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Case No: CL-2021-000066

Neutral Citation Number: [2022] EWHC 38 (Comm)

IN THE HIGH COURT OF JUSTICE
BUSINESS AND PROPERTY COURTS
COMMERCIAL COURT (QB)

Rolls Building
Fetter Lane
London, EC4A 1NL

Date: 11 January 2022

Before :

THE HONOURABLE MR JUSTICE FRASER

- -

Between :

THE FOOTBALL ASSOCIATION PREMIER LEAGUE LIMITED
Claimant

- and –

PPLIVE SPORTS INTERNATIONAL LIMITED
(a company incorporated in Hong Kong SAR)
Defendant

JUDGMENT

Robert Howe QC and Peter Head
(instructed by **DLA Piper UK LLP**)
for the Claimant
Ms Zuo Jia and Mr David Ran
(In-house counsel at the Defendant)
for the Defendant

Hearing Dates: 29 and 30 November 2021

Mr Justice Fraser:

Introduction

1. This judgment concerns a summary judgment application by the Claimant. In these proceedings the Claimant is the entity called the Football Association Premier League Ltd, which is more widely known simply as "the Premier League". That is how I will refer to the Claimant. The Premier League is the entity that organises and markets the Premier League football competition on behalf of its member clubs, of whom there are currently 20 in number. The Premier League was formed in the 1990s by certain association football clubs who competed in what was, then, called the First Division (which was organised by the Football League). Over time the attractiveness of the Premier League as a competition, the increase in popularity of watching this on television, and vast improvements in technology, have collectively led to a very considerable increase in the maximisation of television rights and wealth within that particular element of the sport, both domestically and across the world. The Defendant is PPLive Sports International Ltd ("PPL"), a company based in the Hong Kong Special Administration Region of the People's Republic of China ("PRC"). It has been involved in broadcasting Premier League football matches within mainland China and Macau.

2. In outline terms, PPL and the Premier League entered into two separate contracts for three seasons whereby PPL obtained the rights to show both live and delayed Premier League football matches, and also so-called "clips" or highlights, on television both within the mainland PRC and also Macau. The details of those two contracts are dealt with below, and they are called the Live Package Agreement ("LPA") and Clips Package Agreement ("CPA") respectively. The sums to be paid to the Premier League under these agreements are considerable; the payment for the three seasons under the LPA was to be US$701 million, and under the CPA the more modest amount of US$8.02 million.

3. However, although the LPA was agreed in 2017, the first of the three football seasons under that agreement was the one that ran (or was intended to run) from August 2019 to June 2020. The first season was therefore the one that was severely disrupted by the Covid-19 pandemic. This hit the world in about March 2020, starting on different dates in different parts of the world, but started in China before that. The World Health Organisation declared Covid-19 to be a pandemic on 1 March 2020, although it had been declared a Public Health Emergency of International Concern on 30 January 2020. As is widely known, the pandemic has impacted the lives, livelihoods and activities of almost everyone on the planet, and certainly the Premier League football season was affected too. At its heart this case concerns both that disruption, and also two instalment payments of US$210.3 million and US$2.673 million, one under the LPA, and the other under the CPA, that were missed. These were due to be paid by PPL to the Premier League on 1 March 2020 and 1 June 2020 respectively. Neither of them has been paid by PPL. In these proceedings the Premier League sues for these sums and seeks summary judgment.

4. The Premier League season of 2019/2020 was temporarily suspended on 13 March 2020 as realisation began to dawn about how Covid-19 would hit UK society. On 23 March 2020 the UK Government banned all public gatherings, including professional association football matches and other sports, imposed social distancing and also what

is now widely called lockdown (or more usually, the first lockdown). I will not recite the full measures that were adopted but few will need reminding of them. On 3 April 2020 the Premier League formally suspended the 2019/2020 season, and when the competition resumed on 17 June 2020 it was under very different conditions, not least being played in empty sports stadiums or stadia, without any fans present. There were other differences in how the matches were played, and these are identified further below. The 92 remaining fixtures in the 2019/2020 season were played between 14 June 2020 and 26 July 2020 when the season was completed, with one club being proclaimed champions and three others being relegated to the Championship, the competition that sits below the Premier League in terms of status. As is normal, these clubs were replaced by three promoted clubs in due course for the 2020/2021 season.

5. Notwithstanding the non-payment of the instalments to which I have referred, the Premier League continued to provide PPL with the relevant feeds of matches under both the LPA and the CPA for the remaining 92 matches of the 2019/2020 season that ran from June to July 2020. On 20 August 2020, after the end of that season but before the 2020/2021 season commenced, the Premier League suspended both agreements under their respective terms, and then on 3 September 2020 terminated both agreements, again under their terms (although the contractual effect of these provisions is somewhat controversial and will be addressed further below). Later that same day PPL purported to terminate the agreements as well, although the Premier League submits that by the time it did so, the agreements had already come to an end due to their prior termination by the Premier League. The precise timings are as follows. The Premier League served the termination notice in respect of the LPA on 3 September 2020 at 11.31 am (London time) and a similar notice under the CPA very shortly afterwards, at 11.33 am (London time). Later on the same day, at 12.15 pm (London time), PPL purported to serve its own termination notices in respect of both the LPA and the CPA. However, in paragraph 30 of the Defence and Counterclaim, PPL admits – but only in relation to the CPA, and not the LPA - that the Premier League was entitled to terminate the CPA, and that the Premier League did so by way of its termination notice on 3 September 2020. Whether the Premier League was entitled to terminate the LPA is an issue that has to be dealt with, and I do so below.

6. A claim form was also issued by the Premier League on 3 September 2020. The reason that this case has a Commercial List case number from 2021 is because the Premier League, for reasons that have not been explained, initially issued the proceedings in the London Circuit Commercial Court. Given the value of the claim and the nature of the issues, the case was then transferred to the Commercial Court (and hence given its existing case number) in 2021.

7. Following the termination referred to at [5], and for the season 2020/2021, the rights to broadcast matches in mainland China and Macau have been acquired from the Premier League by another company, Tencent Sports, although at what is reported to be a far lower fee of US$10 million. Different contractual arrangements with a further company have been entered into by the Premier League for the third of the seasons under the LPA and CPA, namely the 2021/2022 season.

8. Some central facts are agreed by the parties. PPL accepts that the instalments were not paid by the contractually due dates, and admits the terms of both the LPA and the CPA. In addition to the other points which it raises, it submits that the effect of granting summary judgment to the Premier League for the outstanding instalments, given the termination of the agreements, is that PPL will have received rights to

broadcast matches for only one of the three seasons agreed, and a severely disrupted season at that. It also points out – and this is based on public news announcements, rather than being available as direct evidence on the application, or on disclosure – that the Premier League has been reported as agreeing very substantial rebates to its broadcast partner domestically for the season in question. For example, on 17 June 2021 sportspromedia.com reported that the Premier League and Sky Sports had agreed a rebate of £170 million (approximately at that date US$213 million) payable *to* Sky Sports *by* the Premier League in respect of the contract between the two for domestic TV rights in the UK. PPL relies on concepts of fairness and justice to maintain that it would be unfair to grant the Premier League summary judgment in these circumstances. This is a point to which I shall return at the end of this judgment.

9. As is well known, summary judgment may be granted to a claimant when, under CPR Part 24, a defendant has no real prospect of successfully defending a claim or issue, and there is no other compelling reason why the case or issue should be disposed of at a trial. Such applications are heard by the court earlier in time than when a trial could be held, and are done without full evidence or disclosure having taken place. Evidence is submitted in advance in the form of witness statements lodged by the parties, and witnesses are not heard in person or cross-examined. Before turning to the substance of the summary judgment application, there are two applications that must be explained, both issued by PPL shortly before the summary judgment hearing.

The Defendant's two pre-hearing applications

10. On 4 November 2021, the firm of solicitors who were then on the court record acting for PPL, Quinn Emanuel Urquhart & Sullivan ("Quinn Emanuel"), applied to come off the record. By that stage, all the pleadings in the proceedings had been served; the Premier League had issued its application for summary judgment on 9 April 2021 supported by evidence (that of Mr Curle, a partner at the Premier League's firm of solicitors, in his first witness statement dated 9 April 2021); the summary judgment application had been listed for a two day hearing on 29 and 30 November 2021; and PPL had served its own evidence in response (the witness statement of Ms Vernon, a partner at Quinn Emanuel, dated 18 June 2021).

11. Quinn Emanuel explained in that application that PPL had failed to pay a substantial amount of outstanding legal fees due to them, despite an instalment plan having been agreed with PPL by one of the partners in the case. Quinn Emanuel also explained that PPL did not intend to appoint any replacement firm to act in its stead in these proceedings. Bryan J approved this application on 4 November 2021.

12. This state of affairs was communicated to DLA Piper UK LLP, the Premier League's solicitors. DLA Piper ascertained from PPL that PPL did indeed intend to represent itself going forwards in the litigation. PPL did not have a CE-File account (and one could not realistically expect them to have one, given that it is a Hong Kong-based media rights and broadcast company) and DLA Piper assisted them in explaining the need for a formal application to the court in this respect, and the need for the court's permission to do so. Other helpful procedural advice was also provided by DLA Piper.

13. This resulted in the following. PPL made an application to the court dated 17 November 2021 that Ms Zuo and Mr Ran of PPL (two of its employees) be permitted to represent PPL in the litigation; it served a skeleton argument for the summary judgment hearing on 19 November 2021 in accordance with the agreed and ordered

timetable; it requested permission to appear at the summary judgment application hearing by video link; and it also then applied to adjourn the hearing in a further application dated 19 November 2021.

14. The second application, the one to adjourn, was opposed by the Premier League, who lodged the second witness statement of Mr Curle in response. In respect of the first application, namely for permission to be represented by its employees, the Premier League's position was one of cautious neutrality, realising that this was a matter for the court. I considered the applications on the papers and made the following order on 23 November 2021, early in the week before the hearing:

    1. Further evidence was invited from PPL regarding the circumstances in which its previous solicitors had ceased to act. This could potentially be relevant to the application to adjourn;

    2. Permission was granted to PPL's named employees to appear for it and make submissions at the summary judgment hearing. However, encouragement was given to PPL to seek to obtain English based solicitors and English qualified counsel, and it was suggested that sufficient time remained before the hearing for this to be done;

    3. The hearing would be conducted in what is called "hybrid form" to avoid the need for Ms Zuo and Mr Ran to travel to London;

    4. The adjournment application would be heard first on 29 November 2021. This is because it was contested. If it were unsuccessful, the hearing would thereafter proceed. If successful, an alternative date (which would doubtless be well into 2022) would be given.

15. It is not usually (or ever) advisable for parties to represent themselves in the type of litigation habitually conducted in the Business and Property Courts, including the Commercial Court. It does, however, happen, but only very occasionally in the specialist QB lists. A natural person is entitled as of right to appear before any court and conduct litigation for or against themselves; a limited company has no such right. However, subject to certain requirements being observed (for example the authority of the company in question being demonstrated) the court can be asked for permission and will sometimes grant it. In the Commercial Court, specific discouragement is given in Section M of the Commercial Court Guide generally, and Section M3.1 regarding companies. This identifies that the complexities of cases in the Commercial Court makes representation of a company by an employee particularly unsuitable, and explains that permission will only be given in unusual circumstances. There are obvious reasons for this reluctance on the part of the court to permit employees to represent their employers which it is not necessary to recite.

16. The reasons that I gave PPL permission to do so for the summary judgment application in this case are as follows. The skeleton argument served by PPL was signed by Ms Zuo – who is in-house counsel - and demonstrated a high level of legal analysis. Indeed, both Ms Zuo and Mr Ran have a high standard of English. The Premier League was seeking summary judgment of a very sizeable instalment which fell due on the admitted date of 1 March 2020. There was certainly time between Quinn Emanuel coming off the record, and the hearing itself, for PPL to have instructed alternative representation absent permission to represent itself, but if (as might prove to be the case) it was relying on lack of funds to pay new solicitors as an explanation for its predicament, that might lead to a non-effective hearing by default. PPL had demonstrated that it could deal with the complexity of the issues by virtue of

its own skeleton argument, which gave the court in this instance some comfort that no disadvantage would be experienced, by any party, by granting that application. Additionally, the situation in which PPL found itself seemed (on the face of Quinn Emanuel's application) to have been caused by non-payment of fees by PPL. No evidence was served by PPL to suggest that was not the case (even though it would also go to the merits of the adjournment application). In my judgment the combination of different circumstances in this case made it unusual.

17. I was confident that no particular disadvantage would be caused to PPL by its not having separate solicitors and/or counsel, but even if there were, that is something that PPL would have brought upon itself. Additionally, had I refused permission, the Premier League would have simply proceeded on an unopposed application. That did not seem to me to demonstrate a just approach to the matter. In all the circumstances, I concluded that the justice of the case in the unusual circumstances came down on the side of permitting Ms Zuo and Mr Ran to appear for PPL.

18. No further evidence was served by PPL prior to the hearing and in response to the specific invitation to do so by the court on 23 November 2021 to which I refer above. The hearing therefore proceeded by PPL, first, applying for an adjournment. This was said to be needed to give PPL time for evidence to be compiled and for alternative solicitors to be instructed.

19. I refused that application to adjourn the hearing for the following reasons:

1. The summary judgment application was issued in April 2020 and served on PPL shortly thereafter. There had been ample time for evidence to be served in accordance with the order of the court and the Commercial Court Guide. In any event, a witness statement had been served already by Ms Vernon as I have explained. That was comprehensive. There was no particular area in which further evidence was called for.

2. There had been sufficient time from Quinn Emanuel coming off the record on 4 November 2021, until the hearing itself over three weeks later, for PPL to have instructed alternative representation. PPL submitted that there had been insufficient time and no-one suitable could be found. I reject that submission for at least two reasons. Firstly, Quinn Emanuel's application demonstrated that PPL had been given advance notice of the risk of Quinn Emmanuel ceasing to act well before early November; the instalment plan was agreed in September. Secondly, the London legal commercial market is a highly sophisticated one with many different law firms and barristers' chambers. A high profile case such as this, involving such large sums, would be most attractive to any number of suitable firms. Indeed, the evidence suggested that PPL had intended to represent itself (rather than instruct alternative solicitors) from *before* the issue of the application by Quinn Emanuel. Seeking time to instruct an alternative firm seemed to me to be a device to buy time.

3. In any event, the fact that PPL did not have solicitors acting for it had been caused, on the evidence before the court, by PPL failing to pay its solicitors the fees claimed which had already been incurred (both for the solicitors and counsel who had settled the pleadings).

4. One of the reasons relied upon by PPL, namely that relevant employees had left the company, could have no bearing on the issues in the summary judgment application because these were points of law and/or construction of the agreement. The primary facts relevant to the termination were agreed, as demonstrated by the pleadings.

5. A re-arranged hearing for a two day application could not be listed for earlier than July 2022 due to the pressure on the resources of the Commercial Court. This would mean that the Premier League would have issued an application for summary judgment in April 2021 that would only eventually be heard some 15 months later. In circumstances where the whole ethos of CPR Part 24 is to deal with cases where a defendant has no real prospect of successfully defending a claim or issue, such delay is to be avoided. This is not to pre-judge that application, but rather to conclude that it ought to be resolved, one way or the other, at a hearing of which the parties had some seven months' notice.

6. Adjourning the hearing as sought by PPL would, in all the circumstances, be contrary to the over-riding objective.

20. Indeed, such were the circumstances in this case that even if both parties had presented an agreed application to adjourn, given the over-riding objective in CPR Part 1.1 and the need to consider other court users, it would have taken considerable persuasion for me to grant an adjournment in any event. Even a joint application for an adjournment at such a late stage before a hearing that had been set so far in advance would have faced substantial difficulties.

21. I also formed the view, given the lack of any witness statement in support setting out proper evidential grounds, that the application to adjourn the hearing was an attempt by PPL to put off the day of reckoning in terms of having to pay the instalments, in particular the very sizeable one due under the LPA in excess of US$210 million.

22. The hearing of the summary judgment application therefore took place as listed. As matters transpired, Ms Zuo made her oral submissions with some skill, and my conclusion at [17] above that there was no disadvantage to PPL was reinforced. For completeness, I ought to record that each of the agreements contained an exclusive English law clause, both substantive and procedural. This is contained in clause 23 in the LPA and clause 22 in the CPA. There is no issue between the parties regarding the jurisdiction of this court to decide the dispute.

Summary judgment – the principles

23. Under CPR Part 24.2, the Court may give summary judgment against a defendant on the whole of the claim or a particular issue where it considers that: (a) the defendant has no real prospect of successfully defending the claim or issue; and (b) there is no other compelling reason why the case or issue should be disposed of at a trial. Here, the Premier League's primary submission was that the two claims in debt – for each of the instalments under the LPA and the CPA respectively – were straightforward. On the true construction of the two agreements (which were drafted in very similar terms) the instalments had fallen due on two particular dates in 2020 which had passed; the payments had not been made by PPL, either in full or in part; this non-payment was admitted; and under their respective terms, the Premier League became entitled to terminate the two contracts, and had done so. The Premier League submitted that this also entitled the Premier League to summary judgment on its claim for those two payments. The Premier League submitted that the defences that were raised were not sound in law or in fact, and PPL had no real prospect of successfully defending the claim for the two instalments.

24. PPL raised a number of defences which I will consider below. Simply because a defence is raised, this does not mean that a claimant is not entitled to summary judgment. So far as CPR Part 24 is concerned, the relevant principles are well-settled.

They are conveniently summarised by Popplewell J (as he then was) in ***Barclays Bank plc v Lester Charles Landgraf*** [2014] EWHC 503 (Comm) at [26]. In that judgment, the judge adapted the summary of Lewison J (as he then was) in the earlier case of ***Easyair Ltd v Opal Telecom Limited*** [2009] EWHC 339 (Ch) (which applied to defendant applications, which are also permitted under CPR Part 24) as he had adapted them for claimants' applications in an earlier case (***FG Wilson v Holt***, considered further below at [129] on a different point, namely the effect of a "no set-off" clause). As recognised by Popplewell J in the extract below, ***Easyair*** had in any case been approved by the Court of Appeal in a number of cases including ***AC Ward & Son v Catlin (Five) Ltd*** [2009] EWCA Civ 1098 at [24] in the judgment of Etherton LJ (as he then was); the ratio is undoubtedly binding on me. There is no need for me to restate the principles in my own words; I simply adopt them as explained by Popplewell J. In ***Barclays Bank*** he stated the following:

> "[26] The principles to be applied on applications for summary judgment are well established. In respect of defendant's applications, they were summarised by Lewison J, as he then was, in ***Easyair Ltd v Opal Telecom Limited*** [2009] EWHC 339 (Ch), in a formulation approved in a number of subsequent cases at appellate level, including ***AC Ward & Sons v Catlin (Five) Limited*** [2009] EWCA Civ 1098 and ***Mellor v Partridge*** [2013] EWCA Civ 477. In ***FG Wilson Engineering Limited v Holt*** [2012] EWHC 2477 (Comm) I adapted them for claimants' applications. The principles are:
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> > (1) The court must consider whether the defendant has a "realistic" as opposed to a "fanciful" prospect of success: ***Swain v Hillman*** [2001] 2 All ER 91;
> >
> > (2) A "realistic" defence is one that carries some degree of conviction. This means a defence that is more than merely arguable: ***ED & F Man Liquid Products v Patel*** [2003] EWCA Civ 472 at [8];
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> > (3) In reaching its conclusion the court must not conduct a "mini-trial": ***Swain v Hillman***;
> >
> > (4) This does not mean that the court must take at face value and without analysis everything that a defendant says in his statements before the court. In some cases it may be clear that there is no real substance in factual assertions made, particularly if contradicted by contemporaneous documents: ***ED & F Man Liquid Products v Patel*** at [10];
> >
> > (5) However, in reaching its conclusion the court must take into account not only the evidence actually placed before it on the application for summary judgment, but also the evidence that can reasonably be expected to be available at trial: ***Royal Brompton Hospital NHS Trust v Hammond (No 5)*** [2001] EWCA Civ 550;
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> > (6) Although a case may turn out at trial not to be really complicated, it does not follow that it should be decided without the fuller investigation into the facts at trial than is possible or permissible on summary judgment. Thus the court should hesitate about making a final decision without a trial, even where there is no obvious conflict of fact at the time of the application, where reasonable grounds exist for believing that a fuller investigation into the facts of the case would add to or alter

> the evidence available to a trial judge and so affect the outcome of the case: ***Doncaster Pharmaceuticals Group Ltd v Bolton Pharmaceutical Co 100 Ltd*** [2007] FSR 63;
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> (7) On the other hand it is not uncommon for an application under Part 24 to give rise to a short point of law or construction and, if the court is satisfied that it has before it all the evidence necessary for the proper determination of the question and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. The reason is quite simple: if the respondent's case is bad in law, he will in truth have no real prospect of succeeding on his claim or successfully defending the claim against him, as the case may be. Similarly, if the applicant's case is bad in law, the sooner that is determined, the better. If it is possible to show by evidence that although material in the form of documents or oral evidence that would put the documents in another light is not currently before the court, such material is likely to exist and can be expected to be available at trial, it would be wrong to give summary judgment because there would be a real, as opposed to a fanciful, prospect of success. However, it is not enough simply to argue that the case should be allowed to go to trial because something may turn up which would have a bearing on the question of construction: ***ICI Chemicals & Polymers Ltd v TTE Training Ltd*** [2007] EWCA Civ 725 ."
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> (emphasis added)

25. On a summary judgment application the court must always be astute, and on its guard against, both a claimant maintaining that particular issues are very straightforward and simple, and also a defendant attempting to dress up a simple issue (or issues) as being very complicated (factually or otherwise) and therefore requiring a trial. The overriding objective in CPR Part 1.1 is not achieved by sending matters to a full trial if that is not justified when defences are properly considered. Equally, a defendant with a defence (or defences) that ought to be heard at trial is entitled to have that occur.

26. The Premier League, in the alternative to its summary judgment application, made submissions concerning conditional orders. This is provided for in the Practice Direction to CPR Part 24, namely PD24 at paragraph 4. Where it appears that a claim or defence may succeed, but this is improbable, the court "may make a conditional order". The Premier League, as its alternative position, maintained that even if it failed to obtain summary judgment, a conditional order should be made and PPL should be required to pay the whole sum into court. If one were to reach that stage in the analysis, one potential conditional order in a case such as this could be likely to be payment of a substantial sum into court as a condition of the case continuing and PPL having its defences heard at a full trial. It is similar to – though not the same as - what used to be called "conditional leave to defend" under Order 14 in the old Rules of the Supreme Court, although I refer to this as a matter of historical interest only. I have had no regard to the RSC and deal with this case solely under the Civil Procedure Rules or CPR.

27. The power of the court to make a conditional order is found in CPR Part 24.6 and also arises in CPR Part 3.1(3), as part of the court's general powers of case management. The principles are contained in ***Gama Aviation (UK) v Taleveras Petroleum Trading***

DMCC [2019] EWCA Civ 119 at [42] to [54]. That case concerned a payment into court which was imposed as a condition for relying upon fresh evidence, but the Court of Appeal expounded and restated the principles that arise in the same respect on a summary judgment application as well.

28. In my judgment, the correct approach on this application is, first, to decide whether PPL has a real prospect of success on any of its defences. If it does not, then the Premier League would be entitled to summary judgment. It would only be if the Premier League failed to satisfy the court that PPL had no real prospect of success on any of its defences that I ought then to go on to consider whether a conditional order were, in all the circumstances of the case and in the exercise of the court's powers of case management, the correct one to make on the application, and if so what the conditions within that order should be. I therefore propose to consider these matters sequentially. It is not therefore necessary to turn to ***Gama Aviation*** in any further detail at this stage of this judgment, nor is it necessary to consider some of the points made by the Premier League in support of such an order. These included submissions that the alleged inability on the part of PPL to pay such a sizeable sum at all (which must impact upon a payment into court, as much as a payment to satisfy a summary judgment order) were made only by way of submission, and not underpinned by any evidence in PPL's witness evidence. Matters that could potentially arise concerning whether such a condition or conditions should be imposed (and whether one could realistically be complied with), such as those considered in ***MV Yorke Motors v Edwards*** [1982] 1 WLR 444 (under the RSC), re-affirmed under the CPR by the Supreme Court in ***Goldtrail Travel Ltd (in liquidation) v Onur Air Tasimacilik AS*** [2017] UKSC 57 at [12], do not therefore at this stage arise. I will return to them if that is necessary.

29. The Premier League made clear that its application for a conditional order was very much advanced in the alternative, if its application for summary judgment did not succeed. I shall deal with that only if it arises.

The contract terms

30. Each of the two contracts should, of course, be considered individually, and each should be construed as a whole. I shall not recite the entire terms of the LPA, nor of the CPA either, although that latter document follows the wording and definitions of the former. PPL did not submit that there should or could be any different result for each of the two instalment payments under each contract; it was effectively and realistically accepted that the outcome would be the same on both. I reproduce the following terms for convenience from the LPA. It is dated 17 February 2017. The Premier League was represented by DLA Piper in negotiations between the parties, and the name of that firm appears on the front page of the contract itself. PPL was represented by King Wood Mallesons. It is plainly a commercial agreement made by sophisticated business entities who were represented by solicitors, and agreement of its terms followed success by PPL in a bidding competition held by the Premier League in accordance with an Invitation to Tender or ITT issued by it. The CPA is dated 4 February 2019 and there are no material differences in the relevant terms. Those that follow are taken from the LPA.

31. Clause 1.1 contains definitions.

"Clips Licensee means any licensee of the Clips Package in the Territory;

Clips Package means any package of audio-visual clip rights designated for exploitation in:

(a) the Territory; and/or

(b) the Overseas Territory in its entirety; and/or (as the Premier League may determine)

(c) any part(s) of the Overseas Territory which include(s) the Territory;

Club means in respect of each Season during the Term, each football club which, at the commencement of the relevant Season, is affiliated to and is a member of the Premier League (a list of the Clubs for the 2016/17 Season is attached at Schedule 1);

Club Match of or in relation to any Club, means any Match in which that Club plays (whether home or away) as part of the Competition;"

"Competition means the league competition which is organised by the Premier League and played during each Season and whose format requires that the first team of each Club is scheduled to play the first team of each of the other Clubs twice in each Season."

32. The meaning of the term "Competition", and in particular the "format" of the Competition, was the focus of substantial submissions. Format appears also in clause 12.1(d) and self-evidently, the term should be given the same meaning in both places. That latter clauses uses the phrase "the format of the Competition". The definitions also include the following:

"Content Utilisation Plan means the plan agreed between the Premier League and the Licensee after the signature of this Agreement and in accordance with Clause 2.14 and Schedule 6 which sets out the permitted exploitation of Footage by the Licensee and (if relevant) its Permitted Sub-Licensees as part of the Live Package within the Territory with particular reference to exploitation (i) by means of one (1) or more Additional Distribution System(s), (ii) on an On-Demand Basis and (iii) by means of Standalone Live Transmissions."

"Fixture List means the fixture list for each Season during the Term which is to be published by the Premier League (and copied to the Licensee) prior to the start of that Season and which will contain the dates on which Matches are scheduled to be played during that Season;

Fixture Programme means a full fixture programme consisting of ten (10) Matches which are initially scheduled in the Fixture List for any Season during the Term to be played on the same day or on two (2) consecutive days;

Fixture Programme Weekend means any weekend (comprising for this purpose Friday, Saturday, Sunday and, if applicable, Monday) during the Term over which a weekend Fixture Programme takes place."

"Footage means all material, pictures, programme feeds and footage (including all associated soundtracks other than commentary) of Matches which may be filmed, produced or recorded by or on behalf of the Premier League or any UK Broadcaster during the Term."

"Force Majeure Event has the meaning ascribed thereto in Clause 20.1 ."

"Live Package means the package of rights designated for exploitation in the Territory which is referred to as the Live Package and described at Section 4 of the ITT;

Live Transmission means any live and simultaneous (i.e. at the same time as the relevant Match is being played) transmission of a Match in its entirety (including without limitation any such live transmission made on a Designated Channel or as part of a Standalone Live Offering)."

"Match means any football match played for points during the Term between two (2) Clubs as part of the Competition (and, for the avoidance of doubt, does not include any Current Term Match or any other Archive Match)"

"PL Highlights Programme means, in respect of each Fixture Programme of Matches, the television programme currently entitled "Premier League Review" which is produced by or on behalf of the Premier League and which consists primarily of Recorded Highlights of the Matches played as part of that Fixture Programme;

PL Live Feed means a live programme feed of each Match which shall:

(a) be accompanied by a PL Commentary in respect of that Match; and

(b) contain data and graphics incorporating the Approved Main Logo, Approved Standard Logo, Approved Masthead Logo and/or Approved Short Logo and the brand name associated with such data and which shall also contain the name and/or branding of each Accreditation Partner and/or the Principal Sponsor (as described in Clause 8.5(f) of this Agreement),

and which shall, in the event that the Licensee so notifies the Premier League in accordance with the provisions of Clause 2.6, be delivered via satellite or fibre to the Licensee by the International Production and Distribution Partner (on behalf of the Premier League)."

"Rights means the rights licensed to the Licensee and more particularly set out in Clause 2 and Clause 3 (but specifically excluding the right to exploit Footage in any form or medium on International Flights)."

"Season means (a) any season of Archive Matches played prior to the commencement of the Term; or (b) any season of Matches during the Term commencing with the first scheduled Match set out in the Fixture List for that season (which shall usually be scheduled for August in each year) and ending with the last scheduled Match set out in the Fixture List for that season (which shall usually be scheduled for April or May of the following year) but including any extension of that season so as to include postponed or rearranged Matches taking place after the final day of that season as set out in the Fixture List."

"Term means the period which (subject to any earlier termination of this Agreement in accordance with the provisions of this Agreement) shall commence upon 1 August 2019, shall expire on 31 May 2022 or (if later) fourteen (14) days after the last day of the 2021/22 Season and shall consist of the 2019/20, 2020/21 and 2021/22 Seasons."

"Trophy means the trophy or any representation of the trophy which is to be awarded to the winner of the Competition in respect of a Season, which has been pre-approved in writing by the Premier League, which may have ribbons incorporating the Principal Sponsor's name and/or the Approved Competition Title, and which may be altered or changed from time to time by the Premier League giving written notice of such alterations or changes to the Licensee."

33. Clause 1.5 stated that "all references in this Agreement to a time are (save as expressly provided in Part G of Schedule 4) to that time in the United Kingdom".

34. Clause 2 deals with the grant of Rights and states:

"The Premier League hereby grants to the Licensee during the Term, within the Territory and in the Authorised Language(s) only:

(a) the licence to make and to authorise the simultaneous re-transmission, together with the right to sub-license to Permitted Sub-Licensees the right to make and to authorise the simultaneous re-transmission, of:

(i) a Live Transmission **OR** Delayed Transmission of each Match; and

(ii) in each Season during the Term, three (3) Repeat Transmissions for the Licensee and each Permitted Sub-Licensee of each Match which has previously been the subject of a Live Transmission or a Delayed Transmission by that Permitted Sub-Licensee in the Territory,

which Live Transmissions, Delayed Transmissions and Repeat Transmissions shall be made on the Designated Channel(s) by means of:

(aa) Broadcast Distribution Systems; and/or
(bb) (in accordance with the Content Utilisation Plan) Additional Distribution Systems,

and otherwise in accordance with and subject to the provisions of this Agreement (including without limitation Clauses 2.18, 11.17 and 13)."

(bold present in the original)

35. Rights continues in clause 2.1(b)(iii) to make it clear that the Licence includes for each Fixture Programme:
"(iii) in respect of each week of each Season during the Term in which a weekend Fixture Programme of Matches is scheduled to be played:

(aa) four (4) transmissions for the Licensee and each Permitted Sub-Licensee of the PL Preview Programme in respect of that week; and
(bb) four (4) transmissions for the Licensee and each Permitted Sub-Licensee of the PL Statistics Programme in respect of that week,

in each case, which shall be made prior to the scheduled kick-off of the first Match to be played as part of that weekend Fixture Programme".

36. Clause 2.1 is a lengthy one and for that reason I have not reproduced it in its entirety. It continues for a number of sub-paragraphs over several pages. The majority of those terms do not impact on the issues in this case and are not relevant, although I have considered them as a matter of construction. The part reproduced above makes it clear

that PPL has the rights to show either live or delayed broadcasts of Premier League football matches during the Season. The LPA covered three different seasons. The definition of Season includes "any season of Matches during the Term commencing with the first scheduled Match set out in the Fixture List for that season (which shall usually be scheduled for August in each year) and ending with the last scheduled Match set out in the Fixture List for that season (which shall usually be scheduled for April or May of the following year) but including any extension of that season so as to include postponed or rearranged Matches" as I have set out from clause 1.1. This refers to when such matches "shall usually be scheduled" but makes it clear that "Season" as defined includes "any extension of that season" and this will include matches that have to be postponed or re-arranged. The use of the word "usually", and also the express provision that Season includes "any extension" to include postponed or rearranged Matches makes it clear, in my judgment, that the resumption of the Season in June 2020 (which ran into late July 2020) does not impact upon the nature of the contractual Rights.

37. Clause 2.6 provides that:
"The Premier League shall (subject to the provisions of Clauses 04.8 and 13) make available to the Licensee on a secure basis a PL Live Feed of the entirety of each Match played in each Season during the Term at British Telecom Tower in London (without any charge levied by or on behalf of the Premier League) and the Licensee shall be responsible at its own cost for making all necessary arrangements for the onward transmission, delivery and/or distribution of each such PL Live Feed (whether by satellite or otherwise) for reception by or on behalf of the Licensee in the Territory UNLESS the Licensee (by written notice to the Premier League at least sixty (60) days prior to the start of any Season during the Term) notifies the Premier League that during that Season it wishes, or its Permitted Sub-Licensees wish, to have a PL Live Feed of each Match (or a minimum number of Matches specified by the Licensee in such notice) delivered to it or (as the case may be) the relevant Permitted Sub-Licensee(s) via satellite or fibre by the International Production and Distribution Partner (on behalf of the Premier League)….."

38. Clause 2.11 deals with so-called Archives matches, which are defined in clause 1.1 as any matches played between the clubs ending with the 2018/2019 season. In other words, previous matches not part of the current season at the time. Clause 2.11 states:

"The Premier League shall deliver the Archive Starter Pack in respect of each Season during the Term to the Licensee, at British Telecom Tower in London and at the Licensee's sole cost, not later than 1 July immediately preceding the commencement of that Season….."

39. Clause 2.14 provides for a draft Content Utilisation plan to be agreed between the parties for the following Season. As can be seen from the definition of that which has been reproduced above, this relates to how PPL would exploit the footage of the matches in terms of the type of broadcast and method used by a viewer, for example "on demand" (where a person pays a fee to watch a particular event, or in this case a match) or by standalone live transmission. No part of the plan related to any agreement with PPL as to date, time or location of matches. PPL was therefore given no role in deciding or agreeing such matters.

40. Clause 2.18 stated "The Licensee has been awarded the Live Package on the basis that it will in each Season during the Term ensure that the CCTV FTA Obligation and the Regional FTA Obligation are observed and performed in Mainland China in accordance with the provisions of this Clause 40." This clause uses both Season and Term to define the period.

41. Turning to the fees payable, these are dealt with in clause 4, "Consideration for Grant of Rights", Clause 4.1 states:
"4.1 The Licensee will pay to the Premier League, in consideration of the Rights granted hereunder, fees which total in the aggregate over the Term the sum of **SEVEN HUNDRED AND ONE MILLION UNITED STATES DOLLARS (US$701,000,000)**.

4.2 The Licensee has already paid to the Premier League, and the Premier League has retained in part payment of the Fees (as set out in this Clause 0), a pre-payment (the **Pre-Payment**) in the amount of **TWENTY-ONE MILLION AND THIRTY THOUSAND UNITED STATES DOLLARS (US$21,030,000)** (representing three (3) per cent of the aggregate amount of the Fees set forth in Clause 41) pursuant to the standstill agreement between the Premier League and PPLive Corporation Limited (an Affiliate of the Licensee) dated 22 November 2016. In the event that this Agreement terminates in accordance with Clause 1.6, the Premier League shall be entitled to retain the Pre-Payment in full. The balance of the Fees (in addition to the Pre-Payment) shall be paid in instalments in the amounts and not later than the dates set forth in Schedule 2."

(bold present in original)

42. Clause 4.4 was a provision for interest to be payable on any "Fees which remain unpaid following the due date for payment" at 2% over Barclays Bank plc's base rate on a monthly compound basis, and clause 4.5 stated:

"4.5 The Licensee shall pay each instalment of the Fees to the Premier League in accordance with Clauses 4.1 and 4.2 in full and without set-off or counterclaim and free and clear of and without deduction or withholding for or on account of any tax or other deductions of any nature imposed now or at any time after the date of this Agreement, unless the deduction or withholding is required by law….."
(emphasis added)

43. Clause 4.6.2 stated that "The Licensee hereby irrevocably waives any right of set-off which it may have (howsoever arising) in respect of the Fees."

44. Clause 4.7 followed:

"4.7 In the event of any lawful termination of this Agreement by the Premier League under Clause 48, the Premier League shall be entitled to retain (without prejudice to any of its other rights and remedies) in full all amounts of the Fees (including without limitation the Pre-Payment) paid by the Licensee prior to the effective date of such termination PROVIDED THAT, if the Premier League is able to and does grant rights which comprise or are substantially similar to the Rights (the **Relevant Rights**) to a third party for exercise within the Territory during the period commencing on the later of 1 August 2019 and the effective date of such termination and ending on the final day of the 2021/22 Season, the Premier League shall pay to the Licensee, within sixty (60) days after the entry into of a legally binding agreement for the grant of the Relevant Rights to such third party for exercise within the Territory, a sum equal to ninety-seven per cent (97%) of (A - B), where A exceeds B and where:

A = C + D

B = the total amount of the Fees payable by the Licensee in respect of the Term pursuant to Clause 4.1;

C = the total amount of the Fees actually paid by the Licensee and received by the Premier League prior to the effective date of such termination; and

D = the total licence fee payable by such third party for the grant of the Relevant Rights within the Territory and in respect of the period commencing on the later of 1 August 2019 and the effective date of such termination and ending on the final day of the 2021/22 Season…." (bold present in original)

Clause 4.8 then stated:

"In the event of a failure by the Licensee to pay any instalment of the Fees within two (2) days after the due date for payment of that instalment (as set out in Schedule 2) which has not been remedied by the Licensee within five (5) days after written notice of such failure has been given to the Licensee, the Premier League shall (without prejudice to any of its other rights and remedies) be entitled by notice in writing to the Licensee and without incurring any liability to the Licensee:

(a) to suspend immediately the exercise of any or all of the Rights (as specified by the Premier League in such notice) by the Licensee and each Permitted Sub-Licensee; and

(b) to cease immediately the provision of the PL Live Feed of each Match and/or (as specified by the Premier League in such notice) the Premier League Content Feed,

until such time as the Licensee has remedied in full its failure to pay the relevant instalment(s) of the Fees to the Premier League. For the avoidance of doubt, the Licensee shall not be relieved of or discharged from its liability to pay the Fees in full to the Premier League as a result of any exercise by the Premier League of its rights pursuant to this Clause 04.8."

45. Due to the differences in how the parties characterise the changes to the way matches were played after the resumption of the Season in June 2020, it is necessary to include the whole provision relating to kick off times. These were contained in clause 5 headed "Kick-off times":

"5.1 Current Term Matches shall, as a general rule, kick-off at the following times (UK time) and on the following days during the Current Term:

(a) in the case of Current Term Matches which are scheduled in the Fixture List to be played on a Saturday and are selected for live broadcast by a UK Broadcaster: on Fridays at 19.30, 19.45 or 20.00 hours, on Saturdays at 12.30 hours, on Saturdays at 17.30 hours, on Sundays at 13.30 hours, on Sundays at 16.00 hours, on Mondays at 20.00 hours, occasionally on Sundays at 12 noon;

(b) in the case of Current Term Matches which are scheduled in the Fixture List to be played on a Saturday and are **not** selected for live broadcast by a UK Broadcaster: on

Saturdays at 15.00 hours or such time(s) on a Sunday as may be determined by the Premier League;

(c) in the case of Current Term Matches which are scheduled in the Fixture List to be played on a weekday: on Tuesday, Wednesdays and Thursdays (other than Bank Holidays) at 19.30, 19.45 or 20.00 hours;

(d) in the case of Current Term Matches which are scheduled in the Fixture List to be played on a day which is a Bank Holiday in the United Kingdom: on each such Bank Holiday at such times as may be determined by the Premier League;

provided always that all kick-off times and re-starts shall be subject to the approval of, and any requirements of, the police (and any other competent statutory authorities) in the United Kingdom.

5.2 If the kick-off times for Matches during the Term will or are likely to be different from those during the Current Term (as set out in Clause 45), the Premier League will notify the Licensee to that effect not later than fourteen (14) days after the date on which the Premier League has awarded all of its packages of live audio-visual rights for exploitation in the United Kingdom during the Term (and, in any event, not later than 31 December 2018). In the event that any of the kick-off times for Matches during the Term subsequently alter in the course of the contractual negotiations between the Premier League and its UK Live Licensees, then the Premier League will notify the Licensee to that effect not later than fourteen (14) days after the date on which all of the agreements between the Premier League and its UK Live Licensees in respect of the Term have been signed (and, in any event, not later than 28 February 2019).

5.3 In respect of each Fixture Programme during the Term, the Premier League shall publish on the PL Website the kick-off time at which, and the date on which, each Match is to be played as part of that Fixture Programme as soon as such information is known to the Premier League.

5.4 The Licensee agrees and acknowledges that, due to the requirements of the football calendar and other domestic and international football competitions, Matches will not be scheduled to be played on a number of weekends in each Season during the Term."

(emphasis by way of underlining added; one word in bold present in original)

46. The Premier League draws attention to the features of the clauses above as demonstrating that the dates and times of matches are entirely in the discretion of the Premier League, and that PPL was given no rights to be consulted in this, nor was it involved in this in any respect. Further, there was no provision or warranty provided by the Premier League that kick off times (or the days of matches) would be chosen to suit the Chinese market.

47. Some warranties were given by the Premier League, however, and these are included in Clause 12, "Warranties and Undertakings":

"12.1 Subject to Clauses 14.2 and 14.6(b) the Premier League hereby warrants and undertakes that:

(a) the Premier League has, and will continue during the Term to have, the full right, title and authority to enter into, observe and perform all the terms of this Agreement which require observance and performance on its part;

(b) without prejudice to the generality of sub-clause 0, the Premier League is authorised by the Clubs to enter into this Agreement on their behalf;

(c) the obligations imposed upon the Premier League under this Agreement shall be performed by the Premier League in accordance with their terms and that such obligations are binding upon and enforceable against the Premier League in accordance with their terms;

(d) during the Term the format of the Competition will not undergo any fundamental change which would have a material adverse effect on the exercise of the Rights by the Licensee and, for the purposes of this sub-clause, a **fundamental change** shall include any change which results in:

(i) the total number of Clubs being reduced to less than eighteen (18); or

(ii) the Competition ceasing to be the premier league competition played between professional football clubs in England and Wales.

If any such fundamental change to the format of the Competition occurs during the Term, then (without prejudice to its other rights and remedies) the Licensee shall be entitled to enter into a period of good faith negotiations with the Premier League in order to discuss a possible reduction of the Fees payable by the Licensee pursuant to Clause 4 in order to reflect the effect of that fundamental change on the exercise of the Rights granted to the Licensee hereunder;

(e) in the Fixture List for each Season during the Term each Club will be scheduled to play against each of the other Clubs twice in the course of that Season; and

(f) the Premier League will indemnify and keep the Licensee fully indemnified from and against all liabilities, claims, actions, proceedings, damages and loss suffered, incurred or paid by the Licensee in consequence of or arising out of any breach or non-performance of all or any of the covenants, warranties and representations, undertakings, obligations or agreements on the Premier League's part (including, without limitation, where such breach or non-performance has been caused by the fraud, wilful misconduct or negligence of the Premier League) contained in this Agreement."

(emphasis by way of underlining added; bold present in original)

48. Termination is dealt with in Clause 14, and relevant provisions are:

"14.1 This Agreement may be terminated with immediate effect by either party by written notice to the other party given at any time after the occurrence of any of the following events:

(a) if such other party shall have committed a breach of any of the material terms hereof (which shall include each Material Provision of this Agreement (as defined in Clause 14.8 of this Agreement but excluding, for the purposes of this Clause 014.1(a), Clause 2.18), all terms relating to payments and the warranties and undertakings contained herein and Clauses 8.1, 8.13, 10 and 11.2) and (where such breach is capable of being remedied) shall have failed to remedy the same within (subject to Clause 4.9) five (5) Business Days (in the case of a failure to pay any instalment of the Fees or to comply with or perform any Material Provision of this Agreement) or (subject to Clause 8.13(b)) fourteen (14) Business Days (in the case of any other breach) after receiving a written notice specifying the breach and requiring its remedy;

(b) to (f) [these deals with meetings of creditors, voluntary arrangements, insolvency and other matters akin to insolvency]"

49. Clauses 14.3 and 14.2 deal with matters where, under clauses 14.2(b)(ii) to (iv), a court, tribunal or regulatory authority shall have declared any material provision of the LPA void unlawful or unenforceable leading to impossibility of lawful performances. Their provisions are not relevant here as there was no such declaration.

50. Consequences upon termination more generally are set out in the same part of the contract, Clause 14.5 states:

"14.5 If this Agreement is terminated pursuant to Clause 14.4, then, subject to Clause 14.6, such termination shall not affect any lawful obligation of either party to this Agreement falling due for performance prior to such termination."

(emphasis added)

51. Clause 14.10 states:

"14.10 In the event of any lawful termination of this Agreement by either party for any reason (including without limitation under Clause 14.4) or the expiry of this Agreement by the effluxion of time, the Rights and all other rights granted to the Licensee and all liabilities and obligations under this Agreement shall automatically cease (save for accrued liabilities and obligations) with the exception that:

(a) the provisions of Clause 4314.7 and Clause 14.6 shall survive any termination of this Agreement; and

(b) subject to Clause 14.6(b) such termination or expiry shall not prejudice or affect any lawful obligation of either party falling due for performance prior to such termination or the rights of either party against the other arising out of any breach of this Agreement; and

(c) within fourteen (14) days after the expiry of the Term or after any earlier termination of this Agreement, the Licensee shall upon and in accordance with the written instructions of the Premier League either:

(i) return or procure the return (shipping costs for the account of the Premier League) of all or any recordings of Footage or Archive Footage made pursuant to this Agreement to the Premier League at the address notified to the Licensee by the Premier League in writing or otherwise in accordance with the written instructions of the Premier League; or

(ii) delete or destroy or procure the deletion or destruction of all of the recordings of Footage or Archive Footage made pursuant to this Agreement and shall, at the request of the Premier League, promptly produce written evidence thereof signed by an officer of the Licensee."

(emphasis added)

52. Finally for these purposes, clause 20 deals with Force Majeure. This is defined as "any strike, lockout, labour disturbance, government action, riot, armed conflict, Act of God, period of mourning as a result of the death of a reigning monarch, accident or adverse weather conditions….."

53. Schedule 2 sets out the statement of what are simple instalment amounts and dates; there are four. The third one, to which these proceedings relate, is for US$210.3 million, and the "due date" is given in the Schedule as 1 March 2020. It is not in

dispute that this date passed without PPL making the payment under the LPA, and indeed no payment was made either prior to the termination events of 3 September 2020 or by the date this application was heard. This is not a case of late payment, it is a case of non-payment. The date for payment of the instalment under the CPA was different and fell in June 2020 (the amount was different too) but the same comments apply in respect of that too. It is not in dispute that it was not paid by PPL on the date required or at all.

54. The terms of the CPA are, to all intents and purposes, broadly identical to those of the LPA. The instalment amounts are different – and far lower – and the payment dates are different. It is not contended by either party that there could be a different result on the application for summary judgment for the unpaid instalment under the LPA and the CPA. The parties approached the case as though the same analysis and the same words would apply in both contracts equally. The payment schedule in the CPA was in Schedule 1, there were only three payments, and the due date for the one in question in these proceedings was 1 June 2020. However, the same considerations arise in terms of construction.

The competing arguments in summary

55. There is one aspect of the way that PPL sought to argue the application which must be dealt with first. This is that Ms Zuo sought to rely upon certain passages from a draft expert report of Alix Partners concerning the impact upon PPL's finances (and hence the profitability of exercise of the Rights under the LPA) of the conditions under which the 2019/2020 season resumed. Such material is inadmissible for three reasons:

1. No permission had been given by the court for the use of expert evidence. This is required under CPR Part 35.4(1). Indeed, the court had not even been asked, either by PPL or by its solicitors before they ceased to act, for such permission. Had the court been asked, it is highly likely such permission would have been refused. I cannot see any issue before the court on this application in respect of which expert evidence could be relevant.

2. The date of the report was 17 December 2020, well before Ms Vernon's witness statement was served (and indeed even before the summary judgment application was issued). However, it was not exhibited to any witness statement, nor was the report itself (even in draft form) before the court. No copy was provided.

3. Its contents are, in any event, not relevant to the points of construction under the terms either of the LPA or the CPA. There were no provisions of either agreement that included, in any respect, consideration of the profitability on the part of PPL's business in terms of how any of the terms were to operate, and certainly not the payment and termination provisions.

56. I do not therefore consider the Alix Partners' draft report as part of the material properly before the court on the application and I have not taken account of the extracts read to the court by Ms Zuo. I permitted this to be done *de bene esse*.

57. The essential facts are as follows. The two instalment dates in question came and went without these instalments being paid to the Premier League by the PPL. The due date under the LPA for the larger instalment was 1 March 2020, and the Season was not suspended until 13 March 2020. Therefore for almost two weeks, pre-lockdown, the football matches were played as expected and PPL continued to broadcast them, without making payment of the instalment. Ms Zuo explained this was due to the breakdown of banking arrangements in Hong Kong during that period, because the

impacts of Covid-19 were felt in China before they were felt in Europe. She submitted that it was not possible to make bank payments from Hong Kong in March 2020. Whether that is correct or not, whilst it is the sort of point which could fall for consideration if the payment had been late (rather than never being made at all) I do not see how it can assist PPL on this application. The LPA was not terminated by the Premier League until 3 September 2020, the first day of the next season, and PPL had ample time between 1 March 2020 and (say) June or July to make the payment. There was no evidence before the court that any structural banking difficulties in Hong Kong or China were such that during the six month period from 1 March to 3 September payments simply could not be made. This is a claim for non-payment, not late payment.

58. Some countries entirely suspended their football season and did not resume as the UK began to open up after the first lockdown. Scotland and Wales did this. In competitions in those countries, the points that had already been won by clubs for the matches that had been played were re-calculated on a mathematical basis to pro-rata the results in some way, to take account of matches that were not played. The Premier League, however, did not. It decided to complete the season. It is the conditions under which this completion was performed upon which PPL rely. PPL sought to invoke the procedure under clause 12.1(d), maintaining that the format of the competition had been fundamentally changed as a result of the way that the remaining matches were played, and argued that this had an adverse effect on the exercise by PPL of the Rights it had under the LPA.

59. There is no doubt that after the resumption of matches, there were significant changes made by the Premier League to how the matches that remained to be completed were played. These changes were marked, such that a match post-resumption would be different as a spectacle compared to those that had been played before. The remaining 92 matches had to be completed within about 4 weeks, due to pressure on the footballing calendar. 288 matches were played before the interruption. However, the drive to complete the season meant that more matches had to be played each week than would usually be the case, which meant more matches on weekday evenings. The most important changes were as follows.

60. No fans were permitted, so the matches were played in empty stadiums. PPL relies upon the Premier League's own recognition in its own 'Restart Guide' dated 15 June 2020, where it stated that "one of the most recognisable and important features of Premier League football is the atmosphere created by home and away fans". Later messages on its website in June stated that "the Premier League won't be fully 'back' until fans can return".

61. The compression of the remaining fixture list meant that all remaining fixtures were condensed into a five week period (instead of over a nine week period) and a significant number were re-scheduled from weekends to weekdays. In particular, the proportion of weekend fixtures fell from approximately 79% (prior to suspension) to 43% (following the suspension); the proportion of mid-week fixtures correspondingly rose from 21% (prior to suspension) to 57% (following the suspension); and the overall frequency of fixtures also increased to an average of 2.3 fixtures per day following the suspension (compared to an expected average frequency of approximately 1.4 fixtures per day, had the fixture schedule not been expedited).

62. Kick-off times were also modified. A substantially greater number of fixtures were scheduled to kick-off in the late evening (China Standard Time or "CST") than would have been in the case in what PPL called "a conventional season". By way of example, the proportion of fixtures scheduled to kick-off at or after midnight (CST) rose from 33% (prior to suspension) to 67% (following the suspension), and the number of fixtures scheduled to kick-off at or after 0200 (CST) rose from 16% (prior to suspension) to 32% (following the suspension).

63. The origin of these different percentages is not clear, and I have recited them only because PPL relies upon them. As a matter of impression, they seem to be broadly sensible, but I do not need to decide whether they are wholly mathematically accurate. In any event, percentage accuracy is not required in order to consider the point fully. There is no doubt, in my judgment, that those who enjoy watching football generally, and the Premier League is no exception, on television would prefer a packed stadium for any match, with the accompanying atmosphere. Crowd noise, cheering, and singing, for many are likely to be part of the enjoyment, for those watching on television as much as for those who attend in person. This is what people are used to, and most people enjoy the familiar. The same probably applies for any sport, not simply football. Some "synthetic" crowd noise was added by broadcasters, in an attempt to replicate this, but that was probably a poor substitute. Many sports have been affected in this way. There were no crowds at the Tokyo Olympics in 2021, for example. Also, there is perhaps little doubt that fewer hardy fans would wish to rise at 0200 to watch their favourite (or any) team compete, rather than do so for a fixture at a more amenable time of day. Given the time difference between the UK and China (the latter being either 9 or 8 hours ahead) a kick-off at 1930 BST on a Tuesday evening will be at 0330 CST on Wednesday morning in some parts of China. This will have had an impact on viewing figures. One would have to be closely invested in the fortunes of a particular team to wish to watch a match at that time, compared (for example) to 1200 BST on a Saturday lunchtime, when a company such as PPL would be able to sell advertising and obtain other revenue from people wishing to watch that match at 2000 CST on the same Saturday evening. Not everyone enjoys the small hours of the morning, which can also seem like the middle of the night, depending upon one's individual view. However, on this application the court is not in a position to decide whether the exercise of the rights by PPL was adversely affected to a material degree as a result of these changes. The court does have to decide whether such a consideration arises under the terms of the contract.

64. Although it was explained in different ways, there are two aspects to the complaints raised by PPL so far as the 2019/2020 season is concerned. The first is that the season was interrupted. The second is that the conditions under which it resumed were very different to what PPL (and perhaps everyone else) imagined when the contract was agreed in February 2017. However, as a matter of contract law, that latter point does not necessarily matter. The English law of contract does not require, or expect, contracts to be renegotiated or rewritten simply because events transpire differently to what is expected. This would lead to confusion and indeed chaos.

65. The main issue on this point between the parties is whether the conditions under which the interrupted 2019/2020 season resumed in June 2020 are properly characterised as a "fundamental change" – or indeed fundamental changes – to "the format of the competition", such that PPL can (or could) rely upon the terms of clause 12.1(d) of the LPA. It is only if the changes can be so characterised, that it would be

necessary to turn to the second limb of that clause, to consider whether such changes had a "material adverse effect on the exercise of the Rights" by PPL. I do not consider that latter point to be suitable for summary determination; further evidence would be required and a trial would be necessary in order to decide it. In my judgment PPL would have a realistic prospect of success at trial on that issue. However, that issue would only arise if the changes properly could be said to be "fundamental changes" to the "format of the competition". That is a separate point and one that arises for determination on this application.

66. I consider that this primary point is suitable for summary determination. I remind myself therefore of the dicta at [26](7) in ***Barclays Bank***, recited at [24] above, which explains that it is not uncommon for an application of this type to give rise to a short point of law or construction. If the court is satisfied that it has before it all the evidence necessary for the proper determination of the question, and that the parties have had an adequate opportunity to address it in argument, it should grasp the nettle and decide it. I am so satisfied, and that is what I propose to do. I consider this to be a point or issue entirely suitable for summary determination, and the position at trial would be no different to what it is now, regardless of any oral evidence, disclosure, or other knowledge. It is common ground these changes were made to the way matches were played in order to complete the season; the issue is whether they were changes (of any type) to "the format of the competition", which will lead to a conclusion of how, if at all, they fit into the contractual terms. That situation is exactly the same now as it would be after a trial.

67. The Premier League's stance on this is as follows. Mr Howe QC submitted that there was no change at all to the format of the competition as a result of these changes, still less a fundamental one. The changes were not to "format" at all, examples of which are given in Clause 12.1(b)(i) and (ii), such as changes to the number of clubs (to a number below 18) or the competition "ceasing to be the premier league competition played between professional football clubs in England and Wales". The Premier League explained that each club still played each other club twice, as intended, home and away, and a win still resulted in 3 points for that club, and a draw in 1 point each. If a club lost a match it won no points. The league table was still organised in the same way in terms of points, goal difference and so on. The club which finished top of the league table was still proclaimed the champion, and the bottom three were all relegated. He submitted that it was not therefore necessary to consider whether the changes were fundamental or not, or whether they had a material adverse effect on the exercise of the rights by PPL. He submitted that they were not changes to the format of the competition at all.

68. He also submitted that matters such as kick-off times were, when clause 5 was properly construed, plainly within the discretion of the Premier League. The use of such phrases as "as a general rule" in clause 5.1(a); "may be determined by the Premier League" in clause 5.1(b); and "at such times as may be determined by the Premier League" in clause 5.1(d), made this perfectly clear. Further, clause 5.2 states that "if the kick-off times for Matches during the Term will or are likely to be different from those during the Current Term (as set out in Clause 45), the Premier League will notify [PPL] to that effect"; Mr Howe submitted that this demonstrated that kick off times would be notified to PPL, who would (effectively) have to organise their business model around when the Premier League chose to kick off their football matches.

69. The word "format" is a perfectly normal English word with synonyms such as arrangement, plan, organisation, design, system and structure. In the definition of Competition in clause 1.1, this is stated to be

"the league competition which is organised by the Premier League and played during each Season and whose format requires that the first team of each Club is scheduled to play the first team of each of the other Clubs twice in each Season".

70. The admissible factual matrix upon which the Premier League relies includes the Premier League Rules in force as of the date of the LPA (being the Rules for the 2016-17 Season) (the "2016-17 Rules"). Clauses 14.2(b) and 14.11 of the LPA refer expressly to the Premier League Rules which shows that they were not merely reasonably available to the parties in 2017 but were contemplated in the LPA itself. Section C of the 2016-17 Rules sets out rules in relation to matters including the "League Competition" (including rules in relation to points and goal difference), the "League Championship" (relating to the winner of the Competition), and "Relegation" – the bottom three clubs leave the competition for the next season and are replaced by another three from the tier below. Section C says nothing at all about the scheduling of Matches on particular dates or at particular times, or at a particular frequency each week. Nor does it refer to the presence of supporters or how many fans would be in each stadium.

71. In its Defence and Counterclaim, PPL referred both to the terms of the LPA and to the factual matrix which would be relied upon at trial. PPL was then asked in a Request for Further Information to identify what terms of the agreement would be relied upon, and what matters would be relied upon by way of the factual matrix. This is in accordance with the practice in the specialist courts that such points ought not to be kept up one's sleeve for a later date, namely the trial. In the answers provided on 22 February 2021, the terms were identified (I deal with them at [73] below) and the answer to the factual matrix request was "Insofar as this request seeks full particulars of the factual matrix relied upon by the Defendant, it is premature. The Defendant has already identified in its pleading specific aspects of the factual matrix that support its interpretation of the [LPA]. It reserves its right to identify further aspects of the factual matrix further following documentary and witness evidence".

72. This answer is not only inadequate, it seeks to avoid compliance with the Commercial Court Guide. It was provided at a time when PPL was represented by Quinn Emanuel and it was settled by both leading and junior counsel and supported by a statement of truth. However, its effect means that there were no other pleaded elements of the factual matrix expressly relied upon by PPL at the hearing of the summary judgment application. Those which I consider to be part of the factual matrix are the knowledge available to both parties contained in the then-current 2016-2017 Rules, and the terms of the ITT. No other matters are pleaded by PPL.

73. The terms of the LPA upon which PPL relied which were identified in the same answers to the Request for Further Information are as follows. A short description follows each one in order to summarise that terms subject matter. The majority of them are quoted in full above, but where they are not fully quoted, the descriptive term is sufficient for the purposes of this judgment:

Clause 1.1: definition of 'Competition'

This sets out the definition of the Premier League competition. PPL draws attention to the fact that the competition is played during each season.

Clause 1.1: definition of 'Fixture List'
This defines the fixture list to be published by the Premier League, containing the dates on which Matches are scheduled to be played. PPL draws attention to the fact that it is to be published prior to the start of that Season by the Premier League and contains the dates on which Matches are scheduled to be played.

Clause 1.1: definition of 'Fixture Programme'
This defines the full fixture programme of 10 Matches to be initially scheduled in the Fixture List to be played on the same day or two consecutive days in the Fixture List.

Clause 1.1: definition of 'Fixture Programme Weekend'
This defines the Fixture Programme Weekend over which a weekend Fixture Programme takes place. Such a weekend is Friday to Sunday, and potentially also Monday, during the Term.

Clause 1.1: definition of 'PL Preview Programme'
This defines the television programme currently entitled 'Premier League Preview' which previews the Matches to be played in the relevant week.

Clause 1.1: definition of 'PL Statistics Programme'
This defines the statistics-based preview programme currently entitled 'Matchpack' which contains a statistics-based preview of the Matches to be played in the weekend Fixture Programme.

Clause 1.1: definition of 'Season'
This defines the season of Archive Matches and any season of Matches during the Term. PPL draws attention to the fact that it commences from the first scheduled Match in the Fixture List for the Season, and ends with the last scheduled Match in it.

Clause 2.1(b)(iii)
This describes the transmissions to be made available to PPL in respect of each week of each Season during the Term in which a weekend Fixture Programme of Matches is scheduled to be played.

Clause 2.14
This requires the Defendant, inter alia, to provide the Premier League with a draft of the Content Utilisation Plan on or before 31 March prior to each Season during the Term, commencing in 2019.

Clause 2.18.1(a)
This requires PPL to ensure that China Central Television makes a certain number of Matches in each Season during the term by way of Live Transmissions on the Free-To-Air Channel known as 'CCTV-5'.

Clause 2.18.2

This requires the Defendant to enter into a Permitted Sub-Licence in each Season during the Term with a certain number of Regional FTA (Free-To-Air) Sub-Licensees.

Clause 3.2(d)
Reserves to the Premier League the right to authorise any licensee of its audio-visual rights in the Domestic Territory to make Domestic Internet Promotions regarding each Match.

Clauses 5.1-5.4
This sets out when, 'as a general rule' Current Term Matches will kick off during the current Term. The Premier League submits that these are "subject to various qualifications". PPL does not accept that description, but the clauses do contain (and PPL accepts) that these clauses provide a 14 day notification provision to PPL from the Premier League before changes to the kick off time if these are different from "the general rule".

Clause 10.3
This requires PPL, in any notification to the Premier League, in relation to a proposed Permitted Sub-Licensee, to explain how the proposed Permitted Sub-Licensee would showcase the Competition as a whole.

Clause 11.5
This requires PPL, inter alia, to supply a written monthly schedule specifying which Matches are to be featured in Live Transmissions (and requires the Premier League to use its best endeavours to publish the same).

Clause 12.1(d) and (e)
This contains the Premier League's warranties in relation to the format of the Competition and Fixture List.

Schedule 6
This is a template for the Content Utilisation Plan, being the plan to be agreed between the Premier League and PPL after signing of the LPA which sets out the scope of permitted exploitation of Footage by PPL. PPL draws attention to the fact that it sets out the indicative schedule for the exercise of the Rights by PPL.

74. In the post-hearing written submissions relating to neutral descriptive terms to apply to each clause in the LPA, PPL accepted that the warranties given by the Premier League in clause 12.1(d) and (e) related to the format of the competition but submitted that only such changes "which would not have a material adverse effect on the exercise of the Rights of the Defendant" were permitted, "otherwise the Claimant shall negotiate with the Defendant in good faith to reduce the Fees". That is indeed what the clauses state, but it does not much advance matters given the issue that I have outlined at [65] above.

75. Similarly, the extra terms of description which PPL sought to have included in the post-hearing written submissions in respect of some of the clauses do not advance matters much either, and certainly do not advance them in PPL's favour. For example, Clauses 5.1 to 5.4 clearly permit the Premier League to change the kick off time,

subject to proper notification to PPL. The fact that proper notification to PPL is required does not much matter; the issue on this application for summary judgment is whether the changes that were made were made to the format of the competition, and whether they were fundamental. The requirement for 14 days' notice is somewhat off that point. There is no issue on the pleadings in terms of inadequate notification to PPL of changes to kick off times. Further, the term "indicative schedule" in Schedule 6, to which PPL drew attention, makes it clear that the schedule is not set or fixed, but only "indicative". That supports the Premier League's case, not PPL's.

76. The correct approach to construction is as follows. The starting point is the words the parties have actually used in the written agreement. But these are not focused upon to the exclusion of the factual matrix, or the context in which the agreement was reached. Construing a contract is a "unitary exercise [which] involves an iterative process by which each suggested interpretation is checked against the provisions of the contract and its commercial consequences are investigated". This is now trite law. Lord Hodge JSC explained this approach at [12] in ***Wood v Capita Insurance Services Ltd*** [2017] UKSC, itself following on from (and to some extent explaining) the earlier case of ***Arnold v Britton*** [2015] UKSC 36. As Lord Hodge expressed it, "once one has read the language in dispute and the relevant parts of the contract that provide its context, it does not matter whether the more detailed analysis commences with the factual background and the implications of rival constructions or a close examination of the relevant language in the contract, so long as the court balances the indications given by each."

77. Performing that exercise, and undertaking the balancing exercise referred to, in my judgment it can be seen that none of these terms assists PPL in its submissions in this respect. Format of the competition does not include kick off times, the days when matches are played, or whether there are fans. Format of the competition refers to the way that the competition is undertaken between the 20 member clubs competing that season. How many times they play one another; the number of matches between all of them (an arithmetic function of the first point); the fact they play one another home and away; how many points are awarded for different results; how the league table is organised. These are all elements of the format of the competition. None of these were changed when the season resumed.

78. I consider that the words in the LPA, together with their meaning, are clear. However, when one includes consideration of the 2016-2017 Rules, which form part of the factual matrix known to both parties at the time that the LPA was agreed, then the issue becomes even more clear cut in my judgment.

79. I accept the construction contended for by the Premier League. I do not consider that the changes imposed on the resumed fixtures in June 2020 were changes to the format of the Competition. That remained unchanged. The competition comprises the way in which each of the 20 clubs compete with one another over the course of the season in order to determine league placings, the identity of the winner and the three bottom clubs who are relegated. This involves a certain number of points being won as a result of the results, goals scored, goal difference and so on, by playing all the other clubs twice, once at home and once away. None of the changes that were required when the competition resumed in June 2020 changed any of this. Without in any way being thought of as disparaging those to whom attending a football match is an enjoyable or important part of their life – and there are a great many such people, who

add to the history, sense of identity and affiliation with their team – whether fans are present in a stadium or not, the match still consists of Team A playing Team B. The winner will obtain 3 points; if they draw, they will each obtain 1. The losing team gains no points at all. The number of goals will go towards their season total, and count towards total goals scored together with goal difference. All of these elements are part of deciding which place in the table each club will occupy at the end of the season. Whether the fans are there, or not, does not affect the "format of the Competition". Without embarking upon any form of analysis of the psychology of crowds, it might affect the *result* – playing at home is seen as an advantage generally – but that is not the same as affecting the format of the competition.

80. Turning to the time of day, and the days upon which matches were played, these are not part of the format of "the Competition" either. Nothing in any of the terms relied upon by PPL supports such a construction. The references that are contained in the terms either to fixture list, fixture, matches, kick-off or anything else connected with when such matches are played, are replete with terms that demonstrate that it is for the Premier League to decide in its discretion when to play such matches.

81. This is clear from the terms themselves. It also makes commercial sense, given the subject matter of the Competition. Particularly as any season unfolds, there are many variables that could occur. Some clubs may do well in other competitions that are played in parallel, such as those in Europe (for clubs that have qualified and go on to win different matches) or the FA Cup. The latter matches are usually played on weekends, but not invariably. Depending upon which team is being played – a fierce local rival, for example – the police may have strong views on when such matches should be scheduled to kick-off. The domestic (ie UK) TV rights are known to be very valuable and high profile matches will be broadcast accordingly. If PPL were to be given (or were to have required) either some form of veto over such details, or even the right to be involved in negotiations over them, then this would have been included in the terms of the LPA itself. Such involvement by PPL, given the time difference with China, could have been very problematic. There are simply no provisions in the LPA that do this, and the detailed provisions that there are, demonstrate that it is for the Premier League to choose. It would be even more problematic because there will be other non-UK markets as well, not simply China. No warranties are given by the Premier League in respect of any of the matters upon which PPL relies.

82. There is one final element to the conclusion on construction that I have reached. It is entirely consistent with the examples given within clause 12.1(d) itself – at (i) and (ii) of (d) itself – of what would be a fundamental change. These are not expressed as examples *per se*, but they plainly must be seen as being examples, because the clause states that:

> "a fundamental change shall include any change which results in:
>
> (i) the total number of Clubs being reduced to less than eighteen (18); or
>
> (ii) the Competition ceasing to be the premier league competition played between professional football clubs in England and Wales."

83. Each of these matters would therefore be a fundamental change. The first is purely objective – the number of clubs competing. A change in number would impact the number of matches in a season, because each club plays every other club twice. If there are 20 clubs, there will be 114 more matches in a season than if there were only (say) 17. It is more difficult to envisage how (ii) could occur without (i) occurring also, but if (again, as an example) the two biggest or best known clubs were to leave the Premier League for another competition, then (i) would not necessarily be triggered, but (ii) could be. Again, this would impact upon the number of matches. I consider the construction that I have preferred to be wholly consistent with both (i) and (ii) of clause 12.1(d), whereas the construction contended for by PPL is not.

84. Finally, if there had been a fundamental change to the format of the competition (and I have decided there was not) then the latter part of clause 12.1(d) would be engaged. This states (after identifying the examples at (i) and (ii) that I have just dealt with) the following:

> "If any such fundamental change to the format of the Competition occurs during the Term, then (without prejudice to its other rights and remedies) the Licensee shall be entitled to enter into a period of good faith negotiations with the Premier League in order to discuss a possible reduction of the Fees payable by the Licensee pursuant to Clause 4 in order to reflect the effect of that fundamental change on the exercise of the Rights granted to the Licensee hereunder."

85. PPL sought to invoke this, maintaining that there had been a fundamental change to format, and therefore to commence good faith negotiations. A letter to this effect was sent signed by PPL and on the headed paper of its parent company, Suning, to the Premier League dated 14 June 2020. It appears to be common ground that whether negotiations took place or not (which if they did, were probably without prejudice) they did not lead to any agreed compromise or variation. However, given my finding on the first limb of clause 12.(1)(d), it is not necessary to consider this point further. The Premier League was not obliged to negotiate because the requirements of clause 12.1(d) were not triggered by the changes. Mr Howe sought to argue that there could be no enforceable obligation to negotiate in good faith in any event, and relied upon cases such as ***Walford v Miles*** [1992] 2 AC 128 to make this good. He also relied upon academic criticism of some decisions to the contrary in respect of dispute resolution clauses to justify the same submissions. One such decision is that of Teare J in ***Emirates Trading Agency LLC v Prime Mineral Exports Private Limited*** [2015] EWHC 2104 (Comm) in which he had taken a contrary view.

86. I am not deciding this point and these remarks are therefore obiter. I can therefore deal with this point briefly, but ***Walford v Miles*** is wholly distinguishable. That case concerned whether there was a duty to negotiate in good faith towards reaching a finalised contract in respect of the sale of a company and property. The House of Lords held that it was unworkable in practice and inherently inconsistent with the position of a negotiating party, including (at least partly) because there was no term as to the duration of the obligation. That is, in my judgment, very different to a specific express term within an existing contract that, in the event of certain matters transpiring, the parties will enter into good faith negotiations to resolve certain matters. The concept of good faith in contracts in English law has moved on a great deal since the events of ***Wolford v Miles*** which occurred in 1987. There are a great many dispute clauses in very many contracts – including some very substantial ones with lengthy terms, such as PFI contracts – that include similar provisions. The reason

for considering such clauses enforceable is, as Teare J observed at [64] in ***Emirates***, because it is in the public interest for expensive and time consuming arbitration or litigation to be avoided. Enforcement may, depending on the terms of such a clause, amount to nothing more than the court preventing a party from litigating or arbitrating until the period for such negotiations has passed (or a reasonable period if no specific duration is specified). However, that does not mean that such express provisions can simply be ignored, as the Premier League maintains. If parties expressly agree that if something comes to pass, they will negotiate in good faith, I do not consider such a term should be simply ignored. I would therefore have found against the Premier League on this issue, had I come to the opposite conclusion on the nature of the changes. However, in the circumstances, this does not matter and the point does not arise.

87. In summary therefore, given my conclusion on the "format of the competition" issue, and the approach that I have explained at [65] above, it is not necessary to go on to consider whether such changes had a "material adverse effect on the exercise of the Rights" by PPL, which, as I have explained, would require a trial and cannot be resolved summarily. Nor is it necessary to consider the attempt by PPL, which was rebuffed by the Premier League, to enter into good faith negotiations to seek to reduce the Fee. It also means that the issue of whether the Premier League was entitled to terminate the LPA (which I have outlined at [5] above, given this is admitted in respect of the CPA) is also resolved in the Premier League's favour. Given the timings, the termination notice served by the Premier League in respect of the LPA was sent approximately 44 minutes before PPL sent their notice. By the time that was done by PPL, the LPA had been terminated by the Premier League and so the notice sent by PPL was of no effect.

88. The same analysis on the nature of the changes made to the competition upon resumption of the season in June 2020 applies to the CPA. The vast majority of the submissions on both sides focused on the LPA for obvious reasons; apart from any other considerations, the sum claimed by way of unpaid instalment under the CPA is only about 1.27% of the far higher sum claimed under the LPA. Neither party contended for any analysis or construction that could lead to a different result under each of the two agreements. It was broadly accepted that the same result would flow under both agreements. Given the fact that the LPA was agreed somewhat earlier than the CPA, the factual matrix of the latter included the contractual relationship of the parties in the LPA. The terms of the LPA are therefore aids to construction of the terms of the CPA. The terms are broadly similar, but are not identical.

89. In particular, the warranties given by the Premier League in the CPA under clause 10 are far narrower in terms than the warranties in the LPA. There is no warranty in the CPA similar to that in the LPA under clauses 12.1(d) and (e) regarding format of the competition. The position of PPL is therefore substantially weaker under the CPA than it is under the LPA; however, given my conclusion that the changes that were made were not to the format of the competition, this does not assist PPL. The end result of this is that the Premier League was contractually entitled to terminate both the CPA and the LPA when it sent the notices to which I have referred on 3 September 2020, and by virtue of those notices both agreements were lawfully terminated in accordance with their terms.

90. Clause 14.5 of the LPA states that "If this Agreement is terminated pursuant to Clause 14.4, then, subject to Clause 14.6, <u>such termination shall not affect any lawful</u>

obligation of either party to this Agreement falling due for performance prior to such termination" (emphasis added). Clause 14.6 deals with what would happen if negotiations in good faith were to fail. However, that would only arise if the obligation under clause 12.1(d) had been triggered, which it had not. Therefore the proviso does not arise in the instant case.

91. Further Clause 14.10 is set out in full at [51] above. It states that "in the event of any lawful termination of this Agreement by either party for any reason" (and it is clear that this was a lawful termination by the Premier League) then "the Rights and all other rights granted to the Licensee and all liabilities and obligations under this Agreement shall automatically cease (save for accrued liabilities and obligations)….." (emphasis added). Exceptions then follow that do not apply.

92. These two clauses match what the position would be at common law in terms of termination, but it is not necessary to consider that common law position in any detail, because the terms themselves expressly state that accrued liabilities and obligations survive termination. Lawful obligations of the parties falling due for performance prior to the termination are not affected. Accrued liabilities and obligations survive. This is very clear. The obligation upon PPL to pay the March 2020 instalment had arisen as at 1 March 2020, plainly before 3 September 2020, and therefore survives the termination.

93. This is the same under the CPA, which has a clause to like effect at clause 12.7. Given that under each agreement, the obligation or liability upon PPL to pay the March instalment (under the LPA) and the June instalment (under the CPA) had already arisen as at the date of termination on 3 September 2020, then the right of the Premier League to those instalments – and the obligation upon PPL to pay them – survives those two terminations at 11.31 and 11.33 am on 3 September 2020. I therefore turn to the other matters relied upon by PPL to defeat the summary judgment application.

The Defences relied upon and the Counterclaim

94. In addition to what might be called the primary defence which I have explained concerning what are alleged to be fundamental changes to the format of the competition upon its resumption in June 2020, and the potential effect of clause 12.1(d) of the LPA, there are a number of other defences upon which PPL rely. I shall deal with these below. I shall call these the advance payment defence; the circularity defence; the penalty/relief from forfeiture defence; and set-off. I shall then deal with the counterclaim which includes unjust enrichment. Some of the different defences advanced rely on similar principles to one another.

The Fees as "Advance Payments"

95. PPL maintains that the sums payable under each of the two agreements are "advance payments" which are made in consideration of matches being shown live (under the LPA) and as clips (under the CPA). Accordingly, PPL submits that the sums can – or more accurately should - be apportioned either to individual matches or seasons. This contention is then deployed by PPL in the following way. The termination of both agreements on 3 September 2020 means that PPL will not be able to transmit either matches or clips for either of the second or third seasons under the agreements. That much is common ground. It is also said by PPL that this means that the two instalment payments are not due to the Premier League, because if one calculates the fee across matches and seasons, because of the earlier instalments that were paid, PPL has in fact

and law overpaid. In other words, PPL will have paid in excess of one third of the total fee but only broadcast one season out of three. Accordingly, PPL contends for a re-apportionment or re-calculation, and maintains that this should be done across each season (or match) and the amount due from PPL should be calculated by reference to the season (or matches) that it did in fact broadcast. PPL therefore claims restitution of those sums said to have been overpaid by PPL for the one season (or number of matches) shown. In order to justify this restitutionary claim, PPL maintains there has been a failure of consideration (what is now called a failure of basis).

96. Mr Howe described this defence as "hopeless", being contrary to the plain terms of the agreements themselves, and points out that no failure of basis can have occurred in circumstances where PPL has broadcast one full season of matches. He also submits that given the Premier League was contractually entitled to the instalments, it cannot be said to have been unjustly enriched.

97. The relationship between restitutionary claims and contract has very recently and authoritatively been stated by the Court of Appeal in ***Dargamo Holdings Limited and another v Avonwick Holdings Limited and others*** [2021] EWCA Civ 1149 ("***Avonwick***"). That was an appeal from Picken J in the Commercial Court who heard a lengthy trial in what was described, by Carr LJ in the leading judgment, as "bitter litigation". It arose from events between 2007 and 2011 surrounding the division of the shared business interests of three wealthy and powerful Ukrainian businessmen who conducted their business affairs through a variety of corporate vehicles. The businessmen founded a global portfolio of assets which came to be worth billions of dollars, including a Ukrainian metallurgical business. One of them was responsible for the industrial and energy sectors of Donetsk Oblast, a region of Ukraine. The first instance judgment is at [2020] EWHC 1844 (Comm) and runs to some 1105 paragraphs. One discrete limited part of it went to appeal, namely a claim in restitution, and it was this that the ***Avonwick*** judgment in the Court of Appeal considered. That claim had been dismissed by the judge.

98. In essence the issue was that one set of parties (called "the Taruta Parties") claimed that part of a purchase price in a sale purchase agreement was for something additional to what had been included in that agreement. They maintained that the sum of US$82.5 million paid by Dargamo to Avonwick, as part of the total consideration of US$950 million payable under the share purchase agreement for the sale and purchase of shares in Castlerose Ltd ("the SPA"), was included in the total consideration on the understanding (and in anticipation) that the parties would enter into legally binding contracts obliging the other set of parties (the "Gaiduk Parties") to transfer to the Taruta Parties further assets. These assets, and this arrangement for their transfer, were not included in the terms of the SPA itself. They included 50% of the Gaiduk Parties' interests in two other Ukrainian companies. No part of these interests was ever transferred to the Taruta Parties. The US$82.5 million was therefore claimed in unjust enrichment. The problem was that the terms of this part of the transaction were not included in the SPA at all.

99. Picken J had dismissed all the claims, including the unjust enrichment one, and the appeal to the Court of Appeal on the unjust enrichment issue was dismissed. Carr LJ stated that a payee cannot be said to have been unjustly enriched if he was entitled to receive the sum that had been paid to him. She followed ***Kleinwort Benson v Lincoln City Council*** [1999] 2 AC 349 in which Lord Hope had said at 407:

"The third question arises because the payee cannot be said to have been unjustly enriched if he was entitled to receive the sum paid to him. The payer may have been mistaken as to the grounds on which the sum was due to the payee, but his mistake will not provide a ground for its recovery if the payee can show that he was entitled to it on some other ground."

100. That passage was quoted by Carr LJ at [68]. She referred to this as the "*Obligation Rule"*. She accepted and explained that it had some exceptions, but they were limited. In dismissing the appeal, her observations in that case at [115] and [116] could have been tailor-made for the instant claim by the Premier League. She stated:

"[115] In my judgment, the fundamental reason why the claim in unjust enrichment cannot succeed is clause 2.4 of the Castlerose SPA, repeated here for ease of reference:

'2.4 The consideration for the sale of the Shares shall be US$950,000,000 (the Consideration).'

[116] This was the express basis of payment agreed in a relevant contract the validity of which cannot be (and has not been) impugned. In such circumstances, there is no scope for the law of unjust enrichment to intervene by reference to a basis which is not only alternative and extraneous, but which also directly contradicts the express contractual terms. None of the authorities begin to go that far."

(emphasis added)

101. Asplin LJ added the following, again in terms that could be equally applied to the instant case:

"[142]……In the light of the express terms of the Castlerose SPA, there was no "unjust factor" in this case. To put the matter another way, the Taruta Parties sought to use the principle of unjust enrichment to override rather than complement the express contractual obligations contained in the Castlerose SPA."

102. That is exactly what PPL is attempting to do here. Clauses 4.1 and 4.2 of the LPA are set out above in [41]. There is simply no unjust factor, and the Premier League is merely attempting to keep PPL to the contractual bargain. PPL is seeking to override the way the fee was to be paid, and what it was for. It was not one third of the fee per season, for three seasons. It was one fee (payable in instalments) for three seasons. If the Premier League is contractually entitled to the consideration, which it plainly is, each agreement gives a specific indivisible sum for the rights that were granted. There is no apportionment of fee, or payment per match, or any formula for its calculation based on those metrics, or indeed any others, other than in a clause 14.6 situation, which does not apply here for reasons that I have explained. The fee was payable for all three of the seasons in total, was payable in instalments, and failure to pay the fee would give rise to termination rights, which expressly preserved existing rights accrued as at the date of termination. The instalment fell due under the LPA on 1 March 2020, was unpaid, and in September the Premier League exercised its termination rights. That brought the LPA to an end, but the Premier League remained contractually entitled to the outstanding instalment. That analysis, based on the express terms, would be overridden were PPL to be permitted to deploy the principle of unjust enrichment. It would wholly rewrite the contract terms were the court to permit this. In any event, there is no injustice in permitting the Premier League to enforce its contractual rights.

103. Simply because the consideration was paid in instalments does not assist PPL. Further, the instalments (or calculation of the Fee) are not in any respect set out or calculated by reference to matches or seasons. There is no relationship between the instalment dates and amounts, and matches and/or seasons (not that it would matter if there were, but that would at least give some hook on which PPL could at least attempt to hang such an argument).

104. Yet further, clause 4.7 states:

"In the event of any lawful termination of this Agreement by the Premier League under Clause 48, the Premier League shall be entitled to retain (without prejudice to any of its other rights and remedies) in full all amounts of the Fees (including without limitation the Pre-Payment) paid by the Licensee prior to the effective date of such termination…." and a proviso is then included which includes a calculation and potential part-repayment in circumstances that have not here arisen.

105. In its Defence, PPL pleaded that that Clause 4.7 only applied to sums which have actually been paid prior to the date of termination, as opposed to sums which were due and payable as of that date, but which had not been paid. I do not accept that argument. The short answer is that clause 4.7 did not need to include any rebate or repayment of fees that had not in fact been paid; it would not be logical to deal with repayments in those circumstances. Further, given any instalments payable as at the date of termination would remain payable (because accrued rights survive termination), the Premier League would retain its rights to those due, but outstanding, payments in any event. In a sense, clause 4.7 could be seen as being an encouragement to PPL to keep up to date on its instalments (if construed the way that PPL now seek to construe it) because unpaid, but due, instalments would not be included in any calculation of the rebate. But in any event, the central point remains, that part-repayment is contemplated in some circumstances in the contractual terms agreed, but not the ones that have arisen here.

106. This further demonstrates, in my judgment, that any re-calculation or apportionment of the fee by reference to seasons or matches in fact broadcast would be contrary to the express terms of the LPA.

107. Two other clauses also make it clear that the Fee cannot be interpreted as being advance payments. Clauses 14.6 and 20.3 demonstrate that it is mathematically possible to apportion sums paid by PPL to individual Matches or Seasons, and also specify that the parties agreed to do so in specific, limited circumstances (none of which currently apply). Clause 14.6 provides for repayment by the Premier League in the event of a no-fault termination due to regulatory intervention, or termination by PPL in the circumstances referred to under Clause 14.1 or 14.11, which do not apply here. None of these circumstances have occurred here, but importantly, the fact that the parties agreed that payments could, or would, be apportioned in particular circumstances, and specifically did not agree to apportion payments in the circumstances which currently pertain, demonstrates that the Fee (or more accurately the Fees under the two agreements) are not, in the existing circumstances, subject to any rebate. They are not anywhere in the contract terms, nor have they ever been, characterised as 'advances'. I therefore accept Mr Howe's submissions that in no other circumstances other than those specified in the LPA itself, can any question of any rebate of Fees arise.

108. Finally on this point – and it is not necessary to consider this in any detail, but I include it for completeness – the factual matrix of the LPA included the Invitation to Tender or ITT. This makes clear at section 3.3 of that document that the issue of the financial security of any bidder is of very high importance to the Premier League, and that one way of achieving this was by an irrevocable letter of credit from the bidder, or by an "accelerated payment schedule". In other words, the fact of instalments, their amounts and dates were part of the way that the successful bidder and the Premier League was intending for the contracting party to provide financial security to the Premier League for the whole of the Fee payable under the LPA. This is not consistent with the claim by PPL for reapportionment or rebate. It is wholly consistent with the Fee being due for the Rights for the three Seasons (the Term) in an indivisible amount.

109. The same analysis applies to the CPA. The Fees were not advance payments in the way contended for by PPL.

110. PPL advanced a similar argument by seeking to rely upon an implied term. In the Defence the following was pleaded:

> "Further, on the true construction of the [LPA], and/or by operation of law and/or by reason of a term implied by law or in fact, to give business efficacy to the contract, and/or because it was so obvious to go without saying, in the event that it became clear that the Live Transmissions, in exchange for which PPL was to make advance payments under Clause 4.1, could not or would not ever be provided by the Premier League, then the Premier League could not thereafter recover any such advance payments for those Live Transmissions by way of a claim for debt under Clauses 4.1 and 4.2…"

111. In my judgment this is not a good argument, and it can be dealt with briefly. There is no scope here for an implied term of the type contended for in the Defence. The Supreme Court in ***Marks & Spencer plc v BNP Paribas Securities Services Trust Co*** [2015] UKSC 72, [2016] AC 742, explained the correct approach to consideration of implied terms in commercial contracts. One need go little further than the headnote in the Official Law Reports which gives the ratio of the case as "a term would only be implied into a detailed commercial contract only if that were necessary to give the contract business efficacy or so obvious that it went without saying; that the implication of a term was not critically dependent on proof of an actual intention of the parties when negotiating the contract but was concerned with what notional reasonable people, in the position of the parties at the time at which they had been contracting, would have agreed; and that it was a necessary but not sufficient condition for implying a term that it appeared fair or that the court considered that the parties would have agreed it if it had been suggested to them."

112. Such an implied term as is contended for by PPL is neither necessary to give either of the LPA or the CPA business efficacy, nor is it so obvious as to go without saying. It is an *ex post facto* recalculation of the Fee to provide a different payment structure. Further, the alleged implied term crucially depends upon the fees being interpreted or construed as advance payments. Yet further, the current situation is not one where that the future transmission of matches "could nor would not" be provided by the Premier League. The reason that PPL does not have the transmission of each of the 2020/2021 and 2021/2022 seasons is because the Premier League acquired termination rights under the express terms of the contract, as a result of non-payment by PPL, and

exercised them. The alleged implied term is not only not necessary for business efficacy or so obvious as to go without saying, it is actually in conflict with the express termination provisions. They expressly preserve existing rights, which include the right to the final instalment payment of the Fee under the LPA which fell due on 1 March 2020. Conflict with express terms is an important and overwhelming obstacle that prevents implication of such an implied term; at [28] of ***Marks & Spencer*** Lord Neuberger stated it is a "a cardinal rule that no term can be implied into a contract if it contradicts an express term".

113. There is no scope for implying such a term and this alternative way of advancing this line of argument by PPL is not arguable.

The Circuity of Action Defence

114. Mr Howe called this the circularity defence. This defence is an argument by PPL that the claim by the Premier League for the instalments is circular, as PPL is entitled to counterclaim under Clause 14.6 of the LPA (or the equivalent Clause 12.4 of the CPA), or in restitution, of at least the same sums that would be otherwise payable to the Premier League. One way that this is put in PPL's skeleton argument is as follows:

"The Premier League does not appear to dispute that, if PPL has a valid claim in unjust enrichment over such part of the Fees which constituted (or would have constituted) advance payments, then any claim it would have had in relation to the unpaid instalments in debt would fail for circuity of action. In any event, the correct position, as a matter of law and/or the proper construction of the LPA and the CPA, is that the Premier League cannot claim as debts sums which would be immediately repayable to PPL in restitution."

115. There are therefore two limbs to this, contended for by PPL in the alternative. The first is contractual, and the second is one in restitution. Under each of them, PPL maintains that because it will recover at least the amounts otherwise due under the instalments in its counterclaim, it would be circular to grant summary judgment to the Premier League. The claim for the instalments would fail, it is said, for circuity of action. Two integral and necessary ingredients of the defence are that the Fees are advance payments, and also that PPL has a good arguable claim in unjust enrichment.

116. The court would not ordinarily grant a party summary judgment on a claim if the defendant had an arguable counterclaim (whether contractual, or for restitution) for equal or greater sums. However, this is not such a case. The contractual and restitutionary arguments have been considered above, and in my judgment are not realistic, nor are they properly arguable. Given the Fees are not advance payments and cannot be characterised as such, that there is no unjust factor, and also that the payments are in any event due as payments under the Premier League's existing contractual rights, neither of the integral requirements are made out in PPL's favour.

117. I do not consider that the defence of circuity of action raises new issues, additional to those considered above, and PPL cannot rely upon it to defeat the application for summary judgment. It is, in reality, the same arguments advanced in a slightly different way. This defence has no real prospect of success.

Penalties and relief from forfeiture

118. Although penalties is a point that is pleaded in the Defence and Counterclaim (at paragraphs 31 and 52) this is not an argument advanced by PPL to any appreciable degree in the skeleton argument, or indeed orally. I will deal with it shortly. The pleaded argument on penalties can be summarised in the following way. Firstly, the pleaded point in paragraph 31 of the Defence and Counterclaim is that insofar as the Premier League was permitted on a proper construction of both the LPA and CPA both to claim the instalments notwithstanding termination of the Agreements, and also to recoup the Rights to the remaining Matches or Seasons, then each contract contains what is said to be a disguised penalty; and/or it is argued that PPL should be granted relief from forfeiture in respect of the consequences of those provisions. Secondly, it is pleaded by PPL in paragraph 52(4) of the Defence and Counterclaim that Clause 4.7 of the LPA is an unenforceable penalty clause and/or a forfeiture clause from which PPL is entitled to relief.

119. I shall take each of those arguments, the penalty argument and the forfeiture from relief argument, in turn.

120. Dealing with penalties, until about 6 or 7 years ago, the jurisprudence on penalties could be said to be of considerable age. Nor had it worn well, and it appeared to be coming under increased academic pressure. ***Dunlop Pneumatic Tyre Co Ltd v New Garage and Motor Co Ltd*** [1915] AC 79 was one hundred years old, and generally it could be said that this particular area of the law was more than due an update. That update was given most authoritatively by the Supreme Court in ***Cavendish Square Holding BV (Appellant) v Talal El Makdessi*** [2015] UKSC 67. In that case Mr Makdessi had sold his business (but retained certain shares) subject to a non-compete provision, which he then breached. The purchaser sought declarations to permit it to exercise certain options to acquire the remaining shares, the detailed contractual provisions permitting it to do so having been included in the very detailed sale agreements, which were reached after detailed negotiations between the parties with both sides fully represented. In restating that the common law rule against enforcement of penalties should not be abolished (one of the arguments advanced before them) the Supreme Court explained that there was a strong initial presumption that in detailed commercial contracts where both sides were represented, the parties were the best judges of what was legitimate in a provision dealing with the consequences of breach.

121. That strong initial presumption would apply here, and PPL would have some difficulty in rebutting it. However, it does not even arise for consideration, given the fact that the provisions in question cannot be characterised as penalties in any event. A penalty was defined by the Supreme Court in ***Makdessi*** as a secondary obligation which imposed a detriment on the contract-breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. Here, PPL's obligations to pay the Fees under both the LPA and the CPA were primary obligations, rather than provisions dealing with the consequences of breach. Termination of the LPA (and the contractual consequences of that) cannot be said to fall within this definition of a penalty. Yet further, and even if the consequences that were to occur upon termination could be described as secondary obligations (which in my judgment they plainly cannot) the detriment imposed on the contract-breaker is simply the end of the ability under the contracts to exercise the Rights. That cannot be said to be out of all proportion to the legitimate interests of the Premier League. The

detriment to the contract breaker also can be seen, properly considered, as being wholly proportionate, given the breach by PPL is a failure to pay the full agreed cost of the Fees contained in the instalment schedule.

122. The Premier League's legitimate interests include (or in the case of the LPA, consist of) permitting the other contracting party to broadcast the Matches only in exchange for the Fee. If the Fee is not paid, then why should PPL be entitled to broadcast the Matches, one asks rhetorically. The legitimate interests of the Premier League include being paid the sums agreed for the Rights, with mechanisms available to remedy the situation if the party exercising the Rights does not pay those agreed sums. The provisions attacked by PPL as being out of all proportion to the legitimate interests of the Premier League, when analysed correctly, can be seen simply as permitting the Premier League to enforce its own legitimate interests, namely the grant of broadcast rights in exchange for payment. Even if one reached that stage in the analysis of a penalty – which for reasons of primary obligation one does not – then the provisions are not unenforceable penalty provisions. The consequences are entirely proportionate.

123. Turning to relief from forfeiture, this is an equitable remedy. As with penalties, it merited only a passing mention in PPL's skeleton argument. The leading case on this remedy is ***Vauxhall Motors Ltd (formerly General Motors UK Ltd) v Manchester Ship Canal Co Ltd*** [2019] UKSC 46**,** [2020] AC 1161. At [2] Lord Briggs described it in the following ways, namely a remedy "which plays a valuable role in preventing the unconscionable abuse of strict legal rights for purposes other than those for which they were conferred". In that case, Vauxhall Motors had, since the 1960s, had a licence (for which the annual payment was only £50) to cross land owned by the Manchester Ship Canal Co ("MSCC"), adjacent to its Ellesmere Port factory, with a system of pipes for drainage purposes. Clause 5 of the Licence permitted MSCC to terminate the licence if that fee was not paid within 28 days of demand. In 2014, Vauxhall (through administrative oversight) failed to pay within the 28 days, so MSCC terminated the licence. The value of the rights – or the cost of a further licence – would be in the region of hundreds of thousands of pounds per year. Vauxhall would, absent this relief, have had to negotiate for a new licence at this vastly increased cost. Vauxhall applied to the court for relief from forfeiture.

124. The doctrine is described in the summary as allowing the court to relieve parties from terms which forfeit their rights in order to secure some lesser primary obligation if they operate harshly. In this case, MSCC's right to terminate under clause 5 was a forfeiture clause which secured Vauxhall's obligation to make an annual payment of £50.

125. A large part of the decision in the Supreme Court is concerned with whether the doctrine applies to possessory as well as propriety rights. Such a distinction is not important in the instant case because the rights which PPL was granted under the LPA and the CPA were purely contractual in nature. The doctrine does not therefore apply. However, and even if I were to be wrong about that, the doctrine would not be of assistance to PPL in any event. This is because, as set out at [2] in the speech of Lord Briggs, the doctrine is available only as follows:

"[2] Relief from forfeiture is one of those equitable remedies which plays a valuable role in preventing the unconscionable abuse of strict legal rights for purposes other than those for which they were conferred. But it needs to be constrained within principled boundaries, so that the admirable certainty of English law in the fields of

business and property is not undermined by an uncontrolled intervention of equity in any situation regarded by a judge as unconscionable."

126. Thus unconscionability is a key ingredient. PPL has not identified any unconscionable conduct or abuse by the Premier League of any of its legal rights for purposes other than that for which they were conferred. Nor has PPL identified any provision which requires it to forfeit anything. PPL has, as a result of the exercise of the contractual termination provisions, simply lost its rights to broadcast Matches for the second and third season of the Term, having failed to pay a very substantial instalment due some six months prior to those termination provisions having been exercised. There is no forfeiture involved. It would be very difficult, if not impossible, to portray any aspect of that as being unconscionable. Further, there is no reasonably arguable "harsh operation" in this instance of any term.

Set-off

127. This can be dealt with briefly. There are specific provisions of the contract terms that prevent PPL from advancing this argument. Under Clauses 4.5 and 6.2 of the LPA and Clause 5.6 of the CPA, PPL was required to pay each instalment of the Fees to the PL "in full and without set-off or counterclaim and free and clear of any … other deductions of any nature imposed now or at any time".

128. Clause 4.6.2 of the LPA states that "The Licensee hereby irrevocably waives any right of set-off which it may have (howsoever arising) in respect of the Fees."

129. These words are completely clear. Clauses such as this, using words such as this, excluding set-off are plain, and the words mean exactly what they say. In ***FG Wilson (Engineering) Ltd v John Holt & Co (Liverpool) Ltd*** [2013] EWCA Civ 1232, [2014] 1 WLR 2365 a similar clause was considered by the Court of Appeal relating to the sale of generator parts and spares by FG Wilson to Holt & Co for onwards sale and distribution to Nigeria. Popplewell J granted summary judgment for unpaid sums due under the sale agreement, holding that other proceedings against FG Wilson for damages in respect of alleged supply to Nigeria in breach of exclusivity provisions could not be relied upon to defeat or delay payment.

130. The relevant clause in that case stated:

"Buyer shall not apply any set-off to the price of Seller's products without prior written agreement by the Seller."

131. The word "any" was given its true and normal meaning, and was considered to be an important part of the clause. Indeed, in relation to a sophisticated argument advanced by Holt that the clause applied only to legal, and not equitable, set-off, Longmore LJ stated at [36]:

"That would be a most surprising result; indeed the average businessman who was told that a clause of this kind applied to legal set-offs but not equitable set-offs would hardly be able to contain his disbelief."

132. Patten LJ agreed and stated at [59]:

"The words used in the relevant condition are clear and it must be assumed that the condition was drafted in this way to achieve its obvious commercial purpose of ensuring that the price is paid free of any underlying disputes about the goods sold or any related matter."

133. Although the appeal was allowed on the basis of the treatment of retention of title clauses, and Longmore LJ dissented in that respect and would have dismissed the appeal, all three members of the court agreed with the wording and effect of the no set-off clause, and the treatment of it by the judge below. Floyd LJ agreed with both Longmore and Patten LJJ on this issue at [71]. By parity of reasoning, the same could be said to apply to the no-set off provisions in the LPA and CPA. The obvious commercial purpose of these clauses is that the Premier League was entitled to be paid the Fee, under both contracts, in full, and without set-off or counterclaim and free and clear of any other deductions of any nature. The wording and the effect is clear. PPL agreed expressly that no set off would be permitted under the contract terms. In those circumstances, there is no proper or justifiable basis to allow this line of defence by PPL.

134. The set off provisions are completely clear, in my judgment, and do not permit PPL properly to rely upon any of these matters to raise any set off against the claim by the Premier League for summary judgment for either of the two instalments, one under the LPA and the other under the CPA.

The Counterclaim

135. There are three matters advanced by PPL in its counterclaim. The first is that PPL can recover damages for breach of warranty under clause 12.1(d) of the LPA for a failure to negotiate in good faith. However, for the reasons already explained, given I have found that there was no "fundamental change" to the "format of the competition" then the obligation to negotiate did not arise under the terms of the contract. Given there was no obligation to do so, the Premier League cannot be in breach of a requirement to do so.

136. An alternative argument is also advanced by PPL, which is effectively the other side of the coin to the breach of warranty argument under clause 12.1(d). This is that, under clauses 14.4 and 14.6 of the LPA, negotiations are to proceed and thereafter, if agreement cannot be reached, certain consequences would have followed in terms of repayment by the Premier League to PPL upon termination. However, this is a consequential argument that is centrally dependent on whether there was any fundamental change to the format of the competition. If not, then there was no obligation upon the Premier League to negotiate in good faith under the second part of that clause. However, the clause relied upon by PPL in this part of its counterclaim would only come into operation if my conclusions on "fundamental change" and "format of the competition" were different to those I have set out above, and were in favour of PPL. Given my conclusions on those matters were in favour of the Premier League, this does not assist PPL. On my findings on the nature of the changes under which the interrupted season resumed, the clause is not triggered and neither is the obligation to negotiate.

137. Finally, PPL also relies in its counterclaim upon unjust enrichment. For the reasons already explained, this does not assist PPL. This doctrine is not available to it, as the Premier League has enforced its legal contractual rights and there is no unjust factor as explained.

Other matters

138. The parties do not contend for consideration of the Covid-19 pandemic as an event that would qualify as force majeure. There is one passage in the skeleton argument of

PPL that must be addressed because it appears, on one reading, to be internally contradictory. It states on page 2:

"Finally, the COVID-19 pandemic neither constitutes a force majeure event under the LPA nor has any bearing on whether the change in the format of the competition constitutes a "fundamental change", and it has no bearing on the fact that PPL has overpaid the Premier League for the insufficient services rendered. Under the LPA, the Premier League is still obliged to negotiate in good faith with PPL, failing to do so constituted a breach of the LPA under clause 14.6(a). The Premier League shall repay the sum of payment, representing a pro rata valuation of the Seasons/Matches for which PPL has paid for, but never received, the Rights. Moreover, whether or not the COVID-19 pandemic itself or the relevant government actions constitute a force majeure needs to be analyzed in the context of the facts and is not suitable for adjudication in summary judgment, and should at least proceed to a trial."

(emphasis added)

139. The underlined passage suggests that PPL accepts that the pandemic was not a force majeure event; the remainder of the text from the skeleton argument quoted above refers to this point using the introductory term "whether or not", and refers to the need for a trial. Recourse must therefore be had to the pleadings in order to be clear what PPL's position is in this respect. Consideration of that pleading shows that force majeure is not pleaded in the Defence and Counterclaim by PPL and therefore the underlined part of the skeleton argument reproduced at [138] above is consistent with that. It is not necessary therefore to consider this point further; force majeure does not arise on the pleaded issues and does not need to be resolved on this application.

140. PPL has also drawn attention, both in evidence and argument, to what is said to be the "huge impact of the Premier League's claim in this case on PPL and the Chinese sports market" and the investment in time and money by PPL historically to promote and increase the profile of the Premier League in that market. Although I understand, in business and commercial terms, how important that is to PPL and why these points have been made, they are not relevant when construing the two agreements and considering the issues in this case on this application for summary judgment.

Conclusion

141. None of the defences advanced by PPL have, in my judgment, anything other than fanciful prospects of success. At least three of them (if one counts the counterclaim separately) are, in my judgment, practically unarguable. These are the advance payment defence; the penalty/relief from forfeiture defence; and the claim of unjust enrichment. Reliance upon these by PPL to defend claims for payment of the two instalments is wholly misplaced, and there is direct authority (which I have identified above) which demonstrates that the legal concepts upon which these defences rest are simply inapplicable to the circumstances here.

142. Similarly, some of the other matters relied upon by PPL are directly contrary to the express terms of the contracts which were agreed with the Premier League. For example, PPL submits that it is entitled to set off, against the two instalment payments, the damages it claims arise from the alleged breach of the warranty in clause 12.1(d) of the LPA. Putting entirely to one side my finding on the meaning of the warranty, in clause 4.6.2 of the LPA, and as set out at [43] and also [127] above, PPL has in the terms of the LPA clearly and expressly waived "any right of set-off

which it may have (howsoever arising) in respect of the Fees". Those words are clear, unambiguous and directly contrary to the argument mounted by PPL in this respect. I do not consider that any set-off can sensibly be relied upon by PPL in those circumstances.

143. The legal inapplicability of these defences, together with the factual subject matter, and the weakness of the counterclaim, demonstrate that the test for summary judgment in respect of the two unpaid instalments, one under the LPA due in March 2020, and the more modest one under the CPA which fell due in June 2020, is satisfied in the Premier League's favour on this application. PPL has no real prospect of successfully defending the claim on either of the two instalments on any of the grounds relied upon to justify non-payment. Further, there are no other compelling reasons why the case should be disposed of at a trial.

144. This therefore disposes of the matter and it is not necessary to go on and consider whether a conditional order ought to be made against PPL. In my judgment, the Premier League is entitled to summary judgment for the total amount of both of the two instalments and the issue of a conditional order does not arise.

145. Finally, PPL is somewhat aggrieved at what it perceives to be the unjust or different treatment it has received from the Premier League, compared to that afforded to other media partners over the fees paid for TV rights to the interrupted 2019/2020 season. PPL relies upon the widely reported news in the public domain that the Premier League agreed a rebate to Sky Sports for similar rights in the UK domestic market for the same Covid-interrupted season. This rebate is said in press reports to be a figure of some £170 million, as a result of the unattractiveness of the resumed season compared to how it was conducted before the pandemic. That rebate is said, in the news articles relied upon by PPL, to be payable from the Premier League back to Sky Sports. PPL also draws attention to news articles suggesting the far lower fees paid by its successor in the mainland China market for the 2020/2021 season, Tencent Sports. That company is said in such articles to have paid the Premier League only US$10 million, a mere fraction of the level of fees payable by PPL to the Premier League in the LPA, for that one season.

146. There are two points that ought to be made in this respect. Firstly, this is just the sort of evidence that would have been admissible at trial had I reached the opposite conclusion on "format of the competition", and were PPL attempting to demonstrate the material adverse impact upon the value of the Rights granted to it under the LPA. However, as I have set out at [78] to [87] above, given my conclusion on the point of construction concerning "format of the competition", such matters do not arise on this application. I have concluded that the resumed season conditions and changes that were imposed as a result of Covid-19 were not "fundamental changes" to the "format of the competition". That resolution, as a matter of contractual construction, is in the Premier League's favour. Accordingly, whether broadcasting the resumed season to the TV audience under the different conditions was more, or less, attractive to that audience, and whether it was less profitable to PPL to do so, does not impact on the issues that arise on this application. Put another way, the risk of profitability in broadcasting to the audience in mainland China and Macau rested with PPL under the terms of the two contracts, and the interruption to the season, and the way matches in the resumed season were played, did not change that.

147. Secondly, the terms of the Sky Sports contract are not known, nor is the level of the fee, nor is there any reason to suspect that instalments due under that contract were not paid as they fell due, nor is it known whether termination provisions were triggered and therefore available to be invoked by the Premier League. One difficulty that PPL may have had in terms of its relations with the Premier League is, given the non-payment of the instalment of US$210 million on 1 March 2020, or on any date in the following six months, the Premier League became entitled as of contractual right to terminate the two contracts, the LPA and the CPA, and chose to do so in September 2020. The dispute between them therefore became one of historical non-payment and the strict contractual consequences of the termination. Speculation as to the different fortunes of PPL on the one hand for the rights in mainland China and Macau, and other broadcasters on different contract terms for other jurisdictions, is neither relevant nor of assistance. It is of further note that the very sizeable payment by PPL under the LPA of over US$210 million fell due for payment almost two weeks *before* the 2019/2020 was interrupted by the pandemic. It was not paid as due even when the season was being played as originally anticipated, and under non-Covid conditions. This is said by PPL to have been because of the impact on PPL's fortunes of the pandemic which hit China some weeks earlier than the rest of the world; a lockdown was imposed on the city of Wuhan on 23 January 2020, and it is well known that China was affected before the rest of the world.

148. Whether that is correct or not, it is neither necessary nor desirable to speculate upon what effects PPL was experiencing in January and February 2020 whilst the 2019/2020 season in the UK was proceeding normally. I do not consider that the arrangements reached between the Premier League and any of its other broadcast or media partners for any other market on different contracts with potentially different terms are relevant to construing this agreement (or these two agreements, when one considers both the LPA and the CPA). Nor do I consider, on the terms of the contracts agreed by the parties, that the impact on PPL's finances of the lockdown in China (or worldwide) is relevant to the rights and obligations under those contracts. In many commercial contracts events may transpire other than as anticipated by one, or even both, contracting parties. That does not mean that the court will re-write the parties' bargain and impose different terms upon them to suit those later events. That is not the function of the law of contract.

149. In all the circumstances therefore, and for the reasons explained above, the Premier League are entitled to summary judgment on the two instalments that were not paid to it by PPL under the LPA and the CPA respectively. The total due to the Premier League which is owed by PPL is US$210.3 million and US$2.673 million respectively, in aggregate US$212.973 million, together with interest, and I grant summary judgment against PPL for that amount. I invite the parties to agree the amount of interest and the terms of the relevant order, together with other outstanding matters such as costs. In the event those cannot be agreed, a short hearing will be held before me on a date to be arranged. The permission that I granted to PPL to be represented by Ms Zuo and Mr Ran extends only to those consequential matters before me (and the permission for them to attend by video link is extended too). However, it does *not* extend to any appearances before the Court of Appeal, were this stage even to arise. The Court of Appeal should not be burdened with representations argued by employees without consciously deciding for itself whether to permit this. It is one thing for PPL to be represented by its employees before the High Court; it is

quite another for that to occur before the Court of Appeal. It is a matter for the Court of Appeal (and not the High Court) whether it is prepared to permit representation before it by employees.