Neutral Citation Number: [2019] EWHC 1287 (Ch)

Claim No: BL-2017-000149

IN THE HIGH COURT OF JUSTICE
THE BUSINESS AND PROPERTY COURTS OF ENGLAND AND WALES
CHANCERY DIVISION

Royal Courts of Justice, Rolls Building
Fetter Lane, London, EC4A 1NL
Date: 24 May 2019

Before :
STUART ISAACS QC
(SITTING AS A DEPUTY JUDGE OF THE HIGH COURT)

- -

Fawaz Al-Hasawi

Claimant

- and –

Nottingham Forest Football Club Limited

Defendant

- and –

NF Football Investments Limited

Third Party

- and -

NFFC Group Holdings Limited

Fourth Party

- -
- -

Mr Tom Hickman QC (instructed by Squire Patton Boggs (UK) LLP) appeared on behalf of the Claimant and the Fourth Party.

Mr George Spalton and Mr Joshua Folkard (instructed by Browne Jacobson LLP) appeared on behalf of the Defendant and the Third Party.

Hearing dates: 30 April and 1, 2 and 3 May 2019

- -

Approved Judgment

I direct that pursuant to CPR PD 39A para 6.1 no official shorthand note shall be taken of this Judgment and that copies of this version as handed down may be treated as authentic.

Stuart Isaacs QC:

Background

1. This case concerns a dispute arising out of the sale in 2017 of the defendant (the "Club"), a professional football team which plays in the English Football League (the "EFL") Championship. By a share purchase agreement dated 12 April 2017 (the "SPA") between the third party (the "Buyer"), the fourth party (the "Seller") and the claimant, Mr Fawaz Al-Hasawi ("Mr Al-Hasawi"), the Buyer agreed to buy from the Seller all of the allotted and issued share capital in the Club, on the terms and conditions set out in the SPA. The Seller's obligations under the SPA were guaranteed by Mr Al-Hasawi, its then chairman and sole legal and beneficial owner. In this judgment, the Seller and Mr Al-Hasawi are referred to collectively as the claimants and the Buyer and the Club are referred to collectively as the defendants.

2. Mr Al-Hasawi's involvement with the Club dated back to 2012, when, through the Seller, he bought the Club's entire share capital from its previous owners. Over the period of his ownership, he invested heavily in the Club, including investment in its training ground, academy and match day facilities at The City Ground, the Club's stadium.

3. At around the end of 2015, a dispute arose between the Club and Olympiacos FC ("Olympiacos"), a leading Greek football club majority-owned by Mr Evangelos Marinakis, a shipping magnate, over unpaid transfer fees for two players bought by the Club. During discussions between Mr Al-Hasawi and Mr Marinakis on that subject, Mr Marinakis expressed an interest in buying the Club and negotiations ensued over the summer of 2016 with a view to completion of the sale at the end of the 2015/2016 season. In the negotiations, Mr Marinakis was represented by Mr Ioannis Vrentzos, at the time the managing director of Olympiacos. As part of the acquisition process, Ms Samantha Gordon, who is now the Club's chief financial officer, was engaged by Mr Vrentzos on behalf of the proposed buyer on a consultancy basis to assist in the due diligence process being conducted by Grant Thornton on the proposed buyer's behalf. In the event, the sale of the Club did not proceed at that time due to allegations against Mr Marinakis in Greece of match-fixing which it appeared would result in the EFL banning him from being an owner or director of an EFL club.

4. Subsequently, discussions took place over the sale of the Club to an American consortium but those too broke down in December 2016. Mr Al-Hasawi and Mr Marinakis then got back in contact with a view to restarting negotiations for Mr Marinakis to buy the Club. By this time, it appeared that Mr Marinakis would not face the same regulatory issues with the EFL. Mr Al-Hasawi stated that negotiations could only resume if he received a loan of £5,000,000 to repay loans made by the American consortium. Mr Marinakis expressed interest and this led to Mr Vrentzos getting in contact for the first time with Mr Hassan Saef, a business associate of and adviser to Mr Al-Hasawi. Discussions ensued which led to an agreement dated 12 January 2017 between the claimants and Container GR Inc, a company associated with Mr Marinakis, which provided for a £5,000,000 loan to Mr Al-Hasawi for the purpose of repayment of the previous loans and a further £5,000,000 loan to be made upon signature of the SPA.

5. In view of the work already done in connection with the previous abortive sale of the Club to Mr Marinakis, it was envisaged that a deal could be concluded very quickly and that no formal due diligence would be required. The negotiations were again led by Mr Vrentzos on Mr Marinakis' behalf and by Mr Saef on Mr Al-Hasawi's behalf. They coincided with the opening of the January transfer window for the transfer of players between clubs permanently or on loan. It was a particularly important time for the Club, which was in danger of relegation from the Championship and which therefore needed to strengthen its team. The parties' original and over-optimistic hope was to be able to conclude a deal before the end of the transfer window.

6. Prior to the execution of the SPA, Mr Al-Hasawi and others connected with him (the "Historic Lenders") had advanced a series of loans to the Club. Clause 5.5.1 of the SPA provided for the parties to execute and enter into or procure the execution and entering into of a deed of variation and facility on Completion of the sale under which some of the Debt would be written off or restructured, others would be repaid on Completion and others would be repaid at later dates.

7. By clause 4 of the SPA, the Buyer agreed to pay a purchase price of £1 on completion of the sale and purchase of the shares and to procure the repayment by the Club of the "Completion Loans" and the "Promotion Loan" (as defined in the proposed deed of variation and facility).

8. Completion of the sale took place on 18 May 2017.

9. On that date, the parties to these proceedings, together with the Historic Lenders, entered into the deed of variation and facility provided for in clause 5.5.1 of the SPA (the "Deed"). The Deed referred to the Club as "the Borrower" and the Seller as "Holdings".

10. The Deed provided *inter alia*:

> "*3.* ***The Initial Loan, August Loan, October Loan and January Loan***
>
> *3.1 Subject to clause 3.6, £5,380,000 of the Debt owed to Mr Al Hasawi shall remain outstanding as an interest free unsecured sterling term loan granted by Mr Al Hasawi to the Borrower and shall be repaid: (i) as to £1,880,000, in full, on* [15 May 2017] *(and such £1,880,000 shall be the* ***Initial Loan****); and (ii) as to the £3,500,000, in full, on* [31 August 2017]*, subject to the provisions of clause 3.4 and clause 5 of this agreement (and such £3,500,000 shall be the* ***August Loan****).*
>
> *3.2 Subject to clause 3.6, a further £348,164.50 of the Debt owed to Mr Al Hasawi shall remain outstanding as an interest free unsecured sterling term loan granted by Mr Al Hasawi to the Borrower and shall be repaid in full on* [31 October 2017]*, subject to the provisions of clause 3.4 and clause 5 of this agreement (and such loan shall be the* ***October Loan****).*
>
> *3.3 Subject to clause 3.6, a further £348,164.50 of the Debt owed to Mr Al Hasawi shall remain outstanding as an interest free unsecured sterling term loan granted by Mr Al Hasawi to the Borrower and shall be repaid in full*

on [31 January 2018] *subject to the provisions of clause 3.4 and clause 5 of this agreement (and such loan shall be the* ***January Loan****).*

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.

3.5 While the Initial Loan and/or the Completion Loans remain outstanding, the Buyer and the Borrower agree (and the Buyer shall procure) that the Borrower shall not, without the prior written consent of Mr Al Hasawi, create any security over its assets and the Buyer and the Borrower agree that the Borrower shall not make any payments to the Buyer, Curzon Shipbrokers Corp., Container GR Inc., or any person Connected with any of them (including but not limited to payment of dividends, repayment of any loan or debt, payment of fees and/or charges, assumption of liabilities) in excess of £20,000 per month.

…

No relegation in 2016/17

3.7 In the event that the Borrower is not relegated from the Championship at the end of the 2016/17 season, and any amount in respect of the Completion Loans has not been paid within 10 Business Days of its due date, then if a notice is sent in writing by or on behalf of Mr Al Hasawi to the Borrower (an ***Acceleration Notice****) any and all unpaid amounts in respect of the Completion Loans (whether due for payment or not) shall become immediately due and payable and interest shall accrue from the date of the Acceleration Notice and be payable in respect of all such unpaid amounts in accordance with clause 9.*

…

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.*
>
> *…*
>
> *9.* ***Interest***
>
> *If any party fails to pay in full on the due date any amount which is payable to the other party pursuant to this agreement, or where this agreement otherwise specifies or provides that an amount of interest should be applied, then the amount outstanding or payable shall bear interest both before and after any judgment at 2 per cent per annum over Barclays Bank plc base rate (the interest rising to 8% flat per annum if clause 3.7 and/or clause 3.20 applies) from time to time from the due date until up to and including the date payment is made in full. Such interest shall be compounded and accrue on a daily basis.*"

11. Of the loans referred to in clause 3.1 of the Deed, only the Initial Loan has been repaid by the Club. The date for repayment of the August Loan, namely 31 August 2017, passed without it having been repaid. It will be necessary later in this judgment to consider in more detail the circumstances surrounding the non-repayment of the August Loan.

12. On 4 October 2017, Mr Al-Hasawi served an Acceleration Notice as provided for under clause 3.7 of the Deed due to the alleged non-repayment of the August Loan on 31 August 2017.

13. By a claim form issued on 5 October 2017 (claim no. BL-2017-000034), the Buyer then claimed various sums allegedly due from the claimants under the SPA which they seek

to set-off under clause 5 of the Deed and for alleged misrepresentation of the Club's liabilities. The Buyer also sought rectification of the SPA so as to permit the Club, which is not a party to the SPA, to enforce the various guarantees and indemnities in its favour given by the claimants under the SPA (the "Club Rights") if, on the SPA's proper construction, the Club does not have any such rights.

14. By a claim form issued on 20 October 2017 (claim no. BL-2017-000149), Mr Al-Hasawi claimed the repayment of a total sum of £4,196,329 in respect of the Completion Loans, together with interest thereon and on the outstanding loaned amount of £3,500,000.

15. On 7 November 2017, the Club was added as a co-claimant to the Buyer's claim in claim no. BL-2017-000034. Those parties served particulars of claim seeking the above relief. The Club's amended defence and counterclaim and the Buyer's amended claim dated 16 January 2019 and their re-re-amended reply to the claimants' defence to counterclaim/Part 20 claim dated 12 April 2019 set out the defendants' position.

16. On 6 June 2018, Master Bowles ordered that the two sets of proceedings were to be treated as consolidated under claim no. BL-2017-000149 and gave consequential directions in relation to the joinder of the Buyer and the Seller to that claim and the service of statements of case in the consolidated proceedings.

17. By a consent order made on 26 April 2019, the rectification claim was withdrawn following the parties' agreement that the Club Rights can be enforced by the Buyer and that any sums recovered by it under the guarantees and indemnities in the SPA that reflect losses suffered by the Club would be passed on by the Buyer to the Club. It is therefore unnecessary to consider the rectification claim further.

18. It is common ground that, subject to the defendants' claims under the SPA, the principal sum of £4,196,329 is due to Mr Al-Hasawi in respect of the Completion Loans. The claimants maintain that the defendants' claims under the SPA are without merit and that the Club's only entitlement is to set-off sums against the Completion Loan under clause 5 of the Deed, of which the conditions are not satisfied. I therefore propose to consider first the claims under the SPA and then whether any amounts may be set-off under the Deed and questions of interest.

19. At the trial, oral evidence of fact was given on the claimants' behalf by Mr Saef and Mr Mark Yeo, a partner in the claimants' solicitors who acted for the claimants in connection with the sale of the Club. Mr Al-Hasawi did not give evidence. He and Mr Saef have known each other since 1997 as a result of their involvement in Kuwaiti football and Mr Saef continues to work closely with Mr Al-Hasawi in the running of a number of the latter's business interests. Mr Saef made a statement dated 4 April 2019. Mr Yeo made statements dated 4 April and 24 April 2019. Oral evidence of fact was given on the defendants' behalf by Mr Vrentzos, the Club's chief executive officer and a director of the Buyer, and Ms Gordon, who is a qualified management accountant. Mr Marinakis did not give evidence. Mr Vrentzos, who was involved in all relevant meetings, made statements dated 19 January 2018, 28 December 2018, 4 April and 29 April 2019 and Ms Gordon made a statement dated 4 April 2019. At the start of the hearing, I granted the parties permission under CPR Part 32.10 to rely on the statements of Mr Yeo dated 24 April 2019 and of Mr Vrentzos dated 29 April 2019. I also made a

consent order under CPR Part 31.22(2) to prohibit the use of certain documents containing confidential information about players' remuneration and other financial information disclosed by the defendants, even though they may have been read to or by the court, or referred to, at this hearing.

20. I found Mr Saef and Mr Vrentzos to be essentially truthful witnesses although in certain respects mentioned below the evidence of neither was satisfactory. In several respects, Mr Saef's evidence was based on hearsay and speculation. This has made it all the more important to consider their oral evidence in the light of the contemporaneous documentary evidence. I found Mr Yeo and Ms Gordon to be helpful witnesses and accept the evidence which they gave. In Ms Gordon's case, I preferred her evidence to that of Mr Saef where it differed.

Claims under the SPA

21. The defendants advance four claims under the SPA, namely for so-called Leakage, Losses, Schedule Claims and other costs and expenses. The burden of proving those claims rests on the defendants. The claim for Leakage is made by the Buyer alone. In relation to the other three claims, the effect of the consent order made on 26 April 2019 is that it is no longer necessary to consider the various ways in which the defendants were previously alleging that it was the Club which had an entitlement to enforce the provisions in question.

22. The SPA provided *inter alia*:

> "*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;*

…

Intermediary *as defined in the FA Regulations on Working with Intermediaries or the FIFA Regulations on Working with Intermediaries, as applicable;*

Leakage *means any amount in excess of £2,303,671 … received by the Seller, or any person Connected to it, in breach of Clause 6;*

…

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 …;*

…

- *any liability to Pietro Chiodi Soccer Management,*

…;

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;*

…

Permitted Payments *means the payments, receipts or transactions which are listed in Schedule 5;*

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]*;*

…

Schedule Claim *a claim under Clause 7.4 of this agreement;*

…

6. ***Leakage***

6.1 The Seller undertakes to the Buyer that, in the period from and including the Liability Statement Date up to Completion, the only payments received by it or any person Connected to it have been or will be Permitted Payments, and in particular during that period (except for such Permitted Payments): …

6.2 With effect from Completion, the Seller undertakes to the Buyer to pay to the Buyer, within 10 Business Days of a written demand by the Buyer, an amount equal to any Leakage which it … has received ….

…

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.*

…

7.4 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.*

*18. **Third Party rights***

18.1 A person who is not a party to this agreement shall not have any rights under the Contracts (Rights of Third Parties) Act 1999 to enforce any term of this agreement."

23. Schedule 6 to the SPA provided *inter alia*:

> "*1.* ***Time Limits***
> *1.1 The Seller shall not be liable for an Indemnity Claim or a Schedule Claim … unless written notice of that Indemnity Claim or Schedule Claim has been served on the Seller (providing specific details of the relevant Claim, including reasonable details of the matter or default which gives rise to the Claim, and the Buyer's bona fide estimate of any alleged Losses where reasonably quantifiable) on or before 31 December 2018.*
>
> *…*
>
> *3.* ***No Double Counting***
>
> *3.1 The Buyer shall not be entitled to recover damages in respect of any Claim or otherwise obtain reimbursement or restitution more than once in respect of any one breach of this agreement arising out of or in connection with the same circumstances.*
>
> *3.2 The liability of any Seller shall not be increased by reason of the fact that any Claim in respect of one circumstance is made or is capable of being made in respect of more than one provision of this agreement or any other Transaction Document.*
>
> *…*
>
> *7.* ***Changes on and/or after Completion***
>
> *The Seller shall not be liable for any Claim to the extent that it arises, or is increased or extended by:*
>
> *…*
>
> *7.1.3 any change in any accounting basis, policy, practice or approach of, or applicable to, the* [Club] *or the Subsidiary or the Buyer or any member of the Buyer's Group, or any change in the way an accounting basis is adapted for Tax purposes, in each case, made on and/or after Completion (save where such change is required to conform such policy or practice with generally accepted policies or practices or where such change is necessary to correct an improper policy or practice; …*
>
> *…*
>
> *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."

References in Schedule 6 to "*the Seller*" were expressed to be deemed to include "*the Guarantor*".

24. Schedule 7 to the SPA is concerned with specific indemnities. It provided *inter alia*:

"*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 £30,000 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]*'s 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 alteration on behalf of the Buyer).*

4. ***Effect of the Transaction***
Neither the entering into of this agreement nor Completion nor the change of control of the [Club] *will result in the* [Club] *or the Subsidiary assuming any liability or obligation to make or pay any payment, fee, bonus, success fee or otherwise to any person.*"

(1) Leakage

25. As defined in the SPA, Leakage means any amount in excess of £2,303,671 received by the Seller, or any person Connected to it, in breach of clause 6 of the SPA. On 1 August 2017 and again on 17 October 2017, the Buyer demanded Leakage in the sum of £106,622. By the particulars of claim served on 7 November 2017, the defendants

demanded further Leakage in the sum of £78,219. According to the defendants, Leakage has continued to accrue such that, until recently, a total amount of £191,788 was being claimed, with the additional Leakage having been claimed in a letter dated 16 January 2018 to the Seller and a letter dated 31 January 2018 to Mr Al-Hasawi. The defendants also allege that Mr Al-Hasawi is in breach of his obligation under clause 10.1 of the SPA to procure the due and punctual performance, observation and discharge by the Seller of its obligation to pay the Leakage demanded.

26. Of the total Leakage previously claimed, the only amount which now remains in dispute is a sum of £46,334. It comprises so-called solidarity payments totalling £9,348 made by the Club to other clubs to compensate them for the education and training of a young player, as required under FIFA regulations, and legal fees totalling £34,206 paid to solicitors in respect of various disputes in which the Club was involved. It also includes an amount of £2,780 paid in relation to three players to Vertex Soccer Ltd, a soccer school, referred to by Ms Gordon in her evidence. The claimants' position is that none of the £46,334 is within the definition of Leakage since it does not relate to payments "*received by the Seller, or any person Connected to it*" within the definition of "*Leakage*" in the SPA.

27. The defendants submit that the disputed items do constitute Leakage. They draw attention to the fact that, prior to the sale of the Club, the Seller and the Club were both controlled by Mr Al-Hasawi and, accordingly, that the Seller and the Club were "Connected" with each other in accordance with section 1122(2)(a) of the Corporation Tax Act 2010. They also draw attention to the fact that one of the Permitted Payments listed in Schedule 5 to the SPA was the payment of £4,521,014.80 made to the American consortium in repayment of its loan. From those facts, the defendants submit that it is to be inferred that payments made by the Club to reduce its liabilities which, as Mr Saef conceded in cross-examination, benefited Mr Al-Hasawi, are to be considered as Leakage.

28. I reject the defendants' submissions. It is clear that the disputed payments were not received by the Seller, or any person Connected to it and, accordingly, that they do not constitute Leakage. The clubs to which the solidarity payments were made, the firms of solicitors to which the legal fees were paid and Vertex Soccer Ltd are not Connected persons. In my judgment, there is no basis for the inference contended for by the defendants. I also consider that the question whether Mr Al-Hasawi benefited from the payments (as to which Mr Saef's oral evidence was in contradiction to his statement) is irrelevant to the proper construction of the expression "*Leakage*" in the SPA.

29. Accordingly, the Seller is not liable under clause 6.2 of the SPA and Mr Al-Hasawi is not liable under clause 10.2 of the SPA to pay Leakage in respect of the disputed items. There is no dispute as to claimants' liability in respect of the other items which comprise the Leakage claim.

(2) Losses

30. Under clause 7.1 of the SPA, subject to the provisions of Schedule 6, the Seller is required to indemnify the defendants from and against all Losses suffered or incurred by the defendants arising out of or in connection with the aggregate of the Liabilities being in excess of £6,600,000 at the Liability Statement Date, namely 31 December

2016. The Losses claimed amount to £103,099.57, comprising £5,250 in relation to exchange rate movements in the claim concerning Villarreal Club de Futbol SAD ("Villarreal"), £50,025 exchange rate losses on transfer fees paid in relation to two players and legal fees of £28,697.57 and £7,627 in relation to the claims of Mr Chiodi and Auditel. The defendants also allege that Mr Al-Hasawi is in breach of his obligation under clause 10.1 of the SPA to procure the due and punctual performance, observation and discharge by the Seller of its obligation to pay the Losses claimed. According to Mr Yeo, whose evidence I accept, the approach of identifying a level of liabilities above which the claimants would indemnify the Buyer was a bespoke arrangement agreed between the parties. A full due diligence exercise was not possible due to the tight timetable to which they were working and the lack of senior management at the Club to provide information for such an exercise.

31. After some fluctuation during the course of the hearing, the defendants' position is that the Liabilities amount to £8,020.529.40. On that basis, the amount in excess of the £6,600,000 referred to in clause 7.1 of the SPA which potentially constitutes Losses is £1,420,529.40. Of the sum of £8,020,529.40, the claimants dispute that an amount of £1,710,496 constitutes Liabilities. If the claimants' position is correct, it will reduce the Liabilities to £6,318,033.40, with the consequence that the Liabilities are not in excess of £6,600,000 and no Losses are recoverable. Hence the defendants need to establish £281,966.60 worth of disputed Liabilities in order to reach the £6,600,000 threshold in excess of which Losses potentially arise.

32. The disputed Liabilities fall broadly into five categories: services and ticketing; the Villarreal claim; player signing-on fees, transfer fees and agents' fees. At the start of the hearing, there were also disputed Liabilities in relation to tax on agents' fees and other tax disputes but these were resolved in the light of Ms Gordon's oral evidence and documents provided by the defendants to the claimants.

33. The claimants contest the disputed Liabilities on three grounds. They submit that (1) certain of the amounts in dispute are not within the definition of "*Liabilities*" since they are not liabilities which relate to a period prior to the Liability Statement Date; (2) certain of the amounts in dispute are contingent, not capable of being quantified or not due and payable and thus are excluded from clause 7.1 of the SPA by virtue of paragraph 9 of Schedule 6 thereto; and (3) in respect of certain of the amounts in dispute, no liability has been established.

34. The central question here concerns the proper construction of "*Liabilities*" as defined in the SPA. The defendants submit that the definition of "*Liabilities*" reflects Financial Reporting Standard applicable in the UK and Republic of Ireland ("FRS") 102, the accounting standard adopted by the Club. In contrast, the claimants submit that the defined term "*Liabilities*" in the SPA is different from and more restrictive than the approach taken to the assessment of liabilities for accounting purposes in FRS 102.

35. Under paragraph 2.39 of FRS 102, an entity is required to 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. Paragraph 2.40 of FRS 102 defines a contingent liability as either a possible but uncertain obligation or a present obligation

that is not recognised because it fails to meet one or both of conditions (b) and (c) above.

36. In view of the importance of the Losses claim in the proceedings, the parties agreed to take the unusual course, approved at the pre-trial review which took place on 20 March 2019 before Mr Mark Cawson QC, sitting as a deputy judge of this court, of adducing expert accountancy evidence at the hearing prior to the factual evidence being given. In accordance with an order dated 18 December 2018 made by deputy master Bartlett, the experts were required to provide their calculation of the disputed Liabilities and then to explain the accounting treatment applied. The defendants adduced oral evidence from Mr Navin Waghe, a partner and a senior managing director of FTI Consulting Group LLP, who prepared a report dated 6 March 2019. He also prepared a supplemental report dated 17 April 2019 on which, at the start of the hearing, I granted the defendants permission to rely, without prejudice to any submissions which the claimants might wish to make as to the relevance of or weight to be attached to the contents of the report. The claimants adduced oral evidence from Mr Jonathan Pryor, a partner in Smith & Williamson, who prepared a report dated 21 February 2019 and a supplemental report dated 1 May 2019 (the latter being in response to Mr Waghe's oral evidence and which was admitted in evidence without objection from the defendants). The experts also prepared a joint statement dated 18 March 2019.

37. Mr Pryor's approach was to start with the items that should be classified as liabilities for financial reporting purposes but also to take into account the additional restrictions and modifications imposed by the SPA. The claimants submit that whereas Mr Pryor had complied with deputy master Bartlett's directions, Mr Waghe had simply conducted an analysis of the Club's liabilities as at the Liability Statement Date under FRS 102 because those were the instructions he received from the Buyer (see paragraph 1.23 of Mr Waghe's first report).

38. Consistently with Mr Pryor's approach, the claimants submit that under the definition of "*Liabilities*" in the SPA, the liabilities in question must "*relate to*" the period up to the Liability Statement Date, with the consequence 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.

40. In support of their construction, the defendants relied on the Court of Appeal's decision in *Macquarie Internationale Investments Ltd v Glencore UK Ltd* [2010] EWCA Civ 697 as authority for the proposition that where accounting terms are used in share sale and purchase agreements they should be construed in the context of the accounting standards used in the statements of the relevant entity. However, that case concerned the meaning of the concept of materiality in the context of a warranty in a share sale and purchase agreement as to the accuracy of management accounts. The warranty was that the management accounts were *inter alia* "*not misleading in any material respect*". At [68], Jackson LJ, with whom Lord Neuberger MR and Lloyd LJ agreed, stated that the concept of materiality had to be interpreted by reference to published accounting standards and not by reference to some different or more rigorous test. That statement is, in the context in which it was made, plainly uncontentious but in my judgment it has no bearing on the present issue. In particular, it does not lead to a conclusion that a defined term in a share sale and purchase agreement must or should be given the same meaning as is used in accounting standards. Relevant accounting standards may be the starting point when considering the defined term in question but are not determinative.

41. The defendants also submit that the words in parentheses in the definition of "*Liabilities*" resulted from zealousness on the part of the draftsman of the SPA to make clear that there existed liabilities which related to the period prior to the Liability Statement Date and that the claimants' argument on those words being meaningless if the defendants' construction were correct has little force. I accept that there will be cases where, as Jackson LJ stated in *Macquarie* at [70], the efforts of the draftsman of a contract to ensure that he has hit his target will result in the inclusion of unnecessary words or a degree of repetition. However, for the reasons already stated, I do not regard the words in parentheses in the present case as being unnecessary or duplicative of what the position would be without those words. Mr Pryor's evidence, which I accept, was that certain items relating to the period after the Liability Statement Date might be regarded as liabilities under FRS 102. The effect of the words in parentheses is that such liabilities are removed from the definition of "*Liabilities*" and hence those words are not surplusage.

42. On the basis that, as I have determined, the claimants' construction of "*Liabilities*" is correct, the defendants concede the amounts disputed by the claimants on the ground that the liabilities in question do not relate to a period prior to the Liability Statement Date. That concession is sufficient to dispose entirely of the disputed Liabilities concerning transfer fees and agent's fees, where the only ground for dispute raised by the claimants is that the liabilities in question do not relate to a period prior to the Liability Statement Date. It also disposes of all of the other disputed liabilities with the exception of the claims concerning Mr Pietro Chiodi of Soccer Management Srl (also described as Pietro Chiodi Soccer Management Srl) and the players Britt Assombalonga, Benjamin Osborn and Apostolos Vellios, where the allegation that the liabilities in question does not relate to a period prior to the Liability Statement Date is only one of the grounds of dispute raised by the claimants. However, in case my

construction of "*Liabilities*" is wrong and for the sake of completeness, I deal with the other grounds for dispute raised by the claimants in respect of those liabilities. It is also necessary to determine the Villarreal claim, which the claimants dispute on grounds other than that the liabilities in question do not relate to a period prior to the Liability Statement Date.

Mr Chiodi

43. On 30 August 2016, the Club and Mr Chiodi of Soccer Management Srl, his corporate vehicle, concluded a scouting agreement under which Mr Chiodi was to provide the Club with a list of professional players available in Italy on a free transfer, identify clubs in Italy which might be interested in acquiring registrations of the Club's players which the Club wished to sell and represent the Club in negotiations with players and clubs. The scouting agreement provided that he would be paid £200,000 plus VAT in two instalments on 25 September 2016 and 25 January 2017 and would invoice the Club in two separate invoices. Following correspondence, on 5 December 2017 Mr Chiodi and Soccer Management Srl instituted arbitration proceedings against the Club to recover the monies alleged to be due to him. Those proceedings were settled by a settlement agreement dated 11 March 2019 under which the Club agreed to pay £70,000. The defendants now claim the settlement sum of £70,000. No point is taken by the claimants as to whether any distinction is to be drawn between Mr Chiodi and Soccer Management Srl.

44. The claimants submit that the defendants have failed to establish any liability to Mr Chiodi. In this regard, the scouting agreement was expressed to be for a period from 30 August 2016 to 30 July 2017, after which it would terminate without notice. The available documentary evidence establishes that between September and December 2016, Mr Chiodi provided the Club with Italian match reports which contained observations on a number of players. In correspondence with the Club, his Italian lawyers contended that the services which he agreed to provide had been duly carried out. However, the Club disputed its liability as to the monies owing to him. The settlement agreement was entered into without any admission of liability on the Club's part. Mr Pryor's evidence was that he did not know what proportion of the services which Mr Chiodi agreed to provide had in fact been provided and so he was unable to reach any conclusion as to how much of the settlement sum was a liability under FRS 102 at the Liability Statement Date. He agreed that, if it were the case that all of the services were provided prior to 31 December 2016, all of the £70,000 should be regarded as a liability. The defendants submit that there is no evidence to suggest that all of the services were not provided prior to that date and observed that the four months period of the scouting agreement up to the end of 2016 out of its 11 months term roughly equated to the settlement sum as a proportion of the total £200,000 remuneration. Mr Waghe assessed the Club's liability at the full settlement amount having regard to the correspondence from the Italian lawyers and his understanding that a liability of £200,000 was included in the Club's accounts dated 30 November 2016 which Mr Al-Hasawi signed.

45. In my judgment, the defendants have not established the Club's liability to Mr Chiodi in the sum of £70,000. The services which he was obliged to provide under the scouting agreement extended beyond the provision of the match reports up to December 2016. The statement in the Italian lawyers' correspondence to the effect that all of the services

which he agreed to provide had been duly carried out is understandable in the context of the making of a claim on Mr Chiodi's behalf for the full amount of the remuneration due to him but it does not accord with the scope of his obligations under the scouting agreement and the term of that agreement. There is also no evidence as to how the settlement sum was arrived at and there was in terms no admission of liability on the Club's part in respect of Mr Chiodi's disputed claim. The liability for the settlement sum is not established by the earlier inclusion of the £200,000 in the Club's accounts dated 30 November 2016. Additionally, although it is a smaller point, the claimants point out that the £70,000 is stated in the re-re-amended reply dated 12 April 2019 to have been inclusive of interest and costs, of which there has been no evidence and which makes it impossible to quantify how much of the settlement sum was not in respect of interest and costs. While that is the defendants' pleaded case, I am uncertain as to its correctness, since the settlement agreement states that each party is to bear its own legal costs and is silent on the question of interest.

Villarreal

46. On 4 January 2016, the Club entered into an agreement with Villarreal for the loan to the Club of a player called Bojan Jokic in return for a payment of £9,800 per week until 4 June 2016. Clause 5 of the loan agreement provided for payment by the Club of a €250,000 indemnity due to the payment schedule not having been complied with. The Club paid sums owing to Villarreal but not in accordance with the payment schedule. Following correspondence, on 14 March 2017 Villarreal lodged a claim with FIFA to which the Club responded on 28 April 2017 disputing the claim. The claim remains unresolved. It is common ground that any Liabilities in respect of this claim relate to the period prior to the Liability Statement Date.

47. The Club's financial statements for the year ended 31 May 2017 recognise a liability of £212,000 (being the sterling equivalent of €250,000 at the Liability Statement Date) in respect of Villarreal's claim, on the basis, confirmed by Mr Vrentzos, that the Club anticipates a greater than 50% probability that it will have to pay the sum claimed. By the time that Mr Waghe prepared his first report, the sterling equivalent had risen to £217,250.

48. The claimants dispute the defendants' allegation that they are liable to indemnify the defendants in the sum of £217,250. In this regard, the claimants point to the fact that the existence of a provision in the accounts is no more than evidence of the fact that the persons preparing the accounts considered, on the information available to them at the time, that a provision should be made. It is clear from Mr Waghe's first report and his oral evidence that he had not considered any legal advice received by the Club in respect of the claim and that his assessment of the position is based entirely on what is stated in the accounts. He states that, if further evidence on the status of the dispute were to be provided that is contrary to his understanding, then he would revise his assessment.

49. I am prepared to assume in the defendants' favour that the accounts did correctly record the amount of Villarreal's claim as a liability under FRS 102. There is no reason to doubt that the auditors properly considered that the 50% probability threshold was crossed. I also accept Mr Pryor's evidence in cross-examination that the Villarreal claim is within the definition of "*Liabilities*".

50. The claimants submit, however, that the claim is excluded from the indemnity provided for in clause 7.1 of the SPA on the ground that paragraph 9 of Schedule 6 to the SPA is applicable. Under clause 7.1 of the SPA, the Seller's obligation to indemnify the Buyer and the Club is expressed to be subject to the provisions of Schedule 6. Paragraph 9 of Schedule 6 provides *inter alia* that the Seller shall not be liable to make payment for any Claim which, at the time it is notified to the Seller, is not capable of being quantified or otherwise due and payable unless and until such liability becomes capable of being quantified and due and payable.

51. In the Club's response to Villarreal's claim on 28 April 2017, the Club invited FIFA to reject the claim in its entirety or else to reduce it on the grounds set out in detail in the response. In the light of that response, in my judgment, the Villarreal claim is not one which has become capable of being quantified and due and payable. Accordingly, I agree with the claimants that paragraph 9 of Schedule 6 to the SPA applies so as to exclude the Villarreal claim from the Seller's obligation to indemnify under clause 7.1 of the SPA.

52. It is therefore unnecessary to deal with the recoverability of the £5,250 claimed due to exchange rate movements in addition to the sum of £212,000.

Player signing-on fees

53. Players in the EFL are employed on standard form employment contracts with their club which have a maximum duration of five years. The contracts set out the player's financial terms such as salary and appearance bonuses and also the fees of any intermediary, expressed as a percentage of the player's salary (and, in some instances, also a percentage of the signing-on fee). Signing-on fees are required under EFL regulations to be paid in equal annual instalments over the period of the contract. Intermediaries' fees are payable by the Club on the player's behalf. In addition to a player's employment contract, there is also a player representation contract under which the intermediary represents the player in the negotiation of the player's contract and a representation contract between the intermediary, the player and the club. All the contracts are required to be notified to the EFL. Where a player is transferred from one club to another permanently, there is a contract between the clubs setting out the transfer fee and the instalments and the player's employment contract. Where a player is transferred on loan, there is an agreement between the clubs setting out the loan fee and the instalments but no employment contract unless the loan is made by a club outside England, since the player remains employed by the lending club. In both cases, there is an agreement with any intermediary for the payment of his or her fees.

54. In relation to the signing-on fees of three players, the claimants dispute the disputed Liabilities not only on the ground that the liabilities in question do not relate to a period prior to the Liability Statement Date but on other grounds.

<u>Assombalonga</u>

55. Under his employment contract with the Club dated 2 September 2016, Britt Assombalonga was entitled to a £500,000 signing-on fee payable in five instalments of £100,000 each on 15 September in each of the years 2016 to 2020. In July 2017, the player was transferred by the Club to Middlesbrough FC and the £400,000 balance of

the signing-on fee was waived by the player. The claimants submit that there is no claim against it under clause 7.1 of the SPA on two additional grounds. First, because of that waiver, no sum is due and payable under paragraph 9 of Schedule 6 to the SPA; and, second, for the same reason, any Loss was mitigated.

56. In my judgment, the defendants have provided no satisfactory answer to the claimants' argument based on paragraph 9 of Schedule 6 to the SPA. The claim for £400,000 was not payable when the claim was notified and subsequently it has not and will not become payable. I did not understand the claimants' mitigation argument since paragraph 6.2 of Schedule 6 to the SPA, on which the argument was founded, is concerned only with the obligation of the Buyer to mitigate its loss.

Osborn and Vellios

57. Under his employment contract with the Club dated 4 August 2016, Benjamin Osborn was entitled to a £40,000 signing-on fee payable in four instalments of £10,000 each on or before 31 December in each of the years 2016 to 2019. Under his employment contract with the Club dated 27 June 2016, Apostolos Vellios was entitled to a signing-on fee to be paid on 31 January in each of the years 2017 to 2020 in accordance with a formula set out in an annex to his contract. The claimants submit that there is no claim against it under clause 7.1 of the SPA in respect of the disputed Liabilities on the additional ground that the sums in question in respect of each player are excluded by paragraph 9 of Schedule 6 to the SPA.

58. In my judgment, the claimants are correct in contending that, when the claims were notified, the disputed sums were contingent and not payable and that therefore, by virtue of paragraph 9 of Schedule 6 to the SPA, the Seller is not liable to make any payment in respect thereof. The defendants have provided no answer to that contention.

Conclusion

59. In the result, I conclude that there are no Losses in respect of which the claimants have any liability to indemnify the claimants under clauses 7.1 and 10.1 of the SPA because the aggregate of the Liabilities was not in excess of £6,600,000 as at the Liability Statement Date. It is therefore unnecessary to examine the recoverability of the Losses claimed.

(3) Schedule Claims

60. A Schedule Claim is a claim under clause 7.4 of the SPA, which provides *inter alia* that the Seller shall indemnify the defendants from and against all Losses suffered or incurred by the defendants due to the statements set out in paragraph 3 and/or 4 of Schedule 7 being inaccurate or untrue as at Completion. There are two groups of Schedule Claims consisting of the Schedule Claims originally made by the defendants (the "original Schedule Claims") and the additional Schedule Claims first notified by the defendants at the end of November 2018 (the "additional Schedule Claims").

The additional Schedule Claims

61. The additional Schedule Claims concern 11 contracts pleaded in paragraph 67A of the Club's amended defence and counterclaim against the claimants which the defendants allege were Material Contracts that were not included in the Data Room. Of these, six are intermediary contracts entered into on or after 31 January 2017 between the Club and players' agents; three are transfer agreements between the Club and other clubs, of which one was entered into on 28 January 2017 and the others on 31 January 2017; one is a sub-loan agreement between the Club and another club dated 26 January 2017; and one is a contract (or series of contracts) concluded orally or by conduct on or before 12 January 2017 between the Club and Square House Ltd in respect of which there is an ongoing dispute as to the Club's alleged liability concerning certain building and maintenance projects.

62. The first issue here is whether any of the contracts in question is a "*Material Contract*" or else is a contract "*in respect of Players*" within the exclusion of such contracts in paragraph 3.2(i) of Schedule 7.

63. The claimants submit that this "Player exception" applies to all of the contracts in question with the exception of the Square House contract or series of contracts (considered separately below and referred to for convenience in the singular as a contract). They are parasitic on Players' contracts and the services to be provided relate entirely to Players. In particular, an Intermediary's contract is part of the suite of contracts that accompanies transfers, loans and player employment extensions.

64. The defendants submit that the contracts in question are not "*in respect of Players*", which exception is confined to players' employment contracts with their clubs.

65. The expression "*in respect of*" is used throughout the SPA. Considered alone in the context of the Player exception, it does not indicate one way or another whether the Player exception is confined in the way suggested by the defendants or else whether it should be understood more broadly to include other contracts that are in some way related to or connected with a player. The fact that there will not be an employment contract where a player is on loan from another club in England does not, in my view, affect the position. However, I have come to the conclusion that the defendants' construction of the Player exception is correct. In view of the fact that "*Intermediary*" is a defined term in the SPA, it seems to me that the Player exception would have made express mention of contracts with agents by reference to that defined term if they were intended to be included within it. The fact that the Player exception could have been clearer by referring to contracts "with" rather than "*in respect of*" Players does not alter the position, in particular since those words could just as well have appeared before each of exceptions (i) to (v) in the clause instead of being repeated at the start of each of those exceptions (albeit that minor consequential modification would need to be made in relation to the wording of exception (v)). Some support for the defendants' position may also be derived from exception (ii), which refers to the obligations and liabilities of employees of the Club which would include Players, managers and assistant managers who are the subject of exception (i) but not third parties.

66. If, as I consider is the case, the Player exception is confined in the way suggested by the defendants, transfer and loan and sub-loan agreements between the Club and other clubs are also not within the exception.

67. Accordingly, leaving aside for the moment the Square House contract, I conclude that each of the contracts in question is a "*Material Contract*".

68. The second issue is whether, if any of the contracts in question is a Material Contract, the defendants have established that the Buyer suffered or incurred Losses as a result of them not being in the Data Room. The defendants submit that they have suffered Loss in respect of each of the Schedule Claims and that there is no separate requirement to establish that the Buyer's position would have been different had the agreements in question been included in the Data Room. Following the conclusion of the hearing, the defendants served a note on the quantum of the Schedule Claims setting out their position and indicating where the claimants' position differed.

69. The defendants submit that the establishment and use of the Data Room created a system akin to strict liability and that there was no need to show what Loss may have been caused by the non-inclusion of a Material Contract in the Data Room. They submit that, if that were not the case, there would have been no real utility in placing Material Contracts in the Data Room at all.

70. 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.

71. The claimants submit that the defendants have failed to establish any Loss as a result of the statement that all Material Contracts were in the Data Room at Completion being inaccurate since, even if the statement had been correct, it would have made no difference to the defendants' position. The subject-matter of the contracts in question was well-publicised and Mr Vrentzos, acting for the Buyer, had access to all of the financial information supplied to it by Mr Saef and Ms Gordon. Yet the Buyer took no steps to re-negotiate any of the financial terms of the SPA or Deed on the basis of such knowledge.

72. I accept the claimants' submissions. Mr Vrentzos' evidence was to the effect that, had the contracts in question been placed into the Data Room, he would have become aware of them and then looked to renegotiate the SPA's commercial terms. However, I do not accept that he would have become aware of the contacts in question. He last accessed the Data Room at 9.33am on 31 January 2017, that is, prior to the Zac Clough transfer and before three of the Schedule Claims relating to contract extensions in March-May

2017 had been concluded, so he would have been unaware whether or not those contracts had been placed in the Data Room. The last login to the Data Room by the defendants' advisers was on 15 February 2017 and it was closed on 10 April 2017. He gave evidence that when a document was placed in the Data Room, an email notification was sent. However, no such notification was produced in evidence and I do not accept that evidence. There is no evidence that, if he did receive such a notification, it would have made any difference to his position. Mr Vrentzos did not in fact know until September 2018 whether the contracts in question were in the Data Room or not.

73. Even if Mr Vrentzos had become aware of the contracts in question, I am unable to accept that he would have looked to renegotiate the SPA's commercial terms. By way of illustration, his evidence was that he was unhappy with the increase in the transfer fee in respect of Zac Clough and the intermediary's fee in respect of another player, Ross McCormack. Yet he made no attempt to renegotiate the terms of the SPA.

74. Further, evidence that the defendants would have looked to renegotiate the SPA's commercial terms falls far short, in my view, of demonstrating that the defendants have suffered Loss due to the absence of the contracts in question from the Data Room.

75. It is convenient here to refer to the role played by Ms Gordon. She was cross-examined at length, in particular by reference to emails between Mr Vrentzos and her and between Mr Vrentzos and Mr Saef in January 2017, about her alleged involvement on behalf of the Buyer in the conduct of its due diligence being carried out by it prior to Completion. She was adamant that she was not in any way acting on the Buyer's behalf, unlike her role at the time of the proposed sale of the Club in April to July 2016, and that her role was to act as a conduit of information between the Club and the Buyer. Her evidence was supported by that of Mr Vrentzos. I accept that evidence. I reject Mr Saef's evidence to the contrary effect. Mr Yeo referred in his written evidence to his "*understanding*" that, throughout the transaction, Ms Gordon was a representative of the defendants. However, that understanding was derived from what he was told by Mr Saef and is incorrect. Mr Yeo also stated – and I accept - that, when meeting with the EFL, Ms Gordon made it clear that she was a representative of the Club only and had nothing to do with either the Buyer or the Seller.

76. The third issue, which does not arise in the light of the conclusions already reached and which the claimants did not press in their closing submissions, is whether the Buyer is estopped or otherwise precluded from relying on the fact that the documents were not in the Data Room and from contending that it would have negotiated different terms, based on an implied representation by it that the additional Schedule Claims were not to be treated as Material Contracts. Had it been necessary to decide this issue, I would have rejected the claimants' submissions since, in the light of the evidence of both Mr Vrentzos and Mr Saef on the subject, I am not satisfied that there was any or any sufficiently clear and unequivocal representation to the effect alleged.

77. With regard to the Square House contract, the claimants submit that (1) there was no contract capable of being put in the Data Room and, as a contract made orally and by conduct, the statement in paragraph 3 of Schedule 7 that all Material Contracts were in the Data Room was not inaccurate or untrue; (2) it is not a Material Contract because it has not been established to exceed £100,000; (3) the defendants have not established any liability under it; (4) any claim in respect of it is not capable of being quantified or

otherwise not due and payable under paragraph 9 of Schedule 6 to the SPA; and (5) that the claim was not notified as soon as reasonably practicable as required under clause 4.3.1 of the SPA and the Buyer did not keep the Seller informed of the claim and consulted with the Seller in accordance with paragraphs 4.3.2 and 4.3.3 of Schedule 6 to the SPA.

78. The defendants submit that the Square House contract was a Material Contract which exposed the Club to a non-contingent liability. I am prepared to assume in the defendants' favour that a contract which is not in writing is a Material Contract, on the basis that written evidence of it was capable of being placed in the Data Room. The definition of a Material Contract in paragraph 3.2 of Schedule 7 to the SPA is not in terms restricted to written contracts and it would be odd if a contract falling within the definition were nonetheless excluded from being a Material Contract because it was not in writing. However, Mr Vrentzos' evidence was that the Club denies the claim against it and it remains in dispute. The defendants have not, therefore, established that the Square House contract involved the Club in assuming liabilities in excess of £100,000 and have not established any liability under it.

79. In the result, the additional Schedule Claims fail.

The original Schedule Claims

80. The defendants advance original Schedule Claims in the total sum of £772,738.15 on the ground of the inaccuracy or untruth of the statement in paragraph 3.1 of Schedule 7 that the Club had not entered into any Material Contract not included in the Data Room. They allege that the Data Room did not include a written intermediary fee agreement dated 25 January 2015 between the Club and a Dr Hootan Ahmadi (£543,631), the scouting agreement dated 30 August 2016 between the Club and Mr Chiodi (£93,914.64) and any record of an agreement made orally or by conduct no later than 30 November 2016 between the Club and Scotcomms Technology Group Limited ("Scotcomms") (£135,192.51). The defendants submit that each of these contracts is a "*Material Contract*". The claimants accept that these alleged agreements were not in the Data Room but dispute the claims on other grounds.

Dr Ahmadi

81. The defendants' evidence is that, on the basis of advice from leading counsel, the Club settled Dr Ahmadi's claim under the intermediary fee agreement in February 2019 for £400,000 plus VAT plus £50,000 costs and that an additional £200,000 plus VAT payment will be due if the Club is promoted to the Premier League before the start of the 2021/2022 season. (The settlement agreement of 25 February 2019 refers to an intermediary fee agreement signed by Dr Ahmadi on or around 7 February 2016). According to Mr Vrentzos, the Club's management considered that the Club was obliged to pay Dr Ahmadi and that the settlement represented a very good result for the Club. In re-examination, he confirmed that the decision to settle Dr Ahmadi's claim was based on the agreement with Dr Ahmadi.

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.

83. The claimants rely on two authorities in support of their position. In *BP plc v Avon Ltd* [2006] EWHC 424 (Comm), Colman J highlighted various considerations applicable when determining the reasonableness of a settlement in the context of the recoverability of a claimant's loss represented by the terms of the settlement. At paragraph [281], he quoted a passage from his judgment in *General Feeds Inc Panama v Slobodna Plovidba Yugoslavia* [1999] 1 Ll. Rep. 688, at 691-692 which included the following:

> "*In other words, when properly analysed, the overall exercise which the Court must do is to consider whether the specified eventuality (in the case of an indemnity) or the breach of contract (in a case such as the present) has caused the loss incurred in satisfying the settlement. Unless the claim is of sufficient strength reasonably to justify a settlement and the amount paid in settlement is reasonable having regard to the strength of the claim, it cannot be shown that the loss has been caused by the relevant eventuality or breach of contract. That is not to say that unless it can be shown that the claim is likely to succeed it will be impossible to establish that it was reasonable to settle it. There may be claims which appear to be intrinsically weak but which common prudence suggests should be settled in order to avoid the uncertainties and expenses of litigation. Even the successful defence of a claim in complex litigation is likely to involve substantial irrecoverable costs.* "

He then stated, at paragraph [282], that the fact that the terms of a settlement were entered into upon legal advice establishes, at least, that those terms were prima facie reasonable and that it was then for the defendant to displace the inference by evidence to the contrary.

84. In *Digicel (St Lucia) Ltd and others v Cable & Wireless Plc and others* [2009] EWHC 1437 (Ch), the claimants applied during the course of a trial for disclosure of legal advice referred to in witness statements filed by the respondents. In the action, the claimants alleged that the defendants conspired to injure the claimants by unlawful means. The defendants disputed liability *inter alia* on the ground that they genuinely believed at the relevant times that they had acted lawfully. The application related to the disclosure of legal advice given to the defendants as to the lawfulness of their conduct, in respect of which the claimants alleged that privilege had been waived. Morgan J held that there had been no waiver of privilege and went on to state, at paragraph [25], that:

> "*Mr Rubin* [the claimants' leading counsel] *accepted that if the legal advice were not disclosed as a result of this application, he would contend in closing submissions at the end of the trial that it could not be inferred that the legal advice supported the alleged beliefs. I put it to Mr Rubin that if the defendants did not disclose the legal advice, they could hardly ask the court to infer that the legal advice supported the alleged beliefs. This would not be a case of drawing adverse inferences against the defendants by reason of the claim to privilege; it would instead be a case of not drawing inferences in their favour; the reason for not drawing inferences in their favour being that the material was simply not before the court and could not be assessed.*
>
> *In due course, Mr Patton, on behalf of the defendants, accepted in clear terms that in the absence of disclosure of the legal advice, the defendants could not contend for such an inference in their favour.*"

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.

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.

Mr Chiodi

87. In January 2017 – hence after the Liability Statement Date - Mr Chiodi made a claim against the Club for agent's fees allegedly owed to him under the scouting agreement dated 30 August 2016. Mr Vrentzos' evidence is that the Club settled the claim for £70,000, including interest and costs and that the Club's management considered that the Club was obliged to pay Mr Chiodi for his services and that the settlement was a very good result for it. The claimants dispute that clause 7.4 of the SPA was engaged on two grounds, in addition to the ground which has already been addressed that the

absence of the contract with Mr Chiodi from the Data Room caused the Buyer no loss since the defendants were well aware of the claim prior to completion. First, the claim was settled without admission of liability in an amount less that £100,000. Second, the liability to Mr Chiodi is accounted for in the Liabilities claim and cannot be double counted as a Schedule Claim in light of the provisions of paragraph 3.2(iii) of Schedule 7 to the SPA and paragraphs 3.1 and 3.2 of Schedule 6 to the SPA.

88. I reject the claimants' submission that the fact that the claim was settled without admission of liability in an amount less that £100,000 means that the contract with Mr Chiodi is not a Material Contract. Paragraph 3.2.1 states that a Material Contract means *inter alia* a contract entered into by the Club "*which involves the* [Club] … *assuming liabilities or obligations in excess of £100,000*". The fact that the claim was settled for only £70,000 does not mean that the contract with Mr Chiodi did not involve the Club assuming liabilities in excess of £100,000 since the Club was liable thereunder to pay Mr Chiodi £200,000 plus VAT.

89. However, I accept the claimants' submission that the liability to Mr Chiodi cannot be a Schedule Claim on the ground that it has been taken into account in the Liabilities claim. Under paragraph 3.2(iii) of Schedule 7, a contract in respect of obligations and liabilities, to the extent taken into account in determining whether there is an Indemnity Claim, is excluded from the definition of a Material Contract. The term "*Indemnity Claim*" is defined by clause 1.1 of the SPA to mean a claim under the indemnity set out in clause 7.1 of the SPA. As set out earlier in this judgment, the claim in relation to Mr Chiodi *has* been taken into account in determining the Losses claim under clause 7.1 of the SPA. The definition of "*Liabilities*" expressly includes "*any liability to Pietro Chiodi Soccer Management*". The fact that the claim under clause 7.1 in relation to Mr Chiodi has been unsuccessful does not mean that it has not been taken into account.

90. If, contrary to what I consider is the case, it were to be adjudged that the contract with Mr Chiodi is a Material Contract and that the defendants have suffered Losses due to the provisions of paragraphs 3 and 4 of Schedule 7 to the SPA not having been complied with, paragraphs 3.1 and 3.2 of Schedule 6 to the SPA would not, in my judgment, prevent the defendants recovering such Losses. The Losses claim having failed, there would be no double recovery. As to the amount of such Losses, the amount claimed of £93,914.64 does not appear to be in dispute.

Scotcomms

91. The defendants' evidence is that the Club is facing a claim by Scotcomms for £135,192.51 in respect of new TeamCard membership cards to access The City Ground. The claimants submit that any agreement concluded orally or by conduct with Scotcomms would have been impossible to put into the Data Room in any event and was, on the defendants' own case, concluded no later than 30 November 2016 - prior to the Liability Statement Date - and so any liabilities have again been taken into account in the Liabilities claim. Very little was said about the Scotcomms claim during the course of the hearing or indeed in the parties' written submissions and the documentation relating to it is scant.

92. As in the case of the Square House contract, I am prepared to assume in the defendants' favour that the Scotcomms contract is a Material Contract even though not in writing.

However, on the available material, it is not possible to ascertain how the defendants are liable in the sum of £135,192.51 under the Scotcomms contract or how that alleged Loss was caused by the fact that there was no record of it in the Data Room.

93. In the result, the original Schedule Claims fail.

(4) Other costs and expenses

94. The defendants claim, pursuant to clause 7.5.1 of the SPA, their costs and expenses of and relating to the present proceedings and the preceding correspondence which they allege have been properly incurred in bringing the present claims. They also allege that Mr Al-Hasawi is in breach of his obligation under clause 10.5 of the SPA to procure the due and punctual performance, observation and discharge by the Seller of its obligation to pay the costs and expenses in question. The sum claimed has inevitably increased over the course of the proceedings and, by the end of the hearing, the parties were agreed that the appropriate course was to leave over the determination of such costs and expenses until after this judgment. The claimants accept that, insofar as the defendants are successful in establishing any liability on the claimants' part, the defendants will in principle be entitled to recover their costs and expenses properly incurred in bringing the claims in question.

Claim under the Deed

95. Although I have determined that no sum is due for payment by the claimants under the SPA in respect of the disputed claims, the claimants accepted that some sums are due for payment by them. I have not been concerned to deal with those undisputed claims but it remains necessary to consider the conditions for the exercise of the Club's entitlement to set-off the undisputed amounts against its liability to Mr Al-Hasawi in the principal sum of £4,196,329 in respect of the Completion Loans.

96. Under clause 5.1 of the Deed, the Club is entitled to reduce the amount payable to Mr Al-Hasawi under the Completion Loans by an amount equal to any amount due for payment on a Completion Loan Repayment Date by the claimants to the Buyer under the SPA.

97. In determining whether any amount was due for payment by the claimants to the Buyer under the SPA, the notice provisions of the SPA are germane. Under clause 6.2 of the SPA, the Seller undertook to pay Leakage to the Buyer within 10 business days of a written demand by the Buyer. Under paragraph 1 of Schedule 6 to the SPA, the Seller was not liable for an Indemnity Claim or Schedule Claim (otherwise than in relation to Tax) unless written notice of such claim had been served on the Seller "*providing specific details of the relevant Claim including reasonable details of the matter or default which gives rise to the Claim and the Buyer's bona fide estimate of any alleged Losses where reasonably quantifiable … on or before 31 December 2018*". Notice had to be given in accordance with the requirements of clause 15 of the SPA and could not be given by fax or email.

98. On 1 August 2017, Ms Gordon sent Mr Saef an email, which was copied to Mr Vrentzos. She attached the Club's initial findings on Leakage and Liabilities and asked

him to "*confirm agreement for set off of this total value of £4,088,817*" without prejudice to further claims in due course. Mr Vrentzos' evidence was that the email was intended to constitute a notice of claims under the SPA on behalf of the defendants and would have been so understood by the claimants. However, it is now not in issue that the email did not satisfy the SPA's requirements for a valid notice.

99. In emails on 15 August 2017 and subsequently, the claimants' solicitors reminded Ms Gordon and Mr Vrentzos that the August Loan Repayment Date was approaching.

100. On 29 August 2017, a meeting took place at Mr Marinakis' office in London between Mr Al-Hasawi, Mr Saef, Mr Marinakis and Mr Vrentzos. Following the meeting, Mr Saef sent Mr Vrentzos an email which stated "*Just to remind you about what we agreed today that you will provide me with all information as requested before by tomorrow and we will meet on Monday 4th of September to clarify the liabilities.*"

101. On 30 August 2017, Mr Vrentzos emailed in response, saying "*As agreed yesterday we will supply the information for the meeting next week to discuss clarifying the Liabilities. This obviously means that the date for the payment of any outstanding August Completion Loan needs to be moved but we did not agree on a precise date yesterday. Can I suggest we agree that the new date is 30th September 2017?*" Mr Saef did not respond to the email.

102. Mr Vrentzos' written evidence was that it was agreed that the Club would not repay the August Loan when it fell due on 31 August 2017, that the claimants would take no formal steps to demand the August Loan Repayment on 31 August 2017, that he would provide further information in support of the defendants' claims, and that a further meeting would take place on 4 September 2017. He said that there was no suggestion "*that our claims had not been validly notified or demanded under the SPA*". The claimants dispute this account of events. Mr Saef's evidence was that at no stage did the claimants intend to nor did they waive any rights under the SPA or Deed or suggest that the August Loan was not repayable on 31 August 2017.

103. The claimants submit that no contractual notice was given to the Seller by 31 August 2017, and that proper notice was not given until 16 January 2018 and then only in relation to the subject matter thereof and not, for example, the additional Leakage or additional Schedule Claims. As already stated, it is now not in issue that the 1 August 2017 email did not satisfy the SPA's requirements for a valid notice and that no other notice was given prior to 31 August 2017.

104. No meeting took place on 4 September 2017. Two days later, on 6 September 2017, Mr Saef emailed to say that he was in the process of reviewing information supplied by Ms Gordon but that "*to be clear, it is not agreed that the August Loan Repayment Date provided for under the Deed … has been moved to 30 September 2017 (or any other date). The time we are taking to review the documents and responses is separate and without prejudice to any rights* [the claimants] *may have under the SPA and/or Deed … and all of their rights are reserved in this regard*".

105. On 8 September 2017, Mr Vrentzos replied by email, saying "*As we agreed the discussions are without prejudice to all the parties' rights but please confirm our*

understanding that no action will be taken by each party (including an Acceleration Notice to be served) without 10 business days written notice being given."

106. Later the same day, Mr Saef replied by email, saying "*We agree all discussions are without prejudice to all the parties' rights. However, we have not agreed to take no further action without 10 business days' notice being given. As the August Loan Repayment Date has passed, without payment of the August Loan, the 10 day period provided for within clause 3.7 of the Deed … has started to run and we reserve the right to serve an Acceleration Notice on 15 September in the event payment remains outstanding.*"

107. In a WhatsApp message from Mr Saef to Mr Al-Hasawi on 11 September 2017, Mr Saef reported on a telephone call from Mr Vrentzos in which Mr Vrentzos asked for Mr Al-Hasawi's approval to "*halting procedures*" until their meeting, to which Mr Al-Hasawi responded that Mr Saef should not do so. The claimants submit that this clearly shows that Mr Vrentzos knew that there was no agreement and that the August Loan was overdue.

108. On 12 September 2017, Mr Vrentzos emailed Mr Saef saying that he understood it to have been agreed that they would meet on 16 September 2017 in Nottingham to discuss the liabilities and that "*As you confirmed to me during our last discussion no action will be taken by any party before the end of our discussion and in any case not before 25th of September 2017.*" Mr Saef replied by email later that morning disputing that any agreement was reached not to take action before the end of their discussions on 25 September 2017 and adding that any decision on that issue would need to be taken by Mr Al-Hasawi alone and that "*In the circumstances all of* [Mr Al-Hasawi's] *rights under the Deed … remain reserved including the right to serve the acceleration notice on Friday* [15 September] *in the event payment remains outstanding.*"

109. As already stated, on 4 October 2017, Mr Al-Hasawi served an Acceleration Notice as provided for under clause 3.7 of the Deed. The following day, Mr Al-Hasawi texted Mr Marinakis to inform him out of courtesy that he would be taking legal action to recover the unpaid Completion Loans.

110. The defendants submit, on the basis of Mr Vrentzos' evidence and the parties' exchanges summarised above, that the claimants agreed on 29 August 2017 that the Buyer need not give notice of the SPA claims or that the claimants are estopped from contending otherwise, with the consequence that the Acceleration Notice served on 4 October 2017 is invalid because the August Loan had been agreed not to be repayable on 31 August 2017 and therefore that there was no requirement to pay the amount of the August Loan within 10 business days of 31 August 2017. The defendants also rely in particular on a passage in Mr Saef's evidence in cross-examination where he stated that what was agreed at the meeting was that the defendants "*Agreed they support us with the supporting document for their - - for the e-mail of 1 August with the liabilities so we can look through it. And then, if there is a money due and Mr Al-Hasawi, it will be set off from the payment*".

111. I reject the defendants' submissions. The 31 August 2017 date for repayment of the August Loan was plainly an important milestone for the defendants. I find that the claimants did not agree at the 29 August 2017 meeting that the August Loan need not

be repaid on 31 August 2017 and did not make any representation to that effect. The passage from Mr Saef's evidence quoted above and the other passages from his evidence relied on by the defendants fall short of establishing the agreement alleged by the defendants. If Mr Al-Hasawi had made any such agreement or representation, it was to be expected that Mr Vrentzos' email of the following day in reply to Mr Saef's email sent soon after the meeting would have recorded any agreement or representation to that effect but it did not. I reject Mr Saef's evidence in cross-examination that his absence of a response to Mr Vrentzos' email was because, in his culture, not to respond to an email signified disagreement with its contents. That evidence was clearly invented by Mr Saef on the spur of the moment and was inconsistent with the fact that he did respond to other emails with which he did not agree. However, it was not suggested by the defendants that the claimants were under any duty to respond to Mr Vrentzos' email disputing its contents and the failure to respond did not, in my judgment, constitute any waiver by the claimants of the right to require repayment of the August Loan on the following day.

112. The existence of the alleged agreement or representation is also, in my judgment, inconsistent with Mr Vrentzos' email of 8 September 2017. Mr Vrentzos sought to explain the email by saying that he was willing to agree, even though he considered it was contrary to the agreement on 29 August 2017, because he wanted to ensure that the parties' relationship remained constructive and amicable. However, I do not accept that explanation. Had Mr Vrentzos considered that there was an agreement reached on 29 August 2017, it would have been important for the defendants that he recorded that position at that time. It is also inconsistent with Mr Vrentzos' request recorded in Mr Saef's WhatsApp message of 11 September 2017 and the fact that there was no response by Mr Vrentzos to Mr Saef's email of the following day.

113. For those reasons, in my judgment the Acceleration Notice served on 4 October 2017 was valid.

Misrepresentation of the Club's liabilities

114. Prior to the conclusion of the SPA, the Seller had established the Data Room, to which the defendants and their advisers were given access. It contained about 1,000 contracts and included a large amount of corporate and financial information and data concerning disputes. In or around late January 2017, the Seller added to the Data Room a spreadsheet named "Trial Balance Comp – Dec16.xlsx" (the "Trial Balance") which *inter alia* stated the Liabilities as at the Liability Statement Date to be £6,566,213.66.

115. The defendants allege that the Trial Balance amounted to a representation that the Club's liabilities at the Liability Statement Date were as stated in it, that the Seller must have intended the Buyer to rely on the Trial Balance and should in any event have known that the Buyer would do so and that the Buyer was in fact induced to enter into the SPA and the Deed in reasonable reliance on the Trial Balance. In consequence, the defendants allege that the Buyer has suffered loss and damage in the sum of the difference in value between the actual and represented liabilities. They allege that the Buyer would not have entered into the SPA unless the Completion Loans which were to be repayable pursuant to the Deed were reduced by that difference. They allege that the Buyer would not have agreed to the interest rate claimed by the claimants under the Deed.

116. The claimants first of all point, in my view justifiably, to the discrepancy between, on the one hand, the way the defendants advanced their case at the hearing and, on the other hand their pleaded case and Mr Vrentzos' written evidence, in which the alleged representation related to the Club's Liabilities (as later defined in the SPA) and the loss which is claimed is the difference between the actual and the represented Liabilities and not at all, as now alleged, in the interest position. The defendants made no application to amend their pleaded case and it is not open to them to advance a different case.

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.

118. On the assumption in the defendants' favour, consistently with their pleaded case, that the Trial Balance was a representation as to the Club's Liabilities, in my view the Seller had reasonable grounds to believe that the representation was true. The defendants submit that there was no evidence of any such belief. However, in my judgment, the fact that (as I find) it was derived from information provided by Ms Gordon and the others responsible at the Club provides a sufficient basis for there to have been reasonable grounds that the representation was true.

119. On the subject of reliance, Mr Vrentzos' written evidence, which I accept, was that "[i]*n reliance upon the Trial Balance painting an accurate picture of the Liabilities of the Club as at 31 December 2017, I agreed to the provision at clause 7.1 of the SPA …. The only reason the figure of £6,600,000 was agreed was because of the specific reliance I and the Buyer placed on the figures in the Trial Balance.*" I agree with the claimants that the Buyer's reliance was only for the purpose of establishing the £6,600,000 Liabilities figure in clause 7.1 of the SPA. I do not accept, as also stated in Mr Vrentzos' written evidence, that if the Trial Balance had shown that the Club had actual liabilities which were higher than the £6,566,213.66 figure, he would have insisted upon reducing the loan repayments which were to be made by the Club under the Deed on a pound for pound basis. Nor do I accept that the Buyer would have revisited the amount of interest which would have been repaid. The contractual rate of interest under the Deed is high but, other than what Mr Vrentzos stated, there is nothing to suggest that there would have been any re-negotiation of the interest rate. In my view, that was not in his mind at the time the SPA was entered into.

120. Assuming in the defendants' favour that the Trial Balance represented that the Club's liabilities at the Liability Statement Date were £6,566,213.66 and was not simply a best estimate, in the light of my conclusions above, the representation was also not false.

121. Accordingly, the misrepresentation claim fails.

Summary

122. In summary: (1) the claims under the SPA fail; (2) there are no sums to be set-off against the sum of £4,196,329 claimed under the Deed in respect of the Completion Loans; (3) the Acceleration Notice is valid; and (4) the misrepresentation claim fails. The parties are requested to prepare draft minutes of order which reflect this judgment and, in particular, the calculation of interest due under clause 8 of the Deed and the position with regard to the costs and expenses provided for in clause 7.5.1 of the SPA.