IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W.51.5 OF THE PREMIER LEAGUE RULES BEFORE THE PREMIER LEAGUE INDEPENDENT DISCIPLINARY COMMISSION

PLJP 2023/3

Mr David Phillips KC FCIArb
HH Alan Greenwood
Mr Nick Igoe ACA

B E T W E E N –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

DECISION

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INTRODUCTION

1. The hearing of Burnley's substantive claim took place at the International Dispute Resolution Centre and the International Arbitration Centre over ten days between 17 September 2025 and 9 October 2025. Burnley was represented by Ruth Byrne KC, Tom Sprange KC, Charity Kirby and Liam Petch (of King & Spalding instructed by Wiggin). Everton was represented by Sonia Tolaney KC, James Segan KC, Douglas Paine and Barnaby Lowe (counsel instructed by Pinsent Masons).

OVERVIEW

2. At the conclusion of the 2021/22 season Burnley finished just two places, and four points, below Everton, with a superior goal difference. It finished in 18th place in the Premier League and was therefore relegated to the EFL Championship. Burnley's claim is for compensation for losses caused by that relegation. It alleges that that relegation was caused by the sporting advantage conferred on Everton by its breach of the PSR. Burnley's claim is to be put in the position that it would have been in if Everton had not breached the PSR.

3. The claim can be simply stated in that way but the reality is that it involves a complicated argument that is strongly contested by Everton. Two overarching issues arise. The first is causation. Everton disputes that the breach of the PSR caused Burnley's relegation. The second is quantum. Everton asserts that relegation to the Championship did not cause Burnley any loss.

4. Burnley emphasises that Everton broke the PSR in order to avoid relegation. That strategy succeeded. Everton was not relegated. But Burnley was. Burnley submits that Everton prioritised relegation avoidance over PSR compliance.

5. Burnley supports its case by expert evidence from Professor Rob Wilson and

William Daniels. The Wilson/Daniels analysis demonstrates by means of statistical and probabilistic modelling that if Everton had not broken the PSR it would likely have been relegated with the consequence that Burnley would have remained in the Premier League.

6. Burnley's case is disputed by Everton. It accepts that any breach of the PSR confers a sporting advantage but argues that that simple assertion begs the question of the extent and effect of that advantage. It also points to the comments made in a number of decisions that in practice it is impossible to quantify the extent of a sporting advantage secured by a breach of financial fair play rules. Everton rejects Burnley's argument. It supports that rejection by the mathematical modelling advanced by Derek Holt in his expert report which not only reaches a different conclusion but also, it says, demonstrates the unreliability of the Wilson/Daniels analysis. Further and in any event Everton argues that on a proper construction of the Rules Burnley's relegation took place before any breach of the PSR by Everton, so the relegation cannot have been caused by the breach.

7. Resolution of these competing arguments involved evaluation and analysis of the strengths and weaknesses of the competing expert opinions.

8. The quantum claim is similarly contested. Both parties have produced experts' reports to support their respective cases – Richard Boulton for Burnley, Louis Dudney for Everton. Burnley alleges its recoverable loss to be in the region of £51.7 million. Everton disputes the reliability of Mr Boulton's analysis, and relies on Mr Dudney's evidence to demonstrate that in fact Burnley has suffered no loss. Both experts have produced detailed (and complex) analyses to support their reasoning.

9. There is a further dispute between the parties, namely as to the appropriate rate of interest to be added to any award that may be made in Burnley's favour. That, too, attracts the opinion of the quantum experts but, comparatively speaking, raises less complex arguments.

PROCEDURAL HISTORY

10. These Rule W proceedings were commenced on 24 March 2023 when the Premier

League made a Complaint, alleging Everton to have been in breach of the PSR for the 2021/2022 season. The only parties to the Complaint were the Premier League and Everton. The Complaint sought the imposition of a sanction on Everton for the breach of the PSR.

11. On 20 April 2023 Burnley applied to the Commission to intervene in the proceedings to enable it to pursue against Everton a claim for compensation under Rule W. The Commission (Mr Phillips sitting alone) heard the application on 9 May 2023. It recognised that Burnley had a potential claim for compensation under Rule W but refused the application. A copy of the Commission's *ex tempore* decision is at Attachment 1.

12. The Commission heard the Complaint against Everton in October 2023. The Commission's written decision was handed down on 17 November 2023. The Commission found Everton to be in breach of the PSR for the 2021/2022 season and imposed a sanction of a deduction of 10 points. A copy of the Commission's decision is at Attachment 2.

13. On 1 December 2023 Everton brought an appeal against the Commission's decision. That appeal was heard by the Appeal Board in January/February 2024. The Appeal Board's written decision was handed down on 26 February 2024. The Appeal Board upheld two of Everton's nine grounds of appeal and reduced the sanction to a deduction of 6 points. A copy of the Appeal Board's decision is at Attachment 3.

14. On 1 March 2024 Burnley wrote to Everton, informing it of its intention to pursue a claim under Rule W for compensation. The effect of Burnley's compensation claim and of the 9 May 2023 decision was that, under the provisions of Rule W, this Commission became seized of the compensation proceedings. These had been stayed pending the final determination of the PSR proceedings until revived by Burnley's communication with Everton.

15. On 12 April 2024 Everton applied to the Commission for an Order that it should recuse itself from determining that Rule W compensation claim. That application was heard by the Commission on 10 May 2024. The Commission's written decision, dismissing the application, was handed down on 22 May 2024. A copy of the Commission's decision is at Attachment 4.

16. In its Statement of Claim served on 14 June 2024 Burnley included a claim that the Commission should award it compensation by way of a further sanction. In its Defence dated 2 August 2024 Everton denied that compensation under Rule W could be characterised as a sanction. Burnley maintained its position in its Statement of Reply, arguing that contractual principles of assessment of compensation had no application to its Rule W compensation claim. That issue ("the Construction Issue") was formalised in Everton's application dated 13 September 2024. The Construction Issue was heard by the Commission on 20 September 2024. The Commission's written decision was handed down on 25 October 2024. The Commission ruled that Burnley was not entitled to claim compensation by way of further sanction, and that its claim was a contractual claim in which conventional principles of causation applied. A copy of the Construction Issue decision is at attachment 5.

17. In its Amended Statement of Claim dated 30 January 2025 Burnley introduced a claim that as part of its Rule W compensation claim it was entitled to rely on unadjudicated PSR breaches by Everton over and above those established in the original Complaint proceedings. In its Amended Statement of Defence Everton denied that the Commission had jurisdiction to determine the unadjudicated breaches. It asserted that the Commission's jurisdiction was limited to what may have been caused by the breaches established in the PSR Complaint hearing and did not extend to unadjudicated breaches that were not found to be proved in those Complaint proceedings. That issue ("the Jurisdiction Issue") was heard by the Commission on 15 May 2025. The Commission's written decision was handed down on 20 May 2025. The Commission ruled that Burnley was not entitled to rely on unadjudicated breaches but was limited to those breaches that were found to have been proved in the PSR Complaint proceedings. A copy of the Jurisdiction Issue decision is at attachment 6.

18. On 7 April 2026 the Commission sent the parties a draft of this decision to enable them to consider typographical corrections and consequential matters. Those matters were the subject of a hearing on 28 May 2026 after which the Commission handed down the Consequential Matters decision dated 2 June 2026. A copy of the Consequential Matters decision is at attachment 7.

STATUS OF EARLIER DECISIONS

19. We deal in this part of the decision with the status of the decisions that have been

made earlier in the Rule W proceedings – both the PSR complaint (to which Burnley was not a party) and the interim decisions made in the compensation proceedings (to which Burnley was a party). That status was considered in the Jurisdiction Issue decision, which dealt with Burnley's claim that it was entitled to rely on unadjudicated PSR breaches over and above those established in the PSR proceedings. As explained in paragraph 16, we ruled that Burnley was not entitled to rely on unadjudicated breaches but was limited to those breaches that were found to have been proved in the PSR complaint proceedings.

20. That decision was based on the construction of Rule W. In paragraphs 28 and 29 of the Jurisdiction Issue decision we said the following.

> 28. We consider that the proper construction of the wording of Rule W limits the power to award compensation under Rule W51.5 to a power to award compensation caused by breaches found by the Commission to have been proved. It is not open to the Rule W applicant to seek to recover wider losses. It is not open to such an applicant to advance claims based on losses caused by anything other than the breaches found by the Commission. That is the plain intention of the wording of Rule W. The Commission's powers after a complaint has been proved are contained in Rule W51, which set out a range of possible sanctions. Clearly, those powers arise only in the event of a complaint being proved. The Rule W compensation power is contained in Rule W51.5. That power to order compensation, as with the power to impose sanctions provided in Rule W51, can sensibly only arise in the event of the complaint being proved. It cannot be that the Commission could award compensation if the complaint had not been proved.
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> 29. Other provisions of Rule W confirm that construction. Rule W27 enables the Commission to indicate that it may wish to award compensation if the Complaint is proved. There is a direct link between proof of the allegations and potential compensation. Rule W58 deals with the consequences of the Commission refusing to order compensation claimed to arise out of the Rule W PSR breach alleged in the complaint. Further claims based on the established breaches are barred.

21. That construction requires that Burnley's claim for compensation is limited to loss caused by the breaches found in the PSR complaint proceedings. That construction also requires that the facts found by the Commission leading to the findings of breaches that were proved in the PSR complaint proceedings are binding on the parties in these compensation proceedings. Accordingly, by reason of the contractual provisions embodied in the Rules, the findings of fact made in the PSR complaint proceedings are binding on both Burnley and Everton notwithstanding the fact that Burnley was not a party to those proceedings. The findings in the interim decisions made in these complaint proceedings are binding on both parties by reason of an application of conventional issue estoppel principles. It is for that reason that we have copied the earlier decisions in these proceedings as attachments to this decision.

COUNTERFACTUAL

22. Determination of the causation and quantum issues requires analysis of what would have happened if Everton had not breached the PSR requirements. It is necessary to determine what would have happened if the contract had not been broken. That involves making findings of the appropriate hypotheticals. Although the parties agree the principles to be applied they seek to apply them in different ways.

23. Everton emphasises that the counterfactual requires the exercise of altering its conduct only to the minimum extent necessary to avoid a breach of the PSR. In other words, the hypothetical that should be adopted is the one that is most favourable to Everton so long as it avoids any breach. In its closing submissions (paragraph 9.3) Everton relied on the following passage from *Durham Tees Valley Airport Ltd v Bmibaby Ltd* [2010] EWCA Civ 485 at paragraph 79 –

> The court, in my view, has to conduct a factual inquiry as to how the contract would have been performed had it not been repudiated. Its performance is the only counter-factual assumption in the exercise. On the basis of that premise, the court has to look at the relevant economic and other surrounding circumstances to decide on the level of performance which the defendant would have adopted. The judge conducting the assessment must assume that the defendant would not have acted outside the terms of the contract and would have performed it in his own interests having regard to the relevant factors prevailing at the time. But the court is not required to make assumptions that the defaulting party would have acted uncommercially merely in order to spite the claimant. To that extent, the parties are to be assumed to have acted in good faith although with their own commercial interests very much in mind.

24. Everton further relied on the following passages from *Recovery Partners v Rukhadze* [2025] 2 WLR 529 –

> 162. When a claimant's right to claim compensation depends on proving a causal connection between a breach of a duty owed by the defendant and harm suffered by the claimant, the law uses counterfactual reasoning to determine whether the necessary causal connection has been shown. A comparison is made between what actually happened and what would have happened if the breach had not occurred. The purpose of the comparison is to identify with precision those consequences, if any, of the defendant's conduct for which the defendant should (subject to any further limiting factors) be held responsible.
>
> 163. It is worth spelling out in a little more detail what the exercise involves. The first step is to identify the specific duty of which the defendant was in breach and the particular conduct which constituted the breach. The next step is to construct a hypothetical scenario in which the defendant's conduct is changed to the minimum extent necessary to achieve compliance with the duty. The court then considers what harm, if any, the claimant would have suffered in that scenario.

25. Whilst agreeing the statement of principle, Burnley disputes the manner in which it should be applied in practice. It cites a different paragraph (paragraph 96) from *Durham Tees Valley* which states that the court's task is to take a *practical and*

realistic approach to making findings of fact in the counterfactual. What is required is to adopt a realistic approach – Everton cannot adopt an approach described by Burnley as being *wholly self-serving and unrealistic*.[1]

26. We note that the phrase used in paragraph 79 of *Durham Tees Valley* to describe our task is *to decide on the level of performance* [of the contract] *which the defendant would have adopted* [without the breach]. The fact that a course of action is hypothetically possible is not the same as making it one that that would probably have been adopted. We consider that our task is to make findings as to what Everton would probably have done if it had complied with the PSR. That requires us to look at all the circumstances, including how Everton actually conducted itself in relation to the facts under consideration. We consider that this is consistent with taking a *practical and realistic* approach. It involves making findings as to what would have been done: the fact that something could have been done is a relevant fact but it is not of itself determinative of the counterfactual finding.

27. We apply that approach to the matters that we deal with in the later sections of this decision. We give here only two examples of its application, taken from submissions made by Everton.

28. Under the sub-heading *Even if Everton had to save money on players, the most likely counterfactuals do not involve any difference to Everton's sporting performance* Everton argued as follows.[2]

> Yet further, even if the Commission were to assume that all of the £19.5 million savings needed to come from the playing budget, the most likely counterfactual is quite plainly that Everton would have sold another player in addition to [redacted], most likely [redacted]
>
> ....
>
> It is plain that if driven to make a further £19.5 million of savings, Everton would have sold another player at that time. Indeed, [redacted] in fact made an offer of [redacted] for [redacted]:

29. A footnote provides further clarification.[3]

> [redacted] Net Book Value [redacted], and so the extra [redacted] in Tottenham's offer over and above the [redacted] for which [redacted] was in fact sold would have yielded an additional profit of £19.5 million, thereby eliminating the PSR breach.

[1] Burnley's closing submissions, paragraph 6
[2] Everton's closing submissions, paragraph 17-17.2
[3] Everton's closing submissions, footnote 2

30. In its oral closing submissions, Everton had linked this counterfactual argument to the *Durham Tees Valley* assumption about a party's motivations.[4]

> You assume they would have acted in good faith but with their commercial interests very much in mind, and that is entirely what we say is the most likely counterfactual and it's precisely what we say Everton would have done by selling another player in the run-up to the 30 June 2022 deadline to become PSR compliant.

31. However, the assumption that Everton would have sold [redacted] for [redacted] is not borne out by other evidence presented to the Commission.

32. First, the combined offer [redacted] was reported in the witness statement of Mr Moshiri, the club's then owner and chairman in the original PSR hearing.[5]

[redacted]

33. Mr Moshiri's dismissal of the offer, just one month before Everton had to achieve compliance with the PSR, was unequivocal. We consider that in light of that evidence it is not realistic for Everton to claim that, in the counterfactual, it would have sold the player in summer 2022.

34. Second, the club's view that [redacted] was at a material undervalue is borne out by subsequent evidence of the sale of [redacted]. Mr Maryniak, Everton's Chief Finance Officer, reported to the Premier League that the sale was [redacted][6]

35. On the basis of the fee eventually obtained for [redacted] the Commission concludes that, assuming Everton would have *acted in good faith but with their commercial interests very much in mind* in May/June 2022, it would never have accepted an offer for [redacted] of [redacted].

[4] Day 9, P92 (20) – P93 (1)
[5] First witness statement of Ardavan Farhad Moshiri dated 14 August 2023, paragraph 55
[6] Email from James Maryniak to Ross Christie and Jamie Herbert dated 31 January 2023

36. Everton sets out an *alternative counterfactual* in its closing written submissions.[7]

> The alternative counterfactual is that Everton could and would have refrained from buying other players, or made other player sales, without affecting its sporting performance in the 2021/22 season. The evidence from both sides made clear that Everton's spending on players during the era from February 2016 lacked efficiency, such that there was plenty of 'fat' which could have been cut without affecting Everton's on-pitch performance:

37. This is attributed to two factors, first, a record of inefficient spending by Everton and, second, the presence of underperforming players within its playing squad. The first point relies on Mr Holt's evidence which demonstrated that Everton's final league position compared unfavourably with its investment in its squad.[8]

> These points are made in Everton's Written Opening, ¶51, and, in particular, in Mr. Holt's analysis, which shows that Everton was the most significant underperformer versus money spent in the whole PL, failing to achieve its expected place in the 2021/22 season by eight league places, finishing 16th when its spending implied an 8th place finish.

38. That argument has already been addressed and dismissed by the Appeal Board in the original PSR case.[9]

> As we have described, the Club's relevant expenditure was on players. That the Club may not have bought as wisely or as successfully as it had hoped and projected is not to the point. The fact that the Club finished Season 2021-22 in 16th place, rather than the projected sixth place, does not assist the Club here: the point is not that the Club, having invested heavily in players, did not do as well as it expected or hoped, but rather that, having made that investment, the Club is likely to have performed better than it would had it not done so.

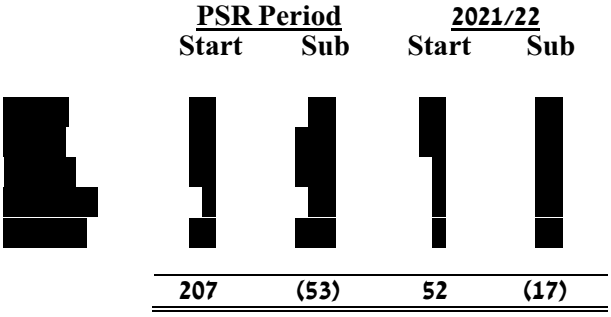
39. In support of its second point, in its submissions and various witness statements on which it relied Everton has quoted the names of players who, it claims, *cost Everton a significant amount of money but who made little sporting contribution and who Everton could have refrained from purchasing*.[10] In its opening submissions, Everton had [redacted] players, [redacted], who, according to Mr Maryniak's evidence, cost the club [redacted] over the course of the period of the breach, i.e. 2018/19 to 2021/22, (the 'PSR Period') but who provided *negligible contributions to Everton's on-pitch performance during the Relevant Period*.[11]

40. In his first witness statement, Mr Thelwell, Everton's Director of Football, added

[redacted]

[7] Everton's closing submissions, paragraph 18
[8] Everton's closing submissions, paragraph 18.1
[9] Appeal Board decision, paragraph 150(ii)
[10] Everton's closing submissions, paragraph 18.3
[11] Everton's opening submissions, paragraphs 53-54

[redacted]



	PSR Period		2021/22	
	Start	Sub	Start	Sub
[redacted]				
	207	(53)	52	(17)

41. It may indeed be the case that, with hindsight, Everton believes that it did not obtain value by purchasing these players but, with the exception of [redacted] they nevertheless featured quite regularly in the club's matchday squad. To echo the Appeal Board's conclusion, *having made that investment, the Club is likely to have performed better than it would had it not done so*. It must also be noted that Mr Baldwin said the following of [redacted].[13]

> [redacted]. You have to take that into consideration. I have had a number of players throughout my durations at clubs where they have had [redacted]. You acquire players in good faith, injury unfortunately is a major factor in player cost. Generally then it is the players[14] with more money that are able to support that loss because they have alternate back-ups. [redacted].

42. In that context, the Appeal Board had already observed that player injury or similar factors did not constitute mitigation for a breach of the PSR.[15]

> Third, where a club has breached the PSR, it cannot plead in mitigation that the breach resulted from adverse circumstances which were of a nature and level that may well befall any PL club during the course of a season, even if the precise circumstances which in fact befall the club in a particular season might not have been foreseeable. For example, during the course of a season, each club is likely to lose the services of different players, sometimes for lengthy periods, for a wide variety of reasons, often by virtue of injury but also for other reasons such

[12] Witness statement of Kevin Thelwell dated 16 May 2025, paragraph 21 and annex 1
[13] Day 6, P32 (18) – P33(5)
[14] It is believed that Mr Baldwin misspoke here and meant to say *the clubs with more money…*
[15] Appeal Board decision, paragraph 93

as international duties, family or other personal reasons, or a falling out with or loss of enthusiasm for the club. Unless the club can show that the likelihood of the level of the loss of players' services was significantly and unforeseeably high, then the loss of those services is not a mitigating factor. It is simply an aspect of the ordinary business of professional football, certainly at PL level.

43. In its closing submissions, Everton had referred to *players who Everton – acting commercially and in its own interests – would not have bought, or if bought would have sold, in the counterfactual*.[16] The Commission notes the need to take a *practical and realistic* approach to assessing the counterfactual and is not persuaded that Everton can simply assert that it *would not have bought, or if bought would have sold* a group of players who, with hindsight, have underperformed relative to their cost to the club. In particular, the Commission questions whether the club could realistically have sold any of the named players. Daniel Purdy, Everton's then Head of Recruitment, provided evidence to the original PSR hearing in which he emphasised the challenge he and colleagues had faced trying to secure player sales in order to comply with the PSR.[17]

44. Mr Thelwell, who had only joined Everton in March 2022, commented on the challenge of selling squad members at that time.[18]

[16] Everton's closing submissions, paragraph 1.2.3
[17] Witness statement of Daniel Purdy dated 14 August 2023, paragraph 12-14
[18] Witness statement of Kevin Thelwell dated 16 May 2025, paragraph 21

[redacted]

45. The Commission concludes that neither of the counterfactuals argued by Everton meet the *practical and realistic* test. In our view the only realistic counterfactual would be for Everton to have secured an additional £19.5 million in profit on player sales, together with any associated wage saving, at an earlier stage in 2021/22.

DATE OF BREACH

46. Everton argues that Burnley's relegation (which is the cause of its claimed losses) occurred before Everton's breach of the PSR spending limit. Accordingly, Everton says, whatever loss may have been suffered as a result of the relegation was not caused by Everton's breach of contract.

47. The relevant provisions of the PSR are not in dispute. By 1 March in each season a club must submit to the Premier League copies of its accounts for the two preceding financial years (E45.1[19]) and an estimated profit and loss account and balance sheet for the current financial year (E45.2). At a later date, by which time the Annual Accounts for the current financial year will have been prepared, the Premier League will consider the completed accounts for that Accounting Reference Period (Guidance between E45 and E46). The Accounting Reference Period is defined as being the period in respect of which the Annual Accounts are prepared (A1.1). The Rules (A1.8) provide that a club's financial year must end on a date between 31 May and 31 July – that is, during the close season. The effect of that provision is that the playing season will fall within and is tied to the financial year. *By this mechanism each financial year relevant for the purposes of the PSR Calculation is tied to a particular Season.*[20] If those accounts, taken together with the accounts for the preceding two financial years, reveal a loss the club must submit to the Premier League a calculation of its adjusted earnings before tax (E46). Adjusted earnings before tax are defined (A1.5) as being the earnings before tax excluding certain identified costs. The adjusted earnings before tax produces the figures relevant to the PSR Calculation, which is defined (A1.178) as being the aggregate of the figures from a number of specified years. If the PSR Calculation results in losses in excess of the permitted maximum (£105

[19] All references to the Premier League Rules are to the 2021/22 Rules. Although the numbers have changed in subsequent years the relevant provisions are not in dispute.
[20] Rule X tribunal decision, paragraph 15

million) the Premier League will refer the breach to a Commission – as was done in this case.

48. The dates relevant to this case are not in dispute. Burnley was relegated from the Premier League on 22 May 2022. Everton's financial year ended on 30 June 2022. Everton argues that there could be no breach of the PSR until the end of its financial year because that was the earliest that its accounts could be drawn up. Up until then it was open to it to remedy any incipient breach by the sale of one or more players. The consequence is that Burnley's relegation had already taken place (on 22 May 2022) by the time of Everton's PSR breach (no earlier than 1 July 2022). Everton cites paragraph 12-015 of McGregor on Damages (35th edition) in support of its submission that the PSR breach cannot have caused any recoverable loss –

> No damages can be given on account of any loss before the cause of action arose. This is so clear that it is hardly controverted.

49. Burnley disputes this analysis, which it says produces a result that is inconsistent with the purpose of the PSR. Its mistake is to conflate the breach with the mechanism for determining whether there is a breach. Burnley argues that properly construed the PSR recognise the concept of a breach that was in existence before the end of Everton's financial year.

50. Both parties rely on the various decisions in the Premier League v Leicester City tribunals. These are the decision of the Disciplinary Commission (13 June 2024); the decision of the Appeal Board (30 August 2024); and the decision of the Rule X Arbitration (19 May 2025). The issue in those decisions was whether the Premier League was able to bring proceedings against Leicester City for breach of the PSR after it had been relegated, and therefore at a time when it was no longer a member of the Premier League. Similar to the case advanced here by Everton, Leicester City argued that it had been relegated before the end of its financial year, so that no breach of the PSR had been committed while it was a member of the Premier League.

51. The Disciplinary Commission rejected Leicester City's argument, preferring the Premier League's purposive and contextual construction of the relevant rules. Its reasoning can be seen from the following passages from the decision.

> 45. The Commission considers that LCFC is a "Club" under the PL Rules applicable to the

Season in which it participated and remains so despite its relegation. Such an interpretation of the personal scope of application of the PL Rules fulfils the purpose of the PSRs and the principle of fairness that underpins their application and ensures that benefits (if any) are not conferred by a breach of the PSRs, and that the rights of other clubs which may have an entitlement to compensation under Section W are preserved. A literal interpretation of the term "Club" would thwart the purpose of the PSRs and enable LCFC, and other clubs in a similar position, to avoid disciplinary proceedings for alleged breaches of the PL Rules which in the Commission's view cannot have been intended by the PL clubs when they agreed the PSRs and the PL Rules.

53. We accept LCFC were entitled to change its Accounting Reference Period and did so properly in order to try and comply with the PSRs, however the Commission considers the fact that LCFC's financial year end fell after it was relegated is irrelevant to the issue of whether LCFC remains liable for an alleged breach of the PSRs for the 2022/2023 Season. The process (and ongoing obligations in respect of the process) of compliance with the PSRs commenced before LCFC ceased to be a member and was a process that continued until LCFC provided its final accounts for the financial year ended 30 June 2023, which it eventually did on 2 April 2024.

52. The Appeal Board reversed the Disciplinary Committee's decision, favouring Leicester City's argument. It found that the effect of Leicester City's relegation was that it had ceased to be a member of the Premier League. The PSR breach revealed by the accounts could not be a breach of the Premier League's rules (because Leicester City had ceased to be bound by the PSR), and could not be the subject of a complaint (because it was no longer a *Club* (defined in Rule A1.39 as *an association football club in membership of the League*).

53. The Appeal Board's reasoning can be seen from the following passages of its decision.

50. However, in the judgment of the Appeal Board, the submissions of the PL, and the Decision, understate the importance of the gap in time between LCFC ceasing to be a Club and the end of its accounting period. In paragraph 49 of the Decision, the Commission referred to and would seem to have accepted, the PL's submission that there was an "accounting process" to be concluded. There was indeed an accounting process to be concluded, but it had to follow, and could not precede, LCFC's accounting reference date of 30 June 2023.

51. The importance of the period of time between LCFC ceasing to be a Club and 30 June 2023 is that LCFC continued to carry on its business during that period. It is possible that it could have sold players during the fortnight beginning on 14 June 2023. A Club could have had an accounting reference date as late as 31 July, so that if it ceased to be a Club on the same date as had LCFC, i.e., 13 June 2023, it could have some 6 weeks of trading to reduce its expected losses. Apart from possible transfers of its players, it could have recruited sponsors who would agree to pay sponsorship fees before the year end, so that those fees would reduce the club's accounting losses. Thus, the period leading to 30 June 2023 was not, so far as LCFC was concerned, simply a period in which an "accounting process" was concluded: the relevant accounting process could not begin until after that date and had to take account of the club's transactions between the date it ceased to be a "Club" and the end of its accounting reference period.

52. This consideration affects the Commission's conclusion that "it is in practice impossible to determine the precise point of time at which LCFC allegedly exceeded the cumulative adjusted loss threshold of £105m". That point of time could not have been before 30 June 2023. Whether that point of time was midnight on 30 June 2023 or when LCFC's audited accounts for the year ended 30 June 2023 were signed off need not detain us: the important point is that it could not have been before midnight on 30 June 2023.

53. In paragraph 51 of the Decision the Commission accepted the PL's submission that that it is not necessary to determine a point in time when LCFC allegedly exceeded the loss threshold. The Commission stated that it was unnecessary to "determine a point in time when LCFC allegedly exceeded the loss threshold" because the Rules provide that a Club is "treated as being in breach" of the Rules.

54. In the view of the Appeal Board, the Commission placed too much weight on the phrase "treated as being in breach". This phrase could have been used because the liability under that Rule does not result from a deliberate or instant breach of the Rules, but is the result of a Club's trading over a 3-year period. The Commission did not seem to take into account that Rule E.49.2 applies only to a Club, as defined, and that LCFC was no longer a Club when the 2023 PSR Calculation came to be carried out.

55. We do not consider that the considerations relied upon by the PL justify departure from the words of Rule E.49. At paragraph 10.2 of its skeleton argument for the hearing before the Commission, it submitted:

> 10.2 *The PL rules are intended to be enforceable. A construction of the PL Rules that made them unenforceable against a club which breached them at a time it was subject to them would be absurd and contrary to principles of both law and sport.*

56. We agree, but this contention begs the question, which is before us, whether LCFC broke the PL Rule in question when it was subject to it, or whether at the material time it was no longer subject to the Rule in question.

54. On the basis of this reasoning the Appeal Board concluded –

59. It follows that Rule E.49 did not apply to LCFC when the PSR Calculation could be carried out and that LCFC was not in breach, and should not be treated to be in breach, of the Rules.

55. The Premier League challenged the Appeal Board's decision by way of a Rule X arbitration. The issue before the Rule X tribunal was the same as had been before the Disciplinary Commission and the Appeal Board, namely whether Leicester City could be held liable for breaching the PSR in 2022/23. The Rule X tribunal disagreed with the Appeal Board's approach to the construction of the relevant rules. It considered that the Appeal Board had adopted a too literal construction, and had failed to have sufficient regard to the purpose and context of the agreement created by the Rules. Its reasoning can be seen from the following.

53. The passage cited by the Appeal Board in its paragraph 45 is drawn from paragraph 18 iv) of the judgement of Lady Justice Carr in ABC Electrification Ltd. That passage was taken in turn from the judgment of Lord Neuberger in Arnold v Britton. The relevant passage continued as follows:
"Commercial common sense is only relevant to the extent of how matters would or could have been perceived by the parties, or by reasonable people in the position of the parties, as at the date that the contract was made"

54. In brief therefore, Lord Neuberger in *Arnold v Britton* and Lady Carr in citing the passage in *ABC Electrification* drew a distinction between invoking commercial considerations retrospectively to rewrite the meaning of a contract in light of how it had worked out for one of the parties, and having regard to commercial common sense when interpreting what the parties must be taken to have intended at the time they contracted. It is not just permissible but obligatory to have regard to the context in which an agreement was made in deciding what a reasonable person in the position of the parties at the time of the agreement would have understood the parties to mean.

68. It is clear, therefore, that in interpreting the meaning of words in a contract it is obligatory to consider the words in question in their contractual setting and the contract in which they

appear in its context. This is merely part of considering all relevant circumstances known or reasonably available to the parties when they reached agreement which might shed light on the contract's overall purpose and intended meaning. If, but only if, that exercise, reveals two possible constructions, a court is entitled to prefer the construction that is consistent with business common sense and to reject the other.

75. The real problem, however, with the Appeal Board's approach is that it appears to have disregarded the evident purpose of the scheme contained in Rules E.45 to E.50. Specifically, in considering whether Rule E.49 was intended to apply to any Club that had competed in the PL during the Season in which the PSR Calculation was to be performed, the decision of the Appeal Board appears not to have had regard to the evident purpose of the scheme constituted by this section of the Rules.

77. The clear impression evident from the content and sequencing of these Rules is that they are intended to operate as a coherent scheme which applies in its entirety to each Club competing in the PL during the Season in which the PSR Calculation is to be performed. That impression is strengthened by the "Guidance" that follows Rule E.45. The "Guidance" makes it clear that in due course the Board will examine the Annual Accounts for the accounting reference period in respect of which the information pursuant to E.45.2 has been supplied in order to check that the Clubs have been consistent in their methodology. The expectation, therefore, is that the PL will maintain jurisdiction to investigate in due course the Annual Accounts for each Club. There is no suggestion that this may exclude those Clubs that are relegated at the end of the Season and whose Annual Accounts may be prepared to dates that postdate their departure from the PL.

80. Similarly, although "*Club*" is a defined term, a fair reading of Rules E.45 to E.50 suggests that the repeated references to "*the Club*" throughout these Rules all echo the reference to "*Each Club*" in the opening words of Rule E.45. All such references denote a Club competing in the PL on and before 1 March during the Season in which the machinery in E.45 to E.50 is triggered. The inference from these Rules is that a Club to which E.45 to E.48 applies does not cease to be a Club to which E.49, the culminating Rule in the sequence, applies, simply because it is relegated and ceases to be a member of the PL before its Annual Accounts are prepared.

86. … the Tribunal has found justified the criticism that the Appeal Board failed to have due regard to the evident purpose of the scheme contained in Rules E.45 to E.50. However, we have no doubt that the concession that Rule E.49 could only apply to a PSR Calculation performed by reference to final figures in the Statutory Accounts (a concession which in the Tribunal's view is incorrect[2]) deflected the Appeal Board from engaging in detailed analysis of the scheme contained in Rules E.45 to E.50. Furthermore, in treating the defined meaning of "*Club*" as decisive the Appeal Board did not have the advantage afforded to us of the judgment and reasoning in *Europa Plus*.

56. The fact that Rule E49 was capable of applying to breaches other than a breach revealed by the PSR Calculation performed by reference to the Annual Accounts was considered further by the Rule X tribunal in *The FY 24 dispute* section of its decision. In that section the Rule X tribunal expressly recognised that (in the context of the EFL P&S Rules) a breach could take place before the Annual Accounts were completed after the end of the financial year, and therefore before the P&S Calculation could be made. The following passages from the decision are relevant.

100. In the Tribunal's judgment a P&S Calculation provided under Rule 2.5 of the P&S Rules is to be treated as giving rise to a breach of Rule 2.10.3 if the calculation discloses a loss exceeding the Upper Loss Threshold, even though a final P&S Calculation cannot be performed before the Annual Accounts for T are available and the figures may be subject to adjustment.

101. Although the final figure for Earnings Before Tax in the Annual Accounts may bring a Club that had previously predicted a loss above the Upper Loss Threshold back within those

> limits, there is some utility in Rule 2.10.3 being triggered by estimated figures for T pending provision of the Annual Accounts. An estimated loss that exceeds the Upper Loss Threshold triggers an embargo on Player registration under Rule 2.10.1 and the fact that the Club is treated as being in breach of 2.10.3 makes it mandatory to refer the breach to the CFRP. Accordingly, the concept of a deemed breach pending the provision of Annual Accounts would appear to have real utility in triggering a referral to, and investigation by, the CFRP in advance of Annual Accounts for T being made available. Where a loss exceeding the Upper Loss Threshold is predicted, it makes sense that the referral to the CFRP should occur before Annual Accounts are available. Finally, the language of Rules 2.1 to 2.10 with its multiple references to "the P&S Calculation" affords no textual support for the proposition that while references to a P&S Calculation in Rules 2.1.3 (c), 2.5. 2.6 and 2.8 are, necessarily, to a calculation based on estimated figures for T, the reference to the P&S Calculation in 2.10 can only be to a calculation based on Annual Accounts for T.

We consider that those observations made in relation to the P&S Calculation apply equally to the PSR Calculation.

57. We recognise the force of the simplicity of Everton's argument – a breach that occurred after the claimed loss had been suffered cannot have been the cause of that loss. As McGregor said, that proposition needs no authority. The argument, however, is based upon an analysis that the breach cannot have taken place before the end of Everton's financial year on 30 June 2022. If that analysis were to be incorrect, the argument would fall away.

58. We consider that Everton's argument makes the same error of construction as was made by the Appeal Board. It relies on a literal construction of the Rules. We consider that that literal construction fails properly to reflect the purpose and context of the PSR regime. As the Rule X tribunal explained, the Rules create an integrated, coherent system that creates the context in which any construction exercise must be carried out. That exercise must reflect the purpose and structure of that regime so as to give effect to its overall purpose.

59. Everton's construction fails to do that, but produces a result (albeit based on a logical literal construction) that does not deliver the purposes of the regime. The correct construction must recognise that, as explained by the Rule X tribunal, a breach may take place during the currency of the playing season before the Annual Accounts can be completed, and therefore before the final PSR Calculation can be made.

60. There is no doubt about the facts. By 2022 Everton was on a path to a PSR Calculation that would reveal a true loss of £19.5 million above the permitted upper limit. It is entirely correct that it was theoretically possible for Everton to mitigate that loss by a variety of means, the most obvious of which is selling

players. But as a matter of fact it did not do so. The reality is that the PSR breach revealed by the PSR Calculation had been present for many months before Burnley's relegation at the end of the season. A construction of the Rules that does not reflect that factual reality is simply at variance with the PSR regime created by the Rules.

61. As the Rule X tribunal explained, the Rules tie the annual accounts to the playing season. Any adverse effect caused by a breach of the PSR occurs during a playing season which falls within a financial year. Accordingly, a proper construction of the Rules should recognise that any breach relates to the playing season: it is not something that can be confined to a particular date determined by the end of the financial year.

62. We therefore conclude that Everton's breach of the PSR began before the end of the 2021/22 season and before Burnley was relegated. It did not materialise only at the end of Everton's financial year or when the Annual Accounts were completed. It was not a breach that emerged as a single event, but is one that developed and continued over a period of time. The breach was therefore in existence before Burnley's relegation. It is open to Burnley to maintain its case that the breach caused the relegation and caused the claimed loss.

CAUSATION

Causation: The Parties' Cases

63. Burnley's case is that Everton's breach of the PSR caused it to be relegated from the Premier League into the Championship. We found in the PSR complaint proceedings that Everton had breached the PSR by losses that were £19.5 million in excess of the permitted maximum. We have ruled in this decision that that breach began before the end of the 2021/22 season and was therefore capable of having caused the relegation. The issue that we now address in this section of the decision is whether as a matter of fact it did so.

64. As explained in paragraph 2, at the conclusion of the 2021/22 season Burnley finished just two places, and four points, below Everton, with a superior goal difference. It finished in 18th place in the Premier League and was therefore relegated to the EFL Championship.

65. Burnley argues that the Commission found in the PSR complaint proceedings that Everton's breach of the PSR conferred on it a sporting advantage, and that finding is binding on Everton. We agree. It is not, however, a live issue because Everton accepts the fact (but not the extent or the effect) of the sporting advantage.

66. Burnley submits that the simplest method of quantifying the sporting advantage is to adopt as a proxy the 6 points deduction imposed by the Appeal Board in the PSR complaint proceedings. That directly reflects the extent of the breach. A deduction of 6 points at the end of the 2021/22 season would have had the effect of securing Everton's relegation in place of Burnley, who would have remained in the Premier League. Causation would therefore be simply established. We recognise the attraction of the simplicity of Burnley's submission but cannot accept it as being appropriate. The 6 points deduction was expressed to be a sanction for Everton's breach of the PSR. Financial fair play decisions repeatedly recognise that determination of the appropriate sanction for a breach is not a quantification of the sporting advantage conferred by that breach. For example in Sheffield Wednesday FC v The Football League Ltd (SR/196/2020) Lord Dyson said at paragraph 103 –

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

67. In support of a submission advanced as an alternative to the 6 point proxy argument Burnley instructed experts to conduct an analysis as to whether Everton's breach of the PSR resulted in a sporting advantage and, if so, the extent of that advantage. The experts in question were Professor Rob Wilson, Director of Executive Education at University Campus of Football Business, and William Daniels of Daniels Associates, a statistician who has previously worked as both Head Football Trader and Head American Football Trader at Spreadex, a leading company in the Sports Spread Betting sector. Mr Daniels has also held executive roles at both AFC Wimbledon and Forest Green Rovers. In response Everton instructed Derek Holt of Alix Partners, an economist with 30 years' experience as an expert and economic advisor but with no direct experience of footballing issues. Mr Holt was instructed to assess the impact of Everton's breach of the PSR and the likely impact had Everton reduced its spending by £19.5 million over the PSR Period.

68. In addition to technical expert evidence Burnley called non-technical expert evidence from David Baldwin. Mr Baldwin has had eighteen years' experience in the football industry, more than six of which were at or associated with Burnley. He communicated his evidence forcefully and clearly. Mr Baldwin was confident that what he described as his *lived experience* enabled him to express an informed opinion.

69. Mr Baldwin's opinion and experience can be seen from the following passage from his evidence. Mr Baldwin had asked to see page 19 of Mr Holt's opening presentation.[21]

> A. I will just wait for it to load {O2/2/19}. So as an example of what I did at Huddersfield and more closely what I did at West Bromwich Albion and the very virtue of the fact of why my credentials of being an expert is useful to today's Commission. So when you read through the table that has been referred to in Kevin Thelwell's report, in Mr Maryniak's report, it is also in Wilson and Daniels' report, take the period from the four years of the PSR period that has been under review and you see the wages and amortisation of -- I will put my glasses on -- 255.1, 264, 263.8. That is the three seasons in the prelude before you go into the 21/22 season. What you see there is a points acquisition of 54, 49, 59. Just for average, that is 54 points achieved. If then you then come down to 21/22 season and you see a reduction in the wages and amortisation cost at 230, that is a significant drop and it's also a significant points drop of 39 points. If I walked into that boardroom in the summer of '21 and was asked to look at this club and assess there what their aspirations are, what their challenges are and what they needed to do in order to continue on the trajectory of performance or to avoid any potential breaches, the first question I would be asking is, "At what level do you need to be at in order to ensure that you achieve your equal objectives of 20/21?" Now, if it was presented to me they were going to reduce by £30 million and yet they were saying that their budget were saying they would achieve an eighth place finish, I would say, "How are you going to achieve more than 59 points spending £30 million less?" That is a high risk strategy. But if I then asked a second question -- and these are the things I would do going in to assess a club. I would say, "Where are you on your PSR position for this year?" And the answer would be, "Actually, if we want to be compliant (mistranscribed as "complaint"), we need to be a further 19.5 million reduced from our 230.3 million". Absolutely the advice I would be giving them in those set of circumstances are, "You are running a massive risk of relegation. If you want to be compliant with the PSR and you are going to take a further 19.5 million off the 30 that you have already taken off on a year by year comparison, and in that year by year comparison, the points had already dropped by an average of 15 serious problem". That is my expert capability and that's what -- doing that over 15/20 clubs already in my career, that is why people call on me, because I can assess these things based on living experience.
>
> Q. The answer that you have just given, the proposition you have just given to me, would depend entirely on how you planned to make the savings, wouldn't it?
>
> A. The proposition I'm giving you is that I can assess this information. I have run clubs prudently for 13 years. I was employed by the EFL because I was an exemplar on how clubs should be run and very quickly can assess what challenges they have, ask the right questions and then apply solutions to them. West Bromwich Albion was sold to a new owner and prevented administration. Huddersfield Town was sold to a new owner, avoided relegation and literally avoided administration by four hours.

70. Mr Baldwin was asked about his lack of technical expertise in the following

[21] Day 5, P168 (14) – P171 (2)

exchange.[22]

Q. Can we go, please, to paragraph 42 of your statement {E2/1/11} it is on page 11. You say:

"Based on my experience, and for the reasons set out above, it is my opinion that had Everton spent £19.5 million less during the 2021/22 season, it would probably have been at least four points worse off at the end of that season."

Now, just pausing there, you are aware, aren't you, that we had nearly two days of statistical and econometric evidence directed to the question of how you might quantify the impact of the overspend, yes?

A. I was here for one of those days, yes.

Q. Well, I saw.

A. Yes.

Q. And you are not yourself claiming any statistical or econometric expertise?

A. No, not at all.

Q. And you don't here offer any empirical reasoning in support of the conclusion that you express, do you?

A. It is my lived experience and it is the analysis of why the datum line was at Everton at the time, what they adjusted down for that 21/22 season and what would have happened if they adjusted down by a further 19.5. £30 million reduction, reduce them down by an average of 15 points. In my opinion, and this is just a lived opinion, I'm not providing any economics or any data analysis, I am saying that had that reduction – instead of being 30 million, had that reduction been 49.5 million, instead of losing 15 points against the datum average of three years, I believe it would have been more than that. A minimum of four more. And it is lived experience.

71. The analysis undertaken by Professor Wilson & Mr Daniels involved three separate stages. The first stage performed an examination of the relationship between player expenditure (wages plus amortisation) and points gained by all Premier League clubs over 12 seasons from 2012/23 to 2023/24. As we have said, it was common ground between the parties that expenditure caused a sporting advantage in the form of a greater number of points.

72. The second stage involved an assessment of the value of the additional points gained by Everton caused by the breach of the PSR under four different scenarios covering different periods within the 12 seasons analysed in stage 1. Wilson/Daniels calculated the additional points gained by dividing the total points gained by Everton in each of the periods by the club's total player related expenditure for the same period to arrive at a figure for points gained per £1 million spend. By multiplying this resulting figure by the £19.5 million overspend the experts calculated their estimate of the points advantage enjoyed by Everton as a result of the overspend.

[22] Day 6, P29 (10) – P30 (16)

73. The third stage of the Wilson/Daniels analysis was to undertake a probabilistic assessment of Everton being relegated if it had not benefitted from the points advantage estimated in stage 2. This assessment was undertaken using *ratings* for each Premier League club, generated by Daniels Associates ahead of the 2021/22 season, and a model which simulated the outcome of Everton's 38 matches 100,000 times, assigning an adjusted rating to Everton which reflected the reduced points totals derived from each of the four scenarios in stage 2.

74. The result of the stage 3 analysis is that in each of the four scenarios Everton is more likely to have been relegated than Burnley. Professor Wilson & Mr Daniels concluded as follows.[23]

> Based on the three-stage analysis provided in this expert report, it is the view of …the report authors, that Everton gained an unfair sporting advantage over Burnley Football Club in the season 2021/22, which led to the relegation of Burnley, rather than Everton.

75. Mr Holt, on behalf of Everton, made a number of criticisms of the Wilson/Daniels report. He argued that Professor Wilson & Mr Daniels were wrong to presume that the entire £19.5 million could be attributed to the 2021/22 season. He believed that the Wilson/Daniels report failed to reflect the effect of diminishing returns. He argued that each of the four scenarios failed to reflect that player related expenditure had increased over time – in particular over the 12 years analysed in stage one. So the second stage of the analysis produced a distorted and unreliable result. Mr Holt made the point that if the inputs from stages 1 and 2 were unreliable any conclusions from stage 3 would be equally unreliable. Professor Wilson and Mr Daniels sought to rebut each of these challenges to their analysis.

76. Mr Holt adopted a different methodology from the Wilson/Daniels report. He reported that he had been instructed to allocate the entirety of the £19.5m overspend to player-related expenditure. He carried out a logit regression analysis to determine how player spend influenced match results. For each of the four seasons of the PSR Period Mr Holt replayed the 380 Premier League games and modelled expected results, points and league positions. He then deducted points attributable to Everton's breach from the club's actual points for each season to arrive at a counterfactual points total for Everton. He undertook this exercise using three different allocations of the £19.5m overspend and reported the points adjustment for each allocation and each season of the PSR Period.

[23] Professor Wilson's and Mr Daniels' report dated 23 June 2025, paragraph 56

77. Mr Holt concluded as follows.[24]

> ...the evidence suggests that EFC's £19.5 million PSR breach did not materially contribute to BFC's relegation from the Premier League in 2021/22. BFC's relegation resulted from sporting underperformance that cannot be attributed to EFC's PSR breach but rather to the complex interplay of factors that determine success and failure in elite football.

78. In response to criticism by Professor Wilson and Mr Daniels that his methodology was incomplete for failing to rely on probabilistic testing Mr Holt produced a second report in which he addressed this criticism. He reported that his conclusion regarding the likelihood of Burnley's relegation remained unchanged after conducting 100,000 simulations consistent with the Wilson/Daniels methodology.

Causation: Discussion

79. We consider it important not to lose sight of the fact that Everton spent more than was permitted by the PSR because it was seeking to maintain its Premier League status. It is common ground that as a matter of fact breach of the PSR conferred a sporting advantage on Everton, and that as a matter of fact Everton was not relegated but stayed in the Premier League. The question, however, is not whether that sporting advantage contributed to Everton staying in the Premier League, but whether it caused it to do so, and therefore caused Burnley to be relegated.

80. Mr Baldwin was an important witness. We recognise that Mr Baldwin had a history of close involvement with Burnley, but we are satisfied that that did not colour his evidence. He was a straightforward, forceful witness who we consider was giving unvarnished evidence of his true opinion. We considered Mr Baldwin to be a credible and impressive witness who has a wealth of experience in the industry which enables him to provide an authoritative opinion. Mr Baldwin's reasoned evidence of the link between expenditure and performance is compelling and strengthens Burnley's case that the breach of the PSR probably caused it to be relegated. We recognise that notwithstanding Mr Baldwin's clear opinion it is not possible to establish from his evidence a mathematical correlation between expenditure and points. Nevertheless, we accept the force of Mr Baldwin's opinion that if Everton's overspend of £19.5 million had not taken place it would have received at least 4 fewer points in 2021/22 and would therefore

[24] Mr Holt's report dated 28 July 2025, paragraph 9.1.6

have been relegated.

81. We proceed to evaluate the technical expert evidence to see whether that displaces or supports our provisional conclusion that Burnley's relegation was caused by Everton's breach of the PSR.

Causation: Wilson & Daniels Analysis

Introduction

82. As we have explained, Professor Wilson's and Mr Daniels' analysis was undertaken in three stages. Stage 1 involved the creation of a database of financial information and points won for all Premier League clubs for the 12 seasons from 2012/13 to 2023/24. 2012/13 was selected as the start point because it coincided with the first full three-year reporting phase of UEFA's original Financial Fair Play rules. For the 12 seasons they considered three possible cost variables to be compared with the league points achieved by each club, namely *(1) wage costs; (2) wage and amortisation costs; and (3) wage and amortisation cost plus player additions*.[25] Most clubs do not report player wages separately and so the amounts disclosed in clubs' accounts for wages represent the total cost for all staff, albeit with player wages being by far the largest component. Commentators such as Deloitte rely on the amounts disclosed as total wages as a reliable proxy for player wages. Professor Wilson and Mr Daniels concluded that wages plus amortisation represented the best measure of player-related expenditure and so plotted these figures against points gained for each club over the 12 seasons under review. They concluded that this stage of their analysis evidenced a high degree of correlation between player-related expenditure and points achieved.

83. Stage 2 involved a more detailed investigation into Everton's spending and a calculation of the additional points attributable to the club's overspend. Wilson/Daniels utilised annual player-related expenditure and points achieved by Everton from stage 1 and considered four scenarios.

(1) Scenario 1 was the entire 12 year period reviewed in stage 1. For this scenario Wilson/Daniels calculated Everton achieved an average of 0.37 points per £1m spent and so would have gained an estimated 7.13 points as a consequence of the £19.5m overspend.

(2) Scenario 2 was the nine year period (2015/16 to 2023/24) during which the

[25] Professor Wilson's and Mr Daniels' presentation dated 22 September 2025, slide 6

PSR have been in force. For this scenario, Wilson/Daniels calculated Everton achieved an average 0.25 points per £1m spent and so would have gained an estimated 4.82 points as a consequence of the overspend.

(3) Scenario 3 was the eight years during which Everton was owned by Farhad Moshiri (2016/17 to 2023/24). For this scenario, Wilson/Daniels calculated Everton achieved an average 0.22 points per £1m spent and so would have gained an estimated 4.35 points as a consequence of the overspend.

(4) Scenario 4 was the four years during which Everton was found to be in breach of the PSR (2018/19 to 2021/22). For this scenario, Wilson/Daniels calculated Everton achieved an average 0.20 points per £1m spent and so would have gained an estimated 3.85 points as a consequence of the overspend.

84. Wilson/Daniels conclude that scenario 1 was *the preferable and most statistically robust scenario* while recognising the merits of the alternative scenarios.

85. Adjusting Everton's actual points achieved in 2021/22 (39 points) by the estimated gains in scenarios 1-4 would reduce the club's points for the season to between 35.15 (scenario 4) and 31.87 (scenario 1) points by comparison with Burnley's 35 points. In their second report, Wilson/Daniels emphasised that their stage 2 analysis merely calculated the average points advantage gained by Everton and so a third stage remained necessary to assess the probability of Everton or Burnley being relegated.

86. For the stage 3 analysis Wilson/Daniels employed historical ratings for Premier League clubs for 2021/22 which had been developed and used by the gambling industry. These ratings take account of the wide range of criteria listed on page 22 of the Wilson/Daniels presentation to the Commission, including historical performance, financial data, squad quality & depth, management, injuries, benefits of home advantage, recent transfer activity, club organisational quality, club & supporter cohesion, etc. In the Wilson/Daniels stage 3 analysis the ratings for the 19 other clubs remained as originally set ahead of that season while Everton's rating was revised to reflect the 39 points actually gained by the club in the season, less the adjustment for its overspend in each of the four scenarios as calculated in stage 2. Everton's 38 matches were then simulated 100,000 times in order to assess the probability of Everton or Burnley being relegated at the end of

the season. Matches which did not involve Everton were not revisited.

87. The ratings were adjusted as part of the process of predicting the outcome of a match: *Betting companies apply an adjusted Poisson Distribution model to convert the number of "expected goals scored" by each team in that match into a probability of match outcomes.*[26] An adjusted Poisson Distribution corrects what would otherwise be a tendency to underestimate draws in low scoring matches.

88. The results of the stage 3 analysis are summarised in the table below.

Scenario	Seasons	Period	Average Everton points per £1m spend[1]	Estimated points gain on £19.5m overspend[2]	Everton expected points[3]	Chance of relegation	
						Everton	Burnley
1	12/13 – 23/24	Entire 12 years	0.37	7.13	31.87	69.54%	29.39%
2	15/16 – 23/24	Years PSR active	0.25	4.82	34.18	57.21%	41.24%
3	16/17 – 23/24	Moshiri era	0.22	4.35	34.65	54.50%	43.80%
4	18/19 – 21/22	PSR Period	0.20	3.85	35.15	51.47%	46.71%

Notes
1. The average points per £1m spend are as reported in paragraph 83.
2. The estimated points gain on £19.5m overspend is calculated by multiplying the average points in the preceding column by £19.5m.
3. The Everton expected points total is calculated by deducting the estimated points gain in the preceding column from the 39 points actually gained by Everton in season 2021/22.

89. Based on these findings, Professor Wilson & Mr Daniels concluded as follows.[27]

> Based on the three-stage analysis provided in this expert report, it is the view of…the report authors, that Everton gained an unfair sporting advantage over Burnley Football Club in the season 2021/22, which led to the relegation of Burnley, rather than Everton.

Everton's Challenge to Stage 2

90. Everton made a number of criticisms of the Wilson/Daniels analysis. These were originally articulated in Mr Holt's first report and subsequently expanded upon, in particular during cross examination of Professor Wilson and Mr Daniels. Everton questioned the reliability of the Wilson/Daniels stage 2 outputs and claimed that *as Burnley's experts accepted, the stage 3 process was dependent on stage 2 inputs*.

91. Everton identified six particular criticisms of the stage 2 findings, summarised as follows and addressed in detail in the following paragraphs.

(1) Incorrect allocation of entire £19.5 million to season 2021/22.

(2) Increasing transfer fees and wages over the period.

[26] Professor Wilson's and Mr Daniels' presentation dated 22 September 2025, slide 23
[27] Professor Wilson's and Mr Daniels' report dated 23 June 2025, paragraph 56

(3) Diminishing marginal returns.

(4) Absolute versus relative spend.

(5) Inefficiency of spend.

(6) Assumption that entire overspend was on players.

92. (1) Incorrect allocation of entire £19.5 million overspend to season 2021/22. In his first report Mr Holt expressed the view that the Wilson/Daniels approach was *fundamentally incorrect*, arguing that the Commission had found that Everton's breach had been *with reference to the Relevant Period of four seasons* and quoting Everton's factual witnesses who suggested *that spending across multiple seasons of the Relevant Period was high and ineffective, consistent with allocating at least some of the overspend to earlier seasons.*[28] By contrast, although Mr Holt models three allocations of the overspend, his favoured allocation was to spread the overspend evenly over the PSR Period, i.e. £6.5 million per season.

93. Under cross-examination, both Professor Wilson and Mr Baldwin agreed that any sporting advantage derived from the overspend accrued over the four seasons. Professor Wilson further agreed that Everton's spending and losses were higher in the earlier years of the PSR Period.

94. However, Professor Wilson expressed the opinion that *spending will have an impact over the course of the period, as it will do within a season, and the overspending, so in this instance the £19.5 million, is applicable in the season to which that overspending relates, so in this context, the 21/22 season.*[29] He emphasised that *the impact of spending takes place across the course of a PSR period and that the impact of the overspending, which has to be cumulative because you add up all the years that have gone before it, has an impact in the final year of the PSR period -- the final year of the PSR period, which is the year of the breach*[30]. Page 14 of the Wilson/Daniels' presentation asserted *It is crucial, therefore, to consider spending as a cumulative effort, culminating in a breach in the final season, rather than to consider only the spending by the club in that final season.*

95. Professor Wilson confirmed the cumulative benefit derived from the sporting

[28] In these extracts from Mr Holt's report, he use the term "Relevant Period" to define the PSR Period
[29] Day 4, P123 (11-16)
[30] Day 4, P129 (15-21)

advantage in answer to questions from the Commission[31].

Q. Yes, I just want to clarify what you said about cumulative. As I understood it, you were talking about cumulative sporting advantage; were you?

A. Cumulative spending.

Q. Or cumulative spending, only cumulative spending, you were not talking about cumulative sporting advantage?

A. I almost think they are one and the same. So your cumulative spending will have an impact on your cumulative sporting performance.

Q. So are we to understand by that that -- and just correct me if I am completely on the wrong track, which I may be. If the spending achieves in effect the building of a team, getting together a team, you start in year one and you buy one player, next year you buy another player and so on, the sporting advantage builds up over time. Is that what you meant?

A. That's right. Theoretically, that is what should happen.

Q. So as you go along, you are spending money on more and more players. You end up, you hope, with a better team and hence the final effect is the ultimate sporting advantage which you had in mind.

A. That's right.

96. We conclude that Professor Wilson is correct to say that the benefit of the overspend is cumulative. It would be wrong to divide it across the four years of the PSR reporting period by reference to individual seasons. The reality is that the benefit continues from season to season. Its effect cannot sensibly be compartmentalised. The proper approach is therefore to examine the effect that the total overspend of £19.5 million had on Everton's performance in the 2021/22 season.

97. (2) Increasing transfer fees and wages over the period. In his first report, Mr Holt challenged the Wilson/Daniels conclusion that their scenario 1 (player expenditure and points achieved over the 12 years from 2012/13 to 2023/24) represented *the preferable and most statistically robust scenario*. Wilson/Daniels argue that *a larger dataset is preferable*. Mr Holt accepts that that may assist in providing more accurate results *where the underlying relationship between variables of interest would not be expected to change* but that *this is clearly not the case as concerns expenditure by football clubs and their sporting performance*. Over the 12 year period the available points per season have not changed whereas total player-related expenditure (both by Everton and by Premier League clubs generally) has more than doubled.

98. In stage 2 of the Wilson/Daniels analysis, the 12 year scenario (scenario 1)

[31] Day 4, P180 (3) – P181 (3)

calculated Everton's advantage as 7.13 points, compared with points advantages of 3.85-4.82 for the shorter periods. Professor Wilson nevertheless justified the use of the 12 year scenario on the basis that a larger dataset (240 data points) ensured the highest degree of correlation between expenditure and points in stage 1 of his and Mr Daniels' analysis,[32] as evidenced in the exchange below.

Q. Yes. And your conclusion was that the most robust and preferable analysis was that it is 0.37 points per million and if you apply that to whatever Everton actually spent you get the results in the last column.

A. So we need to be clear, then. So the statistically significant relevance of this context is from stage 1, so the relationship between spending and the number of league points achieved, and that larger dataset gives us confidence to observe those relationships. As I mentioned, we are looking for as much certainty as we can possibly find in using a correlation coefficient so that we understand that the relationship happens on a general basis and not by chance.

99. Although Professor Wilson was seeking *as much certainty as we can possibly find*, he did acknowledge that, for the data covered by his and Mr Daniels' analysis, smaller datasets also provided strong evidence of correlation, as evidenced in his response below.[33]

Well, I think the period of the PSR calculation, if we accept scenario 4 in our analysis, I believe, and we haven't -- or I haven't modelled this in my report, but I believe the correlation coefficient for those four data points is 0.85, which is statistically strong and positively correlates.

And as further evidenced in the exchange below.[34]

Q. But that is not my question. My point is more that you are using 100% of the population each year. If you say it is 12 years, you have 240; if you said it's 10 years, you would have 200. Say you just did this exercise for eight years; have you any idea what the correlation coefficient would be? Would it still be telling you that you were getting reliable results or once you're down to sort of eight years does it begin to get a bit more questionable?

A. It is a fair question –

Q. The reason for asking is that obviously then you are eliminating the low spend years.

A. It is a good question. Over the Premier League, and I don't have this data to hand, but over the Premier League season the correlation would still be statistically [mistranscribed as "statutorily"] significant. It would drop a little bit, I imagine, maybe 0.7 as opposed to 0.72, but it would still be statistically significant.

100. These responses acknowledge that, notwithstanding Professor Wilson's preference for scenario 1 as being *the most statistically robust*, the points per £1m spend for scenarios 2-4 are also supported by a correlation that is statistically significant.

101. Data presented by Mr Holt disclosed total wage and amortisation spend by

[32] Day 4, P74 (3-20)
[33] Day 4, P101 (12-17)
[34] Day 4, P186 (16) – P187 (8)

Premier League clubs of £2.178 billion in 2012/13, increasing to £5.692 billion in 2023/24. Professor Wilson accepted the accuracy of those figures and agreed that the maximum number of points available to a club remained at 114 each season. Notwithstanding this, Professor Wilson rejected the suggestion that inclusion of (lower) spending data from earlier seasons resulted in misleading figures being used in the stage 2 analysis, or that those spending figures should be adjusted for inflation. In support of his opinion he emphasised that the upper limit for the PSR had remained at £105 million throughout the period and had not been *adjusted for inflation*.

102. It appeared to be common ground between the parties that Mr Holt's data merely represented the increase in spending by Premier League clubs over the period rather than inflation as more conventionally defined, namely the increase in price of individual products. Although it seems certain that both individual player wages and amortisation costs have risen over the period, it is not known the extent to which these are the principal component of Mr Holt's reported increase in expenditure. Other factors might include increased squad sizes and the cost of additional non-playing staff. For example, it was acknowledged in paragraph 82 that clubs' total wage costs have been used in lieu of (undisclosed) player wages in both experts' calculations of player-related expenditure. Everton's accounts to 31 May 2013 disclose the average number of employees for the year to have been 234 (playing training and management – 82) whereas the club's accounts to 30 June 2024 report 506 average employees (playing, training and management – 176). It therefore seems probable that factors other than just an increase in average player wages and amortisation costs have contributed to Mr Holt's reported increases. However, for simplicity, we have adopted the term "inflation" throughout this decision to describe the increase in spending.

103. In response to Everton's attempt during cross examination to distinguish between stage 1 (*trying to analyse…whether there is a relationship between spending and points*), and stage 2 (*trying to establish how many points in the 21/22 season £19.5 million of spending was worth*)[35] Professor Wilson maintained his opinion that the methodology adopted for stage 2 was correct and it was unnecessary to adjust the figures for annual spend for inflation.

[35] Day 4, P71 (14-21)

104. Everton had prepared analyses seeking to highlight the flaws in the Wilson/Daniels stage 2 findings which relied on the scenario 1 analysis (0.37 points per £1m spend) as being the *preferable and most statistically robust scenario*. Everton produced a table which applied the 0.37 points per £1m spend to Everton's actual spend in each of the 12 years covered by the analysis. This table produced improbable results: for example, that Everton would have achieved just 27 points in 2012/13 (actual – 63), resulting in a 19th place finish (actual – 6th), and that the club would have consistently qualified for the Champions League in the more recent seasons, including securing points totals of 85-98 in the seasons of the PSR breach. The evident purpose of the analysis by Everton was to draw attention to the very significant increase in player-related expenditure over the 12 year period.

105. Everton also presented in tabular form data which had been presented graphically in Mr Holt's first report purporting to represent inflation in player-related expenditure over the 12 years. Using 2021/22 as the base year, an inflation/deflation multiplier was calculated as the spend in 2021/22 divided by the spend in each of the other years (2012/13 to 2023/24). By way of example the multiplier for 2012/13 was 2.27 and for 2023/24 was 0.87. By applying these multipliers to Everton's actual wage and amortisation spend in each of the 12 seasons it was possible to calculate *inflation-adjusted outputs*, namely an adjusted spend and an adjusted points per £1m spend, both for each individual season and for each of the four scenarios in stage 2 of the Wilson/Daniels analysis. Predictably, the resulting points per £1m spend were, on average, considerably lower than those calculated by Wilson/Daniels in stage 2.

106. Everton made the further point to Professor Wilson that, even after adjusting for inflation, the points per £1m spend were significantly higher in the earlier years than in the later years. It argued that this demonstrated that Everton was *spending more efficiently in the period 12/13, 13/14, 14/15, etc*. Accordingly, it argued, using that data to calculate Everton's points advantage in 2021/22 would give a *misleading and inaccurate impression*. Professor Wilson did not agree with Everton's argument, maintaining the correctness of his and Mr Daniels' approach which was *smoothing out the outliers within that dataset by using the full 12 years*.

107. In its closing submissions,[36] Burnley went further, claiming as follows.

> There is no need to adjust the wages and amortisation figures for "inflation" in circumstances where (i) the Pt/W+A[37] ratios take into account Everton's relative spending vis-à-vis other teams in the league in a given season; (ii) by virtue of the "inflation" in wages and amortisation in the Premier League, all teams were spending more for the same number of points available in more recent seasons; (iii) clubs' revenues were increasing alongside their wages and amortisation outgoings across this same period; and (iv) there is no agreed rate of inflation for Premier League wages and amortisation.

108. Burnley sought to reinforce this point during cross-examination of Mr Holt, informing him that the points per inflation-adjusted spend referred to in paragraph 105 above had been run through the Wilson/Daniels stage 3 simulation with the following results. In each scenario the exercise continued to show a greater probability of Everton rather than Burnley being relegated, albeit the margin between the two outcomes had narrowed.

Scenario	Seasons	Period	Average Everton points per £1m spend[1]	Estimated points gain on £19.5m overspend[2]	Everton expected points[3]	Chance of relegation	
						Everton	Burnley
1	12/13 – 23/24	Entire 12 years	0.24	4.66	34.34	56.20%	42.13%
2	15/16 – 23/24	Years PSR active	0.21	4.01	34.99	52.47%	45.63%
3	16/17 – 23/24	Moshiri era	0.20	3.90	35.10	51.81%	46.25%
4	18/19 – 21/22	PSR Period	0.19	3.66	35.34	50.51%	47.59%

Notes
1. The average points per £1m spend are the *inflation-adjusted outputs* reported in paragraph 105.
2. The estimated points gain on £19.5m overspend is calculated by multiplying the average points in the preceding column by £19.5m.
3. The Everton expected points total is calculated by deducting the estimated points gain in the preceding column from the 39 points actually gained by Everton in season 2021/22.

109. Mr Holt conceded that he was not surprised by these results, observing that the scenario 4 points per adjusted spend were *broadly consistent with* the original scenario 4 calculation. However, he took issue with Burnley's suggestion that this exercise demonstrated that *inflation does not matter*. He maintained that *the trend inflation is important but it is not the only thing that is important, it is one of several things that are important*. Mr Holt also agreed that allowing for the impact of inflation *would be less acute in the four-year case than the 12-year case, but it doesn't mean it doesn't suffer also from the inflation within the four-year period. So that is my observation as to whether the four-year period corrects for trend inflation. It somewhat -- it mitigates it somewhat, but not entirely.*[38]

[36] Burnley's closing submissions, paragraph 43.2
[37] Points per wages and amortisation spend
[38] Day 5, P33 (5-11)

110. We consider that there is some force in the criticism of Wilson/Daniels' choice of the 12 year period. It is clear that player-related expenditure grew dramatically throughout that period. We consider that the much higher points per £1m spend in scenario 1 (7.13) than in scenario 4 (3.85) is, to a great extent, a consequence of that expenditure growth. Scenario 4 covers a four year period with relatively modest growth in expenditure and is also the four year period of Everton's PSR breach. This period comprised a smaller dataset but Professor Wilson was nevertheless confident of a *statistically strong* degree of correlation. Finally, we are mindful of Burnley's evidence, presented in paragraph 108, that even the *inflation adjusted* points per £1m spend, when run through the Wilson/Daniels stage 3 simulation, showed there to be a greater probability of Everton rather than Burnley being relegated, under each of the scenarios (including scenario 4). The criticisms of Wilson/Daniels' preference for the 12 year period therefore do not alter the validity of their conclusion.

111. (3) Diminishing marginal returns. Mr Holt raises this issue in his first report[39].

> Economic theory often predicts that the relationship between expenditure – and a given outcome variable – exhibits diminishing marginal returns. In the context of this case, this would imply that as the amount being spent by a club increases, each additional pound spent should generate progressively smaller performance improvements. This could happen for a number of reasons, such as the finite pool of elite talent available for acquisition or the increasing difficulty of improving already strong squads.

112. Mr Holt claims that the relationship between expenditure and sporting performance may be non-linear and that Professor Wilson and Mr Daniels have failed to take account of this possibility in their assessment of the points advantage resulting from the overspend. Mr Holt further notes that a number of academic studies have suggested the existence of diminishing marginal returns between spend and performance for football clubs.

113. Professor Wilson and Mr Daniels address this criticism in their reply report[40] as follows.

> The proposition that each additional pound spent yields progressively smaller returns is only empirically observed among the highest spending clubs, where existing squads already possess closer-to-optimal talent levels. This diminishing effect is significantly diluted in mid-to-lower-tier clubs (such as, for example, Everton) for whom incremental spending continues to deliver direct and measurable performance benefits.

[39] Mr Holt's report dated 28 July 2025, paragraph 4.2.6
[40] Professor Wilson's and Mr Daniels' report dated 8 August 2025, paragraph 17.a

114. Mid-to-lower level Premier League clubs are likely to focus recruitment on specific deficiencies within their squad. Wilson/Daniels cite the example, articulated in the evidence of Mr Moshiri to the Commission in October 2023, of Everton needing to recruit in 2021/22 *to deal with the contingency as the entire mid-field had long-term injury*. In their evidence to the Commission, Wilson/Daniels contrasted the circumstances of Manchester City (estimated turnover c £700 million) and Everton (estimated turnover c £200 million). They suggest that Manchester City spending £20 million on a new player would have relatively little impact on its squad whereas Everton spending a similar sum would have a significant impact with that player likely to feature regularly in the matchday squad.

115. In subsequent evidence, Professor Wilson expressed the view that there might be a turning point beyond which diminishing marginal returns became a consideration. He acknowledged that he could offer no empirical analysis in support of this view but believed diminishing marginal returns would be likely to affect only the top six clubs, speculating that the turning point might be player expenditure in excess of £400 million, noting that *Everton are below what that turning point probably is*.

116. Mr Holt was reluctant to express any view on the existence of a turning point. He reiterated the existence of academic studies which addressed diminishing marginal returns but *none of them have suggested, as far as I can see, that it is only a feature at the very top*. He also agreed that diminishing marginal returns could have been *baked into Everton's results over that period of time*, being the 12 season period covered by the experts' analyses.

117. In its closing submissions, Everton claimed that *Professor Wilson accepted that Everton experienced diminishing returns over this period, spending a lot more and getting fewer points*. There is no doubt Professor Wilson did indeed acknowledge that, based on his and Mr Daniels' data, Everton had *spent a lot more and in fact they got fewer points than they were getting in 12/13 or 13/14*. Rather than a concession of the operation of the principle of diminishing marginal returns, we consider that to be more a consequence of other factors, including the impact of the increasing cost of player related expenditure over the period and the possibility that Everton spent inefficiently over the period, as discussed further in

paragraphs 122 to 127 below.

118. We consider that Mr Holt is correct to recognise the general principle of diminishing returns. However, we prefer Professor Wilson's opinion that in practice it is something that will affect higher spending clubs and not lower/middle spending clubs such as Everton. We accept Professor Wilson's analysis that it is only likely to have a practical effect when a club's spending is significantly greater than Everton's spending. The passage from Mr Moshiri's evidence concerning the need to replace/reinforce the club's midfield bears that out. We do not agree Everton's case based on marginal returns.

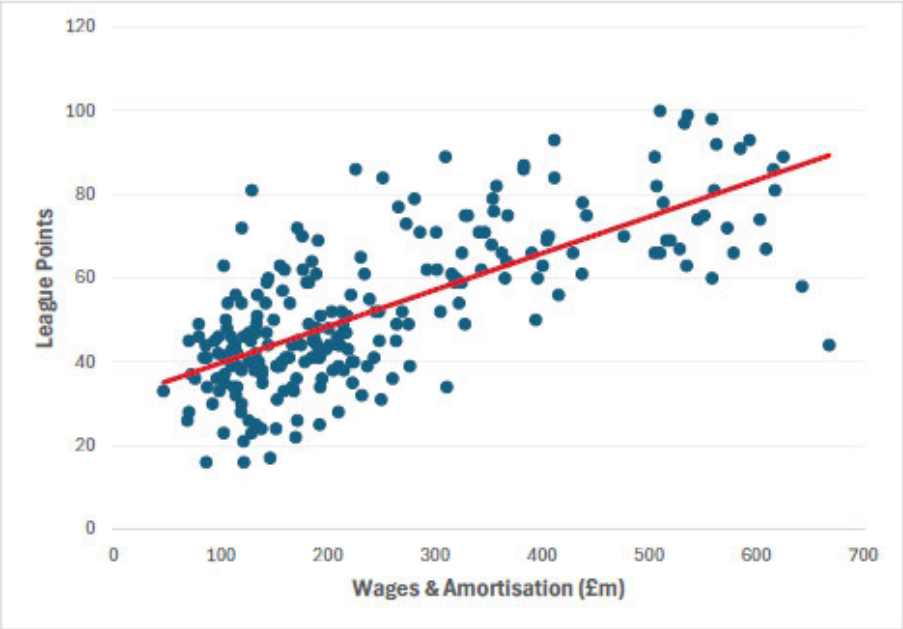
119. (4) Absolute versus relative spend. In his first report, Mr Holt claims that Wilson/Daniels *conflate absolute spending levels with relative competitive advantage*. A club does not secure a competitive advantage simply by spending more if rival clubs increase their spending by similar amounts. Given the increase in player-related expenditure in the 12 years under review, it follows that calculating average points achieved relative to a club's spend across the entire period will give a misleading result in stage 2 of the Wilson/Daniels analysis.

120. Burnley, in their closing submissions, state that *Mr Holt's complaints regarding relative vs absolute spending have receded such that they are irrelevant to analysis*. We observe that Everton did not place any emphasis on this issue in their closing submissions. However, it seems to the Commission that Mr Holt's concerns about absolute versus relative spending echo the concerns expressed about the impact of the increase in player-related expenditure over the period, namely that such increases, unless inflation adjusted, result in a misleading calculation of Everton's average points per £1m spend in Wilson/Daniels' stage 2 analysis.

121. Our view is similar to the one that we expressed in relation to the large increase in player expenditure. The fact that player expenditure may have grown in absolute terms does not mean that it will not have done so in relative terms. The Wilson/Daniels' analysis of spend per point is relative because a point is earned in the Premier League against other teams with substantial spending of their own. Further, the Spreadex ratings (which take into account financial data) will have reflected the relative spending. In any event, as we have already observed, each

of the four scenarios produce the result that Everton was more likely to be relegated than Burnley.

122. (5) Inefficiency of spend. The Wilson/Daniels stage 1 analysis examined player-related expenditure and points achieved for all 20 Premier League clubs over a 12 year period. They presented their findings graphically.



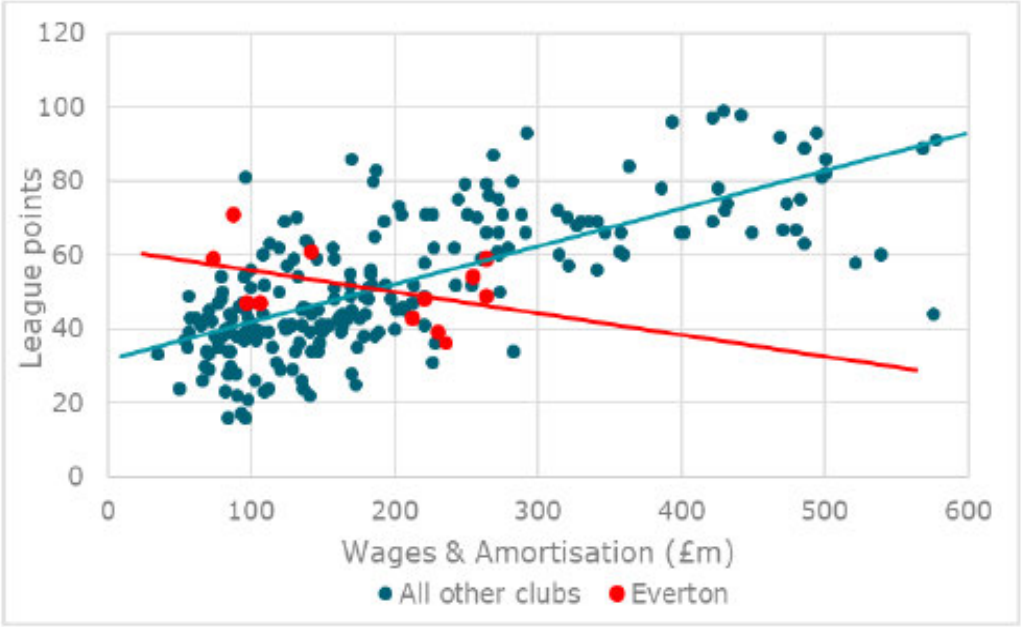
They concluded as follows[41].

> The upward slope of the trendline in Figure 1 shows a positive relationship between the two variables. The correlation coefficient (r) is 0.72 which is a strong and statistically significant (p<0.001) indication of correlation. In short, we conclude that the higher the wage and amortisation spend, the higher the number of points achieved.

The findings of stage 1 formed the basis of their stage 2 calculation of Everton's points advantage resulting from their £19.5 million overspend.

123. Mr Holt, in his first report, confirmed that *the positive trendline across most clubs is consistent with existing literature suggesting a broadly positive relationship between spending and performance over time*. However, he emphasised that *this general positive relationship does not necessarily apply uniformly to all clubs* and presented his own graph, which showed a negative correlation between spending and points achieved for Everton over the period, as demonstrated by the red trendline in the graph reproduced below.

[41] Professor Wilson's and Mr Daniels' report dated 23 June 2025, paragraph 24



124. For this reason, Mr Holt argued that it was not appropriate for Wilson/Daniels to use their stage 1 findings as a basis for their stage 2 analysis. He speculates that the negative correlation could be driven by a range of factors including coaching and managerial quality, organisational factors, club culture and operational and support factors. He cites Mr Thelwell's testimony as evidence of poor decision making regarding managerial recruitment and quotes a number of academic studies in support of the other factors. Mr Holt also quotes Everton witnesses, Mr Maryniak and Mr Thelwell, both of whom were critical of Everton's player recruitment strategy following Mr Moshiri becoming the club's majority shareholder in 2016. [redacted]

125. However, the subject of any inefficient spending, in terms of the identity of individual players, was of less concern to Everton than establishing that the club's average points per £1m spend in the Wilson/Daniels stage 2 analysis were adversely affected by factoring in its points per £1m spend across the entire 12 year period analysed in scenario 1. Everton's points per £1m spend in 2012/13 was 0.86 but just 0.17 in 2021/22. It is probably a misnomer to attribute all of this reduction to "inefficiency". Although a good deal of evidence was provided regarding the cost of under-performing players, a significant element of the

reduction can be attributed to the increase in transfer fees and wages over the period discussed in paragraphs 97 to 110.

126. The Wilson/Daniels first report describes Everton as being *more efficient on the pitch…in the seasons 2012/13 and 2013/14* while *in the remaining seasons that follow, the club became more inefficient in their on-pitch performance*. Professor Wilson acknowledged during cross-examination that *Everton's performance based on their spending in the early part of this dataset was better than towards the end of its spending*.

127. We consider the proper analysis of this dispute is as discussed in the decision of the Appeal Board, in which the efficiency of spend argument was considered. At paragraph 150(ii) the Appeal Board said –

> As we have described, the Club's relevant expenditure was on players. That the Club may not have bought as wisely or as successfully as it had hoped and projected is not to the point. The fact that the Club finished Season 2021-22 in 16th place, rather than the projected sixth place, does not assist the Club here: the point is not that the Club, having invested heavily in players, did not do as well as it expected or hoped, but rather that, having made that investment, the Club is likely to have performed better than it would had it not done so.

We adopt this reasoning. It may well be that Everton did not perform as well as had been expected, but the reality is that it performed better than it would have done if it had not spent beyond the PSR limit. Many of the players identified by Mr Thelwell as being poor performers relative to their cost (in terms of wages and amortised transfer fee) nevertheless featured regularly in the club's matchday squad. We therefore find that the inefficiency of spend argument takes the matter no further.

128. (6) Assumption that entire overspend was on players. In its opening submissions, Everton stated that it was *wrong to allocate the whole overspend to players*. However, it instructed Mr Holt *to allocate the entirety of the £19.5m overspend to player-related expenditure*. We note the following.

129. First, Everton quoted Mr Maryniak observing that *the overspend is likely to represent a mixture of different costs that EFC incurred during the course of the four-year Relevant Period*, quoting examples including stadium operations, debt servicing, salaries for non-football staff, utilities, etc. However, during cross-examination, Mr Maryniak emphasised that the club had effective cost control

procedures in place, as follows.[42]

Based on Mr Maryniak's evidence it would be difficult for Everton to justify an alternative assumption that any material element of the £19.5m overspend was spent on non-playing expenditure.

130. Mr Baldwin also expressed scepticism as to whether material savings could be achieved other than by reducing player wages or selling a player.

> But when you prepare your budget for the year, you prepare your budget for your entire cost. Your entire cost then determines how close you are to your PSR line. The reality is that if you are extremely close to it [redacted] you are looking how do you move this dial, what do I do now going into the start of 21/22 season to move the dial. Now, I would love to meet a chief executive that can tell me other than selling players and reducing wage costs that they can suddenly manufacture something that can actually balance the books on it.

131. Second, Everton drew attention to an amount of £6.5 million of finance costs incurred in 2020/21 and 2021/22 in respect of the new stadium project and retrospectively capitalised in 2022/23, arguing that if the £6.5 million had been spent on the stadium it could not be attributed to player expenditure. The consequence of this argument based on the retrospective capitalisation would be to exclude that £6.5 million from the PSR calculation and thus reduce the size of the overspend. In the same way that it is not now open to Burnley to seek to argue that Everton's overspend was in excess of £19.5 million, as explained in paragraphs 19 to 21, it is not open to Everton to advance an argument the consequence of which would be to reduce the overspend below £19.5 million. We therefore do not accept the argument.

132. We therefore consider the Wilson/Daniel's attribution of the overspend to player expenditure to be reasonable and appropriate.

133. We summarise our conclusions in relation to the six criticisms made by Everton as follows. (1) It was appropriate for Wilson/Daniels to allocate the cumulative effect of the entire £19.5 million overspend to season 2021/22. (2) There is force in the criticism of Wilson/Daniels' choice of scenario 1 (the 12 year period) but

[42] Day 3, P60 (20) – P61 (5)

that does not undermine their conclusion that there is a greater probability of Everton rather than Burnley being relegated under each of the scenarios (including scenario 4). (3) The principle of diminishing marginal returns has no application. (4) Wilson/Daniels' treatment of expenditure takes into account relative expenditure. (5) Inefficiency of spend has no application. (6) Wilson/Daniels were correct to attribute the overspend to player expenditure.

Everton's Challenge to Stage 3

134. For their stage 3 analysis, Professor Wilson and Mr Daniels place great emphasis on the *robustness and credibility of [the] gambling industry*. Everton, however, identified what it believes to be three major deficiencies in the Wilson/Daniels analysis which it argues undermine the credibility of stage 3.

(1) The ratings used in Stage 3 were wrong by large numbers of points.

(2) Everton's rating was adjusted down with the benefit of hindsight.

(3) Failure to present relative increase in probability of relegation.

135. (1) The ratings used in Stage 3 were wrong by large numbers of points. Professor Wilson and Mr Daniels disclosed in their second report the number of points Spreadex had expected Everton to achieve ahead of each of the four seasons in the PSR Period. These are summarised in the table below alongside the actual points achieved by Everton.

	Spreadex expected points	**Actual points**
2018/19	46.00	54
2019/20	54.25	49
2020/21	52.25	59
2021/22	53.25	39
Total	**205.75**	**201**

136. Mr Sprange addressed this issue in his closing oral submissions, making two points. First he emphasised the complexity of the exercise being undertaken, the expertise of Professor Wilson and Mr Daniels and the superior accuracy of Mr Daniels' model compared with that created by Mr Holt. Second, he acknowledged the average 8.56 point variance per season between Spreadex's predictions and Everton's actual points totals but commented as follows[43].

> They say, oh, if it's 8.5 points per season out, that's big, 8.5 points per season with a full spend.

[43] Day 10, P115 (18) – P116 (1)

That's not what we're doing. We are not looking at the full spend of every club and saying what differential did it have in points. We're looking at taking off 19.5 million worth of spend. That's the distinction. If you take off 19.5 million worth of spend and then work out the points coefficient, that's the difference.'

We accept Mr Sprange's submissions.

137. (2) Everton's rating was adjusted down with the benefit of hindsight. As explained in paragraph 86, for the purpose of stage 3, Wilson/Daniels used historical ratings for the 19 Premier League clubs other than Everton. Everton's rating was adjusted to the 39 points actually gained by the club in the season. Stage 3 then calculated *implied ratings* based on further points reductions of between 7.13 and 3.85 points to take account of the points advantage resulting from the overspend as calculated in stage 2. It was based on these implied ratings that the 100,000 simulations were performed to calculate the probability of Everton being relegated instead of Burnley.

138. During cross examination, Mr Daniels confirmed that Everton's original Spreadex rating had been 1.30, predicting a 9th place finish with 53.25 points. Its rating was revised to 1.8795 to reflect the 14.25 point reduction and drop from 9th to 16th place. The ratings for none of the other clubs had been adjusted to take account of their actual finishing position. Mr Daniels justified the decision not to adjust other teams' ratings for two reasons. First, because Mr Daniels maintained that it would be an *almost impossible task to re-rate 20 teams*. Second, because, by not doing so, it *would slightly underestimate Everton's chances of relegation* and it was therefore *safer to assume the first rating*. In other words, if there was an omission it was more likely than not to be in Everton's favour. It was inevitable that the 14.25 points (or similar, allowing for the possibility of drawn games) that Everton failed to win would be shared among the other 19 clubs and would increase the points being received by the other clubs, further worsening Everton's position.

139. When questioned on the variances between the final league positions and Spreadex rankings for the four teams named above, Mr Daniels responded that *I stand by the robustness of the gambling industry, the football pricing techniques*.

140. In the course of both their written and oral evidence, Professor Wilson and Mr Daniels placed great emphasis on the *robustness and credibility of [the] gambling industry*. They also emphasised the thoroughness of the research underpinning

the Spreadex ratings, taking account of a wide range of criteria including historical performance, financial data, squad quality & depth, management, injuries, benefits of home advantage, recent transfer activity, club organisational quality, club & supporter cohesion, etc.

141. We accept Mr Daniels' explanation. The short point is that it was inevitable that if the model were rerun as argued for by Everton the points that Everton failed to win would be shared among other clubs, increasing their share of points and further worsening Everton's position. We conclude that if it was a deficiency not to rerun the model, the error more likely than not produced a result in Everton's favour.

142. (3) Failure to present relative increase in probability of relegation. It emerged in the course of the hearing that the stage 3 model predicted a 31% probability of Everton being relegated with its actual points total of 39 points. Clearly this did not happen but Everton has argued that stage 3 should have focused on the relative increase in probability, for example between 31% and the 51.47% probability calculated in stage 3 for scenario 4.

143. Mr Daniels responded as follows[44].

> Well, then you would be changing the relegation odds of everyone and every team in the league would have a probability of being relegated, but that didn't happen. What we are trying to do -- we're not trying to change 20 teams' results here. We are trying to change one team's results because there is only one team who overspent in this league, so we need to change all of the matches that they played. We don't need to change everyone else.
>
> So when we are running a simulation where Everton had 39 points, we -- I suspect -- which bit are you talking about? I suspect that was simulating every game in the season just to show that if every team was playing all of their games again, that there would have been a 31% chance they'd have got relegated had they received 39 points as their average over 100,000 simulations. The difference between them is totally irrelevant.

We accept Mr Daniels' explanation.

144. We accept that trying to quantify the impact of Everton's overspend in points terms is an inexact science and that the analysis undertaken by Professor Wilson and Mr Daniels is based on data from the gambling industry which, although thorough and detailed, recognises that outcomes are uncertain. The conclusions they have drawn from their analysis reflect that uncertainty. However, their analysis does consistently show that, having adjusted for the impact of Everton's

[44] Day 4, P149 (1-18)

overspend, Everton would have been more likely than Burnley to have been relegated. Even under Wilson/Daniels' scenario 4, their analysis shows a probability of 51.46% to 46.71% in favour of Everton rather than Burnley being relegated (50.51% to 47.59% under the inflation adjusted calculation put in cross-examination by Burnley to Mr Holt).

Causation: Holt Analysis

145. Mr Holt's first report comprised two principal elements. First, he set out his own methodology for assessing the points advantage secured by Everton as a consequence of its overspend and the results thereof. Second, he undertook a detailed review of the Wilson/Daniels analysis, expressing his reservations about their approach. Those reservations have been discussed in detail in the foregoing sections.

146. Although he agreed with the principle on which the Wilson/Daniels analysis was based (a positive correlation between player-related expenditure and sporting performance) Mr Holt adopted a different methodology from that used by Professor Wilson and Mr Daniels. As with Wilson/Daniels, his objective was to establish *how relative player expenditure influences match results* and specifically the impact of Everton's £19.5m overspend. He elected to employ an ordered logit regression analysis, consistent with the approach used in two other studies by respected academics in sports management. Mr Holt explained that this was *an appropriate model to consider in this case as for a given team there is a clear ordering of outcomes (home team win, draw, home team loss), and the outcomes are all mutually exclusive*.

147. Mr Holt's model replayed each match in the four Premier League seasons of the PSR Period using two variables.

(1) As an independent variable, the natural logarithm of the ratio of home team player expenditure to away team player expenditure each season. Mr Holt defines 'player expenditure' as *payroll expenditure plus amortised transfer fees*, obtained from clubs' annual financial statements. This is the same data as was used by Wilson/Daniels in their analysis.

(2) As the dependent variable, Mr Holt used the actual outcome for each match ordered from the perspective of the home team, i.e. home win, draw, away win.

148. Mr Holt maintained that his model *establishes the statistical relationship between the relative player expenditure of the home team to the away team and match outcomes, distinguishing between a measurable impact of relative player expenditure and random variation, i.e. 'luck'*. Throughout his reports Mr Holt relies on 'luck' as a catch-all phrase for the *consistent unexplained element in sporting performance*.

149. In section 8 of his report Mr Holt identified a number of factors, other than player-related expenditure, which he acknowledges can impact sporting performance. These include the following.

(1) Coaching and managerial quality.

(2) Organisational factors and club culture.

(3) Operational and support factors.

(4) Interaction between financial and non-financial factors.

150. Mr Holt acknowledges that his model *does not explicitly consider factors which are identifiable and may predict performance* and adds that *to be clear these are factors above and beyond 'luck'...[which] reflects the inherent uncertainty and unpredictability of football matches*.

151. As explained in paragraph 76, Mr Holt replayed every Premier League match of the four seasons of the PSR Period to arrive at *expected points* totals and an expected league position for each team, based on actual player expenditure. The next stage was for Mr Holt to assess the impact of Everton's overspend in terms of points. To do so he considered how the overspend should be allocated and selected three options.

152. Allocation 1 assumed that the overspend would be allocated evenly over the PSR Period. Bearing in mind that, at this time, the PSR averaged the financial results for 2019/20 and 2020/21, allocation 1 apportioned £6.5 million to each of 2018/19, 2019/21 (2 financial years) and 2021/22. Allocation 2 spread the overspend in proportion to Everton's losses adjusted for PSR purposes for the three periods, namely £58 million in 2018/19, £55 million (averaged) for 2019/21 and £10 million for 2021/22. So the overspend was allocated across the three periods in the ratio

47%: 45%: 8%.[45] Allocation 3 assumed the entire overspend should be attributed to the final season, namely 2021/22.

153. Mr Holt made it clear that he believed allocation 1 to be the *baseline allocation*. He considered allocation 3 to be *acutely conservative* and *unrealistic* but included it within his analysis *in order to allow a ready comparison of the impact of the differences in my methodology versus that used in W&D 1*.

154. The next stage of Mr Holt's analysis was to adjust for Everton's overspend, for each of his three allocations, by deducting the relevant allocation (for example £6.5 million for each season under allocation 1) from Everton's actual player expenditure and then rerunning his model to recalculate the counterfactual points for each of Everton's matches. He then deducted the points attributable to the breach from Everton's actual points for each season and adjusted the league table for each season in order to arrive at a *counterfactual league table*.

155. Mr Holt concludes that *EFC's overspend did indeed provide a modest sporting advantage of 0.2 – 2.6 points in the 2021/22 EPL season, depending on how much of the £19.5 million overspend is allocated to that season*. These were the points to be deducted to arrive at Mr Holt's counterfactual. There was also a very marginal gain for Burnley of 0.01 – 0.12. The impact for season 2021/22 is summarised in the table below.

Allocation no.	Allocation of overspend	Difference in points	
		Everton	Burnley
1	- £6.5m	- 0.8	+ 0.04
2	- £1.6m	- 0.2	+ 0.01
3	- £19.5m	- 2.6	+ 0.12

156. Based on his analysis, Mr Holt concludes as follows[46].

> In particular, BFC's position in the league in the 2021/22 season is unaffected and even in the counterfactual - where EFC did not breach PSR - BFC would still have been relegated at the end of this season.

Mr Holt made the further point that his analysis *likely overestimates the effect of Everton's PSR breach*. He relied for this on Everton's factual witnesses' evidence of Everton's inefficient spending on player recruitment.

[45] Mr Holt wrongly calculates Everton's total adjusted loss as £123 million, rather than the actual £124.5 million. The difference has no material impact on his calculation of allocation 2.
[46] Mr Holt's report dated 28 July 2025, paragraph 7.1.5

157. Mr Holt sought to validate the accuracy of his model by benchmarking the results given by his model against the latest odds available from several bookmakers prior to the start of each match. He acknowledges that bookmakers' odds would be likely to reflect a number of factors whereas his predictions focussed solely on the ratio of the home and away teams' player expenditure. He concluded that *my model performs reasonably well compared to bookmakers' odds* and included this table by way of evidence.

PL Season	Bookmakers odds	Logit regression analysis
2019/20	53.20%	52.60%
2020/21	51.80%	51.30%
2021/22	59.20%	55.00%
Average	**54.70%**	**53.00%**

158. Professor Wilson and Mr Daniels responded to Mr Holt's report in their second report. In particular, they drew attention to the absence of probabilistic testing by Mr Holt as the most significant difference between the experts' reports. They argue that stage 3 of their methodology was an essential part of their analysis without which it would be impossible to draw conclusions about the inferred points reduction.

159. Taking note of this criticism, Mr Holt undertook his own probabilistic simulation exercise, albeit only of Everton's 38 matches in 2021/22. The result, after 100,000 iterations, is as summarised below.

	Relegation risk		Counterfactual position	
Allocation	**Everton**	**Burnley**	**Everton**	**Burnley**
1	4.39%	95.61%	16	18
2	26.00%	99.74%	16	18
3	31.13%	68.87%	17	18

Mr Holt emphasised once again that he considered allocation 3 to be *implausible* but *I include these results to provide a direct methodological comparison with W&D's approach*.

160. Other criticisms of Mr Holt's approach, and indeed his own expertise, emerged in the course of the hearing.

161. Mr Holt conceded under cross examination that he had never worked at a football

club nor had he been retained to advise any clubs. Burnley contrasted this with Professor Wilson's status as a leading academic in sports finance and Mr Daniels' roles in the gambling industry and with two EFL clubs.

162. Mr Holt acknowledged that the model he had developed for this exercise had never been put to any practical use.

163. When challenged under cross examination on his comparison of his predictions with those of the betting industry (see paragraph 157) he acknowledged that *my model has a somewhat less accurate set of predictions, but, again, I'm not expecting it to match the betting predictions because I'm only taking into account the impact of financial spending, whereas the betting predictions take into account a range of other factors.*[47] It must be observed that Burnley interpret this comment by Mr Holt as being acceptance that his model is inferior to that used by Wilson/Daniels although, to be fair, it must be noted that the comparison he made in the table at paragraph 157 was with odds from six betting companies obtained from football-data.org.uk and not with Spreadex data as used by Wilson/Daniels. Although Mr Holt regarded the difference between his predictions and those of the six betting companies as being relatively modest, Mr Daniels noted that *while 1.7% may seem a small number, that would be the difference between being the bookmaker and the punter and being on the wrong side of the betting market.*[48]

164. Despite the superficial sophistication of Mr Holt's model for assessing the correlation between player-related expenditure and points gained, it emerged that his counterfactual league table, before adjustment for Everton's overspend, was simply a ranking of the 20 Premier League clubs in order of expenditure on wages and amortisation. Moreover, as mentioned at paragraph 163 above, Mr Holt's model does not take into account many factors which would be likely to have a material bearing on the match result. He acknowledged this more than once during cross examination. These factors include the human factor described by Mr Daniels as being *what happens in football games and sport, by human nature, is actually when one team scores the other team's probability of scoring actually slightly increases because of the humanistic nature of going a bit defensive and come back, etc., etc.*.

[47] Day 5, P44 (12-17)
[48] Day 4, P33 (24) – P34 (2)

165. We have already expressed our conclusions on Everton's criticisms of the Wilson/Daniels' analysis. Those criticisms were, of course, based upon the material produced by Mr Holt. We remain of the view that Mr Holt's analysis is less compelling than that of Professor Wilson and Mr Daniels.

Causation: Conclusion

166. It will have been seen from what we have said above that we prefer Burnley's case on causation to that advanced by Everton. It is common ground that expenditure confers a sporting advantage – that is the reason that clubs spend money on players. Everton prioritised performance over compliance with the PSR.

167. We have considered carefully the expert evidence, the most important elements of which we have discussed above. It is important to recognise that the experts are expressing hypotheses based on sophisticated modelling. As we made clear in our conclusion regarding stage 3, there can be no certainty when experts are required to predict sporting results based on such modelling. This is an inexact science. The conclusions arrived at by the two sets of experts emphasise the very fine margins involved. Wilson/Daniels' scenario 4, shows a probability of 51.46% to 46.71% in favour of Everton rather than Burnley being relegated (50.51% to 47.59% under the *inflation adjusted* calculation put in cross-examination by Burnley to Mr Holt).

168. We were favourably impressed by Mr Baldwin's evidence which lent support to the conclusions of Professor Wilson and Mr Daniels. We recognise his considerable practical experience, and accept his opinion that expenditure of £19.5 million probably accounted for an additional four points, or possibly more. The effect of those additional points was the difference between relegation and staying in the Premier League.

169. Overall, we prefer the opinions of Professor Wilson and Mr Daniels. Our reasoning that led to that conclusion has already been discussed. In summary, we were impressed by their expertise in football matters, and consider that their modelling more accurately reflects the probable outcomes than that advanced by Mr Holt. The fact that we have accepted criticisms of some of the Wilson/Daniels reasoning does not diminish the overall force of their conclusions. We consider

that the Wilson/Daniels analysis is more likely to be correct than that of Mr Holt.

170. We therefore conclude that, on the balance of probabilities, the breach of the PSR caused Everton to avoid relegation and enabled it to stay in the Premier League. That finding means that Everton's breach of the PSR caused Burnley to be relegated.

QUANTUM

Quantum: The Parties' Cases

171. Each party has relied upon expert evidence to support its case on quantum. Burnley adduced evidence from Richard Boulton KC FCA. Mr Boulton is qualified as both a chartered accountant and a barrister: his evidence was given in his capacity of an accountant. Everton adduced evidence from Louis Dudney CPA CFF. Mr Boulton's opinion is that relegation caused Burnley to suffer substantial losses. Mr Dudney considered that Burnley had so effectively managed its finances that it suffered no loss, but made a gain.

172. Mr Boulton advanced Burnley's claim by reference to *lost cash flow*. Although never defined by Mr Boulton, these cash flows comprise the aggregate of the following:

(1) operating profit/loss before deduction of depreciation, interest, player amortisation and profit/loss on sale of players; and

(2) net player trading comprising the total cost of player registrations acquired in a period, less the disposal proceeds of any player registrations sold.

173. These are not cash flows in the commonly accepted accounting sense. However, as Mr Boulton's approach has been accepted by Mr Dudney, we proceed on the basis of that common ground.

174. Equally, the treatment of player trading represents a departure from conventional accounting practice whereby the cost of and associated with player registrations, would usually be capitalised on a club's balance sheet as intangible assets and then amortised over the duration of those players' contracts. On sale or release of a player, the difference between any transfer fee received, after offsetting costs of disposal, including agents' fees, any balance of signing-on fees payable to the player or any sell-on fees payable to former clubs, and the unamortised book

value of the player would be accounted for as a profit or loss on disposal and recognised as such in a club's accounts. By contrast, both experts treat the cost of player trading, net of disposal proceeds, as a material element of Burnley's claim/gain, notwithstanding the fact that the players purchased in the period represent assets of the club, many of whom will have been sold within the period, in many cases for a surplus, or may be sold in the future. Mr Boulton explained the rationale for this treatment.[49]

> Q. What was the rationale for departing from a more conventional accounting treatment for players, because it is accepted accounting policy now amongst -- well, within football for probably getting on for 30 years that they are treated -- capitalised as an intangible asset, they are not expensed in the year of acquisition at all. And indeed, if they are acquired towards the end of a financial year, the amortisation expense may only kick in in the following financial year?
>
> A. But because the figures I'm working with are adding back key depreciation and amortisation, there is no impact. So the touchstone normally on lost profits cases is you don't use accounting profits, you use something that is close to cash flows, because that's the real economic loss, is the impact on cash flows. So for here, what matters -- it doesn't affect the operating side of things at all, I don't think, but on the player trading you are in principle in keeping with the accounting but you are not reflecting depreciation/amortisation, it is the cash flows associated: you buy a player, that is an outflow; you sell a player, that is an inflow. You have to reflect the timing of it, but those are the amounts that matter.
>
> Q. But you think it is appropriate to do that even though, as I say, they are really accounted for as assets in a company's balance sheet?
>
> A. Yes, I do, in the same way that -- well, sorry, I need to make sure I'm doing justice to your question. They are accounted for on the balance sheet as assets but the impact is on Burnley's cash flows, so what matters is have they received more cash or have they had to spend more cash as a consequence of the relegation because ultimately the only way you can restore them to that position is through the cash rather than through other items on the balance sheet. It would be the same in any case if you were dealing with investments in factories or property and plant, or anything else. You might be capitalising those assets but the damages assessment would always focus on cash in and cash out. Otherwise what you find is damages changes according to accounting treatment and that doesn't reflect the economic substance.

Mr Dudney has adopted the same treatment in his calculation.

175. Capital expenditure is included in the experts' calculations as a third component of Burnley's claim, but both experts adopt the same figures for both actual and but-for scenarios, which has the effect of cancelling this head out. For this reason we do not undertake any analysis of the club's capital expenditure.

176. Both experts have added pre-award interest to their calculation of Burnley's claim/gain. However, unless stated otherwise, all references to the experts' calculations within this decision are to the pre-interest claim/gain.

[49] Day 7, P181 (17) – P183 (8)

177. Both experts have calculated the claim over the four year period ending summer 2025 (the "Relevant Period"). Both agree that the consequences of relegation are to be evaluated over that period. Neither party pursues an argument that Burnley's promotion back to the Premier League in summer 2023 should be treated as an intervening act that breaks the chain of causation.

178. Neither expert includes in their calculation any cash flows for FY26[50] or beyond. Mr Boulton observes that *the losses will continue beyond 2024/25; however, the relevant But-For Scenario is harder to model, and the cash flows are increasingly uncertain, beyond this initial period.*[51]

179. Mr Boulton elaborated on this point in his presentation to the Commission, observing that, had he projected forward to FY26, there would have been no actual outcome against which to compare a but-for scenario.[52]

> I will come back to why four seasons, but what I will say at this stage is that one has actual figures up to the end of the 2024/2025 season and one could extend this, and indeed my own view is damages are probably continuing, but the quantification of those damages becomes fraught with difficulty and that's for a very simple reason: in this period, one has actual as a fixed baseline where everything is known and one is only modelling the but-for, what would have happened. If I roll this forward another season, I would not have the baseline of actual and I would be comparing two estimates: an estimate of what the actual will be this year and an estimate of what it would have been in the but-for. I think once you have two moving parts with the subjectivity associated with forward estimating in football, that becomes too uncertain and that is why I have cut it off when I run out of actual data.

180. Mr Dudney disagrees with Mr Boulton's approach but has nevertheless opted to use the same discrete loss period as Mr Boulton (between FY 2022 and FY 2025) in his assessment, not least because Burnley *has not disclosed its forecasted player trading activities either for the current summer 2025 transfer window or the longer term*[53]. Mr Dudney has modelled two alternative scenarios for FY26, one showing a loss of £43.2 million[54] and one showing a gain of £46.8 million, but neither is included within Mr Dudney's calculation of Burnley's gain. We share Mr Boulton's opinion regarding the uncertainty of future cash flows and so have not considered FY26 cash flows in arriving at this decision.

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[50] Throughout this decision, financial years are defined as, for example, 2024/25, meaning, in Burnley's case, the financial year ending 31 July 2025 or with the prefix "FY". The financial year 2024/25 would be defined as FY25. Football seasons, which do not align precisely with a club's financial year, are in all cases defined by reference to the years they straddle, i/e 2024/25.
[51] Mr Boulton's report dated 23 June 2025, paragraph 4.2.2
[52] Day 7, P12 (6-22)
[53] Mr Dudney's report dated 28 July 2025, paragraphs 2.1.9-10
[54] Unless stated otherwise all components of the experts' calculations, and reconciliations between those calculations, are expressed in millions, rounded to one decimal place. On occasion this may give rise to rounding differences of +/- £0.1 million.

181. Mr Boulton calculates Burnley's claim for compensation to be £51.7 million before interest. In the alternative he suggests that Burnley's claim might be calculated by reference to the amount by which Everton breached the PSR threshold, namely £19.5 million before interest. However, he qualifies this by asserting that *I consider that the benefit to Everton may be significantly higher than £19.5 million because, by virtue of its overspending, it avoided being relegated and the significant effect such an event would have on its revenues*. We do not accept that the scale of the overspend represented a suitable proxy for Burnley's financial loss. We take the view that Mr Boulton's primary case, calculated by reference to lost cash flows, is a more appropriate measure of Burnley's claim and so do not consider his alternative calculation further.

182. Mr Dudney calculates Burnley's gain to be £18.2 million before interest. This is his primary case, although he also presents an alternative case of a gain of £6.8 million before interest.

183. Both Mr Boulton and Mr Dudney calculate alternative cash flows, based on a range of assumptions, which they term 'but-for scenarios' and which they offset against actual cash flows in order to arrive at the net loss (Mr Boulton) or net gain (Mr Dudney). Analysis of their detailed models has identified the two principal components of their loss/gain, specifically (1) the amount attributable to operating profit/loss and (2) the amount attributable to the net cash inflow/(outflow) on player trading, as summarised below for the four years of the Relevant Period. Their differing approaches give rise to a variance of £69.9 million between their final figures for loss/gain.[55] [56]

[55] Throughout this decision a great many tables are used to analyse the experts' models. These tables are not reproduced from the experts' reports but will, in all cases, rely on figures sourced from the appendices supporting the experts' models.

[56] It should be noted that, in this table, as well as others in this decision comprising actual and but-for cash flows, the total loss/gain will be the difference between the actual and but-for cash flows and not sum of those cash flows. For example, Mr Boulton calculates Burnley's total claim in respect of operating profit/loss as £29.7 million, being the difference between an actual cash outflow of £21.2 million and a but-for cash inflow of £8.6 million, subject to rounding.

	Boulton[57]	Dudney (primary)[58]	Variance
	£m	£m	£m
Operating profit/(loss)			
Actual cash inflow/(outflow)	(21.2)	(21.2)	0.0
But-For cash inflow/(outflow)	8.6	0.1	(8.5)
	(29.7)	**(21.3)**	**8.5**
Player trading inflow/(outflow)			
Actual cash inflow/(outflow)	(24.4)	(83.5)	(59.1)
But-For cash inflow/(outflow)	(2.4)	(122.9)	(120.6)
	(22.0)	**39.4**	**61.4**
Total (loss)/gain before interest	**(51.7)**	**18.2**	**69.9**

184. It will be noted that the experts agree on the club's actual cash outflow of £21.2 million in respect of operating profit/loss for the period. Both experts also assume that Burnley would not, in fact, have been relegated in FY22 and also agree on the consequent financial impact on the club's operating profit/loss in that financial year, but not the player trading cash flows in that year.

185. Mr Dudney's alternative case has been prepared on a basis consistent with Mr Boulton's. Mr Dudney explains that he provides this alternative calculation, and a review of Mr Boulton's assumptions, *for completeness*. He takes issue with a number of Mr Boulton's assumptions and so, despite the more consistent approach to the method of calculation, he continues to argue that Burnley has fully mitigated its losses.

[57] Mr Boulton's actual and but-for cash flows are obtained from Appendix A to his report dated 19 September 2025. The actual cash flows are from worksheet 'Actual Scenarios', sum of cells K-N56 (operating profit/loss cash flows) and sum of cells K-N62 (player trading cash flows). The but-for cash flows are from worksheets 'But-For Scenario 1' – 'But-For Scenario 4', weighted average of cells K-N56 (operating profit/loss cash flows) and of cells K-N62 (player trading cash flows).

[58] Mr Dudney's actual and but-for cash flows are obtained from his Updated Appendix 4 to his expert report. The actual cash flows are from worksheet 'Actual Scenarios', sum of cells K-N56 (operating profit/loss cash flows) and sum of cells K-N62 (player trading cash flows). The but-for cash flows are from worksheet 'But-For Scenario 3', sum of cells K-N56 (operating profit/loss cash flows) and of cells K-N62 (player trading cash flows).

	Boulton[59]	Dudney (alternative)[60]	Variance
	£m	£m	£m
Operating profit/(loss)			
Actual cash inflow/(outflow)	(21.2)	(21.2)	0.0
But-For cash inflow/(outflow)	8.6	(2.7)	(11.2)
	(29.7)	**(18.5)**	**11.2**
Player trading inflow/(outflow)			
Actual cash inflow/(outflow)	(24.4)	(12.5)	11.9
But-For cash inflow/(outflow)	(2.4)	(37.8)	(35.5)
	(22.0)	**25.3**	**47.3**
Total (loss)/gain before interest	**(51.7)**	**6.8**	**58.6**

186. In every respect other than the actual operating profit/loss, the experts adopt materially different assumptions, hence the £69.9 million variance between Mr Boulton's loss (£51.7 million) and Mr Dudney's primary case gain (£18.2 million) and the £58.6 million variance between Mr Boulton's loss (£51.7 million) and Mr Dudney's alternative case gain (£6.8 million).

187. The principal assumptions can be summarised under the following five headings.

(1) Selected but-for scenarios including league status. Mr Boulton selected four alternative scenarios for the three seasons after FY23 with different assumptions regarding Burnley's league status in each of those seasons. He then calculated a weighted average of the but-for cash flows for these scenarios. By contrast, Mr Dudney's primary case relied on just one scenario, Mr Boulton's scenario 3, which he believed most closely mirrored the actual scenario, delayed by one year. Despite his stated misgivings about Mr Boulton's approach, Mr Dudney's alternative case adopts the same but-for scenarios and weightings between the four scenarios as Mr Boulton.

(2) Timing of cash flows. Burnley's financial year end is 31 July.

[59] Mr Boulton's actual and but-for cash flows are obtained from Appendix A to his report dated 19 September 2025. The actual cash flows are from worksheet 'Actual Scenarios', sum of cells K-N56 (operating profit/loss cash flows) and sum of cells K-N62 (player trading cash flows). The but-for cash flows are from worksheets 'But-For Scenario 1' – 'But-For Scenario 4', weighted average of cells K-N56 (operating profit/loss cash flows) and cells K-N62 (player trading cash flows).

[60] Mr Dudney's actual and but-for cash flows are obtained from Updated Appendix 7 to his expert report. The actual cash flows are from worksheet 'Actual Scenarios', sum of cells K-N56 (operating profit/loss cash flows) and sum of cells K-N62 (player trading cash flows). The but-for cash flows are from worksheets 'But-For Scenario 1' – 'But-For Scenario 4', weighted average of cells K-N56 (operating profit/loss cash flows) and cells K-N62 (player trading cash flows).

Notwithstanding this, Mr Boulton argued that, in calculating Burnley's claim, it was more appropriate to account for player trading by reference to a football season (1 June to 31 May) rather than the financial year (1 August to 31 July). His calculation of operating profit/loss continues to be as reported for the club's financial year. Mr Dudney's primary case was based entirely on the club's financial year for both operating profit/loss and player trading, while his alternative case adopted Mr Boulton's approach.

(3) Assumptions within but-for operating profit/loss. The net variance between the two experts' calculation of but-for operating profit/loss is £8.5 million (Mr Dudney's primary case) and £11.2 million (Mr Dudney's alternative case). The first figure masks more significant variances resulting not only from different assumptions about revenue and expenditure but also from the experts' different assumptions about the club's league status. The second variance, between Mr Boulton's case and Mr Dudney's alternative case, although a slightly larger variance, is more readily comparable because of the consistent assumptions about league status used by the experts.

(4) Actual player trading. It might seem counterintuitive for there to be differences between the experts' figures for actual player trading. These arise partly because the experts have obtained their information from different sources and partly because of the different assumptions about timing of cash flows discussed above. For example, Mr Boulton's calculation of the club's loss takes no account of player trading in summer 2025. According to Mr Dudney's primary case, in which his actual net outflow exceeded Mr Boulton's by £59.1 million, this player trading represented a net outflow of £33.7 million, comprising £63.6 million purchases[61] and £29.9 million sales.[62] Although this player trading does not feature in Mr Dudney's alternative case there remains a variance, in this instance with Mr Boulton's net outflow exceeding Mr Dudney's by £11.9 million. The causes of this variance are discussed in more detail in paragraph 310 et seq. A further difference between the experts emerged in respect of Mr Boulton's calculation of actual player trading for FY24. Mr Dudney challenged Mr Boulton's inclusion of a net cash outflow of £95.4

[61] Mr Dudney's Updated Appendix 4 to his expert report, worksheet 'BFC Transfers', cell G19
[62] Mr Dudney's Updated Appendix 4 to his expert report, worksheet 'AP Actual Player Trading', cell D10

million, alleging that, on Mr Boulton's own evidence, an element of that expenditure represented squad betterment which should be disregarded.

(5) Assumptions used within but-for player trading. Within his four scenarios, Mr Boulton estimates player trading based on average cash flows for what he considers to be broadly comparable periods. In the single scenario selected by Mr Dudney for his primary case, he uses figures comparable to the club's actual player trading in the preceding financial year. In his alternative case, although he makes assumptions consistent with Mr Boulton's regarding league status and timing of cash flows, he models but-for player trading on quite different assumptions to those used by Mr Boulton.

We proceed to discuss these factors in more detail from paragraph 214.

Impact of Relegation for Burnley in Player Trading Market

188. Aside from its claim for *lost cash flows*, Burnley placed emphasis in its original pleadings on the particular pressures experienced by clubs relegated from the Premier League.[63]

> Secondly, and as set out in paragraph 45 above, clubs in Burnley's position following Everton's PSR breach and relegation will incur cost that they otherwise would not have incurred. Having sold low upon relegation, they then have to buy high to aim for and then try to retain any promotion.

189. Examples of player sales or releases due to contract expiry were provided.[64]

(1) Burnley sold Nick Pope to Newcastle in July 2022 at an undervalued price of €11.5 million.
(2) Burnley sold Dwight McNeil to Everton (ironically) in July 2022 for €17 million. The sale was at an undervalue and McNeil went on to be Everton's top goal scorer in 2022/23 and the team's lead on assists (as well as tied fourth scorer) in 2023/24.
(3) James Tarkowski moved from Burnley to Everton (again, ironically) on a free transfer in July 2022, signing a four-year deal. His market value was in excess of €20 million at the time and he went on to play in every single Premier League game for Everton in the subsequent two seasons.
(4) Burnley's club captain, Ben Mee, moved from Burnley to Brentford on a free transfer in July 2022.

The source for the figures given as the sale proceeds for Pope and McNeil, quoted in euros in both cases, was Transfermarkt.com, a German database which is widely used within football, rather than the club's own records.

190. Mr Williams, Burnley's Chief Operating Officer, provided more detail on these and other players. In his witness statement he said the following of [redacted].[65]

[63] Re-Re-Amended Statement of Claim dated 9 June 2025, paragraph 56
[64] Re-Re-Amended Statement of Claim dated 9 June 2025, paragraph 55
[65] First witness statement of Matthew Williams, dated 24 June 2025, paragraph 20

In my opinion, the market rate for [redacted] at that time was more than [redacted] and could have been as much as [redacted]. I believe that if Burnley had not been relegated, it would have secured a much higher fee for the transfer.

191. In cross examination, Mr Williams was unable to substantiate with evidence his valuation of £20 million.[66]

Q. But there is again absolutely no evidence for that figure of 20 million that has been put forward.

A. Not in the witness statement, no.

Q. No. And Transfermarkt, which Burnley itself uses when it wishes to in accounts, has a valuation very close to what you got for him.

A. Yes, Transfermarkt did.

Q. Right, and there is no bid that you refer to that justifies [redacted].

A. No, there's -- and, again, the historical data of -- that we subsequently did on the [redacted] so ...

Q. But it is impossible, if you are putting forward evidence orally, to look as of at the basis for which –

A. No, I -- I agree.

Q. -- (overspeaking) [redacted]. Did he have a Transfermarkt valuation of that? Was it age and profile?

A. We have agreed that the Transfermarkt value wasn't -- the Transfermarkt website value wasn't [redacted].

Q. Correct.

A. But my belief, had we --

Q. It is just your belief.

A. Yes, it is, yes.

192. He expressed the following opinion on [redacted] in his witness statement.[67]

I believe that, had Burnley not been relegated, [redacted] would have stayed with the club for at least the duration of his contract, which was not due to expire until [redacted] Alternatively, if Burnley had sold [redacted] while it remained a Premier League club, its bargaining position would have been stronger and I believe it would have secured a higher transfer fee, likely in excess of [redacted], given his age profile.

193. In cross-examination, Mr Williams advised that [redacted] contract [redacted] but acknowledged the lack of evidence to substantiate his opinion of the player's value.[68]

Q. So you have put in two statements, but you don't actually give that as a justification for the valuation, which only you seem to have plucked out of the air.

A. Yes, that is my opinion and I will stand by that.

[66] Day 2, P142 (4) – P143 (9)
[67] First witness statement of Matthew Williams, dated 24 June 2025, paragraph 25
[68] Day 2, P137 (14-20)

Q. But it is just your opinion. It is not –

A. We didn't have any offers to -- over -- than the Everton offer.

194. In his witness statement, Mr Williams expressed confidence that [redacted] would have renewed his contract had Burnley not been relegated. He reiterated this under cross-examination.[69]

> We tried to retain [redacted] and I maintain had we stayed up, we would have retained him. Because the cost of replacing a [redacted] in the Premier League would be [redacted]. So to -- in his case, had we stayed up, we could have quite easily offered him the package that Everton offered, which I'm led to believe is between [redacted].

195. In response to a question from the Commission regarding the offer made to [redacted] and how it compared to his understanding of Everton's offer, Mr Williams slightly contradicted his earlier statement: Burnley's offer was considerably less than the package offered by Everton.[70]

Q. Could you tell me what those offers were, roughly?

A. Again, they were divisional offers. I think, from memory, and I would have to check my notes, [redacted] offer was almost a [redacted]-type deal. I think it was [redacted], which was -- I think is less than -- it is less than he signed for at Everton. But those were the conversations that we were having. As soon as he said no, he wanted to concentrate on keeping the club in the Premier League and he would revisit at the end of the season, we knew that if we were to go down that he would leave.

196. Mr Williams acknowledged that [redacted] contract expired at the end of the 2021/22 season. He expressed the following view in his witness statement.[71]

> When Burnley's relegation was confirmed, [redacted] made clear that he would not play in the Championship and so would not renew with the club..... Had Burnley not been relegated, I believe [redacted] would have renewed his contract.

197. Mr Williams confirmed to the Commission the terms offered to the player in summer 2022.[72]

Q. Right. So the contract offered before the end of the season, was –

A. Inaudible - overspeaking) at the end of the season, it was [redacted]. And off the top of my head I think it was [redacted].

However, Mr Williams confirmed that he knew [redacted] the club [redacted] opted to join, was paying the player a salary of [redacted].

198. In his first witness statement, Mr Williams also asserted that, but for Burnley's relegation, the club would not have needed to sell either [redacted] or

[69] Day 2, P84 (22) – P85 (3)
[70] Day 2, P201 (21) – P202 (6)
[71] First witness statement of Matthew Williams, dated 24 June 2025, paragraphs 15-16
[72] Day 2, P199 (7-12)

[redacted], and might therefore have been able to generate higher transfer fees for those players at some future date.[73]

199. [redacted] had only joined the club in summer 2021 and Mr Williams claimed that had Burnley not been relegated the player would not have been sold and his transfer value would have been much higher than the [redacted] received *and perhaps as much as* [redacted] In cross examination, Mr Williams acknowledged that he had no evidence to support that valuation.[74]

200. [redacted] contract [redacted] Although not mentioned in either of his two witness statements, Mr Williams claimed in cross examination that higher offers had been received from [redacted] but that the player had opted to join [redacted], Mr Williams did not substantiate with evidence his argument that the club might have received a higher fee for the player.

201. Mr Boulton repeated Burnley's claims in his first report.[75]

> Burnley alleges that, following its relegation, it (a) lost players that wished to continue in the Premier League and (b) engaged in the fire sale of its players to reduce costs ahead of anticipated revenue losses.
>
> Moreover, Burnley claims that other clubs were aware of its weak negotiating position following its relegation, which caused Burnley to sell players at below market value.

202. Despite these assertions, at no point in Mr Boulton's assessment of Burnley's claim for damages does he attempt to quantify the effect of either selling players *at below market value* or purchasing new players at a premium due to loss of bargaining power, although it is understood that it might be argued that the net cost of such transactions will be reflected within the actual player trading cash flows. Mr Boulton was not cross-examined on this aspect of Burnley's original pleadings.

203. Within his model, Mr Boulton records the net sale proceeds for [redacted]

[73] First witness statement of Matthew Williams, dated 24 June 2025, paragraphs 29-31 ([redacted] and 32-34 ([redacted]
[74] Day 2, P146 (24) – 147 (24)
[75] Mr Boulton's report dated 23 June 2025, paragraphs 3.4.22 and 3.4.25

[redacted].[76] This latter value compares favourably with the €17 million (£14.3 million at the exchange rate of £1.00 = €1.19 used by Mr Boulton in his model[77]) described as *at an undervalue* in Burnley's pleadings.[78]

204. Burnley only touched on this subject very superficially in its closing submissions, quoting Mr Thompson and Mr Williams to the effect that *Burnley's relegation…put it in a weakened negotiating position* and that *when you are relegated the vultures circle and the valuations of players undoubtedly reduces on relegation*.[79] Burnley nevertheless did not attempt to ascribe a value to losses resulting from these experiences.

205. The Commission is satisfied that, to the extent Burnley suffered loss resulting either from player sales at undervalue or purchases at overvalue, these losses are reflected in the player trading element of the adjusted claim. Notwithstanding Mr Williams' claims, we were not convinced that players such as [redacted] were sold at materially undervalue. Moreover, although both [redacted] left the club on free transfers on expiry of their contracts in summer 2022, we were not persuaded that it had been proved that those players' decisions were a consequence of the club's relegation. Mr Williams' evidence indicated that [redacted] and it therefore seems probable that future earnings will also have been a factor influencing the players' decisions.

Going-Concern Statement

206. In addition to modelling his primary and alternative cases, Mr Dudney advanced the argument that statements by Burnley within their annual accounts for the year ended 31 July 2022 demonstrated that the club had been able to fully mitigate its loss of revenue following relegation.

207. The full statement, within both the Directors' Report and the Accounting Policies note under the heading of *Going Concern*, is reproduced below.[80]

Relegation from the Premier League in May 2022 meant the Company incurred a significant

[76] Mr Boulton's Appendix A to his report dated 19 September 2025, worksheet '1-Pager', cells M6-7
[77] Mr Boulton's Appendix A to his report dated 19 September 2025, worksheet 'Player Trading Expense Ledger', cell F1
[78] Re-Re-Amended Statement of Claim dated 9 June 2025, paragraph 55
[79] Burnley's Closing Submissions, paragraph 48.2
[80] Annual Accounts of The Burnley Football & Athletic Company Limited for the year ended 31 July 2022, pages 4 and 16

reduction in turnover the following season as full Premier League broadcasting revenue was reduced by parachute payments.

The Company sold a number of player registrations and replaced them with newly acquired talent, raising funds and significantly reducing total salaries. The Company reduced its borrowings to a sustainable level more sustainable for the Championship and subsequently refinanced its debt at a much lower interest rate. Borrowings will reduce over time, reducing financial pressure on the club.

The reduction in total wages and the influx of cash from transfer fees more than offset the loss of broadcasting revenue due to relegation. The Company now has a stable, lower cost foundation should it remain in the Championship. The directors are satisfied that further cash can be generated from player transfers, if necessary.

The nature of the football industry naturally involves a certain degree of uncertainty when preparing for the next 12 months from the date of signing these financial statements. The football club has recently been promoted to the Premier League and has factored in prospective fee payments from the league into our forward financial planning. Based on their assessment, the directors are satisfied that the Company will have sufficient resources available to be able to meet its obligations as they come due.

208. Within their report, the club's auditors have endorsed the conclusion in the final paragraph above.[81]

In auditing the financial statements, we have concluded that the directors' use of the going concern basis of accounting in the preparation of the financial statements is appropriate.

Based on the work we have performed, we have not identified any material uncertainties relating to events or conditions that, individually or collectively, may cast significant doubt on the Company's ability to continue as a going concern for a period of at least twelve months from when the financial statements are authorised for issue.

209. Mr Dudney's assertion that Burnley had fully mitigated its losses quotes just the third paragraph of the Going Concern statement as follows.

The reduction in total wages and the influx of cash from transfer fees more than offset the loss of broadcasting revenue due to relegation. The Company now has a stable, lower cost foundation should it remain in the Championship. The directors are satisfied that further cash can be generated from player transfers, if necessary.

210. By quoting just an extract, Mr Dudney fails to acknowledge important points made by Burnley within the full statement. First, player trading conducted post-relegation had the effect of *significantly reducing total salaries*. The club's FY23 accounts confirm that total wages fell from £92.0 million in FY22 to £53.7 million in FY23. Second, the extract notes that the club *now has a stable, lower cost foundation should it remain in the Championship*, by implication not a cost base which would necessarily allow it to be competitive in the Premier League. Third, paragraph 4 of the statement emphasises that it had been made in the knowledge of the club's promotion back to the Premier League (although made up to 31 July

[81] Annual Accounts of The Burnley Football & Athletic Company Limited for the year ended 31 July 2022, page 8

2022, the accounts had only been signed on 23 April 2023) and its conclusion that it would *have sufficient resources available to be able to meet its obligations as they come due* will have been made with that in mind. Failure to have achieved promotion, with the associated financial benefits, might have necessitated further asset sales and cost savings.

211. Financial Reporting Standards oblige all companies to make a statement regarding their going concern status in their annual accounts. This requires them to make an assessment regarding their ability to meet their *obligations as they come due* for a twelve month period from the date of signing those accounts. Auditors must also report on the company's use of the going concern basis in the preparation of their accounts and whether any material uncertainty exists about the company's ability to continue as a going concern. In making the statements reproduced above, the club and its auditors were discharging those obligations.

212. Mr Thompson, the club's Finance Director, who was employed by the club's auditors at the time the FY22 accounts were being prepared, offered some perspective on the wording of the going concern note.[82]

Q. And then paragraph 3 explains that:

"The reduction in player wages and the influx of cash from player sales more than offset the loss of broadcasting revenue due to relegation. The group now has a stable, lower cost foundation ..."

Do you see that?

A. Yes, and for sort of the wider context, this disclosure within the accounts is -- it is a -- marketing is probably too strong a word, but it is the way -- it is the mechanism by which the directors can turn around and say, "Yes, we are aware of the situation. We understand any concerns", for want of a better word, "that any reader of the accounts may have", but this is their place in the accounts to say, "This is what we're going to -- these are the things we could do about it and therefore, we feel that there's no going concern issue".

Q. Yes, but again, as we were saying previously, it has to be accurate.

A. It –

Q. It has to be true.

A. It has to be true, yes. It has to have an element of truth. You can't turn around and say, you know, "We made 2 billion turnover" when we only did 100 million. You know, there has to be truth in what it is saying, but it is -- it is giving the best look at it.

Q. Well -- but it says "more than offset the loss of broadcasting revenue due to relegation", and that's true.

A. I think for that -- based on what Burnley did in the summer of 2022, I believe that we brought in more disposals than loss revenue.

213. In its closing submissions, Everton once again quoted the going concern

[82] Day 2, P53 (18) – P54 (23)

statement as evidence that *Burnley has suffered no recoverable loss*. However, The Commission is satisfied that, in making this statement, Burnley was doing no more than confirming that it had taken the necessary steps to preserve its going concern status, taking account of the impact of relegation on its revenue. The fact that it took these steps should not compromise its entitlement to submit a claim for damages: the issue of whether it suffered actionable loss remains.

Quantum: Discussion

214. We have already explained that we believe Mr Boulton's primary case, calculated by reference to lost cash flows, to be a more appropriate measure of Burnley's claim than his alternative case, of £19.5m based on the quantum of Everton breach of the PSR, and so do not consider his alternative calculation further.

215. Mr Dudney has presented a primary case (£18.2 million gain) and an alternative case (£6.8 million gain). We address the relative merits of both cases within the following analysis of the principal assumptions.

(1) Selected But-For Scenarios, Including League Status

216. These were selected by Mr Boulton and are set out in the table below alongside Burnley's actual league status during the Relevant Period.[83]

	2021/22	2022/23	2023/24	2024/25
Actual	**PL**	**EFL**	**PL**	**EFL**
Scenario 1	PL	PL	PL	PL
Scenario 2	PL	PL	PL	EFL
Scenario 3	PL	PL	EFL	PL
Scenario 4	PL	PL	EFL	EFL

217. Mr Boulton explains his approach as follows.[84]

> To calculate Burnley's cash flows in the But-For Scenario:
>
> (a) I assume that Burnley would not have been relegated at the end of the 2021/22 season and would have played in the Premier League for the 2022/23 season;
>
> (b) For the following two seasons, I perform a probabilistic assessment of Burnley's cash flows, considering several possible outcomes for Burnley's performance at the end of each season in terms of relegation, survival, and promotion; and
>
> (c) I then weight each of these possible cash flows to perform a probabilistic assessment of Burnley's cash flows (the "**Weighted But-For Scenario**").
>
> I calculate the loss suffered by Burnley as the difference in its cash flows for the four years between 2021/22 to 2024/25 in the Actual Scenario to those in the Weighted But-For Scenario.

[83] Mr Boulton's report dated 23 June 2025, Figure 5-1
[84] Mr Boulton's report dated 23 June 2025, paragraphs 4.2.5-6

218. Mr Boulton elaborates on this later in his report.[85]

> As I discuss in section 5.2.A, there are a number of outcomes that could have transpired but for Burnley's relegation from the Premier League at the end of the 2021/22 season as a result of Everton's PSR Breach. Therefore, I assign a probability weighting to the cumulative cash flows of each But-For Scenario in order to calculate the Weighted But- For Scenario.
>
> I consider that it is broadly equally likely that any of the four But-For Scenarios could have transpired. I therefore assign an equal weighting of 25% to each of the four But-For Scenarios to calculate the Weighted But-For Scenario.

219. Notwithstanding his references to *probabilistic assessments* under cross examination Mr Boulton distanced himself from the suggestion that he was offering an *expert opinion* on the likelihood of Burnley's changes in league status during the Relevant Period.[86]

> Q. Let's just have a look at 5.2.40, that is the page we were just on. Page {E2/6/40}, please. You say: "I consider that it is broadly equally likely that any of the four But-For Scenarios could have transpired.
>
> A. Yes.
>
> Q. That is your expert opinion?
>
> A. No, I don't think it is my expert opinion, I think that is a justification for why I am doing the simple assumption of 25% to each. I say elsewhere that ultimately it is a matter for the Commission and I'm available if the Commission wanted to conclude that the probabilities of each scenario are different from that. But for the purpose of this –
>
> Q. Are you saying it is not your opinion, then, that it is broadly equally likely?
>
> A. I'm saying that seems to me an entirely sensible, neutral assumption. But I'm not here to try and persuade the Commission at all that in fact Burnley could have -- would have stayed in the Premier League or would have been –
>
> Q. I completely understand that. I'm not challenging -- you have not got a crystal ball.
>
> A. My language here is to say that if I'm going to come up with four scenarios, which is one step, and those are in my view the sensible scenarios, then I'm not here as a football expert and it is not for me to impose probabilities other than something neutral.
>
> Q. Right.
>
> A. And therefore I choose 25%. Now, you are right, I do justify it by saying it is broadly equally likely, but I mention other factors that might lead you to think that remaining in the Premier League was more likely. But I'm not going to adopt that because I want to have a neutral presentation of the scenarios.

220. In the exchange below, Mr Boulton offers justification for the scenarios he has selected as capturing *everything that in the actual world has happened*.[87]

> Q. Now, can I just -- and it is not a criticism, I'm just trying to understand it. There's no factual evidence to support your assessment that these are the four most likely scenarios, this is your assessment?
>
> A. I don't think that is quite true. We do have the facts from the actual scenario.
>
> Q. So that's scenario 3?
>
> A. No, hold on. The factual pattern which, as Mr Dudney says, informs any analysis of but-

[85] Mr Boulton's report dated 23 June 2025, paragraphs 5.2.39-40
[86] Day 7, P63 (1) – P64 (10)
[87] Day 7, P65 (24) – P 66 (20)

for -- and both of us use the actuals to inform our but-for -- what the actual scenarios show is that promotion and relegation are both realistic possibilities.

Q. So that's very fair –

A. And therefore the four scenarios I have looked at capture everything that in theory looks as it would be likely to happen and everything that in the actual world has happened.

Q. And I think that's a fair point. But what you seem to be saying is what has happened in fact is a very good input, if I can put it that way, into any form of assessment as to what might happen?

A. Yes, it is certainly a sense check.

221. By contrast, Mr Dudney relied on just one scenario in his primary case, namely Mr Boulton's scenario 3 which he concluded was *the most reasonable scenario as it mirrors the Actual Scenario, delayed by one year*.

	2021/22	2022/23	2023/24	2024/25
Actual	**PL**	**EFL**	**PL**	**EFL**
Scenario 3	PL	PL	EFL	PL

222. In his first report, Mr Dudney argues that selection of the appropriate counterfactual should be undertaken as follows.[88]

Instead of selecting what appears to be an arbitrary and artificially limited range of sporting scenarios, it is my opinion that the most appropriate approach is either to:

(a) consider all possible relegation, promotion and retention scenarios, including relegation from the Championship, and assign probabilities to each scenario based on supporting information; or

(b) identify the most reasonable but-for scenario and conduct a loss assessment on the basis of this scenario.

223. Mr Dudney is critical of Mr Boulton for, in his view, failing to *consider all possible relegation, promotion and retention scenarios*. Mr Dudney identifies a total of thirteen alternative scenarios. Eight of the nine additional scenarios involve making alternative assumptions about Burnley's league status in 2025/26 and would only impact on but-for cash flows to the extent that they gave rise to different assumptions about bonuses which might be paid, or saved, at the end of 2024/25 as a result of promotion, retention of Premier League status or relegation.

224. Mr Dudney's thirteen alternative scenarios also included five where the club experiences further relegation either to League 1 or, in one instance, League 2. Mr Boulton confirms he had decided not to account for the possibility of further relegation.[89]

[88] Mr Dudney's report dated 28 July 2025, paragraph 4.4.1
[89] Day 7, P96 (18) – P97 (4)

Q. But you said at the beginning that you haven't carried out any probabilistic assessment to determine whether or not but-for scenario 4 does in fact capture all downside risk?

A. No, that's a judgment call based on 40 years of experience, that it would capture unlikely downside risks. I mean, it has got a double consecutive season in the Championship, which Burnley hasn't had in the 10 years that we are looking at.

Q. But we have –

A. That is a significant downside scenario and it is worse than what has happened in actual-world.

225. Mr Boulton rejected Mr Dudney's criticism, maintaining that his selection of four scenarios was appropriate.[90]

Mr Dudney's suggestion that I should have modelled "***all*** *possible relegation, promotion and retention scenarios*" is inconsistent with standard practice, whilst also simply not pragmatic or proportional. Indeed, my adoption of four scenarios is broadly consistent with the literature:

(a) A leading corporate finance textbook stresses that, rather than model "*an infinite number of possible future scenarios*", analysts should instead consider "*no more than two or three scenarios that capture the main uncertainties*";[91]

……..

(c) Similarly, IAS 36 guidance for preparing expected cash flows, which use multiple expectations of possible cash flows instead of a single most likely cash flow, highlights the "*need to balance the cost of obtaining additional information against the additional reliability that information will bring to the measurement*".[92]

226. Mr Boulton also specifically addressed Mr Dudney's criticism that his scenarios were unduly optimistic for excluding the possibility of a second relegation by observing that he had also discounted the possibility of Burnley qualifying for Europe, despite the club having qualified for the Europa League as recently as 2018/19.[93]

Q. So you suggest that your scenarios may be conservative because you didn't model the scenario involving European qualification. This is at {E2/12/30}. But that really would have been a fanciful scenario, surely?

A. I think when once in the last five years Burnley has qualified for Europe, I wouldn't call it fanciful. I would say I properly excluded it from my core modelling.

Q. But it is not a very good example, with respect, of being conservative, because there must have been a zero or close to zero chance of a European qualification, given its history of playing in the last five years?

A. I think probably people wouldn't use terms like zero or close to zero, but I would agree with you that it is sufficiently unlikely as to not need to be modelled as one of my four scenarios. I'm simply addressing an allegation made by Mr Dudney that my scenarios were somehow optimistic because I excluded double relegation and I'm simply showing there is a balanced portfolio of outcomes and I have tried to ensure that mine are conservative.

[90] Mr Boulton's report dates 8 August 2025, paragraph 4.2.27
[91] Brealey et al – "Principles of Corporate Finance" (2023), chapter 10, P281
[92] IAS36 "Impairment of Assets" (2021), paragraph A12
[93] Day 7, P94 (16) – P95 (11)

227. Mr Dudney acknowledged under cross examination that Mr Boulton has been conservative in this regard.[94]

Q. And Mr Boulton's four but-for scenarios do not include any of those positive trips to Europe, et cetera, do they?

A. That's correct.

Q. So would you accept that he has been conservative in not including those?

A. In that aspect, but I think there are other issues, of course, taken as a whole. But in relation to that attribute, yes, I think that's -- you know, all else equal, that is a conservative aspect to his calculation.

228. Despite arguing that having identified the thirteen possible scenarios it would be appropriate to *assign probabilities to each scenario based on supporting information*, Mr Dudney did not attempt to *assign probabilities* in his original report. Moreover, under cross-examination, Mr Dudney conceded that he would not have the expertise to assign relative probabilities to a range of scenarios.[95]

Q. So, for example, if this Commission decided, "We think four but-for scenarios is the right way to go", but equal weight might not be -- they are not going to come to you, Mr Dudney, to establish the relative probability of those four scenarios, are they? That is not your area.

A. No, I'm not in a position to opine on what the probability of one versus the other is, except for the assumption that I made and why I selected but-for scenario 3.

229. In his first report, Mr Dudney had explained why he favoured Mr Boulton's scenario 3 for his primary case.[96]

I consider Mr Boulton's But-For Scenario 3 to be the most reasonable counterfactual scenario for the following reasons which I will explain in turn:

(a) Mr Boulton's wage spend assumptions mean BFC had a lower chance of remaining in the PL in the 2022/23 season, making But-For Scenarios 1 and 2 less likely by comparison; and

(b) the Actual Scenario factually sets out what happened after BFC's relegation. Therefore, Mr Boulton's But-For Scenario 3 which mirrors the "yo-yo" pattern of the Actual Scenario, delayed by a year, appears to be the most reasonable but-for scenario, as it replicates what actually happened following BFC being relegated.

230. Mr Dudney reaffirmed this approach in his presentation to the Commission, noting that Burnley itself had highlighted the *yo-yo effect*.[97]

There's more to that scenario when that first relegation happens, and that is that Burnley has put forward its position, as I understand it, that that first relegation increases the likelihood of what is referred to as the yo-yo effect. I noted that when I evaluated Mr Boulton's four different scenarios that, again, but-for scenario 3 reflected that yo-yo effect that would be more likely in the event of a first relegation.

So what you can see from the chart on the screen is simply that in light of the fact that in the actual performance of Burnley, it did experience this yo-yo and I'm then able to use that actual

[94] Day 8, P35 (22) – P36 (6)
[95] Day 8, P 41 (5-13)
[96] Mr Dudney's report dated 28 July 2025, paragraph 4.4.4
[97] Day 8, P6 (23) – P7 (13)

experience and financially what happened and use that to inform my quantum with respect to the but-for world that I compare the actual world to.

231. In his second report, Mr Boulton rejects Mr Dudney's approach.[98]

In my view, a single scenario cannot capture the inherent uncertainty in the range of sporting outcomes competition for a club such as Burnley. Reliance on a single-scenario approach risks being too rigid in this case and overlooking the range of reasonably foreseeable outcomes, whilst giving potentially a misleading impression of certainty. This can be avoided by using multiple scenarios.

For example, Mr Dudney's sole But-For Scenario sees Burnley fall into the Championship in the final year of his damages estimate, triggering a large cash inflow from player sales upon relegation.

232. In his presentation to the Commission, Mr Boulton also draws attention to the fact that scenario 3 was the most loss-making scenario in both experts' calculations, £31.3 million according to Mr Boulton and £86.7 million according to Mr Dudney's alternative case, in both cases including both operating losses and net player trading cash flows and before averaging.[99]

So Mr Dudney assumes that the only scenario that he needs to quantify is scenario 3, which is a delayed scenario whereby Burnley is relegated the next season, promoted and then relegated again.

It just happens that that is by far the most pessimistic of the four scenarios and Mr Dudney is putting 100% weight on that but-for world and that is why he thinks Burnley has in fact gained £18 million.

233. We recognise that selection of the most appropriate scenarios has a material bearing on the but-for cash flows. We also recognise the challenges the experts faced in selecting these. Although both admitted that they lacked the expertise to assign relative probabilities to different scenarios, both have effectively done so, Mr Boulton by weighting each of his scenarios by 25% and Mr Dudney by selecting just one scenario, as noted in Burnley's closing submissions.[100]

Moreover, the reality is that he has done a probabilistic analysis of sorts: his primary case ascribes 100% probability to one scenario only.

234. Despite his criticisms of Mr Boulton's approach, Mr Dudney's alternative case uses the same weighted average of four scenarios.

235. We found Mr Boulton's quotation from Brealey at al on "Principles of Corporate Finance", referenced in paragraph 225, to be helpful, recommending that rather

[98] Mr Boulton's report dated 8 August 2025, paragraphs 4.2.4-5
[99] Day 7, P17 (7-15)
[100] Burnley closing submissions, paragraph 62

than modelling *an infinite number of possible future scenarios* analysts should consider *no more than two or three scenarios that capture the main uncertainties*. We consider there to be merit in this approach. Moreover, the four scenarios Mr Boulton has selected were, as he observed, *sensible* and based on *everything that in the actual world has happened*. For this reason we are comfortable with his decision to discount the possibilities both of further relegations, and of European qualification. Burnley's history over the preceding twenty or more seasons had been in the Premier League or Championship: it had not played in League 1 since 1999/2000.

236. It follows that we are less convinced by Mr Dudney's argument in favour of his preferred scenario in his primary case. We recognise the strength of Burnley's observation that Mr Dudney had *done a probabilistic analysis of sorts* by assigning a 100% probability to scenario 3.

237. Although, ideally, scenarios should be weighted according to probability, in the absence of persuasive argument in favour of alternative weightings (which both experts acknowledged that they lacked the expertise to attempt), we accept Mr Boulton's weighting of 25% for each but-for scenario.

238. We note that a consequence of Mr Boulton's selection is that eight of the twelve but-for scenarios (i.e. two thirds) involve Burnley's participation in the Premier League whereas, in the actual scenario, Burnley spent just one of those three seasons in the Premier League. However, we consider this to be an inevitable consequence of the fundamental but-for assumption that, in the counterfactual, Burnley was not relegated at the end of the 2021/22 season and therefore played in the Premier League in 2022/23. This is consistent with the instructions given to both experts, as confirmed by Mr Boulton.[101]

> The question is if 2022/23 had been in the Premier League, and that's the starting point Mr Dudney and I are both instructed to assume, so putting aside the causation of whether the breach caused the relegation, our starting point for the damages analysis is yes, it did and therefore Burnley would have been in the Premier League in 2022/2023.

(2) Timing of Cash Flows

239. It has already been explained that the *lost cash flows* on which both experts base their calculations of loss/gain are not cash flows in the conventional accounting

[101] Day 7, P10 (17-24)

sense. The experts' calculations of lost cash flows relating to operating profit/loss are the club's reported operating profits/losses before deduction of depreciation, interest, player amortisation and add back or deduction of profit/loss on sale of players. The club's audited accounts confirm that reported profit/loss is accounted for on an accruals basis and not a cash basis. However, the experts rely on the profit/loss as reported and without adjustment.

240. Player trading cash flows represent the total cost of player registrations acquired, less the disposal proceeds of any player registrations sold. These comprise the total value of the respective transactions as at the date of the transfer of registration. Two points should be noted. First, the treatment of these cash flows within the experts' calculations is at odds with conventional accounting for player trading as intangible assets. Second, the treatment ignores the timing of actual player trading cash flows. In practice, transactions for the purchase and sale of players are most likely to be phased over a number of years although clubs often accelerate the receipt of deferred player sale proceeds by factoring these instalments with financial institutions which specialise in providing such funding. However, since both experts adopt the same approach we are content to proceed on this basis.

241. A further nuance is added by Mr Boulton's treatment of the timing of Burnley's player trading. Although the club's financial year end is 31 July, Mr Boulton argues that in calculating Burnley's claim it is more appropriate to account for player trading by reference to a football season (1 June to 31 May) rather than the financial year. His calculation of operating profit/loss continues to be as reported for the club's financial year (1 August to 31 July). He explains this treatment in his first report.[102]

> Player trading concerns the purchase and sale of player registrations. Player trading relates closely to which league Burnley plays in; I therefore match the player trading data to that season, rather than Burnley's financial years. This means that the entirety of the summer transfer window is reflected in the following season in my calculations rather than being split.

242. Mr Dudney takes issue with what he describes as Mr Boulton's *mismatch in cash flow periods* in his first report.[103]

> 1. I do not agree with Mr Boulton's approach to assessing actual player trading and consequently but-for player trading.

[102] Mr Boulton's report dated 23 June 2025, paragraph C.4.64
[103] Mr Dudney's report dated 28 July 2025, paragraph 5.2.1-3

2. Mr Boulton estimates BFC's operational cash flows on a financial year basis (i.e. between August and July each year). This is consistent with BFC's financial statements and the results which are submitted to the PL for PSR purposes. However, in estimating BFC's player trading cash flows, Mr Boulton matches the player trading data to the season (June to May each year) rather than the financial years. This means he includes player sales and purchases which occurred in June and July of the previous financial year in the following financial year ,e.g. player trading in the 2021/22 season (which ranges from 1 June 2021 to 31 May 2022) is reflected in FY 2022 (from 1 August 2021 to 31 July 2022).

3. Mr Boulton justifies his mismatch of financial years and seasonal data on the basis that, *"Player trading concerns the purchase and sale of player registrations. Player trading relates closely to which league Burnley plays in; I therefore match the player trading data to that season, rather than Burnley's financial years"*. I do not consider this justification sufficient to make unnecessary adjustments to the actual cash flows of BFC, creating a mismatch in cash flow periods. Further, the timing of sales and purchases of players can also be driven by a club's need for cash in a particular financial period (for example for PSR compliance purposes which is also assessed on a financial year basis) and is not solely linked to the league in which a club plays in.

243. Mr Boulton expands on his reasons for his seasonal approach and addresses some of Mr Dudney's comments in his second report.[104]

> Player trading can be viewed as a forward-looking investment. Clubs buy and sell players in the summer transfer window to, amongst other factors, assemble a squad for the upcoming season (and in the winter transfer window to adjust their squad mid-season). The transfer strategy is significantly impacted by whether the club will compete in the Premier League or the Championship.
>
> Mr Dudney appears to acknowledge this general principle, but it is not captured in his conclusion. Rather than align player trading with the football season, Mr Dudney bases player trading on accounting years that end mid-way through the summer transfer window. This approach introduces an important timing mismatch that obscures the link between a club's transfer activity and the league in which it is about to compete.
>
> By contrast, my approach matches player trading cash flows with the relevant football season. Unlike an approach based on Burnley's accounting year, I do not bisect the summer transfer window, which ensures that player trading cash flows are aligned to the performance in the upcoming season.

244. Both experts make valid points. It is undoubtedly the case that much of any club's summer transfer window activity will include restructuring the playing squad to equip it for the forthcoming season, with a greater level of activity likely to be evident following promotion or relegation. Equally some clubs' activity may be motivated by other factors including, as Mr Dudney observes, cash flow requirements or PSR compliance. That said, Mr Dudney added (by way of footnote 108 to his first report) that he was *not aware of any sales being made by BFC to assure PSR compliance*, a point he later acknowledged under cross examination.

245. Mr Boulton elaborated on the reasons for his approach in his presentation to the

[104] Mr Boulton's report dated 8 August 2025, paragraph 2.2.7-9

Commission.[105]

> On player trading, as I have already intimated, my strong view is that you have to think about player trading on a seasonal basis. So there are shown here -- I've divided the player trading data into three dates: early summer; that's before 31 July; late summer, that is August, and any trading in September; and winter, which is the January window.
>
> Burnley's accounts, as the Tribunal knows, are 31 July and so within Burnley's accounts player trading falls either side of the financial year-end but is not associated with one season or another, it essentially splits it. One can see that, for example, on the right-hand box along the top which is the 2024/2025 season, where one actually has player disposal -- purchases in early summer, negative cash flow, then significant sales in late summer and relatively small trading in that particular winter.
>
> But my own view is that you need to combine the early summer and the late summer. It would be possible to associate those with the previous season as a consequence of what happened in that season or with the coming season on the basis that they are getting the side ready for the coming season, and given the swings and what we see, it seems to me sensible to associate purchases with the season you are buying those players for and the same with the sales.

246. The presentation slide to which Mr Boulton was referring[106] highlighted very clearly the merit of his approach. It showed a net cash inflow from player sales of £35 million in June/July 2022. These transactions would have featured in Burnley's FY22 annual accounts but, in strategic terms, were likely to have been in response to relegation from the Premier League. Further, the slide showed a net cash outflow from player purchases in June/July 2023 which will have featured in the club's FY23 annual accounts but which will have been largely in response to the club's promotion back to the Premier League and the need to strengthen the squad ahead of the forthcoming season.

247. Later, under cross-examination, Mr Boulton was at pains to distinguish between how clubs might account for income and expenditure within their accounts by contrast with *what a damages analysis is doing is looking at the economic substance of the cash flows and what they relate to*. He was also keen to emphasise the importance of his seasonal approach when assessing the but-for player trading.[107]

> I'm conscious that a lot of my evidence has probably been far from clear on this general issue about why I try and look at player trading on a transfer window rather than the July cut-off and the answer is it is only because we are trying to do but-for player trading and in the but-for world you are trying to work out what is player trading depending on whether you are promoted or relegated and to inform those assumptions it is much easier to think about it as a window rather than splitting July and August.
>
> So there is a lot of what probably is complexity introduced by seasonal player trading, but the reason is that otherwise it is very difficult to make assumptions about the but-for world.

[105] Day 7, P15 (19) – P16 (19)
[106] Mr Boulton's presentation dated 29 September 2025, slide 18
[107] Day 7, P175 (25) – P176 (13)

248. In his presentation to the Commission, Mr Dudney placed emphasis on how his primary case approach was perhaps more expedient, allowing him to rely on figures extracted from the club's accounts with minimal adjustment.[108]

> You see that as I have shown here, I do my original or primary assessment on a fiscal year basis, and there was a lot of discussion yesterday about fiscal year versus a seasonal approach to doing the damages quantum. While I will talk about it more in a moment, generally speaking, I took the fiscal year approach for the simple reason that I was able to utilise to a more fulsome extent the financial statements of the company and I didn't have to engage in a series of assumptive exercises given my approach.

249. However, in cross examination, Mr Dudney acknowledged that Mr Boulton's seasonal approach may indeed be more in line with how clubs made their decisions regarding squad building.[109]

> Q. Isn't the reality, Mr Dudney, that your financial year approach is just simply not the way that clubs think about their objectives? We have numerous board packs in the bundle. I'm not going to take you to them, not least given the time of day, but they take a seasonal approach when they are thinking about the squad that they need for the games ahead of them, don't they?
>
> A. I think they certainly consider a seasonal approach, but my only point is that consistent with that, player trades occur when they occur and they fall within the financial years that they do. Those financial years have operational cash flows with them and I have simply matched those, if you will, the operational flows, with the underlying player trading flows regardless of what the underlying summer window is, given its -- the fact that it doesn't match up one for one with the fiscal year –

250. This issue of timing of cash flows is particularly relevant to the analysis of the experts' calculations of actual and but-for player trading discussed in later sections. By way of example, as a consequence of his approach Mr Boulton's calculation of Burnley's loss totally excludes all summer 2025 player trading whereas Mr Dudney's primary case calculation includes all trading undertaken up to 31 July 2025: a net outflow of £33.7 million as shown in paragraph 187(4).

251. Although he continued to favour his primary case, Mr Dudney confirmed that his alternative case did adopt Mr Boulton's seasonal basis for player trading.[110]

> Now, recognising the issues from my perspective from quantum in front of the panel, I also wanted to, as part of my assessment, do an alternative assessment which accepted the use of four scenarios as Mr Boulton put forward. I wanted to then dig into and reflect what I thought were a more appropriate application of that structure, if you will, if the panel felt as if the four-scenario approach was a more appropriate approach, so I engaged in that seasonal player trading but-for scenario alternative.

252. We have already noted that we accept the experts' method of accounting for

[108] Day 8, P4 (5-14)
[109] Day 8, P52 (16) – P53 (7)
[110] Day 8, P7 (20) – P8 (14)

player trading cash flows, even though this represents a departure from conventional accounting practice for such transactions.

253. In the same way, we can see merit in Mr Boulton's preference for accounting for player trading on a seasonal basis rather than by financial year. He emphasises that this treatment is purely for the purposes of assessing damages and so is separate and distinct from how football clubs might otherwise account. We note that emphasis. His method seeks to align player trading cash flows with the league in which the club will participate in the forthcoming season: there is particular logic in this approach for a club, such as Burnley, experiencing regular promotion and relegation within the Relevant Period. The table in paragraph 296 illustrates this clearly with Burnley a net purchaser in Premier League seasons (FY22 and FY24) and a net seller in Championship seasons (FY23 and FY25). Mr Boulton also makes the valid point that, unless a seasonal approach is adopted, *it is very difficult to make assumptions about the but-for world*.

254. Mr Dudney emphasised how his approach allowed him to rely on figures extracted from the club's accounts with minimal adjustment and this will have assisted him in his primary case but-for scenario. However, we were not persuaded by his argument that Mr Boulton's approach created a *mismatch in cash flow periods* since, as emphasised, this treatment of player trading cash flows is for the purposes of assessing damages only and has no wider application.

255. Due to their different approaches, Mr Dudney's primary case included June and July 2025 player purchases (a net cash outflow of £33.7 million). Both Mr Boulton's model and Mr Dudney's alternative case excluded these transactions and we agree with this approach.

256. We were also not convinced by Mr Dudney's suggestion that player trading *can also be driven by a club's need for cash in a particular financial period (for example for PSR compliance purposes which is also assessed on a financial year basis) and is not solely linked to the league in which a club plays*.[111] This may well be the case for certain clubs' activity (although Mr Dudney did agree he was *not aware of any sales being made by BFC to assure PSR compliance*) but we are satisfied that the vast majority of Burnley's player trading activity during the

[111] Mr Dudney's report dated 28 July 2025, paragraph 5.2.3

Relevant Period was driven by the need to restructure its playing squad following either relegation or promotion.

(3) Assumptions Within But-For Operating Profit/Loss

257. Paragraph 183 summarises the experts' calculations of their total loss/gain. The operating profit/loss element of Mr Boulton's loss was £29.7 million, broken down over the four years of the Relevant Period as follows. The actual and but-for league status for each season is also shown.[112]

	League status	Total £m	2021/22 £m	2022/23 £m	2023/24 £m	2024/25 £m
Operating profit/(loss)						
Actual cash inflow/(outflow)	PL-EFL-PL-EFL	**(21.2)**	12.5	(20.4)	18.6	(31.9)
But-for cash inflow/(outflow) *		**8.6**	0.9	16.4	1.1	(9.8)
Total gain/(loss)		**(29.7)**	**11.6**	**(36.8)**	**17.6**	**(22.2)**
* Weighted average of following four scenarios						
Scenario 1	PL-PL-PL-PL	**57.2**	0.9	20.2	22.8	13.3
Scenario 2	PL-PL-PL-EFL	**(0.0)**	0.9	8.3	22.8	(31.9)
Scenario 3	PL-PL-EFL-PL	**6.7**	0.9	18.6	(26.8)	14.0
Scenario 4	PL-PL-EFL-EFL	**(29.6)**	0.9	18.6	(14.5)	(34.5)

258. The operating profit/loss element of Mr Dudney's overall gain in his primary case was £21.3 million, broken down over the four years of the Relevant Period as follows.[113]

	League status	Total £m	2021/22 £m	2022/23 £m	2023/24 £m	2024/25 £m
Operating profit/(loss)						
Actual cash inflow/(outflow)	PL-EFL-PL-EFL	**(21.2)**	12.5	(20.4)	18.6	(31.9)
But-for cash inflow/(outflow)	PL-PL-EFL-PL	**0.1**	0.9	17.2	(27.0)	9.0
Total gain/(loss)		**(21.3)**	**11.6**	**(37.5)**	**45.6**	**(41.0)**

259. Mr Boulton identifies the principal source of information for his actual scenario as two spreadsheet models maintained by the club. These summarise financial data under five main income headings and ten main cost headings. Mr Boulton

[112] Mr Boulton's actual and but-for cash flows are obtained from Appendix A to his report dated 19 September 2025. The actual cash flows are from worksheet 'Actual Scenarios', cells K-N56. The but-for cash flows are from worksheets 'But-For Scenario 1' – 'But-For Scenario 4', cells K-N56.
[113] Mr Dudney's actual and but-for cash flows are obtained from his Updated Appendix 4 to his expert report. The actual cash flows are from worksheet 'Actual Scenarios', cells K-N56. The but-for cash flows are from worksheet 'But-For Scenario 3', cells K-N56.

incorporates this source information into his own model, using the same income and cost headings. The data from the actual scenario informs Mr Boulton's but-for scenarios together with contemporaneous club budgets for 2021/22 and 2022/23, information about central distributions by the Premier League and assumptions made in the club's own internal models. Mr Boulton adopts a high-level approach to his but-for analysis.

260. Broadcast/league distributions represent by far Burnley's largest source of revenue: 84.8% of total revenue in the FY22 actual scenario. Mr Boulton calculates but-for revenue by reference to known distributions, merit fees based on Burnley's assumed finishing position, a minimum of 12 *TV picks* (live appearances, consistent with Burnley's actual picks in 2021/22) and parachute payments for seasons when the club was assumed to play in the Championship.

261. Depending on the club's assumed league status in each scenario, other sources of revenue (commercial, matchday, retail and hospitality) are calculated by reference to actual revenue, modified to take account of the club's league status and other factors including historical revenue growth.

262. Playing staff overheads (in practice all staff wages as explained more fully in paragraph 275) made up 84.5% of Burnley's total overheads in FY22. Where the club's but-for league status mirrors the actual league status, Mr Boulton uses the actual figure for playing staff overheads. Where the league status differs, Mr Boulton has, in two cases, taken the average of the prior and subsequent years (when Burnley did actually play in the same league). For example, in his but-for analysis for Burnley playing in the Championship in FY24, Mr Boulton averaged the club's costs for FY23 (£48.2 million) and FY25 (£62.6 million) to arrive at a figure of £55.4 million. For scenario 1 in FY25 (Premier League status) Mr Boulton has applied indexation of 4.2% to the FY24 cost. For scenario 4 in FY25 (second season of Championship status) Mr Boulton has assumed that staff costs will be 82.4% of revenue, in line with the actual staff cost: revenue ratio in the preceding financial year (FY24) and recognising the reduction in parachute payment for the club's second season in the Championship within the revenue figure.

263. Following his original model, which accompanied his first report dated 23 June

2025, Mr Boulton updated his model on two subsequent occasions, making adjustments where he reconsidered his original assumptions, in some cases as a consequence of recommendations from Mr Dudney.

264. Mr Dudney has relied on Mr Boulton's model as a starting point for his analysis. His analysis is therefore consistent with Mr Boulton's in terms of both format and the main headings for income and costs. However, Mr Dudney's preference for just one but-for scenario (scenario 3) prohibits a direct comparison of his primary but-for case with Mr Boulton's weighted average scenarios.

265. Mr Dudney's alternative case is prepared on a basis consistent with Mr Boulton's, using the weighted average of four but-for scenarios. This discloses a net loss of £18.5 million compared with his primary case of a loss of £21.3 million.[114]

	League status	Total £m	2021/22 £m	2022/23 £m	2023/24 £m	2024/25 £m
Operating profit/(loss)						
Actual cash inflow/(outflow)	PL-EFL-PL-EFL	**(21.2)**	12.5	(20.4)	18.6	(31.9)
But-for cash inflow/(outflow) *		**(2.7)**	0.9	12.2	(1.8)	(13.9)
Total gain/(loss)		**(18.5)**	**11.6**	**(32.5)**	**20.4**	**(18.0)**
* Weighted average of following four scenarios						
Scenario 1	PL-PL-PL-PL	**22.2**	0.9	7.5	12.1	1.7
Scenario 2	PL-PL-PL-EFL	**(2.1)**	0.9	6.8	22.1	(31.9)
Scenario 3	PL-PL-EFL-PL	**0.1**	0.9	17.2	(27.0)	9.0
Scenario 4	PL-PL-EFL-EFL	**(30.9)**	0.9	17.2	(14.4)	(34.5)

266. The consistency of approach between Mr Boulton and Mr Dudney's alternative case permits a close comparison of the two experts' assumptions for FY22 to FY25 and their areas of disagreement. Mr Dudney has also adopted a high level approach and only departed from Mr Boulton's assumptions in a limited number of instances. Whereas Mr Boulton calculates a net but-for cash inflow for those four years of £8.6 million (paragraph 257), Mr Dudney calculates a £2.7 million outflow (paragraph 265). The resulting variance between the experts of £11.2 million is analysed in the table below. Figures in brackets denote Mr Dudney's assumptions of lower income and greater cost by comparison with Mr Boulton's

[114] Mr Dudney's actual and but-for cash flows are obtained from Updated Appendix 7 to his expert report. The actual cash flows are from worksheet 'Actual Scenarios', cells K-N56. The but-for cash flows are from worksheets 'But-For Scenario 1' – 'But-For Scenario 4', cells K-N56.

assumptions.[115]

	£m
Broadcast/league distributions (but-for 1 / FY23-FY25)	(8.5)
Broadcast/league distributions (but-for 3 / FY25)	(0.7)
Matchday income & costs (all scenarios / FY23-FY25)	(1.2)
Commercial income & costs (but-for 1 & but-for 3 / FY25)	(0.7)
Hospitality income & costs (all scenarios / FY23-FY25)	(0.7)
Retail income & costs (all scenarios / FY23-FY25)	(0.3)
	(12.2)
PL retention payments (but-for 1 / FY23-FY25)	0.9
Net variance	**(11.2)**

267. Both experts agree on the adjustment to the but-for outcome for FY22 where Burnley retains Premier League status in the counterfactual, namely a notional gain of £11.6 million.[116]

	£m
PL retention bonus payable	13.8
Additional unit of merit fee	(2.2)
Net cost saving in FY22	**11.6**

The variances between the two experts' models, totalling £11.2 million and analysed in the table in paragraph 266, therefore all arise in FY23 to FY25. The following analysis focuses solely on the variance between Mr Boulton's model and Mr Dudney's alternative case.

268. For broadcast/league distributions, Mr Boulton has assumed a 13th place Premier League finish in each year in his but-for scenario 1. By contrast, Mr Dudney assumes a 17th place finish. Premier League merit fees are £2.6-3.1 million per place and so a four place difference over 3 seasons is worth £34 million before being weighted by 25%, hence a variance of £8.5 million. Mr Boulton justifies his

[115] The variances summarised in this table are the differences between revenue and costs set out in Mr Boulton's and Mr Dudney's models. Mr Boulton's figures are taken from Appendix A to his report dated 19 September 2025, worksheets 'But-For Scenario 1' – 'But-For Scenario 4'. Mr Dudney's figures are taken from his Updated Appendix 7, worksheets 'But-For Scenario 1' – 'But-For Scenario 4'. Within those worksheets, both experts' cell references are the same, namely Broadcast/league distributions (L-N13); Matchday income & costs (L-N12 & L-N27); Commercial income & costs (L-N14 & L-N28); Hospitality income & costs (L-N23 & L-N33); Retail income & costs (L-N16 & L-N30); PL Retention Payments (L-N52). The differences between the figures in the respective models are then weighted by 25% to produce the net variances recorded in the table.

[116] Mr Boulton's Appendix A to his report dated 19 September 2025 and Mr Dudney's Updated Appendix 7. Variance comprises differences, within both expert's models, between worksheets 'But-For Scenario 1' to 'But-For Scenario 4' and 'Actual Scenario' – cell K13 (Broadcast/league distributions) and cell K52 (PL retention payments).

assumption in his first report.[117]

In But-For Scenario 1, I assume that Burnley spent each of the 2022/23, 2023/24, and 2024/25 seasons in the Premier League.

In the five years prior to its relegation, Burnley's average position in the Premier League table was 13th, with its highest position being 7th and lowest 17th.

269. Mr Dudney takes issue with Mr Boulton's assumption regarding league finish in his own first report.[118]

It is unclear on what basis Mr Boulton considers that the average of BFC's historic league finishes is an appropriate indicator of BFC's counterfactual league position. In my view, there are a number of reasons why this assumption is highly unlikely and inconsistent with the available information:

a) BFC's own forecasts are typically prepared on the basis that BFC would finish in 17th place in the PL (if not assuming relegation). This suggests that it was BFC's own expectation that, in the case of not being relegated from the PL, it would finish in 17th place;
b) Mr Boulton has not explained why he considers that the finishing position in earlier years is equally relevant to predict the counterfactual finishing position as the most recent finishing position. BFC's historical positioning becomes more irrelevant the further back the season goes as it does not reflect the current squad, ownership, player strategy or that of competing clubs in the PL which suggests that it is not necessarily a meaningful indicator of BFC's counterfactual finishing position; and
c) Mr Boulton does not take into account the assumed finishing position of 17th place in the 2021/22 season (which represents an 18th place finish in the Actual Scenario) in his average. BFC also finished 17th place in the 2020/21 season.

270. In subsequent versions of his model, Mr Boulton declined to make any amendment following Mr Dudney's criticism and so, without elaborating on the reasons set out in his first report, Mr Dudney reiterates his opinion in his third report dated 12 September 2025.

271. In addition to their differences regarding but-for scenario 1, Mr Boulton assumes an 18th place finish in the Premier League in but-for scenario 3 for 2024/25 whereas Mr Dudney argues in favour of a 19th place finish, mirroring the club's actual performance in 2023/24 but delayed by one year. The associated merit fee for 18th compared with 19th is estimated to be £2.6 million.

272. Mr Boulton addressed the different approaches with regard to league position in his presentation to the Commission.[119]

It is a neutral estimate in the context of the most optimistic scenario, scenario 1 being stays in the Premier League. So it is not as though one is putting 100% weight on scenario 1 and saying Burnley forever more would have come 13th and that is the end of the equation. In the most optimistic scenario it would have come 13th every year, but of course scenarios 2, 3 and 4 all have relegation, all have lower finishing positions therefore and my average but-for finishing position is the equivalent of 18th in the Premier League.

[117] Mr Boulton's report dated 23 June 2025, paragraphs 5.2.13-14
[118] Mr Dudney's report dated 28 July 2025, paragraph A6.4.5
[119] Day 7, P26 (14-23)

273. Mr Boulton was cross examined extensively on this assumption, including being asked about the likely impact on performance of the club's changes in ownership and head coach in the period since the five seasons in which they had averaged 13th position. He questioned how one might adjust for either of those changes in the club's circumstances and stood by his own approach.[120]

> But for the purposes of what I'm doing, it seemed to me that I was much better dealing with actual data and assuming that trend, that average would continue, than coming up with my personal subjective opinions of what difference Mr Kompany might have made on replacing Mr Dyche.

274. Mr Boulton did, however, acknowledge that he had not attempted to estimate the cost, in terms of playing and coaching staff and associated costs, of achieving three consecutive 13th place finishes.[121]

> Q. Can we agree, therefore, there is no part of your analysis in which you consider what level of spend would be required to be at and stay at 13th place, as opposed to simply staying up in the Premier League?
>
> A. It is not an analysis I have done and it is not within my expertise. But I would point out that the weighted average of my four scenarios is that Burnley come 18th.

275. Mr Boulton's model discloses Burnley's total cost for FY22 for *Playing staff* (understood to represent total wages for all staff, as borne out by disclosure in the club's annual accounts) of £91.5 million. This total evidently included £8.6 million of exceptional and non-recurring costs. His model then estimates costs of £85.6 million for FY23 (an average of FY22 and FY24 after elimination of the non-recurring FY22 costs), £88.3 million for FY24 (actual cost) and £91.5 million for FY25 (FY24 + 4.2% indexation). Mr Boulton's but-for scenario 1 therefore predicts three consecutive 13th place finishes for the club based on average annual wage costs of £88.5m, against a cost of £82.9 million (after exclusion of the non-recurring costs) in a season when the club finished 18th. Deloitte reports that Burnley's wage cost in FY22 was 18th highest among Premier League clubs while the club finishing 13th (Aston Villa) reported wage costs of £137 million. That said, both Mr Williams and Mr Baldwin emphasised how Burnley had outperformed relative to their wage budget in recent seasons.

276. Mr Boulton was asked by the Commission whether he believed he had made sufficient allowance for player cost increases and transfer expenditure in order to allow the club to achieve 13th position. He responded – [122]

[120] Day 7, P80 (19-24)
[121] Day 7, P82 (5-12)
[122] Day 7, P188 (21) – P189 (13)

> Yes, on two grounds. First, although Burnley has a lower player spend than most other clubs, I include a table in my second report showing that its average finishing position is much higher than its average wage spend, so there is a historical pattern, at least for the five previous years, that shows that in every year Burnley outperforms its wage spend.
>
> And second, the point was implicit in the first part of your question, which is of the four scenarios, it is the optimistic one and within that world, 13th in a scenario I give a 25% weighting to, as against a scenario where I have two seasons in the Championship, which has not happened for Burnley in the recent past. I feel there is a fair balance there. I'm not concerned about the fact that yes, of course, in isolation, 13th sounds like a good performance. On average, my Burnley finishing position is 18th across the four but-for scenarios.

277. On more than one occasion in his evidence Mr Boulton mentioned that Burnley's weighted average finishing position was 18th across the four scenarios. In fact, the weighted average of his outcomes is 17.625, against the club's actual average finish of 20th over the four years of the Relevant Period (18th – 21st – 19th – 22nd.

278. For matchday income and costs, Mr Boulton had originally modelled annual matchday income of £6 million while Burnley was in the Premier League and £6.5-6.9 million while in the Championship. He revisited this in the model accompanying his second report in which he adopted actual matchday income for both Premier League and Championship scenarios. He explained his revised approach as follows.[123]

> In practice, this means matchday revenue does not change between the Actual and But-For Scenarios. For consistency, I apply the same approach to matchday costs. This updated approach is consistent with both:
>
> a) Witness evidence indicating that matchday revenue would remain broadly consistent whether Burnley was competing in the Premier League or the Championship; and
> b) Mr Dudney's stated preference for relying on data from the Actual Scenario where possible. My revised approach applies that same logic to matchday revenue and costs.

279. The *witness evidence* had been provided by Mr Thompson.[124]

> Match day income is less affected by relegation than a club's other sources of income, at least initially. I would say it is only once a club has been competing in the Championship for a number of years that there starts to be a more significant effect on match day attendance by the fans…….. There are also more games in the Championship than in the Premier League, such that matchday revenue may in fact increase.
>
> During the 2022/23 season [following the club's relegation to the Championship], Burnley's match day increased slightly – the club was winning matches and performed better than expected in the knockout cups during the season.

280. Mr Boulton's estimates are borne out by the club's actual matchday income while in the Premier League (FY24 - £6.7 million) and the Championship (FY23 - £7.2 million; FY25 - £6.9 million).

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[123] Mr Boulton's report dated 8 August 2025, paragraph 3.2.22
[124] Witness statement of Andrew Thompson dated 14 May 2025, paragraphs 26-27

281. Mr Thompson also drew attention to the club performing *better than expected in the knockout cups* which is understood to be a reference to away ties against both Manchester City and Manchester United in FY23 which would have been a material factor contributing to the £7.2 million matchday income in the year. Mr Boulton reconsidered his approach to cup tie revenue in his updated model accompanying his second report, as he explains.[125]

> However, my previous modelling of matchday revenue did not account for this and, instead, excluded Burnley's 2022/23 cup run in the But-For Scenarios. It implicitly assumed that similar cup runs would not recur in equivalent but-for seasons, in effect assuming that Burnley's cup results would have been materially worse absent Everton's overspend.
>
> In my view, the simpler and more objective approach is to assume that Burnley's cup runs would not differ between the But-For and Actual Scenarios. I also assume that Premier League and Championship league related match revenue is broadly the same.

282. Mr Dudney did not engage in any detailed analysis of matchday revenue and costs but opted to retain Mr Boulton's original estimates in his models. In his third report he submitted that those assumptions were *more appropriate*, without elaborating on this point.[126]

> In Boulton2, Mr Boulton updated his methodology for calculating his counterfactual matchday revenues assumptions by assuming matchday revenues are the same in the Actual and But-For Scenarios, irrespective of whether BFC is competing in the PL or the EFL Championship. In Boulton1, Mr Boulton estimated matchday revenues based on an assumption of the number of matches per seasons and revenue per match based on BFC's model. Although there are issues with Mr Boulton's approach in Boulton1, as I explained in Dudney1, paragraphs 5.3.21 to 5.3.26, I consider that the assumptions made in Boulton1 are more appropriate than the assumptions made in Boulton2. Therefore, I have adjusted Mr Boulton's assumptions to revert to those made in Boulton1.

283. In his second report Mr Boulton had also adjusted matchday costs to reflect actual costs for FY23, FY24 and FY25 in each of the four scenarios whereas Mr Dudney retained Mr Boulton's original assumptions. Neither expert departed from their respective positions, hence the variance of £1.2 million on net matchday income and costs, as set out in table in paragraph 266.

284. Mr Dudney challenges Mr Boulton's assumption about commercial revenue in the Premier League in FY25. This assumption is applicable to both but-for scenario 1 and but-for scenario 3. Mr Boulton had looked at commercial revenue in the club's two most recent seasons in the Premier League (FY22 - £7.0 million; FY24 - £10.1 million) and extrapolated from these two figures a compound annual growth rate of 20% which he has applied to the FY24 figure to predict revenue in

[125] Mr Boulton's report dated 8 August 2025, paragraphs 3.2.20-21
[126] Mr Dudney's report dated 12 September 2025, paragraph 3.13

FY25 of £12.2 million. Mr Boulton applied the same methodology to commercial costs, as a consequence of which he increased costs from £2.3 million to £2.7 million in both but-for scenarios.

285. Mr Dudney asserts that the growth rate selected by Mr Boulton ignored historical trends. Depending on the base year selected, since FY17 Burnley's commercial revenue had increased or contracted by between +12.5% and -1.2%. Moreover, the club had already shared with the experts evidence of its projected FY25 commercial revenue, had it remained in the Premier League, in the sum of £10.8 million.

286. Mr Dudney favoured figures of £10.5 million (revenue) and £2.4 million (costs), arguing as follows.[127]

> Where possible, I consider the Actual Scenario to be the most appropriate basis to estimate BFC's but-for financial performance as it represents the actual decisions made by management in similar circumstances. Therefore, I consider that the best estimate of BFC's counterfactual commercial revenue is BFC's actual commercial revenue earned in the prior year. To account for the timing difference, I adjust the actual commercial revenue for inflation. This results in an assumed commercial revenue in FY 2025 of £10.5 million which is reasonably aligned to BFC's forecasted expectations.

287. Neither expert departed from their respective positions hence the variance of £0.7 million set out in the table in paragraph 266 being the weighted average of income, net of costs, for scenarios 1 and 3 of £1.4 million (Boulton £9.5 million; Dudney -£8.1 million). The experts agree on the figures for commercial income and costs for but-for scenarios 2 and 4.

288. In the model which accompanied his first report, Mr Boulton claimed to have identified a correlation between hospitality and retail revenue and matchday income in the actual scenario. Accordingly, having calculated matchday income in each of his but-for scenarios, he then calculated hospitality and retail revenue as a function of that matchday income, applying the same percentage as he had identified in the actual scenario. He also considered there to be a correlation between direct hospitality and retail costs and the associated revenue and so calculated the relevant costs in each of his but-for scenarios as a percentage of hospitality and retail revenue, applying the same percentage he had identified in the actual scenario.

[127] Mr Dudney's report dated 28 July 2025, paragraph 5.3.13

289. Mr Boulton revisited his original assumptions in his second report and, just as he had with matchday revenue and costs, he modelled but-for hospitality and retail revenue and costs as being equal to revenue and costs in the actual scenario.[128]

> In my First Report, I estimated the retail and hospitality costs as a percentage of retail and hospitality revenues, respectively. Retail and hospitality revenues were also both modelled as a percentage of matchday revenue.
>
> As I discuss in section 3.2.E, I now assess but-for matchday revenue and costs to be equal to actual matchday revenue and costs, respectively. The net effect of this change, when combined with the methodology in my First Report, is that retail and hospitality costs in the But-For Scenarios now match the Actual Scenario. I therefore revise my assumption for retail and hospitality costs to directly match actual costs.

290. Mr Dudney challenges Mr Boulton's conclusion of a correlation between revenue and costs but opted not to amend Mr Boulton's original figures. He did not address Mr Boulton's new approach in either his second or third reports but continued to use Mr Boulton's original figures in subsequent versions of his own model, hence the variance of £0.7 million (hospitality) and £0.3 million (retail) as set out in the table in paragraph 266.

291. Based on Burnley's own model, bonuses of [redacted] would have been payable in the event of the club achieving a 13th place finish in the Premier League (squad - [redacted]; management - [redacted]). Accordingly, Mr Boulton provides for payment of such bonuses in his but-for scenario 1 for each of FY23 to FY25. Mr Dudney notes that the club's bonus structure provided for [redacted] to be paid for a 17th place finish (squad - [redacted]) and so provides for this lower figure in his model, hence the variance of £1.2 million for each of the three seasons in but-for scenario 1. The net variance following adjustment for weighting is £0.9 million (i.e. £1.2 million x 3 x 25%).

292. The Commission has considered the variances between the two experts' models (in all cases comparing Mr Boulton's model with Mr Dudney's alternative case) and has concluded as follows.

(1) Broadcast/league distributions (but-for 1/ FY23-FY25). Mr Boulton makes valid points to support his assumptions regarding a finishing position of 13th. This represents an average of its position in the five seasons 2016/17 to 2020/21 with the club's average finishing position being consistently higher than its average wage spend in those seasons. However, his average

[128] Mr Boulton's report dated 8 August 2025, paragraphs 3.2.29-30

of previous finishes ignores the club's actual 18th (assumed 17th) in 2021/22. Moreover his assumption that the club could secure three successive 13th place finishes in FY23-FY25 on relatively modest average annual wages, is ambitious. A more prudent assumption, recognising that the club might have continued to outperform its wage spend, and viewed in the context of assumptions regarding player trading discussed more fully in paragraphs 334 to 351, would be a 15th place finish in each of those three seasons. But-for merit fee income for those seasons should be adjusted accordingly.

(2) Broadcast/league distributions (but-for 3 / FY25). We favour Mr Dudney's argument that the club's finishing position in 2024/25 should mirror its actual 19th place finish in 2023/24.

(3) Matchday income & costs (all scenarios / FY23-FY25). We favour Mr Boulton's revised assumptions regarding matchday income and costs which were borne out by the club's actual matchday income while in the Premier League and the Championship. Moreover, his assumption that the club would enjoy the same cup runs in either the actual or but-for scenarios is reasonable.

(4) Commercial income (but-for 1 & but-for 3/FY25). We consider Mr Boulton's estimate of commercial revenue for FY25 to be ambitious and note that Mr Dudney has aligned his estimate with the club's own projection for the year. We favour Mr Dudney's figure.

(5) Hospitality and retail income & costs (all scenarios /FY23-FY25). We accept Mr Boulton's revised assumptions regarding these sources of income and costs. Mr Dudney continued to rely on figures from Mr Boulton's original report and did not engage with Mr Boulton's new approach in any substantive way.

(6) Premier League retention payments (but-for 1/FY23-FY25). Mr Boulton's model provides for bonus payments of [redacted] for a 15th place finish, by comparison with his provision of [redacted] for 13th position. Adopting the lower bonus payments would be consistent with the approach to broadcast income discussed above and would reduce the bonus payments for each of FY23, FY24 and FY25 by £0.6 million, or £0.5 million after adjusting for weighting.

293. We explained the components of the £11.2 million variance between the two experts' models in paragraph 266 and footnote 115. The table below reproduces

the table in paragraph 266 with two further columns added. The consequence of the conclusions set out in the preceding paragraph is that we apportion the £11.2 million total variance as summarised in the table. Mr Dudney had challenged the entire £11.2 million, asserting that Mr Boulton's but-for cash flows in respect of operating profit/loss were overstated by this amount. We have only accepted Mr Dudney's argument in respect of £5.2 million of the £11.2 million but we favour Mr Boulton's position with regard to the balance of £6.1 million.[129] [130]

	Total variance £m	Accept £m	Reject £m
Broadcast/league distributions (but-for 1 / FY23-FY25)	(8.5)	(4.3)	(4.3)
Broadcast/league distributions (but-for 3 / FY25)	(0.7)	(0.7)	
Matchday income & costs (all scenarios / FY23-FY25)	(1.2)		(1.2)
Commercial income (but-for 1 & but-for 3 / FY25)	(0.7)	(0.7)	
Hospitality income & costs (all scenarios / FY23-FY25)	(0.7)		(0.7)
Retail income & costs (all scenarios / FY23-FY25)	(0.3)		(0.3)
	(12.2)	(5.6)	(6.5)
PL retention payments (but-for 1 / FY23-FY25)	0.9	0.5	0.4
Net variance	**(11.2)**	**(5.2)**	**(6.1)**

294. Accordingly, Mr Boulton's weighted average but-for cash inflow in respect of operating profit/loss cash inflow of £8.6 million (see paragraph 257) is reduced by the above £5.2 million and becomes a cash inflow of £3.4 million. Mr Dudney's weighted average but-for cash outflow of £2.7 million (see paragraph 265) is adjusted by £6.1 million and becomes a cash inflow of £3.4 million.

295. The two experts' but-for cash inflows in respect of operating profit/loss are therefore aligned at £3.4 million and, when compared with the actual cash outflows in respect of operating profit/loss agreed by both experts to be £21.2 million, result in a total loss of £24.6 million.

(4) Actual Player Trading

296. It is necessary to identify the reasons for the significant disparity between the two experts' calculations for actual player trading before proceeding to any discussion of their respective but-for calculations. Mr Boulton reports an actual cash outflow

[129] As noted in footnote 54, readers are reminded of the existence of rounding differences
[130] Footnote 115 explains the source of the figures in this table

of £24.4 million made up as follows.[131]

	Total	FY22 PL	FY23 EFL	FY24 PL	FY25 EFL
	£m	£m	£m	£m	£m
Player sales	**168.3**	25.4	63.8	1.7	77.5
Player purchases	**(192.7)**	(37.7)	(35.9)	(97.1)	(22.0)
Net player trading inflow/(outflow)	**(24.4)**	**(12.3)**	**27.9**	**(95.4)**	**55.4**

297. Mr Dudney reports an actual cash outflow of £83.5 million in his primary case made up as follows.[132]

	Total	FY22 PL	FY23 PL	FY24 EFL	FY25 PL
	£m	£m	£m	£m	£m
Player sales	**193.5**	62.6	19.5	7.7	103.7
Player purchases	**(277.0)**	(41.0)	(84.1)	(73.2)	(78.7)
Net player trading inflow/(outflow)	**(83.5)**	**21.6**	**(64.6)**	**(65.5)**	**25.0**

298. The £59.1 million variance is a consequence of two factors. First, the experts have relied on different sources for their data. Second, due to his reliance on seasonal data, Mr Boulton has not only restated each year's player trading, but also cut off his analysis at 31 May 2025, thereby including June and July 2021 transactions but excluding June and July 2025 transactions.

299. As regards the source of his data, Mr Boulton stated in his first report that he had relied on *The value of player trading reported in Burnley's audited financial statements for the years 2017/18 to 2023/24*[133]. However, he later reconsidered this approach and in his second report he advised that he would be relying on *Burnley's seasonal player trading data* as his primary source. Mr Thompson believed that the *seasonal player trading data* to which Mr Boulton referred was prepared by Travis Edwards, vice president of finance, who did not provide evidence to the Commission.

300. Mr Boulton's source data is set out in one very detailed worksheet, containing

[131] Mr Boulton's Appendix A to his report dated 19 September 2025, worksheet 'Actual Scenario Inputs', cells K26-N32
[132] Mr Dudney's Updated Appendix 4 to his expert report, worksheet 'AP Actual player trading', cells E71-H76
[133] Mr Boulton's report dated 23 June 2025, paragraph C.3.9 (b)

data going back as far as 2014/15 season (although it is accepted that data preceding the Relevant Period may be incomplete), within the appendices to his second and third reports. He confirms its introduction as a *New Worksheet* in his second report.[134]

> 'Player Trading Expense Ledger', which underlies the 'Player Trading' tab in Appendix D of my First Report, which in turn was a worksheet extracted from data disclosed by Burnley. This worksheet details cash outflows related to player trading from the 2014/15 to 2024/25 seasons. I have adjusted this ledger to account for certain errors identified by the Experts, discussed further at paragraphs B.6.4 to B.6.9, and to use foreign exchange rates as of the first date of cash outflow for each player;

301. The figures set out in paragraph 296 are from Mr Boulton's third and final report. Although Mr Boulton had included tables in his reports comparing the seasonal data with the club's accounts he did not attempt to reconcile the figures. Timing differences are understood to be a material factor in the differences between the two sets of figures.

302. In response to a question from the Commission, Mr Boulton quotes this *timing mismatch* but nevertheless expresses confidence that his figures were consistent with the club's annual accounts.[135]

> Q. I think the point remains valid for that version of 4-3 because there is a difference between the figures you are using and the financial accounts.
>
> A. Yes, so the -- I think there isn't, sir, except if you try and aggregate it. The financial accounts end 31 July, the seasonal data reflects the seasons. So all I'm doing is showing that whether you run transfers to 31 July or to 31 August, you get this big timing mismatch.
>
> Q. No, I fully appreciate the timing. But my question is have you tried to reconcile that difference to say well, if you include or exclude the June/July transactions at the beginning/ end of the period, then it reconciles to the penny?
>
> A. Not to the penny, but part of the problem is you can't do it over just a three-year period, because you have what has been brought forward from previous years, what continues into the next years. But yes, I'm happy that Burnley's seasonal data maps to what goes into their financial accounting.

303. By contrast with Mr Boulton's approach, Mr Dudney confirms that, in his primary case, he uses *player trading cash flows incurred within each financial year, consistent with operating cash flows and BFC's audited financial statements*[136], to the extent these accounts are available. Mr Dudney's actual net player trading of £83.5 million, as disclosed in paragraph 297, includes a net outflow for FY22-FY24 (the years for which club accounts are available) of £108.5 million which approximates to the figure disclosed in Burnley's annual accounts

[134] Mr Boulton's report dated 8 August 2025, paragraph B.2.1(f)
[135] Day 7, P185 (18) – P186 (12)
[136] Mr Dudney's report dated 28 July 2025, paragraph 2.2.4 (a)

of £101.2 million.

304. It appears that Mr Dudney has also placed reliance on Mr Boulton's reports and his other sources. Mr Dudney has had no direct access to club data other than that obtained by Mr Boulton. Indeed, Mr Boulton acknowledges Mr Dudney's assistance in identifying and correcting errors in his player trading model.

305. For player trading data for FY25, for which accounts have not yet been published and for which negligible information was available from the club, Mr Dudney reports that he relied on Transfermarkt, although witnesses for both parties acknowledged that it had limitations. This data will have included June and July 2025 transactions not accounted for under Mr Boulton's seasonal approach.

306. In his second report, Mr Dudney challenged Mr Boulton's approach and his assertion that the club's seasonal analysis represented a more reliable source than the club's accounts.[137]

Mr Boulton also questions the reliability of BFC's audited financial statements. His critique of BFC's audited financial statements relies on misleading comparisons with seasonal data, which reflect different trading periods and therefore cannot support conclusions about accuracy or reliability. In the absence of precise cash flow data, audited financial statements remain the most reliable source.

307. In paragraph 298 it was noted that the £59.1 million variance between the two experts' calculations of actual player trading was a consequence both of their reliance on different sources and of Mr Boulton's adoption of a seasonal basis for accounting for player trading. There are both pros and cons in the contrasting approaches.

308. Mr Boulton's analysis, as explained in paragraph 296, emphasises the merit of accounting for player trading by season, thereby matching player trading cash flows with the upcoming season as explained in paragraphs 241 to 245, rather than by financial year. The table shows the club to be a net purchaser in Premier League seasons and a net seller in Championship seasons.

309. Mr Dudney's figures more readily reconcile to the totals for player purchases and sales in the club's accounts, albeit without any analysis by player name. That said, Mr Dudney adopts Mr Boulton's seasonal approach in his alternative case,

[137] Mr Dudney's report dated 3 September 2025, paragraph 4.2.4

summarised below. This model also uses, with minor exceptions, consistent values for players bought and sold in the Relevant Period.[138]

	Total	FY22 PL	FY23 EFL	FY24 PL	FY25 EFL
	£m	£m	£m	£m	£m
Player sales	**179.3**	33.4	63.8	2.9	79.2
Player purchases	**(191.8)**	(37.7)	(35.7)	(86.7)	(31.6)
Net player trading inflow/(outflow)	**(12.5)**	**(4.3)**	**28.1**	**(83.8)**	**47.5**

310. These figures align much more closely with Mr Boulton's. The variance between the two experts' actual cash flows is summarised in the table below: brackets around the figures in the column headed 'Variance' indicate that Mr Boulton's calculation of player sales revenue is lower than Mr Dudney's while his estimate of purchase cost is slightly higher than Mr Dudney's.

	Boulton	Dudney (alternative)	Variance
	£m	£m	£m
Player sales	168.3	179.3	**(11.0)**
Player purchases	(192.7)	(191.8)	**(0.9)**
Net player trading cash outflow	**(24.4)**	**(12.5)**	**(11.9)**

311. The variance between the two experts' calculations of the actual player trading cash outflow of £11.9 million comprises the following.[139]

	£m
[redacted] loan fee receivable - FY24	[redacted]
[redacted] loan fee receivable - FY25	[redacted]
Contingent transfer fees payable - FY24 & FY25	[redacted]
	[redacted]
[redacted] - FY22	[redacted]
	(11.9)

The two loan fees receivable for [redacted] and [redacted] are listed in supporting schedules within Mr Boulton's model but do not flow through to his main model

[138] Mr Dudney's Appendix 7 to his expert report, worksheet 'Actual Scenario Inputs', cells K27-N29

[139] [redacted] fees – see Mr Boulton's Appendix A to his report dated 19 September 2025, worksheet 'Actual Player Trading', cells O113-P114. [redacted] fee – see Mr Dudney's Updated Appendix 7 to his expert report, worksheet '1-Pager', cell M9. Contingent fees – see Mr Boulton's Appendix A to his report dated 19 September 2025, worksheet 'Player Trading Expense Ledger', cells O472-475.

due to apparent errors in the relevant formulae. The two transactions need to be added to Mr Boulton's player sales total of £168.3 million, thereby reducing the actual net player trading outflow.

312. The contingent fees are for four players purchased by Burnley and reported to Mr Boulton by the club as being *likely to become payable*[140], presumably in the expectation that the conditions upon which payment was contingent [redacted] were expected to be triggered. Mr Dudney argued to the contrary.[141]

I disagree with these adjustments as they are not consistent with the assessment of loss on a cash flow basis. Since the payments are only "likely," they have not yet occurred and, under a cash flow approach, these should be recognised when they are paid (which would assume to be in the 2025/26 season), outside Mr Boulton's loss assessment period.

313. It has been noted from the outset that the experts' calculations of lost cash flows for player trading were at odds with conventional accounting treatment of player acquisition costs and ignored the timing of actual player trading cash flows which would be likely to be phased over a number of years. On the basis that the [redacted] of contingent fees would be likely to form part of the ultimate cost of acquiring the four players, the Commission agrees with Mr Boulton's approach. The [redacted] should therefore be added to Mr Dudney's calculation of player trading cash flows.

314. One of the contingent fees, in the sum of [redacted], relates to the purchase of [redacted], recognised by Mr Boulton as a transaction in FY24 in the sum of [redacted] and by Mr Dudney as a transaction in FY25 in the sum of [redacted]. The experts disagree on the timing of the transaction. Mr Boulton contends that [redacted][142] In contrast, Mr Dudney argues that *the first instalment was not due until July 2024. Further,* [redacted] *Transfermarkt ….. record him as a 2024/25 season transfer. Therefore, the transfer fee should be reflected in Mr Boulton's 2024/25 seasonal period*[143]. [redacted], regardless of the timing of the first transfer fee

[140] Mr Boulton's report dated 8 August 2025, paragraphs B.6.11-12
[141] Mr Dudney's report dated 3 September 2025, paragraph 4.3.4 (b)
[142] Mr Boulton's report dated 8 August 2025, paragraph B.6.19
[143] Mr Dudney's report dated 3 September 2025, footnote 49

instalment, the Commission accepts Mr Boulton's approach.

315. The [redacted] for [redacted] is matched by an identical variance in the but-for calculations and so is not an area of difference between the experts. This arises because Mr Dudney records the sale of this player in July 2021 in both his actual and but-for cash flows. Mr Boulton excludes the player for the reason set out below.[144]

> Mr Dudney suggests that the data disclosed by Burnley erroneously excludes the sale of [redacted] for [redacted] in July 2021.[235] I understand that the sale of [redacted] was agreed early in the 2020/21 season and would therefore have taken place even if Burnley had not been relegated. I therefore consider the sale of this player irrelevant to my assessment of damages and omit it from my analysis.

316. Notwithstanding some misgivings about the source of his player trading data, we see merit in Mr Boulton's approach of accounting for player trading on a seasonal basis, purely for the purposes of assessing damages. Mr Dudney's adoption of a consistent approach in his alternative case has made possible the reconciliation of the experts' figures for actual player trading cash flows in paragraph 311. Moreover, we concur with the exclusion of June and July 2025 player trading (a net cash outflow of £33.7 million as reported in paragraph 187(4)) as a consequence of this approach.

(4a) Allegation of Expenditure on "Squad Betterment"

317. In light of assumptions made by Mr Boulton in calculating his but-for player trading cash flows, Everton challenged Burnley's inclusion of a net cash outflow of £95.4 million for actual player trading for FY24 within its claim as shown in the table in paragraph 296. Everton articulated this point in its closing submissions.[145]

> First, it was difficult to reconcile Mr. Boulton's inclusion of all of the £95.4 million within his loss calculation with his own evidence that "*the cost of buying back players of a similar calibre to those sold following relegation* [was] *approximately £47.7 million*", or £41.7 million on his corrected figures. Even on Mr. Boulton's own evidence, taken at face value, Burnley therefore spent an additional £53.7 million above what was required to rebuild the Burnley squad to play in the PL.

318. Having estimated a but-for cash outflow for a promotion season (scenario 3/FY25), as FY24 had been, Mr Boulton then undertook a high level sense check to substantiate his estimate.[146]

> As a sense-check, a reasonable level of net cash outflow may reflect (i) the cost of buying back players of a similar calibre to those sold following relegation, of approximately £47.7 million,

[144] Mr Boulton's report dated 8 August 2025, paragraph B.6.13
[145] Everton's closing submissions, paragraph 39.1
[146] Mr Boulton's report dated 8 August 2025, paragraph D.2.17(b)

and (ii) typical net spending to maintain Premier League status of approximately £4.0 million. Together, these suggest cash outflow on player trading of approximately £51.6 million.

319. It must be noted that the figures quoted by Mr Boulton above were superseded in his final report. The £47.1 million average net cash outflow from player sales for FY22 and FY24 was updated to £41.7 million, as evidenced in the table in paragraph 355 while the average net outflow *to maintain Premier League status* became £4.5 million, as evidenced in the table in paragraph 340. Mr Boulton's 'sense check' of his estimated net cash outflow for a promotion season of £53.8 million would therefore be £46.2 million (i.e. £41.7 million plus £4.5 million).

320. Everton's argues that Mr Boulton's own 'sense check' for a but-for net outflow in a promotion season shows that Burnley would have needed to spend no more than £41.7 million in summer 2023, ahead of the 2023/24 season when in the actual scenario Burnley had been promoted back to the Premier League, to buy back *players of a similar calibre to those sold following relegation* (ignoring Mr Boulton's further point about a *typical net spending to maintain Premier League status* of £4.5 million). Assuming this to be correct, Burnley overspent by £53.7 million (£95.4 million less £41.7 million) in FY24.

321. Indeed, Everton goes on to argue in its closing submissions that the correct measure of *players of a similar calibre* should be *by reference to the net cashflows that Burnley received when selling off players following its relegation in 2022, of £27.9 million*[147]. On this basis the overspend would have been £67.5 million (i.e. £95.4 million less £27.9 million).

322. Evidence was also adduced regarding a change in Burnley's player recruitment strategy [redacted] as confirmed by Mr Williams.[148] In conclusion, Everton argued as follows.[149]

> Burnley's own decision to spend more on its squad and to pursue a different strategy may have been a reasonable and commercially sensible decision, in light of the evidence as to Burnley's historic under-investment in its squad, but it is not spending that can be laid at Everton's door.

323. Mr Dudney sought to expand upon this point in his second report, in which he

[147] Everton's closing submissions, paragraph 39.2
[148] Day 2, P58 (14-17)
[149] Everton's closing submissions, paragraph 40

produced a table purporting to show how Burnley's squad had increased in value *based on Transfermarkt player values between the 2018/19 and 2024/25 seasons* from €128 million at the end of the 2021/22 season to €261 million at the end of 2023/24.[150]

324. In the course of lengthy cross-examination on whether Burnley had indeed overspent on its return to the Premier League, Everton put it to Mr Boulton that the actual net outflow of £95.4 million in FY24, following promotion, included an element of squad betterment, which should be excluded from the actual player trading cash outflow and would therefore reduce Mr Boulton's calculated loss. Mr Boulton did not agree, arguing that if, hypothetically, an adjustment had to be made, it should be through the but-for cash flows and not the actuals.[151]

> Q. I think you would agree that if the 95.4 million figure was not just replacing of a similar calibre and therefore couldn't be said to be a consequence of the relegation, but instead included sums that were a choice to better the squad or as a result of a different strategy, I think your approach would be if you knew that, you would take those figures out?
>
> A. No, it wouldn't. My approach would be to say the actual is the actual and you have then got to look at the -- make sure that you have taken everything into account in the but-for. So what you are doing is building what would have happened. But you can never get away from a comparison that you are comparing actual to but-for. Actual is what happened.

325. By way of justification for including the entire actual FY24 net outflow, Burnley also drew attention to a Deloitte press release dated September 2022 which had reported the net spend of clubs promoted to the Premier League in seasons immediately preceding Burnley in 2022/23. These had included Nottingham Forest (2021/22 - £126 million), Aston Villa (2018/19 - £124 million) and Fulham (2017/18 - £104 million).[152]

326. In its closing submissions, Burnley made the following further point.[153]

> We've also given you our submissions on the fact that there was no excess spending in any event, concluding with the rather trite submission that if Burnley really had overspent in the summer of 2023, as Everton now suggests, why was it relegated again?

327. Everton argued that this FY24 outflow was *not spending that can be laid at Everton's door*. However, on balance we favoured Burnley's approach for the following reasons.

(1) We accept that Mr Boulton was merely conducting a sense check of his

[150] Mr Dudney's report dated 3 September 2025, paragraph 2.2.11
[151] Day 7, P148 (18) – P149 (7)
[152] Day 9, P61 (7-11)
[153] Day 9, P60 (23) – P61 (2)

estimated but-for player trading outflow in a promotion scenario against figures that were not, indeed, entirely comparable. For example the FY23 net inflow would have included no proceeds for [redacted] or [redacted] released at the end of their contracts but who nevertheless would have had to be replaced at a cost.

(2) We were not persuaded by Mr Dudney's evidence showing an increase in Burnley's squad value based on Transfermarkt values. We discuss elsewhere in this decision witnesses' reservations about Transfermarkt's reliability as a source, as quoted in paragraphs 343 to 344. Mr Dudney's exercise will have been based on arguably less reliable data.

(3) The increase in player-related expenditure within the Premier League as a whole has previously been discussed in relation to causation – for example within paragraphs 101 to 102. In this context Burnley had drawn attention to the level of spending (all in excess of £100 million) by recently promoted clubs which had successfully retained their Premier League status.

(4) Moreover, as Burnley observed in their closing submissions, *if Burnley really had overspent in the summer of 2023, as Everton now suggests, why was it relegated again?*

For these reasons we accept Mr Boulton's inclusion of a net cash outflow for actual player trading of £95.4 million for FY24.

(5) Assumptions Used Within But-For Player Trading

328. Paragraphs 183 and 185 summarise the experts' calculations for player trading cash flows. As with operating profit/loss, Mr Boulton calculates a weighted average of four but-for scenarios, set out below against his actual player trading for each of the four years of the Relevant Period. The club's actual and but-for league status for each scenario is also shown.[154]

[154] Mr Boulton's actual and but-for cash flows are obtained from Appendix A to his report dated 19 September 2025. The actual cash flows are from worksheet 'Actual Scenarios', cells K-N62. The but-for cash flows are from worksheets 'But-For Scenario 1' – 'But-For Scenario 4', cells K-N62.

	League status	Total £m	21/22 £m	22/23 £m	23/24 £m	24/25 £m
Player trading						
Actual cash inflow/(outflow)	PL-EFL-PL-EFL	**(24.4)**	(12.3)	27.9	(95.4)	55.4
But-For cash inflow/(outflow)*		**(2.4)**	(12.3)	(4.5)	18.6	(4.2)
Total gain/(loss)		**(22.0)**	**0.0**	**32.4**	**(114.0)**	**59.6**
* Weighted average of following four scenarios						
Scenario 1	PL-PL-PL-PL	**(25.8)**	(12.3)	(4.5)	(4.5)	(4.5)
Scenario 2	PL-PL-PL-EFL	**20.4**	(12.3)	(4.5)	(4.5)	41.7
Scenario 3	PL-PL-EFL-PL	**(29.0)**	(12.3)	(4.5)	41.7	(53.8)
Scenario 4	PL-PL-EFL-EFL	**24.9**	(12.3)	(4.5)	41.7	0.0

329. As previously explained, Mr Dudney's primary case calculates just a single but-for scenario, akin to Mr Boulton's scenario 3 in terms of league status. He maintained that this scenario most closely mirrored the actual scenario, delayed by one year.[155]

	League status	Total £m	21/22 £m	22/23 £m	23/24 £m	24/25 £m
Player trading						
Actual cash inflow/(outflow)	PL-EFL-PL-EFL	**(83.5)**	21.6	(64.6)	(65.5)	25.0
But-For cash inflow/(outflow)	PL-PL-EFL-PL	**(122.9)**	(10.7)	23.4	(67.4)	(68.2)
Total gain/(loss)		**39.4**	**32.3**	**(88.0)**	**1.9**	**93.2**

330. Mr Dudney's choice of just one scenario obviously limits the extent to which the experts' models can be compared. Moreover, his inclusion of June and July 2025 actual but-for player trading will be a material factor limiting any objective comparison. His alternative case has the advantage, with very minor and identifiable exceptions, of basing his actual and but-for player trading scenarios on the same players, and associated values, as Mr Boulton. Mr Dudney's alternative case actual and but-for player trading cash flows are as set out in the table below.[156]

[155] Mr Dudney's primary case actual and but-for cash flows are obtained from his Updated Appendix 4 to his expert report, worksheet 'Actual Scenario', cells K-N62 (actual cash flows), and worksheet 'But-For Scenario 3', cells K-N62 (but-for cash flows)

[156] Mr Dudney's alternative case actual and but-for cash flows are obtained from Updated Appendix 7 to his expert report, worksheet 'Actual Scenarios', cells K-N62 (actual cash flows), and worksheets 'But-For Scenario 1' – 'But-For Scenario 4', cells K-N62 (but-for cash flows)

	League status	Total £m	21/22 £m	22/23 £m	23/24 £m	24/25 £m
Player trading						
Actual cash inflow/(outflow)	PL-EFL-PL-EFL	**(12.5)**	(4.3)	28.1	(83.8)	47.5
But-For cash inflow/(outflow) *		**(37.8)**	(4.3)	(17.8)	5.1	(20.8)
Total gain/(loss)		**25.3**	**0.0**	**45.9**	**(88.9)**	**68.4**
* Weighted average of following four scenarios						
Scenario 1	PL-PL-PL-PL	**(57.7)**	(4.3)	(17.8)	(17.8)	(17.8)
Scenario 2	PL-PL-PL-EFL	**(11.9)**	(4.3)	(17.8)	(17.8)	28.1
Scenario 3	PL-PL-EFL-PL	**(77.8)**	(4.3)	(17.8)	28.1	(83.8)
Scenario 4	PL-PL-EFL-EFL	**(3.8)**	(4.3)	(17.8)	28.1	(9.8)

331. For reasons previously explained, the Commission favours Mr Dudney's alternative case to his primary case. The following analysis of but-for player trading cash flows therefore considers Mr Boulton's model purely by comparison with Mr Dudney's alternative case.

332. In the course of his presentation to the Commission, Mr Boulton acknowledged the challenge, for both experts, of making assumptions about but-for player trading.[157]

> This is difficult. There is no question that working out what the volume of trading would have been in a but-for world is uncertain and that's because one is dealing with it at a different time from when Burnley was actually making those kinds of trading decisions if its pattern of promotion and relegation is different. It is making player trading decisions in a different market. It is a year out with different contractual positions of its own players, different players available in the market and therefore one can't even begin to posit what player trading would have been by reference to individuals, it is simply too hard. So one is trying to do it in a quantified way on what on average is a sensible assumption for what the volume of player trading would have been in different scenarios: if Burnley was promoted, if it stayed in the same league, if it was relegated.

333. He stood by his approach but recognised that he and Mr Dudney had relied on different assumptions.[158]

> …. it is not as though one is obviously right and one is obviously wrong. I have tried to use judgment in arriving at averages, but it is an uncertain position.

334. Mr Boulton sets out the basis for his calculation of but-for player trading cash flows firstly in paragraphs C.4.64-67 of his first report and secondly in paragraphs D.2.1-23 of his second report. For FY22, Mr Boulton has used the club's actual player trading for the year and so no variance arises between his actual and but-

[157] Day 7, P24 (12) – P25 (4)
[158] Day 7, P 25 (10-12)

for cash flows. For FY23-FY25 Mr Boulton looks at a total of twelve but-for scenarios and adopts consistent assumptions depending on Burnley's but-for league status. Mr Dudney has made his own assessment of Burnley's but-for player trading cash flows based on the same scenarios. The twelve scenarios can be grouped as follows.

(1) Premier League culminating in retention of status – four scenarios (scenario 1 (FY23-FY25) and scenario 2 (FY23)).

(2) Premier League culminating in relegation – three scenarios (scenario 2 (FY24), scenario 3 (FY23) and scenario 4 (FY23)).

(3) Championship following relegation from Premier League – three scenarios (scenario 2 (FY25), scenario 3 (FY24) and scenario 4 (FY24)).

(4) Premier League following promotion from Championship – one scenario (scenario 3 (FY25)).

(5) Second season in Championship – one scenario (scenario 4 (FY25)).

335. The variance between the two experts' but-for assumptions regarding player trading cash flows (Mr Boulton £2.4 million net outflow; Mr Dudney £37.8 million net outflow) totals £35.5 million, as detailed in the table below. Bracketed figures in the final column denote Mr Boulton's assumption of a smaller cash outflow than Mr Dudney.

League status (prior season to current season)	**Reference**	***No. of scenarios***	**Estimated net cash flow**			**Weighted [3]**
			Boulton[159]	**Dudney[160]**	**Variance**	
			£m	**£m**	**£m**	**£m**
PL to PL [1]	336 - 351	*4*	(4.5)	(17.8)	(13.3)	(13.3)
PL to PL [2]	352 - 354	*3*	(4.5)	(17.8)	(13.3)	(10.0)
PL to EFL	355 - 358	*3*	41.7	28.1	(13.6)	(10.2)
EFL to PL	359 - 367	*1*	(53.8)	(83.8)	(30.0)	(7.5)
EFL to EFL	368 - 370	*1*	-	(9.8)	(9.8)	(2.5)
						(43.5)
[redacted] – FY22						[redacted]
Net variance on player trading cash flows						**(35.5)**

Notes
1. Seasons culminating in PL retention.
2. Seasons culminating in relegation.
3. The weighted amount for each scenario takes 25% of the variance between the experts' figures and multiplies by the number of scenarios. For example, for the PL to PL (retention of status) scenario, £13.3m x 25% x 4 = £13.3m. For the PL to PL (relegation) scenario, £13.3m x 25% x 3 = £10.0m.

[159] Mr Boulton's but-for cash flows obtained from Appendix A to his report dated 19 September 2025, worksheets 'But-For Scenario 1' – 'But-For Scenario 4', cells L-N62
[160] Mr Dudney's but-for cash flows obtained from Updated Appendix 7 (undated) to his expert report, worksheets 'But-For Scenario 1' – 'But-For Scenario 4', cells L-N62

336. (1) Premier League culminating in retention of status. For all seasons in which Burnley remains in the Premier League, Mr Boulton bases his estimate of the club's but-for player trading cash outflow on an average of the club's net spend in seasons FY18-FY22, throughout which period the club had retained its Premier League status. He initially calculated this average by reference to the club's annual accounts for those years, notwithstanding his seasonal approach to calculating player trading cash flows within the Relevant Period. The club's seasonal data was evidently unavailable for periods before FY22. He explained his approach in his first report.[161]

> I recognise that this average relies in part on data from Burnley's audited financial statements; however, in the absence of full trading data for these years, I consider it reasonable to rely on these figures as Burnley was a stable Premier League club between 2017/18 and 2020/21.

337. This approach resulted in an average annual net outflow of £14.7 million which Mr Boulton then used in all four scenarios for FY23, as well as scenarios 1 and 2 in FY24 and scenario 1 in FY25, namely seven scenarios.

338. By his second report, Mr Boulton had determined on a different approach. Although continuing to rely on an average of the club's spend over the preceding five seasons, he opted to use data from Transfermarkt to assess the club's pre-FY22 player trading cash outflows, although he relied on the club's seasonal data for FY22.[162]

> Burnley's seasonal player trading analysis does not extend before the 2021/22 season. However, data for earlier seasons are still relevant, as I use it to inform my assumptions in the But-For Scenario. Therefore, for these earlier seasons I used information from Burnley's audited accounts. Mr Dudney also highlights this inconsistency in my data source and the potential problem of overlapping data.
>
> To overcome this problem, and in the absence of Burnley's seasonal player trading data, I use an alternative source. I now source player trading cash flow data from Transfermarkt, instead of relying on the audited accounts for periods before 2021/22.
>
> My analysis suggests that, on a net basis, it is sufficiently similar to Burnley's own data to be reliable.

339. The *problem of overlapping data* to which he refers was the observation made by Mr Dudney that Mr Boulton's approach resulted in double counting of player trading in June and July 2021, included in both Burnley's seasonal data for 2021/22 and the FY22 annual accounts figures. The double counted transactions comprised a net cash outflow of £12.5 million ([redacted],

[161] Mr Boulton's report dated 23 June 2025, footnote 231
[162] Mr Boulton's report dated 8 August 2025, paragraphs 4.3.29-31

[redacted]). Excluding these transactions would reduce the five year average used in Mr Boulton's first report from £14.7 million to £12.2 million.

340. The result of Mr Boulton's revised approach reduces the but-for player trading cash outflow in the seven relevant scenarios to £4.5 million in his final model, as below (the model attached to his second report had provided for £4.0 million, but this figure was superseded in the model attached to his third and final report). The re-stated average of £12.2 million, referred to in paragraph 339 is also included in the table below.

	Appendix D (re-stated) £m	Appendix A[163] £m	Appendix D[164] £m
Actual net player trading			
FY18	(7.2)	12.2	(7.2)
FY19	(25.8)	(22.5)	(25.8)
FY20	(13.5)	(8.9)	(13.5)
FY21	(10.3)	9.0	(10.3)
FY22	(16.6)	(12.3)	(16.6)
Transactions double-counted	12.5		
Five year average	**(12.2)**	**(4.5)**	**(14.7)**

341. Mr Boulton has not attempted to reconcile the difference between his original (£14.7 million) and revised (£4.5 million) estimates of net cash outflows. In the quotation reproduced in paragraph 338 he had expressed some confidence in the comparability of Transfermarkt and the club's *own seasonal player trading data* for FY22-FY25. The table to which he refers (table 4-4 of his report dated 8 August 2025) discloses net differences between the two sources of £32.6 million from which Mr Boulton concludes *Table 4-4 shows that the data aligns reasonably well between the sources, with comparatively low differences given The absolute level of transfer value aggregated across sales and purchases.*[165]

342. In his second report, Mr Dudney disputes Mr Boulton's conclusion.[166]

> Mr Boulton sets out a comparison of the Transfermarkt data to the data he received from BFC, stating that "*the data aligns reasonably well*". However, I consider these differences to be material, with the total variance across the four periods being £32.6 million.

343. Whilst recognising its extensive use, both within clubs and across the industry,

[163] Appendix A to Mr Boulton's report dated 19 September 2025, worksheet 'Actual Scenario', cells F-K62
[164] Appendix D to Mr Boulton's report dated 23 June 2025, worksheet 'Actual Scenario', cells F-K71
[165] Mr Boulton's report dated 8 August 2025, paragraph 4.3.33
[166] Mr Dudney's report dated 3 September 2025, paragraph 4.3.2

witnesses expressed reservations about Transfermarkt. Mr Thompson commented as follows.[167]

Q. Yes. And you mentioned Transfermarkt. That is what everyone uses, isn't it?

A. Seemingly, yes.

Q. So that's the sort of go-to for value; correct?

A. It is -- it is a crude tool for something that is very, very unpredictable, yes.

344. Mr Williams made the following two comments.[168] [169]

I accept Transfermarkt is a reference point. I don't personally believe that people should solely rely on Transfermarkt.

Again, as I have said earlier, I'm not a big fan of benchmarking, Transfermarkt. I understand everybody does it, but it irritates me because people are taking it as gospel when it is far from gospel.

345. Mr Dudney also questioned whether averaging over a five-year historical period was justifiable.[170]

More fundamentally, I do not agree that using an average of historical data over a five-year period is an appropriate approach to estimate future, but-for player trading cash flows. Player trading in PL clubs can be influenced by several factors, including financial performance, regulations, macroeconomic conditions like COVID-19, club strategy, and ownership changes such as ALK Capital's acquisition of BFC. Market conditions, player metrics, and the loan market also play significant roles and vary season to season.

However, Mr Boulton stood by his approach, hence his retention in his model of an average annual net cash outflow of £4.5 million.

346. Mr Dudney's approach is different. For all seven scenarios where the club is playing in the Premier League, having retained its status, he models as follows.[171]

Continued PL participation ("*PL-to-PL*"): In my view, it is preferable to select But-For assumptions which relate as closely as possible to the Actual Scenario where appropriate. I consider the player trading cash flows for summer 2021/22 to be a more suitable alternative proxy for continued participation in the PL than Mr Boulton's five-year average of previous seasons, a period which included a change in BFC's ownership and COVID-19.

347. Mr Dudney's approach results in an average annual net cash outflow for those seven scenarios of £17.8 million, based on transactions in the summer 2021 transfer window rather than the entire 2021/22 season for reasons on which he does not elaborate (Burnley generated a net cash inflow of £13.5 million in the winter 2022 window). In contrast, he uses both summer and winter transfer window trading in all other scenarios.

[167] Day 2, P45 (7-12)
[168] Day 2, P119 (10-12)
[169] Day 2, P185 (9-13)
[170] Mr Dudney's report dated 28 July 2025, Paragraph A6.3.5
[171] Mr Dudney's report dated 28 July 2025, paragraph A6.1.8 (b) (i)

348. Mr Boulton noted the significant impact of Mr Dudney's exclusion of winter 2022 trading from his estimate, which would be used in seven scenarios.[172]

> So, simply omitting £15 million of positive trading going forward has a £24-25 million effect on his but-for player trading. And that difference alone, simply excluding the January 2022 transfer window, changes his gain of £6.8 million into a loss of £18.7 million.

349. The experts' contrasting assumptions on net cash outflow per season make no distinction between a season at the end of which the club retained its Premier League status (four scenarios) and a season at the end of which the club is relegated (three scenarios). Retention of Premier League status might reasonably be considered a consequence of greater investment in the playing squad while a reduced spend might result in relegation. Accordingly, we conclude that the experts' models should record different levels of investment for those alternative scenarios.

350. The Commission agrees that Mr Boulton's approach of averaging prior seasons' player trading is reasonable but questions whether reliance on Transfermarkt values is justifiable, in light of reservations previously expressed by witnesses about this source. We consider Mr Boulton's assumption of an annual net outflow of £4.5 million to be optimistic for seasons in which Burnley retains Premier League status, not least because his model also assumes that Burnley will achieve a 13th place finish in three of those seven scenarios: we have already concluded that an assumption of 15th place would be more prudent for the purposes of assessing the merit fees receivable by the club in but-for scenario 1 for FY23-FY25. We were also unconvinced by Mr Dudney's apparently selective approach to using FY22 cash flows, in excluding winter 2022 transactions as explained in paragraphs 346 to 348. For these reasons, for the four scenarios in which Burnley retains its Premier League status at the end of the season (scenario 1 in FY23-FY25 and scenario 2 in FY23), the Commission favours relying on the estimated net cash outflow of £12.2 million, being Mr Boulton's original estimate recalculated to exclude the double counted transactions. The Commission notes that neither expert sought to adjust playing staff costs and we are therefore content to rely on net player trading as a key factor determining league position.

351. This conclusion represents a variance against both Mr Boulton's revised estimate

[172] Day 7, P24 (5-10)

of £4.5 million and Mr Dudney's estimate of £17.8 million.

352. (2) Premier League culminating in relegation. For the reasons explained above, the Commission distinguishes between the four scenarios in which the club retains its Premier League status and the three scenarios at the end of which the club finished in 18th position and is relegated (scenario 2 in FY24, scenario 3 in FY23 and scenario 4 in FY23).

353. We emphasise that estimating but-for cash flows is an inexact science and recognise the work undertaken by the experts in their modelling. We have explained our reasons for departing from Mr Boulton's estimate of £4.5 million per season net outflow for scenarios in which Burnley retains its Premier League status at the end of the season.

354. However, we conclude that there is logic in making a distinction between those seasons and ones at the end of which the club is relegated. In such circumstances it is reasonable to assume that a material factor contributing to the relegation will have been the reduced investment in the playing squad. For these three scenarios we therefore accept Mr Boulton's estimate of a net cash outflow of £4.5 million per season.

355. (3) Championship following relegation from Premier League. For seasons following Burnley's relegation (scenarios 3 and 4 – FY24; scenario 2 – FY25), Mr Boulton calculates the net player trading cash inflow as the average of Burnley's actual player trading cash inflows in its two most recent relegation seasons, namely FY23 and FY25.[173]

		Actual player trading	
	Average	**FY23**	**FY25**
	£m	**£m**	**£m**
Player sales	70.6	63.8	77.5
Player purchases	(29.0)	(35.9)	(22.0)
Average actual net inflow	**41.7**	**27.9**	**55.4**

356. Mr Dudney, on the other hand, uses just the net proceeds for FY23, as explained below.[174] His figure of £28.1 million is a barely material £0.2 million different from Mr Boulton's for the same period.

Relegation to EFL Championship ("*PL-to-EFL*"): Similarly, I consider player trading cash

[173] Mr Boulton's Appendix A to his report dated 19 September 2025, worksheet 'Actual Scenario Inputs', cells L26-32 and N26-32

[174] Mr Dudney's report dated 28 July 2025, paragraph A6.1.8 (b) (ii)

flows from the 2022/23 season to be a more appropriate proxy for BFC's first relegation from the PL to the EFL Championship in each But-For Scenario than Mr Boulton's average of previous seasons, because the actual player trading cash flows from the 2022/23 season reflect the decisions that BFC's management made in similar circumstances within the period of assumed loss.

357. Mr Boulton justified his approach, as opposed to Mr Dudney's single scenario, as follows.[175]

In my view, using multiple data points provides a more reliable estimate. Relying on a single season reduces data normalisation and increases the risk of outlier effects. Further, both seasons included in my methodology are PL to EFL seasons and so offer a direct reflection of the But-For Scenario. This is consistent with Mr Dudney's preference for assumptions reflecting decisions that Burnley's "*management made in similar circumstances*".

358. Mr Dudney's estimated net cash inflow is therefore materially lower than Mr Boulton's. There is merit in Mr Boulton's approach, taking an average of two comparable and fairly recent periods. Moreover, Burnley's net player trading inflow in summer 2022 may have been adversely affected by the fact that the club had lost senior players [redacted] on free transfers following relegation who would nevertheless have had to be replaced at cost. For these reasons we favour Mr Boulton's assumption of a net cash inflow of £41.7 million.

359. (4) Premier League following promotion from Championship. For the one promotion season (scenario 3 – FY25), Mr Boulton uses the average of FY22 and FY24, Burnley's last two seasons in the Premier League, albeit only FY24 was a promotion season whereas FY22 was Burnley's last season of six in the Premier League and had culminated in relegation.[176]

		Actual player trading	
	Average	FY22	FY24
	£m	£m	£m
Player sales	13.5	25.4	1.7
Player purchases	(67.4)	(37.7)	(97.1)
Average actual net cash outflow	**(53.8)**	**(12.3)**	**(95.4)**

360. In his first report, Mr Dudney takes issue with this approach by Mr Boulton.[177]

I disagree with Mr Boulton's approach. The 2021/22 season and 2023/24 season differ significantly: 2021/22 is a PL season following a PL season in 2020/21; whereas 2023/24 is a PL season following an EFL season in 2022/23. I would expect BFC may make different player

[175] Mr Boulton's report dated 8 August 2025, paragraph D.2.13
[176] Mr Boulton's Appendix A to his report dated 19 September 2025, worksheet 'Actual Scenario Inputs', cells K26-32 and M26-32
[177] Mr Dudney's report dated 28 July 2025, paragraphs A6.3.13-14

trading decisions in each of these situations.

For example, in 2021/22, based on the statements made in its RRASoC[178], I assume that BFC would have been replacing its experienced PL players with other experienced PL players, whereas in 2023/24, BFC would have been replacing experienced EFL Championship players with players with PL experience. I consider these to be materially different circumstances and in my view it is not appropriate to use the average of these two seasons to represent a season in which BFC is promoted from the EFL to the PL.

361. Mr Dudney goes on to set out his preferred approach.[179]

Therefore, on a seasonal basis, where BFC is promoted for the first time in a But-For Scenario, I consider it is appropriate to assume the net player trading from the 2023/24 season (being the first season in the Actual Scenario in which BFC was promoted to the PL).

362. Mr Dudney has estimated a cash outflow of £83.8 million, £11.6 million lower than Mr Boulton's figure for FY24 due, principally, to the experts' different treatment of the purchase of [redacted], as explained in paragraph 314.

363. Mr Boulton acknowledged Mr Dudney's point regarding the use of FY22 data but stood by his calculation.[180]

I completely understand the point you are making. The alternative -- we don't have two years of actual data at the time of writing these reports where Burnley was moving from the Championship to the Premier League. The witness evidence when I wrote this report appeared to suggest that the outflows consequent on relegation had been much more significant than normal and therefore the outflows investment on promotion were much higher than would typically be the case on a Championship to Premier League promotion.

He accepted that Mr Dudney had based his calculation solely on FY24 actual cash flows but observed that *this is a differential between us*.

364. As explained in paragraphs 317 et seq, Mr Boulton had also undertaken a high level sense check to substantiate his estimated cash outflow.[181]

As a sense-check, a reasonable level of net cash outflow may reflect (i) the cost of buying back players of a similar calibre to those sold following relegation, of approximately £47.7 million, and (ii) typical net spending to maintain Premier League status of approximately £4.0 million. Together, these suggest cash outflow on player trading of approximately £51.6 million.

365. It was also explained that these figures were superseded in Mr Boulton's final report where his *sense check* of an estimated net cash outflow for a promotion season of £53.8 million became £46.2 million.

366. Both experts' arguments have some merit. Mr Boulton argues that *using multiple*

[178] Re-Re-Amended Statement of Claim
[179] Mr Dudney's report dated 28 July 2025, paragraph A6.3.17
[180] Day 7, P154 (14-23)
[181] Mr Dudney's report dated 8 August 2025, paragraph D.2.17(b)

data points provides a more reliable estimate while Mr Dudney reasonably observes that, since FY22 was not a promotion year, the scale of investment would not be comparable. It is noted that, although Everton argued that Mr Boulton's use of the club's actual net outflow of £95.4 million in FY24 contained an element of overspend or arguably squad betterment, Mr Dudney has nevertheless included a similar figure for this but-for promotion scenario.

367. We have noted the significant investment required by clubs in order to retain Premier League status following promotion. Notwithstanding Mr Boulton's *sense check* Burnley actually did spend £95.4 million in FY24 but nevertheless finished 19th with just 24 points. By contrast, clubs identified by Burnley which had spent in excess of £100 million following promotion (including Fulham, Aston Villa and Nottingham Forest) have successfully retained their Premier League status). For this reason the Commission favours Mr Dudney's estimate of an £83.8 million cash outflow on player trading in a promotion scenario.

368. (5) Second season in Championship. Mr Boulton's final assumption was for a season where Burnley spends a second season in the Championship (scenario 4 – FY25) after finishing third in 2023/24. Here, Mr Boulton assumes the club will achieve promotion in first place in 2024/25 but estimates net player trading of nil.

369. Mr Dudney takes a different view. The club would still be in receipt of parachute payments, in theory permitting it to outspend rival clubs. Mr Dudney has provided for net expenditure of £9.8 million, being 55% of Mr Dudney's own estimate of Burnley's estimated average Premier League cash outflow of £17.8 million. He explains his rationale below[182]

> Mr Boulton states that a club receives 55% of the central payments received by PL clubs in the first season following relegation. As a simplifying assumption, in the first EFL to EFL season in the But-For Scenario, I assume that BFC spends 55% of the amount it would spend in a PL-to-PL year.
>
> I apply 55% as a proxy for the reduction in spend that is likely to occur as parachute payments diminish and prior year player sales proceeds are depleted. I use 55% based on the proportion relating to the first parachute payment, as opposed to the second payment of 45%, as I assume the spend is based on the cash BFC has available when the summer transfer window opens.

370. However, all else equal, clubs in receipt of parachute payments, even if a reduced figure in their second season in the Championship, would be able to outspend rival clubs. Moreover, if Burnley aspired to achieving first place in the Championship and promotion, it seems probable that it would need to invest in

[182] Mr Boulton's report dated 28 July 2025, paragraphs A6.3.21-22

its playing squad. Estimating the necessary cash outflow is inevitably subjective, as is the basis of Mr Dudney's calculation (for example we have revisited his assumption of a net average Premier League spend of £17.8 million). However, in the absence of persuasive evidence to the contrary, the Commission favours Mr Dudney's argument regarding Burnley's need to invest in a second Championship season and we accept his estimate of a net £9.8 million cash outflow.

Summary of Conclusions

371. We have set out in the foregoing paragraphs our conclusions regarding the experts' assumptions and calculations of Burnley's net player trading cash flows. We summarise the effect of those conclusions in the table in paragraph 372 below which reproduces much of the detail shown in tables in paragraphs 310, for actual cash flows, and 335, for but-for cash flows. This table shows the components of the £47.3 million variance between the experts' calculations of actual and but-for player trading cash flows first disclosed in the table in paragraph 185. The column headed 'Reference' records the paragraphs in which each component of the variance on but-for cash flows has been discussed. The columns headed 'Boulton', 'Dudney' and 'Variance' record the but-for cash flows estimated by the experts, and the variance between them. The column headed 'Commission decision' then records the cash flows which the Commission has determined to be appropriate, either one of the experts' estimates or, in just one instance, a figure between those estimated by the experts. Cash flows in brackets (most scenarios and specifically those where the club will play in the Premier League in the forthcoming season) signify a net cash outflow and those not in brackets signify a net cash inflow (the three scenarios where the club has been relegated and will play in the Championship in the forthcoming season). Bracketed figures in the columns headed 'Commission decision' and 'Total variance' denote Mr Boulton's assumption of a smaller cash outflow than Mr Dudney.

372. For reasons explained in the foregoing paragraphs, the Commission accepts (or accepts in part) Mr Dudney's arguments that Mr Boulton's cash flows are overstated in the sum of £20.6 million, and these transactions are set out in the column headed 'Accept'. The Commission has favoured Mr Boulton's arguments in respect of the balance of the variance, totalling £26.7 million, and these transactions are set out in the column headed 'Reject/contra' (the 'contra' is the

[redacted] transaction explained in paragraph 315 shown as both a plus and a minus amount in the column and consequently the effect is neutral). Subject to rounding, the cash flows on each line of the Accept column (total - £20.6 million) and the Reject column (total - £21.7 million) reconcile to the total variance of £47.3 million.[183]

Description	Reference	*No. of scenarios*	Estimated net cash flow			Commission decision	Total variance[1]	Accept	Reject/ contra
			Boulton[184]	Dudney[185]	Variance				
			£m	£m	£m	£m	£m	£m	£m
Actual cash flows									
[redacted] loan fees							[redacted]	[redacted]	[redacted]
Contingent transfer fees							[redacted]	[redacted]	[redacted]
[redacted] - FY22							[redacted]	[redacted]	[redacted]
Total variance on actual cash flows							**(11.9)**	**(3.0)**	**(8.9)**
Weighted but-for cash flows[1]									
League status: PL to PL[3]	336 - 351	*4*	(4.5)	(17.8)	(13.3)	(12.2)	**(13.3)**	(7.7)	(5.6)
League status: PL to PL[4]	352 - 354	*3*	(4.5)	(17.8)	(13.3)	(4.5)	**(10.0)**		(10.0)
League status: PL to EFL	355 - 358	*3*	41.7	28.1	(13.6)	41.7	**(10.2)**		(10.2)
League status: EFL to PL	359 - 367	*1*	(53.8)	(83.8)	(30.0)	(83.8)	**(7.5)**	(7.5)	
League status: EFL to EFL	368 - 370	*1*		(9.8)	(9.8)	(9.8)	**(2.5)**	(2.5)	
[redacted] - FY22							[redacted]		[redacted]
Total variance on but-for cash flows							**(35.5)**	**(17.6)**	**(17.8)**
Total variances on all player trading cash flows							**(47.3)**	**(20.6)**	**(26.7)**

Notes

1. The figures in the 'Total variance' column for the weighted but-for cash flows are the product of the variances between Mr Boulton's and Mr Dudney's assumptions for each scenario, weighted by 25% and then multiplied by the number of scenarios. For example, for the PL to PL (retention of status) scenario, £13.3m x 25% x 4 = £13.3m. For the PL to PL (relegation) scenario, £13.3m x 25% x 3 = £10.0m.
2. As explained in paragraph 350, for seasons where the club has retained Premier League status, the Commission has determined that the cash outflow to be used is £12.2 million per annum. The adjustment in the 'Accept' column (meaning the Commission accepts in part Mr Dudney's argument and must reduce Mr Boulton's cash flow accordingly) is calculated as the variance between the Commission's decision and Mr Boulton's estimate, weighted by 25% and then multiplied by the number of scenarios (i.e. £12.2m minus £4.5m = £7.7m x 25% x 4 = £7.7m). The adjustment in the 'Reject' column (meaning the Commission does not fully accept Mr Dudney's estimate) is calculated as £17.8m minus £12.2m = £5.6m x 25% x 4 = £5.6m.
3. Seasons culminating in PL retention.
4. Seasons culminating in relegation.

373. Accordingly, Mr Boulton's actual player trading cash outflow is reduced by £3.0 million from £24.4 million to £21.4 million and his weighted but-for cash outflow increases by £17.6 million from £2.4 million to £20.0 million.

[183] As explained in footnote 54, unless stated otherwise all components of the respective experts' calculations, and reconciliations between those calculations, are expressed in millions, rounded to one decimal place. On occasion this may give rise to rounding differences of +/- £0.1 million.
[184] Mr Boulton's but-for cash flows obtained from Appendix A to his report dated 19 September 2025, worksheets 'But-For Scenario 1' – 'But-For Scenario 4', cells L-N62
[185] Mr Dudney's but-for cash flows obtained from Updated Appendix 7 to his expert report, worksheets 'But-For Scenario 1' – 'But-For Scenario 4', cells L-N62

374. Mr Dudney's actual player trading outflow is increased by £8.9 million from £12.5 million to £21.4 million and his weighted but-for cash outflow is reduced by £17.8 million from £37.8 million to £20.0 million.

375. The consequence of the adjustments to operating profit/loss, summarised in the table in paragraph 0, and of the above adjustments to player trading cash flows is that the experts' respective calculations of loss or gain, as set out in the table in paragraph 185, are amended to a loss of £26.0 million as set out below.[186] This table shows the actual and but-for cash flows for both operating profit/loss and player trading for the four years of the Relevant Period, with the estimated cash flows for each of the four but-for scenarios set out below the main table.

	League status	Total £m	2021/22 £m	2022/23 £m	2023/24 £m	2024/25 £m
Operating profit/(loss)						
Actual cash inflow/(outflow)	PL-EFL-PL-EFL	**(21.2)**	12.5	(20.4)	18.6	(31.9)
But-for cash inflow/(outflow) [1]		**3.4**	0.9	15.0	(0.2)	(12.3)
Total gain/(loss) on operating profit/(loss)		**(24.6)**	**11.6**	**(35.4)**	**18.8**	**(19.6)**
Player trading						
Actual cash inflow/(outflow)	PL-EFL-PL-EFL	**(21.4)**	(12.3)	27.9	(94.1)	57.1
But-For cash inflow/(outflow) [2]		**(20.0)**	(12.3)	(8.3)	16.7	(16.0)
Total gain/(loss) on player trading		**(1.4)**	**0.0**	**36.2**	**(110.8)**	**73.2**
Total loss before interest		**(26.0)**	**11.6**	**0.9**	**(92.0)**	**53.5**
1. Weighted average of following four scenarios for operating profit/(loss)						
Scenario 1	PL-PL-PL-PL	**40.6**	0.9	14.6	17.8	7.3
Scenario 2	PL-PL-PL-EFL	**(0.0)**	0.9	8.3	22.8	(31.9)
Scenario 3	PL-PL-EFL-PL	**2.7**	0.9	18.6	(26.8)	10.0
Scenario 4	PL-PL-EFL-EFL	**(29.6)**	0.9	18.6	(14.5)	(34.5)
2. Weighted average of following four scenarios for player trading						
Scenario 1	PL-PL-PL-PL	**(48.8)**	(12.3)	(12.2)	(12.2)	(12.2)
Scenario 2	PL-PL-PL-EFL	**12.7**	(12.3)	(12.2)	(4.5)	41.7
Scenario 3	PL-PL-EFL-PL	**(58.9)**	(12.3)	(4.5)	41.7	(83.8)
Scenario 4	PL-PL-EFL-EFL	**15.1**	(12.3)	(4.5)	41.7	(9.8)

376. A net cash outflow of just £1.4 million for player trading, when comparing the actual outcome with but-for scenarios, is modest when viewed in the context of Burnley's assertion that Everton's breaches, and Burnley's consequent

[186] As previously explained, in this table, the total loss/gain will be the difference between the actual and but-for cash flows and not the sum of those cash flows.

relegation, had *caused Burnley significant loss* including *losses and/or costs arising from the impact of relegation on its squad*.[187] As part of its review of the parties' claims, the Commission has undertaken a detailed analysis of the experts' models, summarised in the table below in respect of player trading cash flows. It is emphasised that this analysis has been undertaken, and is now reproduced, purely as a sense check of the final outcome.

377. The data in the columns under the heading 'Actual cash inflow/(outflow)' are the player trading cash outflows, totalling £21.4 million, for the four actual scenarios including FY22, as set out in the table in paragraph 375, after adjustment for the variances discussed in paragraphs 310 to 315 and apportioned between the experts in the table in paragraph 372. The data in the columns under the heading 'But-for cash inflow/(outflow)' are the player trading cash outflows, totalling £20.0 million, as set out in the table in paragraph 375 and determined by the Commission after the adjustments explained in paragraphs 336 to 370 for the sixteen but-for scenarios, including four for FY22 which are identical to the actual cash flow for that financial year. The figures in the right hand column, headed 'Variance', total £1.4 million, are the difference between the actual outflow of £21.4 million and the but-for cash flow of £20.0 million.

378. The purpose of the sense check is to demonstrate how the net variance results from comparing weighted cash flows for each of the experts' sixteen but-for scenarios, grouped together where consistent assumptions have been used, with the unweighted cash flows for the four actual scenarios. This approach highlights but-for scenarios where there might be no equivalent actual scenario, for example the seven PL to PL scenarios, four where the experts assume retention of Premier League status (incurring an adjusted annual spend of £12.2 million) and three where the experts assume relegation (incurring an adjusted annual spend of £4.5 million).

379. For but-for scenarios where there is a comparable actual scenario, the but-for cash flows show a reasonable degree of correlation to the actual cash flows. By way of example the net but-for cash outflows for the four PL-PL scenarios, where Burnley retains its Premier League status at the end of the relevant season (£12.2

[187] Burnley's opening submissions, paragraph 60

million), bear comparison with the actual cash outflow of £12.3 million in FY22, albeit (subject to the impact of Everton's breach) Burnley was relegated at the end of that season. Equally, the net but-for cash inflows for the three relegation seasons (£41.7 million) bear comparison with the average of the two actual relegation scenarios (£42.5 million), albeit these are an average of FY23 (£27.9 million) and FY25 (£57.1 million), as shown in see paragraph 355.

		Actual cash inflow/(outflow)			But for cash inflow/(outflow)				
Status [1]	**Seasons**	***No. of scenarios***	**Average per scenario**[6]	**Total**	***No. of scenarios***	**Average per scenario**[7]	**Total**	**Weighted @ 25%** [2]	**Variance**[3]
			£m	**£m**		**£m**	**£m**	**£m**	**£m**
PL-PL [4]	FY22	*1*	(12.3)	**(12.3)**	*4*	(12.3)	(49.1)	**(12.3)**	-
PL-PL [5]	FY23-FY25				*4*	(12.2)	(48.7)	**(12.2)**	12.2
PL-PL	FY23-FY25				*3*	(4.5)	(13.5)	**(3.4)**	3.4
EFL-PL	FY23-FY25	*1*	(94.1)	**(94.1)**	*1*	(83.8)	(83.8)	**(21.0)**	(73.2)
EFL-EFL	FY23-FY25				*1*	(9.8)	(9.8)	**(2.4)**	2.4
PL-EFL	FY23-FY25	*2*	42.5	**85.0**	*3*	41.7	125.0	**31.3**	53.8
				(21.4)				**(20.0)**	**(1.4)**

Notes
1. This column shows the league status in the immediately preceding season and the current season.
2. The figures in the column headed 'Total' for the but-for cash flows are arrived at by multiplying the average cash flows per season by the applicable number of scenarios. The figures in the 'Weighted @ 25%' column are then the figures in the 'Total' column multiplied by 25%. For example, for the PL to PL (retention of status) scenarios, £12.2m x 4 = £48.7m x 25% = £12.2m.
3. The figures in the column headed 'Variance' are the difference between the total actual cash flows of £21.4 million and the weighted average but-for cash flows of £20.0 million.
4. Seasons culminating in PL retention.
5. Seasons culminating in relegation.
6. The source for the actual average cash flows per scenario is the table in paragraph 375, row headed 'Player trading – actual cash inflow/(outflow)'.
7. The source for the but-for average cash flows per scenario is the table in paragraph 375, rows headed 'Scenario 1' to 'Scenario 4' under 'Weighted average of following four scenarios for player trading'.

380. The following conclusions can be drawn from this analysis and other relevant evidence within the experts' models.

(1) Mr Boulton's seasonal accounting for player trading is helpful in highlighting the relationship between league status and player trading cash flows.

(2) Actual player trading cash flows confirm that Burnley was a net purchaser in Premier League seasons (following either retention of status or promotion) but a net seller in Championship seasons (at least those immediately following relegation).

(3) There is a mismatch between actual and but-for scenarios in terms of the number of purchaser scenarios versus seller scenarios, in part caused by

the parties' instructions to experts to assume Burnley had stayed up in FY23.

	Actual scenarios	But-for scenarios
Burnley a net purchaser *	1	8
Burnley a net seller	2	3

* One additional scenario when Burnley was a net purchaser after it remained in the Championship for a second season.

(4) Weighting of but-for cash flows by 25% has the capacity to cause further distortion.

(5) As a separate point, based on actual cash flows, Burnley sold eleven players for a reported £40m profit. It must be emphasised that this is not an exhaustive list of player movements in the period and may exclude players sold at a loss, players purchased in the period but released without fee and home grown players sold for a fee.[188]

	Player purchases		Player sales		
	Date	Cost £m	*Date*	Proceeds £m	Profit £m
[redacted]	*Jul 21*	[redacted]	*Jul 22*	[redacted]	[redacted]
	Aug 21	[redacted]	*Aug 22*	[redacted]	[redacted]
	Jul 22	[redacted]	*Jul 24*	[redacted]	[redacted]
	Aug 22	[redacted]	*Aug 24*	[redacted]	[redacted]
	Jul 22	[redacted]	*Aug 24*	[redacted]	[redacted]
	Jul 22	[redacted]	*Aug 24*	[redacted]	[redacted]
	Jan 23	[redacted]	*Aug 24*	[redacted]	[redacted]
	Aug 23	[redacted]	*Aug 24*	[redacted]	[redacted]
	Jul 23	[redacted]	*Aug 24*	[redacted]	[redacted]
	Aug 23	[redacted]	*Aug 24*	[redacted]	[redacted]
	Jul 22	[redacted]	*Aug 24*	[redacted]	[redacted]
		(68.5)		**108.1**	**39.6**

Had the club enjoyed less success in its player trading, and subject obviously to any impact on its but-for assumptions of a different pattern of player trading in the actual scenario, Burnley's actual player trading cash outflows would have been far higher without these profits.

(6) The evidence does not support Burnley's contention, discussed in more detail in paragraphs 188 to 205, that relegated clubs such as itself suffer a loss of bargaining power and are therefore forced to *buy high*.

[188] Data obtained from Mr Boulton's Appendix A to his report dated 19 September 2025. Data relating to player sales was obtained from worksheet '1-Pager', cells M6-35, and data relating to player purchases was obtained from worksheet 'Player Trading Expense Ledger', cells O239-417.

PRE-AWARD INTEREST

381. Each expert has adopted his own approach to calculating pre-award interest to be applied to the net loss/gain they have calculated. As shown in paragraph 375, Burnley's total loss before interest is £26.0 million.

382. Mr Boulton has used the interest rate applicable to the MSD loan, namely an average of the daily SONIA rate [redacted] The MSD loan agreement stipulated LIBOR [redacted] but, since LIBOR is no longer published, Mr Boulton has substituted SONIA.[189,190] He has calculated interest on his assessment of Burnley's total loss up to 31 July 2025.

383. The MSD loan agreement provided for the interest margin to increase [redacted] in the event of Burnley's relegation. Notwithstanding this, Mr Boulton has continued to calculate the rate as the average daily SONIA rate plus [redacted] for each of the three years for which he has calculated interest. For FY25 he has calculated the average annual rate based on the daily rate from 1 August 2024 to 16 June 2025, being shortly before publication of his first report. The rates used by Mr Boulton are as follows.

	FY22	FY 23	FY 24	FY 25
[redacted]	[redacted]	[redacted]	[redacted]	[redacted]

384. The loan had been advanced by MSD UK Holdings Limited to Calder Vale Holdings Limited ("Calder Vale") under the terms of an agreement dated 23 December 2020. Calder Vale is defined in note 32 of the FY22 accounts of Burnley FC Holdings Limited ("Burnley Holdings"), the club's immediate parent company, as that company's *immediate parent undertaking*.

385. Although the loan was advanced to Calder Vale it was disclosed as a liability in the accounts of Burnley Holdings. Mr Thompson confirmed both the original purpose of the loan and the nature of the club's obligations in respect thereof. [191]

Q. And that had been taken out in December 2020; correct?

A. Correct, yes.

Q. And that was when Burnley had been acquired by ALK Capital.

A. Yes, it was.

[189] Mr Boulton's report dated 23 June 2025, paragraph 7.3.2
[190] LIBOR = London Inter-Bank Offered Rate. SONIA = Sterling Overnight Index Average
[191] Day 2, P58 (24) – P59 (14)

Q. And the purpose of the loan was to part-fund the acquisition, wasn't it?

A. My understanding, yes.

Q. The club itself wasn't a party to the loan agreement, was it?

[redacted]

386. [redacted]

387. Mr Thompson also agreed that the MSD loan was refinanced in November 2022 by a loan from Aldermore.[192]

[redacted]

388. [redacted] The respective interest rates quoted [redacted] are extracted from a Finance Update to the Burnley board dated November 2022. However, there is a suspicion that the [redacted] quoted was the margin over SONIA rather than the actual rate payable under the Aldermore facility. Although no loan documentation has been seen for that facility, Burnley's FY23 accounts report that *Bank loan bears interest at 11.23% per annum* while the FY 24 accounts report that *Bank loans bear interest between 8.5% fixed and SONIA + 7.5%*.

389. [redacted]

[192] Day 2, P64 (4-19)
[193] Day 2, P63 (11-15)

390. In advocating the use of the MSD loan interest rate for the purposes of calculating pre-award interest, Mr Boulton does not acknowledge the repayment of the MSD loan in November 2022 or the other sources of loan finance. Having already observed that *Burnley's relegation affected its financing arrangements. Specifically, the club no longer had access to the same favourable financing terms as it did prior to relegation*,[194] he then set out his rationale for using the MSD rate.[195]

> I consider that the rates on the MSD loan are particularly relevant when calculating pre-award interest because:
>
> (a) The MSD loan determined Burnley's financing position upon relegation in 2021/22 and therefore affected its cash position;
>
> (b) As Mr Thompson explains, the need to repay the MSD loan affected Burnley's negotiating position; and
>
> (c) The period of the loan covers the period of loss, as the loan term ends in 2025.

391. Mr Boulton's claim that *the club no longer had access to the same favourable financing terms* is not consistent with Mr Thompson's [redacted], as noted in paragraph 388, there is some uncertainty about the actual interest rates payable on the loan facilities subsequently negotiated with Aldermore and Macquarie.

392. In his first report, Mr Dudney challenges Mr Boulton's approach.[196]

> I disagree that the MSD loan is relevant to BFC [redacted] According to BFC Holdings' 2021 financial statements, the purpose of the MSD loan was related to ALK Capital's acquisition of BFC. The borrowed funds were then lent on to Calder Vale Holdings Limited ("**Calder Vale**"), BFC Holdings' immediate parent company.
>
> [redacted]. As at 31 July 2023, BFC had increased its borrowing to £70 million, [redacted] BFC's financial statements state that this loan carried an interest charge of 11.23%. However, BFC Holdings continued to show a receivable of £65 million owed by Calder Vale in its financial statements and it appears that following the refinancing, BFC Holdings was due to pay £65 million to BFC, [redacted].

393. Mr Dudney is correct to say that the loan, and associated interest, were disclosed in the FY21, and indeed the FY22 accounts of Burnley Holdings. However, the new £70 million loan, presumably the Aldermore facility, was disclosed as a liability in Burnley's FY23 accounts and not those of the immediate parent company. Moreover, all but £1.4 million of bank loan interest is borne in

[194] Mr Boulton's report dated 23 June 2025, paragraph 7.2.1
[195] Mr Boulton's report dated 23 June 2025, paragraph 7.2.4
[196] Mr Dudney's report dated 28 July 2025, paragraphs 7.3.5-6

Burnley's, as opposed to Burnley Holdings', FY23 accounts and all bank loan interest is borne in the club's FY24 accounts.

394. The accounts of the two companies disclose minimal information about indebtedness between group companies and so it is not possible to verify the correctness of Mr Dudney's assumption [redacted] Indeed Calder Vale never filed any annual accounts and was placed in members' voluntary (i.e. solvent) liquidation in April 2024 following which liquidators' reports indicate that the company had no assets or liabilities. [redacted]

395. Mr Dudney maintains the appropriate interest rate to use is a weighted average of the interest paid by Burnley based on its borrowings from all sources, including debt factoring in relation to transfer fee receivables. He updated those rates in subsequent versions of his report.

396. In his second and third reports, Mr Boulton stands by the method he adopted for his original calculation. He also takes issue with Mr Dudney's calculation of factoring costs in his second report, points acknowledged by Mr Dudney in subsequent versions of his report.

397. In cross-examination, Mr Boulton was asked about Mr Thompson's evidence that the MSD loan had been repaid and replaced by funding from Aldermore and others.[197]

[redacted]

[197] Day 7, P172 (14) – P173 (13)

[redacted]

398. Mr Boulton admitted that, had he been aware of Burnley's refinancing, he would have taken account of the interest being charged on these new sources of finance.

399. Within his model, Mr Dudney calculates the weighted average rate of interest for each year in the table reproduced below.[198]

	FY22		FY23		FY24		FY25	
	Debt £m	***Interest rate***	**Debt £m**	***Interest rate***	**Debt £m**	***Interest rate***	**Debt £m**	***Interest rate***
Additional borrowing - 2023			5.0	*11.23%*	5.0	*11.23%*	5.0	*11.23%*
New loan – 2024					30.0	*12.75%*	29.6	*12.75%*
Debt factoring	17.2	[redacted]	30.9	[redacted]	20.2	[redacted]	46.6	[redacted]
Total debt/ weighted average interest rate	**17.2**	[redacted]	**35.9**	[redacted]	**55.2**	[redacted]	**81.2**	[redacted]

400. The following points should be noted.

(1) Mr Dudney recognises only the £5 million of *additional borrowing*, assumed to result from Aldermore refinancing of the £65 million MSD loan. In practice, since the full £70 million was thereafter treated as a liability in Burnley's accounts, we conclude that the entire £70 million should be included as the relevant FY23 bank loan balance for weighting purposes.

(2) The interest rate of 11.23% for FY23 is as reported in Burnley's accounts for that year. In practice [redacted]. Analysis of the evidence undertaken by the Commission supports this view. It is assumed that Mr Thompson was referring to a margin over SONIA in the exchange at Day 2, P64 (4-19) (see paragraph 387 above) and this is borne out by disclosure in Burnley's FY24 accounts.

(3) For this reason it is unlikely that the rate of 11.23% would have prevailed in FY24 and FY25, as assumed by Mr Dudney. Burnley's FY24 accounts

[198] Mr Dudney's Updated Appendix 4 to his expert report, worksheet 'Weighted average interest cost'

report that *Bank loans bear interest between 8.5% fixed and SONIA plus 7.5%*. The source of the finance attracting 8.5% fixed is not known but it may not be material. The Commission has undertaken a very high level calculation of interest cost based on disclosure of bank loans and associated interest in Burnley's FY24 accounts.

Bank loans – FY23	£70.0m
Bank loans – FY24	£92.2m
Bank loan interest	£11.1m
Effective rate – based on FY24 balance [1]	*12.08%*
Effective rate – based on averaged balance [2]	*13.74%*

Notes
1. £11.1m ÷ £92.2m
2. £11.1m ÷ ((£70m + £92.2m) ÷ 2)
3. In both the above calculations of the effective rate, readers should note that these are based on figures rounded to the nearest million to one decimal place, as explained in footnote [54]

(4) SONIA averaged 5.2% for FY24, translating to [redacted] with the addition of the bank's [redacted] margin, [redacted] to an *unsecured £30,000,000 facility bearing interest at 12.75%, disclosed within bank loans under one year, [and] converted to a secured facility on 1st September 2024* reported in the club's FY24 accounts[199], shown as *New loan – 2024* in the table at paragraph 398 above. It is therefore proposed that an effective rate of 12.08% should be used as the applicable interest rate for bank loans for FY24 rather than Mr Dudney's 11.23%.

(5) Because Mr Dudney has opted to ignore the original £65 million loan (the former MSD loan) he also overlooks any assumed repayment of those or related borrowings. Although the FY24 accounts report the £30 million new loan, borrowings only increase from £70 million in FY23 to £92.2 million in FY24, meaning that, if £30 million of new funding was obtained, £7.8 million must have been repaid.

(6) Mr Dudney makes broad assumptions about bank loans in FY25 for which year accounts are not yet available. The FY24 accounts note that, following the end of the financial year, the £30 million new loan, included within a total of £69.7 million repayable within one year, was renegotiated and just £0.4 million would now be repayable in FY25. [redacted]

[199] Annual accounts of The Burnley Football & Athletic Company Limited for the year ended 30 July 2024, page 25, note 16

[redacted]

(7) The debt factoring liabilities recorded by Mr Dudney in the table in paragraph 399 are consistent with those disclosed in Burnley's FY22, FY23 and FY24 accounts.

(8) Mr Dudney's debt factoring rate of [redacted] is based on a review of five agreements by which [redacted] of receivables was factored in November 2022. Mr Dudney had originally, wrongly, assumed the [redacted] was the total charge from which he calculated an assumed rate of [redacted] per annum. Mr Boulton pointed out this error in his second report and Mr Dudney corrected the rate on debt factoring to [redacted] per annum.

(9) Mr Dudney assumes future factoring facilities would also attract a rate of [redacted] per annum but Mr Boulton challenges this assumption in his third report.[200] Without having access to rates borne by the club on any facilities obtained in FY23 or FY24, he assumes that rates would increase in line with the increase in SONIA since FY22, proposing rates of [redacted]. In response to a question from the Commission, Mr Dudney expressed some scepticism about Mr Boulton's assumptions.[201]

> What I would say is that, again, subject to check, but as I recall, he makes certain assumptions with respect to the later years based on earlier years. It is certainly possible that the combination of base rate plus what they would call the spread, basically the credit risk portion above the base rate, could yield a higher rate. But as I remember sitting here, there is not data that would tell us what the credit spread portion of it was versus the base rate.
>
> So I think it is -- it is not demonstrated as cleanly as probably Mr Boulton or I would like in that regard. So he has made an assumption, I think, with respect to that, whereas I have not.

(10) The Commission has reviewed Mr Boulton's proposed debt factoring rates but has concluded it is not appropriate to use the average FY22 SONIA rate as a base point bearing in mind that the [redacted] rate used by Mr Dudney was extracted from facilities entered into in November 2022 and not mid-FY22. Using SONIA as at 1 November 2022 as a base gives slightly lower rates of 8.82% (FY23) and 10.60% (FY24) which the Commission proposes to use. The Commission continues to use 7.60% for FY22.

(11) Mr Dudney also makes broad assumptions about debt factoring in FY25. His estimated FY25 debt of [redacted] comprises £7.4 million disclosed

[200] Appendix B to Mr Boulton's report dated 19 September 2025, worksheet 'Interest Rate Adjustments'
[201] Day 8, P80 (8-20)

as due for repayment within one year in Burnley's FY24 accounts and [redacted]. He assumes an instalment of one third will have been paid on completion of sale in summer 2024, a further one third will have been received by Burnley before or soon after the end of the financial year and the balance of one third would have been factored by the club. In the absence of more certainty regarding debt factoring undertaken by Burnley in FY25, and the associated terms, the Commission favours making no assumptions on the matter.

401. Based on the foregoing, the Commission has recalculated appropriate interest rates as follows. In light of the considerable uncertainty surrounding FY25 interest rates and level of debt, the Commission proposes using the FY24 weighted average rate of 11.81% for FY25 also.

	FY22		FY23		FY24	
	Debt £m	***Interest rate***	**Debt £m**	***Interest rate***	**Debt £m**	***Interest rate***
All bank loans [1]			70.0	*11.23%*	92.2	*12.08%*
Debt factoring [2]	17.2	[redacted]	30.9	[redacted]	20.2	[redacted]
Total debt/weighted average interest rate	**17.2**	[redacted]	**100.9**	[redacted]	**112.4**	[redacted]

Notes
1. For year-end bank loan balance see paragraph 400(3) and, for calculation of applicable interest rate, see paragraphs 400(2) re FY23 and 400(4) re FY24
2. For year-end debt factoring balance, see paragraph 399 and, for calculation of applicable interest rate, see paragraph 400(10).

402. A comparison of Mr Boulton's rates, Mr Dudney's rates and those adopted by the Commission is shown in the table below.

	FY22	FY 23	FY 24	FY 25
Mr Boulton (paragraph 383)	[redacted]	[redacted]	[redacted]	[redacted]
Mr Dudney (paragraph 399)	[redacted]	[redacted]	[redacted]	[redacted]
Commission (paragraph [401)	7.60%	10.49%	11.81%	11.81%

403. Four other issues had to be addressed by the experts.

404. As reported by Mr Dudney, the experts were instructed to calculate interest only from 30 June 2022, being the assumed date of the breach. In practice, both experts have assumed this to apply from 31 July 2022, being the last day of Burnley's

financial year. Accordingly, no interest is charged on the FY22 cash flows of £11.6 million (see paragraph 267) which were assumed to arise on the final day of that financial year.[202]

> Both Mr Boulton and I agree that pre-award interest should be calculated from the date of the Breach, which I am instructed to assume is, at the earliest, 30 June 2022.

405. Despite the fact that no pre-award interest would be charged in respect of FY22, both experts calculated and reported what they considered to be the appropriate rate of interest for that year, as shown in the table in paragraph 402.

406. For FY23 and thereafter interest is charged in full on the brought forward balance of net cash flows. For current year cash flows, both experts assume these will attract interest for a half year only.

407. The experts disagree on whether or not interest should be compounded. Mr Boulton expressed the following view.[203]

> In my opinion, compounding interest better reflects the purpose of an award of interest in compensating a claimant for having been kept out of its money. Unlike simple interest, compound interest accounts for the fact that the interest is not paid at the end of each period, but rather at some point after damages are awarded. As interest on the MSD loan was payable quarterly, I adopt a quarterly compounding convention.

408. Mr Dudney challenged this approach.[204]

> Whether compounding interest or simple interest should apply is a matter for the Commission to determine. However, as I do not agree that the MSD loan is a relevant benchmark, I also disagree that quarterly compounding is appropriate. If the Commission decides that compound interest is appropriate, I consider it most reasonable to adopt an annual basis because my calculation of the interest rate, inferred by the debt factoring fees is an annual compound rate and is relevant to all years in the discrete period.

409. The Commission notes that the MSD loan agreement did indeed provide for quarterly interest although this is of limited relevance bearing in mind the early repayment of that facility. We are persuaded by Mr Boulton's case for compound interest, but consider that it is fair and proportionate for it to be compounded annually rather than quarterly.

410. Mr Boulton has challenged Mr Dudney's weighted average calculation on the grounds that Burnley, just like any other borrower, would in practice pay off its

[202] Mr Dudney's report dated 28 July 2025, paragraph 7.4.1(c)
[203] Mr Boulton's report dated 23 June 2025, paragraph 7.3.4
[204] Mr Dudney's report dated 28 July 2025, paragraph 7.4.1(b)

most expensive debt first.[205]

I consider Mr Dudney's weighting approach is inappropriate. This is because it does not recognise that Burnley would be economically incentivised to repay its most expensive debt first. As a result, his weighted average understates the actual rate of interest by placing undue weight on the cheapest source of financing.

411. Mr Dudney addressed this point in cross examination.[206]

The premise in part of Mr Boulton's -- one of his critiques and positions, I believe, is that you should utilise what is the highest interest rate instrument under the theory that had the club had additional funds, it would be economically rational to pay down that particular loan or debt facility.

Putting aside for a moment the issues that were raised on his cross-examination around whether or not the club was a party to the agreement or not, just setting that aside for a moment, the other issue that you should be aware of is that some of the cash flows in terms of size, because, as we know, due to the timing issues under either a seasonal year or a financial year basis, become quite large and they become larger than the MSD loan themselves.

So, in other words, you can't actually pay off that much debt when you are applying it to the loss in the period and so that was, you know, one reason in part that I felt a weighted average was better because you actually couldn't pay off a $100 million MSD loan or $75 million -- again, I apologise, a £75 million loan. You can't do it because the loan wasn't of that size.

412. The Commission considers Mr Dudney's assessment of the position to be correct, hence its adoption of the weighted average rates set out in paragraph 401.

413. Taking all of the foregoing into account, the Commission's calculation of pre-award interest, and its impact on Burnley's claim, is as follows. The net cash outflow of £26.0 million is as shown in the table in paragraph 375.

[205] Mr Boulton's report dated 8 August 2025, paragraph 5.4.5
[206] Day 8, P79 (3-24)

	Total £m	FY22 £m	FY23 £m	FY24 £m	FY25 £m
Net cash inflow/(outflow) for the period	(26.0)	11.6	0.9	(92.0)	53.5
Opening balance			11.6	13.8	(82.0)
Interest charged	(9.1)		1.3	(3.8)	(6.5)
Closing balance	(35.0)	11.6	13.8	(82.0)	(35.0)
Annual interest rate [1]		*7.60%*	*10.49%*	*11.81%*	*11.81%*
Interest charged					
On opening balance [2]	(6.8)		1.2	1.6	(9.7)
On current year balance [3]	(2.2)		0.0	(5.4)	3.2
	(9.1)		1.3	(3.8)	(6.5)

Notes

1. The annual interest rate is as shown in the table in paragraph 402. A rate of FY22 is shown even though no interest was charged in that year, as explained in paragraph 405.
2. Interest is charged on the opening balance by multiplying the opening balance for each financial year by the annual interest rate applicable in that year. For example, for FY23, the opening balance was £11.6 million and the interest rate was 10.49%. £11.6m x 10.49% = £1.2m.
3. Interest is charged on the current year balance by multiplying the net cash inflow/(outflow) for the period by the annual interest rate applicable in that year, and then taking 50% of that figure on the assumption that the annual cash inflow or outflow will have accrued evenly over the financial year. For example, for FY24, the net cash outflow was £92.0 million and the interest rate was 11.81%. £92.0m x 11.81% x 50% = £5.4m.
4. Readers are reminded that these calculations are based on figures rounded to the nearest million to one decimal place, as explained in footnote [54].

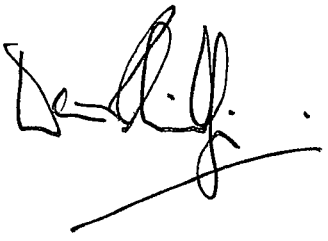
414. Pre-award interest has been calculated to 31 July 2025. It continues to accrue in FY26 at an annual rate of 11.81%.

CONCLUSION

415. We conclude that Everton's breach of the PSR has caused Burnley recoverable loss. We assess the compensation at £35,038,000, including pre-award interest calculated to 31 July 2025. We should be grateful if the parties would calculate interest for the period since 31 July 2025 in accordance with the principles discussed above.

416. The parties have invited us to assess costs on paper, adopting a global approach. We shall do so once we have received the parties' submissions on costs, and will hand down a separate decision.

David Phillips KC FCIArb
HH Alan Greenwood
Nick Igoe ACA



2 June 2026

IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W.51.5 OF THE PREMIER LEAGUE RULES BEFORE THE PREMIER LEAGUE INDEPENDENT DISCIPLINARY COMMISSION

PLJP 2023/3

B E T W E E N –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

ATTACHMENT 1

Intervention Application Decision – 9 May 2023

IN THE MATTER OF A PREMIER LEAGUE COMMISSION PLJP 2023/3

Date: **9 May 2023**

Before :

David Phillips KC

- -

Between :

The Premier League	**Claimant**
- and -	
Everton Football Club Company Limited	**Respondent**
Leeds United Football Club Limited	**Applicants**
Nottingham Forest Football Club Limited	
Southampton Football Club Limited	
Leicester City Football Club Limited	
Burnley Football & Athletic Company Limited	

- -

- -

Adam Lewis KC (instructed by **Linklaters LLP**) for the **Claimant**
Mr James Segan KC (instructed by **Pinsent Masons LLP**) for the **Respondent**
Nick De Marco KC (instructed by **Walker Morris LLP**) for the **Applicants**

Hearing dates: **9th May 2023**

- -

David Phillips KC **Tuesday, 9 May 2023**
(**14:59** am/pm)

Ruling by **DAVID PHILLIPS KC**

Introduction

1. By way of introduction, this is not in any shape or form a reasoned reserved judgment. I recognise the importance of everybody having a decision and basic reasons quickly, so I am giving an oral decision now. The decision I am completely satisfied about. The explanation I am giving, I hope, will make clear the reasoning which led to it, but I know you and anybody else reading a transcript of what I say will make due allowance for any infelicities.
2. It is divided into, I think, four short sections. The first is jurisdiction.

Jurisdiction

3. I am satisfied that the Commission has no inherent jurisdiction. Its powers derive from the rules and are limited to what is conferred by the rules.
4. There is no specific power to order joinder to the complaint from additional parties who would then become full participants in the proceedings. There is a good reason for that. The fact is that complaints such as made in this case involve commercially sensitive and properly confidential material. Involvement in the proceedings should be limited to what is necessary for the proper determination of the complaint.
5. It is the role of the Premier League to bring and prosecute complaints. The presence of interested parties as additional prosecutors, even if restricted by directions, would lead to procedural chaos. Hence the need for W.27, which would be unnecessary if the Commission had some overarching wider power.
6. The purpose of W.27 is to avoid unnecessary multiplicity of proceedings. It creates a procedure to enable a club who claims to have been caused loss by the breach of the rules to claim compensation in the same proceedings. Liability is, of course, contingent upon the breach being upheld, causation and other factual issues.

7. So I rule that the Commission's powers derive from W.27. W.27 confers a wide discretionary power. However, the discretion and its exercise cannot go beyond the actual power conferred. That enables the Commission to act *at any stage*. It enables the Commission to give an indication that it may wish to award compensation under W.51.5 and, if such an indication is given, it enables the Commission to give directions for the admission of evidence relating to loss caused to the club by the breach.
8. Those powers are limited. They do not extend to admitting the club claiming compensation as a party to the complaint. They do not extend to granting permission to the club claiming compensation to participate in the proceedings in a manner other than as provided for by W.27. In particular, W.27 does not extend to permitting the club to participate in the issue of whether there has been a breach of the rules. W.27 does not extend to permitting the club to have disclosure of documents relating to the issue of the alleged breach of the rules.
9. I am satisfied that this construction properly protects the interests of a club claiming compensation for loss caused by a breach of the rules. It achieves the purpose behind W.51.5 and W.27. This construction reflects the provisions of W.52, which recognises that the complaint may be determined before the issue of compensation is addressed. The W.53 right to be present at the hearing is a reference to the hearing at which compensation is addressed. At the discretion of the Commission, that may be a combined complaint/compensation hearing or a compensation hearing that is held after the conclusion of the complaint hearing.
10. I accept that W.38.9 gives the Commission power to give directions for the assessment of compensation. In the ordinary course of events, those directions would be limited to the evidence referred to in W.27 but, without doing any more than saying that it is a possibility, I can see that in an appropriate case the power might permit wider directions. That would depend on the facts of the individual case, but I am satisfied that what W.38.9 does not do is to permit some general joinder that is wider than that provided by W.27.

Application

11. The next section is application. I am satisfied that the applicant clubs have potential claims for compensation. Those claims and their validity depend on whether the complaint is upheld. They depend on factual circumstances concerning the causation of any loss and they depend on other factual issues.

12. Accordingly, I find that if the complaint is upheld by the Commission, it may wish to exercise its power under W.51.5. That finding triggers a discretionary power to direct admission of evidence directed to loss which may have been caused by the breach, but that power does not extend to ordering joinder of the applicant clubs as parties to the complaint, nor does it extend to ordering the disclosure of documents relating to the complaint. The power is limited to directing receipt of evidence of loss and, by W.38.9, in an appropriate case, the giving of further directions, but such directions would be limited to issues of compensation.

13. Accordingly, I rule that I have no power to permit the intervention of the applicant clubs in the manner that they seek. The applicant clubs do not have the standing to request procedural directions such as expedition or disclosure.

Discretion

14. The next section is discretion. If I were wrong about my construction of the rules, I should nevertheless, in the exercise of my discretion, have refused the applications.

15. First, it is neither necessary nor proportionate for the applicant clubs to be involved in the issue of breach. Their interest is a contingent claim for compensation. If the complaint were to be upheld, the clubs' interests would be fully protected by involvement in W.27 compensation proceedings. The Premier League is the regulator who is responsible for the prosecution of the charge. It is not necessary or proportionate for the applicant clubs to be involved.

16. Second, the Commission has already determined that it is not practicable for the complaint to be properly and fairly determined both at first instance and on appeal by mid-June. I consider,

nevertheless, that if my construction of the rules were to be wrong, Mr De Marco is correct and that it would be open to me to review that decision.

17. However, the time available before mid-June is now significantly less than had been available when the Commission made its decision at the end of March. If I do have jurisdiction to review that decision, I should have come to the same conclusion, namely that it is impossible to have a proper and fair hearing of this complaint before the middle of June.
18. Third, disclosure to the applicant clubs is not necessary or proportionate either to secure the proper prosecution of the complaint, which is the responsibility of the Premier League, or to protect the interests of the applicant clubs in relation to compensation. I should, therefore, have refused disclosure as applied for.

Disposal

19. The next section is simply the disposal of these applications.
20. One, I find that if the complaint is upheld, the Commission may wish to award W.51.5 compensation to one or more of the applicant clubs.
21. Two, I refuse the procedural applications made by the applicant clubs.
22. Three, I direct that if the complaint is upheld, the Premier League must provide a copy of the decision to the applicant clubs forthwith. Within 28 days of receipt of a copy of the decision, each applicant club must inform the Commission whether it wishes to pursue a claim for W.51.5 compensation.
23. That formula in the last section, disposal, is open to suggestions, correction, comment from the three of you, if you want to perfect it into a different form, but that is, in essence, what I intend to do by way of disposal. Which is to make a recording of my finding under W.27, refuse the procedural applications, and to ensure the applicant clubs get a copy of the decision as soon as is practicable so that they can make a decision whether they want to take these applications further.

IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W.51.5 OF THE PREMIER LEAGUE RULES BEFORE THE PREMIER LEAGUE INDEPENDENT DISCIPLINARY COMMISSION

PLJP 2023/3

B E T W E E N –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

ATTACHMENT 2

Commission's PSR Decision – 17 November 2023

IN THE MATTER OF A PREMIER LEAGUE COMMISSION PLJP 2023/3

Mr David Phillips KC FCIArb
His Honour Alan Greenwood
Mr Nick Igoe ACA
16-20 October 2023

BETWEEN –

THE PREMIER LEAGUE

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

DECISION

1. INDEX

2. INTRODUCTION

2. By this complaint the Premier League alleges that Everton FC is in breach of the Profitability & Sustainability Rules. The Premier League's case is that a proper PSR calculation for the season 2021/2022 demonstrates losses of £124.5 million, which exceeds the sum of £105 million permitted by Rule E51 by £19.5 million. Everton accepts that it is in breach of the PSR: by the conclusion of the hearing it argued that properly calculated the breach was £9.7 million. Further, Everton advances factual material that it asserts mitigates the gravity of the breaches. The parties' cases were initially pleaded in the Complaint (24 March 2023), the Answer (29 April 2023), and the Reply (26 May 2023), but those statements of case were significantly amended with effect from 4 October 2023. The hearing took place on 16 – 20 October. The Premier League was represented by Mr Adam Lewis KC and Mr Jason Pobjoy, instructed by Linklaters LLP. Everton was represented by Mr James Segan KC and Ms Celia Rooney, instructed by Pinsent Masons LLP.

3. This is a complicated case. We have been presented with a great quantity of documents, many witnesses of fact, and voluminous and detailed experts' reports – which were revised and updated in the run up to and during the hearing. It is to the credit of counsel that the case was presented with clarity, focussing on what was truly relevant. But counsel would not have been able to achieve that were it not for the parties' solicitors and other advisors who have worked on and contributed to the case. We acknowledge the considerable work that has been done, and express our thanks to all those responsible for carrying it out.

4. In the (lengthy) skeleton arguments and orally both parties have suggested to the Commission that it is not necessary to resolve all the potential issues that have been raised. They have said (albeit from different standpoints) that many potential issues either do not need to be dealt with at all or can be resolved in a simple straightforward manner. The Commission has attempted to follow that advice. In this decision we deal with the matters that are necessary for the proper determination of the case. We have, of course, considered everything that has been put before us but we have confined our reasoning to that which is required to resolve the issues. The fact that something may not be dealt with specifically does not mean that it has not been considered.

3. WHO's WHO

5. We identify here brief details of some (but not all) of the individuals and organisations who are referred to in this Decision or in documents included in the hearing bundle.

- **Carlo Ancelotti** Everton's manager (December 2019 – June 2021).
- **Denise Barrett-Baxendale** A member of Everton's Board of Directors and Everton's Chief Executive Officer throughout the relevant PSR assessment period (May 2018 – June 2023).
- **Marcel Brands** Everton's Director of Football (May 2018 – December 2021).
- **Jonathan Brown FCCA** Expert witness for the Premier League.
- **Katie Charles** Everton's Director of Legal Services.
- **Ross Christie** Premier League's Chief Financial Officer since 2019. Witness for the Premier League.
- **Colin Chong** Everton's Chief Stadium Development Officer since January 2017. Subsequently, since June 2023, interim Chief Executive Officer. Witness for Everton: not required to give oral evidence.
- **Everton Stadium Development Ltd** Wholly owned subsidiary of Everton. Responsible for expenditure on the construction of the new stadium.
- **Nicholas Good FCA** Expert witness for Everton.
- **David Harrison** Everton's Director of Football Operations and Club Secretary until March 2023. Witness for Everton: not required to give oral evidence.
- **Jamie Herbert** Premier League's Director of Governance.
- **Grant Ingles** A member of Everton's Board of Directors and Everton's Director of Finance throughout the relevant PSR assessment period, and until June 2023.
- **Ben Johnson FCCA** Expert witness for the Premier League.
- **William Kenwright** A member of Everton's Board of Directors and Everton's chairman throughout the relevant PSR assessment period, who died on 23 October 2023. Witness for Everton – unable to give oral evidence due to ill health.
- **James Maryniak** Everton's current Interim Chief Financial Officer. Before that, and throughout the relevant PSR assessment period, he held a number of roles, including Head of Reporting and Financial Planning and Analysis, and Director/Deputy Director of Finance. At no stage was he a member of Everton's Board of Directors. Witness for Everton.
- **Richard Masters** Premier League's Chief Executive Officer since December 2019. Witness for the Premier League.

- **Metro Bank** Commercial lender to Everton.
- **Aidan Miller** Stadium Director of Finance of Everton Stadium Development Ltd since February 2023. Before that, since 2019, Stadium Development Head of Finance. Witness for Everton.
- **Ardavan Moshiri** Everton's de facto owner since September 2016. Witness for Everton.
- **Dr Daniel Parnell** Expert witness for Everton.
- **Daniel Purdy** Everton's Head of Recruitment since November 2022. Before that, since July 2019, Manager of Scouting. Witness for Everton.
- **Richarlison** Everton player. Transferred to Tottenham Hotspur FC on 30 June 2022 for £60 million.
- **Rights** & **Media Funding Ltd** Commercial lender to Everton.
- **Alisher Usmanov** Uzbek-Russian businessman interested in investing in Everton.
- **USM Services Limited** A British Virgin Islands registered company forming part of a group of companies owned by Mr Usmanov.
- **Player X** Player for Everton. Arrested in July 2021 and whose employment was terminated in August 2021.
- **Player Y** Everton player, considered for sale in the summer 2020 transfer window.

4. PROFITABILITY & SUSTAINABILITY RULES

6. The PSR are designed to promote financial stability and sustainability amongst Premier League clubs by limiting the losses that Premier League clubs can incur. They promote similar objectives to the Financial Sustainability Regulations of UEFA, and the Profitability & Sustainability Rules of the English Football League. The PSR regime is designed to ensure that clubs are financially responsible and do not spend beyond their means. The PSR guard against unlimited cash injections from owners to ensure clubs operate within their own means, with the aim of protecting the long-term financial viability of clubs and the league.

7. The PSR operate in the following way. By 1 March in each year every club must submit to the Premier League its accounts for T-1 and T-2 (the accounts for the preceding year and the year before that) together with its estimated profit and loss account for T (the current year). If the aggregation of a club's earnings before tax in T-1, T-2 and T-3 results in a loss the club must by 1

March also submit to the Premier League its PSR calculations. Those calculations are required to show the club's adjusted earnings before tax for each of T, T-1 and T-2. The adjusted earnings before tax means the earnings before tax excluding costs incurred, broadly speaking, on matters that the Premier League recognises to be in the general interest of football. They include, for example, depreciation of tangible fixed assets, Women's Football Expenditure, and Youth Development Expenditure. Exceptionally, in relation to years 2019/2020, 2020/2021 and 2021/2022 *COVID-19 Costs* were also permitted to be excluded.

8. Although a club's target is that adjusted earnings before tax should not show a loss, the Rules provide a degree of latitude. A loss of up to £15 million is largely forgiven. The only consequence is that the Premier League will determine whether in T+1 (the following year) the club will be able to discharge its obligations under Rule E15.9. Greater consequences arise if the loss exceeds £15 million but is less than £105 million. In that event, the club is required to provide the Premier League forecasting to the end of T+2 (the year after the following year), as well as to satisfy the Premier League of its ability to provide evidence of Secure Funding.

9. The making of a complaint to a Commission does not take place until the loss exceeds £105 million. In that event, the Premier League may impose budgetary/financial restrictions on the club and *shall* refer the matter to a Commission by way of a Rule W complaint. It is such a complaint that we are determining in these proceedings.

10. The Commission considers that a number of things are clear from this summary. First, the PSR's core objective is to ensure that clubs operate within their financial means. Clubs are, however, permitted to receive a limited amount of financial support from their owners without breaching the Rules. Second, costs incurred in what is regarded as being in the best interests of football generally are excluded from the PSR calculation. Third, the PSR allow a club considerable latitude – losses up to £105 million will not attract Rule W disciplinary proceedings. Fourth, the Premier League (certainly at the early stages of any PSR investigation) is substantially reliant on the accuracy of the material put before it by the reporting club.

5. COVID-19

11. The impact of Covid began to be felt in early 2020. On 13 March 2020 the Premier League suspended the 2019/2020 season. The season resumed on 17 June 2020, with clubs playing behind closed doors. The 2020 summer transfer window opened on 27 July 2020 and did not close until 5 October 2020. The 2020/2021 season commenced with clubs playing behind closed doors. It was not until the start of the 2021/2022 season on 14 August 2021 that games were once more able to be played before full stadiums.

12. On 6 August 2020 the Premier League shareholders approved amendments to the Rules to implement changes to the PSR regime to reflect the impact of Covid. Those changes were subsequently extended to include the entirety of the 2021/2022 season, so that they applied to each of the seasons 2019/2020, 2020/2021 and 2021/2022. Two changes are relevant to the matters in issue in this Complaint.

13. First, costs incurred because of Covid were added to the list of permitted costs that could be excluded when calculating the adjusted earnings before tax. Those costs were defined as *lost revenues and/or exceptional costs incurred by a Club that are directly attributable to the COVID-19 pandemic….* The intention was to allow clubs credit for losses caused by Covid provided that those costs fell within the category of being *directly attributable* to Covid. Eligible costs included any impairment of value, including player registrations, that could be *cogently evidenced as directly attributable to Covid-19*.

14. Second, the figures for FY 2020 and FY 2021 were no longer to be calculated individually, but were to be averaged. The effect of that meant that calculation of the adjusted earnings before tax PSR calculation for FY 2022 was the total of the adjusted earnings before tax figures for FY 2019, the average for FYs 2020 and 2021, and for FY 2022.

6. FACTS

15. Mr Moshiri first acquired a beneficial interest in Everton in March 2016. By September 2018 he had acquired a beneficial interest in the majority of Everton's share capital. Since January 2022 he has been the beneficial owner

of more than 90% of the share capital. Mr Moshiri came to Everton with great aspirations. He wanted to transform the club into one of the top teams in the Premier League, regularly playing in Europe. And he wished to provide the club with a new, state of the art, stadium. No other Premier League club had carried out two such projects at the same time. It was, as Mr Maryniak said, a challenging plan.

16. Mr Moshiri intended to improve the squad by spending a substantial amount of money in the first three or four years of his ownership. The investment in players would be realised in two ways. First, the enhanced squad would result in Everton being in the top quarter of the Premier League, and playing in Europe: both would produce increased revenue. Second, having improved the squad, future player acquisitions would be funded partly from the increased revenue and partly from making player sales. The plan was that once this strategy had been put in place there would be little or no need to rely on funding from the owner. As Mr Moshiri recognised in his witness statement, the plan required that *a substantial amount of money is spent in the first three/four years of new ownership.* It was, he said, *all part of a normal investment cycle in a football club following a change of ownership.*

17. The provision of a new stadium was as much a priority to Mr Moshiri as was rebuilding the squad. Everton embarked on a demanding project, namely the construction of a new stadium at Bramley-Moore Dock. It set up a wholly owned subsidiary, Everton Stadium Development Ltd, to carry out the development. The cost of the project was considerable and is now estimated to total £760 million. Everton Stadium Development Ltd had no income, and was wholly dependent upon funds from Everton to enable it to carry out the development. When Mr Moshiri had first acquired an interest in Everton he had enabled it to pay off its external debt, a total of £55 million. Everton's plan was that part of the cost of the stadium would be funded by Mr Moshiri but that the majority of the cost would be funded by third party debt. That third party debt (referred to as senior debt) was intended to fund the stadium for the next 30 years.

18. Until such senior debt could be obtained, Everton continued to fund the stadium development by means of an intercompany loan to Everton Stadium

Development Ltd. Everton's debt liability was to two distinct sources, Mr Moshiri and third party commercial lenders. Mr Moshiri made payments to Everton by way of interest free loans, some of which were subsequently converted into shares. Mr Moshiri's investment now totals c.£750 million.

19. Everton also obtained commercial loans. Following the introduction of the government's Coronavirus Large Business Interruption Loan Scheme, in June 2020 Everton applied to Metro Bank PLC for a loan. The application contained the following statement –

> **Use of Funds**
>
> If the facility is successfully completed, the funds will be used for working capital facility purposes. Hence, in the same way as the Rights and Media Funding Limited facility this additional financing support will be used for operational purposes during the 2020/21 season.
>
> We do not intend to use any of the funds for the new stadium project or to buy players in the transfer window. These funds will be used to continue to support the Club and all of the activities that the Club are involved in for the term of the facility.

That representation is incorporated into the Metro Bank PLC loan agreement dated 29 April 2021. Clause 2.3 reads –

> **Purpose**
>
> The Borrower shall apply all amounts borrowed by it…towards the payment of indebtedness and its working capital requirements.

According to Everton's accounts to 30 June 2022, the sums borrowed by Everton from Metro Bank PLC totalled £26.25 million as at that date. By an amended and restated agreement originally dated 29 April 2021 Rights & Media Funding Ltd agreed to lend Everton the sum of £150 million. Clause 3.1 of that agreement provided –

> The Borrower shall apply all amounts borrowed by it…towards its working capital purposes.

According to Everton's accounts to 30 June 2022 the sums borrowed under this agreement totalled £150 million as at that date.

20. Everton's evidence was that funds coming into the company, whether from Mr Moshiri or from the commercial lenders, were not earmarked or ringfenced in any way. All incoming funds were paid into Everton's current account. Those funds are therefore said to be fungible.

21. In October 2019 Everton produced a *Sustainable Business Plan.* The plan projected that the club would regularly finish in the top eight clubs of the Premier League, and that the new stadium would be constructed. It

recognised the significant recent expenditure on players but projected both a reduced need to purchase new players coupled with revenue generated from the sale of existing players. This is what Mr Moshiri described as being the normal investment cycle.

22. By early 2019 Everton identified what it regarded as an anomaly in the treatment of the expenditure on the stadium. The nature of Everton's stadium development project (given its location on Bramley Moore Docks, a UNESCO World Heritage site), meant that significant investment was made before planning permission was granted. Financial Reporting Standard 102 provided that expenditure could not be capitalised unless it was probable that the future economic benefit associated with the expenditure would flow to Everton. In practical terms that meant that the expenditure on the stadium could not be capitalised until planning permission had been granted – because without planning permission the benefit could not be said to be probable. The consequence of that was that instead of the expenditure being capitalised it had to be recorded in Everton's profit and loss account: thereby representing a cost for the purposes of its adjusted earnings before tax in the relevant years and, ultimately, its PSR calculation. The perceived anomaly arose because other clubs had been able to capitalise expenditure on improving/redeveloping an existing stadium, so that that expenditure had never featured in their PSR calculations.

23. In October 2019 Everton engaged the Premier League in discussions about what it considered to be the capitalisation anomaly. The Premier League at that stage declined to permit the stadium expenditure to be excluded from the PSR calculation. Everton continued to address its concerns about the PSR calculation. On 20 February 2020 Ms Barrett-Baxendale wrote to the Premier League requesting that Everton's reporting perimeter should be changed to exclude Everton Stadium Development Ltd.

24. On 13 March 2020 Mr Brands produced the club's *2020 Player Trading Strategy*, which envisaged selling/releasing 12 existing players and purchasing 4 new players in the summer 2020 transfer window. In Everton's FY 2022 PSR calculation it stated that if eight (of the aforementioned 12) identified players (including Player Y) had been sold during the summer 2020

transfer window Everton would have received transfer fees of £83.2 million, producing a net profit on disposal of £49.9 million, resulting in an overall profit/cost saving of £87.7 million once FY 2021 amortisation and wages had been taken into account.

25. During late 2020 and early 2021 Everton made further approaches to the Premier League about the capitalisation of stadium expenses anomaly. On 5 January 2021 Ms Barrett-Baxendale gave a presentation to the Premier League Board that included the New Stadium Project Update. In that Update Everton stated that the club had invested c.£54 million that could not be capitalised because of the lack of planning permission. It stated that *Mr Moshiri's investment into the Club, through the shareholder loan, has funded these development costs. Without this commitment from Mr Moshiri, it is unlikely the Club could have financed this development from its ongoing revenue sources.*

26. On 14 January 2021 the Premier League produced a report to its board on Everton's expenditure. It noted that while Everton was forecast to breach the PSR maximum permitted loss of £105 million it would not do so if the stadium expenditure were to be excluded. It contrasted Everton's position with that of six other clubs who had been able to capitalise expenditure on stadium development, principally because their developments could be considered probable at an early stage of the respective projects. The report recommended that the Premier League should negotiate an agreed sanction with Everton for the PSR breaches, that sanction to reflect the anomaly identified by the club.

27. On 23 February 2021 Everton received planning permission from Liverpool City Council. On 26 March 2021 the Secretary of State confirmed that the issue would not be called in. It is now common ground that the effect of the grant of planning permission is that stadium expenditure incurred in and after FY 2021 (ie from 1 July 2020) could be capitalised.

28. Discussions between the Premier League and Everton about Everton's inability to capitalise stadium expenditure before 1 July 2020 continued, culminating with the execution of the 13 August 2021 agreement. The effect

of that agreement was that, subject to certain conditions, Everton would be able to exclude from its PSR calculation stadium expenditure that could not be capitalised. The 13 August 2021 agreement contained the following (amongst other) terms.

> 1.2 During the Club's financial years 2017-2020 (inclusive), prior to the financial year when planning permission for the Stadium was obtained, the Club incurred costs of approximately £39,346,000 in respect of the Stadium (the "**Stadium Costs"**). Given that the Stadium Costs were incurred in the financial years prior to planning permission being granted, under applicable accounting regulations, these costs cannot be capitalised and must therefore be included in the Club's PSR Calculation.
>
> 1.3 The Club is forecast to be non-compliant with Rule E.51 of the Rules by:
>
> 1.3.1 having a PSR Calculation with losses in excess of £105 million (the "**Threshold"**) for Season 2020/21; and
>
> 1.3.2 potentially Season 2021/22 and 2022/23
>
> (together the "**Potential Non-Compliance"**).
>
> 1.4 Subject to compliance by the Club with the conditions set out in paragraph 2 of this Agreement (the **"Conditions"),** the Premier League agrees that it will not, either during the Term or at any time after (i) exercise its powers set out in Rule E.15 in respect of the Potential Non-Compliance and/or (ii) refer the Potential Non-Compliance to a Commission pursuant to Rule E.51.2.
>
> 2.1 The Club's PSR Calculation for Seasons 2020/21, 2021/22 and 2022/23 (after the application of any mitigation or reduction by the Board in accordance with the guidance it has issued in relation to the impact of COVID-19) must not exceed the Threshold plus such portion of the Costs as falls to be reported in the relevant period (the "**Threshold Condition"**). For the avoidance of doubt, the relevant period is the financial year in question and the two preceding financial years.

29. Everton had signed Player X in 2017. Player X had proved to be a star player for the club. In July 2021 Player X was arrested. The FA suspended Player X from all football activity, making it impossible for him to perform his contractual duties. On 23 August 2021 Everton dismissed Player X. Everton sought advice on the possibility of suing Player X for breach of contract but elected not to do so.

30. By early 2022 it was clear to Everton that even allowing for the concessions made in the 13 August 2021 agreement meeting its PSR calculation target would be a challenge. The club's performance on the pitch had fallen short of what had been planned – with a reduction in merit fee of £2.1 million for each final place in the league. Everton considered the loss of Player X to be a cause of the poor performance. Other players had suffered injuries. The

knowledge that Everton was facing PSR calculation challenges caused potential purchasers for their players to drive a hard bargain. Everton considered that the sale on 30 June 2022 of Mr Richarlison to Tottenham Hotspur FC for the sum of £60 million, rather than the sum of £80 million that it had budgeted to receive, to be directly attributable to its PSR calculation difficulties.

31. Everton asserts that it had been in the process of negotiating a stadium naming rights agreement with USM Services Limited which would have generated £10 million per annum for a period of 20 years, but were obliged to withdraw from the negotiations following the Russian invasion of Ukraine and the imposition of sanctions by the UK government on Russian companies and individuals.

32. In February 2022 Everton decided to pass on the interest charges payable under the Rights & Media Funding Ltd and Metro Bank PLC loans by levying interest on the inter-company loan to Everton Stadium Development Ltd. The intention was that that interest would be calculated retrospectively from FY 2018 and all charged in the FY 2022 accounts.

33. Everton submitted its audited accounts for FY 2021 to the Premier League on 18 March 2022. On 31 March 2022 it submitted Form 3A setting out its PSR calculations. The calculations sought to exclude new sums from the adjusted earnings before tax for the relevant period. Everton further explained its PSR calculations in a slide deck titled *FY22 PSR Submission* that it sent to the Premier League on 26 August 2022. It sought to exclude (1) £17.4 million on account of the new interest charge being passed to Everton Stadium Development Ltd in respect of the intercompany loan; (2) £5.8 million in respect of that part of the Transfer Levy that was passed on by the Premier League in respect of Youth Development; (3) £10 million in respect of loss caused by not suing Player X; (4) £61 million in respect of player trading losses attributable to Covid in addition to the Covid Costs permitted by the new rules introduced on 6 August 2020.

34. The Premier League responded to Everton's submissions by way of a telephone call on 9 December 2022 from Mr Herbert to Ms Charles. Mr

Herbert reported that the Premier League Board had considered carefully the exclusions sought by Everton but had concluded, provisionally, that none fell within a proper application of the PSR. It was recognised by both Mr Herbert and Ms Charles that the differences between the Premier League and Everton would become live only once the FY 2022 accounts and PSR calculation had been provided.

35. Everton submitted its audited accounts to the Premier League on 1 March 2023, followed by its PSR calculation for FY 2022 on 2 March 2023. Everton's PSR calculation, which continued to exclude items it had identified in March 2022 showed an adjusted loss of £87.1 million, significantly below the £105 million threshold. The Premier League rejected the additional excluded items and, on 24 March 2023, began these proceedings.

36. The Premier League's Complaint is a comparatively short document. It sets out the PSR regime and asserts that on a proper application of the Rules Everton's PSR calculation for FY 2022 should show a loss of £120.8 million. It rejected Everton's attempt to exclude the additional items first advanced in March 2022. Everton's Answer is a fuller pleading. It advanced two cases. First, it argued that the additional exclusions were legitimate and produced a PSR calculation of a loss of £87.1 million – well within the threshold of £105 million. Second, it advanced what it argued to be substantial mitigating factors, namely (1) the stadium project, (2) the Player X losses, (3) the impact of Covid, and (4) the fact of Everton's transparent cooperation with the Premier League. The Premier League served an equally detailed Reply to Everton's Answer. It took issue with each of Everton's additional exclusions, and challenged many of the facts that it had relied on in mitigation. It is not necessary for us to say more about this first round of pleadings, partly because they were substantially amended in October 2023, and partly because the issues raised are discussed in greater detail below.

37. At the pre-trial review on 4 October 2023 both parties were given permission to amend their pleaded cases. In its Amended Answer Everton admitted it had abandoned its claim to be entitled to many of the additional exclusions that it had advanced in its PSR calculation, and accepted that it had exceeded the PSR threshold. Maintaining its entitlement to exclude the Transfer Levy

and the pre-planning stadium interest adjustment, Everton argued that its breach of the PSR threshold was £7.9 million. It further maintained that it was entitled to substantial mitigation. The Premier League challenged Everton's case in its Amended Reply. It rejected the claimed entitlement to the additional exclusions, and rejected the claimed mitigation, arguing instead that the reality was that there were aggravating factors. It put Everton's breach of the PSR threshold at £124.5 million.

7. PROCEDURAL HISTORY

38. In the Complaint the Premier League had asked for an expedited hearing so that the proceedings could be concluded before the end of the 2022/2023 season. That application was determined at a Teams hearing on 31 March 2023. The Commission decided that it was unrealistic to expect these proceedings and any appeal to be determined in the current season – and that to compel Everton to attempt to meet such a timetable would run the risk of procedural unfairness. Conventional directions were agreed, with the substantive hearing to take place in the autumn of 2023, which would permit any appeal to be heard and determined in the 2023/2024 season.

39. In June 2023 both parties applied by way of Redfern schedules for disclosure. The Commission allowed significant parts of each party's application. We were told at the hearing that a total of over 40,000 documents had been produced, of which approximately 28,000 had been included in the hearing bundle.

40. The pleadings were amended to their present form on 6 October 2023. Both parties served comprehensive skeleton arguments before the hearing began on 16 October 2023.

8. AMENDED PLEADINGS

The Premier League's Amended Complaint

41. On 1 March 2023 Everton submitted its accounts for the financial year ending 30 June 2022. On the following day, 2 March 2023, it submitted its PSR calculation for FY 2022 demonstrating a PSR loss of £87.1 million, well below the permitted maximum. The Premier League disputed the accuracy of the PSR calculation, asserting in its original Complaint the actual loss to be

£120.8 million. In the Amended Complaint the Premier League revised the alleged loss to £124.5 million – £19.5 million above the PSR threshold of £105 million.

42. In its Complaint the Premier League asserts that it is for Everton to justify the figures that it has put forward: the detail of its case emerges in its Amended Reply to Everton's now Amended Answer. In the Amended Complaint the Premier League identifies four areas of dispute.

43. First: post-planning stadium costs. Everton claimed to exclude £14.5 million comprising £13.6 million in respect of interest incurred on inter-company loans used to finance stadium costs and £0.9 million of other post-planning permission stadium expenditure. The charges were incurred after planning permission had been obtained. The Premier League argues that post-planning permission expenditure falls outside the terms of the 13 August 2021 agreement. Further, it asserts that Everton has made calculation errors so that even if interest charges were to be excluded as a matter of principle, the sum of £14.5 million is not correct.

44. Second: Transfer Levy. Clubs pay a 4% levy on transfer fees under A.1.5 of the Rules. The sums are used to fund a footballers' pension scheme. Any surplus is distributed by the Premier League to the Professional Game Youth Fund. Everton claims that that surplus falls within the category of Youth Development Expenditure, and should accordingly be excluded from the PSR calculation. The Premier League asserts that neither Everton nor any other club had ever sought to exclude any part of the Transfer Levy from the PSR calculation. The Premier League objected to the attempted exclusion as being both unprecedented and wrong in principle.

45. Third: player termination loss. Everton had dismissed Player X, leaving available to it (it asserted) a claim against that player for losses of £10 million. However, it decided not to pursue that claim on grounds associated with the player's welfare. It sought to exclude the sum of £10 million from its PSR calculation. The Premier League object to the proposed exclusion, both on grounds of principle and uncertainty.

46. Fourth: Covid. Everton claimed to exclude the sum of £43.9 million on the grounds of impact on player trading in the 2020 summer transfer window caused by Covid. The Premier League objected, arguing that the proposed exclusion did not fall within its Covid provisions. Moreover, in the Amended Complaint the Premier League asserts that a significant part of the sum sought to be excluded by Everton under this head related to the impact of failing to sell a particular player, Player Y. The Premier League asserts that the factual reality is that Everton had made a decision not to sell Player Y, so that no Covid based deduction can properly be claimed.

47. In its Amended Complaint the Premier League advanced four factors which it maintains aggravated Everton's breaches of the PSR.

(1) Significant causes of the PSR breaches were the fact that Everton overspent on players, and that it failed to take steps to reduce expenditure.

(2) The amount by which Everton's actual losses exceeded the £105 million threshold.

(3) The fact that Everton submitted misleading information about the stadium financing costs.

(4) The fact that contrary to its Covid related representations Everton had made a decision not to sell Player Y.

Everton's Amended Answer

48. In its original Answer Everton asserted that it was not in breach of the PSR, in the alternative that it had substantial mitigation. The mitigation took the form of the fact that it faced unexpected financial losses (stadium costs, the player termination loss, and Covid expenses), together with the fact that it had cooperated fully with the Premier League's investigations. It set out the details of that cooperation, which culminated in the August 2021 agreement, and continued thereafter. Everton maintained that it also took real steps to reduce its losses: it cited detailed examples from the summer 2021 and January 2022 transfer windows.

49. Everton's case changed significantly in its Amended Answer. In the Amended Answer Everton admitted a breach of the PSR but disputed the size of the breach. It asserts that the Premier League has wrongly failed to exclude the Transfer Levy sums (£7.6 million) and the pre-planning stadium interest

sums (£4.1 million). The Transfer Levy sums should be excluded because they constitute *Youth Development Expenditure*. The pre-planning stadium interest sums should be excluded to achieve the same position as if the project had been financed externally. If those sums had been excluded the correct PSR loss would have been £112.9 million – £7.9 million above the £105 million threshold.

50. In addition to challenging the extent of its breach of the PSR Everton advances six factors that, although not reducing the extent of the breach, are said to mitigate it. Those factors, Everton argues, are directly relevant to the nature and size of the sanction that the Commission should impose. We summarise those factors.

(1) Everton could have treated stadium post-planning interest charges of £9.3 million as capital expenditure, in which case it would have reduced its loss before tax by that amount. Although it is now too late to do so, that is a mitigating factor.

(2) The player termination loss, although not one that can be excluded from the PSR calculation, is a mitigating factor.

(3) Covid prevented Everton from selling players, and to realise amortisation and wage savings.

(4) Everton had cooperated fully and proactively with the Premier League in relation to its PSR challenges.

(5) Everton's PSR adjusted losses demonstrate a positive trend, showing that it had positively addressed its PSR obligations.

(6) The impact of the Russian invasion of Ukraine caused a significant and unexpected impact on Everton's investment and sponsorship income.

51. Everton concluded the introduction to the Amended Answer with the following statement –

The Club's alleged overspend arose, in short, from a combination of unforeseen circumstances, which frustrated prudent plans to reduce its losses. The PL has rightly accepted that losses incurred by the Club in constructing the Stadium are the result of "applicable accounting standards" and reflect costs for which "there was no sporting imperative in the circumstances (not least when other Clubs had, in effect, been able

to capitalise similar capital-related expenditure) ". In those circumstances there should be no question of a sporting sanction. The Club has always been, and remains, committed to operating sustainably and in accordance with the PL's rules.

The Premier League's Amended Reply

52. The Premier League pointed out that it had had insufficient time to set out its case in response to Everton's Amended Answer and that what it pleaded in its Amended Reply was no more than a summary that it would develop in its skeleton argument and at the hearing. The issues taken with Everton's case were, however, clear.

53. Stadium Interest. The Premier League advances three arguments. First, relying on the wording of the August 2021 agreement it argues that any costs incurred in the financial year in which planning permission was obtained cannot be excluded from the PSR calculation. The consequence is that the permissible exclusion is a maximum of £2.2 million. Second, it argues that in any event *interest* does not fall within the August 2021 agreement unless it is a cost incurred in relation to the stadium. The Premier League contended that Everton had not in fact incurred any of the alleged interest costs in relation to the stadium. The consequence is that the entirety of the pre-planning interest should not have been excluded. Third, and in any event, the interest is an inter-company charge that does not impact the earnings before tax in the consolidated accounts and so cannot be excluded from the PSR calculation.

54. Transfer Levy. The Premier League relies on two short construction points. First, the levy is not *expenditure by a Club*: it is expenditure by the Premier League of funds derived from the levy. Second, levy payments are not *directly attributable* to the Professional Game Youth Fund: they are payments to the pension fund, the surplus of which is directed to the Professional Game Youth Fund by the Premier League.

55. The Premier League addresses the heads of mitigation advanced by Everton as follows.

(1) Stadium interest. If the Premier League's construction of the

August 2021 agreement is correct there is no basis for holding that Everton's contrary belief can constitute mitigation.

(2) Player termination. Everton cannot show that the alleged loss was in fact due, or recoverable. This therefore cannot stand as mitigation.

(3) Covid. Everton, in common with all other clubs, has already received the benefit of the Covid concessions. The sums to which it now refers fall outside those concessions and are of a nature borne by other clubs. There is no basis for saying that they can constitute a mitigating factor.

(4) Cooperation. The Premier League accepts that in principle cooperation could be a mitigating factor but rejects the suggestion that the facts of this case can constitute mitigation.

9. ISSUES

56. Each party has produced a List of Issues but they have not been able to agree a common list. However, having heard the parties' closing submissions the Commission is satisfied that that failure to agree was more a matter of form than one of substance. We consider that to a very great extent there is common ground between the parties as to the central issues that must be determined in this Decision. We summarise them in the following paragraphs.

57. The first issue is to quantify the extent of Everton's breach – the amount by which its PSR calculation for FY 2022 exceeded the figure of £105 million. That involves consideration of two distinct items of expenditure claimed by Everton, namely (1) the Transfer Levy and (2) the pre-planning stadium interest.

58. The second issue is to determine the principles that should be applied when determining the appropriate sanction. That involves determining the purpose and approach to sanctioning and (amongst other things) whether the structured formula advanced by the Premier League should be adopted.

59. The third issue is to determine the character of facts that are capable of constituting aggravation. That involves consideration of a number of matters of principle including the burden and standard of proof to be applied to the evaluation of aggravating matters.

60. The fourth issue is the application of the principles relating to aggravation to the facts relied on. In other words, the Commission must determine which of the matters advanced by the Premier League as constituting aggravation in fact stand as aggravating matters.

61. The fifth and sixth issues require a similar exercise to be carried out in relation to matters put forward by Everton as constituting mitigation. The fifth issue concerns the principles to be applied to the evaluation of what Everton advances as mitigating matters. The sixth issue is the application of those principles to the facts relied on.

62. The seventh issue is determination of the appropriate sanction, and the Commission's reasons for its determination.

63. Determination of these issues involves consideration of a number of factual and expert issues that have been developed during the course of the hearing. In this Decision we confine ourselves to consideration of matters that are necessary for the proper determination of the Complaint. We have considered all the matters that have been raised, but determine only those that are required to be determined.

10. QUANTIFICATION OF BREACH – YOUTH DEVELOPMENT

64. Rule A1.11(c) permits a club to exclude from the PSR calculation *Youth Development Expenditure*. *Youth Development Expenditure* is defined in Rule A1.273 as being *expenditure by a Club directly attributable to activities to train, educate and develop Academy Players….* Everton seeks to exclude not only the conventional payments that it made in relation to youth development but also the proportion of the Transfer Levy paid by it which has been passed on by the Premier League for youth development.

65. The Transfer Levy is a charge of 4% of the value of any transfer payments made by a club which the club is required to pay to the Premier League: Rule V38. The sums received by the Premier League by way of the Transfer Levy are used to pay premiums due under the Professional Footballers' Pension Scheme: any surplus is added to the Professional Game Youth Fund: Rule V41.

66. Everton argues that that surplus is youth development expenditure within the meaning of the Rules. The Premier League disagrees. Both parties agree that resolution of the dispute is a matter for construction of the various regulatory provisions.

67. Everton's case is that the proportion of the Transfer Levy that is paid to the Professional Game Youth Fund is an expenditure made by it that is directly attributable to development of academy players. Everton asserts that the fact the payments were made by the Premier League does not alter the fact that the monies are expenditure paid by the club: and that the payments made by it were directly attributable to relevant youth expenditure.

68. The Premier League disagrees. It points to the fact that historically neither Everton nor any other club has sought to make a deduction from the PSR calculation in this way. It argues that the purpose of the exemption for Youth Development Expenditure is to encourage clubs to make such expenditure: it is of a category and for a purpose quite different from the Transfer Levy, the principal purpose of which is to fund player pensions. As a matter of pure construction, the expenditure *by* Everton was the Transfer Levy: it was not expenditure in respect of youth development. Further, putting the same point in a different way, the expenditure by Everton was not *directly attributable* to development of academy players: it was payment of the Transfer Levy. Finally, the Premier League points out that if this deduction were permissible a club would not be able to complete its PSR calculation within the time scale directed by the Rules: it would have to wait until the Premier League had calculated and announced the amount of the Transfer Levy that had been added to the Professional Game Youth Fund.

69. We consider that the Premier League's construction is to be preferred. We note that this exclusion has not been claimed before, but do not consider that to be determinative of the issue: if Everton has identified a proper construction, it remains proper notwithstanding the fact that it had hitherto not been identified. We consider the pure construction points to be compelling. The payment made *by* Everton was the Transfer Levy, not a payment in respect of youth development. Similarly, the payment made by Everton was not *directly attributable* to the Professional Game Youth Fund:

it was a payment for pension purposes, any surplus being paid by the Premier League to the Youth Fund. We recognise the practical difficulties that would have been caused in relation to the date for completion of PSR calculations but do not consider this to be determinative of the issue: if Everton's construction had been correct a practical solution would have been arrived at.

70. The conclusion is that no exclusion can be made as sought by Everton under this head. The sum of £7.6 million deducted by Everton must be added as a loss in the PSR calculation.

11. QUANTIFICATION OF BREACH – PRE-PLANNING STADIUM INTEREST

71. During the course of the hearing Everton agreed that the date upon which it became able to capitalise interest payments relating to the financing of the stadium project was the start of the financial year in which it had been granted planning permission (1 July 2020) and not the date on which planning permission had been granted (23 February/26 March 2021). The effect of that agreement was that the expenditure that it claimed to be excluded under this head was reduced from £4.1 million to £2.2 million.

72. Everton's case is that any interest attributable to expenditure on the stadium should be excluded from its PSR calculation. It relies on a construction of FRS 102, and a finding of fact that if the stadium had not been constructed Mr Moshiri would have made funds available to repay the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd, or alternatively the loans would never have been negotiated and drawn down. It makes the point that in April 2022 the Premier League had accepted that such interest could be deducted, and only recently had changed its case to argue that as a matter of principle none of the pre-planning stadium interest could be excluded from the PSR calculation as a cost.

73. Everton points out that although no interest was charged on the monies advanced by Mr Moshiri interest was charged on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd. It argues that it is not necessary for it to demonstrate that those commercial loans were used to fund the stadium development in order to exclude the interest charges from its PSR calculation. Its case is that on a proper application of FRS 102 it is sufficient

if on a counterfactual analysis it can show that those commercial loans (and therefore the interest payable under them) would not have existed were it not for the stadium development. This issue, Everton argues, therefore turns on a question of fact, namely whether if there had been no stadium development Mr Moshiri would have secured the repayment of the commercial borrowings. Everton says that we need look no further than the fact that when he first acquired an interest in the club Mr Moshiri had repaid the commercial, interest bearing debt. The fact that he had done so in the past makes it probable that he would have done something similar in the counterfactual scenario of there being no stadium development with the consequence that Mr Moshiri would have had additional funds available.

74. The Premier League advances a number of different arguments in response to Everton's case. Before doing so it explains its change of position in relation to pre-planning stadium interest. In April 2022 the Premier League believed that the financing of the stadium development had been carried out with use of the commercial loans, and the sum sought to be excluded from the PSR calculation had therefore been calculated by reference to interest charged on those loans. That belief had been created by the way in which Everton had presented its position in respect of the PSR calculation. The Premier League's change of position was simply to correct a mistake that had been made because of the misleading information that had been provided by Everton.

75. The Premier League's first submission is that the pre-planning permission stadium interest paid on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd could be excluded from the PSR calculation only if it fell within the terms of the 13 August 2021 agreement. The Premier League argued that to be excluded from the PSR calculation the interest charges had to fall within clause 1.2 of the 13 August 2021 agreement. They would do so only if they were incurred *in respect of the Stadium*.

76. The Premier League argued that the pre-planning stadium interest charges had not been incurred *in respect of the Stadium* because the stadium had not been funded by the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd but by the interest free loans made by Mr Moshiri. In

support of that factual assertion the Premier League pointed to a large number of Everton's own documents, all of which showed that Mr Moshiri's funds had been used to fund the stadium development. The Premier League also relied on the wording of the Metro Bank PLC loan application and the wording of the Purpose clauses in the commercial loan agreements with Metro Bank PLC and Rights & Media Funding Ltd, which we have referred to above.

77. We consider that the Premier League is correct in saying that the stadium was funded from Mr Moshiri's interest free loans. We have not overlooked, and accept, Everton's evidence that it kept its funds in a mixed, fungible account from which all payments were paid. We cannot, however, disregard the weight of Everton's own contemporaneous documents and the express restrictions imposed on the use of the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd. The Premier League also points to the concessions made in the evidence of Mr Miller, Mr Maryniak and Mr Good. We note that there was a sound commercial reason for Everton to have funded the stadium from the interest free loans from Mr Moshiri. It presented a cleaner and more attractive picture to the lenders from whom Everton was seeking to raise senior debt to fund the stadium for 30 years. The overwhelming evidence is that the stadium was funded from the loans made by Mr Moshiri, and not from those made by Metro Bank PLC and Rights & Media Funding Ltd. The conclusion, the Premier League argues, is that no pre-planning interest charges were incurred *in respect of the Stadium*.

78. Everton counters that, contrary to the Premier League's case, that finding of fact is not determinative of the issue whether the interest charged on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd was expenditure incurred *in respect of the Stadium*. That submission is founded on Mr Good's analysis of the operation of FRS 102. Mr Good's opinion is that the central question is whether the borrowing costs of the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd would have been incurred if the stadium development had not taken place. The source of the funds actually used for stadium development is therefore irrelevant. All that matters is a factual finding of the counterfactual using a but-for test.

79. We have considered the counterfactual arguments with care. We recognise that there is material that supports both parties' submissions. When he first became interested in Everton Mr Moshiri had made funds available to repay the club's existing commercial debt. It follows, Everton submits, that it is likely that if funds had not been committed to the stadium development they would have been used to prevent the taking of commercial debt or to repay such commercial debt as may have been incurred. Accordingly, the but-for test is satisfied – if it had not been for the stadium development the interest on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd would not have been incurred. Conversely, the Premier League points to the fact that Mr Moshiri is a very wealthy individual who had sufficient funds available to make it unnecessary for Everton to have sought commercial debt if he had wished to do so. It points to Mr Maryniak's evidence that it was normal for clubs to carry a degree of commercial debt, so that Everton's decision was not unusual. The Premier League cautions that the Commission should be slow to permit a company such as Everton to capitalise interest on an unrelated external debt on the basis of self-serving, ex post facto assertions by its owner that had it not been for a particular project that unrelated debt would have been repaid. The Commission sees the force of that submission.

80. The Commission recognises that there is material to support both parties' cases but has concluded that the outcome of the counterfactual analysis is too uncertain for us to find that if it had not been for the stadium development the Metro Bank PLC and Rights & Media Funding Ltd borrowings would not have been incurred, or if incurred would have been paid off. We cannot find on the balance of probabilities that that would have been the case.

81. We note that the Premier League argued that even if we had resolved the counterfactual finding of fact in favour of Everton, Everton would still have been unable to bring itself within the ambit of FRS 102. Section 25 applies to *borrowing costs*. Section 25.2 permits the capitalisation of borrowing costs that are *directly attributable* to a qualifying asset. Section 25.2 addresses funds that form part of *the entity's general borrowings*. It is clear that the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd were advanced for the limited purposes of working capital. We consider that the Premier League is correct to say that such funds do not fall into the

category of *general borrowings* which we construe to mean funds advanced without restrictions on how they can be used.

82. The consequence is that the pre-planning stadium interest on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd cannot be excluded from the PSR calculation.

12. QUANTIFICATION OF BREACH – CONCLUSIONS

83. On 1 November 2023 the Commission received a joint statement with appendices from Mr Johnson and Mr Good addressing the Double Counting issue raised by the Commission during the course of the hearing. The Commission is satisfied that in view of its findings in relation to the issue of pre-planning stadium interest the figures discussed in the joint statement do not affect the quantification of the breach. The consequence of these findings set out above is that Everton's PSR calculation for FY 2022 was a loss of £124.5 million, which amounts to an excess above the £105 million threshold of £19.5 million.

13. SANCTION PRINCIPLES – THE PREMIER LEAGUE's PROPOSED FORMULA

84. On 17 September 2018 the EFL approved sanctioning guidelines for breaches of its P&S regime. Those guidelines presume that a sporting sanction in the form of a points deduction is appropriate in all cases. The starting point is a sanction of 12 points that is reduced (potentially to zero) to reflect the quantum of the P&S breach and other mitigating factors. Reductions can be made if the losses show an improving trend: increases can be made in the event of aggravating features. Those guidelines, however, do not restrict a Commission's power to impose whatever sanction it considers appropriate. It was recognised in *EFL v Birmingham City FC* that the guidelines do not have legal force and are not binding on a Commission: the Commission retains its general power to impose any sanction permitted by the Rules. The function of the guidelines is to stand as instructions to those presenting the EFL's case as to the sanctions that should be sought from the Commission. The Commission is free to accept or reject the submissions according to what is appropriate in the individual case.

85. The Premier League has not incorporated any such guidelines into its Rules.

The Commission's powers in relation to sanction are contained in Rules W50&51. W50 provides simply *Upon finding a complaint to have been proved the Commission shall invite the Respondent to place any mitigating factors before the Commission.* W51 lists the very wide range of sanctions that a Commission may impose, concluding with the power to *make any such other order as it thinks fit.* The appropriate sanction is to be determined by the Commission *having heard and considered…mitigating factors.*

86. On 10 August 2023 the Premier League board adopted a sanction policy that it considered to be appropriate to breaches of the PSR. The policy was detailed in section 7 of Mr Masters' witness statement. At the pre-trial review held on 4 October 2023 the Premier League clarified a misunderstanding as to the status of its position. It made clear that it was not seeking to impose a policy on the Commission as a binding formula. Rather it was advancing its view in the same way as the EFL policy was advanced by those representing it before a Commission hearing an EFL P&S complaint. Its status was therefore no more than that of a submission.

87. The guidelines advocated by the Premier League are similar to, but different from, those of the EFL. As with the EFL guidelines they start with a presumption that the appropriate penalty will be a sporting sanction in the form of a deduction of points. They adopt a fixed starting point of a deduction of 6 points. There would be an increase from that starting point of one point for every £5 million by which the club had exceeded the PSR threshold of £105 million. Further adjustments could be made to reflect aggravating or mitigating features. The rationale for this view is given in the evidence of Mr Masters.

88. The Commission recognises the attraction of a regulator imposing a structured formula that was required to be applied in breaches of a particular regulation. Such a structured formula would fully inform clubs of the consequences of PSR breaches – although that would deny the Commission the power, as a specialist tribunal, to approach the question of sanction in whatever way it considered to be appropriate to the individual case before it.

89. Nevertheless, the Commission is concerned that the adoption by it of a

structured formula such as is advocated by the Premier League would be inconsistent with the unrestricted powers conferred by Rules W50&51. We consider that it is not for a Commission to introduce such a structured formula even on a case by case basis. We consider that we are required by the Rules to hear and consider the mitigation, after which we have a wide discretion to impose any of the sanctions listed in Rule W51. If the Premier League wishes to impose a mandatory structured formula on a Commission dealing with PSR breaches, it can do so. In that event the Commission would be required to comply with those Rules. But as things stand at present that has not been done: the Commission has the wide discretion conferred by Rules W50&51.

90. We therefore decline to adopt the structured formula proposed by the Premier League. We will determine the appropriate sanction according to all the circumstances of the case, including (as required by Rules W50&51) any mitigating factors.

14. SANCTION PRINCIPLES – APPROACH TO SANCTION

91. The Premier League made a number of submissions as to the principles that should be applied by the Commission when determining the appropriate sanction. Those submissions remain relevant notwithstanding our decision not to adopt the structured formula advocated by the Premier League. The Premier League identifies four separate heads that it submits should guide our decision making in relation to sanction. It recognises that adoption of that approach should not result in a sanction that is greater than one that is necessary and proportionate for achieving the purpose that underlines the individual heads.

92. The first head is that of punishment. A breach of the PSR involves an overspend in excess of £105 million above the target of a nil PSR loss. It is therefore at any level a serious breach. Further, as was recognised in *Sheffield Wednesday FC v The Football League Ltd* a breach of the PSR will confer a sporting advantage on the defaulting club, to the detriment of competing clubs who have managed their finances more responsibly. The fact that that sporting advantage cannot be quantified but must be inferred underlines the need for a sanction that imposes a proper punishment. Anything less than that would encourage default to the expense of compliant

clubs.

93. The other heads overlap with the head of punishment. The second head is to vindicate compliant clubs. The sanction must ensure that the defaulting club does not retain a benefit at the expense of other clubs. The third head is that the sanction must act as a deterrent to clubs that might be tempted to breach the PSR. The sanction must be such as to demonstrate that such breaches do not confer a lasting benefit. The fourth head is to protect the integrity of the game – a sport that attracts global support. The Premier League cited the authority of *Bolton v The Law Society* [1994] 1 WLR 512.

94. Everton did not dispute the purpose of a sanction or the principles to be applied. It concentrated its submissions on the practical application of those principles to the circumstances of this case, and the submissions that it made concerning aggravating and mitigating factors. We consider those in greater detail below.

95. The Commission has no doubt that one of the primary purposes of the sanction is to punish the transgressing club. We must not be swayed by sympathy – for example, the fact that the penalty might make the prospect of relegation greater. We agree with the Premier League that any PSR breach involves a significant overspend. In order to constitute a breach that will be referred to a Commission the club will have failed to achieve the target of no loss, will have crossed the lower threshold of £15 million (a breach of which may result in Premier League imposing conditions); and will have had a loss in excess of the upper threshold of £105 million. The Commission considers the Premier League to be correct to characterise such a loss as being a significant overspend. We also recognise that the inference of a sporting advantage is one that should properly be drawn from the fact of a PSR breach, and that sporting advantage will have been enjoyed for each of the seasons on which the PSR calculation was based – in this case, because of Covid, four seasons. Determination of the appropriate sanction will always involve consideration of the facts and circumstances of the PSR breach, but it is inevitable that when assessing the sanction the need for punishment will be at the forefront of the Commission's considerations.

96. The Commission recognises that one of the purposes of a sanction is to provide a deterrent effect. That is a legitimate purpose of the sanction. That would not, however, justify the imposition of a penalty that was disproportionate to the extent of the wrongdoing in any individual case. We also recognise the need to protect the integrity of what is such an important sport – although we consider that some of the observations made in *Bolton* have greater resonance when dealing with membership of a professional body than with the operation of a regulated sport.

97. Our application of these principles to the facts of this case can be seen from the discussion below.

15. SANCTION PRINCIPLES – AGGRAVATING/MITIGATING FACTORS

98. The Commission's approach takes into account all relevant material when assessing the overall culpability of a club that is in breach of the PSR. That, of course, involves reducing or increasing the culpability according to the factors in any particular case.

99. The principles are clear. The party asserting an aggravating or mitigating factor bears the burden of proving that factor on the balance of probabilities. The Commission considers that there is no need for the assessment exercise that it must carry out to be complicated. When assessing culpability the Commission may take into account any feature of the case that tends to increase culpability, and any feature that reduces it: it is a fact sensitive assessment that must be carried out in every case. An important feature in that factual analysis is to consider the extent by which the PSR threshold has been exceeded: the greater the excess, the greater the culpability. The reasons for the excess are likely to be relevant, and will be capable of increasing or reducing the culpability depending on the facts of the individual case.

100. In this case the Premier League has advanced a number of factors that it says increase Everton's culpability. Everton has advanced a number of factors that it says reduce its culpability. We consider those factual allegations, and any impact that they have, in the following sections of this decision.

16. AGGRAVATING FACTORS

101. The Premier League advances four separate factors that it says aggravate Everton's default.

Overspend despite repeated warnings

102. The 13 August 2021 agreement imposed certain obligations on Everton, one of which was to obtain the Premier League's approval of purchases of new players. The Premier League approved each such request but when doing so cautioned Everton that it (the Premier League) was not managing Everton's finances, and that it was for Everton to ensure that it complied with the PSR. The Premier League asserts that for Everton to have persisted in player purchases in the face of such plain warnings was recklessness that constitutes an aggravating factor.

103. The Commission considers that it was unwise for Everton not to have curtailed player purchases. It was aware of potential PSR difficulties but pressed ahead in the hope that it would make sales of players that would enable it to achieve PSR compliance. Events have proved that to be a poor judgment.

104. At one level, disregard of the potential PSR difficulties can be said to increase Everton's culpability. But the Commission considers that there is a danger of double counting. We have already made clear that our approach is to start by considering the extent by which the PSR threshold has been exceeded: the greater the excess, the greater the culpability. We do not consider that the reasons for the PSR breach should aggravate that culpability unless they can be said to constitute exceptional conduct. For example, a deliberate cynical breach of the PSR to achieve a sporting advantage might increase culpability beyond that already arrived at by the extent of the breach. We do not think that this is such a case. Everton may have taken unwise risks, but it did so in the mistaken belief that it would achieve PSR compliance: it is not a case of a deliberate breach.

Extent of the breach of the PSR threshold

105. The Commission will take the extent of the breach of the PSR threshold as an important indicator of the level of culpability. To include it as an aggravating

factor would constitute double counting.

Misleading the Premier League about stadium interest

106. The Premier League complains that Everton deliberately misled it about the source of the funds used for the stadium development. In its FY 2022 PSR submission Everton had asserted that the loan to Everton Stadium Development Company Ltd bore *financing costs by way of interest and arrangement fees*. The Commission has found that that was not the case. The Premier League asserts that Everton must have known that its assertion was incorrect, and that that inaccuracy constitutes an aggravating factor, although in its closing submissions it made it clear that it was not accusing Everton of dishonesty. Further, the Premier League complains that Everton failed to disclose the fact that it was in discussion with Rights & Media Funding Ltd to secure a waiver of a breach of the terms of its loan agreement. The Premier League asserts that Everton must have known of this fact, and therefore must have consciously decided not to disclose it.

107. The Commission notes the provisions of Rule B15 –

> B.15. In all matters and transactions relating to the League each Club, Official and Director shall behave towards each other Club, Official, Director and the League with the utmost good faith. For the avoidance of doubt and by way of example only, it shall be a breach of the duties under this Rule to:
>
> B.15.1. act dishonestly towards the League or another Club; or
>
> B.15.2. engage in conduct that is intended to circumvent these Rules or obstruct the Board's investigation of compliance with them.

The obligation to act in utmost good faith is high. As we have observed above, at the initial stages of consideration of a PSR submission the Premier League will be dependent on the accuracy of the information supplied by the submitting club. In this case the information supplied by Everton was materially inaccurate. Under cross examination, the evidence of Everton's representative was that, in the same way that a tax accountant's job was to reduce a client's tax exposure, an element of his job was *to protect or interpret PSR rules to the benefit of my employer*. The Commission notes that the Premier League already needs to devote considerable resources to monitoring PSR compliance by its member clubs. If all clubs were to adopt a similar approach to interpreting the PSR, the Premier League's task would become yet more challenging.

108. The Commission is satisfied that Everton's PSR calculation in relation to

stadium interest was less than frank. The Premier League has made it clear that it makes no allegation of dishonesty. We consider, therefore, that Everton did not consciously intend to circumvent the Rules but there is no doubt that it failed to discharge the duty of utmost good faith imposed by B15. This is an aggravating factor that increases Everton's culpability.

Misleading the Premier League about the intention to sell Player Y

109. In its FY 2022 PSR submission Everton identified Player Y as being one of the players whom it had targeted for sale, but whom it had been unable to sell. The Premier League asserts that that identification was false. It points to two facts that it argues support that conclusion. First, Player Y had been identified in Everton's 13 March 2020 Summer Player Trading Strategy as being a player whom the club intended to sell. However, in a series of Everton's documents produced in 2020 starting with the Financial Forecast Update April 2020 Player Y's name had been removed from the list of players whom Everton intended to sell. In his evidence Mr Purdy agreed the fact of the removal but explained it by the fact that Player Y's potential sale was being handled by Mr Kenwright and therefore the removal of his name from the regular lists did not mean that Everton would not have been willing to sell Player Y. Second, although his contract was not about to expire, Player Y was given a new contract during the summer 2020 transfer window.

110. The Premier League argued that those facts demonstrated that Everton's submission in relation to Player Y was false. This was disputed by Everton. It submitted that Mr Purdy's evidence provided a complete answer to the fact that Player Y's name had been removed from the list. It asserted that if Mr Kenwright had received an appropriate offer Everton would have been willing to sell Player Y. It argued that the fact of a new contract would simply enhance the value of any transfer.

111. Again, the Commission has hesitated over this issue. We have concluded that the Premier League has not proved its case on the issue. We find that although Player Y's name had been removed from the lists Everton would have been willing to sell him if it had received an appropriate offer. Accordingly, Everton's FY 2022 PSR submission was not intentionally misleading about Player Y's status and does not constitute an aggravating feature.

17. MITIGATING FACTORS

112. Everton advances six factors that it says stand as mitigating factors.

Post-planning permission interest

113. Everton relies on an argument that substantial amounts of interest incurred in relation to the stadium development could have been capitalised after planning permission had been obtained. It argues that that expenditure is *good* expenditure, namely expenditure of a character to be encouraged by the Premier League. Accordingly, even though it omitted to capitalise that expenditure the fact that it could have done so, and the fact that it is expenditure that should be encouraged, means that it is a feature that should stand as mitigating its culpability for the PSR breach. In short, because it could have been excluded from the PSR calculation means that it should stand to Everton's credit.

114. The Commission considers that this argument is based on a false premise, namely that the post-planning permission interest could properly have been capitalised and therefore excluded from the PSR calculation. This is an issue that we have already determined against Everton in relation to the pre-planning stadium interest. The consequence is that the post-planning permission interest also could not have been capitalised.

115. That is sufficient to determine this claimed head of mitigation. It is, however, appropriate that we note a further difficulty with Everton's argument. Its case is that the reason that it had not sought to exclude the post-planning permission interest was simply that it had not considered the possibility. Everton's evidence went further, making clear that even if it had considered the possibility to capitalise the post-planning permission interest it would not have done so in order to enhance the prospects of securing the senior lending that it was seeking. The Commission doubts that it would be appropriate to permit Everton to raise in mitigation a factual position that not only did not take place but would in any event have not taken place.

116. For these reasons the post-planning permission interest claim cannot stand as a mitigating factor.

Positive trend

117. Everton argues that its PSR calculation shows a downward trend for losses. It points to the EFL P&S Rules that allow credit for such a downward trend. The Premier League challenges that Everton can show a trend that should stand as mitigation. First, it disputes Everton's reliance on the EFL P&S Rules. The Premier League has no such rules, and it is wrong to attempt to import those of another league. Second, Everton could show a positive trend only if the figures for FYs 2020 and 2021 were averaged. Third, any positive trend is not continued into FY 2023.

118. The Commission considers that Everton has the better case on this issue. We agree with the Premier League that it is inappropriate to attempt to import isolated provisions from the EFL, but we consider that a consistent improving trend is something that can be credited as a matter of principle. A specific provision is not required to enable a Commission to find that a club which is attempting to improve may be able to have such improvement stand as mitigation. We consider it is wholly appropriate for Everton to follow the Covid provisions and to average the PSR figures for FYs 2020/2021: indeed, as that averaging was introduced by the Premier League to meet one of the challenges created by Covid, it would be strange not to do so. Finally, we consider that it is appropriate for us to look at the trend over the years included in the PSR submission. The position in subsequent years is a matter for those years.

119. For these reasons we conclude that the improving trend is a feature that goes some limited way to diminish Everton's culpability.

Player X

120. Everton maintains that it is entitled to credit for not pursuing an economically viable claim against Player X. Despite the fact that it had received advice from solicitors and from leading counsel that the claim could be pursued it chose not to bring proceedings. Its case is that that decision was made out of concern for the player's psychological wellbeing.

121. The Commission considers there to be a number of difficulties with Everton's argument. First, as a matter of principle we do not see why this should stand

as mitigation. Everton asserts that it suffered a loss as a consequence of a business decision that it made: we do not see that that can stand as mitigation. Second, although there was evidence of the player's psychological state in the immediate aftermath of his arrest, there was no evidence of his psychological state when the decision not to pursue the claim was taken. Third, the value of £10 million that Everton puts on the foregone claim is speculative. The claim may have faced difficulties, and there is no evidence that Player X would have been able to meet whatever judgment might have been obtained.

122. The circumstances surrounding Everton's claimed losses are the sort of events that occur in the management of football clubs where a player's services and value can be lost for a variety of reasons – most obviously because of injury, or a loss of form. It is not something that can stand as mitigation in these proceedings.

Ukraine

123. Everton advances the Russian invasion of Ukraine as creating a mitigating factor. Everton had the benefit of an option agreement that entitled USM Services Limited to call down a Naming Rights Agreement generating an annual fee for Everton of £10 million. The Naming Rights Agreement was expected to come into force with effect from the 2025/2026 season. Everton advanced in mitigation the assertion that it had been in negotiations with USM Services Limited to bring the agreement into force early, producing an accelerated annual receipt of £10 million commencing in FY 2022. No agreement had been reached but negotiations were said to have reached an advanced stage. The mitigation was claimed because the possibility of any such agreement ceased upon imposition of sanctions on Russian entities by the UK government following the Russian invasion of Ukraine. Everton felt that it had no alternative but to withdraw from the negotiations.

124. The Commission agrees with the Premier League that this cannot stand as a head of mitigation. First, the prospects of an agreement having been concluded are uncertain. We were not shown any contemporaneous documents to show that receipt of the monies was probable. Second, the loss of a proposed agreement, even when that agreement might have been thought

likely, is the type of event that businesses experience. It is not something that can stand as diminishing Everton's culpability.

125. Similarly, the argument that the invasion of Ukraine caused stadium construction costs to increase, and made it harder for Everton to secure the senior debt that it was seeking, constitute mitigating features that cannot stand. Again, it is no more than the type of event that businesses have to contend with as part of their daily life.

Impact of Covid on the market for players

126. Conscious of the PSR challenges that it faced Everton had planned to sell a number of its players in the summer 2020 transfer window. Mr Brands had placed values on eight of the players who had been targeted for sale, producing a total sale value in excess of £80 million. In the event sales did not take place as projected. Everton argues that that failure was caused by the impact of Covid, which depressed the market, preventing it from making sales at the expected prices.

127. The impact of Covid on player sales in 2020 has been the subject of extensive expert evidence from Mr Brown and Dr Parnell. That evidence was supplemented by a series of additional reports, some of which were produced after the hearing had commenced. The Commission does not intend to rehearse the detail of that voluminous evidence. It notes, however, that shortly before he gave evidence Dr Parnell found it necessary to revise some of his calculations – although he was at pains to say that those revisions had not affected his overall conclusions. What is of note is that as a result of those revisions Mr Brown and Dr Parnell agreed that of all the national and international markets for purchasing players the Premier League was the least affected by Covid. Mr Brown's evidence, based on Everton's actual experience, was that Everton's most significant market for selling players was the Premier League. That conclusion, Mr Brown said, demonstrated that Covid had had comparatively little impact on Everton's ability to sell players.

128. The Premier League argued that any difficulties experienced by Everton in achieving sales of the players targeted for sale in the summer 2020 transfer window was largely attributable to the fact that there was no ready purchaser

for those players at the prices that Everton was seeking. The cause of Everton's difficulties was therefore market forces, rather than the impact of Covid. The Commission accepts that submission.

129. When considering its claimed Covid mitigation it must not be forgotten that Everton has already received the benefit of the Premier League's concession in respect of losses caused by Covid. Where it has been able to satisfy the evidential standards required by the Premier League Everton has already had the benefit of Covid exclusions totalling £70.2 million, made up of standard add-backs and two years' averaged impairment provisions, permitted under the Premier League's Covid guidance. Included within those impairment provisions were deductions totalling £16.8 million (£8.4 million after averaging) for five of the eight players who had featured in Everton's Summer 2020 Player Trading Strategy. The additional cases that Everton now advances as a mitigating factor are ones in which Everton has been unable to satisfy the Premier League's evidential requirements.

130. The Commission has concluded that this claimed head of mitigation cannot be allowed. First, the values put on the players by Mr Brands are no more than target prices – they are aspirations, not true open market values. The fact that those prices were not achieved is more likely to have been caused by the fact that there was no market appetite for those players at those prices than by the impact of Covid. Second, the ability to sell players is inherently uncertain. Events and market forces (including the fact of a club's PSR challenges) may operate against a selling club. Third, these are the types of events that a club is expected to have in mind when planning its expenditure: it needs to plan for untoward eventualities. The PSR threshold of £105 million provides clubs with a generous ceiling within which to operate, and, with prudent planning and budgeting, provides considerable protection against untoward events.

Transparency and cooperation with the Premier League

131. Everton asserts that it has behaved openly and responsibly in its dealings with the Premier League in relation to its PSR challenges, and that that behaviour should stand to its credit. The Commission recognises that Everton engaged extensively with the Premier League in relation to the problems caused by the inability to capitalise pre-planning permission expenditure. That

approach was, of course, in Everton's self-interest. Further, as already discussed, the information provided by Everton about the source of the stadium development funds and the consequent claim to exclude interest were not wholly straightforward. Everton acknowledged in the course of the hearing that the PSR calculation included claims that were novel, some of which were persisted with in Everton's Answer but were subsequently abandoned shortly before the hearing. We have already found Everton's conduct not to be in compliance with the obligation of utmost good faith imposed by Rule B15.

132. We do not consider that there is any feature of Everton's dealings with the Premier League that is of such an exceptional nature that it should stand as mitigation of Everton's culpability.

18. NATURE OF SANCTION

133. The Premier League submits that the only proper sanction is a sporting sanction in the form of a deduction of points. It argues that only a points deduction will meet the requirements of the principles that we have discussed above. The Premier League relies on the decision in *Sheffield Wednesday FC v The Football League Ltd*: a sporting advantage is to be inferred so that anything other than a points deduction would be simply inappropriate.

134. Everton disagrees. It submits that a financial penalty would meet the justice of the case. If some form of sporting sanction is required, the Commission should consider imposing a transfer ban.

135. We have no doubt that the circumstances of this case are such that only a sporting sanction in the form of a points deduction would be appropriate. A financial penalty for a club that enjoys the support of a wealthy owner is not a sufficient penalty. We agree with the Premier League that the requirements of punishment, deterrence, vindication of compliant clubs, and the protection of the integrity of the sport demand a sporting sanction in the form of a points deduction. The issue is not the form of sanction, but its extent.

19. QUANTIFICATION OF SANCTION

136. The size of the points deduction is to be determined by Everton's culpability.

There is no fixed formula to be applied: we are required to determine the extent of the culpability, and from that to determine the points deduction. That requires the exercise of our discretion as a specialist panel, and a determination to be made based on all the facts of the case.

137. It helps to stand back from all the detail that has been put before us and to see the overall picture. Everton's PSR difficulties are not attributable to the costs of the stadium development. Those costs were excluded from the PSR calculation in respect of the period before planning permission was granted by reason of the 13 August 2021 agreement, and thereafter by the ability to capitalise relevant costs by the application of FRS 102. The cause of Everton's PSR difficulties was the fact that it overspent (largely on its purchase of new players and its inability to sell other players), and because it finished lower in the league than it had projected in FY 2022 (16th against the projected 6th – causing a loss of expected income of c.£21 million). Everton's understandable desire to improve its on-pitch performance (to replace the non-existent mid field, as Mr Moshiri put it in evidence) led it to take chances with its PSR position: those chances resulted in it exceeding the £105 million threshold by £19.5 million.

138. The position that Everton finds itself in is of its own making – it is Everton's responsibility to ensure that it complies with the PSR regime. The excess over the threshold is significant. The consequence is that Everton's culpability is great. We take into account the fact that Everton's PSR trend over the relevant four years is positive, but cannot ignore the fact that the failure to comply with the PSR regime was the result of Everton irresponsibly taking a chance that things would turn out positively. Further, Everton was less than frank in its dealings with the Premier League over the stadium interest issue. The reality is that Everton failed to manage its finances so as to operate within the generous threshold of £105 million. Its mismanagement led to that threshold being exceeded by £19.5 million.

139. This was a serious breach that requires a significant penalty. The Commission considers that it should order an immediate deduction of 10 points.

20. CONCLUSION

140. The Commission directs that Everton shall be subject to an immediate deduction of 10 points. We invite the parties to attempt to agree any consequential orders, including the question of the costs of the proceedings. Please will the parties liaise and inform the Commission what may have been agreed, and what issues remain for determination by the Commission.

21. ADDENDUM

141. After it had completed its deliberations the Commission submitted a draft copy of its decision to the parties for comment. The intention was the conventional one of enabling the parties to identify typographical mistakes and the like. Both parties responded with suggested revisions, some of which went beyond typographical mistakes and amounted to rewording of passages of the decision. The only alterations that we have made to the form of the draft decision that we submitted to the parties are to correct typographical mistakes, and to reword passages where that rewording has not been objected to by either party.

David Phillips KC FCIArb
His Honour Alan Greenwood
Nick Igoe ACA

17 November 2023

IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W.51.5 OF THE PREMIER LEAGUE RULES BEFORE THE PREMIER LEAGUE INDEPENDENT DISCIPLINARY COMMISSION

PLJP 2023/3

B E T W E E N –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

ATTACHMENT 3

Appeal Tribunal's PSR Appeal Decision – 26 February 2024

IN THE MATTER OF AN APPEAL FROM A COMMISSION OF THE PREMIER LEAGUE DISCIPLINARY PANEL UNDER RULE W.62 OF THE PREMIER LEAGUE RULES

BEFORE AN APPEAL BOARD (THE RT HON SIR GARY HICKINBOTTOM, KATHERINE APPS KC AND DANIEL ALEXANDER KC)

B E T W E E N:

EVERTON FOOTBALL CLUB COMPANY LIMITED

Appellant

-and-

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED (trading as THE PREMIER LEAGUE)

Respondent

DECISION

This Decision comprises three parts:

1. **Summary**
2. **Index**
3. **Reasoned Decision**

Summary

The Appeal Board allows Everton's appeal against the decision of the Commission to impose an immediate ten point deduction.

The Appeal Board substitutes a sanction of an immediate six point deduction.

This is an appeal by Everton Football Club against the decision of a Premier League Commission to impose a sanction of an immediate ten point deduction for a breach of the Premier League Profitability and Sustainability Rules ("the PSR"). The PSR, and the procedure for their enforcement, were agreed by all Premier League Clubs.

Before this Appeal Board, the Club accepts that it breached the PSR for Season 2021-22 by having losses, as calculated by a formula set out in the PSR and as found by the Commission, of £124.5m which exceeded the upper loss threshold of £105m. It appeals against only the sanction imposed.

The Club relies on nine grounds of appeal. Seven relate mainly to how the Commission dealt with various mitigating and aggravating factors. The Appeal Board refuses the appeal on all these grounds, concluding that the Commission's approach to these issues was correct and the evidence supported its conclusions.

However, on the other two grounds, the Appeal Board concludes that the Commission made legal errors.

First, the Commission found that, in relation to what it told the Premier League about its new stadium debt (which affected the calculation on which the relevant losses were calculated), the Club had been "less than frank" and breached another Premier League Rule (rule B.15) which imposes an obligation of "utmost good faith". The Appeal Board concludes that the Commission was wrong to make those findings, because those allegations had not been made against the Club. Whilst the representations made by the Club about the stadium debt were materially wrong, it was not the Premier League's case that that was anything other than an innocent mistake.

Second, the Commission was wrong not to take into account available benchmarks (e.g. the approach taken in English Football League ("EFL") Guidelines cases), which had been relied upon by the Club, when it addressed the proportionality of the sanction.

These errors were material, in that they affected approach and conclusion of the Commission in relation to sanction.

As a result, the Appeal Board sets aside the sanction imposed by the Commission and, at the request of the parties, itself has considered the appropriate and proportionate sanction.

In doing so, the Appeal Board considers:

(i) The aims of the PSR, which include protecting the integrity of the competition, preventing clubs from taking undue financial risks with player spending which may give them a relative sporting and financial advantage over other clubs.

(ii) In all the circumstances, including relevant mitigating and aggravating factors, what sanction is proportionate in that it is necessary and sufficient to achieve those aims but does not exceed what is reasonably required to achieve them.

In assessing the appropriate sanction, the Appeal Board has taken into account, among other things:

(i) The breach was a serious matter in that it exceeded the £105m threshold by a significant amount, both in percentage and monetary terms (nearly £20m). The Board agree with the Commission that the main reason for the Club's breach was that it did not manage its finances, as prudently it should have done, so as to operate within the generous threshold of making no more than £105m losses over the relevant period.

(ii) The remaining mitigating factor is "trend", i.e. the losses incurred by the Club reduced year-on-year throughout the relevant period. However, given that the losses in the first two years were each over £50m and aggregated over £110m, before the Club put brakes on player spending for the final year of the period, the extent to which that evidenced prudent financial planning aimed at sustainably reducing losses was restricted. The mitigating effect of this factor is limited.

(iii) On the other hand, there are two aggravating factors: the extent to which the PSR losses were over £105m, and the Club's provision of incorrect information to the Premier League in relation to the new stadium costs.

(iv) Whilst there are clear and obvious differences between the Premier League and the Football League, the Football League scheme for profitability and sustainability is structurally similar to that of the Premier League, and the EFL Guidelines for sanction in this area are the closest available benchmark. A six point sanction is broadly in line with those. It is also not out-of-kilter with any other available benchmark, including those under the Premier League Rules themselves (such as the automatic sanction for insolvency of nine points).

In all the circumstances, including relevant mitigating and aggravating factors, the Appeal Board considers that a six point immediate points deduction is appropriate and proportionate in that it is a sanction both necessary and sufficient to achieve the aims of the PSR.

This summary is for the assistance of those reading this Decision, but does not detract from or alter the full reasoning in the Reasoned Decision.

Index

Reasoned Decision

Introduction

1. This is an appeal by Everton Football Club Company Limited ("the Club" or "Everton") against the decision dated 17 December 2023 of a Commission (David Phillips KC FCIArb, His Honour Alan Greenwood and Nick Igoe ACA) ("the Commission") to impose a sanction on the Club of an immediate ten point deduction for breaching the Premier League Profitability and Sustainability Rules ("the PSR"). The Club accepts that it breached the PSR for Season 2021-22 by having losses, as calculated by a formula set out in the PSR and as found by the Commission, of £124.5m which exceeded the upper loss threshold of £105m. It appeals against only the sanction imposed.

2. At the appeal hearing, the Club was represented by Laurence Rabinowitz KC, James Segan KC and Celia Rooney of Counsel, instructed by Pinsent Masons LLP. The Respondent was represented by Adam Lewis KC and Jason Pobjoy of Counsel, instructed by Linklaters LLP. In addition, we received written submissions from Matthew Stanbury of Park Square Barristers instructed by Reece Thomas Watson on behalf of the Everton Football Club Fans Advisory Board ("the Everton FAB"). At the outset, we thank all the legal representatives for their assistance.

Background

The Premier League

3. The Respondent, The Football Association Premier League Limited ("the PL"), is a private company limited by shares, the shareholders being The Football Association ("the FA") as the national governing body for the sport of football in England, and the 20 member clubs of the league at any given time. Each club holds one share such that, at shareholder meetings at which major decisions involving the PL are taken, they have an equal vote. The FA has a special vote, which means that certain actions, such as appointment of directors, can only be taken with its approval. Shareholder meetings take place throughout the season. The Annual General Meeting ("the PL AGM") takes place at the close of each season, at which time the relegated clubs transfer their shares to the clubs promoted into the PL from the English Football League ("the EFL") Championship. The PL also has an Executive Board of five Directors ("the Board"), including a Chief Executive, all of whom are independent of the member clubs.

4. The PL described itself in its submissions as "an events organiser." In addition to organising the league as a competition, the PL operates as a licensor for the valuable broadcasting rights to the fixtures and various other merchandising and profit-making activities of the league. The revenue generated in each season is substantial, and is very much higher than in the EFL. That revenue is split between the member clubs. We deal in more detail with that split below (see paragraph 20); but, briefly, half of the profits are shared equally between the clubs, a quarter on the basis of league position and the remaining quarter on the basis of television/media fixture coverage. The PL was thus properly described before us as a "joint venture" governed by detailed rules agreed by the member clubs. The joint venture has both a sporting purpose and a financial (profit-sharing/revenue-generating) purpose, which are linked.

5. The clubs in the PL joint venture agree to the form of the competition and the standards of behaviour towards the PL and each other as set out in, not only the company's Memorandum and Articles of Association, but crucially the PL Rule Book ("the PL Rules"). The PL Rules serve as a contract between the PL and the member clubs, and the members clubs between each other, which includes required levels of conduct by clubs and their officials and the processes by which any misconduct is to be adjudicated and sanctioned. The PL Rules are approved every year by the clubs themselves in the PL AGM, and therefore prescribe standards of behaviour and conduct (including financial conduct) that they themselves have set. These are to be administered and enforced by the PL through processes the clubs themselves have approved. The PL Rules are aimed at ensuring fair sporting competition, and fair revenue sharing, what is "fair" in each case being determined by the clubs themselves. They are also designed to ensure a dynamic and robust competition. The PL Rules are published every year, having been approved at the PL AGM. Rule changes require a two-thirds majority.

6. The PL Rules and their enforcement are therefore not imposed on the clubs by an external regulatory body. They are agreed by the PL clubs to ensure (among other things) fairness and sustainability of the competition as whole. When the Board of the PL enforces the PL Rules against a club in breach it is, in effect, doing so on the mandate given to it by the clubs in the PL Rules, and in the interests of all (and, certainly, all other) member clubs and, given the enduring nature of the PL, prospective member clubs to some indirect extent. Some breaches of some PL Rules have fixed sanctions attached. Others require reference to an independent Commission to determine the appropriate sanction.

7. So far as standards of conduct for this appeal are concerned, the relevant PL Rules are those for Season 2021-22; and, unless indicated to the contrary, it is to those we refer in this Decision.

Everton Football Club

8. The history and background of the Club are summarised in a statement of the officers of Everton FAB dated 16 January 2024. Everton FAB is an unofficial body representing Everton fans and neither party to this appeal objected to our reading the materials they supplied. In respect of the Club's history, for the purposes of this Decision, we can be brief; but we fully acknowledge the long and rich history of the Club, its integration with (and importance to) the local community and the passion which its fan base, in Liverpool and around the world, have for the Club. From the evidence, these characteristics are clear and strong. In considering this material, we of course bear in mind that other clubs and their fans would, given the opportunity, have their own stories to tell.

9. The Club was formed in 1878 as St Domingo's Football Club, playing in Stanley Park, Liverpool. It was a founder member of the Football League in 1888, winning the first of nine League championships in 1890-91 and the first of five FA Cups in 1906. It has been in the top flight of English football since 1888 except for four seasons, most recently 1953-54.

10. In 1892, the Club moved to the first purpose-built football stadium, Goodison Park, where it still plays. It is a grand and historic ground, in the past hosting FA Cup Finals and a World Cup Semi-final; but the evidence before the Commission was that it is no longer fit for purpose or economically sustainable due to its age, condition, configuration and capacity constraints – its capacity is just under 40,000 – which has a direct, adverse impact on the club's financial performance compared with its peers. The matchday revenues from Goodison Park rank 18th in the PL.

11. The Club's majority shareholder is Ardavan Farhad Moshiri ("Mr Moshiri") who purchased 49.9% of the shares in the Club in 2016, and now holds 94%. He has provided very significant sums by way of investment to support the Club's activities over the years.

12. Mr Moshiri gave evidence to the Commission. When he bought the club, he had the aspiration of turning it into one of the country's top teams, competing at the top end of the PL and challenging for European qualification on a regular basis. To meet this aspiration, he considered investment was needed in two particular areas: the first team playing squad, and the Club's infrastructure in the form of a new stadium.

13. His most urgent priority was the playing squad. He explained that, at the time of his first investment, although the Club had had some quite successful seasons so far as league position was concerned, the first team squad was not strong enough to push to the next level; so his plan was that he would "bridge the gap", i.e. he would invest heavily in forming a squad that could challenge for European qualification on a regular basis. That, he said (paragraphs 16-18 of First Witness Statement dated 15 August 2023):

> "16. … would result in more revenue in respect of gate receipts, TV broadcasting, better commercial deals, and prize money. The better the revenue, the more sustainable a business becomes.
>
> 17. This is all part of a normal investment cycle in a football club following a change of ownership. Improvements are made to the first team squad (buying new players, offering better wages to attract the best talent etc) with the aim of improving performance on the pitch. Improved performance should lead to better results and, subsequently, to higher-placed finishing positions in the PL, and qualification for a European competition.
>
> 18. As part of the normal investment cycle, the expectation is that, although a substantial amount of money is spent in the first three/four years of new ownership, performance on the pitch improves in conjunction with that spending. Therefore, after those initial years: (i) a club's need to repeatedly spend significant fees on transfers should reduce as the club has built a team capable of competing at a higher level; and (ii) if further investment on players is required, a club should be able to spend the additional revenue it has generated as a result of its improved on-pitch performance (and crucially onwards player sales), instead of relying on funding from the owner."

That was Mr Moshiri's investment plan for the Club. It was dependent upon heavy, early investment in players resulting in a corresponding improvement in results and higher league position. He pointed to other PL clubs where that strategy had been successful.

14. This evidence supports the general point discussed below (paragraph 20) that, even if heavy losses are incurred initially, significant spending on players is likely to benefit a club in sporting terms which may then translate into financial success. The converse is that other clubs which, for whatever reason, do not make that investment may be relatively disadvantaged both in sporting and financial terms.

15. Mr Moshiri's other priority was a new stadium. There were few potential sites in Liverpool; and the chosen site was on Bramley-Moore Dock in the Port of Liverpool. This was in a World Heritage Site, and required land reclamation before work could commence; and the new, 52,888-capacity stadium was just one part of a larger regeneration programme involving both the dock and Goodison Park. The project was

especially challenging. In particular, because of the nature of the site, the pre-planning permission work and expense of the project were greater than otherwise would have been the case. By August 2023, the estimated costs of the whole project were £760m; and it was hoped that, whilst Mr Moshiri would help in the funding, the majority of the funding would be by way of third-party debt.

16. Those were Mr Moshiri's aspirations when he first invested in the club. Unfortunately, they have not been met. Substantial investment was indeed made in respect of the playing squad; but that did not result in a corresponding improvement in results and PL placing. For Season 2021-22, the Club (which had, at the start of the season, projected that it would end the season in sixth position), finished 16th, two positions above the relegation places. So far as the new stadium is concerned, that project is indeed proceeding, through a wholly-owned subsidiary of the Club, Everton Stadium Development Limited ("Everton SDL") which is intended to bear all of the costs of, and receive all of the income from, the new stadium. However, no third-party investor has been found. Everton SDL, currently having substantial costs of development on the new stadium but no income, is financed by a loan from the Club. The reasons for these disappointments – and their relevance to the Club's culpability in respect of the Season 2021-22 PSR breach – underlie several grounds of appeal.

Financial Fair Play

17. As explained in paragraphs 34-36 of Club's Written Submissions, the PSR are the means by which the PL gives effect to the Financial Fair Play ("FFP") principles adopted by the Union of European Footballing Associations ("UEFA"), the governing body for the sport of football in Europe, in 2012. As found by the Commission (paragraph 6 of its Decision) and agreed by the parties before us, the aims of the PSR are similar to those pursued by the UEFA FFP regime.

18. Following a period of financial crisis (which in the UK included, e.g., Portsmouth Football Club going into administration in 2010), on 21 March 2012, the European Commission and UEFA issued a Joint Statement identifying the objectives of FFP as follows (paragraph 1):

> "The objectives of FFP are to:
>
> - Improve the economic and financial capability of clubs;
> - Increase transparency and credibility;
> - Improve governance standards in football;
> - Encourage clubs to operate on the basis of their own revenues;
> - Introduce more discipline and rationality in club finances;
> - Protect the integrity and smooth running of UEFA club competitions;
> - Encourage responsible spending for the long term benefit of football;
> - Protect the long-term viability and sustainability of European club football."

19. The Joint Statement continued (paragraph 4):

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

20. "Football related expenditure", as the term is used here, is dominated by player related costs, i.e. transfer/loan costs and the costs of paying players; and, although of course often requiring hard decisions, these costs are not fixed and most readily controllable by the club. They can be reduced, not only by not buying players, but also by selling and loaning out players. It is also uncontroversial that, although difficult to quantify, spending money on players is likely to give a club a sporting advantage – that was the basis of Mr Moshiri's investment strategy referred to above (paragraph 13) – and, consequently, a financial advantage. Most of the income of the PL comes from the sale of broadcasting rights, which produce very much more than (say) the EFL. A quarter of the proceeds of the PL UK Broadcast Revenue is put into a Merits Based Fund which is distributed in correlation to league position, with the team that finishes in first place getting twenty times more money from this pot than the team that finishes on 20th place (rules A.1.165, A.1.166, D.16 and D.17.2). League position at the end of the season also determines places in (very lucrative) European competitions the following year, and relegation to the EFL which, we were told, results in a reduction in the annual income of a club of, perhaps, £100m. Furthermore, a further quarter of that broadcast revenue is put into a Facility Fees Fund which is distributed in accordance with participation in broadcast matches which, to an extent, depends upon league success (rules A.1.91, D.16 and D.17.3); and sporting success also has potential beneficial commercial spin offs (e.g. in terms of sales of merchandise). The sporting advantage obtained by spending on players can, therefore, be accompanied by a substantial financial advantage in terms of increased revenue; and the integrity of the PL as a competition has both sporting and (related) financial aspects.

21. As emphasised in the Joint Statement, whilst it is arguable that FFP principles strengthen the competitive balance as between clubs (and paragraph 8 of that Statement refers to "the objective of preserving fair competition between football clubs in the context of state aid"), "they are principally directed at preventing the type of overspending and poor financial management that can (and has) led to some clubs becoming insolvent, and the negative consequences of bad debt", by "essentially [limiting] the amount of debt a club is permitted to have in a particular league or competition by reference to that club's income, and [requiring] a club to pay its debts as they fall due" (De Marco, "Football and the Law" (Bloomsbury Professional), 1st edition (2017), at paragraph 16.2).

22. On the basis of these principles, each major, professional football competition in Europe has adopted regulations which are designed to ensure that the debt of a club is not such as to jeopardise that club and, consequently, the integrity of the competition itself and the sport of football more generally. Those regulations, in their various forms, recognise that the continued support of a club by one or more wealthy investors cannot be guaranteed – the investor may lose the source of their

wealth, may lose the ability to invest their wealth in the club (e.g. as a result of sanctions) or may simply lose their enthusiasm – and, so, accrued debt in a club will put a club at risk even if that club has an investor who is, for the time being, willing to bear the costs and debt of the club personally. As indicated above, the UEFA Joint Statement refers expressly to dissuading clubs from requiring subsidies. While this was originally inserted as an aim with the need to avoid state subsidy in mind, a parallel point arises when potentially wealthy owners subsidise a club but may not do so indefinitely.

23. Under the UEFA FFP scheme (set out in the UEFA Club Licensing and FFP Regulations ("the CL & FFP Regulations"), which put the principles into practice so far as UEFA competitions are concerned), first, there was an acceptable deviation (loss) of €5m. Further, the regulations originally allowed for a further excess of up to €45m over a three-year monitoring period, "if such excess is entirely covered by contributions from equity participants and/or related parties". That provision tapered down to €30m in Season 2015-16; and, although we were not shown the provisions, Mr Lewis said that, over time, "the latitude disappeared". This form of UEFA regulating football finance has since changed. Second, there was recognition that expenditure on certain, non-player related items (e.g. finance costs directly attributable to the construction of tangible fixed, depreciation of tangible fixed assets, amortisation of intangible fixed assets except player registrations, and community development activities) is to be encouraged because their "…aim is to encourage investments and expenditure on facilities and activities for the long-term benefit of the club" (and, consequently, the relevant competition, the sport of football, and the wider community and public more generally); and so they were excluded from the account of costs in any FFP assessment.

24. Although FFP regulations may not be designed to maintain a level playing field in terms of resources available to clubs, it is vitally important for the integrity of the competition that the FFP regulations are applied, and applied equally to all clubs in that particular competition. This is inherent in the label attached to these principles, "Financial Fair Play". As the UEFA Club Financial Control Body (Adjudicatory Chamber) said in UEFA v Dynamo Moscow (AC/2/15) (19 June 2015) ("Dynamo Moscow"):

> "79. The… Adjudicatory Chamber has made it clear in a number of cases concerning breaches of the no overdue payables requirements… of the CL & FFP Regulations that the CL & FFP Regulations are underpinned by the principle that all of the clubs that compete in UEFA's club competitions must be treated equally…. It would be unfair for one club to be allowed to compete when it is in serious breach of the monitoring requirements which apply to all.
>
> 80. This principle has even greater force in relation to the Break-even Requirement because a breach of this requirement (for example, because of excessive spending on player acquisitions and employee benefits expenses in order to attract 'star players') may directly affect the competitive position of a club, to the detriment of the vast majority of clubs who comply with the CL & FFP Regulations. So, in general, it would be unfair to allow a club which is in serious breach of the Break-even Requirement to compete in a UEFA club competition. The power to impose disciplinary measures exists not just to encourage compliance with the rules by deterring breaches of the monitoring requirements, but also to protect the integrity of UEFA's club

competitions by ensuring that all of the clubs that compete are subject to the same requirements.

81. As submitted by the Club at the Oral Hearing, the CFCB Adjudicatory Chamber does have a power, under Article 30 of the Procedural Rules, to suspend the imposition of disciplinary measures. However, Article 53(2) of the CL&FFP Regulations provides that in carrying out its responsibilities the CFCB must ensure the 'equal treatment of all licensees'. Accordingly, it would (in principle and depending on the circumstances of the case) not be justified to suspend a disciplinary measure if, as a consequence, a club would be allowed to participate in a UEFA club competition in circumstances where it is in serious breach of the monitoring requirements."

25. The principle of equal treatment is equally applicable to the PSR. A breach of FFP Regulations by a club is unfair to other, compliant clubs in the same competition, which may be put into the invidious position of having to choose between (i) complying with the FFP scheme and suffering a sporting disadvantage (and accompanying financial disadvantage), and (ii) themselves spending in breach of the regulations causing (as Mr Lewis put it) "an arms race" which, irrespective of the financial support available to the first club in breach, may put these other clubs (and, thus, the competition) in jeopardy. That is one reason why, as noted in Dynamo Moscow at [81] (albeit in the different context of a UEFA competition), it is important that effective sanctions are imposed where there is a breach so that clubs are not able to take an unfair advantage of their breach.

The Premier League PSR

26. In furtherance of FFP principles, the PSR were introduced into the PL Rules for Season 2013-14, and are now found in rules E.47-E.52 in Section E: Clubs – Finance, under the heading "Profitability and Sustainability".

27. In summary, the PSR provide a formula for calculating losses over a defined three year period with various consequences if the total losses exceed certain thresholds. Once these get to more than £105m over the three-year period, the matter becomes a disciplinary issue and must be referred to a Commission to determine sanction.

28. Under these rules, generally, for each season the PL assesses each club's compliance with the PSR using financial information which the club is required to submit in relation to three of the club's annual Accounting Reference Periods ("ARP"), namely the ARP ending in the year in which the assessment is taking place ("T"), the preceding ARP ("T-1") and the ARP before that ("T-2"). However, for Season 2021-22, because of the effects of COVID-19, information was required for four years, namely T, T-1, T-2 and the ARP before T-2 ("T-3) because, to ameliorate the consequences of the pandemic, the PSR calculation was based on, not the figures for periods T, T-1 and T-2, but rather the figures for T, the mean of T-1 and T-2, and T-3.

29. Where the aggregation of a club's Earnings Before Tax for the three years results in a loss, then the club must submit a "PSR Calculation" of its "Adjusted Earnings Before Tax" for those years, i.e. the Earnings Before Tax excluding certain costs. Those exclusions are agreed between the clubs as being beneficial to the club and the sport of football more generally. The PSR set out in detail how a PSR

Calculation is to be done. In the PL Rules for Season 2021-22, the crucial definitions were as follows:

(i) Rule A.1.169 defined "PSR Calculation" as:

> " …. In respect of Season 2021/22, the PSR Calculation shall be the aggregation of: (a) the Adjusted Earnings Before Tax for T; (b) the mean of the Adjusted Earnings Before Tax of T-1 and T-2; and (c) the Adjusted Earnings Before Tax of T-3".

(ii) Rule A.1.5 defined "Adjusted Earnings Before Tax" as:

> "… Earnings Before Tax adjusted to exclude costs (or estimated costs as the case may be) in respect of the following:
>
> (a) depreciation and/or impairment of tangible fixed assets, amortisation or impairment of goodwill and other intangible assets (but excluding amortisation of the costs of Players' registrations);
>
> (b) Women's Football Expenditure;
>
> (c) Youth Development Expenditure;
>
> (d) Community Development Expenditure; and
>
> (e) in respect of Seasons 2019/20, 2020/21, and 2021/22 only, COVID-19 Costs…".

(iii) Rule A.1.59 defined "COVID-19 Costs" as:

> "… lost revenues and/or exceptional costs incurred by a Club that are directly attributable to the COVID-19 pandemic and that are identified and calculated in accordance with such guidance as issued by the Board".

30. The PSR provide that the PL will consider the financial information supplied by each club and check its PSR Calculation and identify whether the losses are such as to trigger any consequences under the Rules. It is, of course, crucial to this exercise that each club fully, frankly and accurately discloses all its financial information material to the PSR Calculation. Each club, uniquely, has the relevant financial information in respect of its own financial position. Given that the PL is in effect a joint venture and the PSR are designed in part to prevent improper financial (and, hence, sporting) advantage of one club over another, it is self-evident that each club will fairly and fully disclose all relevant financial information to the PL Board, so that, if necessary, steps can be taken against any club in breach. Particular obligations in respect of disclosure are found in the PL Rules, as follows:

> "B.15 In all matters and transactions relating to the League each Club, Official and Director shall behave towards each other Club, Official, Director and the League with the utmost good faith. For the avoidance of doubt and by way of example only, it shall be a breach of the duties under this Rule to:

B.15.1 act dishonestly towards the League or another Club; or

B.15.2 engage in conduct that is intended to circumvent these Rules or obstruct the Board's investigation of compliance with them."

"B.18 … [E]ach club shall comply promptly and in full with any request for information made by the League…".

31. Under the PSR, what happens after the PSR Calculation has been made depends upon the amount of the loss, if any, as shown by that Calculation.

(i) If no loss has been made, then no further steps are prescribed.

(ii) If the PSR Calculation results in a loss of up to £15m (the minimum loss threshold) then, by rule E.49, the PL Board simply has to be satisfied that the club will, up to the end of the ARP following T (i.e. "T+1"), be able to pay its liabilities and fulfil its obligations set out in the PL Rules. If it is – as will almost always be the case – then no further steps are prescribed.

(iii) If the PSR Calculation results in a loss in excess of £15m, then rule E.50 sets out a number of requirements which the club has to fulfil, including giving the PL Board future financial information and advance estimates of Adjusted Earnings Before Tax to the end of the year after T+1 (i.e. "T+2"), and evidence of Secure Funding (a defied term in the PL Rules), failing which the Board has the power to exercise any of its powers under rule E.16 (which include, for example, a requirement that the club submits, agrees and adheres to a particular budget; and/or an embargo on registering new players).

32. If the loss is in excess of £105m (reduced by £22m for each season of the three seasons that the club was not in the PL but in the EFL: rule E.52), then rule E.51 provides that the PL Board may exercise its powers under rule E.16; and "the Club shall be treated as being in breach of these Rules and accordingly the Board shall refer the breach to a Commission constituted pursuant to Section W (Disciplinary) of these Rules…". (In the EFL P&S Rules, the threshold for breach is referred to as the Upper Loss Threshold as a defined term. Although not a term used in the PSR, we consider it to be useful and, in this Decision, we have adopted it in respect of the £105m breach threshold in the PSR.) Under Section W, the Commission is appointed by the independent Chair of the Judicial Panel, and comprises three members all of whom are similarly independent. It is noteworthy that the "offence" under this rule is one of strict liability: the rule is breached because the PSR Calculation shows a loss of over £105m, irrespective of any intention, recklessness, insight or lack of care on the part of the club.

33. In the Club's case, there was a further effective deduction of costs from the 2021-22 PSR Calculation. As explained above, where the costs of a project are capitalised, then they are excluded from a club's Profit and Loss Account ("P&L Account"), and thus from PSR Calculation. For the reasons mentioned above, some of the costs of the proposed new stadium development were higher than would be usual, and were front-loaded.

34. The PSR Calculation to an extent incorporates standard accounting practice in determining how profits and losses should be accounted for. In some respects, these require the application of rigid rules; but, in other respects, involve the

exercise of judgment or the application of standardised or widely recognised approaches. Under United Kingdom Generally Accepted Accounting Practice ("UK GAAP") FRS 102 ("FRS 102"), "The Financial Reporting Standard applicable in the United Kingdom and Northern Ireland", a cost related to such a project cannot be capitalised until it can be demonstrated that it is probable that future economic benefits will accrue from that project. While the Club was confident that its project would go ahead and that future economic benefits would accrue to the Club from the completed new stadium, the accounting threshold for "probable economic benefit" was, as a matter of accountancy practice, considered to be when planning permission for the new stadium was granted. This meant that about £39m of early project costs, incurred prior to planning permission, had to be expensed to the club's P&L Account, and so be included as costs in the relevant PSR Calculation(s).

35. The Club considered that the inability to capitalise these expenses resulted from the unique circumstances of the project site, and it would be unfair for them to be included in the PSR Calculation. The PL Board was eventually persuaded; and, in August 2021, the Club and the PL entered into an agreement ("the August 2021 Agreement"), recognising the exceptional nature of the new stadium project and the positive impact it would have on both the local community and the long-term security of the club, and effectively agreeing how the un-capitalised (and non-capitalisable) new stadium project costs incurred prior to the start of the financial year in which planning permission was granted were to be treated. The parties agreed that Club would not be in breach of the PSR unless its PSR Calculation for "Relevant Seasons" (which included Season 2021-22) exceeded the £105m threshold "plus such proportion of the Stadium Costs [i.e. the £39m costs referred to above] as falls to be reported in the relevant period". In consideration of these uncapitalised costs being excluded, the Club was required to comply with to a number of conditions, including (i) disclosure obligations relating to the total of its player services costs for its professional players, including salary (both fixed and contingent), all tax and pension liabilities and image rights payments (i.e. "Player Service Costs"), the Club's strategy for player acquisitions and disposals, and forecasts of commercial income and profit and loss on player transactions, (ii) the obligation to obtain prior approval from the PL in respect of the proposed registration of any player where the total cost of registration exceeded £5m, and (iii) limiting its Player Service Costs to £140m and £135m in Seasons 2021-22 and 2022-23 respectively.

36. Where the PL considers that a breach of rule E.51 has occurred, as indicated above, that must be referred to a Commission in the form of a complaint. The Commission deals with it in accordance with the procedures set out in the PL Rules.

37. So far as sanction is concerned, rule W.40 provides:

> "Upon finding a complaint to have been proved the Commission shall invite the Respondent [club] to place any mitigating factors before it."

38. Rule W.51 gives the Commission wide powers in relation to sanction in respect of diverse breaches of the PL Rules. After considering any mitigating factors put forward, it has the power to make any "order as it thinks fit"; but expressly including a reprimand, a fine, compensation, a points deduction and a recommendation that a club should be expelled from the PL. However, the PL has not issued any policy or other guidance as to how any sanction (and, notably, how any sanction for a breach of rule E.51) should be approached or assessed within that wide discretion.

39. Because referrals of a breach of rule E.51 to a Commission are mandatory, it can be said that, since their inception in Season 2013-14, on the basis of its PSR Calculation as approved by the PL, prior to Everton in respect of Season 2021-22 (and leaving aside one other set of pending proceedings), no club had breached the £105m upper loss threshold. The Commission in this case was the first to issue a decision in relation to sanction for breach of rule E.51. The significance of this is that other clubs appear to be able to stay within the mandated upper loss threshold of £105m.

The EFL Profitability and Sustainability Rules

40. Before turning to the detail of this appeal, there is one other background matter to which we should refer, namely the similar FFP rules and guidance adopted by the EFL. The EFL is another major English football league organiser, which administers three leagues forming part of the same pyramid structure as the PL (i.e. the Championship, League One and League Two), PL clubs being relegated to and promoted from the EFL Championship at the end of each season.

41. The EFL pursues the aims of FFP in its Championship Profitability and Sustainability Rules, found now in Appendix 8 of the EFL Regulations ("the EFL P&S Rules"). These are relevant to this appeal because the Club contend that the Commission erred in failing to take them – and guidance issued under them – as a relevant comparator.

42. The general architecture of the EFL P&S Rules is similar to the PSR. There is the same graduated approach to loss that is derived from a P&S Calculation in respect of three financial years which is performed in much the same way as a PSR Calculation for a PL club, with similar consequences for similar categories of loss as set out in paragraph 31 above. However, the minimum loss threshold (below which no steps are taken) is £5m rather than £15m; and the maximum loss threshold (above which is a breach of the rules) is £39m rather than £105m.

43. Another difference is that, in 2018, the EFL issued Sanctioning Guidelines ("the EFL Guidelines"). These do not form part of the EFL Regulations, and are clearly only guidance and not binding on any EFL Disciplinary Panel which finds a breach of the EFL P&S Rules. The genesis of the Guidelines was referred to by an EFL Arbitration Panel on appeal from an EFL Disciplinary Commission in Sheffield Wednesday Football Club v Football League Limited (SR/196/2020) (4 November 2020) (Sheffield Wednesday) at [84]:

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

44. The extent to which the EFL Guidelines have been the subject of consultation with relevant EFL clubs is not clear from the evidence before us; but they have been in place for five years, and do not appear to have been changed or challenged in that time. Indeed, in the reported individual cases of which there are a number (including Sheffield Wednesday), far from being challenged, they appear to have been accepted and used as non-binding guidelines.

45. In the EFL Guidelines, it is said that: "For each breach, the Board will instruct the Executive to seek a sporting sanction of a points deduction based on [a] formula, adjusted to include any aggravating factor". In respect of the "formula", the penalty for a breach of the EFL P&S Rules is a deduction of 12 points in the season

following the breach; but points are taken away from that deduction starting point if the amount of the overspend is less than £15m over the maximum loss threshold of £39m. The deductions are not in a straight line, but are £2m-£2.5m per point, so if the P&S calculated loss is £39m-£41m (a breach of less than £2m), then nine points are removed from the deduction (leaving a minimum of a three point deduction); and, if the loss over £54m (a £15m breach), no points are removed, so that the full 12 point deduction is applied. In short, there is a graduated points deduction based on amount by which the maximum loss threshold is breached of between three and 12 points. These thresholds are moderated if the club is in the PL for one of the seasons which fall into the assessment.

46. In addition:

    (i) Further points are removed from the deduction on the basis of "trend", because this "shows an intent to comply, even if they have fallen short". One point is removed from the deduction if T is less than that for T-1; but two points if the loss for T is less than that for T-1, and the loss for T-1 is less than that for T-2.

    (ii) The EFL Board can request up to an additional nine points penalty, and any other penalty it considers appropriate, for any aggravating factors. The Guidelines say that "the aggravated breach principle is to ensure that all factors can be taken into account". However, it is clear that a Disciplinary Commission must also take into account mitigating factors as having the potential for reducing the points deduction otherwise indicated by the Guidelines (see, e.g., Sheffield Wednesday at [113]-[114]).

Commission/Appeal Board Procedure

47. The PL Rules as agreed by all PL clubs provide that disciplinary proceedings before any Commission and Appeal Board shall be confidential and heard in private (with certain limited exceptions which do not apply in this case) (rule W.82). However, final awards of any Commission or Appeal Board are required to be "confirmed publicly and published on the League's website" (rule W.82.2). That means that, other than as referred to in final awards, the public does not have access to the evidence, submissions or the hearing. Consequently, before we turn to the issues before us, we consider it will be helpful to explain briefly both the nature of these proceedings and the procedures by which they have been determined.

48. The PL made its initial Complaint under rule W.24 of the PL Rules on 24 March 2023 requesting urgent consideration but not then stating the level of sanction it considered appropriate. The Club answered the Complaint on 28 April 2023, among other things denying that there had been any breach of the PSR. The PL replied on 26 May 2023.

49. A Commission was appointed under rule W.19, the three members (all independent of both the PL and the Club) being selected by the Chair of the Judicial panel (who is similarly independent). Two members of the Commission are lawyers, experienced in the field of regulation in sport generally and football in particular; and the third is an accountant, again experienced in football regulation.

50. Extensive written evidence, including expert reports focusing on accountancy matters, was served by each side between August and October 2023. On 10 August 2023, the PL put forward a proposed sanctions approach including a suggested formula for determining sanctions in this case. On 29 September 2023, the Club served an amended Answer, for the first time admitting breach of the PSR but not in the sum claimed by the PL.

51. There was a hearing in private before the Commission, over five days (16-20 October 2023) of which a considerable proportion was taken up with hearing oral evidence and cross-examination of witnesses. The Commission's 41-page Decision was issued about four weeks later, and published on the PL website.

52. The Club served Notice of Appeal on 1 December 2023 together with summary grounds of appeal. Under the PL Rules, appeals of this kind are determined by an Appeal Board of three members, again all independent and again appointed by the Chair of the Judicial Panel. The Appeal Board Chair is required to have held judicial office. The other two Board members in this case are senior barristers. All three members have experience of regulatory cases in sport generally and football in particular. Parties have the right to object to any member of an Appeal Board hearing the case (rule W.68). No objection was made in this case.

53. The Appeal Board gave directions, agreed by the parties, for the procedure on the appeal and a timetable to enable it to be heard as soon as the parties could be ready. The appeal was heard over three days (31 January to 2 February 2024). Each side provided the Board with comprehensive written submission in advance, elaborating on the summary grounds of appeal and response, with references to over 100 authorities from the UK and elsewhere. The parties selected the material from the proceedings before the Commission that they wished the Board to consider. This resulted in a large set of appeal bundles which included the key factual and expert evidence, transcripts and the arguments that were made before the Commission. The Board was invited to read over 3000 pages of factual documents, and was referred to over 3000 pages of legal authorities.

54. Written submissions were prepared by the teams on each side. Whilst these are often referred to as "Skeleton Arguments", they were each substantial, comprehensive written submissions and we will refer to them as such. During the hearing, additional notes and references were provided from each side on specific issues.

55. At the hearing before the Appeal Board, Counsel made the oral submissions on behalf of the Club and on behalf of the PL, dealing with questions to clarify and test points. The hearing timetable of two and a half days agreed by the parties was extended for an additional half day to enable each side to have sufficient time to make their arguments.

56. In our view, the preparation, presentation and advocacy, written and oral on both sides were of exceptional quality and comprehensiveness: arguments were developed with skill and presented with commitment and force.

57. We indicated at the end of the hearing that we would provide our Decision by the end of February 2024. In accordance with the practice of the High Court and adopted by the Commission, a draft of this Decision was provided to the parties' solicitors on 19 February 2024 on a confidential basis to enable them to identify any typographical errors before publication. We received a few additional comments on peripheral matters, and this finalised version has taken those comments into consideration where appropriate. The Board invited the parties to agree a timetable for distribution and publication of the Decision. The parties agreed between themselves that the Decision should be handed down on 26 February 2024, with which we have complied. This Decision, to which each member of the Board has fully and equally contributed, is unanimous.

The Everton Complaint and the Commission Decision

58. We now turn to the substance of the Complaint against the Club, and how the Commission dealt with it.

59. The Commission helpfully set out the procedural history in paragraphs 35-55 of its Decision, and it also summarised the factual background to the Complaint in paragraphs 15-34. That Decision has been published, and we need not repeat that background here. We restrict ourselves to the aspects of the history directly relevant to this appeal.

60. On 26 August 2022, the Club submitted materials to the PL in respect of its PSR Calculation for Season 2021-22, in a document entitled "Everton Football Club FY22 PSR Submission" ("the August 2022 PSR Submission"). (In the documents and submissions, the shorthand "FY21", "FY22" etc are used for "the financial year 2020-21", "financial year 2021-22" etc: and in this Decision, we adopt the same abbreviations.) The Club submitted that it was PSR compliant as at 30 June 2022 (the end of FY22) after three "additional reasonable and justifiable items" were taken into account, namely (i) the allocation of interest charges relating to the new stadium to Everton SDL (£17.4m), (ii) the proportion of the PL Transfer Levy relating to youth development (£5.8m), and (iii) "… the Club's exceptional claim arising from the termination of the contract of a player ['Player X'] (circa £10m)". It also effectively reserved its right to raise, if necessary to reduce the PSR Calculation to below £105m, the contraction of the transfer market as a result of COVID-19 as the basis of a further deduction (of "up to £88m").

61. The PL Board was unconvinced that those deductions could properly be made, and informed the Club accordingly.

62. On 1 March 2023, the Club submitted to the PL Board a copy of its audited accounts for FY22; and, the following day, submitted a calculation of its aggregated Adjusted Earnings Before Tax for FY22 based on those accounts. It submitted that it was not in breach of the PSR because, taking into account the various deductions which it had raised in in the August 2022 PSR Submission and still claimed, the PSR calculated loss was less than £105m.

63. However, the PL again did not accept these deductions, and calculated the PSR Calculation loss as £120.8m; and it referred the matter to a Commission under rule E.51, as it was obliged to do.

64. In the course of the proceedings before the Commission:

    (i) the PL re-calculated the PSR Calculation loss to include an additional £3.8m interest in respect of the new stadium loan which it had deducted in error (on the basis, the PL said, of a misrepresentation by the Club), so the PSR Calculation loss was £124.6m which breached the upper loss threshold of £105m by £19.5m; and

    (ii) shortly before the hearing, the Club conceded some of the deductions, so that it accepted a PSR Calculation loss of over £105m (and, hence, breach), but contended that the loss was only £114.7m, a breach of the upper loss threshold of only £9.7m.

    The £9.8m difference between the Club and the PL was accounted for by (i) £2.2m in respect of interest paid by the Club on commercial loans from Rights & Media Funding Limited ("RMF") and Metro Bank plc ("Metro") which, it was said, was effectively passed on to Everton SDL and was attributable to the pre-planning permission stage of the new

stadium project, and (ii) £7.6m in respect of repaid Transfer Levy which, it was said, was investment in youth development.

65. The Commission held that neither amount was a proper deduction in the PSR Calculation, and the Club has not appealed either finding. The Commission consequently found that Everton breached the upper loss threshold by £19.5m and, again, there is no appeal against that conclusion.

66. In respect of sanction, the PL submitted that only an immediate points sanction was appropriate in this case; and, as to amount of points, it submitted that, given the purpose of the PSR, (i) there should be a starting point of a six point deduction, and (ii) that starting point should be increased by one point for every £5m the PSR Calculation was over the upper loss threshold of £105m plus £5m (i.e. in this case, an additional three points reflecting the breach by £19.6m); by an additional point for the Club's continued overspending despite repeated warning from the PL; and a further significant increase because of the Club's misrepresentations to the PL in its PSR submissions in relation to the funding of the new stadium and its intention to sell a particular player. The PL therefore sought a sanction of an immediate at least 12 point deduction.

67. The Club contended that there should be no points deduction. However, it also relied upon the EFL Sanctions Guidelines which suggested a 3-4 point deduction as a starting point (if the percentage above the upper loss threshold was extrapolated across from the EFL scheme to the PSR scheme), reduced by the following mitigation factors (i) post-planning permission interest in relation to the new stadium which, whilst it had not capitalised, was "good" expenditure on a capital project which could have been capitalised, and for which the Club should have some credit; (ii) the downward trend within the PSR Calculations, the loss in T-1 being less than in T-2, and less in T than in T-1 (which would result in the removal of two points from the points deduction under the EFL Guidelines); (iii) its claim against Player X, whose services the Club lost in unexpected and unpredictable circumstances; and the reasons for not pursuing him (which were, it was contended, commendable); (iv) the unexpected and unpredictable loss of sponsorship as a result of the sanctions imposed as a result of the Russian invasion of the Ukraine; (v) the adverse impact of COVID-19 in the market for players; and (vi) the cooperation of the Club with the PL in respect of PSR matters. In the circumstances, the Club submitted that the appropriate sanction was a fine or, at most, an inward transfer (registration) ban.

68. The Commission proceeded to consider a number of matters put to it by the parties as mitigation or aggravation, and the principles to be applied in approaching sanction in cases such as this; before imposing the sanction of an immediate 10 point deduction.

69. It is against that sanction which the Club now appeals.

Appeal Criteria

70. This appeal is brought under rule W.62 of the PL Rules, which gives a club the power to appeal from the decision of a Commission in relation to a sanction imposed. Where, as here, there is no permission to adduce fresh evidence, it is common ground that, by virtue of rule W.74, an appeal is by way of review. So, an Appeal Board cannot change the Commission's decision just because the Board would have taken a different view on the facts. However, the Board must set aside a decision of the Commission if, among other things, it has made a

material error of law which may have affected its ultimate decision, or if it acted in a way that was procedurally unfair. "Errors of law" for these purposes include (i) an error in approach, (ii) taking into account something which, as a matter of law, should not have been taken into account, and (iii) failing to take into account something which, as a matter of law, should have been taken into account. Where the Board sets aside a Commission decision, if it can be, that decision has to be re-made; and, where a sanction is being appealed, it is usual for the Board to re-evaluate the appropriate sanction, applying the law correctly and giving due deference to those parts of the Commission's decision that are unaffected by any error. Before us, the parties were agreed that, if we set aside the Commission's sanction, we should correct the error rather than remit it, if we properly and justly could do so.

71. It is also common ground that, just as they have been imported into professional regulatory proceedings, the rules governing appeals by way of review in the court system can be applied to an appeal such as this, with appropriate recognition of the sport regulatory context.

72. CPR rule 52.21(3) provides that:

> "The appeal court will allow an appeal where the decision of the lower court was—
>
> (a) wrong; or
>
> (b) unjust because of a serious procedural or other irregularity in the proceedings in the lower court".

"Serious procedural or other irregularity" includes a breach of the requirement for the tribunal below to act with procedural fairness.

73. The correct approach in respect of an appeal in proceedings in respect of a breach of a regulatory regime, but in the context of a profession, was considered by the Divisional Court (Sharp LJ and Dingemans J, as they then were) in General Medical Council v Jagjivan [2017] EWHC 1247 (Admin) ("Jagjivan") at [40]. In a passage later approved by the Court of Appeal (Sastry v General Medical Council [2021] EWCA Civ 623 at [33]), Sharp LJ giving the judgment of the court said:

> "In summary:
>
> (i) Proceedings under [sections 40 and 40A of the Medical Act 1983 (the provisions giving a right of appeal against a Medical Practitioners Tribunal to the Administrative Court)] are appeals and are governed by CPR Part 52. A court will allow an appeal under CPR rule 52.21(3) if it is 'wrong' or 'unjust because of a serious procedural or other irregularity in the proceedings in the lower court'.
>
> (ii) It is not appropriate to add any qualification to the test in CPR Part 52 that decisions are 'clearly wrong'….
>
> (iii) The court will correct material errors of fact and of law…. Any appeal court must however be extremely cautious about upsetting a conclusion of primary fact, particularly where the findings depend upon the assessment of the credibility of the witnesses, who the Tribunal, unlike the appellate court, has had the advantage of seeing and hearing….

(iv) When the question is what inferences are to be drawn from specific facts, an appellate court is under less of a disadvantage. The court may draw any inferences of fact which it considers are justified on the evidence: see CPR rule 52.11(4).

(v) In regulatory proceedings the appellate court will not have the professional expertise of the Tribunal of fact. As a consequence, the appellate court will approach Tribunal determinations about whether conduct is serious misconduct or impairs a person's fitness to practise, and what is necessary to maintain public confidence and proper standards in the profession and sanctions, with diffidence….

(vi) However, there may be matters, such as dishonesty or sexual misconduct, where the court 'is likely to feel that it can assess what is needed to protect the public or maintain the reputation of the profession more easily for itself and thus attach less weight to the expertise of the Tribunal…'…. As Lord Millett observed in Ghosh v General Medical Council [2001] UKPC 29 at [34], the appellate court 'will accord an appropriate measure of respect to the judgment of the committee…. But the [appellate court] will not defer to the committee's judgment more than is warranted by the circumstances'.

(vii) Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public.

(viii) A failure to provide adequate reasons may constitute a serious procedural irregularity which renders the Tribunal's decision unjust…."

These principles are generally applicable to disciplinary proceedings in a sporting context, and in particular an appeal under rule W.62 of the PL Rules. Although the PL did not formally accept that these principles applied to appeals to the Appeal Board, it realistically said in its Written Submissions that CPR Part 52 was an "obvious analogy" but needed to be applied with care and in a manner sensitive to the different context of disciplinary proceedings. We do not disagree with that; and have approached the appeal criteria on that basis although, for the reasons we set out below, we do not consider that this case turns on precisely how the approach to the appeal is formulated.

74. As indicated in those principles, the deference due to the findings and conclusions of the Commission depends upon the particular finding or conclusion being challenged. The Commission had two advantages over this Appeal Board, which generally require us to give deference to its findings and conclusion. First and most importantly, the Commission heard evidence, at some length from a number of witnesses, and therefore the deference given to primary findings of fact that turn on that evidence must be considerable. Second, the Commission was a specialist tribunal and had a member who was an accountant, with particular experience of accountancy in football. On the other hand, if the Commission made an error in its approach to a matter, or some other error of law, deference would play no part: that would be an error which, if material, this Board would be bound to correct.

The Grounds of Appeal: Introduction

75. In its Grounds of Appeal, the Club makes the overall argument that: "The sanction imposed upon [the Club] by the Commission of an immediate deduction of ten

league points was flawed, unduly harsh, disproportionate in all the circumstances and lay outside the range of reasonable sanctions". The Grounds of Appeal then set out particulars (i.e. detailed reasons why, in the Club's view, the Commission went wrong). In its Written Submissions for the hearing, the Club helpfully restructured its appeal into nine grounds, which Mr Rabinowitz confirmed were exhaustive of the grounds pursued; and, at the hearing itself, it gave more emphasis to some than to others. All fall within the scope of the Notice of Appeal. Before the Appeal Board, submissions were made on the basis of these nine grounds, and these are the grounds that we will cover and determine in this Decision.

76. The grounds are as follows. For convenience and the reasons set out immediately below, we have re-ordered them slightly from the order in which they appear in the Written Submissions.

(i) The proper approach to mitigation and aggravation in the context of a breach of the PSR (Ground 2).

(ii) The failure to treat cooperation as mitigation (Ground 3).

(iii) The failure to treat the costs of the new stadium project as mitigation (Ground 4).

(iv) The failure to treat the impact of the sanction on the Club as mitigation (Ground 8).

(v) The error in approach to overspending (Ground 5).

(vi) The error in approach to sporting advantage (Ground 6).

(vii) The failure to consider lesser alternative sanctions such as a transfer ban (Ground 9).

(viii) The findings of (i) "less than frank" and (ii) a breach of rule B.15 (utmost good faith) as aggravating factors (Ground 1).

(ix) The failure to impose a sanction consistent with existing and relevant benchmarks (Ground 7).

77. Before we deal with those grounds, it would be helpful if, at the outset, we briefly summarise our conclusions. In his submissions, Mr Rabinowitz focused on two grounds, namely:

(i) Ground 1: In finding that the Club, in making representations as to funding in its August 2021 PSR Submission, was less than frank and in breach of rule B.15 (utmost good faith) – and then treating those matters as aggravating factors with regard sanction – the Commission erred in law and breached the Club's right to a fair procedure. This error tainted the exercise performed by the Commission in assessing an appropriate sanction.

(ii) Ground 7: In failing to consider or impose a sanction taking into account relevant benchmarks, the Commission erred in law. This error too undermined the exercise performed by the Commission in assessing an appropriate sanction.

For the reasons set out below, these two grounds are successful. We do not accept the criticism of the Commission's Decision on the other grounds which, again for the reasons set out below, we dismiss. For convenience, we deal first with unsuccessful Grounds 2-6 and 8-9, clearing the decks before we go on to consider successful Grounds 1 and 7.

78. Our conclusion in respect of Grounds 1 and 7 requires us to allow the appeal, and set aside the decision of the Commission to impose an immediate ten point sanction. The exercise of assessing an appropriate sanction therefore needs to be re-performed. Both parties submitted that, in these circumstances, it would be appropriate for this Appeal Board to determine the appropriate sanction afresh on the basis of the findings of the Commission insofar as they remain good, giving them such weight as we consider appropriate, and the submissions made to us. That was proposed by both parties, unless justice required remittal. We consider that we can properly and justly determine the appropriate sanction, and indeed that we are in as good a position as any Commission to do it. We deal with that issue in paragraphs 193-229 below.

79. We now turn to the individual grounds.

Ground 2: The proper approach to mitigation and aggravation in the context of a breach of the PSR

80. In respect of aggravation and mitigation, it is well-recognised in the context breaches of the criminal law that circumstances in relation to the offence or the offender may warrant a higher or lower sentence/sanction, because they indicate higher or lower culpability and/or they reflect higher or lower consequential harm. Thus, in Archbold Criminal Pleading, Evidence and Practice 2024, to which we were referred, it says (paragraph 5A-41):

> "Aggravating factors are those factors which indicate a higher level of culpability on the part of the offender or greater degree of harm than that inherently present in the offence. The presence of such factors aggravates the seriousness of the offending, and accordingly increases the appropriate sentence."

Conversely, it says mitigating factors are those which reduce the severity of the sentence (paragraph 5A-40), by lowering culpability or harm. A particular mitigating or aggravating factor may focus on the offence or the offender.

81. In our view, as a matter of principle, the circumstances of a breach of rule E.51 may similarly aggravate and/or mitigate for sanctioning purposes under the PSR in the same ways. This is reflected in rules W.50 and W.51, which refer to the Commission inviting a respondent to a complaint found in breach "to place any mitigating factors before the Commission" and to the Commission having powers to sanction "having heard and considered such mitigating actors (if any)…". It is uncontroversial that the Commission must consider and take into account not only mitigating circumstances relied on by a respondent club, but also potentially aggravating factors of the particular breach by the club to which its attention is drawn by the PL.

82. However, circumstances are only mitigating or aggravating when marked against the aims of the regime in which sanctions are being imposed. Therefore, in a safeguarding context, whilst punishment of someone who has committed a breach of safeguarding regulations and maintaining the integrity and public confidence in

the (e.g.) profession or sport being regulated are of course relevant, the overwhelming purpose of the sanction is usually to ensure that children and other protected persons are kept safe. Similarly, in the context of the regulation of professions, whilst the rights and interests of any professional person being sanctioned for breach are of course relevant, often the "most fundamental purpose" of sanction is to maintain public confidence in the profession, so that in respect of a proper sanction, the consequences for the individual professional and their family may be serious if not tragic, and a sanction may appear harsh if viewed in only punitive terms (see, e.g., Bolton v Law Society [1994] 1 WLR 512 at pages 519-520 per Sir Thomas Bingham MR). As has been said in the context of sanction for professional disciplinary breaches: "Matters of mitigation are likely to be of considerably less significance in regulatory proceedings than to a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public" (Jagjivan at [40], quoted at paragraph 73 above). We have already considered the aims of FFP and the PSR (see paragraphs 17-25 above). Mitigating and aggravating circumstances – like the assessment of proportionality (see paragraphs 193 and following below above) – must be considered through the prism of those aims.

83. Mr Rabinowitz submitted that the Commission erred in its approach to aggravating and mitigating factors, by approaching them on a binary basis, as matters which either "stand" or not; and, if not, then they are excluded entirely from assessment. He submitted the correct approach would have been for the Commission to have taken these factors into account, and given them the weight that it considered appropriate. By adopting the approach that it did, the Commission (wrongly, Mr Rabinowitz submitted) left out of account several mitigating factors which it ought to have taken into account, notably (i) the Club's cooperation with the PL, (ii) the difficulties faced by the Club as a result of sanctions against Russian entities following the invasion of Ukraine, in particular with regard to a prospective sponsorship deal with USM Holdings Limited ("USM") (a company owned by Alisher Usmanov, a Russian citizen with whom Mr Moshiri had jointly invested in Arsenal Football Club before Mr Moshiri purchased Everton)), and (iii) the loss to the Club when it decided not to sue Player X whose contract was terminated following his arrest in relation to alleged sexual misconduct with a child.

84. In relation to this issue, the Commission set out its approach to aggravating and mitigating factors as follows (paragraph 99):

> "The principles are clear. The party asserting an aggravating or mitigating factor bears the burden of proving that factor on the balance of probabilities. The Commission considers that there is no need for the assessment exercise that it must carry out to be complicated. When assessing culpability the Commission may take into account any feature of the case that tends to increase culpability, and any feature that reduces it: it is a fact sensitive assessment that must be carried out in every case. An important feature in that factual analysis is to consider the extent by which the PSR threshold has been exceeded: the greater the excess, the greater the culpability. The reasons for the excess are likely to be relevant, and will be capable of increasing or reducing the culpability depending on the facts of the individual case."

85. It is clear from that passage that the Commission had in mind, first, both ways in which a circumstance may aggravate or mitigate in this context, namely it may indicate a higher or lower culpability, and/or it may go to increase or decrease consequential harm. The Commission therefore, for example, appears to have

regarded the amount of the PSR calculation loss over £105m as being an aggravating factor. However, it used the word "culpability" to cover both elements. In our view, there is nothing of any substance wrong in that; so long as it is remembered that there are two elements, and the "offence" under rule E.51 is one of strict liability: the rule is breached simply by the PSR Calculation showing a loss in excess of £105m, irrespective of the intention of the Club (see paragraph 32 above). There is no necessary correlation between amount of the loss over £105m and "culpability" in the true, legal sense of that word; but the more the loss, the more the aggravation for sanctioning purpose. The analogy is not of course exact, but the £105m threshold is something like a speed limit. If one drives at 60mph in a 30mph zone, one is guilty of the offence as is a person who drives at 35mph in the same zone; but it is a more serious breach and, everything else being equal, the penalty will reflect that.

86. The Commission also had in mind, second, that: "When assessing culpability the Commission may take into account any feature of the case that tends to increase culpability [in the sense the Commission used that word], and any feature that reduces it". We agree with that proposition. Circumstances which do not tend either to increase or reduce culpability, or to reflect the amount of consequential harm, neither aggravate nor mitigate for sanctioning purposes, and can and must be left out of account.

87. In considering whether any identified circumstances tend to increase or decrease culpability or harm in a specific case, a Commission must consider the circumstances in context and determine whether they do indeed have that tendency. Although we would not necessarily have used the word, that is a "binary" issue, in respect of which, as the Commission recognised, the burden of proof (of showing tendency) lies upon the party alleging the factor is an aggravating or a mitigating factor. In respect of a possible mitigating circumstance, if the respondent (in this case, the Club) does not satisfy that burden of proof on that issue, then those circumstances are left entirely out of account. If the respondent satisfies the Commission as to that tendency, then the Commission must take that circumstance into account, giving it the weight that it (the Commission) considers appropriate.

88. In our view, that was the purport of paragraph 99: and, in our view, that approach was and is correct.

89. Before we turn to the particular matters raised by the Club under Ground 2, it would be helpful if we dealt with three overlapping general matters in relation to the proper approach to mitigation and aggravation in this context that were raised during the course of the hearing.

90. First, a particular regulatory scheme might (e.g.) set a relatively high starting point sanction and then expressly provide that cooperation with the regulating authority will be reflected in a reduction in severity. However, that would be unusual, in effect setting an artificially low level for expected cooperation. Normally, those who are regulated by a scheme are expected to cooperate reasonably with the regulating authority in any investigation and any enforcement proceedings. That is reflected to some extent in the criminal justice system. We appreciate the obvious differences, notably the duties of a prosecutor to give disclosure which do not fall on a defendant in the same way. However, in that system, a reasonable level of cooperation is expected from those accused of crimes and defendants; and, if no more than that level of cooperation is given, then that will not be a mitigating factor when it comes to sentence. A plea as a mitigating circumstance

is dealt with in a way which recognises its particular value to the criminal justice system (and so to the public interest), particularly if early. But, otherwise, only levels of cooperation over that which is to be reasonably expected warrant any reduction in sentence.

91. We are not of course dealing here with criminal proceedings: we are dealing with a regulatory scheme which forms part of a joint venture to which all PL clubs are a party, each of which has agreed to the standard of required conduct and the enforcement regime provided in the PL Rules. Because the PL is a joint venture, the costs of enforcement against one club inevitably falls on all the clubs by reducing the money available for distribution. In that context, we consider that the reasonable level of cooperation to be expected of clubs in respect of the PSR mechanics and process is relatively high. A club cannot plead cooperation at that level as a mitigating circumstance. Only where the level of cooperation is exceptional (i.e. above the level reasonably expected) would it be a mitigating circumstance. Where a club's cooperation falls below that level, then that may be an aggravating circumstance.

92. Second, flexibility in the PSR threshold is restricted because the PSR Calculation is defined in terms of a club's audited annual accounts which must be prepared under recognised accounting standards and approved by the club's directors in compliance with Companies Act 2006 requirements (including a certificate that they be true and fair). While we accept that, in respect of some items, there might be issues as to what the accounting standards require, the wording of the PL Rules means that on many matters there is little scope for argument as to what is and is not to be counted in for the purposes of the PSR Calculation. The scope of the Calculation is, to a large extent, visible and predictable for clubs both in real time and when they prepare their audited annual accounts.

93. Third, where a club has breached the PSR, it cannot plead in mitigation that the breach resulted from adverse circumstances which were of a nature and level that may well befall any PL club during the course of a season, even if the precise circumstances which in fact befall the club in a particular season might not have been foreseeable. For example, during the course of a season, each club is likely to lose the services of different players, sometimes for lengthy periods, for a wide variety of reasons, often by virtue of injury but also for other reasons such as international duties, family or other personal reasons, or a falling out with or loss of enthusiasm for the club. Unless the club can show that the likelihood of the level of the loss of players' services was significantly and unforeseeably high, then the loss of those services is not a mitigating factor. It is simply an aspect of the ordinary business of professional football, certainly at PL level.

94. Similarly, it is not a mitigating circumstance if the aspirations and predicted success of a club prove, over the season, to have been (reasonably or unreasonably) unfounded. Such circumstances again fall within the ordinary course of conducting the business of professional football, and cannot of themselves reduce the culpability of the club for the breach. We also consider it would be unfortunate if determination of a level of sanction required a Commission to examine a club's documents and other materials to determine (on the basis of possibly inadequate information) whether its historical projections for (e.g.) revenue and/or likely finishing position in a table were unduly over-optimistic. We do not consider that the PL Rules require such an approach.

95. Fourth (and closely related to our third point), the PSR are designed to promote and encourage prudent financial planning within each PL club. As we have

emphasised, breach of rule E.51 of the PSR is strict liability. It is less than prudent financial planning for a club to sail so close to the upper loss threshold for breach of £105m over a three-year PSR such that, as a result of circumstances arising in the ordinary course of conducting the business of professional football, that threshold is breached. That is particularly so given the scheme of the PSR which take account of several years loss on a rolling basis, which alleviates the effect of circumstances in the ordinary course of business being particularly adverse in (say) one year.

96. We now turn to the three particular matters raised by the Club as mitigation.

Cooperation

97. The way in which the Commission dealt with the Club's cooperation as a potential mitigating factor is the subject of Ground 3, which we deal with below (paragraphs 111-116).

Russian Sanctions

98. Mr Moshiri's evidence was that he hoped Mr Usmanov would invest heavily in an equity stake in the Club. The Club had already, on 7 January 2020, entered into an option and naming rights agreement for the Club's training facility and new stadium with USM, Mr Usmanov's company. This was to take effect from Season 2024-25, i.e. after the stadium had been opened; but, Mr Moshiri said, negotiations had reached an advanced stage to bring this forward to FY22, so that the naming rights sponsorship of £10m per season would commence during the construction phase in that financial year. The possibility of this revenue in FY22 was lost, he said, because of the sanctions imposed on Russian entities, including Mr Usmanov and USM, as a result of the invasion of Ukraine; which meant that the Club had to withdraw from further negotiations with him. This loss of chance, it was submitted, should have been taken into account by the Commission as mitigation.

99. However, in the Commission's view, this was not a head of mitigation upon which the Club could successfully rely to reduce the penalty. It did not diminish the Club's culpability because (i) the prospects of an agreement being concluded were uncertain, no documents having been adduced which showed that receipt of monies was probable (paragraph 124); and (ii) the loss of a proposed agreement, even if the agreement had been likely, was "no more than the type of event that businesses have to contend with as part of their daily life" (paragraph 125).

100. As to (i), Mr Rabinowitz referred us to Board Minutes for both the Club and Everton SDL in January 2022, which indicate that legal work had been done on the naming agreement, which it seems needed to be signed before third-party senior debt was obtained; and they were waiting for Mr Moshiri's instruction. We know that Russia invaded Ukraine on 24 February 2022 and sanctions were imposed shortly afterwards. The naming agreement had not been concluded by then. In our view, on the evidence the Commission was entitled to say – and cannot be criticised for saying – that "no documents [had] been adduced which showed that receipt of monies [from this source in FY22] was probable". The Commission was in the best position to make this finding on the evidence.

101. But, in any event, as regards (ii), whilst we accept that, in certain circumstances, the loss of a chance might be a mitigating circumstance, as we have described, the Commission approached the issue of mitigation correctly, and was entitled to find (as it did) that the circumstances in respect of the loss of any chance so far as

Mr Usmanov/USM paying £10m in FY22 was concerned, was not such as to tend to reduce the Club's culpability in respect of breaching the PSR Rules. In our view, on the multi-factorial assessment of the evidence which it conducted, the Commission was entitled to conclude that this did not constitute a mitigating factor. In particular, we consider that the inherent uncertainties of whether any money might have come from this source in FY22 to which the Commission referred, were in themselves capable of reducing any weight of this as a mitigating factor very substantially and may alone have rendered it insignificant.

102. These uncertainties are compounded here because the existing agreement made between the Club and USM was not one which *would* have provided an additional £10m in the relevant year but for the invasion of Ukraine. There was, at best, only the chance that a re-negotiated agreement might have done so.

103. Thus, in our view, the argument in mitigation could be put no higher than that, had that chance (itself filled with other uncertainties) been fulfilled, then there would have been somewhat less of a breach (but still a significant breach). That is not a basis for a mitigating factor of any real weight.

104. However, we consider this ground of appeal fails for a shorter reason, emphasised by the Commission in paragraph 124 of its Decision. Whilst the precise circumstances of the loss of this chance of sponsorship (i.e. as a result of sanctions imposed on Russia as a result of its invasion of Ukraine) might not have been foreseeable, for any PL club, the loss of such chances during the course of a season is sufficiently foreseeable and a contingent risk against which, if a club acts with financial prudence as the rules require, the club should properly guard and steer a financial course that does not result in a breach of the PSR if such chances do not come to fruition as hoped or even expected.

Player X

105. The Club lost the services of Player X. Player X was, at the time of his arrival, the Club's record signing, and he was a successful and popular player. However, in Summer 2021, he was arrested on suspicion of child abuse and was suspended by the Club and then the FA. The circumstances of his suspension meant that the Club was entitled to terminate his contract which, on 23 August 2021, it did. In terms of the Club's P&L Account (and, hence, the PSR Calculation) that resulted in the net book value of the player (£9.1m) being written off, and additional losses of £0.9m for wages paid to the player for the period before 23 August 2021 when he could not provide any contractual services because of his suspension. The Club also lost the services of Player X on the pitch. Whilst the Club was advised that it had an economically viable claim against Player X, it did not pursue it because of concerns about his psychological well-being. The charges against the player were ultimately not pursued.

106. In its August 2022 PSR Submission, the Club submitted that this £10m loss was entirely unforeseeable, and no amount of business planning and prudent financial decision-making would have avoided suffering this loss; this loss resulted from the Club considering that it would not be appropriate to pursue an action against Player X which "everyone agrees would have an adverse impact on the player's welfare". The Club sought to have that £10m deducted from the costs side of the PSR Calculation.

107. As we understand it, by the time the matter had reached the Commission, the Club no longer contended that that sum should be deducted: rather, it submitted that it

was entitled to credit as a matter of mitigation for not pursuing an economically viable claim against Player X because of proper concern for his welfare.

108. In its Decision (paragraph 121), the Commission noted (i) the decision not to pursue Player X was a business decision taken by the Club which, as such, could not stand as mitigation, (ii) there was no evidence as to the player's psychological condition when the decision not to pursue him was taken, (iii) the value of the claim (£10m) was speculative, (iv) the claim may have faced difficulties, and (v) there was no evidence that Player X would have been able to meet any judgment made against him. The Commission then found (paragraph 122):

> "The circumstances surrounding Everton's claimed losses are the sort of events that occur in the management of football clubs where a player's services and value can be lost for a variety of reasons – most obviously because of injury, or a loss of form. It is not something that can stand as mitigation in these proceedings."

109. We consider there is no error here, for much the same reasons as with loss of the chance of the USM sponsorship. We accept that the precise circumstances of the loss of the services of this player (i.e. as a result of arrest pending possible criminal charges being brought against him, which resulted in his suspension by the Club and the FA, followed by the termination of his contract by the Club) might not have been foreseeable. We leave aside entirely the inherent uncertainties of the Club recovering any money from a claim brought against Player X for breach of contract that could properly be reflected in FY22, which relegated this to the loss of a chance at best. However, for any PL club, the loss of the services of a player or players during the course of the season for a variety of reasons (including, most obviously, injury; but PL clubs losing the services of players as a result of a player's actual or alleged misconduct are not rare) is foreseeable and a contingent risk against which, if a club acts with financial prudence, the club should properly guard. This was essentially the second ground relied upon by the Commission for denying this as a mitigating factor (paragraph 124 of its Decision). We consider this alone to be sufficient reason.

Conclusion

110. For those reasons, leaving aside the issue of cooperation with the PL (dealt with in Ground 3 below: see paragraphs 111-116), we conclude that the Commission made no error in its approach to aggravating and mitigating factors, nor did it err in the manner in which it dealt with the circumstances of the USM sponsorship and Player X as relied on by the Club in mitigation. We dismiss this ground.

Ground 3: The failure to give credit for cooperation as mitigation

111. The Commission recognised that "Everton engaged extensively with the [PL] in relation to the problems caused by the inability to capitalise pre-planning expenditure" (paragraph 131), but concluded that there was no feature of the Club's dealings with the PL that was of "such an exceptional nature that it should stand as mitigation of Everton' culpability" (paragraph 132). Mr Rabinowitz submitted that the Commission thus erred by excluding this mitigation factor altogether, rather than giving credit for the Club's extensive engagement with the PL.

112. Before the Commission, the PL accepted that cooperation with sport regulatory authorities in relation to an alleged breach of a code of conduct – such as the PSR

– could amount to mitigation, but whether it did (it said) depended on the circumstances of the case. In this case, it submitted that it did not; the Commission agreed; and we consider that it did not err in coming to that conclusion.

113. The Club said that it had behaved openly and responsibly in its dealings with the PL in relation to its PSR challenges, and that behaviour should stand as mitigation. But, as we have described (see paragraphs 90-91 above), reasonable cooperation and openness is a requirement of the contractual relationship between the PL clubs, and not in itself mitigation. We do not accept that, if cooperation with the PL in PSR matters is not positively rewarded in the form of a reduction in sanction, then clubs would be reluctant to bear what Mr Rabinowitz called "the risk of cooperation". We do not think that fairly describes what the Rules require from clubs as part of a sporting league that is also a joint venture. They require active and genuine cooperation, and accurate, true and fair financial reporting in accordance with recognised accounting standards and the Rules themselves. Compliance with such requirements is to be expected of clubs; and, welcomed by the PL as it no doubt is, that expected level of cooperation with the PL as the regulating/enforcing authority under the joint venture contract does not in itself reduce culpability (however that is defined) and is not mitigation. Something over and above that is required: in the word used by the Commission, something "exceptional".

114. Here, the Commission did not find any such feature; and, indeed, found as follows.

(i) The Club's extensive engagement with the PL in relation to its liability to capitalise pre-planning expenditure was in its own self-interest (i.e. self-serving), in that it sought (in the event, successfully) to persuade the PL that, contrary to the PSR, non-capitalisable expenditure should be deducted from the costs balance in the PSR Calculation. Whilst we fully accept that this is not positively aggravating, it is difficult to see how it reduces culpability in any way.

We have carefully considered the Club's evidence and submission on this issue of cooperation as a mitigating factor, including Appendix to the Club's Written Submissions (detailing the co-operation in the early period, the pandemic and post pandemic period and the circumstances surrounding the making and implementation of, and the Club's compliance with, the August 2021 Agreement) and the evidence (including underlying documents and presentation slides etc) relating to the history and the discussions about business plans. From that material, taken as a whole, it seems that a significant part of the "co-operation" sought to be relied on was directed to persuading the PL to accept the Club's approach to its finances, much of which was later abandoned. It is true that the Club was said to deserve credit for its "openness, transparency and proactivity" (in the words of the PL in 2020) but that was said in the context of the PL evaluating requests by the Club to be given favourable treatment with respect to its reporting perimeter. In our view, insofar as that is properly called "cooperation" in relation to the PSR, it is engagement with the PL as regulating/enforcing authority which is not of a kind which reduces culpability for a breach of rule E.51 or which should be reflected in a downwards adjustment of the sanction.

(ii) In respect of the financing of the new stadium, the Club had provided information that was materially inaccurate and maintained its arguments based on this inaccuracy for some time. We have exercised particular caution here because (a) the Commission proceeded on the basis that, in

making this misrepresentation to the PL, the Club was "less than frank" and in breach of rule B.15 (which we have concluded was a wrong basis: see paragraphs 163-181 below)); and (b) the circumstances in which this misrepresentation was given are a potentially aggravating factor, and it is important not to double count. However, we do not accept that the Commission's findings in relation to "less than frank" and rule B.15 were necessarily material to its conclusion that cooperation was not a mitigating circumstance; and, in any event, on the evidence, we ourselves would conclude that, on the basis of all the evidence and submission we have before us (including those referred to immediately above), that the level of the Club's cooperation with the PL is not a mitigating factor in this case.

(iii) The Club had not accepted the breach, at first at all and then not in the amount contended for by the PL; and had "acknowledged in the course of the hearing that the PSR Calculation included claims that were novel, some of which were persisted with in the Club's Answer but were subsequently abandoned shortly before the hearing" (paragraph 131 of the Commission's decision). Again, the analogy is not entirely apt; but, continuing the analogy with criminal proceedings drawn by Mr Rabinowitz and picking up on our general comments at paragraphs 90-91 above, far from pleading guilty at the first opportunity (which is a substantial mitigating circumstance in the criminal courts), the Club maintained that it was not in breach of rule E.51 at all until shortly before the Commission hearing. Following that hearing, the Commission made adverse findings on the Club's remaining contentions in relation to amount of the shortfall. Without needing to consider the reasonableness of the positions taken by the Club, that resulted in the PL expending time, energy and indeed money on refuting the arguments put by the Club; which has to be set against such cooperation that there might have been.

115. For those reasons, we do not consider that the Commission erred in concluding that the nature and extent of cooperation given by the Club to the PL in respect of its PSR Calculation did not reduce the Club's culpability for its breach of the PSR, and therefore did not act as a mitigating factor .

116. We dismiss this ground of appeal.

Ground 4: The failure to give credit for the interest costs of the new stadium project as mitigation

117. The respective experts of the Club and PL agreed that the Club incurred £12.3m in interest charges on its external loan facilities with RMF and Metro in the period relevant to the PSR Calculation for Season 2021-22 which had counted as costs in the PSR Calculation. Mr Rabinowitz referred to this as "good" spending, in that it was spending, not on players, but on an infrastructure project that the PL (and the PSR) encouraged. By the time the matter reached this Appeal Board, the Club accepted that none of these costs could be deducted from the costs in the PSR Calculation; but, Mr Rabinowitz submitted, the circumstances of the expenditure should have been taken into account as mitigation.

118. The background to this ground of appeal is as follows. We have already referred to FRS 102 (see paragraph 34 above). Section 25 of FRS 102 deals with "Borrowing Costs". Paragraphs 25.2 and 25.2A state:

> "25.2 An entity may adopt a policy of capitalising borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset as part of the cost of that asset. Where an entity adopts a policy of capitalisation of borrowing costs, it shall be applied consistently to a class of qualifying assets. Where an entity does not adopt a policy of capitalising borrowing costs, all borrowing costs shall be recognised as an expense in profit or loss in the period in which they are incurred.
>
> 25.2A The borrowing costs that are directly attributable to the acquisition, construction or production of a qualifying asset are those borrowing costs that would have been avoided if the expenditure on the qualifying asset had not been made."

Paragraph 25.2C concerns circumstances in which funds applied to obtain a qualifying asset from part of the entity's general borrowings. It is not necessary to quote that paragraph in full.

119. It was common ground between the experts that the effect of paragraphs 25.2 and 25.2A is that borrowing costs including interest charges are "directly attributable" to the construction of a qualifying asset (such as the new stadium) if those costs would have been avoided but for the construction project. Ben Johnson, the PL's expert whose evidence Mr Rabinowitz particularly relied upon before us, emphasised that it was only where the costs would (not may or might) have been avoided (Commission Transcript Day 3, pages 75-77 and 81). It is common ground that whether the costs would have been avoided was a question of fact for the Commission.

120. The Commission rejected the submission that pre-planning permission interest should be excluded from costs in the PSR Calculation for two reasons.

    (i) The RMF and Metro loans were not "general borrowings", so that capitalisation was not eligible under paragraph 25.2C (paragraph 81 of the Decision).

    (ii) Nor was the interest on the loans "directly attributable" to the new stadium project for the purposes of paragraphs 25.2A, because the Commission could not find on the balance of probabilities that the outcome of the counter-factual scenario relied upon by the Club (i.e. that if it had not been for the new stadium development the RMF and Metro borrowings would not have been incurred, or if incurred would have been paid off) would have occurred (paragraph 80).

121. Post-planning permission interest was not raised as a possible deduction from the costs in the PSR calculation, but only as mitigation. The Commission rejected it as a mitigation factor because:

    (i) Post-planning permission interest could not be capitalised for the same reasons as pre-planning permission interest could not (see immediately above).

    (ii) Furthermore, the counter-factual relied upon by the Club under this head included the proposition that this interest would have been capitalised, if the Club had thought about it; but, found the Commission, not only was it non-capitalisable, the Club would not have capitalised it even if they could have

done, because it wished to enhance the prospects of obtaining senior third-party loans.

122. Turning to the Club's submissions, insofar as Mr Rabinowitz sought to undermine the Commission's finding that the RMF and Metro loans were not "general borrowings", this was not a point at the forefront of his submissions; and rightly so. In our view, there is no basis for reversing that finding of fact. The Commission's finding is one of fact and evaluation in respect of which there was evidence in support; and, as such, it is unimpeachable.

123. The Club's main submission was in relation to the Commission's finding that the interest was not "directly attributable" to the new stadium project, because it would have been avoided altogether but for the new stadium construction project. Had there been no stadium (the argument went), Mr Moshiri would have loaned money to the Club to ensure that interest-bearing third-party borrowings were unnecessary and avoided. Although whether the interest would have been avoided in that way was a question of fact for the Commission, Mr Rabinowitz submitted that the available evidence all pointed one way, to the effect that it would have been avoided because Mr Moshiri would have loaned interest-free money to cover that debt. Mr Moshiri said that "the Club would simply not have carried so much external debt if it was not for the New Stadium Project" and that if the Club had not been undertaking the project then he "would have loaned the Club the money required interest-free" (paragraph 25 of his First Witness Statement dated 14 August 2023, and paragraph 2 of his Second Witness Statement dated 13 September 2023). Similarly, Mr Maryniak said that if the project had not been underway then "the facilities would either (i) not have been required at all or (ii) would have been repaid to RMF and Metro when [Mr Moshiri] injected money into the Club" (paragraph 155.3 of his First Statement dated 11 August 2023: see also paragraphs 13.4 and 18 of his Second Statement dated 12 September 2023). That evidence was supported by what had in fact happened when Mr Moshiri had bought the Club when he paid off the existing loan balance of £57.5m. If the evidence of Mr Moshiri and Mr Maryniak was to be rejected, then, as a matter of procedural fairness (Mr Rabinowitz submitted), the PL was obliged "fairly and squarely" to challenge it in cross-examination. This procedural requirement was established in Browne v Dunn (1893) 6 R 67, and recently reaffirmed by the Supreme Court in Griffiths v TUI (UK) Limited [2023] UKSC 48 ("TUI") at [41]-[70]. The PL did not do so: neither Mr Moshiri nor Mr Maryniak were cross-examined on this issue, nor were they challenged on their evidence in respect of it.

124. However, we consider that the Commission did not err in finding that the counter-factual relied upon by the Club had not been proved.

(i) The counter-factual relied upon by the Club was that, but for the new stadium costs, Mr Moshiri would have made interest-free loans to the Club that would have ensured that there was no (or, at least, less) external interest-bearing debt. That was the basis for the proposition that all (or, at least, some) of the borrowing costs incurred to RMF and Metro would have been avoided but for the stadium project.

(ii) It is uncontroversial that the Club, as the party relying on the mitigation suggested, had the burden of proving the facts underlying it. As we have indicated, it appears to have been common ground before Commission that the Club was required to prove what would have happened on the posited counter-factual on the balance of probabilities.

(iii) The evidence was not as one-sided as Mr Rabinowitz suggested in his submissions. For example, Mr Moshiri was cross-examined at some length on

both his ability to pay off the external debt even with the stadium costs, and (admittedly briefly) what the position would have been if there had been no such costs (Commission Transcript Day 2 pages 28-34). Mr Maryniak was also asked briefly about the counter-factual. In his written evidence, he indicated that, if there had been no stadium costs, then Mr Moshiri's loan would have been used "on other areas of business, such as improving its first-team squad" (paragraph 115.2 of his First Statement dated 11 August 2023). As Mr Lewis pointed out, Mr Moshiri left some external debt in place after 2018 in circumstances in which, he put to Mr Moshiri in cross-examination, he could have paid it off.

(iv) The extent to which there is an obligation to challenge evidence in relation to a counter-factual sparked debate before us, as to whether a line of cases including LMH v EGK [2023] EWHC 1832 (Comm) undermined the rule in Browne v Dunn in respect of counter-factuals. For the purposes of this ground of appeal, it is unnecessary for us to consider that issue in detail. As TUI confirmed, the principle underlying Browne v Dunn is the need for procedural fairness; and the question we have to answer is whether the Club was treated unfairly by the Commission making its finding on this issue as it did. We are firmly of the view that it was not. It was clear that the PL, whilst not suggesting that Mr Moshiri or Mr Maryniak was being untruthful in respect of their opinion as to what would have happened if there was no new stadium project, did not accept the counter-factual relied upon by the Club. That is clear from the questions put, particularly, to Mr Moshiri. Both Mr Moshiri and Mr Maryniak had at least a reasonable opportunity to put forward their evidence on that issue. As with nearly all evidence of counter-factuals, their evidence could be no more than opinion as to what would have happened, and opinion which, even if innocently as in this case, is necessarily prone to being affected by a tendency towards the self-serving.

(v) In our view, the Club's contention in respect of this issue was little more than the self-evident proposition that, if the facts and accounting rules had been different, then the Club might not have breached the £105m threshold or might not have done so to the extent that it did. That proposition does not add to the weight of the Club's arguments.

125. In all of the circumstances, in our view, the Commission was fully entitled to conclude that the Club had not satisfied it on the balance of probabilities that all or any of the expenditure on third-party borrowing costs would have been avoided, in whole or part, but for the stadium project: and there was no failure to challenge the evidence of Mr Moshiri and/or Mr Maryniak such as to render that finding procedurally unfair or otherwise wrong.

126. Underlying this point was a broader issue, generally raised on behalf of the Club, namely whether credit should be given to the Club in some way for the fact that it was undertaking extensive work in developing a badly needed new stadium and was financially stretched. A new stadium is potentially a significant revenue earner for a successful club in the longer term, and is likely to have wider benefits (including community benefits). However, we do not see how this mitigates a breach of a specific PSR provision to which all clubs have agreed, in circumstances in which the PL Rules themselves provide for how stadium construction costs are to be treated within the specific accounting rules set out in Section E.

Ground 5: The error in approach to overspending

127. There are two limbs to this ground.

128. First, the Club submitted that the Commission made a "fundamental error" in effectively proceeding on the premise that, within the PSR, there is "the target of a nil PSR loss" (paragraphs 92 and 95), so that (i) losses of below the £105m threshold is overspending in breach of the PSR; (ii) any loss over £105m is a significant overspend and a "serious breach" of the PSR; and (iii) a sporting advantage can be inferred from any loss over £105m. Each of these propositions is wrong, it is submitted, because the underlying premise is wrong.

129. We do not consider that this criticism of the Commission's Decision is justified. Although the PSR do not state in terms that there is "a target of a nil PSR loss", as we have described, one of the principles upon which FFP is based is "the Break-even Principle". In simple terms, the sustainability of a football club requires, over time, expenditure not to exceed income. FFP regimes do not operate to secure sustainability in exactly the same way. We set out above (paragraph 23) how the UEFA CL & FFP Regulations had a €5m "acceptable deviation" and then a further, tapering allowable excess so long as covered by owner injections. In the case off the PL, the PSR set out the way in which PL clubs have agreed that this should be achieved: and these allow losses to be made, but subject to a graduated regime of checks and conditions up to £105m. If losses go over that threshold, then the PSR make that a disciplinary breach that mandates referral to a Commission to determine any issues between the Club and the PL as to the PSR Calculation and then sanction.

130. As to (i), we do not consider that the Decision, when fairly read, provides any evidence that the Commission misunderstood the scheme of the PSR, or its own role in it. The Commission clearly did not proceed on the basis that a loss of below £105m was a breach of the PSR. However, as we have described (paragraph 31 above), where the PSR calculation shows a loss of £15m-£105m, rule E.50 requires various financial data to be provided to the PL; and, if Secured Funding cannot be evidenced, then the PL Board may exercise its powers as set out in rule E.15 above including the power to refuse registration of new player acquisitions.

131. The reference to "a target of a nil PSR loss" does not suggest that a breach of the PSR occurs if there is any loss at all: it is merely a reference to the underlying Break-even Principle. The reference to "breach" in paragraph 95, relied on by Mr Rabinowitz, is clearly a reference to breach of the £15m lower loss threshold which is referred to immediately before, and not to a breach of the PSR.

132. As to (ii), whilst we would not necessarily have phrased matters exactly as the Commission did in its Decision, we agree with the gist of this part of the Decision which, again when fairly read, does no more than indicate that, with (a) the exclusions in respect of costs in place, (b) the £105m "buffer" before any action as a breach is triggered and (c) the fact that any club has a three-year rolling period over which to change course if necessary to avoid a breach, a PSR loss of any amount over £105m over the three-year PSR period is a serious matter warranting serious concern and, subject to mitigation, a substantial penalty. We would add two points:

    (i) With regard to (b), and with reference to "serious breach", we note that, when that phrase was first used in Dynamo Moscow (quoted at paragraph 24 above), it was used in the context of a "serious breach of *the Break-even Requirement"* or of "*the monitoring requirements*" (emphasis added). When breaches of the different PSR are considered, the graduated nature of the scheme in relation to losses and the £105m "buffer" have to be taken into account.

(ii) With regard to (c), there will usually be clear warning signs in years 1 and 2 of the period (i.e. ignoring the COVID-related provisions, in T-2 and T-1): in this case, the Club had losses of over £110m in those years (as affected by the COVID-related provisions: see paragraph 221 below); and so, going into year 3, they were aware of the task ahead so as not to breach rule E.14, namely it had no headroom and was required to better than break-even in that year. The Club did not come close to doing so, making a further loss of £10m.

133. As to (iii), we deal with the issue of sporting advantage in the context of Ground 6 below.

134. The second limb of this ground is that Mr Rabinowitz submitted that the Commission erred in finding that the Club's breach was caused by "the fact that it has overspent *on players*" (that quote being from paragraph 137 of the Decision, emphasis added). Given that the principal aim of an FFP regime is to encourage prudent finances so that clubs are sustainable, and the main relevant source of expenditure is players, this is a particularly important finding. Ground 5 leads with this strand of complaint (paragraph 81 of Amended Written Submissions).

135. In particular, the Club criticises the Commission for not giving weight to any of the following matters:

(i) The Club's net spending on players in FY22 was the lowest in the PL.

(ii) In FY22, the Club was the subject of the conditions set out in the August 2021 Agreement, which included restrictions on player services costs (see paragraph 35 above). The Club complied with these conditions. It is submitted that the PL would not have set levels of player spending that would have been reckless; and consequently, the Club having complied with all those conditions, it is wrong for the PL or the Commission to criticise the Club now for overspending on players in that year.

(iii) There was uncontested evidence that the new stadium posed an inevitable strain on the finances of the Club which has to date committed over £800m to the project.

(iv) The Commission reached its finding as to the Club's culpability on the mistaken premise that the Club had been warned by the PL about its PSR compliance on every occasion during FY22 on which the Club had sought PL approval for player purchases under the August 2021 Agreement.

136. However, we are again unpersuaded by this submission.

137. The passage relied upon by the Club from paragraph 137 of the Decision, in full, reads as follows:

> "The cause of Everton's difficulties was the fact that it overspent on players (largely due to its purchase of new players and its inability to sell other players), and because it finished lower in the league than it had projected in [FY22] (16th against the projected 6th – causing a loss of expected income of c £21 million). Everton's understandable desire to improve its on-pitch performance (to replace the non-existent mid-field, as Mr Moshiri put it in evidence) led to it to take chances with its

PSR position: those chances resulted in it exceeding the £105 million threshold by £19.5 million."

138. Before us, the Club in substance accepted (as, we consider, was inevitable) that its PSR difficulties and ultimate breach resulted from a combination of expenditure on players and the failure of that expenditure to result in the projected playing improvement and place in the PL; but, insofar as it did not, on the evidence, it was clearly a finding open to the Commission to make and, indeed, clearly correct. The PSR require a PL club not to lose more than £105m in a relevant PSR reference period. We do not find the distinction Mr Rabinowitz sought to make between "good" and "bad" spending in this context to be helpful. The PSR clearly set out what the clubs have agreed is and is not included in the PSR Calculation by reference to well-recognised accounting principles and standards which apply to businesses inside and outside of football.

139. That the Club considered itself to have been in the unhappy position (as Mr Rabinowitz said) in which it had either to keep expenditure up and risk not achieving a place high enough in the PL to recover that expenditure, or to reduce the expenditure and risk financially disastrous relegation, is not to the point. Those are the very choices which the PSR often require clubs to make, on the basis of prudent financial management.

140. In accordance with the PSR, other clubs made similarly challenging decisions, and did so mindful of the need to keep below £105m threshold. To take such risks and to stay under that threshold was a requirement of the joint venture scheme that is the PL. Moreover, most clubs appear to have stayed under the *£15m* threshold. It is noteworthy that the evidence before the Commission was that, in the seven years of the PSR regime to Season 2021-22, only one other club may have breached the £105m threshold on the basis of its PSR Calculation – that is the matter which is still proceeding before a Commission – and only 8-9 clubs had gone over the £15m threshold in Season 2021-22. Other clubs had clearly taken overall more financially prudent steps which were effective in keeping them below (often, well below) the £105m threshold for breach of the PSR regime with the risk of disciplinary sanctions that that entails.

141. Of the particular points raised by Mr Rabinowitz, in order:

    (i) The Club's net spending on players in FY22 being the lowest in the PL is not the full picture: it does not take into account the very significant prior spending on players. As indicated above, given the Club's losses in T-2 and T-1, it was well aware of its obligation in FY22 to do better than break-even so as not to breach rule E.51.

    (ii) Similarly, the compliance with the conditions imposed in the August 2021 Agreement: that too provides no answer to the significant prior spending on players. That agreement did not in any way exempt the Club from compliance with the PSR (as, in the Club's case, relaxed by the August 2021 Agreement in respect of pre-planning permission new stadium interest costs).

    (iii) The Commission expressly did not take into account the impact of the new stadium costs on the PSR, as they were rightly not part of the PSR Calculation. The Commission rightly held that the Club's PSR difficulties "are not attributable to the costs of the stadium development" (paragraphs 137 of the Decision).

(iv) As Mr Lewis and Mr Pobjoy submitted, the Commission does not say that the Club was warned on every occasion that a player was registered, and the Club accepts that there were two warnings. However (a) it was for the Club to monitor its expenditure against the PSR criteria, and to make sure that the £105m threshold was not breached; and (b) in any event, the Commission expressly declined to take these warnings into account as an aggravating factor (Paragraph 104 of its Decision).

142. We do not consider that any strand of this ground has been made good.

Ground 6: The error in approach to sporting advantage

143. This point is advanced by the Club in part to support its argument that there should not be a sporting sanction by way of a points deduction because breach of the PSR threshold should not be assumed to have resulted in a sporting advantage.

144. However, there is an obvious correlation between a Club spending on players and improvement on the pitch and, hence, in league placing. Indeed, Mr Moshiri's investment strategy when he bought the Club (see paragraphs 12-14 above) was based upon this correlation: it was his plan to put substantial, early money into improving the first-team squad so that the Club would improve its league position thereby gaining more of the PL pot distributed on the basis of placing and regularly challenging for and obtaining a lucrative European place.

145. As the financial figures show, the income (and, consequently, spending power from income) of PL clubs varies substantially; and, as Mr Rabinowitz submitted, as a general principle, clubs having better players is good for the PL as a competition. However, that is subject to FFP. It is well-recognised that a strand of the purpose of an FFP regime is to ensure that a club does not risk stability by seeking a sporting advantage as a result of financially imprudent spending on players (as Mr Lewis put it, by "chasing the dream"). Because PSR overspending is almost always on players, where a club breaches the FFP regime of a competition in which it competes, it obtains or may obtain a sporting advantage (with any financial advantage that that entails) over rival clubs which comply with the regime. To allow that would be unfair.

146. That was the thrust of the passage from the decision of the Adjudicatory Chamber in Dynamo Moscow quoted above (paragraph 24). It is unnecessary to repeat that quote here. Although the Club accepted (as was inevitable) that the "integrity of the rules" and equal treatment under the rules were legitimate aims, Mr Rabinowitz particularly noted the sentence: "So, in general, it would be unfair to allow a club which is in *serious* breach of the Break-even Requirement to compete in a UEFA club competition" (emphasis added). We have already considered that issue to an extent (see paragraphs 23, 24 and 132(i)).

147. This theme was picked up by an EFL Disciplinary Commission in EFL v Birmingham City Football Club (No 1) (SR/Adhocsport/199/2018) (22 March 2019) ("Birmingham City") in the context of the EFL P&S Rules. Having referred to the Dynamo Moscow passage referred to above, the Commission said:

> "27. Under that approach financial fair play rules operate by reference to the failure to comply with financial restrictions, not by any analysis of the degree to which any overspending by clubs has had the effect of improving the performance of an offending club in competition. Excessive spending on players is clearly designed to achieve an

> enhancement of sporting performance, but whether in practice it does enable a particular club at a particular point in time to achieve better results than it would have achieved if it had complied with the rules is practically impossible to assess. Even more difficult to assess would be the other counter-factual, namely whether competitor clubs would have performed better if they too had been permitted to overspend to the same degree. The principle of fairness and equal treatment can only be applied in this context by measuring the degree of overspending, recognising that any substantial breach may directly affect the competitive position of the offending club, to the detriment of other clubs in the same competition. Given that the UEFA and EFL financial fair play rules have the same objectives these principles must apply equally to the P&S Rules.
>
> 28. For those reasons the Commission cannot accept the Club's argument that for the EFL to justify a sporting sanction it is necessary to prove a 'measurable sporting advantage' caused by the overspending. That argument does not meet the point that any substantial overspending is in principle detrimental to the interests of other clubs which comply with the rules, because it gives the overspending club a direct advantage in bidding for players during the transfer window. Any such advantage gained from breach of the rules, in the acquisition of players or in the fielding of a stronger team in competition, is in principle unfair."

148. In Sheffield Wednesday, an EFL Arbitral Panel – again, of course, in the context of the EFL P&S – having referred to Dynamo Moscow and Birmingham City (No 1), continued (at [103], emphasis added):

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

Whilst these cases do not concern the PL, on their face, they are clear authority for the proposition that, where there is a breach of a FFP regime, sporting advantage can be inferred and a sporting sanction is appropriate.

149. Nevertheless, Mr Rabinowitz submitted that the Commission in this case erred in proceeding on the basis that "… a breach of the PSR will confer a sporting advantage for the defaulting club, to the detriment of clubs who have managed their finances more responsibly" (paragraph 92 of its Decision), and that "… the inference of a sporting advantage is one that should properly be drawn from the fact of a PSR breach…" (paragraph 95). He submitted that Sheffield Wednesday was a very different case on its facts. In any event, he said, it did not hold that an irrebuttable presumption or inference of sporting advantage can be drawn from the mere fact of a breach of the PSR: the cases merely say that, where there is a "serious breach" or "substantial breach" of the loss thresholds a sporting advantage could be inferred if it represented "excessive spending on players" (Sheffield Wednesday at [101]-[102]). In the Club's case, the inference drawn by

the Commission that the Club had gained a sporting advantage was difficult to square with its own conclusions (i) that the Club had on its books whose values had been impaired and who could not be sold at prices determined by an expert, and (ii) one cause of the Club's difficulties was that it finished lower in the PL in Season 2021-22 than it had projected.

150. However:

(i) The passage from paragraph 92 of the Commission's Decision with Mr Rabinowitz took issue is, in full (emphasis added): "… *as was recognised in Sheffield Wednesday*, a breach of the PSR will confer a sporting advantage for the defaulting club, to the detriment of clubs who have managed their finances more responsibly". The Commission was not suggesting there that Sheffield Wednesday was exactly similar on its facts to this case. It was merely referring to the proposition in that other case that, where there is a breach of the EFL P&S Rules Upper Loss Threshold, "… a sporting advantage is to be inferred and a sporting sanction is appropriate". Given the similar aims and structure of the EFL P&S Rules and the PSR, that was an apt reference; and there is no reason why that is not applicable to the PSR.

(ii) The Commission did not in terms say that the inference was irrebuttable; but, in any event, there was no evidence to rebut the inference. As we have described, the Club's relevant expenditure was on players. That the Club may not have bought as wisely or as successfully as it had hoped and projected is not to the point. The fact that the Club finished Season 2021-22 in 16th place, rather than the projected sixth place, does not assist the Club here: the point is not that the Club, having invested heavily in players, did not do as well as it expected or hoped, but rather that, having made that investment, the Club is likely to have performed better than it would had it not done so.

(iii) Mr Rabinowitz made much of his submission that the breach of rule E.51 must be measured in terms of the amount which the losses went over £105m. Measured in those terms – the Club were just under £20m over – he submitted that this was not a "serious breach" as the cases require for the inference to apply and which the Commission (wrongly, it is submitted) found (at paragraph 139 of its Decision). However, as we have already considered, the term "serious breach" was first used in Dynamo Moscow in the context of a serious breach of the Break-even Requirement and the monitoring requirements as then prescribed in the UEFA CL&FFP Regulations (see paragraphs 23, 24, 132(i) and 146 and following above). Whilst we accept that seriousness of breach of rule E.51 is commensurate with the amount the PSR Calculation losses are over £105m, when paragraphs 138-139 of the Decision are read fairly and as a whole, we do not consider that the Commission was saying anything more than what we say above (at paragraph 126), namely that, with (a) the exclusions in respect of costs in place, (b) the £105m "buffer" before any action as a breach is triggered and (c) the fact that any club has a three-year period over which to change course if necessary to avoid a breach, a PSR loss of any amount over £105m over the three-year PSR period is a serious matter warranting serious concern and, subject to mitigation, a serious penalty. With that, we agree.

(iv) Mr Rabinowitz also relied upon De Marco, "Football and the Law" (Bloomsbury Professional), 2nd edition (2022), at paragraph 17.5 where,

having set out the UEFA Joint Statement aims (quoted at paragraph 18 above), it is said:

> "Despite these clear objectives, there is a widely-held misconception that the underlying purpose of the FFP rules is to put all clubs on a level playing field. UEFA have expressly denied this, saying 'The aim of financial fair play is not to make all clubs equal in size and wealth, but to encourage clubs to build for success rather than continually seeking a 'quick fix'' [UEFA, "Financial fair play: all you need to know"].

However, we do not consider that this assists his argument. Whilst, as we have described (paragraphs 17-25 above), the aim of the FFP principles and rules is not "to make all clubs equal in size and wealth", (a) the legitimate aims of FFP, which are essentially aimed at "financial fairness" as between clubs, have a positive "sporting fairness" *consequence*; and (b) the clubs in the PL have agreed to implement FFP through the PSR, and fairness as between the clubs requires each club to comply and, if not, for the PSR to be enforced by the PL.

(v) We would add that this debate about whether any breach of the £105m threshold is properly described as a "serious breach" is, in our view, subsidiary to the real issue of the nature and level of sanction that is appropriate, necessary and proportionate in respect of such a breach. For the reasons we have given, we consider that any breach of rule E.51 is a serious matter warranting a substantial sanction. As described above (paragraph 45), a breach of the equivalent threshold in the EFL scheme – which, the Club accepts, is the most closely comparable to the PSR (and, certainly, more closely comparable than the UEFA CL&FFP Regulations) – leaving aside mitigating and aggravating factors, is treated as meriting a substantial sporting sanction of three points.

151. For those reasons, whilst we return to sporting advantage when we deal with Ground 9, we dismiss the appeal on Ground 6.

Ground 8: The failure to treat the impact of the sanction on the Club as mitigation

152. The Commission said (at paragraph 101 of its Decision) that it "must not be swayed by sympathy – for example the fact that the penalty might make the prospect of relegation greater". Mr Rabinowitz submitted that, following that approach, when considering sanction, the Commission did not take into account at all the likely impact of any sanction on the Club and whether, however serious, such an impact was justified by the seriousness of the breach. That, he submitted, was an error in approach.

153. Having already set out the relevant principles (paragraphs 17-25 above), we can deal with this ground shortly. As we emphasised there, circumstances can only be mitigating when marked against the aims of the relevant regulatory scheme, in this case the PSR. The overarching aim of the PSR is to ensure that the debt of a PL member club is not such as to jeopardise that club (or, by seeking to compete by themselves not complying with the PSR, other clubs) and, consequently, the integrity of the competition itself, through compliance with the PSR as agreed by the PL members clubs. Compliance with the PSR – and, so, enforcement as and where necessary – is an essential element in maintaining fairness as between the

PL clubs. The approach to sanction for breach of rule E.51 must be seen through the prism of those aims.

154. Therefore, matters of mitigation are likely to be of considerably less significance when a professional disciplinary tribunal is considering sanction compared with a court imposing retributive justice, because the overarching concern of the professional regulator is the protection of the public (see paragraph 82 above). There is, consequently, a sound and well-established principle applied that the effect of sanction upon the professional individual and his family – which, as was said in Bolton v The Law Society (again, see paragraph 82 above), may not only be serious but tragic – although not excluded from consideration, will generally have little if any weight by way of mitigation.

155. Similarly, they are likely to be of less significance in proceedings for breach of rule E.51 because the overarching concern there is the integrity of the PL competition. In the context of sport regulation, there is a similar line of authority that, generally, the effect of sanction upon the regulated athlete, their family and (if any) their team will generally have little or no force by way of mitigation. That line of authority is equally sound and well-established. In particular, it has been held that the actual, projected, probable or possible position of a football club at the end of a season has been disregarded in cases in which a points penalty has been considered and/or imposed. We agree with the observation of the EFL Disciplinary Commission in EFL v Derby County Football Club Limited (SR/107/2020) (30 June 2021) ("Derby County") at [39(2)] when, having considered the authorities to the same effect, it said:

> "Even without the assistance of those authorities, we would have reached the same conclusion. While there might be circumstances in which the impact [or lack of impact: see, for example, Sheffield Wednesday] of a deduction of points on a club in a particular season could be taken into account when determining sanction, those circumstances would likely need to be exceptional."

To approach the sanctioning exercise in any other way, in our view, would be a failure to treat the clubs in the PL equally and fairly. Furthermore, if (e.g.) the effect of a particular point deduction on relegation risk were taken into account, that may be dependent upon the time within a season that the sanction is imposed and/or consideration of the risk with and without the points deduction. Even if such exercises were possible in practice, we do not consider that this approach would in any way further the aims of the PSR.

156. In this case, the Commission did not see any evidence in relation to the Club that was exceptional so as to render any otherwise appropriate points deduction sanction inappropriate or disproportionate, irrespective of the increased risk that the Club would be relegated as a result. In our view, not only was that approach and conclusion open to the Commission, it was undoubtedly correct.

157. For those reasons, we do not consider that the Commission erred in imposing a point deduction notwithstanding the possibility of relegation.

158. Although it was no part of this ground that the Commission also failed to take into account the effect of the sanction imposed on those who support Everton (as opposed to the Club itself), as we have indicated, we have received submissions and evidence from Everton FAB. Everton FAB have no standing in this appeal, and we are acutely sensitive to the fact that the supporters of other affected clubs

have been given no opportunity to submit evidence or submissions to either the Commission or this Appeal Board. However, we can say this. We accept the sincerity, commitment and indeed passion with which these have been prepared and submitted. We also accept that at least some and possibly many Everton supporters feel that the Club, and its supporter base, have been badly done by as a result of the points penalty that has been imposed. We deal with the predictability, proportionality and appropriateness of the sanction (to each of which the Everton FAB refer) below; but emphasise here that the necessity, appropriateness and proportionality of any sanction imposed cannot be affected by the understandable strength of feeling of the Everton supporter base in circumstances in which, through no fault of their own (as opposed to the Club's), their club may suffer a points deduction and all the consequences that may flow from that.

159. However, particularly in the light of the Everton FAB submissions and the fact that, save for this Decision which will be published, the process required by the PL Rules is confidential, we are sensitive to the need for full explanation of any sanction imposed in respect of a breach of rule E.51. Fans who directly or indirectly pay significant sums to watch football and support it in other ways, should, so far as consistent with the PL Rules on confidentiality, be able to understand how and why off-pitch decisions affect their club. In saying that, we also reflect (again, so far as we are able given the PL Rules on confidentiality) the importance of fan engagement, involving as it does a degree of transparency and understanding, emphasised in the recommendations of the respected Fan-Led Review of Football Governance (November 2021) to which the Everton FAB submissions refer.

Ground 9: The failure to consider lesser alternative sanctions such as a transfer ban

160. Before the Commission, the PL submitted that an appropriate sanction would be an immediate substantial – in the region of 12 – point penalty. The Club contended that an appropriate sanction would be a fine but that, if a sporting sanction were required, then the Commission should consider imposing a transfer ban. Mr Rabinowitz submitted that the Commission erred in not considering penalties other than a points deduction, notably a transfer ban.

161. This was treated as a peripheral point before us, in both written and oral submissions; and, in our respectful view, rightly so. The ground has no force. To a large extent it is based on propositions that feature in other grounds (e.g. that the Commission erred in its approach mitigating and aggravating factor generally, the "overspend" and sporting advantage), which we have concluded are not sound. In any event, the Commission expressly identified and adopted the principle that any sanction should be no greater than that which is necessary and proportionate for achieving the sanction's purpose (paragraph 91 of its Decision) – and expressly referred to the Club's submission that, if some form of sporting sanction were required, it should consider imposing a transfer embargo – before concluding, with "no doubt", that "the circumstances of this case are such that only a sporting sanction in the form of a points deduction would be appropriate" (paragraph 135). In drawing that conclusion, the Commission clearly had in mind both the correct principle, and the availability of other sanctions including some form of transfer embargo.

162. We therefore reject this ground of appeal.

Ground 1: The findings of (i) "less than frank" and (ii) a breach of rule B.15 (utmost good faith) as aggravating factors

163. The heart of this ground is that the Commission erred in law in basing its decision on sanction on two matters which it should not have taken into account, namely that, in relation to the Club's PSR representations to the PL on the funding of the new stadium, the Club was (i) "less than frank", and (ii) in breach of rule B.15 (the utmost good faith obligation).

164. As we have already indicated (paragraph 16 above), the new stadium was to be developed through Everton SDL, a wholly owned subsidiary of the Club. As Everton SDL at the time had no source of income, the costs of the development were borne by the Club, through a loan to Everton SDL. At the end of FY22, that loan stood at £259m.

165. In respect of its loan to Everton SDL, the Club established an "intercompany charge" at an annual rate of 7.5% between Everton SDL and itself, accounted as "interest payable" in Everton SDL's accounts, and as "interest receivable" in the Club's accounts. That interest, of course, was a matter of internal accounting within the group.

166. Through a company he owned, Mr Moshiri contributed substantially to the funds that were loaned to Everton SDL. By the end of FY22, his loans to the Club stood at £380m, rising to £750m by November 2023. The increase is, of course, largely accountable by the development costs of the new stadium. Those loans were interest free. However, the Club also had external borrowings from RMF (a £150m facility dated 5 November 2021, at an annual interest rate of 4.25-5.5% above Bank of England base rate) and Metro (a £30m facility dated 29 April 2021, at 3.5% above base rate) (see paragraph 64 above). Each loan was the subject of an arrangement fee. Each external loan was for working capital purposes. Indeed, the Club's application for the Metro loan expressly stated that any funds borrowed would not be used "for the new stadium project or to buy players in the transfer window".

167. In the Club's August 2022 PSR Submission to the PL, the Club said:

> "The intercompany loan is significant with a balance at the end of FY22 of £259m. That sum is derived from working capital facilities with RMF and Metro that total £180m, and in respect of which the Club incurs financing costs by way of interest and arrangement fees. The remainder of the intercompany loan is derived from funds received by the Club via a shareholder loan."
>
> "To date, the Club has absorbed the financing costs in its P&L. However, during the FY22 financial year, the Club's financial advisers… commented that it would not be unusual for the Club to pass these financing costs on to [Everton SDL] in these circumstances. The Club has therefore established a monthly interest charge on the intercompany loan balance at the rate of 7.5% (which is reflective of the interest rates applicable under the RMF and Metro facilities plus the arrangement fee under these facilities."
>
> "The Club obviously has to procure its debt facilities well in advance of the actual cash being required to be paid to suppliers. Therefore, up until December 2021 [when the passing on of financing costs to

> Everton SDL began], the intercompany loan balance is not reflective of the full cost of procuring the Club's working capital facilities."

168. Before the Commission, there were several issues involving the loans, including whether any interest could be deducted in the PSR Calculation for FY22 (the Commission concluding that it could not, a finding of fact which is not challenged in this appeal).

169. Importantly for this ground of appeal, the Commission also found:

    (i) The new stadium was funded exclusively from Mr Moshiri's interest-free loans, in respect of which the Commission found that the evidence was "overwhelming". It noted that there were good commercial reasons for the Club financing the stadium in that way: "It presented a cleaner and more attractive picture to the lenders from whom [the Club] was seeking to raise senior debt to fund the stadium for 30 years" (paragraph 77).

    (ii) The representation in the August 2022 PSR Submission that the new stadium was being funded in part by the RMF and Metro interest-bearing loans, the costs of which were in effect passed on by the Club to Everton SDL by way of the intercompany charge, was therefore incorrect and misleading (paragraphs 77 and 106).

170. Those findings are not challenged; although Mr Rabinowitz stressed that it was not suggested by the Club in the August 2022 PSR Submission (or anywhere else) that the whole of the external debt was committed to the new stadium costs or that Mr Moshiri only bore the balance over that debt of £79m. Indeed, in his evidence before the Commission, the PL's Chief Financial Officer (Ross Christie) accepted the main funding source for the new stadium was attributed to Mr Moshiri, and indeed he said he would have thought that "the vast majority would have come from Mr Moshiri" – but, he said, the Club had also represented in the August 2022 PSR Submission that it had attributed part of it to the working capital facilities (Commission Transcript Day 1, page 165). It was that representation which was wrong.

171. The Commission dealt with this as a potentially aggravating factor in terms of sanction at paragraphs 106-108 of its Decision. After referring to its factual findings set out above, it said that the PL had "made it clear that it was not accusing Everton of dishonesty" (paragraph 106). It then quoted rule B.15 (set out above: paragraph 30), before saying this (emphasis in the original):

> "107. …The obligation to act in utmost good faith is high. As we have observed above, at the initial stages of consideration of a PSR submission the Premier League will be dependent on the accuracy of the information supplied by the submitting club. In this case the information supplied by Everton was materially inaccurate. Under cross examination, the evidence of Everton's representative was that, in the same way that a tax accountant's job was to reduce a client's tax exposure, an element of his job was *to protect or interpret PSR rules to the benefit of my employer*. The Commission notes that the Premier League already needs to devote considerable resources to monitoring PSR compliance by its member clubs. If all clubs were to adopt a similar approach to interpreting the PSR, the Premier League's task would become yet more challenging.

> 108. The Commission is satisfied that Everton's PSR calculation in relation to stadium interest was less than frank. The Premier League has made it clear that it makes no allegation of dishonesty. We consider, therefore, that Everton did not consciously intend to circumvent the Rules but there is no doubt that it failed to discharge the duty of utmost good faith imposed by B.15. This is an aggravating factor that increases Everton's culpability."

In paragraph 138, the Commission used the phrase "less than frank" – and, in paragraph 131, the phrase "not wholly straightforward" – in the same context.

172. We consider that the Commission erred in two material respects.

173. First, we do not consider that it was open to the Commission to find that, in misrepresenting the position with regard to the new stadium financing in its August 2022 PSR Submission, the Club had been "less than frank".

174. Before us, Mr Lewis clearly, firmly and fairly confirmed that it was never part of the PL's case before the Commission – nor was it before us – that the misrepresentation as to the source of new stadium funding in the August 2022 PSR Submission was, on the part of the Club, dishonest, intentional, reckless or even negligent. Although the PL's Written Submissions for the hearing of this appeal may on their face have suggested that the PL relied upon evidence given by certain of the Club's officials to show that dishonesty/deliberateness were "in play" (and even, perhaps, that one such official had accepted that it was the intention of the Club's misrepresentation to mislead the PL) (see paragraph 38-50 of the PL's Written Submissions), Mr Lewis confirmed that that evidence was only elicited and relied upon to evidence that the representation as to new stadium funding was incorrect, not that it was accompanied by any particular mental element on the part of the Club or any of its officials.

175. In terms of sanction, it was the PL's straightforward and limited submission that the misrepresentation as to source of the new stadium finance was in itself aggravating, in circumstances in which it was made by the Club as part of its argument as to why it had not breached the PSR Rules – in financial terms, a substantial part of its argument, given that the Club submitted that, on this head, £17.4m deduction of its costs should be made in the PSR Calculation – and it was based on financial information which was in the unique possession of the Club which, for the PSR properly to function, must be accurate.

176. However, Mr Lewis submitted that the Commission did not err in its relevant analysis and conclusion, because the finding of "less than frank" did not require any particular mental element: a mistake, in the circumstances outlined above, was sufficient to ground and explain the findings made the Commission. It is clear (he submitted) that the Commission did not consider, let alone make any findings in relation to, mental element: indeed, it stressed that the PL did not allege dishonesty (in both paragraphs 106 and 108 of its Decision), and it made a positive finding that "Everton did not consciously intend to circumvent the Rules…".

177. We are unable to accept that submission.

178. The term "less than frank" is not used in the PL Rules, and is not a legal term of art. It is not necessary for us to attempt a definition of the term but, in our view, although dishonesty falls within its scope, it may also include (e.g.) obfuscating the true position or being disingenuous or less than straightforward. However, the

Club's representation that the external debt in part financed the new stadium costs was perfectly clear and straightforward: it was simply wrong, and materially so because it stated figures that went to the PSR Calculation that were incorrect and the Club had exclusive possession and control over the underlying information. In our view, just being wrong, did not make it "less than frank". And, as we have described, it was never the PL's case that, in misrepresenting the position with regard to the stadium interest in its August 2022 PSR Submission, the Club was more than simply wrong: there was no pleaded case to that effect in the Complaint (as originally made or as amended), nor was that case put to appropriate witnesses or otherwise developed during the course of the proceedings before the Commission. Making that finding against the Club was therefore also procedurally unfair to the Club.

179. Two final points on this issue.

(i) In its Written Submissions (paragraph 55) and Mr Rabinowitz's oral submissions, the Club accepted that its misrepresentation with regard to stadium interest was "objectively misleading". We do not find that phrase helpful in the context of this case. The representation was simply wrong; it has not been alleged to have been accompanied by any mental element. However, it was persisted in for some time after its first presentation in the August 2022 Submission; and, until the PL understood the true position, it misled the PL with regard to the PSR Calculation.

(ii) Apparently in support of its finding that the August 2022 PSR Submission was "less than frank", the Commission appears to have relied on what the Club's Interim Chief Financial Officer said (in the context of the Club's submission in relation to the deduction of part of the returned Transfer Levy (see paragraphs 60 and 64 above), an argument for deduction which he had developed which is no longer live), that "an element of his job was to protect or interpret PSR rules to the benefit of his employer" (Commission Transcript Day 2, page 1373 lines 15-16). We appreciate that the Commission heard that evidence, and we have not; but, when it is seen in the context of the cross-examination he was undergoing, we accept Mr Rabinowitz's submission that the relevant Club official was saying no more than that it was legitimate and proper part of his job to put forward to the PL submissions on behalf of the Club with regard to potential deductions from the costs taken into account in the PSR Calculation, so long as such submissions were reasonably arguable and, of course, based on accurate data. The fact that that was his role was irrelevant to any mental element and to the question of whether (and, if so, the extent to which) that misrepresentation was an aggravating factor which increased the Club's culpability in respect of the breach of the PSR. We also note that the PL expressly did not challenge the intention, recklessness or state of mind of the relevant Club official when making the slide show presentation to the PL pursuing its (later abandoned) adjustments which the Club said would make it not in breach of the PSRs. In short, the evidence did not support the Commission's finding that the August 2022 Submission was "less than frank".

(iii) Whatever the Commission considered a finding of "less than frank" entailed, when paragraphs 106-108 and 138 of the Decision are looked at as a whole, the Commission appears to have given it some discrete aggravating weight. The legal error made by the Commission was therefore material in this context.

180. The second error which we consider the Commission made was in respect of its finding that the way in which stadium interest was represented in the August 2022 PSR Submission was not only "less than frank" but a breach of rule B.15 (the duty of utmost good faith, quoted at paragraph 30 above), for the following reasons.

(i) The Commission appears to have considered that a breach of rule B.15 flowed from its finding that the Club had been "less than frank". Whilst a proper finding that a party had been "less than frank" in its disclosure of information might, at least arguably, automatically result in the same circumstances being breach of rule B.15, for the reasons given immediately above, the Commission's finding of the Club being "less than frank" here was not open to it.

(ii) In any event, the written complaint which the Club faced did not allege a breach of rule B.15, as required by rule W.24. It was not pursued by the PL during the course of the proceedings before the Commission, where it was not in issue; and was not the subject of any cross-examination, other evidence or submissions. The first time rule B.15 appeared was in the Commission's Decision. As neither potential breach of that rule nor, more widely, the mental element accompanying the inaccurate statement were ever raised before Commission's Decision, the Club was denied the opportunity of both making submissions and adducing evidence in relation to those issues.

(iii) There are many authorities and some fine arguments about the boundaries of the obligation to act in "utmost good faith". It is unnecessary for us to consider those cases, or to determine those boundaries, none of which was put or argued before the Commission. It is sufficient that the manner in which the Commission dealt with the issue of the misrepresentation by the Club to the PL in its August 2022 PSR Submission as it related to the source of the funding for the new stadium breached the Club's right to procedural fairness and resulted in the Commission, on sanction, taking into account a matter that it ought not to have taken into account.

(iv) Furthermore, we consider there some considerable force in Mr Rabinowitz's submission that, as with its finding in relation to less than frank, whatever the Commission considered a finding of a lack of utmost good faith encompassed, when paragraphs 106-108 and 138 of the Decision are looked at as a whole, the Commission appears to have given the breach of rule B.15 its own discrete aggravating weight. The procedural unfairness was therefore material in this context.

(v) Simply because the PL submitted to the Commission that this misrepresentation should be marked by only an additional one point deduction, does not mean that these errors by the Commission in respect of "less than frank" and rule B.15 breach in the context of the misrepresentation in respect of stadium interest in the August 2022 PSR Submission, was immaterial or that we can proceed on the basis that the Commission attached no more than an additional one point deduction to it. From the Decision, it is clear that the Commission attached some significant, but unquantified and indeterminable, weight to these findings.

181. For those reasons, we allow the appeal on Ground 1.

Ground 7: The failure to impose a sanction without taking into account existing and relevant benchmarks

182. Under this ground of appeal, the Club submits that the Commission made an error of law in not taking into account relevant comparators, notably the approach taken under the EFL P&S Rules. Had the Commission done so, the Club says, the sanction would have been less severe.

183. As we have already described (paragraphs 43-46), the EFL Board has issued EFL Guidelines in respect of sanctions for a breach of the EFL P&S Rules which, although not formally approved by EFL clubs, appear to have gained general acceptance as guidelines for an EFL Disciplinary Commission dealing with a breach of the EFL P&S Rules. They are, of course, guidelines and not binding on a Commission.

184. A PL Commission has no such assistance from the PL, either included in the PL Rules themselves or issued by the PL Board. As the Commission Decision records (paragraph 86), on 10 August 2023 (at a time when the proceedings against the Club were pending), the PL Board adopted "guidelines". But, in its Decision, the Commission helpfully records the history, content and the status of these, and its own approach both to these "guidelines" and to its task of assessing an appropriate sanction in this case:

> "86. On 10 August 2023 the Premier League board adopted a sanction policy that it considered to be appropriate to breaches of the PSR. The policy was detailed in section 7 of Mr Masters' witness statement [Richard Masters being the PL CEO]. At the pre-trial review held on 4 October 2023 the Premier League clarified a misunderstanding as to the status of its position. It made clear that it was not seeking to impose a policy on the Commission as a binding formula. Rather it was advancing its view in the same way as the EFL policy was advanced by those representing it before a Commission hearing an EFL P&S complaint. Its status was therefore no more than that of a submission.
>
> 87. The guidelines advocated by the [PL] are similar to, but different from, those of the EFL. As with the EFL guidelines they start with a presumption that the appropriate penalty will be a sporting sanction in the form of a deduction of points. They adopt a fixed starting point of a deduction of 6 points. There would be an increase from that starting point of one point for every £5 million by which the club had exceeded the PSR threshold of £105 million. Further adjustments could be made to reflect aggravating or mitigating features. The rationale for this view is given in the evidence of Mr Masters.
>
> 88. The Commission recognises the attraction of a regulator imposing a structured formula that was required to be applied in breaches of a particular regulation. Such a structured formula would fully inform clubs of the consequences of PSR breaches – although that would deny the Commission the power, as a specialist tribunal, to approach the question of sanction in whatever way it considered to be appropriate to the individual case before it.
>
> 89. Nevertheless, the Commission is concerned that the adoption by it of a structured formula such as is advocated by the Premier League

> would be inconsistent with the unrestricted powers conferred by Rules W.50&51. We consider that it is not for a Commission to introduce such a structured formula even on a case by case basis. We consider that we are required by the Rules to hear and consider the mitigation, after which we have a wide discretion to impose any of the sanctions listed in Rule W51. If the [PL] wishes to impose a mandatory structured formula on a Commission dealing with PSR breaches, it can do so. In that event the Commission would be required to comply with those Rules. But as things stand at present that has not been done: the Commission has the wide discretion conferred by Rules W.50&51.
>
> 90. We therefore decline to adopt the structured formula proposed by the [PL]. We will determine the appropriate sanction according to all the circumstances of the case, including (as required by Rules W50&51) any mitigating factors."

We shall refer to these so-called "guidelines" as "the PL's Structured Sanctions Submission".

185. In its written submissions, relying on the judgment of the Grand Chamber of the European Court in European Superleague Company SL v UEFA Case No C-333/21 (21 December 2023) at [203], Everton FAB submit that, in respect of sanction in a sporting context, there is a requirement generally for "transparency, clarity, precision, neutrality and proportionality". It also prays in aid the Government's review of governance in football, which refers to the benefits of transparency (albeit mainly in the context of transparency by clubs). Everton FAB says in its submissions that: "Fans want to see fairness, consistency and transparency". As we have indicated (see paragraph 38 above), the clubs that comprise the PL have decided not to have guidelines in relation to sanctions for a breach of the PSR. It is, of course, possible to have fairness, consistency and transparency without guidelines. We deal with the submissions made to us in respect of fairness and consistency below (see paragraphs 188 and following). In respect of transparency, although the clubs in the PL have agreed that disciplinary procedures are otherwise confidential, the PL Rules require that Commission decisions and Appeal Board decisions are published. That is the full degree of transparency allowed under the PL Rules. However, we note that sanction guidelines which have been developed with appropriate consultation has proved helpful to other regulators, inside and outside of sport, including other football leagues (see, e.g., Birmingham City at [31] about the merits of guidelines in the context of the EFL). It is, of course, open to the PL clubs and/or the PL Board to agree to issue guidelines if they are minded to do so.

186. The Club had no particular complaint with regard to how the Commission dealt with the PL's Structured Sanctions Submission. We agree that they were right to reject it as any form of guideline.

187. However, the Club submitted that, having rejected the "structured formula" suggested by the PL and rather approaching its sanctioning task with "no fixed formula" when exercising the wide discretion in respect of sanction given to it by rule W.51, the Commission failed to address the Club's submission that regard should be given to "benchmarks", i.e. existing relevant reference points. The most obvious are the EFL Guidelines; but the Club also submitted that regard could and should also be had to authorities in relation to sanction under the EFL P&S Rules and the UEFA FFP scheme, the automatic points deduction within the both PL and EFL Rules for an Event of Insolvency, the sanction imposed by the PL on the six

clubs who announced that they proposed to join a new European Super League, the proposed PL Squad Cost Rule, and evidence on squad cost of a PL point. These matters, having been raised by the Club, as being relevant to the sanctioning exercise here and of assistance in "tethering" the sanction imposed and ensuring that it was fair and proportionate, the Commission erred in not taking them into account, not dealing with them as an issue and apparently not considering them at all in the exercise of assessing an appropriate sanction. The result, the Club submitted, was that the ten point sanction imposed was inconsistent with and harsher than every available relevant benchmark. That was an indication that the sanction imposed was disproportionate.

188. In evaluating this point, we say at the outset that we have some sympathy for the Commission. As we have indicated, first, it did not have the benefit of any guidelines developed by the PL itself as to how the very wide discretion as to sanction for a breach of rule E.51 should be exercised, nor any precedents in respect of sanctioning for such breaches. This was the first case in which sanction for a breach of rule E.51 had been considered.

189. However, the Commission should have appreciated that it was not exercising its wide discretion as to sanction in a complete vacuum. In our view, there was some assistance to be gained from the PL Rules themselves. In addition, as the Club submitted, whilst we do not consider that all of the identified potential benchmarks raised were necessarily helpful or even relevant, we accept that there are benchmarks or comparators from other football competitions that, despite the differences in context, are sufficiently analogous to be relevant and potentially helpful. We consider that the Commission did err in failing to consider and take into account these comparators which had been raised and relied upon by the Club.

190. Whilst some assistance can be found within the PSR themselves (e.g. in the points deduction for an Event of Insolvency), as Mr Rabinowitz submitted, by far the most obvious and compelling benchmarks are found in the EFL P&S Rules and Guidelines, and the cases applying these.

191. The UEFA FFP scheme, whilst having the same aims as the PSR, is a very different scheme focusing on the "Break-even Principle" and applying, not to a league, but to a cup competition that is in essence based on knock-out principles. The fact that penalties for breach of the UEFA CL & FFP Regulations often comprise suspended exclusion and/or financial penalty and/or transfer ban is of very little assistance indeed here. Similarly, despite the seriousness of the conduct, the financial penalty and suspended points deduction which the PL clubs involved in the European Super League negotiations voluntarily accepted. Similarly, the Squad Cost Rule, a different scheme of addressing FFP which the PL clubs may be considering, which we were told has a maximum points deduction of nine points. We shall return, briefly, to the relevance and weight of these benchmarks below, in our assessment of the appropriate sanction in this case (paragraphs 209-219). Because the Commission did not address these benchmarks and we do, it is appropriate to address them in the next section.

192. For those reasons, we allow the appeal on Ground 7.

The Appropriate Sanction

Introduction

193. As indicated at the beginning of the section of this Decision on the Grounds of Appeal, our conclusion in respect of Grounds 1 and 7 means that we shall allow the appeal; set aside the decision of the Commission to impose an immediate ten point penalty; and determine the appropriate sanction ourselves.

194. It is common ground that any sanction must be "proportionate", i.e. proportionate to the legitimate aims pursued. This is sometimes broken down into several stages. For example, in Russian Olympic Committee v International Association of Athletics Federations (CAS 2016/O/4684) (10 October 2016) ("ROC") at [130], a Court of Arbitration for Sport Panel said that the principle of proportionality in a sporting context requires (i) the measure (here, the sanction) is capable of achieving the envisaged aims (here, the aims of the PSR), (ii) the sanction is necessary to achieve those aims, and (iii) the adverse effects which the affected person will suffer as a consequence of the sanction are justified by the overall interest in achieving those aims. There are many similar formulations. However, given that a sanction which is incapable of achieving the relevant aims cannot be "necessary" to achieve that aim, and if it not "necessary" to achieve the aim then it cannot be justified, then it is unnecessary to go beyond the alternative formulation in ROC, namely:

> "In other words, to be proportionate a measure must not exceed what is reasonably required in the search of the justifiable aim":

To put that into context – and into more ready language – to be proportionate, a sanction must achieve the aims of the PSR but not exceed that which is reasonably required to achieve those aims.

195. That requires us to consider the following issues, which we do in turn below:

(i) the legitimate aims of sanctions in the context of the PSR (see paragraphs 196-200 below);

(ii) whether a points deduction is reasonably required to achieve those aims (as the PL submit), or whether some other, lesser sanction would fulfil those aims (as the Club submits) (paragraphs 201-206); and

(iii) if a points deduction is reasonably required to achieve those aims, what is the minimum points deduction that will do so and should the deduction be suspended in whole or in part (paragraphs 207-229).

What are the Aims of a Sanction for a Breach of the PSR?

196. The aims of sanctions in this context have to be assessed with reference to the aims of the PSR, which we have already considered in detail (paragraphs 17-25 above).

197. In Derby County at [20]-[23], an EFL Disciplinary Commission said that any sanction for breach of the EFL P&S Rules should serve four purposes, namely (i) to punish the club for the breach, (ii) to vindicate other clubs which had not engaged in conduct that breached the P&S Rules, (iii) to deter future breaches of the P&S Rules, whether by the relevant club or other clubs and (iv) to restore/preserve public confidence in the fairness of the EFL competition. In our view, (iv) necessarily incorporates the aim of ensuring that the competition is in fact fair. The Disciplinary Commission went on to say that, consequently, "proportionality" in this context meant that any sanction should go no further than

reasonably necessary to achieve those four aims, such that any sanction that went beyond the achievement of those aims would be disproportionate, and conversely any sanction that failed to achieve those aims would be inadequate.

198. In this case, the Commission essentially approved those aims and that approach (see paragraphs 91-94 of its Decision). It was right to do so; and we will adopt and apply those principles and approach. In our view, The Football Association v Klopp at [92], cited in The Football Association v Da Silva and Mitrović (25 April 2023) at [45] to which we were referred, takes matters no further. The aim of deterring other clubs, and protecting compliant clubs, is built into the very aims of the Rules themselves. There is no suggestion that, in order to deter the Club or other clubs in the future, a Commission or an Appeal Board would or could increase a sanction beyond a level which is proportionate.

199. However, in our view, it is important that the underlying purpose of the PSR as an FFP scheme should remain at the forefront. Therefore, insofar as the Commission's Decision suggested that punishment is the overriding or even main aim of sanction in this area of football regulation, we would respectfully disagree. Whilst a sanction may result in (possibly severe) adverse consequences, including financial, sporting and/or competitive consequences, for the relevant club, sanctions in this field are not essentially punitive: their primary purpose is to protect the integrity of the relevant competition by restricting the level of financial risk a club might take, in the case of the PL, to a level and in the manner in which the PL clubs agree. Therefore, in our view, as an aim of any sanction, punishment is far less important than maintaining the integrity of the competition and thus the sport of football, with deterrence being an important overlapping aim.

200. Vindication of compliant clubs is also important, given the unfairness to them of a breach of an FFP scheme. As the Commission, reflecting the comments in Dynamo Moscow at [81] (see paragraph 24 above), said: "The sanction must be such as to demonstrate that such breaches do not confer a lasting benefit [on the club in breach]" (paragraph 93 of its Decision). That includes both the sporting impact and potential financial impact, which are inextricably linked as is all the more apparent in the PL compared with UEFA because of the agreed profit-sharing provisions we have described.

Is a points deduction reasonably required to achieve those aims?

201. We have considered all available options, including a fine or some form of transfer ban, but we have no doubt that, leaving aside mitigating factors, any breach of rule E.51 (i.e. any PSR Calculation showing losses of over £105m over the relevant period) warrants a points deduction, and nothing less than a points deduction. The unfair advantage achieved by a breach may include a financial advantage over other clubs, but it is most immediately a sporting advantage and consequently the sanction for breach can legitimately focus on sporting disadvantage.

202. We accept that other available sanctions (such as a transfer embargo and even, because of the inextricable link between finance and sporting achievement, a fine) may be "sporting sanctions" in the sense that an aim or potential effect is to apply a sporting disadvantage to the relevant club. However, we agree with the Commission that, leaving any mitigation aside, only a points deduction is appropriate for a breach of rule E.51. For the reasons we have given (see, e.g. paragraphs 132 and 150(iii) above), it is clear from the context of the PL Rules, any breach of rule E.51 is serious matter. It likely gives the club in breach an unfair sporting advantage and a correspondent revenue advantage. In our view, only a

points deduction, with its immediate and overt effect, has the appropriate power of disincentive for clubs to remain within the upper loss threshold required to maintain the aim of an FFP regime. It also, in our view, addresses both the financial and sporting aspects in the most appropriate way.

203. We do not consider that a fine would be appropriate. A fine may have little impact on a club with a wealthy owner. It is also inherently less suitable to sanction a failure to spend within means with a simple additional debt, without anchoring the sanction more closely to the integrity of the competition, in both sporting and financial terms; and to addressing the impact on the aims of equal treatment under the PL Rules.

204. Nor do we consider that a player registration ban, or any form of incoming "transfer ban", would have any reasonable disincentivising power for clubs such that it would ensure that the aims of the PSR were fulfilled. We note that the power to impose a registration ban is available to the PL Board under rule E.15 if a Club breached the £15m threshold, without the PL needing to go to a Commission. In our view, that to an extent supports the PL's contention before us that such a ban would not generally be appropriate for a breach of rule E.51 .

205. Further, Mr Masters, the PL CEO, gave evidence to the Commission that the FFP regimes for the EFL and the PL (i.e. the EFL P&S Rules and the PSR) are "aligned" (paragraph 7.3.2 of his First Statement dated 6 October 2023). Given the annual promotion/relegation between the two leagues, this is understandable. There is an obvious overlap in that some clubs currently playing in the EFL have played in the PL and vice versa. The EFL Guidelines make clear that, in the context of that competition, the starting point for any breach of the P&S Rules is a deduction of points (see paragraph 45 above). We were informed that the EFL Guidelines have been generally accepted and applied, and have never been collaterally challenged as erroneous in approach or as to the level of sanction suggested in any of the EFL cases. In Sheffield Wednesday, the club contended that the EFL Guidelines were not relevant. However, the EFL Arbitration Panel held that they were "relevant and applicable" in that case, not only as guidance as to what the EFL should seek by way of sanction but also as to the nature and level of sanction it would be appropriate for an EFL Disciplinary Commission to impose. In the present case, the Club (correctly, in our view) described them as "obviously relevant" context.

206. There is no reason to consider that less than a points deduction is appropriate for a breach of the PSR, as being necessary to fulfil the rules' aims. We consider a points deduction to be most suitable, fits best both with the purpose of the PSR and the nature of the breach in this case and has the benefit of being recognised as appropriate in the EFL Guidelines and case law. Indeed, given the EFL Guidelines, and the history of the sanctions imposed in EFL P&S Rules disciplinary proceedings, any PL club could properly predict that, leaving aside any particular powerful mitigation, any breach of the PSR would result in a significant points deduction.

What is the minimum points deduction reasonably required to achieve those aims in the context of this case, and can the deduction be suspended?

207. The assessment of how many points would be appropriate is neither a mathematical exercise nor, indeed, an exercise in which the PL has given any guidelines. Had the PL clubs wished to have had a structured approach, which would have given them more predictability and transparency, then they could have

agreed such an approach either in the Rules themselves or in published Guidelines: they have not done so. Similarly, if the PL Board had wished to give guidelines on the approach to sanction, as the EFL Board has done in the EFL Guidelines, then it could in principle have done so, with the level of consultation with the PL Clubs which it considered appropriate: it has not done so. Instead, both the PL and the PL Board have left this important matter, which not only affects the position of a club subject to sanctions but also (actually or potentially) the relative position of other clubs in the PL, to a Commission or on appeal to an Appeal Board, taking into account matters it considers relevant and giving those factors the weight the Commission/Board considers appropriate.

208. In assessing the number of points that would be appropriate in this case, we have taken into account the following.

209. First, the benchmarks relied upon by the Club, notably the EFL P&S Rules and EFL Guidelines. The EFL Guidelines reflect the extent of the breach in money terms. They have a starting point of 12 points, but that is "top down": excluding aggravating factors, it is the maximum deduction. The points deducted are reduced from 12 if the breach of the EFL upper loss threshold is less than £15m. For a breach of the EFL upper loss threshold of no more than £2m, and leaving aside "trend" (dealt with below), the points deduction is three points.

210. Absent any particular mitigation, three is therefore the minimum points deduction prescribed by the EFL Guidelines, with an increase in that minimum to reflect extent of breach in money terms of one point per £2m-£2.5m up to a maximum of 12 points leaving aside any particular aggravation. On the information available, the EFL Guidelines appear to us to suggest that, without descending to precise numbers (which would be over-mathematical), where there is a significant overspend in percentage terms beyond the upper loss threshold, such as of the order of 20%, without other factors, it is appropriate for that to be reflected in an additional three points sanction. Mr Rabinowitz calculated that, excluding trend, extrapolating the EFL Guidelines across to the PL on the basis of percentage above the upper loss threshold, the Club would have a starting point deduction of six points (paragraph 96.2 of his Written Submissions). We understand that, under the EFL Guidelines, the Club would receive a reduction in that sanction of two points for "trend", which we deal with below.

211. In his evidence, Mr Masters said:

> "7.3.4 The sporting value of a [PL] point is not the same as the value of a Championship point. The Championship is a 46-match competition featuring 24 clubs, in contrast to our [the PL's] 38-match competition featuring 20 clubs.
>
> 7.3.5 The financial value of a [PL] point is also greater than a Championship point, given the level of merit-based payments available to clubs and a hugely significant implications of avoiding relegation or achieving or missing out on qualification for European competition."

That evidence was uncontroversial and, Mr Rabinowitz submitted, suggests that any scale of points deduction in the EFL should be discounted when extrapolated across to the PL.

212. However, we consider that puts more weight on the numerical scaling exercise between the EFL Guidelines and the PL situation than it can bear.

213. The structured approach of EFL Guidelines cannot automatically be translated across in a linear way. The PL clubs have decided not to have such an approach. The two competitions are different and the economics (both in the average and for any given club) are very different. For example, the value and cost of players in the PL is very much higher than in the EFL: and the "dream" chased by investors (to use the PL's language) is bigger and hugely prized. The investors generally invest on a larger scale. The potential prizes are bigger. Sides in the EFL, of course, have their own ambition – for some, of course, to be promoted into the PL – but, in our view, the temptation to take financial risks to enhance sporting achievement in the PL is particularly high, and the reputation and earnings of the PL as a joint venture are at a level where a significant level. There was also some force in Mr Lewis's submission that the number of reported EFL cases arising from breaches of its P&S Rules – compared with the dearth of cases in the PL until FY22 – might suggest that the EFL Guidelines are not a sufficient deterrent. However, the EFL scheme nevertheless provides some useful assistance in assessing appropriate sanctions for breach of the PSR.

214. We have also had regard to the cases which have been determined on the basis of the EFL P&S Rules and Guidelines. Mr Rabinowitz specifically referred us to Sheffield Wednesday (see, e.g., paragraph 91 of the Club's Written Submissions). In that case, the club had exceeded the EFL upper loss threshold by 46.7% (equivalent of a £49m overspend in the PL, compared with the Club's overspend of just under £20m), and the club had a worsening trend of losses. The club offered no explanation for its losses, having spent 168.1% of its entire turnover in the last year of the relevant period on wages alone. The case, it was submitted, was therefore in every respect more serious than this case; but a deduction of only six points was made. However, that submission fails to take into account that the Commission in that case was minded to deduct 12 points, but for the mitigation of the club having sold its ground shortly after the relevant period which, had the ground been sold less than three weeks earlier, would have meant that the P&S Rules would not have been breached at all. That was the reason why the Commission reduced the deduction from 12 points to six (see [113]). We deal with the mitigation relied on by the Club below (see paragraphs 220-224); but the Club has no golden mitigation point such as that.

215. Second, the task of correlating cost and PL points is inherently and obviously difficult. However, Mr Masters' evidence was that: "… the appropriate squad cost value of a [PL] point is £5 million", which suggests a penalty of an additional point per £5m might be appropriate (i.e. an additional penalty of four points in the Club's case for the £20m PSR costs over the upper loss threshold of £105m, over and above any starting point). There is no underlying evidence for this figure from Mr Masters, which of course substantially diminishes the weight we can attach to it. Furthermore, (i) in addition to squad cost value, as we have explained, league points have a correlation with financial benefits, not only in terms of the distribution of the PL profit by league placing but also in terms of other spin off commercial benefits; and (ii) a sanction that only removes the squad cost equivalent from a club in breach would not properly or sufficiently address all of the aims of the Rules. However, whatever the precise figures – and we consider this is not a simple mathematical exercise – the fact that the PSR loss in this case was £20m over the upper loss threshold, which gave the Club a sporting advantage with an associated financial advantage, should be appropriately reflected in the sanction imposed in a significant way.

216. Third, we have to consider what assistance can be gained from within the PL Rules themselves.

217. We have taken into account the fact that, under rule E.35, a PL club suffers a nine point deduction on an "Event of Insolvency". Mr Rabinowitz submitted, with some force, that an Event of Insolvency is an inevitably more serious matter for the relevant club in respect of its sustainability, and so for the integrity of the PL as a competition; which is indicative that a nine or more point penalty for the Club in respect of its breach of the PSR would be too high. The two penalties are not, in our view, directly comparable because, as Mr Lewis pointed out, the nine point penalty under rule E.35 is automatic and may be accompanied by other disciplinary sanctions for breaches of other rules which an Event of Insolvency (or the underlying circumstances) may trigger. Nevertheless, we found this submission by Mr Rabinowitz to have some force. It suggests that the ten point penalty here was internally inconsistent within the framework of the PL Rules.

218. We have also taken into account:

(i) The number of points available over the course of one season, namely 108: a ten point penalty is nearly 10% of the available points.

(ii) The number of points available for a win and a draw (i.e. a three point deduction is equivalent to erasing one match win; one point is equivalent to erasing one draw).

(iii) We were told that the median and mean points earned per season through the history of the PL were respectively 49 and 52. Ten points would therefore be approximately 20% of the mean and median points per season.

(iv) The PL's Structured Sanctions Submission (see paragraph 184 above). Of course, we see the force in Mr Rabinowitz's submissions as to why little if any weight can be placed on this. It is not even a guideline. The PL clubs have decided not to adopt any guidelines, let alone any that adopt a structured or mechanical approach to sanction as the PL's Structured Sanction Submission seeks to do. It was not supported by underlying evidence or support from the PL clubs – indeed, it was produced by the PL Board without consultation with the clubs. However, it seems to us that the broad view of the PL Board, which is bound to act in the interests of all PL clubs, that breaches of rule E.51 are a serious matter requiring a substantial points deduction sanction, is worthy of some respect.

219. Fourth, we do not find the other benchmarks to which the Club referred to be of incremental assistance in our task. Where there are better benchmarking comparators from more closely analogous situations, it is more appropriate to focus on those than on potential benchmarks from more remote situations. We have followed that approach. However, at the end of this assessment, we will check whether the sanction we propose is out of kilter with any of these other benchmarks (paragraph 229).

220. Fifth, we have taken into account mitigating factors. On the basis of the findings of the Commission (and our conclusions on the grounds of appeal), trend is the only mitigating factor raised by the Club for which credit should be given.

221. The EFL Guidelines provide for "trend" by adopting a broad brush, mechanical approach. As set out above (paragraph 45), one point is removed from any points deduction if the PSR loss for T is less than that for T-1; but two points if the loss for T is less than that for T-1, and the loss for T-2 is less than that for T-1. In the Club's case, as we have explained, as a result of COVID-19, the scheme for FY22

was altered so that the figures for T, the mean of T-1 and T-2, and T-3 were used. T-3 showed an adjusted loss of £58m; the mean of T2 and T-1 showed an adjusted loss of £55m; and T showed an adjusted loss of £10m (see paragraph 3.4 of and Schedule 2 to the Complaint. The schedule gives a figure of £59m for T-3: we have used the lower figure of £58m in paragraph 3.4. The difference, which appears to arise from rounding up/down, does not matter for the purposes of this Decision). Mr Rabinowitz submitted that a downward trend in losses was something to be taken into account in mitigation; and, extrapolating from the EFL Guidelines, two points should be removed from the deduction.

222. The Commission took into account the positive trend in the PSR figures as a mitigating factor, saying that it "goes some limited way to diminish Everton's culpability". The Commission left out of account evidence as to the PSR picture in FY23, which showed an upturn. We agree with the Commission's approach, assessment and the way in which it dealt with the PSR picture in FY23.

223. Whilst, as the Commission said, it is inappropriate to import specific provisions from the EFL Guidelines, a consistently improving trend is something for which credit can and should be given by way of mitigation because it evidences effort and intent (although not, of course, success) in respect of addressing losses that are unacceptable under the PSR and thus compliance with the PSR.

224. However, we consider there are difficulties both in carrying over the numerical points adjustment of the EFL and/or giving a factor of this kind significant weight in the present case. In our view, the PL not having adopted a blunt reduction in points based on reduced PSR losses over the relevant period, the nature of the "trend" needs to be considered. We consider there is difference between, on the one hand, a situation in which there has been a steady significant year-on-year decline in losses and a modest breach of the £105m loss threshold; and, on the other hand, a situation in which a club has lost so much money as a result of spending on players unmatched by revenues over earlier years that it is at the loss threshold by the start of the final year of the period when it starts to reduce its player spending significantly. Although in one sense, one can describe both situations as ones in which there is a positive, mathematical "trend" of reducing losses, it is more realistic to regard the latter situation as one of having to apply an emergency brake on spending because it has been far too high in earlier years. In the latter situation, a club is likely to benefit from having spent significantly in the earlier years even when there was much reduced spending/losses later. In the former case, in our view, the mitigation of "trend" as an indication of intent and financial prudence is much the greater. In the Club's case, the trend was anything but steady, the PSR losses in the first two "years" being both very significant and similar in amount (£58m and £53m) and the losses before the start of the third year in the PSR period being over £105m, before considerable (albeit, in the event, inadequate) spending brakes were applied in the final year. We, therefore, agree with the Commission that the degree of credit to be given is modest given the failure of the Club successfully to address the position with regard to losses over the four year PSR period. We also agree with the Commission that, for these purposes, we should ignore any figures for T+1 (i.e. FY23).

225. Fifth and lastly, we have taken into account aggravating factors. We consider there are two.

    (i) First, there is the extent to which the PSR losses exceeded £105m. We have already dealt with this (see, e.g., paragraph 85 above). We do not understand paragraph 105 of the Commission's Decision. The extent of

PSR loss is an aggravating factor from a starting point based upon mere breach (i.e. a loss of only an insignificant amount over £105m). That was uncontroversial before us. It is clearly important that there is no double counting, in the sense of treating the excess loss over £105m more than once: but we shall not do that. A loss over the upper loss threshold of nearly £20m is, clearly, substantial. For the reasons set out above, we can infer that it gave the Club a significant sporting advantage which, although impossible precise to quantify, requires a deduction of some points in order simply to eradicate that advantage and to be fair to other PL clubs.

(ii) Second, there is the admission by the Club that they submitted information to the PL which was wrong and, in their own phrase, "objectively misleading." The PL is entitled to receive accurate PSR information, and should not be materially misled (even unintentionally). The purpose of the August 2022 PRS Submission (mis)representation in respect of stadium debt interest was to persuade the PL that there had been no breach of the PSR because of the substantial downward adjustment of the losses to reflect the payment of this interest. Mr Rabinowitz referred to the August 2022 PRS Submission as a "pitch", which in some respects it was. But the error was not simply a slip or over-enthusiastic proposal: it was a representation of fact set out in a formal PSR submission to the PL, which was entitled to proceed on the basis that factual assertions in relation to accountancy matters in that document were correct. The Club appears to have persisted with the representation for some time. The fact that, eventually, the PL did not accept the inaccurate information does not make this less than an aggravating factor over and above the "deemed" breach of rule E.51. A Club should not be submitting incorrect figures to the PL in respect of FFP submissions, in circumstances in which the club uniquely have access to the underlying financial data. Even absent any accompanying dishonesty or other accompanying mental element, that is something we are entitled to take into account as a factor that aggravates the breach of rule E.51 to some extent.

226. The breach was serious in that it exceeded the £105m threshold by a significant amount, both in percentage and monetary terms (nearly £20 million). We agree with the Commission that the main reason for the Club's breach was that it did not manage its finances so as to operate within the generous threshold of making no more than £105m losses over the relevant period. It imprudently sailed close to the wind, in making very significant losses (of over £110m) before the final year of the relevant period and, given the ordinary commercial risks inherent in football in the PL, it was unable to avoid a PSR Calculation loss of well in excess of the upper loss threshold of £105m. We wish to emphasise that, although there is in this case some (modest) credit to be given for "trend" and some (modest) aggravation in the light of the inaccurate provision of information directly related to the extent of breach, the main rationale for the points deduction we propose is that there has been a breach of the PSR to a significant extent and, with the picture becoming clearer as time passed, the Club did not act with sufficient financial prudence to avoid this significant breach.

227. Taking all of the above into account, together with all the circumstances set out in the Commission's decision and in submissions before us, we consider that the appropriate sanction for the Club's breach of rule E.51 is six points.

228. Finally, we have considered the possibility of suspending the points deduction; but have concluded that the points deduction proposed is proportionate, and otherwise entirely appropriate, if given immediate effect. A suspended points deduction

would not address the position in the league itself, nor would it address the potential profit share advantage that not having any deduction in points would have. Dynamo Moscow (quoted at paragraph 24 above) sets out why anything less than an immediate points deduction will not be an appropriate sanction for an FFP breach. We also note that the EFL Guidelines provide for an immediate points deduction for an unmitigated breach of the threshold applicable in that league of three points. That suggests that a significant number of English football clubs playing relatively high level football do not consider that approach to be inappropriate. It would also potentially risk destabilising the league in the future, if activated. There would also be potential difficulties in suspending a points deduction in the context of a league of this kind, and neither the PL nor the Club argued for it.

229. We recognise that our view differs from both that of the Commission (an experienced panel including an expert in accountancy in the field of football) and the approach considered appropriate in the PL's Structured Sanctions Submission by the PL Board (which has unrivalled experience as regulator of the PL). However, we consider that a six point deduction is the minimum but sufficient sanction required to achieve the aims of the PSR; it is reasonable and proportionate; and it is not out of kilter with any of the benchmarks to which Mr Rabinowitz referred us including other PL Rules and the EFL scheme with its Guidelines and the cases (such as Sheffield Wednesday) which have been decided under that scheme.

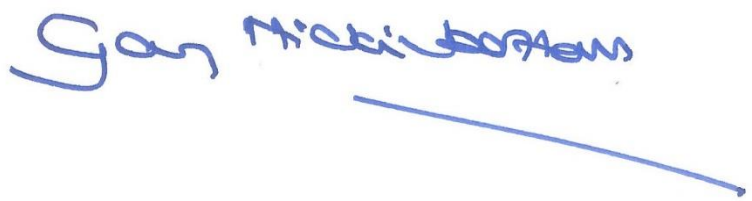
Conclusion

230. For those reasons, we allow the appeal, we set aside the Decision of the Commission, and in place of the penalty it imposed, we impose a sanction of an immediate points deduction of six points.

231. Under rule W.78.6, we have the power to order a party to pay or contribute to the costs of the appeal. We shall give directions to allow the parties to make submissions on costs, which we will deal with separately.

232. Subject to the provisions of Section X of the PL Rules, this Decision is final and binding on the parties.

Dated 26 February 2024



The Rt Hon Sir Gary Hickinbottom
For the Appeal Board

IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W.51.5 OF THE PREMIER LEAGUE RULES BEFORE THE PREMIER LEAGUE INDEPENDENT DISCIPLINARY COMMISSION

PLJP 2023/3

B E T W E E N –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

ATTACHMENT 4

Commission's Recusal Decision – 22 May 2024

IN THE MATTER OF A PREMIER LEAGUE COMMISSION PLJP 2023/3

Mr David Phillips KC FCIArb
His Honour Alan Greenwood
Mr Nick Igoe ACA
10 May 2024

BETWEEN –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Applicant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

DECISION
(Recusal Application)

INTRODUCTION

1. This is the Commission's decision on Everton's application for the Commission to recuse itself from determination of Burnley's application that Everton should pay it compensation pursuant to Rule W51.5. The basis of Everton's application has been set out in its Grounds for Recusal dated 12 April 2024. The basis of Burnley's resistance to the application has been set out in its Response dated 26 April 2024. The application was heard by the Commission at the International Dispute Resolution Centre on 10 May 2024. Everton was represented by Laurence Rabinowitz KC and Celia Rooney. Burnley was represented by Ruth Byrne KC and Liam Petch.

BACKGROUND

2. On 24 March 2023 the Premier League made a Complaint against Everton, alleging breaches of the Profitability and Sustainability Rules. The present members of the Commission were appointed as the Commission to determine that Complaint. On 20 April 2023 Burnley, together with a number of other clubs, applied to be joined in the Complaint to enable it to pursue a claim for compensation under Rule W51.5. That application was heard by Mr Phillips on 9 May 2023. The applications to be joined in the proceedings were refused, but a finding was made under Rule W27 that if the Complaint were to be proved the Commission might wish to award compensation. Each applicant club was to be provided with a copy of the Decision in the Complaint proceedings once that was available, and were allowed 14 days from the receipt of the Decision to inform the

Commission whether it wished to pursue a claim for Rule W51.5 compensation.

3. The Commission heard the PSR Complaint over the week commencing 16 October 2023. The Commission's PSR Decision was delivered on 17 November 2023. The Commission found Everton to be in breach of the PSR and imposed a sanction of a deduction of 10 points. On 30 November 2023 Burnley notified the Commission that it intended to pursue a claim for compensation. On 1 December 2023 Everton filed notice of its appeal against the Commission PSR Decision, raising 9 separate grounds of appeal. On 25 January 2024, by consent, the compensation proceedings were stayed until 28 February 2024. On 26 February 2024 the Appeal Board delivered the Appeal PSR Decision. The Appeal Board upheld the Commission's findings in relation to quantification of breach of the PSR, dismissed 7 grounds of appeal, allowed 2 grounds of appeal, and reduced the sanction from 10 to 6 points. On 5 March 2024 Everton gave notice that it considered it inappropriate for the present Commission to determine the compensation proceedings. Everton's position was amplified in Everton's solicitors' letter dated 25 March 2024.

4. The Commission is constituted by and proceeds under the provisions of Rule W, which provide a detailed procedural code. The Commission was appointed under Rules W3.4 and W19 to determine the PSR Complaint made by the Premier League against Everton. The Rules provide that if the Commission seized with the PSR Complaint indicates that it may wish to award compensation under Rule W51.5 it shall determine (either at the same time as the PSR Complaint proceedings or subsequently) the compensation claim. Accordingly, the effect of Burnley's compensation claim and of the 9 May 2023 decision was that the Commission became seized of the compensation proceedings. The compensation proceedings formed no part of the PSR proceedings, or of the PSR Decision, and were not before the PSR Appeal Board. They were stayed pending the final determination of the PSR proceedings until revived by Burnley's solicitors' email dated 5 March 2024.

THE DECISIONS

5. The basis of Everton's application is that the deficiencies of the Commission's PSR Decision revealed by the PSR Appeal Decision were so egregious that the Commission cannot fairly and properly determine the compensation claim. The

appeal raised nine grounds. The PSR Appeal Board rejected seven of the grounds and allowed the appeal on two grounds. It did not reverse the Commission's findings as to the extent of the PSR breaches, or that a points deduction was the correct sanction. The Appeal Board ruled that the Commission was wrong to have relied on Rule B.15, and was wrong to have found that Everton had been less than frank. It further ruled that the Commission erred "in failing to consider and take into account…comparators…"[1] . We set out the Commission's findings that were set aside, and the way in which the PSR Appeal Board dealt with them.

6. The first successful ground of appeal concerned the Commission's findings of a breach of Rule B.15 and that Everton had been less than frank in its dealing with the Premier League. The Commission dealt with that in paragraphs 106-108 of the PSR Decision.

Misleading the Premier League about stadium interest

106. The Premier League complains that Everton deliberately misled it about the source of the funds used for the stadium development. In its FY 2022 PSR submission Everton had asserted that the loan to Everton Stadium Development Company Ltd bore *financing costs by way of interest and arrangement fees*. The Commission has found that that was not the case. The Premier League asserts that Everton must have known that its assertion was incorrect, and that that inaccuracy constitutes an aggravating factor, although in its closing submissions it made it clear that it was not accusing Everton of dishonesty. Further, the Premier League complains that Everton failed to disclose the fact that it was in discussion with Rights & Media Funding Ltd to secure a waiver of a breach of the terms of its loan agreement. The Premier League asserts that Everton must have known of this fact, and therefore must have consciously decided not to disclose it.

107. The Commission notes the provisions of Rule B15 –

> B.15. In all matters and transactions relating to the League each Club, Official and Director shall behave towards each other Club, Official, Director and the League with the utmost good faith. For the avoidance of doubt and by way of example only, it shall be a breach of the duties under this Rule to:
>
> B.15.1. act dishonestly towards the League or another Club; or
>
> B.15.2. engage in conduct that is intended to circumvent these Rules or obstruct the Board's investigation of compliance with them.

The obligation to act in utmost good faith is high. As we have observed above, at the initial stages of consideration of a PSR submission the Premier League will be dependent on the accuracy of the information supplied by the submitting club. In this case the information supplied by Everton was materially inaccurate. Under cross examination, the evidence of Everton's representative was that, in the same way that a tax accountant's job was to reduce a client's tax exposure, an element of his job was *to protect or interpret PSR rules to the benefit of my employer*. The Commission notes that the Premier League already needs to devote considerable resources to monitoring PSR compliance by its member clubs. If all clubs were to adopt a similar approach to interpreting the PSR, the Premier League's task would become yet more challenging.

108. The Commission is satisfied that Everton's PSR calculation in relation to stadium interest was less than frank. The Premier League has made it clear that it makes no allegation of dishonesty. We consider, therefore, that Everton did not consciously intend to circumvent the Rules but there is no doubt that it failed to discharge the duty of utmost good faith imposed by B15. This is an aggravating factor that increases Everton's culpability.

[1] Paragraph 189, Appeal Board PSR Decision.

7. The Appeal Board dealt with this ground in paragraphs 163-181 of the PSR Appeal Decision.

Ground 1: The findings of (i) "less than frank" and (ii) a breach of rule B.15 (utmost good faith) as aggravating factors

163. The heart of this ground is that the Commission erred in law in basing its decision on sanction on two matters which it should not have taken into account, namely that, in relation to the Club's PSR representations to the PL on the funding of the new stadium, the Club was (i) "less than frank", and (ii) in breach of rule B.15 (the utmost good faith obligation).

164. As we have already indicated (paragraph 16 above), the new stadium was to be developed through Everton SDL, a wholly owned subsidiary of the Club. As Everton SDL at the time had no source of income, the costs of the development were borne by the Club, through a loan to Everton SIX. At the end of FY22, that loan stood at £259m.

165. In respect of its loan to Everton SDL, the Club established an "intercompany charge" at an annual rate of 7.5% between Everton SDL and itself, accounted as "interest payable" in Everton SDL's accounts, and as "interest receivable" in the Club's accounts. That interest, of course, was a matter of internal accounting within the group.

166. Through a company he owned, Mr Moshiri contributed substantially to the funds that were loaned to Everton SDL. By the end of FY22, his loans to the Club stood at £380m, rising to £750m by November 2023. The increase is, of course, largely accountable by the development costs of the new stadium. Those loans were interest free. However, the Club also had external borrowings from RMF (a £150m facility dated 5 November 2021, at an annual interest rate of 4.25-5.5% above Bank of England base rate) and Metro (a £30m facility dated 29 April 2021, at 3.5% above base rate) (see paragraph 64 above). Each loan was the subject of an arrangement fee. Each external loan was for working capital purposes. Indeed, the Club's application for the Metro loan expressly stated that any funds borrowed would not be used "for the new stadium project or to buy players in the transfer window".

167. In the Club's August 2022 PSR Submission to the PL, the Club said:

> "The intercompany loan is significant with a balance at the end of FY22 of £259m. That sum is derived from working capital facilities with RMF and Metro that total £180m, and in respect of which the Club incurs financing costs by way of interest and arrangement fees. The remainder of the intercompany loan is derived from funds received by the Club via a shareholder loan."
>
> "To date, the Club has absorbed the financing costs in its P&L. However, during the FY22 financial year, the Club's financial advisers... commented that it would not be unusual for the Club to pass these financing costs on to [Everton SDL] in these circumstances. The Club has therefore established a monthly interest charge on the intercompany loan balance at the rate of 7.5% (which is reflective of the interest rates applicable under the RMF and Metro facilities plus the arrangement fee under these facilities."
>
> "The Club obviously has to procure its debt facilities well in advance of the actual cash being required to be paid to suppliers. Therefore, up until December 2021 [when the passing on of financing costs to Everton SDL began], the intercompany loan balance is not reflective of the full cost of procuring the Club's working capital facilities."

168. Before the Commission, there were several issues involving the loans, including whether any interest could be deducted in the PSR Calculation for FY22 (the Commission concluding that it could not, a finding of fact which is not challenged in this appeal).

169. Importantly for this ground of appeal, the Commission also found:

(i) The new stadium was funded exclusively from Mr Moshiri's interest-free loans, in respect of which the Commission found that the evidence was "overwhelming". It noted that there were good commercial reasons for the Club financing the stadium in that way: "It presented a cleaner and more attractive picture to the lenders from whom [the Club] was seeking to raise senior debt to fund the stadium for 30 years" (paragraph 77).

(ii) The representation in the August 2022 PSR Submission that the new stadium was being funded in part by the RMF and Metro interest-bearing loans, the costs of which were in effect passed on by the Club to Everton SDL by way of the intercompany charge, was therefore incorrect and misleading (paragraphs 77 and 106).

170. Those findings are not challenged; although Mr Rabinowitz stressed that it was not suggested by the Club in the August 2022 PSR Submission (or anywhere else) that the whole of the external debt was committed to the new stadium costs or that Mr Moshiri only bore the balance over that debt of £79m. Indeed, in his evidence before the Commission, the PL's Chief Financial Officer (Ross Christie) accepted the main funding source for the new stadium was attributed to Mr Moshiri, and indeed he said he would have thought that "the vast majority would have come from Mr Moshiri" — but, he said, the Club had also represented in the August 2022 PSR Submission that it had attributed part of it to the working capital facilities (Commission Transcript Day 1, page 165). It was that representation which was wrong.

171 The Commission dealt with this as a potentially aggravating factor in terms of sanction at paragraphs 106-108 of its Decision. After referring to its factual findings set out above, it said that the PL had "made it clear that it was not accusing Everton of dishonesty" (paragraph 106). It then quoted rule B.15 (set out above: paragraph 30), before saying this (emphasis in the original):

> "107. ...The obligation to act in utmost good faith is high. As we have observed above, at the initial stages of consideration of a PSR submission the Premier League will be dependent on the accuracy of the information supplied by the submitting club. In this case the information supplied by Everton was materially inaccurate. Under cross examination, the evidence of Everton's representative was that, in the same way that a tax accountant's job was to reduce a client's tax exposure, an element of his job was *to protect or interpret PSR rules to the benefit of my employer*. The Commission notes that the Premier League already needs to devote considerable resources to monitoring PSR compliance by its member clubs. If all clubs were to adopt a similar approach to interpreting the PSR, the Premier League's task would become yet more challenging.
>
> 108. The Commission is satisfied that Everton's PSR calculation in relation to stadium interest was less than frank. The Premier League has made it clear that it makes no allegation of dishonesty. We consider, therefore, that Everton did not consciously intend to circumvent the Rules but there is no doubt that it failed to discharge the duty of utmost good faith imposed by B.15. This is an aggravating factor that increases Everton's culpability."

In paragraph 138, the Commission used the phrase "less than frank" — and, in paragraph 131, the phrase "not wholly straightforward" — in the same context.

172. We consider that the Commission erred in two material respects.

173. First, we do not consider that it was open to the Commission to find that, in misrepresenting the position with regard to the new stadium financing in its August 2022 PSR Submission, the Club had been "less than frank".

174. Before us, Mr Lewis clearly, firmly and fairly confirmed that it was never part of the PL's case before the Commission — nor was it before us — that the misrepresentation as to the source of new stadium funding in the August 2022 PSR Submission was, on the part of the Club, dishonest, intentional, reckless or even negligent. Although the PL's Written Submissions for the hearing of this appeal may on their face have suggested that the PL relied upon evidence given by certain of the Club's officials to show that dishonesty/deliberateness were "in play" (and even, perhaps, that one such official had accepted that it was the intention of the Club's misrepresentation to mislead the PL) (see paragraph 38-50 of the PL's Written Submissions), Mr Lewis confirmed that that evidence was only elicited and relied upon to evidence that the representation as to new stadium funding was incorrect, not that it was accompanied by any particular mental element on the part of the Club or any of its officials.

175. In terms of sanction, it was the PL's straightforward and limited submission that the misrepresentation as to source of the new stadium finance was in itself aggravating, in circumstances in which it was made by the Club as part of its argument as to why it had not breached the PSR Rules — in financial terms, a substantial part of its argument, given that the Club submitted that, on this head, £17.4m deduction of its costs should be made in the PSR Calculation — and it was based on financial information which was in the unique possession of the Club which, for the PSR properly to function, must be accurate.

176. However, Mr Lewis submitted that the Commission did not err in its relevant analysis and conclusion, because the finding of "less than frank" did not require any particular mental element: a mistake, in the circumstances outlined above, was sufficient to ground and

explain the findings made the Commission. It is clear (he submitted) that the Commission did not consider, let alone make any findings in relation to, mental element: indeed, it stressed that the PL did not allege dishonesty (in both paragraphs 106 and 108 of its Decision), and it made a positive finding that "Everton did not consciously intend to circumvent the Rules...".

177. We are unable to accept that submission.

178. The term "less than frank" is not used in the PL Rules, and is not a legal term of art. It is not necessary for us to attempt a definition of the term but, in our view, although dishonesty falls within its scope, it may also include (e.g.) obfuscating the true position or being disingenuous or less than straightforward. However, the Club's representation that the external debt in part financed the new stadium costs was perfectly clear and straightforward: it was simply wrong, and materially so because it stated figures that went to the PSR Calculation that were incorrect and the Club had exclusive possession and control over the underlying information. In our view, just being wrong, did not make it "less than frank". And, as we have described, it was never the PL's case that, in misrepresenting the position with regard to the stadium interest in its August 2022 PSR Submission, the Club was more than simply wrong: there was no pleaded case to that effect in the Complaint (as originally made or as amended), nor was that case put to appropriate witnesses or otherwise developed during the course of the proceedings before the Commission. Making that finding against the Club was therefore also procedurally unfair to the Club.

179. Two final points on this issue.

(i) In its Written Submissions (paragraph 55) and Mr Rabinowitz's oral submissions, the Club accepted that its misrepresentation with regard to stadium interest was "objectively misleading". We do not find that phrase helpful in the context of this case. The representation was simply wrong; it has not been alleged to have been accompanied by any mental element. However, it was persisted in for some time after its first presentation in the August 2022 Submission; and, until the PL understood the true position, it misled the PL with regard to the PSR Calculation.

(ii) Apparently in support of its finding that the August 2022 PSR Submission was "less than frank", the Commission appears to have relied on what the Club's Interim Chief Financial Officer said (in the context of the Club's submission in relation to the deduction of part of the returned Transfer Levy (see paragraphs 60 and 64 above), an argument for deduction which he had developed which is no longer live), that "an element of his job was to protect or interpret PSR rules to the benefit of his employer" (Commission Transcript Day 2, page 1373 lines 15-16). We appreciate that the Commission heard that evidence, and we have not; but, when it is seen in the context of the cross-examination he was undergoing, we accept Mr Rabinowitz's submission that the relevant Club official was saying no more than that it was legitimate and proper part of his job to put forward to the PL submissions on behalf of the Club with regard to potential deductions from the costs taken into account in the PSR Calculation, so long as such submissions were reasonably arguable and, of course, based on accurate data. The fact that that was his role was irrelevant to any mental element and to the question of whether (and, if so, the extent to which) that misrepresentation was an aggravating factor which increased the Club's culpability in respect of the breach of the PSR. We also note that the PL expressly did not challenge the intention, recklessness or state of mind of the relevant Club official when making the slide show presentation to the PL pursuing its (later abandoned) adjustments which the Club said would make it not in breach of the PSRs. In short, the evidence did not support the Commission's finding that the August 2022 Submission was "less than frank".

(iii) Whatever the Commission considered a finding of "less than frank" entailed, when paragraphs 106-108 and 138 of the Decision are looked at as a whole, the Commission appears to have given it some discrete aggravating weight. The legal error made by the Commission was therefore material in this context.

180. The second error which we consider the Commission made was in respect of its finding that the way in which stadium interest was represented in the August 2022 PSR Submission was not only "less than frank" but a breach of rule B.15 (the duty of utmost good faith, quoted at paragraph 30 above), for the following reasons.

(i) The Commission appears to have considered that a breach of rule B.15 flowed from its finding that the Club had been "less than frank". Whilst a proper finding that a party had

been "less than frank" in its disclosure of information might, at least arguably, automatically result in the same circumstances being breach of rule B.15, for the reasons given immediately above, the Commission's finding of the Club being "less than frank" here was not open to it.

(ii) In any event, the written complaint which the Club faced did not allege a breach of rule B.15, as required by rule W.24. It was not pursued by the PL during the course of the proceedings before the Commission, where it was not in issue; and was not the subject of any cross-examination, other evidence or submissions. The first time rule B.15 appeared was in the Commission's Decision. As neither potential breach of that rule nor, more widely, the mental element accompanying the inaccurate statement were ever raised before Commission's Decision, the Club was denied the opportunity of both making submissions and adducing evidence in relation to those issues.

(iii) There are many authorities and some fine arguments about the boundaries of the obligation to act in "utmost good faith". It is unnecessary for us to consider those cases, or to determine those boundaries, none of which was put or argued before the Commission. It is sufficient that the manner in which the Commission dealt with the issue of the misrepresentation by the Club to the PL in its August 2022 PSR Submission as it related to the source of the funding for the new stadium breached the Club's right to procedural fairness and resulted in the Commission, on sanction, taking into account a matter that it ought not to have taken into account.

(iv) Furthermore, we consider there some considerable force in Mr Rabinowitz's submission that, as with its finding in relation to less than frank, whatever the Commission considered a finding of a lack of utmost good faith encompassed, when paragraphs 106-108 and 138 of the Decision are looked at as a whole, the Commission appears to have given the breach of rule B.15 its own discrete aggravating weight. The procedural unfairness was therefore material in this context.

(v) Simply because the PL submitted to the Commission that this misrepresentation should be marked by only an additional one point deduction, does not mean that these errors by the Commission in respect of "less than frank" and rule B.15 breach in the context of the misrepresentation in respect of stadium interest in the August 2022 PSR Submission, was immaterial or that we can proceed on the basis that the Commission attached no more than an additional one point deduction to it. From the Decision, it is clear that the Commission attached some significant, but unquantified and indeterminable, weight to these findings.

181. For those reasons, we allow the appeal on Ground 1.

8. The second successful ground of appeal concerned the Appeal Board's findings that the Commission had erred in failing to consider and take into account "some assistance to be gained from the Premier League Rules", and "benchmarks or comparators from other football competitions" that "had been raised and relied upon" by Everton [2]. The Commission dealt with that in paragraphs 84-90 of the PSR Decision.

13. SANCTION PRINCIPLES – THE PREMIER LEAGUE's PROPOSED FORMULA

84. On 17 September 2018 the EFL approved sanctioning guidelines for breaches of its P&S regime. Those guidelines presume that a sporting sanction in the form of a points deduction is appropriate in all cases. The starting point is a sanction of 12 points that is reduced (potentially to zero) to reflect the quantum of the P&S breach and other mitigating factors. Reductions can be made if the losses show an improving trend: increases can be made in the event of aggravating features. Those guidelines, however, do not restrict a Commission's power to impose whatever sanction it considers appropriate. It was recognised in *EFL v Birmingham City FC* that the guidelines do not have legal force and are not binding on a Commission: the Commission retains its general power to impose any sanction permitted

[2] Paragraph 189, Appeal Board PSR Decision.

by the Rules. The function of the guidelines is to stand as instructions to those presenting the EFL's case as to the sanctions that should be sought from the Commission. The Commission is free to accept or reject the submissions according to what is appropriate in the individual case.

85. The Premier League has not incorporated any such guidelines into its Rules. The Commission's powers in relation to sanction are contained in Rules W50&51. W50 provides simply *Upon finding a complaint to have been proved the Commission shall invite the Respondent to place any mitigating factors before the Commission.* W51 lists the very wide range of sanctions that a Commission may impose, concluding with the power to *make any such other order as it thinks fit.* The appropriate sanction is to be determined by the Commission *having heard and considered…mitigating factors.*

86. On 10 August 2023 the Premier League board adopted a sanction policy that it considered to be appropriate to breaches of the PSR. The policy was detailed in section 7 of Mr Masters' witness statement. At the pre-trial review held on 4 October 2023 the Premier League clarified a misunderstanding as to the status of its position. It made clear that it was not seeking to impose a policy on the Commission as a binding formula. Rather it was advancing its view in the same way as the EFL policy was advanced by those representing it before a Commission hearing an EFL P&S complaint. Its status was therefore no more than that of a submission.

87. The guidelines advocated by the Premier League are similar to, but different from, those of the EFL. As with the EFL guidelines they start with a presumption that the appropriate penalty will be a sporting sanction in the form of a deduction of points. They adopt a fixed starting point of a deduction of 6 points. There would be an increase from that starting point of one point for every £5 million by which the club had exceeded the PSR threshold of £105 million. Further adjustments could be made to reflect aggravating or mitigating features. The rationale for this view is given in the evidence of Mr Masters.

88. The Commission recognises the attraction of a regulator imposing a structured formula that was required to be applied in breaches of a particular regulation. Such a structured formula would fully inform clubs of the consequences of PSR breaches – although that would deny the Commission the power, as a specialist tribunal, to approach the question of sanction in whatever way it considered to be appropriate to the individual case before it.

89. Nevertheless, the Commission is concerned that the adoption by it of a structured formula such as is advocated by the Premier League would be inconsistent with the unrestricted powers conferred by Rules W50&51. We consider that it is not for a Commission to introduce such a structured formula even on a case by case basis. We consider that we are required by the Rules to hear and consider the mitigation, after which we have a wide discretion to impose any of the sanctions listed in Rule W51. If the Premier League wishes to impose a mandatory structured formula on a Commission dealing with PSR breaches, it can do so. In that event the Commission would be required to comply with those Rules. But as things stand at present that has not been done: the Commission has the wide discretion conferred by Rules W50&51.

90. We therefore decline to adopt the structured formula proposed by the Premier League. We will determine the appropriate sanction according to all the circumstances of the case, including (as required by Rules W50&51) any mitigating factors.

9. The Appeal Board dealt with this ground in paragraphs 182-192 of the PSR Appeal Decision.

Ground 7: The failure to impose a sanction without taking into account existing and relevant benchmarks

182. Under this ground of appeal, the Club submits that the Commission made an error of law in not taking into account relevant comparators, notably the approach taken under the EFL P&S Rules. Had the Commission done so, the Club says, the sanction would have been less severe.

183. As we have already described (paragraphs 43-46), the EFL Board has issued EFL

Guidelines in respect of sanctions for a breach of the EFL P&S Rules which, although not formally approved by EFL clubs, appear to have gained general acceptance as guidelines for an EFL Disciplinary Commission dealing with a breach of the EFL P&S Rules. They are, of course, guidelines and not binding on a Commission.

184. A PL Commission has no such assistance from the PL, either included in the PL Rules themselves or issued by the PL Board. As the Commission Decision records (paragraph 86), on 10 August 2023 (at a time when the proceedings against the Club were pending), the PL Board adopted "guidelines". But, in its Decision, the Commission helpfully records the history, content and the status of these, and its own approach both to these "guidelines" and to its task of assessing an appropriate sanction in this case:

> "86. On 10 August 2023 the Premier League board adopted a sanction policy that it considered to be appropriate to breaches of the PSR. The policy was detailed in section 7 of Mr Masters' witness statement [Richard Masters being the PL CEO]. At the pre-trial review held on 4 October 2023 the Premier League clarified a misunderstanding as to the status of its position. It made clear that it was not seeking to impose a policy on the Commission as a binding formula. Rather it was advancing its view in the same way as the EFL policy was advanced by those representing it before a Commission hearing an EFL P&S complaint. Its status was therefore no more than that of a submission.
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>
> 90. We therefore decline to adopt the structured formula proposed by the [PL]. We will determine the appropriate sanction according to all the circumstances of the case, including (as required by Rules W50&51) any mitigating factors."

We shall refer to these so-called "guidelines" as "the PL's Structured Sanctions Submission".

185. In its written submissions, relying on the judgment of the Grand Chamber of the European Court in European Superleague Company SL v UEFA Case No C333/21 (21 December 2023) at [203], Everton FAB submit that, in respect of sanction in a sporting context, there is a requirement generally for "transparency, clarity, precision, neutrality and proportionality". It also prays in aid the Government's review of governance in football, which refers to the benefits of transparency (albeit mainly in the context of transparency by clubs). Everton FAB says in its submissions that: "Fans want to see fairness, consistency and transparency". As we have indicated (see paragraph 38 above), the clubs that comprise the PL have decided not to have guidelines in relation to sanctions for a breach of the PSR. It is, of course, possible to have fairness, consistency

and transparency without guidelines. We deal with the submissions made to us in respect of fairness and consistency below (see paragraphs 188 and following). In respect of transparency, although the clubs in the PL have agreed that disciplinary procedures are otherwise confidential, the PL Rules require that Commission decisions and Appeal Board decisions are published. That is the full degree of transparency allowed under the PL Rules. However, we note that sanction guidelines which have been developed with appropriate consultation has proved helpful to other regulators, inside and outside of sport, including other football leagues (see, e.g., Birmingham City at [31] about the merits of guidelines in the context of the EFL). It is, of course, open to the PL clubs and/or the PL Board to agree to issue guidelines if they are minded to do so.

186. The Club had no particular complaint with regard to how the Commission dealt with the PL's Structured Sanctions Submission. We agree that they were right to reject it as any form of guideline.

187. However, the Club submitted that, having rejected the "structured formula" suggested by the PL and rather approaching its sanctioning task with "no fixed formula" when exercising the wide discretion in respect of sanction given to it by rule W.51, the Commission failed to address the Club's submission that regard should be given to "benchmarks", i.e. existing relevant reference points. The most obvious are the EFL Guidelines; but the Club also submitted that regard could and should also be had to authorities in relation to sanction under the EFL P&S Rules and the UEFA FFP scheme, the automatic points deduction within the both PL and EFL Rules for an Event of Insolvency, the sanction imposed by the PL on the six clubs who announced that they proposed to join a new European Super League, the proposed PL Squad Cost Rule, and evidence on squad cost of a PL point. These matters, having been raised by the Club, as being relevant to the sanctioning exercise here and of assistance in "tethering" the sanction imposed and ensuring that it was fair and proportionate, the Commission erred in not taking them into account, not dealing with them as an issue and apparently not considering them at all in the exercise of assessing an appropriate sanction. The result, the Club submitted, was that the ten point sanction imposed was inconsistent with and harsher than every available relevant benchmark. That was an indication that the sanction imposed was disproportionate.

188. In evaluating this point, we say at the outset that we have some sympathy for the Commission. As we have indicated, first, it did not have the benefit of any guidelines developed by the PL itself as to how the very wide discretion as to sanction for a breach of rule E.51 should be exercised, nor any precedents in respect of sanctioning for such breaches. This was the first case in which sanction for a breach of rule E.51 had been considered.

189. However, the Commission should have appreciated that it was not exercising its wide discretion as to sanction in a complete vacuum. In our view, there was some assistance to be gained from the PL Rules themselves. In addition, as the Club submitted, whilst we do not consider that all of the identified potential benchmarks raised were necessarily helpful or even relevant, we accept that there are benchmarks or comparators from other football competitions that, despite the differences in context, are sufficiently analogous to be relevant and potentially helpful. We consider that the Commission did err in failing to consider and take into account these comparators which had been raised and relied upon by the Club.

190. Whilst some assistance can be found within the PSR themselves (e.g. in the points deduction for an Event of Insolvency), as Mr Rabinowitz submitted, by far the most obvious and compelling benchmarks are found in the EFL P&S Rules and Guidelines, and the cases applying these.

191. The UEFA FFP scheme, whilst having the same aims as the PSR, is a very different scheme focusing on the "Break-even Principle" and applying, not to a league, but to a cup competition that is in essence based on knock-out principles. The fact that penalties for breach of the UEFA CL & FFP Regulations often comprise suspended exclusion and/or financial penalty and/or transfer ban is of very little assistance indeed here. Similarly, despite the seriousness of the conduct, the financial penalty and suspended points deduction which the PL clubs involved in the European Super League negotiations voluntarily accepted. Similarly, the Squad Cost Rule, a different scheme of addressing FFP which the PL clubs may be considering, which we were told has a maximum points deduction of nine points. We shall return, briefly, to the relevance and

weight of these benchmarks below, in our assessment of the appropriate sanction in this case (paragraphs 209-219). Because the Commission did not address these benchmarks and we do, it is appropriate to address them in the next section.

192. For those reasons, we allow the appeal on Ground 7.

THE PARTIES' CASES

Everton – principles

10. Everton's case is that "it would be inappropriate for the FY22 Commission to hear and determine the Proposed Compensation Claim and/or there are other compelling reasons why the Commission should recuse itself."[3] Everton relies on the Appeal Board's finding of "a number of serious irregularities which were said to give rise to procedural unfairness"[4]; on the finding of a "failure to take into account…relevant benchmarks"[5]; and on "erroneous findings as regards the alleged breach of the duty of good faith"[6]. In simple terms, Everton's case is that the content of those parts of the Commission's PSR Decision that were reversed by the PSR Appeal Board is such that a fair hearing by the Commission of the compensation claim is not possible. Everton relies on two related but separate principles namely apparent bias, and the fact that it would be inappropriate for the Commission to determine the compensation claim.

11. There is common ground between the parties that the formulation of the apparent bias principle is as stated in Porter v Magill[7]. Lord Hope put it succinctly in paragraph 103 –

> The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased.

Everton advances this principle as being a Common Law principle that is of general application, and therefore applies to the Commission in the context of the compensation claim.

12. Everton recognises that the Premier League Rules do not provide for removal of the members of a Commission. There is no provision in the Rules that is the equivalent of section 24 Arbitration Act 1996. Nevertheless, Everton argues that if the circumstances are such that it would be inappropriate for the Commission to determine the complaint it should recuse itself. It relies on a principle that any

[3] Paragraph 23, Statement of Case.
[4] Paragraph 24, Statement of Case.
[5] Paragraph 25, Statement of Case.
[6] Paragraph 26, Statement of Case.
[7] Paragraph 103, Porter v Magill [2002] 2 AC 357.

tribunal that concludes that it can no longer fairly and properly determine the issues before it should recuse itself. In support of this appropriateness argument Everton adopts by analogy sections 24 and 68 Arbitration Act 1996 that provide (1) for the removal of an arbitrator, and (2) the circumstances in which the court will not remit a matter back to the original arbitral panel.

13. Section 24 Arbitration Act 1996 empowers the court to remove an arbitrator in circumstances (amongst others) where there is doubt as to impartiality, or where there has been a failure to conduct the proceedings properly, so that substantial injustice will be caused to a party. This, Everton argues, is illustrative of the wider appropriateness principle for which it contends.

14. Similarly, Everton relies by analogy on the provisions of section 68 Arbitration Act 1996. The power under section 68 Arbitration Act 1996 enabling the court to set aside an award instead of remitting it to the arbitral panel arises when there has been a "serious irregularity"[8] affecting the tribunal. To constitute a serious irregularity the irregularity must be of a kind set out in section 68(2) Arbitration Act 1996, and must have caused or will cause "substantial injustice"[9]. Even if those elements are satisfied the court will intervene only if it is satisfied that it would be inappropriate to remit the matters to the tribunal[10].

Section 68(2) and (3) reads –

> (2) Serious irregularity means an irregularity of one or more of the following kinds which the court considers has caused or will cause substantial injustice to the applicant—
> (a) failure by the tribunal to comply with section 33 (general duty of tribunal);
> (b) the tribunal exceeding its powers (otherwise than by exceeding its substantive jurisdiction: see section 67);
> (c) failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties;
> (d) failure by the tribunal to deal with all the issues that were put to it;
> (e) any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award exceeding its powers;
> (f) uncertainty or ambiguity as to the effect of the award;
> (g) the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy;
> (h) failure to comply with the requirements as to the form of the award; or
> (i) any irregularity in the conduct of the proceedings or in the award which is admitted by the tribunal or by any arbitral or other institution or person vested by the parties with powers in relation to the proceedings or the award.
>
> (3) If there is shown to be serious irregularity affecting the tribunal, the proceedings or the award, the court may—
> (a) remit the award to the tribunal, in whole or in part, for reconsideration,
> (b) set the award aside in whole or in part, or
> (c) declare the award to be of no effect, in whole or in part.

[8] Section 68(1) Arbitration Act 1996.
[9] Section 68(2) Arbitration Act 1996.
[10] Section 68(3) Arbitration Act 1996.

The court shall not exercise its power to set aside or to declare an award to be of no effect, in whole or in part, unless it is satisfied that it would be inappropriate to remit the matters in question to the tribunal for reconsideration.

15. Everton referred us to Home Secretary v Raytheon Systems Ltd[11] as providing useful guidance as to the approach to be taken to the section 68 Arbitration Act 1996 criteria. Akenhead J said –

> 3. It is clear that remission is the "default" option and the Court cannot set aside unless it would be "inappropriate" to remit. It cannot be said however that there is in the wording of Section 68 any "weighting" against or for any of the grounds of irregularity set out in Section 68 such that setting aside cannot or only in extraordinary circumstances be ordered for instance where the serious irregularity ground is that set out in Section 68(2)(d) . Whilst the burden of establishing that it would be inappropriate to remit must in effect be on the party seeking relief other than remission, what has to be established in respect of any proven serious irregularity is that in the particular case it would be inappropriate to remit to the existing arbitral tribunal. There is no authority which suggests that it will invariably be inappropriate to set aside the award where the serious irregularity ground is the Section 68(2)(d) one. It is properly common ground that there is little or no difference in practice between the setting aside and declaration of no effect remedies (see *Hussman v Ahmed Pharaon* [2013] I All ER (Comm) 879 at Paragraph 81).
>
> 4. What the Court needs to do in deciding whether to remit or set aside is to consider all the circumstances and background facts relating to the dispute, the award, the arbitrators and the overall desirability of remission and setting aside, as well as the ramifications, both in terms of costs, time and justice, of doing either. A review of "appropriateness" encompasses a pragmatic consideration of all the circumstances and relevant facts to determine what it is best to do but it necessarily covers the interests of justice as between the parties.

Everton submits that a similar approach should be adopted when considering its appropriateness submission.

16. Everton also referred us to the decision of the Employment Appeal Tribunal in Sinclair Roche & Temperley v Heard[12], a case in which notwithstanding the adverse findings made about the Employment Tribunal's decision the issue was remitted to the same tribunal so that, with the guidance of the Employment Tribunal's decision, it could make use of its knowledge of the case to reach a final determination – there was "unfinished business to be done" [13].

Everton – submissions

17. Mr Rabinowitz commenced his submissions by emphasising that this was a bona fide application, born out of concern about the Commission's suitability to determine the compensation claim. He rejected the suggestion that Everton was simply seeking to delay the outcome of the compensation claim. He made the point that Burnley could easily have agreed to discontinue its present claim and

[11] [2015] Bus LR 628.
[12] [2004] IRLR 763.
[13] Paragraph 47.1.

to recommence it by way of a Rule X arbitration: that course would have speeded the process. Mr Rabinowitz recognised that it could be efficient and sensible for a single Commission to deal with both the sanction for the breach of the PSR and the compensation for loss caused by the same breach of the PSR. However, this was not that case as the compensation claim had been stayed since May 2023 without there being any step in the proceedings: no statements of case had been served, no directions had been given, and no evidence or argument had been heard. Any Commission, whether the present Commission or a replacement Commission, would be starting with a clean slate. This case was therefore very different from the circumstances that faced the Employment Appeal Tribunal in Sinclair Roche.

18. Mr Rabinowitz submitted that when applying the Raytheon requirement to take into account all the circumstances and facts the Commission should recognise two of the Commission's findings in the Commission PSR Decision that go beyond being merely wrong. The first is the Commission's reliance on a breach of Rule B15 and the finding that Everton had been less than frank. Mr Rabinowitz relied on paragraphs 178-181 of the Appeal Board's PSR Decision as demonstrating a serious irregularity. Mr Rabinowitz argued that the Rule B15/less than frank issue had not been argued by the parties and formed no part of the Premier League's case. In terms of section 68 Arbitration Act 1996 the Commission's Rule B15/less than frank finding was a serious irregularity. It clearly caused substantial injustice because the finding fed into the quantification of the sanction and led to the excessive points deduction. The second finding relied on by Mr Rabinowitz was the failure to consider and take into account comparators that had been relied on by Everton. Mr Rabinowitz advanced this failure as being a further serious irregularity which caused substantial injustice in that it led to the excessive points deduction.

19. Mr Rabinowitz submits that, pursuing the arbitration analogy, the Commission's errors were such that a judge, applying the section 68 Arbitration Act 1996 criteria, would be justified in not remitting the issue to the arbitral panel. The case is therefore one in which the appropriateness test is satisfied – the Commission should recognise that it is inappropriate for it to determine the compensation claim.

20. Mr Rabinowitz argued that the fair-minded and informed observer would be in no doubt that there remained a real possibility that the Commission was biased. The cause of that concern was a combination of the gravity of the Commission's errors combined with the exceptional public interest in the case. In support of his submission Mr Rabinowitz provided the Commission with a selection of press reports demonstrating the public interest and the criticism that the Commission's PSR Decision had attracted.

21. Everton relied on two subsidiary matters that, although not determinative in themselves, showed the correctness of its analysis. First, it points to Mr Phillips' past professional relationship with Burnley's solicitors, and to the fact that he had sat on two FA tribunals with Matt Williams of Burnley. Everton recognises that that past activity does not of itself constitute a basis for recusal but points to such issues in the context of this case as being "peculiarly sensitive"[14]. Second, it points to the fact that an accountant's presence on the Commission is a requirement of the constitution of a PSR Commission: it is not something that would be expected where the Commission was dealing with a commercial issue such as the compensation claim. If the Commission were to recuse itself the replacement Commission appointed to determine the compensation claim could be composed of three lawyers.

22. Mr Rabinowitz submitted that in relation to each of the apparent bias or the appropriateness issues the Commission was free to decline to hear the compensation claim. Rules W.51 and 52 confer powers: they do not impose an obligation.

Burnley – principles

23. Burnley agrees Everton's formulation of the test of apparent bias – the question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Ms Byrne referred us to T v V & Ors[15] where, in the context of section 24 Arbitration Act 1996, Popplewell J gave the following guidance at paragraph 95 –

> (3) The test is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased (see *Porter v Magill* [2002] 2 AC 357 per Lord Hope at para. 103).
>
> (4) The fair-minded observer is gender neutral, is not unduly sensitive or suspicious,

[14] Paragraph 33, Statement of Case.
[15] [2017] EWHC 565 (Comm).

reserves judgment on every point until he or she has fully understood both sides of the argument, is not complacent and is aware that judges and other tribunals have their weaknesses. The informed observer is informed on all matters which are relevant to put the matter into its overall social, political or geographical context. These include the local legal framework including the law and practice governing the arbitral process and the practices of those involved as parties, lawyers and arbitrators (see *Helow v Secretary of State for the Home Department & Anor.* [2008] 1 WLR 2416 at paras. 1 to 3, *A v B* at paras. 28 to 29).

(5) The test is an objective one. The fair-minded observer is not to be confused with the person who has brought the complaint and the test ensures that there is a measure of detachment. The litigant lacks the objectivity which is the hallmark of the fair-minded observer. He is far from dispassionate. Litigation is a stressful and expensive business and most litigants are likely to oppose anything which they perceive might imperil their prospects of success even if, when viewed objectively, their perception is not well-founded (see *Helow* per Lord Hope at para. 2, *Harb v HRH Prince Abdul Aziz Bin Fahd Bin Abdul Aziz* [2016] EWCA Civ. 556 per Lord Dyson, MR, at para. 69).

(6) All factors which are said to give rise to the possibility of apparent bias must be considered not merely individually but cumulatively (see, for example, *Cofely Limited v Anthony Bingham & Knowles Limited* [2016] EWHC 240 (Comm) at para. 115).

24. So far as the appropriateness principle was concerned, Ms Byrne did not dispute the proposition that a tribunal that considered that it could no longer fairly determine the issues before it should recuse itself. However, she questioned the validity of the analogy with arbitration principles. First, the structure of the Arbitration Act 1996 was to give an arbitral panel considerable autonomy with which the court is slow to intervene. In an arbitration there was no automatic right of appeal; the default position was for the court to remit matters rather than determine them itself; removal of an arbitrator was an exceptional step. By contrast, the Premier League Rules provided an automatic right of appeal; the norm was for an Appeal Board to substitute its own decision rather than to remit matters for determination by the arbitral panel; there is therefore no need for provision for the removal of an arbitrator.

25. Burnley argued[16] a judge should not recuse himself simply because he had been challenged, but could do so only if he concluded that he could not provide a fair determination, or if there was apparent bias. It relies on the observations of Chadwick LJ in Dobbs v Triodos Bank[17] as illustrating the appropriate approach.

6. The second application which Mr Dobbs makes is for the proceedings to be stayed generally. He puts that application, first, on the very general assertion that any member of the judiciary — and in particular any member of this court — will not be impartial in relation to Mr Dobbs' litigation because of the criticisms which Mr Dobbs is making in his proceedings in Strasbourg. Those are criticisms which, as he tells us, include the criticism that the judiciary is likely to favour arguments advanced by professional advocates from the Bar or the solicitors' profession, against arguments advanced by unrepresented litigants. He tells me us that his criticisms are directed, in particular, at me personally. That, he says, stems from my conduct in relation to a hearing on an application for permission to appeal in related

[16] Paragraph 47, Response to Statement of Case.
[17] [2005] EWCA Civ 468.

proceedings. I refused that application for the reasons which I set out in the judgment which I gave on that day.

7. It is always tempting for a judge against whom criticisms are made to say that he would prefer not to hear further proceedings in which the critic is involved. It is tempting to take that course because the judge will know that the critic is likely to go away with a sense of grievance if the decision goes against him. Rightly or wrongly, a litigant who does not have confidence in the judge who hears his case will feel that, if he loses, he has in some way been discriminated against. But it is important for a judge to resist the temptation to recuse himself simply because it would be more comfortable to do so. The reason is this. If judges were to recuse themselves whenever a litigant — whether it be a represented litigant or a litigant in person — criticised them (which sometimes happens not infrequently) we would soon reach the position in which litigants were able to select judges to hear their cases simply by criticising all the judges that they did not want to hear their cases. It would be easy for a litigant to produce a situation in which a judge felt obliged to recuse himself simply because he had been criticised — whether that criticism was justified or not. That would apply, not only to the individual judge, but to all judges in this court; if the criticism is indeed that there is no judge of this court who can give Mr Dobbs a fair hearing because he is criticising the system generally. Mr Dobbs' appeal could never be heard.

Burnley – submissions

26. Burnley's core submission is that the high threshold required for a tribunal to recuse itself had not been crossed. Having been appointed under the Rules the Commission is under an obligation to discharge its duty: it is not open to it to withdraw simply because it might feel uncomfortable because of the nature of Everton's challenge.

27. Burnley argued that the errors found by the Appeal Board were not of a character that required the Commission to recuse itself. Ms Byrne emphasised that there had been no appeal against the Commission's finding of a breach of the PSR. She emphasised that seven of the nine grounds[18] of appeal had been dismissed. She further submitted that the errors that were found by the Appeal Board could properly be characterised as being errors of law. Ms Byrne points out that the Appeal Board's PSR Decision does not contain any finding of serious irregularity or substantial injustice.

28. Ms Byrne emphasised the difference between the Arbitration Act procedure and that of a Premier League Complaint. The Commission's errors had been identified by the Appeal Board, and had been corrected. The unfairness suffered as a consequence of those errors had been removed by the reduction in the points sanction. There was no reason to believe that the Commission would not accept the Appeal Board's decision. There was no basis to believe that it might harbour some sort of grudge or hidden prejudice. The Commission can be trusted to be

[18] Ms Byrne mistakenly gave the numbers as being "five out of seven".

objective.

DISCUSSION

Introduction

29. The recusal application has generated a volume of detailed submissions supported by many authorities. In writing this decision the Commission has spent time reviewing the written submissions, the transcript of the oral submissions, and the authorities. The parties will appreciate that it is inevitable that we do not refer to all the arguments advanced or to all the authorities relied on: in this decision we limit ourselves to explaining the decision that we have reached, and why we have reached it. We have, however, considered with care everything that has been put before us. The fact that not everything is referred to does not mean that it has not been fully and properly considered.

30. We do not accept Mr Rabinowitz's submission that appointment under the Premier League Rules puts the Commission in a materially different position from appointment as a judge or an arbitrator. We consider that having been appointed we are under a similar obligation or duty to discharge our appointment. It is not open to us to recuse ourselves simply because that might be convenient. In order to be able to recuse ourselves one of the recognised justifications must be established.

31. We agree that in this case such justification would be apparent bias, or that it was not appropriate for us to determine the compensation claim. The principles are not in issue. In order to establish apparent bias Everton needs to show that the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the Commission was biased. In order to establish that it is not appropriate for the Commission to determine the compensation claim Everton needs to show that the Commission can no longer fairly and properly determine the issue before it.

32. When considering both apparent bias and appropriateness we must take into account all the circumstances and background facts so as to determine what is fair and in the interests of justice for both parties. It is a fact-sensitive exercise. We consider the following facts and circumstances to be important.

(1) There had been no appeal against the Commission's quantification of the

extent of the PSR breach or of the findings of fact necessary for that finding to be made. Of the nine grounds of appeal the Appeal Board allowed only two. In doing so it identified two errors of law that permitted it to vary the Commission's points sanction. It remedied the injustice caused by the Commission's errors by reducing the points sanction. The direct impact of those errors has therefore been nullified.

(2) In relation to the B15/less than frank ground of appeal the Appeal Board PSR Decision included these observations.

> 169. Importantly for this ground of appeal, the Commission also found:
>
> (i) The new stadium was funded exclusively from Mr Moshiri's interest-free loans, in respect of which the Commission found that the evidence was "overwhelming". It noted that there were good commercial reasons for the Club financing the stadium in that way: "It presented a cleaner and more attractive picture to the lenders from whom [the Club] was seeking to raise senior debt to fund the stadium for 30 years" (paragraph 77).
>
> (ii) The representation in the August 2022 PSR Submission that the new stadium was being funded in part by the RMF and Metro interest-bearing loans, the costs of which were in effect passed on by the Club to Everton SDL by way of the intercompany charge, was therefore incorrect and misleading (paragraphs 77 and 106).
>
> 170. Those findings are not challenged; …

(3) In relation to the failure to take into account comparators the Appeal Board PSR Decision included the following observations.

> 188. In evaluating this point, we say at the outset that we have some sympathy for the Commission. As we have indicated, first, it did not have the benefit of any guidelines developed by the PL itself as to how the very wide discretion as to sanction for a breach of rule E.51 should be exercised, nor any precedents in respect of sanctioning for such breaches. This was the first case in which sanction for a breach of rule E.51 had been considered.

(4) The errors of law that were made by the Commission were made in the course of the PSR sanction proceedings. Although forming part of the Complaint, the compensation claim involves separate and distinct issues from those that arose in the PSR breach proceedings. The issues in the compensation claim focus on Burnley's alleged losses and how they were caused, whereas in the PSR sanction proceedings the issues focused on Everton's conduct.

(5) Breach of the PSR is a prerequisite to Burnley's entitlement to compensation but determination of the compensation claim is a separate exercise from determination of the issues in the PSR sanction proceedings. Insofar as any part of the PSR Decision may be relevant both the Commission and the parties will proceed on the basis of the Appeal Board PSR Decision.

Apparent bias

33. Determination of the apparent bias application requires us to form a view whether the fair-minded and informed observer would conclude that there was a real possibility that the Commission was biased. We consider that such an observer would inform himself either by reading both the Commission's PSR Decision and the Appeal Board's PSR Decision or accurate summaries of them. He would therefore understand the reasoning of the Commission, that that reasoning was to a large part upheld by the Appeal Board, and that the injustice caused by the Commission's errors had been corrected by reduction of the sanction imposed by the Commission. He would also understand that the compensation claim was largely separate and distinct from the PSR Complaint. Finally, he would understand that the members of the Commission were senior professionals who had been selected from a specialist panel. They could be trusted to discharge their duty responsibly and dispassionately, giving full weight to the guidance contained in the PSR Appeal Decision.

34. We are satisfied that armed with that knowledge the objective observer would conclude that the Commission could be trusted to conduct the compensation claim fairly and properly, without bias. We find that Everton has not established that the fair-minded and informed observer would conclude that there was a real possibility that the Commission was biased.

Appropriateness

35. We consider that Ms Byrne is correct to question the validity of the analogy that Everton draws with the provisions of the Arbitration Act 1996. The Arbitration Act 1996 regime is different from the Premier League PSR Complaint procedure. The court adopts a non-intervention approach. There is no general right of appeal. The provisions of sections 24 and 68 Arbitration Act 1996 are reserved for extreme cases. Cases involving errors of law will be remitted to the arbitral tribunal unless, having found a serious irregularity that caused substantial injustice, the court exercises its discretion not to do so.

36. By contrast the Premier League procedure provides for a generous right of appeal. In an appropriate case the Appeal Board is free to substitute its own decision in place of that of an erroneous Commission. It did so here, remedying the injustice caused by the Commission's errors of law.

37. However, even if Ms Byrne's submissions on the Arbitration Act 1996 analogy were to be wrong we consider that the errors made by the Commission do not fall into the category of serious irregularity as applied by the court under the Arbitration Act 1996. We note that the expression "serious irregularity" does not appear in the Appeal Board's PSR Decision, and that in that Decision the Commission's failures are characterised as being "legal errors"[19]. Moreover, any injustice caused by the errors has been corrected by the Appeal Board. Accordingly, if the Arbitration Act 1996 principles were to be applied by analogy this case does not come within the category of serious irregularity within the meaning of section 68 Arbitration Act 1996.

38. We have not limited our consideration of the appropriateness argument to the Arbitration Act 1996 analogy. We are satisfied that even if the case does not fall within the section 24 or section 68 Arbitration Act 1996 criteria we should recuse ourselves if we were to find that we could no longer fairly determine the issues before us. We have concluded, however, that that is not the case.

39. In reaching that conclusion we have relied on many of the same factors as we have discussed above. We do not repeat them. In summary, the Commission's finding of breach of the PSR and seven of the nine grounds of appeal were not disturbed by the Appeal Board; the injustice has been corrected; the PSR Complaint is separate from the compensation claim; the composition of the Commission is such that it can be relied on to fulfil its appointment. On the facts of this case there is no concern that the Commission would be unable to determine the compensation claim fairly and properly.

Other matters

40. For the sake of completeness we record that we have considered the observations made about Mr Phillips' past professional contact with Burnley's solicitors and with Mr Williams. We have also considered what has been said about Mr Igoe's presence on the Commission that will determine the compensation claim. None of those matters cause us to question the correctness of our decision.

41. Finally, we record that we accept Mr Rabinowitz's submissions in relation to Sinclair Roche. That was a case in which, notwithstanding the errors that it had

[19] Appeal Board's summary, unnumbered paragraph 4.

made, there was a compelling argument that the Employment Tribunal's detailed knowledge made it appropriate for the matter to be remitted to it. That is not the case here. Nevertheless, the fact that this Commission will come to the compensation claim effectively as a new claim does not of itself justify the Commission's recusal.

CONCLUSION

42. The recusal application is dismissed. The Commission will proceed to determine the compensation claim.

David Phillips KC FCIArb
His Honour Alan Greenwood
Nick Igoe ACA

22 May 2024

IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W.51.5 OF THE PREMIER LEAGUE RULES BEFORE THE PREMIER LEAGUE INDEPENDENT DISCIPLINARY COMMISSION

PLJP 2023/3

B E T W E E N –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

ATTACHMENT 5

Commission's Construction Issue Decision – 25 October 2024

IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W51.5 OF THE PREMIER LEAGUE RULES

PLJP 2023/3

Mr David Phillips KC FCIArb
His Honour Alan Greenwood
Mr Nick Igoe ACA
25 October 2024

BETWEEN –

BURNLEY FOOTBALL & ATHLETIC CLUB LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

DECISION
(Construction Issue)

INTRODUCTION

1. On 20 September 2024 the Commission heard the Construction Issue formalised in Everton's application dated 13 September 2024. Burnley was represented by Ruth Byrne KC and Tom Sprange KC. Everton was represented by James Segan KC and Celia Rooney. Both parties had exchanged detailed statements of case (Statement of Claim, Statement of Defence, and Statement of Reply). Both had also exchanged detailed written submissions on the Construction Issue, including a one page Reply served by Everton on 19 September 2024. The Commission was provided with 675 pages of documents and 1,387 pages of authorities (not including the additional authority produced by Burnley during the afternoon of the hearing). This is the Commission's reserved decision of the Construction Issue application.

THE RULES

2. In their statements of case the parties have referred to different editions of the Rules – Burnley to 2021/22, Everton to 2022/23. Nothing turns on this: the provisions are the same, although the numbering is different. At the hearing it was common ground that the 2022/23 edition should be referred to. That is the edition that we refer to in the body of this decision: where we quote we maintain the numbering used in the document that is quoted from.

3. It is common ground that the Rules create a multi-lateral contract between the

Premier League and the member clubs. Rule B14.4 provides –

Membership of the League shall constitute an agreement between the League and the Club (both on its own behalf and on behalf of its Officials) and between each Club to be bound by and comply with...these Rules.

4. These proceedings concern Burnley's application for payment from Everton pursuant to Rule W51. The relevant provisions are as follows.

Commission Procedures

W.27 At any stage the Commission may indicate (either of its own accord or as a result of representations from a Person, Club (or club) and in any event in its sole discretion), that if the complaint is upheld, it may wish to exercise its power under Rule W.51.5 to award compensation to any Person or to any Club (or club). If the Commission so indicates, it shall notify the parties to the Proceedings and the relevant Person, Club (or club) of this fact. The Commission may then make appropriate directions as to the receipt of evidence of loss from the relevant Person, Club (or club) as well as directions on the receipt of evidence in response from the parties to the proceedings.

W.28 Where (in proceedings in which the Respondent is a Club or Relegated Club) the Commission makes the indication referred to at Rule W.27, above, and after having heard evidence from both parties subsequently determines that no compensation is to be awarded in accordance with Rule W.51.5, the Club (or Relegated Club) claiming compensation in such circumstances may appeal that determination to an Appeal Board. If it fails to do so (or if the Appeal Board dismisses any such appeal) the Club (or Relegated Club) will not be able to bring any further claim of any kind (whether for compensation, in damages or otherwise) against the Respondent Club arising out of the breach of these Rules in respect of which the Commission was appointed.

Commission's Powers

W.50 Upon finding a complaint to have been proved the Commission shall invite the Respondent to place any mitigating factors before the Commission.

W.51 Having heard and considered such mitigating factors (if any) the Commission may:

- W.51.1 reprimand the Respondent;
- W.51.2 impose upon the Respondent a fine unlimited in amount and suspend any part thereof;
- W.51.3 in the case of a Respondent who is a Manager, Match Official, Official or Player, suspend him/her from operating as such for such period as it shall think fit;
- W.51.4 in the case of a Respondent which is a Club:
  - W.51.4.1 suspend it from playing in League Matches or any matches in competitions which form part of the Games Programmes or Professional Development Leagues (as those terms are defined in the Youth Development Rules) for such period as it thinks fit;
  - W.51.4.2 deduct points scored or to be scored in League Matches or such other matches as are referred to in Rule W.51.4.1;
  - W.51.4.3 recommend that the Board orders that a League Match or such other match as is referred to in Rule W.51.4.1 be replayed; and/or
  - W.51.4.4 recommend that the League expels the Respondent from membership in accordance with the provisions of Rule B.6;
- W.51.5 order the Respondent to pay compensation unlimited in amount to any Person or to any Club (or club);
- W.51.6 cancel or refuse the registration of a Player registered or attempted to be

registered in contravention of these Rules;

W.51.7 impose upon the Respondent any combination of the foregoing or such other penalty as it shall think fit;

W.51.8 make any such penalty conditional, including imposing the penalty unless a defined action is taken by the Respondent within a defined period of time;

W.51.9 order the Respondent to pay such sum by way of costs as it shall think fit which may include the fees and expenses of members of the Commission; and/or

W.51.10. make such other order as it thinks fit.

W.52 Where a Person, Club (or club) has been invited to address the Commission on compensation, in accordance with Rules W.27 and W.28, the Commission may adjourn the hearing to allow all relevant parties to make submissions, or if it considers that it is in the interest of justice that the determination of the complaint be resolved before the issue of compensation is addressed, direct that a further hearing take place on the issue of compensation after the complaint has been determined.

W.53 A Person, Club (or club) invited to make submissions on compensation shall be entitled to be present at the hearing, but may only make submissions or advance evidence or question witnesses if and to the extent that the chairman of the Commission gives it leave.

SUMMARY OF EVENTS

5. The details of this case are well known to the parties. We do no more than summarise the matters that are relevant to the determination of the Construction Issue.

6. On 24 March 2023 the Premier League brought a Complaint against Everton alleging breaches of the PSR. On 20 April 2023 Burnley applied to intervene in the Complaint in order to enable it to pursue a claim for compensation under the provisions of Rule W51.5. That application was heard by the Commission (Mr Phillips sitting alone) on 9 May 2023. The Commission refused Burnley's application to intervene, but ruled that it was satisfied that if the Complaint were to be upheld it might wish to award compensation to Burnley. It directed that if it found the PSR Complaint proved any application for such compensation should be made thereafter.

7. During the course of the 9 May 2023 hearing leading counsel for Burnley made the following submission.

This case is, in fact, a paradigm example where issues of sanction and compensation themselves are completely intertwined. In determining what, if any, sporting sanction should be applied against the club that has breached Profit and Sustainability Rules, a Commission will consider the illegitimate advantage that the breaching club has obtained from its breach in order to help assess the appropriate points deduction. If that advantage is absolutely minimal, Everton might have a good argument that a points deduction should be very minimal. If it is extreme, then the Premier League will have

a case that the points deduction should be significant. Those are precisely the same arguments that the clubs will have to deal with in proving causation for their claim for compensation because the claim for causation -- just like it was in Tevez, the claim for causation in compensation, what the clubs will be having to demonstrate is that Everton's rule breach gave them a significant illegitimate advantage such that it caused, for example, a club to finish one place below Everton in a season or be relegated instead of Everton in a season. Those will be the issues. Those will be the difficult issues of causation to demonstrate in the compensation claim. The amount of compensation is not the difficult issue. Of course there will have to be evidence about that and you will have perhaps experts or accounting evidence about the amount of compensation. The breach is not the difficult issue, because you will be determining the breach. As with Tevez, the issue and the issue that Fulham needed to rely on is proving causation.

8. Those observations about the need to establish causation were adopted in the Commission's decision.

> 6. The purpose of W.27 is to avoid unnecessary multiplicity of proceedings. It creates a procedure to enable a club who claims to have been caused loss by the breach of the Rules to claim compensation in the same proceedings. Liability is, of course, contingent upon the breach being upheld, causation and other factual issues.
>
> 11. I am satisfied that the applicant clubs have potential claims for compensation. Those claims and their validity depend on whether the complaint is upheld. They depend on factual circumstances concerning the causation of any loss and they depend on other factual issues.
>
> 12. Accordingly, I find that if the complaint is upheld by the Commission, it may wish to exercise its power under W.51.5. That finding triggers a discretionary power to direct admission of evidence directed to loss which may have been caused by the breach,…

9. By its decision dated 17 November 2023 the Commission found Everton to have been in breach of the PSR, and that the Complaint was proved. It imposed a sanction of a deduction of 10 points. Everton appealed the decision. By its decision dated 26 February 2024 the Appeal Board allowed two of the nine grounds of appeal, and reduced the sanction to a deduction of 6 points. On 1 March 2024 Burnley wrote to the Commission, indicating its wish to proceed with its claim for compensation under Rule W51.5. On 12 April 2024 Everton applied to the Commission to recuse itself on the grounds of apparent bias. That application was heard by the Commission on 10 May 2024. By its decision dated 22 May 2024 the Commission dismissed the recusal application. It was only at that stage that Burnley was able to advance its claim for compensation under Rule W51.5.

10. Burnley's Statement of Claim is dated 14 June 2024. Burnley advanced its claim for compensation pursuant to Rule W as being a claim for a further sanction, as

distinct from being a claim for breach of contract.

28. At no point during the proceedings has Everton ever suggested that the Commission lacks power to determine Burnley's compensation claim. To the contrary, during Burnley's joinder application, Everton submitted that "the Rules specifically provide in W.52 for the Commission to be able to hold a separate hearing on compensation as a distinct issue after everything else." The existence of the Commission's powers further to sanction Everton by awarding compensation to Burnley should, therefore, be common ground. Burnley accordingly claims compensation pursuant to the Commission's powers to award that sanction under Rule W.

29. Burnley reserves all of its rights, in the alternative and if necessary, to maintain that Everton's breach of the PSR was also in breach of its contractual obligations to Burnley under B.14 and B.15 of the PL Rules, entitling Burnley to damages.

11. Burnley proceeded to rely on the fact that the Commission and the Appeal Board had held that the breaches of the PSR had given Everton a sporting advantage. It argued that the effect of that advantage had been detrimental to Burnley.

41. Everton's sporting advantage was the difference between its Premier League survival and Burnley's relegation in the 2021/22 season. While the authorities make clear that a precise quantification of the sporting advantage inferred from a breach of the PSR is challenging, even on a conservative estimate the value of Everton's sporting advantage must have exceeded the four points between Everton and Burnley's league positions at the end of the 2021/22 season.

42. In 2021/22, Burnley finished just two places, and four points, below Everton, with a superior goal difference. Had Everton's serious breach of the PSR been met by an immediately applicable six-point sanction in the season of the breach itself, it would have been relegated and Burnley would have stayed up.

12. In Section VII of its Statement of Claim Burnley advanced its claim to Rule W compensation. It indicated (paragraph 50) that it would rely on expert evidence *with respect to the quantification of its compensation claim*, and stated (paragraph 51) that there were *a number of ways in which Burnley's entitlement to compensation may be measured.* It identified two possible approaches but reserved its position pending disclosure.

13. Everton's Statement of Defence is dated 2 August 2024. The Construction Issue was heralded. Everton (paragraph 4) denied that compensation under Rule W could be characterised as a *sanction* and asserted that –

…a claim for compensation is – and can only be – a claim for compensation for a breach of contract, the PL Rules forming part of a multi-lateral contract between the Premier League…and each of its member clubs, including as between the clubs themselves. Accordingly, any claim for compensation pursuant to Rules W.27 and W.50.5[1] must be determined in accordance with the ordinary contractual principles

[1] A mistake for W51.5.

governing causation and loss under English law (applicable by reason of Rule A.7).

Everton continued (paragraph 6) –

> EFC, accordingly, denies that BFC's claim for compensation can properly be pursued as presently pleaded, i.e. as a claim for the imposition of a further sanction for the Breach. Given the obvious importance of this issue for the further directions and evidence in these proceedings, and the proper determination of BFC's claim, the Commission is invited to determine this issue as a preliminary issue in these proceedings.

Everton responded in detail to Burnley's case, reiterating its denial that Rule W compensation could be a further sanction, and complaining about a lack of particularity in Burnley's pleaded case.

14. Burnley served a Statement of Reply dated 11 September 2024. It maintained its position that contractual principles of assessment of compensation were inapplicable. It argued (paragraph 4) –

> Burnley's request is that the Commission award "*compensation pursuant to the Commission's powers to award that sanction under Rule W*". Everton dedicates much of the Defence to objecting to the description by Burnley of the Commission's relevant power under Rule W.51.5 as a "*sanction*". This objection is irrelevant. Whether characterised as a sanction, penalty, order or otherwise, the Commission has the power to award compensation "*unlimited in amount to any Person or to any Club (or club)*" and Everton cannot argue to the contrary.

It denied that contractual principles applied.

> The list of consequences in Rule W.51 expressly follows from two things: (i) a finding that a complaint has been proved (see Rule W.50); and (ii) the hearing and consideration of any mitigating factors raised by the Respondent (see the introductory language of Rule W.51 itself). It is therefore plain on the face of these provisions that compensation is one of a series of consequences that may flow once those two things have occurred and nothing more is required.[2]
>
> …the potential entitlement of any party (including the contracting Clubs) to compensation under W.51.5 is distinct from and independent of any contractual entitlement to damages of contracting Clubs.[3]
>
> The Commission…has a discretion as to whether it requires any evidence from Burnley, and even if it exercises that discretion, the evidence sought will only concern the quantification of Burnley's loss. … This truncated procedure is entirely inconsistent with "*the rigorous analysis of causation and loss*" that Everton wrongly says is required. There is nothing in these procedural provisions that suggests that the relevant Person, Club or club (as applicable) will be required to engage in a fully contested contractual damages analysis, still less prove a separate cause of action.[4]
>
> The Commission has the power to award compensation in an unlimited amount (regardless of how that power is characterised, a point which is irrelevant to its existence). To the extent it may assist in its assessment of the amount due, the Commission has the power to request that Burnley submits evidence of its loss. Everton's suggestion that the Commission can only award compensation following an assessment of the principles applicable to a claim for damages following a breach of contract is contrary to the plain language of the relevant PL Rules and involves the

[2] Paragraph 7.
[3] Paragraph 11.
[4] Paragraph 12.

attempted re-litigation of existing findings of the Commission.[5]

Everton is wrong to frame Burnley's claim for compensation as a new cause of action, which can only be determined as a claim for breach of contract. It may be that Everton would rather Burnley had initiated proceedings for breach of contract under Rule X of the Premier League Rules, but that is irrelevant. Burnley's claim for relief is in fact a request that the Commission uphold the contract to which both Burnley and Everton are party, by awarding compensation in an unlimited amount as it sees fit. As set out in the SoC, Burnley respectfully submits that in light of its losses, compensation in an amount to be assessed currently estimated at not less than £60 million is appropriate.

15. Everton served its application for determination of the Construction Issue on 13 September 2024.

> 1. The Respondent ("**EFC**") hereby applies for an Order that the Commission shall determine, as a preliminary issue (the "**Issue**"):
>
> 1.1. whether a claim for compensation under PL Rules (the "**PL Rules**") W.27 and W.50.5[6] – such as that made by the Claimant ("**BFC**") – is properly to be regarded as (i) a request for the imposition of a "*further... sanction*"; (ii) a claim for damages for breach of contract; or (iii) something else, and if so what; and
>
> 1.2. whether a claimant seeking compensation under PL Rules W.27 and W.50.5[7] must show that the losses being claimed were caused by a breach of the PL Rules by the person against whom compensation is claimed.
>
> 7. For the avoidance of doubt, as to the resolution of the Issue, EFC will contend that:
>
> 7.1. BFC's claim for compensation under PL Rules W.27 and W.50.5[8] is not properly to be regarded, and could not properly be pursued, as a request for the imposition of a "*further... sanction*"; and is instead a claim for damages for breach of contract (or should be approached in the same way in any event).
>
> 7.2. That a claimant seeking compensation under PL Rules W.27 and W.50.5[9] must show that the losses being claimed were caused by a breach of the PL Rules by the person against whom compensation is claimed.

16. Burnley served submissions on the Construction Issue on 16 September 2024. It adhered to its position that quantification of compensation did not require a contractual damages assessment exercise.

> 2. Everton seeks to supplant Burnley's entitlement to claim compensation under Section W of the PL Rules as a consequence of the complaint that the Commission has now long upheld against it with the requirement to establish a "*different cause of action ... rais*[ing] *distinct and separate issues of causation and loss under the ordinary principles for the determination of a claim for breach of contract*". This is not what the contracting parties to the PL Rules agreed in Section W. Burnley respectfully invites the Commission to reject Everton's preliminary issue and proceed to hear Burnley's request that it exercise its broad discretion under Section W of the Rules to award it compensation without further delay.

[5] Paragraph 14.
[6] A mistake for W51.5.
[7] A mistake for W51.5.
[8] A mistake for W51.5.
[9] A mistake for W51.5.

4. The answers to the questions now posed by Everton are as follows:
   4.1 A claim for compensation under W.51.5 is not a claim for damages for breach of contract: the Commission has and retains the power to award compensation in an unlimited amount to a Person, Club or club (in this case Burnley) as a consequence of its decision upholding the complaint for a breach of the PSR against Everton.
   4.2 Further, the Commission has broad discretion in determining the amount of compensation to be paid and there is no need for a Person, Club or club claiming such compensation separately to prove causation.

17. Everton's submissions on the Construction Issue are also dated 16 September 2024. It maintained its case that –

> A claim for compensation under Rule W.27 and W.51.5 is a claim for *"compensation"* for a disciplinary breach, which is a breach of contract: it is certainly not a claim for the imposition of a "*further sanction*",…[10]

Everton advanced ten *key points* [11] to support its case. In relation to the requirement to show causation it said [12]–

> 22. This is, at heart, a simple matter of basic principle and common sense. Test the position in this way: if BFC's claim is a claim for compensation, what is it being compensated <u>for</u>? It must, and can only sensibly be, losses *actually caused* by EFC's breach. Were it otherwise, there would be no principled basis for ordering compensation; nor, absent a causative tether, is it clear how the Commission would actually begin to quantify BFC's losses. To compensate is to *"counterbalance, make up for, make amends for"* (Oxford English Dictionary, 2nd Edition, Vol III, p601). There are centuries of case law laying down causation and remoteness principles which are designed to establish whether a contract-breaker is, or is not, fairly to be required to make up for the alleged losses of another party. Absent the clearest textual support, it would be astonishing if the Commission were to find that the member clubs of the PL had endorsed the abandonment of all of those principles in favour of, in effect, agreeing to be liable for uncapped losses which they did not legally or factually cause. This is…an entirely uncommercial and unworkable interpretation.

18. On the afternoon of 19 September 2024, the day before the hearing, Everton served a short, one page, Reply to Burnley's submissions.

THE HEARING

19. In Everton's oral submissions Mr Segan followed the structure of the Defence and the written submissions. The theme that ran through his submissions was that Burnley's claim could be only for breach of contract: it could not be for a further sanction. Accordingly, the conventional principles for assessing damages for breach of contract applied – of which proof of causation was an essential element. Mr Segan submitted that the detail of Burnley's case was not sufficiently pleaded,

[10] Paragraph 9.
[11] Paragraph 10.
[12] Paragraph 24.

that it could not simply reserve its position in relation to a contractual claim, but had to set out the case at this stage of the proceedings.

20. Mr Segan argued that Burnley's argument made in its written submissions[13] that the Commission should adopt a truncated procedure that did not involve rigorous analysis of causation and loss was simply wrong. Mr Segan pointed to the fact that although the Commission and the Appeal Board had found that Everton's breach of the PSR had conferred a sporting advantage neither had quantified the extent or effect of that advantage. The effect of a sporting advantage was a causation issue that had to be determined as part of the quantification of loss.

21. Mr Segan proceeded with submissions on the structure and effect of the Rules, which created a multi-lateral contract to which each member of the Premier League was a party. Compliance with the Rules was therefore a contractual obligation. Mr Segan took us to *Sara & Hossein Holdings Ltd v Blacks Outdoor Retail Ltd* [2023] 1 WLR 575 to demonstrate the conventional principles of contractual interpretation. He pointed us to *South Shields FC v FA* ISLR 2021 SLR1-SLR12 to support the argument that business contracts should be construed so as to make them workable, from which he argued that quantification of compensation would be unworkable if causation were not to be part of the calculation exercise. Mr Segan relied on the reasoning in *Sheffield United v West Ham* ISLR 2009 SLR25-SLR41 in which the tribunal had proceeded on the basis that compensation was for breach of contract[14] so that compensation fell to be assessed according to conventional contractual principles[15], of which causation was an essential element.

22. Mr Segan made the point that Everton had already been punished by the points deduction. That was the entire sanction. Burnley's claim for compensation was factually separate and conceptually distinct from being a further sanction. It was properly characterised as a claim for breach of contract with the inevitable consequence that in order to be recoverable any loss must have been caused by the relevant breach. That submission was supported by the Appeal Board's decision in the costs appeal, in which it analysed the concept of a sanction in the context of Rule W.

[13] Written submissions, paragraph 12.
[14] Paragraph 1.
[15] Paragraphs 58 & following.

23. Finally, Mr Segan pointed to the contrast between the case now being advanced by Burnley and the submissions that it had made at the intervention hearing in May 2023, in which it was taken as a given that any claim for compensation required proof of the causation of the loss claimed.

24. Both Ms Byrne and Mr Sprange made oral submissions on behalf of Burnley. Ms Byrne advanced Burnley's core submission, namely that assessment of compensation under Rule W51.5 did not involve any contractual analysis. She submitted that Everton's case to the contrary involved relitigating matters that had already been decided in the PSR proceedings. The concepts of sanction and compensation were intertwined. The hearing on 9 May 2023 had not addressed the interpretation of Rule W51.5 but had been concerned with whether Burnley's compensation claim should be split from the PSR proceedings.

25. Ms Byrne took us to passages from the Appeal Board decision, particularly Ground 6 which dealt with sporting advantage. Ms Byrne emphasised that the Commission had found that Everton's breaches of the PSR had conferred a sporting advantage and that that finding had been upheld by the Appeal Board. Everton cannot be permitted to mount a collateral attack on those findings. The Commission had dealt with the issues of liability, sanction and disposal. Everton cannot revisit issues that have been disposed of.

26. Mr Sprange began his submissions with two points. First, Burnley was not bringing a sanction claim. It was pursuing compensation pursuant to the provisions of Rule W51.5. In ordinary terms payment of a large sum by way of compensation would be seen as *a sanction* but that does not detract from the fact that Burnley's claim was for Rule W51.5 compensation. Second, Everton's application was not about interpretation of the Rules but was an attempt to prevent Burnley from running one of its alternative cases. The core point was that it was not now permissible for Everton to challenge the finding that its breaches of the PSR caused it to benefit from a sporting advantage. There was no reason that Burnley should be prevented from pursuing its first case.

27. In support of his arguments Mr Sprange took us to Burnley's statements of case to demonstrate that the claim was for *compensation*. For example, paragraph 2 of the Statement of Claim asked the Commission to *sanction Everton by an award of compensation….* Paragraph 28 advanced a claim *for compensation pursuant*

to the Commission's power to award that sanction under Rule W. Mr Sprange explained that Burnley's right to bring a contractual claim[16] was reserved pending disclosure – at present Burnley had not seen all the relevant documents and was not in a position to formulate a fully pleaded case.

28. Mr Sprange pointed to the wording of Section VII of the Statement of Claim as explicitly claiming compensation. The basis for that claim is that the Commission and the Appeal Board have already found that Everton's breaches of the PSR secured it a sporting advantage: those findings are binding and cannot be revisited in the compensation proceedings[17]. Mr Sprange took the Commission to section VII of the Statement of Reply, which expressly addressed (albeit as an alternative to Burnley's primary case) the causative effect of the sporting advantage. Burnley has therefore addressed the question of causation – insofar as it is able to do so at this pre-disclosure stage of the proceedings.

29. Subsequently in his submissions Mr Sprange confronted the issue whether proving causation was an essential element of quantifying Burnley's loss. He said –

> …even if the question of causation is in contention, and on that case it is a simple but for, we have to -- if we are forced to prove causation, we say from the appeal board's decision it is obvious. Six points. If Everton had had those six points deducted that season, we wouldn't have been relegated and we wouldn't have suffered the loss. That's the simplest application of causation principles that you will see, and we say very open to us on the findings that were previously made.
>
> What we then say is, even if we're wrong on that, in the further alternative, Everton's overspending caused Burnley to be relegated, and Everton to remain in the Premier League, so we have a very clear case on causation on traditional principles, and what we do in 36, in the subparagraphs, is explain how and why, and we say it ought to be measured by reference to the tangible advantages that Everton gained by its breaches.[18]

30. Thereafter the following exchange took place –

> THE CHAIR: There's a difference between as a matter of principle whether you need to establish causation and, on the other hand, whether the evidence is so overwhelming, because of what has already been decided, whatever you find on disclosure, whatever you plead from your side, that there is no argument.
> MR SPRANGE: Yes.
> THE CHAIR: What I'm trying to pin you down on --
> MR SPRANGE: Latter.

[16] Paragraph 29.
[17] Paragraph 34, Statement of Reply.
[18] Transcript page 96.

> THE CHAIR: -- what I'm trying to pin you down on -- it is the latter.
> MR SPRANGE: Yes.
> THE CHAIR: So you agree that causation is a necessary element, but you expect and hope the evidence to be so overwhelming there won't be a true issue?
> MR SPRANGE: Yes, and, look, I can put it no better than we put it in the reply. In paragraph 34 -- so this is page 77, tab 3 of A, we say you've already determined, because you've said it was worth in excess of four points, accordingly the only issue that remains is the level of loss, level of compensation, so that, we say, is it is so overwhelming on what has taken place before. We're not saying as a matter of principle a club in our position never has to deal with causation, we're not saying that at all. We're just saying that's the effect of what has happened in these proceedings, and then we go on –
> THE CHAIR: I'm sorry to keep interrupting you, but this seems to me to be the crux of it. I understand it to be the dispute between you, which Mr Segan has framed, it seems to me that you have said, I just want to be perfectly clear about this, that causation is an element, but what you are saying is on this case, from what you've got already and what you expect to get in terms of further evidence, there won't be an arguable issue.
> MR SPRANGE: Yes. Yes. So what I say is this: I don't go -- and I will cover Everton's points on interpretation in a moment, but what you will hear from me is I don't go to the Rules and say aha, read 51.5 to say this is unlimited compensation without reference to causation. That that's not my case. My case is simply it doesn't say pursuant to contractual principles. That's the real difference between us. [19]

31. Mr Sprange challenged whether the Construction Issue was suitable for determination as a preliminary issue. He asserted that determination of the Construction Issue would not resolve a significant part of the proceedings – the same, full range of evidence would still be required. Further, summary determination of the Construction Issue would be unfair to Burnley. Everton had objected to Burnley's presence in the PSR proceedings: it would be wrong to prevent Burnley advancing the full case that it now wished to present.

32. Finally, Mr Sprange addressed the ten points advanced by Mr Segan. He repeated that Burnley was seeking compensation not a punitive sanction. He made the point that when providing for compensation the Rules did not state that it was providing for contractual compensation: and, similarly, in the costs decision the Appeal Board did not say that compensation involved contractual damages.

33. Mr Segan replied. He submitted that the Construction Issue was suitable for summary determination. Everton, he said, needed to know the basis of the case

[19] Transcript page 105.

that it had to meet, namely whether loss was to be quantified by reference to contractual principles or in some other way. Everton was not seeking to strike out Burnley's claim but was seeking to identify the issues of causation and sanction. It was not sufficient for Burnley simply to point to the findings of sporting advantage: it needed to show that without that sporting advantage Burnley would not have been relegated.

34. There were further submissions made after the conclusion of the hearing. On 20 September 2024 Burnley supplied a copy of the additional authority produced during the afternoon of the hearing (*Ferguson v Astrea Asset Management Ltd* [2020] ICR 1517). On 23 September 2024 Everton made submissions that that case supported its analysis in relation to the distinction between a sanction and compensation. On 11 October 2024 both parties sent emails confirming that no agreement had been reached between the parties.

DISCUSSION

35. The Commission is faced with two questions to determine. One question is whether the Construction Issue should be determined as a preliminary issue. The other question is, if it is to be determined as a preliminary issue, determination of that issue. We consider that the correct approach to those questions is to consider the Construction Issue first, and thereafter to consider whether it is appropriate for it to be dealt with as a preliminary issue.

36. Everton argues that its application was made necessary by the way in which Burnley has pleaded its claim. By pleading the claim for compensation as a further sanction Burnley was making a different character of claim from the alternative contractual claim. Paragraph 4 of Burnley's written submissions demonstrate the difference: it is expressly stated that the claim for compensation under Rule W.51.5 is not a claim for damages for breach of contract. Everton argues that this assertion lies at the heart of the Construction Issue. It complains that if Burnley's claim is not a contractual claim it is not clear what it is. It argues that if the claim is not contractual there is no clear procedure by which the compensation is to be quantified. Everton says that it is no answer to say that Rule W51.5 permits the Commission to order compensation in an unlimited amount: what is required is a statement of how it is said that the sums claimed reflect losses that are consequential upon Everton's conduct. Burnley, Everton argues, can recover only compensation for losses that have been caused by

Everton's breaches of the PSR.

37. Everton's arguments were disputed by Burnley in its written submissions. It makes clear that its primary claim is for Rule W51.5 compensation, and that its alternative claim is a contractual claim for breach of the Rules. What was not made explicit in either Burnley's statements of case or in its written submissions was how it said that Rule W51.5 compensation was to be quantified. The absence of clarity on that issue would create, as Everton argued, difficulties for the parties and the Commission – some principle is required. Mr Sprange confronted that challenge in his oral submissions. In what appeared to be a qualification of Burnley's position Mr Sprange accepted that in order to be recoverable Burnley's Rule W51.5 losses would have to have been caused by Everton. In answers to questions from the Commission he accepted that causation was a necessary element of quantification, but maintained that given the finding of sporting advantage made by both the Commission and the Appeal Board there could, as a matter of fact, be no issue about the matter.

38. The Commission is satisfied that Everton's analysis of the Construction Issue is correct. It considers that (whether described as a sanction or a claim for compensation) Burnley's claim for Rule W51.5 compensation is a claim for damages for breach of the Rules that involves the conventional contractual quantification including the element of causation. As a general proposition we consider it unlikely that the Rules would provide for an award of compensation for losses that had not been caused by Everton. If that had been intended plain and clear words would have been used. On the contrary, Rule W51.5 is intended to provide for the payment of compensation for losses that have been caused by the wrongdoing party's breach of the Rules, which form a multi-lateral contract. It is therefore a claim for damages for breach of contract. If that were not the case the quantification exercise would lack principle, and would be unworkable in practice. Our conclusion accords with the approach adopted in *Sheffield United v West Ham.* It is consistent with the submissions made on behalf of Burnley at the 9 May 2023 hearing, and is consistent with the observations made by the Commission in its decision.

39. We consider it appropriate for the Construction Issue to be determined at this stage. It is necessary in order for the parties and the Commission to know the

principles that will apply to the Rule W51.5 claim. We consider that ruling on the Construction Issue at this stage will determine an important point of law and will lead to a saving of time at the final hearing. There is no prejudice to Burnley: indeed, it is to Burnley's advantage to have clarity as to the principles that will be applied. Determination of the Construction Issue at this stage does not prevent Burnley from running any arguments that can properly be advanced.

CONCLUSION

40. The Commission rules that Burnley's Rule W51.5 claim is a claim for damages for breach of the Rules, which are part of the multi-lateral contract between Premier League clubs. Compliance with the Rules is a contractual obligation and a breach of the Rules is a breach of contract. Therefore for the losses claimed to be recoverable Burnley must demonstrate that they were caused by Everton's breach of contract.

41. The Commission makes clear that it has limited its ruling to what is said in paragraph 40, above. It has not made any decision on other matters that may arise in the course of the compensation claim. Insofar as properly arguable, all such matters remain live issues in the proceedings. Any appearance that the Commission has ruled more widely is unintended and must be disregarded.

42. The Commission will now proceed to give directions for the conduct of the claim. Will the parties please liaise about what is required so that the Commission may know what is in issue and what is common ground.

David Phillips KC FCIArb
His Honour Alan Greenwood
Nick Igoe ACA

25 October 2024

IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W.51.5 OF THE PREMIER LEAGUE RULES BEFORE THE PREMIER LEAGUE INDEPENDENT DISCIPLINARY COMMISSION

PLJP 2023/3

B E T W E E N –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

ATTACHMENT 6

Commission's Jurisdiction Issue Decision – 20 May 2025

IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W51.5 OF THE PREMIER LEAGUE RULES

PLJP 2023/3

Mr David Phillips KC FCIArb
His Honour Alan Greenwood
Mr Nick Igoe ACA
20 May 2025

BETWEEN –

BURNLEY FOOTBALL & ATHLETIC CLUB LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

DECISION
(Rule W Jurisdiction)

INTRODUCTION

1. On 15 May 2025 the Commission held a Teams meeting to hear submissions directed to the Commission's jurisdiction under Rule W. Burnley was represented by Tom Sprange KC (of King & Spalding, instructed by Wiggin). Everton was represented by James Segan KC and Celia Rooney (counsel instructed by Pinsent Masons). Both parties had exchanged skeleton arguments that succinctly and clearly set out their respective cases.

PRODEDURAL HISTORY

2. On 24 March 2023 the Premier League brought a Rule W complaint against Everton alleging breach of the PSR. The complaint was in Form 22. It set out the allegation of breach of Rule E51. It set out the details of the alleged breach, including quantifying the amount of the spending in excess of the PSR limit. On 9 May 2023 the Commission heard applications by Burnley and a number of other clubs to intervene in the Rule W complaint proceedings so as to pursue claims for compensation against Everton. The Commission recognised that Burnley and the other clubs had potential claims for compensation under Rule W but held that the time for bringing such claims would be after any PSR breach and sanction had been determined. The application to intervene in the complaint proceedings was dismissed.

3. The Commission delivered its decision on the alleged PSR breach on 17

November 2023. The Premier League had alleged that Everton had exceeded the PSR limit of £105 million by £19.5 million. Everton admitted a PSR breach but argued that the excess was £7.9 million. The Commission found that the PSR complaint was established, and that Everton had exceeded the PSR limit by £19.5 million, as alleged by the Premier League. The Commission imposed a sanction of a 10 point deduction. Everton appealed that decision. On 25 January 2024 the parties agreed to stay Burnley's proposed Rule W compensation claim pending the outcome of the appeal. The Appeal Board's decision was delivered on 26 February 2024. The Commission's finding of the £19.5 million breach was not changed. The sanction was reduced to a 6 point deduction.

4. On 27 March 2024 the Commission gave directions for the conduct of Burnley's Rule W compensation claim. On 12 April 2024, before Burnley served a Statement of Claim, Everton applied for the Commission to recuse itself. By the decision dated 22 May 2024 (following a hearing on 10 May 2024) the Commission dismissed the recusal application. On 29 May 2024 the parties agreed that Burnley should serve a Statement of Claim of its Rule W claim by 14 June 2024.

5. In its Statement of Claim served on 14 June 2024 Burnley sought (amongst other things) compensation by way of a further sanction independent of any contractual claim. On 13 September 2024 Everton applied for determination of a construction issue, namely whether Burnley was entitled to claim a further sanction under Rule W or whether its entitlement was limited to contractual claims. The Commission heard the application on 20 September 2024. By its decision dated 25 October 2024 the Commission ruled that Burnley's Rule W compensation claim was limited to contractual claims, and that it was not open to it to claim compensation by way of a further sanction.

6. On 28 November 2024 the Commission gave further directions for the conduct of Burnley's Rule W compensation claim. Those directions included the provision to Burnley of the entirety of the documents produced in the PSR complaint proceedings, and a direction for service of an Amended Statement of Claim by 27 January 2025.

7. Burnley served an Amended Statement of Claim dated 30 January 2025. In it Burnley introduced a new claim. It alleged that the financial extent of Everton's PSR breach was greater than the sum of £19.5 million found by the Commission.

The allegation that the excess was greater than £19.5 million had not been considered or adjudicated by the Commission in its PSR complaint decision because it had not been advanced by the Premier League as part of its case. Burnley pleads that that allegation is relevant to its Rule W compensation claim because *the greater the breach, the greater the resulting sporting advantage*[1].

8. In its Amended Statement of Defence Everton challenges the Commission's jurisdiction to determine the unadjudicated claims. It asserts that the Commission's jurisdiction is limited to what may have been caused by the breaches established in the PSR complaint hearing. That jurisdiction does not extend to unadjudicated breaches that were not found to be proved in that hearing.

9. Everton made the present application in Pinsent Mason's letter dated 28 February 2025 in the following terms.

> EFC, therefore, applies for directions for the following issues to be heard as preliminary issues:
>
> **Issue 1**. Does the Commission have jurisdiction to hear and determine a claim for compensation arising from any alleged breach of the PL Rules over and above that which was before it in the FY22 PSR Proceedings, namely EFC's admitted breach of the PSRs over the four-year rolling assessment period ending in the financial period ending 30 June 2022 (i.e., FY22), whereby EFC exceeded the £105 million threshold of permissible losses by £19.5 million (the "**Admitted Breach**")? If not, should the following paragraphs of the ASoC (or any relevant part thereof) be struck out: 2, 6A, 29, 29A, 29B, 30, 41, 41A, and/or 41B?

10. Following a hearing held on 22 April 2025 the Commission directed that the challenge to its jurisdiction to determine the unadjudicated claims should be determined as a preliminary issue. The hearing of that issue was held by Teams on 15 May 2025. This is the Commission's decision on that issue.

PRINCIPLES OF CONSTRUCTION

11. There was no difference between the parties as to the principles of construction to be applied to the interpretation of the Rules. We adopt the following from paragraph 11 of Everton's skeleton argument.

> 11. The relevant principles of contractual interpretation are familiar. They are to be found in ***Rainy Sky SA v Kookmin Bank*** [2011] WLR 2900, ***Arnold v Britton*** [2015] AC 1619 and ***Wood v Capita Insurance Services Ltd*** [2017] AC 1173. They were summarised by Carr LJ (as she was then) for the Court of Appeal in ***EMFC Loan Syndications LLP v The Resort Group Plc*** [2022] 1 WLR 717, at [56]-[58]. In broad summary:
>
> 11.1. A court or tribunal is *"concerned to identify the intention of the parties by reference to what a reasonable person having all the background knowledge which would have been available to the parties would have understood the language in the contract to mean"* (***EMFC***, at [57]).
>
> 11.2. It does so *"by focusing on the meaning of the relevant words in their documentary, factual and commercial context. That meaning has to be assessed in the light of the*

[1] Paragraph 29A, Amended Statement of Claim.

natural and ordinary meaning of the clause, any other relevant provisions of the contract, the overall purpose of the clause and the contract, the facts and circumstances known or assumed by the parties at the time that the document was executed and commercial common sense, but disregarding evidence of the parties' subjective intention" (***EMFC***, at [57]).

11.3. While commercial common sense is *"a very important factor"*, a court or tribunal *"should be very slow to reject the natural meaning of a provision as correct simply because it appears to be a very imprudent term for one of the parties to have agreed. The meaning of a clause is usually most obviously to be gleaned from the language of the provision. Where the parties have used unambiguous language, the court must apply it"* ***(EMFC**, at [57])*. If there are *"two possible constructions, the court is entitled to prefer the construction consistent with common sense and to reject the other"* ***(EMFC**, at [57])*.

11.4. The weight to be given to *"elements of the wider context"* will vary according to the *"nature, formality and quality of drafting of the contract"* ***(EMFC**, at [58])*.

EVERTON'S CASE

12. Everton bases its case on what it submits to be a conventional construction of the Rules. It submits that Rules W and X must be seen as part of the same regime. They provide for different procedures that complement each other. Rule W contains a disciplinary scheme: Rule X contains an arbitration scheme. Everton argues that compensation claims brought under Rule W are limited to compensation for breaches established in the Rule W disciplinary proceedings. Claims based on wider/different breaches cannot be brought under Rule W but must be the subject of a Rule X arbitration. In Rule W proceedings the Premier League controls the allegations that are put before a Commission. By contrast, in Rule X proceedings the applicant club is free to bring whatever allegations it chooses to make.

13. Everton argues that proceedings under Rule W are defined by the complaint brought by the Premier League. Compensation is secondary to the complaint. So, only breaches that have been proved can lead to an award of compensation. It is not open to a party to seek to establish grounds for compensation that go beyond those grounds found to have been proved by the Commission. That, Everton submits, is plain from the wording of Rules W50 and 51.

14. By contrast, Rule X provides a discrete conventional arbitration procedure. It is a self-standing procedure. There is therefore no need to strain the construction of Rule W to accommodate what is already provided by the comprehensive Rule X procedure. It is for the applicant club to elect between the different procedures provided by Rules W and X.

15. In support of that analysis Mr Segan took the Commission to the wording of the Rule W provisions, developing the submission made in paragraph 14 of Everton's

skeleton argument. Those provisions, he submitted, unequivocally demonstrate the correctness of Everton's construction. That construction is consistent with the purpose of the Rules, and provision of the different but complementary Rules W and X schemes.

16. Mr Segan submitted that the *Fiona Trust v Privalov* [2008] 1 Lloyds Rep 254 one-stop principle had no application. This was a case in which the Rules provided a coherent scheme that had two alternative routes. An applicant who wished to raise allegations beyond those found proved by the Commission was free to bring them under Rule X. There was no compulsion to follow the Rule W route – it was a matter for election by the applicant. The one-stop principle was therefore not relevant.

17. Everton had argued in correspondence that on the facts of this case Burnley was unable to advance a viable Rule X claim. That argument was based on the fact that Burnley had been relegated from the Premier League in mid-June 2022 at which point it ceased to be a member of the League. That argument was not accepted by Burnley. Mr Segan recognised that if that argument were correct Burnley would not have the option of pursuing a viable claim through Rule X proceedings. He argued that that fact did not detract from the case that he had advanced. Burnley's position was exceptional. The case that Mr Segan had advanced was based on how the Rules applied in the vast majority of cases. The fact that it might not apply to Burnley did not justify a different construction of those Rules. The scheme created by Rules W and X was not unfair. In any event, the issue that the Commission had to decide was not to be determined by apparent unfairness, but by principles of construction. A proper application of those principles admitted of only one conclusion. The Rules provided a scheme that left an applicant free to choose between Rules W and X.

BURNLEY'S CASE

18. On behalf of Burnley Mr Sprange emphasised the procedural facts. Burnley's application to intervene in the PSR proceedings had been refused. It was therefore unable to contribute to the allegations placed before the Commission. The present Rule W compensation claim was the first opportunity that Burnley had to understand the extent of Everton's breaches and to consider the detail of the claims that it wanted to make. Mr Sprange argued that Everton's construction

of Rule W would result in significant prejudice to Burnley, who would be deprived of the opportunity to advance its full compensation claim.

19. Mr Sprange argued that the proper approach was to recognise that the Complaint had alleged a single breach, namely a breach of the FY22 PSR limit. The *extent* of the breach remained wide open – it was something that could and should be determined in Burnley's Rule W compensation claim. The proper construction of Rule W51 was that after the Rule W PSR breach had been determined it remained open to an applicant in a Rule W compensation claim to put before the Commission all relevant matters so that the actual losses could be determined.

20. Mr Sprange relied on the *Fiona Trust* one-stop principle, which applied to any dispute resolution clause. Rule X was irrelevant to the construction of Rule W. It would hamstring a Rule W compensation applicant to the findings made by a Commission in a Rule W compensation claim hearing. Causation is at large, so an applicant can bring forward the full amount of its losses. The consequence of cross-referencing Rules W and X would be to compel Burnley to bring its claims in two separate sets of proceedings. That is the vice that the *Fiona Trust* principle is designed to prevent.

21. Mr Sprange distinguished *Guidance Investments Ltd v Guidance Hotel Investment Co* [2013] EWHC 3413. In *Guidance* the agreement expressly created arbitration provisions to determine disputes in relation to events of default, leaving other disputes to be determined by the court. The fact that clear language had been used enabled the court to give effect to the provisions. That is not the case in relation to Rule W. There is nothing in the rule to suggest that part of the claim may be made under Rule W but that other parts must be made under Rule X. Rule X is a separate, discrete provision that has no relevance to the construction of Rule W. The express language of Rule W should prevail, and the *Fiona Trust* one-stop principle should therefore be applied.

22. Mr Sprange took the Commission through various provisions of Rule W. Rule W23 provided for proceedings to be commenced by a Complaint drafted by the Premier League. The power given to the Commission under Rule W27 was wide and unfettered. Burnley was entitled to advance its claim for the unadjudicated breaches as part of the Rule W compensation claim. Everton had admitted the

breach alleged in paragraph 1.1 of the Complaint, so the October 2023 hearing was a Rule W43.1 mitigation hearing, not a Rule W43.2 liability hearing. What was in issue at the October 2023 hearing was the question of sanction, not the question of breach, which had been admitted. To give effect to the wide compensation provisions of Rule W Burnley must be permitted to adduce evidence of the actual amount of Everton's overspend.

23. Mr Sprange reiterated the unfairness that would be caused to Burnley if it were to be locked out in the way sought by Everton. It had been denied the opportunity to participate in the Rule W PSR proceedings: it should be afforded a full opportunity now. Rule W expressly enables the same Commission that determined sanction to decide compensation. It would be unjust to limit Burnley's claim to something other than its true losses.

DISCUSSION

24. The Commission is conscious of the potential unfairness to Burnley if it is denied the opportunity to rely on alleged unadjudicated breaches for proof of sporting advantage. Burnley made a timely application to intervene in the Rule W PSR proceedings. It was denied the opportunity to participate in those proceedings. It now wishes to advance a claim based on what it says is the true extent of Everton's excess spending. Mr Sprange submitted, the more the overspend the greater the sporting advantage. If Everton's submissions are correct Burnley will not be able to bring that full claim in these Rule W compensation proceedings. Burnley says that it would be unsatisfactory for it to bring two sets of proceedings (under both Rules W and X) raising related but different allegations.

25. The Commission understands Burnley's complaint of unfairness, but it cannot decide this application on questions of fairness – although it gives due weight to the need to achieve a decision that is just to both parties. The outcome of Everton's application turns on a construction of the Rules. The relevant principles of construction are not in dispute. The Commission must give effect to the words used in the Rules, and to determine the parties' intention from those words and their natural meaning. It is not permissible to strain the proper construction of Rule W by in effect rewriting what the parties must be taken to have agreed.

26. That is so notwithstanding the fact of Everton's argument that Burnley cannot

bring Rule X proceedings. The Commission must determine the scheme created by the Rules from the words used. That requires us to give due weight to the coexistence of Rules W and X. We consider that the fact of the challenge made on the facts of this case to Burnley's ability to bring Rule X proceedings should not affect the proper construction of the Rules.

27. The Commission has no doubt that in construing Rule W it must give due weight to the existence and effect of Rule X. We do not accept Burnley's submission that Rule X is simply irrelevant. Both are in the section of the Rules directed to *Disciplinary and Dispute Resolution*. Rule W is *Disciplinary*; Rule X is *Arbitration*. Rule W primarily addresses discipline: the compensation provisions are secondary to the discipline provisions. Under Rule W it is for the Premier League to frame the Complaint. Others who may be potentially affected by the alleged breaches have no role in framing the charge. The Commission determines the allegations made by the Premier League in the Complaint: it has no investigatory role.

28. We consider that the proper construction of the wording of Rule W limits the power to award compensation under Rule W51.5 to a power to award compensation caused by breaches found by the Commission to have been proved. It is not open to the Rule W applicant to seek to recover wider losses. It is not open to such an applicant to advance claims based on losses caused by anything other than the breaches found by the Commission. That is the plain intention of the wording of Rule W. The Commission's powers after a complaint has been proved are contained in Rule W51, which set out a range of possible sanctions. Clearly, those powers arise only in the event of a complaint being proved. The Rule W compensation power is contained in Rule W51.5. That power to order compensation, as with the power to impose sanctions provided in Rule W51, can sensibly only arise in the event of the complaint being proved. It cannot be that the Commission could award compensation if the complaint had not been proved.

29. Other provisions of Rule W confirm that construction. Rule W27 enables the Commission to indicate that it may wish to award compensation if the Complaint is proved. There is a direct link between proof of the allegations and potential compensation. Rule W58 deals with the consequences of the Commission refusing to order compensation claimed to arise out of the Rule W PSR breach alleged in the complaint. Further claims based on the established breaches are

barred.

30. That construction of Rule W is consistent with and is confirmed by the provisions of Rule X. There is no need for the unadjudicated claims to be brought in the Rule W compensation proceedings. The provisions of the scheme provide that it is open to an applicant to bring those claims in a Rule X arbitration. The fact that in a specific case a claim under Rule X may not be possible does not affect the proper construction of Rule W.

31. This construction is not inconsistent with the *Fiona Trust* one-stop principle. Rule W must be construed in the context of the Rules as a whole including, in particular, the provisions of Rule X. Rules W and Rules X create a scheme that expressly enables two distinct routes for compensation claims. Claims based on matters found to have been proved in Rule W disciplinary proceedings can be brought in Rule W compensation proceedings. Such claims will be limited to what has been proved in the Rule W disciplinary proceedings. Other claims can be brought in Rule X arbitration proceedings. The availability of the Rule X arbitration procedure would mean that in the ordinary case the consequence of limiting the breadth of a Rule W compensation claim is not to deprive an applicant of the opportunity to bring wider claims. It would then be open to an applicant that has both types of claim to elect whether to bring them in both Rule W compensation proceedings (where it will have the advantage of basing a claim on established breaches) and separate Rule X proceedings, or to bring the entirety of its claims in Rule X arbitration proceedings. It would be open to the applicant to elect which procedure to adopt – or to adopt both.

32. The Commission does not accept Burnley's submission that the complaint is limited to the general words used in paragraph 1.1 of the Complaint, or that Everton had admitted the breach so that the Rule W PSR October 2023 hearing was a Rule W43.1 mitigation and sanction hearing. The Complaint must be read as a whole. It is plain that the allegations in the Complaint contained details of the facts relied on, and the extent of the financial overspend. Some of those allegations were denied by Everton, were the subject of detailed lay and expert evidence, and were the subject of lengthy argument and submissions. They were dealt with by the Commission in the 17 November 2023 decision. We are quite satisfied that the October 2023 hearing was a Rule W43.2 hearing during the course of which Everton's denial was fully ventilated.

CONCLUSION

33. We consider that it would be unjust for Everton to face claims in the Rule W compensation proceedings based on breaches of contract that went beyond those found by the Commission in the Rule W PSR proceedings. For the reasons that we have explained, such wider claims are not permitted by the Rule W compensation provisions.

34. The Commission therefore allows Everton's application that the Commission does not have jurisdiction to entertain claims for the unadjudicated breaches. We hope that, as we indicated at the hearing, the parties will agree which passages of the ReAmended Statement of Claim are affected by this decision. In the absence of agreement the Commission will hear the parties on the issue and will make a determination.

David Phillips KC FCIArb
His Honour Alan Greenwood
Nick Igoe ACA

20 May 2025

IN THE MATTER OF A CLAIM FOR COMPENSATION PLJP 2023/3
UNDER RULE W.51.5 OF THE PREMIER LEAGUE RULES
BEFORE THE PREMIER LEAGUE INDEPENDENT DISCIPLINARY COMMISSION

B E T W E E N –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

ATTACHMENT 7

Consequential Matters Decision – 2 June 2026

IN THE MATTER OF A CLAIM FOR COMPENSATION UNDER RULE W.51.5 OF THE PREMIER LEAGUE RULES BEFORE THE PREMIER LEAGUE INDEPENDENT DISCIPLINARY COMMISSION

PLJP 2023/3

Mr David Phillips KC FCIArb
HH Alan Greenwood
Mr Nick Igoe ACA

B E T W E E N –

BURNLEY FOOTBALL & ATHLETIC COMPANY LIMITED

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

DECISION
(Consequential Matters)

INTRODUCTION

1. The Commission held a remote hearing on 28 May 2026 to deal with matters consequent upon its decision in the compensation claim. Burnley was represented by Mr Tom Sprange KC, (of King & Spalding instructed by Wiggin). Everton was represented by Ms Sonia Tolaney KC, Mr Douglas Paine (counsel instructed by Slaughter and May). The Premier League was represented by Mr Ben Carroll (of Linklaters).

2. The matters that were dealt with had been the subject of correspondence between Burnley and Everton, but largely had not been agreed. They were –
   (1) Typographical corrections to the draft decision.
   (2) Form of the Order.
   (3) Stay of enforcement of decision/costs.
   (4) Stay of publication, and redaction of decision.
   (5) Costs.

TYPOGRAPHICAL CORRECTIONS

3. We have adopted the changes agreed by the parties.

FORM OF ORDER

4. We serve with this Decision a form of the draft Order that we believe reflects the

decision made on these consequential issues. Please will each party confirm its agreement to the draft. In the event of disagreement, please will they provide a revised draft and explain the need for the proposed revisions.

STAY OF ENFORCEMENT OF DECISION/COSTS

5. Everton applies for a stay of enforcement of the decision and of any costs Order pending the determination of its appeal against the compensation decision. It argues that the Commission has power to grant a stay by reason of Rule W51.5 and/or Rule W 51.10. We note that Rule W does not confer an express power to order a stay. However, we are satisfied that the proper construction of Rule 51.5 is that it is intended to include such a power. That conclusion is reinforced by the catch-all provision of Rule W51.10.

6. Everton relied on *Hammond Suddards v Agrichem* [2001] EWCA Civ 2065 and *AssetCo v Grant Thornton* [2019] EWHC 592 (Comm) as setting out the relevant principles to be applied in deciding whether to grant a stay pending appeal. We note that the appeal is as of right. We agree with Ms Tolaney that examination of the merits is not an appropriate exercise. All that is required is that the proposed appeal should be arguable. Notwithstanding Mr Sprange's submissions about the draft Grounds of Appeal we are satisfied that some of them are arguable. We are satisfied that we have a discretion to order a stay.

7. We accept Ms Tolaney's submissions as to the criteria to be applied in the exercise of that discretion. In order to obtain a stay Everton must demonstrate a real risk of some irremediable harm so that not to grant a stay would cause an injustice. The question is what is in the interests of justice.

8. Everton's case is that Burnley's financial circumstances are so weak that there is a real risk that if the appeal were to succeed Burnley would be unable to repay compensation that it would have received from Everton. Everton therefore seeks a stay of execution pending the appeal. In the alternative, it proposes that the funds be secured by being paid into an escrow account, or the repayment being the subject of a bank guarantee. In support of its submissions as to Burnley's financial position Everton adduced evidence in the form of a report from AlixPartners. We agree with Mr Sprange that that report lacks the formalities that would be expected, including not identifying the author. However, as Ms

Tolaney points out, the report exhibits the raw material on which the report's conclusions are based. It is therefore possible, notwithstanding the formalities' irregularities, to see the criticisms made by AlixPartners from the source material. Ms Tolaney undertook that exercise in her oral submissions. Burnley was able to respond to the AlixPartners' report, and did so in the form of the fourth report from Mr Boulton. Mr Boulton criticises AlixPartners' conclusion as being based on out of date information. Mr Boulton also deals with the effect of the Football Creditors Rule (Rule E22), not referred to in AlixPartners' report, which he says would mean that if Burnley failed to repay monies to Everton the Premier League would divert Central Funds (principally parachute payments) that were due to Burnley to Everton to discharge the liability. Moreover, notwithstanding the fact that Burnley had assigned future Central Funds receivable from the Premier League as security for a bank loan, both Burnley and its lender had executed a document acknowledging that this assignment was subordinate to the Football Creditors Rule. Ms Tolaney made clear that Everton was not confident either that the Premier League would necessarily apply the Football Creditors Rule or that Burnley's current or possible future lender would be bound by the agreement making their assignment of Central Funds subordinate to the Football Creditors Rule .

9. We consider the justice of the case requires us to admit the reports from both AlixPartners and Mr Boulton. The lack of formality in the AlixPartners' report does not prevent us from considering the reports as well as the exhibits and making findings on what they show.

10. We consider that there is some force in Everton's concerns about Burnley's financial position. Burnley's accounts to 31 July 2025 show net current liabilities of £62 million with £142 million of financial debt, much of which is secured on the club's assets. Moreover, the auditor's report within those accounts noted a material uncertainty relating to the club's going concern status, which was reliant on the proceeds of player trading and continuing parent company support.

11. Nevertheless, there is also force in Mr Sprange's response: Burnley is a club that has survived financially for many years; its proposed expenditure out of the proceeds of the compensation claim would be in the ordinary course of business; within the accounts to 31 July 2025 the directors have reported their confidence that the club is a viable going concern. None of the conventional indicators of a

football club in dire financial straits are present: for example, the club is PSR compliant, it has not had points deductions, it has not been the subject of a transfer ban, it has not failed to pay sums due to HMRC, it has not failed to pay wages. Mr Sprange emphasised that Burnley's ownership structure had been approved by the Premier League and that the club was "well-run" with directors who "are acutely aware of the fact that clubs' fortunes can change, relegation and promotion being the obvious one, so they factor those things in in terms of uncertainties".

12. Mr Sprange relied on the Football Creditors Rule as providing a guarantee of payment. Ms Tolaney is correct that the full amount that would be repayable by Burnley to Everton, if the appeal were to succeed and Burnley were to default on repaying, might not be immediately available under the Football Creditors Rule but would be paid by instalments only as the elements of Central Funds became due. We accept that as being correct, but we are satisfied that the full amount due would be paid, albeit in instalments.

13. Our conclusion is that although Burnley's financial position may give cause for concern, the likelihood is that it would be able to make any repayments to Everton if called upon to do so. If there were to be default in repayment of some or all of the sums due, that shortfall would be covered by the Football Creditors Rule – albeit over a period of time.

14. For these reasons we refuse the application for a stay.

STAY OF PUBLICATION, REDACTION OF DECISION

15. Everton seeks a direction preventing publication of the decision until the determination of the appeal. That application is resisted by Burnley, who argues that the Commission has no power to prevent publication. Burnley's position is supported by the Premier League.

16. Ms Tolaney submits that, properly construed, the Rules give the Commission power to delay publication of the decision pending the determination of the appeal. We do not agree. Rule W82.2 imposes an obligation on the Premier League to publish final awards. Rule W83 contains the individual clubs' consent to that publication. Those provisions are clear. The power to postpone would be

inconsistent with those provisions.

17. The parties have agreed a number of redactions to the decision that remove the names of players, their personal information, and the like. We are not satisfied, however, that we have power to direct redactions that go beyond those expressly provided for in Rule W83, namely medical and safeguarding information. The power to direct wider redaction would be inconsistent with the express provisions. It may be that where the parties agree the redactions the Premier League will consider it to be appropriate to make those redactions on the decision that is published on its website. That is a matter for the Premier League, about which we express no view. So far as the Commission is concerned it is required to hand down an unredacted decision.

COSTS

18. Burnley served a schedule of costs on 20 May 2026 along with its skeleton argument. Everton had not served any response. We considered that we would like to receive Everton's response before assessing costs. The parties agreed that the Commission should not make a line by line examination of the schedule, but should adopt a global approach. We directed that Everton should serve a response within 21 days to which Burnley had permission to respond if so advised. The Commission will assess the costs on paper, without a further hearing, unless either party requests one.

CONCLUSION

19. We attach the draft Order that we intend to make. We invite the parties to approve the form or to propose revisions.

David Phillips KC FCIArb
HH Alan Greenwood
Nick Igoe ACA

2 June 2026