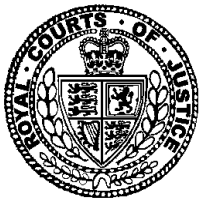

Neutral Citation Number: [2019] EWCA Civ 2242

Case No: A3/2019/1305

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
BUSINESS LIST (ChD)
Mr Stuart Isaacs QC
[2019] EWHC 1287 (Ch)

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 17 December 2019

Before :

LORD JUSTICE PATTEN
LORD JUSTICE MALES
and
MR JUSTICE ROTH

- -

Between :

FAWAZ AL-HASAWI	**Claimant/First Respondent**
- and -	
NOTTINGHAM FOREST FOOTBALL CLUB LIMITED	**Defendant/First Appellant**
- and -	
NF FOOTBALL INVESTMENTS LIMITED	**Third Party/ Second Appellant**
- and -	
NFFC GROUP HOLDINGS LIMITED	**Fourth Party/ Second Respondent**

- -
- -

Ian Mill QC and George Spalton (instructed by **Browne Jacobson LLP**) for the Defendant and Third Party
Tom Hickman QC and Warren Fitt (instructed by **Squire Patton Boggs (UK) LLP**) for the Claimant and the Fourth Party

Hearing dates : 19 and 20 November 2019

- -

Approved Judgment

Lord Justice Patten:

1. This is an appeal by the defendant and the third party, Nottingham Forest Football Club Limited ("the Club"), and NF Football Investments Limited ("NFIL"), against an order of Mr Stuart Isaacs QC (sitting as a deputy judge of the High Court) dated 24 May 2019. The judge ordered the Club to pay to the claimant, Mr Al-Hasawi, the sum of £4,109,873 plus interest representing the amount of various loans which he had made to the Club and which it is common ground are now due and payable. He also dismissed the counterclaim of the Club and the Part 20 claim brought by NFIL. There is no appeal against the judge's calculation of what is due and owing by the Club to Mr Al-Hasawi in respect of the loans. But both the Club and NFIL challenge the judge's dismissal of certain parts of their respective counterclaim and Part 20 claim.

2. The claims which the judge tried arose from the sale in 2017 of the Club which plays in the Championship of the English Football League ("EFL"). In 2012 Mr Al-Hasawi acquired the Club from its previous owners and proceeded to invest in a new training ground and other facilities at the Club's stadium. Towards the end of 2015, during the course of a dispute with the Greek club Olympiacos FC (majority-owned by Mr Evangelos Marinakis ("Mr Marinakis")) over unpaid transfer fees, Mr Marinakis indicated that he was interested in acquiring the Club. Negotiations ensued but ultimately came to nothing due to allegations made against Mr Marinakis in Greece about match-fixing.

3. In 2016 there were also negotiations for a sale of the Club to a US consortium but these too were inconclusive. However, discussions about a possible sale were renewed with Mr Marinakis early in 2017 and led to the signing of a share purchase agreement ("the SPA") on 12 April 2017 by which NFFC Group Holdings Limited ("Group"), a company owned and controlled by Mr Al-Hasawi which held the issued shares of the Club, agreed to sell those shares to NFIL for the sum of £1 and NFIL agreed to procure the repayment by the Club to Mr Al-Hasawi of what were defined as "the Initial Loan", "the Completion Loans" and "the Promotion Loan" in accordance with the terms of a deed of variation and facility ("the Deed") that was to be entered into by the parties on completion of the SPA.

4. During his period of ownership various unsecured loans (most of which were repayable on demand) were made to the Club by Mr Al-Hasawi and various companies (including Group). It was agreed as part of the sale of the Club that the unpaid balance of those loans should be written off save for the Promotion Loan, the Initial Loan and the Completion Loans as defined.

5. Completion of the sale of the Club to NFIL took place on 18 May 2017. On the same date the parties to the SPA (Group, NFIL and Mr Al-Hasawi) entered into the Deed together with the various historic lenders. The Club was a party to the Deed but not to the SPA.

6. The effect of the Deed was, as indicated, to write-off the unpaid debts of the Club to Mr Al-Hasawi and the other historic lenders (clause 2.1) but to preserve and re-schedule the payment of the three categories of loan I have referred to. Under clause 3.1 of the Deed £5,380,000 of the Club's indebtedness to Mr Al-Hasawi was to remain outstanding as an interest-free unsecured term loan and repaid:

(i) as to £1,880,000 on 15 May 2017 (defined as "the Initial Loan"); and

(ii) as to £3,500,000 in full on 31 August 2017 ("the August loan").

7. Under clauses 3.2 and 3.3 of the Deed two further amounts of debt due to Mr Al-Hasawi were also to remain outstanding as interest-free term loans and to be repaid as follows:

(i) £348,164.50 on 31 October 2017 ("the October Loan"); and

(ii) a further £348,164.50 on 31 January 2018 ("the January Loan").

8. The August Loan, the October Loan and the January Loan are what are defined in the Deed as the Completion Loans. The Promotion Loan is a further £15m of debt due to Mr Al-Hasawi which was agreed to be repaid or written-off in accordance with the provisions of clause 4.2 of the Deed depending on whether the Club gained promotion to the Premier League in the 2016/2017 to 2017/2018 seasons or thereafter. The Club has not achieved promotion and, as a result, no part of the Promotion Loan has become repayable to Mr Al-Hasawi.

9. The repayment of the Initial Loan and the Completion Loans under clause 3 is made subject to the provisions of clauses 3.4 and 5 of the Deed. The "Borrower" is the Club and the "Buyer" is NFIL. So far as material, they provide:

> "3.4 Where a reduction is to be made to any of the Completion Loans in accordance with clause 5, Mr Al Hasawi shall write-off and waive any actions, claims, rights, demands and set-offs that he ever had, may have or hereafter can, shall or may have against the Borrower arising out of or connected with the relevant part of the Completion Loans.
>
> …
>
> 5. Set-off
>
> 5.1 If, on a Completion Loan Repayment Date or any date a payment in respect of the Promotion Loan is due:
>
> 5.1.1 any amount is due for payment by Holdings and/or Mr Al Hasawi to the Buyer under the SPA (the Settlement Sum), the Borrower shall be entitled (at its sole discretion) to reduce the amount payable to Mr Al Hasawi under the applicable Completion Loan or the Promotion Loan (as applicable) by an amount equal to the Settlement Sum (and, in the event that the Borrower reduces the amount payable under the applicable Completion Loan or the Promotion Loan in accordance with this clause, then it is agreed that the amount due for payment by Holdings and/or Mr Al Hasawi to the Buyer under

> the SPA shall be reduced accordingly on a £ for £ basis); and/or
>
> 5.1.2 there is an Outstanding Claim, and provided always that the Buyer has obtained and delivered to Holdings and Mr Al Hasawi a Barrister's Opinion (or in respect of an Outstanding Claim which relates to Leakage the Buyer has obtained and delivered to Holdings and Mr Al Hasawi an Accountant's Opinion), the Borrower shall be entitled (at its sole discretion) to withhold from the sums due pursuant to clause 3 or 4, by way of repayment of the applicable Completion Loan and/or the Promotion Loan (as applicable), an amount equal to the Estimate and/or the Leakage Estimate or, if the Estimate and/or Leakage Estimate is greater, the full amount of the relevant part of the Completion Loans and/or relevant part of the Promotion Loan that is due for payment (as applicable) (the Reserved Sum) and to pay such amount into an Escrow Account. The Borrower shall pay any balance of the relevant Completion Loan and/or Promotion Loan following any such withholding on its due date.
>
> …
>
> 5.6 Where a reduction is to be made to the Completion Loans or the Promotion Loan in accordance with this clause 5, Mr Al Hasawi shall write-off and discharge any actions, claims, liabilities, rights, demands and set-offs that it ever had, may have or hereafter can, shall or may have against the Borrower arising out of or connected with the amount of the Completion Loans or the Promotion Loan so reduced."

10. The Initial Loan has been repaid but the August Loan was not repaid on the date provided for under clause 3.1 with the result that on 4 October 2017 Mr Al-Hasawi served an Acceleration Notice pursuant to clause 3.7 of the Deed which entitles him to serve such a notice if any amount of the Completion Loans is not paid within 10 working days of its due date. The service of a valid Acceleration Notice has the effect of making the whole of the Completion Loans which remain unpaid immediately due and payable.

11. On 5 October 2017 NFIL issued a claim against Group and Mr Al-Hasawi seeking payment of various sums under the SPA which they alleged that the Club was entitled to set-off against the Completion Loans under clause 5 of the Deed. They also sought rectification of the SPA so as to permit the Club to enforce the guarantees and indemnities which it contains. On 20 October 2017 Mr Al-Hasawi issued his own claim form seeking repayment by the Club of the sum of £4,196,329 plus interest in respect of the Completion Loans.

12. On 7 November 2017 the Club was added as a co-claimant in NFIL's claim against Group and Mr Al-Hasawi. The two sets of proceedings were subsequently consolidated and under a consent order made on 26 April 2019 the parties agreed that NFIL should be entitled to enforce the guarantees and indemnities in the SPA for the benefit of the Club and would account to the Club for any sums which it recovered. The issues about rectification and privity of contract therefore fell away.

13. At the trial it was common ground, as I have mentioned, that the sum of £4,196,329 together with interest is owed to Mr Al-Hasawi by the Club in respect of the Completion Loans. But the Club and NFIL advanced a number of claims which they maintained should be set-off against the amount due. In summary, the key claims were:

    (i) liability or indemnity claims against Group under clause 7.1 of the SPA on the basis that the "Liabilities" of the Club as at the Liability Statement Date of 31 December 2016 exceeded the sum of £6,600,000. Mr Al-Hasawi has guaranteed the indemnity obligations of Group in clause 10 of the SPA;

    (ii) a claim against Group for an indemnity under clause 7.4 of the SPA on the basis that the warranty (contained in paragraph 3.1 of Schedule 7 to the SPA) that the Club had not entered into any Material Contract which had not been included in the Data Room was false. The same claim was made against Mr Al-Hasawi under his guarantee;

    (iii) claims against Group for "costs and expenses" under clause 7.5.1 of the SPA and against Mr Al-Hasawi under his guarantee;

    (iv) "leakage" claims under clause 6.1 of the SPA against Group and against Mr Al-Hasawi as its guarantor; and

    (v) a claim against Group for misrepresentation of the Club's liabilities.

14. The judge dismissed each of these claims except for the claim for costs and expenses which fell away as a result of other conclusions reached in his judgment. There is no appeal against the dismissal of either the leakage claims or the claim for misrepresentation. But the Club and NFIL do challenge the judge's dismissal of the claims under clause 7.1 and clause 7.4 of the SPA.

15. Before I come to the various grounds of appeal, it is convenient to set out the material provisions of clauses 1, 7 and 10 of the SPA together with the paragraphs of Schedule 7 which are relevant to the claim under clause 7.4. There are some additional provisions relevant to the arguments on construction raised in the appeal but I will come to those when considering the particular points to which they relate:

> "1. Interpretation
>
> 1.1 The definitions and rules of interpretation in this Clause apply in this agreement.
>
> …

Claim	any claim brought by the Buyer in respect of any Indemnity Claim, … Schedule Claim or claim under Clause 6;
…	
Completion Loans	shall have the meaning prescribed in the Deed …;
Connected	has, in relation to a person, the meaning given in section 1122 of the [Corporation Tax Act] 2010 and, also, all Al Hasawi Entities and the Seller are deemed to be Connected with each other;
…	
Data Room	means the virtual data room named 'Project Roy' containing documents relating to the [Club] …;
…	
Guaranteed Obligations	all present and future obligations and liabilities of the Seller under this agreement including all money and liabilities of any nature from time to time due, owing or incurred by the Seller under this agreement;
…	
Liabilities	in relation to the [Club] …, the aggregate amount of all liabilities in respect of any fact, matter or circumstance on or prior to the Liability Statement Date (and only to the extent such liabilities relate to such period) and whether or not due for payment at the Liability Statement Date including, without limitation: - trade creditors; - transfer fees and levies; - player payments; - agent fees;

- bonuses;

- signing fees;

- liabilities in respect of pensions;

- liabilities in respect of any on-going or unresolved disputes (including, without limitation, in respect of Billy Davies);

- all Tax liabilities (including PAYE, National Insurance, VAT);

- accruals;

- any liability relating to any failure to construct a bridge in accordance with the terms of a transfer dated 16 September 1994 and made between the [Club] and Nottinghamshire County Council; and

- any liability to Pietro Chiodi Soccer Management,

but excluding:

- the Completion Loans, the Promotion Loans and the Al Hasawi Loans;

- match specific deferred income;

- seasonal deferred income for season ticket sales;

Liability Statement Date 31 December 2016;

…

Losses losses, damages, penalties, fines, liabilities and expenses (including all reasonable and proper legal and other professional fees and expenses) and **Loss** shall be construed accordingly;

Player means any football player who is registered to play for the [Club] and has either: (a) entered into a written contract of

employment with the [Club]; or (b) is on loan to the [Club];

…

7. Indemnities

7.1 Subject to the provisions set out in Schedule 6, the Seller shall indemnify the Buyer, [and] the [Club] … from and against all Losses suffered or incurred by the Buyer, [or] the [Club] … arising out of or in connection with the aggregate of the Liabilities being in excess of £6,600,000 as at the Liability Statement Date.

7.2 The Seller shall indemnify the Buyer, the [Club] and/or the Subsidiary from and against all Losses suffered or incurred by the Buyer, the [Club] and/or the Subsidiary:

7.2.1 arising out of or in connection with the Al Hasawi Loans other than pursuant to Clause 7.2.2; or

7.2.2 any claim for repayment therefore or otherwise in respect thereof (save for the Completion Loans and the Promotion Loan).

7.3 The Seller shall indemnify the Buyer, the [Club] and/or the Subsidiary from and against all Losses suffered or incurred by the Buyer, the [Club] and/or the Subsidiary due to the statements set out in paragraphs 1 and/or 2 of Schedule 7 being inaccurate or untrue as at Completion.

7.4 The Seller shall indemnify the Buyer, [and] the [Club] … from and against all Losses suffered or incurred by the Buyer, [and] the [Club] … due to the statements set out in paragraph 3 and/or 4 of Schedule 7 being inaccurate or untrue as at Completion.

7.5. Subject to the provisions of Schedule 6, any payment made by the Seller in respect of a Claim shall include:

7.5.1 an amount in respect of all reasonable costs and expenses properly incurred by the Buyer or the [Club] in bringing the relevant Claim; ….

…

10. Guarantee and Indemnity

10.1 Mr Al Hasawi guarantees to the [Club] and the Buyer the due and punctual performance, observance and discharge by the Seller of all the Guaranteed Obligations if and

when they become performable or due under this agreement.

10.2 If the Seller defaults in the payment when due of any amount that is a Guaranteed Obligation, Mr Al Hasawi shall, immediately on demand by the Buyer or the [Club], pay that amount to the Buyer or the [Club] as if he were the Seller.

10.3 Mr Al Hasawi as principal obligor and as a separate and independent obligation and liability from its obligations and liabilities under Clause 10.1 and Clause 10.2, agrees to indemnify and keep indemnified the [Club] and the Buyer in full and on demand from and against all and any Losses suffered or incurred by the [Club] or by the Buyer arising out of, or in connection with, the Guaranteed Obligations not being recoverable for any reason, or the Seller's failure to perform or discharge any of the Guaranteed Obligations.

10.4 The guarantee in this Clause 10 is and shall at all times be a continuing security and shall cover the ultimate balance of all monies payable by the Seller to the [Club] or the Buyer in respect of the Guaranteed Obligations.

10.5 Mr Al Hasawi shall, on a full indemnity basis, pay to the Buyer or the [Club] on demand the amount of all reasonable and properly incurred costs and expenses (including legal and out-of-pocket expenses and any value added tax thereon) incurred by the [Club] and the Buyer in connection with the guarantee in this Clause 10, PROVIDED always that the claim to which such costs and expenses relate is successful.

...

10.7 The guarantee in this Clause 10 shall be in addition to and independent of all other security which the [Club] may hold from time to time in respect of the discharge and performance of the Guaranteed Obligations.

10.8 Mr Al Hasawi waives any right he may have to require the Buyer or the [Club] (or any trustee or agents on its behalf) to proceed against or enforce any other right or claim for payment against any person before claiming from Mr Al Hasawi under this clause 10.

…

Schedule 6:

…

9. **Contingent and Unascertainable Claims**

The Seller shall not be liable to make payment for any Claim which is based on a liability which, at the time such Claim is notified to the Seller, is contingent only, not capable of being quantified, or is otherwise not due and payable, unless and until such liability ceases to be contingent, becomes capable of being quantified and becomes due and payable but so that the period of six months referred to in paragraph 1.4 above shall not start to run until such time.

Schedule 7:

…

3. **Material Contract**

3.1 Neither the [Club] nor the Subsidiary has entered into any Material Contract which has not been included in the Data Room.

3.2 For the purposes of this paragraph 3, Material Contract means:

3.2.1 any single contract, agreement or arrangement entered into by or on behalf of the [Club] or the Subsidiary which involves the [Club] or the Subsidiary assuming liabilities or obligations in excess of £100,000; or

3.2.2 any contracts, agreements or arrangements which each individually involves the [Club] or the Subsidiary assuming liabilities or obligations in excess of £300,000 per annum and which together in aggregate involve the Club assuming liabilities or obligations in excess of £300,000,

other than contracts, agreements or arrangements: (i) in respect of Players, football managers and/or football assistant managers; (ii) in respect of the obligations and liabilities set out in the employee list in the agreed form or employees hired (or whose terms are altered) after the date of this agreement with the approval of the Buyer; (iii) in respect of obligations and liabilities to the extent taken into account in determining whether there is an Indemnity Claim; (iv) in respect of which costs were incurred during the financial year ending 31 May 2016 and reflected in the [Club] statutory accounts relating to

> that financial year; or (v) entered into after the date of this agreement which have been approved by the Buyer (the approval of the Buyer for the purposes of this paragraph being evidenced by an individual signing or initialling the relevant agreement or terms alternation on behalf of the Buyer)."

The clause 7.1 claim

16. The SPA was a bespoke contract for the sale of the Club for a nominal sum but on terms that Mr Al-Hasawi was repaid some £6.076m of the loans he had made. With the exception of these liabilities NFIL was therefore to acquire the Club free of its indebtedness to Mr Al-Hasawi and the other lenders but on terms that its "Liabilities" as defined did not exceed £6.6m as at 31 December 2016. Any excess of Liabilities over this sum was to be compensated for by a corresponding reduction in the amounts payable to Mr Al-Hasawi. The evidence before the judge was that the parties had hoped to be able to complete the sale by the end of the transfer window in January 2017, a few weeks after the Liability Statement Date of 31 December 2016 referred to in clause 7.1. But, in the event, the SPA was not entered into until 12 April 2017 with completion on 18 May of that year.

17. The relatively short period leading up to the SPA meant that NFIL was not able to carry out the usual due diligence exercise in respect of the liabilities of the Club and had, to a large extent, to rely on the information about liabilities disclosed by the Club and Group. To this end, the SPA made provision for the creation of a database (defined in the SPA as "the Data Room") to which NFIL and its advisers had access and on to which Group placed financial information relevant to the Club and its liabilities. This included a spreadsheet with the title "Trial Balance Comp-Dec16.xlsx" ("the Trial Balance").

18. The evidence before the judge, which is not in dispute, is that the Trial Balance document consisted of the Club's management accounts for December 2016 that had been prepared in January 2017 by its accounts department using (as one can see from the document) some form of accounts or bookkeeping software. The evidence of Mr Mark Yeo, the claimants' solicitor, which the judge accepted (see his judgment at [20]) is that the document was provided to his firm on 25 January 2017 and uploaded to the Data Room shortly thereafter.

19. The Trial Balance contains a long list of entries beginning with the Club's fixed and other assets followed by its debtors and the sums held to its credit in various bank accounts. The current assets totalled some £6.125m. The entries then continue with what are listed as current liabilities beginning with trade and other creditors including tax liabilities and continuing with "Accruals and Deferred Income". The Trial Balance goes on to list long-term liabilities and the Club's capital and reserves but these are not relevant for present purposes. The Trial Balance (as one would expect with management accounts) provides the reader with a list of assets and liabilities quantified in two separate columns so as to provide debit and credit balances. It is not a true balance sheet as such although it contains the information that could be used to prepare one. It does not therefore set-off the Club's accrued liabilities against its assets and reserves but it does net-off any credit entries included within the various categories of debts against those accrued liabilities. So, for example, VAT input tax

which was recoverable as at the end of December 2016 in the sum of £96,597.47 is deducted from the output tax then due (£125,016.67) in computing the total VAT liability of £540,892.28. There are other small credits in relation to staff and players' salaries which are also set-off against the Club's other liabilities.

20. The claimants accepted before the judge that the Trial Balance was intended to provide and be relied on by NFIL as the basis of calculation for the £6.6m Liabilities figure contained in clause 7.1. The judge said at [117]:

> "The claimants accept that the Trial Balance constituted a representation that it was a best estimate of the Club's Liabilities as at the Liability Statement Date but that the Seller had reasonable grounds to believe that the representation was true since it was derived from information provided by the responsible officers at the Club. They accept that, as intended by the Seller, the Trial Balance was relied on by the Buyer but only for the limited purpose of the setting of the £6,600,000 Liabilities figure in clause 7.1 of the SPA."

21. This confirms what is evident from a comparison of the liabilities column of the Trial Balance with the definition of "Liabilities" in the SPA. The list of items in that definition which are specifically included as liabilities for the purpose of clause 7.1 beginning with trade creditors has been lifted from the Trial Balance list of liabilities including entry No. 3401 for Accruals which is shown in the Trial Balance as a liability of some £168,580.07. The SPA definition has, however, expressly excluded match specific deferred income and seasonal deferred income for season ticket sales which are also included in the Trial Balance. Those items identified as liabilities in the definition which are included in the Trial Balance add up to £6,566,213.66. This was subsequently adjusted or rounded-up to £6.6m so as to provide the figure used in clause 7.1 of the SPA as the upper limit of liabilities as at the Liability Statement Date which NFIL was required to accept before becoming eligible to seek an indemnity from Group which could be set off against and therefore used to reduce the amount of debt repayable to Mr Al-Hasawi.

22. In addition to this mechanism NFIL also has the benefit of the indemnity provisions in clause 7.4 of the SPA which are triggered if it or the Club suffers a loss "due to" the inaccuracy of what is stated in paragraph 3 of Schedule 7. This is intended to remedy the non-disclosure in the Data Room of any Material Contract of the Club. The effect of clause 7.4 is to provide a remedy against non-disclosure in the period up to completion so that it would include any Material Contract entered into by the Club up to that date "except to the extent taken into account in determining whether there is [a claim under clause 7.1]": see Schedule 7 paragraph 3.2(iii). A liability of the Club which pre-dates 31 December 2016 and is included as one of the "liabilities" measured against the £6.6m limit in clause 7.1 cannot therefore form the basis of a claim under clause 7.4 and these provisions against double recovery are reinforced by Schedule 6 paragraph 3 of the SPA.

23. Under clause 7.1 of the SPA, Group is required to indemnify NFIL and the Club from and against all "Losses" which they incur as a result of the "Liabilities" of the Club exceeding £6.6m as of 31 December 2016. "Losses" is defined to include liabilities and expenses and it is common ground between the parties that if and so far as the

"Liabilities" of the Club exceeded the £6.6m limit at the Liability Statement Date then NFIL has a claim for an indemnity in the amount of that excess which it is entitled to set off against the amount due to Mr Al-Hasawi in respect of the Completion Loans.

24. The issue on this part of the appeal is whether those "Liabilities" should be determined, as the appellants contend, in accordance with the accounting standard FRS 102 which the Club used in preparing the Trial Balance and its other accounts or whether that approach has been modified by the definition of "Liabilities" contained in clause 1 of the SPA so as to exclude liabilities of the Club which were incurred prior to 31 December 2016 but relate in some part to a subsequent period in the sense that the services which the Club is obliged to pay for extended beyond the 31 December date.

25. The appellants have produced a schedule of various liabilities of the Club which they say were accrued liabilities as at 31 December 2016 but which were not taken into account in calculating the Trial Balance and therefore the £6.6m. If all these items are included in their full sum as part of the Club's "Liabilities" then this would bring the total of liabilities as at the Liability Statement Date to £7,203,976.40 and the Club would be entitled to a credit of £603,976.40 against the sums due to Mr Al-Hasawi. Conversely, if they are excluded from being "Liabilities" as at that date on the proper construction of the SPA then it is common ground that the claim under clause 7.1 fails. At the trial Mr Al-Hasawi raised additional objections to a number of the alleged "Liabilities" on the basis that they were contingent or unquantifiable in amount (and therefore excluded under Schedule 6, paragraph 9 of the SPA) or were simply not liabilities of the Club. But the judge's findings on those issues are no longer in dispute and we are concerned only with the issue of construction that arises in relation to the definition of "Liabilities" contained in clause 1 of the SPA.

26. The disputed items which make up the clause 7.1 claim consist of additional liabilities in respect of services and ticketing, player signing-on fees, transfer fees and agent's fees and various tax liabilities. All of these fall within one or other of the types of liability included in the definition of "Liabilities" and they were all liabilities which pre-dated the Liability Statement Date of 31 December 2016 in the sense of when the various contracts were made and the other liabilities were incurred. As such, they fall within the terms of the definition of "Liabilities" in the SPA unless and to the extent that they are excluded by the words in parenthesis "and only to the extent such liabilities relate to such period".

27. The appellants contended before the judge, as they do on this appeal, that the definition of "Liabilities" in the SPA does no more than reflect the accounting standard FRS 102 which the Club adopted in preparing its accounts including the management accounts used as the Trial Balance. The accountants who gave expert evidence in these proceedings were agreed that each of the items in the appellants' schedule satisfied the definition of a liability in FRS 102. This is the set of accounting standards issued by the Financial Reporting Council for use in the UK and the Republic of Ireland. It contains detailed provisions covering all aspects of financial statements but, for present purposes, we can concentrate on those which govern the way in which the financial position of a company or other entity should be presented in its accounts. Paragraph 2.15 of FRS 102 sets out a general definition of the elements which comprise the financial position of an entity:

> "The financial position of an entity is the relationship of its assets, liabilities and equity as of a specific date as presented in the statement of financial position. These are defined as follows:
>
> (a) An asset is a resource controlled by the entity as a result of past events and from which future economic benefits are expected to flow to the entity.
>
> (b) A liability is a present obligation of the entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits.
>
> (c) Equity is the residual interest in the assets of the entity after deducting all its liabilities."

28. The statement of a company's financial position which conforms to FRS 102 involves a process of recognising or identifying the assets, liabilities and income which need to be included. Paragraph 2.27 sets out what is involved:

> "Recognition is the process of incorporating in the statement of financial position or statement of comprehensive income an item that meets the definition of an asset, liability, equity, income or expense and satisfies the following criteria:
>
> (a) it is probable that any future economic benefit associated with the item will flow to or from the entity; and
>
> (b) the item has a cost or value that can be measured reliably."

29. Of particular importance in this case are paragraphs 2.36 – 2.39 which state:

> "2.36 An entity shall prepare its financial statements, except for cash flow information, using the accrual basis of accounting. On the accrual basis, items are recognised as assets, liabilities, equity, income or expenses when they satisfy the definitions and recognition criteria for those items.
>
> **Assets**
>
> 2.37 An entity shall recognise an asset in the statement of financial position when it is probable that the future economic benefits will flow to the entity and the asset has a cost or value that can be measured reliably. An asset is not recognised in the statement of financial position when expenditure has been incurred for which it is considered not probable that economic benefits will flow to the entity beyond the current reporting period. Instead such a transaction results in the recognition of an expense in the statement of comprehensive income (or in the income statement, if presented).

> 2.38 An entity shall not recognise a contingent asset as an asset. However, when the flow of future economic benefits to the entity is virtually certain, then the related asset is not a contingent asset, and its recognition is appropriate.
>
> **Liabilities**
>
> 2.39 An entity shall recognise a liability in the statement of financial position when:
>
> (a) the entity has an obligation at the end of the reporting period as a result of a past event;
>
> (b) it is probable that the entity will be required to transfer resources embodying economic benefits in settlement; and
>
> (c) the settlement amount can be measured reliably."

30. There is a measure of agreement between the parties as to what the accruals basis of accounting requires. Unlike accounts prepared on a cash basis which simply record income when it is received and outgoings when they are paid, accounts prepared on an accruals basis must recognise and report liabilities during the financial period in which the obligation or liability is incurred and assets or income when the entity has acquired the right to receive future economic benefits whose value can be reliably measured. The focus in both cases is on when the obligation or the right to receive the benefits accrues. Mr Hickman QC, for the respondents, therefore accepts both that the liabilities recorded in the Trial Balance complied with the accruals basis of accounting and that the "liabilities" of the Club on or prior to the Liability Statement Date of 31 December 2016 referred to in the SPA definition of "Liabilities" comprise the financial cost of satisfying the contractual or other obligations assumed by the Club as at that date regardless of when the payment of those sums became due or when the services received by the Club under those contracts were due to be performed. He accepts, in other words, that the "liabilities" referred to in the second line of the SPA definition of "Liabilities" means liabilities calculated on an accruals basis. But he contends that the words in parenthesis which follow limit the amount of those liabilities by excluding the costs which are attributable to services provided or events which occur after 31 December 2016.

31. Paragraph 2.39 of FRS 102 and the definition of "Liabilities" in the SPA both recognise as a liability an obligation to pay which was created prior to the end of the relevant reporting period and which was in a quantifiable amount even if the amount due will become payable after the end of the reporting period. This is made clear by the words "whether or not due for payment at the Liability Statement Date". But the words in parenthesis in the SPA definition include pre-December 31 liabilities only to the extent that they "relate to" the period up to that date. The judge (at [38]-[39]) said that this meant that:

> "any liabilities relating to a subsequent period, in the sense that the benefit in respect of which they are incurred is enjoyed or provided after the Liability Statement Date, are not within the

> definition. Otherwise, the words "*(and only to the extent such liabilities relate to such period)*" in the definition would be meaningless. The defendants submit that those words do not mean that "*Liabilities"* mean something different from liabilities in accordance with FRS 102 and, in that regard, sought to rely on Mr Pryor's evidence in cross-examination about how "*Liabilities*" might be construed. However, as Mr Pryor recognised, the construction of the SPA is a matter for the court and not the experts.
>
> 39. In my judgment, the claimants' construction is to be preferred. The definition of "*Liabilities*" is differently worded from the wording of FRS 102 and, as Mr Pryor pointed out, it would be "*harder work*" to say that the bespoke wording of the former had the same meaning as that of the latter. The SPA draws a clear distinction between "*Liabilities*" and "*liabilities*", which latter term appears in a number of places in the SPA, including in particular in the definition of "*Losses*". The term "*Liabilities*" comprises a bespoke sub-species of "*liabilities*" which, in particular, is expressed to include 12 specific liabilities listed in indents in the definition and to exclude the three specific groups of liabilities also listed in indents. To equate the two would not give effect to the parenthetical words "*and only to the extent such liabilities relate to such period*" in the definition of "*Liabilities*". It would also not be in accordance with the commercial rationale of the exclusion of liabilities that relate to the period after the Liability Statement Date, namely that those liabilities relate to benefits which accrue to the defendants and not the claimants."

32. Mr Hickman gave various examples of how this qualification was intended to work. The Club, he says, was acquired by NFIL as a going concern with its various assets and liabilities. Any benefits which it derived after 31 December 2016 from obligations entered into before that date would accrue to NFIL as its new owner. The disputed words in the SPA definition of "Liabilities" were intended to reflect this fact by not requiring Group (and therefore Mr Al-Hasawi) to account for the cost of those benefits as part of the clause 7.1 arrangements. So, for example, Dr Peirce, who was the Club's medical officer from 1 November 2016 to 30 June 2017, invoiced the Club in November 2016 for £15,000 in respect of services to be rendered in the period up to June 2017. This was therefore a pre-31 December 2016 accrued liability but the charge was payable in 8 monthly instalments. On the appellants' case the entirety of this charge falls to be accounted for under clause 7.1 even though for 6 out of the 8 months of the contract the benefit of his services would be provided to the Club in the ownership of NFIL. The purpose of the SPA definition of "Liabilities" was, Mr Hickman submits, to capture liabilities of the Club that related to the period of Group's ownership and not beyond it.

33. On any view, the provisions of clause 7.1 struck a balance as at 31 December 2016 in terms of the amount of disclosed debts and other liabilities on the part of the Club which NFIL was prepared to accept without any further adjustment in the sums

payable to Mr Al-Hasawi. The appellants contend that the claimants' construction produces an uncommercial result and a number of uncertainties. Instead of making a ready calculation of the financial cost of any obligations assumed by the Club prior to the 31 December date, NFIL would need to carry out an analysis of the extent to which the services it had contracted to purchase could be said to relate to a future period and then make an apportionment of the relevant costs. This would be both complicated and controversial. The parties to the SPA could reasonably be assumed to have put in place a formula which would enable them to know precisely and clearly which liabilities were or were not to be included within the £6.6m threshold. Of the two suggested constructions of clause 7.1 this is only achievable by reading the definition of "Liabilities" in the same way as [2.39] of FRS 102.

34. But the principal (and, in my view, the more compelling) argument advanced by Mr Mill QC for the appellants is that the judge's construction of the definition of "Liabilities" is simply inconsistent with the purpose it was intended to perform in relation to clause 7.1. As I have already explained, and as is common ground, the £6.6m figure in clause 7.1 is based on the computation of liabilities contained in the Trial Balance. These are management account figures prepared on an accruals basis which provided the most up-to-date account that was available of the various classes of liabilities which NFIL was prepared to take over with its ownership of the Club. Certain types of liability included in the management accounts which formed the Trial Balance were specifically excluded from the scope of the indemnity. These included the two types of deferred income (which under the FRS 102 definition of assets are booked as an expense) together, of course, with the Completion Loans. But otherwise Mr Al-Hasawi's entitlement to the payment of his loans without further reduction was dependant on the "Liabilities" of the Club not exceeding the £6.6m figure. It did not depend on any assessment of whether the remaining liabilities were onerous or beneficial to the Club.

35. In order for the indemnity provisions to be operated it is necessary for a calculation to be made under clause 7.1 of "the aggregate of the Liabilities" as at 31 December 2016 and for the figure which that produces to be compared with the £6.6m which we know was calculated on an accruals basis using the Trial Balance figures. It must, in my view, follow that for these provisions to be operable at all the calculation of the Club's actual "Liabilities" as at 31 December 2016 must be carried out in the same way as in the Trial Balance. Otherwise one is not comparing like with like. If the judge's construction of the definition of "Liabilities" is adopted and applied to all of the Club's "liabilities" as at 31 December 2016 including those disclosed in the Trial Balance it is very likely that the total of those liabilities would not even reach the figure of £6.566m stated in the Trial Balance. Clause 7.1 could not therefore perform its intended function of compensating NFIL for the non-disclosure of additional liabilities which had existed at the Liability Statement Date but were not included in the Trial Balance. Had they been included then, like the other figures in the Trial Balance, they would have been put in at their full value on an accruals basis.

36. The judge based his construction of the definition of "Liabilities" and, in particular, the words in parenthesis on the basis that the commercial rationale of the exclusion of part of the accruals figure was to ensure that Mr Al-Hasawi did not have to pay for benefits which accrued to the appellants in the period after their purchase of the Club. But, with respect to the Judge, that, I think, misunderstands both the purpose of the

clause 7.1 indemnity and the terms upon which NFIL agreed to take over the Club. It is tolerably clear from the Trial Balance that the Club was heavily indebted and had a negative asset value as at 31 December 2016. It was dependent upon loans from its shareholders and others in order to remain a going concern and these were, for the most part, repayable on demand. The Club was therefore sold for a nominal value; most of the shareholder loans were extinguished; and Mr Al-Hasawi was to be repaid some £6.1m of his loans provided that the Club's liabilities to trade and other creditors did not exceed £6.6m. If the intention was that Mr Al-Hasawi should not have to give credit for the full extent of the Club's accrued liabilities then there was no purpose in including the £6.6m figure as the benchmark for the indemnity. The entirety of the Club's liabilities as at the Liability Statement Date should have been valued on the apportioned basis for which the claimants contend. The benchmark figure was (as the judge himself accepted) a figure for accrued liabilities based on the Trial Balance. This strongly supports the view that the phrase "the aggregate of the Liabilities being in excess of £6,600,000" which one sees in clause 7.1 means the aggregate of the Club's accrued liabilities and that the words in parenthesis were not intended to change or modify the Trial Balance accruals basis of calculation for the purpose of operating the indemnity.

37. It seems to me that the words in parenthesis do no more than to emphasise that the "liabilities" referred to in the SPA definition are those which should be recognised as liabilities within the meaning of FRS 102 in respect of the reporting period ending on 31 December 2016. Mr Mill drew our attention to the Glossary in FRS 102 which (as it states) is to be treated as an integral part of the Standard. That provides a definition of the accrual basis (of accounting) as that phrase is used in paragraph 2.36 as follows:

> "The effects of transactions and other events are recognised when they occur (and not as cash or its equivalent is received or paid) and they are recorded in the accounting records and reported in the financial statements of the periods to which they relate."

38. This confirms that accruals (both liabilities and income or assets) are reportable in respect of the period in which the relevant transactions or other events occur and not when the cash or other value is either received or paid. The judge thought that if the words in parenthesis did no more than to confirm that the "liabilities" of the Club were to be calculated on an accruals basis then they were meaningless or at least unnecessary. But arguments based on surplusage or redundancy are rarely reliable or sure ground on issues of construction: see *Macquarie Internationale Investments* Ltd *v Glencore UK Ltd* [2010] EWCA Civ 697 at [83]. It seems to me much more likely that the words in parenthesis were intended to confirm that the liabilities referred to were accruals in (i.e. relating to) the period ("such period") prior to the Liability Statement Date rather than to change the whole basis of accounting under clause 7.1 in a way which would make the calculation of the excess of liabilities over the £6.6m accruals figure unworkable.

39. As part of his submissions as to how the definition of "Liabilities" in clause 7.1 was intended to operate Mr Hickman produced a note on the accrual method of accounting. This makes the point that as part of a double entry basis of accounting for accruals it is necessary to record not only the liability which the debtor accrues in the

relevant accounting period but also the value of any corresponding benefits which it becomes entitled to as a result of that liability: for example, the value of the services which it has contracted to pay for. The effect of recognising the asset which is acquired is that there is no change in the net financial position of the entity assuming that the assets are at least as valuable as their cost.

40. I, of course, accept that. It is clear from the provisions in FRS 102 that I have quoted that there will be matching accruals of assets or income in respect of any accounting period. Indeed, as mentioned earlier, the Trial Balance included accruals of this kind in the form of VAT input tax and the other items which were set off against the accrued liabilities in order to reach the £6.566m figure. They were appropriate amounts to set off as part of the calculation of the Club's liabilities on an accruals basis. There may be an issue (which would have to be decided on the basis of expert accounting evidence) as to precisely what ought to be included (like the input tax) as a counter-balancing entry in relation to the calculation of liabilities as opposed to being included in a separate part of the accounts as an asset or income for balance sheet purposes. But that does not need to be decided in this case. It was not part of the claimants' defence to the claim under clause 7.1 that in respect of the undisclosed accrued liabilities set out in the schedule I have referred to it was necessary to include a matching entry, the value of which needed to be set off against the additional liabilities on an accruals basis. The defence in respect of each of the undisclosed liabilities was simply that they related to events or services which took place or were performed after 31 December 2016 and were therefore excluded by the words in parenthesis. This argument, as I have explained, is not an application of the accruals method of accounting by the inclusion of corresponding credits accrued in the same period. It is, by the claimants' own admission, a variation of the accrual basis (as set out in paragraph 2.36 of FRS 102) by excluding liabilities incurred prior to 31 December 2016 to pay for services which would not be rendered and received until after that date. As the judge recognised in [39] of his judgment, this involves a departure from the accounting treatment described in FRS 102 which formed the basis of the Trial Balance. Instead of producing a net figure for accrued liabilities as at 31 December after taking into account any assets or credits acquired in the same period what one has to do on the judge's construction of the definition of "Liabilities" is to remove from the calculation the accrued cost of any services which will be provided after that date. By the same token it would also be necessary to exclude the amount of any corresponding asset value attributable to the same period. None of this would be consistent with the way in which the "aggregate of the liabilities" represented by the £6.6m figure were calculated. Nor could it therefore allow the Club and NFIL to be compensated for the "liabilities" which should have been included in that calculation. I would therefore allow the defendants' appeal on this issue.

The clause 7.4 claims

41. The appellants have made various claims under clause 7.4 totalling some £5.711m. They all relate to contracts with the Club which are said to be Material Contracts within paragraph 3.1 of Schedule 7 to the SPA but which have not been "included in the Data Room".

42. Under clause 7.4 Group must indemnify NFIL against all losses which it has suffered "due to" the statements set out in paragraph 3 being inaccurate or untrue as at completion. The Data Room referred to in paragraph 3.1 and defined in clause 1 of

the SPA was, as I have explained, simply a computer database used as the agreed method of pre-contract disclosure in respect of Material Contracts which the Club had entered into.

43. As originally pleaded, the claim on the indemnity under clause 7.4 was based on three contracts, only two of which are the subject of this appeal. They are:

(i) a written intermediary fee agreement dated 25 January 2015 between the Club and Dr Hootan Ahmadi ("the Ahmadi contract"); and

(ii) a scouting agreement with Mr Pietro Chiodi dated 30 August 2016 ("the Chiodi contract").

44. Dr Ahmadi's claim against the Club was settled in February 2019 on the advice of leading counsel for the sum of £400,000 plus VAT and costs with provision for a further payment of £200,000 if the Club is promoted to the Premier League prior to the start of the 2021/2022 season. The claim by Mr Chiodi was for £200,000 but it was settled without any admission of liability for £70,000.

45. The claimants accept that neither of these contracts was disclosed by being included in the Data Room. But, in relation to the Ahmadi contract, Mr Al-Hasawi maintained at the trial that the Club never had any liability to Dr Ahmadi; that the alleged agreement was never executed; and that its terms were inconsistent with it having incurred the liability alleged. It was also said that there was no evidence as to what Dr Ahmadi had done in order to earn his commission. The judge held that the various factors relied on by Mr Al-Hasawi were sufficient to displace any *prima facie* inference based on the settlement itself that the claim of Mr Ahmadi was sufficiently strong as to justify a settlement in the amount paid.

46. In relation to Mr Chiodi, the argument was different. The claimants relied on three matters in response to the claim. The first is that there was disclosure of the Chiodi contract prior to completion of the SPA, although not by its inclusion in the Data Room. The contract is referred to expressly in the clause 1 definition of "Liabilities". Second it was said that because the claim was settled for less than £100,000 the contract did not fall within the definition of a Material Contract in paragraph 3 of Schedule 7. The third defence to the claim was that because the liability under the contract was included as a liability for the purposes of the clause 7.1 indemnity it cannot also be included as part of the claim under clause 7.4 because of the provisions of paragraphs 3.1 and 3.2 of Schedule 6 and paragraph 3.2(iii) of Schedule 7.

47. The judge rejected the argument that the Chiodi contract was not a Material Contract due to the amount of the settlement being less than £100,000 but accepted that it was excluded from the definition of a Material Contract and therefore from the scope of clause 7.4 because it had been "taken into account in determining whether there is an Indemnity claim" within paragraph 3.2(iii) of Schedule 7. An "Indemnity Claim" means a claim under clause 7.1. But he also held that no liability had been incurred to Mr Chiodi under the contract.

48. Although not originally pleaded, the appellants, during the course of the proceedings in November 2018, notified the respondents that they had additional claims under clause 7.4 relating to ten contracts entered into between 26 January and 18 May 2017.

They relate to player loans, transfers and contract extensions for players. The claim is for the full value of those contracts and totals £4,410,604. The claimants accept that none of these contracts was included in the Data Room but asserts that Mr Vrentzos, who represented Mr Marinakis and NFIL in the negotiations which led to the SPA, was well aware of all these contracts and of their financial terms. Those claims as a group accounted in value for the largest part of the defendants' counterclaim and were defended on two main grounds. First it was said that to recover anything under the clause 7.4 indemnity it was necessary to prove that either NFIL or the Club had suffered loss due to the inaccuracy of the statement in paragraph 3 of Schedule 7 that all Material Contracts entered into by the Club had been included in the Data Room. The only loss on the part of NFIL or the Club which could in theory have resulted from that inaccuracy would have been the inability or failure of Mr Vrentzos to be able to negotiate more favourable terms for the acquisition of the Club in the light of these additional liabilities. But Mr Vrentzos, they said, had knowledge of these contracts when agreeing the terms of the SPA and their non-disclosure in the Data Room cannot therefore have been causative of any loss of the kind contemplated by clause 7.4.

49. The second point of defence relied upon was that none of the ten contracts was a Material Contract within the meaning of paragraph 3 of Schedule 7. Each of them related to a player at the Club and they were therefore contracts "in respect of Players" which are excluded from the definition of Material Contracts. A "Player" as defined means any player who is registered to play for the Club either under a contract of employment or on loan.

50. The judge held that the ten contracts were not contracts in respect of Players within the meaning of Schedule 7 because, in context, that expression was limited to mean the employment contracts of players with the Club: see his judgment at [65]. But he dismissed the additional claims on the basis that it was necessary for the defendants to prove that the failure to include the contracts in the Data Room had caused loss to NFIL in the sense I have described. The judge held that on the evidence this had not been established.

51. The defendants have abandoned their appeal against the judge's findings of fact on causation. Their sole ground of appeal in relation to the additional claims is that the judge was wrong in his construction of the words "due to" in clause 7.4. They submit that the purpose of clause 7.4 was to provide a further indemnity against the non-disclosure of Material Contracts which post-dated 31 December 2016 and that in relation to any such contracts they are entitled to an indemnity in the full amount of the Club's liability under the contract just as under clause 7.1. Mr Mill, however, accepts that if his clients' appeal on this issue of construction fails then the judge's rejection of the claim on the evidence must stand.

52. The claimants by a respondent's notice have challenged the judge's finding that the claims are not excluded by being contracts "in respect of Players".

The Additional Claims

53. It is convenient to deal with these claims first because the effect of the words "due to" in clause 7.4 is relevant to all of the clause 7.4 claims.

54. The judge (at [70]) said this:

> "I reject that submission. Clause 7.4 of the SPA affords the defendants an indemnity from and against all Losses suffered of incurred by them "*due to*" the inaccuracy or untruth of the statements set out in paragraphs 3 and 4 of an contract made orally and by conduct Schedule 7 to the SPA. The concept of indemnification connotes the existence of some loss against which the indemnified party is to be protected and, in the absence of such loss, is otherwise meaningless. Also, the need for the defendants to establish that the Losses against which they are indemnified have been caused by the inaccuracy or untruth of the statements set out in paragraphs 3 and 4 of Schedule 7 is clear from words "*due to*" in clause 7.4 of the SPA. The defendants were unable to explain on what basis there was no need to show what Loss may have been caused by the non-inclusion of a Material Contract in the Data Room or why, otherwise, the placing of Material Contracts in the Data Room had no utility."

55. It seems to me that this is right. The clause 7.4 indemnity is in very different terms from that contained in clause 7.1. The latter is designed, as I have explained, to adjust the amount of the loans repayable to Mr Al-Hasawi by reference to any undisclosed liabilities of the Club as at 31 December 2016. This is to be measured against the calculation of liabilities in the sum of £6.6m contained in the Trial Balance. But clause 7.4 covers only later losses and liabilities insofar as they are "due to" the non-disclosure of Material Contracts in the Data Room. It can therefore only be directed to the effect which the non-disclosure of those later contracts would have had on the negotiations about the terms of the SPA. The fact of non-disclosure could not of itself have increased the liabilities of the Club. That was a product of the contracts themselves. But it might have caused loss to NFIL if it could be shown that Mr Vrentzos would have driven a harder bargain had he been aware of their existence. The defendants were therefore required to establish causation and it is common ground that they have not done so. I would therefore dismiss the appeal in respect of the additional claims for that reason. It is not therefore necessary to decide the issue about what is meant by a contract "in respect of Players".

The Chiodi contract

56. There are a number of difficulties with this part of the appeal. The first is that the claim is inconsistent with the claim under clause 7.1 in respect of "liabilities". The contract was made on 30 August 2016. If, as I have held, that extends to the totality of any liabilities under a pre-31 December 2016 contract then it covers all of the Club's liabilities (if any) under the Chiodi contract and an alternative claim under clause 7.4 is in my view precluded by paragraph 3.2(iii) of Schedule 7. But even if I were wrong about that and payments relating to services to be rendered after 31 December are not "liabilities" under clause 7.1 then the defendants' challenge to the judge's construction of paragraph 3.2(iii) must first overcome the judge's finding in [45] that there was in fact no liability on the part of the Club to Mr Chiodi under the terms of his contract. Since this finding by the judge is not itself the subject of any appeal, the challenge by the defendants to the judge's construction of paragraph

3.2(iii) is purely academic. I would therefore dismiss the appeal in respect of the Chiodi contract.

The Ahmadi contract

57. The remaining schedule claim relates to the contract with Dr Ahmadi. This was an intermediary fee agreement for services relating to the sale of the Club. In February 2019 the Club, on the advice of leading counsel, settled the claim by Dr Ahmadi in the sum of £450,000 including costs. The contract was not disclosed in the Data Room.

58. The claimants required the defendants to prove that Dr Ahmadi had earned any fee under the agreement and I think that it is common ground that ultimately the burden lies upon them to establish that liability. At the trial the claimants highlighted a number of facts which they said showed that no liability existed. These included the fact that the copy of the agreement dated 25 January 2015 was not executed by Dr Ahmadi and that the commission on the sale was expressed to be payable by June 2016, although the sale took place the following year.

59. The defendants relied on the fact that the claim had been settled for £450,000 on the advice of leading counsel as raising at least an evidential inference or presumption that the settlement was reasonable. From that it followed, they said, that the court would and should infer that the Club had the liability contended for. The advice which the Club received was not, however, disclosed on grounds of legal professional privilege.

60. The judge accepted that there was an inference that the settlement was a reasonable one but he held that the inference was displaced by the other evidence relied on by the claimants. He said:

> "82. The onus is on the defendants to prove that the sale of the Club resulted in a liability under the intermediary agreement with Dr Ahmadi. The claimants deny any liability to the defendants under clause 7.4 of the SPA on the grounds that the Club owed no such liability. They refer to the fact that the alleged agreement dated 25 January 2015 is not executed by Dr Ahmadi; that the 2% commission based on the purchase price was expressed to be payable to Dr Ahmadi on or before June 2016 and so had no bearing on a sale in 2017; that the alleged agreement refers to Dr Ahmadi's entitlement to the commission being triggered by a legally binding share sale agreement executed by the Club and the Prospect despite the fact that the Club itself would not receive any purchase price and would not be a party to a share sale agreement; that given that the Buyer paid £1 for the shares in the Club, this would not have given rise to a liability of £400,000 as claimed by the defendants; and that it is unclear what Dr Ahmadi did in order to earn the commission payment. During the hearing, the claimants abandoned a further ground for disputing the Club's liability to Dr Ahmadi, namely that Mr Al-Hasawi's signature on it was a forgery.

> …
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> 85. I accept Mr Vrentzos' evidence that the settlement in the present case was entered into by the defendants on the advice of leading counsel who, I was told by Mr Spalton, was independent of the Club. I consider that the fact that it was entered into on legal advice establishes, at least, the reasonableness of the settlement and that it is for the claimants to displace the inference by evidence to the contrary. The present situation is, in my view, not comparable with that in *Digicel:* the fact that, as I have found, the settlement was entered into on the basis of legal advice is sufficient to give rise to the inference that the settlement was reasonable.
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> 86. The question then comes to be whether the various matters relied on by the claimants displace that inference. It may be that, if Dr Ahmadi did sign the intermediary agreement, he only did so on or about 7 February 2016, as stated in the settlement agreement. Mr Vrentzos did not know when it was signed by Dr Ahmadi, since his statement states only that "*it appears that the contract was in fact concluded in or around February 2016, whatever the date on the face of the agreement*". It may be that the date of 7 February 2016 is erroneous and the settlement agreement should have referred to 2015, since the period between 25 January 2015 and 7 February 2016 seems unduly lengthy but there is no evidence about that. There are also the other oddities about the intermediary agreement identified by the claimants and referred to above. The confidentiality obligations in clause 6.1 of the settlement agreement would not have prevented the defendants providing further information about the intermediary agreement itself to resolve those oddities. Taking all these matters into account, I consider that the inference that the settlement was reasonable is displaced. There are, in my judgment, too many uncertainties to enable me to conclude that the defendants have established that the Club genuinely owed a liability to Dr Ahmadi."

61. The defendants challenge the judge's rejection of this part of their claim on the ground that the claimants had not pleaded that any inference to be drawn from the settlement has been rebutted; that the evidence relied on by the judge was insufficient to rebut the inference and that any lack of evidence on the part of the defendants was explicable by the fact that Mr Vrentzos was bound to observe the obligations of confidentiality imposed on the Club by the terms of clause 6 of the settlement agreement. Although this contains an exception for disclosure which is required by law, Mr Vrentzos had not been ordered to make further disclosure.

62. I am afraid that I am unpersuaded by any of these grounds of appeal. The judge correctly directed himself on the law and accepted that the settlement raised an inference that its terms were reasonable. But, having considered all of the other evidence which the parties (and, in particular, the claimants) put before the Court, he was satisfied that the inference was displaced. That left the defendants to establish a

liability of the Club under the alleged contract which they were unable to do. It did no more than to put the defendants in the position in which they were on the evidence absent the mere fact of the settlement.

63. Although the judge lists the points of concern in relatively short order in his judgment, this is not a reasons challenge and there is nothing to indicate that he failed to give the evidence the consideration which it required. Moreover, the provisions about confidentiality in clause 6 of the settlement agreement could be overridden by the consent of Dr Ahmadi or an order of the Court, neither of which was sought by the defendants. As for the legal professional privilege attaching to the advice received from leading counsel, that was a privilege for the benefit of the defendants which it was open to them to waive. While the defendants were entitled to maintain privilege, and no adverse inference should be drawn from the fact that they chose to do so, the result was that the mere fact of advice carried little weight when put in the scale against the matters listed by the judge.

64. Mr Mill referred to other evidence which he said should have led the judge to take a different view about the strength of their case. The judge, he said, has not tested the alleged oddities against the other available material. But we are not here to re-try the claim and none of the material he referred to shows that the judge reached a conclusion which was not open to him on the evidence. A decision to settle Dr Ahmadi's claim could have been made for a number of reasons not necessarily limited to the strength of his claim. I can see no error in the judge's decision that such inferences as might have arisen from the settlement itself had been rebutted by the uncertainties which the judge identified in his judgment. I would therefore dismiss the appeal in respect of the contract with Dr Ahmadi.

Conclusion

65. In summary therefore I would allow the appeal in relation to the clause 7.1 claim but dismiss the appeals relating to the claims under clause 7.4.

Lord Justice Males :

66. I agree.

Mr Justice Roth :

67. I also agree.