IN THE MATTER OF A PREMIER LEAGUE COMMISSION PLJP 2023/3

Mr David Phillips KC FCIArb
His Honour Alan Greenwood
Mr Nick Igoe ACA
16-20 October 2023

BETWEEN –

THE PREMIER LEAGUE

Claimant

and

EVERTON FOOTBALL CLUB COMPANY LIMITED

Respondent

DECISION

1. INDEX

2. INTRODUCTION

2. By this complaint the Premier League alleges that Everton FC is in breach of the Profitability & Sustainability Rules. The Premier League's case is that a proper PSR calculation for the season 2021/2022 demonstrates losses of £124.5 million, which exceeds the sum of £105 million permitted by Rule E51 by £19.5 million. Everton accepts that it is in breach of the PSR: by the conclusion of the hearing it argued that properly calculated the breach was £9.7 million. Further, Everton advances factual material that it asserts mitigates the gravity of the breaches. The parties' cases were initially pleaded in the Complaint (24 March 2023), the Answer (29 April 2023), and the Reply (26 May 2023), but those statements of case were significantly amended with effect from 4 October 2023. The hearing took place on 16 – 20 October. The Premier League was represented by Mr Adam Lewis KC and Mr Jason Pobjoy, instructed by Linklaters LLP. Everton was represented by Mr James Segan KC and Ms Celia Rooney, instructed by Pinsent Masons LLP.

3. This is a complicated case. We have been presented with a great quantity of documents, many witnesses of fact, and voluminous and detailed experts' reports – which were revised and updated in the run up to and during the hearing. It is to the credit of counsel that the case was presented with clarity, focussing on what was truly relevant. But counsel would not have been able to achieve that were it not for the parties' solicitors and other advisors who have worked on and contributed to the case. We acknowledge the considerable work that has been done, and express our thanks to all those responsible for carrying it out.

4. In the (lengthy) skeleton arguments and orally both parties have suggested to the Commission that it is not necessary to resolve all the potential issues that have been raised. They have said (albeit from different standpoints) that many potential issues either do not need to be dealt with at all or can be resolved in a simple straightforward manner. The Commission has attempted to follow that advice. In this decision we deal with the matters that are necessary for the proper determination of the case. We have, of course, considered everything that has been put before us but we have confined our reasoning to that which is required to resolve the issues. The fact that something may not be dealt with specifically does not mean that it has not been considered.

3. WHO's WHO

5. We identify here brief details of some (but not all) of the individuals and organisations who are referred to in this Decision or in documents included in the hearing bundle.

- **Carlo Ancelotti** Everton's manager (December 2019 – June 2021).
- **Denise Barrett-Baxendale** A member of Everton's Board of Directors and Everton's Chief Executive Officer throughout the relevant PSR assessment period (May 2018 – June 2023).
- **Marcel Brands** Everton's Director of Football (May 2018 – December 2021).
- **Jonathan Brown FCCA** Expert witness for the Premier League.
- **Katie Charles** Everton's Director of Legal Services.
- **Ross Christie** Premier League's Chief Financial Officer since 2019. Witness for the Premier League.
- **Colin Chong** Everton's Chief Stadium Development Officer since January 2017. Subsequently, since June 2023, interim Chief Executive Officer. Witness for Everton: not required to give oral evidence.
- **Everton Stadium Development Ltd** Wholly owned subsidiary of Everton. Responsible for expenditure on the construction of the new stadium.
- **Nicholas Good FCA** Expert witness for Everton.
- **David Harrison** Everton's Director of Football Operations and Club Secretary until March 2023. Witness for Everton: not required to give oral evidence.
- **Jamie Herbert** Premier League's Director of Governance.
- **Grant Ingles** A member of Everton's Board of Directors and Everton's Director of Finance throughout the relevant PSR assessment period, and until June 2023.
- **Ben Johnson FCCA** Expert witness for the Premier League.
- **William Kenwright** A member of Everton's Board of Directors and Everton's chairman throughout the relevant PSR assessment period, who died on 23 October 2023. Witness for Everton – unable to give oral evidence due to ill health.
- **James Maryniak** Everton's current Interim Chief Financial Officer. Before that, and throughout the relevant PSR assessment period, he held a number of roles, including Head of Reporting and Financial Planning and Analysis, and Director/Deputy Director of Finance. At no stage was he a member of Everton's Board of Directors. Witness for Everton.
- **Richard Masters** Premier League's Chief Executive Officer since December 2019. Witness for the Premier League.

- **Metro Bank** Commercial lender to Everton.
- **Aidan Miller** Stadium Director of Finance of Everton Stadium Development Ltd since February 2023. Before that, since 2019, Stadium Development Head of Finance. Witness for Everton.
- **Ardavan Moshiri** Everton's de facto owner since September 2016. Witness for Everton.
- **Dr Daniel Parnell** Expert witness for Everton.
- **Daniel Purdy** Everton's Head of Recruitment since November 2022. Before that, since July 2019, Manager of Scouting. Witness for Everton.
- **Richarlison** Everton player. Transferred to Tottenham Hotspur FC on 30 June 2022 for £60 million.
- **Rights & Media Funding Ltd** Commercial lender to Everton.
- **Alisher Usmanov** Uzbek-Russian businessman interested in investing in Everton.
- **USM Services Limited** A British Virgin Islands registered company forming part of a group of companies owned by Mr Usmanov.
- **Player X** Player for Everton. Arrested in July 2021 and whose employment was terminated in August 2021.
- **Player Y** Everton player, considered for sale in the summer 2020 transfer window.

4. PROFITABILITY & SUSTAINABILITY RULES

6. The PSR are designed to promote financial stability and sustainability amongst Premier League clubs by limiting the losses that Premier League clubs can incur. They promote similar objectives to the Financial Sustainability Regulations of UEFA, and the Profitability & Sustainability Rules of the English Football League. The PSR regime is designed to ensure that clubs are financially responsible and do not spend beyond their means. The PSR guard against unlimited cash injections from owners to ensure clubs operate within their own means, with the aim of protecting the long-term financial viability of clubs and the league.

7. The PSR operate in the following way. By 1 March in each year every club must submit to the Premier League its accounts for T-1 and T-2 (the accounts for the preceding year and the year before that) together with its estimated profit and loss account for T (the current year). If the aggregation of a club's earnings before tax in T-1, T-2 and T-3 results in a loss the club must by 1

March also submit to the Premier League its PSR calculations. Those calculations are required to show the club's adjusted earnings before tax for each of T, T-1 and T-2. The adjusted earnings before tax means the earnings before tax excluding costs incurred, broadly speaking, on matters that the Premier League recognises to be in the general interest of football. They include, for example, depreciation of tangible fixed assets, Women's Football Expenditure, and Youth Development Expenditure. Exceptionally, in relation to years 2019/2020, 2020/2021 and 2021/2022 *COVID-19 Costs* were also permitted to be excluded.

8. Although a club's target is that adjusted earnings before tax should not show a loss, the Rules provide a degree of latitude. A loss of up to £15 million is largely forgiven. The only consequence is that the Premier League will determine whether in T+1 (the following year) the club will be able to discharge its obligations under Rule E15.9. Greater consequences arise if the loss exceeds £15 million but is less than £105 million. In that event, the club is required to provide the Premier League forecasting to the end of T+2 (the year after the following year), as well as to satisfy the Premier League of its ability to provide evidence of Secure Funding.

9. The making of a complaint to a Commission does not take place until the loss exceeds £105 million. In that event, the Premier League may impose budgetary/financial restrictions on the club and *shall* refer the matter to a Commission by way of a Rule W complaint. It is such a complaint that we are determining in these proceedings.

10. The Commission considers that a number of things are clear from this summary. First, the PSR's core objective is to ensure that clubs operate within their financial means. Clubs are, however, permitted to receive a limited amount of financial support from their owners without breaching the Rules. Second, costs incurred in what is regarded as being in the best interests of football generally are excluded from the PSR calculation. Third, the PSR allow a club considerable latitude – losses up to £105 million will not attract Rule W disciplinary proceedings. Fourth, the Premier League (certainly at the early stages of any PSR investigation) is substantially reliant on the accuracy of the material put before it by the reporting club.

5. COVID-19

11. The impact of Covid began to be felt in early 2020. On 13 March 2020 the Premier League suspended the 2019/2020 season. The season resumed on 17 June 2020, with clubs playing behind closed doors. The 2020 summer transfer window opened on 27 July 2020 and did not close until 5 October 2020. The 2020/2021 season commenced with clubs playing behind closed doors. It was not until the start of the 2021/2022 season on 14 August 2021 that games were once more able to be played before full stadiums.

12. On 6 August 2020 the Premier League shareholders approved amendments to the Rules to implement changes to the PSR regime to reflect the impact of Covid. Those changes were subsequently extended to include the entirety of the 2021/2022 season, so that they applied to each of the seasons 2019/2020, 2020/2021 and 2021/2022. Two changes are relevant to the matters in issue in this Complaint.

13. First, costs incurred because of Covid were added to the list of permitted costs that could be excluded when calculating the adjusted earnings before tax. Those costs were defined as *lost revenues and/or exceptional costs incurred by a Club that are directly attributable to the COVID-19 pandemic….* The intention was to allow clubs credit for losses caused by Covid provided that those costs fell within the category of being *directly attributable* to Covid. Eligible costs included any impairment of value, including player registrations, that could be *cogently evidenced as directly attributable to Covid-19*.

14. Second, the figures for FY 2020 and FY 2021 were no longer to be calculated individually, but were to be averaged. The effect of that meant that calculation of the adjusted earnings before tax PSR calculation for FY 2022 was the total of the adjusted earnings before tax figures for FY 2019, the average for FYs 2020 and 2021, and for FY 2022.

6. FACTS

15. Mr Moshiri first acquired a beneficial interest in Everton in March 2016. By September 2018 he had acquired a beneficial interest in the majority of Everton's share capital. Since January 2022 he has been the beneficial owner

of more than 90% of the share capital. Mr Moshiri came to Everton with great aspirations. He wanted to transform the club into one of the top teams in the Premier League, regularly playing in Europe. And he wished to provide the club with a new, state of the art, stadium. No other Premier League club had carried out two such projects at the same time. It was, as Mr Maryniak said, a challenging plan.

16. Mr Moshiri intended to improve the squad by spending a substantial amount of money in the first three or four years of his ownership. The investment in players would be realised in two ways. First, the enhanced squad would result in Everton being in the top quarter of the Premier League, and playing in Europe: both would produce increased revenue. Second, having improved the squad, future player acquisitions would be funded partly from the increased revenue and partly from making player sales. The plan was that once this strategy had been put in place there would be little or no need to rely on funding from the owner. As Mr Moshiri recognised in his witness statement, the plan required that *a substantial amount of money is spent in the first three/four years of new ownership.* It was, he said, *all part of a normal investment cycle in a football club following a change of ownership.*

17. The provision of a new stadium was as much a priority to Mr Moshiri as was rebuilding the squad. Everton embarked on a demanding project, namely the construction of a new stadium at Bramley-Moore Dock. It set up a wholly owned subsidiary, Everton Stadium Development Ltd, to carry out the development. The cost of the project was considerable and is now estimated to total £760 million. Everton Stadium Development Ltd had no income, and was wholly dependent upon funds from Everton to enable it to carry out the development. When Mr Moshiri had first acquired an interest in Everton he had enabled it to pay off its external debt, a total of £55 million. Everton's plan was that part of the cost of the stadium would be funded by Mr Moshiri but that the majority of the cost would be funded by third party debt. That third party debt (referred to as senior debt) was intended to fund the stadium for the next 30 years.

18. Until such senior debt could be obtained, Everton continued to fund the stadium development by means of an intercompany loan to Everton Stadium

Development Ltd. Everton's debt liability was to two distinct sources, Mr Moshiri and third party commercial lenders. Mr Moshiri made payments to Everton by way of interest free loans, some of which were subsequently converted into shares. Mr Moshiri's investment now totals c.£750 million.

19. Everton also obtained commercial loans. Following the introduction of the government's Coronavirus Large Business Interruption Loan Scheme, in June 2020 Everton applied to Metro Bank PLC for a loan. The application contained the following statement –

> **Use of Funds**
>
> If the facility is successfully completed, the funds will be used for working capital facility purposes. Hence, in the same way as the Rights and Media Funding Limited facility this additional financing support will be used for operational purposes during the 2020/21 season.
>
> We do not intend to use any of the funds for the new stadium project or to buy players in the transfer window. These funds will be used to continue to support the Club and all of the activities that the Club are involved in for the term of the facility.

That representation is incorporated into the Metro Bank PLC loan agreement dated 29 April 2021. Clause 2.3 reads –

> **Purpose**
>
> The Borrower shall apply all amounts borrowed by it…towards the payment of indebtedness and its working capital requirements.

According to Everton's accounts to 30 June 2022, the sums borrowed by Everton from Metro Bank PLC totalled £26.25 million as at that date. By an amended and restated agreement originally dated 29 April 2021 Rights & Media Funding Ltd agreed to lend Everton the sum of £150 million. Clause 3.1 of that agreement provided –

> The Borrower shall apply all amounts borrowed by it…towards its working capital purposes.

According to Everton's accounts to 30 June 2022 the sums borrowed under this agreement totalled £150 million as at that date.

20. Everton's evidence was that funds coming into the company, whether from Mr Moshiri or from the commercial lenders, were not earmarked or ringfenced in any way. All incoming funds were paid into Everton's current account. Those funds are therefore said to be fungible.

21. In October 2019 Everton produced a *Sustainable Business Plan.* The plan projected that the club would regularly finish in the top eight clubs of the Premier League, and that the new stadium would be constructed. It

recognised the significant recent expenditure on players but projected both a reduced need to purchase new players coupled with revenue generated from the sale of existing players. This is what Mr Moshiri described as being the normal investment cycle.

22. By early 2019 Everton identified what it regarded as an anomaly in the treatment of the expenditure on the stadium. The nature of Everton's stadium development project (given its location on Bramley Moore Docks, a UNESCO World Heritage site), meant that significant investment was made before planning permission was granted. Financial Reporting Standard 102 provided that expenditure could not be capitalised unless it was probable that the future economic benefit associated with the expenditure would flow to Everton. In practical terms that meant that the expenditure on the stadium could not be capitalised until planning permission had been granted – because without planning permission the benefit could not be said to be probable. The consequence of that was that instead of the expenditure being capitalised it had to be recorded in Everton's profit and loss account: thereby representing a cost for the purposes of its adjusted earnings before tax in the relevant years and, ultimately, its PSR calculation. The perceived anomaly arose because other clubs had been able to capitalise expenditure on improving/redeveloping an existing stadium, so that that expenditure had never featured in their PSR calculations.

23. In October 2019 Everton engaged the Premier League in discussions about what it considered to be the capitalisation anomaly. The Premier League at that stage declined to permit the stadium expenditure to be excluded from the PSR calculation. Everton continued to address its concerns about the PSR calculation. On 20 February 2020 Ms Barrett-Baxendale wrote to the Premier League requesting that Everton's reporting perimeter should be changed to exclude Everton Stadium Development Ltd.

24. On 13 March 2020 Mr Brands produced the club's *2020 Player Trading Strategy*, which envisaged selling/releasing 12 existing players and purchasing 4 new players in the summer 2020 transfer window. In Everton's FY 2022 PSR calculation it stated that if eight (of the aforementioned 12) identified players (including Player Y) had been sold during the summer 2020

transfer window Everton would have received transfer fees of £83.2 million, producing a net profit on disposal of £49.9 million, resulting in an overall profit/cost saving of £87.7 million once FY 2021 amortisation and wages had been taken into account.

25. During late 2020 and early 2021 Everton made further approaches to the Premier League about the capitalisation of stadium expenses anomaly. On 5 January 2021 Ms Barrett-Baxendale gave a presentation to the Premier League Board that included the New Stadium Project Update. In that Update Everton stated that the club had invested c.£54 million that could not be capitalised because of the lack of planning permission. It stated that *Mr Moshiri's investment into the Club, through the shareholder loan, has funded these development costs. Without this commitment from Mr Moshiri, it is unlikely the Club could have financed this development from its ongoing revenue sources.*

26. On 14 January 2021 the Premier League produced a report to its board on Everton's expenditure. It noted that while Everton was forecast to breach the PSR maximum permitted loss of £105 million it would not do so if the stadium expenditure were to be excluded. It contrasted Everton's position with that of six other clubs who had been able to capitalise expenditure on stadium development, principally because their developments could be considered probable at an early stage of the respective projects. The report recommended that the Premier League should negotiate an agreed sanction with Everton for the PSR breaches, that sanction to reflect the anomaly identified by the club.

27. On 23 February 2021 Everton received planning permission from Liverpool City Council. On 26 March 2021 the Secretary of State confirmed that the issue would not be called in. It is now common ground that the effect of the grant of planning permission is that stadium expenditure incurred in and after FY 2021 (ie from 1 July 2020) could be capitalised.

28. Discussions between the Premier League and Everton about Everton's inability to capitalise stadium expenditure before 1 July 2020 continued, culminating with the execution of the 13 August 2021 agreement. The effect

of that agreement was that, subject to certain conditions, Everton would be able to exclude from its PSR calculation stadium expenditure that could not be capitalised. The 13 August 2021 agreement contained the following (amongst other) terms.

1.2 During the Club's financial years 2017-2020 (inclusive), prior to the financial year when planning permission for the Stadium was obtained, the Club incurred costs of approximately £39,346,000 in respect of the Stadium (the "**Stadium Costs**"). Given that the Stadium Costs were incurred in the financial years prior to planning permission being granted, under applicable accounting regulations, these costs cannot be capitalised and must therefore be included in the Club's PSR Calculation.

1.3 The Club is forecast to be non-compliant with Rule E.51 of the Rules by:

1.3.1 having a PSR Calculation with losses in excess of £105 million (the "**Threshold**") for Season 2020/21; and

1.3.2 potentially Season 2021/22 and 2022/23

(together the "**Potential Non-Compliance**").

1.4 Subject to compliance by the Club with the conditions set out in paragraph 2 of this Agreement (the **"Conditions")**, the Premier League agrees that it will not, either during the Term or at any time after (i) exercise its powers set out in Rule E.15 in respect of the Potential Non-Compliance and/or (ii) refer the Potential Non-Compliance to a Commission pursuant to Rule E.51.2.

2.1 The Club's PSR Calculation for Seasons 2020/21, 2021/22 and 2022/23 (after the application of any mitigation or reduction by the Board in accordance with the guidance it has issued in relation to the impact of COVID-19) must not exceed the Threshold plus such portion of the Costs as falls to be reported in the relevant period (the "**Threshold Condition**"). For the avoidance of doubt, the relevant period is the financial year in question and the two preceding financial years.

29. Everton had signed Player X in 2017. Player X had proved to be a star player for the club. In July 2021 Player X was arrested. The FA suspended Player X from all football activity, making it impossible for him to perform his contractual duties. On 23 August 2021 Everton dismissed Player X. Everton sought advice on the possibility of suing Player X for breach of contract but elected not to do so.

30. By early 2022 it was clear to Everton that even allowing for the concessions made in the 13 August 2021 agreement meeting its PSR calculation target would be a challenge. The club's performance on the pitch had fallen short of what had been planned – with a reduction in merit fee of £2.1 million for each final place in the league. Everton considered the loss of Player X to be a cause of the poor performance. Other players had suffered injuries. The

knowledge that Everton was facing PSR calculation challenges caused potential purchasers for their players to drive a hard bargain. Everton considered that the sale on 30 June 2022 of Mr Richarlison to Tottenham Hotspur FC for the sum of £60 million, rather than the sum of £80 million that it had budgeted to receive, to be directly attributable to its PSR calculation difficulties.

31. Everton asserts that it had been in the process of negotiating a stadium naming rights agreement with USM Services Limited which would have generated £10 million per annum for a period of 20 years, but were obliged to withdraw from the negotiations following the Russian invasion of Ukraine and the imposition of sanctions by the UK government on Russian companies and individuals.

32. In February 2022 Everton decided to pass on the interest charges payable under the Rights & Media Funding Ltd and Metro Bank PLC loans by levying interest on the inter-company loan to Everton Stadium Development Ltd. The intention was that that interest would be calculated retrospectively from FY 2018 and all charged in the FY 2022 accounts.

33. Everton submitted its audited accounts for FY 2021 to the Premier League on 18 March 2022. On 31 March 2022 it submitted Form 3A setting out its PSR calculations. The calculations sought to exclude new sums from the adjusted earnings before tax for the relevant period. Everton further explained its PSR calculations in a slide deck titled *FY22 PSR Submission* that it sent to the Premier League on 26 August 2022. It sought to exclude (1) £17.4 million on account of the new interest charge being passed to Everton Stadium Development Ltd in respect of the intercompany loan; (2) £5.8 million in respect of that part of the Transfer Levy that was passed on by the Premier League in respect of Youth Development; (3) £10 million in respect of loss caused by not suing Player X; (4) £61 million in respect of player trading losses attributable to Covid in addition to the Covid Costs permitted by the new rules introduced on 6 August 2020.

34. The Premier League responded to Everton's submissions by way of a telephone call on 9 December 2022 from Mr Herbert to Ms Charles. Mr

Herbert reported that the Premier League Board had considered carefully the exclusions sought by Everton but had concluded, provisionally, that none fell within a proper application of the PSR. It was recognised by both Mr Herbert and Ms Charles that the differences between the Premier League and Everton would become live only once the FY 2022 accounts and PSR calculation had been provided.

35. Everton submitted its audited accounts to the Premier League on 1 March 2023, followed by its PSR calculation for FY 2022 on 2 March 2023. Everton's PSR calculation, which continued to exclude items it had identified in March 2022 showed an adjusted loss of £87.1 million, significantly below the £105 million threshold. The Premier League rejected the additional excluded items and, on 24 March 2023, began these proceedings.

36. The Premier League's Complaint is a comparatively short document. It sets out the PSR regime and asserts that on a proper application of the Rules Everton's PSR calculation for FY 2022 should show a loss of £120.8 million. It rejected Everton's attempt to exclude the additional items first advanced in March 2022. Everton's Answer is a fuller pleading. It advanced two cases. First, it argued that the additional exclusions were legitimate and produced a PSR calculation of a loss of £87.1 million – well within the threshold of £105 million. Second, it advanced what it argued to be substantial mitigating factors, namely (1) the stadium project, (2) the Player X losses, (3) the impact of Covid, and (4) the fact of Everton's transparent cooperation with the Premier League. The Premier League served an equally detailed Reply to Everton's Answer. It took issue with each of Everton's additional exclusions, and challenged many of the facts that it had relied on in mitigation. It is not necessary for us to say more about this first round of pleadings, partly because they were substantially amended in October 2023, and partly because the issues raised are discussed in greater detail below.

37. At the pre-trial review on 4 October 2023 both parties were given permission to amend their pleaded cases. In its Amended Answer Everton admitted it had abandoned its claim to be entitled to many of the additional exclusions that it had advanced in its PSR calculation, and accepted that it had exceeded the PSR threshold. Maintaining its entitlement to exclude the Transfer Levy

and the pre-planning stadium interest adjustment, Everton argued that its breach of the PSR threshold was £7.9 million. It further maintained that it was entitled to substantial mitigation. The Premier League challenged Everton's case in its Amended Reply. It rejected the claimed entitlement to the additional exclusions, and rejected the claimed mitigation, arguing instead that the reality was that there were aggravating factors. It put Everton's breach of the PSR threshold at £124.5 million.

7. PROCEDURAL HISTORY

38. In the Complaint the Premier League had asked for an expedited hearing so that the proceedings could be concluded before the end of the 2022/2023 season. That application was determined at a Teams hearing on 31 March 2023. The Commission decided that it was unrealistic to expect these proceedings and any appeal to be determined in the current season – and that to compel Everton to attempt to meet such a timetable would run the risk of procedural unfairness. Conventional directions were agreed, with the substantive hearing to take place in the autumn of 2023, which would permit any appeal to be heard and determined in the 2023/2024 season.

39. In June 2023 both parties applied by way of Redfern schedules for disclosure. The Commission allowed significant parts of each party's application. We were told at the hearing that a total of over 40,000 documents had been produced, of which approximately 28,000 had been included in the hearing bundle.

40. The pleadings were amended to their present form on 6 October 2023. Both parties served comprehensive skeleton arguments before the hearing began on 16 October 2023.

8. AMENDED PLEADINGS

<u>The Premier League's Amended Complaint</u>

41. On 1 March 2023 Everton submitted its accounts for the financial year ending 30 June 2022. On the following day, 2 March 2023, it submitted its PSR calculation for FY 2022 demonstrating a PSR loss of £87.1 million, well below the permitted maximum. The Premier League disputed the accuracy of the PSR calculation, asserting in its original Complaint the actual loss to be

£120.8 million. In the Amended Complaint the Premier League revised the alleged loss to £124.5 million – £19.5 million above the PSR threshold of £105 million.

42. In its Complaint the Premier League asserts that it is for Everton to justify the figures that it has put forward: the detail of its case emerges in its Amended Reply to Everton's now Amended Answer. In the Amended Complaint the Premier League identifies four areas of dispute.

43. First: post-planning stadium costs. Everton claimed to exclude £14.5 million comprising £13.6 million in respect of interest incurred on inter-company loans used to finance stadium costs and £0.9 million of other post-planning permission stadium expenditure. The charges were incurred after planning permission had been obtained. The Premier League argues that post-planning permission expenditure falls outside the terms of the 13 August 2021 agreement. Further, it asserts that Everton has made calculation errors so that even if interest charges were to be excluded as a matter of principle, the sum of £14.5 million is not correct.

44. Second: Transfer Levy. Clubs pay a 4% levy on transfer fees under A.1.5 of the Rules. The sums are used to fund a footballers' pension scheme. Any surplus is distributed by the Premier League to the Professional Game Youth Fund. Everton claims that that surplus falls within the category of Youth Development Expenditure, and should accordingly be excluded from the PSR calculation. The Premier League asserts that neither Everton nor any other club had ever sought to exclude any part of the Transfer Levy from the PSR calculation. The Premier League objected to the attempted exclusion as being both unprecedented and wrong in principle.

45. Third: player termination loss. Everton had dismissed Player X, leaving available to it (it asserted) a claim against that player for losses of £10 million. However, it decided not to pursue that claim on grounds associated with the player's welfare. It sought to exclude the sum of £10 million from its PSR calculation. The Premier League object to the proposed exclusion, both on grounds of principle and uncertainty.

46. Fourth: Covid. Everton claimed to exclude the sum of £43.9 million on the grounds of impact on player trading in the 2020 summer transfer window caused by Covid. The Premier League objected, arguing that the proposed exclusion did not fall within its Covid provisions. Moreover, in the Amended Complaint the Premier League asserts that a significant part of the sum sought to be excluded by Everton under this head related to the impact of failing to sell a particular player, Player Y. The Premier League asserts that the factual reality is that Everton had made a decision not to sell Player Y, so that no Covid based deduction can properly be claimed.

47. In its Amended Complaint the Premier League advanced four factors which it maintains aggravated Everton's breaches of the PSR.

(1) Significant causes of the PSR breaches were the fact that Everton overspent on players, and that it failed to take steps to reduce expenditure.

(2) The amount by which Everton's actual losses exceeded the £105 million threshold.

(3) The fact that Everton submitted misleading information about the stadium financing costs.

(4) The fact that contrary to its Covid related representations Everton had made a decision not to sell Player Y.

<u>Everton's Amended Answer</u>

48. In its original Answer Everton asserted that it was not in breach of the PSR, in the alternative that it had substantial mitigation. The mitigation took the form of the fact that it faced unexpected financial losses (stadium costs, the player termination loss, and Covid expenses), together with the fact that it had cooperated fully with the Premier League's investigations. It set out the details of that cooperation, which culminated in the August 2021 agreement, and continued thereafter. Everton maintained that it also took real steps to reduce its losses: it cited detailed examples from the summer 2021 and January 2022 transfer windows.

49. Everton's case changed significantly in its Amended Answer. In the Amended Answer Everton admitted a breach of the PSR but disputed the size of the breach. It asserts that the Premier League has wrongly failed to exclude the Transfer Levy sums (£7.6 million) and the pre-planning stadium interest

sums (£4.1 million). The Transfer Levy sums should be excluded because they constitute *Youth Development Expenditure*. The pre-planning stadium interest sums should be excluded to achieve the same position as if the project had been financed externally. If those sums had been excluded the correct PSR loss would have been £112.9 million – £7.9 million above the £105 million threshold.

50. In addition to challenging the extent of its breach of the PSR Everton advances six factors that, although not reducing the extent of the breach, are said to mitigate it. Those factors, Everton argues, are directly relevant to the nature and size of the sanction that the Commission should impose. We summarise those factors.

(1) Everton could have treated stadium post-planning interest charges of £9.3 million as capital expenditure, in which case it would have reduced its loss before tax by that amount. Although it is now too late to do so, that is a mitigating factor.

(2) The player termination loss, although not one that can be excluded from the PSR calculation, is a mitigating factor.

(3) Covid prevented Everton from selling players, and to realise amortisation and wage savings.

(4) Everton had cooperated fully and proactively with the Premier League in relation to its PSR challenges.

(5) Everton's PSR adjusted losses demonstrate a positive trend, showing that it had positively addressed its PSR obligations.

(6) The impact of the Russian invasion of Ukraine caused a significant and unexpected impact on Everton's investment and sponsorship income.

51. Everton concluded the introduction to the Amended Answer with the following statement –

The Club's alleged overspend arose, in short, from a combination of unforeseen circumstances, which frustrated prudent plans to reduce its losses. The PL has rightly accepted that losses incurred by the Club in constructing the Stadium are the result of "applicable accounting standards" and reflect costs for which "there was no sporting imperative in the circumstances (not least when other Clubs had, in effect, been able *to capitalise similar capital-related expenditure) ". In those circumstances there should be no question of a sporting sanction. The Club has always been, and remains, committed to operating sustainably and in accordance with the PL's rules.*

<u>The Premier League's Amended Reply</u>

52. The Premier League pointed out that it had had insufficient time to set out its case in response to Everton's Amended Answer and that what it pleaded in its Amended Reply was no more than a summary that it would develop in its skeleton argument and at the hearing. The issues taken with Everton's case were, however, clear.

53. Stadium Interest. The Premier League advances three arguments. First, relying on the wording of the August 2021 agreement it argues that any costs incurred in the financial year in which planning permission was obtained cannot be excluded from the PSR calculation. The consequence is that the permissible exclusion is a maximum of £2.2 million. Second, it argues that in any event *interest* does not fall within the August 2021 agreement unless it is a cost incurred in relation to the stadium. The Premier League contended that Everton had not in fact incurred any of the alleged interest costs in relation to the stadium. The consequence is that the entirety of the pre-planning interest should not have been excluded. Third, and in any event, the interest is an inter-company charge that does not impact the earnings before tax in the consolidated accounts and so cannot be excluded from the PSR calculation.

54. Transfer Levy. The Premier League relies on two short construction points. First, the levy is not *expenditure by a Club*: it is expenditure by the Premier League of funds derived from the levy. Second, levy payments are not *directly attributable* to the Professional Game Youth Fund: they are payments to the pension fund, the surplus of which is directed to the Professional Game Youth Fund by the Premier League.

55. The Premier League addresses the heads of mitigation advanced by Everton as follows.

(1) Stadium interest. If the Premier League's construction of the

August 2021 agreement is correct there is no basis for holding that Everton's contrary belief can constitute mitigation.

(2) Player termination. Everton cannot show that the alleged loss was in fact due, or recoverable. This therefore cannot stand as mitigation.

(3) Covid. Everton, in common with all other clubs, has already received the benefit of the Covid concessions. The sums to which it now refers fall outside those concessions and are of a nature borne by other clubs. There is no basis for saying that they can constitute a mitigating factor.

(4) Cooperation. The Premier League accepts that in principle cooperation could be a mitigating factor but rejects the suggestion that the facts of this case can constitute mitigation.

9. ISSUES

56. Each party has produced a List of Issues but they have not been able to agree a common list. However, having heard the parties' closing submissions the Commission is satisfied that that failure to agree was more a matter of form than one of substance. We consider that to a very great extent there is common ground between the parties as to the central issues that must be determined in this Decision. We summarise them in the following paragraphs.

57. The first issue is to quantify the extent of Everton's breach – the amount by which its PSR calculation for FY 2022 exceeded the figure of £105 million. That involves consideration of two distinct items of expenditure claimed by Everton, namely (1) the Transfer Levy and (2) the pre-planning stadium interest.

58. The second issue is to determine the principles that should be applied when determining the appropriate sanction. That involves determining the purpose and approach to sanctioning and (amongst other things) whether the structured formula advanced by the Premier League should be adopted.

59. The third issue is to determine the character of facts that are capable of constituting aggravation. That involves consideration of a number of matters of principle including the burden and standard of proof to be applied to the evaluation of aggravating matters.

60. The fourth issue is the application of the principles relating to aggravation to the facts relied on. In other words, the Commission must determine which of the matters advanced by the Premier League as constituting aggravation in fact stand as aggravating matters.

61. The fifth and sixth issues require a similar exercise to be carried out in relation to matters put forward by Everton as constituting mitigation. The fifth issue concerns the principles to be applied to the evaluation of what Everton advances as mitigating matters. The sixth issue is the application of those principles to the facts relied on.

62. The seventh issue is determination of the appropriate sanction, and the Commission's reasons for its determination.

63. Determination of these issues involves consideration of a number of factual and expert issues that have been developed during the course of the hearing. In this Decision we confine ourselves to consideration of matters that are necessary for the proper determination of the Complaint. We have considered all the matters that have been raised, but determine only those that are required to be determined.

10. QUANTIFICATION OF BREACH – YOUTH DEVELOPMENT

64. Rule A1.11(c) permits a club to exclude from the PSR calculation *Youth Development Expenditure*. *Youth Development Expenditure* is defined in Rule A1.273 as being *expenditure by a Club directly attributable to activities to train, educate and develop Academy Players….* Everton seeks to exclude not only the conventional payments that it made in relation to youth development but also the proportion of the Transfer Levy paid by it which has been passed on by the Premier League for youth development.

65. The Transfer Levy is a charge of 4% of the value of any transfer payments made by a club which the club is required to pay to the Premier League: Rule V38. The sums received by the Premier League by way of the Transfer Levy are used to pay premiums due under the Professional Footballers' Pension Scheme: any surplus is added to the Professional Game Youth Fund: Rule V41.

66. Everton argues that that surplus is youth development expenditure within the meaning of the Rules. The Premier League disagrees. Both parties agree that resolution of the dispute is a matter for construction of the various regulatory provisions.

67. Everton's case is that the proportion of the Transfer Levy that is paid to the Professional Game Youth Fund is an expenditure made by it that is directly attributable to development of academy players. Everton asserts that the fact the payments were made by the Premier League does not alter the fact that the monies are expenditure paid by the club: and that the payments made by it were directly attributable to relevant youth expenditure.

68. The Premier League disagrees. It points to the fact that historically neither Everton nor any other club has sought to make a deduction from the PSR calculation in this way. It argues that the purpose of the exemption for Youth Development Expenditure is to encourage clubs to make such expenditure: it is of a category and for a purpose quite different from the Transfer Levy, the principal purpose of which is to fund player pensions. As a matter of pure construction, the expenditure *by* Everton was the Transfer Levy: it was not expenditure in respect of youth development. Further, putting the same point in a different way, the expenditure by Everton was not *directly attributable* to development of academy players: it was payment of the Transfer Levy. Finally, the Premier League points out that if this deduction were permissible a club would not be able to complete its PSR calculation within the time scale directed by the Rules: it would have to wait until the Premier League had calculated and announced the amount of the Transfer Levy that had been added to the Professional Game Youth Fund.

69. We consider that the Premier League's construction is to be preferred. We note that this exclusion has not been claimed before, but do not consider that to be determinative of the issue: if Everton has identified a proper construction, it remains proper notwithstanding the fact that it had hitherto not been identified. We consider the pure construction points to be compelling. The payment made *by* Everton was the Transfer Levy, not a payment in respect of youth development. Similarly, the payment made by Everton was not *directly attributable* to the Professional Game Youth Fund:

it was a payment for pension purposes, any surplus being paid by the Premier League to the Youth Fund. We recognise the practical difficulties that would have been caused in relation to the date for completion of PSR calculations but do not consider this to be determinative of the issue: if Everton's construction had been correct a practical solution would have been arrived at.

70. The conclusion is that no exclusion can be made as sought by Everton under this head. The sum of £7.6 million deducted by Everton must be added as a loss in the PSR calculation.

11. QUANTIFICATION OF BREACH – PRE-PLANNING STADIUM INTEREST

71. During the course of the hearing Everton agreed that the date upon which it became able to capitalise interest payments relating to the financing of the stadium project was the start of the financial year in which it had been granted planning permission (1 July 2020) and not the date on which planning permission had been granted (23 February/26 March 2021). The effect of that agreement was that the expenditure that it claimed to be excluded under this head was reduced from £4.1 million to £2.2 million.

72. Everton's case is that any interest attributable to expenditure on the stadium should be excluded from its PSR calculation. It relies on a construction of FRS 102, and a finding of fact that if the stadium had not been constructed Mr Moshiri would have made funds available to repay the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd, or alternatively the loans would never have been negotiated and drawn down. It makes the point that in April 2022 the Premier League had accepted that such interest could be deducted, and only recently had changed its case to argue that as a matter of principle none of the pre-planning stadium interest could be excluded from the PSR calculation as a cost.

73. Everton points out that although no interest was charged on the monies advanced by Mr Moshiri interest was charged on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd. It argues that it is not necessary for it to demonstrate that those commercial loans were used to fund the stadium development in order to exclude the interest charges from its PSR calculation. Its case is that on a proper application of FRS 102 it is sufficient

if on a counterfactual analysis it can show that those commercial loans (and therefore the interest payable under them) would not have existed were it not for the stadium development. This issue, Everton argues, therefore turns on a question of fact, namely whether if there had been no stadium development Mr Moshiri would have secured the repayment of the commercial borrowings. Everton says that we need look no further than the fact that when he first acquired an interest in the club Mr Moshiri had repaid the commercial, interest bearing debt. The fact that he had done so in the past makes it probable that he would have done something similar in the counterfactual scenario of there being no stadium development with the consequence that Mr Moshiri would have had additional funds available.

74. The Premier League advances a number of different arguments in response to Everton's case. Before doing so it explains its change of position in relation to pre-planning stadium interest. In April 2022 the Premier League believed that the financing of the stadium development had been carried out with use of the commercial loans, and the sum sought to be excluded from the PSR calculation had therefore been calculated by reference to interest charged on those loans. That belief had been created by the way in which Everton had presented its position in respect of the PSR calculation. The Premier League's change of position was simply to correct a mistake that had been made because of the misleading information that had been provided by Everton.

75. The Premier League's first submission is that the pre-planning permission stadium interest paid on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd could be excluded from the PSR calculation only if it fell within the terms of the 13 August 2021 agreement. The Premier League argued that to be excluded from the PSR calculation the interest charges had to fall within clause 1.2 of the 13 August 2021 agreement. They would do so only if they were incurred *in respect of the Stadium.*

76. The Premier League argued that the pre-planning stadium interest charges had not been incurred *in respect of the Stadium* because the stadium had not been funded by the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd but by the interest free loans made by Mr Moshiri. In

support of that factual assertion the Premier League pointed to a large number of Everton's own documents, all of which showed that Mr Moshiri's funds had been used to fund the stadium development. The Premier League also relied on the wording of the Metro Bank PLC loan application and the wording of the Purpose clauses in the commercial loan agreements with Metro Bank PLC and Rights & Media Funding Ltd, which we have referred to above.

77. We consider that the Premier League is correct in saying that the stadium was funded from Mr Moshiri's interest free loans. We have not overlooked, and accept, Everton's evidence that it kept its funds in a mixed, fungible account from which all payments were paid. We cannot, however, disregard the weight of Everton's own contemporaneous documents and the express restrictions imposed on the use of the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd. The Premier League also points to the concessions made in the evidence of Mr Miller, Mr Maryniak and Mr Good. We note that there was a sound commercial reason for Everton to have funded the stadium from the interest free loans from Mr Moshiri. It presented a cleaner and more attractive picture to the lenders from whom Everton was seeking to raise senior debt to fund the stadium for 30 years. The overwhelming evidence is that the stadium was funded from the loans made by Mr Moshiri, and not from those made by Metro Bank PLC and Rights & Media Funding Ltd. The conclusion, the Premier League argues, is that no pre-planning interest charges were incurred *in respect of the Stadium.*

78. Everton counters that, contrary to the Premier League's case, that finding of fact is not determinative of the issue whether the interest charged on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd was expenditure incurred *in respect of the Stadium*. That submission is founded on Mr Good's analysis of the operation of FRS 102. Mr Good's opinion is that the central question is whether the borrowing costs of the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd would have been incurred if the stadium development had not taken place. The source of the funds actually used for stadium development is therefore irrelevant. All that matters is a factual finding of the counterfactual using a but-for test.

79. We have considered the counterfactual arguments with care. We recognise that there is material that supports both parties' submissions. When he first became interested in Everton Mr Moshiri had made funds available to repay the club's existing commercial debt. It follows, Everton submits, that it is likely that if funds had not been committed to the stadium development they would have been used to prevent the taking of commercial debt or to repay such commercial debt as may have been incurred. Accordingly, the but-for test is satisfied – if it had not been for the stadium development the interest on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd would not have been incurred. Conversely, the Premier League points to the fact that Mr Moshiri is a very wealthy individual who had sufficient funds available to make it unnecessary for Everton to have sought commercial debt if he had wished to do so. It points to Mr Maryniak's evidence that it was normal for clubs to carry a degree of commercial debt, so that Everton's decision was not unusual. The Premier League cautions that the Commission should be slow to permit a company such as Everton to capitalise interest on an unrelated external debt on the basis of self-serving, ex post facto assertions by its owner that had it not been for a particular project that unrelated debt would have been repaid. The Commission sees the force of that submission.

80. The Commission recognises that there is material to support both parties' cases but has concluded that the outcome of the counterfactual analysis is too uncertain for us to find that if it had not been for the stadium development the Metro Bank PLC and Rights & Media Funding Ltd borrowings would not have been incurred, or if incurred would have been paid off. We cannot find on the balance of probabilities that that would have been the case.

81. We note that the Premier League argued that even if we had resolved the counterfactual finding of fact in favour of Everton, Everton would still have been unable to bring itself within the ambit of FRS 102. Section 25 applies to *borrowing costs*. Section 25.2 permits the capitalisation of borrowing costs that are *directly attributable* to a qualifying asset. Section 25.2 addresses funds that form part of *the entity's general borrowings*. It is clear that the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd were advanced for the limited purposes of working capital. We consider that the Premier League is correct to say that such funds do not fall into the

category of *general borrowings* which we construe to mean funds advanced without restrictions on how they can be used.

82. The consequence is that the pre-planning stadium interest on the commercial loans from Metro Bank PLC and Rights & Media Funding Ltd cannot be excluded from the PSR calculation.

12. QUANTIFICATION OF BREACH – CONCLUSIONS

83. On 1 November 2023 the Commission received a joint statement with appendices from Mr Johnson and Mr Good addressing the Double Counting issue raised by the Commission during the course of the hearing. The Commission is satisfied that in view of its findings in relation to the issue of pre-planning stadium interest the figures discussed in the joint statement do not affect the quantification of the breach. The consequence of these findings set out above is that Everton's PSR calculation for FY 2022 was a loss of £124.5 million, which amounts to an excess above the £105 million threshold of £19.5 million.

13. SANCTION PRINCIPLES – THE PREMIER LEAGUE's PROPOSED FORMULA

84. On 17 September 2018 the EFL approved sanctioning guidelines for breaches of its P&S regime. Those guidelines presume that a sporting sanction in the form of a points deduction is appropriate in all cases. The starting point is a sanction of 12 points that is reduced (potentially to zero) to reflect the quantum of the P&S breach and other mitigating factors. Reductions can be made if the losses show an improving trend: increases can be made in the event of aggravating features. Those guidelines, however, do not restrict a Commission's power to impose whatever sanction it considers appropriate. It was recognised in *EFL v Birmingham City FC* that the guidelines do not have legal force and are not binding on a Commission: the Commission retains its general power to impose any sanction permitted by the Rules. The function of the guidelines is to stand as instructions to those presenting the EFL's case as to the sanctions that should be sought from the Commission. The Commission is free to accept or reject the submissions according to what is appropriate in the individual case.

85. The Premier League has not incorporated any such guidelines into its Rules.

The Commission's powers in relation to sanction are contained in Rules W50&51. W50 provides simply *Upon finding a complaint to have been proved the Commission shall invite the Respondent to place any mitigating factors before the Commission.* W51 lists the very wide range of sanctions that a Commission may impose, concluding with the power to *make any such other order as it thinks fit.* The appropriate sanction is to be determined by the Commission *having heard and considered…mitigating factors.*

86. On 10 August 2023 the Premier League board adopted a sanction policy that it considered to be appropriate to breaches of the PSR. The policy was detailed in section 7 of Mr Masters' witness statement. At the pre-trial review held on 4 October 2023 the Premier League clarified a misunderstanding as to the status of its position. It made clear that it was not seeking to impose a policy on the Commission as a binding formula. Rather it was advancing its view in the same way as the EFL policy was advanced by those representing it before a Commission hearing an EFL P&S complaint. Its status was therefore no more than that of a submission.

87. The guidelines advocated by the Premier League are similar to, but different from, those of the EFL. As with the EFL guidelines they start with a presumption that the appropriate penalty will be a sporting sanction in the form of a deduction of points. They adopt a fixed starting point of a deduction of 6 points. There would be an increase from that starting point of one point for every £5 million by which the club had exceeded the PSR threshold of £105 million. Further adjustments could be made to reflect aggravating or mitigating features. The rationale for this view is given in the evidence of Mr Masters.

88. The Commission recognises the attraction of a regulator imposing a structured formula that was required to be applied in breaches of a particular regulation. Such a structured formula would fully inform clubs of the consequences of PSR breaches – although that would deny the Commission the power, as a specialist tribunal, to approach the question of sanction in whatever way it considered to be appropriate to the individual case before it.

89. Nevertheless, the Commission is concerned that the adoption by it of a

structured formula such as is advocated by the Premier League would be inconsistent with the unrestricted powers conferred by Rules W50&51. We consider that it is not for a Commission to introduce such a structured formula even on a case by case basis. We consider that we are required by the Rules to hear and consider the mitigation, after which we have a wide discretion to impose any of the sanctions listed in Rule W51. If the Premier League wishes to impose a mandatory structured formula on a Commission dealing with PSR breaches, it can do so. In that event the Commission would be required to comply with those Rules. But as things stand at present that has not been done: the Commission has the wide discretion conferred by Rules W50&51.

90. We therefore decline to adopt the structured formula proposed by the Premier League. We will determine the appropriate sanction according to all the circumstances of the case, including (as required by Rules W50&51) any mitigating factors.

14. SANCTION PRINCIPLES – APPROACH TO SANCTION

91. The Premier League made a number of submissions as to the principles that should be applied by the Commission when determining the appropriate sanction. Those submissions remain relevant notwithstanding our decision not to adopt the structured formula advocated by the Premier League. The Premier League identifies four separate heads that it submits should guide our decision making in relation to sanction. It recognises that adoption of that approach should not result in a sanction that is greater than one that is necessary and proportionate for achieving the purpose that underlines the individual heads.

92. The first head is that of punishment. A breach of the PSR involves an overspend in excess of £105 million above the target of a nil PSR loss. It is therefore at any level a serious breach. Further, as was recognised in *Sheffield Wednesday FC v The Football League Ltd* a breach of the PSR will confer a sporting advantage on the defaulting club, to the detriment of competing clubs who have managed their finances more responsibly. The fact that that sporting advantage cannot be quantified but must be inferred underlines the need for a sanction that imposes a proper punishment. Anything less than that would encourage default to the expense of compliant

clubs.

93. The other heads overlap with the head of punishment. The second head is to vindicate compliant clubs. The sanction must ensure that the defaulting club does not retain a benefit at the expense of other clubs. The third head is that the sanction must act as a deterrent to clubs that might be tempted to breach the PSR. The sanction must be such as to demonstrate that such breaches do not confer a lasting benefit. The fourth head is to protect the integrity of the game – a sport that attracts global support. The Premier League cited the authority of *Bolton v The Law Society* [1994] 1 WLR 512.

94. Everton did not dispute the purpose of a sanction or the principles to be applied. It concentrated its submissions on the practical application of those principles to the circumstances of this case, and the submissions that it made concerning aggravating and mitigating factors. We consider those in greater detail below.

95. The Commission has no doubt that one of the primary purposes of the sanction is to punish the transgressing club. We must not be swayed by sympathy – for example, the fact that the penalty might make the prospect of relegation greater. We agree with the Premier League that any PSR breach involves a significant overspend. In order to constitute a breach that will be referred to a Commission the club will have failed to achieve the target of no loss, will have crossed the lower threshold of £15 million (a breach of which may result in Premier League imposing conditions); and will have had a loss in excess of the upper threshold of £105 million. The Commission considers the Premier League to be correct to characterise such a loss as being a significant overspend. We also recognise that the inference of a sporting advantage is one that should properly be drawn from the fact of a PSR breach, and that sporting advantage will have been enjoyed for each of the seasons on which the PSR calculation was based – in this case, because of Covid, four seasons. Determination of the appropriate sanction will always involve consideration of the facts and circumstances of the PSR breach, but it is inevitable that when assessing the sanction the need for punishment will be at the forefront of the Commission's considerations.

96. The Commission recognises that one of the purposes of a sanction is to provide a deterrent effect. That is a legitimate purpose of the sanction. That would not, however, justify the imposition of a penalty that was disproportionate to the extent of the wrongdoing in any individual case. We also recognise the need to protect the integrity of what is such an important sport – although we consider that some of the observations made in *Bolton* have greater resonance when dealing with membership of a professional body than with the operation of a regulated sport.

97. Our application of these principles to the facts of this case can be seen from the discussion below.

15. SANCTION PRINCIPLES – AGGRAVATING/MITIGATING FACTORS

98. The Commission's approach takes into account all relevant material when assessing the overall culpability of a club that is in breach of the PSR. That, of course, involves reducing or increasing the culpability according to the factors in any particular case.

99. The principles are clear. The party asserting an aggravating or mitigating factor bears the burden of proving that factor on the balance of probabilities. The Commission considers that there is no need for the assessment exercise that it must carry out to be complicated. When assessing culpability the Commission may take into account any feature of the case that tends to increase culpability, and any feature that reduces it: it is a fact sensitive assessment that must be carried out in every case. An important feature in that factual analysis is to consider the extent by which the PSR threshold has been exceeded: the greater the excess, the greater the culpability. The reasons for the excess are likely to be relevant, and will be capable of increasing or reducing the culpability depending on the facts of the individual case.

100. In this case the Premier League has advanced a number of factors that it says increase Everton's culpability. Everton has advanced a number of factors that it says reduce its culpability. We consider those factual allegations, and any impact that they have, in the following sections of this decision.

16. AGGRAVATING FACTORS

101. The Premier League advances four separate factors that it says aggravate Everton's default.

Overspend despite repeated warnings

102. The 13 August 2021 agreement imposed certain obligations on Everton, one of which was to obtain the Premier League's approval of purchases of new players. The Premier League approved each such request but when doing so cautioned Everton that it (the Premier League) was not managing Everton's finances, and that it was for Everton to ensure that it complied with the PSR. The Premier League asserts that for Everton to have persisted in player purchases in the face of such plain warnings was recklessness that constitutes an aggravating factor.

103. The Commission considers that it was unwise for Everton not to have curtailed player purchases. It was aware of potential PSR difficulties but pressed ahead in the hope that it would make sales of players that would enable it to achieve PSR compliance. Events have proved that to be a poor judgment.

104. At one level, disregard of the potential PSR difficulties can be said to increase Everton's culpability. But the Commission considers that there is a danger of double counting. We have already made clear that our approach is to start by considering the extent by which the PSR threshold has been exceeded: the greater the excess, the greater the culpability. We do not consider that the reasons for the PSR breach should aggravate that culpability unless they can be said to constitute exceptional conduct. For example, a deliberate cynical breach of the PSR to achieve a sporting advantage might increase culpability beyond that already arrived at by the extent of the breach. We do not think that this is such a case. Everton may have taken unwise risks, but it did so in the mistaken belief that it would achieve PSR compliance: it is not a case of a deliberate breach.

Extent of the breach of the PSR threshold

105. The Commission will take the extent of the breach of the PSR threshold as an important indicator of the level of culpability. To include it as an aggravating

factor would constitute double counting.

Misleading the Premier League about stadium interest

106. The Premier League complains that Everton deliberately misled it about the source of the funds used for the stadium development. In its FY 2022 PSR submission Everton had asserted that the loan to Everton Stadium Development Company Ltd bore *financing costs by way of interest and arrangement fees.* The Commission has found that that was not the case. The Premier League asserts that Everton must have known that its assertion was incorrect, and that that inaccuracy constitutes an aggravating factor, although in its closing submissions it made it clear that it was not accusing Everton of dishonesty. Further, the Premier League complains that Everton failed to disclose the fact that it was in discussion with Rights & Media Funding Ltd to secure a waiver of a breach of the terms of its loan agreement. The Premier League asserts that Everton must have known of this fact, and therefore must have consciously decided not to disclose it.

107. The Commission notes the provisions of Rule B15 –

> B.15. In all matters and transactions relating to the League each Club, Official and Director shall behave towards each other Club, Official, Director and the League with the utmost good faith. For the avoidance of doubt and by way of example only, it shall be a breach of the duties under this Rule to:
>
> B.15.1. act dishonestly towards the League or another Club; or
>
> B.15.2. engage in conduct that is intended to circumvent these Rules or obstruct the Board's investigation of compliance with them.

The obligation to act in utmost good faith is high. As we have observed above, at the initial stages of consideration of a PSR submission the Premier League will be dependent on the accuracy of the information supplied by the submitting club. In this case the information supplied by Everton was materially inaccurate. Under cross examination, the evidence of Everton's representative was that, in the same way that a tax accountant's job was to reduce a client's tax exposure, an element of his job was *to protect or interpret PSR rules to the benefit of my employer.* The Commission notes that the Premier League already needs to devote considerable resources to monitoring PSR compliance by its member clubs. If all clubs were to adopt a similar approach to interpreting the PSR, the Premier League's task would become yet more challenging.

108. The Commission is satisfied that Everton's PSR calculation in relation to

stadium interest was less than frank. The Premier League has made it clear that it makes no allegation of dishonesty. We consider, therefore, that Everton did not consciously intend to circumvent the Rules but there is no doubt that it failed to discharge the duty of utmost good faith imposed by B15. This is an aggravating factor that increases Everton's culpability.

Misleading the Premier League about the intention to sell Player Y

109. In its FY 2022 PSR submission Everton identified Player Y as being one of the players whom it had targeted for sale, but whom it had been unable to sell. The Premier League asserts that that identification was false. It points to two facts that it argues support that conclusion. First, Player Y had been identified in Everton's 13 March 2020 Summer Player Trading Strategy as being a player whom the club intended to sell. However, in a series of Everton's documents produced in 2020 starting with the Financial Forecast Update April 2020 Player Y's name had been removed from the list of players whom Everton intended to sell. In his evidence Mr Purdy agreed the fact of the removal but explained it by the fact that Player Y's potential sale was being handled by Mr Kenwright and therefore the removal of his name from the regular lists did not mean that Everton would not have been willing to sell Player Y. Second, although his contract was not about to expire, Player Y was given a new contract during the summer 2020 transfer window.

110. The Premier League argued that those facts demonstrated that Everton's submission in relation to Player Y was false. This was disputed by Everton. It submitted that Mr Purdy's evidence provided a complete answer to the fact that Player Y's name had been removed from the list. It asserted that if Mr Kenwright had received an appropriate offer Everton would have been willing to sell Player Y. It argued that the fact of a new contract would simply enhance the value of any transfer.

111. Again, the Commission has hesitated over this issue. We have concluded that the Premier League has not proved its case on the issue. We find that although Player Y's name had been removed from the lists Everton would have been willing to sell him if it had received an appropriate offer. Accordingly, Everton's FY 2022 PSR submission was not intentionally misleading about Player Y's status and does not constitute an aggravating feature.

17. MITIGATING FACTORS

112. Everton advances six factors that it says stand as mitigating factors.

<u>Post-planning permission interest</u>

113. Everton relies on an argument that substantial amounts of interest incurred in relation to the stadium development could have been capitalised after planning permission had been obtained. It argues that that expenditure is *good* expenditure, namely expenditure of a character to be encouraged by the Premier League. Accordingly, even though it omitted to capitalise that expenditure the fact that it could have done so, and the fact that it is expenditure that should be encouraged, means that it is a feature that should stand as mitigating its culpability for the PSR breach. In short, because it could have been excluded from the PSR calculation means that it should stand to Everton's credit.

114. The Commission considers that this argument is based on a false premise, namely that the post-planning permission interest could properly have been capitalised and therefore excluded from the PSR calculation. This is an issue that we have already determined against Everton in relation to the pre-planning stadium interest. The consequence is that the post-planning permission interest also could not have been capitalised.

115. That is sufficient to determine this claimed head of mitigation. It is, however, appropriate that we note a further difficulty with Everton's argument. Its case is that the reason that it had not sought to exclude the post-planning permission interest was simply that it had not considered the possibility. Everton's evidence went further, making clear that even if it had considered the possibility to capitalise the post-planning permission interest it would not have done so in order to enhance the prospects of securing the senior lending that it was seeking. The Commission doubts that it would be appropriate to permit Everton to raise in mitigation a factual position that not only did not take place but would in any event have not taken place.

116. For these reasons the post-planning permission interest claim cannot stand as a mitigating factor.

Positive trend

117. Everton argues that its PSR calculation shows a downward trend for losses. It points to the EFL P&S Rules that allow credit for such a downward trend. The Premier League challenges that Everton can show a trend that should stand as mitigation. First, it disputes Everton's reliance on the EFL P&S Rules. The Premier League has no such rules, and it is wrong to attempt to import those of another league. Second, Everton could show a positive trend only if the figures for FYs 2020 and 2021 were averaged. Third, any positive trend is not continued into FY 2023.

118. The Commission considers that Everton has the better case on this issue. We agree with the Premier League that it is inappropriate to attempt to import isolated provisions from the EFL, but we consider that a consistent improving trend is something that can be credited as a matter of principle. A specific provision is not required to enable a Commission to find that a club which is attempting to improve may be able to have such improvement stand as mitigation. We consider it is wholly appropriate for Everton to follow the Covid provisions and to average the PSR figures for FYs 2020/2021: indeed, as that averaging was introduced by the Premier League to meet one of the challenges created by Covid, it would be strange not to do so. Finally, we consider that it is appropriate for us to look at the trend over the years included in the PSR submission. The position in subsequent years is a matter for those years.

119. For these reasons we conclude that the improving trend is a feature that goes some limited way to diminish Everton's culpability.

Player X

120. Everton maintains that it is entitled to credit for not pursuing an economically viable claim against Player X. Despite the fact that it had received advice from solicitors and from leading counsel that the claim could be pursued it chose not to bring proceedings. Its case is that that decision was made out of concern for the player's psychological wellbeing.

121. The Commission considers there to be a number of difficulties with Everton's argument. First, as a matter of principle we do not see why this should stand

as mitigation. Everton asserts that it suffered a loss as a consequence of a business decision that it made: we do not see that that can stand as mitigation. Second, although there was evidence of the player's psychological state in the immediate aftermath of his arrest, there was no evidence of his psychological state when the decision not to pursue the claim was taken. Third, the value of £10 million that Everton puts on the foregone claim is speculative. The claim may have faced difficulties, and there is no evidence that Player X would have been able to meet whatever judgment might have been obtained.

122. The circumstances surrounding Everton's claimed losses are the sort of events that occur in the management of football clubs where a player's services and value can be lost for a variety of reasons – most obviously because of injury, or a loss of form. It is not something that can stand as mitigation in these proceedings.

Ukraine

123. Everton advances the Russian invasion of Ukraine as creating a mitigating factor. Everton had the benefit of an option agreement that entitled USM Services Limited to call down a Naming Rights Agreement generating an annual fee for Everton of £10 million. The Naming Rights Agreement was expected to come into force with effect from the 2025/2026 season. Everton advanced in mitigation the assertion that it had been in negotiations with USM Services Limited to bring the agreement into force early, producing an accelerated annual receipt of £10 million commencing in FY 2022. No agreement had been reached but negotiations were said to have reached an advanced stage. The mitigation was claimed because the possibility of any such agreement ceased upon imposition of sanctions on Russian entities by the UK government following the Russian invasion of Ukraine. Everton felt that it had no alternative but to withdraw from the negotiations.

124. The Commission agrees with the Premier League that this cannot stand as a head of mitigation. First, the prospects of an agreement having been concluded are uncertain. We were not shown any contemporaneous documents to show that receipt of the monies was probable. Second, the loss of a proposed agreement, even when that agreement might have been thought

likely, is the type of event that businesses experience. It is not something that can stand as diminishing Everton's culpability.

125. Similarly, the argument that the invasion of Ukraine caused stadium construction costs to increase, and made it harder for Everton to secure the senior debt that it was seeking, constitute mitigating features that cannot stand. Again, it is no more than the type of event that businesses have to contend with as part of their daily life.

Impact of Covid on the market for players

126. Conscious of the PSR challenges that it faced Everton had planned to sell a number of its players in the summer 2020 transfer window. Mr Brands had placed values on eight of the players who had been targeted for sale, producing a total sale value in excess of £80 million. In the event sales did not take place as projected. Everton argues that that failure was caused by the impact of Covid, which depressed the market, preventing it from making sales at the expected prices.

127. The impact of Covid on player sales in 2020 has been the subject of extensive expert evidence from Mr Brown and Dr Parnell. That evidence was supplemented by a series of additional reports, some of which were produced after the hearing had commenced. The Commission does not intend to rehearse the detail of that voluminous evidence. It notes, however, that shortly before he gave evidence Dr Parnell found it necessary to revise some of his calculations – although he was at pains to say that those revisions had not affected his overall conclusions. What is of note is that as a result of those revisions Mr Brown and Dr Parnell agreed that of all the national and international markets for purchasing players the Premier League was the least affected by Covid. Mr Brown's evidence, based on Everton's actual experience, was that Everton's most significant market for selling players was the Premier League. That conclusion, Mr Brown said, demonstrated that Covid had had comparatively little impact on Everton's ability to sell players.

128. The Premier League argued that any difficulties experienced by Everton in achieving sales of the players targeted for sale in the summer 2020 transfer window was largely attributable to the fact that there was no ready purchaser

for those players at the prices that Everton was seeking. The cause of Everton's difficulties was therefore market forces, rather than the impact of Covid. The Commission accepts that submission.

129. When considering its claimed Covid mitigation it must not be forgotten that Everton has already received the benefit of the Premier League's concession in respect of losses caused by Covid. Where it has been able to satisfy the evidential standards required by the Premier League Everton has already had the benefit of Covid exclusions totalling £70.2 million, made up of standard add-backs and two years' averaged impairment provisions, permitted under the Premier League's Covid guidance. Included within those impairment provisions were deductions totalling £16.8 million (£8.4 million after averaging) for five of the eight players who had featured in Everton's Summer 2020 Player Trading Strategy. The additional cases that Everton now advances as a mitigating factor are ones in which Everton has been unable to satisfy the Premier League's evidential requirements.

130. The Commission has concluded that this claimed head of mitigation cannot be allowed. First, the values put on the players by Mr Brands are no more than target prices – they are aspirations, not true open market values. The fact that those prices were not achieved is more likely to have been caused by the fact that there was no market appetite for those players at those prices than by the impact of Covid. Second, the ability to sell players is inherently uncertain. Events and market forces (including the fact of a club's PSR challenges) may operate against a selling club. Third, these are the types of events that a club is expected to have in mind when planning its expenditure: it needs to plan for untoward eventualities. The PSR threshold of £105 million provides clubs with a generous ceiling within which to operate, and, with prudent planning and budgeting, provides considerable protection against untoward events.

<u>Transparency and cooperation with the Premier League</u>

131. Everton asserts that it has behaved openly and responsibly in its dealings with the Premier League in relation to its PSR challenges, and that that behaviour should stand to its credit. The Commission recognises that Everton engaged extensively with the Premier League in relation to the problems caused by the inability to capitalise pre-planning permission expenditure. That

approach was, of course, in Everton's self-interest. Further, as already discussed, the information provided by Everton about the source of the stadium development funds and the consequent claim to exclude interest were not wholly straightforward. Everton acknowledged in the course of the hearing that the PSR calculation included claims that were novel, some of which were persisted with in Everton's Answer but were subsequently abandoned shortly before the hearing. We have already found Everton's conduct not to be in compliance with the obligation of utmost good faith imposed by Rule B15.

132. We do not consider that there is any feature of Everton's dealings with the Premier League that is of such an exceptional nature that it should stand as mitigation of Everton's culpability.

18. NATURE OF SANCTION

133. The Premier League submits that the only proper sanction is a sporting sanction in the form of a deduction of points. It argues that only a points deduction will meet the requirements of the principles that we have discussed above. The Premier League relies on the decision in *Sheffield Wednesday FC v The Football League Ltd*: a sporting advantage is to be inferred so that anything other than a points deduction would be simply inappropriate.

134. Everton disagrees. It submits that a financial penalty would meet the justice of the case. If some form of sporting sanction is required, the Commission should consider imposing a transfer ban.

135. We have no doubt that the circumstances of this case are such that only a sporting sanction in the form of a points deduction would be appropriate. A financial penalty for a club that enjoys the support of a wealthy owner is not a sufficient penalty. We agree with the Premier League that the requirements of punishment, deterrence, vindication of compliant clubs, and the protection of the integrity of the sport demand a sporting sanction in the form of a points deduction. The issue is not the form of sanction, but its extent.

19. QUANTIFICATION OF SANCTION

136. The size of the points deduction is to be determined by Everton's culpability.

There is no fixed formula to be applied: we are required to determine the extent of the culpability, and from that to determine the points deduction. That requires the exercise of our discretion as a specialist panel, and a determination to be made based on all the facts of the case.

137. It helps to stand back from all the detail that has been put before us and to see the overall picture. Everton's PSR difficulties are not attributable to the costs of the stadium development. Those costs were excluded from the PSR calculation in respect of the period before planning permission was granted by reason of the 13 August 2021 agreement, and thereafter by the ability to capitalise relevant costs by the application of FRS 102. The cause of Everton's PSR difficulties was the fact that it overspent (largely on its purchase of new players and its inability to sell other players), and because it finished lower in the league than it had projected in FY 2022 (16th against the projected 6th – causing a loss of expected income of c.£21 million). Everton's understandable desire to improve its on-pitch performance (to replace the non-existent mid field, as Mr Moshiri put it in evidence) led it to take chances with its PSR position: those chances resulted in it exceeding the £105 million threshold by £19.5 million.

138. The position that Everton finds itself in is of its own making – it is Everton's responsibility to ensure that it complies with the PSR regime. The excess over the threshold is significant. The consequence is that Everton's culpability is great. We take into account the fact that Everton's PSR trend over the relevant four years is positive, but cannot ignore the fact that the failure to comply with the PSR regime was the result of Everton irresponsibly taking a chance that things would turn out positively. Further, Everton was less than frank in its dealings with the Premier League over the stadium interest issue. The reality is that Everton failed to manage its finances so as to operate within the generous threshold of £105 million. Its mismanagement led to that threshold being exceeded by £19.5 million.

139. This was a serious breach that requires a significant penalty. The Commission considers that it should order an immediate deduction of 10 points.

20. CONCLUSION

140. The Commission directs that Everton shall be subject to an immediate deduction of 10 points. We invite the parties to attempt to agree any consequential orders, including the question of the costs of the proceedings. Please will the parties liaise and inform the Commission what may have been agreed, and what issues remain for determination by the Commission.

21. ADDENDUM

141. After it had completed its deliberations the Commission submitted a draft copy of its decision to the parties for comment. The intention was the conventional one of enabling the parties to identify typographical mistakes and the like. Both parties responded with suggested revisions, some of which went beyond typographical mistakes and amounted to rewording of passages of the decision. The only alterations that we have made to the form of the draft decision that we submitted to the parties are to correct typographical mistakes, and to reword passages where that rewording has not been objected to by either party.

David Phillips KC FCIArb
His Honour Alan Greenwood
Nick Igoe ACA

17 November 2023