Loss by awarding simple interest at 4% a year on the following amounts for the following periods down to the issue of this award:

Period	**Amount (£)**	**Interest (£)**
01/06/18 – 15/05/19	369,000	14,113
16/05/19 – 15/11/19	470,000	9,477
16/11/19 – 30/04/20	600,000	10,980
01/05/20- 16/02/21	478,000	15,296
Total		**£49,866**

234. The starting dates for the last three periods are the mid-points of the periods (B) to (D), which we consider a fair and realistic way to account for the spread of costs and benefit over those periods and the consequent cumulative net loss. The starting date of 1 June 2018 for the first period is put slightly earlier than the mid-point of 1 August 2018 to account for the fact that £200,000 of the transfer fee was paid on 31 January 2018 (with the second instalment of £200,000 paid on 31 August 2018).

235. The downward adjustment of the principal sum for the last period reflects the fact that the HCT Actual Benefit exceeded the further HCT Gross Costs incurred during

[5] £478,000 is rounded net loss of £477,659

that period. That was a consequence of the £440,000 Transfer Costs having been incurred back in 2018.

236. On the rate of interest, as generally on the exercise of this discretion, useful guidance is obtained from the judgment of Andrew Smith J in the Commercial Court case *Fiona Trust & Holding Corporation v Privalov* [2011] EWHC 664 (Comm), cited by HCT, particularly paragraphs 13 to 16. Again, it is to be done with a broad brush, without minute examination and without requiring any proof of the actual cost to the particular claimant of its having been so deprived. Instead, it is to be done by considering the general characteristics of the claimant.

237. The HCT January Submission proposes 5 % per annum over Barclays Bank base rate. That is the rate prescribed by EFL Regulation 51.2.4 where an EFL club defaults in payment of a transfer or compensation; and by EFL Procedural Rule 19.1 on default in payment of sums due under an arbitration award.

238. The specification of that interest rate in those two situations does not necessarily make it the appropriate rate here. Those situations are both cases of default in making payments which are overdue. By comparison, the fixed interest rate on unpaid judgment debts in the English courts is the Judgment Acts rate of 8% per annum whereas discretionary interest on damages for the period until judgment is usually not awarded at more than 3% above bank base rates. In situations where the EFL Regulations 51.2.4 or Procedural Rule 19.1 prescribe a rate of 5% p.a. above Barclays base rate, it is fair to assume that (as with the Judgments Act rate) it is intended to contain a punitive or deterrent element to reflect the fact that there will have been a wrongful withholding of sums which were plainly due.

239. Apart from a period of 8 days in March 2020 when it was at 0.75%, since 31 January 2018 Barclays Bank base rate was either 0.5% or 0.25% until it fell to 0.1% on 19 March 2020 where it has been ever since.

240. We accept HCT's submission that, in following the guidance from the *Fiona Trust* case (paragraph 236 above), the key general characteristic of HCT is that it is a professional football club and a member of the EFL. However, we do not accept HCT's

submission that the appropriate rate of interest is therefore 5% p.a. over Barclays Bank base rate. Its submission is that this rate of interest, specified in the EFL Regulations and Procedural Rules, reflects the fact that professional football clubs are generally unable to borrow from high street banks and must, instead, borrow from specialist lenders at high rates of interest. HCT has however not supported this submission with evidence.

241. We readily accept that professional football clubs at the level of the EFL Championship/League One are not "blue chip" borrowers. Taking account of our observations in paragraph 238 above, we consider there should be some reduction from the rate prescribed in the EFL Regulations for those specific situations. We conclude that a simple interest rate of 4% per annum is a fair rate to apply in this context for the whole relevant period up to the date of the Final Award.

242. We do note that BFC did not propose any rate lower than 5% over Barclays Bank base rate. However, BCT did not address the rate of interest for the pre-award period at all, as it simply attempted (unsuccessfully) to sweep away the whole notion of pre-award interest. There was no concession that 5% over Barclays Bank base rate was the appropriate rate for any pre-award interest. That is a decision for the Panel and, for the reasons given above, we have decided it is not.

243. HCT's February Submission suggests that, in considering what interest is fair and appropriate under our section 49 discretion, we should take into account that HCT "in the interests of simplicity and proportionality" does not "either (a) claim interest on its legal costs, notwithstanding that it would be entitled to do so under the terms of the Indemnity Clause; or (b) claim compound interest, even though its actual losses suffered from being kept out of its money have been completed". We disregard both points. As to (a), HCT could either make that claim or not make it; and having waived the whole of that claim, cannot seek to include it, either wholly or partly, in a totally different head of claim. As to (b), the established approach to the section 49 discretion (as under section 35A) is that the actual losses suffered need not be proved in order to be taken into account. Moreover, the award we have made at a simple interest rate of 4% p.a. is intended to compensate HCT fairly in all the circumstances, in line with an appropriate broad brush approach.

Costs

244. Paragraph 136 of HCT's counterclaim set out three items of relief which (in the introductory wording) it alleged were required "*to put Hull in the position that it would have been in had the Transfer not completed at all*":

a. a declaration that Barnsley acted in breach of its obligations under the Medical Disclosure Warranty and is entitled to rely upon the Indemnity Clause against Barnsley:
b. an order for a full indemnity, alternatively, for the payment of damages in the sums set out in the attached Schedule of Loss, plus interest; and
c. an order that Barnsley do pay the costs of the present proceedings.

245. Although request c. was separate from the claim for indemnity under request b., there was already a clear indication from the introductory wording that the basis of the costs claim was not the conventional discretionary power of the arbitration tribunal, but the right to be compensated for actual loss.

246. Moreover, although at that point the Schedule of Loss included nothing about legal costs, HCT's Amended Schedule of Loss expressly added an item of Legal Costs with the explanatory footnote 6:

> *"The entire amount of legal costs incurred by HCT in these proceedings less any amount of such costs paid by BFC to HCT pursuant to any legal costs order made by the Tribunal. Such amount cannot be quantified by HCT until such time as the Tribunal has made all legal costs orders pertaining to this litigation."*

247. By referring to "all legal costs orders", that footnote could have been understood as contemplating that the Panel would make whatever discretionary costs orders we thought fit, whether interim or final, and that HCT would recover under all (if any) costs orders made in its favour and then, under the Indemnity Clause, recover the balance of whatever costs it had actually incurred. But whether or not that is the correct understanding, the clear thrust of that addition in the Amended Schedule of Loss was that HCT was seeking all its legal costs (subsequently expressed in the HCT January Submission as "every single penny"); and that its claim to recover "the entire amount"

of its legal costs was expressly based on the Indemnity Clause. The crucial point is that there could have been no question of BFC being taken by surprise by the application for costs which is advanced.

248. If HCT is right that it is entitled to recover all its costs under the Indemnity Clause, it makes no practical difference whether:

(1) recovery on that "every single penny" basis is done entirely under the Indemnity Clause, with no need for any discretionary costs order under the Panel's express powers in EFL Procedural Rule 14; or

(2) there is first a discretionary costs order by the Panel under our express powers in EFL Procedural Rule 14, with HCT recovering under that order and then recovering the balance of its costs under the Indemnity Clause on an "every single penny" basis.

249. The HCT January Submission made plain that HCT's primary submission was in the terms of (1) in the previous paragraph. On that footing, HCT would not need and would not seek any discretionary costs order from the Panel under Procedural Rule 14. Its case is that it is entitled as a matter of contract to an order that BFC should pay HCT the entire amount of HCT's costs incurred in this arbitration.

250. We conclude that HCT is correct. The Indemnity Clause (set out in paragraph 6 of this award) clearly and expressly gives HCT the contractual right to recover all its legal costs in this arbitration from BFC. The Panel has no discretion to override that right and the exercise of no discretion is needed to give HCT that right. HCT is entitled to an order from this Panel enforcing that contractual right.

251. BFC's January Submission set out reasons why, as a matter of discretion, the Panel should make no order for costs or, alternatively as BFC's fallback position, HCT's costs should be summarily assessed at no more than 28% of its budgeted costs. However, all those reasons count for nothing in the face of HCT's contractual right to indemnity under clause 10 of the Transfer Agreement.

252. Faced with HCT's stance as noted in paragraph 249 above, BFC's February Submission presented its arguments against the clear and simple result reflected in paragraph 250 above.

253. BFC's first main argument is that "the procedural and statutory framework requires both proportionality and reasonableness". By the procedural framework BFC mainly means the Procedural Rules in Annex 2 to the EFL Regulations; and by the statutory framework it mainly means sections 59 to 65 of the1996 Act. It also refers to Part 44 (General Rules about Costs) of the Civil Procedure Rules.

254. It is entirely correct that HCT, like BFC, has agreed to this arbitration which is subject to the EFL Procedural Rules; and that the 1996 Act applies except where a particular provision can be and has been excluded by agreement of the parties. The Civil Procedure Rules do not apply but, together with relevant case law, CPR Part 44 and its accompanying Practice Directions can provide valuable guidance on the exercise of any discretionary powers on costs.

255. However, the answer to all those arguments by BFC is essentially the same as in paragraphs 250 and 251 of this award: They do not come into play in the face of HCT's contractual right to be indemnified for all its legal costs. The EFL Regulations and the Procedural Rules in Annex 2 contain procedures to be followed in the determination and implementation of the parties' substantive rights. They do not override or change HCT's contractual rights.

256. BFC draws attention to the Costs Management Order made under Procedural Rule 14.1, setting approved costs budgets on 9 September 2020 with amendments on 1 October 2020. The limits set by the Panel for specific items of costs would normally be applied in any costs orders at the conclusion of the proceedings. However, an approved budget is relevant only where a Panel makes an order for costs under its discretionary powers. BFC is correct in its observation (in footnote 8 to its February Submission) that, on the outcome of this dispute, the result is that all the parties' work, and the legal fees on the costs budgets, have turned out to be redundant. That is because this work was done at a point when it was not known whether it was BFC or HCT which would win the case; or whether, if HCT won the case, it would succeed, as it has, in its reliance on the Indemnity Clause. Once it has been established that HCT is entitled to

rely on that clause for recovery of all its legal costs, it is irrelevant what costs it might have been entitled on any other basis.

257. BFC's second main argument is that "Clause 10 itself – properly construed – prevents HCT from recovering costs unreasonably incurred or unreasonable in amount".

258. The parties' agreement on the applicable principles of contractual interpretation, as summarised in paragraphs 78 to 80 above, applies equally to the proper construction of the Indemnity Clause in clause 10.

259. BFC argues for two limitations on HCT'S ability to recover its costs in these proceedings under the Indemnity Clause:

(1) by the express reference in clause 10 to legal costs "*calculated on a full indemnity basis*"; and

(2) by the words limiting the recoverable costs to those costs and expenses "*suffered or incurred by Hull arising out of or in connection with*" a breach by BFC.

260. On point (1), BFC's submission is that those words import the requirement of reasonableness that underpins an award of costs on the indemnity basis under CPR 44.3(1); and that to judge what is or is not reasonable requires assessment by the Panel.

261. We do not agree. The words "*full indemnity basis*" have a clear and unambiguous meaning entirely independently of the Civil Procedure Rules. We see no reason to suppose that the parties intended to import and apply the CPR definition of the indemnity basis, allowing for a discretionary assessment by the Panel. We add, although we do not rely on it to reach that conclusion, that the word "calculated" in the phrase "*calculated on a full indemnity basis*" also militates against the notion that an assessment was contemplated.

262. On point (2), BFC argues that HCT cannot claim costs arising out of or in connection with those aspects of its case not referable to the breaches established in our

Partial Final Award (now set out in this Final Award). BFC refers particularly to HCT's case on alleged breach of the duty of utmost good faith and on dishonesty.

263. We also reject BFC's arguments on point (2). It is not a sensible interpretation of clause 10 to conclude that the parties intended to allow something akin to an issue-based costs order. In any case, words such as "*arising out of or in connection with*" have a very wide ambit. Failed points and allegations in the course of legal proceedings which have nonetheless successfully established a breach by BFC are still within that ambit (unless, to take an extreme situation not found here or ever likely to have been found, they are not rationally connected at all with any breach or claim within (a) or (b) at the end of clause 10).

264. We have applied the established principles of contractual interpretation. The application of those principles leaves no ambiguity about the interpretation of clause 10 which could bring the *contra proferentem* principle into play.

265. BFC's February Submission puts forward the further argument that a requirement of proportionality and/or reasonableness is to be implied into clause 10 at common law. The way it is put is that the implication of a term as to reasonableness and proportionality "does nothing more than expressly articulate that which is inherent in the procedural and statutory framework adopted by the parties." This is essentially the same argument as we have already considered and dismissed in paragraph 255 above. We also reject BFC's submission that clause 10 should be interpreted so as to apply the provisions of CPR 44.5. In court proceedings, section 51 of the Senior Courts Act 1981 makes it mandatory that all costs of and incidental to the proceedings shall be in the discretion of the court. But these are not court proceedings. Neither the Senior Courts Act 1981 nor the Civil Procedure Rules apply to this arbitration and we see no basis for construing clause 10 as including an intention of the parties to import CPR Part 44 or any other part of the Civil Procedure Rules.

266. We accept there must be some limit on the costs which may be recouped under clause 10. For example, an absurdly inflated cost – say £1,000 for a dozen pages of printing - could not be recoverable. In accordance with established principles of contractual interpretation, that would have been outside the contemplation of the parties when they made the contract and clearly outside their common intention. There is no

such extreme item in this case, which despite the strong differences between the parties has been professionally conducted on both sides. Nor has it been alleged that any part of the costs claimed was not in fact incurred, or was "absurd" or in any way improper.

267. The legal costs on both sides of this arbitration have been high, including solicitors' and counsel's fees which are broadly in the same region on each side. We see no costs incurred by HCT which could be regarded as going beyond the limit and into the territory described in the previous paragraph. We have examined BFC's Comments on HCT's Costs, submitted on 29 January 2021, but they do not alter this conclusion. It follows from everything we have said above that we are not engaging in an examination and assessment of HCT's costs by analogous application of the Civil Procedure Rules. The outcome of that process might have been different, but it is not the correct process here.

268. We note a submission by BFC that clause 10 could have been "potentially penal". There is nothing in that point. The indemnity in clause 10 is firmly tied to costs and expenses actually incurred so cannot possibly be an unlawful penalty - which is by definition an amount not in fact related to costs or expense actually incurred.

269. HCT is entitled to recover its own legal costs of this arbitration of **£432,573.57** and we shall so order. That total comprises £428,616.07 (exc VAT) shown in HCTs Schedule of Costs dated 25 January 2021 and a further £3,957.50 shown in its Supplementary Schedule of Costs dated 4 February 2021. That amount is to be paid exclusive of Value Added Tax, as the VAT on those sums is recoverable by HCT as input tax (cf. CPR Practice Direction 44, paras. 2.3 and 2.4). These figures do not include the fees and expenses of the Panel or the EFL, which we cover in the next section in paragraphs 272 to 284.

270. HCT has confirmed that it does not seek recovery under the Indemnity Clause of two separate amounts of £5,500 each of assessed costs ordered to be paid (and already paid) by HCT to BFC (the relevant costs orders being on 6 November 2020 and 7 December 2020). Those costs orders may therefore now be disregarded. There were also two orders for costs in the case (i.e. to be payable in line with the main order for costs at the end of the arbitration). Those orders, on 9 September 2020 and 5 October 2020, can also now be disregarded as they could only now operate in favour of the

successful party HCT, who are no longer claiming costs except under the Indemnity Clause. An order on 1 October 2020 reserved our decision on costs incurred since 9 September 2020. As to those costs, we see no grounds on which we should make an order in favour of BFC and the same point as above applies to HCT, i.e. that it no longer claims costs except under the Indemnity Clause. In relation to those reserved costs, we therefore now formally decide to make no order for costs as reflected in paragraph (5) of our order in paragraph 299 below.

271. The costs amount of **£432,573.57** in paragraph 269 above is included in the overall sum payable by BFC to HCT under the Indemnity Clause as stated in paragraph (1)(a) of our order in paragraph 299 below.

Fees and expenses of the Tribunal

272. EFL Procedural Rule 14.2 gives the Panel discretion as to:

(a) whether costs are payable by one party to another;
(b) the amount of those costs; and
(c) when they are to be paid

and by Procedural Rule 14.3 such order may include the costs of the Applicable Tribunal (the LAP in this arbitration).

273. The costs of the Applicable Tribunal include both the arbitrators' fees and expenses and the fees and expenses of the EFL as the arbitral institution concerned. This is the clear effect of Procedural Rule 14 and would also be the effect of sections 59 and 61 of the 1996 Act, which apply alongside the EFL Procedural Rules as there is no inconsistency excluding those statutory provisions.

274. Given that HCT is plainly the successful party in this arbitration, and as in paragraph 263 above we reject the suggestion of treating any issues differently on costs, we exercise that discretion by ordering BFC to pay both (a) the arbitrators' fees and expenses and (b) the EFL's fees and expenses.

275. HCT's January Submission in respect of "Panel fees and costs" is that: "The Panel's fees plainly come within the scope of recoverable costs and expenses as defined

by Clause 10 and, as such, should be paid by BFC. HCT considers that this proposition should be uncontroversial...." However, neither party has addressed the issues which we consider to be raised by Regulation 98.5 and the potential impact of Procedural Rule 14.9.

Regulation 98.5

276. This provides as follows:

> Regulation 98.5:
> *Members of a League Arbitration Panel shall be entitled to receive from the League a reasonable sum by way of fees and expenses, as determined by the* [EFL] *Board from time to time. Where a party seeks to appoint an individual whose costs exceed those determined by the Board, that party will be responsible for any additional fees and expenses in any event, and such excess amounts cannot be the subject of an order for costs under any circumstances.*

277. In accordance with common practice, each of the party-appointed arbitrators in this arbitration has negotiated with the party appointing him an uplift in his fees from the £150 an hour determined by the EFL Board to £400 an hour. The fee determined by the Board for chairing a League Arbitration Panel is £250 an hour, with no scope for any negotiated uplift for the Chairman.

278. What is less clear to us is the effect of Regulation 98.5. This Regulation acknowledges that a party is entitled to agree to pay its appointed arbitrator fees higher than those fixed by EFL Board, and expressly imposes an obligation on such a party to pay those "additional fees and expenses in any event..." The Regulation then goes on to add: "... such excess amounts cannot be the subject of an order for costs under any circumstances." While we accept that no part of this Regulation provides, or makes any allowance, for the kind of indemnity provisions contained in Clause 10, the concern which we have, and which as LAP arbitrators we feel obliged to address even in the absence of express submissions, is whether or not the effect of Clause 10 as properly construed is an impermissible avoidance of the purpose of Regulation 98.5.

279. We are satisfied that there is nothing in Regulation 98.5 which can properly be read as limiting the right of HCT to recover an indemnity in respect of those additional fees or preventing us from ordering payment by BFC to meet that indemnity. HCT has a contractual liability to its appointed arbitrator for those additional fees and Clause 10 expressly entitles it to recover the whole amount of those additional fees, which may be done by an award in this arbitration without any infringement of Regulation 98.5. The amount in question is **£48,484.37** and is included in the overall sum of £958,716.94 in paragraph (1)(a) of our order in paragraph 299 below. HCT has confirmed that it does not seek to recover under the Indemnity Clause any of the Tribunal fees and expenses it was ordered to pay under our 6 November 2020 costs order, which are assessed at £3000 in paragraph (4)(b) in paragraph 299 below. However, that costs order did not include any additional fees and expenses of the HCT-appointed arbitrator, which would have been expressly prohibited by the last two lines of Regulation 98.5.

280. If we had concluded that there was a conflict between Clause 10 and Regulation 98.5, we would have determined that the provision of the EFL Regulations, to which the parties and this arbitration are subject, prevails. However, although the answer is far from obvious, we have decided that there is no conflict. If the EFL wishes it to be impossible for a club to place the ultimate liability for additional fees of its appointed arbitrator upon another party, we consider that this requires amendment of the EFL Regulations.

281. We have set out above our construction of Clause 10 and our findings as to the breadth of the indemnity which the parties had agreed by that clause. In the light of that construction, we see no obstacle to our award including an indemnity extending to the additional fees which HCT has agreed to pay its appointed arbitrator. There is no question of limiting the amount to less than the level agreed by HCT, for the same reasons as explained in paragraphs 265 and 266 above. It may be noted that the uplift agreed by HCT is exactly the same as agreed by BFC with its appointed arbitrator.

Procedural Rule 14.9

282. This provides:

Until they are paid in full, the parties shall be jointly and severally liable to meet the fees and expenses of the Applicable Tribunal, the total amount of which shall be specified in an award.

283. Although we do not find Procedural Rule 14.9 easy to construe, we read it as requiring the total of the arbitrators' fees, i.e. including the contractually negotiated uplifts for the party-appointed arbitrators, to be included in the total amount of the fees and expenses of the Applicable Tribunal to be specified in an award. Accordingly, we state that total amount of £248,400 (exc VAT). That figure comprises £247,800 (exc VAT) fees of the three arbitrator members of the Panel and £600 (exc VAT) as the fees and expenses of the EFL.

284. We do make an order under Procedural Rule 14 for BFC to pay all three arbitrators' fees at the levels determined by the EFL Board, i.e. £150 an hour for the party-appointed arbitrators and £250 for the chairman. We are prevented by the express terms of Regulation 98.5 from making an order for costs under Procedural Rule 14 (or section 61 of the 1996 Act) which includes the party-appointed arbitrators' additional fees above that level. However, for the same reasons as explained in paragraphs 249 to 251 above, we are not making, and do not need to make, any such an order for Tribunal fees in relation to the additional fees of £250 an hour agreed between HCT and its appointed arbitrator.

Publication

285. Our Partial Final Award raised the question of publication of the Final Award and each party addressed that issue in its January Submission.

286. In Appendix 2 to the EFL Regulations, Procedural Rule 20 states:

20.1 Subject to Rule 20.2, any Applicable Tribunal shall be entitled to publish any judgment, decision or award.

20.2 Decisions of:

(a) a Disciplinary Commission; and/or

(b) the League Arbitration Panel in proceedings conducted pursuant to Regulations 95.2.1 to 95.2.3 inclusive and Regulation 95.2.5 (where The League is a party, but not otherwise),

shall, unless otherwise agreed between the parties, be published (subject to appropriate redaction to protect third party confidentiality).

20.3 In any event, copies of any judgment, decision or award of any Applicable Tribunal in proceedings to which The League is not a party must be provided to The League within 24 hours of the making of the order. Where The League considers, acting reasonably, that the terms of the judgment, decision or award are of general importance to Member Clubs, The League may produce an anonymised version and/or summary of such judgment, decision or award for distribution to Member Clubs.

20.4 All evidence given and any other elements of the case record (for example pleadings, documents, correspondence, statements and submissions) shall, subject to Rule 20.1, be confidential.

20.5 Each Club, Official and Player shall be treated as having consented to any publication and/or disclosure of any judgment, decision or award pursuant to this Rule 20.

287. This arbitration does not fall under Procedural Rule 20.2. Accordingly, this Panel is entitled but not obliged to publish the Final Award. Although not expressly stated in Procedural Rule 20.1, that entitlement must also allow us in our discretion to order publication of a redacted Final Award and not the full Final Award delivered to the parties.

288. BFC opposes publication for five reasons. It submits:

(1) There is a presumption and a normal practice that a final award in this type of dispute is not published. BFC draws a contrast with decisions falling under Procedural Rule 20.2, where there is a contrary presumption.

(2) The type of dispute meant by BFC in (1) is a private dispute between the parties, with no involvement of the EFL as a party and no public interest element. The parties in the present type of dispute are entitled to expect that the

confidentiality with which the proceedings were commenced and conducted will be maintained post-Award.

(3) This is particularly so where (as in this case): (i) allegations of dishonesty were made and abandoned; and (ii) where the Player in question was not a party and yet would be easily identifiable, even with redactions.

(4) The specific medical conditions, which are key to understanding the dispute, are of a particularly sensitive nature. Even if the Player had been a party to the proceedings, there would have been a powerful case to maintain confidentiality for that reason.

(5) In circumstances where the Player is not a party to the proceedings, has not contributed to the proceedings in any way, has not been asked for his views on the underlying matters, and has not consented to publication of an award he has not seen, the reasons for maintaining the confidentiality of these proceedings are overwhelming.

289. HCT submits that the Final Award should be published, given what it describes as "a significant litigation victory". Leaving that aside, we summarise its reasons as follows:

(1) There has been adverse media coverage of HCT's withholding of the third transfer fee instalment in August 2019, starting with a *Daily Mail* online article on 16 November 2019 headlined: "Hull City refuse to pay Barnsley £200,000 final transfer fee for defender Angus Macdonald, who was diagnosed with cancer." The implication of the article was that the cancer diagnosis was the reason for that refusal to pay – an allegation pursued by BFC in this arbitration but rejected by this Panel (as explained in paragraphs 146 to 149 above). HCT would like publication to put the record straight.

(2) There are good reasons for football clubs to take heed of the importance of medical disclosure warranties.

(3) Recent EFL decisions have been published, including so that other clubs can learn lessons: see https://www.efl.com/-more/governance/judgments

290. HCT adds that it agrees that the Player's sensitive medical information should not be placed in the public domain, although pointing out that (as clear from the *Daily Mail* online article mentioned above) some aspects are already public. HCT would have no objection to the Panel contacting the Player for his views on publication/redaction.

291. There is no presumption for or against publication under Procedural Rule 20.1. We are clear on that point, even though each of the 13 decisions accessible to the public on the EFL website at the date of this Final Award was published under Procedural Rule 20.2. That there is currently on that website no award of a tribunal published under Procedural Rule 20.1 does support BFC's submission that it is normal practice not to order publication. But the discretion is ours, in all the particular circumstances of this case.

292. The EFL's own discretion under Procedural Rule 20.3 to publish an anonymised version and/or summary does not affect the Tribunal's entitlement to direct publication under Procedural Rule 20.1. If it had been intended to leave all publication decisions to the EFL, Procedural Rule 20.1 would not have been put there at all.

293. It is not for us to set any policy for the EFL and our decision has no binding force for any future tribunal which has to decide whether or not to publish under Procedural Rule 20.1. Nevertheless, despite the apparent reluctance of tribunals in Procedural Rule 20.1 cases to order publication, our firm and unanimous view is that this Final Award should be published with our redactions to remove those of the Player's sensitive medical details which are still private and so should remain private.

294. Our starting point is that, based on the experience of all three of us as members of sports tribunals, there is nearly always something to be learned from even the most apparently straightforward or routine decisions. Seeing how other tribunals have dealt with substantive, procedural and practical issues has real value. That is even more true where those decisions involve unusual or difficult questions, as this case does. Even

what we have to say on this question of publication is likely to provide food for thought for future tribunals, whether or not they are attracted to our approach in the circumstances of their particular cases.

295. Accordingly, without applying any presumption, we have considered the reasons for and against publication of this Final Award in the redacted form we have indicated. We are unpersuaded by any of BFC's submissions against publication. We have already dealt with its point (1). Our views on points (2) to (5) are:

Point (2): Apart from the points in paragraph 294 above, the Medical Disclosure Warranty and the Indemnity Clause and the issues which have led to this dispute are likely to be of general importance to all those involved in professional football transfers, including but not limited to EFL's member clubs. An order for publication under Procedural Rule 20.1 makes our redacted version of the Final Award available to other tribunals and all those in the football world who may have a genuine interest in access to the decision

As to the supposed expectation that the Final Award will be kept confidential, Procedural Rule 20.1 and 20.5 together make clear that this is misplaced as far as the Final Award is concerned. If BFC had an expectation based on the practice of previous tribunals, such an expectation such does not bind this tribunal and BFC cannot claim anyway to have taken any action in reliance on that expectation. As an EFL member club it was bound to refer this dispute to arbitration conducted under the EFL Regulations and Procedural Rules. By Procedural Rule 20.5, BFC and HCT are treated as having given their consent to publication, on which their only entitlement is to a fair exercise of the Panel's discretion under Procedural Rule 20.1.

Point (3): We do not see the making of abandoned allegations of dishonesty as a significant factor. This Final Award makes clear there was no dishonesty by anyone, so we do not see why publication should worry anybody on that score.

As we have already indicated, we do propose redactions and with those redactions we do not see identification of the Player (who will be named in the redacted version) as a difficulty.

Point (4): All details of the Player's specific medical conditions will be redacted, except for those which are already in the public domain (and there is much that has appeared in the media). The redacted details are not necessary for an understanding of the dispute or our findings in the Final Award. They are only important to the parties' full understanding of the Final Award, and they have the full unredacted Final Award. The Panel has no reason to suppose that our conclusion would have been any different if the Player had been a party, even though of course he would then have been entitled to express his views first.

Point (5): The published version of the Final Award will be redacted as indicated above. It contains no criticism or other negative remark about the Player – in fact, the exact opposite, as he emerges from all these difficulties with great credit. We see no need to consult him and there is no discourtesy in our not involving him. We shall include his name. Given the information already in the public domain, it would be pointless to attempt to disguise his identity. That would require us to redact our decision so heavily as to make it practically unreadable. We doubt that even then his identity would not be clear to many in the world of professional football.

296. This conclusion does not need reinforcement by HCT's point (1) in paragraph 289 above concerning previous media coverage. Nevertheless, there is much force in that point. Without any slight at all against any participant in any capacity in this arbitration, it is unrealistic to expect that all details in this arbitration will remain forever in a notional sealed box marked "Strictly Confidential". HCT fully supports redaction of the Player's sensitive medical but otherwise it is reasonable for HCT to want the full details of the decision to be publicly available as a correction of past media reports and a protection against the partial and inaccurate leaks which might easily occur if we made no order for publication under Procedural Rule 20.1. In itself this is a strong reason why this decision should be openly available to the press and the public in its redacted but non-anonymised form, and not restricted to EFL member clubs in an anonymised and/or summarised version under Procedural Rule3. That will enable HCT to put the record straight in relation to that earlier media coverage mentioned in paragraph, which we consider important.

297. At all stages during this arbitration we have been mindful of the applicable data protection regime, first the EU GDPR and now the UK GDPR, in particular as regards the Player and his special category data. The special category data put before us is information that was already known to the Player and was necessary for "the establishment of, exercise or defence of legal claims" between the parties. The protection of the Player's data rights is reflected in our decision to publish only the Redacted Final Award.

298. Procedural Rule 20.1 refers to an entitlement of the Applicable Tribunal to publish an award. It is obvious that the tribunal (this League Arbitration Panel) will not ourselves do the actual publishing of the redacted Final Award. The mechanics of wider publication by the EFL will be in its the hands. The effect of our decision is that: (1) the full unredacted Final Award remains confidential to the parties (and the EFL, the tribunal and all others involved in this arbitration are bound by that strict confidentiality); (2) there is no continuing confidentiality in relation to the Redacted Final Award, which we have lifted by our discretionary decision under Procedural Rule 20.1.

Order by this Final Award

299. By this Final Award, this League Arbitration Panel ("the LAP") ORDERS AND AWARDS:

(1) Barnsley Football Club Limited ("BFC") shall pay Hull City Tigers Limited ("HCT") forthwith the sums of:

(a) £958,716.94 by way of indemnity under clause 10 of the Transfer Agreement dated 31 January 2018 for the transfer of the Player Mr Angus Macdonald ("the Indemnity Clause"); and

(b) £49,866 interest awarded under section 49 of the Arbitration Act 1996

(2) BFC shall pay:

(a) £138,206.24 (plus VAT) fees and expenses of the three arbitrator members of the LAP; and

(b) £600 (plus VAT) fees and expenses of The Football League Limited ("the EFL") as the arbitral institution concerned in this arbitration.

in each case by payment to the EFL within 7 days of receiving an invoice from the EFL.

(3) The fees and expenses in paragraph (2)(a) above do not include fees and expenses of the two party-appointed arbitrators additional to the reasonable sum determined by the EFL Board referred to in EFL Regulation 98.5 (but those additional fees and expenses of HCT's appointed arbitrator amounting to £48,484.37 (exc VAT) are included in the sum of £958,716.94 in paragraph (1)(a) above).

(4) The fees and expenses of the LAP mentioned in paragraph (iii) of its 6 November 2020 order now being assessed at £4,000 (exc VAT), which does not include fees and expenses of the two party-appointed arbitrators additional to the reasonable sum determined by the EFL Board referred to in EFL Regulation 98.5:

(a) BFC shall pay £1,000 (plus VAT), which sum is included in the amount specified in paragraph 2(a) above; and

(b) HCT shall pay £3,000 (plus VAT), to be paid to the EFL within 7 days of receiving an invoice from the EFL, which sum is not included in the amount specified in paragraph 2(a) above.

(5) There shall be no further order for costs, fees or expenses.

(6) BFC shall indemnify HCT under the Indemnity Clause for all future losses caused to HCT by the value added tax treatment by Her Majesty's Revenue and Customs of any payments relating to the Transfer Agreement mentioned in paragraph (1) of this order, including any payments made pursuant to this Final Award.

(7) Under EFL Procedural Rule 20.1, this Final Award shall be published in the form of the Redacted Final Award provided to the parties at the same time as this full unredacted Final Award.

(8) This full unredacted Final Award shall not be published and shall remain confidential to the parties, the LAP and the EFL (save as the BFC and HCT may otherwise agree), subject always to the power of the EFL under EFL Procedural Rule 20.3 to publish an anonymised version and/or summary of this Final Award.

(9) In accordance with EFL Procedural Rule 19.1 way, in default of payment on the due date of any sum ordered to be paid under paragraphs (1), (2), (4) or (6), the party in default shall pay interest at the rate of 5 per cent per annum over Barclays Bank base rate in force from time to time calculated on a daily basis on the outstanding sum from the due date until the date of actual payment.

300. The sum of £958,716.94 in paragraph 1(a) of our order comprises three elements:

- £477,659 basic loss (paragraph 209 above);
- £432,573.57 HCT legal costs (paragraph 271 above);
- £48,484.37 additional fees of HCT's appointed arbitrator (paragraph 279 above)

301. There are no recoverable costs which could require to be determined by award under section 63(3) of the Arbitration Act 1996.

Final Award delivered by us (as the League Arbitration Panel) in London, England, on 16 February 2021

Nicholas Stewart QC, Chairman

Edwin Glasgow QC

Jonathan Bellamy C.Arb