IN THE MATTER OF AN ARBITRATION UNDER RULE K OF THE FOOTBALL ASSOCIATION

Between:

HULL CITY TIGERS LIMITED **Claimant**

and

THE FOOTBALL ASSOCIATION LIMITED **Respondent**

AWARD OF THE ARBITRATION TRIBUNAL pursuant to Rule K of the Rules of the Football Association

Introduction

1. This is the award of the Arbitral Tribunal, consisting of the Right Hon Sir Stanley Burnton (chairman), Tim Kerr QC and Nicholas Stewart QC, in the arbitration commenced by the above Claimant against The Football Association Ltd pursuant to Rule K of the Rules of the Association. We shall refer to the Claimant as "the Club" and to the Respondent as "the FA" or "the Association", and to the Rules of the Association as "the Rules".

2. The decision of the Tribunal is unanimous.

3. In the arbitration, the Club challenges the decision of the Association to refuse to permit the Club to change its playing name from Hull City to Hull Tigers with effect from the start of the 2014/2015 season. The Club alleges that the decision was unlawful; the Association rejects this allegation.

The Arbitral Procedure

4. The Club is a "Participant" within the meaning of the Rules of the Association: see Rule 2. By Rule K, it was required to submit its dispute with the Association to arbitration in accordance with the provisions of that Rule.

5. The Club commenced this arbitration by serving on the Association in accordance with paragraph 2 of Rule K its Notice of Arbitration dated 23 June 2014. In it the Club challenged the decision of the FA Council ("the Decision") to reject the Club's application to change its playing name to Hull Tigers. "Tigers" is a nickname of the Club, owing to the colour and striping of the players' shirts. The Club sought an award setting aside the Decision and its replacement with a decision approving the change in its playing name. The Club appointed Tim Kerr QC as its arbitrator, in accordance with paragraph 2(a)((iv) of Rule K.

6. The Association duly served its Response, dated 7 July 2014, to the Club's Notice of Arbitration. It denied the Club's allegations and contended that the Club was not entitled to any relief. Pursuant to paragraph 2(a)((iv) of Rule K the Association named as its arbitrator Nicholas Stewart QC.

7. The parties agreed that the Standard Directions should apply. The Club duly served its Points of Claim. The Club alleged that in making the Decision the Association had contravened the provisions of the Competition Act 1998; that the Association had failed to follow its own Rules; that there had been a breach of natural justice; and that the Decision was unlawful by reasons of the bias or appearance of bias on the part of Dr Malcolm Clarke, a member of the FA Council and its Membership Committee.

8. The Association served its Points of Defence dated 29 October 2014, denying all of the Club's allegations.

9. The Club served Points of Reply dated 16 January 2015.

10. The parties agreed on the appointment of the Right Hon. Sir Stanley Burnton as chairman of the Tribunal. He duly accepted the appointment. Terms of appointment were agreed and signed on behalf of both the Club and the Association and by the Arbitrators dated 12 January 2015.

11. On 4 February 2015 the Chairman gave a direction, in terms agreed between the parties, for the disclosure by the Association on a confidential basis of responses to the consultation carried out by Membership Committee of the Association in connection with the Club's application.

The hearing

12. By agreement of the parties and the Arbitrators the hearing of the arbitration took place on 9 and 10 February 2015 at the offices of the Association's solicitors Charles Russell Speechlys in London.

13. The Club was represented by Nicholas Randall QC and Nick de Marco, instructed by Brabners, the Club's solicitors.

14. The Association was represented by Adam Lewis QC, leading Jon Ellis, a partner of Charles Russell Speechlys, who instructed Mr Lewis.

15. Both parties served skeleton arguments. The Association served a helpful chronology.

16. On 9 February 2015 both parties made short opening submissions, in the case of the Club with a written supplemental opening note. The Club abandoned its contention that there had been an infringement of competition law. It maintained its allegations that the Decision was liable to be set aside on grounds of unfairness, bias and breach of natural justice and a failure to comply with the Association's own Rule and the fettering of its discretion. The Association maintained its denial of any irregularity in its proceedings.

17. On 10 February the Club called one witness, Ehab Allam, its Vice Chairman, who confirmed the truth of his witness statement, was asked brief supplemental questions in chief and was cross-examined. We shall refer to him as "Mr Allam", it being borne in mind that he is the son of the Chairman, who of course has the same surname. The Club had also served a witness statement of Simon King, the Commercial Manager of the Club, but it was not relied upon during the hearing.

18. The Association put in evidence the witness statement of Jonathan Hall, Director of Football Services at the Football Association. With the Club's agreement he was not required to give evidence in person or to be cross-examined. The Association called

Philip Smith, the Vice-Chair of the Kent Football Association, the Kent FA's representative on The FA Council ("Council"), and the Chairman of the Membership Committee since 2011, and he was cross-examined on behalf of the Club.

19. We find that neither Mr Allam nor Mr Smith sought to mislead the Tribunal, and it was not suggested otherwise. Mr Allam is obviously emotionally involved in the success of the Club, and this affected his tone, but not the content, of his answers in cross-examination. Mr Smith's evidence was impressively fair and measured.

20. The Arbitral Tribunal has carefully considered the written and oral evidence put before us, and the written and oral submissions, of great clarity and cogency on both sides, and we express our gratitude to counsel and solicitors for these and for the administrative support given to us.

The facts

21. There was little or no dispute between the parties. Indeed, since most of the primary facts were either documented or, in the case of the meeting of Hull City Till We Die ("HCTWD") evidenced by a contemporaneous video recording, there was relatively little room for factual dispute. As will be seen, however, in one important respect there was an absence of evidence, and the Tribunal had to make, and has made, sensible inferences from the evidence before us.

(a) The Constitution

22. The Council is the governing body of the Association.

23. The Club is in the Premier League.

24. Rule A 3 (l) of the Rules ("the Rule") is as follows:

> A Club competing in any one of The Premier League, The Football League, The Football Conference, the Southern Football league, the Isthmian League and the Northern Premier League shall not be permitted to change its playing name (i.e. the name under which the Club competes in a Competition),... Save with the prior written permission of Council.
>
> Any application for a change of playing name must be received by The Association before 1st April in any calendar year in order for it to be considered by Council for adoption in the following playing season. Council will use its absolute discretion in deciding whether to approve a change in a Club's playing name.

25. The Council, a large body, has established a Membership Committee ("the Committee") to which it has delegated certain of its powers. The Committee's terms of reference include among its duties "to consider matters pertaining to ...Clubs' names and constitutions and report on the same to Council". It comprises a maximum number of 12 members. At the times relevant to this Arbitration, they included Dr Malcolm Clarke, the Chair of the Football Supporters Federation and in consequence the Supporters' Representative on the Council.

(b) The Membership Committee's adoption of the policy and the Club's application

26. In the summer of 2013 there were reports that the Club intended to change its name. The requirement of FA permission was brought to its attention.

27. Knowing that the Club and others were likely to seek permission for a change in their playing name, and no doubt because of the entirely general terms of the Rule, Mr

Smith sensibly asked Neil Prescott, a Financial Regulation Officer at The FA and a member of the FA Executive who provides support to the Membership Committee, to produce a draft policy on the exercise by the Committee of its functions concerning applications for a change of playing name. Mr Prescott duly drafted a policy for consideration by the Committee.

28. On 3 December 2013 the Club submitted by email a letter dated 26 November 2013 by which it formally applied for the Council's approval of the change of its playing name from Hull City to Hull Tigers, a name which the Club's chairman (Assem Allam, the father of Ehab Allam) considered would "deliver a greatly enhanced and more rapid global marketing impact thereby helping to catapult the Club into commercial markets previously ... out of its reach".

29. The Committee met on 4 December 2013. That this was the day after the receipt of the Club's application was coincidence: the meeting had been scheduled earlier. One of the agenda items was consideration of the draft policy that Mr Prescott had produced. It was discussed before Mr Smith, as Chairman, identified the Club as an applicant for the change of its playing name. It was suggested by Dr Clarke that a vote of season ticket holders should be required as a condition of approval of a name change. The minute of the meeting, the accuracy of which is not challenged, reads:

> In advance of considering the agenda item the Chairman advised Members that an application had been received by email late on 3 December 2013 from a Club wishing to change its playing name from the start of the 2014-15 season and that an application from another Club was expected.
>
> Members then considered the draft Policy paper in general terms.

> Members agreed that it was important that the assessment process should take into account the views of the supporters of a Club and that this should form part of the assessment process. Consideration was given to the imposition of a vote of season-ticket holders, although it was concluded this would impose too onerous a condition on a Club. It was agreed that the draft Policy was to be amended in order to take into account the views of the supporters of a Club.

30. The Committee adopted the Policy.

31. On 22 January 2014 the Policy was approved by the Council.

32. The Club does not criticise the provisions of the Policy or its adoption.

(c) The content of the Policy

33. The Policy sets out a number of "Matters to be considered in relation to the application of FA Rule A 3 (l)". There are three prohibitions: the playing name is not to include a sponsorship reference; is not to be "improper, offensive or bring the game into disrepute"; or "be similar or the same as the playing name of any other Club such that it may result in confusion". None of these was applicable to the Club's application.

34. Under the heading "Assessment process" the Policy stated:

> Membership Committee shall consider all the circumstances of an application and any matters that Membership Committee considers to be relevant to an application including:
>
> (i) the reasons provided by the Club for the proposed change in playing name and any consultation process undertaken by the Club. Membership Committee may invite the Club to a meeting to explain the proposed change;
>
> (ii) the application has been approved by the shareholders or members of the Club at a general meeting;
>
> (iii) the history of the current playing name of the Club;

(iv) the standing of the Club within the game;

(v) the views of the supporters of the Club;

(vi) the relationship (if any) of the current playing name and the proposed playing name with the locality with which the Club is traditionally associated; and

(vii) if the proposed playing name may adversely affect any other Club.

35. Under the heading "Consultation", the Policy continued:

> In arriving at its decision Membership Committee may seek the opinions of any parties that in its sole opinion may be affected by the application if it were to be approved. These may include:
>
> (i) any other Club that may be adversely affected by the proposed change of playing name;
>
> (ii) the League in which the Club is currently playing or may in the near future play;
>
> (iii) the Club's County FA;
>
> (iv) the views of the supporters of the Club;
>
> (v) Supporters Direct and the Football Supporters Federation;
>
> (vi) Local government of the area in which the Club is located;
>
> (vii) National government such as the Department for Culture Media and Sport; and
>
> (viii) Any other parties that the Membership Committee may wish to approach.

36. The Policy required the Club to be notified of the decision in writing together with reasoning.

37. We are particularly concerned with paragraph (v) under the heading "Assessment process" and paragraph (iv) and (v) under the heading "Consultation".

(d) The making of the Decision

38. After the reference to the adoption of the Policy, the Minute of the Committee meeting of 4 December 2013 continues:

> The Chairman confirmed that the application received to change playing name was from Hull City. The Committee agreed that a Sub-Committee should be formed to consider all applications (including that received from Hull City) in accordance with the Policy agreed by the Committee and to report their findings to the Committee. The Committee agreed to the Chairman's proposal that the Sub-Committee should comprise of himself and two members of the Committee; one member from the professional game and one from the national game if practicality allowed. The Chairman was also to identify a reserve. The Committee mandated the Chairman to approach members outside of the meeting and to request the agreement of the Leaders of Council to the Sub-Committee in accordance with the Committee's Terms of Reference.

39. The Sub-Committee was duly established. Its members, in addition to Mr Smith, were Jez Moxey, a Councillor and Divisional Representative from Wolverhampton Wanderers, and Roy Northall, a Councillor and representative of Worcestershire Football Association.

40. In a letter dated 12 December 2013, Mr Prescott informed the Club of the adoption of the Policy, a copy of which was enclosed, of the establishment of the Sub-Committee, and the names of its members, and the consultation that it proposed. The proposed consultees included the Premier League and the Football League. The letter stated that representatives of the Club would be invited to meet the members of the Sub-Committee in January 2014 "to give the Club the opportunity to explain the rationale behind the request to change its playing name and to answer any questions that the members of the Sub-Committee may have in relation to the request".

41. On the same date, Mr Thompson emailed Mr Prescott "to take the opportunity to raise a few points that have occurred to me". The first item was the following:

> 1. I understand that Malcolm Clarke is addressing supporters, at the ironically named Tigers Lair, on Saturday 14th December. I appreciate that Malcolm is the Supporters' representative on the Committee but does this constitute a conflict of interest?

Mr Prescott responded by email on 16 December 2013:

> 1. Malcolm Clarke is the Supporters' Representative on Council and is a member of the Membership Committee. We wish to draw your attention to Standing Orders 43 to 45 of the meetings of Council and its Committees that address "Interests". These Standing Orders can be found at Page 20 of the FA Handbook 2013/14. The contents of Standing Orders 43 to 45 have previously been brought to Malcolm Clarke's attention in connection with this matter.

42. Standing Orders 43 to 45 were as follows:

> INTERESTS
>
> 43 Provided that he has disclosed to the chairman of any meeting of Council or committee meeting (as applicable) the nature and extent of any interest, a Member of Council may be a party to, or otherwise interested in, any decision or arrangement which indirectly relates to that interest.
>
> 44 A Member of Council shall not attend or vote at a meeting of Council or of a Committee of Council (or any part thereof) on any matter in which he has, directly or indirectly, a material conflicting interest or duty save where authorised by a resolution passed by the members of Council or the committee (other than the Member of Council so interested). A Member of Council shall not be counted in the quorum in relation to a resolution on which he is not entitled to vote.
>
> 45 If a question arises at a meeting of Council or of a Committee of Council as to the right of a Member of Council to vote, the question may, before the conclusion of the meeting, be referred to the chairman of the meeting and his ruling in relation to any Member of Council other than himself shall be final and conclusive. An issue in relation to the chairman of the meeting shall be determined by the meeting itself.

43. The Association also produced copies of the Council Code of Conduct, a document that is to be signed by each member of Council. Conflicts of interest are the subject of paragraph 5:

> 5. Conflicts of interest
>
> You agree to abide by the Articles of Association and Standing Orders relating to conflicts of interests.
>
> Whilst you may properly be influenced by the views of others, including the body that has the right to appoint you as a Council or Committee Member, it is your responsibility to objectively decide what view to take, and how to vote, on any question which the Council or committee has to decide. When taking such decisions you agree to act in the best interests of The FA.
>
> You may take part in the consideration of matters that come before Council or a committee unless there is a conflict of interest between any personal or private interest (including those of connected persons) and The FA's interest in the matter, in which case you should preclude yourself from participation. As well as avoiding actual impropriety, you should avoid any appearance of it.
>
> Conflicts may arise not just around or in relevant meetings that you attend. A conflict of interest may exist through your external interests, appointments or investments or those of members of your family or associated companies. You must ensure that you notify any real or perceived conflicts of interest to the Company Secretary through the annual declaration process and on an interim basis if a new issue arises. If you are unsure of whether or not a conflict exists you should raise this with the Company Secretary.

44. The members of the Sub-Committee and Mr Prescott met Ehab Allam on 10 January 2014. We have the minutes of that meeting, and again their accuracy has not been challenged. Mr Allam explained the commercial motivation for the proposed name change, and agreed to provide a business plan in support of it. Paragraphs 3.7 and 3.8 of the minute are as follows:

> 3.7 EA questioned the basis of the test and what weightings were being applied as it would affect any submission that he would provide. EA stated that he is more comfortable if presenting a business case but struggles with the idea that fans can make the decision.

3.8 PS replied that The FA has an overall concern for the benefit of football as a whole.

45. There was also discussion of the consultation that the Sub- Committee would conduct with supporters. The supporters groups included the Official Supporters' Club and a group calling itself "City Till We Die", referred to as CTWD. Mr Allam was concerned about these consultations. The minutes of the meeting state:

> 5.5 PS advised EA that the assessment process was not a numbers game.
>
> 5.6 EA advised that the members of CTWD are part of other fan groups. It is difficult to set out the Club's case when he does not understand the Policy or the test.
>
> 5.7 EA questioned what he described as The FA Supporter Liaison Officer ("SLO") meeting supporter groups at the "Tigers Lair" and highlighted the irony of the name of the meeting place. EA referred to correspondence between Nick Thompson (the then Club MD) and NP on the matter. NP advised that the meeting to which EA referred was to his knowledge attended by Malcolm Clarke who is a FA Councillor and not a FA SLO. PS confirmed that Malcolm Clarke had attended the meeting with supporters as the Chair of the Football Supporters Federation. PS also confirmed that there are protocols in place for FA Councillors in relation to declarations of interest. EA confirmed that he had no concerns with that.
>
> ...
>
> 5.11 In reply to a question as to why the Club had not prepared a survey and structured a question in whatever way that the Club wanted and emailed it to season ticket holders EA replied that it was not part of the Club's test. It is a test for The FA. EA believed that it was the right decision to change the playing name of the Club. EA confirmed that the Club had not handled liaising with supporters and the public relations well. EA wanted it to be a decision without fans views because it is in the interests of the Club....

46. In an email dated 27 January 2014, Mr Allam requested copies of the submissions made by the various groups of the Club's fans. In reply, Mr Prescott stated:

> Unfortunately I am not able to provide the Club with copies of any of the submissions provided to The FA from the consultees that have been approached for their views, including the supporter groups. The submissions are for the Sub

> Committee to consider and if necessary raise follow up queries with any of the consultees and/or the Club.

47. On 4 February 2014, Mr Allam submitted a long memorandum setting out the Club's case for a change in its playing name, and addressing the various factors identified in the Policy. Nothing turns on it.

48. There were two responses from consultees that call for mention. The Premier League, in its letter dated 4 February 2014, stated that its Board had considered the issue of where the "bar" should be placed. It stated:

> The Board's view is that any proposed change should be permitted where the Membership Committee is satisfied on the facts and submissions that the case for change is strong.

49. It added that its view was that the strength of the case for a name change must be higher for a Club in the senior leagues.

50. More important, for present purposes, was the letter dated 31 January 2014 from the Football League. It stated:

> ... there is a fine balance to be struck each time an application of this kind is received. In essence, the onus is on the club involved to demonstrate the compelling rationale for such a name change and on the football authorities to ensure that it does not undermine the interests of the wider game ....

51. It set out five factors which it considered should be taken into account, of which the fifth was as follows:

> The case for change should be considered to be proven by those who will have the greatest understanding of its impact, namely the club's supporters. The Football League believes that any change of name that satisfies the above four principles should be subject to a ballot of the club's season ticket holders (given that they have demonstrated a significant financial commitment to the club) held under the auspices of the FA at the club's expense.

52. The letter concluded:

> Therefore taking into account the above, we would argue that Hull City's application satisfies the first four principles and should ultimately be determined by a ballot of the club's season ticket holders held under the auspices of the FA.

53. The Sub-Committee produced a written report ("the Report") for the Membership Committee. Its Executive Summary stated, among other things:

> 13. Many of the consultees including the Department for Culture Media and Sport and local MPs made reference in their submissions to the need to consult with supporters of the club. The Football League, Supporters Direct and the Football Supporters Federation stated that the consultation process should include a vote of season ticket holders given the importance of a club's playing name to its supporters. Four of five Premier League club owners spoken to believe that consultation with supporters should be undertaken in the event of a name change.
>
> 14. Consultation by the Club with supporters on the proposed change in playing name was found have been poor....

54. The Report concluded:

> 17. In making its assessment against all of the requirements set out in the Policy the Sub Committee found that based on the information and explanations provided by the Club, its application for a change in playing name to Hull Tigers was neither strong nor compelling.

55. The Report is a long document, of 19 pages and 102 paragraphs. It included a number of quotations from the Football League letter, but not the paragraph set out at paragraph 52 above.

56. The Membership Committee next met on 12 March 2014. The only item on the agenda was the Club's application to change its playing name. There were 11 members of the Committee present, including Mr Smith. He raised the question of conflicts of interest. He read out an extract from the Council Code of Conduct:

> Whilst you may be properly influenced by the views of others, including the body that has the right to appoint you as a Council or Committee Member, it is your responsibility to objectively decide what view to take, and how to vote, on any question which the Council or Committee has to decide. When taking such decision, you agree to act in the best interests of The FA.

57. The minutes of the meeting record:

> 82.4 Mr Smith requested members to declare any conflicts of interest. Dr Clarke advised that he did not consider that he had a conflict. No material interests were declared.

58. The Membership Committee discussed the Report and endorsed it unanimously.

59. On 17 March 2014, Mr Prescott sent to Mr Allam copies of the Report and of the minutes of the Membership Committee meeting of 12 March 2014.

60. By email dated 21 March 2014, the Club's solicitors asked for copies of the written submissions received by the Sub-Committee. Their request was refused, on the ground that "some of the written submissions were provided to The FA in confidence and this confidence must be respected".

61. On 27 March 2014 the Club's solicitors presented a long submission to the Association in support of its application. For the purposes of this Award it is unnecessary to summarise it. Mr Allam also sent a long letter, of the same date, which too does not require summarising.

62. On 8 April 2014, the Club's solicitors wrote to Mr Prescott with the result of the ballot of the Club's supporters that had been held, asking for that information to be presented to the Council in advance of its meeting on 9 April 2014. The letter stated:

To summarise, the current season ticket holders of the Club who are over the age of 16, were asked to vote upon the following three options:

1. Yes to Hull Tigers with the Allam family continuing to lead the club;
2. No to Hull Tigers; and
3. I am not too concerned and will continue to support the club either way.

The Club currently has 15,033 season-ticket holders who were eligible to vote. Of these, a total of 5,874 registered a valid vote against the three options above.

The result of the ballot was as follows:

- 2,565 voted for option 1;
- 2,517 voted for option 2; and
- 792 voted for option 3.

63. The Club's application was considered by the Council at the meeting on 9 April 2014. The documents placed before the Council included the Policy, the report of the Sub-Committee, the minutes of the Membership Committee's meetings on 12 March 2014, and submissions received from the Club and its solicitors, including the results of the ballot referred to above. A slide show presented to the Council included a reminder that the decision was in the absolute discretion of Council, that Council Members had a duty to act objectively, and must act reasonably, in good faith, and assess all of the available information.

64. The representatives of the Football League and the Premier League declared a non-material interest in the application, as on this occasions so did Dr Clarke. Nonetheless, according to the Minutes, "Council was informed that these Council Members would still be able to participate in the discussion and vote on this matter." The Council had before it the Report. The minutes record:

On a show of hands, Council rejected the application for a change of playing name by a majority of 47 votes (63.5%) to 27 votes (36.5%).

(e) Dr Clarke

65. In December 2013 Dr Clarke attended a large gathering of CTWD at a pub called, ironically, "The Tiger's Lair". He made a speech addressing the Club's application. We saw a video of his speech, taken and placed on its website by CTWD on 19 December 2013, and we were provided with an agreed transcript. In it, he said:

> Now it may surprise you if I say that I don't actually have a view of what your football club should be called any more than I would expect you to have a view of what Stoke City as it is currently called... What we do have a view on very clearly in the FSF *is that the name of a football club should not be changed unless it can be clearly demonstrated by a robust process that the majority of its supporters want that to happen. That is the test* and the club itself could undertake that test if it so wanted....

The italics are ours. The reference to Stoke City is only because Dr Clarke is apparently a Stoke City supporter.

66. Certain postings on the "Oatcake" website (a discussion forum for Stoke City fans) concerned the proposed change in the playing name of the Club. Dr Clarke's posting on 15 January 2014 was as follows:

> I find this a very depressing thread, I'm afraid. Football clubs are part of the cultural heritage of their communities. It's like owning a listed building – the fact that you own it legally doesn't, or shouldn't, entitle you to do what you want with it, however much money you have lent to that club. *I don't believe that such changes should be allowed unless it can be demonstrated that the majority of the fans want it.* The fact that things have happened in the past which shouldn't have happened doesn't mean owners should have carte blanche to do what they want.
>
> Have those who call the Hull fans stupid and other such descriptions, met them and discussed all the issues with them? If not it's arrogant and patronising to use those descriptions and dismiss their arguments. I have met them, spoken at their

meeting and discussed all the issues with them, and I can assure you that they are not stupid.

Again, the italics are ours.

The role of the Arbitral Tribunal

67. Both parties rightly accepted that the Tribunal exercises a review jurisdiction, not an appellate jurisdiction. Our views of the merits of the Decision are immaterial. The only question is whether, objectively, the procedure by which it was made was fair. If it was unfair, questions then arise as to the relief, if any, to be granted.

The contentions of the parties

68. The Club made it clear from the beginning of its submissions that it did not allege that anyone involved in the Decision acted in bad faith.

69. In summary, the Club contends that the procedure adopted by the Membership Committee was unfair:

(1) It failed to inform the Club that it was required to present a "strong and compelling" case for its change of playing name.

(2) It failed to disclose to the Club the responses to the consultation exercise carried out by it Sub-Committee, and in particular the Football League's letter. The Club relied on the paragraph, cited at paragraph 52 above, to the effect that it supported the Club's application subject to the support of the Club's supporters, and contended that it would have emphasised the League's position in its submissions, and this might have affected the result.

(3) The Sub-Committee's Report was misleading, and liable to mislead, and would have misled, the Committee and the Council. It gave the impression that the Football League was opposed to the Club's application, when in fact it supported it.

(4) The Sub-Committee and the Membership Committee failed to inform the Club that a supportive ballot of its supporters was vital for the success of its application.

(5) Dr Clarke's speech to the CTWD meeting in December 2013, and his posting on the Oatcake website, showed that he was biased against the Club's application; that he had pre-determined it; that he proposed to participate in the decisions of the Membership Committee and the Council in a manner inconsistent with the Rule and the Policy, and that he in effect delegated the decision of the Council to the supporters.

70. As to (1), the Club contends that it would, or at least might, have brought additional material before the Sub-Committee and the Membership Committee.

71. As to (2), the Club states that it would have emphasised to the Sub-Committee and to the Membership Committee that its application was supported by a very important stakeholder, i.e., the Football League. This might well have led to a different result.

72. As to (3), in effect the Club argues that if the Football League letter been fairly summarised or disclosed to the members of the Membership Committee, it would have or might have decided differently.

73. As to (4), the Club contends that if it had understood the importance placed on the supporters, it would have conducted a ballot of season ticket holders at an earlier stage, and possibly more professionally.

74. (5) is in our view the most important ground of challenge. It is sufficiently summarised above.

75. The Association contends:

(1) The Club knew that it was for it to persuade the Sub-Committee, the Committee and the Council of its case for a change in its playing name. It put forward its best case. It had agreed to provide a business case, but did not do so, and it did not carry out a ballot of its supporters until the eleventh hour; when it did so, the questions asked were unimpressive and the result unconvincing. In any event, it was taken into account by the Council.

(2) It was not under any obligation to provide to the Club copies of consultees' responses. It was sufficient for the Club to be made aware of the gist of the responses. The response of the Football League was fairly summarised in the Sub-Committee's Report, which the Club saw before it was adopted by the Membership Committee and on which it had a full opportunity to comment.

(3) The Club was made aware of the importance attached to its supporters' views, and took the position that they were irrelevant, or barely relevant, until a very late stage. Even then, the ballot conducted was unimpressive, but it was duly taken into account by the Council.

(4) Dr Clarke was entitled to hold and to express the views he expressed at the meeting of CTWD and his website posting. The fact that he considered the views of the Club's supporters to be of great importance did not affect the fairness of the decision making.

(5) In any event, Dr Clarke was not a member of the Sub-Committee and played no part in the production of its Report or its conclusion. He was only one of 11 members of the Membership Committee, and even if he was biased (which is denied) his views did not affect the result of its consideration of the Report. At the meeting of the Council at which the Decision was made, he was one of an even greater number of Members present. It follows that his views made no difference to the result.

(6) The Club knew that Dr Clarke was to attend, and had attended the meeting of CTWD at the Tiger's Lair, and had made no objection to his doing so or his participation at the meeting; any justifiable objection had been waived by the Club.

Discussion

76. The Membership Committee was fully entitled to adopt the Policy, which was save in one respect well drafted and impressive. The exception was the absence of any mention of the standard to be applied to an application. The requirement that the case for a change had to be "strong and compelling" did not appear. That phrase seems to be amalgam of the expressions used in their consultation responses by the Premier League and the Football League. We accept that the Sub-Committee and the

Membership Committee, and Council, were entitled to require a stronger and more convincing case from a Club that was in the Premier League and had played under its existing name for as long as the Club has; but the Club should have been so informed when it was presenting its case to the Sub-Committee.

77. The more difficult question is whether this made any difference. This is by no means easy to determine. At the meeting of 10 January 2014, Mr Allam did question "the basis of the test and what weightings were to be applied, as it would affect any submission he would provide". Clearly, however, he appreciated that a business case for the change was desirable, yet no professionally prepared business plan or case was provided. In its letter dated 27 March 2014, the Club did elaborate on the business benefits of the name change, but it is not suggested that it was a business case as expected by the Sub-Committee. In any event, the letter was considered by the Committee before it adopted the Report. It is significant that the omission of the test from the information originally provided to the Club was not relied upon in its closing submissions (save in relation to the importance of supporters' views). Save in that respect, the Club has not identified what it would have done but did not do if the need to present a "strong and compelling" case had been flagged from the beginning. In the end, leaving aside the question of supporters' views, we see no realistic possibility that the Club would have acted differently in relation to its business case or any other aspect of its application if it had been told of the test to be applied to its application.

78. The fact that the Football League's letter was not disclosed to the Club was heavily relied upon by it. However, we agree with Mr Lewis QC's submission that it was not necessary for copies of the consultation letters to be disclosed. It was sufficient for the

Club to be made aware of the gist of the points made against its proposal, so as to be able to address them. We add that it is not clear that a decision maker must disclose to an applicant the gist of responses to a consultation that support his application. Where there is an obligation of disclosure, it is normally expressed as an obligation to inform the applicant of the case against him, the case he has to meet: see, e.g., *McInnes v Onslow-Fane* [1978] 1 WLR 1520, *Ridge v Baldwin* [1964] AC 40.

79. Be that as it may, on one of the crucial points made in the Football League's letter, it was against the application. The paragraph relied upon by the Club stated that in the circumstances the Club's application should be determined by a ballot of the Club's supporters, and as mentioned above there was no such ballot until after the Report had been adopted by the Membership Committee. Furthermore, and importantly, this suggestion was rightly not adopted by the Sub-Committee.

80. Paragraph 56 of the Report could have been clearer:

> The Sub Committee gave careful consideration to the reasons provided by the Club for the proposed change. The Sub Committee, having noted the comments of the Premier League Board and the Football League, found that based on the information and explanations provided by the Club the reasons for the proposed change were neither strong nor compelling.

81. This paragraph might have been read as indicating that the League were opposed to the change of name, whereas what was intended to refer to was the standard to be met by the Club, i.e., a "compelling rationale" for the change. However, in our view, viewed as a whole, the Report fairly summarised the views of the Football League. Paragraph 43 of the Report included the following highly supportive paragraph of the League's letter:

> We strongly believe that club owners and their Boards of Directors should be given every opportunity to run their clubs in the manner in which they see fit without being restricted wherever possible by unnecessary rules and regulations. The investment they make in our clubs ensures that the on-field product attracts the public and drives the revenues that sustain the game's growth.

82. Moreover, at the meeting of the Council at which the Decision was made, representatives of the League spoke in support of the Club's application. We do not think that there was any material unfairness in the non-disclosure of the Football League's letter or the references to it in the Sub-Committee's Report.

83. It is correct that the Club was not told that the support of its supporters was vital. As stated above, at the meeting of 10 January 2014, Mr Allam said that he "struggles with the idea that fans can make the decision", and was told, correctly but uninformatively, that "the FA has an overall concern for the benefit of football as a whole". He was told that the Sub-Committee would seek the views of supporters, but his concerns were allayed by Mr Smith's statement that "the assessment process was not a numbers game".

84. We do not consider that this gives rise to any separate right to relief. This is because Mr Smith's statement that the process was not a numbers game was not misleading so far as Mr Smith and the Sub-Committee were concerned. The report of the Sub-Committee did not advise rejection of the Club's application simply because a majority of supporters were opposed to it.

85. We come, finally and most importantly, to Dr Clarke. We fully accept that it was open to him to place great weight on the views of the Club's supporters, and it was equally open to the Sub-Committee, the Membership Committee and the Council to do the

same. However, contrary to the Association's contention, his stated position went further than this. His position, as announced in his address to CTWD and on his website posting, was inconsistent with the requirement of Rule A 3 (l). His position, as so announced, was that the decision was that of the supporters, whereas the Rule requires it to be that of the Council. The power of the Council under that Rule is to be exercised so as to promote the objects of the Association, essentially those set out at paragraph 3(1) and (2) of its Memorandum of Association. The Policy set out non-exhaustively the factors to be taken into account in exercising that power. The decision of the Council cannot be delegated to any external body, and specifically it cannot lawfully be delegated to any body of supporters. However, such delegation was in effect what Dr Clarke advocated.

86. There are other ways that the objection to Dr Clarke's position may be put. He fettered his discretion, in that rather than take account of all the matters that were relevant to the decision, he decided in advance to base his decision on one, namely the support of the Club's supporters. Bias is another description: his view was that the decision should be made in accordance with the views of supporters instead of on a consideration of all the applicable and relevant factors. His speech and internet posting indicated that he had already decided to reject the Club's application. The objection to Dr Clarke's participation goes beyond a failure to declare an interest, required by Standing Orders 43 to 45 and the Council Code of Conduct.

87. If Dr Clarke had been the sole decision maker, then in the absence of any evidence that he had recanted before making his decision, it would indubitably be set aside. If the Decision is to stand, it can only be because he was not a member of the Sub-

Committee, did not participate in the formulation of the Report, was only one of the 11 members of the Membership Committee that considered it, and was only one of a greater numbers of the Council who made the Decision.

88. In our view, the crucial decision in the present case was that of the Membership Committee. The Committee having unanimously adopted the Report, it would have taken a strong Council to reject it. The decision of the Committee obviously had a powerful causative effect on the decision of the Council.

89. The minutes of the meeting of the Membership Committee of 12 March 2014 do not identify Dr Clarke as a speaker. However, according to Mr Smith's witness statement, "[The] issues were discussed and debated at length, with the meeting lasting over three hours." In cross-examination, Mr Smith thought that Dr Clarke had not played a major part in the debate.

90. We are somewhat surprised that the Association did not call Dr Clarke to give evidence. In the absence of his evidence, we are not prepared to assume that, having expressed his view so strongly to CTWD and on the internet, he abandoned it and exercised his responsibility in accordance with the advice given to the Committee by its chairman. Nor are we prepared to assume that he did not communicate his view at the meeting, or that he did not influence the views of other members of the Committee towards the rejection of the Club's application. Furthermore, the Club was entitled to a decision made by every member of the Committee in accordance with the Rule, in which the views of the Club's owners and other relevant factors were given due

weight and no member acted solely in accordance with the views of the Club's supporters. We are not assured that this happened.

91. We do not think that the Club waived its objection. The minutes of Mr Allam's meeting with the Sub-Committee and Mr Prescott on 10 January 2014 show that Mr Allam was concerned by Dr Clarke's attendance at the meeting of CTWD, but do not suggest that he knew what Dr Clarke had said at that meeting (which was minuted as we have noted in paragraph 45 above). He was told by Mr Smith that "there are protocols in place for FA Councillors in relation to declarations of interest". We accept that this reassured Mr Allam. Curiously, we note that Dr Clarke did not declare any interest at the meeting of the Membership Committee, but did do so at the meeting of the Council, when the same matter was to be discussed. In any event, the objection is not that Dr Clarke should have declared, or that he had, a conflict of interest: it is that he had declared that the decision should be made on an incorrect basis. We also accept Mr Allam's evidence that he was unaware of the video and of the internet posting until recently, and only after the Council had made its Decision. We note that neither was referred to in the Club's solicitors' letter to Mr Prescott of 27 March 2014, not long before the Council made its Decision.

Criminal Justice and Courts Act 2015

92. By email on Thursday 19 February 2015 the solicitors for the FA drew our attention to the Criminal Justice and Courts Act 2015 having received the Royal Assent on 12 February 2015, two days after the conclusion of the oral hearing in this case. When section 84 of that Act comes into force (by rules of court not yet made) then unless

there are reasons of exceptional public interest the court will be obliged to refuse relief on an application for judicial review "it if appears to the court to be highly likely that the outcome for the applicant would not have been substantially different if the conduct complained of had not occurred".

93. The Applicant's solicitors say that section 84 is not relevant to this arbitration. We agree, for three reasons: (1) section 84 is not in force; (2) if it were in force, it would have no direct application to this arbitration; and (3) even if we were to apply the section 84 test by analogy, on the facts of this case it would not change our conclusion that the Decision should be set aside.

Our decision

94. For the reasons set out in paragraphs 85 to 91 above, we have concluded that the decision of Council cannot stand. We set it aside.

Other orders

95. At this stage of the season, it would be impractical and wholly inappropriate to direct the Association to make a fresh decision to take effect during the current season. The Club is free to make a new application, and it must be satisfied with the substantive relief we have granted.

96. We shall decide any question of costs separately. We direct the parties, unless costs are agreed, to exchange, and to serve on the Arbitral Tribunal, within 14 days their submissions on the costs order or orders they seek, with submissions in reply 7 days later. The parties are at liberty to apply to vary these time limits.

Signed in London, the place of arbitration, on this 23rd day of February 2015

Tim Kerr QC

Nicholas Stewart QC

The Right Hon. Sir Stanley Burnton

(Chairman of the Tribunal)