SPORT RESOLUTIONS (UK)

SPECIALIST INDEPENDENT DISPUTE SERVICE

SR/Adhocsport/201/2019

IN THE MATTER OF THE PREMIERSHIP RUGBY SALARY REGULATIONS

**Before:**

**Rt Hon Lord Dyson**

**Mr Aidan Robertson QC**

**Mr Jeremy Summers**

**BETWEEN:**

**PREMIER RUGBY LIMITED**

- and -

**SARACENS LIMITED**

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**Decision of the Disciplinary Panel**

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## A. INTRODUCTION

1. This Disciplinary Panel ("the Panel") has been appointed to determine (i) whether Saracens Limited ("Saracens") has breached certain of the Premiership Rugby Salary Regulations ("the Regulations") as alleged by Andrew Rogers in the charges set out in his letter and Appendices dated 20 June 2019 in respect of the Salary Cap Years ("SCYs") 2016/17, 2017/18 and 2018/19 and, if so, (ii) what sanctions to impose. We shall refer to the charges compendiously as "the Charge". Mr Rogers has at all material times been the Salary Cap Manager ("SCM") of Premier Rugby Limited ("PRL")

2. We set out and discuss the Regulations in detail in Sections D and Appendix 2 below. At this stage, it is sufficient to refer briefly to Regulation 2.2, which describes the "*Objectives* of *the Regulations*" as follows:

> "The Regulations were introduced, and are maintained, by PRL to achieve the following objectives in an appropriate and proportionate manner:
>
> (a) Ensuring the financial viability of all Clubs and of the Aviva Premiership competition;
>
> (b) Controlling inflationary pressures on Clubs' costs;
>
> (c) Providing a level playing field for Clubs;
>
> (d) Ensuring a competitive Aviva Premiership competition; and
>
> (e) Enabling Clubs to compete in European Competitions."

3. Each Club is permitted to pay its players a certain amount of total salary ("the Salary") in each SCY up to a cap that is referred to in the Regulations as the "*Senior Ceiling*". Each SCY runs from 1 July in one year until 30 June in the following year. The Senior Ceiling comprises the combined salaries of all the players at a Club. Schedule 1 describes the amounts that constitute Salary. The application by Mr Rogers of Schedule 1 to Saracens and its proper interpretation lie at the heart of the dispute that we have to resolve.

4. The Charge of breach of Regulations 3 and 11.1 that was made against Saracens is set out in Appendix 1 to this Decision. In respect of the SCY 2016/17, Mr Rogers stated in the Charge that he had identified payments to players that constituted Salary such that he was of the reasonable opinion that Saracens had exceeded the Senior Ceiling of £6 million by £325,000 or more. He calculated the amount of the excess as £1,104,968.60. He has since revised this figure to £1,134,968.60. This revised figure (which is supported by PRL) was placed before the Panel in a Revised Calculation ("the Revised Calculation") at the end of the hearing without objection by Saracens.

5. In respect of the SCY 2018/19, Mr Rogers stated in the Charge that he had identified payments to players that constituted Salary such that he was of the reasonable opinion that Saracens had exceeded the Senior Ceiling of £6.4 million by £350,000 or more. He calculated the amount of the excess for this year as £883,615.51. He has since revised this figure to £906,505.57. This revised figure (which is supported by PRL) was placed before the Panel in the Revised Calculation at the end of the hearing without objection by Saracens.

6. The Charge in respect of SCY 2017/18 alleges that Saracens exceeded the Senior Ceiling by £140,249.80 and was therefore liable to "overrun tax" pursuant to Regulations 3 and 10.

7. The Charge also alleges that in a number of SCYs Saracens failed, in breach of Regulation 4.4, to provide to the SCM a number of documents that it was required to disclose within 28 days: see further para 295 below.

8. Saracens takes a preliminary point that the salary cap provided for by the Regulations is illegal on the grounds that it is contrary to Competition law. A similar point was taken in the case of *Queen's Park Rangers v English Football League* [2017] in relation to the Financial Fair Play ("FFP") Rules that have been introduced in football. The grounds on which it was rejected by the arbitral tribunal in that case are relied on by PRL in the present case. We deal with Competition law challenge in Section C below.

## B. THE EARLIER CHALLENGE

9. Saracens has been the subject of investigation under the Regulations before. In accordance with what is now Regulation 4.9(a), Mr Rogers initiated an Investigatory Audit in relation to Saracens on 1 December 2014, because he thought that it was in breach of the Regulations. During the process, he concluded that Saracens was guilty of failing to co-operate with that Investigatory Audit. He decided to charge the Club with breach of what is now Regulation 11.2.

10. Saracens sought to defend these proceedings by contending (as it has contended in the current proceedings) that the Regulations were contrary to Competition law and that they were therefore of no legal effect.

11. Those Disciplinary proceedings (and some collateral arbitration proceedings) were settled on 30 September 2015.

## C. THE COMPETITION LAW CHALLENGE

12. Saracens alleges that the Regulations are illegal and thus void and unenforceable because the salary cap is contrary to the competition rules of the Treaty on the Functioning of the European Union ("TFEU") and the equivalent and, for present purposes, materially identical domestic competition rules under the Competition Act 1998 ("the 1998 Act"). The challenge is principally based upon infringement of Article 101 TFEU and the Chapter I prohibition under the 1998 Act, although an allegation of abuse of dominant position contrary to Article 102 TFEU and the Chapter II prohibition under the 1998 Act was also advanced in the written pleadings.

13. As there is no material difference for present purposes between the EU and UK prohibitions and the case as argued before the Panel focused on the EU prohibitions, what follows concentrates on the allegations of breach of the EU prohibitions and the same reasoning applies to the allegation of breach of the equivalent prohibitions under the 1998 Act, unless otherwise stated.

14. The evidence put forward by Saracens consists of a first witness statement from its current chief executive officer ("CEO"), Mr Mitesh Velani, and an expert report entitled "*The impact of the Salary Cap on English Premiership* Rugby" from Professor Stefan Szymanski who is the Stephen J. Galetti Professor of Sport Management at the University of Michigan.

15. The evidence advanced by PRL in support of its case consisted of witness statements from its CEO from September 2005 until July 2019, Mr Mark McCafferty and from Mr Damian Hopley, the group CEO of the Rugby Players' Association, an organisation which he founded to represent the interests of rugby players after he was forced by injury to retire prematurely from playing rugby in 1998. The PRL served expert reports, from Mr Derek Holt who is an antitrust economist working for AlixPartners UK LLP and from Mr Daniel Jones who is a chartered accountant working in the Sports Business Group within the UK firm Deloitte LLP.

***Article 101 TFEU***

16. Article 101 TFEU provides:

> "1. The following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market, and in particular those which:
>
> (a) directly or indirectly fix purchase or selling prices or any other trading conditions;
>
> (b) limit or control production, markets, technical development, or investment;
>
> (c) share markets or sources of supply;
>
> (d) apply dissimilar conditions to equivalent transactions with other trading parties, thereby placing them at a competitive disadvantage;

(e) make the conclusion of contracts subject to acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

2. Any agreements or decisions prohibited pursuant to this Article shall be automatically void.

3. The provisions of paragraph 1 may, however, be declared inapplicable in the case of:

- any agreement or category of agreements between undertakings,
- any decision or category of decisions by associations of undertakings,
- any concerted practice or category of concerted practices,

which contributes to improving the production or distribution of goods or to promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit, and which does not:

(a) impose on the undertakings concerned restrictions which are not indispensable to the attainment of these objectives;

(b) afford such undertakings the possibility of eliminating competition in respect of a substantial part of the products in question."

17. It is common ground between the parties that the Regulations are to be categorised as a decision by an association of undertakings for the purposes of paragraph (1) of Article 101, as the clubs that make up the PRL are undertakings (i.e. businesses) and that the PRL operates as an association of those undertakings. It is therefore unnecessary to decide whether the Regulations are also an agreement between the individual clubs.

18. There is also no dispute that the Regulations may affect trade between Member States for the purposes of the application of Article 101(1). Even if that were in issue, that would still leave the Chapter I prohibition where the requirement of an effect on trade is only within the United Kingdom, and so nothing in practice would turn on any dispute on this point.

19. Also uncontroversial is that the burden of proof in establishing breach of Article 101(1) TFEU lies with the party alleging breach, Saracens, and that the standard of proof is the normal civil standard, that is to say on the balance of probabilities.

20. Therefore, the argument between the parties on the applicability of paragraph (1) of Article 101 turns on whether the Regulations "*have as their object or effect the prevention, restriction or distortion of competition*". Thus Article 101(1) applies either if the Regulations have an anti-competitive object or an appreciable anti-competitive effect. The requirements of "*object or effect*" are alternatives, not cumulative.

21. In very broad summary, Saracens' principal case as developed before us is that the Regulations have an anti-competitive object, but if that argument is rejected, its fall-back position is that the Regulations have an appreciable anti-competitive effect. PRL disputes both propositions, as well as asserting that PRL has a legitimate margin of discretion to adopt the Regulations without falling foul of Article 101(1) under a line of authority established in the jurisprudence of the Court of Justice of the European Union ("CJEU") in Case C-309/99 *Wouters* [2002] ECR I-1577 and Case C-519/04 P *Meca-Medina* [2006] ECR I-6991.

22. We turn first to consider the case on object.

***Object***

23. The distinction between "*object*" and "*effect*" has been considered in a large number of cases by the CJEU as well as national courts, dating back to the CJEU's seminal judgment in Case 56/65 *LTM* [1966] ECR 337. It is not necessary for present purposes to set out that line of case law, because the CJEU reviewed it in its judgment of 11 September 2014 in Case C-67/13 P *Cartes Bancaires* ECLI:EU:C:2014:2204 and held as follows:

> "49. … it is apparent from the Court's case law that certain types of coordination between undertakings reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects …

50. That case law arises from the fact that certain types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition …

51. Consequently, it is established that certain collusive behaviour, such as that leading to horizontal price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant, for the purposes of applying [Article 101(1) TFEU], to prove that they have actual effects on the market … Experience shows that such behaviour leads to falls in production and price increases, resulting in poor allocation of resources to the detriment, in particular, of consumers.

52. Where the analysis of a type of coordination between undertakings does not reveal a sufficient degree of harm to competition, the effects of the coordination should, on the other hand, be considered and, for it to be caught by the prohibition, it is necessary to find that factors are present which show that competition has in fact been prevented, restricted or distorted to an appreciable extent …

53. According to the case law of the Court, in order to determine whether an agreement between undertakings or a decision by an association of undertakings reveals a sufficient degree of harm to competition that it may be considered a restriction of competition 'by object' within the meaning of [Article 101(1) TFEU], regard must be had to the content of its provisions, its objectives and the economic and legal context of which it forms a part. When determining that context, it is also necessary to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and structure of the market or markets in question …

54. In addition, although the parties' intention is not a necessary factor in determining whether an agreement between undertakings is restrictive, there is nothing prohibiting the competition authorities, the national courts or the Courts of the European Union from taking that factor into account …

…

58. … in the light of that case law, the General Court [in the decision under appeal] erred in finding … that the concept of restriction of competition by "object"

must not be interpreted "restrictively". The concept of restriction of competition "by object" can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition.

...

78. In order to assess whether coordination between undertakings is by nature harmful to the proper functioning of normal competition, it is necessary, in accordance with the case-law referred to in paragraph 53 above, to take into consideration all relevant aspects – having regard, in particular, to the nature of the services at issue, as well as the real conditions of the functioning and structure of the markets – of the economic or legal context in which that coordination takes place, it being immaterial whether or not such an aspect relates to the relevant market."

24. Saracens accepted at para 29 of its skeleton argument that the *Cartes Bancaires* judgment correctly sets out the principles to be applied as a matter of law to the interpretation of the concept of object.

25. Saracens also referred to the judgment in Case C-209/07 *Beef Industry Development Society* [2008] ECR I-8637 ("*BIDS*"), in which the CJEU stated that, in determining whether there was an infringement by object, it was not necessary (but it may be relevant) that the parties should have had any subjective intention of restricting competition (see para 22). This is not disputed by PRL.

26. Saracens' case is that the salary cap in the Regulations is "*by nature harmful to the proper functioning of normal competition*" between Clubs for the services of players.

27. Its opening submissions on the application of the concept of object to the facts of the present case relied heavily on an extract from a textbook Sport: Law and Practice (3rd edition, 2014, Bloomsbury Professional) co-authored by Adam Lewis

QC (leading counsel in this case for PRL) and Jonathan Taylor QC. In a passage headed "*Salary caps and UEFA's Financial Fair Play Regulations*" (paragraphs F.2.206-2.212), the authors express the view at paragraph F2.209 that "*Obviously salary caps restrict the ability of clubs to compete with each other for the services of players, and would therefore appear to be anti-competitive.*" However, no CJEU or other relevant EU or UK authority is cited for this proposition by the authors. The only case cited in a footnote, *Johnson v Cliftonville Football and Athletic Club* [1984] 1 NI 9, is a domestic restraint of trade case and thus not relevant. The remainder of the textbook extract cites various articles in sports law journals and refers to complaints being made to the European Commission, but no enforcement action in the form of any relevant competition decision appears to have ensued. We therefore find this textbook extract of no real assistance to us.

28. Moreover, so far as the discussion in the textbook extract concerns the FFP regulations, this is now out of date. It has been superseded by the decision of a panel of the Football Disciplinary Commission (Lord Collins of Mapesbury, Mr James Flynn QC and Mr Thomas de la Mare QC) dated 19 October 2017 in *QPR v EFL*. The panel, chaired by a former Justice of the Supreme Court sitting with two practising silks each with extensive competition law experience, considered a Competition law challenge by QPR to the EFL's 2012 FFP Rules. The FFP Rules operate differently from a salary cap because they limit the amount an owner or owners of a football club may invest in that club rather than imposing a cap specifically on how much players can be paid.

29. QPR advanced an argument that the FFP Rules infringed by object because they patently conflicted with the economic independence of a club, which would otherwise be able to benefit from whatever investment the owners would be prepared to make. The panel in *QPR v EFL* decided, applying the principles in *Cartes Bancaires* and *BIDS*, that the FFP Rules were not an infringement of Article 101 TFEU or the Chapter I prohibition by object.

30. Therefore, the question of whether the Regulations in the present case infringe by object comes down to an application of the principles in *Cartes Bancaires* and *BIDS* to the evidence before this Panel as to whether an examination of the operation of

the Regulations reveals a sufficient degree of harm to competition that it may be found that there is no need to examine the effects of the operation of the Regulations.

31. As the CJEU observed in *Cartes Bancaires* at para 52 (cited at para 23 above), object infringements are typically found where the conduct, such as price-fixing by cartels, may be considered so likely to have negative effects, in particular on the price, quantity or quality of the goods and services, that it may be considered redundant to consider the effect.

32. No judgment of a court or decision of an EU competition authority was cited to us in which a regulation akin to a salary cap was held to be an object infringement. The nearest was a reference by Saracens to para 262 of the opinion of Advocate General Lenz in Case C-415/93 *Bosman* [1995] ECR I-4921, but that concerned the transfer system for players in football. In any event, the competition analysis in that part of the opinion was not adopted by the CJEU in that case, which decided the case on other grounds, and has not formed the basis for any other judgment subsequently.

33. By contrast, the decision in *QPR v EFL*, while concerning rules on FFP (limiting the amount of investment owners may make in clubs) rather than a salary cap, strongly indicates that rules of this nature aimed at promoting financial stability are not of such a nature as to reveal a sufficient degree of harm to competition absent an examination of their effects.

34. None of the objectives of the Regulations, which are clearly set out in Regulation 2.2 (which we have quoted at para 2 above), can reasonably be described as having the purpose of restricting competition. In broad terms, their aims include ensuring financial stability and promoting a competitive balance between clubs so as to encourage uncertainty of results and make the competition more attractive to spectators and broadcasters. These objectives appear consistent with EU law.

35. Financial stability was recognised in *QPR v EFL* as being a legitimate objective for the FFP rules and there is nothing in the present case to suggest a different view should be taken of the Regulations.

36. As to competitive balance, the CJEU in *Bosman* (in the context of football transfer rules) stated at para 106 of its judgment that "*the aims of maintaining a balance between clubs by preserving a certain degree of equality and uncertainty as to results … must be accepted as legitimate*".

37. The European Commission has also endorsed measures taken to promote competitive balance, stating in its Staff Working Document accompanying the White Paper on Sport (SEC (2007) 935) at para 3.4(a) under the heading "*The applicability of [EU] antitrust law to organisational sporting rules and the specificity of sport*" that "*a certain degree of equality in competitions … sets the sport sector apart from other industry or service sectors*".

38. In Saracens' closing submissions, four points were made specifically in support of the submission that the Regulations have an anti-competitive object. These were made on the basis of propositions taken from the extract from Lewis and Taylor's textbook to which we have already referred.

39. Its first point is that the salary cap inherently restricts the ability of clubs to compete with one another for the services of players. However, it cites no authority in support of the proposition that makes this restriction on clubs' commercial freedom restrictive by object, other than the Lewis and Taylor's textbook and that, as we have explained above, does not cite authority for such a proposition. There is no other authority that restricting the ability of clubs to compete for the services of players involves a sufficient degree of harm to competition that it may be found that there is no need to examine the effects of such a restriction. For example, there are transfer rules applicable in many professional sports, including football, which restrict the ability of clubs to compete for the services of players, but there no authority was cited to us in which such rules have been held to be restrictive by object. Accordingly, we reject Saracens' first point.

40. Saracens' second point is that the salary cap was not the product of collective bargaining. The argument advanced here is that because collective bargaining agreements may fall outside the prohibition under Article 101(1) TFEU provided certain conditions are met (as to which see Case C-67/96 *Albany* [1999] ECR I-5751, cited in Lewis and Taylor at para F2.210). However, it does not follow that other types of agreements concerning wages and salaries are therefore to be categorised as restrictive by object, and, as with the previous point, no authority to that effect was cited to us. What authority there is indicates that agreements impacting on wages and salaries are not restrictive by object. Thus the FFP rules considered in *QPR v EFL* inevitably had an effect on clubs' ability to pay wages and salaries at any level they wanted (see e.g. para 303 "*The whole basis of the FFP Rules is the encouragement of the operation of clubs on the basis of sustainable, internally generated revenues and not on unlimited expenditure on players using debt or equity injections*") but the panel in that case held that the rules did not have an anti-competitive object. Therefore, we also reject Saracens' case on this point.

41. Saracens' third point on object is also dependent on an observation at para F2.209 of Lewis and Taylor that salary caps are "*very difficult on a pan-European basis*" as "*[a]ny system would have to apply to all clubs throughout Europe*". But again, no authority on the meaning of object is cited, this observation is no more than an expression of view, and we reject the argument that it is necessary or relevant to take a pan-European view. What happens elsewhere in different European leagues with different rules adopted by different associations of undertakings (such as the salary cap applied in French professional rugby) cannot determine whether this particular decision (i.e. the Regulations) adopted by the PRL as an association of undertakings complies with Article 101 TFEU and the 1998 Act. Therefore, this point does not assist Saracens in demonstrating that the Regulations as they apply to clubs forming the PRL have an anti-competitive object.

42. Saracens' final point is that, as Lewis and Taylor state at para F2.211, "*it is difficult to see how such a system [i.e. a salary cap] could be said to be the least restrictive means of achieving the objectives of preserving competitive balance and maintaining economic viability".*

43. A test of strict necessity is not, however, the test to be applied in determining whether an agreement has anti-competitive object in accordance with *Cartes Bancaires*.

44. Moreover, the CJEU's jurisprudence indicates that organisers of sports competitions have a margin of appreciation to identify appropriate measures to achieve legitimate objectives, such as those set out in Regulation 2.2. This margin of appreciation was first identified in the context of professional self-regulation in Case C-309/99 *Wouters* [2002] I-1577 where a challenge to a rule of the Dutch Bar association prohibiting multi-disciplinary partnerships was held to fall outside Article 101(1) TFEU ([106] "*The Bar of the Netherlands was entitled to consider that members of the Bar might no longer be in a position to advise and represent their clients independently and in the observance of strict professional secrecy if they belonged to an organisation which is also responsible for producing an account of the financial results of the transactions in respect of which their services were called upon and for certifying those accounts*.")

45. It was then applied in Case C-519/04 P *Meca-Medina* [2006] ECR I-6991 in relation to anti-doping rules adopted by the International Olympic Committee and applied by the International Swimming Federation (FINA).

46. In *QPR v EFL* the panel considered that *Wouters* and *Meca-Medina* established that the margin of appreciation to be applied was whether a rule was proportionate to a legitimate objective identified by the sporting organisation (see "Conclusion on *Meca-Medina*" at para 338).

47. We therefore reject Saracens' final point in support of its case on object.

48. As to subjective intention, to the extent that this is relevant in determining the object of a restriction in accordance with *BIDS*, there is nothing in the evidence as to the history behind the introduction of the Regulations and their subsequent retention to suggest that there has ever been an intent to prevent, restrict or distort competition. The objectives sought to be attained by the Regulations are clearly set out in Regulation 2.2.

49. Indeed in cross-examination, Saracens' factual witnesses supported a salary cap in principle, but took issue with its current operation. Mr Velani, stated "*I think maybe there should be a salary cap, but I think the current salary cap is not fit for purpose*" (Transcript Day 4, page 38, lines 21-22). Mr Wray, Saracens' owner, stated that "*I think there's a lot of things going wrong with the current salary cap, but I think you asked me if I think there should be a salary cap, and the answer is yes*" (Transcript Day 4, page 107, lines 10-12).

50. In our view, that candid acceptance of the desirability of a salary cap in some form puts the final nail in the coffin of Saracens' case on object. While subjective intentions and views are not determinative, it is revealing that both Saracens' owner and its CEO support the principle of a salary cap. Indeed, we were surprised to observe such a disconnect between the case on object advanced by Saracens' legal team before the Panel and this evidence, as it emerged in cross-examination, from both Saracens' owner and its CEO.

51. In the absence of any authority to support Saracens' contention that a salary cap poses such a sufficient degree of harm to competition that there is no need to examine the effect of a salary cap, and such authority as there is (in particular *Wouters*, *Meca-Medina* and *QPR v EFL*) pointing to the contrary conclusion, and in view of the support of Saracens' owner and CEO offer for a salary cap in principle, we conclude that the Regulations do not have an anti-competitive object within the meaning of Article 101(1) TFEU or the Chapter I prohibition.

***Effect***

52. We turn now to consider Saracens' case on anti-competitive effect.

53. There is no dispute between the parties that the effect of an allegedly anti-competitive restriction must be shown to be appreciable in order to fall within Article 101(1) TFEU.

54. Guidance as to how to approach this assessment was given by the CJEU at para 21 of the judgment in Case C-226/11 *Expedia* ECLI:EU:C:2012:795:

"the existence of such a restriction must be assessed by reference to the actual circumstances of such an agreement (Case 1/71 Cadillon [1971] ECR 351, paragraph 8). Regard must be had, inter alia, to the content of its provisions, the objectives it seeks to attain and the economic and legal context of which it forms a part (Joined Cases C-501/06 P, C-513/06 P, C-516/06 P and C-519/06 P GlaxoSmithKline Services and Others v Commission and Others [2009] ECR I-9291, paragraph 58). It is also appropriate to take into consideration the nature of the goods or services affected, as well as the real conditions of the functioning and the structure of the market or markets in question (see, to that effect, Asnef-Equifax and Administración del Estado, paragraph 49)."

55. As the Court indicates, an analysis of potential anti-competitive effect cannot be carried out in the abstract. It can only be carried out by reference to a realistic counterfactual, as the CJEU held in Case C-382/12 P *MasterCard* ECLI:EU:C:2014:2201 at para 108:

"irrespective of the context or aim in relation to which a counterfactual hypothesis is used, it is important that that hypothesis is appropriate to the issue it is supposed to clarify and that the assumption on which it is based is not unrealistic."

56. The CJEU then stated at para 161 that:

"the Court of Justice has repeatedly held that in order to determine whether an agreement is to be considered to be prohibited by reason of the distortion of competition which is its effect, the competition in question should be assessed within the actual context in which it would occur in the absence of the agreement in dispute (see judgments in LTM, 56/65, EU:C:1966:38, 250; Béguelin Import, 22/71, EU:C:1971:113, paragraphs 16 and 17; Lancôme and Cosparfrance Nederland, 99/79, EU:C:1980:193, paragraph 26; L'Oréal, 31/80, EU:C:1980:289, paragraph 19; ETA Fabriques d'Ébauches, 31/85, EU:C:1985:494, paragraph 11; Bagnasco and Others, C-215/96 and C-216/96, EU:C:1999:12, paragraph 33 and the case-law cited; and also General Motors v Commission, EU:C:2006:229, paragraph 72). As the General Court rightly held, in paragraph 128 of the judgment under appeal, the same applies in the case of a decision of an association of undertakings within the meaning of Article [101 TFEU]." (Emphasis added)

57. The use of a counterfactual was also explained by the Competition Appeal Tribunal (chaired by Rimer J) in *Racecourse Association v Office of Fair Trading* [2005] 29. The Tribunal held at para 153 "*the effect of the [salary cap in this case] has to be compared with that which would have prevailed had it not been entered into, an exercise requiring an assessment of the competitive landscape that would exist in its absence*". A failure in that case by the OFT to advance a realistic counterfactual meant that its infringement decision under the Chapter I prohibition was set aside.

58. An assessment of the competitive landscape also requires an understanding of which specific market or markets comprise that landscape, which involves defining the relevant market(s). As the European Commission's "*Notice on the definition of relevant market for the purposes of Community competition law*", OJ 1997 C 372/5, explains at para 2:

> "Market definition is a tool to identify and define the boundaries of competition between firms. ... The main purpose of market definition is to identify in a systematic way the competitive constraints that the undertakings involved face. The objective of defining a market in both its product and geographic dimension is to identify those actual competitors of the undertakings involved that are capable of constraining those undertakings' behaviour and of preventing them from behaving independently of effective competitive pressure."

59. Although Saracens submits at para 49 of Appendix 1 to its closing submissions that "*[i]t is important not to overstate the importance of market definition*", it is clearly regarded by the Commission and Courts as an essential element in determining actual or potential anti-competitive effects.

60. Saracens' own evidence on alleged anti-competitive effect was decidedly limited. The principal factual witness, Mr Velani, had only been in post as CEO since 2018, having been on the board since September 2017 after originally joining the club in 2010. His witness statement purported to give evidence about matters dating back to the introduction of a salary cap by PRL in 1999. However, it turned out under cross-examination that his witness statement had largely been copied *verbatim* from a statement made by Mr Edward Griffiths, a former CEO of Saracens, dated 23rd January 2015 in relation to earlier proceedings between the parties arising out

of alleged non-compliance by Saracens with the Regulations which were subsequently settled. Prior to joining the board of Saracens in September 2017, Mr Velani had no involvement with the salary cap and was therefore in no position to give evidence about its introduction or operation prior to that date. Mr Velani had been involved in Saracens board discussions about the salary cap after joining the board, but he did not attend PRL board's Salary Cap Sub-Committee meetings.

61. In our view, Mr Velani gave truthful evidence in so far as he was able in view of his limited time on the Saracens board, but it is regrettable that he (or those acting for Saracens assisting him in drafting his statement) did not make clear the extent to which his written statement simply reiterated Mr Griffiths' earlier statement and addressed matters on which he had no first-hand knowledge.

62. PRL served a witness statement from its former CEO, Mr Mark McCafferty, who had been in that position from September 2005 until July 2019. As to the position prior to September 2005, Mr McCafferty was not able to give direct evidence, but did exhibit contemporaneous PRL documents about the formulation and introduction of the Regulations. Saracens' closing submissions make a serious attack on Mr McCafferty's credibility in giving that evidence, suggesting that he was unwilling to give accurate and truthful evidence on certain important matters. We deal with those matters below, but we wish to make it clear that we found Mr McCafferty to be an entirely truthful witness who was at pains to be clear about his evidence. We regard Saracens' attack on his credibility as unjustified.

63. PRL also relied on a witness statement from Mr Damien Hopley the group CEO of the Rugby Players' Association, who we considered gave cogent and helpful evidence on the implications of the salary cap from the players' perspective.

64. We turn to the experts' reports. Most of the evidence of Professor Szymanski (Saracens' expert) dealt with salary caps and similar regulation in other sports, with relatively little attention to evidence or facts specific to English professional rugby.

65. A particular drawback to his report was a complete absence of consideration of the counterfactual that would apply absent a salary cap. This is despite the fact that

under cross-examination he accepted "*that what's relevant here is the counterfactual. What would be the nature of competition in the absence of the salary cap. That's the important point isn't it?*" (Transcript Day 1, page 141, lines 1-4).

66. Consideration of the counterfactual necessarily involves identifying the relevant market in which competition is alleged to be affected. That exercise was not carried out in Professor Szymanski's report, nor was any other evidence led by Saracens on this issue. This is a serious limitation on the utility of his report.

67. A further limitation to Professor Szymanski's report was that it did not address questions of relevant market definition as set out in the European Commission's Notice on the definition of relevant market. Nor did Saracens lead any other expert evidence on the counterfactual or market definition.

68. By contrast, Mr Holt in his report did address issues of market definition and counterfactual analysis by reference to specific evidence and data. He is an experienced antitrust economist. His report was supplemented by the report served by Mr Jones drawing upon his experience of sports leagues generally, which contained detailed data and analysis. We found both of PRL's experts to be careful and thorough in their evidence.

69. We were left with the impression that Saracens' competition case had originally nailed its colours to the anti-competitive object infringement mast, and that the case on appreciable anti-competitive effect was advanced as a somewhat secondary line of attack, being more reliant on what could be gleaned from PRL's factual and expert evidence than on the very limited evidence led by Saracens.

70. The principal contentions now advanced by Saracens as to effect are as follows.

71. As to market definition, Saracens advances its case at para 48 of Appendix 1 of its written closing submissions, reflecting para 26a of its Response to the Charge, on the basis that "*there is a specific market for the services of English qualified elite players which is geographically limited to England. Saracens also accepts that there*

*is a wider market for the services of non-English-qualified elite players which is worldwide. Alternatively, if the Panel does not accept Saracens' English qualified elite players market, Saracens relies on the wider worldwide market for elite players*."

72. Saracens does not appear to pursue its case at para 26b of its Response that there is a market for elite club rugby matches or para 26c of its Response that there is a market for live sporting events. No submissions were made as to effect on either alleged market in closing.

73. Mr Holt's response at para 15 of his report to the markets suggested at para 26a of Saracens' Response is that:

> "Neither Saracens nor Professor Szymanski have provided any evidence or analysis to support the relevant markets proposed in the Saracens response. That is, their conclusions do not appear to be based on any empirical evidence. Saracens does not even describe what, if any, conceptual framework it used to define the relevant markets. Saracens' discussion of the relevant market provides no indication that it has followed the well-established approach of examining competitive constraints to delineate relevant markets."

74. We agree with Mr Holt's criticism of Saracens' written case on market definition.

75. Saracens advances a case at para 53 of Appendix 1 of its written closing submissions (based not on its own evidence but that of Mr Holt and Mr Jones) that "*PRL Clubs have a 'captive' group of players – elite English qualified players – who they can pay substantially below the market rate for their services as a result of the 'English club only' rule which exists pursuant to an agreement between PRL and the RFU. This shows that PRL Clubs do not face normal competitive constraints in relation to elite English qualified players. There is, therefore, a separate market for elite English qualified players which is limited to England*."

76. We do not agree with this analysis.

77. Saracens' suggestion that the "English club only" rule (which is an RFU rule) holds English qualified players "captive" in England, elite or otherwise, is not supported by the evidence which suggests that most English players choose to play in England irrespective of their level of performance and that cannot be attributed to the "English club only" rule. Both Mr McCafferty and Mr Hopley gave evidence of the measures which the PRL and the Rugby Players' Association have sought to put in place with clubs. This strongly indicates that there is a range of welfare and other support considerations going beyond simply wage levels that would be taken into account by players in deciding whether to play in England or elsewhere.

78. We note in this regard that the "English club only" rule is an RFU rule, as that is the organisation responsible for the English national team. It is now referred to in the PRL and RFU Professional Game Agreement. Saracens makes criticism at para 10 of its written closing submissions of Mr McCafferty for not mentioning that Agreement in his written witness statement, but we regard that as misplaced. It is not that Agreement which is under challenge and if Saracens thought it had grounds for challenging it at that the time, doubtless it would have done so.

79. There is also no evidence that English players are paid below "the market rate" (we note that also begs the question under consideration). Saracens' submission is principally advanced on a superficial comparison between the English and French salary caps, but there is no evidence as to the actual levels of take home pay earned by professional rugby players in England and France and so no accurate basis on which such a comparison could be carried out.

80. At paras 11 to 13 of its written closing submissions, Saracens criticises Mr McCafferty's comparison of English and French salaries as unsatisfactory. We reject that criticism: what was unsatisfactory was the lack of evidence from Saracens on what was presented as a central plank of Saracens' Competition law case. Mr McCafferty was doing his best to assist the Panel with his understanding from an English perspective of what little evidence Saracens had adduced on this point.

81. As to Saracens' fall-back alternative market definition of a wider worldwide market for elite players, the evidence before the Panel is that male rugby players are

recruited to play professional rugby from around the world and that appears to be the position not just in the UK but in other countries where professional rugby is played. The word "elite" does not add anything, other than to denote players capable of playing at a professional level.

82. However, if that situation could be described as a global market for the recruitment of professional rugby players on which the salary cap under the Regulations could have an effect, it would then be necessary for Saracens to prove that such an effect was appreciable. But Saracens has not led any evidence on this alternative market definition either.

83. Saracens now seeks to make a case at paras 54-56 of Appendix 1 to its closing submissions that, on the basis of information in Mr Holt's and Mr Jones' reports, there are over 60 professional rugby teams which operate across the elite rugby leagues in the top tier rugby nations internationally, of which 12 comprise the PRL. Saracens invites the Panel at paras 67-68 of Appendix 1 to its closing submissions to conclude that the 10% market share in the European Commission's "*Notice on agreements of minor importance which do not appreciably restrict competition under Article 101(1) of the Treaty on the Functioning of the European Union (De Minimis Notice)*", OJ 2014 C 291/1, is met and that therefore the appreciability threshold is met.

84. That is a *non sequitur* because the *De Minimis* Notice operates as a safe harbour for parties to agreements falling below its market share thresholds so far as European Commission enforcement action is concerned. It does not operate as a legal presumption of appreciability of effect above those thresholds.

85. Moreover, the *De Minimis* Notice does not in any event assist here, because the question on this alternative market definition is whether the salary cap has an appreciable adverse effect on competition in a global market for the recruitment of professional rugby players. There is simply no evidence before the Panel as to any adverse impact caused by the salary cap on the ability of elite rugby clubs to recruit players on the global market. Indeed, there is evidence in Chart 2.5 of Mr Jones' report that the total number of non-English national team players in PRL clubs

playing squads in 2018/19 is 134, coming from 16 countries around the world in addition to those from Wales, Scotland and Ireland, which does not at first sight seem indicative of any real constraint.

86. Finally, Saracens suggests that the impact on competition can be seen in its reduced ability to compete on the pitch, particularly in European competition, but this suggestion is at odds with Saracens' tremendous success on the pitch in recent years, being a European Champions Cup semi-finalist every year but one since 2012/13 and winning three of the last four European Champions Cup finals.

87. We turn now to consider the counterfactual against which any alleged effect on competition would have to be assessed.

88. The statement of a proposed counterfactual advanced on behalf of Saracens is at para 52 of the skeleton argument for the hearing: "*It is clear that, absent the salary cap Regulations, the normal competitive process which is currently restricted and distorted by the Regulations would apply, i.e. clubs would compete on an unfettered basis for the services of players.*" In closing Saracens affirmed this approach, stating at para 59 of Appendix 1 of the written closing submissions that "*Saracens does not advance a case based on the introduction of some alternative measure, Saracens relies simply on how the market [sic] absent the alleged restriction*."

89. As already explained above in relation to the *MasterCard* and *Racecourse Association* judgments, it is not permissible to assume a counterfactual of no restriction, but otherwise everything else remaining the same in the competitive landscape. A counterfactual has to be realistic: what would have happened in the competitive landscape had the restriction in issue not been put in place.

90. In the present context, there is no dispute that the objectives set out in Regulation 2.2 have remained valid throughout the period during which the Regulations have been in place.

91. It is clear that Saracens was party to the original decision to introduce a salary cap in the original Regulations and to subsequent decisions to retain the Regulations, although much more recently Saracens has expressed disapproval of the salary cap as currently implemented.

92. Saracens now disputes the basis on which the Regulations were originally adopted, which had as their genesis a report in 1999 from Deloitte.

93. The 1999 Deloitte report recommended that the PRL should adopt a salary cap to control costs. It suggested different types of cap, namely a cap based on a percentage of club revenues (what has more recently come to be known as FFP) and an alternative absolute cap (which is what was ultimately put in place).

94. Saracens criticises Mr McCafferty's evidence about the original Deloitte report on the basis that he did not make it clear that Deloitte's recommendation was for an FFP approach, but we reject that criticism. Mr McCafferty was merely exhibiting documentary evidence about a decision making process in which he did not take part, as he did not join PRL until six years later. His description of what was in those documents seems to us to be fair and not a matter on which he ought to be criticised.

95. Moreover, it is clear that the clubs at the time, including Saracens, adopted the principle of a salary cap at a PRL board meeting on 23 March 1999. PRL and the clubs then debated what form of cap to introduce, eventually settling on a fixed cap rather than an FFP approach. It is clear from board minutes at that time that Saracens were in favour of the salary cap and that seems to have been the case until at least 2014, when the clubs, including Saracens unanimously approved various changes to the Regulations for 2015/16 onwards. There is no evidence during this period that Saracens ever voted against the salary cap.

96. In more recent years, Saracens has voiced its dissatisfaction with the Regulations, but that appears to be more directed at their operation in practice than against the idea of a salary cap in principle. Saracens' current position was candidly stated by its owner, Mr Wray, to be that:

"I think there's a lot of things going wrong with the current salary cap, but I think you asked me if I think there should be a salary cap, and the answer is yes".

97. The pressures on club finances which saw some leading clubs fold in the late 1990s (Bristol, Richmond, London Scottish, West Hartlepool) and which led to the adoption of the Regulations have not obviously diminished. The vast majority of clubs forming the PRL are loss-making and have been for many years, Saracens included (indeed, it has never made a profit and relies on its owner's continued support).

98. The biggest cost faced by all clubs is typically player salaries, which can amount to more than half of a club's costs. A salary cap holds down these costs, even for clubs that do not pay up to the salary cap, because the overall level of salaries is kept lower than would be the case without the salary cap.

99. Clubs are principally motivated by a desire to win and retain PRL membership, not by a desire to make profits (as evidenced by their continuing loss-making). Absent a restriction on player salaries, there would be a rapid return to player costs spiralling out of control as clubs outbid each other to secure the best players, which would in turn lead to some clubs folding. This is a risk that all owners and the PRL wish to avoid, due to the adverse impact it would have for the commercial exploitation of Premiership rugby. As Mr Hopley explained in his evidence, it is not a risk that the players his Association represents wish to run either because players are left financially high and dry when a club folds.

100. Therefore, we entirely understand why Mr Wray thinks that there should be a salary cap. It is an obvious means of bringing under control a major risk to the viability of professional rugby.

101. In our view, the counterfactual to the present salary cap would in all likelihood be some other form of financial self-discipline imposed by clubs on themselves through the PRL. In all probability, it would be a differently organised salary cap, perhaps being placed in the hands of an independent commissioner as Mr Wray suggested should happen: "*We have to move to an independent commissioner who will run*

*the whole business of club rugby. I think that is crucial step number 1*." (Transcript Day 4, page 107, lines 6-8)

102. Whatever form regulation would take, it would remain aimed at achieving the objectives set out in Regulation 2.2.

103. For these reasons, we reject Saracens' submission that the counterfactual ought to be that clubs would compete on an unfettered basis for the services of players. That has led to financial ruin for some clubs in the past and is too big a risk for the PRL and clubs, including Saracens, to accept.

104. Against the counterfactual we have found, it is clear that the present salary cap in the Regulations could not have an appreciable adverse effect on competition. Clubs would remain restricted as to the amount they could spend on salaries in order to achieve the same objectives as are set out in Regulation 2.2.

105. In conclusion on effect, we therefore find that Saracens has not discharged the burden of proof in:

(a) establishing either (i) a specific market for the services of English qualified elite players which is geographically limited to England or (ii) its alternative market of a wider worldwide market for elite players; or

(b) demonstrating in either case that the salary cap has an appreciable adverse effect on competition.

106. In our view, it is in fact the case that the salary cap has operated and continues to operate in a pro-competitive manner by promoting the objectives set out in Regulation 2.2.

107. In very broad summary, the evidence as to those objectives shows that:

(a) the clubs have remained financially viable with none folding despite generally being loss-making, and the Premiership competition has generated increasing central revenues, with consequent distribution to clubs;

(b) salary costs are subject to a cap which is under constant review;

(c) clubs benefit from a level playing field so far as fixed salary cap is concerned;

(d) the Premiership competition benefits from competitive balance (a variety of clubs are successful, not just the one with the biggest financial backer), which leads to a competition which is more attractive to spectators and television audiences, which in turn drives greater revenues for all clubs; and

(e) clubs have successfully competed in European competitions, none more so than Saracens itself which has been a European Champions Cup semi-finalist every year but one since 2012/13 and has won three of the last four Cup finals.

108. Those are, on any view, positive outcomes for PRL and Saracens. Whether improvements could be made to the operation of the Regulations in practice is a matter which, as Mr McCafferty explained, is kept under continuous review by the clubs in conjunction with the PRL and is not a matter which even remotely causes concern about the potential application of Article 101(1) TFEU or the Chapter I prohibition.

109. In view of this conclusion, it is unnecessary to consider whether the Regulations would meet the exemption criteria under Article 101(3) TFEU or section 9 of the 1998 Act.

***Article 102 TFEU***

110. It is also follows from our conclusions about the facts supporting our conclusions as to the non-applicability of Article 101(1) TFEU and the Chapter I prohibition that there is also no question of the Regulations constituting any abuse of an individual or dominant position under Article 102 TFEU or the Chapter II prohibition.

***Conclusion on the Competition Law Challenge***

111. Accordingly, we reject Saracens' competition law challenge to the Charge.

## D. THE REGULATIONS IN MORE DETAIL

112. Regulation 1 provides a comprehensive list of definitions. It is only necessary to refer to the following:

> "'Salary' means: 'the total of all amounts referred to in Schedule 1, which are paid or payable, provided or to be provided within the relevant Salary Cap Year, as determined by the Accountants acting as experts'.
>
> 'Reckless' and 'Recklessly' means either:
>
> (a) failing to give any significant thought as to the risk or possibility of breaching the Regulations; or
>
> (b) having recognised that there is some risk or possibility, nonetheless deliberately taking a risk of breaching the Regulations."

113. Regulation 4 imposes on Clubs a number of obligations. These include the certification of sums paid to players during each SCY (Reg 4.3), the provision to the SCM of contracts with players and other documents (Reg 4.4); cooperation with the SCM in connection with any queries that he may raise in relation to issues relevant to the compliance and operation of the Regulations (Reg 4.8); and assisting Investigators instructed by the SCM to carry out an Investigatory Audit (Reg 4.9).

114. Regulation 6 defines the role of the SCM. He is responsible for all aspects of the operation of the Regulations "*including without limitation, monitoring compliance with the Regulations and overseeing the audit process*" (Reg 6.1). He is required to "*investigate any potential breach of the Regulations, any other actual or potential issue of non-compliance with the Regulations…*" (Reg 6.5(a)). He is required to obtain further information from any Club or Player "*as may be reasonably required to ensure compliance with the Regulations*" and the Club must respond to the request within 14 days (Reg 6.7). "*If a Club wishes to clarify the meaning or*

*applicability of any of the Regulations, it shall contact the SCM in writing with its query. The SCM will respond within a reasonable time*" (Reg 6.13).

115. Regulation 11 deals with breaches of the Regulations. Any breach of the Regulations relating to Salary exceeding the Senior Ceiling by more than the specified amount shall be dealt with in accordance with the procedures set out in Regulation 12 (Reg 11.1). Failure to cooperate is dealt with in Regulation 11.2. Other breaches of Regulations are dealt with in Regulation 11.3.

116. Regulation 12 makes provision for the Panel. It provides:

> "12.1 If:
>
> (a) The Salary Cap Manager is of the reasonable opinion that a Club has exceeded the Senior Ceiling…by [ ]; and/or
>
> (b) The Salary Cap Manager is of the reasonable opinion that a Club is guilty of a Failure to Co-operate,
>
> the Salary Club Manager shall serve on the relevant Club and Sports Resolution UK a written charge (the "Charge").
>
> 12.2 The Charge shall:
>
> (a) Identify the provision(s) of the Regulations that the Club is alleged to have breached;
>
> (b) Describe the nature of the alleged misconduct;
>
> (c) Provide a statement of the facts relied upon; and
>
> (d) Provide copies of all documents or other evidence relied upon or referred to in the Charge.
>
> …
>
> 12.4 The Disciplinary Panel shall within 3 working days of being appointed set down a timetable for the resolution of the Charge. The Disciplinary Panel shall have the discretion to decide all procedural and evidential matters….

…..

12.10 The Disciplinary Panel shall determine whether the Club has breached the Regulations as alleged in the Charge ....."

117. Regulation 13.1 provides for any dispute or difference arising out of the Regulations (including any challenge to a decision of the Panel) to be referred to Sports Resolutions UK for final and binding arbitration. Regulation 13.2 provides:

> "Regulation 13.1 shall not operate as an appeal of a decision of the Disciplinary Panel or any other decision made pursuant to the Regulations and shall operate only as a forum and procedure for a challenge to the validity of such a decision under English law on the grounds of ultra vires (including error of law), irrationality or procedural unfairness with the Tribunal exercising supervisory jurisdiction only."

118. Regulation 14 provides for penalties for breach of the Regulations. We refer to the Regulations relating to Breaches and Penalties in more detail at para 272 below.

119. We have set out the material parts of Schedule 1 in Appendix 2 to this Decision. We refer here to certain parts of it because, as will become apparent, they are central to the dispute with which we are concerned. The Schedule is headed "***Amounts that constitute Salary".***

120. Para 1 of Schedule 1 provides that:

> "Salary' means for the purposes of compliance with the Senior Ceiling…the total of all amounts referred to in this paragraph 1, whether they are paid or payable…by or on behalf of a Club or any Connected Party of the Club…..to or on in respect of a Player or any Connected Party of the Player, and shall exclude any amount set out in paragraph 2."

121. Paragraphs (a) to (w) contain a detailed list of payments and benefits. They include at (d):

> "any loan pursuant to which the Player or any Connected Party of the Player is not obliged to repay the full sum advance (sic) in the Salary Cap Year in which the loan is made".

And at (p):

> "any payment or benefit in kind which the Player would not have received if it were not for his involvement with a Club".

122. Para 2 of Schedule 2 includes:

> "For the avoidance of doubt, the following are excluded for the purposes of determining total Salary:
>
> (a) Any payments or benefits in kind in connection with an individual sponsorship, endorsement, merchandising, employment or other individual arrangement between a Player (or any Connected Party of a Player) and any Connected Party of the Club or Third Party which the Salary Cap Manager reasonably concludes on the balance of probabilities should not be considered Salary, having taken into account the following factors" (our underlining).

123. There are then set out sixteen factors which are to be taken into account, of which factor (xvi) is:

> *"any other matter that, in the opinion of the Salary Cap Manager in his absolute discretion, ought to be taken into account".*

124. Para 2(b) to (q) contains a list of other payments and benefits which are excluded for the purposes of determining total Salary.

## E. THE INTERPRETATION OF THE REGULATIONS AND THE ROLE OF THE PANEL

125. There are some important differences between the parties as to the interpretation of the Regulations and the role of the Panel.

### *The Panel's role under Regulation 12.10*

126. It is clear that, where the Charge is disputed by a Club, the Panel has to resolve the dispute and decide whether to uphold the Charge in whole or in part or to reject it. Regulation 12.4 refers to "*the resolution of the Charge*". There is disagreement

between the parties in this case as to whether (i) the Panel is required to decide for itself *de novo* all matters relevant to the Charge or (ii) it exercises a review function in which it should or may allow to the SCM a margin of appreciation or area of discretionary judgment in respect of some matters relevant to the Charge. It is (rightly) common ground that the Panel is required to decide for itself disputed issues of objective fact. For example, if there is a dispute as to whether a transaction is a loan pursuant to which the Player or any Connected Party of the Player is obliged to repay the full sum advanced in the SCY in which it is made (within the meaning of Schedule 1 para 1(d)), the Panel must determine the dispute for itself. As we understand it, there is no disagreement that it is for the Panel to decide for itself *de novo* whether, in formulating the Charge, the SCM has correctly applied para 1 of Schedule 1.

127. The central issue between the parties is the role of the Panel in relation to Schedule 1 para 2. Saracens' position is as follows. The Panel's role in relation to para 2 is as an original decision-maker. It does not exercise a reviewing function. Where the Regulations provide a review standard, they do so expressly as in Regulation 13. They have not done so in Regulation 12.10. Accordingly, an allegation that a payment or transaction does not fall to be excluded under para 2(a) and is therefore Salary is an allegation that falls to be determined by the Panel for itself *de novo* in the same way as, for example, an allegation that a payment or transaction falls with Schedule 1 para 1. The Panel is not concerned with whether the SCM acted reasonably, but with whether there has *in fact* been a breach. It is immaterial whether the SCM has acted reasonably in reaching an objectively wrong conclusion under para 2(a). The role for the Panel is to determine the allegation in the Charge of breach of the Salary Cap provided by the Regulations. Saracens does not go so far as to say that the Panel should disregard what is said by the SCM in the Charge and the evidence filed with it. It accepts that the Panel should have regard to an assertion in a Charge that a payment or transaction does not fall to be excluded under para 2(a). But it says that the decision on the application of para 2(a) of Schedule 1 is for the Panel and the SCM should be given no margin of appreciation.

128. We do not accept this interpretation of the Panel's role in relation to para 2(a) largely for the reasons given by PRL. The Panel is concerned to resolve the question whether there has been a breach of the Regulations as alleged in the Charge. Many of the elements which comprise the alleged breach are objectively ascertainable. The crucial element of the Charge is that the SCM has determined that the Salary in the relevant SCY exceeds the Senior Ceiling. This requires the Panel to decide whether the Salary as determined by the SCM for that SCY should be replaced by a different Salary. This in turn requires the Panel to resolve Saracens' challenge to the sum determined by the SCM as Salary for the purposes of the Charge.

129. The fundamental problem facing Saracens' argument is that it ignores the words that we have underlined in para 2(a) (see para 122 above) and it takes no account of para 2(a)(xvi).

130. Under para 2(b) to (q), the amounts to be excluded from Salary are defined and objectively ascertainable. If any of these sub-paragraphs had been relevant in this case (which they are not), it would have been necessary for the Panel itself to decide whether one or more arrangements fell within them untrammelled by the opinion of the SCM.

131. But para 2(a) is quite different. It confers on the SCM a power to choose to exclude from Salary some payments by a Connected Party of the Club or by a Third Party that would otherwise fall within para 1. In making his decision whether or not to exclude such payments, the SCM is required to take into account the sixteen listed factors in so far as they are applicable. The last factor in (xvi) could hardly be expressed more broadly: the SCM can take into account any other matter that "*in his absolute discretion, ought to be taken into account*".

132. This requires an exercise of judgment on the part of the SCM, as opposed to a determination of objectively ascertainable fact. In exercising this judgment, he is required to take into account the sixteen factors to the extent that he considers them to be applicable. The only constraint on the way in which he exercises this judgment is that he should do so reasonably. This gives him a certain freedom of

choice, but his decision must always fall within the range of reasonable decisions. In particular, it is to be noted that the first fifteen factors do not all point in the same direction. Some tend to suggest that the payment or benefit should be considered Salary; others suggest the opposite. The balancing of these factors is a matter for the SCM. Provided that he conducts this weighing exercise reasonably, he is acting in accordance with para 2(a) and there is no basis for the Panel to substitute its own judgment.

133. The fact that para 2(a)(xvi) gives the SCM such a wide residual discretion is also important. It supports and is consistent with the interpretation of para 2(a) overall that we have just expressed. As regards (xvi) itself, there is no basis for the Panel to substitute its own discretion unless the SCM has acted unreasonably and exercised his discretion impermissibly, for example, by taking into account irrelevant matters or matters which no SCM could reasonably take into account. The motif of reasonableness runs through para 2(a).

134. To summarise, the Panel does not approach the SCM's application of para 2(a) when formulating the Charge *de novo* as if it were formulating the Charge for itself. It assesses whether the judgment exercised by the SCM in determining whether payments or benefits should not be considered Salary was a reasonable one taking account the sixteen factors. The application of para 2(a) is not a hard-edged judgment, but one on which opinions can reasonably differ. As we have said, Saracens accepts that the Panel will *have regard to* the SCM's view that a payment does not fall to be excluded under para 2(a). But we understand this to mean that the Panel may do no more than treat this as part of the evidence to be taken into account by it in determining the Salary. As we have explained, this completely disregards the words that we have underlined in para 2(a) and factor (xvi). The judgment of the SCM can only displaced by the Panel if it was one which was not reasonably open to him, even if the Panel might have reached a different conclusion if it were deciding the matter *de novo* for itself; and as regards any application of (xvi), if the SCM's exercise of discretion was outside the range of decisions that were reasonably open to him.

***The interpretation of para 2(a)***

135. We have already largely dealt with this. But it is important to say more about it because Mr Rogers' application of para 2(a) lies at the heart of the some of the particular issues that have arisen in this case.

136. Mr Rogers says at paras 80 to 83 and 88.1 of his second statement that the purpose of the para 2(a) provisions was to provide for certain "*exceptional circumstances*" where arrangements with Connected Parties, as well as Third Parties, can be excluded.

137. At paras 76 to 84 of his second witness statement, he gives evidence as to the background to para 2(a) which was first introduced into the Regulations in the SCY 2013/14. At para 77 he says:

> "The purpose behind the introduction of Schedule 1, paragraph 2(a) was to provide an ability for me to assess, in appropriate circumstances, whether sponsorship or endorsement payments made by Connected Parties to payers should be excluded from Salary."

138. Previously, all such payments from Connected Parties fell to be considered as Salary. At para 80, Mr Rogers says:

> "In that way, the purpose of its inclusion was to provide for certain exceptional circumstances where arrangements with Connected Parties, as well as Third Parties, could be excluded. That does not mean that arrangements with Connected Parties fall to be treated in the same way as arrangements with Third Parties. Arrangements with Connected Parties are obviously less likely to be suitable for exclusion, due to the close link with the club"

139. At para 81, he says:

> "….it was important that this was a power exercisable by me, and that it was applied in appropriate circumstances taking into account my experience and expertise in these matters, and was not to apply in every case—this was to ensure that no club or player sought to use this relaxation of the position as a method by

which to circumvent the Regulations. In that way, these powers would only be used in exceptional circumstances".

140. Saracens says that the Charge is vitiated by Mr Rogers' impermissible approach to para 2(a) in treating it as being applicable only in exceptional circumstances. It says that para 2(a) clearly provides for the exception of "*individual arrangements*" with Third Parties and Connected Parties by reference to the same 16-point factorial analysis and that there is no scope for treating it as applying only exceptionally to arrangements with Connected Parties: given the breadth of the definition of "Connected Party", it would be perverse for arrangements with Connected Parties to always result in Salary, subject only to exclusion in exceptional circumstances. Para 2(a) requires a fact-sensitive evaluation to be carried in by reference to the sixteen factors in all cases.

141. There has been debate before us as to precisely what Mr Rogers means by "*exceptional circumstances*" in this context. PRL says that he means no more than that the para 2(a) power falls to be exercised "*exceptionally*" in the sense that it involves making an exception to take outside Salary something that would normally be treated as within Salary in accordance with para 1.

142. Mr Rogers does not spell out clearly how he decides whether exceptional circumstances exist in any particular case. But it is plain that he considers that it will only be in an unusual or exceptional case that, on a proper application of the para 2(a) factors, payments or benefits conferred on a Player by a Club's Connected Party should be excluded from Salary. It seems to us that this is a reasonable approach to take for the reasons that Mr Rogers gives. We draw attention to the first of the sixteen factors ("*if the arrangement is with a Connected Party, it will be more likely to be considered Salary").* It is true that this is only one of sixteen factors. But as we have already said, the weight to be given to the various factors is a matter for the SCM provided that he does not act outside the range of reasonableness. In our view, Mr Rogers is entitled to treat the first factor as being of particular importance and that is what he has done.

143. We should add in any event that, for the reasons that we give in the following paragraphs of this Decision, we are entitled to take into account the evidence that is contained in Mr Rogers' second statement where he elaborates on (and to some extent supplements) the exercise that he performed in formulating the Charge. Exceptionality as a criterion appears to play no part in this analysis.

***Is PRL limited to allegations in the Charge and the evidence in support?***

144. Saracens submits that Regulations 12.2 and 12.10 provide that the allegations that fall to be determined by the Panel are those set out in the Charge and supported by the evidence filed with it together with the statement of facts relied on by the SCM and the documents and other evidence relied on or referred to in the Charge. In seeking to prove the breaches alleged in the Charge, PRL may not rely on any *"statement of facts"* or *"documents or evidence"* that do not form part of the Charge (including the evidence filed with it). It is not entitled to extend the allegations of breach or the statement of facts or the supporting evidence. This is necessary for procedural fairness, not least given the tight timetable imposed by the Regulation and the severity of the penalties that are available under Regulation 14. The SCM is a prosecutor who makes a Charge which, if proved, has potentially severe penal consequences for Saracens.

145. We accept that the scheme of Regulation 12 is that where the SCM serves a Charge, he is required to satisfy the requirements of Regulation 12.2. Saracens rightly accepts that the SCM may respond to specific criticisms of matters in the Charge with further argument or explanation. But it says that the SCM may not make new allegations of "*misconduct*" and/or extend the "*statement of facts*" relied on in the Charge: For example, if in deciding that Saracens had exceeded the Senior Ceiling in a particular SCY, Mr Rogers had failed to take account of all or any of the factors set out in para 2(a) of the Schedule. Saracens' case is that such an omission cannot be made good by Mr Rogers subsequently carrying out the exercise before the Panel makes its decision.

146. We do not accept that the SCM is restricted in this way. We agree that the remit of the Panel is limited to resolving the particular Charge that was served by the SCM

and which is in issue (Reg 12.4). We shall assume that the Panel does not have the power to permit the SCM to amend the Charge as a "*procedural*" matter within the meaning of Regulation 12.4. But it does have the "*discretion to decide all procedural and evidential matters".* We see no reason to give these words a narrow meaning. In our view, the only limit on this broad discretion is that it should be exercised fairly. We do not see why it would not permit the Panel to allow the SCM to introduce evidence in support of the Charge which is additional to that which accompanied the Charge when it was first served provided that it is not unfair to do so and the Club is not prejudiced thereby.

## F. THE SUBSTANCE OF THE CHARGE

### Salary Cap Year 2016/17

147. There are two principal matters at issue in relation to this SCY. Both of them relate to property co-investments with Players by Connected Parties of Saracens. They are (i) capital contributions to the purchase of properties ("Capital Contributions") and (ii) contributions to capital expenditure for renovation and refurbishment ("Capex Funding"). Although there are differences between the two types of transaction, it seems to be common ground that these are not material to the issues that we have to decide.

148. PRL alleges an overspend of £1,134,968.60 (after deduction of the audited headroom of £335,484). The Club contends that, on the proper application of the Regulations, there was no overspend and no breach.

149. The entirety of the alleged overspend arises from approximately £1.3 million of funding provided by way of Capital Contributions and Capex Funding in respect of the property investments referred to in Mr Rogers' witness statement that accompanied the Charge.

***Capital Contributions (totalling £923,947.63)***

150. The most substantial category of payment is the Capital Contributions provided by Mr Wray (who is the majority shareholder of Saracens) to special purpose companies used for the joint purchase of investment properties by him and Players. The payments were made to companies jointly owned with the following Players in the following amounts:

(i) [redacted] £451,188.92;

(ii) [redacted] £219,932.36;

(iii) [redacted] £252,826.35.

151. Before we consider the details of these investments, we should refer to what Mr Rogers says at para 125 of his first statement:

> "…all the arrangements described below that have been entered into with the players are designed to benefit them in a way additional to their normal remuneration as a Saracens player. None of the arrangements would have been made with them if it were not for the fact that they were Saracens players. The arrangements are designed to provide additional reward for playing for Saracens… There has been a concerted and deliberate attempt to create structures that supposedly take that reward outside the ambit of Salary, for the purposes of the Regulations. That attempt is however misconceived…"

152. At para 22 of his witness statement, Mr Wray strongly disputes this characterisation of the nature and purpose of these co-investments. He says that he entered into:

> "bona fide commercial transactions with a number of Players (and/or Connected Parties of Players) based on the merit of those investments, not, as PRL suggests, in order to provide an additional reward to players for playing their rugby at the Club. While it is important to me to help the Club's Players prepare for a life outside rugby and it is certainly the case that where I know and trust an individual, I am more favourably disposed to an idea they pitch to me and to entering into a business relationship with them, my motivations when making investment decisions are ultimately always commercial…."

153. We now consider the payments made to purchase properties with [redacted] has a total issued share capital of [redacted] Its shareholders are [redacted] and Mr Wray. It is not in dispute that [redacted] is a Connected Party of [redacted].

154. On 17 May 2019, Saracens disclosed to Mr Rogers a document dated "[redacted]" and titled "*Joint Venture Agreement relating to* [redacted]" ("the JVA"). The parties to the JVA are [redacted] (the Joint Venture Company ("JVC")), Mr Wray, [redacted]. Clause 5.3 of the agreement provides that [redacted] responsible for providing 66.6% of the required property finance for each Project and Mr Wray is responsible for providing 33.3% of the required Property Finance for each Project interest free.

155. In short, the property arrangements between the parties operate in the following way:

(i) The JVC buys a property not to be lived in by the Player [redacted] but as an investment. The JVC enters into a mortgage for a proportion of the purchase price of the property, guaranteed by the Player and secured by a first charge and pays the mortgage instalments out of the rent received;

(ii) Mr Wray makes a loan to the JVC, protected by a second charge, which the JVC uses to pay the remainder of the purchase price. Capex Funding is also loaned by Mr Wray to the JVC for improvements to the property: the Player is not required to contribute to the costs of improvement; and

(iii) Under clause 6.4 of the JVA, on sale the mortgage is discharged first; and, after that, the Capital Contribution loan from Mr Wray is repaid followed by repayment of the Capex Funding loan from Mr Wray for the improvements. Only then are any residual proceeds of sale distributed to the shareholders pro rata to their shareholdings.

156. The effect of these arrangements is that, once the mortgage has been discharged, the Player's risk ceases. It is likely that the property would have to suffer a

significant drop in value for there to be insufficient money on a sale to repay the mortgage. It is only once the mortgage had been repaid (and the Player's risk as guarantor ceases) that Mr Wray is repaid the loan he has made for the purchase and then any loan he has made for the improvements. It is, therefore, Mr Wray who bears the risk of any negative equity. Any drop in value is a loss for him.

157. In his first witness statement (that accompanied the Charge), Mr Rogers considered the funding of the purchase by [redacted] of two properties, namely [redacted] and [redacted]. The purchase price of [redacted] after costs was £689,991.29 which was funded as to £471,433 on mortgage by [redacted] and as to 218,557.91 by Mr Wray. The purchase price of [redacted] after costs was £677,369.08, which was funded as to £442,968.75 on mortgage by [redacted] and as to £232,631.01 by Mr Wray.

158. In formulating the Charge, Mr Rogers said that in his assessment the Capital Contributions to the purchase price of the two properties made by Mr Wray were loans "*within the ordinary meaning of Schedule 1 para 1(d)*": see para 165 of his first statement. They were interest free. As loans, they were prima facie Salary, since there was no obligation on [redacted] to repay the monies advanced by Mr Wray within the SCY in which they were paid (para 169 of Mr Rogers' first statement). They were repayable in priority to the distribution of the proceeds of sale of the properties pro rata to the parties' shares. He therefore concluded that the sum of £451,188.92 was to be treated as having been loaned to a Connected Party of [redacted] in SCY 2016/17.

159. At para 171 of his statement, Mr Rogers states: "*In addition, I believe this payment would be a benefit in kind pursuant to Schedule 1 paragraph 1(p) to the Regulations".*

160. Saracens says that the correct analysis is that Mr Wray's loan to the company is caught by para 1(d) of Schedule 1 (i.e. is a loan pursuant to which the Player is not obliged to repay the full sum in the SCY in which it was made). It accepts that the loans were in each instance an "*other individual arrangement between a Player (or*

*any Connected party of a Player) and any Connected Party of the Club or a Third Party"* within the meaning of para 2(a) of Schedule 1."

161. Saracens has two arguments in relation to Mr Rogers' reliance on para 1(d). First, it says that Mr Rogers failed to apply his mind to whether the payments should be excluded from Salary under para 2(a). The decision to treat them as Salary is, therefore, vitiated by his failure to follow the decision-making process mandated by the Regulations. Secondly and in any event, having regard to the factors stated in para 2(a), the Capital Contributions made by Mr Wray should have been excluded.

162. As regards Mr Rogers' reliance in the alternative on para 1(p), Saracens says that Mr Rogers provides no justification for valuing the "*benefit in kind*" as being the full principal amount of the loan to the company, since (i) the loan is repayable and (ii) the Player does not own 100% of the company in any event.

***Does Mr Rogers' approach vitiate his conclusion on the application of para 2(a)?***

163. Saracens places some reliance on the fact that Mr Rogers says nothing in his first statement about para 2(a). But in his second witness statement, he says:

> "105. I confirm that, in making my assessment as to whether [the Capital Contributions and Capex Funding] should be included as Salary, I did have paragraph 2(a) of Schedule 1 to the Salary Regulations in mind. Having enforced the Regulations now for nearly a decade, I am intimately aware of their content and that the majority of the paragraph 2(a) factors do not apply to a loan being made in these circumstances, or are not a natural fit…
>
> 106. For these reasons, it is fair to say that I gave paragraph 2(a) less detailed consideration in these circumstances than I would a sponsorship, endorsement, merchandising or employment arrangement…This is not least as the paragraph 2(a) factors are not a natural fit with, and have little application to loans…"

164. Mr Rogers explains at para 30.1 of his first statement that, without para 1(d) of Schedule 1, a Club could loan money to a Player on the informal understanding that the Club would never seek to recover the money from the Player. This would

be an easy way to circumvent the Salary Cap which would be extremely difficult to police.

165. At para 108 of his second statement, he says that the loans pursuant to the joint venture agreements illustrate this well. The company is lent money by Mr Wray to purchase a property. At some point in the future, presumably either the property is sold or one party buys the shares of the other. This could be years down the line. He says that he cannot police in the future whether, for example, (i) the shares were purchased at market value, (ii) Mr Wray actually required the company to repay the loan or (iii) interest was applied on commercial terms.

166. Despite his opinion that the para 2(a) factors are *"a bad fit"* for loans, Mr Rogers says at para 115 of his second statement that he has reconsidered these factors in so far as they relate to Capital Contributions and has maintained his assessment. The following are the salient points that he makes.

167. The arrangements are with Connected Parties of Saracens and are therefore more likely to be considered Salary (factor (i)). The arrangements were in each case made with one or more directors of Saracens and Mr Wray (its majority shareholder) and not negotiated at arm's length from the Club (factor (ii)). Mr Rogers accepts that he does not have evidence of obvious temporal connection between the agreements and the Players' playing contracts (factor (iii)). On the material available to him about the nature of the arrangements, it is difficult for Mr Rogers to apply factors (iv) and (v) because it is difficult to identify clear obligations on the part of the Player that are truly distinct from Saracens. Saracens' position is that factor (vi) (Player obligations under the arrangement "*either wholly or partly at the direction of the Club*") points to the arrangements being Salary because the Player has no obligations arising from or in relation to the investments that were required to be carried out at the direction of the Club. Mr Rogers says that the Player has no readily identifiable obligations such as he would have, for example, if he were providing a service. To the extent that the Player does have obligations under the agreements, they cannot be completely divorced from any direction from Saracens. This is because one or more of the directors and Mr Wray have contractual rights to which the Player is subject.

168. Factors (vii) and (viii) have no application.

169. As for factor (ix), Mr Rogers considers that these co-investments are not "*on terms typical of commercial contracts of that type*" (so as to make them less likely to be considered Salary). Saracens says that these arrangements are economically very similar to other co-investments that Mr Wray has with Players, where the money is invested directly in the property and which is not treated as Salary by Mr Rogers. It says that the commercial risks and rewards for Mr Wray and the Player are similar in each case.

170. Mr Rogers disagrees. The differences are set out in detail at para 156 of PRL's Opening Written Submissions. It is not necessary to go into the detail here. Mr Rogers points to the effect of the arrangements under the JVA (summarised at para 156 above). He says that they remove any real risk from the Player, who never provided any money and yet stood to gain from an increase in value of the property. His only exposure was as a guarantor of the mortgage. As the mortgage was only between 70% and 79% of the original price, the property would have to drop in value by between 21% and 30% before the resale price failed to discharge the mortgage. It was, therefore, very unlikely that the Player would be called upon to pay anything under the guarantee. By contrast, any drop in the value of the property would leave Mr Wray out of pocket. Indeed, even a rise in value of less than the Capex Funding (which was typically around £230,000) would leave him out of pocket. In short, Mr Rogers says that the JVA is not typical of commercial contracts of this type because the risks between the parties are weighted heavily against the Saracens Connected Party.

171. As for factor (x) (whether the term of the arrangement is different to the term of the Player's player contract with the Club), Mr Rogers accepts that there is no term for the JVA. But he says that the arrangements have only been put in place while the relevant Player is a Club player and can end when he ceases to be a Club Player. He has concluded that the difference in terms is of little indicative value.

172. Mr Rogers says that factor (xi) (if a servant or agent of the Club was involved in securing for the Player the benefit of the arrangement, it is more likely to be

considered Salary) plainly applies. The provider of the benefit was a director (and owner) of the Club.

173. He also says that factor (xii) (the existence of similar arrangements with other players) applies and points in favour of the benefit being Salary.

174. Factor (xiii) (Player promoted as a sportsman associated with the Connected Party) has no application here.

175. Factor (xiv) (counterparty connected to a Club sponsor) has no application here either.

176. As regards factor (xv) (remuneration payable to the Player exceeds market value of services to be provided by the Player pursuant to the arrangement), Mr Rogers says that this has no application to a loan because the Player provides no services. In any event, he says that the points he makes in relation to factor (ix) are relevant here too. A loan as part of an arrangement that provides a Player with something for nothing and involves him in no risk, but exposes the Connected Party to risk, is not at market value.

177. Finally, at para 115.15 of his second statement, Mr Rogers says that the following are matters which were relevant and which he was entitled to take into account in his application of factor (xvi).

(i) The arrangements were concealed from him and were not contemporaneously disclosed as required by Regulation 4.4;

(ii) In view of the difficulty of policing whether a loan has been repaid in the long term, there are clear and significant policy reasons for prohibiting loans in their full amounts;

(iii) The Capital Contributions and Capex Funding arrangements have been entered into only with certain Players at Saracens. This selective approach is not consistent with Saracens' stated rationale that the arrangements concern

the provision of long term career support. If that were the case, he would have expected similar arrangements to have been entered into with all the Players; and

(iv) The timing of the incorporation of more than one JVC is not suggestive of an organic idea originating from a Player, but rather of a scheme entered into by Saracens with certain key Players.

178. As we have said at para 146 above, Regulation 12.4 allows us to exercise our discretion to allow Mr Rogers to introduce additional evidence in support of the Charge provided that it is not unfair to Saracens to do so. No material has been placed before us to demonstrate that it would be unfair to take account of what Mr Rogers says in his second statement in relation to Capital Contributions (or Capex Funding). We propose to take it into account.

***Our conclusion on the Capital Contributions***

179. We are satisfied that these Capital Contributions were Salary. We do not base our decision on a conclusion as to the motive or purpose of the payments. It is unnecessary for us to express a view on whether, as Mr Rogers has said at para 125 of his first statement, "*there has been a concerted and deliberate attempt to create structures that supposedly take that reward outside the ambit of Salary".* We prefer to focus on the true meaning and effect of the arrangements. It is (rightly) accepted by Saracens that the Capital Contributions were loans which fall within Schedule 1 para 1(d) and were therefore to be included in Salary unless excluded under para 2(a).

180. It follows that the only question is whether the dispute as to whether Mr Rogers reasonably concluded on the balance of probabilities that they should not be excluded under para 2(a) should be resolved in Saracens' favour. We reject Saracens' challenge to the exercise performed by Mr Rogers in his second statement. Mr Rogers was reasonably entitled to analyse the sixteen factors in the way that he did and to conclude that the balance of the factors came down in favour of treating the Capital Contributions as Salary. In particular, he was

reasonably entitled to disagree with Saracens' characterisation of the payments as commercial transactions based on the merit of the investments, and not an additional reward to Players for playing their rugby at Saracens. In reaching his conclusion, he was reasonably entitled to rely in particular on his assessment that, in respect of the Capital Contributions made pursuant to the JVA, "*the parties do not share the risk in the manner of an equity contribution*" (para 118 of his second statement).

181. Saracens criticises Mr Rogers' approach to loans. It says that he failed to appreciate that there is a fundamental distinction between sham loans (which the Regulations must capture as Salary) and genuine loans that are intended to be and are repaid. It contends that Mr Rogers misses the point that, as long as the loan is genuine, there is no transfer of value when the loan is made: the benefit of the loan is off-set by the dis-benefit of the obligation to repay (together with interest). Saracens says that the correct analysis is that the loan to the JVC is caught by para 1(d), but excluded from Salary under para 2(a). In reality, the effect of the loan was not to give any value to the Player at all, since the company had a nil asset value as a result of the loan.

182. We cannot accept this criticism. Para 1(d) of Schedule 1 clearly states that a loan pursuant to which the Player is not obliged to repay the full sum within the SCY is Salary. The only question for the SCM is whether he should reasonably conclude for some reason that the loan should not be considered as Salary. As we have earlier stated, this is not a hard-edged decision, but calls for an exercise of judgment taking into account the sixteen factors. In our view, Mr Rogers was reasonably entitled to conclude that the loan was of benefit to the Player, even if the value of the benefit could not be precisely quantified because it would depend on whether the property or properties purchased appreciated in value. He did not have to value the benefit to the Player. Moreover, he was reasonably entitled to take into account the policy reasons for not excluding loans to which we have referred at para 177 (ii) above.

183. If it were necessary for us to substitute our own judgment for that of Mr Rogers in weighing the sixteen factors in para 2(a), we would reach the same conclusion as

he did. It seems to us that, for the reasons that he has given, the factors pointing towards treating the Capital Contributions as Salary heavily outweigh those pointing the other way. Standing back from the detail, it seems to us to be clear that these transactions (which were very favourable to the Players) would not have taken the form that they took if the counterparties had not been selected Players of Saracens. Mr Rogers was not only reasonably entitled, but right, to take the view that these were not ordinary arm's length transactions between commercial parties.

184. It is, therefore, unnecessary to deal with Mr Rogers' alternative position that the Capital Contributions qualify as Salary under para 1((p) of Schedule 1 as a "*benefit in kind which the Player would not have received if it were not for his involvement with the Club".*

***Capex Funding for renovations and refurbishment (total £363,404.97)***

185. Although there are differences of detail between the Capital Contributions and the Capex Funding, they are not material to the question of whether the funding was Salary. The Capex Funding in SCY 2016/17 relates to [redacted]

186. For the reasons that we have given in relation to the Capital Contributions issue, we conclude that Mr Rogers was not only reasonably entitled, but right, not to exclude them from Salary.

187. There are two remaining disputed issues in relation to SCY 2016/17, being [redacted] and MBN.

[redacted] ***Option to Purchase (£23,950)***

*The facts*

188. [redacted] was a Saracens player between [redacted], during which period he also played [redacted].

189. In [redacted] Mr Wray purchased a property, [redacted] for £655,000. At the time of the purchase Mr Wray also granted [redacted] an option to purchase 50% of the property for £341,818.79 plus 50% of any money that was spent on the property going forward. The option could have been exercised at the above price even if the value of the property had increased. If the value of the property had decreased, [redacted] could have declined to exercise the option.

190. In SCY 2015/16 Mr Rogers assessed the value of the option at £23,225 and included it as Salary in that year. That assessment appears to have been accepted by Saracens. Indeed, Mr Velani accepted that the option should be accounted for as Salary in SCY 2015/16 (Transcript Day 4 page 88, lines 4 to 7).

191. In [redacted], Mr Wray further granted an assured shorthold tenancy to [redacted] permitting him and his partner to live in the property for a monthly rental of £2,487.58.

192. The property was sold in [redacted] for £770,000. At the point of the sale, [redacted] exercised the option (to purchase 50% of the property) at the agreed price of £341,818.79.

193. Prior to the point of sale, [redacted] had spent £38,744.71 by way of capital expenditure to improve the property.

194. After allowing for the costs of sale, [redacted] received £32,994.52 on the sale of the property, leaving a deficit of £5,780.19 as against the money he had spent on capital contributions.

195. Saracens had not formally fully disclosed a copy of the option agreement, but had merely allowed Mr Rogers to review a copy of it in Mr Wray's office in 2015 as part of the process that led to Saracens entering into the settlement that year, which is referred to at paras 9 to 11 above. Mr Rogers was not allowed to take a copy of the option agreement away with him to further consider it.

196. Similarly, the payments in respect of [redacted] capital expenditure were not disclosed contemporaneously, but only as a result of the current investigation.

197. Mr Rogers considers that the grant of the option to [redacted] falls to be considered as Salary pursuant to Schedule 1, paragraph 1(p) of the Regulations, viz *"Any payment or benefit in kind which the Player would not have received were it not for his involvement with a Club.*

198. Following his assessment of the option in SCY 2015/16, and having obtained an updated valuation of the property from *Zoopla*, Mr Rogers assessed the value of the option falling within Salary for SCY 2016/17 as £23,950.

199. Although not relevant for SCY 2016/17, it is convenient to complete the story by adding that, when the property was sold in [redacted] Mr Rogers further considered that the payment made by Mr Wray to [redacted] of £32,994.52 should be included as Salary in SCY 2017/18.

200. Since the benefit in relation to the option in SCY 2016/17 had been assessed at £23,950 and included as Salary that year, this left a balancing payment of £9,044.52 which was included as Salary within SCY 2017/18.

*The issue*

201. Saracens disputes that the option, or the payment subsequently made to [redacted] were Salary pursuant to Schedule 1, para 1(p). In its submission, the approach adopted by Mr Rogers is wrong in principle. It says [redacted] did not profit from the option agreement. He made a small loss. As noted, [redacted] had spent £38,244.71 on improvements to the property, but only received £32,944.52 by way of his share in the equity following the sale. Accordingly, in Saracens' submission, no Salary should be attributed to the grant or exercise of [redacted] option. Mr Rogers was wrong to look only at the increased value of the property, ignoring the fact that this was the result of the capital expenditure that was 50% funded by [redacted] It is commercially unreal to ignore this element of the bargain. In short, the option was not a "*benefit in kind*" within the meaning of Schedule 1 para 1(p).

202. Accordingly it is for the Panel to determine whether:

(i) the option granted to [redacted] should be considered as Salary for the purposes of SCY 2016/17; and

(ii) the payment made to [redacted] should be considered as Salary for the purposes of SCY 2017/18.

*Our conclusion*

203. We reject Saracens' challenge to Mr Rogers' decision for the reasons given by him which are supported by PRL. The fundamental point is that the SCM is required to determine Salary within each SCY. He cannot wait to see what happens in a later SCY before determining it. The scheme created by the Regulations does not admit of a "wait and see" approach. Thus for the SCY 2017/18, Regulation 4.3 provides for a Club to provide the SCM between 1 and 30 September 2018 with a copy in the prescribed form of Certification which includes *"the total amounts paid or payable provided or to be provided as Salary in the preceding [SCY]…"* If the SCM was required or permitted to wait until possibly long after the end of the SCY before determining Salary, the scheme (which is based on determinations of Salary on a SCY to SCY basis) would not work. Mr Rogers explains that a "wait and see" approach would be difficult to police, especially in relation to players once they had left their club.

204. In a sense, Saracens is right to say that the somewhat unusual facts relating to [redacted] show that this approach can produce results which are commercially unreal. But in our view, Mr Rogers' interpretation of the Regulatory scheme is correct. He was required to assign a value to the option each year. The fact that [redacted] chose to pay for improvements (the cost of which exceeded the gain on the option) is not relevant to the value of the option itself. The value of the option is linked to the value of the property and nothing else.

205. Even if, contrary to our opinion, the approach adopted by Mr Rogers was not mandated by the Regulations, it was an approach that he was reasonably entitled

to adopt. For completeness, we should add that Saracens has not submitted that the option and payment should have been excluded pursuant to Schedule 1 para 2(a) of the Regulations.

***MBN Promotions (£30,000)***

*The facts*

206. MBN Promotions ("MBN") was, at the relevant time, the trading name of Premier Team Promotions Limited. MBN is a hospitality business providing companies with the opportunity to purchase tables at marketing and networking events. It is owned by Tony and Lucy Mercey. Mrs Mercey is Mr Wray's daughter and, since July 2018, has been a director of Saracens.

207. MBN has its office premises at Allianz Park Stadium, which is also Saracens' operations base. From March 2018, MBN further assumed responsibility for all commercial aspects of Saracens. It has been in business for a number of years and has engaged a large number of international sportsmen to appear at corporate hospitality events, including many Saracens players, among them [redacted]

208. It is common ground that MBN has paid the following amounts to [redacted]

- SCY 2016/17 - £30,000.
- SCY 2017/18 - £30,000.
- SCY 2018/19 - £35,000.

209. Saracens failed to disclose a copy of the agreement said to have been entered into between MBN and [redacted] and no evidence was provided by Saracens to show any events that [redacted] had in fact attended. Mr Velani accepted in oral evidence that, as MBN was a Connected Party for the purposes of the Regulations, the payments to [redacted] should have been disclosed to Mr Rogers. This was an oversight, for which Saracens, through Mr Velani and Mr Wray, apologised.

*The issue*

210. It is common ground that the payments to [redacted] all fell to be considered as Salary pursuant to Schedule 1, para 1(j) of the Regulations, viz: *"Any payment in connection with promotion, media or endorsement work".*

211. Saracens however submits that the payments were arm's length commercial transactions made by an independent party for the provision of services by [redacted] and that Mr Rogers gave unreasonable weight and/or failed to have reasonable regard to the factors set out in para 2(a) of Schedule 1. Had he done so, the payments would have been excluded for the purposes of determining total Salary in each of the three SCYs concerned. The issues that arise are the same for each of the SCYs.

212. Before we consider Saracens' submission further, we need to set out the reasons given by Mr Rogers for his conclusion. These are to be found at para 314 of his first statement and paras 85 to 89 of his second statement. In his first statement, he states that he has taken into account all of the para 2(a) factors and identifies the particular factors that have led him to conclude that the MBN payments to [redacted] were Salary. These are:

(i) The arrangement was with a Connected Party and the payments were therefore more likely to be considered Salary (factor (i));

(ii) It did not appear that the remuneration under the arrangement was payable to [redacted] as and when he performed services for MBN, but rather was paid as a lump sum and was therefore more likely to be considered Salary (factor (viii));

(iii) MBN had entered into similar arrangements with other Saracens players and they were therefore more likely to be considered Salary (factor (xii));

(iv) So far as Mr Rogers could tell, [redacted] was not promoted by MBN as a sportsman associated with MBN, but rather as a Player from Saracens so that the payments were more likely to be considered as Salary (factor (xiii)); and

(v) As of March 2018, Premier Team Promotions Limited entered into a commercial joint venture with Saracens whereby it would take on responsibility for all commercial aspects of Saracens (factor (xvi)).

213. At para 88 of his second statement, Mr Rogers has carefully reconsidered the Schedule 2(a) factors. We need to summarise what he says:

(i) Mr Rogers places particular weight on the fact that MBN is a Connected Party of Saracens. MBN has extremely close connections with Saracens: the Schedule 2(a) factors were only extended to include Connected Parties (as opposed to Third Parties) "*in exceptional circumstances*" and this makes it more likely to be considered Salary (factor (i));

(ii) There is no evidence that the arrangement was negotiated at arm's length from Saracens. MBN and Saracens are extremely closely connected. The arrangement is not set out in a written contract. The lack of a written contract is of itself most unusual and runs counter to the suggestion that the arrangement was negotiated at arm's length, rather, it is indicative of an arrangement between two very closely Connected Parties which makes it more likely to be considered Salary (factor (ii));

(iii) In the absence of a written contract, it is difficult to be sure whether the arrangement was negotiated at around the same time as [redacted] Playing Contract. Mr Rogers is, however, aware that [redacted] signed a new contract with Saracens in [redacted] and that a payment of £30,000 was made by MBN to him on [redacted]. Saracens has not provided any evidence as to when this sum was negotiated or discussed. In the opinion of Mr Rogers, it is unlikely that the negotiations for a new Playing Contract were not underway about a month before the contract was concluded. The MBN payment is therefore more likely to considered Salary (factor (iii));

(iv) MBN is very closely connected to Saracens. Against this background, Mr Rogers considers that the obligations of [redacted] are linked to Saracens by virtue of MBN's status as a Connected Party (factor (iv));

(v) There is no suggestion that the obligations of MBN are linked to Saracens: this makes it less likely that the payment should be considered as Salary (factor (v));

(vi) Since MBN is closely connected with Saracens, Mr Rogers considers that Saracens has an influence over [redacted] obligations under the arrangement with MBN: this makes it more likely that the payment should be considered as Salary (factor (vi));

(vii) The fact that [redacted] is not obliged to perform his obligations to MBN in Saracens playing kit or apparel makes it less likely that the MBN payment will be considered Salary (factor (vii));

(viii) The remuneration is paid as a lump sum and not as and when services are performed for MBN: in Mr Rogers' experience, this is unusual and makes it more likely that the payment should be considered as Salary (factor (viii));

(ix) The arrangement is not on terms typical of commercial contracts of this type: this makes it more likely to be considered Salary (factor (ix));

(x) It is most unusual not to have a written contract which would set out the term of the arrangement. There is no evidence to support Saracens' suggestion that the contract is on a rolling yearly basis or that the term of the arrangement is different from that of [redacted] Playing Contract. This makes it more likely that the MBN payment should be considered Salary or, at the very most, is neutral (factor (x));

(xi) It is a reasonable assumption that MBN (i.e. an agent of Saracens) was involved in securing the benefit of the arrangement for [redacted] this makes it more likely that the payment should be considered Salary (factor (xi));

(xii) Saracens has entered into similar arrangements with other players of the Club: this makes it more likely that the payment should be considered Salary (factor (xii);

(xiii) Mr Rogers maintains his opinion (summarised at para 210 (iv) above) in relation to factor (xiii);

(xiv) He acknowledges that MBN is not a Connected Party of any Club sponsor, but this factor does not carry weight here since MBN is a Connected Party of the Club in any event;

(xv) Mr Rogers is of the view that the remuneration payable by MBN to [redacted] exceeds the market value for the services that he provides. In reaching this conclusion, he has made comparisons with sums paid to other players. This makes the payment made by MBN more likely to be considered Salary (factor (xv)).

214. Mr Rogers has also reconsidered factor (xvi) and considers the following to be relevant:

(i) The arrangement was concealed from him and was not contemporaneously disclosed as required by Regulation 4.4;

(ii) The connection between Saracens and the arrangement is very close; and

(iii) Given the closeness of the relationship, one would expect Saracens to show how this was a genuine arrangement. However, there is no written contract and the arrangement was concealed from him for years. Saracens has made no attempt to show how or when the arrangement was negotiated, how the figure was arrived at and when (and whether) [redacted] fulfilled each of the obligations for which he was paid.

215. Saracens submits that we should reject Mr Rogers' conclusion. It says that PRL accepts that MBN has entered into arm's length promotional agreements with

hundreds of other sportsmen, including other Saracens players, but inexplicably singles out the agreement with [redacted] and treats payments made to him as Salary. It says that these payments did not involve a transfer of value to [redacted] *in return for playing for Saracens.*

216. It also criticises Mr Rogers' evaluation of the para 2(a) factors as "*misconceived*" because he has applied a test of "*exceptional circumstances*" and has wrongly assessed the current relationship between MBN and Saracens, rather than assessing the relationship at the time when [redacted] made the agreement with MBN in 2016. Saracens also criticises Mr Rogers for relying on its failure to adduce evidence to refute allegations that he did not make in the Charge: this is to mistake the nature of the Charge process under Regulation 12 and is unfair.

*Our conclusion*

217. In the light of what we have said in Section E above, we can deal with this quite shortly. It is true that Mr Rogers has said that the Schedule 2(a) factors were only extended to include Connected Parties "*in exceptional circumstances*". We repeat what we have said at paras 142 and 143 above. We do not consider that this statement undermines the exercise that Mr Rogers has performed of considering and weighing each of the sixteen factors. Where his judgment is that a factor militates in favour of Salary he says so; and where he considers that a factor militates against Salary (or is neutral), he says that too. He has gone through the exercise factor by factor and with some care. Where a payment is made or a benefit is conferred on a Player by a Party that is a Connected Party of a Club, Mr Rogers is entitled to give that fact particular weight in deciding whether the payment of benefit should be considered Salary.

218. Provided that he has conducted the exercise reasonably, there is no basis for the Panel to substitute its own judgment. We repeat what we have said at paras 131 to 134 above.

219. In our view, the weighing exercise performed by Mr Rogers led to a conclusion that fell within the range of reasonable decisions. We add that we would have reached

the same conclusion if we had been deciding the issue for ourselves on the material before us uninfluenced by Mr Rogers' decision.

220. We do not consider that the criticisms made by Saracens undermine Mr Rogers' conclusion. Although he used the expression "*exceptional circumstances*", we do not consider that he has applied a discrete test of exceptionality. He has applied the para 2(a) factors in an appropriate manner.

221. He has not limited his application of the factors to a consideration of the current relationship between MBN and Saracens. He was entitled to take the current relationship into account as a relevant factor when determining the Salary in each of the relevant years, particularly in view of the limited evidence that Saracens placed before him.

222. It was not unfair or inappropriate for Mr Rogers to rely (to the limited extent that he did rely) on the fact that, in breach of Regulations 4.4 (duty to provide contracts and documents) and 4.8 (duty to co-operate), Saracens did not provide him with evidence as to the details of the arrangement with MBN.

223. For these reasons, we reject Saracens' challenge to the inclusion of the MBN payment of £30,000 in SCY 2016/17. For the same reasons, we reject the challenge to the inclusion of the payments of £30,000 in SCY 2017/18 and £35,000 in SCY 2018/19.

**Salary Cap Year 2017/18**

224. There are three main transactions at issue here:

(i) [redacted] buy-out of a 20% stake that Mr Wray and Mr Silvester (also a director of Saracens) held in his home at [redacted] The amount at issue is £319,600.76;

(ii) the exercise by [redacted] of the option to purchase 50% of his home from Mr Wray to which we have already referred. The amount at issue in SCY

2017/2018 is £9044.52. For the reasons that we have given at paras [201] to [203] above, we reject the challenge to the inclusion of £9044.52 in Salary; and

(iii) a further sum of £19,000 in respect of Capex Funding, which for the reasons stated at paras 186 and 187 above should be included in Salary.

225. If Saracens succeeds in relation to the first transaction, there is no overspend in this SCY.

[redacted] ***(£319,600.76)***

*The facts*

226. [redacted] played at Saracens between [redacted], during which time he gained [redacted]

227. In [redacted], Mr Wray and Mr Silvester purchased a property, [redacted] together with [redacted] This was a house in which he lived with his partner. The purchase price was £1,350,000, with additional Stamp Duty and incidental costs amounting to £81,251.40.

228. Mr Wray and Mr Silvester each provided 10% of the purchase price (£135,000) and 10% of the additional costs being (£8,125.14). The 80% balance of the purchase price (£1,080,000) and additional costs (£65,001.12) was provided by [redacted] principally through a mortgage and in part by cash. [redacted] was entered as the registered proprietor of the property on [redacted] It is common ground that [redacted] has since made all relevant mortgage repayments.

229. This arrangement was disclosed to Mr Rogers in [redacted]. He determined for the purposes of SCY 2015/16 that [redacted] had been provided with a benefit falling to be regarded as Salary for the purposes of Schedule 1, paras 1(g) (any accommodation or holiday cost) and (p) (any payment in kind which the Player would not have received if it were not for his involvement with a Club). He

calculated the benefit on the basis of 3% per annum of the 20% of the price which [redacted] had not paid. This amounted to £8,100. That assessment appears not to have been challenged by Saracens at that time. Mr Rogers explained at para 98.2 of his first statement that, as [redacted] was living in the property, he was benefiting from the whole of it, but had only paid for 80% of it.

230. On 17 May 2019, in consequence of the investigation leading to these proceedings, Saracens disclosed a Declaration of Trust in respect of the property, which was dated [redacted].

231. In summary, this Deed provided that [redacted] held the property on trust to sell it and to hold the proceeds of sale (including any rents received prior to the sale) as tenants in common, for himself as to 80%, Mr Wray 10% and Mr Silvester 10%.

232. Between [redacted] refurbishment work was carried out to the property at a cost of £234,223.43. The cost of this work was to be borne by [redacted] Mr Wray and Mr Silvester in accordance with their respective shares of ownership of the property.

233. In [redacted] Saracens advised Mr Rogers that [redacted] had purchased both Mr Wray's and Mr Silvester's 10% shares as at [redacted]. The background to this purchase was a market valuation obtained from [redacted] Estate Agents in the sum of £1,600,000. Saracens makes the point that, on an application of this valuation in accordance with the [redacted], Messrs Wray and Silvester would be entitled to a total of £320,000.

234. In fact, [redacted] agreed to pay £333,100.76. This buy-out is recorded in a Supplemental Deed dated [redacted]. The Supplemental Deed included the following provisions:

(i) Recital (7) records that, under the original trust deed, Messrs Wray and Silvester were entitled to £320,000;

(ii) Recital (6) records that a higher price had been agreed: "*The Owner has agreed to purchase the Contributors' share of the property for £333.100.76 being equal to the Contributors' total contribution…*"

(iii) Clause 1 sets out a schedule for the payment of £333,100.76 in monthly instalments of £13,500 (£6,750 to each of Messrs Wray and Silvester) and a final balancing payment of £9,100,76 on [redacted];

(iv) Clause 2 permits [redacted] to make accelerated payment relative to the payment schedule:

> "The Owner may at any time or times pay to Nigel and Dominic additional sums such that the date upon which the Owner will complete the purchase of the Contributors' share of the Property shall be brought forward" (emphasis added);

(v) Clause 3 provides that the 20% interest passes to [redacted] only upon payment of the final instalment:

> "Forthwith upon payment of the final instalment due to the Contributors pursuant to paragraph 1 above, the Contributors shall cease to have any legal or beneficial interest in the property or its proceeds of sale."

(vi) Clauses 4, 5 and 6 provide that Messrs Wray and Silvester would no longer be required "*to contribute towards the insurance premiums for the Property, the cost of repairs and any capital improvements*", with [redacted] agreeing to have sole responsibility for such costs;

(vii) Clause 8 states:

> "[redacted] has agreed to purchase the Contributors' share of the Property for £333,100.76 being equal to the Contributors' total contribution which sum shall be paid as between the Contributors as to £166,550.38 to Nigel and £166,550.38 as to Dominic".

235. It is common ground that [redacted] paid the first instalment as agreed pursuant to the Supplemental Deed, but thereafter, due to problems that it was understood had

arisen with regard to [redacted]

236. On [redacted] paid the outstanding sums of £159,800.38 due to each of Mr Wray and Mr Sylvester in full payment of the sums owing to them in respect of their shares.

237. Mr Rogers had to consider whether these facts disclosed a payment of Salary to [redacted] In his first statement, he set out the reasoning by which he concluded that there had been a payment of Salary of £319,600.76 in SCY 2017/18.

238. He sought advice from Mr Nijaj Patel, a partner of Saffrey Champness LLP, the accountants appointed pursuant to the Regulations. Mr Patel advised him that, according to generally accepted accounting principles, the instalments due under the Supplemental Deed were to be considered as a loan to [redacted] In substance, the Deed had resulted in the transfer for consideration of material risk and rewards from Messrs Wray and Silvester to [redacted] and the consideration had been funded by a vendor loan by them to him.

239. At para 432 of his first statement, Mr Rogers says:

> "Applying the advice from the accountancy experts, I assess that an obligation for [redacted] to pay a liability arose upon the parties entering into the [redacted] Supplemental Deed. That obligation arose in or around [redacted] and was discharged on behalf of [redacted] on [redacted]. Despite the deferred discharge of this obligation, [redacted] was transferred both the risk and rewards from Mr Wray and Mr Silvester. The rewards to [redacted] included the accrual of rental income from [redacted], which Saracens has confirmed [redacted] retained in full. Connected Parties of Saracens therefore conferred a benefit in kind on [redacted] as an Ex-Player, which was the dual benefit of acquiring a share of a revenue generating asset and being able to discharge his obligation to pay the consideration 8 months following the time at which it would otherwise have been due (i.e. the benefit of effectively being loaned the relevant amount)…"

240. On this basis, Mr Rogers assessed that the sum of £319,600.76 (being the total of the two payments of £159,800.38 due to each of Mr Wray and Mr Silvester) constituted Salary pursuant to Schedule 1, paragraph 1(s) of the Regulations i.e.:

> "Any payment or benefit in kind to an Ex-Player (other than supply to each Ex-Player of a maximum of four match tickets per Club match) which is not a bona fide payment for the provision of off-field services by the Ex-Player to the Club such as has been provided by the Ex-Player to the Club subsequent to the termination or expiry of his playing contract with Saracens".

241. Mr Patel gave evidence before us about this. He accepted that, if the proper construction of the Supplemental Deed was that the transfer of the 20% interest in the property did not take place until full payment, his loan analysis fell away. He said:

> "I think it would do. This is all on the basis that there's a transfer---risks and rewards all transferred at the point in time, at that very point in time, and no consideration was paid. There was a vendor loan noted. But if that wasn't the case, then yes." (Transcript Day 3 page 212, lines 8 to 20)

242. At paras 53 to 63 of his second statement, Mr Rogers has expanded on why he contends that the transaction represented a benefit in kind to [redacted] within the meaning of para 1(s). He sees no reason why a loan cannot be a benefit in kind. He summarises what he considers to be the correct position as follows at para 62:

(i) [redacted] agreed with Messrs Wray and Silvester that he would repay the exact sum that they had invested in the property ("*which is how the sum is explained in the contemporaneous documents and Saracens' letter earlier this year*"). There is no evidence that the increased price was interest for deferred payment;

(ii) The expert evidence states that the sum deferred was a loan: it cannot be disputed that [redacted] received property worth £319,600.76 in return for no immediate payment;

(iii) It was doubtful whether [redacted] would have been able to get such a loan elsewhere because (a) he already had a very significant mortgage on the property and (b) he would not have been able to meet any mortgage payments;

(iv) He "*benefitted the sum of £319,600.76 that he would not have been able otherwise to obtain*"; and

(v) The use of the property immediately passed to [redacted] as is clear from the fact that no rent was paid.

*The issue*

243. Saracens disputes Mr Rogers' approach and conclusion. In short, it says that the transaction represented an entirely arm's length commercial bargain by which Mr Wray and Mr Silvester received 4% more than their share of the value of the property in return for accepting payment in instalments over two years.

244. It contends that, on a proper construction of the Supplemental Deed, the 20% interest did not transfer from Messrs Wray and Silvester to [redacted] until final payment (which was due in [redacted], but in fact occurred in [redacted]). It follows that there was no loan and Mr Patel's analysis falls away. In any event, any benefit to [redacted] in being able to make delayed payment in accordance with Schedule 1 did not amount to a "*benefit in kind*" under para 1(s). That is because any benefit was cancelled out by the overpayment relative to the independent valuation. [redacted] was given time to pay, but he had to pay a slightly increased price in return. It is immaterial that the parties did not describe this as interest. The objective feature of the bargain was that delayed payment was offset by a higher price. The delayed payment did not, therefore, involve any net transfer of value to [redacted]. [redacted] would not obtain the 20% interest until he had paid the £319,600.76 to Messrs Wray and Silvester. In these circumstances, it is plainly wrong to characterise this sum as a benefit in kind.

*Our conclusion*

245. We do not find it necessary to decide whether, as a matter of law, the agreement for the sale to [redacted] of the 20% interest under which the interest would not be transferred to him until he paid the final instalment of the purchase price was a loan. That is because, as we have said, Mr Rogers has said that he regards the transaction as a "*benefit in kind*" for the reasons stated at para 242 above.

246. [redacted] undoubtedly received property worth £319,600.76 without having to pay for it during the period of deferment of payment of the price. We do not accept the Saracens analysis that the deferment of payment was a commercial arm's length transaction pursuant to which Messrs Wray and Silvester, in effect, received interest for the deferred payment. It is clear that the difference between £320,000 (based on the independent market valuation of £1,600,000) and the agreed price of £333,100.76 was not referable to interest over the period of the deferment. We refer to para 242 (i) above. Clause 8 of the Supplemental Deed also makes this clear. It expressly states that the purchase price was calculated by reference to the exact sum that Messrs Wray and Silvester had contributed, and not by reference to the value of the property, still less so as to account for interest due from [redacted]

247. It may seem unrealistic and even unfair to treat the whole of the £319,600.76 as Salary in SCY 2017/18 and not to take account of all the subsequent circumstances that are now known. But we accept the submission of PRL that under the Regulations, the SCM is charged with the task of determining Salary within a particular SCY without reference to future events. The most obvious example of this is the inclusion in Salary of loans within the meaning of Schedule 1 para 1(d).

248. In our view, Mr Rogers was right to treat the £319,600.76 as Salary in SCY 2017/18. In the alternative, we consider that he was reasonably entitled to reach this conclusion on the grounds that it was a benefit in kind. We therefore reject the challenge to the inclusion of £319,600.76 in respect of [redacted] and (for the reasons given earlier) the inclusion of £9,044.52 in respect of [redacted]

**Salary Cap Year 2018/19**

***[redacted] (£871,505.57)***

249. In this SCY, Saracens accepts that there is an overrun of £48,636.89 under Regulation 10 and it is common ground that it can elect to pay the automatic "overrun tax" of £24,381.45 under Regulation 10.3.

250. The difference between the admitted overrun and the overspend alleged by PRL (£883,615.49) is mainly attributable to the £800,000 that Mr Rogers identified as Salary on the basis of an alleged overpayment by Mr Wray, Mr Silvester and Mr Leslau (all of whom are Connected Parties to Saracens) for 30% of the shares in [redacted]

251. There is also a more limited issue in relation to payments made by MBN Promotions to [redacted]

252. The primary facts relating to [redacted] are not controversial:

    (i) The idea for the investment came from [redacted] accountant. He approached Mr Wray with a proposal that he invest [redacted] in the company;

    (ii) On [redacted], Messrs Wray, Silvester and Leslau agreed to buy a 30% stake for [redacted]; and

    (iii) In negotiating the purchase price, the investors made use of an independent valuation provided by PwC. The valuation was a draft, but in near final form in [redacted]. The valuation was formally signed off in [redacted].

253. Mr Rogers accepts that the share purchase was genuine, but he maintains that the true market value of the shares was [redacted], which was the mid-point in the range of valuations that PRL obtained from its accountants, Saffery Champness.

254. At paras 308 to 312 of his first statement, Mr Rogers explains how he arrived at his figure of £800,000 for overpayment. In June 2019, he sought advice from Mr Patel of Saffery Champness. Mr Patel produced a report showing how he arrived at an adjusted valuation range for the 30% shareholding in [redacted] of between [redacted] and [redacted] and a valuation of [redacted]. He also sought advice from Mr Elliott (who is a sports, media and entertainment consultant). Mr Elliott's report supported a valuation at the bottom end of the range advised by Mr Patel. Mr Rogers was aware of the PwC valuation which gave a valuation range of between [redacted] and [redacted] and a mid-point valuation of [redacted] for the shareholding. Relying on these valuations, Mr Rogers concluded that the true market value of the 30% shareholding was [redacted] and that the [redacted] paid was an overpayment in the sum of £800,000. This overpayment, therefore, fell to be treated as Salary.

255. Mr Leslau and Mr Wray have described in some detail in their witness statements how they arrived at the price that they were willing to pay and they both gave oral evidence as well. They both consider that [redacted] is likely to turn out to be a good price, although they recognise that there are risks involved. Mr Wray gave unchallenged evidence (witness statement para 79 and Transcript Day 4, page 139 line 4 to page 140 line 15) that, in reaching the view that [redacted] was an acceptable price to offer, he did not rely on the PwC report. He relied on it only in the sense of using it to provide an objective basis for negotiating down from [redacted] accountant's price of [redacted].

256. In the witness statement that accompanied the Charge, Mr Rogers relied on the valuation that he had received from Saffery Champness (and to a lesser extent on the valuation of PwC). In its response to the Charge, Saracens rejected the allegation of overpayment for the shares on the grounds that:

(i) Mr Rogers had failed to have any regard to the Schedule 1 para 2(a) factors;

(ii) Having regard to these factors, the payment for the shares should be excluded for the purposes of determining Salary; and

(iii) Mr Rogers' approach was wrong in principle for reasons which have been more fully developed in the evidence and argument before us and which we discuss below.

257. Mr Rogers responded to these points in paras 90 to 102 of his second witness statement. He says at para 92 that he did consider the para 2(a) factors and, having done so, chose not to exercise the power to exclude conferred on him. At para 94, he says that he has reconsidered the para 2(a) factors and maintains his position. Thus he says:

> "94.1 Factor (i): the arrangement to purchase the shares was with Connected Parties and was therefore more likely to be Salary;
>
> 94.2 Factor (ii): the arrangement was not at arm's length from Saracens. It was with directors and, in the case of Mr Wray, the owner of the Club and was therefore more likely to be considered Salary;
>
> 94.3 Factor (iii): the arrangement was entered into on [redacted] entered into a new Playing Contract on [redacted]. The two arrangements were negotiated at about the same time;
>
> 94.4 Factors (iv) and (v): these factors do not carry any material weight in the present circumstances;
>
> 94.5 Factors (vi) and (vii): these factors do not carry material weight;
>
> 94.6 Factor (viii): the remuneration was paid in a lump sum of [redacted] in [redacted] and not as and when services were performed. It was therefore more likely to be considered Salary;
>
> 94.7 Factor (ix): the arrangement was not on terms typical of contracts of the type because it was overvalued by £800,000. This was not normal or typical, but was highly unusual in rugby. It was therefore more likely to be considered Salary;
>
> 94.8 Factor (x): the arrangement was for a period of [redacted], whereas [redacted] playing contract was for a term of [redacted]. It was therefore more likely to be considered Salary;

94.9 Factor (xi): Messrs Wray, Silvester and Leslau are agents of Saracens and were, on their own evidence, involved in securing the benefit of the arrangement for [redacted] It is therefore more likely to be considered Salary;

94.10 Factor (xii): Mr Rogers did not understand Saracens to have concluded any similar arrangements with other players. This made is less likely that the arrangement should be considered as Salary;

94.11 Factor (xiii): this factor is inapplicable;

94.12 Factor (xiv): this factor does not fit in the present circumstances;

94.13 Factor (xv): [this is the overvaluation point which in the opinion of Mr Rogers "carries very significant weight"];

94.14 Factor (xvi): Mr Rogers also considered the following to be relevant:

(a) The arrangement was concealed from him by Saracens and not contemporaneously disclosed as required by Regulation 4.4; and

(b) The employment payments made to [redacted] were at an undervalue for a player of his ability and experience."

258. At para 95 of his statement, Mr Rogers says:

"In my assessment, when considering Schedule 1, paragraph 1(m) and (p) together with the Paragraph 2(a) Factors as a whole, the sum of £800,000 (representing the sum paid in excess of the true market valuation for the shareholding in [redacted]) constitutes Salary. In my view the payment of that additional amount is not something that would have been done by arm's length investors, and arose in the specific circumstances where the normal basis for remuneration of the player was low. Despite the requirements to report and the opportunity to consult with me, no step was taken to do so. It seems to me that the investors either must or ought to have known that they were overpaying, and that they overpaid anyway because the player was at the Club and was being underpaid normally (and I note that the [redacted] arrangement and the player's playing contract appear to have been being negotiated at around the same time). Whether the investors did or not, there was in my view plainly an overvaluation because the basis for the PwC valuation was incorrect and did not include factors that an arm's length investor would require before investing, and so arrived at too high a figure. Investors can take whatever

approach they want in other circumstances, and have valuations done on whatever basis, and ignore them entirely if they prefer, but they cannot do that when they are subject to the Regulations which treat payments from Connected Parties to players as salary unless I form the view under paragraph 2(a) that they should be excluded. This and all the other factors taken all together seem to me to be an entirely reasonable basis on which to form the view that this Connected Party transaction constituted salary under paragraphs 1(m) and (p) which should not be excluded from salary under paragraph 2(a)."

259. At paras 97 to 102, Mr Rogers explains in some detail why he considers that the employment payments made to [redacted] were an undervalue for a player of his ability and experience.

260. We therefore reject the submission that Mr Rogers failed to have regard to the para 2(a) factors. He says that he did so at the time. He has elaborated on his consideration of the factors in these proceedings. Saracens has not been prejudiced by the admission into evidence of this elaboration.

261. The fundamental point made by PRL is that it was plainly not unreasonable for Mr Rogers to decline to exclude the overvalue of £800,000 from Salary. With two exceptions, Saracens does not challenge Mr Rogers' analysis and application of the para 2(a) factors. The exceptions are (i) the alleged overvalue of £800,000 itself; and (ii) Mr Rogers; statement that the employment payments made to [redacted] were at an undervalue.

262. The central question is whether it was reasonably open to Mr Rogers to decide that the shares were overvalued to the extent of £800,000. The words in para 2(a) of Schedule 1 that we have underlined at para 122 above must be given proper effect. This means that we have to allow the SCM a margin of appreciation. It is not for the Panel to substitute its valuation as if it were determining it without giving any weight to Mr Rogers' conclusion. If we consider that Mr Rogers' conclusion on the valuation was reasonably open to him, then there is no basis for disturbing that conclusion. Valuation is not a science. The question whether the investors acted reasonably in agreeing to pay [redacted] was a material consideration for Mr

Rogers to take into account. But the fundamental question is whether *Mr Rogers* was *reasonable* to conclude that [redacted] overvalued the shares by £800,000.

263. In our view, Saracens has to say that the only valuation that Mr Rogers could reasonably have decided to be the true market value was the [redacted] that the investors agreed to pay. Contrary to what Saracens says at para 139 of its closing written submissions, PRL does not have to say (and does not say) that the valuation provided by Mr Patel for Saffery Champness is the only correct valuation. The question is not what the "correct" valuation is, but whether the conclusion reached by Mr Rogers on the valuation issue was reasonable.

264. We heard a good deal of evidence from the investors as to how they arrived at their figure of [redacted] and how they were not at all influenced by the valuation of PwC and relied entirely on their own business instincts and skills. We shall have to deal with Mr Rogers' suggestion that they knew that they were overpaying because [redacted] was being underpaid as a player. But subject to that point, we accept their evidence without reservation.

265. We also heard evidence from Mr Patel that the valuation of PwC was in error in that (i) it did not quantify the risk of injury or loss of form; and (ii) the 10-25% discount applied to reflect that the shareholders were obtaining a minority share was inadequate. We do not find it necessary to express an opinion on these points.

266. Mr Rogers did not have the expertise to value the shares. That is why he sought the opinion of Saffery Champness. Unless there was something obviously wrong with Mr Patel's valuation, Mr Rogers was reasonably entitled to rely on it. Saracens did not identify any flaws in or otherwise challenge Mr Patel's valuation. They did not call PwC to give evidence in support of its valuation or criticise that of Mr Patel. In these circumstances, we conclude that Mr Rogers was reasonably entitled to rely on the range of valuations set out in Mr Patel's report and arrive at a mid-point figure of [redacted].

267. Much has been made by Saracens of the statement by Mr Rogers at para 95 of his second statement that the investors must or ought to have known that they were

overpaying, and that they overpaid anyway because [redacted] was being underpaid as a player. It is said that PRL is therefore alleging (or at least insinuating) that the investors *knowingly and fraudulently* overpaid for the shares in [redacted] and the purpose of the overpayment was to compensate [redacted] for the fact that he was underpaid salary.

268. Saracens says that this line of argument should be rejected for three reasons:

(i) It formed no part of the Charge and so does not fall for determination under Regulation 12.10. It is a new allegation of "misconduct" and should have been supported by evidence filed with the Charge. Saracens' points are developed at paras 156 to 160 of its Final Submissions;

(ii) The so-called conspiracy allegation was not squarely put in cross-examination to the investors and to Mr Velani (CEO of Saracens) and cannot be advanced in submissions; and

(iii) The alleged conspiracy has no evidential foundation. It is incoherent and inherently improbable. This is developed at paras 166 to 169 of Saracens' Written Submissions.

269. We think there is force in what Saracens says about this. We do not, however, express a concluded view on this issue because it is not necessary to do so. It is clear that Mr Rogers reached his conclusion that the purchase price overvalued the shares *on the basis of the Saffery Champness report*: see paras 308 to 312 of Mr Rogers' first statement. Indeed, part of Saracens' complaint is that the conspiracy allegation formed no part of the Charge and the material that accompanied the Charge. For this reason, we propose to give no weight to Mr Rogers' evidence on the conspiracy allegation.

270. Leaving the alleged conspiracy out of account, we are satisfied that, relying on the Saffery Champness report, Mr Rogers was reasonably entitled to conclude that the purchase price for the [redacted] shares was above the true market value to the extent of £800,000. We emphasise that we are not saying that we find that the market value

of the shares was *in fact* [redacted]. We are saying that it was reasonably open to Mr Rogers to come to that conclusion in all the circumstances. The scheme of Schedule 1 para 2(a) is to give the SCM a margin of appreciation in relation to matters of this kind.

**Conclusion on the three SCYs**

271. We set out in summary form our conclusions at paras 284 to 298 below where we deal with the issue of Sanction. There is no need for us to repeat the exercise here.

## G. SANCTION

### *(A) The Regulatory provisions*

272. The relevant penalty provisions are set out in Regulations 10, 11, 12 and 14, the material parts of which are as follows:

> **"10 Overrun Tax**
>
> 10.1 Any Overrun shall be dealt with in accordance with this Regulation
>
> Whereas any breach of the Regulations in relation to Salary exceeding the Senior Ceiling in excess of the Overrun, shall be dealt with in accordance with Regulation 12.
>
> 10.3 The Overrun tax shall be set at the following values:
>
> | Level of Overrun | Overrun Tax |
> |---|---|
> | £0 to £49,999.99 | £0.50 for every £1 overspend |
> | £50,000 to £199,999.99 | £1 for every £1 overspend |
> | Over £200,000 | £3 for every £1 overspend |
>
> **11 Breaches of the Regulations**

11.1 Breach of Salary Ceiling

Any breach of the Regulations in relation to Salary exceeding the Senior Ceiling by £350,000 or more or the Academy Ceiling by £5,000 or more shall be dealt with in accordance with the procedures set out in Regulation 12.

12 [See para 116 above]

**14 Penalties for Breach of the Regulations**

14.1 When determining whether a Club has exceeded the Academy Ceiling or Senior Ceiling by [the specified sum] or more for a Salary Cap Year governed by the Regulations, the Disciplinary Panel shall take into account any deemed valuation provided by the Salary Cap Manager in accordance with Regulation 6.5.

14.2 Where the Disciplinary Panel concludes that a Club has exceeded the Senior Ceiling… by £350,000 or more for a Salary Cap Year governed by the Regulations and/or is guilty of a Failure to Co-operate, the Disciplinary Panel shall determine the penalty to be imposed on the Club. In determining the appropriate penalty the Disciplinary Panel will apply the penalties set out in Regulation 14.3 - 14.5 below but the Disciplinary Panel shall be entitled to exercise its discretion to impose a penalty which is less than set out in Regulation 14.3 - 14.5 where, in the view of the Disciplinary Panel, such penalty would lead to the Club being unfairly punished or treated under the Regulations or would lead to a result not within the spirit and underlying purpose of the Regulations.

14.3 Breach of Senior Ceiling

Where the Disciplinary Panel concludes that a Club has exceeded the Senior Ceiling by £350,000 or more for a Salary Cap Year governed by the Regulations the following penalties shall apply:

(a) The Club must bear all of the reasonable Costs incurred by PRL in connection with that breach or breaches, such reasonable sum to be assessed by the Disciplinary Panel…

(b) For every £1 exceeding the £350,000 Overrun threshold a fine of £3 is payable by the Club for the Salary Cap Year being considered by the Disciplinary Panel (in addition to any Overrun tax payable).

(c) In addition to the financial penalties set out in (a) and (b) above, if the Disciplinary Panel concludes that the overspend is such that the Salary paid during any Salary Cap Year governed by the Regulations exceeds the Senior Ceiling by the levels set out below, then subject to Regulation 14.3(d) the Disciplinary Panel shall apply the corresponding points sanction, as set out in the table below, which shall be deducted from the number of league points earned by the Club in respect of games played in the Aviva Premiership, which may result in the Club having a negative points balance:

| **Level of breach** | **Points Sanction** |
|---|---|
| £0 to £349,999.99 | 0 |
| £350,000 to £399,999.99 | 5 |
| £400,000 to £449,999.99 | 10 |
| £450,000 to £499,999.99 | 15 |
| £500,000 to £549,999.99 | 20 |
| £550,000 to £599,999.99 | 25 |
| £600,000 to £649,999.99 | 30 |
| Over £650,000 | 35 |

The Salary Cap Year in which the points penalty will be applied shall be determined as follows:

(i) If the Disciplinary Panel or, in the event the Disciplinary Panel's decision is challenged in accordance with Regulation 13, the Tribunal reaches its decision prior to the first match of round 22 of the Aviva Premiership in any Season, the points penalty will be applied during that Season with immediate effect; or

(ii) If the Disciplinary Panel or, in the event the Disciplinary Panel's decision is challenged in accordance with Regulation 13, the Tribunal, reaches its decision during or after round 22 of the Aviva Premiership in any Season, the points penalty will be applied at the commencement of the next Season.

(d) The points sanctions dictated by Regulation 14.3(c) represent the starting point and the Disciplinary Panel shall have the discretion to increase or decrease (to zero if appropriate) the points sanction taking into account the following factors:

(i) Whether the Club has admitted the breach identified;

(ii) Whether the breach of the Senior Ceiling was Deliberate, Reckless, Negligent or due to a non-Negligent mistake;

(iii) Whether the Club has been found to have breached the Regulations before; and

(iv) Whether the Club has Deliberately or Recklessly failed to co-operate during the Disciplinary Process.

(e) For any size of excess above the Senior Ceiling of [£ ] or more, if the Disciplinary Panel is of the opinion that, on a balance of probabilities, the Club Recklessly or Deliberately committed such breach, the Disciplinary Panel can (as appropriate, and in addition to the fines which are payable under Regulations (a), (b) and (c) above), at its sole discretion:

(i) impose any financial penalty on the Club; and

(ii) decide that the Club will have its Senior Ceiling for the subsequent Salary Cap Year reduced by an amount to be determined by the Disciplinary Panel…"

The sum of £350,000 referred to above relates to SCY 2018/19. The corresponding figure for SCY 2016/17 is £325,000.

### *(B) The correct approach to penalties*

*PRL's case*

273. PRL submits that the discretion conferred by Regulation 14.2 to depart from the starting point penalties stated in Regulation 14.3 does not confer on the Panel a general or broad discretion as to penalty. At para 188 of its Written Submissions, it says:

> "188.1 The sanctions specified in Regulations 14.3 to 14.5 apply, unless the Panel specifically concludes that the Club has convinced it that the application of the specified sanctions would lead to unfair treatment of it, or a result not in keeping with the spirit and purpose of the Regulations.
>
> 188.2 This is a high hurdle for the Club to overcome. The specified sanctions have been set out in the Regulations and agreed to by all the Clubs. Regulation 10 provides for overrun (as opposed to overspend under Regulation 11) up to a specified level, protecting against sporting sanction of a club for exceeding the salary cap up to £350,000. As set out in [Mr Rogers' second statement], the specified sanctions once that threshold is exceeded (the 14.3(a) costs obligation, the 14.3(b) fine of £3 for every £1 for overspend above £350,000, and the 14.3(c) rising table of points deductions depending on the level of overspend) have been set at a level that reflects the seriousness of the adverse impact of breach of the rules on all other clubs, on the league competition, on players, and on the public. Without significant sanction, as encapsulated and agreed to in the specified sanctions, there is no vindication for other clubs, there is no deterrence of breaches, and the reputation of the competition among the public and commercial partners remains damaged.
>
> 188.3 Regulation 14.2 in these circumstances provides an exception for extraordinary circumstances not contemplated when the specified sanctions were agreed. There are no such extraordinary circumstances here. The application of the specified sanctions would be neither unfair, nor contrary to the spirit or purpose of the Regulations.

274. PRL's case on sanction is developed by Mr Rogers in his two witness statements. At para 12 of his second statement, Mr Rogers says:

> "I disagree with the suggestion that the Club has been open and transparent. In a number of ways, addressed below, Saracens has over the years been reckless in its approach to the Salary Cap and the related rules and has frequently crossed the line into breach. At best, the Club appears to accept the risk of breaching it. This has been compounded by a reluctance to co-operate and a failure to communicate information".

275. PRL submits that there is no basis for decreasing the points sanctions that would result from a strict application of the table set out in Regulation 14.3(c).

276. Further, it says that the table should be applied separately to each of the three SCYs. The Charge contains allegations in the three years compendiously because the breaches were concealed from Mr Rogers by Saracens. Otherwise, each year would have been the subject of a separate charge.

*Saracens' case*

277. Saracens says that the discretion conferred by Regulation 14.2 is a *broad* discretion to be exercised where the Panel concludes that the penalty that would follow from the application of the starting point penalties would lead to (i) the Club being unfairly punished and/or (ii) a result that would not be within the spirit and underlying purpose of the Regulations.

278. It says that PRL and Mr Rogers are wrong to interpret the broad discretion conferred by Regulation 14.2 as being exercisable only in *"exceptional circumstances".* The only constraints on the exercise of the discretion are those expressly stated in Regulation 14.2 itself.

279. It is essential to fairness that any penalty reflects (i) the substance, rather than the form, of the breach; and (ii) the mental state associated with the breach. As regards (i), the spirit of the Regulations requires there to be a focus on the substance and not technicalities. The spirit of the Regulations is to capture within Salary all transfers of value to Players in return for playing for the Club, no matter how they may be dressed up. Moreover, Regulation 2.2 states that the objectives of the Regulations are to be achieved in *"an appropriate and proportionate*

*manner*". Proportionality requires that the penalty be tailored to the content and circumstances of the breach. A fair and proportionate penalty is not arrived at by applying a mechanistic approach to the calculation of Salary and treating all amounts falling with the Schedule 1 definition as if they are in substance the same thing.

280. As to (ii), a deliberate breach should attract a higher penalty than a reckless breach, and a reckless breach should attract a higher penalty than a negligent breach. This is expressly recognised in Regulation 14.3(d) in relation to points sanctions, but it is also inherent in the concept of fairness in Regulation 14.2.

281. In its closing written submissions, Saracens says:

> "234. If the Panel were to conclude that Saracens has breached the Regulations (beyond its admissions), this would be an appropriate case to depart from the starting point penalties:
>
> a. It is no part of the spirit and purpose of the Regulations to impose substantial financial (let alone points) penalties for technical breaches that did not involve payments equivalent to salary i.e. the transfer of value for playing rugby at Saracens. This applies most notably to genuine loans.
>
> b. The Panel will note that there is no mechanism under the Regulations for credit to be given in a later year when a genuine loan is in fact repaid, e.g. upon the sale of a co-investment property. If the loan is treated as Salary, punished and then repaid in a later year, there is an obvious unfairness and a distortion of the level-playing field between clubs (contrary to the objective in Article 2.2(c)). If, by contrast, a genuine loan is excluded from the overspend for the purpose of calculating the appropriate penalty, there is no prejudice to anyone: if the loan is later not repaid (for whatever reason), the consequences of this can be addressed in the Salary Cap Year when repayment should have occurred.
>
> c. A penalty calculated on the basis of treating a loan as a gift would overstate dramatically any actual transfer of value and run contrary to

the objective of ensuring a level playing field. The purpose of the discretion as to penalty in Article 14.2 is to ensure that technicalities do not trump substance.

d. As regards the share purchase in [redacted], it would be unfair and contrary to the spirit of the Regulations to punish the investors for taking a different view from Mr Rogers as to the value of the shares in the company, not least given that the price that they paid accords with an independent valuation provided by PWC. There was no intention to transfer value to [redacted] in return for playing for Saracens and so no distortion of the level playing field.

**(C) Our Conclusions**

***(i) Penalties without considering whether to exercise the discretion under Regulation 14.2 or 14.3(d)***

*SCY 2016/17*

282. For the reasons set out in our detailed findings above, we have resolved the issues relating to Salary in this SCY as follows:

- Capital Contributions: £923,947.63
- Capex contributions: £363,404.97
- MBN payment: £30,000
- [redacted] payment: £23,950

283. Taking into account the headroom of £206,334.00 that was available to Saracens in the SCY, we find that the total overspend for SCY 2016/17 was **£1,134,968.60.** We should explain that headroom in this context is the difference between the Senior Ceiling set in any SCY and the amount of spend as certified by auditors appointed by the SCM in that SCY.

284. An application of Regulations 10 and 11 results in the following starting point sanctions:

Regulation 10.3 overrun tax

| | | |
|---|---|---|
| £0.5 for every £1 overspend up to £50,000 | = | £25,000 |
| £1 for every £1 overspend up to the next £200,000 | = | £150,000 |
| £3 for every £1 overspend up to the next £325,000 | = | £375,000 |
| | | **£550,000** |

Regulation 14.3(b) overspend penalty

| | | |
|---|---|---|
| £3 for every £1 exceeding the £325,000 threshold | = | £2,429,905.80 |
| | | **Total £2,979,905.80** |

285. In addition to these financial sanctions, a starting point deduction of **35 league points** is dictated by Regulation 14.3(c).

*SCY 2017/2018*

286. For the reasons set out in our detailed findings above, we have resolved the issues relating to Salary in this SCY as follows:

- [redacted] payment: £319,600.76
- [redacted] payment: £9,044.52
- MBN payment: £30,000
- Capex contributions: £19,000

287. Taking into account headroom of £279,395.48 available to Saracens in this SCY, we find that the total overspend for SCY 2017/18 was **£98,249.80.**

288. An application of Regulation 10 results in the following starting point sanction:

Regulation 10.3 overrun tax

£0.5 for every £1 overspend up to £50,000 = £25,000

£1 for every £1 overspend up to £200,000 = £48,249.80

**Total: £73,249.80**

289. No points may be deducted in respect of this SCY.

*SCY 2018/19*

290. For the reasons set out in our detailed findings above, we have resolved the issues relating to Salary in this SCY as follows:

- [redacted]payment: £800,000
- MBN payment: £35,000

291. In addition to these payments, additional payments totalling a further £71,505. 57 were admitted by Saracens.

292. We understand that no headroom was available for this SCY. We accordingly find that the total overspend for SCY 2018/19 was **£906,505.57**.

293. An application of Regulations 10 and 11 results in the following starting point sanctions:

Regulation 10.3 overrun tax

£0.5 for every £1 overspend up £50,000 = £25,000

| | | |
|---|---|---|
| £1 for every £1 overspend up to the next £200,000 | = | £150,000 |
| £3 for every £1 overspend up to the next £350,000 | = | £450,000 |
| | | £625,000 |

Regulation 14.3(b) overspend penalty

| | | |
|---|---|---|
| £3 for every £1 exceeding the first £350,000 | = | £1,669,516.71 |
| | | **Total £2,294,516.71** |

294. In addition to this financial sanction, a starting point deduction of **35 league points** is dictated by Regulation 14.3(c).

*Failure to co-operate (Regulation 4.4)*

295. Additionally, as noted above Saracens accepts that it was guilty of the following non-disclosures, which result in the following further penalties:

| **Breach** | **Year** | **Number** | **Financial sanction** | |
|---|---|---|---|---|
| Non-disclosure | 2015/2016 | 1 | Reg 11.3(c) | £100 |
| Non-disclosure | 2016/2017 | 10 | Reg 11.3(c) | £6,300 |
| Non-disclosure | 2017/2018 | 7 | Reg 11.3(c) | £3,900 |
| Non-disclosure | 2018/2019 | 5 | Reg 11.3(c) | £2,300 |
| | | | | **Total £12,600** |

296. It follows from these conclusions that, if we were to accept PRL's submissions and apply a strict mathematical approach cumulatively to each of the three SCYs, we would impose the following total sanctions:

Financial penalty: **£5,360,272.31**.

Points deduction: **70 league points.**

### (ii) *Should we exercise the discretion to impose different penalties?*

297. The first issue we have to resolve is the nature of the discretion that is conferred by Regulation 14. Regulation 14.3(d) provides a discretion to increase or decrease the points sanction that would result from a strict application of the table set out in Regulation 14.3(c) taking into account the four specified (and no other) factors. Regulation 14.3(e) gives the Panel a discretion to impose sanctions additional to the fines payable under the Regulations, but only if it is of the opinion that the Club breached the Salary Cap recklessly or deliberately. So Regulation 14.3(d) and (e) confer a specific discretion whose exercise is constrained by the conditions set out in these two sub-paragraphs. Whatever the position may be in relation to Regulation 14.3(e), Regulation 14.3(d) does not confer a broad or untrammelled discretion exercisable in accordance with what is fair and just in all the circumstances. The discretion may only be exercised taking into account the four specified factors.

298. But the matter does not end here, because we must also consider the discretion conferred by Regulation 14.2 to impose a penalty which is less than that set out in Regulation 14.3 to 14.5 where in our view "*such penalty would lead to the Club being unfairly punished or treated under the Regulations or would lead to a result not within the spirit and underlying purpose of the Regulations".*

299. In our view, therefore, the matter should be approached in two stages. The first is to apply Regulation 14.3 and to consider whether to exercise the discretion conferred by Regulation 14.3(d) and (e). The second stage is to consider the penalty that results from the first stage and to decide whether to exercise the discretion conferred by Regulation 14.2 to *that* penalty. We shall say no more about Regulation 14.3(e) because PRL does not contend that the penalties that result from a strict application of Regulation 14.3 should be increased.

300. We start, therefore, with Regulation 14.3(d). We accept the submission of PRL that the four factors do not justify a decrease in the points deduction. We take the factors in turn:

(i) Far from admitting any breach giving rise to the points deduction, Saracens has contested them all and even contended that the Regulations are contrary to Competition law and illegal;

(ii) We accept that the breaches were not deliberate, but in our view they were reckless: we agree with the assessment made by Mr Rogers at para 12 of his second witness statement (see para 274 above). At the very least, they were negligent;

(iii) Although Saracens has not been found to be in breach before, it was charged with a failure to co-operate in 2015 before and settled those proceedings, accepting sanctions as part of the settlement; and

(iv) As described at paras 41 to 51 of Mr Rogers' second statement, Saracens has not fully co-operated with him and has given information piecemeal and often incomplete. PRL does not, however, contend that this failure to co-operate was deliberate or reckless.

301. We should say a little more about why we consider that Saracens' breaches were reckless. As we have said, Saracens has admitted multiple offences of failing to disclose information pursuant to the obligation imposed upon it by Regulation 4.4. Those breaches are set out para 296 above and span a period of four years. In our view that was plainly a relevant factor to take into account when determining the sanction for the substantive breaches under regulation 11.

302. Saracens must have known that there was a risk that at least some of the transactions that it and its Connected Parties entered into with Players might be included in Salary by the SCM. In our opinion, it acted recklessly in entering into these transactions without consulting him and seeking to elicit his views.

303. Regulation 6.13 gives Clubs the right to seek clarification from the SCM of the meaning or applicability of the Regulations. Saracens' failure to do this was all the more serious in the light of the 2015 settlement (and the facts that led to it) which we have already mentioned.

304. In sporting parlance, Saracens had been issued with a clear "Yellow Card" in 2015 and the onus was then plainly on it to ensure that it stayed firmly within the Regulations, and to seek clarification from the SCM if it was in any doubt as to whether it was doing so. Again, the repeated failure to disclose breaches, which it has admitted, make the position all the more stark.

305. In our view, following the settlement Saracens should have ensured that it and its Connected Parties scrupulously adhered to the Regulations. There was no evidence before us that Saracens had taken any steps to alert any Connected party of this need.

306. In our view, it is arguable that the application of the Regulation 14.3(d) factors should lead to an increase in the points deduction. This is because there is very little in relation to the four factors which can properly be placed in the scales in Saracens' favour. But PRL has not argued for an increase in the points deduction and we do not, therefore, consider it right to exercise our discretion at the Regulation 14.3(d) stage to increase the points penalty.

307. We turn, therefore, to Regulation 14.2. We are not persuaded by PRL's submission that Regulation 14.2 "*provides an exception for extraordinary circumstances not contemplated when the specified sanctions were agreed*". In our view, there is no warrant for such an extreme interpretation. But we accept that the fairness of a punishment that results from the strict application of Regulation 14.3(b) and (c) must be considered in the context of the spirit and underlying purpose of the Regulations. To some extent, the two Regulation 14.2 criteria for reducing the penalties set out in Regulations 14.3 to 14.5 march together. Fairness is not to be considered in a vacuum. If a strict application of the penalties leads to a result which seems harsh, that of itself is unlikely to mean that the punishment is unfair, still less that it is not within the spirit and underlying purpose of the Regulations. It is important to keep in mind that all the Regulations are carefully worked out and reviewed with the agreement of the Clubs. The process is described in detail in the witness statement of Mark McCafferty, who was the CEO of PRL from 2005 until 2019. There is a Salary Cap Sub-Committee which meets several times during

each season. It considers whether amendments are required to the operation of the salary cap and makes recommendations to the PRL board. The Regulations as amended from time to time are designed to achieve their underlying purpose as expressed in Regulation 2.2.

308. Saracens' principal complaint is that some, if not all, of the breaches that we have found proved were "technical" breaches which did not involve transfers for value for playing rugby for Saracens; and that to deduct points for such breaches is to impose unfair punishment and is contrary to the spirit and underlying purpose of the Regulations.

309. We do not agree. We accept that some of the Regulations may reasonably be described as technical. They are certainly complex. But that is not surprising. The underlying policy and purpose of the Regulations required that Salary be given a wide definition to capture many forms of benefit which, as a matter of ordinary language, would not be regarded as Salary. Otherwise, Clubs could easily frustrate the achievement of the Regulation 2.2 objectives. It is for this reason that Schedule 1 contains such detailed (and arguably technical) definitions of what is included in Salary and what is excluded from it. Certain transactions may be difficult to classify since they fall close to the boundary. That is why the SCM is given a broad discretion under Schedule 1 para 2(a)(xvi).

310. The scheme of the Regulations is clear. The definition of Salary is prescribed in Schedule 1. Its assessment is entrusted to the SCM who has considerable freedom to decide whether transactions in a SCY fall within Salary, but his decisions must be reasonable. The Regulations also contain detailed rules for determining the penal consequences that flow from a breach. The penalties are graduated according to the degree of the breach.

311. The careful structure of the penalty provisions is aimed at achieving the Regulation 2 objectives in a proportionate manner: hence the overrun resulting only in overrun tax; the overspend resulting in a table of fines and penalty reduction which reflects the level of overspend; and breaches of a deliberate or reckless character risking additional points deductions or financial penalty.

312. This is important because, as we have said, the question of whether a penalty is unfair or is not within the spirit or underlying purpose of the Regulations cannot be considered in a vacuum. It must be considered against the background of (i) the detailed definition of what constitutes Salary, (ii) a carefully calibrated set of stepped penalties; (iii) a focused exercise of discretion under Regulation 14.3(d); and (iv) a residual exercise of discretion under Regulation 14.2. The scope of the Regulation 14.2 discretion is informed by this background.

313. Saracens cites the treatment of Capital Contributions as a good example of PRL adopting a technical approach where the concomitant deduction of points leads to unfair punishment and is not within the spirit and underlying purpose of the Regulations: see paras 150 to 184 above. We have explained why we consider that Mr Rogers was right (and certainly reasonably entitled) to regard these payments as loans. He did not adopt an impermissible approach. He applied the Schedule correctly.

314. Saracens also submits that the objective described in Regulation 2.2(e) (combined with the words "*appropriate and proportionate*" in the first line of Regulation 2.2) emphasises that the Regulations are not intended to be applied in a way that jeopardises the competitiveness of the Clubs in European Competitions. This forms part of the spirit and purpose of the Regulations. It speaks in favour of moderating the penalties substantially in respect of negligent breaches.

315. As to this, we make two points. First, we do not accept that Saracens' breaches can all be characterised as merely negligent. Its failure to co-operate with Mr Rogers and to seek clarification was egregious, particularly in the light of the events leading up to the 2015 settlement. It took risks and is now paying the price for doing so.

316. Secondly, it is not the case that one Club can escape the appropriate sanction in accordance with the Regulations on the basis that the sanction might hinder that Club in its ambitions in European Competitions. The aim of the Regulations is to bring about a financially secure and competitively balanced PRL Competition in a

way that enables the Clubs also to compete in European Competitions, through the Clubs' *compliance with* the Regulations, and not by allowing a Club's breach to go unpunished at the appropriate level.

317. We consider that there is nothing unfair or contrary to the spirit and underlying purpose of the Regulations in imposing penalties in accordance with the Regulations; and in particular in imposing a reduction of 35 points in each of SCY 2016/17 and 2018/19 in accordance with the table in Regulation 14.3(c).

318. But we recognise that this would almost certainly mean that Saracens would be relegated from the Premiership to the Championship. We have to ask ourselves whether such a result would be within the spirit and underlying purpose of the Regulations which is to achieve the Regulation 2.2 objectives "*in an appropriate and proportionate manner*". We regard the breaches as very serious, especially in the light of (i) the events which led to the 2015 settlement; (ii) its continuing, flagrant and reckless failure to comply with its obligations to consult and co-operate with Mr Rogers; (iii) the fact that the breaches in relation to the Senior Ceiling in SCY 2016/17 and SCY 2018/19 were not isolated; and (iv) the fact that Saracens exceeded the Senior Ceiling by very large amounts in these two SCYs (almost £3 million as compared with £325,000 in SCY 2016/17; and almost £2.3 million as compared with £350,000 in SCY 2018/19.)

319. We consider, however, that to impose a deduction of 70 points in one SCY is disproportionate and is not required to satisfy the underlying purpose of the Regulations. We are conscious that the breaches were not deliberate. It is true that, by failing to disclose documents and co-operate, Saracens was largely responsible for the fact that the Charge encompassed three SCYs. Nevertheless, we have to have regard to totality. In our view, a total deduction of 70 points is neither appropriate nor proportionate. We consider that a total of 35 points is sufficient to mark the seriousness of the breaches. It is not in dispute that it is open to the Panel to impose concurrent penalties. We therefore impose concurrent deductions of 35 points in respect of SCYs 2016/17 and 2018/19.

320. We would add that we have also had regard to the fact that Regulation 16 provides a plea bargain process whereby Clubs can seek to mitigate the sanction that would otherwise result from a breach of the Regulations. We do not understand that Saracens opted to follow or explore this procedure. Rather, they have contested all material points, including challenging the lawfulness of the Regulations. It was, of course, entitled to challenge the case advanced by PRL. But having done so unsuccessfully, it has lost the mitigation of a plea that would otherwise have been available to it.

321. We see no reason not to impose the full financial penalty of £5,360,272.31. Saracens is supported by wealthy shareholders. That is why it was able to pay sums to Players which far exceeded the Senior Ceiling in SCY 2016/17 and 2018/19. But, as we have said, PRL has not sought an increase in the financial penalty under Regulation 14.3(e). In our view, such an increase would be disproportionate and inappropriate.

## H. SUMMARY AND CONCLUSION

322. For the reasons that we have given, we conclude that Saracens should suffer a deduction of 35 points in SCY 2016/17 and 35 points in SCY 2018/19, but these deductions should be concurrent with each other. In addition, we impose a financial penalty of £5,360,272.31, which comprises £2,979,905.80 for SCY 2016/17, £73,249.80 for SCY 2017/18 and £2,294,516.71 for SCY 2018/19.

323. In Appendix 3, we have set out a brief summary which, if so advised, PRL may publish in accordance with Regulation 16.4.

Rt Hon Lord Dyson (Chair)

Aidan Robertson QC

Jeremy Summers

4 November 2019

London (UK)

## APPENDIX 1
## THE CHARGE

**Charge issued pursuant to Regulation 12.1 of the Salary Regulations (the Charge) in respect of a breach of Regulations 3 and 11.1.**

1. I hereby charge Saracens with a breach of Regulations 3 and 11.1. This Appendix 1 is a Charge for the purposes of Regulation 12.1.

Salary Cap Year 2016/17

2. I am of the reasonable opinion that Saracens has, in breach of Regulations 3 and 11.1 of the Regulations, exceeded the Senior Ceiling by £325,000 or more in respect of Salary Cap Year 2016/17.

3. In that regard:

   3.1 Regulation 3.1(a) provided that the Senior Ceiling for Season 2016/17 was £6,000,000.

   3.2 Regulation 11.1 provided that: "*Any breach of the Regulations in relation to Salary exceeding the Senior Ceiling or Academy Ceiling above the 5% threshold (in 2016/17 £325,000) shall be dealt with in accordance with the procedures set out in Regulation 12*".

   3.3 The Saracens Certification for 2016/17 provided for a total Salary for Senior Players of £5,597,445. Following consideration and final adjustment by PwC, the total Salary for Senior Players was adjusted to £5,664,516.

   3.4 On the basis of the above, following adjustment by PwC, total Salary for Senior Players was under the Senior Ceiling by £335,484.

3.5 As a result of my investigation, I am of the reasonable opinion that a further undeclared sum of £1,440,452.60 was paid in Salary by the club in 2016/17.

3.6 At Annex 1 to my statement, I set out a summary table which provides a total for the undeclared sums paid in Salary in Salary Cap Year 2016/17. The table refers to the relevant paragraphs of my statement that set out the facts and documents that I rely upon.

3.7 As such, Saracens exceeded the Senior Ceiling in Salary Cap Year 2016/17 by £325,000 or more, which I estimate to be as follows:

| | | |
|---|---|---|
| **A** | Senior Ceiling | £6,000,000 |
| **B** | Club Certification | £5,597,445 |
| **C** | Total following PwC Audited Adjustments | £5,664,516 |
| **D** | Headroom (A, less C) | (£335,484) |
| **E** | Undeclared Salary | £1,440,452.60 |
| | **Amount in Excess of Senior Ceiling (D, plus E)** | **£1,104,968.60** |

Salary Cap Year 2018/19

4. I am of the reasonable opinion that Saracens has, in breach of Regulations 3 and 11.1 of the Regulations, exceeded the Senior Ceiling by £350,000 or more in respect of Salary Cap Year 2018/19.

5. In that regard:

5.1 Regulation 3.1(a) provided that the Senior Ceiling for Season 2018/19 was £6,400,000.

5.2 Regulation 11.1 provided that: *"Any breach of the Regulations in relation to Salary exceeding the Senior Ceiling by £350,000 shall be dealt with in accordance with the procedures set out in Regulation 12"*.

5.3 Saracens Declaration for 2018/19 provided for forecast total Salary for Senior Players of £6,224,365.51.

5.4 On the basis of the above, total Salary for Senior Players will be under the Senior Ceiling by £175,634.49.

5.5 As a result of my investigation, I am of the reasonable opinion that a further undeclared sum of £1,059,250 was paid in Salary by the club in 2018/19.

5.6 At Annex 1 to my statement, I set out a summary table which provides a total for the undeclared sums paid in Salary in Salary Cap Year 2018/19. The table refers to the relevant paragraphs of my statement that set out the facts and documents that I rely upon.

5.7 As such, Saracens exceeded the Senior Ceiling in Salary Cap Year 2018/19 by £350,000 or more.

## APPENDIX 2
## EXTRACTS FROM SCHEDULE 1 TO THE REGULATIONS

1. "Salary" means, for the purposes of compliance with the Senior Ceiling and the Academy Ceiling (as appropriate), the total of all the amounts referred to in this paragraph 1, whether they are paid or payable (or in the case of a benefit in kind, provided or to be provided) directly or indirectly onshore or offshore by or on behalf of a Club or any Connected Party of the Club (or in relation to paragraph 1(t) only, by or on behalf of any Third Party), to or in respect of a Player or any Connected Party of the Player, and shall exclude any amount set out in paragraph 2.

   (a) any salary, wage, fee, remuneration, compensation, match fee, per diem, royalty, gratuity, profit, perquisite, reward, emolument, earnings, incentive, retainer, loyalty payment, preferred payment or any other sum

   ...

   (d) any loan pursuant to which the Player or any Connected Party of the Player is not obliged to repay the full sum advance in the Salary Cap Year in which the loan is made.

   ...

   (p) any payment or benefit in kind which the Player would not have received if it were not for his involvement with a Club;

   ...

   (s) any payment or benefit in kind to an Ex-Player (other than the supply to each Ex-Player of a maximum of four match tickets per Club match) which is not a bona fide payment for the provision of off-field services by the Ex-Player to the Club, such services being provided by the Ex-Player to the Club subsequent to the termination or expiry of his playing contract with the Club;

2. For the avoidance of doubt, the following are excluded for the purposes of determining total Salary:

(a) any payments or benefits in kind in connection with an individual sponsorship, endorsement, merchandising, employment or other individual arrangement between a Player (or any Connected Party of a Player) and any Connected Party of the Club or Third Party which the Salary Cap Manager reasonably concludes on the balance of probabilities should not be considered Salary, having taken into account the following factors:

(i) if the arrangement is with a Connected Party, it will be more likely to be considered Salary;

(ii) if the arrangement was negotiated and / or intended to be entered into at arm's length from the Player's Club, it will be less likely to be considered Salary;

(iii) if the arrangement was negotiated at or around the same time as the Playing Contract for the Player, it will be more likely to be considered Salary;

(iv) if the obligations of the Player under the arrangement in question are linked to his Club, it will be more likely to be considered Salary;

(v) if the obligations of the Connected Party/Third Party under the arrangement are linked to the Club, it will be more likely to be considered Salary;

(vi) if the Player will be required to perform his obligations under the arrangement either wholly or partly at the direction of his Club, it will be more likely to be considered Salary;

(vii) if the Player will be required to perform his obligations under the arrangement in his Club's playing kit or other Club apparel, it will be more likely to be considered Salary;

(viii) if the remuneration under the arrangement will be payable to the as and when services are performed by the Player for the Connected Party / Third Party (as opposed to in a lump sum or), it will be less likely to be considered Salary;

(ix) if the arrangement is on terms typical of commercial contracts of that type, it will be less likely to be considered Salary;

(x) if the term of the arrangement is different to the term of the Player's player contract with the Club, it will be less likely to be considered Salary;

(xi) if a servant or agent of the Player's Club was involved, whether directly or indirectly, in securing for the Player the benefit of the arrangement, it will be more likely to be considered Salary;

(xii) if the Connected Party/Third Party has entered into similar arrangements with any other Player(s) from the Player's Club, it will be more likely to be considered Salary;

(xiii) if the Player is to be promoted by the Connected Party/Third Party as a sportsman who is associated with the Connected Party/Third Party as opposed to being promoted as a Player from his Club, it will be less likely to be considered Salary;

(xiv) if the arrangement is with a Connected Party to a Club sponsor, it will be more likely to be considered Salary;

(xv) if the remuneration payable to the Player exceeds the market value of the services to be provided by the Player pursuant to the arrangement, it will be more likely to be considered Salary; and

(xvi) any other matter that, in the opinion of the Salary Cap Manager in his absolute discretion, ought to be taken into account…

## APPENDIX 3
## SUMMARY OF THE PANEL'S DECISION

1. Regulation 2.2 states that the Regulations are designed to achieve in "*an appropriate and proportionate manner*" the objectives of:

   (i) ensuring the financial viability of all Clubs and the Aviva Premiership Competition;

   (ii) controlling inflationary pressures on Clubs' costs;

   (iii) providing a level playing field for Clubs;

   (iv) ensuring a competitive Aviva Premiership Competition; and

   (v) enabling Clubs to compete in European Competitions.

2. In order to meet these objectives, the Regulations contain a detailed set of rules which cap the amount of Salary that Clubs can pay their Players in each Salary Cap Year (SCY). A Club which exceeds the cap is liable to be fined and suffer a deduction of league points in accordance with a carefully graduated scheme which is frequently reviewed by Premier Rugby Limited. The Clubs support the cap and the scheme. These penalties are considered to be necessary if the objectives are to be met.

3. The Salary Cap Manager (SCM) has important functions to perform in connection with the operation of the Regulations. These include determining what payments or

benefits in kind to Players should be excluded from Salary. An important part of the scheme is that the Clubs are obliged to co-operate with the SCM and make disclosure to him of all contracts and arrangements that the Clubs enter into with their Players. This is required to enable him to monitor compliance with the Regulations and oversee the audit process that he is required to undertake.

4. These proceedings are concerned with Saracens' payments of Salary in SCYs 2016/17, 2017/18 and 2018/19. On a strict application of the Regulations:

   (i) the financial penalties payable are £2,979,905.80, £73,249.80 and £2,294,516.71 respectively (making a total of £5,360,272.31); and

   (ii) 35 league points fall to be deducted in each of SCY 2016/17 and SCY 2018/19 (making a total of 70 league points).

5. The Panel has declined to exercise its discretion to reduce the financial penalty.

6. It has refused to reduce the starting point for the league points sanction under Regulation 12.3(d) because, far from admitting the breaches, Saracens launched a major challenge to the lawfulness of the Regulations, arguing (unsuccessfully) that they were contrary to Competition law. The Panel has also taken into account that in its opinion the breaches were reckless.

7. The Panel has explained in detail why it considers Saracens' breaches to be very serious. The main points are:

   (i) Saracens continually and recklessly failed to comply with its obligations to co-operate with the SCM. This failure was all the more serious because in 2015 Saracens settled an earlier charge by PRL of failing to co-operate with the SCM;

(ii) the breaches in SCYs 2016/17 and 2018/19 were several and not isolated; and

(iii) the breaches involved Saracens massively exceeding the cap for these two years. The caps were £325,000 (SCY 2016/17) and £350,000 (SCY 2018/19).

8. Despite its refusal under Regulation 12.3(d) to reduce the starting point specified for a points sanction, the Panel has exercised its discretion under Regulation 14.2, in effect, to halve the points sanction by making the two sanctions of 35 points concurrent with each other. It has taken this course because it recognises that a total of 70 points would almost certainly mean that Saracens would be relegated from the Premiership to the Championship. The Panel has concluded that such a result would not be within the spirit and underlying purpose of the Regulations, which is to achieve the Regulation 2.2 objectives in an appropriate and proportionate manner.

9. The Panels' decision is, therefore, that Saracens is fined a total of £5,360,272.31 for the three SCYs and a total deduction of 35 league points for the SCYs 2016/17 and 2018/19.

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