

IN THE MATTER OF A REFERENCE

UNDER THE PREMIERSHIP REGULATIONS 2021-22 SEASON

BEFORE A PANEL APPOINTED UNDER REGULATION 4.4(j) OF THE REGULATIONS

THE RT HON SIR GARY HICKINBOTTOM, CAROL COUSE AND JONATHAN RENNIE

IN THE MATTER OF

**THE CANCELLATION OF THE GALLAGHER PREMIERSHIP RUGBY MATCH BETWEEN
WORCESTER WARRIORS AND GLOUCESTER RUGBY**

REASONED DECISION

Introduction

1. Worcester Warriors (“Worcester”) and Gloucester Rugby (“Gloucester”) had a scheduled Gallagher Premiership Rugby match fixture on Friday 25 March 2022 at 7.45pm (“the Match”); but the Match was cancelled by Worcester that afternoon because they were unable to field six fit and able front row players as required by the Premiership Regulations 2021-22 Season (“the Regulations”). Later in this decision we will have to go into the facts in more detail but, in short, Worcester had sufficient hookers and loose head props (i.e. two of each), the problem of availability being specifically in respect of tight head props.
2. Under the Regulations, as a result of fixture congestion caused by the COVID-19 pandemic, the cancelled Match will not be re-scheduled and played. The Regulations provide for how the deemed result of the Match, and the consequential league points, are to be determined.

3. Premier Rugby Limited (“PRL”) wrote to Sport Resolutions UK (“SRUK”) on 5 April 2022 asking for a Panel to be convened under regulation 4.4(j) to determine the result of the Match and consequential award of league points. The Chairman gave directions following a hearing on 8 April 2022. The Panel was duly convened; and, following the lodging of evidence and written submissions, there was an in-person hearing on 19-20 April 2022 at which Worcester were represented by Martin Budworth of Counsel, and Gloucester by Nick De Marco QC. We are grateful to them for their assistance.
4. In addition to the written evidence we received, at the hearing, we heard oral evidence from the following witnesses called by Worcester: Luke Broadley (First Team Manager), Steve Diamond (Lead Rugby Consultant, and effectively Director of Rugby and Lead Coach), Jamie Hamment (Head of Medical Services), Jason Whittingham (Co-Owner), Gene Willis (COVID-19 Manager and Head of Stadium Operation) and Dr Nick Tait (Club Doctor). We heard also heard oral evidence from the following witnesses called by Gloucester: Lance Bradley (Chief Executive Officer), Alex Brown (Chief Operating Officer), Eoin Power (Head of Medical Services) and Martin St Quinton (Chairman).
5. On 21 April 2022, the Panel announced its decision that, under regulation 4.4(j)(iii), the Match result shall be 20-0 in favour of Gloucester and that, in respect of the Match, Gloucester shall be awarded five league points. We indicated that a reasoned decision would follow. This is that reasoned decision, to which each member of the Panel has contributed.
6. Unless otherwise indicated, in this decision, references to regulations are to the Regulations which applied to this fixture.

The Regulations

7. The 2021-22 season has been played against the backcloth of the COVID-19 pandemic. Regulation 1.9 provides:
 - “(a) In order to cater for the ongoing impact of the global Covid-19 crisis on rugby union in England, Covid-19 regulatory variations have been agreed and put in place to ensure that, as far as possible, the regulations are flexible enough to

deal with and adapt to the ever changing Covid-19 landscape. This flexibility needs to be balanced against the overriding objective of the RFU [the Rugby Football Union] and PRL to deliver meaningful and authentic competition and maintain the integrity of the competition and to ensure the player welfare is at the forefront.

- (b) In the event of any conflict between Schedule 5 and the remainder of these Regulations, Schedule 5 shall prevail.”

8. Regulation 3.4, so far as relevant, provides:

“(b) In the interests of safety each team playing in the Premiership must have at least six (6) fit and able Players in the squad who can play at hooker, tight head prop and loose head prop who are suitably trained and experienced to ensure that on the first occasion that a replacement in any front row position is required (whether due to injury or consequent to a Player(s) being temporarily suspended or ordered off) the team can continue to play safely with contested scrums. In the event that a Club is unable to field those six players, the Match shall be cancelled. PRL shall determine whether this is the direct result of Covid-19 and:

- (i) if it is as a direct result of Covid-19, then Schedule 5 shall apply; or

- (ii) if it [is] not as a direct result of Covid-19, then Regulation 3.4(c) and Regulation 4.4(j) shall apply.

(c) If a Match is completed with or contains uncontested scrums, the Club that was responsible for causing uncontested scrums must upon the request of PRL provide to PRL such information as it may require including if requested a medical report identifying the injuries sustained by its front row Players which must be signed by the Club Doctor, Club CEO and Director of Rugby. Without prejudice to Regulation 4.4, PRL may take such action it deems appropriate in respect of any suspected, alleged or actual breach of this Regulation 3.4 as it shall decide and shall notify all Clubs. Any Club may appeal against the decision of PRL in accordance with Regulation 14.2.

9. Three initial points can usefully be made about regulation 3.4.

- (i) Regulation 3.4(c) has no application to the circumstances of this case, as it appears to apply to a match which has commenced. In any event, insofar as the possibility of a match being staged without contested scrums throughout was raised by Worcester with PRL (which had the power to agree such a proposal), it was not raised with Gloucester, does not appear to have found favour with PRL and was not pursued. We do not need to consider regulation 3.4(c) further.
- (ii) It is clear that the decision of PRL under regulation 3.4(b) as to whether a cancellation is “the direct result of Covid-19” is binary; and it determines whether (i) Schedule 5, or (ii) regulation 4.4(j) applies. One or the other applies automatically: this Panel has no discretion in relation to which applies.
- (iii) Where regulation 3.4(b)(i) says “if it is as a direct result of Covid-19, then *Schedule 5* shall apply”, that must be a reference to the provisions of Part C of Schedule 5 (set out in paragraph 10 below) which relate to the deemed result and allocation of league points where a match is cancelled. Part B of that Schedule concerns the process by which PRL determine, in advance, whether a match should be cancelled. However, under regulation 3.4(b), cancellation has already been made before Schedule 5 is said to apply. So, despite the opening wording of paragraph 1 of Part B (which appears to be restrictive), regulation 3.4(b)(i) can only relate to the result and league points provisions in Part B of that schedule. As we understand it, that was the common position of the clubs before us.

10. Schedule 5 is headed “Covid-19 Variations”. It provides, so far as relevant, as follows (all emphasis in the original):

“Part A: Background

1. In Season 2021/22, there is no ability to reschedule fixtures due to the congested dates because of Covid-19 (other than the possibility to reschedule matches to another date or time on the same weekend). All fixtures within the Premiership League should be treated equally, but the Semi-Finals and Final need to be treated differently.
2. This Schedule identifies the process which will be followed decide upon whether a Match should be cancelled and the consequences of any cancellation.

Part B: Cancellation of Matches

1. Where any governmental authority (by way of example only, local or national Public Health England) recommends or requires that a Match cannot take place on the date on which it was scheduled:
 - a. Part C of this Schedule 5 shall apply to Matches in the Premiership League Season; ...
2. Where there is no recommendation or requirement from any governmental authority that a Match should not take place but either of:
 - a. the PGB [i.e. the Professional Game Board established pursuant to the agreement made between the RFU, PRL and the Rugby Union Clubs for the time being members of the Premiership for the period from 1 July 2016 to 30 June 2024, and with any amendments agreed from time to time] Medical Advisory Group; or
 - b. the PGB Testing Oversight Group,

consider that the match taking place presents a risk to the health of players, Match Officials or staff of either Club because of the risk of infection of Covid-19, that group may refer the matter to the PGB with a recommendation of the same (a "**Referred Match**").
3. If a Referred Match is referred to the PGB, the RFU and PRL shall procure that the PGB shall meet as soon as practicable. The PGB shall make a recommendation to the PRL Panel as to whether the Referred Match should take place or be cancelled. In order to fulfil this function, the PGB may convene a meeting of such groups (by way of example only, the Testing Oversight Group or the Medical Advisory Group) as it sees fit in order to examine the matter and to make a further recommendation to the PGB).
4. The PRL Panel shall determine whether the Referred Match should take place or be cancelled.
5. The Clubs recognize that assessing the risk to the health of individuals may be a subjective matter and that it is reasonable for all stakeholders to take a

conservative approach. Any determination will be made on a case by case basis and will not be determined by any specific number of positive Covid-19 tests.

Part C: Consequences of a Cancelled Matches: Premiership League Season

The Panel

1. In the event that the PRL Panel decide that a Referred Match in the League Season is cancelled, or any governmental authority recommends or requires that a Match in the Premiership League Season is cancelled (in either case, a **“Cancelled League Season Match”**), then (without prejudice to any action which may be taken under or relating to any Covid Minimum Operating Standards):
 - a. the result of that Cancelled League Season Match shall be deemed to be 0-0; and
 - b. four league points shall be allocated to Club who was able to play the Cancelled League Season Match and two league points shall be allocated to the other Club.
 2. In the event that the PRL Panel considers that both Clubs may have been unable to fulfil a League Season Match by reason of Covid-19, then (without prejudice to any action which may be taken under or relating to any Covid Minimum Operating Standards):
 - a. the result of that Cancelled League Season Match shall be deemed to be 0-0; and
 - b. two league points shall be allocated to each Club.
 3. The decision of the PRL Panel as to whether it is one or both clubs who have been unable to fulfil the match, and the decision as to the allocation of points shall be subject to appeal under RFU Regulation 19.12.6 (and for the purposes of that Regulation, the PRL Panel shall be deemed to be a Constituent Body Disciplinary Panel).”
11. Therefore, under Schedule 5, Part B sets out a procedure whereby a match can be cancelled, prior to the event, in one of two ways. First, it may be cancelled because the government recommends or requires it to be cancelled. Second, on the basis of a

recommendation of the PGB, PRL can determine whether a fixture should be cancelled as a result of COVID-19 or whether it should be played. Part C provides for the consequences in terms of deemed result and league points of cancellation by either route.

12. Regulation 4.4 deals with “Non-Fulfillment of Match Obligations”. Under the heading “Failure to Fulfill Obligations”, provides (so far as relevant):

(i) No Club shall, without just cause (it being for a PRL SRUK [i.e. Premier Rugby Limited Sport Resolutions UK] Panel, to determine whether or not just cause exists (provided that if a match cannot take place for reasons of Covid-19, Schedule 5 shall apply)), fail to fulfil its fixture obligations in respect of a Match on the date and at the time appointed for such fixture.

(j) In the event that a Club shall so fail to fulfil a Match for reasons other than Covid-19, PRL shall, and subject to the Club’s right of appeal pursuant to Regulation 15.2, convene a PRL SRUK Panel to decide the matter as follows:

[There is no (i) or (ii).]

(iii) Where the unfulfillment of a Premiership League Match is due to the unavailability of players due to injury or unavailability (which is not related to Covid-19), the match result shall be 20-0 and 5 league points shall be awarded to the opposition Club who could play the match.

(iv) Where a Premiership League Match is unable to be played due to a Club’s inability to fulfil the fixture due to non-playing issues (e.g. bad weather, frozen pitch), points shall be attributed as follows

a. Where no fault is attributed and a Club has taken all possible steps to ensure that the fixture is played, each Club shall be awarded 2 league points;

b. Where a Club has been shown not to have undertaken all possible steps (e.g. not complied with the agreed bad weather protocols), the Club not at fault shall be awarded the 20-0 win and 5 league points

(v) All decisions of PRL and/or the PRL SRUK Panel pursuant to this Regulation 4.4 shall be subject to the right of the affected Clubs to appeal

the decision pursuant to Regulation 14.2.

(k)

(l) In addition to and whether or not a penalty is imposed upon a Club by PRL or the RFU where in the opinion of the RFU the Club failed to honour its Match obligations a Club shall be liable to pay to any opposing Club compensation in respect of the losses, damages liabilities, costs or expenses suffered or incurred by such opposing Club as a result of such failure. The amount of such compensation will in default of agreement between the Clubs be determined by the RFU.”

13. Therefore, regulation 4.4(j) sets out the consequences in terms of deemed result and league points where a club fails to fulfil a match “for reasons other than Covid-19”. It generally provides that, if a club does not fulfil a fixture, then that club has a deemed result of 0-20 against them and they are awarded no league points, and their opponents are awarded five league points. There are supplemental provisions covering scenarios in which this general rule does not apply, namely where (i) a fixture is cancelled on grounds of non-playing issues and the club unable to fulfil the fixture has taken all possible steps to ensure that the fixture is played, and (ii) a fixture is cancelled on grounds of non-playing issues and the club unable to fulfil the fixture has not taken all possible steps to ensure that the fixture is played, and (iii) a fixture is cancelled on playing issues grounds involving particular COVID-19 issues (the scope of which being something to which we shall return) when Schedule 5 applies. In the case of each of these scenarios, the Regulations provide for a particular deemed result and allocation of league points.
14. What happens if a match is abandoned (rather than cancelled) is dealt with somewhat differently in regulation 4.4(d)-(h), with an independent panel having a discretion, no doubt to allow account to be taken of the score from the part of the match that was in fact played.

The Facts

15. It was rightly common ground that, whilst maintaining the paramountcy of player welfare, the Regulations impose upon Premiership rugby clubs a clear and firm obligation to field a team for each fixture, as reflected in regulation 4.4(i). The cancellation (and, particularly,

the late cancellation) of a match has substantial adverse consequences for the fans who attend matches, for the home club whose income from a match is likely to be a six-figure sum, for broadcasters and their viewers, club sponsors and partners, and for the integrity of the competition; consequences which are compounded by the fact that, due to fixture congestion resulting from the COVID-19 pandemic, there is no opportunity for a cancelled match to be played later.

16. Furthermore, where a match cannot be played, clarity and predictability are important principles running through the Regulations which prescribe the deemed result and league points in each of several sets of circumstances, appearing to cover all possible situations, described in Schedule 5 and regulation 4.4(j). It was – in our view, quite rightly – not suggested by either club that this Panel has any discretion in relation to these matters. The dispute between them is as to the set of circumstances into which this case falls.
17. Of course, a match might be cancelled for a variety of reasons, notably player issues (i.e. non-availability due to injury or illness) and non-player issues (e.g. bad weather). We are concerned with the former.
18. At the relevant time, Worcester had players who were injured, and also players with either COVID-19 or non-COVID 19 viral infections. Some were both injured and infected. We did not have before us medical records of individual players; but Worcester helpfully produced the player availability charts which are completed on each training day, setting out the availability of each player, any injury (including illness) from which he is suffering, the date by which it is expected such players will be fit for selection and “notes” prepared by Jamie Hammett (Worcester’s Head of Medical Services) which incorporate the essential parts of the medical records insofar as they relate to availability. The following is largely derived from those schedules, and the proposed team sheets for the Match circulated internally on Monday 21 March and Thursday 24 March 2022.
19. In the week commencing Monday 21 March 2022, several Worcester players were isolating following positive COVID test results, as follows.

██████ (back row) (“██████”): On 21 March 2022, ██████ was self-isolating. His earliest possible date for return to training was Thursday 24 March, subject to a negative lateral flow test (“LFT”) on each of days 5 and 6. He is recorded as having a positive LFT on the

morning of 21 March. In the event, he had negative tests on Wednesday 23 and Thursday 24 March, had no symptoms of any concern, returned to training on Thursday 24 March, and was available for selection on Friday 25 March.

██████████ (scrum half) (“██████████”): On 21 March 2022, ██████████ too was self-isolating. His earliest possible date for return to training was noted as being Friday 25 March, subject to negative LFTs on days 5 and 6. However, the record for Thursday 24 March shows that he had had negative LFTs on Wednesday 23 and Thursday 24 March, had no symptoms of any concern, returned to training that day, and was available for selection on Friday 25 March.

██████████ (inside centre) (“██████████”): ██████████ tested positive for COVID-19 on Sunday 20 March; but was also recovering from a cruciate ligament operation and was not expected to play before the start of the following season. Irrespective of COVID-19, he would not have been available for Friday 25 March.

██████████ (tight head prop) (“██████████”): ██████████ tested positive for COVID-19 on Thursday 17 (twice) and Friday 18 March 2022, the Thursday tests being LFTs and the Friday test being a polymerase chain reaction test (“PCR test”). He was consequently required to spend six days isolation, with negative LFTs on days 5 and 6 to enable his return to a rugby environment. He had negative LFTs on Wednesday 23 and Thursday 24 March 2022; but, on his return to the club on 24 March, he still had what are described in the daily player report as “mild respiratory symptoms” which meant he could not train effectively; and, under the PRL Guidelines then in place, he was required to follow a ten-day (rather than six-day) protocol. That meant that he could not be considered for selection until Monday 28 March. Worcester therefore knew from Friday 18 March that there was a risk that ██████████ would not be fit to play on Friday 25 March post-COVID-19; and, from the morning of Thursday 24 March, they knew that he was definitely not available for the Gloucester fixture the following day.

██████████ (loose head prop) (“██████████”): ██████████ had a positive LFT on Thursday 24 March and two further positive LFTs on Friday 25 March which, subject to a confirmatory PCR test (which was sent off on 24 March, and proved positive), meant that he was put into self-isolation with a first possible return date of Wednesday 30 March.

██████████(lock) (“██████████”): ██████████ also had a positive LFT on Thursday 24 March and again on Monday 28 March, which meant that he was put into self-isolation with a first possible return date of Wednesday 30 March.

██████████(lock) (“██████████”): ██████████ was already nursing a medial collateral injury (a knee sprain) which was braced to encourage healing. However, he also tested positive in a LFT taken on the morning of Friday 25 March.

20. A number of other players had symptoms of a viral illness – some are recorded as having diarrhoea and vomiting – but were either not COVID-tested or were tested and found to be negative (e.g. ██████████ (tight head prop)). From Wednesday 23 March, Dr Nick Tait, the Worcester Club Doctor who gave evidence to the Panel, himself had this virus, which he said he was confident was a non-COVID virus that was going round. In his email to Colin Goldring (Worcester’s Co-Owner) of 12 April 2022, he said that he was unwell with “the same virus” as these other players. Of the players with these various symptoms, it seems that only ██████████ was COVID-tested, and his results were negative. His virus was not COVID. In his evidence to the Panel, Dr Tait said that, whilst he could not rule out the possibility that some of these other players had COVID-19, he considered it likely that the players with viral symptoms who were not tested, or who were COVID-tested with a negative result, had a non-COVID virus. On all of the evidence, on the balance of probabilities we are satisfied that, other than the players referred to above who had positive COVID tests (including ██████████), the players with viral symptoms had a non-COVID virus.
21. In terms of player availability, a particularly sensitive area is the front row because of the regulation 3.4(b) requirement for six suitably experienced and trained front row players to be fielded, failing which the match has to be cancelled. Given the specialist nature of each of the front row positions and the detailed requirements of regulation 3.4(b), although a few players are able to play at (e.g.) both loose and tight head, a club must field at least six front row players of whom, for each front row position, at least two (one player and one substitute) are “suitably trained and experienced” to play in that position.
22. At all relevant times, Worcester had two players available for both hooker and loose head prop. One of those players was ██████████ (“██████████”), an Academy player, who was

essentially a loose head prop but who had played at least one match at tight head. In the team sheet circulated on Thursday 24 March (the day before the Match), [REDACTED] was named at loose head, with [REDACTED] as a substitute. Those two were sufficient for that position; but no other loose head props were available.

23. Otherwise, Worcester had six registered players at tight head prop. However, (i) one of those players had retired as a result of injury earlier in the season, and (ii) a second player had a long-term injury that had ruled him out for the rest of the 2021-22 season. The number of players who were registered, able to play at tight head and potentially available was therefore reduced to four, as follows:

[REDACTED]: See above. He was still recovering from the symptoms of COVID-19.

[REDACTED] (“[REDACTED]”): [REDACTED] impinged his ankle before Worcester’s game with Exeter on Saturday 19 March 2022. Although he was medicated and played in that match, he was unable to train on Tuesday 22 and Wednesday 23 March. On Thursday 24 March, he reported for training but only trained off-feet, as: “Unwell with upper respiratory tract symptoms”. An LFT that day was negative. His condition is recorded as deteriorating overnight, and, when he reported for training on Friday 25 March, it is recorded that he was sent home with a high temperature and a sore throat. A second LFT taken that day was also negative.

[REDACTED] (“[REDACTED]”): [REDACTED] was on the published team sheet for the Match as tight head prop on both Monday 21 and Thursday 24 March. However, he reported to the club on Friday 25 March (the evidence is not entirely clear, but apparently at about lunchtime) with an upper respiratory tract infection, cough, chills, myalgia etc. It is noted: “Not fit to play”. He too is recorded as being much improved by Monday 28 March.

[REDACTED] (“[REDACTED]”): [REDACTED] was on the team sheet as a front row substitute on both Monday 21 and Thursday 24 March. However, he had suffered acute tightening of the calf during training on Tuesday 22 March, with residual symptoms recorded the following two days. He was due to have a fitness test on Friday 25 March; but was feverish overnight, with a cough and myalgia, and a high temperature and pulse. He failed a fitness test on the morning of Friday 25 March. He is recorded as being much improved on Monday 28 March, with a projected return for the match on 2 April.

As indicated above, [REDACTED], [REDACTED] and [REDACTED] were unfortunately suffering from a non-COVID virus.

24. Consequently, on the afternoon of the Match (Friday 25 March), Worcester had no available tight head props.

25. By mid-Thursday 24 March 2022, Worcester had concerns about the risk that they would not have sufficient registered front row players available for the Match the following day. Loaned front row players could be registered up to 5pm of the day of the Match. Understanding the risks of unavailability at tight head, at 12.31pm on Thursday 24 March, Luke Broadley (the Worcester Team Manager) circulated a message to a WhatsApp group comprising the Premiership club team managers:

“We have illness and covid in camp. If anyone has any loose or tighthead props available could you please drop me a message please.”

It appears that all but three of the recipients opened that message before 1pm, and a further recipient opened it just after 3pm. However, no response was received from any.

26. Mr Broadley did not telephone, or otherwise contact, any other club to seek a loan player. However, he asked two Worcester Development Coaches, Johnny Goodridge and Chris Morgan, to telephone the Championship clubs they had previously coached (Hartpury RFC and Cornish Pirates RFC respectively), to see whether they had any players to loan; but (he said) they came back, before he contacted PRL, to say that they did not have any available props.

27. At 2.27pm on Thursday 24 March, Mr Broadley emailed the PRL Rugby Director (Phil Winstanley) to say that Worcester had “widespread number of COVID symptoms/illness in camp”, and, when combined with current front row injuries, they were short of numbers in the front row. He said that [REDACTED] faced a fitness test the following day but, if he failed that test, Worcester “have no tighthead cover available”. That was followed by an email timed at 2.29pm to Sam Raven (Gloucester’s Team Manager) saying Worcester had “a COVID outbreak in camp”, and Worcester were doing everything they needed to do to go ahead with the fixture; and a further email at 4.05pm saying Worcester were

down to their last four props. These four, however, in fact included [REDACTED] who faced a fitness test the following day.

28. The following day, not having heard anything further, at 8.45am Lance Bradley (Gloucester's Chief Executive Officer) emailed Peter Kelly (Worcester's Chief Executive) for confirmation that the Match was going ahead. This was the first Mr Kelly had heard of any issue, and he said he would investigate. At 9.35am, Alex Brown (Gloucester's Chief Operating Officer) emailed Mr Winstanley at PRL, who was unaware of any further developments, and said he too would investigate.
29. Mr Broadley emailed Mr Raven and Mr Winstanley at 10.24am, by when [REDACTED] had failed his fitness test so that Worcester were down to three props. Mr Broadley said that Worcester were unable to field the necessary front row forwards to fulfil the fixture that evening.
30. There was then a flurry of emails. Mr Winstanley emailed Mr Broadley at 10.28am, saying that Gloucester had front row cover and there was time to register that player; and a loan from another club was also an option. Mr Broadley was asked to consider this and report back. In the meantime, at 10.28am, Mr Brown emailed Mr Broadley, Mr Winstanley and others saying that Gloucester were willing to loan a loose head prop ([REDACTED] ("[REDACTED]")) and/or a tight head prop ([REDACTED] ("[REDACTED]")): he had been trying to call Mr Broadley but could not get through. [REDACTED] was a Hartpury player who Gloucester had loaned for a cup match the following mid-week, but Hartpury had agreed that he could be loaned to Worcester for the Match.
31. Mr Broadley responded at 11.08am, saying that [REDACTED] would not fit the bill, as Worcester were short of a tight head, not loose head, prop. Mr Broadley expressed concern about player safety and perception in respect of Gloucester loaning a tight head to play against Gloucester that evening. In the event, [REDACTED] was not pursued.
32. In the meantime, the club owners became involved. At 10.49am, Martin St Quinton (Gloucester's Chairman) messaged Jason Whittingham (who, with Mr Goldring, was Worcester's Co-Owner) asking Worcester to do everything they could to raise a team as "if we call the game off it will cost us £250,000". He offered to lend a front row player or two, if that would help get the game on. Mr Whittingham responded: "We want to play

and are doing all we can to field a team. Steve [Diamond] due to update us shortly.” He also telephoned Mr St Quinton at about 11am, to say that Worcester were struggling and unlikely to field a team. Mr St Quinton’s evidence was that he made clear to Mr Whittingham that cancelling a match was very serious, given that a large crowd was expected and the Match was to be televised. Mr St Quinton was clear that Mr Whittingham did not appear to appreciate the seriousness of a cancellation until he had received Mr Winstanley’s email of 12.24pm; but Mr Whittingham, although he accepted that he might have said that, denied that that was in fact the case. At about 3.30pm (after the Match had been cancelled), they spoke again. What was said is not agreed. Mr St Quinton’s evidence was that Mr Whittingham told him he had been “outvoted” by Mr Goldring and Mr Diamond, who did not wish the Match to be played because Worcester had an important Premiership Cup match against Bath the following Wednesday. Mr Whittingham accepted that he may have said he had been “outvoted” – although that was not in fact the case – but he strongly denied suggesting that the Match had been cancelled because of another fixture on the following Wednesday.

33. To resume the chain of emails between the club team managers and PRL, at 11.56am, Mr Broadley emailed Mr Winstanley and Mr Raven (and others at both PRL and Gloucester):

“Further to conversations with [PRL] and between the relevant club owners, for clarity and to confirm that we are not in a position to play the fixture this evening due to COVID-19/illness in the squad.”

34. Mr Winstanley responded at 12.24pm:

“I have spoken to Steve [Diamond (the Worcester Lead Rugby Consultant, and effectively their Team Coach and Director of Rugby)] in the last 20 minutes, and he is ringing me back when he has established further information. It is clear that you have problems in the squad but, except for a tight head prop, you have sufficient players to fulfil the fixture. Therefore, if you have the ability to add a player before the extended deadline (5.00pm) you should. It appears from the information provided that this isn’t down to COVID but other illnesses and injuries and, under Premiership Regulations, this becomes a non-fulfilment of a fixture issue and is a matter for an independent panel appointed by SRUK and/or the RFU if they want to call this matter in. This

SRUK/RFU Panel has broader powers than the panel created for COVID issues in relation to points allocations and compensation....

I await Steve's feedback but if your position remains the same, I will discuss with the RFU and move to appoint SRUK or ask for an RFU Panel as soon as possible.

In the meantime, I urge you to continue your efforts to identify appropriate players."

This was therefore a request for Worcester to reconsider, and renew their efforts to field a team, before in fact finally cancelling.

35. Mr Broadley responded at 1.59pm:

"Thanks for this.

Further to your conversation with Steve, we have continually attempted to field a team at every opportunity today but unfortunately the situation is deteriorating and we have further confirmed illness cases so we are unable to play the fixture."

That was confirmation that Worcester did not intend to fulfil the fixture. It was the final decision by Worcester to cancel the fixture.

36. The other players who had by the time of this email reported ill included [REDACTED]. As we have indicated, although the time he reported is not entirely clear on the evidence, it appears to have been around lunchtime that day. In any event, as at 1.59pm on 25 March 2022, Worcester had no available registered tight head props, with the possible exception of [REDACTED] but (i) Worcester did not want to play him at tight head following the only one game in which he had played on that side, and (ii) in any event, Worcester did not have any further "spare" loose head props and therefore moving [REDACTED] to tight head did not assist in compliance with regulation 3.4(b).

37. PRL replied to say that steps would be taken to make an announcement of cancellation at 2.30pm. An announcement was made, and the Match was not played.

38. On 5 April 2022, Andrew Rogers (the Head of Governance at PRL) wrote to SRUK, as follows:

"I am writing to request that [SRUK] convenes an independent panel pursuant to Premiership Regulation 4.4(j) to decide the matters relating to the cancelled [Match].

This [M]atch was due to be played on Friday 25 March 2022 but was cancelled by Worcester... because they did not have sufficient front row players, as required in Premiership Regulation 3.4.

[PRL] is of the view that this was not as a direct result of Covid-19 and requests that the PRL SRUK Panel (as defined in the ... Regulations] decides the matter...".

39. This Panel was duly convened to deal with the matters as set out in that letter.

Discussion and Conclusion

40. There was agreement about the correct general approach to the construction of the Regulations, i.e. that they are to be treated as a "business document" and should therefore be "construed so as to make them workable" (Jones v BWE International Limited [2003] EWCA Civ 298; [2004] 1 BCLR 406 at [22] per Arden LJ (as she then was), and South Shields Football Club 1888 Limited v The Football Association Limited (Rule K Arbitral Tribunal Award dated 5 June 2020 at [51])). We agree as to that approach.

41. However, that having been said, the drafting of the Regulations was not as clear as it might have been. As Counsel indicated, the COVID-19 amendments to the Regulations were drafted urgently and against the backdrop of a quickly evolving situation in respect of the virus – which, in our view, substantially mitigates any criticism of the draftsmen – but it has meant that the wording of the relevant Regulations is not without its challenges, and no construction put forward to us is entirely satisfactory.

42. The starting point is regulation 3.4(b), quoted above (see paragraph 8). That requires each team to have six fit and able, and suitably trained and experienced, front row forwards. As we have described, given the specialist nature of the three positions, although some players may be able to play in more than one of them, the regulation requires each team to field at least two players who can play in each position. If a club cannot field such players, then (i) "the Match shall be cancelled" and (ii) PRL are required

to determine whether the inability to field the relevant players and thus the cancellation is “the direct result of Covid-19”.

43. There is no definition or assistance in respect of “direct result of Covid-19”. Mr Budworth in his closing submissions suggested that the “but for” test applied (i.e. the cancellation would be the direct result of COVID-19 if, but for front row players having COVID-19, sufficient players would have been available); and we will deal with that submission in due course (see paragraph 60 below). However, neither Counsel descended into the labyrinthine world of legal causation. In our view, they were right not to do so. As a practical commercial document, we do not consider that such an exercise would be appropriate. Under regulation 3.4(b), in our firm view, it is for PRL to assess and determine whether the cancellation was, in all the circumstances, a sufficiently “direct” result of COVID-19. That allows for a cancellation due to unavailability of front row forwards to result (“indirectly”) from COVID-19 and nevertheless be subject to the provisions of paragraph 4.4(j) rather than those of Schedule 5. The relevant circumstances include not simply the number of registered players in the relevant position(s) that are unavailable as a result of COVID-19 but also, if the club has insufficient front row players, the steps it has taken to obtain players on loan to enable a team to be fielded. That is the approach apparently taken in the three PRL Panel case awards to which we were referred (Cancellation of the Gloucester Rugby and Northampton Saints Match (PRL Panel Decision dated 3 October 2020), Cancellation of the Worcester Warriors and Harlequins Match (PRL Panel Decision dated 31 December 2020) and Cancellation of the London Irish and Bath Rugby Match (PRL Panel Decision dated 7 January 2021); and to have been common ground between the clubs here.
44. Under regulation 3.4(b), if the PRL determine that the inability of a club to field six appropriate front two forwards was “the direct result of Covid-19”, then Schedule 5 applies. If it determines that it was not, then regulation 4.4(j) applies.
45. It is clear from (i) the email from PRL (Mr Winstanley) to Worcester (Mr Broadley) at 12.24pm on 25 March 2022 (quoted at paragraph 34 above), and particularly (ii) the PRL reference letter to SRUK dated 5 April 2022 (quoted at paragraph 38 above), that the PRL considered that Worcester’s insufficiency of front row players and this the cancellation of

the Match was not as a direct result of COVID-19. Indeed, its determination to that effect was the basis of the reference to this Panel.

46. Mr Budworth submitted that paragraph 4.4(i), (j) and (l) have to be read together. Therefore, we should first decide whether, in failing to fulfil its fixture obligations in respect of the Match, Worcester had “just cause” for the purposes of regulation 4.4(i). “Just cause” (he submitted) meant simply that Worcester had taken reasonable steps to field six appropriate front row players and were not otherwise at fault for the unavailability of front row players and thus the cancellation of the Match. If they have shown just cause in this sense, then, he submitted, if the Match did not take place for reasons of COVID-19, then Part C of Schedule 5 applied. In fact, on the evidence, the Match did not take place because of the unavailability of ██████ as the result of continuing COVID-19 symptoms. Schedule 5 did therefore apply; and the deemed result should be 0-0, with Gloucester being given four league points and Worcester two.
47. Mr Budworth considered that regulation 4.4(j)(iii) is consistent with that construction. That provision only includes circumstances in which unavailability is not related to COVID-19 because, where it is so related, the case has already passed to be dealt with under Schedule 5.
48. Finally, he submitted that that construction of “just cause” also fitted with regulation 4.4(l), because a penalty and/or compensation only arises where a club has “failed to honour its Match obligations”. Where just cause for a cancellation is found, there is no failure to honour such obligations, and therefore no gateway into the provisions of the Regulations which deal with penalties and compensation.
49. Mr Budworth therefore submitted that, because ██████ was unavailable and but for that unavailability the Match could have proceeded, we should find that Worcester had just cause for cancelling the Match; the Match could not take place for reasons of COVID-19, and therefore Schedule 5 applied; and the deemed result under Schedule 5 should be 0-0 with Gloucester being awarded four league points and Worcester two.
50. However, we do not agree with that analysis of the Relevant Regulations, for the following reasons.

51. We consider the correct analysis to be simpler. Under regulation 3.4(b), PRL must determine whether the cancellation of a match because of unavailability of front row forwards is “the direct result of Covid-19”. If, as in this case, PRL determines that it is not the direct result of Covid-19, then regulation 4.4(j) applies. Regulation 3.4 does not refer to regulation 4.4(i) at all; and, in our view, when dealing with the issues of deemed result and league points, there is no need to engage with that provision. It is unnecessary to consider regulation 4.4(i) before arriving at regulation 4.4(j)(iii) from regulation 3.4(b): the application of regulation 4.4(j)(iii) does not require consideration of “just cause” or indeed of fault. We would add, for the sake of completeness, that in our view neither does regulation 4.4(l) engage regulation 4.4(i).
52. Regulation 4.4(j) requires a PRL SRUK panel to be convened; but the panel’s remit is restricted to deciding the matters referred to it “as follows”. Unavailability of players is dealt with in regulation 4.4(j)(iii). There is an issue within that provision as to what is meant by unavailability “which is not related to Covid-19”; but, otherwise, where a fixture is unfulfilled because of unavailability of players, “the match result shall be 20-0 and 5 league points shall be awarded to the opposition Club who could play the match”.
53. Mr Budworth submitted that, within regulation 4.4(j)(iii), the Panel must consider whether unavailability is or is not “related to Covid-19”. If it concludes that it is, then that throws the case into Schedule 5. Mr Budworth’s primary submission, as we understood it, was that the test for the necessary causal relationship between the unavailability and COVID-19 here (“related to Covid-19”) is different from the test in regulation 3.4(b) (“a direct result of Covid-19”) – it is a less rigorous test in that it requires less causal potency – but, he submitted, on the facts of this case it does not matter, because the crucial unavailability was that of ██████ whose unavailability on COVID grounds meets either formulation of the test and Schedule 5 is consequently engaged.
54. However, as a matter of construction, Mr De Marco submitted that the various phrases used in regulation 4.4 (“if a match cannot take place for reasons of Covid-19”, “fail to fulfil a match for reasons other than Covid-19”, “unavailability (which is not related to Covid-19)”) each merely reflect the “direct result” test in regulation 3.4(b). We agree.

55. The Regulations elsewhere describe the circumstances in which Schedule 5 applies (“the gateways”), namely (i) under Schedule 5, where the government recommends or requires that a match be cancelled; (ii) under Schedule 5, where PRL cancel a match following consideration of a recommendation by the PGB and (iii) under regulation 3.4(b)(i), where PRL determine that the cancellation of a match because a club is unable to field six appropriate front row players is “as a direct result of Covid-19”. We do not consider that regulation 4.4(i) or (j) provides for an additional gateway. We understand the tenets of construction that (i) where different formulations of words are used, there is a presumption that that is intended to convey substantively different concepts, and (ii) there is a presumption that all words used in a document are intended to have some substantive purpose and are not otiose. However, where a gateway into Schedule 5 is described elsewhere, the Regulations make the clear that a specific event must happen or a determination must be made to that effect which triggers entry into Schedule 5 (see, e.g., the opening of Schedule 5 Part C paragraph 1: we will return to regulation 3.4(b) shortly). There is no such wording in regulation 4.4. For example, the wording in regulation 4.4(i) (“...it being for a PRL SRUK Panel, to determine whether or not just cause exists (provided that *if a match cannot take place for reasons of Covid-19*, Schedule 5 shall apply)”) does not suggest that it is providing for a gateway into Schedule 5, but merely that, irrespective of “just cause”, Schedule 5 shall apply where a match cannot take place for COVID-19 reasons as described elsewhere in the Regulations. The phrases concerning COVID-19 causality in regulation 4.4(j) are to be interpreted similarly. We consider it is inconceivable that the words used in regulation 4.4 are intended to provide for a different test, under which Schedule 5 is engaged if a PRL SRUK panel such as this in circumstances in which COVID-19 has, in some (even indirect) way, contributed to the unavailability of relevant players irrespective of the circumstances (including efforts made by the club to loan players). For such a discretion or assessment to be read in is contrary to the whole nature of the Regulations.
56. Whilst not determinative here, we also agree with Mr De Marco’s primary case in respect of two further propositions relating to regulation 4.4.
57. First, he submitted that “just cause” in regulation 4.4(i) has nothing to do with either regulation 4.4(j) or (l), as Mr Budworth had submitted: it was simply a shorthand for the

circumstances described in the Regulation where there is a cancellation and the consequences provided for within the Regulations are other than a match result of 20-0 with one club being awarded five league points and the other club no points. Whilst we do not find “just cause” in this context an easy one, we do not accept Mr Budworth’s submission that the term introduces the concept of at-large reasonableness, rather than being a reference to something already found within the four corners of the Regulations themselves. Mr De Marco’s preferred construction explains the reference in regulation 4.4(i) to a PRL SRUK Panel determining “just cause”, because under the Regulations such a panel is ultimately responsible for determining whether a particular case falls within the provisions of (e.g.) Schedule 5 or regulation 4.4(j) that provide for such a conclusion.

58. Second, Mr De Marco submitted that the references to COVID-19 in regulation 4.4(j)(iii) was merely a reminder of the provision in regulation 3.4(b) under which PRL are required to determine whether a cancellation was “the direct result of Covid-19”: regulation 4.4(j)(iii) does not give a convened PRL SRUK panel such as this jurisdiction to revisit that issue. We again agree, primarily because of the lack of any wording clothing a panel with the power to redetermine the issue. Mr Budworth submitted that such a construction must be wrong, because it would leave a panel convened under regulation 4(j) nothing to decide. However, whilst in this particular case any decision under regulation 4(j) may be straightforward, there may be cases in which it is important to determine whether a case falls within regulation 4.4(j)(iii) or (iv); and, if the latter, whether it falls within (iv)(a) or (b). In any event, circumstances in which a match is cancelled for reasons of player unavailability other than as a direct result of COVID-19 appear to be not only extremely serious but extremely rare – the evidence suggests that this case may be unique, or at least there is no evidence of it having happened before – and therefore the appointment of an independent panel formally to determine (even if, in a particular case, that amounts to little more than a confirmation of) the consequences in terms of deemed result and league points is perhaps understandable. In any event, we consider the construction put forward by Mr De Marco to be tolerably clear.
59. However, our decision in this case does not rely on either of these propositions because, even if we are wrong on the primary basis for our conclusions and if (as Mr Budworth submits) regulation 4.4(j)(iii) gives us the power (or obligation) to determine for ourselves

whether the unavailability of tight head props and the cancellation of the Match was “the direct result of Covid-19” and/or “for reasons other than Covid-19”, then we would conclude that it was neither. In coming to that conclusion, we have taken into account in particular the following.

60. Insofar as the “but for” causation test applies (as Mr Budworth submitted it does), it was not satisfied in this case. It is not right to say that the Match would have taken place but for the unavailability of █████ who was still suffering from the symptoms of COVID-19: even if he had been available, no second tight head prop was available (█████ having failed a fitness test) and the unavailability of none of the other tight head props was related to COVID-19. The Match would still have had to be cancelled if the circumstances had been the same but █████ had not been unavailable because of his continuing COVID symptoms.
61. In any event, insofar as the test (or, if the tests are different, either test) involved consideration of the steps taken by Worcester to obtain loan players, on the evidence we do not consider they took sufficient steps.
62. Regulation 4(j)(iv), which concerns cancellation due to non-player circumstances such as weather, mitigates the result and allocation of league points only where “... no fault is attributed and a Club has taken all possible steps to ensure that the fixture is played...”. No such express mitigation appears in regulation 4.4(j)(iii). We consider that if, contrary to our primary view, such mitigation is relevant in (iii), the steps to be taken could be no less stringent.
63. But, even if that construction is incorrect, on the evidence, we do not consider that Worcester took either all possible or even reasonable steps to obtain loan cover. As we have described, their steps were limited to (i) a WhatsApp message to the team managers of the other Premiership clubs the day before the Match asking whether any front row forwards were available on loan for the following day, and (ii) telephone conversations with two Championship sides (Hartpury RFC and Cornish Pirates RFC) the day before the match. However, we accept the evidence of Mr Brown (who was previously Gloucester’s Team Manager, and was in that position when the WhatsApp group was set up) that the large amount of traffic on that group (perhaps, 50 messages per day) and the nature of

the group and messaging through it, meant that it was an unusual and unlikely to be an effective vehicle for obtaining a loan, particularly as team managers would not be primarily responsible for loans to and out of a club: the most effective way of obtaining an emergency loan would be by telephone contact with other clubs. No such contact was made with any Premiership club. Only two Championship clubs were contacted. No contact was made with anyone at other clubs. No contact was made with any club after the morning of Thursday 24 March 2022. The evidence of Mr Brown (who arranged for contact to be made with some Premiership and Championship clubs) suggested that the WhatsApp message was indeed ineffective, and (other than that made with Hartpury RFC and Cornish Pirates RFC which we have described) no other contact with clubs was made. Gloucester made enquiries of some other clubs through contacts that they had, which suggests that a late loan may have been possible even if Worcester's reluctance to take a loan from Gloucester was reasonable (about which we express no view, except to note that PRL in the form of Mr Winstanley appear not to have considered it inappropriate as a matter of principle). The steps taken by Worcester can be compared with (e.g.) the steps taken by Bath in Cancellation of the London Irish and Bath Rugby Match, which included "speaking with Clubs from the Welsh Regions, the Championship and a number of major rugby player agencies..." (see [8]). We consider that even reasonable steps to loan a player or players should have involved speaking to more clubs than the two Championship clubs Worcester in fact approached.

64. In the circumstances, it is unnecessary for us to determine any of the peripheral differences between the clubs in relation to efforts made by Worcester to obtain loan players, e.g. whether they were reasonable not to pursue the offer from Gloucester in relation to one of their players; the difference between the response recorded by Worcester when they contacted Hartpury RFC for a loan player, and the response obtained by Gloucester (which suggested that Hartpury had a player who they were willing to offer Worcester on loan); and the difference in recollection of Mr St Quinton and Mr Whittingham as to the telephone conversations between them on 25 March 2022.
65. Therefore, if we were required to make such findings, we would conclude that the unavailability of front row players (and thus the cancellation of the Match) was not "the

direct result of Covid-19” nor was it “related to Covid-19” for the purposes of regulation 4.4(j)(iii).

Conclusion

66. For those reasons, we consider that, under regulation 4.4(j)(iii), the Match result shall be 20-0 in favour of Gloucester; and that, in respect of the Match, Gloucester shall be awarded 5 league points.
67. This decision deals with all matters required to be dealt with under the Regulations and our letter of reference. Other issues were raised during the course of the case. It is unnecessary (and it would be inappropriate) for us to deal with or comment upon them in this decision, particularly as some of these issues may have to be considered by others (e.g. by the RFU in the context of penalties and compensation under regulation 4.4(l)).
68. There is a right of appeal against this decision to an Appeals Panel under regulation 14.2. Any appeal must be commenced by the lodging of a notice of appeal, in accordance with regulation 14.2(e), within 14 days of this decision.

Dated 29 April 2022

Gary Hickinbottom

**The Rt Hon Sir Gary Hickinbottom
For the Panel**

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

Company no: 03351039 Limited by guarantee in England and Wales
Sport Resolutions is the trading name of Sports Dispute Resolution Panel Limited

www.sportresolutions.com





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

Company no: 03351039 Limited by guarantee in England and Wales
Sport Resolutions is the trading name of Sports Dispute Resolution Panel Limited

www.sportresolutions.com



ENABLING FAIR PLAY