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CAS 2007/A/1298 & 1299 & 1300 CASES BETWEEN WEBSTER, HEART OF MIDLOTHIAN, WIGAN ATHLETIC

CAS 2007/A/1298 Wigan Athletic FC v/ Heart of Midlothian
CAS 2007/A/1299 Heart of Midlothian v/ Webster & Wigan Athletic FC
CAS 2007/A/1300 Webster v/ Heart of Midlothian

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr Quentin Byrne-Sutton, Attorney-at-law in Geneva, Switzerland
Arbitrators Mr Jean-Jacques Bertrand, Attorney-at-law in Paris, France
The Hon. Michael Beloff QC MA, Barrister in London, United Kingdom

CAS 2007/A/1298:

between

Wigan Athletic AFC Limited, Wigan, United Kingdom
Represented by Mr Matthew Bennett, Brabners Chaffe Street LLP, Manchester, United Kingdom

As Appellant

and

Heart of Midlothian PLC, Edinburgh, United Kingdom
Represented by Mr Peter Limbert, Hammonds, London, United Kingdom

As Respondent

CAS 2007/A/1299:

between

Heart of Midlothian PLC, Edinburgh, United Kingdom
Represented by Mr Peter Limbert, Hammonds, London, United Kingdom

As Appellant

and

Mr Andrew Webster, Glasgow, United Kingdom
Represented by Mr Fraser Wishart, Chief Executive, PFA Scotland, Glasgow, United Kingdom and Mr Juan de Dios Crespo, Valencia, Spain

and

Wigan Athletic AFC Limited, Wigan, United Kingdom
Represented by Mr Matthew Bennett, Brabners Chaffe Street LLP, Manchester, United Kingdom

As Respondents

CAS 2007/A/1300:

between

Mr Andrew Webster, Glasgow, United Kingdom
Represented by Mr Fraser Wishart, Chief Executive, PFA Scotland, Glasgow, United Kingdom and Mr Juan de Dios Crespo, Valencia, Spain

As Appellant

and

Heart of Midlothian PLC, Edinburgh, United Kingdom
Represented by Mr Peter Limbert, Hammonds, London, United Kingdom

As Respondent

I. THE PARTIES AND THE ORIGIN OF THE DISPUTE

A. CAS 2007/A/1298

a) The Appellant

1. Wigan Athletic AFC Limited (the Appellant, hereinafter referred to as "Wigan") is a football club with its registered office in United Kingdom. It is a member of the English Football Federation, which is affiliated to FIFA.

b) The Respondent

2. Heart of Midlothian PLC (the Respondent, hereinafter referred to as "Hearts" or the "Club") is a Scottish football club with its registered office in the United Kingdom. It is a member of the Scottish Football Association, which is affiliated to FIFA.

B. CAS 2007/A/1299

a) The Appellant

3. Heart of Midlothian PLC (the Appellant, hereinafter referred to as "Hearts" or the "Club").

b) The Respondents

4. Mr Andrew Webster (the First Respondent, hereinafter referred to as "Andrew Webster" or the "Player") was born on 23 April 1982 and is of English nationality. He is a professional football player currently on loan to the Glasgow Rangers, a Scottish football club, after having been transferred from Hearts to Wigan.

5. Wigan Athletic AFC Limited (the Second Respondent, hereinafter referred to as "Wigan").

C. CAS 2007/A/1300

a) The Appellant

6. Mr Andrew Webster (the Appellant, hereinafter referred to as "Andrew Webster")

b) The Respondent

7. Heart of Midlothian PLC (the Respondent, hereinafter referred to as "Hearts" or the "Club").

D. The Origin of the Dispute

8. On 31 March 2001, shortly before the Player's 19th birthday, Hearts and Andrew Webster signed an employment contract that was due to expire on 30 June 2005.

9. Upon engaging Andrew Webster, Hearts paid a transfer fee of £75,000 to the Scottish football club *Arbroath.*

10. On 31 July 2003, two years before the expiry of the initial contract and following a renegotiation of its terms, Hearts and Andrew Webster entered into a new employment contract, which provided for the Player's employment for a term of four years until 30 June 2007 (the "employment contract").

11. While employed by Hearts, Andrew Webster became an important member of the first team and enjoyed significant national and international success. He made his debut for Scotland in 2003 and went on to gain twenty two international caps by the age of 24. Hearts also enjoyed a number of sporting successes during the period of his employment.

12. Consequently, Hearts became interested in retaining the Player for a longer period of time.

13. Thus, in April 2005, more than two years before the end of the employment contract, Hearts wrote to the Player's agent, Charles Duddy, offering to extend the contract for a further two seasons, on improved terms. However, no agreement was reached.

14. In January 2006, with approximately 18 months to run under the employment contract, discussions resumed regarding its re-negotiation. Through his agent, Andrew Webster turned down an initial offer from Hearts.

15. Between January and April 2006, Hearts made several other offers to Andrew Webster but none of them were accepted because the terms did not match his expectations.

16. During the saure period, Andrew Webster was not selected by Hearts for several games. Due to the timing and circumstances of the decisions, he formed the impression that this was a tactic designed by Hearts to compel accepting a new employment contract.

17. Matters carne to a head between April and May 2006, when the majority shareholder of Hearts, Mr Vladimir Romanov, made various statements in the media to the effect that Andrew Webster's commitment to the club was uncertain and that he would therefore be put on the transfer list. Mr Romanov was also quoted as having declared that *"Unfortunately in football there are agents, but the most negative influente is the parents -*

they shouldn't interfere in matters".

18. Upset by these statements, Andrew Webster decided to seek advice from the Scottish Professional Footballer's Association ("SPFA").

19. During a meeting with representatives of SPFA in early May 2006, Andrew Webster explained his feelings about the situation. He was advised that if there was a complete mutual breakdown in trust he had the legai right to terminate his contract by invoking caause 18 of his employment contract, whereby: *"If the Club intentionally fails to fulfil the terms and conditions of this Agreement the Player may, on giving fourteen days' written notice to the Club, terminate this Agreement".*

20. In light of the discussions with SPFA; Andrew Webster resolved to terminate his contract for just cause. On 4 May 2006, he wrote to Hearts indicating he was terminating his contract with 14 days notice. In the letter, Mr Webster explained that he believed the club had failed in its duties towards him and that a fundamental breakdown in trust justified his action.

21. Hearts replied by stating it had lodged an appeal with the Scottish Premier League Board.

22. In the light of this development, SPFA further advised Andrew Webster that, in addition to the termination for just cause, he could unilaterally terminate his contract without cause in accordance with article 17 of the *FIFA Regulations for the Status and Transfer of Players* (the "FIFA Status Regulations"), since his termination would occur outside a Protected Period of three years commencing from the date when he was employed by Hearts.

23. Realizing that the appeal procedure triggered by Hearts could result in a protracted dispute that might prevent him from securing a contract with another club in time for the 2006/2007 season, Andrew Webster decided to follow the alternative route suggested to him by SPFA.

24. As a result, on 26 May 2006, Andrew Webster notified Hearts that he was also unilaterally terminating his contract on the basis of article 17 of the FIFA Status Regulations, i.e. irrespective of the existence or otherwise of a just cause.

25. On 28 June 2006, Hearts wrote to Andrew Webster asking him to clarify whether he was relying on the notice of 4 May 2007 or on the subsequent notice of unilateral termination.

26. On 7 July 2006, Andrew Webster replied to the effect that he was no longer relying on the grounds invoked in his notice of 4 May 2007 but was maintaining his unilateral termination with reference to article 17 of the FIFA Status Regulations.

27. Meanwhile, in the final weeks of June 2006, Hearts had rejected an offer of £1.5 million from Southampton Football Club for the transfer of Andrew Webster, in the belief that Player's market value was higher.

28. On 9 and 10 July 2006, Andrew Webster's agent sent a fax to approximately fifty clubs, stating that the player had terminated his contract with Hearts, that no sanctions would apply as a result of this termination, and that compensation would be fixed by FIFA in the region of £200,000.

29. On 4 August 2006, Blackburn Rovers, a Premier League club, wrote to Hearts to indicate its interest in signing the Player and to enquire about his contractual status.

30. On 9 August 2006, Andrew Webster signed a three-year employment contract with Wigan.

31. Neither the Player nor Wigan offered Hearts any compensation upon his departure.

32. In November 2006, Hearts filed a claim against Andrew Webster and Wigan in front of the FIFA Dispute Resolution Chamber ("DRC"). It claimed compensation for breach of contract in the amount of £5,037,311 against Mr Andrew Webster, and against Wigan as jointly and severally liable for having induced the breach.

33. Hearts also requested that the Andrew Webster be declared ineligible to take part in any official matches for a period of two months, in application of article 17.3 of the FIFA Status Regulations and that Wigan be banned from registering any new player for one registration period, in application of article 17.4.

34. The DRC heard the case and, on 4 April 2007, handed down the following decision (the "DRC decision"):

> *"1 The claim of the Scottish club, Heart of Midlothian, is partially accepted.*
>
> *2. The Scottish player, Andrew Webster, has unilaterally breached the*

employment contract with Heart of Midlothian without just cause outside the Protected Period.

3. *Mr Andrew Webster has to pay the amount of GBP 625,000 to Heart of Midlothian within 30 days of notification of this decision.*

4. *If this amount is not paid within the aforementioned deadline, a 5% interest rate per annum as for the expioy of the aforementioned deadline will apply, and the present matter will be submitted to the FIFA's Discplinary Committee, so that the necessary discplinary sanctions may be imposed*

5. *The English club Wigan Athletic is jointly and severally liable for the aforementioned payment.*

6. *Any other -reguestfled by Heart ofMidlothian is rJected.*

7. *Heart of Midlothian is directed to inform Mr Andrew Webster and Wigan Athletic immediatey of the account number to which the remittance is to be made, and to notify the Dispute Besolution Chamber of any pay ent received.*

8. *Mr Andrew Webster failed to give Heart of Midlothian due notice of termination.*

9. *Mr Andrew Webster is not eligible to partecipate in any official football match for a period of two weeks as froin the beginning of the next national league championship for which he will be registered.*

10. *The matter concerning the role p/ayed by the Scottish player's agent, Mr Charles Duddy, in the breach of contract, will be forwarded to the Players' Status Committee fòr investigation and decision.*

35. Each party disagreed for different reasons with the finding of the DRC and, therefore, each decided to file an Appeal in front of the Court of Arbitration for Sport ("CAS").

36. In January 2007, Andrew Webster was loaned by Wigan to the Glasgow Rangers until the end of the season.

II. SUMMARY OF THE ARBITRATION PROCEEDINGS

37. On 24 May 2007, Wigan filed its Statement of Appeal with the CAS against the DRC decision, requesting the following relief:

"1) The Appellant requests that the CAS annuls Section III paragraph 3 of the DRC Decision relating to compensation and replaces the sum £625,000 with a sum representing no more than the residual value of the Contract; or in the alternative

2) In the event that the CAS upholds the DRC decision to award a sum of compensation in excess of the residual value of the contract, the Appellant shall in any event request the CAS to annul Section III paragraph 3 of the DRC Decision relating to compensation and replace it with a new decision as it is unclear how the DRC has arrived at the figure of £625,000 and furthermore, this amount of compensation is excessive. In particular, the Appellant requests that the compensation awarded to the Respondent by the DRC be reduced for a number of reasons including, but without limitation as follows:

(i) the DRC Decision is procedurally flawed due to the way in which the DRC Decision was reached in breach of Article 13.4 of the Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber (ed June 2005) ('Procedural Rules') which provides that decisions of the DRC musi contain "reasons for the findings". Although the DRC refers to a number of factors that is considered relevant to the calculation of compensation due to the Respondent, it fails to adequately explain the significante of each of the factors and how the final award has been calculated; and/or in the alternative

(ii) the DRC in the DRC Decision has failed to follow its own settled jurisprudence, in accordance with Swiss Law and in particular, Article 44(1) of the Swiss Civil Code of Obligations, that contributo fault of the "injured party" (i.e. the Respondent) is a material factor to consider when calculating the sums of calculation due in the case of a contractual termination without just cause. It is the Appellant's case that the Respondent treated the Player unfairly in the 2005/06 season and this is a material factor to be considered by the CAS when determining the sum of compensation due to the Respondent; and/or in the alternative

(iii) the DRC in the DRC Decision appears to piace reliance in the Respondent's favour on the fact that the Player had spent five seasons with the Respondent. Furthermore, the DRC incorrectly observes that

the Respondent had a real interest in retaining the services of the Player, however, the manner in which the contractual negotiations vere conducted between the Respondent and the Player and the Respondent's subsequent unfair treatment of the Player are clear evidence to the contrary; and/or in the alternative

(iv) the DRC in the DRC Decision wrongly considers that the amortised transfer fee paid by the Respondent to Arbroath for the acquisition of the Player in 2001 is relevant to the determination of the sum of compensation payable in this case (given that the originai playing contract the Player entered into in March 2001 was replaced by the Contract in July 2003); and/or in the alternative '

(v) the DRC in the DRC Decision has incorrectly placed reliance on the weekly wage that the Player was due to earn under his new employment contract with the Appellant. The Appellant submits that this contract is irrelevant to the calculation of compensation, given that it has no bearing on the loss suffered by the Respondent.

3) The DRC at Section II, paragraph 36 of the DRC Decision has itself acknowledged that the Appellant is not guilty of any wrongdoing, nor has it induced the Player to breach the Contract. The Appellant submits that it should therefore not be held to be jointly and severally liable to compensate the Respondent, nor should it be deprived of the Player's playing services for the two week period in which the DRC has ordered a playing ban to take effect. Thus, the Appellant further requests that the CAS respectively annuls Section III paragraph 5 and 9 on the following grounds:

(i) the DRC has determined that the Appellant is not guilty of any wrongdoing and did not induce the Player to terminate the Contract and therefore it should not be held liable to pay compensation for such breach. Contrary to the DRC's reasoning, the liability for breach of contract and the liability pay compensation flowing from such a breach are inextricably linked; and/or in the alternative

(ii) the DRC in the DRC Decision wrongly imposed a two *week playing ban on the Player as it incorrectly concluded that the 15 day time period within which the Player must have served his notice to terminate the Contract in accordance with Article 17(3) of the FIFA Regulations for the Status and Transfer of Players (ed Dec 2004) commenced on the last league match and did not include the Scottish FA Cup Final. In the alternative, if the DRC interpretation is upheld, the* two *week*

playing ban imposed by the DRC is disproportionate to the 4 day delay in the service of the notice by the Player. Furthermore and in any event, given that the DRC has decided that the Appellant is not guilty of any wrongdoing in this matter, these "disciplinary measures" adversely impact on the Appellant and its own sporting performance as it is deprived of the Player's playing services during this period and are not therefore sustainable.

4) The Appellant therefore requests that in accordance with Article R 57 of the CAS Code, the Panel reviews the facts and the law relevant to above points, annuls the specified sections of the DRC Decision and replaces them with a new decision. In addition to the above requests, and in the event that they are successful, the Appellant shall request the Panel to grant an order that the Respondent shall be liable for all costs and expenses incurred by the Appellant in bringing this appeal, including the costs and expenses of the CAS."

38. On the same date, Andrew Webster filed an appeal with the CAS against the DRC decision, requesting the following relief:

"27.(1) *The Appellant requests that the CAS annuls Section III paragraph 3 of the DRC Decision relating to compensation and replaces it with a new decision as it is unclear how the DRC has arrived at this decision and in any event, the amount of compensation awarded to the Respondent is excessive. In particular, the Appellant requests that the compensation payable to the Respondent be reduced for a number of reasons including, but without limitation as follows:*

(i) to (iii) same as Wigan's (2) (i) to (iii))

(iv) the DRC in the DRC Decision wrongly considers that the amortised transfer fee paid by the Respondent to Arbroath for the acquisition of the Player in 2001 is relevant to the determination of the sum of compensation.

(v) the DRC in the DRC Decision has incorrectly took into account the weekly wage of the new contract. The Appellant submits that this contract is irrelevant to the calculation of compensation. Also the guidelines indicate that this way of calculation is only possible for players transferring from outside the EU/EEA zone of from this zone.

(2) the DRC wrongly imposed a two week playing ban on the Player as it incorrectly concluded that the 15 day time period within which the

Player must have served his notice to terminate his playing contract with the Respondent in accordance with Article 17(3) of the FIFA Regulations for the Status and Transfer of Players (ed Dec 2004) commenced on the last league match and did not include the Scottish FA Cup Final. In the alternative, if the DRC interpretation is upheld, the two week playing ban imposed by the DRC is disproportionate to the 4 day delay in the service of the notice by the Player.

(3) The Appellant therefore requests that in accordance with Article R 57 of the CAS Code, the Panel reviews the facts and the law relevant to above points, annuls the specified sections of the DRC Decision and replaces them with a new decision. In addition to the above requests, and in the event that they are successful, the Appellant shall request the Panel to grant an order that the Respondent shall be liable for all costs and expenses incurred by the Appellant in bringing this appeal, including the costs and expenses of the CAS. ((same as 4. of Wigan)).”

39. In their Statements of Appeal, Wigan and Andrew Webster jointly appointed Mr Jean-Jacques Bertrand as arbitrator.

40. On 25 May 2007, Hearts filed its Statement of Appeal with the CAS against the DRC decision, requesting the following relief:

“4.1 The relief sought on the Appeal is, pursuant to R57 and R65.4, that CAS:

(a) Accepts this Appeal against the Decision;

(b) Replaes the Decision of the FIFA DRC and issues a new decision, which:

(i) Confirms that the FIFA DRC failed to assess the level of compensation payable in accordance with Article 17(1) of the FIFA Regulations, either adequately, or at all;

(ii) Specifies the level of compensation for which the First and Second Respondents should be liable to the Appellant pursuant to Article 17(1) of the FIFA Regulations, in an amount to be determined in accordance with Article 17(1). (In the Appeal Brief the Appellant will make submissions as to the amount.);

(iii) Orders that the Respondents pay the amount so assessed; and

(iv) Orders the Respondents to pay costs before the DRC and CAS in an amount to be assessed by the CAS."

41. In its Statement of Appeal, Hearts appointed The Hon. Michael Beloff QC MA as arbitrator.

42. On 31 May 2007, the CAS invited the parties to indicate whether the same Panel should be appointed in the cases CAS 2007/A/1298, CAS 2007/A11299 and CAS 2007/A/1300 and whether they would agree that the three appeals proceedings be joined.

43. On 31 May 2007, Wigan indicated its agreement to the appointment of the same Panel and to the joinder of the three proceedings.

44. On 1 June 2007, Andrew Webster indicated his agreement to the appointment of the same Panel and to the joinder of the three proceedings.

45. On 4 June 2007, Hearts indicated its agreement to the appointment of the same Panel and to the joinder of the three proceedings.

46. On 4 June 2007, all three parties filed their appeal briefs and Andrew Webster indicated that he would be relying on the arguments and evidence submitted by Wigan.

47. On 6 June 2007, following the agreement of the Parties, the CAS confirmed that the saure Panel would be appointed to decide the three appeals in a single arbitral award.

48. On 26 June 2007, Wigan filed its Answer, which contained the following prayers for relief:

"98. The Respondent requests that the Panel dismisses the Appellant's claim for compensation in the sum of approximately £4,680,508.96.

99. In particular, in respect of each head of loss claimed at paragraph 11.2 of the Appeal Brief, the Respondent responds as follows:

(i) loss of opportunity to receive a transfer fee/or the replacement value of the Player – £4 million: the Respondent rejects this head in its entirety and refers the CAS to its arguments set out above and in particular, to paragraphs 41 to 61;

(ii) the residual value of the fina) year of the Contract –

£199,976: the Respondent accepts that this is the only head of potential recovery for the Appellant but submits that the residual value of the Contract should be calculated in accordance with its arguments as set out in more detail in the Respondent's Appeal Brief (and summarised below at paragraph 100) so that the sum due to the Appellant is limited to £132,585.24;

(iii) the profit that the Player will make from the New Contract – £330,524: the Respondent rejects this head in its entirety and refers the Panel to its arguments set out above and in particular, to paragraphs 82 to 84;

(iv) the fees and expenses incurred by the Appellant to date – £80,008.96 (plus further legai expenses pursuant to the proceedings before the CAS): the Respondent rejects this head in its entirety and refers the Panel to its arguments set out above and in particular, to paragraph 86;

(v) the sporting and commercia) losses suffered by the Appellant – £70,000: the Respondent rejects this head in its entirety and refers the Panel to its arguments set out above and in particular, to paragraphs 94 to 95.

100. Furthermore, the Respondent refers to its Appeal Brief which it submits must be read in conjunction with this Answer. In the Appeal Brief, the Respondent sets out its own interpretation of the relevant provisions of the Regulations and its request for relief which, in summa, is that the CAS annuls the DRC Decision and replaces it with its own decision which orders that:

(i) the compensation due to the Appellant is limited to the residual value of the Contract, given that this is a termination which occurred outside the Protected Period. On the facts of this case, given that the Appellant had informed the Player that he would not play again until he signed a new playing contract, only the guaranteed sums payable under the Contract can be taken into account and no appearance or performance bonuses are relevant. Furthermore, the outstanding bonus payment due to the Player should also be deducted so the Respondent calculates the maximum residual value of the Contract in the sum of £132,585.24. Furthermore, in accordance with Article 44(1) of the Swiss Civil Code of Obligations, the compensation should be also reduced to reflect the fact that the Appellant

by treating the Player unfairly during the period February to May 2006, had contributed to its own loss; or in the alternative

(ii) a figure of compensation that is less than the £625,000 is payable to the Appellant, which it considers to be reasonable in the circumstances, giving due regard to the objective criteria 'under Article 17(1) as detailed in the Respondent's Appeal Brief the most important of which is that the termination occurred outside the Protected Period, so that the most severe aggravating factor of a termination inside the Protected Period is absent in this case. Furthermore, the Respondent requests that the compensation in any event should be further reduced as the Appellant has contributed to its own losses by its treatment of the Player during the period of February to May 2006; and

(iii) the Respondent is not to be held jointly and severally liable to pay compensation for the Player's termination as the DRC has determined that the Respondent was not guilty of any wrongdoing and did not induce the Player to terminate the Contract. Contrary to the DRC's reasoning, the Respondent avers that the liability for breach of contract and the liability to pay compensation flowing from such a breach are inextricably linked; and

(iv) the DRC in the DRC Decision wrongly imposed "disciplina measures" in the form of a two week playing ban on the Player as it incorrectly calculated the 15 day time period within which the Player must have served his notice to terminate the Contract, or in the alternative, if it has corrected calculated this 15 day time frame, that the two week playing ban is in any event excessive."

49. On 27 June 2007, Hearts filed its Answer, which contained the following prayers for relief:

"6.1 In light of the arguments made in this Response, Hearts respectfully requests that the Appellants' appeal be dismissed."

50. On 27 June 2007, Andrew Webster filed his Answer.

51. On 28 June 2007, FIFA informed the CAS that it was renouncingits right to intervene in the proceedings.

52. On 3 July 2007, Hearts filed additional exhibits.

53. On 3 July 2007, the CAS confirmed the constitution of the Panel as follows: Mr Quentin Byrne-Sutton, as President, Mr Jean-Jacques Bertrand and The Hon. Michael Beloff QC MA, as arbitrators.

54. On 24 July 2007, the Panel issued three procedural orders containing the following decisions:

" *1. The two additional exhibits filed by Hearts are admitted on record.*

2. Wigan and the Player are entitled to file any rebuttal documents (affidavits and/or other documents) by 24 August 2007.

3. CAS will make arrangements for a hearing to be held in September at a date which is convenient.

4. The costs of the present order shall be determined in the final award.

and

1. A hearing shall take piace as soon as possible after 1 September 2007 at a convenient date to be found between the parties and CAS.

2. If the parties cannot agree on a reasonable date of hearing, it shall be fixed by the Panel.

3. The costs of the present order shall be determined in the final award.

and

1. CAS has no jurisdiction to entertain an appeal against that part of FIFA's decision of 4 Aprii 2007 imposing two-weeks of ineligibility on the player Andrew Webster as a disciplinary measure.

2. The costs of the present order shall be determined in the final award."

55. On 21 August 2007, Andrew Webster filed additional exhibits.

56. On 7 September 2007, the CAS informed the parties that the hearing would take piace over a period of two days and that it would be held on 17 and 18 October 2007 at the CAS Court Office in Lausanne.

57. On 12 September 2007, the CAS informed the parties that the additional

exhibits submitted by Andrew Webster had been admitted on record.

58. On 15 October 2007, the Lega Nazionale Professionisti filed a non-solicited letter with the CAS purporting to comment on certain aspects of the dispute between the parties.

59. On 15 October CAS issued a generai procedural order, which was subsequently countersigned by the parties for acceptance, indicating, among others, that the CAS had jurisdiction and that the parties confirmed their acceptance of the joint appeal proceedings for the three cases and of the issuance of a single award.

60. The hearing took piace in front of the Panel on 17 and 18 October 2007 in Lausanne, Switzerland, with the Counsel of CAS (Mr. David Casserly) in attendance. The following participants were present:

a) Hearts

Ian Mill QC, counsel
Peter Limbert, counsel
Stephen Sampson, counsel
Jane Mulcahy, counsel
Dr Stephan Netzle, counsel
Simon Di Rollo QC, counsel
Pedro Lopez, witness
Frank Clark, witness
Vilma Vensiovaitienne, observer
Donaldas Urniezius, observer

b) Andrew Webster

Juan de Dios Crespo Perez, counsel
Andrew Webster, player

c) Wigan

Brenda Spencer, Chief Executive
John Benson, Generai Manager
Jim Sturman QC, counsel
Carol Couse, counsel
Fraser Wishart, witness
Charles Duddy, witness
Graham Rix, witness
Philippe Piat, witness

61. At the beginning of the hearing three outstanding procedura) issues were addressed. The Panel informed the parties that the letter submitted by the Lega Nazionale Professionisti was not admitted into the record, due to the latter not being a party to the proceedings. Furthermore, with the parties' agreement, it was decided that an additional witness statement submitted by Hearts would be admitted into the record and that the Panel's determination as to the applicable law would be included in the final award after hearing the parties' pleadings on that issue, together with expert testimony on Scottish and Swiss law.

62. The hearing continued with opening statements by the parties, followed by the examination of the witnesses and of Andrew Webster and, finally, the parties' closing arguments.

III. THE PARTIES' CONTENTIONS

A. Hearts

63. Hearts in summary submits the following:

- The relationship with Andrew Webster deteriorated when he refused to extend the employment contract.

- It is clear the Player was already then seeking a more lucrative contract and, to this end, would not hesitate to terminate his employment with Hearts.

- Only the second termination, without just cause, is relevant in determining what compensation Andrew Webster must pay to Hearts as a result.

- In that respect, it is not disputed that the Player is liable to Hearts for compensation. Rather, the appeal relates only to the amount of compensation awarded by the DRC decision.

- This is the first case concerning a player breaching his contract without just cause outside the 'Protected Period' as defined in the FIFA Status Regulations.

- In front of the DRC, Hearts claimed approximately £4.9 million in compensation, however the DRC awarded the Club just £625,000, thus falling into error by assessing the amount of compensation at far too low a level.

– Moreover, the FIFA DRC failed to explain how it arrived at the figure of £625,000 for compensation.

– That figure of compensation does not compensate Hearts as required by the FIFA Status Regulations.

– The dispute forming the subject of this appeal must be viewed in the Tight of the purpose underlying Article 17 of the FIFA Status Regulations, namely the maintenance of contractual stability. This is of paramount importance to the football world. Indeed the importante of the maintenance of contractual stability underpins the entirety of section IV of the FIFA Status Regulations.

– In order to ensure the maintenance of contractual stability the FIFA Status Regulations provide for deterrents in the form of sporting sanctions (i.e. a ban on a player from playing for four months or more) and the payment of compensation to the injured party by the player and his new club.

– The sanction to act to deter a player breaching his contract outside of the Protected Period is the payment of compensation.

– Compensation assessed in accordance with the Status Regulations has two purposes: (i) to act as a deterrent, especially where the breach is outside of the Protected Period – as an injured club does not benefit from the player being subject to a ban – and (ii) to compensate the injured club for the loss it has suffered.

– The deterrent element is particularly necessary as the FIFA Player's Status Committee will not permit a club to prevent a player who has terminated in breach of contract without justcause from playing for his new club.

– In this case, the contract did not provide for any assessment of compensation in the event of a breach by either party.

– Thus, the compensation must be calculated in accordance with Article 17(1) of the FIFA Status Regulations, whereby the assessment should be undertaken by establishing and giving due consideration (i) to the relevant national law, (ii) the specificity of sport, (iii) if relevant, the examples of objective criteria as set out in the Article, (iv) whether the breach occurred within a Protected Period, and (v) any other objective criteria which is relevant.

– This approach was allo confirmed in several prior decisions of the DRC and in CAS award Mexes & AS Roma vs. AJ Auxerre (TAS 2005/A/902, dated 5 December 2005) ("Mexes"). In that case, the CAS confirmed that the three principal criteria established by Article 22 of the 2001 edition of the Status Regulations for assessing compensation for breach of contract are: (i) the principles used in the applicatile national law to establish and quantify losses recoverable for breach of contract, (ii) the specificity of the sport, and (iii) "any other objective criteria relevant to the case", including those objective criteria specified in Article 22 itself.

– In Mexes, the club Auxerre had not signed the player as a professional from another club and therefore did not have unamortised acquisition costs to take into account. The CAS instead calculated the compensation payable (•7 million) by reference to (among other things) the amounts payable to the player under the contract he had breached (including the commission paid by the club to the player's agent), as well as the losses that Auxerre suffered as a result of losing the possibility to receiving a transfer fee for the player's registration.

– Mexes is a particularly apposite case. It dealt with a central defensive player (like Webster); whom the former club had acquired without a transfer fee (the fee for Webster was the de minimis sum of £75,000); whom the club had trained and developed for nearly six years, four of those as a professional (Hearts trained and developed Webster for five years as a professional); where the player was 22 at the time of his unilateral breach of contract (Webster was 24); and was of some significane reputation and potential (like Webster), although with only a handful of international appearances for his country, Rance (whereas Webster had 22, for Scotland).

– In this case, to the extent that the Panel is required to construe the meaning of the relevant parts of the FIFA Status Regulations (which Hearts' asserts are clear), the Panel must do so in accordance with Swiss Law, as the law of the domicile of FIFA and the law goveming the FIFA Statutes. That is the limit to which Swiss Law is relevant to this dispute.

– Indeed, pursuant to Artide 17 (1) *"...compensation for breach shall be calculated with due consideration for the law of the country concerned..."*.

– In this case the "law of the country concemed" under Article 17(1) of the FIFA Status Regulations is Scots Law.

– Consequently, the FIFA Status Regulations, as governed by Swiss Law, require that the DRC and now the CAS give due consideration to Scots Law when assessing the compensation due to the Club. To apply any other national law would be contrary to article 17(1).

– The particular remedies which exist under Scots law for breach of contract are based on the principle of *restitutio in integrum* which attempts to return the injured party to the position he would have been in had the breach not occurred. In other words, Hearts' remedy for the Player's unilateral termination without just cause should be the award of damages in an amount which would return the Club to the position it would have been in had the Player not terminated the Contract.

– It is also well established that, under Scots law, damages for loss of profit pursuant to breach of contract are recoverable. Therefore the DRC should have had regard to Hearts' loss of opportunity to agree the transfer of the Player's registration to another football club and profit consequent thereon.

– Similarly, the DRC should have had regard to the costs that would be incurred by Hearts had it purchased a replacement player of a similar age, experience and ability to the Player.

– In addition, the DRC should have had regard to the costs which were wasted in the acquisition, training and development of the Player, and for which it did not receive the expected return of a transfer fee.

– Another basic axiom of Scots law is that interest is recoverable on contractual damages. As such, the DRC should have imposed upon the Player and/or Wigan, interest on the compensation payable from the date of the Player's termination.

– Alternatively, and in the event that the CAS decides Swiss law principles should be applied in establishing the measure of the compensation to be paid, the CAS should arrive at broadly the same position asexists under Scots law as the steps set out below are similarly consistent with the application of Swiss law.

– In order to assess the amount that it would cost Hearts to obtain a replacement player of similar age, experience and quality to the Player, or the loss of the opportunity to receive a transfer fee, it is necessary for the CAS to consider the market value of the Player or his replacement by reference to the following three factors: (a) whether

there were existing or pre-existing bids from other football clubs for the Player; (b) the transfer fees recently paid for players of similar value to the Player; and (c) the assessment of the Player's market value by an independent expert witness, in this case Mr Franti Clark.

– In respect of the first criterion, on 21 June 2006 Hearts received an official written offer of £1.5million GBP for the Player from Southampton.

– However, Hearts refused this offer since it was considerably below the market value of the Player.

– Other clubs, including Blackburn Rovers Football Club, also expressed interest in the Player.

– In respect of the second criterion, the cost to a club in the English Premier League for a player of a similar pedigree to the Player would have been between £3-5 million. This is evidenced by the transfer fees paid by or to English Premier League clubs during the transfer window in Summer 2006 for players of a similar age, position, calibre, and contractual status as the Player.

– In respect of the third criterion, the CAS is invited to consider the evidence of Mr Franti Clark, who is an independent expert in assessing a player's value in the football market, particularly in the UK.

– As set out in full in his report, Mr Clark's view of the market value of the Player at the time of his unilateral termination without just cause was approximately £5 million.

– Hearts submits that this would also form the basis of a sum to obtain a replacement player of the same standing. In practice, Hearts has not obtained a player of similar age, ability and experience chiefly because the Club has not had the financial resources to enter the transfer market at the necessary level. Instead, the Club has been compelled to replace the Player with Christophe Beffa, a fotlner academy player.

– The CAS must also have regard to characteristics of the Player's employment at the Club. In particular, it is relevant to establish the training and educational role played by Hearts, and its approach to the maintenance of contractual stability.

– It is recognised by the DRC decision that Hearts played a fundamental

role in the vast improvement of the Player during the time he spent with Club from the ages of 19 to 24.

– The improvement in the Player, which Hearts facilitated and cultivated, was itself duly recognised by Hearts. Hearts attempted over a period of one year to agree the tenns of a new and substantially improved contract,but its offers were rejected.

– Further, the CAS shouldrecognise that it cannot be for the good of the game for a breach of contract in these circumstances to be compensated inadequately.

– The residuai value of the Player's Contract should also be considered as an element informing the assessment of compensation due to Hearts.

– The CAS should also have regard to the profit the Player will make on his contract with Wigan, which was obtained as a direct result of his unilateral termination without just cause.

– With regard to the fees and expenses incurred by Hearts, it signed the Player on a 4-year contract in 2001 for £75,000 from Arbroath Football Club. In 2003, the Club and the Player agreed to re-negotiate the Player's employment tetuis and entered into the Contract.

– In view of the above, the amortisation of the transfer fee paid for the Player should be considered, but not to the detriment of other factors, as to do so would result in Hearts not being compensated for the unilateral termination. Rather, what is relevant to this calculation is the sporting and financial investment Hearts has made in training and developing the Player during the last 5 years.

– Hearts (a) has also incurred legai fees in dealing with the Player's unilateral teiuiination and pursuing its claim for compensation and sanctions before the FIFA DRC, amounting to £80,008.96 and (b) will incur additional costs in relation to this appeal, none of which would have been incurred but for the Player's unilateral termination.

– When calculating the level of compensation which should be awarded to Hearts, the CAS should take into account the following criteria are: (i) whether there are any terms in the Contract which provide for compensation in the event that the Player terminates his contract or is transferred; (ii) the circumstances surrounding the Player's unilateral termination of the Contract and his disregard for contractual stability;

and (iii) the playing and commerciai losses suffered by Hearts as a result of the Player's unilateral termination of the Contract.

– In that relation, Clause 21 of the contract states, inter alia: "....the *Player shall not be registered for any other club without payment of a compensation fee (fixed in manner provided by the Rules of The Scottish Premier League) by that other club to the club which previously held the Player's Scottish Premier League Registration."*

– In this case, the Player deliberately sought to circumvent Hearts' contractual right to compensation in the event of the Player's transfer to another club. The actions of the Player have been reprehensible from the outset. The Player has sought to exploit the good faith of Hearts and his actions to date as evidenced by his consistent aim to secure a significant financial gain directly at the expense of, and without regard for, Hearts, the maintenance of contractual stability, his National Association or FIFA regulations.

– The Player's actions in this matter are an aggravating factor which must be taken into accounted.

– With respect to sporting and commercial losses suffered by Hearts, had the Player honoured the terms of the Contract as the parties intended, Hearts would not have been deprived of the services and positive impact for its image of one of its most important players.

– For all the foregoing reasons, pursuant to the proper assessment of compensation under Article 17(1) of the FIFA Status Regulations, Hearts should be compensated in a sum in the region of £4,680,508.96 broken down as follows: (i) for Hearts' loss of opportunity to receive a transfer fee for the Player/or the replacement value of the Player (calculated reasonably by reference to the schedule of players transferred in the last transfer window, the offers received for the Player from other clubs, and the estimated market value for the Player given by Frank Clark) – £4 million; (ii) for the residuai value of the last year of the Player's Contract (calculated in accordance with the salary of the Player for the last 12 months of the Contract) – £199,976; (iii) for the profit the Player will make from the New Contract – calculated by reference to the difference between the value of the last year of the Contract and the first year of the New Contract – (subject to clarification by Wigan) approximately £330,524; (iv) for the fees and expenses incurred by Hearts to date – £80,008.96 (plus further legai expenses pursuant to the proceedings before the CAS to be provided);

(v) for the sporting and commerciai losses suffered by Hearts – £70,000 (which is an estimated sum at this stage).

B. Andrew Webster and Wigan

64. Although the Player's newly appointed counsel added some points during his closing arguments, the Player's submissions of both fact and law throughout the proceedings have largely incorporated or reflected those of Wigan. Consequently, except for the specific argument made by Wigan in relation to the issue of its joint liability, the following summary reflects the substance of both the Player's and Wigan's submissions:

– The DRC decision is procedurally flawed due to the way in which the DRC Decision was reached in breach of Article 13.4 of the *Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber* (ed June 2005), which provides that decisione of the DRC must contain *"reasons for the findings"*. Although the DRC refers to a number of factors that it considered relevant to the calculation of compensation due to the Respondent, it fails to adequately explain the significance of each of the factors and how the final award has been calculated.

– The DRC decision fails to follow its own settled jurisprudence, in accordance with Swiss Law and in particular, Article 44(1) of the Swiss Civil Code of Obligations, that contributory fault of the "injured party" (i.e. Hearts) is a material factor to consider when calculating the sums of calculation due in the case of a contractual tennination without just cause. Hearts having treated the Player unfairly during the 2005/06 season this is a material factor to be considered when determining the sum of compensation.

– The DRC decision appears to piace reliance in the Club's favour on the fact that the Player had spent five seasons with the Club. Furthermore, the DRC incorrectly considers that Hearts had a generai interest in retaining the services of the Player.
The manner in which the contractual negotiations were conducted and the Club' s subsequent unfair treatment of the Player are clear evidence to the contrary.

– The DRC decision wrongly considera that the amortised transfer fee paid by Hearts for the acquisition of the Player in 2001 is relevant to the determination of the sum of compensation payable in this case (given that the original playing contract the Player entered into in March

2001 was replaced by the contract in July 2003).

– The DRC decision incorrectly places reliance on the weekly wage that the Player was due to eam under his new employment contract with Wigan. That contract is irrelevant to the calculation of compensation, given that it has no bearing on the loss suffered by Hearts.

– The DRC decision recognizes that Wigan is not guilty of any wrongdoing, nor has it induced the Player to breach the contract. Wigan should therefore not be held jointly and severally liable to compensate Hearts.

– The employment contract is not expressed to be governed by Scottish law, but rather the contract provides at clause 26 that it is subject to the *"Articles of the Scottish Football Association and the Rules of the Scottish Premier League"*. Mese Articles and Rules have made themselves expressly subject to the statutes and regulations of FIFA, including, in particular, the Regulations themselves. Furthermore, the Appellant has expressly accepted the relevance of the Regulations by submitting the resolution of the dispute to both FIFA and the CAS.

– In this respect, it is to be noted that according to article 17(1) and article 25 (6) of the FIFA Status Regulations, national law is not binding upon the DRC or, therefore, the CAS in these appeal proceedings.

– Given the international nature of this dispute, it is appropriate that the Regulations should apply to this dispute as far as possible unfettered by the idiosyncrasies of individual national laws.

– This principle is confirmed in the CAS Case 2005/A1983 & 984 Club Atletico Penarol v Carlos Heber Bueno Suarez and Christian Gabriel Rodriguez Barotti & Paris Saint Germain, in which the CAS held: *"Sport is, by its nature a phenomenon which transcends borders. It is not only desirable, but essential that the rules governing sport on an international level have a uniform and broadly consistent nature throughout the world. To ensure its respect on a world level, such regulations cannot be applied differently from one country to another, particularly because of the interferences between state law and sports regulations. The principle of the universal application of FIFA rules – or any other international federation – meets the requirements of rationality, safety and legai predictability ... The uniformi ty which results tends to guarantee equality of treatment between all destinees of these standards whatsoever country they are in"*.

– However, Swiss law is also relevant to determine the crux of this matter, i.e. the sum of compensation due to the Appellant.

– In the Mexes case the CAS held that in the context of the dispute regarding the premature termination of a French employment contract, which expressly referred to the 'Professional Football Charter' (which governs football employment relations in France) French law was relevant, but only to *"the limited angle of the interpretation andlor assessment of Mr Philippe Mexes' employment contract"*. It went on to hold that the substance of the dispute should be determined in accordance with Swiss law: *"as all the parties to there proceedings agreed to submit to the FIFA statutes and the Code of Arbitration..., the Unit considered that Swiss law musi govern determining the loss"*.

– EC law is also applicable in this case as all three parties reside and engage in economic activities in Member States of the EU. Furthetmore, the Regulations themselves actually govern the movement of players between EU Member States and therefore they affect trade between Member States.

– Therefore the activities of Hearts, Wigan and the Player are subject to EC law and EC law is applicable in this case so far as the DRC decision and the Panel's own determination must be in compliance with EC law to be legal and prima facie enforceable.

– That said, it is clear that the resolution of the issues at the centre of this appeal will turn on an interpretation of Article 17 of the FIFA Status Regulations.

– Hearts seeks to piace reliance on the importance of contractual stability, which it asserts is a justifying factor for the level of compensation sought by Hearts as a suitable "deterrent" for the Player having terminated his contract. It fails to acknowledge, however, that another fundamental concept, developed with the goal of striking a right balance between the respective interests of clubs and players was the so called "Protected Period". Whilst a player may be required to compensate his former club for a unilateral termination of contract which has occurred, if this termination occurred outside the Protected Period, then the sum of compensation awarded cannot constitute a restriction upon that player's right of freedom of movement within the EU, as he has already complied with the stipulated period of contractual stability.

– Imposition of compensation in excess of the residuai value of the

employment contract would constitute such a restriction. The imposition of any amount in the region of £4,680,508.96 as requested by Hearts, which effectively comprises the imposition of an arbitrary transfer fee, would undoubtedly create a barrier to the free movement of the Player, contrary to the principles of EC Law.

– There is a vital distinction between the treatment of a termination, dependent upon whether this has occurred inside or outside the Protected Period. It is evident that the Player has observed the terms of the contract during the agreed stability period, a concept which had been expressly approved by clubs and thus Hearts.

– Given that under article 17 of he FIFA Status Regulations there is a sliding scale of sanctions in piace that is referable to whether the termination took piace inside or outside the Protected Period, by analogy, the issue of whether the termination occurred inside or outside the Protected Period must therefore be of major significance when determining the level of compensation payable.

– Indeed, whether the termination occurred incide or outside the Protected Period is expressly stated as being one of the objective criteria for calculating compensation under Article 17(1) of the FIFA Status Regulations. Therefore whilst it accepts that compensation is due to Hearts in accordance with the provisions set out in Article 17(1) of the Regulations, such sums must not be punitive in nature, so as to restrict the Player's free movement rights, contrary to the rights enshrined in Article 39 of the EC Treaty, as the Player has fully respected the required contractual stability period of three years.

– Whilst it is accepted that the article 17 objective criteria may not be exhaustive, it is the particular criteria Hearts seeks to introduce that are unacceptable. The two considerations upon which Hearts' whole case for compensation hinges are the alleged criteria for the replacement costs of acquiring a new player and/or the loss of opportunity to receive a transfer fee.

– It is noteworthy that two such purportedly significant factors, which are likely to form part of the factual matrix of any termination and which Hearts values in this case at £4 million are not expressly included in the article 17 objective criteria. ff these factors were intended to be included, they would have been listed in article 17(1).

– Even if the CAS accepted that the principle of *"restitutio in integrum"*

was applicable, then the position that Hearts be in had the Player not utilised the article 17(3) mechanism would be to have had the Player contractually bound to it under the contract for a further year. This position is a wholly different position from the one put forward by Hearts that it has in fact lost the opportunity to sell the Player for a profit.

– Furthermore, Hearts cannot claim that it would have sold the Player had he not terminated the contract as any such transfer would have required his consent. Consequently, Hearts has not proven that had the Player not terminated the contract, it would have transferred him for a profit. Indeed, it is very likely that the Player would have left Hearts upon the expiry of the contract without any compensation being payable to Hearts. Hearts accepts this at paragraph 9.10 of the Appeal Brief as it states that *"upon expiry of the contract, the Player would be able to move to another club without payment of a transfer fee"*. Hearts cannot therefore prove that it has lost a transfer fee in respect of the Player. Its claim for loss of a transfer fee must therefore be rejected.

– In its argument for loss of a transfer fee, Hearts attempts to construct a claim based upon an arbitrary and subjective 'market value' of the Player by reference to three factors. This whole argument for a transfer fee is rejected as a matter of principle: however the relevance of the evidence adduced by Hearts as to the market value is also rejected.

– Hearts adduces evidence of transfer fees paid by or to English Premier League clubs during the summer 2006 Registration Period for "players of a similar age, position, calibre and contractual status as the Player". Such an approach is flawed as it fails to recognise the fact that each of these transfers was a mutually agreed transfer between the selling club, player and the buying club of a player under contract and thus has no resemblance to the situation where a player has legitimately terminated his contract in accordance with Article 17(3). The comparisons which Hearts seeks to make cannot be made.

– Moreover, the CAS was criticai of a similar approach by Auxerre in the Mexes case, holding that *"AJ Auxerre's argument is based on a hypothetical transfer price contingent on transfers completed for other players. The amount claimed is therefore unfounded because it is hypothetical and based solely on estimates"*.

– Although Hearts relies on the Mexes case, the present case is clearly

distinguishable since the unilateral termination occurred outside the Protected Period. It is, however, also vital to note the basis upon which the conclusion in the Mexes case was reached: the player's former club Auxerre and his new club, AS Roma, had been in negotiations over a possible transfer of the player's registration which had not proven to be successful, in which Roma had made a definite offer of •4.5m for the transfer of the player. The CAS therefore concluded that "... *(I)t is therefore quite clear that Mr Mexes' violation of his contract resulted in the French club being deprived of a transfer fee which had been the object of a concrete offer from AS Roma in the region of •4,500,000."*

– Thus clearly the calculation of damages in Mexes has to be considered within the context of a negotiation between two clubs both where the buying club made an offer for the transfer of the player's registration and whilst the player was inside the Protected Period. Therefore the situation constituted what CAS refers to as a "failed transfer". This was the only reason that the CAS concluded that Auxerre had suffered a loss in not receiving a transfer fee from AS Roma.

– The evidence of Mr Frank Clark relied on by Hearts is irrelevant. Mr Clark has evidently been requested to provide a subjective opinion on a perceived transfer market value of the Player during the Summer 2006 transfer Registration Period.

– Furthermore, Hearts rejected the offer from Southampton FC on 21 June 2006 and was thus prepared to wait for other offers into July and August 2006, i.e. during the last 12 months of the Contract. As such, the evidence of Mr Clark that "...the *generai rule is that the value of a player reduces when he is coming towards the end of his contract – i.e. when he is within the last 12 months of it ..."* actually undermines Heart's argument for a transfer fee in excess of the level of Southampton's offer.

– Hearts asserts that the DRC should have had regard to the costs that would be incurred by Hearts had it purchased a replacement player of a similar age, experience and ability to the Player. However, it is clear that by the Appellane s own admission, this is a hypothetical head of loss that has not been proven as the Appellant has not demonstrated what its loss actually is. Indeed, Hearts states *"in practice, Hearts has not obtained a player of a similar age, ability and experience."* The Panel must therefore reject this argument.

– Furthermore, on the basis of the Swiss law principle that contributory fault of the injured party should be taken into account when assessing damages, given that it was Hearts that chose not to select the Player and transfer listed him, Hearts must be held solely responsible for the situation fit finds itself in, or in the alternative to have made a major contribution in this regard.

– Hearts states that the DRC should have had regard to the costs which were allegedly wasted in the acquisition, training and development of the Player and for which it did not receive the expected return of a transfer fee. However no transfer fee was guaranteed in respect of this Player.

– Moreover, any credit attributable to Hearts for the Player's development can only be by reference to the seasons between the ages of nineteen and twenty one, i.e. until his training period ended, and in this case no Training Compensation is payable under Article 20, Annex 4 of the FIFA Status Regulations as the Player was twenty four when he terminated the contract.

– In any event, the costs of acquisition of the Player were not "wasted" since Hearts benefited from what it has acknowledged as the performances of a player who became "integrai to the first team" over a course of over 5 years in return for what it has itself acknowledged to be *"a de minimis sum of £75,000"* transfer fee to Arbroath in March 2001.

– On the basis of established jurisprudence of the DRC, interest is only payable on contractual damages awarded by the DRC if payment of the said sum has not been paid within thirty days of the decision to this effect, (unless, of course, an appeal is made). Furthermore until a final and binding determination is reached, neither party is aware of the exact sum of compensation due to Hearts, so interest cannot yet run.

– The principle of the specificity of sport is a factor which is to be considered within the context of assessing compensation under Article 17(1) as the said Article makes express reference to it.

– In that relation, credit must be attributed to the Player's development to his own abilities, commitment and professionalism. The CAS itself ratified such approach in Mexes, where it held that when assessing compensation, credit should be given to the player for his own effort

in progressing his career.

– In addition, insofar as Hearts seeks an increase in the compensation due to the development role it played, it must also therefore accept its role in the relative decline of the Player during the period of February 2006 to October 2006 during which time his appearances in both first team club football and international football were greatly diminished. This negative impact on the Player must also be considered under the head of the 'specificity of sport' in reducing the sum of damages payable Hearts.

– Hearts refers to the CAS case of Ariel Ortega v Fenerbahce SK & FIFA (2003/0/482) ("Ortega case"), in which the DRC calculated the sum of USD 11,000,000 as compensation due to Ortega's previous club, Fenerbahce SK in consideration of: (i) the transfer fee paid to the player's previous club, Parma AC; (ii) payments to the Argentine Football Association pursuant to the terms of a collettive bargaining agreement; (iii) payments in respect of the acquisition of the image rights of the player; and (iv) the residuai value of the player's playing contract.

– The Ortega Case should, however, be considered on its own facts as this case related to Mr Ortega's unilateral termination of his contract inside the Protected Period and after only 9 months of service to Fenerbahce. The question of when the termination occurs is fundamental to the calculation of compensation. In any event, even if the Panel were to apply the reasoning behind the Ortega case to the facts of this case, given that the transfer fee of £75,000 paid by the Appellant to Arbroath in 2001 is not relevant, and in the absence of image right payments and/or payments to any football association, the only factor of relevance is the residual value of the contract (which on the facts of this appeal is £132,585.24).

– Hearts allo refers to the DRC case of Club A v Player B dated 15 January 2004. However that case does not support its claim. The sum of compensation awarded was based on the proportion of a signing on fee which had been paid to the player up front, and for which the club had not received a benefit, as the player prematurely terminated his contract. The player was therefore required to reimburse the club the proportion of the signing on fee which related to the unexpired portion of the playing contract. This decision is therefore not directly relevant.

– The residual remuneration due to the Player under the Contract is the

sole factor, or in the alternative the principal factor to consider when assessing the compensation that is payable to Hearts.

– In the case in hand, the residual value of the contract can only comprise the guaranteed sums of salary and signing-on fee that the Player was due to receive under the contract, rather than estimated bonuses based on previous seasons when the Player was an ever present member of the team.

– Hearts reliance on the DRC case of Player X v Club Y of 22 November 2005 is botti surprising and misconceived since that case concerns a breach of contract by a club and not by a player. The club was therefore liable to pay damages to the player which must of course be calculated by reference to the sums payable to the player under his new contract to facilitate the principle of the 'mitigation' i.e. so that the player is required to give credit for any sums he receives under a new contract to reduce his losses as a result of the breach of contract by the club. This is the only situation when the value of the new contract can be relevant.

– Hearts has failed to adduce any other jurisprudence to support its argument that remuneration and benefits under the New Contract are relevant. Moreover the exact wording of Article 17(1) i.e. *"and/or the new contract"* is indicative of the fact that the terms of any new contract are clearly not applicable in all circumstances.

– Although Hearts seeks to recoup the legai costs in the sum of £80,008.96 that it has incurred to date, in accordance with established DRC jurisprudence, such fees are not recoverable in DRC proceedings. In respect of the legal fees incurred by Hearts, the Panel must determine this issue in accordance with article R 64.5 of the CAS Code.

– Hearts' submission that it had an absolute right to a compensation fee in reliance on clause 21 of the contract is self-serving as the Appellant has selectively quoted from this clause.

– In that relation and as a preliminary matter it is noteworthy that Scottish Premier League Rules referred to in clause 21 must be limited in scope to national transfers and therefore this clause is irrelevant in this case which is governed by the Regulations.

65. Furthermore, clause 21 must be examined in its true context by accounting for the fact that this provision cross refers to the compensation procedure

set out in detail at Rule D 11 of the Rules of the Scottish Premier League, which expressly provides at Rule D 11.2 that *"a club shall not be entitled to Compensation in the event that Registration to another Club occurs after the Professional Player concerned reaches the age of 24"*. Given that the Player was over twenty four when his registration was transferred, this provision is in any event irrelevant.

IV. DISCUSSION OF THE CLAIMS

A. Jurisdiction

66. The appeals are admissible as they were filed within the deadline stipulated in article 61 of the FIFA Statutes and in the appealed decision.

67. The jurisdiction of CAS, which is not disputed, derives from articles 60 and 61 of the F'IF'A Statutes and art. R47 of the Code of Sports-related Arbitration ("CAS Code").

68. The scope of the Panel's jurisdiction is defined in art. R57 of the CAS Code, which provides that: *"The Panel shall have full power to review the facts and the law. It may issue a new decision which replaces the decision challenged or annul the decision and refer the case back to the previous instance"*.

B. Applicable Law

69. The rules of law applicable to the dispute between the Player and Hearts, on the one hand, and between the latter and Wigan, on the other hand, could in theory be different, since the parties are not the same and the clubs are not contractually bound to one another as the Player was with Hearts.

70. However, for the reasons now examined, the Panel finds that the same set of regulations and same national law are applicable to all three of the proceedings having been joined and to all aspects of the dispute between the parties.

71. Since chapter 12 of the Swiss Private International Law Act ("PILact") governs all international arbitrations with their seat in Switzerland and this arbitration constitutes an international arbitration with its seat in Switzerland as defined by article 176 of the PlLact, article 187 PILact is the underlying conflict-of-law rute which is applicable in determining the governing rules of law.

72. According to article 187 of the PILact (free translation): *"The Arbitral tribunal shall decide the dispute according to the rules of law chosen by the parties or, in the absence of such a choice, according to the rules of law with which the case has the closest connection."*

73. Artide 187 of the PILact gives the parties a large degree of autonomy in selecting the applicable rules of law - including the possibility of choosing conflict-of-law rules (to determine the governing substantive law), a national law or private regulations. Moreover, the parties' choice can be tacit, e.g. result from their conduct during the proceedings.

74. In the present case, the applicable regulations and national law result from a combination of choices and references by the parties.

75. With respect to the Player and Hearts, the primary source of choice of law would be the employment contract. That caid the employment contract contains no choice-of-law clause. With regard to the applicable regulations, clause 10 provides that:
"The Player and the Club shall observe and be subject to the Rules, Regulations and Bye-Laws of The Scottish Football Association, The Scottish Premier League and such other organisations of which these bodies or the Club is a member and in the case of any conflict between this Agreement and such Rules, Regulations or Bye-Laws then such Rules, Regulations or Bye-Laws shall take precedence. The Player shall also at all times observe the reasonable Rules of the Club."

76. Since the Scottish Football Association is a member of FIFA, the FIFA regulations and bylaws are applicable and take precedence in accordance with the reference in clause 10.

77. The FIFA regulations and bylaws in turn contain a main choice-of-law clause under article 60§2 of the FIFA Statutes, whereby: *"The provisions of the CAS Code of Sports-Related Arbitration shall apply to the proceedings. CAS shall primarily apply the various regulations of FIFA and, additionally, Swiss law."*

78. The foregoing choice-of-law clause underlines the primary application of the various FIFA regulations, while referring to the CAS Code and Swiss law.

79. In the present case, the reference to the CAS Code simply has the effect of re-confirming the primary application of the FIFA regulations and the additional application of Swiss law since art. R58 of the CAS Code provides

that: *"The Panel shall decide the dispute according to the applicable regulations and the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body is domiciled or according to the rules of law, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision."*

80. Furthermore, all the parties in all three cases are basing their contentions in part on the FIFA regulations, notably on the FIFA Status Regulations.

81. For the above reasons, the Panel finds that all tee parties have chosen the primary application of the FIFA regulations to the matters in dispute in all three cases.

82. That said, a question remains concerning the scope of application of Swiss law in addition to the FIFA regulations, in light of the fact that according to article 17(1) of the FIFA Status Regulations, "*... compensation for breach shall be calculated with due consideration for the law of the country concerned..."* and that according to article 25 (6) the DRC shall when making its decisions, "*... apply these Regulations whilst taking into account all relevant arrangements, laws and/or collective bargaining agreements that exist at national level, as well as the specifici ty of sport"*.

83. The Panel considers that the reference in article 17(1) of the FIFA Status Regulations to *"the law of the country concerned"* does not detract from the fact that according to the clear w,ording of article 60§2 of the FIFA Statutes, the FIFA intended the interpretation and validity of its regulations and decisions to be governed by a single law corresponding to its law of docile, i.e. Swiss law.

84. Thus, the Panel finds that the interpretation of the FIFA regulations and the validity of the DRC decision under appeal must be determined in application of Swiss law.

85. Moreover, the Panel finds that article 25(6) of the FIFA Status Regulations and the reference in article 17(1) to the *"law of the country concerned"* are not, properly speaking, choice-of-law clauses.

86. Given its formulation, article 25(6) must be deemed a generai render to the decision-making bodies of FIFA (PSC, DRC, Single Judge and DRC Judge) that in making their decisions under the FIFA regulations they must not apply those regulations in a vacuum but must account for the applicable contractual arrangements, collective agreements and national law. Article

25(6) does not purport to specify what national law is relevant.

87. As to article 17(1) of the FIFA Status Regulations, it is clear from its wording that the reference to the *"law of the country concerned"* is not a choice-of-law clause, since it merely stipulates that such law is among the different elements to be taken into consideration in assessing the level of compensation.

88. In other words, article 17(1) does not require that compensation be determined in application of a national law or that the rules on contractual damage contained in the law of the country concerned have any sort of priority over the other elements and criteria listed in article 17(1). It simply means that the decision-making body shall take into consideration the law of the country concerned while remaining free to determine what weight, if any, is to be given to the provisions thereof in light of the content of such law, the criteria for compensation laid down in article 17(1) itself and any other criteria deemed relevant in the circumstances of the case.

89. In the present case, the law of the country concerned is Scottishlaw, since Scotland has the closest connection with the contractual dispute; being at once the country where the employment contract was signed and performed and where the club claiming compensation (Hearts) and the Player were domiciled at the time of signature and termination.

90. In sum and for the above reasons, the Panel considers the applicable law and regulations to be as follows:

- The FIFA regulations in determining the amount of compensation due to Hearts as a result of the Player's unilateral termination of his employment contract.

- Swiss law in interpreting the FIFA regulations and the validity of the DRC's decision under appeal.

- Scottish law, if the Panel deems any provisions are relevant to apply in conjuction with the FIFA Status Regulations in determining the level of compensation dqe to Hearts.

91. For reasons that will be explained below when discussing the claims, the Panel considers that the provisions of Scottish law invoked by Hearts should not be applied.

92. Finally, with respect to EC law invoked by the Player and Wigan, the Panel shall examine its scope of application if it becomes necessary in

relation to the type of compensation decided.

B. Merits of the Appeals

93. The centrai provision of the FIFA Status Regulations invoked by the parties is article 17, which provides as follows:
"Artide 17 Consequences of Terminating a Contract Without Just Cause The following provisions apply if a contract is terminated without just cause:

1. In all cases, the party in breach shall pay compensation. Subject to the provisions of Art.20 and annex 4 in relation to Training Compensation, and unless otherwise provided for in the contract, compensation for breach shall be calculated with due consideration for the law of the country concerned, the specifici ty of sport, and any other objective criteria. These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the breach falls within a Protected Period.

2. Entitlement to compensation cannot be assigned to a third party if a Professional is required to pay compensation, the Professional and his New Club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties.

3. In addition to the obligation to pay compensation, sporting sanctions shall also be imposed on any player found to be in breach of contract during the Protected Period. This sanction shall be a restriction of four months on his eligibility to play in Official Matches. In the case of aggravating circumstances, the restriction shall be six months. In all cases, these sporting sanctions shall take effect from the start of the following Season of the New Club. Unilateral breach without just cause or sporting just cause after the Protected Period will not result in sporting sanctions. Disciplinary measure may, however, be imposed outside of the Protected Period for failure to give due notice of termination (i.e. within fifteen days following the last match of the Season). The Protected Period starts again when, while renewing the contract, the duration of the previous contract is extended."

94. The parties are at one in arguing that the DRC misapplied article 17 of the FIFA Status Regulations and in doing so violated procedural requirements

of FIFA regulations by failing to explain how it arrived at the figure of £625,000 in compensation.

95. The parties however disagree as to how the criteria laid down in article 17(1) should be applied and therefore as to the amount of compensation owed to Hearts.

96. Consequently, the Panel shall (a) begin by examining whether the DRC decision can be deemed in violation of the FIFA regulations and, if so, shall (b) make a new determination as to the amount of compensation owed to Hearts in application of article 17 of the FIFA Status Regulations. Since the parties also disagree as to the joint and several liability of Wigan to pay compensation, this point shall be addressed thereafter (c).

a) The Validity of the DRC's Decision

97. The Panel shall begin by determining whether the DRC breached any formai and procedural requirements of the FIFA regulations andlor any mandatory principles of Swiss law of associations.

98. In that relation, the Panel finds that Wigan rightiy invokes article 13.4 of the FIFA *Rules Governing the Procedures of the Players' Status Committee and the Dispute Resolution Chamber* (the "FIFA Rules"), which provides that decisions of the DRC must contain "*... reasons for its findings"*.

99. The relevance and importance of article 13.4 is confilmed by several mandatory principles of Swiss law that limit the regulatory and decisional freedom of an association in order to protect its members. One such principle is that an association must correctly apply its own regulations, another being that its regulations must be applied and its decisions made in a predictable and cognisable manner, notably to ensure equality of treatment and due process.

100. The Panel finds that in this case the DRC has failed to meet the requirements of article 13.4 of the FIFA Rules, since although the DRC decision does discuss some of the criterio listed in article 17 of the FIFA Status Regulations for determining the level of compensation owed, in the final analysis it is impossible to understand from reading the decision what weight was given to what criterio in determining the quantum, i.e. there is no indication of the method and figures used by the DRC to arrive at the amount of £625,000, or in other words what the figure consists of.

101. For the above reasons, the Panel finds that the DRC's decision is invalid

for having failed to meet the formai requirements laid down in the FIFA regulations.

102. Therefore and given the prayers of ali three parties that the Panel directly renders a new decision, as well as the Panel's authority to do so in accordance with art. R57 of the CAS Code, the Panel shall issue a new decision and now turns to the determination of the level of compensation to be awarded on the basis of article 17 of the FIFA Status Regulations.

b) Level of Compensation Owed by Hearts

103. In determining the level of compensation owned, the Panel shall begin, as a preliminary matter, by (i) listing a certain number of undisputed facts, and (ii) exmmining the disputed existence of any aggravating factors and contributory negligence. The Panel shall then (iii) turn to the interpretation and application of article 17 of the FIFA Status Regulations.

i. Undisputed Facts

104. The Panel notes that the following circumstances relating to the issue of compensation are undisputed:

- Although the Player initially purported to terminate his contract by relying on just cause, he finally renounced such approach, retracted his initial notice and unilaterally terminated his employment contract without cause as defined in article 17 of the FIFA Status Regulations.

- Consequently, the only matter to assess is one of compensation and article 17 of the FIFA Status Regulations applies in that respect.

- The rounded-off figure of £150,000 is accepted by all parties as the residual value of the Player's employment contract remaining after its termination (this figure was agreed at the hearing).

ii. Existence of Aggravating Factors or Contributory Negligence

105. With respect to the reasons which led to the unilateral termination, Hearts is contending in essence that it was a matter of greed on the Player's part who, knowing the end of his contract was approaching, unfairly refused to negotiate a further prolongation of his employment contract despite having received several offers from Hearts, and then made a deliberate attempt to circumvent the requirement of a transfer fee. Hearts views this as an aggravating factor.

106. The Player is essentially arguing the contrary, i.e. that due to the not-too-distant prospect of the end of his employment contract and the likely fast-diminishing value of his transfer value beyond the upcoming 2006 Summer transfer window, Hearts attempted to pressure him finto signing a new contract with Hearts on terms that suited the Club.

107. According to the Player, this pressure was applied by the President of the Club, Mr. Romanov, inappropriately giving instructions to the managers not to select him for certain games despite the Player being willing and able to play and having been consistently a leading and respected member of the team.

108. The Player confirmed at the hearing that perception of the reasons for his non-selection led to a breakdown in his confidence in the Club's intentions, which was increased by disparaging comments being made in the media, attributed to Mr. Romanov, about the Player's commitment to Hearts and about the role of his parents behind the scene. It is in this context that he ultimately decided to terminate his contract, without having had any contacts or offers from Wigan or any other clubs beforehand.

109. To the extend he is required to pay compensation to the Club, the Player contends that the above circumstances constitute a form of contributory negligence on the part of Hearts that should have the effect of diminishing any amount of compensation allowed.

110. Although the Panel is not convinced that the concept of aggravating factors or of contributory negligence are legally relevant or applicable to the calculation of compensation under the criteria of article 17 (1) of the PMA Status Regulations, the legai question can be left open because the Panel finds there is no sufficient evidence that either party (Hearts or the Player) in fact had intentions or misbehaved in their attitude with regard to each other; whatever may have been the contrary perception of each. Neither is there any evidence that Wigan or any other club intervened in the relationship between Hearts and the Player in a manner which would sour it, or incited the Player to leave Hearts by means of an offer prior to the Player' s notice of termination.

111. Rather it would appear that through an unfortunate combination of circumstances, probably fuelled in part by a lack of direct communication between Mr Romanov and the Player, the relationship of confidence between Hearts and the Player gradually broke down.

112. Having carefully listened to the Player as well as several of the Club's

managers and bearing in mind the other evidence on record, the Panel is convinced that the Player's confidence in the Club and desire to continue playing for the Club was broken; his sensitivity to the fact of not being selected for certain games and to various statements in the media in all likelihood being exacerbated by a sentimental attachment to a club in which he began his professional career as a young player and in which he was originally recognized as a player upon whose motivation the club could confidently count.

113. At the same time, given the realities of the transfer market combined with the Player's incontestable right to leave the Club free of charge at the end of his contract, the Panel finds it is more likely than not that Hearts felt under some pressure to secure a new contract with the Player, in order to leave time to place him on the 2006 Summer transfer list if such contract was not signed. Indeed, the manager and experts who testified on the subject were unanimous in declaring that with 18 months left to run on the contract, the Player's value on the market would rapidly decline, if not become in practice extinguished, after the Summer transfer period.

114. For the above reasons, whether or not the question is legally relevant, the Panel does not find that any aggravating factors on part of the Player or contributory negligence on part of the Club have been clearly established. Accordingly, the Panel will take account of neither in determining the level of compensation owed to Hearts in application of article 17 of the FIFA Status Regulations.

iii. The Interpretation and Application of Article 17 of the FIFA Status Regulations

115. In keeping with the practice under Swiss law relating to the interpretation of the bylaws of an association, the Panel shall have regard first for the wording of article 17, i.e. its literal meaning, and if this is unclear shall have regard to the provision's internai logic, its relationship with other provisions of the FIFA Status Regulations as well as its purpose revealed by the history of its adoption.

116. As a starting point, it is noteworthy that according to the first sentence of article 17, in case of unilateral termination without cause: *"In all cases, the party in breach shall pay compensation"*. This comes as a logical consequence of article 13 of the FIFA Status Regulations which underlines the principle *pacta sunt servanda,* by stating *"A contract between a Professional and a club may only be terminated on expiry of the term of contract or by mutual agreement";* such provision being further reinforced

by article 16 whereby "*A contract cannot be unilaterally terminated during the course of a Season"*.

117. In other words, article 17 is not a provision that allows a club or a Player unilaterally to terminate an employment contract without cause. On the contrary, within the framework of section IV of the FIFA Status Regulations – entitled *"Maintenance of Contractual Stabili ty Between Professionals and Clubs"* and covering articles 13-18, any such termination is clearly deemed a breach of contract.

118. Thus, unilateral termination must be viewed as a breach of contract even outside the Protected Period and the position expressed by the Player's counsel in his closing arguments that no compensation at all should be due is not sustainable; the only possible question in this case being how much is due under the system designed by article 17 to deal with the consequences of unilateral termination without cause.

119. A second preliminary point is that according to the wording of its first paragraph article 17 is not intended to deal directly with Training Compensation – such compensation being specially regulated in detail by other provisions of the FIFA Status Regulations.

120. The Panel finds therefore that in determining the level of compensation payable to Hearts under article 17 of the FIFA Status Regulations as a result of the Player's unilateral termination without cause, the amounts having been invested by the Club in training and developing the Player are irrelevant, i.e. are not factors that come into consideration under article 17. Consequently, the Panel disagrees with Heart's submission that among the relevant circumstances in calculating compensation for unilateral termination under article 17 "*... is the sporting and financial investment Hearts has made in training and developing the Player during the last 5 years"*.

121. A third preliminary point is that article 17 gives primacy to the parties' contractual agreement in terms of stipulating types and amounts of compensation, since according to article 17(1) the criteria for calculating compensation only apply if not "*... otherwise provided for in the contract"* and article 17(2) provides that the amount of compensation "*... may be stipulated in the contract or agreed between the parties"*.

122. In the present case, the parties have not invoked any provisions of the Player's employment contract with respect to the assessment of the level of compensation, except Hearts' reference to clause 21 of the contract, whereby *"The Club may offer the Player a further period of engagement under the*

Rules of The Scottish Premier League and the Player shall not be registered for any other club without payment of a,compensation fee (fixed in manner provided by the Rules of The Scottish Premier League) by that other club to the club which previously held the Player's Scottish Premier League registration if and so long as the Club has offered to engage the Player on terms which are in the opinion of the Board not less favourable in all monetary respects that those applicable hereunder".

123. However, Hearts has neither indicated the relevance of clause 21 with respect to the specific case of compensation for unilateral termination without cause nor established any amount of compensation that would allegedly be owed according to such clause. Instead, Hearts has chosen to invoke compensation criteria it deems relevant in application of the Status Regulations and Scottish law and has based its calculations thereon. In addition, Hearts' foregoing reference to clause 21 of the employment contract is partly contradictory to its written submission that the contract did not provide for any assessment of compensation in the event of breach by either party.

124. For the above reasons, the Panel finds that Hearts has failed to allege or prove that any amount of compensation for unilateral termination or criteria for calculating it is contractually specified in the Player's employment contract.

125. Having dealt with the foregoing preliminary points, the Panel shall now analyse the factors to be taken into consideration according to the wording of article 17 of the FIFA Status Regulations when determining the level of compensation. Article 17(1) refers to three categories of factor, which the Panel shall examine in turn: the law of the country concerned, the specificity of sport and any other objective criteria (followed by a list of examples).

126. With respect to the law of the country concemed and as indicated earlier, the Panel considers that it is Scottish law but that the Panel has the discretion to decide whether or not any provisions of Scottish law should be applied in determining the level of compensation.

127. The Panel finds there are several reasons not to apply the rules of Scottish law invoked by Hearts.

128. One reason is that Hearts is relying on generai rules and principles of Scottish law on damages for breach of contract, i.e. on provisions of Scottish law that are neither specific to the termination of employment contracts nor to sport or football, while article 17 of the FIFA Status Regulations was adopted precisely with the goal of finding in particular special solutions for the

determination of compensation payable by football players and clubs who unilaterally terminate their contracts without cause. In other words, it is important to bear in mind that it is because employment contracts for football players are atypical, i.e. require that the particularities of the football labour market and the organization of the sport be accounted for, that article 17 was adopted. At the some time, footballers' contracts remain more akin to employment contracts (and are generally characterized as such under national laws), than to some form of commercial contract to which generai rules on damage are applicable.

129. The Panel therefore sees no reason to renounce application of the specific solutions and criteria laid down in article 17 of the FIFA Status Regulations in favour of general rules on contract damages. On the contrary, the fact that several of the applicable choice-of-law rules (article 60§2 of the FIFA Statutes and art. R58 of the CAS Code) underline the primary application of the regulations chosen by the parties, that article 17(1) itself refers to the specificity of sport and that it is in the interest of football that solutions to compensation be based on uniform criteria rather than on provisions of national law that may vary considerably from country to country, are all factors that reinforce the Panel's opinion that in this case it is not appropriate to apply the general principles of Scottish law on damages for breach of contract invoked by Hearts.

130. Consequently, in determining the level of compensation, the Panel will not rely on Scottish law.

131. With respect to the "specificity of sport", article 17(1) of the FIFA Status Regulations stipulates that it shall be taken into consideration, without however providing any indication as to the content of such concept.

132. In light of the history of article 17, the Panel finds that the specificity of sport is a reference to the goal of finding particular solutions for the football world which enabie those applying the provision to strike a reasonable balance between the needs of contractual stability, on the one hand, and the needs of free movement of players, on the other hand, i.e. to find solutions that foster the good of football by reconciling in a fair manner the various and sometimes contradictory interests of clubs and players.

133. Therefore the Panel shall bear that balance in mind when proceeding to an examination of the other criteria for compensation listed in article 17.

134. With regard to the other criteria for determining compensation, article 17(1) leaves a substantial degree of discretion to the deciding authority to account

for the circumstances of the case, since after stipulating that compensation may be calculated on the basir of *"any otherobjective criteria"*, it provides that *"These criteria shall include, in particular, the remuneration and other benefits due to the player under the existing contract and/or the new contract, the time remaining on the existing contract up to a maximum of five years, the fees and expenses paid or incurred by the Former Club (amortised over the term of the contract) and whether the breach falls within a Protected Period"*.

135. In that relation is it noteworthy that independently from the specificities of a given case, the criteria listed in article 17 need to cope with a number of categories of cases, notably those where unilateral termination occurs inside the protected period as distinct from those where it occurs outside such period and those cases where unilateral termination is by the Player as distinct from those where termination is by the Club. It is therefore logical that article 17(1) includes a broad range of criteria, many of which cannot in good sense be combined, and some of which may be appropriate to apply to one category of case and inappropriate to apply in another.

136. Furthermore, in seeking to balance appropriately the interests of clubs and players for the good of the game, it is necessary to bear in mind that because article 17 of the FIFA Status Regulations applies to the unilateral termination of contracts botti by players and by clubs, the system of compensation provided by article 17 must be interpreted and applied in a manner which avoids favouring clubs over players or vice versa.

137. In the foregoing context, the Panel finds it appropriate to consider that the clubs particular need for contract stability is specifically and adequately addressed by means of the *Protected Period* and the provisions designed to enforce it, which comprise the basic period of protection as defined in paragraph 7 of the "Definitions" contained in the FIFA Status Regulations, the automatic renewal of that period upon the contract being extended (article 17(3), last sentence) and the relatively severe sanctions that can be imposed in case of disrespect for the Protected Period (article 17(3)); such stability being further enhanced for clubs and players alike by article 16 of the FIFA Status Regulations, which entirely prohibits unilateral termination during the course of a Season.

138. The clubs' special interest having been recognized and protected in such regulatory manner, the Panel finds that, beyond the Protected Period and subject to the parties' contractual stipulations, compensation for unilateral termination without cause should not be punitive or lead to enrichment and should be calculated on the basis of criteria that tend to ensure clubs and

players are put on equal footing in terms of the compensation they can claim or are required to pay. In addition, it is in the interest of the football world that the criteria applicable in a given type of situation and therefore the method of calculation of the compensation be as predictable as possible.

139. Accordingly, the Panel deems that in the present case the alleged estimated value of the Player on the transfer market, upon which Heart's is basing its main claim (£4 million), by alternatively claiming such amount as lost profit or as the replacement value of the Player, cannot come into consideration when determining compensation on the basis of article 17(1) of the FIFA Status Regulations because any such form of compensation was clearly not agreed upon contractually and to impose it by regulation would simultaneously cause the Club to be enriched and be punitive vis à vis the Player.

140. Indeed, in this case he Player was initially purchased by the Club for an amount of £75,000 whereas it is today claiming a market value of £4 million. This means that independently from the question of amortization of the initial purchase amount, that the Panel shall deal with below, the Club is claiming to be entitled to a profit of at least £3.9 million on the sole premise that it trained and educated the Player.

141. In any event, subject to it being validly agreed by an enforceable contract, the Panel finds there is no economic, moral or legal justification for a club to be able to claim the market value of a player as lost profit.

142. From an economic perspective there in no reason to believe that a player's value on the market owes more to training by a club than to a player's own efforts, discipline and natural talent. An empirical study might even demonstrate the contrary, i.e. that a talented and hardworking player tends to fare well, stand out and succeed independently from the exact type of training he receives, whereas an untalented and/or lazy player will be less successful no matter what the environment. Also market value could stem in part from charisma and personal marketing. In any case, it is clear that a club cannot simply assume it is the only source of success of a player and thus claim his entire market value, particularly without bringing any proof (which would be very difficult) of its paramount role in the player's success leading to his market value. In this case, Hearts have underlined the Player's success and alleged his market value but have brought no evidence that the Club entirely or even predominantly generated the alleged market value in question through its training and education.

143. In addition from an economic and moral point of view, it would be difficult

to assume a club could be deemed the source of appreciation in market value of a player while never be deemed responsible for the depreciation in value. Consequently, if the approach relied on by Hearts were followed, players should be entitled to claim for example that they are owed compensation for their alleged decrease in market value caused by such matters as being kept on the bench for too long or having an incompetent trainer, etc. Obviously, such a system would be unworkable and would not serve the good of the football.

144. From a regulatory standpoint, to allow clubs to claim the market value of players as lost profit under article 17 of the FIFA Status Regulations would not make sense and would amount to double counting, since, as mentioned earlier, article 20 and annex already provide for a system of compensation to clubs for the training and education of players, and it is not by chance that such compensation is not based on the player's market value but on demonstrable investment made and costs incurred by the club.

145. Moreover, since a club's possible entitlement to the transfer or market value of players is entirely absent from the criteria of compensation listed in article 17(1) and there is no reference to any such form of compensation in favour of Hearts in the Player's employment contract, to apply such criteria and thereby imply it into the contract would contradict both the principle of fairness and the principle of certainty.

146. Finally, because of the potentially high amounts of compensation involved, giving clubs a regulatory right to the market value of players and allowing lost profits to be claimed in such manner would in effect bring the system partially back to the pre-Bosman days when players' freedom of movement was unduly hindered by transfer fees and their careers and well-being could be seriously effected by them becoming pawns in the hands of their clubs and a vector through which clubs could reap considerable benefits without sharing the profit or taking corresponding risks. In view of the text and the history of article 17(1) of the FIFA Status Regulations, allowing any form of compensation that could have such an effect would clearly be anachronistic and legally unsound.

147. For the above reasons, the Panel finds that Hearts is not entitled to claim any part of the Player's alleged market value as lost profit or on any other ground and that as a result its corresponding claim for £4 million must be rejected.

148. Neither can Hearts claim the right to reimbursement of any portion of the fee of £75,000 initially paid by it to purchase the Player from his former

club, since according to the criteria laid down in article 17(1) in this respect, which the Panel finds reasonable, that fee must be deemed amortised over the term of the contract, and in this case the Player remained with the club for a longer period in total than the initially agreed fixed term of four years.

149. In addition, the Panel is not convinced that beyond the Protected Period it is admissible for a club to reclaim a portion of the engagement fee as compensation for unilateral termination unless such form of compensation is stipulated in the employment contract, since contractual fairness would tend to require that upon accepting his employment a player be fully aware of the financial engagements he has undertaken and the way in which they can affect his future movements. In other words, if a club expects an engagement fee to be proportionately reimbursable beyond the Protected Period – which is a matter that cannot be implied – there should be a negotiation and a meeting of the minds on the subject.

150. Among the other criteria of compensation referred to in article 17(1), the Panel considers that the remuneration and benefits due to the Player under his new contract is not the most appropriate criterion on which to rely in cases involving unilateral termination by the Player beyond the Protected Period, because rather than focusing on the content of the employment contract which has been breached, it is linked to the Player's future financial situation and is potentially punitive.

151 Instead the Panel finds it more appropriate to take account of the fact that under a fixed-term employment contract of this nature both parties (club and player) have a similar interest and expectation that the term of the contract will be respected, subject to termination by mutuai consent. Thus, just as the Player would be entitled in principle to the outstanding remuneration due until expiry of the term of the contract in case of unilateral termination by the club [subject it may be, to mitigation of loss], the club should be entitled to receive an equivalent amount in case of termination by the Player. This criterion allo has the advantage of indirectly accounting for the value of the Player, since the level of his remuneration will normally bear some correlation to his value as a Player. Thus a Player receiving very high remuneration (and thereby being able to expect high remuneration in case of a change of club) will have a correspondingly high amount of compensation to pay even if he terminates his contract outside the Protected Period, and the earlier such termination occurs the higher will be the total amount of compensation owed.

152. For the above reasons, the Panel finds that Heart's claim of £330,524 based on the difference between the value of the old and new contract must be

rejected and that the most appropriate criteria of article 17(1) to apply in determining the level of compensation owed to Hearts by the Player is the remuneration remaining due to the Player under the employment contact upon its date of termination, which the parties have referred to as the residual value of the contract.

153. Consequently and because the parties have agreed that such residual value represents an amount of £150,000, the Panel considers the foregoing amount to be due to Hearts as full compensation under article 17(1) of the FIFA Status Regulations for the Player's termination of his contract.

154. Having determined that Hearts is entitled to such amount as fair and adequate compensation for the Player's unilateral termination of his.employment contract and since the criteria listed in article 17(1) are not designed to be cumulative *per se,* the Panel sees no reason to award any other amount as an additional head of damage.

155. For sake of good order, the Panel nevertheless points out that with respect to Heart's claim of £70,000 for alleged sporting and commerciai losses, the Club has established neither the causality of the Player's termination nor the existence of the damage; and that with respect to Heart's claim for £80,008.96 for costs linked to the proceeding in front of the DRC, there is no reason to award such amount because according to the DRC's practice such proceedings do not give rise to awards of costs and because in any event Hearts has lost the present appeal resulting from the DRC proceeding.

156. Finally, with respect to the amount of £150,000 being awarded, the Panel considers that it shall carry interest from the first day following the effective termination of the contract, since within the logic of the system of compensation instituted by article 17(1) such is the date when the compensation became due. Because none of the parties have contested the rate of interest of 5% used by the DRC, that rate shall apply from the date in question.

157. According to the Player's final letter of termination of 26 May 2006, the notice of termination was to take effect on 30 June 2006 given the Player's statement that he would not be honouring the last 12 months of his employment contract. Thus interest is awarded from 1 July 2006.

D. Several and Joint Liability of Wigan

158. Artide 17(2) of the FIFA Status Regulations stipulates that:
"Entitlement to compensation cannot be assigned to a third party. If a

professional player is required to pay compensation, the Professional and his New Club shall be jointly and severally liable for its payment. The amount may be stipulated in the contract or agreed between the parties"

159. Wigan contends that it should not be held jointly liable on the basis of the foregoing provision because it took no part in inciting the Player to leave Hearts and that it had not made him any offer or even made contact with him at the time he decided to leave Hearts and gave the Club his final notice of termination.

160. In light of the evidence on record, the Panel has no reason to doubt Wigan's assertion in this respect or therefore to conclude that Wigan had any causal role in the Player's decision to terminate his contract with Hearts.

161. That said, according to its wording the application of article 17(2) is not conditional on fault and Wigan offered no evidence that article 17(2) should be given any other meaning than its literal sense.

162. Consequently, the Panel considera that the joint and several liability provided under 17(2) must be deemed a form of strict liability, which is aimed at avoiding any debate and difficulties of proof "regarding the possible involvement of the new club in" a player's decision to terminate his former contract, and as better guaranteeing the payment of whatever amount of compensation the player is required to pay to his former club on the basir of article 17.

163. The Panel finds therefore that Wigan is jointly and severally liable with the Player for the payment of £150,000 in compensation to Hearts.

V. COSTS

164. Pursuant to article R64.4 of the Code, the Court Office shall, upon conclusion of the proceedings, determine the final amount of the costs of the arbitration, which shall include the CAS Court Office fee, the costs and fees of the arbitrators computed in accordance with the CAS fee scale, the contribution towards the costs and expenses of the CAS, and the costs of witnesses, experts and interpreters. In accordance with the consistent practice of CAS, the award states only how these costs must be apportioned between the parties. Such costs are later determined and notified to the parties by separate communication from the Secretary General of CAS.

165. Considering that the absence of any indication provided in the DRC decision

as to the manner of calculation of the amount of compensation caused all the parties to remain in doubt as to the correctness of the decision and to legitimately require a clarification by means of an appeal, the Panel finds that the costs of the arbitration shall be shared equally between the parties, i.e. that each party shall bear one third thereof.

166. For the same reasons, the Panel finds it fair that each party bears its own costs and expenses inespective of which party prevailed in its claims.

ON THESE GROUNDS

The Court of Arbitration for Sport pronounces, jointly, with respect to the three proceedings:

1. The appealed decision of 4 April 2007 of the FIFA Dispute Resolution Chamber is set aside.

2. Mr Andrew Webster shall pay Heart of Midlothian an amount of £150,000 (one hundred and fifty thousand Pounds Sterling) as compensation, with interest at 5% from 1 July 2006.

3. Wigan Athletic FC is jointly and severally liable with Mr Andrew Webster to pay Heart of Midlothian the amount of £150,000 (one hundred and fifty thousand Pounds Sterling), with interest at 5% from 1 July 2006.

4. Each party shall bear one third of the total costs of the three proceedings, to be determined and served on the parties by the CAS Court Office.

5. Each party shall bear its own legai costs.

6. Any and ali other prayers for relief are dismissed.

Lausanne, 30 January 2008

THE COURT OF ARBITRATION FOR SPORT

Quentin Byrne-Sutton
President of the Panel

Jean-Jacques Bertrand
Arbitrator

Michael Beloff
Arbitrator