

## Decision of the Tribunal – Kilmarnock FC

At a hearing, by the Tribunal of the SPFL Board, sub-committee, the Kilmarnock Football Club Ltd as owner and operator of Kilmarnock FC where appeared Mr R McKenzie for the Board and Robert Milligan QC for Kilmarnock.

A complaint having been referred to the Tribunal, Kilmarnock admitted breaches of parts (1) of the notice of complaint in terms as follows:-

Whether **Kilmarnock FC** and/or **Kilmarnock Limited**:

- (a) has/have, in the period of 14 days prior to and on the day of the Match, complied with the Testing, social distancing and other infection prevention and control measures specified by the Scottish FA and/or JRG as regards social distancing requirements by Players during (i) squad match bus travel and (ii) squad pre-match dining, in each case, organised by and under the supervision of Kilmarnock FC & Kilmarnock Ltd;
- (b) has/have, in the period of 14 days prior to and on the day of the Match, breached and/or failed to fulfil, as regards social distancing requirements by Players during (i) squad match bus travel and (ii) squad pre-match dining, in each case, organised by and under the supervision of Kilmarnock FC & Kilmarnock Ltd, each or any of the requirements comprised in Regulations 1 and 2 of Annex 11 – Covid 19 – Requirements and Testing Regulations; and
- (c) has/have, in the period of 14 days prior to and on the day of the Match, failed to ensure as regards social distancing requirements by Players during (i) squad match bus travel and (ii) squad pre-match dining, in each case, organised by and under the supervision of Kilmarnock FC & Kilmarnock Ltd, that sufficient and effective training and guidance has been provided by each of them and/or understood by the Players registered with Kilmarnock FC and eligible to Play in League Matches, who, amongst others, travelled together by bus provided by Kilmarnock Limited and/or ate together at a meal or meals provided by Kilmarnock Limited Kilmarnock, with all of such Players being from different households and whilst, from time to time, failing to comply with the minimum social distancing requirements and/or failing to avoid circumstances which had been identified as ‘High Risk’ in risk assessments and/or in the Kilmarnock FC Operational Policy, as regards social distancing requirements by Players during (i) squad match bus travel and (ii) squad pre-match dining, in each case, organised by and under the supervision of Kilmarnock FC & Kilmarnock Ltd, all of which resulted in the infection of some of such Players and the development by each such infected Player of Covid 19.

On the 24<sup>th</sup> November 2020, by Zoom call Tribunal, the club admitted the breaches and the company accepted same, and instructed no further consideration be given to any other elements of the notice of complaint originally submitted for consideration.

## **THE REGULATORY BACKGROUND**

Mr McKenzie then referred the Tribunal to the regulatory material set out at part one of the documents for the Disciplinary Tribunal, being documents 1 to 40 both inclusive, which we have noted.

These regulatory materials included certain regulations of the Scottish Government, advices of the Scottish Government and guidance, Sports Scotland advices and guidance, Scottish Government Communications, NHS Scotland guides, SPFL protocols, Joint Response Group (JRG) guidance and statements as well as updates thereto, SPFL news release and fixtures skeleton document as well as premiership fixture dates, the terms of an SPFL presentation and testing and sampling SPFL information. The Tribunal utilised the procedures set out in annex 8 of the rules of procedure as it conducted the hearing, with particular reference to part three thereof.

The Tribunal were guided as well by part J of the rules and had regard to annex 11 (Covid-19 requirements and testing regulations) amongst all of the other documents.

We had earlier convened a hearing, on 9<sup>th</sup> November 2020, to deal with the issue of preliminary matters raised by the parties.

We are aware that there are 42 members of the company each owning and operating a club as they are found in the articles.

The aforementioned annex 11 (regulation 11) related to the requirement on clubs in the Covid-19 pandemic outbreak and how same, including testing, related to clubs in the Premiership.

The testing and procedures for the Premiership clubs was distinct and separate from all other clubs within the company, with the exception of when a Premiership club played a non-Premiership club during the course of the 2020/21 League cup. We noted there to be no disciplinary difference between the breaches of the rules and the regulations.

Should a club breach the rules and regulation then the member is liable for that breach.

We are aware that article 103 sets out the powers of the Board. These powers are relatively wide.

The rules themselves are to be construed as obligations of the utmost good faith between each of the member clubs, and this is explicitly referred to in Rule B1.

This matter is concerned with the circumstances under which Kilmarnock were unable to fulfil a League fixture during season 20/21 due to lack of sufficient players to do so, and consequently requested that the match be postponed.

It is not questioned that Kilmarnock failed to fulfil the fixture against Motherwell FC on 2nd October 2020 at the Rugby Park Stadium. SPFL matches are Official Matches.

Only a player who has tested negative for Covid-19 within the 168 hours prior to the match, without a subsequent positive test, may play in a match between the clubs in the SPFL Premiership.

Annex 11 sets out in detail various regulations that applied.

In particular, subheading 1 related to social distancing and hygiene principles that must apply, and did apply, to all clubs including Kilmarnock.

Subheading 2 confirmed that these were official matches.

Subheading 3 relates to the tests required of clubs including amongst other things, sample collecting, testing type and the target groups for testing.

It is these rules that Kilmarnock accept they breached, with specific reference to the 2 sets of circumstances admitted by them above. Rule B4.3 binds all SPFL clubs to the articles of association, protocols, procedures, rules, decisions and regulations of the Scottish FA and the statutes and regulations of FIFA and of UEFA.

Subheading 1.5 is the most directly relevant obligation in terms of annex 11 and related to the regulations in force up until the 2<sup>nd</sup> November 2020.

We were provided with a significant amount of documentation, to which no exception was taken, which sets out the regulatory framework.

## **BACKGROUND TO THE BREACHES**

Kilmarnock had an obligation to ensure that the playing staff maintained safe distances, and social distancing, between each other at all relevantly appropriate times.

There was a failure by the club to provide written guidance and regular instruction to players regarding matters such as the dangers of sitting across from each other on a team bus trip or closer than two metres at a table, where a two metre gap between players would still require having been maintained.

None of the players were members of the same household as each other.

The owners were carrying on a business and failed in their obligations with regard to social distancing in the bus, and at the location where meals were provided for the players, and in that regard they failed under annex 11 to maintain social distancing.

The club did not qualify for the one metre rule as they were not said to have applied additional measures to allow the reduction of the two metre social distancing rule to one metre.

Zoom coaching did not appear to have been utilised when it could have been, as physical distancing applies to all parts of the business including when coaching is given to players outwith the field of play and coaching arenas.

Buses were used for related travel to and from the particular match for an away team fixture.

The club failed to consider whether or not they actually should use buses, and if so whether or not they would need more than one bus on the trip, or a larger bus, having failed to consider the government and SPFL guidance as a whole.

The overarching principle was to ensure that there was created a low risk of transmission of the virus, but it is factually clear that the virus did transmit between players in the club. The club failed to ensure that transmission risk was as low as it could be.

The Joint Response Group produced documents initially referable to Premiership clubs only, regarding returning to training protocol, and returning to matches protocol, and all clubs in the SPFL accepted same.

Kilmarnock did develop a Covid-19 operations policy but there is no evidence that they provided each player with a copy of same. Indeed, the club did prepare a number of Covid related documents (both before and after the date of the postponed match) but failed to ensure implementation of same as accepted in the complaint admission.

The club had a Covid-19 officer and a medical officer, but neither were present at the pre match meal at the Hilton, nor in the bus to and from the away fixture which were the occasions upon which the club admitted the breach .

There were failings of middle football management in failing to ensure that the playing staff were complying with, and that backroom staff maintained, the correct social distancing to minimise the risk of spread of the virus. There is no evidence of the management instructing players to cease breaching Covid regulations and guidance, and in particular the Annex 11 regulations.

The failure was not that of the failure of players principally, but more the failure of the football management to prevent breaches of the Covid regulations and guidance, and to ensure safe social distancing to minimise the risk of such failures to occur. These failures were on a day to day basis within the club.

Through the regulatory and advisory documents, it is clear that the club was aware, or should have been aware, that it would have been imperative to retain social distancing at all times other than on the field of play. This was one of the responsibilities of the Covid-19 officer.

Clubs were aware, before the outbreak at the club occurred, of the vital importance of matches not being postponed due to the pressure on the season that had already commenced, to find alternative available dates for matches to be played. Almost all fixture dates were, it appears, pre booked in advance and this was clear to the clubs before the season commenced. There was very significant pressure on potential fixture rescheduling because of the shortening of the season.

## **SPECIFIC ISSUES**

Mr McKenzie, for the company, explained to us that there had been two areas of potential transmission between players and staff at the club. These were the basis for the admission of breach. The club suffered a Covid-19 outbreak which ,thereby, rendered the club unable to fulfil 2 fixtures due to the playing squad either isolating or quarantining through the effects of the virus or having been close contacts of infected persons.

The first was on a bus trip to and from an away fixture.

The second was at the meal at the Hilton hotel before that game.

We were shown a diagram of the bus trip ,which showed that in addition to there being staff members on board the bus there were a number of players, but they were not socially distanced, and a number were facing each other across a table whilst the journey was undertaken. Documentation such as p567 refers.

Secondly the meal at the facility prior to the game, was described by way of a lay out of players seated at round tables. It was clear that the number of players seated round any one table was in excess of the number that would be required for there to have been adequate social distancing. We had documents provided to us with diagrams e.g. p569.

The local health Board's IMT had considered the Covid outbreak at the club and produced draft recommendations and, irrespective of the lack of it having yet been finally approved, concluded in that draft that these were the likeliest cause of transmission. We shall return to this document.

At Kilmarnock, a number players and staff members at the club contracted the virus.

The 2nd October 2020 was the date of the Premiership match that had been postponed at the request of Kilmarnock FC. This was relevant due to the prior contracting of Covid, and the apparent transmission of same, amongst the staff and players.

The club had provided their own risk assessment documents (dated 9<sup>th</sup> July), and they were shown to us. Indeed the club had their own Return to Work Risk Assessment document (page number 307 in our bundle) but even it contained a requirement of 2m social distancing (p310), the recommendation for video coaching (p317) and avoiding public transport (p319).

We are told that all players and staff on the bus were wearing masks, although there is no formal vouching of same.

The use of the bus to and from the game was open to criticism because a larger bus, or indeed two buses, could have been utilised so as to increase the space in between players and allow for appropriate social distancing. It is clear that some players/staff on the bus contracted the virus, and that this trip was identified as a clear source of transmission of the virus.

## **THE CLUB'S POSITION**

Mr Milligan QC, for the club, accepted that there were these two clearly defined areas where there were "issues" for the club.

He accepted that on the said bus trip to and from the fixture there was not adequate social distancing, though he stated that everyone had been wearing masks during the journey.

He accepted that at the pre match meal the club had not ensured social distancing between those utilising the facility whilst eating, by excessive numbers eating (and receiving coaching) at any one table.

It was made clear that the club have a near blemish free history of up to twenty years with only one disciplinary process having been taken against them, and no prior breaches of any government Covid-19 regulations.

It was submitted by the club that all breaches were significant but that in a spectrum of breaches this came at the lower end of the spectrum, that the various regulations are not straight forward, and the breaches were not flagrant .

He further submitted, for the club, the club's response was to take the matter seriously, and that they had previously appointed a Covid officer and a Covid medical officer, and had produced protocols and policies for the club. The club had utilised active control measures as well.

It was stressed that the club, over a very short time scale from being made aware of the nature of the complaint, ingathered a huge amount of information and provided information to the company before making an admission, and clearly focused upon the requirement by providing statements of key witnesses.

It was said by Mr Milligan that the club's conduct during these proceedings had been fully cooperative with the company, and had admitted their responsibility without the need for evidence to be led to prove same. The club had not tried to shy away from the breaches and had dealt with matters appropriately.

He submitted that the club has already suffered penalty by not seeking to gain any competitive advantage by the postponement of matches, by having disruption to the playing season and the disturbance that it caused to the club as a whole. Whilst two games, one League fixture, were lost this was in respect of one outbreak of Covid within the club. They had been put to a substantial expense as a result of the legal proceedings which was a financial penalty in itself, he submitted.

He compared the Aberdeen and Celtic matters, previously dealt with by the Board, as more aggravating by way of offending, and he noted the substantial financial penalties imposed upon those clubs with some part of the penalty suspended. He argued that the level of penalties for Kilmarnock should be significantly lower than those of Aberdeen and Celtic.

## **THE COMPANY'S RESPONSE**

Mr McKenzie reminded us of the option for a sporting sanction and that any suspension of sanction should be treated cautiously, due to the nature of the season that was already underway. The materiality of the breaches should be taken into account in determining the issue of suspension of any penalty.

The club had not yet fully documented all steps taking by them to prevent issues occurring in the future and though they have taken steps to reduce future risk, they have suffered no penalty, yet merely negative consequences.

The club circumstances were much more serious, particularly due to the postponements of an SPFL match, as opposed to the sanctions imposed on Celtic and Aberdeen. In the Celtic and Aberdeen cases, neither club had requested a postponement. Sporting sanctions, he reminded the tribunal, were only relevant where there is a sporting result, or outcome, to the conduct found to be in breach. It was due to Government intervention that the games involving these two clubs were postponed.

There had been two areas of breaches here, ensuring that only twelve players (at a maximum) had been available for the affected match, due to the Covid difficulties at the club. There had been an absence of appropriate and effective controls at the club. The company argued that there had been a sporting advantage gained by Kilmarnock by not having to play the match due to the Covid outbreak.

He submitted that the matter was serious, and would have been serious whether or not the breaches had been found to have resulted in transmission between players.

He submitted that this was not at the lower end of the scale of breaches and reminded the Tribunal that the opponents of Kilmarnock had not asked for the match to be postponed. He reminded that whilst the Board would decide on whether or not there was an issue of expenses to awarded to or by either party, the Tribunal was not being asked by the company for any particular disposal or penalty today and that was a matter for the Tribunal.

Finally, in reply, Mr Milligan (for the club) requested that we make comparison with Celtic and Aberdeen cases, and that in the Celtic instance (Bolingoli) there appeared to have had been untruthfulness on the part of the player, whereas Kilmarnock are not being duplicitous in their conduct. Aberdeen, he said, had not given adequate advice to their players, or if they had it did not filter through to them, and two Aberdeen games have been postponed.

With regard to sporting integrity the club should not have to forfeit a game, as the issue and effect of the season end position would undermine the sporting integrity of the competition if penalties were imposed that could lead to a varied position in the league at conclusion.

He argued that in this situation it would be wholly inappropriate, and disproportionate, for forfeiture of the match to be the sanction imposed.

## **SANCTION CONSIDERATION**

The club accepted that they had breached the SPFL regulations, on the admitted terms relating to a pre match meal and a team bus trip to a football game and in so doing in advance of a relevant match (against Motherwell FC) had failed to comply with the social distancing and other infection prevention and control measures specified by the Scottish FA and/or JRG and in the 14 day period prior to match, had failed to ensure that sufficient and effective training and guidance had been provided to or understood by the players registered with Kilmarnock FC and eligible to play in League matches, and who travelled together by bus provided by Kilmarnock Ltd and/or ate together at a meal provided by Kilmarnock Ltd. In short, they had failed to comply with minimum social distancing requirements required of them in a bus journey to a football match and at a meal prior to said football match.

As a starting point the club were party to and accepted the return to training protocol and had accepted the return to playing protocol and were due to have been adhering to the terms of those documents.

It was accepted by the club that in the instances of their failures to so adhere, for the aforementioned bus trip and meal, they had breached the regulations, rules and guidance that were referable to the club and referred to in a notice of complaint and were referred to this board sub-committee.

The background to this season is one well known with regard to the nationwide Covid-19 Pandemic that has struck our country.

Against that general background SPFL teams were placed in a privileged position to be able to commence their tournament, albeit later than anticipated, and to run the tournament through to its natural conclusion. Senior, professional, sporting clubs like these were entrusted by the Scottish Government and footballing authorities to play football matches and be involved in a league competing against a number of other clubs, both for their benefit and for the benefit of their supporters, and for the country as a whole.

In such a privileged position the football clubs of the SPFL were under no illusion that they should use every conceivable power within their abilities to ensure that they met, and followed, the NHS, government and footballing guidance, rules and regulations given to them as well as those provided to the general member of the Scottish public.

The SPFL was able to return to football because the Scottish Government allowed them to do so with the use of rules and regulations that had to be complied with.

Earlier on in the season, for actions by certain players which appeared to be out with the possible control of their clubs, players from Aberdeen FC and Celtic FC breached certain government guidelines and or regulations, and those two clubs were fined (partially suspended) as a result. Players of both of these clubs had been involved in unregulated acts of folly, and their respective clubs had not breached the aforementioned regulations but were sanctioned on a strict liability basis. No doubt it was hoped that lessons would be learned by the footballing fraternity and SPFL clubs in particular, as a result of the breaches noted by Celtic and Aberdeen players and upon which the First Minister of our country referred to the "yellow card" having been shown.

We were taken to documents that bore to show to us that on a particular bus journey to and from a match, insufficient social distancing was ensured to apply, by the club, in respect of players and staff who utilised the bus. Players on that bus, who failed to appropriately and clearly socially distance to two metres, contracted Covid-19 due to insufficient social distancing.

Whether or not the Covid officer or the medical officer of the club were on the bus that took Kilmarnock to their match is perhaps irrelevant, for these officers of the club should have ensured that those travelling with the team to any match were fully versed in the rules and regulations of safe social distancing, that had to apply to any member of the public as much as it had to apply to the players of their club.

We were also shown drawings and diagrams of the seating arrangements for players at a pre match meal where coaching of some nature (team talk or other) was to have taken place and no exception was taken to that claim.

Players sat at round circular tables but those tables, albeit tables provided by the hotel in question, were then used to seat up to 6 players or staff at a time, thereby showing that the club did not have sufficient regard to the need for appropriate two metre social distancing and this allowed the potential for the spread of the virus amongst those players and staff.

It was clear to us that anyone who had been instructed in the regulations that applied, would have been able to determine that no more than four players should have been sitting at any one table instead of the six who were so seated. Indeed, it could be argued that less than four should have been so seated at any one table.

Again at the pre match meal, as with the bus journey, we noted that the Covid officer and the medical officer were not present but they should have ensured, as should have other management members of the club, that at all times players and staff adhered to the two metre social distancing and did not in any way breach same so as to lead to a potential spreading of the Covid virus.

Even if the tables had been set up in a certain way by the hotel, it was required of the club to ensure that they only seated an appropriate number of players at any one table to ensure that social distancing continued.

In the case of Kilmarnock, document 71 was often referred to in these proceedings. Its provenance, and its provision of a defined finding or outcome of investigation, was less than clear during the course of the information we heard. What is beyond doubt is that it had been prepared for discussion at the final PAG/IMT meeting, whether in draft or final form (and we learn that it is said to be in draft form) that it states "transmission has occurred between players and on the balance of probabilities is this is most likely to have occurred in changing rooms, during pre-match meals or during coach journeys". We discount entirely from our consideration the claim referring to changing rooms for there is no evidence before us with regard to the use of same. It holds important draft findings, and document 71 should have been disclosed to the company by the club.

The recommendations made are for environmental assessment of all areas identified as possible areas of transmission, and that included in particular a hospitality suite where a pre-match meal was held and coach journey.

That document contains the telling phrase "continued vigilance regarding onset of new symptoms amongst close contacts", and this document was produced in draft by the IMT following the enquiry made into the outbreak at Kilmarnock Football Club.



That the club did not produce the document (71) was of concern to us because it was amongst a range of documents which the company called upon the club to produce in advance of our hearings and which was not produced by the club, despite two of their senior representatives (club doctor and a club executive) confirming in statements to the tribunal that they produced all documents that they considered to be relevant, for example ██████████ states in her statement that 'we have not withheld any materials' and ██████████ that he had 'provided copies of all the emails falling within the description of the materials requested'. The document clearly was within the parameters called for by the company, and under Rule B1 all clubs have a responsibility and duty to act in utmost good faith. This was a highly relevant document albeit that we remain with a copy that appears simply to be a draft at this time.

We consider that we were taken, by both representatives, to all relevant documents in respect of the two admitted breaches.

The club had an obligation to ensure that these actions were not undertaken by anyone within Kilmarnock Football Club, which is to say that lack of social distancing particularly at club events, which incorporated herein a bus journey to and from the match and a pre-match meal where some level of coaching was provided. Indeed the club's own document and critical evaluation risk assessment, makes it clear that the club was aware that video meetings were to be preferred to face to face meetings and that they were acutely aware of the need to ensure that no opportunity was given for the spread of infection to occur. Spread it did, and by its spread forced there to be two football matches that could not take place, one SPFL fixture and one Betfred cup match. Their conduct, of course, undermined the necessary protection and welfare of their own players.

Our powers of sanctions are wide and are contained within part J of the rules.

We take account of the whole circumstances of the case and of all the information provided to us where relevant. This season was highly unusual due to the Betfred Cup group stages not taking place in July but being scheduled for October and November, and the Scottish Cup from last season being played to a conclusion in the current season. All clubs were aware of that and that there was a concertina effect upon the season as a result. It made the rescheduling of matches more difficult if they have to be postponed. This was a season like no other and all clubs were aware of the necessity of the league to progress and to try to avoid any postponement of any matches whatsoever. We were indeed drawn to the fixture list which is congested even without postponements.

We are aware that in the league cup (Betfred Cup) the Board had adopted a policy that teams unable to fulfil fixtures for whatever reason would face a three nil loss being imposed, in that game, by the board. Failures to play games due to breaches of the rules and regulations are serious matters.

Unlike this club, both Celtic and Aberdeen had sufficient players to have fulfilled the fixtures required of them, had the Scottish Government not effectively postponed those matches. Both Aberdeen and Celtic situations were strict liabilities rather than the clubs themselves having been found to have a degree of culpability in the actions of their players outwith the club's control. We noted that Kilmarnock have no analogous disciplinary record and although they had one disciplinary complaint, upheld in 2019, that is for an entirely different breach of the regulations and the penalty for that has been wholly suspended. That suspension is not triggered as a result of the breach here admitted.

We noted that both Celtic and Aberdeen had fines of £30,000 imposed on them by the SPFL, part paid and part suspended, but we consider those to be very much base line figures rather than particularly high penalties.

It was submitted, on behalf of the club, that what we are dealing with here are “relatively minor” breaches in their nature. Whilst the club indicated that they were not trying to say that the matter was not “serious” they submitted that in the spectrum of breaches these were at the lower end. We find it hard to consider that repeated breaches (two admitted breaches) that led to the postponement of a football match, against the background explained, could not be seen to be serious. We did not accept that the admitted breaches were minor.

It was even said to us, on behalf of the club, that is “arguable” that there was no breach during the course of the meal by Kilmarnock in respect of the rules and regulations, but they admit the breach by their plea in this case and in these circumstances there is a clear breach and we sanction as such. It was also submitted that the breach was an “understandable breach” due to the changing Government guidelines on social distancing, and we simply cannot accept that. Against the background of the reams of public health information available, the fact that Covid restrictions and regulations, death tolls and infection spread are at the forefront of Scotland’s news on a daily basis, means that we cannot consider that there will be any understandable breach in the circumstances narrated to us. The club patently failed to ensure social distancing between adults, who are either players or staff, and where they had already appointed both a Covid officer and a medical officer and has issued their own documentation to put in place rules that they then did not follow.

There is no ambiguity about two metre distancing. Every school child in Scotland should be aware of it. This is not a complex matter despite the large welter of NHS, SPFL and Government regulations and documentation available on the subject.

Whilst at one point the club told the tribunal that the tables at the Hilton Hotel were of a 12 foot diameter but we had no evidence of that and the evidence provided by the company was of 6 foot tables available at some stage to the club, wherein the club had sought four or five people to sit a six foot diameter tables which only had a circumference of 20 feet whether or not those were in the Hilton. Put bluntly, whatever the table size, there was not social distancing ensured by the club and those travelling with the club.

We saw no evidence that the 2 metre distancing requirement was conveyed fully to the players, nor repeatedly enforced. Whilst this may not have been a deliberate flouting of the regulations this was a clear and repeated breach of those regulations.

Of course, following the protocols is not always a guarantee that transmission cannot occur but in this case it is admitted that it did occur and it had a consequence on a football match or indeed matches. The club’s initial response was to cooperate with the IMT that was undertaken (though regrettably not yet concluded despite the passage of time) and we are advised that the club cooperated with that enquiry. The breaches had however already occurred and matches had been postponed. We say matches because outwith our realm of consideration is the fact that a Betfred cup match involving Kilmarnock had to be postponed because they lost too many players, to Covid infection or isolation, to ensure that they felt able to field a team in a Betfred cup match and consequently a three nil loss was imposed for that failure. We are not considering that cup match in our disposal but it is worthy of note.

It was said by the club that they could not be criticised for its cooperation in the initial stages of the disciplinary investigations where there were tight deadlines. However we note that the important document 71, whatever status it has, was not provided to the company by the club and it appeared that the statements of witnesses ██████ and ██████ disclosed that they only produce documents that they considered to be relevant, rather than which they held might be relevant to the complaint. However, we of course note that the company did not insist that a breach had occurred with regard to the provision of the documentation in respect of that particular charge.

We were told that the club has, following upon this outbreak, taken steps to reduce further the risks identified but had they taken all steps necessary at the start of the season then either the outbreak would not have occurred, or if it had occurred then it would have occurred by transmission and infection outwith the club and would have left them effectively blameless against a set of charges which they now admit.

It was submitted by the club that the club had suffered a penalty by the time and expense involved in the investigation and the hearings but we do not consider that to be a penalty of any significance.

It was submitted that a sporting sanction was wholly inappropriate entirely disproportionate and arbitrary by the club, we disagree.

We consider that a playing sanction is proportionate in these circumstances because a match was lost (or postponed) due to the fact that the club was unable to fulfil its fixture with Motherwell FC as it had insufficient players fulfil that fixture. This, as we have already said, is a season like no other where a tightened schedule means that any postponement threatens the sporting integrity of the tournament. A sporting penalty is not “a wholly inappropriate sanction” because there has been a sporting effect of the failures by the club and so such a sanction is appropriate. We were referred to a European rugby match where a side were unable to travel from France to Leicester to play a game and they had to forfeit that match. We appreciate this was in a knock out cup but nonetheless it is of merit to consider here. Indeed, a similar approach was taken in the recent Autumn Nations Cup match involving a Fiji team who were unable to fulfil fixtures and their respective opponents were awarded 28-0 victories as a result.

The club submitted that there was an accident of timing, with reference to there being 2 matches postponed during one Covid outbreak. We do not consider this to be a mere ‘accident of timing’, in our judgment, as to whether one, two or more games were postponed or lost as a result of this Covid outbreak.

It was submitted that there is nowhere else to go, in future potential breaches, if a sporting sanction is imposed but that it not correct because, as we have pointed out, J16 gives the Board and commissions a wide range of powers to impose a number of sanctions, either in accumulations or as alternatives depending on the circumstances of each breach.

Kilmarnock were not considering the effect upon other clubs that their failure to fulfil a fixture or fixtures would have when they allowed their players to breach the social distancing guidelines. It was submitted to us that it is not impossible to find dates to replay the matches. Whilst that might or might not be the case, there are other vagaries which may befall the season and mean that other matches must be postponed, for reasons such as weather conditions etc.

In any event to allow the match to be postponed and rescheduled (instead of effectively forfeited by a three nil loss with all points given to Motherwell) would be to ignore the effect that would, potentially, have occurred by playing with a much depleted squad on the scheduled match day . Generally, the number required as a minimum for fielding a team is thirteen, when they would have been playing against a far larger squad on match day against Motherwell FC.

We note of course that cup matches operate to a tight timescale but in this year of all years the league matches operate to a tight time scale due to fixture congestion. We consider these breaches, as admitted, to be important and significant breaches. All clubs were aware of the powers of the Board under J16 when entering into this season walking the tightrope of Covid infection.

The effect on the players of the club must be considered. The club had a duty to protect their players and staff, yet in that duty they failed. Player welfare is of high importance.

Whether a particular sanction is to be imposed depends on the facts and circumstances in each individual case. We have considered the degree of culpability of the club in a season where the league can ill afford to see avoidable postponement of fixtures.

We note the club's relatively difficult financial circumstances (and were provided with recent club accounts to consider), potentially as opposed certainly some other clubs, and are aware of the financial constraints on all clubs this season particularly where matches are without fans attending, and there is limited income from streaming of football games.

Our sanction therefore in respect of this matter is that in terms of rule J16.7 the official match between Kilmarnock and Motherwell should be awarded to Motherwell FC with a score of three nil against Kilmarnock. We consider this to be entirely appropriate, proportionate and just having regard to all of the circumstances of this case. Kilmarnock suffered a three nil loss in the Betfred Cup as a result of another game which is not within our jurisdiction to rule upon in respect of this matter today, but we note that other matches have been awarded, in other different circumstances as three nil wins for an opponent, when a breach of regulations has occurred in the past, albeit not a breach of Covid regulations.

We do not consider this to be unfair on the other teams in the League or indeed overly fair to Motherwell, it simply happens that Motherwell were the club involved here. Motherwell players were potentially also being jeopardised by the actions of Kilmarnock, and to reschedule the fixture would have welfare implications for all players to play another fixture.

Covid regulations and in particular social distancing are in place for a very good reason, it is of national importance that Covid is beaten and for the club to have failed to ensure appropriate systems were in place to make sure that no spreading of the infection occurred, is a very serious matter. It had sporting consequences and will have a sporting sanction.

The club is also fined. We referred to the fact that the Celtic and Aberdeen fines were a base line, we consider that although this is a season when finances are strained more than most, and that the club is not a particularly financially "well off" club, a fine is appropriate. However we consider that the financial penalty, which should be imposed at £40,000 shall be wholly suspended until the 1<sup>st</sup> June 2021 and shall only be considered for use and imposition in the event that the club further breaches the Covid regulations prior to the 30<sup>th</sup> June 2021. Should any such financial penalty require to be enforced then the sum shall be paid over to the SPFL Trust, and not to the SPFL itself, for any future breach by this club.

Furthermore, we consider that a reprimand of the club is entirely appropriate in the circumstances of this case. We reprimand because of their patent failures to ensure that the rules and regulations incorporated in Annex 11 were followed, and as a result there were very serious consequences for players, staff and the SPFL.

## **SANCTION IMPOSED**

We determine that, in respect of the match due to have been played on 2<sup>nd</sup> October 2020, there shall be imposed on that fixture the result of Kilmarnock FC 0 Motherwell FC 3. Accordingly, the result shall mean that 3 points shall be awarded to Motherwell FC and zero to Kilmarnock FC

There shall be a fine imposed of £40,000 but that shall be wholly suspended until 30 June 2021. In this decision, the reference to a fine being suspended means suspended until the 30 June 2021. If the

Club, by any act and/or omission, breaches or fails to fulfil any provision of the SPFL Rules and/or Regulations relating to Covid containment for any Competition, any Rule or Regulation with which the Club must comply, then the amount of the suspended fine will immediately become due and payable on any such breach and/or failure to fulfil being determined by a Tribunal to have occurred; and that whether such determination shall occur prior to or after 30 June 2021. The obligation to pay the suspended fine shall be in addition to any sanction imposed for any such future act and/or omission leading to such breach and/or failure to fulfil. In the event that no such determination of breach and/or failure to fulfil is made in respect of any such act or omission on or prior to 30 June 2021, then there will be no liability on the Club to pay the suspended fine.

We issue the aforementioned reprimand to the club.

We shall not deal with the issue of the expenses of this process and we leave that matter for the Board itself to consider.

**3 December 2020**