

**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.

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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 FCI Arb, 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 defined 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

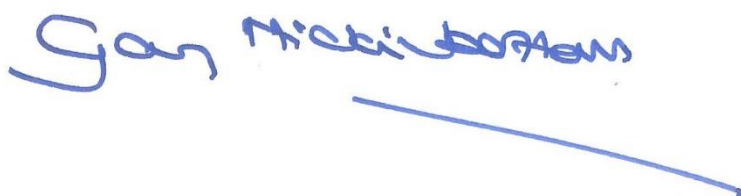
would not address the position in the league itself, nor would it address the potential profit share advantage that not having any deduction in points would have. Dynamo Moscow (quoted at paragraph 24 above) sets out why anything less than an immediate points deduction will not be an appropriate sanction 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**