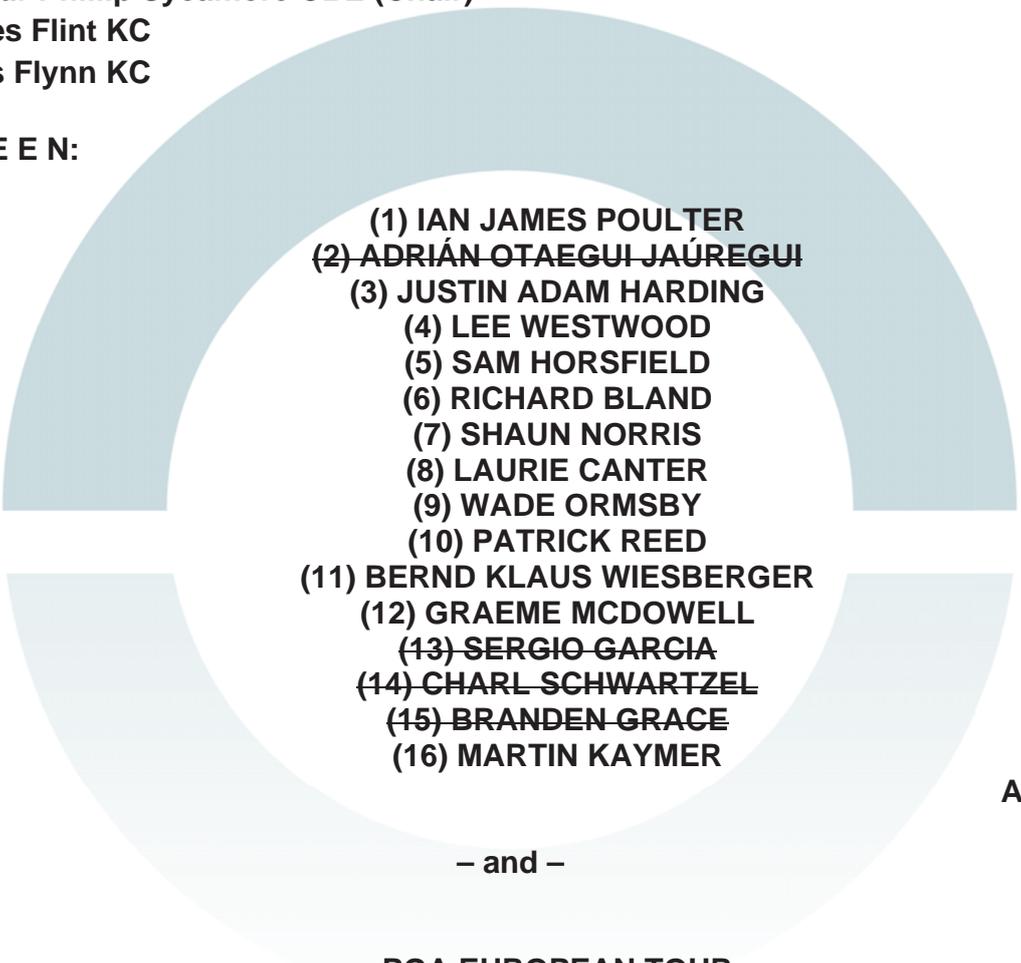


IN THE MATTER OF A REFERENCE UNDER THE DP WORLD TOUR MEMBERS'
GENERAL REGULATIONS HANDBOOK 2022 BEFORE A PANEL APPOINTED UNDER
REGULATION F(II)(3)(d)

Before:

His Honour Phillip Sycamore CBE (Chair)
Mr Charles Flint KC
Mr James Flynn KC

BETWEEN:

- 
- (1) IAN JAMES POULTER
~~(2) ADRIÁN OTAEGUI JAÚREGUI~~
(3) JUSTIN ADAM HARDING
(4) LEE WESTWOOD
(5) SAM HORSFIELD
(6) RICHARD BLAND
(7) SHAUN NORRIS
(8) LAURIE CANTER
(9) WADE ORMSBY
(10) PATRICK REED
(11) BERND KLAUS WIESBERGER
(12) GRAEME MCDOWELL
~~(13) SERGIO GARCIA~~
~~(14) CHARL SCHWARTZEL~~
~~(15) BRANDEN GRACE~~
(16) MARTIN KAYMER

Appellants

– and –

PGA EUROPEAN TOUR

Respondent

DECISION OF THE APPEAL PANEL

THE INDEPENDENT EXPERTS

Appearances: James Segan KC, David Lowe, Tom Mountford (instructed by Gibson Dunn) for the 1st - 9th, 11th, 12th and 16th Appellants.

Larry Klayman for the 10th Appellant.

Marie Demetriou KC, Daniel Piccinin, Ravi Mehta, Emmeline Plews (instructed by Macfarlanes) for the Respondent.

A. INTRODUCTION

1. This Appeal Panel (“the Panel”) has been appointed pursuant to the 2022 DP World Tour Members General Regulations (“the Regulations”) contained in the DP World Tour Members General Regulations Handbook (“the Handbook”) to determine appeals against determinations (“the Determinations”) made in respect of each of the Appellants by the Respondent (“the PGAET”) by which each Appellant was fined £100,000.00 and suspended from participation in three golf tournaments known as the Genesis Scottish Open, the Barbasol Championship and the Barracuda Championship. All of those tournaments took place in July 2022. In respect of the 1st - 9th, 11th, 12th, and 16th Appellants (“the GD Appellants”), the Determinations were made on 24 June 2022. The Determination in respect of the 10th Appellant (“Mr Reed”) was made on 3 July 2022. A sample Determination is set out in Appendix 1.
2. The appeal takes the form of a *de novo* hearing of the disciplinary charges laid against each Appellant which led to the Determinations. The Appellants’ case is that the Regulations and related disciplinary provisions and the Determinations are unlawful, unenforceable and/or void.
3. The Appellants are all self-employed professional golfers and members of the DP World Tour (“the DPWT”), a tour run by the Respondent (and formerly known as the European Tour). The Determinations arose as follows. In the case of the GD Appellants they participated in the inaugural golf tournament run by LIV Golf Investments, known as the LIV Tour (“LIV”), at the Centurion Club, Hemel Hempstead, Hertfordshire (“the London Event”), which was held between 9 – 12 June 2022. They did so without a release from

the Respondent's Chief Executive Officer ("CEO"), Mr Keith Pelley ("Mr Pelley"). In Mr Reed's case, he participated in the LIV Portland event later in June 2022, again without a release from Mr Pelley. The Determinations were expressed in identical terms for each Appellant and the same sanctions were imposed in respect of each Appellant.

4. The sport of golf does not have a single governing body. The sport (both professional and amateur) is governed by two organisations: the United States Golf Association ("USGA") in the USA and Mexico and the Royal and Ancient ("R & A"), based in Scotland, for the rest of the world. Together these two organisations administer a single code of rules for the sport. The Respondent is not a regulatory body for the sport of golf.
5. A number of organisations within the sport organise and promote, on a commercial basis, competitive events involving professional golfers. These are known as golf tours.
6. Golf tours do not employ professional golfers, nor do they require golfers to agree exclusively to participate in a single tour. Professional golfers are self-employed professionals, and they participate as independent contractors. They earn a living primarily through competing for tournament prize money and also by earning sponsorship and endorsements through their sporting profile. They do not receive money from tours when they are unable to play. They are responsible for all of their own costs such as coaching, training, caddies, entry fees, sport-related medical care, travel and accommodation.
7. As independent contractors, professional golfers determine in which tours and tournaments they will participate. Tours and other event organisers compete to attract the services of elite professional golfers at their tournaments, on an event-by-event basis.
8. The largest and most significant tour in the world is the PGA Tour, which is focused on North America (principally the USA and Canada). It has an annual turnover of US\$1,161m, and generally offers the largest purses (prize money) of any of the traditional tours. It is where most of the game's elite players aspire to play.
9. The next most significant tour is the DPWT. It has an annual turnover of US\$200m, which is more than 14 times that of the next largest tour. It is geographically focused on Europe, where it is the only elite level men's tour in the professional game, although a number of

its events take place in the Middle East. Players aspire to play on the DPWT due to its long-standing reputation, substantial purse sizes, Official World Golf Ranking (“OWGR”) points and access to playing in the Ryder Cup.

10. Each of the PGA Tour and DPWT arranges tournaments for most weeks of the year.
11. There are other smaller tours worldwide, such as the Sunshine Tour (based in South Africa), the Japan Golf Tour Organisation, the Asian Tour and the ISPS Handa PGA Tour of Australasia.
12. The DPWT is organised and operated commercially by the Respondent. It was not in dispute that in January 2021 DPWT entered a Strategic Alliance with the PGA Tour (“the PGA”), the organiser of professional golf tours in the United States and North America.
13. The DPWT and the PGA co-sanction several events. A subsidiary of the PGA acquired 15% of the media arm of the Respondent and two board seats. It was accepted that DPWT members do not need to apply for a release to play in a conflicting PGA event.
14. LIV is an organisation which is majority owned by the Public Investment Fund of the Kingdom of Saudi Arabia and minority owned by Performance 54 Group Ltd. It was established in 2022 to provide a different format of golf tour with an intention to involve 48 top golfers competing both individually and in teams, in which the golfers have an equity stake. The LIV tournaments are played over 54 holes with no cut in contrast with traditional tournaments which are played over 72 holes with a cut after 36 holes.
15. LIV offers significant financial rewards for participation, far exceeding those available from other tours. It requires those who sign up to play in all of the events on the Tour but beyond that does not prohibit players from playing elsewhere and on other tours. It plans to hold 14 tournaments in 2023 (as against 8 in 2022). Of those 8 events, 5 were in the USA, 1 in Saudi Arabia, 1 in Europe (London) and 1 in Thailand. Some of the Appellants have entered into long-term contracts with LIV to participate over a number of years.
16. A total of 23 DPWT members, including all the GD Appellants (but not Mr Reed), played in the 2022 London Event (at the Centurion Club). They had all requested but had been refused a release by Mr Pelley on the basis that the tournament clashed with the DPWT Volvo Scandinavian Mixed 2022. Mr Reed requested a release from the DPWT Irish Open

at the end of June 2022 to play at the LIV Portland Event. His request was refused but he nonetheless played in the LIV Portland event. A sample refusal of release letter is set out in Appendix 2. The refusals were expressed in the same terms for each of the Appellants.

17. A company called Official World Golf Ranking Ltd (“OWGR”) comparatively ranks professional golfers throughout the world through the award of what are commonly called “OWGR points”. OWGR points are used as one of the principal qualifying criteria for entry into some of golf’s premier events, including the ‘Majors’ (the Open Championship, the US Masters, the US PGA and the US Open) which are self-standing events not organised by PGA or DPWT.
18. The OWGR system is designed so that players gain the greatest number of points by playing in recognised events against other players who have high rankings. In practical terms, that means that the most points are on offer for the Majors and the Players Championship (for which guaranteed minimum points are in place), then after that the PGA, then the DPWT.
19. It is possible for new tours to apply for recognition by OWGR. It was not in dispute that LIV applied for recognition on 6 July 2022, but that its application has yet to be determined. In practice, given the number of points required for prestigious events such as the Majors and the distribution of available points across tournaments, the vast majority of players will need to participate in at least one of the PGA or the DPWT in order to qualify.
20. The Ryder Cup is a competition organised and administered jointly by the Professional Golf Association of America and Ryder Cup Europe and is a biennial competition between Europe and the United States which alternates between US and European golf courses. The Ryder Cup is a highly prestigious event giving exposure and qualification to other events (but not providing prize money).
21. The Respondent is a membership organisation and a private company limited by guarantee without share capital. The members of the Respondent are current and certain distinguished former players on the golf tours organised by the Respondent (including the DPWT). The objects of the Respondent are set out in its Articles of Association (Article 2) and are to:

“promote, manage and administer golf tournaments for the benefit of professional golfers who are Members of the Tour”.

and:

“to do all such other things as shall be thought fit to further the interests of the Tour or to be incidental or conducive to the attainment of [these objects]”.

22. The Respondent is thus a golfer-controlled commercial organisation which exists to pursue the interests of its members, who are current and former professional golfers.

B. THE REGULATIONS

23. The eligibility and membership requirements for DPWT can be found at Regulation B2. Participation is subject to the Regulations, as amended from time to time, which are currently in the 2022 edition. The Regulations are governed by English law, as provided for in the Handbook at Regulations E8: FI.3 and FII.8. An extract from the Regulations appears at Appendix 3.
24. Regulation B3(a)(ii) provides that, to ensure his continued membership, a member is required to participate in *“the minimum number of Counting Tournaments for inclusion in that Official Season’s World Tour Rankings.”* The minimum number of Counting Tournaments for this purpose is presently 4 tournaments, or sometimes 5, to the extent that Regulation B1(c)(ii) imposes an additional requirement, from a total annual calendar of 44 tournaments organised by the DPWT. An exception, with qualifications, to this requirement is provided in the case of an Honorary Life Member.
25. These appeals are concerned with the “Conflicting Tournaments Regulations” (“CTRs”) and “Release” provisions contained in the Regulations which can be found at Regulations E1 and E2 and the “Code of Behaviour and Disciplinary Procedure” at Regulation F. In essence, the effect of these regulations is that, subject to certain exceptions, DPWT members can only play in non-DPWT tournaments if they have the prior written consent of the Respondent (a “Release”). This lies within the discretion of the Chief Executive of the Respondent (currently, and at all material times, Mr Pelley). Members who play in

such events without a Release are liable to sanctions (again, within the discretion of the Chief Executive) which may include unlimited fines, suspensions and expulsion. There is an exception to the requirement to obtain a Release in the case of a non-European Member participating in a tournament on his own Home Tour.

26. Home Tour is defined in the Handbook (General Regulations – Definitions, page 11) as:

“the Major Golf Tour which sanctions the majority of golf tournaments in the country which the Member has declared as his Nationality on his Membership form as well as golf tournaments in the surrounding countries or territories (and if there is more than one Major Golf Tour which sanctions tournaments in such territories, then the Home Tour shall be the Major Golf Tour nominated by the Member on his Membership form).”

The term “Major Golf Tour” is defined on the same page to mean “any full or associate member of the International Federation of PGA Tours.”

27. The CTRs are framed in terms which expressly recognise the (potentially) competing interests of players and the Respondent, and the need to strike a fair balance between them. For example:

“As a general principle, the PGA European Tour will not unreasonably seek to restrain its Members from Participating in certain golf tournaments or events which are not sanctioned by the PGA European Tour, nor from engaging in independent commercial activities provided that these do not risk unreasonably interfering with the commercial interests or reputation of the PGA European Tour, nor affect the Member’s Participation in Counting Tournaments.”
(Regulation E1(a));

“In considering whether or not to grant a Member’s request to Participate in any Conflicting Tournament...the Chief Executive shall apply his discretion but will act reasonably at all times when considering the relevant factors including the above factors and balancing the legitimate interests of the Member against the best interests of all Members and the PGA European Tour itself.” (Guidelines for Release for Conflicting Tournaments).

28. A Conflicting Tournament is defined as an event which (i) takes place (in whole or in part) during the “Tournament Week” of an Approved Tournament, meaning the period starting two days before the Approved Tournament’s first round and ending on the day of its final round; or (ii) takes place during a Tournament Week or the prior week, if it is within 50 miles of the Approved Tournament, or anywhere in the same country if the player does not intend to play in the Approved Tournament (Regulation E1(c)).
29. The Guidelines for Release for Conflicting Tournaments, expressly provide for a range of considerations which either:
- (i) must be taken into account by the decision-maker; or
 - (ii) may be taken into account by the decision-maker, including “*the wider interests of the PGA European Tour*”.

The specific factors which the CEO must or may consider are set out in the Guidelines which appear at Appendix 3.

30. The Guidelines for Release for Conflicting Tournaments also expressly provide that:

“...each request will be assessed on its own merits and in the context of all relevant factors relating to the Member’s specific request. The Chief Executive’s past decisions do not form a binding precedent and whether a Member might normally be released in certain or equivalent circumstances does not mean the Chief Executive is required to the [sic] release the Member pursuant to any particular request...”

31. There then follows a protocol for Release:

“2. Protocol for Release for a Conflicting Tournament

(a) Release Procedure

All applications by a Member for the above permission must be made in writing to the Chief Executive [REDACTED] and copied to releases@europeantourgroupp.com as soon as reasonably practicable and before any advance Promotion of a Member’s Participation in any such Conflicting Tournament and in any event must be

received by the Chief Executive at least 30 days before the Conflicting Tournament.

(b) Consequences of non-compliance.

It shall be a breach of the Regulations for any Member who either: (i) fails to comply with Regulation E2(a); or (ii) who, having complied with Regulation E2(a), Participates (or allows or agrees to the ¹Promotion of his Participation or expected Participation in) any Conflicting Tournament in circumstances where he has not received the prior written approval of the Chief Executive; or (iii) having complied with Regulation E2(a), fails to fulfil to the Chief Executive's reasonable satisfaction (whether in whole or in part) any conditions accepted by the Member in consideration for permission from the Chief Executive to Participate in any Conflicting Tournament.

In any and all such circumstances such Member will not receive any Ryder Cup points for his performance in the relevant Conflicting Tournament(s).

Members who are in breach of this Regulation E2 may also be deemed to have committed a serious breach of the Code of Behaviour in Regulation F, including without limitation injurious conduct (within the meaning of paragraph 6 of Part I of Regulation F) as it is acknowledged that any failure by the Member to comply with this Regulation E2 may cause considerable damage to the relationship between the PGA European Tour and the promoter or sponsor of any affected Approved Tournament.

¹For the purposes of this Regulation E2, Promotion of has the same meaning as set out at the top of this Regulation E.

32. Regulation F sets out a Code of Behaviour and Disciplinary Procedure. This section of the Regulations first defines the Code of Behaviour which includes:

“(f) Injurious Conduct”, defined as “Conduct likely to injure or discredit the reputation of the [PGAET] or any of its Members or conduct that is contrary to the [PGAET's] constitution, rules or Regulations” and

“(j) *Breaches of Regulations*” and then sets out the Disciplinary Procedure at pages 78-89. A distinction is drawn between a minor breach and a serious breach.

33. The Chief Executive is obliged to require a “Disciplinary Officer” to investigate whether a breach has occurred. If that individual considers that a serious breach may have occurred, then he or she must inform the Chief Executive who will ordinarily refer the matter to “an impartial disciplinary panel” composed of three persons (Serious Breach Procedure FII3(a) page 82/83). An appeal against a decision of a Disciplinary Panel will not ordinarily take the form of a *de novo* hearing. The Serious Breach Procedure provides as follows at paragraph 3(d):

“The appeal will be limited to the four grounds set out above and will not take the form of a de novo hearing (i.e. the Appeal Panel will not hear the matter as if it were a Disciplinary Panel re-hearing the case at first instance) unless:

- (i) the appellant demonstrates a compelling reason why the appeal ought to be heard de novo; or*
- (ii) the parties agree that the appeal ought to be heard de novo*
- (iii) the appeal is made pursuant to paragraph 3(f)(vi), below.”*

34. Notwithstanding this provision, paragraph 3(f)(vi) provides that the Chief Executive, upon referral of a potential Serious Breach by a Disciplinary Officer, may “*elect to himself to determine whether or not a Serious Breach of the Code was committed by the Member*” and if so what sanction to apply, all “*in his absolute discretion*”.
35. The range of sanctions which the Chief Executive can impose is identical to that available to a Disciplinary Panel (paragraph 3(c): “*such sanction as it considers appropriate having regard to all the circumstances*”, including without limitation, “*a reprimand, censure, fine, suspension from participation in one or more tournaments or for a given period expulsion from [PGAET]*”.
36. Regulation 3(b) provides that a member may appeal the determination of the Chief Executive to an Appeal Panel, which will consider the matter *de novo*, as is the case with these appeals. The Respondent has the discretion to request that Sport Resolutions appoint the Appeal Panel, as has happened in these appeals. (Regulation 3(d)).

37. Regulation 3(d) provides: *“If the appeal is heard de novo, the same process as before the Disciplinary Panel will be followed (i.e., in accordance with the procedure set out in paragraphs 3(b), above)”*.
38. The procedure at Regulation 3(b) includes, inter alia, provision for a requirement for the Disciplinary Officer to prepare a file of documentation and evidence relied upon to include details of the alleged breach and copies of the documentation relied upon by the Respondent.
39. Conversely, if the Chief Executive has determined to deal with the matter himself under 3(f)(i) it is provided that: *“he will have a wide discretion as to the evidence that he may consider before making those determinations (which might include communications with the Member and/or making documentary requests of the Member)”*.
40. As the Chief Executive of the Respondent Mr Pelley elected to determine himself, pursuant to sub-paragraph 3(f), whether Serious Breaches of the Code had been committed by the Appellants, the provisions at 3(f) - 3(vi) are engaged and the appeal is required to be heard *de novo* by an Appeal Panel following the same process as before a Disciplinary Panel, in accordance with the procedure set out in 3(b).

C. PROCEDURAL BACKGROUND

41. By letters of 28 June 2022 (First and Second Appellants) and 30 June 2022 and 1 July 2022 (Third Appellant), the First, Second and Third Appellants issued appeals against the Determinations. An application was made in these appeal proceedings for interim relief by way of a stay of the sanctions pending determination of the underlying appeals. By agreement of the parties the matter was dealt with by the Chair sitting alone on 5 July 2022 when it was directed that the sanctions be stayed pending the determination of the substantive appeals.
42. Subsequently, appeals were issued by the 4th to 16th Appellants and the Respondent stayed the sanctions imposed on them pending the determination of the substantive appeals. Although some of the Appellants and other DPWT members have continued to

play in LIV Golf events, without any release by the Respondent, the Respondent has agreed not to impose any sanctions in any further disciplinary proceedings until they are determined.

43. Case management directions were issued on 26 July 2022 which provided, inter alia, for the appeals of the 4th to 12th Appellants to be consolidated with the appeals of the 1st, 2nd and 3rd Appellants and be case managed together. Further directions were issued on 24 August 2022 by which the appeals of the 13th to 16th Appellants were similarly consolidated. A number of other case management directions have been issued during the course of these proceedings.
44. The case management directions required the Respondent, inter alia, to serve statements of charge and any evidence and documentation relied upon as required by the procedure at paragraph 3(b) of the Serious Breach Procedure and provided a timetable of directions thereafter in preparation for the substantive hearing fixed for 6 February 2023. Further directions were given at a pre-hearing review which took place on 11 January 2023. A sample charge is set out at Appendix 4.
45. By notice given on 20 January 2023 the 13th to 15th Appellants, Sergio Garcia, Charl Schwartzel and Branden Grace, withdrew their appeals. By notice given on 31 January 2023 the 2nd Appellant, Adrian Otaegui Jauregui, withdrew his appeal.
46. We heard the appeals between 6th and 10th February 2023 at the International Dispute Resolution Centre in London. We express our appreciation to counsel and those instructing them for their assistance and input throughout both the substantive hearing and the preparatory stages of this appeal.
47. A number of witnesses gave evidence in person and others by video link. In addition, we considered the unchallenged written evidence of a number of witnesses. We set out in Appendix 5 a list of all of the witnesses whose evidence we considered, and we will return to the relevant detail of their evidence in our discussion and analysis.

D. OUTLINE OF THE PANEL'S DISCUSSION AND ANALYSIS

48. The GD Appellants, whose submissions were adopted by Mr Reed, relied on three grounds in support of the appeal, namely Restraint of Trade, UK Competition Law and Excess of Powers/Breach of Contract, which the Panel addresses in sections E to G respectively. In respect of these matters, the solicitors for the 1st, 3rd-9th, 11th, 12th and 16th Appellants and the solicitors for the Respondent provided us with Agreed Facts and Agreed Issues for Determination. These are set out in Appendix 6 and Appendix 7.
49. Two issues particular to Mr Reed fall to be determined which are based on the fact of his status as both an Honorary Life Member and a non – European Member of DPWT. These are addressed in section H below.
50. The Panel's conclusion and ruling on sanctions is set out in Section I below.

E. THE RESTRAINT OF TRADE CHALLENGE

Issues

51. The first legal ground of challenge concerns restraint of trade law and the issues as defined by the parties are:
 - (1) whether the doctrine of restraint of trade was engaged by the CTRs;
 - (2) if so, whether the restraint was reasonable and proportionate, in particular in pursuing the legitimate interests of the PGAET and in going no further than necessary in protecting those interests;
 - (3) if the restraint was reasonable in the interests of the parties, whether it was nevertheless unreasonable as being contrary to the public interest.
52. The Appellants' case is that the CTRs are an unlawful restraint of trade. They interfere with the players' economic freedom as independent contractors to work and maximise

their earnings. The application of the CTRs is not proportionate to the stated legitimate aim of the PGAET. The CTRs cannot be objectively justified by reference to the strength of field, and their asserted reasonableness is belied by the PGA carve-out. These are not reasonable restraints in the interest of the parties, nor in the public interest.

53. The Respondent's argument is that there is no public policy justification for the application of the restraint of trade doctrine in the absence of any oppressive treatment of the players sufficient to warrant interference in the application of the CTRs. The CTRs are in substance provisions which satisfy the "trading society" test having the effect that the regulations are acceptable and necessary to prioritise the economic interests of the PGAET. If the restraint of trade doctrine does apply the CTRs define the legitimate aims of the PGAET, which are reasonable and proportionate and in the public interest.
54. The Appellants' skeleton argument at paragraph 65 sets out the two-stage test¹:
- (1) It is for the Appellants to prove that the doctrine of restraint of trade applies;
 - (2) If a restraint is established the burden shifts to the Respondent to establish reasonableness; that is, that it protects its legitimate interests and is proportionate; where this is shown the burden shifts to the Appellants to show that the restraint is not reasonable in the public interest.

That analysis is not disputed by the Respondent.

Structure of the CTR regulations

55. In 2014 the Regulations were updated so that dual members of the European Tour and the PGA Tour were allowed automatic release for participation in the PGA Tour. As dual members, players were committed to play a minimum number of tournaments on each tour in order to maintain their membership, which was in practice difficult. The aim of this process was to encourage the best European and international players already playing on the PGA Tour to remain members of the European Tour and avoid the need to apply

¹ see *Proactive Sports v Rooney* [2012] FSR 16 at paragraph 57

for a release. That process is known as the “PGA carve-out” and is reflected in the CTRs at E1(d)(iii) which covers *“Any Member who is also a member of the PGA Tour and Participates in a tournament which is being sanctioned by the PGA Tour”* subject to certain conditions. Around 45 members of the DPWT are also dual members of the PGA Tour.

56. In about April 2021 the PGAET made amendments to the CTRs at E1 & 2, so the requirement to apply for a release applied not just to the “Players of Standing” to whom the Regulations previously applied but to all Ranked members, that is any member who fulfilled any of the criteria set out in Regulation B2(a)(i) to B2(a)(xxi). The effect of that alteration to the Regulations was to extend the categories of members required to seek a release to play in a Conflicting Tournament.
57. On 27 November 2020 the PGA Tour and the PGAET publicly announced a strategic alliance, which was entered into in January 2021. It was agreed that the two tours would create a strategic pathway to and from the PGA Tour. Subsequently the tours agreed to co-sanction the Genesis Scottish Open and the PGA Tour made available 50 playing spots to DPWT members in each of the Barbasol Championship and Barracuda Championship on the PGA Tour.
58. Regulations E1 and E2 govern the entitlement of Members to play in tournaments other than Approved Tournaments. Regulation E1(a) states that PGAET *“recognises the individual rights of all Members operating as independent contractors”*; forswears guaranteeing to sponsors and promoters the involvement of any Member at any given event; and states a *“general principle”* that PGAET *“will not unreasonably seek to restrain”* Members from participating in *“certain”* tournaments not sanctioned by PGAET, but with the caveat that these must not *“risk unreasonably interfering with”* PGAET’s *“commercial interests or reputation”* (or players’ participation in Counting Tournaments).
59. Regulation E1(b) sets out what it calls the “Legitimate Aim”:

“Notwithstanding the above, the PGA European Tour requires those Members referred to in Regulation E1(c) below to comply with the Conflicting Tournaments Regulations set out in this Regulation E1. Compliance with this Regulation E1 by Members is required to ensure that the PGA European Tour will remain in a position to fulfil, at all times, the expectations of its tournament sponsors,

promoters and broadcast partners who support the PGA European Tour and its Members by providing playing opportunities and financial opportunities to enhance Members' professional golfing careers. In particular each Member acknowledges the collective obligations of the PGA European Tour to provide representative fields to encourage promoters to provide competitive prize funds and playing opportunities for the benefit of Members."

60. Under Regulation E1(c) there is a general prohibition on participation in any "Conflicting Tournament" without prior written permission of the Chief Executive. A "Conflicting Tournament" is defined as:

- (i) any tournament or exhibition match, whether public or private, that is not an Approved Tournament, scheduled to be staged against the Tournament Week or any part of it;*
- (ii) any tournament or exhibition match, whether public or private, that is not an Approved Tournament, scheduled to be staged against or within seven days prior to the Tournament Week and which tournament or exhibition is either:
 - (A) within 50 miles of the Approved Tournament scheduled that Tournament Week; or*
 - (B) in the same country as the Approved Tournament scheduled that Tournament Week, if the member is eligible, but does not intend to play in such Approved Tournament.**

"Tournament Week" means the period that is two days in advance of the first round and ending on the day of its final round (normally Sunday).

In practice, DPWT events tend to take place over four days, from Thursday to Sunday inclusive. Accordingly, the relevant Tournament Week will generally run from Tuesday to Sunday, leaving only Mondays free from the scope of the Conflicting Tournament and Release provisions.

61. Under Regulation E1(d) the exceptions to the requirement for prior written permission include any Member who (subject to various conditions) is also a member of the PGA Tour and participates in a tournament which is being sanctioned by the PGA Tour.

Restraint of trade – Stage 1

No public policy justification

62. The submission for the Respondent is that the guiding feature in the authorities is that a restraint must be sufficiently oppressive to warrant interference with the parties' freedom of contract. Where the restraint of trade doctrine is held to apply in professional sport the restraint at stake jeopardises "a player's ability to earn any living at all". The thrust of the submission is that the restraint of trade doctrine does not apply if professional players remain able to gain a substantial financial advantage.
63. The case of **Eastham v Newcastle United** [1964] Ch 413 concerned a professional footballer's challenge to the club's enforcement of the Football Association's retention and transfer provisions. The relevant decision of Wilberforce J (at pages 430/431) was that both the retention and the transfer systems operated substantially in restraint of trade. The vice in the retention system was that the retention list substantially interfered with the right to seek other employment, at a time when the player was not actually employed by the retaining club. In that case what was at stake for the player was his ability to earn his living as a professional footballer.
64. In **Greig v Insole** [1978] 1 WLR 302 it was held, inter alia, (a) that the contracts of World Series Cricket with the players were not in restraint of trade and (b) that the bans proposed by the cricketing authorities on playing Test Match and county cricket were in restraint of trade. There is no suggestion in the judgment that it was a pre-condition of a finding of restraint of trade that the three individual plaintiffs, professional cricketers, should demonstrate an inability to earn their living at all. To the contrary, at page 312 C Slade J stated:

"The substantial financial rewards which the three individuals will receive from World Series Cricket will no doubt compensate them to some extent for the loss

of opportunities in other fields. There can, however, be no doubt as to the seriousness of the proposed bans so far as they are concerned and indeed in relation to many of the other players not parties to this action who have contracted with World Series Cricket.”

The general principle finding a restraint of trade was set out at page 345:

“There can be no doubt that the changes of rules effected by the ICC and the changes of rules intended to be effected by the TCCB will, if implemented, substantially restrict the area in which it will be open to professional cricketers to earn their livings. It is common ground that the rules of an association, which seek substantially to restrict the area in which a person may earn his living in the capacity in which he is qualified to do so, are in restraint of trade.”

The professional cricketers were entitled to seek to protect their rights to earnings in those areas, whether or not they had an expectation of substantial financial rewards elsewhere. It is difficult to understand why a public policy justification should turn on the question whether a professional cricketer had the ability to earn a substantial remuneration.

65. In **Hendry v WPBSA** [2002] ECC 8 at paragraph 114 Lloyd J held that a rule designed to maximise revenue for World Snooker was clearly an agreement in restraint of trade. There was no suggestion that the earnings of the claimants, two of whom were leading snooker players, were relevant to that issue. There is no indication in **Quantum Actuarial v Quantum Advisory** [2022] 1 All ER (Comm) 473 (“**Quantum Actuarial**”) at paragraph 60 that the application of the doctrine required analysis of the capital or income available to the party asserting restraint of trade. To the contrary at paragraph 65 (iii) Carr LJ stated:

“It is no answer on the question of reasonableness to say that there have been substantial financial rewards on all sides. The question of reasonableness has to be considered by reference to the terms of the contract.”

66. The decision of the Singapore High Court in **Pilkadaris v Asian Tour** [2012] SGHC 236 (“**Pilkadaris**”) is the only authority which deals with claims made by golfers challenging the validity of a tour’s regulations governing releases to enable participation in conflicting events. The regulations of the Asian Tour were similar, but not identical, to the CTRs in this case. At this stage it is only necessary to consider, at Stage 1, the decision made by

Prakash J as to whether the relevant regulations were in restraint of trade. That issue was determined at paragraph 84:

(84): Having considered the authorities and the arguments, I agree with the plaintiffs that reg 1.10 as it appears in both the 2009 and 2010 regulations is a restraint of trade. It prevents the plaintiffs who are members of the Asian Tour from playing in any golf tournament which they are otherwise eligible to play in if such tournament falls within the ambit of the regulation. The plaintiffs are professional golfers who need to be able to take part in as many tournaments as they can in order to improve their chances of making a living by earning prize money and by qualifying for bigger and better tournaments. The defendants' argument of the plaintiffs owing loyalty to the Asian Tour does not meet the point. The Asian Tour equally has a duty not to impose unreasonable restrictions on its members or seek to substantially restrict the area in which they may earn their living. The Asian Tour does not promise its members the opportunity to participate in any let alone all of its tournaments; they have to qualify and only those members who are highest in ranking have the chance of playing in a reasonable number of tournaments. Low-ranking members like Mr Anis may end up not playing any Asian Tour tournament in any particular year. Since the Asian Tour cannot guarantee its members a living, it must be reasonable when restricting them from seeking opportunities to earn that living outside the tour."

67. The Respondent places some reliance on the sentence referring to "low ranking members", apparently in support of an argument that only those members who might not have the ability to earn any living from the Asian Tour could benefit from the court's decision. In context it is clear that the court was referring to all members of the Asian Tour, who as professional golfers aspired to qualify for bigger and better tournaments (at paragraph 84g) with the opportunity to earn their living and be allowed to determine their own destinies and future (at paragraph 69g). There was no limitation in the court's reasoning which suggested that the past or future level of earnings of golfers could be relevant to the doctrine of restraint of trade. No importance can be attached to the

observations of Choo Han Tek J in the interim relief application ² which were overridden by the judgment of Prakash J.

68. Substantial rewards have been offered by LIV Golf to its players and restrictive terms have been applied for participation in the LIV tournaments. Those terms cannot have any relevance to the submissions on restraint of trade. Consistently with the judgment in **Quantum Actuarial** the question is as to “the practical effect of the restraint in hampering the freedom to trade” (paragraph 60 (vi)). The only relevant restraint of freedom to trade is that asserted by the Appellants against the PGAET.

Commonplace feature of the market – “trading society”

69. The judgment of the Court of Appeal in **Quantum Actuarial** states, at paragraph 57:

“At the heart of the doctrine lies the tension between two freedoms, on the one hand freedom of contract, and on the other freedom of trade ...

How these freedoms are reconciled may depend on the type of contract in question. By way of example, between employer and employee, the court more jealously guards the freedom of an employee to earn a livelihood elsewhere; in other cases, more weight is given to the policy of the law that contracts freely entered into should, prima facie, be enforced”.

Paragraph 60 gives a clear exposition of the applicable legal principles governing the doctrine of restraint of trade. In summary the doctrine is not confined to rigid classification, the doctrine is to be applied to factual situations with a broad and flexible rule of reason, determining the applicability of the doctrine to restrictions on a contracting party’s ability to carry on a business activity is a question of evaluating all the relevant factors, the assessment is to be made by reference to the position at the time the contract is made (not by reference to subsequent events), the doctrine can apply to restraints operating during the currency of the contract, and the application depends on “the practical effect of the restraint in hampering the freedom to trade”.

² **Pilkadaris v Asian Tour** [2010] SGHC 294 at paragraphs 6 - 8

70. At paragraph 60 (iii) reference is made to the “trading society” test in these terms:

“Contractual restraining provisions which are of a sort which have become part of the accepted machinery of a type of transaction which have generally been found acceptable and necessary – reflecting the accepted and normal currency of commercial or contractual conveyancing relations – will generally fall outside the scope of the doctrine (following the ‘trading society’ test discussed above and approved in Peninsula Securities);”

71. In **Peninsula Securities v Dunnes Stores** [2020] UKSC 36 (“**Peninsula**”) Lord Wilson stated at paragraphs 45 & 46:

“...the common law is inevitably a patchwork; and in it we will search in vain for perfect congruity. This is a truth which Lord Wilberforce’s pragmatic test recognises. Although criticised, the phrase “trading society” aptly describes the test. For it reflects the importance attached on the one hand to freedom to trade and on the other to the enforceability of contracts in the interests of trade. It is the former which generates the doctrine and the latter which keeps it within bounds.

Under the trading society test a covenant which restrains the use of land does not engage the doctrine if, in the words of Lord Wilberforce in the Esso case [1968] AC269, 333, it is of a type which has “passed into the accepted and normal currency of commercial or contractual or conveyancing relations” and which may therefore be taken to have “assumed a form which satisfies the test of public policy”.

72. In **Quantum Actuarial** at paragraphs 71 to 75 Carr LJ did not accept the submission that the Supreme Court in **Peninsula** had laid down the “trading society” test as a single test of universal application in determining whether or not the restraint of trade doctrine is engaged. The service agreement was not the type of contract which fell naturally into a category susceptible to considerations of ‘accepted and normal currency’ of commercial or contractual dealings. Rather the case was to be determined on its own terms and in its own circumstances. At paragraph 79 Carr LJ, referring to the terms of the relevant services agreement, reiterated that public policy remained the foundation of the doctrine.

73. It is clear from the judgment of Lord Wilson in *Peninsula* that it is the freedom to trade, not the freedom of contract, which generates the doctrine of restraint of trade. The Appellants assert the freedom to trade in seeking individual releases from the relevant contractual CTRs.
74. The Respondent submits that conflicting tournament rules are commonplace in the world of professional golf and refers to the regulations laid down by other professional tours with similar provisions. In *Esso Petroleum v Harper's Garage* [1968] AC 269 Lord Wilberforce, in formulating what is now called the trading society test, set out the nature of contracts which may be excluded from the doctrine of restraint of trade (at page 333):

“Negatively, and it is this that concerns us here, there will be types of contract as to which the law should be prepared to say with some confidence that they do not enter into the field of restraint at all ...

the development of the law does seem to show that judges have been able to dispense from the necessity of justification under a public policy test of reasonableness such contracts ... as under contemporary conditions may be found to have passed into the accepted and normal currency of commercial or contractual or conveyancing relations ...

moulded under the pressures of negotiation, competition, and public opinion...”

The passages cited by the Respondent from Lord Wilberforce’s judgment at paragraph 335C – 336A (paragraphs 53 & 54 of the Respondent’s skeleton argument) relate to brewery ties, restrictions on certain forms of trade from the premises in leases and the disposition of freeholds, and sales of businesses with goodwill. Such examples have no relation to a restraint which interferes with a golfer’s right to ply his trade.

75. Nor is there any evidence that the structure of international golfing regulations had been moulded under the pressures of negotiation or public opinion to create a commonplace feature of the market. It was in 2014 that the PGAET created the PGA carve-out, changing the CTRs to provide for the automatic release of players for PGA Tour events. In January 2021 the PGA Tour and the PGAET entered into a strategic alliance, creating a strategic pathway to and from the PGA Tour. In April 2021 the PGAET made amendments to the CTRs at E1 & 2, the effect of which was to extend the category of members required to

seek a release in order to play in a Conflicting Tournament. It was only from April 2021 that the regulations applied so that all members seeking a release from a DPWT tournament were required to apply for permission. The evidence does not establish whether similar changes to regulations were made by other golf tours.

76. The judgment in **Quantum Actuarial** (at paragraphs 71 - 73) does not support the submission that the CTRs are to be treated as the type of provision which could satisfy the “accepted and normal currency” of a “trading society” test.

Remaining submissions on Stage 1

77. It is common ground that the Panel is first required to determine whether the doctrine of restraint of trade is engaged, the burden to prove the restraint resting on the Appellants.
78. The Appellants submit that their freedom as independent contractors to ply their trade and maximise their income engages the doctrine of the restraint of trade, as:
- (1) The essence of the CTRs is to restrain the golfers’ freedom to trade, by providing PGAET with a power to control access to the LIV Golf tournaments;
 - (2) The express terms of the CTRs recognise that those rules operate as a restraint on members’ freedoms as independent contractors. The regulations accept that the PGAET will not unreasonably restrain members from participating in golf tournaments which are not approved, but may then impose restrictions by requiring members to comply with CTRs;
 - (3) Under the CTRs PGAET has unlimited power to ban participation in conflicting events and impose financial penalties;
 - (4) The effect of the PGA carve-out is that there is a discrimination in favour of the DPWT’s best golfers competing in the PGA Tour, whereas the other golfers are entitled to choose events which are not sanctioned by the PGAET.

Points (3) and (4) are more relevant to the issue of reasonableness at Stage 2 and will be considered below.

79. Regulation E1(a) recognises that members are to have *“individual rights ... operating as independent contractors”* and *“confirms to all Members that at no time will it hold out to tournament sponsors or promoters the guaranteed appearance or entry of any individual Member.”* However, as a general principle the PGAET will not unreasonably seek to restrain its Members from participating in certain golf tournaments or events which are not sanctioned by the PGAET *“provided that these do not risk unreasonably interfering with the commercial interests or reputation of the PGA European Tour, nor affect the Member’s Participation in Counting Tournaments”*. Under regulation E1(b), the Legitimate Aim states:

“Notwithstanding the above, the PGA European Tour requires those Members referred to in Regulation E1(c) below to comply with the conflicting Tournaments Regulations set out in this Regulation E1.”

80. The regulations thus confer on the PGAET the power to control applications made by the Appellants for release from participation in Approved Tournaments. In practice that power was applied to any application by an Appellant which had the effect of enabling participation in LIV events. Under Regulation FII 3(c) serious breaches of the regulations may include as sanctions a fine, suspension of membership, suspension from one or more tournaments or for a given period, or expulsion from the PGA European Tour.

81. Mr Pelley in his second witness statement at paragraphs 135 and 136 stated:

“I want to explain why we cannot simply stand back and let our members play LIV Golf events ... First, LIV Golf is our competitor. When we grant releases for players to complete, it lends credibility to their format and their product. Conversely, that causes harm to our product.”

It is clear from that statement that the objective of the PGAET was to exercise its powers of control to prevent releases which permitted players to participate in LIV Golf events and thus cause harm to the DPWT. Those powers did operate as a restraint on the freedom of the Appellants to seek to participate in the LIV Golf tournaments. The extent to which the Appellants caused harm to the DPWT by playing at LIV Golf tournaments will be considered at Stage 2.

82. The Respondents' further submissions on Stage 1 are:
- (1) PGAET is entitled to prioritise the economics of its membership as a whole in pursuit of its sporting objectives;
 - (2) The golfers are at liberty to resign from DPWT without any post-termination restrictions.
83. The Respondent submits that as a self-governing membership organisation, serving the collective interests, it is entitled to prioritise the economic interests of its membership as a whole in pursuit of its sporting objectives. That general statement cannot ignore the consequences that flow from the exercise of the disciplinary powers under the CTRs. The effect of denying the right to participate in certain tournaments and imposing sanctions for breaches of the regulations is to impose a restraint on the Appellants. The decision of the court in *Pilkadaris* at paragraph 69f makes the point that *"it has been recognised to be against public policy to allow interference with individual liberty in trading and carrying on a business or an occupation"* and at paragraph 84f that the restraint prevents the players from playing in any golf tournament in which they would otherwise be eligible to play.
84. The Respondent also submits that it would have been open to the Appellants to resign from the DPWT without any post-termination restrictions. Instead, they have made a choice as to which events in which they wish to play. That was an option for the Appellants but they were entitled to continue as members of the DPWT. The fact that the Appellants did not resign from the DPWT does not in any way alter the nature of the restraints which have consequently been imposed on the Appellants.
85. The issue at Stage 1 is whether the restraint of trade doctrine applies to the CTRs in so far as they interfere with the golfers' economic freedom as independent contractors to work and maximise their earnings. The application depends, amongst other factors, on the practical effect of the restraint in hampering the freedom of trade (*Quantum Actuarial* at paragraph 60 (vi)). For the reasons set out above the Appellants have proved that the restraint of trade applies and the issue at Stage 1 is satisfied. The CTRs as applied to the Appellants are a restraint of trade.

Restraint of trade - Stage 2

Test of reasonableness

86. Lord Macnaghten in **Nordenfelt v Maxim Nordenfelt** [1894] AC 269 stated:

“It is a sufficient justification, and indeed it is the only justification, if the restriction is reasonable—reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.”

The onus of establishing that a covenant is no more than is reasonable in the interests of the parties is on the person who seeks to rely on it³. To satisfy this burden,

*“the promisee must show, first, that the non-compete undertaking protects legitimate interests of the promisee and, secondly, that the non-compete undertaking goes no further than is reasonably necessary to protect those interests.”*⁴

Legitimate Aim

87. The Legitimate Aim as stated at Regulation E1(b) contains two elements:

- (1) Compliance with this Regulation E1 by Members is required to ensure that the PGA European Tour will remain in a position to fulfil the expectations of its tournament sponsors, promoters and broadcast partners who support the PGA European Tour and its members by providing playing opportunities and financial opportunities to enhance members' professional golfing careers.
- (2) The Member acknowledges the collective obligations of the PGA European Tour to provide representative fields to encourage promoters to provide competitive prize funds and playing opportunities for the benefit of Members.

³ **Herbert Morris v Saxelby** [1916] 688 at 700,707

⁴ **Harcus Sinclair v Your Lawyers** [2021] 3 WLR 598 at 48

The first provision gives the rationale as to why compliance with the regulation is necessary. The second imposes the obligation on members to recognise the collective obligations of the PGAET to provide representative fields, for the reasons given.

88. The Appellants submit that the strength of field justification is the aim against which the reasonableness and proportionality of the restraint must be assessed. The Respondent submits that the aims expressed extend beyond that of providing representative fields at individual tournaments. The more general purpose of the representative field objective is to encourage promoters to provide competitive prize funds and sponsorship. The purpose of compliance with the first element is to ensure that the PGAET will fulfil the expectation of its tournament sponsors, promoters and broadcasters, and thereby provide playing opportunities and financial opportunities to members. Sufficient strength and depth of field across its tournaments should ensure that the commercial interests of promoters provide competitive prize funds and playing opportunities to members. Properly construed the economic and sporting objectives are thus intertwined. The Respondent's construction of the Legitimate Aim is accepted.

The PGA carve-out

89. In 2014 the PGAET established the PGA carve-out in order to encourage the best European and international players to remain members of the DPWT. As dual members of the DPWT and the PGA Tour those players had been required to play a minimum number of tournaments on each tour in order to maintain membership. The PGA Tour requires its members to play a minimum of 15 tournaments per year, whereas the DPWT members are only required to play a minimum of 4 tournaments. Providing in the regulations for an automatic release for players on the PGA Tour encouraged high ranking members to continue to play in DPWT events and thus avoided the risk of defections.
90. About 45 DPWT members have become dual members of the PGA Tour and the DPWT. A few of the Appellants have taken this course, whilst others have either not taken up membership of the PGA Tour or have taken up an invitation to play as a non-member.

91. The Appellants submit that the PGA carve-out is discriminatory in interfering with the freedom of the golfers to ply their trade in tournaments of their own choosing. It is difficult to see how this contention could apply to any golfer who acquired dual membership of the DPWT and PGA Tour in the years between 2014 and 2021. Several of the Appellants holding dual membership will have participated in PGA Tour tournaments, without any complaint against the DPWT that it was interfering with members' rights in allowing dual membership on the PGA Tour. The basis on which members were permitted to participate on the PGA Tour without seeking any release was clearly set out, by way of exception to the CTRs, at Regulation E1(d)(iii).

92. In 2022 the Appellants raised the complaints in these proceedings that:

"...players are punished if they wish to play outside the DPWT on one tour (ie LIV Golf) but not on a different tour (ie the PGA Tour)"

"The DPWT CTRs discriminate unreasonably and unfairly in favour of PGA Tour events, actively facilitating the loss of the top talent within DPWT's membership to such events whilst blocking equivalent participation in LIV Golf events."

93. There are a number of flaws in this argument:

- (1) The decisions of golfers in 2022 to seek releases under the CTRs could not affect their dual membership rights in the PGA Tour (if the golfer retained dual membership). That entitlement was not cancelled by the PGAET, nor would other players be prevented from applying to join the pathway to the PGA Tour once any sanction had been discharged. Whether any dual memberships have since been affected by any action taken by the PGA Tour is not an issue for the Panel to determine in these proceedings.
- (2) The alleged discrimination in favour of the PGA Tour appears to be based on the theory that the PGA carve-out leads to a loss of top talent within DPWT's membership. The evidence from Mr Pelley (at paragraph 96) is to the contrary, to the effect that the aim of the change in the regulations in 2014 was to encourage the top talent to remain as members of the DPWT.

(3) The continuation of the PGA carve-out was of benefit to those members of the DPWT who wished during the 2022 season to be able to participate in PGA Tour events or to join the pathway to the PGA Tour. There was no discrimination by the DPWT in the treatment of those members. They had the same rights as those Appellants who had applied for releases in order to participate in LIV Golf tournaments. Making available to DPWT members access to the PGA Tour and 50 playing spots in two championships was clearly an advantage to members of sufficient talent.

(4) This argument does not add anything to the core complaint made by the Appellants that the CTRs operate as a restraint on DPWT members' freedom as independent contractors.

94. For those reasons the submission that the PGA carve-out discriminated against the Appellants is not accepted.

Reasonable and proportionate

95. The submissions for the Respondent on these aspects may be summarised as follows:

(1) The guidelines set out a number of factors to be taken into account in making the decision as to whether or not a release should be granted. Some are mandatory and others discretionary. For example, an assessment of the make-up of the field of the tournament is consistent with the legitimate aim. Whether the member's participation will significantly harm the PGAET relationship with the sponsor or promoter is a matter of reasonable judgement for the PGAET. If the request is to participate in the member's Home Open golf tournament then the member will normally be released.

(2) Players who have not qualified for the relevant DPWT events will be entitled to be granted releases and thus enabled to take up the alternative playing opportunities sought.

(3) The CTRs do not impose an automatic sanction for failure to be granted a release, or a contravention of the regulations. The Respondent retains a discretion to impose sanctions on a case-by-case basis consistent with the CTRs and the Guidelines.

- (4) Having served a suspension, the sanction does not prevent a golfer from resuming participation in DPWT tournaments.
- (5) It would also be open to a golfer to resign from the DPWT without any post-termination restraints.

All these factors indicate that the restraints applied under the CTRs are not in principle oppressive. A golfer is not prevented from continuing to exercise his rights to play professional golf. The legitimate aim at E1(b) and the legitimate interest of the DPWT in protecting the rights of its membership is justifiable.

96. The Appellants submit that on the evidence from Mr Pelley his decisions were motivated by the need to refuse any release which would permit the golfers to join LIV Golf as a competitor on the grounds:

“... LIV Golf is our competitor. When we grant releases for players to complete, it lends credibility to their format and their product. Conversely, that causes harm to our product.”

In making his decisions Mr Pelley consulted the Board of the PGAET and the Tournament Committee. So the argument for the Appellants runs, the decisions made by Mr Pelley were designed to protect against competition, which would be impermissible.

97. The Appellants rely upon two authorities. In **Esso Petroleum v Harper’s Garage** [1968] AC 269 at 304 Lord Morris stated:

“The law has for many centuries set itself against restraint of trade. In keeping with this, arrangements are condemned which have as their mere purpose the elimination of competition.”

The same point was made by Lord Birkenhead in **McEllistrim v Balleymacelligott** [1919] AC 548 at 563-4 in referring to “mere competition” and “competition *per se*”.

98. The answer to this point is that the enforcement of the CTRs against the golfers does not have as its aim or effect the elimination of competition by LIV Golf, which maintains a competitive stance against the DPWT as well as the PGA Tour. Competition between the tours is not prevented. The success of LIV Golf will depend on the quality of the

tournaments which it offers, the quality of the players that it can attract, and the success of the players in performing in those tournaments. The golfers are able to compete and there is no evident purpose or ability on the part of the PGAET to eliminate competition.

99. The Appellants submit that the objective justification analysis must take into account as a starting point that the DPWT CTRs are non-negotiable. If golfers wish to become (and remain) members of the DPWT then they are required to accept the provisions of the Handbook, which cannot be negotiated. This is a factor which might be seen to affect the bargaining power of the golfers, but in practice:

- (1) To permit variations to the CTRs would add to the uncertainty as to the number and quality of players intending to participate and distract viewers away from particular DPWT events.
- (2) All the established tours have regulations which prohibit participation in rival competitions, thus precluding any negotiation of those regulations.

100. The Appellants make a number of ancillary points calling into question the justification of the CTRs:

- (1) A narrower restriction, relating to sufficient field strength in DPWT events, could have been organised so as to provide a more effective provision to comply with the legitimate aim stipulated at E1(b). If there were any reasonable basis for concluding that the minimum number of counting tournaments fixed at 4 was not sufficient to secure adequate field strength in DPWT events, then steps could have been taken to increase that number. However, the evidence from Mr Pelley was that if the number of counting tournaments was increased beyond 4 then the very top players who live in the USA and are required to play 15 times on the PGA Tour would be highly unlikely to be able to meet any increased requirements from the PGA European Tour.
- (2) There is no structured analysis disclosing how the CTRs are reasonable and proportionate to the strength of field required in respect of the tournaments for which the players were seeking release. However, as releases may be sought up to 30

days before the tournament week it would be impractical for the PGAET to be in any position to consider necessary adjustments to the relevant DPWT tournaments.

- (3) The structure of the CTRs is said not to be rationally connected to a strength of field aim by reference to the geographic limits applied under the CTRs. The answer is that the DPWT has grounds to refuse a release if there is likely to be insufficient strength of field.
- (4) The Appellants suggest that it is illogical that there is no penalty for non-participation by a player who prefers not to compete in a particular DPWT tournament, whereas golfers who play in a LIV Golf event in preference to that DPWT tournament may be sanctioned. The answer is that active participation in a rival event threatens the Legitimate Aim much more acutely than a golfer's decision to rest or not to travel for a particular DPWT event.

101. In **Pilkadaris** Prakash J stated at paragraph 109:

"[109] In the result, I am satisfied that the defendants have not been able to show that either the Conflicting Event prohibition or the Competing Event prohibition is reasonable either between the parties or with respect to the public interest. The Competing Event prohibition is far too wide and arbitrary whilst the time period covered by the Conflicting Event prohibition is much wider than that imposed by other Tours and the defendants have not been able to establish why the Asian Tour needs such a lengthy period to protect itself."

At paragraph 96g the judge stated that the "common thread running through all those regulations was that there had to be a coincidence of dates" (i.e., a clash between an Asian Tour tournament and the competing tournament) and members of the Asian Tour were restricted whether or not they qualified to play for sanctioned tournaments. Each case must be decided on its own facts. On the facts as found by the judge in that case the reasonableness of the restraint of trade was not satisfied, but the factors applied by the court were substantially different from the terms of the CTRs administered by PGAET.

102. After LIV Golf announced its first Invitational Series in March 2022, Mr Pelley received requests from ■ DPWT members for release from the DPWT Volvo Car Scandinavian Mixed event. The number of release requests was extraordinarily high and was likely to

have been attributed to the substantial earnings offered by LIV Golf for participation. Mr Pelley granted releases under the regulations to members who would not have qualified for the DPWT event. The 15 original Appellants were all refused a release. 24 members of the DPWT played at the first invitational event. A depletion of the DPWT field at that level for the remaining LIV events would, on the evidence of Mr Pelley, have had a serious impact on DPWT tournaments.

103. The Appellants entered into agreements or commercial terms with the aim of playing at the 8 events arranged by LIV Golf in 2022. All of those events clashed with DPWT events, including 3 key European National Opens. The evidence of Mr Pelley, which the Panel accepts, is that the effect of the Appellants participating in the LIV Golf events increased the likelihood that commercial partners would be tempted to terminate or limit relationships with PGAET, and that the relationship with PGA Tour would be seriously jeopardised. The scale and importance of the potential harm to the PGAET can only lead to the conclusion that Mr Pelley acted entirely reasonably in refusing releases to the Appellants.

Conclusion on restraint of trade

104. The decision of the Panel is that the applicability of the doctrine of the restraint of trade was established, but the Respondent has proved that the restraint was reasonable and justified in the interest of the parties. The submissions made for the Appellants do not support a finding that the application of the DPWT Conflicting Tournaments Regulations constituted an unlawful restraint of trade or was contrary to the public interest.

F. THE COMPETITION LAW CHALLENGE

105. The second legal ground of challenge concerns UK competition law, and specifically the so-called Chapter I prohibition found in section 2(1) of the Competition Act 1998 (CA98), which provides relevantly as follows:

“...agreements between undertakings, decisions by associations of undertakings and concerted practices⁵ which ... (a) may affect trade within the United Kingdom, and (b) have as their object or effect the prevention, restriction or distortion of competition⁶ within the United Kingdom, are prohibited unless they are exempt ...”.

106. Agreements which fall within this prohibition are void (section 2(4)) unless they qualify for exemption under, relevantly, section 9.
107. As the Appellants noted, the Respondent took no issue with the assertion that the CTRs and the decisions made under them constituted agreements, decisions or concerted practices within the meaning of that provision, and there was no issue as to whether the ‘effect on trade’ criterion in section 2(1)(a) was satisfied. Accordingly the agreed issues (see Appendix 7) for resolution by the Panel were whether those agreements fell within sub-paragraph (b) of section 2(1) as a restriction by object (issue 4) or by effect (issue 5), and if so whether they were either objectively justified either as ancillary restraints (i.e. were restrictions inherent in and proportionate to a principal operation not itself anti-competitive) (issue 6) or as exempt agreements (for which the only suggested basis was that set out in section 9) (issue 7).
108. Three particular points might be noted from that list of issues. First, there was no suggestion from the Appellants that the Respondent held any form of dominant position within section 18 of the CA98 (which carries with it a special responsibility not to distort competition). Second, despite much criticism by the Appellants of the increasingly close relationship between the Respondent and the PGA Tour, there was no submission that that relationship itself raised any competition law questions that fell for resolution in these proceedings, whether that relationship is to be characterised as a strategic alliance, joint venture or more straightforwardly as an agreement between competing undertakings. Thirdly, although the fact that LIV events are not currently eligible for OWGR points clearly rankles, and it was suggested that OWGR is itself a creature of the incumbent tours and authorities, it was not suggested that any competition law analysis needed to be brought to bear on that issue as part of these proceedings.

⁵ We will refer simply to ‘agreements.’

⁶ We will refer simply to ‘restrictions.’

109. The respective positions of the parties on the competition law issues presented for resolution can be summarised as follows.
110. The Appellants took the position that the CTRs and their practical application constituted a plain and obvious restriction by object and also had the effects (actual or potential) that would be expected in terms of dissuasion of players from signing up for rivals and making rival entry more difficult. The Respondent could not take advantage of any version of the ancillary restraints doctrine (whether applying in the sporting context or to purely commercial operations) and the agreements were not exemptible under section 9 CA98.
111. The Respondent's position was that the CTRs were not restrictive of competition at all as they were inherent in and proportionate to the Respondent's legitimate aim as a professional golf tour (i.e. fell within the ancillary restraints doctrine) and anyway did not have the characteristics of an object restriction or produce any adverse effects on competition. These arguments were heavily disputed by the Appellants, notably on the ground that the Respondent, which admittedly is not a sports regulatory body, could therefore not rely on the ancillary restraints doctrine as propounded in relation to such bodies in the Court of Justice case law.
112. Dealing with the issues in more detail, and following the order in the agreed list of issues, we first set out the essential features of the Court of Justice case law on the issues relating to the characterisation of a restriction, once so identified, as one by object or by effect, before turning to the ancillary restraints doctrine. Only if the Appellants succeed in establishing that the CTRs do not fall within the ancillary restraints doctrine and constitute a restriction by object or effect is it necessary to consider exemption (issue 7).
113. It is an elementary proposition of UK competition law (and of EU competition law under Article 101 of the Treaty on the Functioning of the European Union (TFEU)), on which the Chapter I prohibition is modelled, and the case law on which was, until Brexit, binding on the courts in the United Kingdom (see paragraph 127 below), that a prohibited restriction of competition may be either a restriction by object or a restriction by effect, and that in the case of a restriction by object there is no need to demonstrate that there have been actual adverse effects. The extent and meaning of the case law on these topics was not in dispute between the parties.

114. The test for and meaning of an object restriction is the subject of many judgments of the Court of Justice. It is generally agreed that the leading case now is Case C-67/13 P **Groupement des Cartes Bancaires v Commission** (EU:C:2014:2204) in which the authorities are brought together and explained. The Court explains that the concept of ‘restriction by object’ arises because some types of coordination between undertakings can be regarded, by their very nature, as being harmful to the proper functioning of normal competition, but that must be confined to types of coordination between undertakings which reveal a sufficient degree of harm to competition such that it is not necessary to examine their effects. Whether that sufficient degree of harm exists requires regard to be had to the content of the agreement, its objectives and the economic and legal context of which it forms part, the nature of the goods or services affected and the real conditions of the functioning and structure of the market(s) in question (see notably paragraphs 50, 53 and 57 of the judgment).
115. The law on restriction by effect may be summarised relevantly as follows. A prohibited restriction may have actual or merely potential effects on competition, so long as they are “appreciable,” and such a restriction can take the form of the hindering of market entry. In order to assess the effects of an alleged restriction, it is necessary to define the market or markets on which the restriction is said to operate and then gauge the effects by deploying a counterfactual analysis, i.e. by considering what would have happened in the absence of the restriction in question.
116. It is clear from this summary of the case law that, in order to apply either test, it is necessary, albeit to different degrees, for the Panel to form some view of the relevant market. Accordingly, we refer here to the parties’ views on relevant and affected markets, as advanced on their behalf in expert opinion evidence by Ms Katie Curry for the Appellants and by Mr Derek Holt for the Respondent. Both experts were well qualified to give such evidence and did so fairly and openly. It might be noted that none of this evidence was directed towards the restraint of trade issue.
117. While the Respondent sought to suggest that Ms Curry was keen to advance the Appellants’ case rather than address the cross-examination questions, we did not think that was entirely fair to a witness whose answers were always scrupulously precise and coupled to references to her reports. Each party criticised the other’s expert for

descending into the factual arena, but that criticism was probably over-played and in any event, our conclusions do not critically depend on any factual element for which the only source could be said to be the evidence of either expert.

118. In the end, although they disagreed about the precise formulation and as to the geographical boundaries of the posited markets, there was substantial agreement between the experts that the primary markets in which any effect of the CTRs and the sanctions might be felt were those for (1) the supply of services by elite golfers (Curry) or the supply of elite golf services (Holt) and (2) the organisation of elite golf tournaments (Curry) or the organisation of elite golfing tournaments for golfers (Holt). Nothing fundamental turns on these slight differences in formulation.
119. It was agreed between the experts that the impact on the wider markets (namely for (3) sponsorships of elite golf tournaments (Curry) or elite sporting events (Holt), (4) broadcasting rights to such events in similar time zones, and (5) ticketing and hospitality at such events) which the experts identified, although they disagreed on the precise boundaries (and notably Mr Holt took the view, with which Ms Curry disagreed, that golf formed just one sport within a wider market definition of elite sporting events) was derivative or reflective of the impact on the first two defined markets, on which we accordingly focus.
120. Crucially, Ms Curry took the view that the effects that she discerned would arise even if the markets were defined in the wider manner advanced by Mr Holt. Accordingly the Panel is not called on to resolve any of the issues of difference between the experts.
121. As to market shares, while the parties disagreed about the extent of any market power held by the Respondent, we do not need to reach any concluded view as it was not suggested that the Respondent's position was below any relevant de minimis threshold and the Appellants were not advancing any contention as to market dominance.
122. Accordingly, while the experts' written reports and their live evidence were helpful and illuminating of the issues, the Panel does not find it necessary to evaluate their evidence in any detail.

123. The Respondent's position was that, in the first place, in line with the Opinion of Advocate General Rantos of 15 December 2022 in Case C 333/21 **European Superleague Company** (EU:C:2022:993) ("**Superleague**"), the CTRs fell outside the scope of competition law altogether as an ancillary restraint because they were inherent in legitimate sporting or commercial objectives pursued by the Respondent and proportionate to them; and secondly that they did not meet the tests for the finding of a restriction by object, just as the FIFA and UEFA rules at issue in **Superleague** were found by Advocate General Rantos not to reveal in themselves sufficient harm to competition even if they were viewed as commercial as opposed to purely sporting rules. Mr Rantos reached a similar conclusion in respect of the rules of the International Skating Union in his opinion in Case C-124/21 P **International Skating Union v Commission** ("**ISU**"). The Respondent's position was that the CTRs are essentially vertical non-compete restrictions pursuing legitimate aims and are not anti-competitive by nature when analysed in their legal and economic context.
124. Because of the heavy reliance that the Respondent placed on those recent opinions by AG Rantos, the legal issues as to what extent the Panel may and or should take account of them assume some importance and were stressed to us by the Appellants. We consider this before examining what the opinions actually say.
125. The opinions were given in different contexts: **ISU** is an appeal from a judgment of the EU General Court, and **Superleague** is a request for a preliminary ruling from a Spanish court. No date has been announced for the ruling of the Court of Justice in either case and so we must give our ruling in ignorance of whatever the Court of Justice may say in due course.
126. The first issue is that, as the Appellants said, the opinions are just an Advocate General's opinions, no more and no less. They may not be followed, or may be followed to a greater or lesser extent, by the Court of Justice when it comes to give judgment. The Respondent (while determinedly urging on us the submission that the Opinions were absolutely on point with the present case and highly persuasive in that context) rightly accepted that they were in no way binding on us. This is not a 'Brexit' issue: as a matter of EU law, opinions of an Advocate General have never had any binding effect.

127. Second, as the Respondent also pointed out, since Brexit, judgments of the Court of Justice given after “IP completion day”⁷ do not bind English tribunals deciding competition issues (s.60A(2) CA98). This statutory issue gives rise to a particular problem, at least potentially, in this case as the General Court’s judgment in ***ISU*** (Case T-93/18 EU:T:2020:610) was given on 16 December 2020, that is, before IP completion day and is accordingly binding as a judgment of the ‘European Court’ (the statutory term for the ‘Court of Justice of the European Union’, i.e. embracing the General Court as well as the Court of Justice).
128. The Respondent countered that s.60A(7) states that the obligation to ensure consistency with pre-IP completion day rulings of the ‘European Court’ does not apply if the decision maker thinks it appropriate in the light of (relevantly) “... (d) *generally accepted principles of competition analysis* [sic] *or the generally accepted application of such principles*” or “... (e) *a principle laid down, or decision made by, the European Court on or after IP completion day.*”
129. Subparagraph (e), which would notably permit an English tribunal to have regard to the fact that an otherwise binding judgment of the General Court had been overturned, is plainly of no application here, given the timing. The General Court’s judgment in ***ISU*** has not been overturned and we do not know whether or when it might be. It has merely been criticised in some respects in a non-binding opinion of an Advocate General.
130. By contrast, subparagraph (d) is of potential application, if we could be persuaded that we were not bound to follow the General Court’s ruling in ***ISU*** because it does not reflect generally accepted principles of competition analysis. It is possible that such analysis might be found in or reflected in the two opinions of AG Rantos. However, to the extent that anything in those opinions is novel or unprecedented, those views clearly would not reflect generally accepted competition analysis or application.
131. These legal issues are mitigated to some extent because the Appellants fairly conceded that the differences between ***ISU*** and the present case were such that the Panel was not

⁷ The precise time and date is 11pm on 31 December 2020.

bound to reach the same conclusion as the General Court in ISU on the issue of object restriction (Day 5 Transcript p 56).

132. Turning now to the actual content of the Superleague opinion, the Appellants submitted that the Advocate General's analysis is predicated on his view that Article 165 TFEU⁸ requires respect to be given to the so-called European Sports Model ("ESM"), which he found FIFA and UEFA to be upholding and the Superleague to be jeopardising. Given that it is common ground that the Respondent is not a sports regulator, but simply a commercial operator (see paragraphs 21 and 22 above), the Appellants contended that it was not open to the Respondent to rely on AG Rantos's analysis (Day 5 Transcript p 53, pointing especially to paragraphs 27-32, 39-42, 49 and 67 of the opinion).
133. In oral submissions, perhaps prompted by questions from the Panel as to whether AG Rantos's opinion was indeed wholly dependent on some form of exceptionalism for sports, the Respondent took more trouble to disentangle the various elements of the opinion than it had done in the written arguments. The Respondent acknowledged that as a non-regulatory body, it could not rely on any argument that it was upholding a ESM, but countered essentially that there were parts of AG Rantos's analysis which stated the law as it applied to purely commercial operators or to sports bodies acting with purely commercial motives, and those were the parts that it relied on.
134. The Panel agrees with the Respondent that AG Rantos does seem to attach great importance to the ESM element on which he expounds as a key point in his preliminary discussion of the legal context in which he will deal with the issues before the Court, and to which he returns at various points as he works through the issues arising as relevant to the interpretation of the TFEU articles on competition.
135. Thus, he explains at paragraph 26 that before considering the questions referred by the national court he considers it worthwhile to make some observations on the relationship between sport and EU law. In paragraphs 27-32, he traces the evolution of what became Article 165 TFEU. That provision, he says, requires the EU to contribute to the promotion of European sporting issues, taking account of the specific nature of sport, its structures

⁸ To which we were not specifically referred. AG Rantos does not set the provision out in full in his opinions but sufficiently quotes it for the gist to emerge.

based on voluntary activity and its social and educational function, and also to aim at the development of the European dimension in sport, including by promoting fairness and openness in sporting competitions and cooperation between bodies responsible for sports. He says that Article 165 gives expression to the constitutional recognition of the ESM, characterised by features such as a pyramid structure, open competitions accessible to all with promotions and relegations giving priority to sporting merit, and a financial solidarity model allowing revenues generated at the elite level to be reinvested at the lower levels of the sport. In paragraphs 32-34, he notes that this model is not static and may evolve, but it is the ESM which has “protection” under Article 165, notably in view of alternatives, including the “North American” model of closed competitions and leagues. The rationale behind the introduction of Article 165, he says, is to emphasise the special social character of that economic activity which “may justify a different in treatment in certain respects.”

136. In paragraph 35, in a somewhat tortuous but crucial paragraph, the Advocate General states (as we understand him) that while Article 165 cannot be interpreted in isolation, disregarding the requirements of Articles 101 and 102 which are applicable in particular where sporting activities have an economic dimension, Article 165 can be used as a standard in the interpretation and the application of the competition law provisions. Article 165 is a specific provision as compared with the general provisions of Articles 101 and 102; no provision of the TFEU can apply to the exclusion of another, and Article 165 is a horizontal provision which must be taken into account when implementing other EU policies.
137. This suggests that he considers that Article 165 and the protection of the ESM must be kept firmly in mind and given effect to when interpreting the competition provisions of the Treaty. This impression is compounded by subsequent comments. In paragraph 40, for example, he refers to the need for any assessment of the compatibility of rules issued by sports federations and their conduct in the market to involve consideration of all the elements that form part of the relevant legal and factual context. In paragraph 41 he says that the particular features of sporting activities, notably equality and the need for a competitive balance (which seems to be a reference back to paragraph 30 on the nature of European sporting competitions with promotions and relegations on merit leading to

competitive balance) set them apart from other economic sectors, where competition between economic actors ultimately leads to inefficient companies being driven out of the market. He concludes this preliminary section of his opinion with the view in paragraph 42 that the references to the specific nature of sporting activities and the social and educational function of sport referred to in Article 165 may be relevant for the purposes of analysing objective justifications in that field for restrictions on competition.

138. Accordingly we approach this opinion with caution, bearing in mind that to an extent it goes out on a limb and may seek to make (or rather, point the way to) some new law, and that the AG's interpretation or application of competition law may be implicitly infused, even subconsciously, by principles deriving from Article 165. We take this approach, not out of any disrespect for the Advocate General, who may well be right on these points as a matter of EU law, but because, first, his opinion is, as all agree, not binding on us and cannot be used to displace pre-Brexit interpretation of the TFEU provisions on competition or generally accepted competition analysis and, second, because, to the extent that he is relying on the concept of the ESM deriving from Article 165 as having a special place in competition law, the Respondent accepts that it can take no benefit from that concept.⁹

139. As to the latter point, we consider that the Respondent did seek to rely on legal statements in the opinion which do indeed depend on a particular role for Article 165 in the

⁹ We note that a markedly less expansive view of Article 165 was taken by Advocate General Szpunar in an opinion concerning the UEFA 'home grown players' rule as applied in Belgium delivered after the oral hearing in the present case (Opinion in Case C-680/21, 9 March 2023). The national court's questions concerned both Article 101 TFEU and Article 45 TFEU on the free movement of workers. The Advocate General was apparently requested by the Court of Justice to confine his opinion to Article 45. The AG noted that Article 165 was addressed to the Union and not to Member States, still less private bodies, and gave no legislative competence even at Union level; its position in the Treaties meant that it was not one of the Union policies having general application, and that private bodies such as UEFA could not be regarded as implementing a Union policy (which could not be outsourced to such bodies). He accepts that a private body such as UEFA may use Article 165 as the basis to identify a ground of justification for a restriction of Article 45, known as an overriding reason in the public interest, and secondly, as an indication of what is acceptable in and throughout the Union when it comes to carrying out the proportionality test (and in this respect he states in footnote 39 that he 'can fully subscribe to the Opinion of Advocate General Rantos in [*Superleague*], point 42, where it is stated that 'whilst the specific characteristics of sport cannot be relied on to exclude sporting activities from the scope of the EU and FEU Treaties, the references to that specific nature and to the social and educational function of sport, which appear in Article 165 TFEU, may be relevant for the purposes, inter alia, of analysing, in the field of sport, any objective justification for restrictions on competition or on the fundamental freedoms'.) However, he goes on to note that a private body such as UEFA pursues economic objectives which may conflict with the public interest and would rationally put its own economic objectives first (noting also that the commercial and regulatory objectives pursued by UEFA inevitably lead to conflicts of interest). He therefore suggests that where such a body puts forward a public interest justification for its activities it should be more closely scrutinised than when such a justification is put forward by a governmental authority. As this opinion is just that, another AG's opinion, we do not consider it necessary to seek the parties' views on it.

interpretation and application of the TFEU competition provisions. For example, in its skeleton argument and again in opening submissions (Day 1 Transcript p 89), the Respondent referred to and relied on paragraph 91 of the opinion, stating that it dealt with the application of the ancillary restraints doctrine in the specific context of sport and specifically to measures aimed at dealing with types of dual membership, and quoted a snippet from that paragraph which suggested that the AG was suggesting how to strike a “tricky” balance between commercial and sporting aspects. A reading of the whole paragraph shows that it is in fact one which relies entirely on sports-specific matters, both technical (which the Advocate General refers to as matters such as anti-doping rules or specific aspects of sporting discipline) and more general objectives such as those recognised under Article 165. That plainly underlies his reference to the specific characteristics of sport being incorporated into the competition analysis.

140. Taking all these points together, the Panel proposes (1) to ignore the AG’s opinion in **ISU** (on which we in any event received no developed submissions which were not also made in relation to the **Superleague** opinion) and (2), treating both the GC’s judgment in **ISU** and the AG’s opinion in **Superleague** as not binding on us (in the sense of predetermining the result we must reach on the facts of the present case) but entitled to respect, to take from them such elements as we find to reflect the generally accepted state of the law and disregard other elements, notably anything which seems to depend to any degree on special considerations resting on Article 165 TFEU.
141. However, and although it was only really in oral submissions and especially in closing that the points were fully articulated, we do consider that the Respondent is right to suggest that certain aspects of the AG’s opinion do not depend at all on the Article 165/ESM issues and state an orthodox application of settled principles of EU competition law, as will be discussed below.
142. A principal issue in the **Superleague** case is how to deal from a competition law perspective with the conflict of interest within FIFA/UEFA as regards their sports regulatory powers and their commercial interests as promoters of football leagues. It is common ground in the present case that the Respondent has no regulatory status and is purely a commercial promoter of golf tournaments within a golf tour.

143. Accordingly, it is necessary to focus on the Court of Justice case law on the application of the ancillary restraints doctrine to situations where the primary objective (sometimes called the ‘main operation’ or the legitimate aim) is unconnected to the issue of regulation of an activity, whether sporting, as in *Meca Medina* (C-519/04 P, EU:C:2006:92) on doping rules, or non-sporting, as in Case 309/99 *Wouters* (EU:C:2002:98) which concerned Dutch Bar rules restricting the ability of members of the Bar to form partnerships with accountants.¹⁰
144. A key case outside the purely regulatory context and outside the sporting context on which the Respondent specifically relied is Case 250/92 *Gøttrup-Klim Grovvarforening and Others v Dansk Landbrugs Grovvarseselskab AmbA* (EU:C:1994:413, generally called *Gøttrup-Klim* but otherwise known as, and here referred to as, “*DLG*”), a foundational case in EU competition law which is referred to in many of the subsequent sporting and other cases. This is the judgment to which AG Rantos is referring to when talking about a justification for FIFA/UEFA’s conduct from a purely commercial (or “economic”, as he put it) perspective in paragraphs 106-108 of his *Superleague* opinion.¹¹
145. In those paragraphs, the AG leaves the sporting objectives to one side and assesses the position on the hypothesis that the reasons for the relevant rules of UEFA/FIFA and the threats of sanctions that those bodies had made were purely economic (i.e. commercial). He says that on that view of the matter, the application of the rules could be construed as seeking to avoid a dual membership or even free-riding scenario which would risk a weakening of their position on the market (paragraph 106).
146. In that context he notes that the Superleague did not intend to set up a pure breakaway, but a rival competition to UEFA’s in the most lucrative segment, whilst continuing to be part of the UEFA ‘ecosystem’ by participating in some of its competitions. Thus it appeared that the Superleague’s founding clubs wanted to benefit from the rights and advantages

¹⁰ We were not taken directly to *Wouters*, but it is referred to in all the sporting ancillary restraint cases.

¹¹ See his footnote 56. Admittedly, even in that section of his opinion, AG Rantos concludes by saying in paragraph 110 that the non-recognition by FIFA/UEFA of an essentially closed competition such as Superleague is inherent within the pursuit of legitimate objectives (as recognised in *Wouters* and *Meca Medina*), which he identifies as being the maintenance of principles of participation based on sporting results, equal opportunities and solidarity, upon which he says that “the pyramid structure of European football is founded”, plainly an Article 165-inspired conclusion. However, that is wholly extraneous to the statement of the law in paragraphs 106-108, which in our view simply (and correctly) explains the application of the principles deriving from the *DLG* case in a commercial, or at least non-sporting, context.

linked to membership of UEFA without being bound by UEFA's rules and obligations (paragraph 107).

147. His view on this as a matter of competition law (in paragraph 108) is that an undertaking or association of undertakings cannot be criticised for attempting to protect its own economic interests, in particular in relation to an 'opportunistic' project that risks weakening it significantly. It is at that point that he cites **DLG** directly, summarising its effect as being an approval by the Court of Justice of the statutes of a cooperative association limiting the ability of its members (including through sanctions involving exclusion) to participate in competing forms of cooperation.¹²
148. In **DLG**, the Court of Justice said (paragraphs 33 and 34) that *"where some members of two competing cooperative purchasing associations belong to both at the same time, the result is to make each association less capable of pursuing its objectives for the benefit of the rest of its members It follows that such dual membership would jeopardize both the proper functioning of the cooperative and its contractual power in relation to producers."*
149. It seems to us that the analogy of a purchasing cooperative with a members' organisation such as the Respondent is strong and compelling. The parallels with the position of the Appellants as regards their desire to play in the LIV events whilst continuing to benefit from their DPWT membership do not need much drawing out.
150. Before the Court of Justice, the plaintiffs (the former members of the DLG cooperative) claimed that the object and effect of the clause permitting expulsion of members who bought through rival purchasing cooperatives was to restrict competition (very similar to the present case).
151. The Court however, in holding (see above) that dual membership makes each association less capable of achieving its objectives, stated that prohibition of dual membership was not necessarily restrictive of competition and indeed might have beneficial effects on

¹² AG Rantos also referred to *DLG* in support of the proposition that measures which seek to tackle the phenomenon of dual membership, such as non-competition or exclusivity clauses, do not have the object of restricting competition; in that connection he additionally cites the leading cases on distribution and franchising agreements (in short, *Remia* and *Pronuptia de Paris*, as well as *Maxima Latvija*; full references are given in his footnote 40), again nothing to do with sporting or regulatory issues.

competition (paragraph 34). In order to escape the prohibition of Article 101(1), the restrictions must be limited to what is necessary for the cooperative to function properly and to maintain its contractual power in relation to producers (paragraph 35) and it would be necessary to establish whether the penalties for non-compliance are disproportionate to those objectives (paragraph 36). On the facts the Court found (in paragraphs 37-41) that those conditions were satisfied (and it was noted that the Commission, to which the agreement had been notified under the system then applicable for administrative clearances of potentially restrictive agreements, was prepared to certify that the agreement did not fall within the Article 101(1) prohibition – see paragraph 59).

152. The Court's conclusion in paragraph 45 and its ruling in paragraph 2 of the operative part was that *"a provision in the statutes of a cooperative purchasing association, forbidding its members to participate in other forms of organised cooperation which are in direct competition with it, is not caught by [Article 101(1)] so long as the above-mentioned provision is restricted to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to producers."*
153. The **DLG** case is influential and pervasive, being cited in most if not all the Court's judgments on the ancillary restraints doctrine. By way of example, it is relied on in **Meca Medina**, and also in Case C-382/12 P **Mastercard v Commission** EU:C:2014.2201 ("**Mastercard**"; see below).
154. The Appellants did not make any detailed submissions about **DLG**, perhaps because the Respondent presented the issues largely in the context of the Rantos opinions.
155. The Appellants' principal point was that, on the assumption that the Respondent could not take the benefit of any specific 'sporting' exception and therefore could not gain any positive outcome from the AG's opinions, it was thrown back on 'commercial' ancillarity which on the Appellants' construction depended on a much narrower and less forgiving test of absolute indispensability which they contend was laid down in the **Mastercard** case.
156. In the view of the Panel, the Appellants go too far in suggesting that EU competition law recognises a strict, quasi-statutory distinction between sporting and commercial ancillarity, and that the Respondent is forced to rely on the latter as it is not a sports

regulatory body capable of benefiting from the former. As AG Rantos points out, the ancillary restraints doctrine originally developed in the context of purely commercial agreements (see paragraph 87 where he cites **Metro** (1977) and **Pronuptia de Paris** (1986)). The concept of 'regulatory' ancillary restraint, he says, was then developed in **Wouters** (2002) and **Meca Medina** (2006).

157. Where it seems to us that the Appellants go wrong in their analysis is in suggesting that the question whether the 'restriction must be inherent in the pursuit of legitimate objectives' and be proportionate to them is only relevant as a test for ancillary restraints for sporting rules (as in **Meca Medina**). As the above account of the development of the case law shows, that is the test for ancillary restraints generally. The formulation in the Court of Justice's **Mastercard** ruling (that the restriction must be objectively necessary and that can only be satisfied if the main operation would otherwise be impossible to carry out) is the Court's gloss on the concept of the restriction being inherent in the main operation. The Court relies for its account of the law in **Mastercard** on the cases of **Remia**, **Pronuptia de Paris**, **DLG** itself and **Oude Luttikhuis** (which was produced to us as a supplementary authority on the last day of the hearing but not specifically referred to). It points to paragraph 35 of **DLG**, which thus illustrates what it had in mind when explaining the 'objective necessity' test. In that paragraph of **DLG**, the Court took the view, on examination, that a rule prohibiting purchases through other cooperatives and providing a sanction of expulsion for breach of the rule was '*limited to what is necessary to ensure that the cooperative functions properly and maintains its contractual power in relation to purchasers*' (with our emphasis). The Appellants themselves noted that **Mastercard** referred to the **DLG** case, and indeed that Advocate General Rantos agreed that the ancillary restraints test had to be applied restrictively (see Day 5 Transcript 63-64).

158. It is important to note that it is exactly the same test of 'necessity' that has been applied in the regulatory (sporting and non-sporting) context. **Meca Medina** paragraph 47 says that penalties must be limited to what is necessary to ensure the proper conduct of competitive sport – again citing to paragraph 35 of **DLG** (which is obviously not a sports case). Likewise in **Wouters**, the Court carried out a detailed examination of the Dutch Bar rules in question, and having found that they did indeed have an adverse effect on competition (paragraph 86, that effect consisting in preventing the emergence of new

forms of professional practice and advice for businesses in particular – paragraph 87), nevertheless concluded that they did not go beyond what was necessary “*in order to ensure the proper practice of the legal profession*”, once again citing to paragraph 35 of DLG (which does not concern the legal profession or any form of regulation), and accordingly fell outside the scope of Article 101(1).

159. It follows that in our view, there is not the fundamental difference between the tests applied in the sporting and in the commercial sphere that the Appellants pressed on us. Nevertheless, for the reasons explained above, the Panel does not adopt the analysis of AG Rantos as regards the sporting aspects of the present case (agreeing to that extent with the submissions of the Appellants), and we draw our conclusion wholly in respect of the ‘commercial’ aspects.¹³

160. Assessing the CTRs and their application against this standard, it seems to us that the objective of protecting the integrity of the DPWT and maintaining its ability to promote a tour which is of interest to viewers and spectators, and thereby to sponsors and broadcasters, by requiring a degree of loyalty or priority from its members can be regarded as capable of falling within the scope of the ancillary restraints doctrine without any need to rely on or consider the specific place of sport within the competition rules.

161. The question is then whether the scope and application of the restraint has been limited to what is necessary and proportionate. We answer that question affirmatively, essentially for the same reasons as we conclude above that any restraint of trade inherent in the CTRs and their application to the Appellants is legitimate. The unprecedented number of

¹³ Mr Klayman, on behalf of Mr Reed, cited to us a ruling of 30 January 2023 by a Spanish appeal court (the Audiencia Provincial Civil de Madrid – 28th Section) which restored interim measures preventing FIFA and UEFA from taking steps to prevent the formation of the Superleague (such measures had originally been imposed by the court which made the reference to the Court of Justice, but they had been overturned in a subsequent ruling). The appeal court was highly critical of the behaviour of FIFA and UEFA, saying that it was likely to constitute an abuse of dominance contrary to Article 102 TFEU, and expressed severe reservations about FIFA and UEFA’s suggestion that they were upholding a ESM. Mr Klayman submitted that the Spanish court had “disagreed with nearly everything” that the Advocate General had recommended to the European Court and also (on the basis that this was a judgment, as opposed to a mere advisory opinion like AG Rantos’s) that this authority was binding on us. The ruling does not bind us, being a judgment of a third country court applying a different legal system, but its views on EU law are entitled to respect. Although the court makes no specific reference to Mr Rantos or his opinion, it is plain that it took a different view from him on the competition issues and was sceptical about the ESM justification. However, as we have decided that reliance on the Advocate General’s opinion (and notably the relevance of Article 165 to the interpretation of the competition rules) is unnecessary to the central thrust of the Respondent’s case, and the issue of abuse of dominance does not arise in the present proceedings, we need say no more about this judgment.

releases sought for the London Invitational, and the commitment demanded of players for the LIV series, made Mr Pelley's conclusion that the Respondent faced severe risks entirely reasonable. The CTRs and their application in such circumstances cannot be said to go beyond what is necessary and proportionate to the Respondent's continued operation as a professional golf tour. In circumstances where a measure of dual membership is tolerated, and the sanction has not extended to outright expulsion, we find that conclusion particularly hard to resist.

162. Accordingly, the Panel finds that the CTRs as applied to the Appellants (i.e. the release decisions in context) are properly to be regarded as ancillary restraints and therefore do not infringe the Chapter I prohibition.
163. It follows that the consideration of the issues of restriction by object or effect can be brief, and that the question of exemption does not arise (it was in any event fairly lightly argued before us, essentially suggesting that exemption was if necessary available for the same reasons as the Respondents were contending that the CTRs fell within the ancillary restraints doctrine).
164. In opening on the 'object' issue, the Appellants placed emphasis on what they characterised as the intention of the Respondent to deprive rivals of a key input – namely, players' services, an impact which in our view is felt on market (2) (see the summary of the experts' definitions of the markets discussed at paragraph 118 above). Although in closing the Appellants maintained that there was also a potential impact on the market for the supply of elite golf services by players (market (1) above), in reality it seems to us that, whereas the restraint of trade argument is necessarily focussed on the impact of the CTRs and the Respondent's release decisions on the ability of individual players to ply their trade, the competition argument must be understood as aimed at the allegedly restrictive impact of those rules and decisions on the market for the organisation of elite golf events i.e. on competition between tours. In closing argument, the Respondent said that those two ways of looking at it collapsed into one, namely the costs of procuring golfers by tournament organisers. That seems correct to us. However, it does not seem necessary to reach a concluded view on precisely how or where the alleged restriction works in terms of affected market – it is one or the other, or both.

165. The Appellants' position on object restriction is that the CTRs are by their very nature restrictive of economic freedom and competition, giving discretionary and extremely broad power over such freedom and competition to the Respondent in each week in which a DPWT event is scheduled (39 weeks in the current year), leading by default to a blanket ban on participation in conflicting tournaments, regardless of the actual impact of such participation on the Respondent. The PGA carve-out is on that analysis an anomaly as it permits the most powerful tour in the game to cream off the Respondent's best players without remedy. A further illogicality is said to be that there is no requirement to play in the relevant DPWT event if a release is refused. The rule is deployed primarily against new rivals who wish to compete with the Respondent, inherently making it difficult for such rivals to establish a viable product, and thus ultimately harming consumers by reducing choice.

166. That view of matters was said to be sufficient to establish an object infringement but reinforced by:

- (1) the actual decision-making practice of blanket refusals for participation in LIV events (in contrast with a historically relaxed approaches to releases, and to sanction for playing without prior release, and in contradiction with the PGA Carve-out), paradoxically worsening its own 'strength of field' by banning non-released players from participation in future DPWT events;
- (2) the clear subjective intention (notably deriving from the evidence of Mr Pelley) of making entry by LIV (and the Asian Tour, since its association with LIV) more difficult, and at least discussing, if not coordinating, its competitive response to LIV entry with the PGA Tour.

167. We respond briefly to the arguments presented to us on the object and effect issues.

168. First, all systems of competition law have to engage with the threshold question of what contractual limitations on conduct amount to restrictions of competition or unacceptable restraints of trade. In EU competition law, this has been recognised from the beginning. An explicit statement is to be found in ***Meca Medina*** paragraph 42: "*Not every agreement between undertakings ... which restricts the freedom of action of the parties or one of them necessarily falls within the prohibition laid down in Article [101(1) TFEU] ...*" The

Court then goes on to describe the sort of analysis that has to be carried out to determine whether a restriction is of a kind which Article 101(1) prohibits.

169. We have already pursued that analysis to the point of concluding that the CTRs are restraints which are ancillary to a lawful main operation. But even focussing on the questions which have to be answered to determine whether a restriction is a restriction of competition by object, it is clear that the exercise requires a contextual appraisal going well beyond the identification of a relevant or affected market.
170. In that perspective, it is impossible to ignore the fact that LIV has actually entered the market, and in spectacular style, signing up a substantial roster of famous players for two series of events at prestigious venues. This means that the question whether the CTRs and their application have the potential to limit competition from rivals requires a more searching examination than might have been the case if LIV had not been able to sign any players. If the Respondent had a gatekeeper role, or required exclusivity as a condition of DPWT membership, the case might have taken on a different complexion.
171. A theme much emphasised to us was the players' status as independent contractors, not employed by any tour and free to pick and choose among the opportunities presented to them, including taking a view on how much golf they wish to play. The CTRs on that view of matters represented a serious fetter on their freedoms. This assertion was in our view over-played. The players undoubtedly have that status as recognised in the Regulations (notably in undertaking to avoid any suggestion that sponsors or broadcasters have any right to expect particular players to participate in particular events, and in imposing a relatively mild minimum participation requirement). However, individual players have to accept some limitation on their freedoms inherent in tour membership, should they choose (if qualified) to join one or more. Indeed, none of the Appellants suggested that he had given up his independence by signing up to onerous (albeit remunerative) obligations to LIV, to play in a full season of LIV events, and it is clear that membership of the PGA Tour carries serious limitations on the freedom of a player. The freedom claimed was in effect one of choosing with which set of restraints to comply.
172. It was a point of criticism, nevertheless, from the Appellants that the CTRs themselves recognise that a player may prefer not to play golf in the week of a specific tournament

and the Respondent will only seek to restrain a player if he wants rather to play in a rival event. This was said to be illogical and to indicate the fundamentally anti-competitive nature of the CTRs. This criticism lacks substance in our view: the legitimate concern for the Respondent only arises if the player in fact wants to play golf that week but wishes to devote his talent to a rival event. The criticism that the Respondent used to have a relaxed approach to releases but has responded anti-competitively to the entry of LIV is similarly misplaced: the circumstances are entirely different, resulting in a different set of factors for the decision-maker to weigh up in respect of any request for release.

173. Despite the Appellants' protestations to the contrary, it is also relevant to the contextual assessment that it is open to any member of the DPWT to resign at any time (as indeed certain Appellants have done), or not to renew membership for the following year, without penalty or any kind of adverse consequence. That is a different proposition from a multi-year contract, or one imposing extended periods of gardening leave on those who resign, for example. The Respondent's terms do not include any such feature (and in our opinion it probably does not have the economic power necessary to impose such terms).
174. Several of the Appellants nevertheless sought to explain why it was impossible for them to contemplate giving up DPWT membership, for reasons of a sense of belonging, an emotional attachment to their 'home' tour, the question of securing OWGR points or the possibility of being considered for the Ryder Cup and so on. Mr Reed, in elegiac live evidence before us, explained why as an American he had always loved playing on the European Tour, for the different feel of its golf courses and the banter of the spectators which he found both wittier and kinder than their US equivalents.
175. In our view, those matters, whilst undoubtedly deeply felt, are ultimately facets of the election that the players have to make when they decide whether or not to join LIV, and represent points of attachment to the existing tours and their place in what all parties referred to as the 'eco-system' that LIV may have to overcome by making its own offer sufficiently attractive to players to 'buy them out.' As was put to Mr Davidson, there is nothing to stop LIV seeking to put on its own version of the Ryder Cup or devise an equally attractive format to attract players to it. While Mr Davidson was no doubt right to suggest that it would not be possible to replicate the historic nature of the Ryder Cup from scratch, the force of the point remains – LIV will have to provide not only financial but also sporting

benefits that players of sufficient calibre will find attractive if it wants to take on the incumbents.

176. Furthermore, in our view, nothing that Mr Pelley said or wrote suggests an anti-competitive intent (the demonstration of which can fortify a finding of restriction by object although it is not an essential element). It is one of the paradoxes of competition that the aim of it is to damage, or at least to beat, rivals and that has to be regarded as pro-competitive, at least within limits. LIV undoubtedly aims to damage the hitherto almost unchallenged position of the PGA Tour and the DPWT, and is a disrupter – but that is competition in action and there can be no objection to it. Mr Pelley clearly recognised that he could not prevent LIV from entering but was determined to do what he could to prevent LIV from attracting his best player members. It is no part of competition law to require incumbents to offer no resistance – they are entitled to react and to retaliate, even if dominant.
177. As already noted, the Appellants fairly conceded that the General Court’s conclusion in ISU that the ISU’s rules on competing events constituted an object restriction could not be regarded as binding on us in the sense of requiring us to draw the same conclusion in respect of the CTRs. We consider that this concession was rightly made, as the rules there (amounting to lifetime bans on participation in non-sanctioned events) are entirely different in character and scope from the CTRs and their application. In accordance with the approach we outline at paragraph 140 above, we express no view on whether Advocate General Rantos was right to question the GC’s conclusion in this respect.
178. Ultimately, had we not concluded that the CTRs fell within the ancillary restraints doctrine, we would not have been persuaded that they met the test to be characterised as restrictions by object.
179. As to supposed anti-competitive effects, the Appellants’ view (skeleton paragraph 115) is that the CTRs produce the effects intended and aimed at by the presumed object restriction, namely limitation of golfers’ ability or incentives to offer their services to rivals, increasing barriers to entry for potential rival tours (evidenced by the high cost to LIV of its entry and the reduced scale at which it did so in its first year compared with its initial ambitions) and reducing competition in the putting on of elite golf tournaments and the related wider markets for commercialisation, with knock-on impacts for consumers.

180. We have already responded to the suggestion that the CTRs unlawfully restrict the opportunities of the players. As regards the allegations of adverse effects on rivals (meaning essentially LIV), it is obvious that entry involves cost, and any entrant to the market of promoting professional golf tournaments at the elite level can expect to face extremely high costs. At least absent dominance, there is no duty on incumbents to make it as cheap and painless as possible for the rival entrant. To the extent that refusing releases and imposing sanctions for playing in LIV events without a release can be said to raise LIV's costs (if only because, so far at least, LIV has offered to reimburse the players for any penalties and indeed to pay the Appellants' costs of these proceedings),¹⁴ that is not without more an anti-competitive raising of a rival's costs by the Respondent. It is rather a facet of the competition between LIV and the Respondent for the services of particular elite players.

181. It follows that in the view of the Panel the CTRs cannot be said to restrict competition, whether by object or effect.

182. In conclusion, the competition law argument is dismissed on the basis that the CTRs as applied in the cases under appeal fall within the ancillary restraints doctrine and in any event do not restrict competition by object or effect.

G. ALLEGED EXCESS OF POWERS AND /OR BREACH OF CONTRACT

The Appellants' Procedural Arguments

183. These are categorised by the Appellants as follows:

- (1) the Chief Executive's refusal of the Appellants' Release requests was unreasonable;
- (2) the Chief Executive's role in taking unappealable Release decisions is and was unfair and unreasonable;

¹⁴ We understand that Mr Reed has not availed himself of that opportunity.

- (3) the PGAET unfairly and unreasonably failed to conduct a disciplinary investigation; and
- (4) the Chief Executive's role and decisions in charging and sanctioning the Appellants were unfair and unreasonable.

184. We begin with the observation that this is a *de novo* hearing by an independent panel. There is a degree of overlap between these alleged breaches. First, essentially in relation to the process for making the initial decisions, the Appellants maintain that the decision maker Mr Pelley as the Chief Executive was not impartial and that the refusals were unreasonable. Second, the Appellants say that the Respondent acted unfairly because it failed to appoint a disciplinary panel to conduct the investigation and that the role of Mr Pelley in charging and sanctioning the Appellants was unfair and unreasonable. Third, the Appellants say that the *de novo* right of appeal does not cure the alleged breaches and that it is unfairly limited in its scope as an appeal against the sanctions imposed and is not an appeal against the refusal of the requests for releases.

185. The Respondent for its part maintains that (i) the scope and extent of its obligations to members are set out expressly in the Handbook and (ii) that its decisions have been compliant with these provisions at all times. Although the Appellants sought to argue that the duty to exercise powers fairly and reasonably as set out in **Braganza v BP Shipping Limited** [2015] 1WLR 1661 should be implied and applied to the Respondent, they conceded that the submission may be an arid one, given the acceptance by the Respondent that its decision making and process as set out in the CTRs are required to be both reasonable and fair. The Panel agrees and does not consider it necessary to resolve that issue in the course of determining these appeals.

186. The Respondent submits that the obvious answer to the procedural points is that this appeal is a *de novo* hearing conducted by an independent panel and this appeal process, provided for in the contract, gives the Appellants precisely the independent scrutiny they want.

187. The Panel will address first the Appellants' submission that the *de novo* right of appeal, conferred by the disciplinary procedure at FII 3(f) - (vi), does not cure the breaches of duty committed by the PGAET.

188. The case of **Calvin v Carr** [1980] AC 574 concerned the Australian Jockey Club rules of racing and the issue whether any failure of natural justice by the stewards was relevant to the fair decisions subsequently taken by the appellate committee. Lord Wilberforce (at page 953) did not accept as a general principle that “a failure of natural justice in the trial body could not be cured by a sufficiency of natural justice in an appellate body” but stated:

“the conclusion to be reached, on the rules and on the contractual context, is that those who have joined an organisation, or contract, should be taken to have agreed to accept what in the end is a fair decision, notwithstanding some initial defect. ... it is for the court, in the light of the agreements made, and in addition having regard to the course of proceedings, to decide whether, at the end of the day, there has been a fair result, reached by fair methods, such as the parties should fairly be taken to have accepted when they joined the association. Naturally there may be instances when the defect is so flagrant, the consequences so severe, that the most perfect of appeals or re-hearings will not be sufficient to produce a just result.”

189. In **Modahl v British Athletics** [2001] EWCA 1447 the court followed **Calvin v Carr**. At page 1217 Jonathan Parker LJ said:

“Finally, it seems to me highly significant that the disciplinary process itself allows for an appeal. I take that as a strong indication that if there is a contractual obligation of fairness, it is, as the judge concluded, an obligation of fairness in the operation of the disciplinary process as a whole, that is to say, including any appeal. In the instant case, it is not suggested and cannot be suggested that the appeal hearing did not cure any unfairness which may have existed in the hearing before the disciplinary committee.”

189. Those statements of principle, in each case applying to the rules of a sporting organisation, clearly apply to this appeal process. The Panel dismisses the Appellants’ argument that the Panel does not have jurisdiction to cure any alleged unfairness relevant to the issues of which it is seised.

190. It is thus necessary to consider which of the procedural points put forward by the Appellants arise for determination. The Chief Executive’s refusal or unfairness in dealing with Releases is not a Serious Breach of the Code covered by Regulation FII 3. For the

same reason the failure to conduct a disciplinary investigation is not an issue relevant to the determinations to be made by the Panel. The statements of charge expressly stated that the Appellants were entitled to a *de novo* hearing. To the extent that the Chief Executive played any relevant role in charging the Appellants then his evidence has been considered. The Panel will make its own fair decision on the sanctioning of the Appellants.

191. In reality, the procedural challenges advanced by the Appellants are in any event theoretical as the nature of this appeal, by contrast with the position which would have arisen had the appeal been against the decision of a Disciplinary Panel, is by way of a *de novo* hearing. This is the answer to the procedural points overall. We have been appointed as an independent panel to look at the issues dispassionately and to provide precisely the independent scrutiny which the Appellants now seek. This has been a full, extensive and well-resourced process in which all parties have fully participated.
192. Whilst it is not a matter directly for us, we do observe that the Respondent will need to give some thought as to how it will proceed in the future in the event of similar issues arising. By definition, any case determined by the Chief Executive under Regulation 3(f)(vi) will, in the event of an appeal require a determination by an Appeal Panel which must conduct a *de novo* hearing.

H. ISSUES ARISING FROM THE STATUS OF MR REED.

193. Two issues for consideration arose from the fact of Mr Reed's status as i) a "non-European" member of the Tour and ii) an "Honorary Life Member" of the Tour.
194. Mr Reed gave evidence in person and provided persuasive testimony about his commitment to and love of the DPWT, telling us how it is professionally important to him and his view of his Honorary Life Membership as a great honour. For example:

"...I've absolutely enjoyed and have loved coming over on the DP World Tour. It's a breath of fresh air with how I have been treated like family and the fans have been absolutely amazing..."

195. The first submission was in relation to Mr Reed's status as an Honorary Life non – European Member and was to the effect that he is exempt from the requirement to obtain

a release as the LIV Golf Portland event was a tournament on his home tour. This argument is ill-founded. The term “Home Tour” is defined (see paragraph 26 above) as is the term “Major Golf Tour” as “*any full or associate member of the International Federation of PGA Tours*”. As a matter of construction, it is clear that for these purposes Mr Reed’s Home Tour is the PGA Tour, not LIV. The submission must therefore fail.

196. The second argument advanced on behalf of Mr Reed arose from the exemption provided to Honorary Life Members from the requirement to participate in a minimum of 4 tournaments (Regulation B3(a)(ii)). The note at page 24 of the Handbook provides as follows:

“...Honorary Life Members are exempt from Regulation B3(a)(ii)...”

197. It was submitted that as a matter of common-sense, substance should be put over form to interpret the Regulations in a reasonable manner, and that the CTR provisions should not apply to Mr Reed as he has no minimum playing commitment. There is no merit in this submission. The requirement to obtain a release under the CTRs applies to all DPWT Members and no exemption is provided for Members who are Honorary Life Members. It is a simple point of construction, and the submission must fail.

I. CONCLUSION AND SANCTION

198. It was not seriously disputed in the proceedings that the Appellants had breached a provision of the Code of Behaviour contained in Regulation F: the issue was rather whether the Regulation was enforceable against the Appellants for the reasons explored under Restraint of Trade and Competition Law (Sections E and F above), or had been duly or properly applied in the case of each Appellant (see Excess of Powers/Breach of Contract (Section G above)). Mr Reed additionally argued that the Regulation was inapplicable to him as a non-European, Honorary Lifetime member of the DPWT (see section H above). All those challenges having failed, the Panel dismisses the appeals.

199. The Panel is required under Issue 10 (see Appendix 7) to determine a reasonable and proportionate sanction. This is an issue entirely for us as a *de novo* panel, acting within the scope of the Regulations.

200. As noted above the sanction imposed by Mr Pelley for the Respondent consisted in each case in (a) a suspension from three specified DPWT tournaments (in effect a two-tournament suspension as two of the three were played at the same time) and (b) a £100,000 fine.
201. The Appellants, while contending that the sanctions imposed were harsh and disproportionate, made no substantial submissions on the level or nature of sanction that would be appropriate in the event that the appeals were dismissed. The appropriate level of the financial penalty was said to be found in the sanctions previously imposed for breach of the Regulation before the policy changed on the advent of LIV. The previous highest sanction was, we were told, £12,000.
202. The Respondent contended that the sanctions imposed by Mr Pelley were reasonable and proportionate and that we should in effect adopt them as our own. The Respondent submitted that a financial penalty alone was not adequate to incentivise the players to devote their efforts to the DPWT rather than to LIV, and that only the additional sanction of suspension could have that effect. The Respondent suggested that the parties should be given an opportunity to make further submissions as to the suspension element of the sanctions in the event that we found in the Respondent's favour as the DPWT events from which the Appellants were to be excluded have now taken place and unless a new suspension was imposed there would not be an adequate deterrent. As we explain in paragraph 204 below we do not consider it necessary to receive further submissions in relation to the suspension element of the sanctions.
203. The Panel has no hesitation in imposing a £100,000 fine for the serious breach of the regulations committed by each Appellant by playing in a LIV event (the Centurion event, or the Portland event in Mr Reed's case) without having secured the necessary Release. It was explained that the level of £100,000 had been chosen as it represented a sum just lower than the prize money available to the last-placed participant in the LIV event with which the DPWT event in question conflicted, although that does not seem to us to be a necessary yardstick. It is appropriate for the financial sanction to be set at a dissuasive level. In the context of a player incentivised to sign up for a rival event backed by the resources available to LIV, a fine in the order of £12,000 would seem trivial.

204. The Panel considers that it would not be assisted by further representations as to sanctions. The relevant suspensions were imposed on 24th June 2022 to take effect between the 7th and 17th July 2022, and were stayed on 5th July 2022. So those suspensions were overtaken by events and to the extent that it was practical the Appellants were not prevented from participating in those tournaments, or in subsequent DPWT tournaments. Given the importance of the issues arising in this case and their potential effect both for the Appellants and the PGAET, the Panel considers that it is not necessary to impose any suspension in order for its decision to make clear the significance of any breaches of the relevant DPWT Regulations.
205. The Panel expresses no view as to what action may be taken by the PGAET in respect of the other disciplinary proceedings which remain to be considered. As noted at paragraph 192 above, any determination in respect of such disciplinary proceedings will, if not taken by a Disciplinary Panel, be capable of referral to a *de novo* panel as was done in the case of the present appeals, so that the Appellants' rights of defence will be fully respected.
206. Accordingly, the Panel imposes a fine of £100,000 on each Appellant for playing in a conflicting tournament without having first secured the necessary Release under the CTRs. As we understand the position, the financial element of the sanction was automatically stayed on the lodging of the appeals (see 3(d) at page 86 of the Handbook) and therefore in principle nothing has been paid to the Respondent by any Appellant. That was Mr Poulter's understanding (see Transcript Day 2 p 59) and no Appellant sought relief from us in the form of recovery of any amount paid. Accordingly, and on that understanding, we direct that the fines should be paid to the Respondent within 30 days of the notification of this Decision to the Appellants.
207. Under Regulation FII 3 (e) costs may be awarded to a Member or to PGA European Tour. Any issues as to costs will be reserved for further decision if the parties cannot agree them.

DETERMINATION

The Panel makes this determination:

- (1) It is declared that the 1st, 3rd - 12th and 16th Appellants committed serious breaches of the Code of Behaviour of the DPWT Regulations by playing in the LIV Golf Invitational (London) or in the case of the 10th Appellant by playing in the LIV Portland, despite their release requests having been refused.
- (2) The appeals against the decisions of the Chief Executive Officer for the PGA European Tour are dismissed.
- (3) Each of the 1st, 3rd - 12th and 16th Appellants is to pay a fine of £100,000 within 30 days of the notification of this decision to the Appellants

The Panel reserves for further decision any issues as to the costs of these appeals that cannot be agreed between the Appellants and the Respondent.

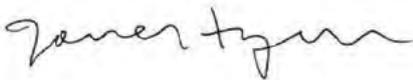
SIGNED:



His Honour Phillip Sycamore CBE (Chair)



Charles Flint KC



James Flynn KC

London, UK

3 April 2023

1 Paternoster Lane, St Paul's London EC4M 7BQ resolve@sportresolutions.com 020 7036 1966

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ENABLING FAIR PLAY

Appendix 1 – Sample Determination

PRIVATE AND CONFIDENTIAL

SENT BY EMAIL ONLY

24th June 2022

Dear _____,

I note that you played in the 2022 edition of the LIV Golf Invitational (London), despite your release request not having been granted.

As outlined in the letter sent to you (by email) on 15 June 2022 by Deputy Director of Tour Operations, David Probyn, you will be aware from Section E of the Members' General Regulations Handbook (the "**Regulations**") that this is a breach of the Regulations. As outlined in those Regulations (and as we set out when we informed you that your request for a release to participate in the 2022 edition of the LIV Golf Invitational (London) was not granted), a breach of this nature may also be deemed to be a serious breach of the Code of Behaviour set out within Section F of the Regulations (the "**Code of Behaviour**").

In this case, having had regard to all relevant factors set out in the Code of Behaviour, including but not limited to the non-exhaustive, illustrative categorisations of behaviours set out therein, and having considered your response (dated 22 June 2022) to David Probyn's letter to you of 15 June 2022, I hereby inform you (having elected to determine this matter myself in accordance with paragraph 3(f) of section II of the Code of Behaviour) that I consider the aforementioned breach to be a serious breach of the Code of Behaviour.

Accordingly, I have decided to impose the following sanctions upon you, with immediate effect:

1. a fine of £100,000 (one hundred thousand pounds Sterling), payable within 14 days of the date of this letter in the manner described in the Appendix to this letter; and
2. suspension from participation in the 2022 edition of (i) the Genesis Scottish Open and the Barbasol Championship each taking place on 7-10 July (inclusive) and (ii) the Barracuda Championship on 14-17 July (inclusive), meaning that you are ineligible to participate in such tournaments in any capacity and where applicable you have duly been removed from the entry lists for these tournaments.

In accordance with paragraph 3(f)(vi) of section II of the Code of Behaviour, you may appeal the above determinations to an Appeal Panel by submitting a written notice of appeal to me copying the Deputy Director of Tour Operations within 14 days of the date of this letter.

Whilst any similar future breach of the Regulations and/or the Code of Behaviour will be evaluated on an individual basis and in light of the specific context and circumstances of each case, it is likely that (without prejudice to my discretion to act on a case-by-case basis), repeatedly breaching the Regulations and/or Code of Behaviour in a similar manner may result in an escalation of the sanctions imposed upon you (such as higher fines or longer suspensions).

Yours sincerely,



Keith Pelley, Chief Executive Officer, for and on behalf of PGA European Tour



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Appendix 2 – Sample Refusal of Release Letter

PRIVATE AND CONFIDENTIAL

SENT BY EMAIL ONLY

17th May 2022

Dear _____,

Thank you for your request for a release from the 2022 edition of the Volvo Car Scandinavian Mixed, a tournament on the DP World Tour schedule, in order to participate in the 2022 edition of the LIV Golf Invitational London between 9th-11th June 2022 (the “**Release**”).

I have carefully considered your request, in light of the factors that are referred to in Sections E1 and E2 of the Members’ General Regulations Handbook (the “**Handbook**”), but have come to the conclusion that if your 2022 DP World Tour membership category and rank is **above** the cut-off line for entry into the 2022 edition of the Volvo Car Scandinavian Mixed as at close of entries on 26th May 2022, I hereby inform you that your Release is **not** granted.

This is our position for a number of important reasons, including the following:

- (i) While trying to balance the challenge of allowing our members the opportunity to play in a conflicting tournament, we have, at the same time, to ensure protection for our Tour, all its members and our relationship with our stakeholders that provide the revenue which will enable all of you to continue to play for the levels of prize fund currently established.
- (ii) We announced the Volvo Car Scandinavian Mixed last November. The LIV Golf Invitational London was subsequently scheduled on the same dates.
- (iii) The tournament in England is only one hour time difference from Sweden so there will be a direct clash with live TV coverage of the DP World Tour event.
- (iv) The general media coverage, social media coverage and TV audience numbers could well be impacted as the tournaments will be played concurrently.

If, however, your 2022 DP World Tour membership category and rank is **below** the cut-off line for entry into the 2022 edition of the Volvo Car Scandinavian Mixed as at close of entries on 26th May 2022, I hereby inform you that your Release **is** granted.

Whilst I endeavour to maintain a reasonably consistent approach in relation to my response to each request for a release, each request is assessed on its own merits and in the context of what, in my reasonable discretion, I consider to be relevant factors relating to the Member’s specific request. I do not consider this decision to be precedent-setting and I will evaluate all future release requests individually, basing my decision on the specific facts and circumstances in accordance with the Handbook.

If your Release has not been granted, but you choose to participate (or allow or agree to the promotion of your participation or expected participation) in the 2022 edition of the LIV Golf Invitational London anyway, this would constitute a breach of the Handbook (pursuant to which you have submitted your request for the Release). In that instance, I would therefore reserve the right (without prejudice to any other rights and remedies available to PGA European Tour) to impose sanctions in accordance therewith.

Yours sincerely,



Keith Pelley, Chief Executive Officer, for and on behalf of **PGA European Tour**



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Appendix 3

EXTRACTS FROM THE REGULATIONS

MEMBERSHIP REGULATIONS

(C) Minimum Counting Tournament Regulation:

To obtain inclusion in the final 2022 DP World Tour Rankings and to Participate in the benefits derived from such inclusion, a Ranked Member in Categories 1-14 inclusive must:

- (i) Participate in a minimum of four Counting Tournaments in the 2022 Official Season. A Counting Tournament includes the following - : 1.) All 2022 DP World Tour Ranking Tournaments excluding the following: the WGC – Dell Technologies Match Play, the Masters, the US Open Championship, the Open Championship, the US PGA Championship and the WGC – HSBC Champions.

Honorary Life Member

shall mean any Member who is granted honorary life membership of the PGA European Tour and who shall benefit from the rights and exemptions set out in Regulation B2(c).

- (c) Honorary Life Membership**, for the remainder of the Player's lifetime.

NOTE: Honorary Life Members are exempt from Regulations B3(a)(ii) and B3(b) ("Termination of Membership") requiring a Ranked Member to Participate in the minimum number of DP World Tour Ranking Tournaments in any one Official Season. However if an Honorary Life Member does not Participate in the minimum number of DP World Tour Ranking Tournaments pursuant to Regulation B1(c) he; (i) will not remain in the final DP World Tour Rankings for the then current Official Season; (ii) will have any points he has earned in the current Official Season removed from the then current Ryder Cup points table; and (iii) will not be eligible for inclusion in the following Official Season's DP World Tour Rankings or Ryder Cup Points table unless he is aged 50 or over at any point within the current Official Season.

Appendix 3

Exception: The Chief Executive in his sole discretion and only in exceptional circumstances may waive the provisions of regulation B2(c)(iii) above.

CONFLICTING TOURNAMENTS

(a) General

The PGA European Tour recognises the individual rights of all Members operating as independent contractors. The PGA European Tour therefore confirms to all Members that at no time will it hold out to tournament sponsors or promoters the guaranteed appearance or entry of any individual Member. As a general principle, the PGA European Tour will not unreasonably seek to restrain its Members from Participating in certain golf tournaments or events which are not sanctioned by the PGA European Tour, nor from engaging in independent commercial activities provided that these do not risk unreasonably interfering with the commercial interests or reputation of the PGA European Tour, nor affect the Member's Participation in Counting Tournaments.

(b) Legitimate Aim

Notwithstanding the above, the PGA European Tour requires those Members referred to in Regulation E1(c) below to comply with the Conflicting Tournaments Regulations set out in this Regulation E1. Compliance with this Regulation E1 by Members is required to ensure that the PGA European Tour will remain in a position to fulfil, at all times, the expectations of its tournament sponsors, promoters and broadcast partners who support the PGA European Tour and its Members by providing playing opportunities and financial opportunities to enhance Members' professional golfing careers. In particular each Member acknowledges the collective obligations of the PGA European Tour to provide representative fields to encourage promoters to provide competitive prize funds and playing opportunities for the benefit of Members.

(c) Application for Permission

Members listed in paragraphs (i)-(xxii) of Regulation B2(a) above (and in relation to those specific weeks in any one Official Season when the Nedbank Golf Challenge and DP World Tour Championship, Dubai are due to be staged, any Members) who are eligible to Participate

Appendix 3

in one or more DP World Tour Tournaments, shall not Participate (or allow or agree to the Promotion of their Participation in) any of the following tournaments or matches without first applying in writing for and obtaining the prior written permission of the Chief Executive in accordance with Regulation E2 below:

- (i) any tournament or exhibition match, whether private or public, that is not an Approved Tournament, scheduled to be staged against the Tournament Week or any part of it; or
- (ii) any tournament or exhibition match, whether private or public, that is not an Approved Tournament, scheduled to be staged against or within seven days prior to the Tournament Week and which tournament or exhibition match is either:
 - (A) within 50 miles of the venue of the Approved Tournament scheduled that Tournament Week; or
 - (B) in the same country as the Approved Tournament scheduled in that Tournament Week, if the Member is eligible, but does not intend to play in such Approved Tournament.

Approved Tournaments

shall mean all those tournaments run under the auspices of the PGA European Tour, which includes: (i) DP World Tour Ranking Tournaments; and (ii) those tournaments for which the prize money available does not count as Official Money.

(d) Exceptions

The following are the exceptions to the above requirements.

- (i) Any Member Participating in the US Masters, US Open, US PGA or the WGC - Dell Technologies Match Play, or the WGC - HSBC Champions.
- (ii) Any non-European Member Participating in a tournament on his own Home Tour; and
- (iii) Any Member who is also a member of the PGA Tour and Participates in a tournament

Appendix 3

which is being sanctioned by the PGA Tour, provided that:-

- such Member has Participated, or it is possible for him to Participate in, the minimum number of Counting Tournaments in the then current DP World Tour Schedule in accordance with Regulation B1(c); or
- the PGA Tour sanctioned tournament offers larger prize money and World Ranking points than the corresponding DP World Tour Ranking Tournament;
- the Member is not the defending Champion of the corresponding DP World Tour Ranking Tournament;
- the corresponding DP World Tour Ranking Tournament is not to be staged in the country of which the Member is a national. (for the avoidance of doubt this requirement applies irrespective of the provisions in Regulation B1(c)); or
- the PGA Tour sanctioned tournament is not in the same geographical region or a similar time zone (+/- 1 hour) as the corresponding DP World Tour Ranking Tournament; or
- the PGA Tour sanctioned tournament does not have similar or simultaneous live television coverage to the corresponding DP World Tour Ranking Tournament.

If a Member has any concerns as to whether a PGA Tour sanctioned tournament falls within an exception under this Regulation E1(d), the Member should refer the question to the Chief Executive for clarification.

Guidelines for Release for Conflicting Tournaments

References to “the Tournament” in the following Guidelines mean the Approved Tournament against which the Conflicting Tournament is scheduled.

When considering whether or not to grant a Member’s request for a release from a Tournament to Participate in any Conflicting Tournament, the Chief Executive shall consider a number of general factors including the following:

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- The overall make-up of the field of the Tournament.
- The Member's standing in the current DP World Tour Rankings and in the DP World Tour Rankings in previous Official Seasons.
- The number of Counting Tournaments that the Member has Participated in, or has committed to Participate in, in the current Official Season and in previous Official Seasons.
- The Member's record of Participation in the Tournament (or, if the Tournament is new, the Member's record of Participation in other Approved Tournaments which are similar to the new Tournament).

In addition, the Chief Executive may give weight to a number of additional specific factors including the following:

- Whether the request is to Participate in the Member's home Open golftournament. (Normally released if so)
- Whether the Member's participation in the Conflicting Tournament will significantly harm the PGA European Tour's relationship with the sponsor or promoter of the Tournament. (Not normally released if so)
- Whether the Member is the defending Champion of the Tournament. (Not normally released if so)
- Whether the Tournament is being staged in the country in which the Member is a national. (Not normally released if so)
- Whether the sponsors of the Conflicting Tournament conflict with the sponsors of the Tournament. (Not normally released if so)
- Whether there is any broadcast coverage of both the Conflicting Tournament and the Tournament which can be viewed in:
 - the country in which the Tournament is being staged; and/or

Appendix 3

- any country which is within the same time zone as the country in which the Tournament is being staged, and in either case, as a result of such coverage, the media exposure of the Tournament may be damaged.
- (Not normally released in either case)
- Whether the Conflicting Tournament offers a prize fund or World Ranking points significantly higher than the Tournament. (Normally released if so)

The Chief Executive may also consider the wider interests of the PGA European Tour in exercising judgment about a requested release, for example if (in the opinion of the Chief Executive):

- The Tournament is co-sanctioned and the relationship between the PGA European Tour and the co-sanctioning golf tour may be damaged if the Member is released from the Tournament. (Not normally released if so)
- There is a likelihood of the public assuming that the Conflicting Tournament is sanctioned by PGA European Tour, whether on account of the Member's Participation or otherwise. (Not normally released if so)
- Any refusal to grant a Member's request to Participate in a Conflicting Tournament will materially prejudice the Member's chances of gaining the right to become eligible for Membership of the DP World Tour for the next Official Season. (Normally released if it will do so)

Whilst the PGA European Tour endeavours to maintain a reasonably consistent approach in relation to the granting or withholding of any permission for a Member to Participate in a Conflicting Tournament, each request will be assessed on its own merits and in

the context of all relevant factors relating to the Member's specific request. The Chief Executive's past decisions do not form a binding precedent and whether a Member might normally be released in certain or equivalent circumstances does not mean the Chief Executive is required to release the Member pursuant to any particular request.

Appendix 3

The Chief Executive shall be entitled (but not obliged) to make any release granted to a Member subject to the acceptance and subsequent fulfilment by the Member of conditions, determined in the discretion of the Chief Executive and with reference to the relevant factors referred to in this Regulation E1 and Regulation E2. If such conditions are stipulated by the Chief Executive and the Member does not wish to accept and subsequently fulfil the conditions, the release will not be granted.

In considering whether or not to grant a Member's request to Participate in any Conflicting Tournament, and whether or not to make any release granted to a Member subject to the acceptance and fulfilment of conditions by that Member, the Chief Executive shall apply his discretion but will act reasonably at all times when considering the relevant factors including the above factors and balancing the legitimate interests of the Member against the best interests of all Members and the PGA European Tour itself.

Appendix 4 – Sample Charge

15 August 2022

Sent by email

Dear _____,

STATEMENT OF CHARGE

1. Pursuant to paragraph 3 of the directions of His Honour Phillip Sycamore CBE dated 26 July 2022 (the “**Directions**”), I write to advise you that you are formally charged with a breach of the DP World Tour 2022 Members’ General Regulations Handbook (the “**Regulations**”).
2. In summary, you are a Member of the PGA European Tour (the “**Tour**”) and as such the Regulations are binding upon you. Contrary to Regulation E(1) and E(2), you participated in a Conflicting Tournament (as defined thereunder) without obtaining prior written permission from the Chief Executive. Pursuant to Regulation E(2), this is a breach of the Regulations, and the Tour has deemed this conduct to be a serious breach of the Code of Behaviour contained in Regulation F (the “**Charge**”).
3. Below, I set out the relevant background to the Charge (section A), the Applicable Regulations (section B), the particulars of the Charge (section C), and next steps (section D).
4. A paginated evidence bundle containing the documents and evidence which the Tour will rely upon in support of the Charge is also enclosed.



PGA European Tour (a company limited by guarantee)
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Appendix 4 – Sample Charge

5. The disciplinary proceedings that will follow this Statement of Charge will be determined in accordance with the procedure provided under Regulation F(II)(3) of the Regulations. A copy of the relevant sections of the Regulations referred to herein is provided in the evidence bundle.

A. BACKGROUND TO THE CHARGE

6. The Tour has a long and well-established history, having been established in 1972 and this year celebrating its 50th anniversary. The Tour is the overarching corporate brand which operates three leading men's professional golf tours for the benefit of its members, namely the DP World Tour, the Challenge Tour and the Legends Tour. The Tour is a thriving brand. It is also the Managing Partner of the Ryder Cup Europe LLP, golf's greatest team contest.
7. As you are aware, the Tour is a membership organisation. It is run by its members for the benefit of its members. Profits which it generates are returned to members in the form of prize monies and/or used to invest in initiatives for the broader benefit of members and the golf ecosystem. Membership of the Tour is highly competitive and sought after. The quality and status of the playing membership is critically important for the Tour.
8. You have been a Member of the Tour since . On 5 January 2022, Mr Pelley, CEO of the Tour, granted you a release (subject to certain conditions) from the 2022 edition of the Ras al Khaimah Championship, in order to allow you to participate in the 2022 edition of the Saudi International between 3 and 6 February 2022 in which you did subsequently participate.
9. By email sent on 28 April 2022, wrote on your behalf to request your release from the Volvo Car Scandinavian Mixed to play the LIV Invitational event in London between 9 and 11 June 2022.
10. By letter dated 17 May 2022, Mr Pelley responded as follows:
 - a. *"I have carefully considered your request, in light of the factors that are referred to in Sections E1 and E2 of the....Handbook, but have come to the conclusion that if your 2022 DP World Tour membership category and rank is*



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Appendix 4 – Sample Charge

***above** the cut-off line for entry into the 2022 edition of the Volvo Car Scandinavian Mixed as at close of entries on 26th May 2022, I hereby inform you that your Release is **not** granted.”*

b. *“This is our position for a number of important reasons, including the following:*

- (i) While trying to balance the challenge of allowing our members the opportunity to play in a conflicting tournament, we have, at the same time, to ensure protection for our Tour, all its members and our relationship with our stakeholders that provide the revenue which will enable all of you to continue to play for the levels of prize fund currently established.*
- (ii) We announced the Volvo Car Scandinavian Mixed last November. The LIV Golf Invitational London was subsequently scheduled on the same dates.*
- (iii) The tournament in England is only one hour time difference from Sweden so there will be a direct clash with live TV coverage of the DP World Tour event.*
- (iv) The general media coverage, social media coverage and TV audience numbers could well be impacted as the tournaments will be played concurrently.”*

c. *“If your Release has not been granted, but you choose to participate (or allow or agree to the promotion of your participation or expected participation) in the 2022 edition of the LIV Golf Invitational London anyway, this would constitute a breach of the Handbook...”*

11. By letter dated 15 June 2022, Mr Probyn, Deputy Director of Tour Operations, wrote to you, noting that *“you played in the LIV Golf Invitational (London), despite your release request not having been granted”*. He explained that *“this is a breach of the Regulations and may be a breach of the Code of Behaviour”*. He requested that you *“explain your position and the circumstances giving rise to your participation or confirm that you acknowledge that your conduct is a breach of Section E of the Regulations and may therefore also be a breach of the Code of Behaviour”*.

Appendix 4 – Sample Charge

12. You responded by letter on 22 June 2022. You did not dispute that you had played in the conflicting event without a release, but stated several reasons why you believed you should not be sanctioned.
13. By letter dated 24 June 2022, Mr Pelley informed you that he had elected to determine whether your participation without a release was a breach of the Code of Behaviour, pursuant to paragraph 3(f) of section II of the Code of Behaviour. He concluded that your behaviour was a “*serious breach of the Code of Behaviour*”, and imposed sanctions of (i) a fine of £100,000 and (ii) a suspension from participation in the 2022 edition of the Genesis Scottish Open and the Barbasol Championship on 7-10 July 2022 and the Barracuda Championship on 14-17 July.
14. You appealed this decision and sought interim relief to stay your suspension. In a hearing convened by Sports Resolution before His Honour Phillip Sycamore CBE on 4 July 2022, your suspension was stayed pending the substantive hearing of your appeal before a Disciplinary Panel.
15. Pursuant to Regulation F, section II(3)(f)(vi), you are entitled to a *de novo* hearing before the Disciplinary Panel. This statement of charge is prepared for the purposes of that hearing.

B. THE APPLICABLE REGULATIONS

Regulations E(1) and E(2)

16. Regulation E(1), “Conflicting Tournaments”¹, provides as follows in relevant part (emphasis added):

“(a) General

The PGA European Tour recognises the individual rights of all Members² operating as independent contractors...As a general principle, the PGA European Tour will not unreasonably seek to restrain its Members from Participating in certain golf tournaments or events which are not sanctioned by the PGA European

¹ “Conflicting Tournament” is defined under the Regulations as meaning “any golf tournament or match referred to in Regulation E1(c)”.

² “Member” is defined under the Regulations as meaning inter alia “a Ranked Member”.

Appendix 4 – Sample Charge

Tour...provided that these do not risk unreasonably interfering with the commercial interests or reputation of the PGA European Tour, nor affect the Member's Participation³ in Counting Tournaments⁴.

(b) Legitimate Aim

Notwithstanding the above, the PGA European Tour requires those Members referred to in Regulation E1(c) below to comply with the Conflicting Tournaments Regulations set out in this Regulation E1. Compliance with this Regulation E1 by Members is required to ensure that the PGA European Tour will remain in a position to fulfil, at all times, the expectations of its tournament sponsors, promoters and broadcast partners who support the PGA European Tour and its Members by providing playing opportunities and financial opportunities to enhance Members' professional golfing careers. In particular each Member acknowledges the collective obligations of the PGA European Tour to provide representative fields to encourage promoters to provide competitive prize funds and playing opportunities for the benefit of Members.

(c) Application for Permission

Members...who are eligible to Participate in one or more DP World Tour Tournaments, shall not Participate (or allow or agree to the Promotion of⁵ their Participation in) any of the following tournaments or matches without first applying in writing for and obtaining the prior written permission of the Chief Executive in accordance with Regulation E2 below:

- (i) *any tournament or exhibition match, whether private or public, that is not an Approved Tournament⁶, scheduled to be staged against the Tournament Week⁷ or any part of it..."*

³ "Participate/Participating" is defined under the Regulations as meaning "a Member must compete in a tournament and for the avoidance of doubt a Member who is unable for any reason...to hit his first tee shot in the 1st round of a tournament shall be deemed not to have "Participated" in that tournament..."

⁴ "Counting Tournament" is defined under the Regulations as meaning "any golf tournament or match that will be counted towards a member's obligation to Participate in a minimum number of tournaments as defined in Regulation B1(c)(i)"

⁵ "Promotion of" is defined in Regulation E as "entering into any oral or written agreement or agreement with a golf tour, tournament organiser, promoter, sponsor or agent under which the Member agrees to (a) Participate in any Conflicting Tournament and/or (b) carry out any personal appearance...in connection with such Conflicting Tournament (including confirming that he will Participate in it)..."

⁶ "Approved Tournament" is defined in the Regulations as "all those tournaments run under the auspices of the PGA European Tour..."

⁷ "Tournament Week" is defined in Regulation E as "the period beginning on the day (normally Tuesday) that is two days in advance of the first round of such Approved Tournament, up to and including the day of the final round of such Approved Tournament (normally Sunday)".

Appendix 4 – Sample Charge

17. Regulation E(2), “Protocol for Release for a Conflicting Tournament”, provides for a “Release Procedure” pursuant to Regulation E(2)(a), and for “Consequences of non-compliance” pursuant to Regulation E(2)(b). The latter provides as follows in relevant part (emphasis added):

“It shall be a breach of the Regulations for any Member who either: (i) fails to comply with Regulation E2(a); or (ii) who, having complied with Regulation E2(a), Participates (or allows or agrees to the Promotion of his Participation or expected Participation in) any Conflicting Tournament in circumstances where he has not received the prior written approval of the Chief Executive...”

Members who are in breach of this Regulation E2 may also be deemed to have committed a serious breach of the Code of Behaviour in Regulation F, including without limitation injurious conduct (within the meaning of paragraph 6 of Part 1 of Regulation F) as it is acknowledged that any failure by the Member to comply with this Regulation E2 may cause considerable damage to the relationship between the PGA European Tour and the promoter or sponsor of any affected Approved Tournament.”

Regulation F

18. Regulation F(I) provides a Code of Behaviour for Members. Regulation F(I)(1), “General”, provides that:

“On becoming a Member, each person voluntarily submits himself to standard of behaviour and ethical conduct beyond those required of amateur/recreational golfers and members of the public. The DP World Tour has been the hallmark of honesty, fair dealings, courtesy, and sportsmanship and each Member must honour and uphold that tradition at all times whether on or off the golf course.”
(the “**Tour’s General Standards of Behaviour**”)

19. Regulation F(I)(2) provides a non-exhaustive list of examples of conduct that “*will be a breach of the Code*”, and specifically “*Injurious Conduct*”, which is defined as “*Conduct likely to injure or discredit the reputation of the PGA European Tour or any of its Members or conduct that is contrary to the PGA European Tour’s constitution, rules or Regulations*” (Regulation F(I)(2)(f)).

20. Regulation F(II) provides the Tour’s Disciplinary Procedure. In relation to Injurious Conduct, a “*Serious Breach*” of the Code is defined as follows:

Appendix 4 – Sample Charge

“actions or comments that may harm or discredit officials, fellow Members, sponsors, promoters, volunteers, third party contractors or the PGA European Tour and that does cause or is likely to cause significant negative media or long term damage to any of the aforementioned persons.”

C. PARTICULARS OF THE CHARGE

21. You are a Member under the Regulations, who is eligible to participate in DP World Tour Tournaments. The LIV Invitational event in London was not an Approved Tournament, and was scheduled to be staged against part of the Tournament Week of the Volvo Car Scandinavian Mixed. You were not entitled to participate in the LIV Invitational event in London without obtaining the prior written permission of Mr Pelley.
22. By his decision on behalf of the Tour dated 17 May 2022, Mr Pelley did not grant you a release. You were not permitted to play in the LIV Invitational event in London. Nevertheless you did so, in breach of Regulation E(1) and E(2)(b).
23. You have acted in breach of the Regulations. Further, you did so knowingly. You sought Mr Pelley’s permission in accordance with the Regulations, but when that permission was withheld, you ignored the Regulations. In accordance with Regulation E(2), the Tour deems this to be serious injurious conduct and/or conduct which is otherwise contrary to the Tour’s General Standards of Behaviour for (at least) the following reasons:
- a. Your conduct may harm and/or discredit the Tour’s officials, volunteers, the Regulations, or the Tour itself, and has caused/is likely to cause significant negative media or long-term damage.
 - b. Your conduct may harm fellow Members who comply with the Regulations and has caused/is likely to cause significant negative media or long term damage to fellow Members.
 - c. Your conduct may harm any of the Tour’s sponsors, promoters or third party contractors, and has caused/is likely to cause significant media or long term damage to the same.

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- d. Your conduct may harm or discredit the Tour and has caused/is likely to cause significant media or long term damage to it.
- e. Further or alternatively, in relation to each and all of paragraphs (a) to (d) above, your conduct is contrary to the Tour’s General Standards of Behaviour.

D. NEXT STEPS

24. Pursuant to paragraph 4 of the Directions, you are required to serve a Defence to this Statement of Charge, together with any documents, evidence and expert evidence relied upon in support.

Yours sincerely



David Probyn
Deputy Director of Tour Operations

Appendix 5

LIST OF WITNESSES

The following witnesses gave evidence in person:

Gary Davidson
Lee Westwood
Ian Poulter
Patrick Reed
Keith Pelley
Keith Waters
Katie Curry
Derek Holt

The following witnesses gave evidence by video link:

Justin Harding
Wade Ormsby
Laurie Canter
Bernd Wiesberger

We considered witness statements from the following:

Atul Khosla
Sam Horsfield
Shaun Patrick Norris
Justine Reed

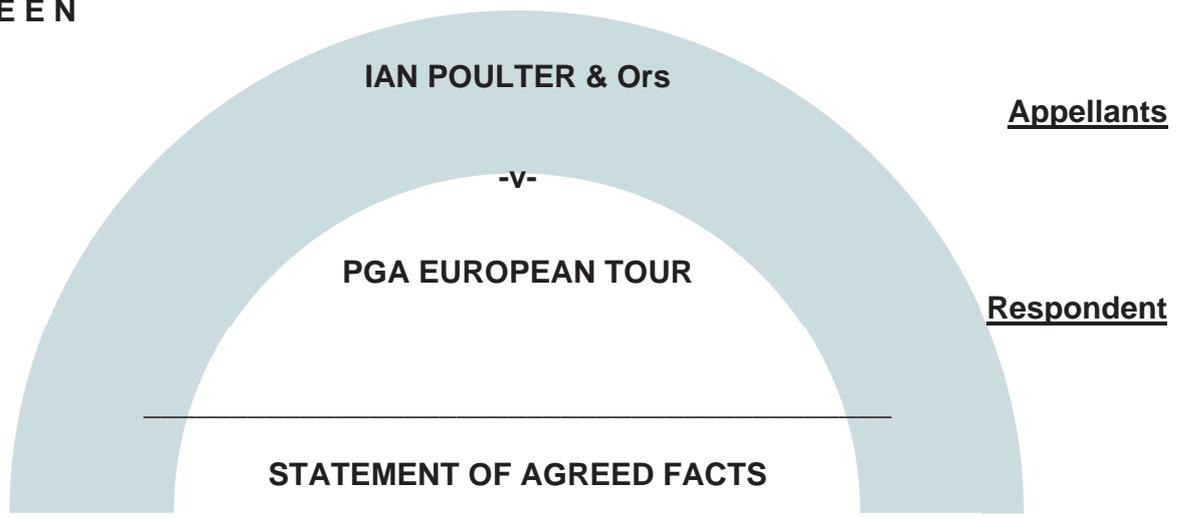
Appendix 6

IN THE MATTER OF A REFERENCE
UNDER THE DP WORLD TOUR MEMBERS'
GENERAL REGULATIONS HANDBOOK 2022

BEFORE A PANEL APPOINTED UNDER REG. F3(d)

Phillip Sycamore CBE
Charles Flint KC
James Flynn KC

B E T W E E N



A. The Parties

1. The Appellants are self-employed professional golfers. The Respondent (“PGAET”) is a membership organisation and private company limited by guarantee. Its members are current and former professional golfers, including most of the Appellants. PGAET promotes, manages and administers golf competitions for the benefit of its members. PGAET operates four golf tours, including the DP World Tour (“the DPWT”), a leading professional golf tour. The DPWT calendar (November 2021 to November 2022) consisted of 38 golf tournaments.

B. Golf

2. The DWPT is one of a number of professional tours. Others include the PGA TOUR, the Japan Golf Tour, the Korean Tour, the Asian Tour, the ISPS Handa PGA Tour of Australasia and the Sunshine Tour.

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3. LIV Golf Limited and LIV Golf Inc. (together, “**LIV Golf**”) established a new professional golf tour which commenced operations as an invitational series in 2022 (“**the LIV Invitational Series**”) and which from 2023 onwards will comprise tournaments making up what will be known as the “LIV Golf League”. As to this:
 - (a) In 2022, the LIV Invitational Series comprised eight tournaments. LIV Golf plans that in 2023, the LIV Golf League will comprise 14 tournaments and a play-off event to decide on the promotion/relegation of players
 - (b) Tournaments in the LIV International Series and the LIV Golf League were and are played over 54 holes with no cut, and included and will include both individual and team components.
 - (c) The prize funds for tournaments in the LIV Invitational Series are materially higher than those for tournaments on the DPWT and all players participating in a LIV Invitational Series tournament are guaranteed a payment.
4. Some of the Appellants have entered into long-term contracts to participate in the LIV Invitational Series and the LIV Golf League across multiple years.
5. In addition to tournaments played on golf tours, other prestigious standalone golf events take place regularly, including the Majors, the Ryder Cup, the World Golf Championships and the Olympic Games. PGAET is involved in the organisation of the Ryder Cup, a biennial competition between the USA and Europe.
6. In January 2021, PGAET and the PGA TOUR entered into a strategic alliance. The strategic alliance provides, *inter alia*, for PGAET and the PGA TOUR to hold events recognised by both the DPWT and the PGA Tour (“**Co-sanctioned**” events).
7. Events, whether sanctioned by a Tour or as a standalone tournament (as above) are played to the rules of golf, which are governed by the Royal & Ancient Golf Club and the United States Golf Association.
8. Official World Golf Ranking (“**OWGR**”), a company limited by guarantee, publishes rankings of professional golfers by reference to “World Ranking Points.”

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9. World Ranking Points are allotted to professional golfers based on participation in tournaments accredited by OWGR. Earning OWGR points is the principal, but not the only, way for players to qualify for some of the Majors, the World Golf Championships, and the Olympic Games.
10. LIV International Series tournaments were not and are not currently accredited by OWGR. LIV Golf has applied for such accreditation; its application has not yet been determined.

C. The DPWT Regulations

11. In order to participate in the 2022 DPWT, members were required to agree to abide by the rules set out in the DP World Tour Members' General Regulations Handbook 2022 ("**the Handbook**").
12. The Handbook provides (amongst other things) that:
 - (a) Members of the DPWT are independent contractors Members must generally play a minimum of four "Approved Tournaments" organised as part of the DPWT, referred to as "Counting Tournaments"
13. According to the Handbook, Members in certain categories must not, absent the prior written permission of the Chief Executive of the PGAET (a "**Release**"), participate in a "Conflicting Tournament." A Conflicting Tournament is defined as an event which (i) takes place (in whole or in part) during the "Tournament Week" of an Approved Tournament, meaning the period starting two days before the Approved Tournament's first round and ending on the day of its final round; or (ii) takes place during a Tournament Week or the prior week, if it is within 50 miles of the Approved Tournament, or anywhere in the same country if the player does not intend to play in the Approved Tournament; The parties refer to this as the "**Conflicting Tournament Regulations**" or "**CTRs.**"
14. A member may resign membership of the DPWT.
15. According to reg. B2(c) of the Handbook, "Honorary Life Members" of the DPWT are exempt from the obligation to play a minimum number of DPWT events each calendar year; however, if an Honorary Life Member fails to play the minimum number of DPWT

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Tournaments, he (i) will not remain in the final DPWT Rankings for the then current Official Season; (ii) will have any points he has earned in the current Official Season removed from the current Ryder Cup points table; and (iii) will not be eligible for inclusion in the following Official Season's DPWT Rankings or Ryder Cup Points table unless he is aged 50 or over at any point within the current Official Season. Mr Reed is an "Honorary Life Member" of the DPWT.

16. According to reg. E1(d) of the Handbook, non-European Members do not need to request a Release when participating in tournaments on their own "Home Tour". Mr Reed is a non-European Member of the DPWT.

D. The events giving rise to disciplinary action

17. The 2022 LIV Invitational Series included the LIV Golf Invitational London held at the Centurion Club on 9-11 June 2022 ("**the Centurion**") and the LIV Golf Invitational Portland held at Pumpkin Ridge Golf Club on 30 June-2 July 2022 ("**LIV Portland**"). These events were "Conflicting Tournaments" within the scope of the CTRs under reg E1(c) because of the DPWT's Volvo Car Scandinavian Mixed tournament and the DPWT's Horizon Irish Open tournament.
18. The Appellants (except Mr Reed) agreed with LIV Golf to play in the Centurion and, in around April 2022, each of those Appellants requested a Release from PGAET. By letters dated around 17 May 2022, each such request was refused. Releases were granted to certain other DPWT members, who did not qualify for the Volvo Car Scandinavian Mixed.
19. The Appellants (except Mr Reed) each played in the Centurion.
20. By letters dated around 15 June 2022, PGAET notified each of the Appellants that it considered their participation in the Centurion without a Release to have breached the CTR provisions of the Handbook and invited submissions.
21. By letters dated around 24 June 2022, PGAET notified each of the Appellants that the Chief Executive of PGAET, Mr Pelley, had elected to determine whether participation in the Centurion was a breach of the Handbook, that he had concluded that such participation was a Serious Breach of the DPWT Code of Behaviour and imposed upon

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the Appellants sanctions of: (1) a fine of £100,000; and (2) suspension from participation in the 2022 edition of the Genesis Scottish Open and the Barbasol Championship each taking place on 7-10 July 2022 and the Barracuda Championship on 14-17 July 2022, stating this meant that the Appellants “are ineligible to participate in such tournaments in any capacity and where applicable you have been duly removed from the entry lists for these tournaments”.

22. As to Mr Reed, he agreed with LIV Golf to play in LIV Portland and requested a Release from the PGAET. By a letter dated 28 June 2022, the request was refused.
23. Mr Reed played in LIV Portland.
24. By a letter dated 30 June 2022, the PGAET notified Mr Reed, that it considered his participation in LIV Portland without a Release to have breached the CTR provisions of the Handbook and invited submissions.
25. By a letter dated 3 July 2022, the PGAET notified Mr Reed that the Chief Executive had elected to determine whether participation in Portland was a breach of the Handbook, and that he had concluded that such participation was a Serious Breach of the DPWT Code of Behaviour and imposed upon Mr Reed sanctions of: (1) a fine of £100,000; and (2) suspension from participation in the Genesis Scottish Open / Barbasol Championship on 7-10 July 2022, and the Barracuda Championship on 14-17 July 2022.

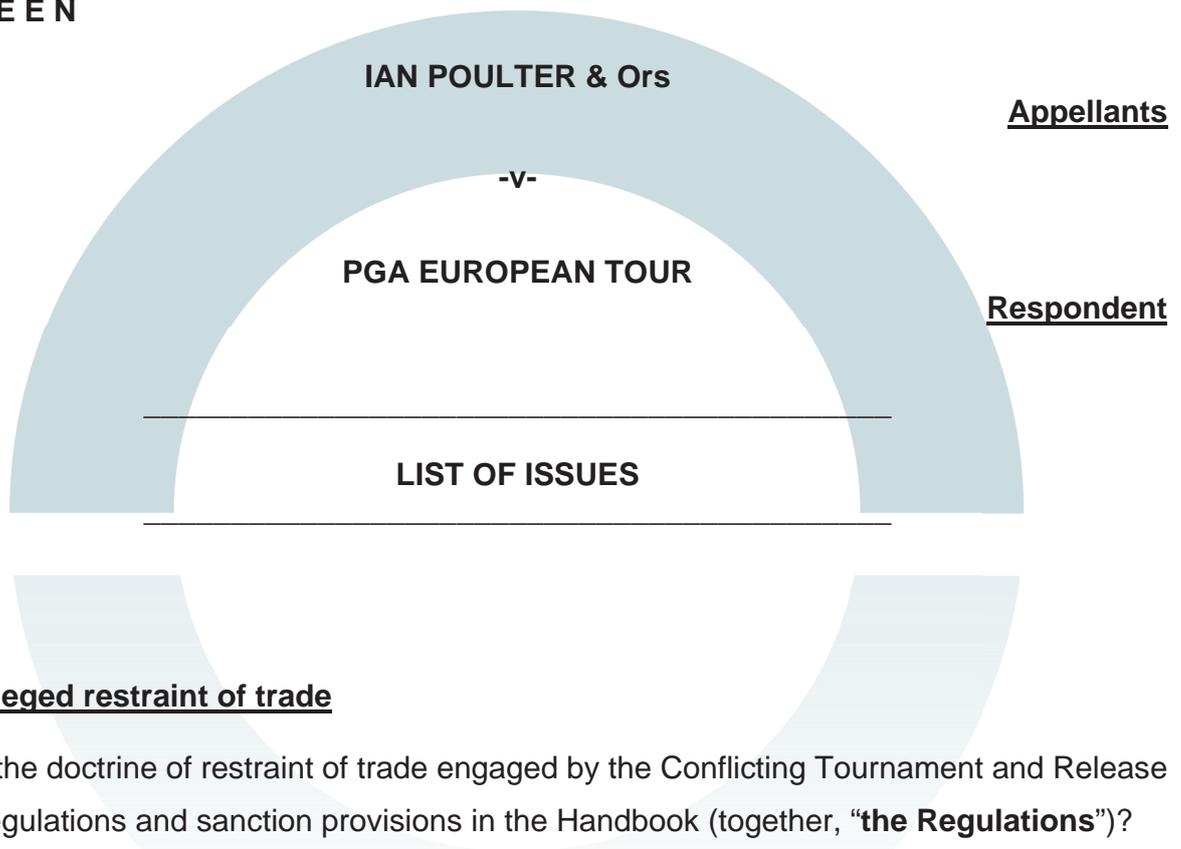
Appendix 7

IN THE MATTER OF A REFERENCE
UNDER THE DP WORLD TOUR MEMBERS'
GENERAL REGULATIONS HANDBOOK 2022

BEFORE A PANEL APPOINTED UNDER REG. F(II)(3)(d)

Phillip Sycamore CBE
Charles Flint KC
James Flynn KC

B E T W E E N



A. Alleged restraint of trade

1. Is the doctrine of restraint of trade engaged by the Conflicting Tournament and Release Regulations and sanction provisions in the Handbook (together, “**the Regulations**”)?
2. If so, is the restraint reasonable and proportionate between the parties? In particular, does it pursue relevant legitimate interests of the PGAET and go no further than is necessary to protect those interests?
3. If the restraint is reasonable in the interests of the parties, is it nevertheless unreasonable as being contrary to the public interest?

Appendix 7

B. Alleged breach of competition law

4. Do the Regulations and their application engage s.2 of the Competition Act 1998 (the 'Chapter I prohibition') on the basis that they prevent, restrict or distort competition in the UK by object?
5. If the Regulations and their application do not amount to an object restriction, do they engage the Chapter I prohibition on the basis that they prevent, restrict or distort competition by effect within the UK?
6. If the Regulations and their application would otherwise be characterised as having the object and/or effect of restricting competition, are they objectively justified such that they fall outside the Chapter I prohibition on the basis that:
 - (a) in circumstances where the panel is satisfied that the Regulations pursue one or more legitimate objectives, they are inherent in and proportionate to any such objectives (as required for ancillary restraints under the test in *Wouters / Meca-Medina*, to the extent that this test applies); or
 - (b) otherwise, they are objectively necessary for the existence or survival of a legitimate main operation or activity (as required for ancillary restraints under *Mastercard*, to the extent that this test applies)?
7. If the Regulations and their application would otherwise be characterised as having the object and/or effect of restricting competition, do the Regulations satisfy the cumulative criteria set out in s.9 Competition Act 1998 such as to be exempt from the Chapter I prohibition? In particular, do the Regulations in the way they are applied:
 - (a) contribute to improving production or distribution, or promoting technical or economic progress, while allowing consumers a fair share of the resulting benefit; and
 - (b) without imposing on the undertakings concerned restrictions which are not indispensable to the attainment of those objectives; or affording the undertakings concerned the possibility of eliminating competition in respect of a substantial part of the products in question.

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C. Alleged excess of powers and/or breach of contract

8. In deciding whether to grant the Releases and/or to impose sanctions, was the PGAET subject to express and/or implied duties to adopt a fair procedure, to act fairly, rationally, not capriciously and not for an ulterior or improper purpose, in accordance with applicable law and its procedure/a fair procedure?
9. If so, did the PGAET breach such duties?

D. Sanction

10. If the Appellants did breach a provision of the Code of Behaviour contained in Regulation F of the Regulations, what is a reasonable and proportionate sanction to be imposed? (To the extent relevant, was it a reasonable and proportionate sanction that was imposed by the PGAET, consisting of (a) suspension from the Barbasol Championship (7-10 July 2022), Genesis Scottish Open (7-10 July 2022) and the Barracuda Championship (14-17 July 2022) and (b) a £100,000 fine?