

Mr David Phillips QC, Mr Philip Rainford, Ms Alison Royston  
23 May 2019, 13 June 2019

BETWEEN -

THE FOOTBALL ASSOCIATION

Complainant

and

MILLWALL FC

Respondent

WRITTEN REASONS

**INTRODUCTION**

1. The FA has charged Millwall with misconduct contrary to FA Rule E20. The allegation is that during its home match against Everton FC on 26 January 2019 Millwall failed to ensure that its spectators conducted themselves properly. The charge letter is dated 20 February 2019. The specific allegation is that supporters chanted racist abuse. The charge is one of strict liability but Millwall has sought to mitigate by arguing that, if it had been available, the Rule E21 *due diligence* defence would have been established.
2. The Regulatory Commission heard evidence at Wembley on 23 May 2019. The FA was represented by Mr Will Martin: Millwall was represented by Mr Jim Sturman QC. The hearing was concluded on 13 June 2019 at the International Dispute Resolution Centre, when both parties made closing submissions. Both had served written submissions in advance of the hearing on 13 June 2019.

## THE INCIDENT

3. This summary is based largely on the evidence adduced by Millwall, which is largely unchallenged by the FA. Specific findings (majority and dissenting minority) are set out below. The incident involved a small group of individuals sitting in the Millwall section of the ground chanting *I'd rather be a Paki than a Scouse*. The chanting lasted for about 14 seconds before it was stopped by the objections of other supporters sitting in the immediate vicinity. It was not heard at the time by stewards, the Police, or by the media. It was a short-lived incident which was not known of beyond the immediate vicinity until a video was put on social media after the match.

## THE CHARGE

4. The charge reads as follows –

You are hereby charged with misconduct for a breach of FA Rule E20 in respect of the above fixture.

It is alleged that Millwall FC failed to ensure that its spectators, and all persons purporting to be its supporters or followers, conducted themselves in an orderly fashion and refrained from using abusive and/or insulting words which included a reference to race and/or ethnic origin and/or colour, namely use of the word "Paki", whilst attending a Match in which it was involved.

Please note that the defence at Rule E21..."shall not apply where the Misconduct by spectators or any other person purporting to be a supporter or follower of the Club included a reference, whether express or implied, to any one or more of ethnic origin, colour, race...." (emphasis added).

5. FA Rule E20 provides –

20 Each Affiliated Association, Competition and Club shall be responsible for ensuring:

- (a) that its directors, players, officials, employees, servants, representatives, spectators, and all persons purporting to be its supporters or followers, conduct themselves in an orderly fashion and refrain from any one or combination of the following: improper, violent, threatening, abusive, indecent, insulting or

provocative words or behaviour, (including, without limitation, where any such conduct, words or behaviour includes a reference, whether express or implied, to any one or more of ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability) whilst attending at or taking part in a Match in which it is involved, whether on its own ground or elsewhere; and

- (b) that no spectators or unauthorised persons are permitted to encroach onto the pitch area, save for reasons of crowd safety, or to throw missiles, bottles or other potentially harmful or dangerous objects at or on to the pitch.

6. The *due diligence* defence contained in Rule E21 provides –

21 Any Affiliated Association, Competition or Club which fails effectively to discharge its said responsibility in any respect whatsoever shall be guilty of Misconduct. It shall be a defence in respect of charges against a Club for Misconduct by spectators and all persons purporting to be supporters or followers of the Club, if it can show that all events, incidents or occurrences complained of were the result of circumstances over which it had no control, or for reasons of crowd safety, and that its responsible officers or agents had used all due diligence to ensure that its said responsibility was discharged.

This defence shall not apply where the Misconduct by spectators or any other person purporting to be a supporter or follower of the Club included a reference, whether express or implied, to any one or more of ethnic origin, colour, race, nationality, religion or belief, gender, gender reassignment, sexual orientation or disability.

7. The FA has issued guidance applicable to the appropriate approach to breaches of Rule E20. The following guidance is applicable to determination of the sanction in a case where the elements of the *due diligence* defence are not established –

Should a Club be charged under Rule E20 (a) for discriminatory behaviour of their supporters, a Regulatory Commission (which will be chaired by a specialist panel member with the requisite experience in crowd managements matters) will consider a range of factors including the following in determining what, if any, sanction should be imposed:

- (a) The number of supporters involved;
- (b) The nature of the behaviour of those involved;
- (c) The duration of the incident(s);
- (d) Action taken against individual supporters either by club, police and/or courts

- (e) Whether the Club took all reasonable steps in their preparation and planning for the fixture;
- (f) Whether the Club and/or its officers took all reasonable steps in dealing effectively with the issue/incident when it arose;
- (g) The Club's actions post-event in identifying any supporters involved in discriminatory behaviour.

In addition to the above case specific mitigating factors, other matters may also be taken into account including the level of assistance and co-operation with the investigation and process.

8. Although the *due diligence* defence is not available in cases involving discriminatory behaviour the FA has recognised that where the elements of the *due diligence* defence have been established by the club a conventional sanction will not be appropriate. In such cases the ordinary disposal will be for the Regulatory Commission to impose an action plan.

The guidance issued by the FA continues with the following statement –

Should the Club establish to the Commission's satisfaction that all events, incidents or occurrences complained of were the result of circumstances over which it had no control and/or that its responsible officers or agents had used all due diligence to ensure that its said responsibility was discharged, whilst this will no longer be a defence so that a Commission will be bound to find that a breach of Rule E20 (a) has occurred, the primary focus for sanction would be to consider an action plan and/or operational advice and/or other practical measures as they see fit to be carried out by the Club. This will subsequently be monitored by The Football Association to ensure implementation and is likely to be taken into account in considering any future offences of a similar nature. Should a Club be found to have breached E20 (a) and a Commission finds that the Club had not satisfactorily discharged its said responsibility, then sanctions would be open to the Commission's discretion.

Notwithstanding this guidance, as the FA notes in paragraph 46 of its submissions dated 25 April 2019, the Commission has a general discretion to impose such sanction as it considers to be appropriate.

9. Millwall's case was that it was able to establish the element of the *due diligence* defence so that a conventional sanction was not appropriate. We therefore determined as a separate issue the question whether the

elements of the *due diligence* defence had been established and announced our decision to the parties during the hearing on 13 June 2019 so that mitigation could be advanced on an informed basis.

## THE DUE DILIGENCE DEFENCE

10. The parties agree that the proper application of the *due diligence* defence is as set out in the decision of the Regulatory Commission in West Ham. The relevant paragraphs of that decision (with the typographical error corrected) –
  5. It is common ground that the burden of providing the due diligence defence rests on West Ham, and that the standard to which that burden must be discharged is the balance of probabilities. It is also common ground that the two limbs of Rule E21 are conjunctive. To bring itself within the rule West Ham must prove *circumstances over which it had no control and all due diligence*. Finally, it is common ground that, as stated in West Ham's Response –  
*When determining whether a Club has made out such defence, a Commission's enquiry cannot include a "descent into a counsel of perfection with the luxury of hindsight". A Club is not required to "eliminate the risks" of the events occurring "as that would nullify the due diligence defence".*
  47. The burden of establishing the Rule E21 due diligence defence lies on the club. The standard is to the balance of probabilities. The defence involves two conjunctive limbs. First, the club must prove that those responsible for security did not have control over the supporters whose conduct is complained of. Mr de Marco correctly draws a distinction between a club's players and employees (over whom it has control) and its supporters (over whom it does not have control). We agree that neither the club nor those responsible for security had control over the supporters.
  48. The relevant question, therefore, is whether the club can show that those responsible for security had exercised all due diligence. The FA emphasises the word all, submitting that its use must have been intended to add to standard. We see the force of that argument. We consider that is sufficiently addressed in the construction advanced by Mr de Marco, which properly reflects what is intended by the provision. We consider that the defence requires the club to show that those responsible for security had taken all reasonable steps to discharge their responsibility. What constitutes reasonable steps is what was known, or should have been known, at the time. It is not to be judged with the benefit of hindsight. Nor does it require perfection.

It does, however, require that all reasonable steps should have been taken. What is required is what would have been done by a prudent, conscientious person in the position of those responsible for security, acting on the knowledge and information that was reasonably available to him. ....

11. In paragraph 7 of its submissions dated 10 June 2019 the FA said –
  7. The test is a high one. Establishing all due diligence requires the Club to show that all reasonable steps had been taken to discharge its responsibility. What constitutes reasonable steps is to be determined by reference to what was known, or should have been known, at the time: *It is not to be judged with the benefit of hindsight. Nor does it require perfection. It does, however, require that all reasonable steps should have been taken. What is required is what would have been done by a prudent, conscientious person in the position of those responsible...acting on the knowledge and information that was reasonably available to him.*
  
12. In paragraph 5 of its submissions dated 10 June 2019 Millwall said –
  5. Perfection is NOT required, the test is - were reasonable steps taken - (that is reflected also in the “Criteria” see Page 15 of the hearing bundle), with what is reasonable being determined according to what should reasonably have been known at the time, and of course may depend on who your opponent is.
  
13. It is common ground between the parties that the burden of proving that it had taken all due diligence lies on Millwall. However, in its submissions Millwall has pointed out that the FA has not adduced any evidence comparing the standards adopted by Millwall with those of other clubs. It is therefore sensible that we should set out our understanding of the significance of the burden of proof lying on Millwall.
  
14. The burden of proof rests with Millwall throughout. However, if it adduces evidence to establish a prima facie case that it had taken all proper steps it would be for the FA to rebut that evidence. That does not

mean that the burden of proof has shifted: it means simply that an evidential burden lies on the FA to rebut the prima facie case that Millwall will have established. How the FA chooses to do so is a matter for it. It may call evidence, but it is not required to do so. It may, as it has done in this case, rely simply on submissions and forensic argument. The Commission, as part of its decision making process, will make a finding based on the totality of the evidence, and all the submissions and arguments advanced by both parties.

#### **MILLWALL v WOLVERHAMPTON WANDERERS: 26 December 2017**

15. There were incidents of racist chanting during Millwall's home match against Wolverhampton Wanderers on 26 December 2017. The chanting is detailed in Millwall's letter dated 6 January 2018, which accepted that the chants had included *you are only here for the chicken* but denied that they included monkey noises, or references to terrorists. The FA had written to Millwall on 27 December 2017, seeking an explanation. Millwall's detailed response is contained in its letter dated 6 January 2018. That letter refers to six complaints that had been made anonymously. A seventh complaint had been made by a Wolverhampton Wanderers photographer, but he had declined to make a witness statement or to assist the investigations made by either the FA or by Millwall. Millwall emphasised that although it accepts that *chicken* chants were made it denies that monkey chants were made.

16. The FA wrote to Millwall on 3 August 2018, informing it that no disciplinary action would be taken but giving it what was described as a *formal warning*. We quote that letter in its entirety.

Many thanks for your assistance with The FA's enquiries into this fixture.

We note the steps taken by the Club to support the Metropolitan Police investigation. We also note the action taken by the Club to remind stewards of

their reporting duties and to educate the supporter base under guidance from Kick It Out. Further, we acknowledge the evidential difficulties presented by the fact that the Wolverhampton Wanderers FC photographer has failed to provide a statement.

The FA has considered the matter and although we will not be taking any formal disciplinary action on this occasion, you should consider this letter to be a formal warning.

We would take this opportunity to highlight our concern that the footage does appear to indicate that the nearest stewards to the incidents in the Lower West Stand took no apparent steps to intervene and/or escalate the matter when the individuals concerned were engaged in the alleged abuse.

Discriminatory chanting is a strict liability offence, therefore any defence under FA Rule E21 is not applicable. As you are aware, this is not the first occasion that The FA have received reports of this nature involving the Club. If further reports of discriminatory chanting should be received next season then we will consider disciplinary action against the Club. The Association reserves the right to refer to the current matter in such circumstances.

The Football Association now considers this matter to be closed.

17. The FA's case is that the fact of the investigation and warning is relevant.

Its position is summarised in its submissions dated 25 April 2019 –

8. The FA does not intend to rely on the facts (as reported) of the previous matter and moreover The FA fully accepts that the club was not charged with those matters. It is however important to note that the club was formally warned, with specific reference made to a perceived lack of response by stewards. Accordingly, we aver the club had the benefit of a written warning in respect of a discriminatory crowd matter and apparent steward inactivity.
9. As such, the club were on notice in respect of alleged discriminatory conduct and ought to have taken steps to improve anti-discrimination measures in response to the warning.

This is not accepted by Millwall, who maintains that the fact of the FA's uncharged and unproved complaint is simply irrelevant.

18. We consider that the facts of the FA's complaint and of Millwall's subsequent investigation cannot simply be ignored. Millwall was on notice of the incidents having occurred: accordingly, pursuant to its regulatory obligations, it was under an obligation to react appropriately.

The fact that the FA's letter dated 3 August 2018 contained a warning does not take the matter further. It is immaterial whether the FA had the power to issue a warning in circumstances where no charge had been brought. Millwall's obligation to react was triggered by the fact of its knowledge of the incidents having occurred. That obligation would have been triggered whether the incident had been raised by the FA, or had been reported to Millwall by other sources. Once Millwall had knowledge of the incident, no matter how that knowledge was acquired, it was under an obligation to react appropriately. The significant fact is that Millwall was on notice of the incident, not that the FA had issued a warning.

## **THE ISSUE**

19. Millwall introduced a very great deal of written evidence, which was confirmed orally by Stephen Kavanagh (Millwall's CEO), John D'Arcy (Millwall's Security & Operations Advisor), and Robert Eastwood (the EFL's Security & Operations Advisor) that although it had received intelligence before the Everton match that there was a real risk of violence and pitch invasion, it had received no intelligence that there was any risk of discriminatory chanting. During additional evidence given during the course of submissions Mr D'Arcy accepted that there was always a risk of discriminatory behaviour, and that before the Everton match the risk was categorised as being *likely*.
20. The FA has recognised the force of the evidence, that there was no intelligence of any specific risk and so has accepted that Millwall was not on notice of specific discriminatory chanting. Its carefully worded concession is contained in paragraph 30 of its submissions dated 25 April

2019 –

30. The FA also notes that the club were not on notice that there was a *particular* risk of discriminatory chanting, as the club had never previously encountered the chant subject of this charge.

We consider that on the evidence that we have heard this concession is unduly limited. We accept that although Millwall was on notice of potential violence and potential pitch invasion, it was not on notice of discriminatory behaviour beyond that which is present in any football match. We consider the FA's concession limited to the words actually used in this incident is too restrictive.

21. In its written submissions dated 25 April 2019 and in its oral submissions on 13 June 2019 the FA focused on the question whether Millwall's reaction to the Wolverhampton Wanderers incident had been sufficient to enable it to satisfy the elements of the *due diligence* defence. We consider that focus to be correct, and to identify what we consider to be the true issue in the case. In its submissions dated 25 April 2019 the FA put its case in the following terms –

31. ...The FA queries whether the club (despite not accepting the misconduct) made any steps to increase its planning and anti-discrimination measures in response to the imposition of the previous warning.
32. ...Mr Kavanagh explains in detailed terms the efforts undertaken by the club to create and publicise an anti-discrimination slogan "Hear Hate, don't Hesitate, report it". This involved messaging, added signage, use of the stadium screens and LED perimeter boards and creating video in which players and management personnel appeared. The FA applauds the aforementioned efforts to address discriminatory misconduct following the fixture, but respectfully highlights the club has not provided evidence of any similar improvements having been made following the previous warning.
33. In respect of ticketing, The FA notes the club's confirmation the seats in which the chanting occurred were initially offered on general sale and then later only to supporters with a 'purchase history.' The FA does not take issue with the club's decision to initially offer the tickets on general sale. Notwithstanding this, given the "high-risk" designation of

the fixture, The FA is concerned with the number and location of stewards given the initial ticketing arrangement. The FA avers that despite the Lower Tier closure, the club ought to have provided greater steward numbers, particularly in areas that had been previously offered on general sale as these are areas where misconduct was more likely to occur. It is important to note the club has now removed the area where the chanting occurred from general sale.

30. The FA notes the club's improvement of steward numbers in the location where the chanting occurred (see John D'Arcy statement dated 9 April 2019). The FA again applauds the club's reaction to the chanting in this regard, but it also unavoidably highlights an insufficiency in steward numbers at the fixture.

Subsequently, in paragraph 40, the FA added -

40. The FA avers that given the volume and audible clarity of the chanting and the proximity of the stewards...it is unlikely no stewards heard the chanting.
- 
22. The FA amplified its position in its submissions dated 10 June 2019, in which it advanced the following case -
    8. In the light of the context of the Everton fixture, The FA submits that the Club has failed to demonstrate that it took all reasonable steps to prevent the discriminatory chanting taking place. In particular, the Club:
      - a. Failed to put in place a visible and effective campaign against anti-discriminatory language ahead of the fixture;
      - b. Failed to use the advertising hoardings to display anti-discriminatory messages;
      - c. Failed to use the public announcement system to broadcast anti-discriminatory messages;
      - d. Failing to ensure there were sufficient stewards in the upper East stand to discourage such language being used;
    9. The FA further submits that the steps taken after the Everton fixture to remedy the above failures supports the proposition that the Club did not take all reasonable steps.
  
  23. We consider that the questions we must address are those identified by the FA, namely whether in light of the incidents at the Wolverhampton

Wanderers match Millwall should before the Everton match have –

- (1) increased the anti-discriminatory steps described by Mr Kavanagh, including instituting an anti-discriminatory campaign before the match, making use of the electronic signage and the public announcement system to display/broadcast anti-discriminatory messages;
- (2) increased the numbers of stewards deployed in areas where tickets had been on general sale;
- (3) increased the number of stewards deployed in the location where the chanting occurred.

And, (4) whether stewards had heard but had failed to react to the chanting.

#### **THE FA's CASE**

24. The FA's case is summarised in the passages that we have quoted in paragraphs 21 & 22, above. Essentially it revolves around the question whether Millwall reacted sufficiently to the Wolverhampton Wanderers incident. The FA argues that Millwall was on notice that steps such as those taken after the Everton match should have been taken at an earlier stage. It relies on the general risk of discriminatory behaviour that is an increasing feature of modern society. It relies specifically upon the Wolverhampton Wanderers incident, the Middlesbrough incident (the giving of a Nazi salute on 4 August 2018), and the Swansea incident (the shouting of *black cunt* on 1 September 2018).

25. The FA's case is that the steps taken by Millwall should have been taken after the Wolverhampton Wanderers, the Middlesbrough, and the Swansea matches. It argues if those steps had been taken before the Everton match the probability is that the discriminatory chanting that

took place at that match would not have happened. There is therefore, for the reasons advanced in the FA's submissions, a failure to have taken all due diligence.

## **MILLWALL'S CASE**

26. Millwall's submissions advance two separate contentions. First, it says that it reacts proactively and properly to intelligence of what might occur at matches yet to be played. Second, it says that it reacts proactively and properly to incidents that have occurred at past matches. So, it says that it plans ahead, drawing from past experience: and reacts to untoward incidents.
  
27. The Police and other intelligence received before the Everton match pointed to the likelihood of both violence and pitch invasion. Millwall reacted to this intelligence. It cooperated with Everton in its planning. It closed the lower tier of the stand in which Everton fans were to be seated, so as to prevent pitch invasion. It increased the number of stewards. It arranged for a significant Police presence in the ground. Millwall argues that the fact that the FA decided not to charge it in relation to any of the matters raised by the referee in his Extraordinary Incident Report demonstrates that the FA was satisfied that it had taken all appropriate measures in response to the information reasonably available to it. Its planning, Millwall argues, was responsible and proper.
  
28. Millwall is at pains to point out that its attitude towards discriminatory behaviour is no less punctilious. It submits that if it had been aware of a specific risk it would have reacted to the risk. Evidence was adduced of the forward planning that took place in relation to potentially homophobic behaviour at Millwall's FA Cup match with Brighton. That

planning was carried out in conjunction with Brighton and was wholly successful. We were told that no discriminatory behaviour took place. Similar precautions are taken when Millwall plays any other club where there is specific risk of discriminatory behaviour – for example (although they have not played each other recently) Tottenham Hotspur.

29. In its submissions dated 7 May 2019 Millwall asserted that it had reacted properly in reaction to the Wolverhampton Wanderers incident. It emphasises that that incident did not result in any charge and that its investigations revealed only the *chicken* chant: there was no evidence of the monkey chant or of references to terrorists, which Millwall does not accept as having been made. The significance of this is that Millwall questions whether the *chicken* chant can properly be characterised as discriminatory: it points out that it could equally have been a reference to the fact that Alfred N'Diaye had attributed his physical prowess to the consumption of chicken. In his letter dated 6 January 2018 Mr D'Arcy had written –

Specifically, the majority of the complaints cover a chant "You are only here for the Chicken". It has to be said that the staff at Millwall FC have no recollection of it being sang previously. I would suggest that by many this would not be seen discriminatory but it is evident that some of those in attendance felt it was. It is now about education and understanding that not only Millwall FC has to overcome but also society. The club will continue to utilise the Community Scheme, Millwall For All Charity as well as its own social media platforms and Supporter Groups to continue that education. Everyone associated with Millwall FC will not rest until we ensure this behaviour is eradicated from our stadium.

The evidence was that Millwall did undertake a programme to educate supporters that the *chicken* chant was potentially discriminatory and would not be tolerated.

30. In his written submissions dated 7 May 2019 Mr Sturman listed the steps that Millwall had taken in response to the Wolverhampton Wanderers

incident –

... the Club DID take action as a result of the shortcomings identified. The steps taken as a direct result of the complaint arising out of the Wolves game included: -

- a) The Club liaised with the Metropolitan Police, reporting the complaint as a hate crime and ensuring the Metropolitan Police recorded the matter appropriately and commenced an investigation;
- b) CCTV and match footage was examined to try to identify any person responsible for an offensive chant;
- c) Contact was repeatedly made with Sam Bagnall in what proved to be a fruitless attempt to get him to attribute to the persons whose photographs he had taken the alleged offensive chanting that had been directed at him;
- d) Both Clubs liaised at CEO level in order to progress the inquiry;
- e) The Club's players were spoken to in an attempt to obtain evidence in support of the investigation;
- f) All stewards in the identified areas were debriefed and spoken to regarding what they had seen or heard, no supporting evidence was obtained;
- g) Stewards were reminded of the need to report any incidents and were reminded of the training they had received from Kick it Out at the beginning of the season;
- h) Supporters the Club could identify from the photographs were called in and spoken to, all denied any discriminatory chanting. Absent any assistance from Mr Bagnall no further action could be taken other than "marking their card";
- i) The Club reviewed steward briefings to ensure discriminatory behaviour was highlighted in all briefings;
- j) Representatives of the Club met with Kick It Out and the Football Supporters Federation to discuss ways of tackling isolated discrimination and agreed to set up a fans discrimination panel and to hold an event with the FSF to launch the panel.

Further to the above the briefing manual was changed, the requirement to report all discriminatory language...was rewritten in bold and red to underline and emphasise the importance of reporting discriminatory conduct.

31. Millwall emphasises that it had received no intelligence to suggest that there might be discriminatory chanting at the Everton match. It had liaised closely with the Police and with Everton, neither of whom had raised discriminatory conduct as a potential issue. What was raised by all involved was the risk of violence and pitch invasion, both of which were fully and sufficiently addressed by Millwall before the match.

Millwall argues that such a responsible proactive response to intelligence demonstrates its high standards which, it asserts, would have been applied equally to the risk of discriminatory conduct if it had had notice of that risk.

## DISCUSSION

32. We consider first whether Millwall has raised a prima facie case that it has exercised all due diligence. There is no evidence to undermine Millwall's case that there was no evidence of any risk of discriminatory behaviour. Neither the Police nor Everton had made any such suggestion. We find that there was no risk that Millwall should have been aware of, such that it should have taken special precautions.
33. That finding does not relieve Millwall from the obligation to have taken general precautions to deal with the risk of discriminatory behaviour. As the FA has argued, such a risk is always present so that a responsible club will have guarded against it. Millwall has adduced evidence of the steps that it has taken. We were told that it was named Family Club of the Year in 2017, and were invited to draw the inference that that award would not have been made if it tolerated discriminatory behaviour. Millwall has a policy of employing staff throughout the ground from diverse ethnic backgrounds. It operates a sophisticated education scheme directed, as Mr Sturman phrased it, *to rehabilitate and educate the unthinking*. Millwall argues that that education programme may well have contributed to the fact that (on its case) the chanting was quickly stopped by neighbouring supporters. Signage at the ground encourages the immediate reporting of discriminatory behaviour. Stewards are instructed to adopt a no-tolerance approach.
34. We heard evidence of the steps that Millwall takes to track down and

identify those guilty of inappropriate conduct, whether discriminatory or otherwise. Millwall has a policy of never closing a case: offenders may be located months and years after the event – Millwall adopts a continuing detective exercise. The offender in the Middlesbrough incident that occurred on 4 August 2018 was identified and detained on 26 January 2019: the offender in the Swansea incident that occurred on 1 September 2018 was identified and detained on 23 February 2019. In all such cases the offenders are treated appropriately, whether by undergoing the education course, banning from the ground or prosecution. We consider that the effect of such relentless pursuit is not limited to punishment and retribution. It has a positive deterrent effect because the knowledge of likely detection will frequently deter the misconduct.

35. Millwall asserts that its proactive policy is exemplary. It asserts that it is better than that of other clubs. That is not something about which we are in a position to make any finding of fact because we have heard no evidence addressed to the policies adopted by other clubs. We do, however, note the very high opinion that Mr Eastwood holds of the anti-discrimination steps taken by Millwall – although some of those steps had not been taken until after the Everton match. In his witness statement Mr Eastwood, amongst other things, wrote –

During my time with the EFL, I have had regular contact with Millwall FC around a variety of issues, many occasions instigated by the Club. Steve Kavanagh reported to me an allegation of racism (which included displaying the Nazi Salute) at their Middlesbrough fixture (4/8/18). We agreed to hold a meeting to look at options to develop an action plan, to ensure there was a comprehensive response to all forms of hate crime during the Clubs operations. It was Steve's idea to invite Kick it Out and they sent two members of staff, Sarah Train, Professional Clubs Equality Officer and Anwar Uddin, Diversity and Campaigns Manager. A number of actions (many of which the Club were already doing) were

agreed which demonstrated Millwall FC's continuing commitment to hate crime and equality and aimed to galvanize support from their fans to the Clubs approach to these problems. Sarah wrote to me and stated 'the meeting was very encouraging and demonstrated a strong commitment from all of us to move forward with clear, positive actions.' I was very encouraged by Millwall FC's commitment to sharing experiences and taking good practices on board. They readily agreed, upon suggestion by Anwar, to initiate a Diversity fans forum and this is to take place during March 2019. The FA did not pursue any action from the circumstances at the Middlesbrough game. I am told the two 'offenders' did not attend a further game until the Everton fixture. They were both detained at this fixture....

There are a number of other good practices Millwall FC implements to demonstrate their commitment to equality and respecting diversity. They employ significant numbers of people on a match day who hail from different BME communities. This is always seen as good practice and in my view reflects very well on the football club as a company and employer of people from the surrounding community, regardless of race or cultural identity. This also sets a standard, in respect of where Millwall FC is regarding equality and the eradication of all forms of discrimination. There are also many other initiatives which the club initiates on a match day and throughout their community programs which, in my view, further demonstrates positive outcomes in respect of equality and challenging discrimination.

36. We now turn to consider whether Millwall has established that it has met the elements of the *due diligence* defence. Unhappily, the Commission has been unable to reach a unanimous decision on this question. We set out the differing analyses of the majority and of the dissenting minority.

### **The majority**

37. The majority was careful to guard against imposing a counsel of perfection, and was careful not to rely on wisdom borne of hindsight. The majority recognises that the question that it must address is not whether Millwall could have taken more precautions, but whether it should have done so. Nevertheless, the majority has reached the clear decision that the *all due diligence* standard had not been proved by

Millwall in relation to the discriminatory chanting that took place during the FA Cup match against Everton on 26 January 2019. In arriving at that decision the majority addressed the submissions advanced by the FA.

38. **Whether additional anti-discriminatory steps should have been introduced after the Wolverhampton Wanderers match, including instituting an anti-discriminatory campaign before the match, making use of the electronic signage and the public announcement system to display/broadcast anti-discriminatory messages**

It was agreed that there was no specific intelligence issued relating to the manifestation of discriminatory chanting for the Everton match. However, the majority finds that there was still an inherent, potential and generic risk of such behaviour being possible at the fixture, as is demonstrated by the Millwall match day risk assessment, which categorised the risk as being *likely*. This recognised risk meant that appropriate and adequate risk controls to mitigate such behaviour should have been in place.

39. Following the highlighted and associated admissions relating to the discriminatory chanting experienced at the Wolverhampton Wanderers match it was therefore incumbent on Millwall to have adopted urgent, improved and continuous measures to counter such discriminatory behaviour at future matches, including the Everton FA Cup tie. Although some measures were adopted, the majority finds that their impact and relevance to future mitigation were inadequate in comparison to the robust measures adopted after the discriminatory chanting that took place after the Everton match. The majority finds that those robust measures could and should have been implemented after the Wolverhampton Wanderers match.

40. **Whether increased numbers of stewards should have been deployed in areas where tickets had been on general sale**

The majority finds that the risk of discriminatory behaviour was further increased by the prevailing *general sales* ticketing policy adopted for the Everton fixture within the East stand. That is a factor which in the opinion of the majority, when combined with Millwall's apparent non-compliance with Ground Regulations and its own operational policy by permitting general fan migration to go unchecked in that area, ought to have resulted in a more proactive approach to stewarding. The majority finds that because of those known features Millwall could and should have increased the number of stewards in the location in which the discriminatory chanting took place.

41. **Whether increased numbers of stewards should have been deployed in the location where the chanting occurred**

It was noted by the Commission that stewarding had been increased in the East Stand following the Wolverhampton Wanderers fixture. However, because no further incidents of discriminatory chanting had been identified in the League matches immediately thereafter, Millwall had reduced the number of stewards to the previous levels. The majority finds that in this particular regard that not enough importance was attached by Millwall to the differential between a League match and an FA Cup tie. Millwall was playing against a high profile opponent whom it had not faced for a long time. The majority finds that in those circumstances Millwall underestimated the elevated risk of discriminatory chanting.

42. Finally, the majority recognises that there was an increase in stewarding numbers for the Everton match commensurate with its designated Category C+ high risk of disorder status. However, the majority finds

that there was a lack of sufficient stewarding in the East Stand to counter the risk of discriminatory behaviour. The majority considers that the level of stewarding should have been maintained at the level introduced after the Wolverhampton Wanderers match – a level that has now been reintroduced after the Everton match.

43. **Whether stewards had heard but had failed to react to the chanting**

The majority recognises the evidence that supported Millwall's case that no steward or police officer actually heard the discriminatory chants. However, it is agreed that the chanting did take place as is plain from the social media posting. Although it may not have been clearly heard in any other stands due to the increased supporter noise levels, the chanting was heard within the East stand by the supporters who allegedly reacted and stopped the chants. Based on the balance of probabilities, if these 'loyal fans' heard and reacted to the chants, it is difficult to comprehend why no steward or police officer in that stand/immediate vicinity failed to hear the chants and failed to report or react to such discriminatory behaviour

44. The chant was heard for only around 14/15 seconds, although the duration of chant did allow time for two full verses of the discriminatory chant, and was immediately followed by a further inappropriate chant. This length of the chant is fairly typical for bursts of chanting by general supporters.

45. We have been presented with conflicting arguments between the FA and Millwall as to whether there were a sufficient number of stewards in this area. We recognise that our finding that there was a lack of a proper number of stewards could explain why those stewards who were present

might not have heard the chanting. The majority notes that although admissible hearsay evidence was given by Mr Kavanagh and Mr D'Arcy the written evidence did not include evidence from all the stewards in the immediate vicinity of this incident.

46. We are required to make a finding of fact of this issue. The majority recognises that this issue must be determined on the evidence: it is not for it to speculate. Nevertheless, the totality of the evidence demonstrates (1) that the chanting was audible in the stand; (2) better behaved supporters heard it; and (3) on Millwall's case those supporters protested so that the chanting ceased. In those circumstances the majority finds that it is more likely than not that the stewards in the stand did in fact hear the chanting but, for whatever reason, failed to react to it. This is a significant finding because the stewards, unlike the chanting supporters, are individuals over whom Millwall had control. This finding therefore has the consequence that that Millwall is unable to satisfy the first limb of the *due diligence* defence.
47. For these reasons the majority finds that Millwall has failed to establish the high standard required by the all *due diligence* test.

### **The dissenting minority**

48. The dissenting minority recognises the force of the analysis of the majority. It considers, however, that that analysis crosses the line of adopting a counsel of perfection, based on the wisdom of hindsight. The dissenting minority acknowledges that this is a finely balanced case but has reached the conclusion that Millwall had satisfied the elements of the *due diligence* defence. It explains that decision by reference to the submissions advanced by the FA.

49. **Whether additional anti-discriminatory steps should have been introduced after the Wolverhampton Wanderers' match, including instituting an anti-discriminatory campaign before the match, making use of the electronic signage and the public announcement system to display/broadcast anti-discriminatory messages**

Millwall has detailed the steps that were taken after the Wolverhampton Wanderers match. The dissenting minority also notes the positive steps recorded by Mr Eastwood as having been taken after the Middlesbrough match (and which continued after the Everton match) – evidence of a proactive approach. The dissenting minority recognises it to be inevitable that further steps could have been taken – it must always be possible for a club to have done more. But the obligation is not to do everything that could be done: the standard is not one of perfection. The obligation is to do what should have been done. What should have been done is to be determined by the information that was reasonably available at the time: a club is obliged to react properly to information that was reasonably available to it.

50. The evidence is that after the Wolverhampton Wanderers match there had been no incident of discriminatory chanting. Millwall had no notice that there would be discriminatory chanting at the Everton match. The dissenting minority considers that it was reasonable for Millwall to have thought that the steps that it had taken, and were continuing to take, were sufficient. The fact that after the Everton match Millwall took further steps does not demonstrate that those steps should have been taken sooner – such an argument would be to introduce a counsel of perfection based on hindsight. What is important is that a club should react to incidents appropriately – as Millwall did after the Middlesbrough match. The dissenting minority considers that it was reasonable for Millwall to have believed that its procedures for preventing discriminatory

behaviour were sufficient. The fact that it reacted properly after events at the Everton match does not detract from that conclusion.

51. **Whether increased numbers of stewards should have been deployed in areas where tickets had been on general sale**

Millwall had reacted to the threats of violence and of pitch invasion by increasing the number of stewards. That reaction demonstrates its willingness to respond to perceived risks. There was no perceived risk of inappropriate behaviour (whether discriminatory or otherwise) in areas in which tickets had been on general sale. There was therefore no reason for Millwall to have increased the number of stewards in those areas.

52. **Whether increased numbers of stewards should have been deployed in the location where the chanting occurred**

Similar reasoning applies. Millwall had reacted to the threats of violence and of pitch invasion by increasing the number of stewards. That reaction demonstrates its willingness to respond to perceived risks. There was no perceived risk of inappropriate behaviour (whether discriminatory or otherwise) in the location in which the discriminatory chanting took place. There was therefore no reason for Millwall to have increased the number of stewards in that area.

53. **Whether stewards had heard but had failed to react to the chanting**

The dissenting minority has found this issue more difficult to resolve than the ones considered above. Having viewed the video footage of the incident the dissenting minority has had some difficulty in identifying the relevant chanting – it was, as has been said, a particularly noisy match. There was only a very small number of individuals chanting, and the chanting lasted for only a short period. Nevertheless, the chanting is

plainly audible on the video that was posted on social media. It was plainly heard by those in the immediate vicinity, whose reaction stopped the incident quickly. In these circumstances the dissenting minority has been troubled by the fact that the evidence is that the stewards in the location of the chanting did not hear it. There is, as the FA understandably suggests, the possibility that the stewards failed to react as they should have, and are therefore not being truthful.

54. The dissenting minority has considered this possibility carefully. It recognises the possibility that the stewards may be lying to cover up their own default. There is, however, no evidence that the chanting was heard widely – certainly, it was not detected by any of the media present in the ground. The evidence shows that it was heard by supporters in the immediate vicinity, but there is no clear evidence where they were seated or how widely the chanting was heard. The stewards have not been required to attend for cross-examination so the Commission has not had the opportunity of determining their veracity in the conventional manner. On the evidence before it the dissenting minority is not able to find that the stewards were lying. It therefore concludes that that they did not fail to react properly to the chanting.

55. In these circumstances the dissenting minority is of the opinion that Millwall has made out the elements of the *due diligence* defence.

## **SANCTION**

56. Mr McCormack confirmed to the Commission that although Millwall has been sanctioned in recent years it has no record for breaches relating to discriminatory behaviour.

57. In its submissions dated 10 June 2019 the FA acknowledged *the significant efforts made by the Club subsequent to the Everton Fixture, and the further steps suggested in the Club's proposed action plan*. Those steps were reiterated and emphasised by Mr Sturman. We consider that Millwall has reacted appropriately and properly to the charge that we are considering. We find that Millwall has a genuine determination to address discriminatory behaviour and has taken and continues to take sensible and proportionate measures in pursuit of that goal. These are substantial mitigating factors.
58. We have considered the seven factors listed in the FA's the guidance to the disposal of Rule E20 charges (paragraph 8, above). A small number of supporters were involved. The behaviour was unacceptable discriminatory chanting. It lasted for about 14 seconds – a comparatively short period. Millwall has done all that can reasonably be expected to identify the individuals involved. By definition, given that its conduct has been found to fail to meet the *due diligence* defence standards, Millwall's preparation before the match was inadequate.
59. The Commission agreed that there was substantial mitigation in this case, particularly in the steps taken by Millwall after the event. Nevertheless, given the failure to meet the *due diligence* standard we considered that it would not be appropriate for us to impose no sanction beyond the imposition of an action plan, as was done in Sheffield United FC (22 March 2016). We considered that some additional penalty was required. Having regard to the substantial mitigation we determined that that penalty should be a fine of £10,000.
60. The Commission also considered that an action plan should be imposed.

The terms of the action plan are revised from that proposed by Millwall, namely -

- (1) Millwall to introduce improved CCTV systems by the beginning of the season 2019/2020.
- (2) Millwall to continue to use and develop the *Hear Hate Don't Hesitate Report It* campaign introduced after the Everton fixture, and to continue with *Kick It Out* reporting processes.
- (3) John D'Arcy to continue to visit other Clubs to seek best practice to incorporate into Millwall's policies and procedures in addressing the potential for discriminatory behaviour.
- (4) Millwall to develop additional supporter and steward educational programmes with the Millwall Inclusion/Diversity Officer.
- (5) Millwall to continue with the ongoing dialogue with *Kick It Out* and further enhance the relationship by seeking advice and ratification of new and developing associated policies and procedures.
- (6) Fully establish and develop the 'Millwall multi agency anti-discrimination focus group' to work closely with key partners such as (but not limited to) *Kick It Out*, FSF, EFL, Millwall supporter groups, Millwall Supporter Liaison Officer, Millwall Equality Liaison Officer and Millwall4All.
- (7) Millwall to facilitate match day PA announcements and usage of LED boards, big screen and match day programme as well as website and social media platforms to target the prevention, usage and detection of any potential discriminatory words or behaviour.
- (8) Millwall to develop a corporate risk policy to include equality and anti-discrimination.
- (9) Millwall to develop and improve steward deployment plans in association with Green Guide guidance, as well as intelligence

based on current and historical information surrounding incidents of discriminatory behaviour within the stadium.

- (10) Millwall continuously to review ticket sales policies and compliance with Ground Regulations to ensure such policies do not increase the risk for discriminatory supporter behaviour.
- (11) Millwall to consider use of 'Professional witnesses' and also their stewards' use of body camera equipment to detect, deter and evidence any incidents of discriminatory behaviour.
- (12) Millwall to review and develop all match day operational planning and steward briefing processes and documentation to ensure its strategies and content addresses the prevention and detection of discriminatory behaviour.

We give Millwall permission within 14 days of receipt of these Written Reasons to apply to vary the terms of that action plan.

61. Finally, the Commission considered that Millwall should pay the costs of the Commission members incurred in these proceedings. Again, we give Millwall permission within 14 days of notification of the figure to apply to vary the amount of those costs.

## CONCLUSION

62. The Commission makes the following decision –
  - (1) Millwall has failed to establish that it has satisfied the elements of the *due diligence* defence.
  - (2) Millwall is fined the sum of £10,000.

The Commission imposes an action plan in the following terms –

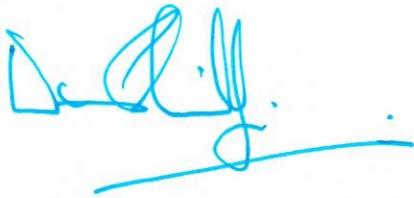
- (1) Millwall to introduce improved CCTV systems by the beginning of the season 2019/2020.
- (2) Millwall to continue to use and develop the *Hear Hate Don't*

- Hesitate Report It* campaign introduced after the Everton fixture, and to continue with *Kick It Out* reporting processes.
- (3) John D'Arcy to continue to visit other Clubs to seek best practice to incorporate into Millwall's policies and procedures in addressing the potential for discriminatory behaviour.
  - (4) Millwall to develop additional supporter and steward educational programmes with the Millwall Inclusion/Diversity Officer.
  - (5) Millwall to continue with the ongoing dialogue with *Kick It Out* and further enhance the relationship by seeking advice and ratification of new and developing associated policies and procedures.
  - (6) Fully establish and develop the 'Millwall multi agency anti-discrimination focus group' to work closely with key partners such as (but not limited to) *Kick It Out*, FSF, EFL, Millwall supporter groups, Millwall Supporter Liaison Officer, Millwall Equality Liaison Officer and Millwall4All.
  - (7) Millwall to facilitate match day PA announcements and usage of LED boards, big screen and match day programme as well as website and social media platforms to target the prevention, usage and detection of any potential discriminatory words or behaviour.
  - (8) Millwall to develop a corporate risk policy to include equality and anti-discrimination.
  - (9) Millwall to develop and improve steward deployment plans in association with Green Guide guidance, as well as intelligence based on current and historical information surrounding incidents of discriminatory behaviour within the stadium.

- (10) Millwall continuously to review ticket sales policies and compliance with Ground Regulations to ensure such policies do not increase the risk for discriminatory supporter behaviour.
- (11) Millwall to consider use of 'Professional witnesses' and also their stewards' use of body camera equipment to detect, deter and evidence any incidents of discriminatory behaviour.
- (12) Millwall to review and develop all match day operational planning and steward briefing processes and documentation to ensure its strategies and content addresses the prevention and detection of discriminatory behaviour.

Millwall has permission within 14 days of receipt of these Written Reasons to apply to vary the terms of that action plan.

- (3) Millwall shall pay to the FA the costs of the Commission members incurred in these proceedings. Millwall has permission within 14 days of notification of the figure to apply to vary the amount of those costs.



David Phillips QC  
Philip Rainford  
Alison Royston

24 June 2019

Mr David Phillips QC, Mr Philip Rainford, Ms Alison Royston  
23 May 2019, 13 June 2019

BETWEEN -

THE FOOTBALL ASSOCIATION

Complainant

and

MILLWALL FC

Respondent

SUPPLEMENTARY WRITTEN REASONS

**INTRODUCTION**

1. In paragraph 62(3) of its Written Reasons dated 24 June 2019 the Regulatory Commission gave Millwall permission to apply to vary the terms of the action plan imposed by the Commission. Millwall raised by correspondence a number of concerns which were considered by the Commission and pursued in further correspondence between Millwall and the Commission. These Supplementary Written Reasons set out the Commission's explanations of the action plan and the modifications that have been made to it.

**EXPLANATION and MODIFICATION**

2. Millwall has suggested and the Commission agrees that the action plan should be in force, and the FA's monitoring of it, should be for a finite period. The period determined by the Commission is one of two seasons, that is until the conclusion of the 2020/2021 season. It has been agreed

between the FA and Millwall that monitoring of the action plan will involve Richard Woolford (the FA's crowd advisor) attending Millwall home games every quarter. Mr Woolford will assess compliance with the action plan, and will be responsible for recommending and taking any necessary consequential steps.

3. Millwall was concerned that paragraph (4) of the action plan raised issues regarding certainty. The Commission has modified the terms of paragraph (4) to address those concerns.

4. Millwall was concerned by the terms of paragraph (7) of the action plan. The Commission clarifies its intention by stating the following, the substance of which has already been explained in correspondence with Millwall –

The Commission considers that Millwall should devise an appropriate proactive PA message highlighting that discriminatory behaviour will not be tolerated and which also advertises the availability of the anonymous texting service should any fan become aware of such behaviour. This would present proactive preventative, deterrent and detection messaging solutions in response to any incidents of discriminatory behaviour. The Commission recommends that the message should be broadcast at every match on at least one or two occasions both pre-match and also at half time to ensure everyone attending will have heard the message. The Commission expects Millwall to have an appropriate reactive PA message available to counter any potential mass (as distinct from individual) chanting.

The Commission considers that the availability and deployment of a reactive message should be at the discretion of the Safety Officer, who will be best positioned to make a risk assessment of the situation.

The Commission also draws to Millwall's attention to the fact that UEFA has a three-step response to racial discriminatory behaviour within the crowd, which mandates the use of PA messages of three levels, increasing in intensity up to a potential full abandonment of the match.

5. Millwall has sought clarification of what is intended by paragraph (8) of the action plan. The Commission notes that in correspondence before the hearing of this matter Millwall had suggested the development of a Club

Corporate Risk Policy, which is what has been ordered by the Commission. The Commission's intention is that risk of discriminatory behaviour should be documented, and that the policy will ensure that such risks are continuously monitored and reviewed.

6. Millwall has raised issues relating to the use of professional witnesses, consideration of which was required by paragraph (11) of the action plan. The Commission notes that its Order does no more than require Millwall to consider the suggested steps: whether they are in fact taken is a matter for proper decision making by Millwall. Having reviewed Millwall's representations the Commission considers that the word "covert" should be added to paragraph (11). The Commission clarifies the intention that lies behind the modified paragraph (11) as follows. The term "professional witness" is intended to cover any undercover staff member whose role is discretely and covertly to monitor behaviour, and to be sufficiently skilled and experienced to be able to detect and report on any incident. The Commission considers that an essential skill for such a professional witness is the ability to gather and present the high standard of evidence necessary to prove the offence that may have been committed.

#### **MODIFIED ACTION PLAN**

7. For the reasons that have been summarised above the Commission issues the following modified action plan, which must be read in conjunction with these Supplementary Written Reasons. The Commission imposes an action plan that will remain in being for two seasons, that is until the conclusion of the 2020/2021 season, in the following terms -
  - (1) Millwall to introduce improved CCTV systems by the beginning of the season 2019/2020.

- (2) Millwall to continue to use and develop the *Hear Hate Don't Hesitate Report It* campaign introduced after the Everton fixture, and to continue with *Kick It Out* reporting processes.
- (3) John D'Arcy to continue to visit other Clubs to seek best practice to incorporate into Millwall's policies and procedures in addressing the potential for discriminatory behaviour.
- (4) Millwall to develop existing supporter and steward educational programmes in association with the Millwall Inclusion/Diversity Officer and Kick It Out, and to seek out and adopt any appropriate enhancements or improvements accordingly.
- (5) Millwall to continue with the ongoing dialogue with *Kick It Out* and further enhance the relationship by seeking advice and ratification of new and developing associated policies and procedures.
- (6) Fully establish and develop the 'Millwall multi agency anti-discrimination focus group' to work closely with key partners such as (but not limited to) *Kick It Out*, FSF, EFL, Millwall supporter groups, Millwall Supporter Liaison Officer, Millwall Equality Liaison Officer and Millwall4All.
- (7) Millwall to facilitate match day PA announcements and usage of LED boards, big screen and match day programme as well as website and social media platforms to target the prevention, usage and detection of any potential discriminatory words or behaviour.
- (8) Millwall to develop a corporate risk policy to include equality and anti-discrimination.
- (9) Millwall to develop and improve steward deployment plans in association with Green Guide guidance, as well as intelligence based on current and historical information surrounding incidents of discriminatory behaviour within the stadium.
- (10) Millwall continuously to review ticket sales policies and compliance

with Ground Regulations to ensure such policies do not increase the risk for discriminatory supporter behaviour.

- (11) Millwall to consider use of covert professional witnesses and also their stewards' use of body camera equipment to detect, deter and evidence any incidents of discriminatory behaviour.
- (12) Millwall to review and develop all match day operational planning and steward briefing processes and documentation to ensure its strategies and content addresses the prevention and detection of discriminatory behaviour.

A handwritten signature in blue ink, appearing to be 'D. Phillips', with a long horizontal stroke underneath.

David Phillips QC  
Philip Rainford  
Alison Royston

31 July 2019